A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers

*William H. Clune III**

Table of Contents

---

* Professor of Law, University of Wisconsin. J.D., M.A., Candidate in Philosophy (Sociology), Northwestern University.

The research for this Article was supported by funds from the National Institute of Education under Grant No. NIE-G-79-0183. Related projects supported by Grant No. NIE-G-81-0009 to the Wisconsin Center for Education Research also played a role in shaping the later stages of the Article.

A preliminary schematic of this Article was presented in February 1980 to the Law and Education faculty colloquium of the Law Program of the Institute for Finance and Governance (IFG), Stanford University. A later version was presented at the colloquium on "Legal Change in a Society of Complex Organizations," March 11, 1981, sponsored by the University of Wisconsin Law School and the *Wisconsin Law Review*. Comments offered by participants in both colloquia are gratefully acknowledged. A Max Weber workshop conducted by David Trubek and Bob Gordon in Spring 1982 was most helpful for understanding the connection between implementation and social theory. The presentations of Hubert Treiber at that seminar on the relationship between Weber's sociology of religion and sociology of law were by far the most illuminating explanations of Weber that I have experienced.

The ancestral and personal origins of a survey paper like this are legion. One was a jointly authored Ph.D. preliminary paper, W. Clune, J. Fitzgerald & R. Kidder, Theory and Methodology in Legal Impact Studies (May 31, 1969) (unpublished manuscript on file with the author). Fred DuBow deserves thanks for subsequent personal, intellectual, and administrative nourishment. My research associate, Bob Lindquist, was a constant source of kibitzing. Marshall Smith, Director of the Wisconsin Center for Education Research, provided numerous real-life political examples of trends about which I was thinking and writing.

Though I have benefited from the ideas of many people, they do not necessarily agree with me; and the organizations that supported this research do not necessarily support its analysis or conclusions.

I. INTRODUCTION

The implementation of social policy through law is an interactive process involving government agencies, regulated organizations, and interest groups. Implementation is the design of government policy, the choice and administration of policy instruments for social purposes, and the management of government policy in a complex and politicized environment. Although implementation is involved in practically all of the socially significant and troublesome problems of law in the modern state, our grasp of the process is partial and fragmentary.[1] Thus, this Article has two main purposes: development and presentation of a general model of implementation, and examination of some implications of that model for public policy, research about law, and changing conceptions of law and lawyers within "postmodern" law (regulatory law dominated by interest-group politics).

Contrary to its relatively abstract connotations, something very concrete is meant by the word "model."[2] A model is a specific description

---

1. *See* Clune & Lindquist, *What "Implementation" Isn't: Toward a General Framework for Implementation Research*, 1981 WIS. L. REV. 1044, 1046-47.

2. The model used in this Article is most similar to the models used in systems analysis. Indeed, Easton's pioneering book on the subject influenced the Clune, Fitzgerald & Kidder paper mentioned in the acknowledgements as an ancestor of this Article. *See generally* D. EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (1965). The major departure from systems analysis is the use in my model of people and organizations instead of abstract variables like "demands" and "support." Wirt and Kirst use Easton's model in their book on the politics of education. F. WIRT & M. KIRST, SCHOOLS IN CONFLICT 29 (1982).

Some social scientists strongly disapprove of the word model as applied to the kind of model used in this Article. Wirt and Kirst suggest that a systems model should be considered "heuristic theory," a "heuristic scheme," or a "framework for political analysis," rather than "theory in its traditional sense" ("a set of . . . related propositions which include among them some law-like generalizations and which can be assigned specific truth value via empirical tests"). *Id.* at 27.

Fundamentally, I agree with Wirt and Kirst, but I refuse to be utterly excluded from the kingdom of positivism, and I would like to elaborate. In this Article, model does not mean a set of variables with quantifiably specified links capable of statistical falsification. *See* C. JENCKS, M. SMITH, H. ACLAND, M. BANE, D. COHEN, H. GINTIS, B. HEYNS & S. MICHELSON, INEQUALITY—A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 320-50 (1972) ("Path Models of Intergenerational Mobility"); Bush, Luce & Suppes, *Models, Mathematical*, 10 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 378 (1968); Christ, *Econometric Models, Aggregate*, 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 344 (1968). The model presented here is a verbal schematic of typical actors and interactions. As such, it is descriptive of a broad range of implementations. It is not at all predictive of what might occur in particular implementations, because it has been formulated to be sufficiently general to cover all implementations. The model *is* predictive, and falsifiable, insofar as it is inconsistent with competing "pictures" of the basic *form* of implementation. *See, e.g.*, Clune & Lindquist, *supra* note 1, at 1067-69 (discussion of "legal impact" model). For discussion of the descriptive aspects of the model and their advantages, see part II(B) of this Article; for a discussion of predictive aspects, see part III (E).

I confess perplexity over territorial claims to the word model. Is there something

of the actors and interactions involved in a process at a sufficient level of generality that common patterns can be recognized across a wide variety of substantive areas. When discussing the implications of a general model it is essential to establish the facts from which the implications are drawn. Too much theory about law is incomprehensible—a tedious series of abstractions and abstractions about abstractions. Hopefully, the model in this Article will not fall victim to this problem, but instead will provide dozens of concrete examples for the subsequent discussion of implications. Indeed, some of the implications are almost inseparable from the model because they involve how we visualize the operation of the legal process.

Another unfortunate connotation of the word model should be addressed at the very beginning. Model sounds strange and artificial, something understood by social "scientists" rather than citizens, lawyers, politicians, and judges. The model presented in this Article, however, should be instinctively familiar to any reasonably sophisticated observer of, or participant in, the modern legal system. In a sense, the purpose of this Article is to harmonize some of the formal constructs of jurisprudence, legal research, and policy analysis with practical aspects of the modern legal process. The basic patterns described here—regulation and the politics of regulation—arose no later than the turn of the century and reached early maturity in the New Deal, but many of our formal ideas have not progressed. If this were a historical article, it would be about the lag between legal culture and legal reality. Yet, culture is powerful. Things that we know instinctively can seem surprising, even shocking, when explicitly compared with preconceptions, ideologies, and rationalizations.

A. What is Implementation?

It is easier to be interested in implementation than to define it. In an earlier article, Robert Lindquist and I attempted an extended definition of implementation, comparing it with other parts of the legal process and contrasting implementation-oriented research with other sorts of

---

unscientific about the goal of this Article—a clear, general, parsimonious, verbal description of an important social process? The word model seems better than concept, names, or even typology, because the attempt here is to "relate . . . concepts into sets of interrelated propositions." P. ABELL, MODEL BUILDING IN SOCIOLOGY 1 (1971). Past a certain point, debate over the merits of various usages of the word model is "a waste of time." *Id.* at 237 n.1.

Sensitivity about use of the word model in this context does have one especially valid basis. In doing research about any of the many subtopics identified by the model in this Article, it is normally necessary to develop or apply a more particular subtheory. For example, in doing research on agency sanctions as discussed in part II (B)(3), it is necessary to classify sanctions in some way—by their severity, for instance—and relate that classification to some other agency behavior (*e.g.*, organizational resistance and avoidance). The same point could be made about genuinely predictive theories, discussed above. Thus, the model presented here is useful for research because it is heuristic (suggesting areas

research.[3] In that article, implementation was defined as the process of creating or attempting social change through law.[4] The social change sought by implementation is "programmatic," consisting of a relatively coherent policy implemented over a reasonably short period of time, after which the policy may become obsolete or reach a state of dynamic equilibrium.[5] The social change also is difficult to accomplish because of unwillingness or incapacity in the regulated sector. The difficulty of the social task calls forth the characteristic legal response of implementation, "finely tuned" legal policy consisting of detailed planning, targeting, oversight, and control.[6] Structurally, implementation tends to involve one or more organizations, agencies of the government, trying to change the behavior of other organizations, governmental or nongovernmental. Implementation is, therefore, a study of organizational interaction. Specifically, it is the study of governmental organizations trying to influence other organizations to do something that is difficult enough to require a great deal of interaction. Implementation is concerned with the manifest rather than the latent functions of law (recognizing the latent functions as they affect the manifest);[7] it takes an instrumental rather than a deterministic, or social theoretical, view of the sociolegal order.[8]

Implementation is a significant subject for study because it is involved in almost all the critically important governmental interventions of our time: educational opportunity, employment discrimination, pollution control, corporate misconduct, and many more. It is important, too, because of the crisis of confidence about such interventions that emerged from the 1960's and 1970's. Intrinsically difficult to accomplish, implementation recently has seemed impossible or too costly.[9]

B. Meaning and Importance of a General Model

The model presented in this Article is a representation of the actors and interactions involved in a typical implementation process, but the abstraction is not very abstract. This Article attempts to distill the essentials of what is described in factually dense implementation case studies

---

for research), holistic (reminding researchers not to overlook crucial parts of the whole process), and synthetic (relating areas of reality and research to each other).

3. *See generally* Clune & Lindquist, *supra* note 1.

4. *Id.* at 1045.

5. *Id.* at 1105-11. For a discussion of stable trends in the interactions depicted by the model, see part II(B)(8)(c).

6. *See* Clune & Lindquist, *supra* note 1, at 1072-83.

7. *Id.* at 1094-1101.

8. *Id.* at 1101-04.

9. "Neoconservatism" defines itself in terms of disillusionment over the results and potential of ambitious social programs. *See* Goodman, *Irving Kristol: Patron Saint of the New Right*, N.Y. Times, Dec. 6, 1981, § 6 (Magazine), at 90. Distinguishing lack of enthusiasm over goals from doubts about the efficacy and cost of means is not easy. *See* Clune, *The Deregulation Critique of the Federal Role in Education*, in SCHOOL DAYS, RULE DAYS: REGULATION AND LEGALIZATION IN AMERICAN EDUCATION (D. Kirp ed., forthcoming).

such as those of school finance litigation, compensatory education, bilingual education, prison reform, school desegregation, and equal employment law.[10] Consequently, the model is not composed of "variables" at a high level of abstraction. It is populated with real people (or, more accurately, real organizations) interacting with each other in intuitively familiar, or at least plausible, ways.

A general model of implementation could be extremely helpful. Existing work on implementation is both partial and fragmented. It is partial because what is commonly considered research on implementation really is research on various parts of the process. It is fragmented because this research is nowhere interrelated or synthesized, or even summarized succinctly in one place. With a general model, research on implementation could be categorized according to various factors, such as what part of the process is described and what point of view is taken.

Apart from helping to organize existing research, a general model helps one to understand the implementation process, and thus has theoretical value. The model itself has a certain predictive, explanatory, and sensitizing power concerning what is likely to occur during implementation, and why. The simple presentation of the process in its actual form tacitly denies a legion of possible rival hypotheses about the implementation process and sensitizes researchers about what to investigate. Also, certain general implications of the model usefully can be inferred, especially insofar as these ideas depart from other views of implementation or have obvious implications for research. When part of the process is considered without reference to other parts, a sense of the realistic constraints on implementation alternatives may be lacking. For example, if what is called "sanction theory" later in this Article is considered without reference to the politics of implementation,[11] a false sense of the range of possible sanctions and responses may result. In the real world of implementation, it may not be possible to enact or enforce attractive sounding sanctions because of the realities of legislative, administrative, and organizational politics.

Reference to a general model also has consequences for methodology and evaluation of policy. When the full range of activities involved in implementation is appreciated, it is also obvious that many different research techniques must be part of implementation research. Many of the more repetitive problems of evaluating legal policy are traceable to a lack of understanding of the implementation process. For example, the repeated and useless finding that all implementations fail to achieve their ideal pur-

---

10. See Clune & Lindquist, *supra* note 1, at 1091 n.103, for a collection of implementation case studies.

11. For discussions of the upward and downward cycles of the implementation process, see parts II(B)(1) and III(A).

poses is, in light of a general model, simply a reformulation of the fact that a legal intervention is itself the product of social compromise and is no more than the overture to a complex process of compromise and adjustment. The implication for policy is that intervention must occur at the margins. Indeed, a general model is probably useful for policy analysis above all else. The tendency of partial analysis to exaggerate the importance of selected parts of the process or to omit necessary qualifications is most harmful when the value of specific, limited interventions is considered.

Finally, a general model is an excellent way to examine changing roles of law and lawyers. The model presented here is really about the form of the modern legal process—how it works and who does what. Discussions of modern law often are excessively abstract because it is difficult to envisage what is being discussed. This situation is especially unfortunate because the predominant characteristics of law discussed by theorists actually are illustrated by events with which we are all familiar—events that we see, hear, or read about every day. It is worth insisting that none of the benefits of a general model depend on the kind of precision that we associate with, for instance, general equilibrium models in economics. Precision would be nice, but it is very helpful just to have a valid general picture of the various parts of the process and how the parts relate to one another.

II. A "POLITICAL" MODEL OF IMPLEMENTATION

This part is concerned mainly with presentation and explication of the model; commentary is reserved for part III. The characteristic "political" nature of the model, however, should be discussed at the outset. The model is political in the sense that the two phases of law making—policy formation and implementation—are represented as a process of struggle, conflict, and compromise among contending interest groups. Indeed, for the most part, the same interest groups are involved in both phases of law making. As will be seen, however, different phases may involve different balances of power, and the politics may take quite different forms. In this Article, the "law" is simply the equilibrium struck by the contending forces at any given stage of the process. Nevertheless, the law is more than simply a political prize or compromise; it is a very special kind of prize or compromise, for it determines behaviors and outcomes in a unique and powerful way. Interested persons or interest groups are the driving force behind policy making and implementation. Therefore, the ultimate purpose of a law is found in social aspirations of people rather than in laws or legislative history. The structure of a law and its legislative history not only may reveal the nature of the underlying social aspirations, but also may help to explain the technical scope and limits of the legal enactment of the social purpose, as well as the manner in which one social purpose was compromised with another. But the "purpose" of a law does

not exist in the abstract; it exists in arguments that the letter or spirit of a law is being violated and in ethical problems concerning the violation of minimum requirements of legality.[12] The model, therefore, describes implementation as an interactive process among *actors* producing *behaviors*. The behaviors include laws (legal commands), legal incentives (essentially enforcement), and legal compliance or noncompliance.

Another introductory note is necessary to avoid confusion. Basically, the model applies to both the legislative and administrative processes as well as some litigation before courts. In the earlier article, implementation was defined in such a way that included only a certain kind of litigation, "public law litigation." [13] In public law litigation, all the functions and interactions described in the model are applicable. The form of the interaction is, of course, strongly influenced by the judicial context. The mandate is a decree rather than a statute; the monitoring, negotiating, and troubleshooting are done by the judge and judicial masters rather than by administrative agencies.[14] But the central functional elements of implementation are the same: a difficult social task is met with finely tuned legal policy, interested actors intervene at all points of the process, and organizational defenses and diversions are raised. These common features increase the usefulness of a single model for court-driven and agency-driven implementation.

A. Actors and Behaviors During Implementation

Table 1 introduces the basic actors of the implementation process and their principal behaviors (the nature of interactions will be described in Table 2):

---

12. For a discussion of the changing roles of law in postmodern, political law, see generally part IV.

13. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Diver, *The Judge As Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Fletcher, *Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); *Symposium: Judicially Managed Institutional Reform*, 32 ALA. L. REV. 267 (1981); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977); Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474 (1982).

14. *See* Yudof, *Plato's Ideal and the Perversity of Politics* (Book Review), 81 MICH. L. REV. 730, 741-45 (1983) (legislatures and courts in institutional litigation are similar in methods of representing political interests, finding facts, interpreting social science evidence, devising remedies, and implementing decisions). In fact, most implementations involve legislatures, courts, *and* administrative agencies; but one institution usually has primary responsibility. For a discussion of multiple institutions involved in implementation, see part II(B)(8)(d).

TABLE 1

BASIC ACTORS DURING THE IMPLEMENTATION PROCESS AND THEIR BEHAVIORS

OUTSIDE ACTORS	INSIDE ACTORS	BEHAVIORS
	(A) Law-making (Policy-forming) Organizations	(1) Legal Commands
(I) Interest Groups and the Media	(B) Regulating Organizations and their Ideologies	(2) Legal Incentives
	(C) Regulated Organizations and their Ideologies	(3) Compliance Behavior (including Noncompliance)

The "variables" are classified by columns. "Outside actors" (column 1) refers to the multitude of interest groups that intervene in law making and implementation. Prominent among these groups (I) would be interest groups in the technical sense—the ACLU, NAACP, labor unions, environmentalists, business lobbies—and the mass media. Implementation is a process created and driven by social movements; social reformers and their opponents are active at every stage. Consequently, the process is political and agitated. "Inside actors" (column 2) are those organizations that make, apply, and are the target of government policy. Law-making (policy-forming) organizations (A) include legislatures, courts, and administrative agencies, to the extent that they initiate policy. Regulating organizations (B) are the agencies charged with responsibility for the enforcement of laws through the use of measures such as sanctions and inspections.[15] Regulating organizations apply their sanctions—the law in action—to regulated organizations (C).

The "behaviors" in column 3 are behaviors of the organizations specified directly to the left in column 2. Thus, legal commands (1) are a behavior of law-making organizations (A); legal incentives (2) are a behavior of regulating organizations (B); and compliance behavior (including noncompliance) (3) is a behavior of regulated organizations (C). Legal outcomes are neither described by the model nor taken into account by it. The reasons for this exclusion, along with the reasons for many other exclusions, are given in the first article.[16] Ideologies of regulating and regulated organizations are mentioned explicitly because of the great impor-

15. One of the unusual structural features of courts is that they combine law-making and regulating functions in one organization.

16. *See* Clune & Lindquist, *supra* note 1, at 1066-72.

tance to the implementation process of orientations toward the implemented law within both kinds of organizations.

B. Standard Interactions During Implementation

Implementation is, above all, an interactive process. Any given legal or political action may be met with a reaction by the organizations affected. Thus, a bill or a judicial decree introduced to enforce civil rights may be met with legislative initiatives designed to dilute it or to reinforce it. Regulations enacted under legislation may be met with political resistance and the regulations may be revoked. Enforcement measures such as threatened sanctions may be greeted with political backlash designed to produce a withdrawal of the threat, or with various organizational adaptations. Throughout the "history" of a given implementation, continuing efforts to amend the underlying legal mandate are common. Sometimes, such politicking succeeds in obtaining a watershed change—for example, the Reagan Administration's efforts to consolidate federal categorical grants.[17]

A "political" model presumably must describe political interactions, and it is not too much to say that the model presented in this Article consists entirely of interactions. This section of the Article introduces the interactions that are "standard" during implementation; that is, those which, because they seem to occur over and over again, give implementation its characteristic "form."[18] Some implications of "interactiveness," or "recursiveness" as it is later called, will be explored in a later section.

Table 2 contains analytically distinct elements of the interactions. The interactions are presented in "logical chronological order," as if the authoritative structure of the legal process were reflected in temporal stages. These types of interactions, however, may occur differently in actual implementations. In actual implementations, the interactions may be simultaneous as well as sequential; various institutional combinations may occur—for example, the intervention of courts in a largely administrative process. Furthermore, there are long-term trends, cybernetic adjustments of competing interests reaching a point of relative stability. These essential refinements will be discussed after the analytically distinct interac-

---

17. The Administration's efforts in education culminated in the Education Consolidation and Improvement Act of 1981 (ECIA), Pub. L. No. 97-35, 95 Stat. 463 (codified as amended in scattered sections of 20, 21 U.S.C.). Although the ECIA contained important changes, it was less "consolidative" than the Administration desired and originally proposed. Bilingual and handicapped programs were not part of the consolidation; and the major federal educational program, Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, 27-36 (aid for disadvantaged students), was preserved in altered, but distinct, form as chapter 1 of the ECIA. 95 Stat. at 464-69 (codified in scattered sections of 20 U.S.C.).

18. Because implementation is a dynamic, longitudinal process rather than a static one, the word "form" should be understood accordingly. The idea of form in music is a more appropriate analogy than form in architecture.

tions are considered.[19] For the moment, it is important to isolate the types of interactions that occur in all the various real world combinations. Note that each interaction refers to the appropriate actors and behaviors in Table 1 through use of the letter and number labels of that table:

TABLE 2

STANDARD INTERACTIONS DURING IMPLEMENTATION IN "LOGICAL" SEQUENCE

I. THE "DOWNWARD CYCLE"
   1. Policy Formation [(I)→ (A)→ (1) in Table 1]
   2. Deployment of Legal Incentives [(1)→ (B)→ (2)]
   3. Responses of Regulated Organizations [(2)→ (C)→ (3)]
   4. Deployment/Response Interactions [(2)→ (3); (3)→ (2)]

II. THE "UPWARD CYCLE"
   1. Influence on the Formal Policies of Regulating Agencies by Insiders and Insider/Outsider Alliances
      [(C)→ (B)→ (2); (C)/(I)→ (B)→ (2)]
   2. Influence on Legislatures by Insiders and Outsiders to Obtain Changes in Underlying Mandates (Statutes)
      [(C)/(I)→ (A)→ (1)]

In the remainder of this section, each type of interaction will be discussed and exemplified separately. Discussion will concern the type of activity that occurs in each phase of implementation.

1. Upward Cycle vs. Downward Cycle

As reflected in Table 2, all the interactions of implementation may be thought of as part of either a "downward cycle" or an "upward cycle." The downward cycle is compliance oriented. It begins with the issuance of a legal mandate, continues through the deployment of legal incentives, and ends with compliance and noncompliance by the regulated sector. The upward cycle, on the other hand, is oriented toward the government, its commands, and its day-to-day sanctions. During implementation, regulated organizations and their allies make continual efforts to obtain compromises in the demands of regulating organizations toward them. In a lawsuit, these efforts take the form of attempts to modify the decree or to obtain various remedial orders. In administrative practice, lobbying to strengthen or to weaken the underlying statute, administrative regulations, and practical administrative sanctions is common.[20]

Perhaps the most difficult aspect of implementation from the stand-

19. For a discussion of the interactions in action, see part II(B)(8).

20. On institutional litigation, see *supra* note 13; on lobbying in the administrative process, see part II(B)(6) (influence on regulating organizations to change formal policy).

point of theory and policy is this ebb and flow of counter forces. In any real implementation, both a tide and an undertow exist at any given time and over the course of the implementation. As a consequence, the implementation process may resemble a military campaign more than the calm, orderly development of policy. When policy does grow in an orderly fashion, it is because struggles were resolved at a multitude of critical junctures in a manner at least reasonably consistent with the underlying purpose of the law.

A good example of this ebb and flow of counter forces is the protracted school finance lawsuit, *Robinson v. Cahill*.[21] Over a period of about six years the New Jersey courts and legislature traded three complicated statutes, one trial court decision, and seven supreme court decisions, including a dramatic confrontational order to shut down the New Jersey schools. The result was a compromise. Not until court and legislature settled the conflict could the administrative phase of implementation begin. That phase, too, would contain innumerable compromises, as the labyrinthine school bureaucracy began to implement the basic skills requirements of the final statute.[22]

2. *Policy Formation: Obtaining and Specifying the Legal Mandate*

The first step of the long series of adjustments that we call implementation occurs when social movements obtain a legal mandate from the government.[23] Understanding the social movement behind a particular

---

21. 118 N.J. Super. 223, 287 A.2d 187, *supp'd*, 119 N.J. Super. 40, 289 A.2d 569 (1972), *modified*, 62 N.J. 473, 303 A.2d 273, *reargued*, 63 N.J. 196, 306 A.2d 65, *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973); 67 N.J. 333, 339 A.2d 193, 69 N.J. 133, 351 A.2d 713, *cert. denied sub nom.* Klein v. Robinson, 423 U.S. 913 (1975); 69 N.J. 449, 355 A.2d 129, *supp'd*, 70 N.J. 155, 358 A.2d 457, *injunction dissolved*, 70 N.J. 464, 360 A.2d 400 (1976).

Typical of institutional or public law litigation, *Robinson* is not really a "case" at all but rather a series of interactions between various courts and other branches of government. Still, the bounded quality of judicial decisions and the hegemonic power of the courts imparts an unusual degree of coherence to judically managed implementations. *See* Clune with Lindquist, Serrano *and* Robinson: *Studies in the Implementation of Fiscal Equity and Effective Education in State Public Law Litigation*, in II SCHOOLS AND THE COURTS 67, 84-104 (P. Piele ed. 1979).

22. Clune with Lindquist, Serrano *and* Robinson: *Studies in the Implementation of Fiscal Equity and Effective Education in State Public Law Litigation*, in II SCHOOLS AND THE COURTS 67, 97-104, 107-11 (P. Piele ed. 1979).

23. For examples of social movements that have sought legal mandates, see generally J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM—A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); R. KLUGER, SIMPLE JUSTICE—THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS—WHY THEY SUCCEED, HOW THEY FAIL (1977); Bell, *The Dialectics of School Desegregation*, 32 ALA. L. REV. 281 (1981); R. Lindquist with W. Clune, Systemic Enforcement: The Implementation of Equal Employment Opportunity Through Executive Order, at II.1-.119 (June 30, 1982) (unpublished manuscript on file with the author).

implementation is crucial to understanding the implementation itself. The "theory" of the law from the perspective of the movement is what we usually think of as the "pure" social purpose of the law, as when nondiscrimination in employment is considered the purpose of Title VII[24] or Executive Order 11,246.[25] More important, the theory or "vision" of the social good held by the movement is necessary to explain the reactions of the movement to actions by the government throughout the course of implementation. We can predict the reactions of the environmental movement to actions of Secretary of the Interior Watt, for example, because we have an intuitive appreciation of the goals and vision of the movement. For the same reasons, it is also necessary to understand the movement's opposition. The compromises initially built into every law obtained by social movements are attributable directly to the powerful interest groups that oppose the particular initiative. The theory of the faults of the law, or of the interests against which the goals of the social movement must be balanced to determine if they are reasonable, emerges out of the structure of interests represented by potentially regulated organizations. Adjustments all along the line proceed from the same source—opposition to the social movement.

In the earlier article, it was explained why implementation properly begins at the point that the legal mandate becomes specific. At this point the fine adjustment of the underlying social purpose to its difficult social realities first occurs.[26] Specific implementation-style mandates are structural embodiments of contending social forces. The social movement proposing the law and the organizations opposing the law leave their respective tracks throughout the legal charter. In a sense, the mandate consists of nothing else *but* these compromises. Under Executive Order 11,246, for example, it was decided to set goals for hiring according to the number of women and minorities in available labor pools.[27] This approach does not further affirmative action as much as other approaches would. Indeed, this approach was a concession to regulated organizations, and it sharply limits the amount of hiring that is required by the law.[28] Moreover, a contrac-

---

24. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66, *amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (current version at 42 U.S.C. § 2000e(1)-(17) (1976)).

25. 30 Fed. Reg. 12,319 (1965).

26. *See* Clune & Lindquist, *supra* note 1, at 1060.

27. *See* 41 C.F.R. § 60-2.11 (1982) (utilization analysis); *id.* § 60-2.12 (goals and timetables).

28. In higher education, for example, definition of hiring goals in terms of qualified minorities available means that the goals for many sizable academic departments are zero, one, or two minorities. A 1979 analysis of affirmative action goals at the University of Wisconsin, for example, determined that minorities accounted for 2% of the available work force in economics (qualified persons with requisite degree). Two percent of the total economics faculty of 37 implied a minority representation of .75 (rounded to 1). Since economics at that time had no minorities, its affirmative action goal was one hire. Availability of minorities in astronomy was defined at 0.9%, implying a "goal" of zero hires in a department of nine persons. University of Wisconsin-Madison, Vice Chancellor

tor is ultimately liable only if hiring is done in bad faith.[29]

The series of compromises contained in the executive order reveal three important points about the implementation process. First, these compromises constrain all subsequent actions during implementation; they set the boundary for what is legal and reasonable. They are the law. Second, manifestations of exactly the same contending forces recur at innumerable subsequent junctures. The conflict between support for more minority hiring and opposition to more hiring is imbedded deeply in the social structure. Pressure on an individual contractor to improve its record illustrates the conflict just as much as the compromises built into the legal mandate. Third, speaking of "the legal mandate" as though it were a fixed reference point is completely misleading. Many executive orders, dating back to President Roosevelt, have been issued concerning affirmative action in hiring; Executive Order 11,246 is simply the most recent. Each one represents a slightly different resolution of the contending social forces, a slightly different "recipe" of standard adjustments.[30] From a prospective view of an implementation, it may be anticipated that modifications of the basic legal mandate frequently will be sought and occasionally will be obtained.[31] It is only relatively exaggerating to say that mandates, like regulations and enforcement interactions, come and go.

Thus, for a variety of compelling reasons, implementation includes obtaining and specifying the legal mandate. It is difficult to tell any part of an implementation story without reference to the constraints of the actual law, and it is utterly impossible to tell a complete story of implementation without substantial attention to policy formation.

3. Deployment of Legal Incentives

The legal mandate is actually just law on the books (except for the symbolic impacts, exclusion of which from implementation is discussed in the earlier article[32]). In order to apply legal policy to regulated organizations in an effective manner, legal incentives must be deployed. Legal incentives must be understood broadly to include the actual or probable

---

for Academic Affairs, 1978 Report on Affirmative Action and Faculty Hiring (May 22, 1979).

29. *See* 41 C.F.R. § 60-2.15 (1982).

30. The chronology and distinctive approach of each executive order is presented in R. Lindquist with W. Clune, Systemic Enforcement: The Implementation of Equal Employment Opportunity Through Executive Order, at III.1- 165 (June 30, 1982) (unpublished manuscript on file with the author).

31. A good example of protracted politics over the terms of a law is Title I of the Elementary and Secondary Education Act (ESEA), Pub. L. No. 89-10, 79 Stat. 27 (1965). *See generally* M. KIRST & R. JUNG, THE UTILITY OF A LONGITUDINAL APPROACH IN ASSESSING IMPLEMENTATION: A THIRTEEN YEAR VIEW OF TITLE I, ESEA (Inst. for Research on Educ. Fin. & Governance, Stanford Univ., Project Report No. 80-B18, 1980); *see also infra* note 56 (*Adams v. Richardson* pattern of judicial intervention).

32. *See* Clune & Lindquist, *supra* note 1, at 1061-66.

imposition of any positive or negative action. Hence, legal sanctions are only a small part of legal incentives. Others are direct orders to do or not to do an action, paperwork requirements, inspections, investigations, and threats of each. The total amount of resources applied to enforcement and the skill with which those resources are organized and managed are obvious parts of the incentive structure.

Most regulatory relationships are long on informal, intermediate incentives, such as the so-called "paperwork sanction,"[33] and short on ultimate punishments. Under federal grants-in-aid, for example, an audit may result in much extra work for the regulated organization, and thus, it may lead to a consensual change in practices. Furthermore, complaints usually are handled through the administrative structure rather than proceeding to the ultimate sanction of the discontinuance of funds.[34]

One of the most important determinants of legal incentives is the "ideology" of the regulating organization. "Ideology" in this sense is used to refer to the orientation of the agency toward the underlying purpose of the law.[35] Obviously, an agency with a deep commitment to the law is likely to deploy a different incentive structure than an agency that is relatively indifferent. A common complaint about new, single-purpose agencies that emerge out of social movements is that they are overly zealous in their enforcement strategy, and that they take "pro-movement" actions not authorized by the underlying legal mandate.[36] People sympathetic to

---

33. Nonfiscal paper sanctions, which can be assessed without the inconvenience of formal process, are only one tool of the "informal management system" helping to implement federal grants. *See* P. HILL, ENFORCEMENT AND INFORMAL PRESSURE IN THE MANAGEMENT OF FEDERAL CATEGORICAL PROGRAMS IN EDUCATION 14-29 (Rand Note No. N-1232-HEW, 1979).

34. *Id.* at 10-12. Audit recommendations to cut off funds are usually watered down due to the political pressure that emerges to defend a threatened program. Actual cut-offs interrupt the service that is the purpose of the grant to provide, and claims for misspent funds often are repaid out of current grant money.

35. A list of sources dealing with various aspects of ideology include, in general: F. SCHURMANN, IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA (2d ed. 1968); in regulating organizations: H. KAUFMAN, THE FOREST RANGER (1960); S. TAYLOR, ENVIRONMENTAL ANALYSTS IN THE BUREAUCRACY: THE IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM (forthcoming); in regulated organizations: M. METZ, CLASSROOMS AND CORRIDORS—THE CRISIS OF AUTHORITY IN DESEGREGATED SECONDARY SCHOOLS (1978); J. MURPHY, STATE EDUCATION AGENCIES AND DISCRETIONARY FUNDS (1974) (A short version of this study is Murphy, *Title V of ESEA: The Impact of Discretionary Funds on State Education Bureaucracies*, in SOCIAL PROGRAM IMPLEMENTATION 77 (1976).)

36. *See* N. GLAZER, AFFIRMATIVE DISCRIMINATION 213-14 (1975). One of the main reasons for consolidating enforcement of the Office of Federal Contract Compliance in one agency was to circumscribe the range of discretion of field inspectors. Some inspectors were exceeding the bounds of the law out of excessive zeal for the underlying social purpose, while others were shirking legal responsibility. Training of investigators and development of an enforcement manual were additional, discretion-limiting aspects of the consolidation. R. Lindquist with W. Clune, Systemic Enforcement: The Implementation of Equal Employment Opportunity Through Executive Order, at III.1-.165 (June 30, 1982) (unpublished manuscript on file with the author).

the social movement understandably are eager to break out of the constraints of the cautious compromises contained in many implementation mandates. Equally understandably, those forces opposing the social movements perceive even reasonable pro-movement interpretations of the law as overreaching. To each side, the compromises of the law are expedient, but hardly desirable.

4. Responses of Regulated Organizations

Regulated organizations respond to legal incentives with some combination of compliance and noncompliance. Any program that is implemented at all will produce at least a tiny amount of compliance, while there is confusion, foot dragging, and evasion in even the most successful implementation. The key to understanding the responses of regulated organizations is that they must integrate incentives toward new behaviors encouraged by the implementation with a great many preexisting and developing organizational purposes formal and informal. The competition with other organizational purposes is the reason that compliance with the implementation's goals is always problematical for an organization, and seldom is more than partial. Compliance is costly; it requires forgoing other organizational goals. In order to understand the conflict between compliance and organizational goals, it is necessary to understand the particular kind of organization in some detail. That is, implementation must be "contextualized."[37] In prisons, a requirement that prisoners be permitted to receive packages through the mail may demand a large mail room staff for inspection purposes to limit the amount of contraband; this budgetary constraint may be financed by reducing the teaching staff in the prison's educational system.[38]

The process by which organizations respond to incentives, and the internal organization by which they do so, also are important. At the broadest level, organizations generally lack the ability to redesign their behavior completely in order to accommodate new incentives. Adjustments are made partially and marginally in order for the organization to minimize uncertainty, even if it does not thereby maximize efficiency.[39] Some organizations are particularly ill-equipped to make organized responses. Schools, for example, are especially "loosely coupled."[40] Administrators

---

37. *See* D. KIRP, JUST SCHOOLS—THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION 53-56, 59-60 (1982).

38. *See* WIS. ADMIN. CODE § HSS 309.05 (1982). *See generally* Dickey, *The Promise and Problems of Rulemaking in Corrections: The Wisconsin Experience*, 1983 WIS. L. REV. 285.

39. J. MURPHY, STATE EDUCATION AGENCIES AND DISCRETIONARY FUNDS 13-17 (1974).

40. Weick, *Educational Organizations as Loosely Coupled Systems*, 21 AD. SCI. Q. 1, 3 (1976); Weick, *Administering Education in Loosely Coupled Schools*, 63 PHI DELTA KAPPAN 673, 673-76 (1982). For a wide-ranging discussion of organizational properties of schools, see generally M. MILES, COMMON PROPERTIES OF SCHOOLS IN CONTEXT: THE

who technically are in hierarchical positions of authority have relatively little systematic control of, or knowledge about, essential activities in the classroom.[41]

Regulated organizations are not just rational utility maximizers. Every organization has a "culture" (close to what was referred to as "ideology" in regulating organizations).[42] This culture may distort the importance and relevance of incentives compared to what might be expected on a "dollars and cents" calculus. In corporations, one reason for the ineffectuality of legal sanctions is that entrepreneurial success is esteemed much more highly than legality in the culture of the business organization. Even when legal sanctions are severe, failure to avoid them is forgiven if they were incurred in the pursuit of a business objective that the organizational culture defines as legitimate.[43]

The conflict between legal incentives and organizational goals leads to all manner of maneuvering and "games."[44] Grumbling, delay, and obfuscation are routine. Organizations subject to legal orders commonly complain about the cost of compliance, the difficulty of obtaining information, and other problems. Noncompliance might be "their fault,"[45] as when the legislature will not provide necessary funds to enable the regulated organization to comply with the goals of the implementation.

The conflict between legal incentives and organizational goals also leads to disagreements about what constitutes "real" compliance versus what constitutes "technical" compliance. The conflict is thus the source of what sociologists call "goal displacement" and what legal philosophers call "legalism."[46] Police officers subjected to a quota of traffic citations

---

BACKDROP FOR KNOWLEDGE UTILIZATION AND "SCHOOL IMPROVEMENT," (Nat'l Inst. of Educ., 1980). *Id.* at 61 n.17 evaluates the loose-coupling concept.

41. *See* Sproull, *Managing Education Programs: A Microbehavioral Analysis*, 40 HUM. ORG. 113, 117-18 (1981).

42. *See* J. MURPHY, STATE EDUCATION AGENCIES AND DISCRETIONARY FUNDS 14-15 (1974). *See generally* S. SARASON, THE CULTURE OF THE SCHOOL AND THE PROBLEM OF CHANGE (1971). The term "bureaucratic social system," used by my colleague Joel Handler, captures the dual organizational/cultural aspects of real organizations.

43. C. STONE, WHERE THE LAW ENDS—THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 7, 46-57, 67-69 (1975).

44. E. BARDACH, THE IMPLEMENTATION GAME—WHAT HAPPENS AFTER A BILL BECOMES A LAW 38-40, 55-58 (1977).

45. Or, as Bardach writes, from the point of view of the corporation, the noncompliance is "Not Our Problem." *Id.* at 159.

46. On goal displacement, see *id.* at 85-95; P. BLAU, THE DYNAMICS OF BUREAUCRACY—A STUDY OF INTERPERSONAL RELATIONS IN TWO GOVERNMENT AGENCIES 231-265 (1963); J. PRESSMAN & A. WILDAVKSY, IMPLEMENTATION 1 *passim* (2d ed. 1979); P. SELZNICK, TVA AND THE GRASS ROOTS—A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION 259 (1949) ("deflection of goals"); Barro, *Federal Education Goals and Policy Instruments: An Assessment of the "Strings" Attached to Categorical Grants in Education*, in THE FEDERAL INTEREST IN FINANCING SCHOOLING 229 (M. Timpane ed. 1978).

On legalism, see E. BARDACH & R. KAGAN, GOING BY THE BOOK—THE PROBLEM OF REGULATORY UNREASONABLENESS 93-123 (1982); R. KAGAN, REGULATORY

may comply with a great many citations that their superiors do not consider high in priority. Affirmative action requirements lead to disputes about who is a true minority—for example, are aristocrats with Spanish surnames a "minority group"? Schools that are required to demonstrate supplemental services for certain classes of students may isolate these students from the regular classroom for part of the day, even though the isolation is educationally harmful.[47]

Response to legal incentives produces some degree of "institutionalization" of compliance behaviors on the part of the regulated organization.[48] Institutionalization is a change in the organization itself, not just in its behavior. Such relatively permanent changes include internal compliance bureaucracies, or "shadow governments," such as federal grant specialists in school bureaucracies.[49] In addition, institutionalization includes more or less stable changes in the duties and practices of existing personnel, such as a new orientation of school psychologists toward the handicapped, and changes in the culture or orientation of the organization, such as new attitudes toward racial discrimination. The degree of permanence of institutionalization is immensely varied.[50] New racial attitudes are probably irreversible. The practice of developing individual education plans for the handicapped is, in some form, probably strongly entrenched. In contrast, some regulation of schools produces tenuous "projects," which exist at

---

JUSTICE—IMPLEMENTING A WAGE PRICE FREEZE 90-97 (1978); J. SHKLAR, LEGALISM 113-23 (1964).

47. *See* Archambault & St. Pierre, *The Effect of Federal Policy on Services Delivered Through ESEA Title I*, EDUC. EVALUATION & POL'Y ANALYSIS, May-June 1980, at 33, 42; G. Glass & M. Smith, "Pull Out" in Compensatory Education (Nov. 2, 1977) (unpublished manuscript on file with the *Iowa Law Review*). On alternatives to the pull-out system, see Turnbull, Smith & Ginsburg, *Issues for a New Administration: The Federal Role in Education*, 89 AM. J. EDUC. 396, 417-21 (1981).

48. *See* Meyer, *Strategies for Further Research: Varieties of Environmental Variation*, in ENVIRONMENTS AND ORGANIZATIONS 352, 355-57 (1978); Meyer & Rowan, *The Structure of Educational Organizations*, in *id.* at 78, 79-81 (1978); Meyer, Scott, Cole & Intili, *Instructional Dissensus and Institutional Consensus in Schools*, in *id* at 233, 256-63; Meyer & Rowan, *Institutional Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 346-48 (1977); J. Meyer, W. Scott & T. Deal, Institutional and Technical Sources of Organizational Structure Explaining the Structure of Educational Organizations (May 1980) (unpublished manuscript on file with the author); *see also* Berman & McLaughlin, *Federal Support for Improved Educational Practice*, in THE FEDERAL INTEREST IN FINANCING SCHOOLING 209, 216-19 (M. Timpane ed. 1978).

49. The term "shadow" is derived from Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979). The idea of a private government existing as a shadow of the law is an extension of the individualistic divorce context, however. *See generally* Galanter, *Justice In Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981). The general idea is that many activities and structures other than compliance with specific commands occur as a response to law.

50. *See* Tyack, Kirst, & Hansot, *Educational Reform: Retrospect and Prospect*, 81 TCHRS. C. REC. 253, 256-63 (1980).

the margins of established operations and are abandoned quickly as soon as the legal incentives are discontinued.[51] It is important to remember that institutionalization may be pernicious and dysfunctional as well as efficiently oriented toward compliance. Excessive emphasis on fiscal accountability, for example, may destroy an organization by producing fear, resentment, and immobilization of productivity through defensive obsession with technical compliance.

5. *Deployment/Response Interactions*

The incentive/response model describes many of the interactions during implementation. Legal rules and incentives are established, and regulated organizations respond to them in a calculated way. For example, new federal legislation contains provisions that private schools must be included in various programs.[52] Local education agencies will decide what these provisions require in practice. Similarly, the incentive/response model is appropriate for many administrative actions. Sometimes an agency or court issues an order to do or not to do a certain thing, and the regulated organization simply must decide how to respond. This incentive/response model does not apply equally well to all interactions in the implementation process. Indeed, the unidirectional incentive/response model is highly misleading when applied to a second type of implementation interactions. These interactions are mutual, simultaneous, ongoing, and negotiated. For lack of a better name, they have been called "deployment/response interactions" in Table 2.

The essence of these interactions is that the regulating and regulated organization negotiate, or "construct," the meaning of compliance over a period of time.[53] Such negotiation tends to occur in what Reiss and Biderman call the "compliance relationship."[54] The compliance relationship

---

51. For a discussion of factors leading to the institutionalization of some projects and not others, see Berman & McLaughlin, *Federal Support for Improved Educational Practice*, in THE FEDERAL INTEREST IN FINANCING SCHOOLING 209, 217-19 (M. Timpane ed. 1978).

52. Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, § 586, 95 Stat. 463, 477 (codified at 20 U.S.C. § 3862 (Supp. V 1981)). *Compare* 20 U.S.C. § 3086 (Supp. V 1981) *with id.* § 3862.

53. *See generally* P. BLAU, THE DYNAMICS OF BUREAUCRACY—A STUDY OF INTERPERSONAL RELATIONS IN TWO GOVERNMENT AGENCIES 121-228 (1963); M. DERTHICK, THE INFLUENCE OF FEDERAL GRANTS (1970); K. HAWKINS, ENVIRONMENT AND ENFORCEMENT: THE SOCIAL CONSTRUCTION OF POLLUTION (forthcoming); K. HAWKINS & J. THOMAS, ENFORCING REGULATION: POLICY AND PRACTICE (1983); Hawkins, *Bargain and Bluff—Compliance Strategy and Deterrence in the Enforcement of Regulation*, 5 LAW & POL'Y Q. 35 (1983); P. HILL, ENFORCEMENT AND INFORMAL PRESSURE IN THE MANAGEMENT OF FEDERAL CATEGORICAL PROGRAMS IN EDUCATION (Rand Note No. N-1232-HEW, 1979).

Much of the discussion of this section is indebted to a presentation by Keith Hawkins entitled "The Compliance Strategy," at an Interdisciplinary Legal Studies Colloquium in the University of Wisconsin Law School (Nov. 6, 1981).

54. A. REISS & A. BIDERMAN, DATA SOURCES ON WHITE-COLLAR LAW-BREAKING 131-37 (Nat'l Inst. of Justice, U.S. Dep't of Justice, 1980).

is an ongoing regulatory relationship in which precise definitions of compliance and noncompliance are unavailable, primarily because various excuses for "technical" noncompliance may be accepted, but also because political conflict may have left the technical definition of compliance itself relatively vague. In this continuing relationship, the survival and legitimacy of the regulated organization is accepted as desirable. The regulatory process consists of striking a proper balance between the goals of the regulation and legitimate competing interests of the regulated organization, as in the case of affirmative action in hiring.

In compliance relationships, pressure from the regulating agency is serial and incremental in order to nudge regulated organizations toward feasible increments of compliance. The definition of compliance is not given in the law, but is constructed socially by the parties on the basis of what actions they can agree are sufficient under all the circumstances. If noncompliance appears to exist, the regulated organization must persuade the regulating organization of plausible excuses. Here, good will is as important as concrete results, honesty in admitting problems is as important as absence of problems, and planning is as important as action.

The social construction of compliance is negotiated through bargaining, in which the regulated organization trades information and promises of compliance for advice and forbearance from sanctions on the part of the regulating organization. Formal and informal sanctions are used at various points to pressure the regulated organization into greater cooperation. Reciprocally, regulated organizations may resort to stonewalling, court action, and political appeals if they feel the regulated organization is behaving unreasonably. Ultimate punitive sanctions (such as the cutoff of funds or the imposition of jail sentences) rarely are invoked or obtained, because they disrupt the continuing relationship and challenge the legitimacy of the regulated organizations. Some regulated organizations, however, may be considered completely unreasonable and unresponsive, and ultimate sanctions may be invoked against them. This serial, mutual maneuvering and negotiating, occurring over a period of time and concerning many substantive issues, is what is meant by deployment/response interactions in Table 2.

6. *Influence on Regulating Organizations to Change Formal Policy*

Obviously, the deployment/response interaction contains strong elements of "upward" influence on the regulating agency. The first purely upward cycle activity to be considered, however, is influence on the formal policies of regulating organizations by insiders and insider/outsider combinations. "Regulating organization" means the agency of the government, whether court or administrative agency, that applies the law directly to the regulated organization. "Formal policy" means the applicable law at the regulatory level, as opposed to changes in discretionary elements of enforcement; examples are court decrees, administrative regulations,

and official administrative policies such as guidelines to regulations. "Insider" means, in essence, one of the parties—either the regulating or the regulated organization. "Outsider" means one of the political allies of an insider, such as pressure groups sympathetic to the regulated organization or the social movement underlying the implementation.

This subsection attempts to define the group of activities by which interested parties strive to obtain a formal change in policy directly from the organization that regulates them. The types of influence exerted break down into formal and informal. Formal influence is the activity of lawyers and other advocates that argue before appropriate forums that particular orders and policies are contrary to the law. In institutional litigation, lawyers frequently return to the court to obtain changes in remedial orders, arguing that the orders are ineffective to implement the rights declared in the liability phase of the lawsuit or, to the contrary, that they impose unreasonable burdens on the defendants.[55] Administrative regulations and decisions are challenged before the agency in hearings. Lawyers also go to court to change the policies of administrative agencies, with an extreme example being the long-lived *Adams v. Richardson*.[56]

Informal influences include, first, pressures brought to bear directly on the regulating agency. Besides formal legal challenges, agencies receive many informal complaints such as comment letters. Publicity and public pressure are aroused and directed against both courts and administrative agencies.[57] The second kind of informal pressure is exerted on powerful

---

55. Practically all the literature on institutional litigation deals with this phenomenon. *See supra* note 13.

56. 351 F. Supp. 636 (D.D.C. 1972), *amended*, 356 F. Supp. 92 (D.D.C.), *modified and aff'd per curiam*, 480 F.2d 1159 (D.C. Cir. 1973), *supp'd sub. nom.* Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975), *supp'd sub nom.* Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977). In Adams v. Mathews, 536 F.2d 417 (D.C. Cir. 1976), the court reversed an order denying the Women's Equity Action League motion to intervene. *Id.* at 418. *See also* Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980) (companion case). In the ongoing litigation, the court later entertained the NAACP Legal Defense Fund's and Women's Equity Action League's motions to find Education and Labor Department officials in civil and criminal contempt of court for ignoring the deadlines set in 1977. Educ. Daily, Mar. 12, 1982, at 1.

See generally Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982).

57. Concerning courts, in addition to the references cited on institutional litigation in *supra* note 13, see Kirp & Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313, 314-30, 340-51 (1981). Concerning other upward-cycle politics, see generally J. CALIFANO, GOVERNING AMERICA (1981); J. CHUBB, INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY (1982); D. HOROWITZ, THE COURTS AND SOCIAL POLICY 68-105 (1977); Cronin, *Small Program, Big Troubles: Policy Making for a Small Great Society Program*, in AMERICAN POLITICS AND PUBLIC POLICY 77 (1978); Elmore & McLaughlin, *Strategic Choice in Federal Education Policy: The Compliance-Assistance Trade-Off*, in POLICY MAKING IN EDUCATION, EIGHTY-FIRST YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION 159 (1982) (implications of vertical issue networks); Murphy, *Progress and Problems: The Paradox of State Reform*, in *id.* at 195 (modern state government not like pyramid

outsiders who in turn try to influence the regulating agency. A never-ending phenomenon in Washington is the powerful member of Congress who, having received a call from a powerful constituent, makes a call or has a visit with someone in an agency, suggesting the error of some actual or proposed administrative action. Those organizations with influence in the legislature include the insiders and their outside political allies. In all of these informal influences, both lawyers and nonlawyers are actively involved.

All the forms of influence, whether as formal as a legal challenge or as informal as a telephoned complaint, tend to emerge out of the interest groups affected by regulation (social movements, regulated organizations, and their allies). The influence is stimulated by adverse decisions or events and sets off a combination of forms of counterinfluence. From the viewpoint of the agency, once an adverse decision is made, complaints and pressure emerge in many different forms from many different directions.

The intensity and variety of the pressures are, of course, related to the importance of the issue; many times, the important issues have been anticipated by everyone knowledgeable in the area. As discussed in subsection 2 above, the underlying mandate has a series of critical compromises built into it, each one a balance struck between effective and ineffective from the viewpoint of the social movement and between reasonable and unreasonable from the viewpoint of the regulated organization. Crucial regulatory actions tend to revolve around these same structural conflict points; frequently, all the interested parties have been waiting for the agency to reveal its position. Failure to act generally works in favor of the status quo. Therefore, the social movement must bring pressure to initiate action. Frequently, the pattern of agency action/negative reaction leads to a whole series of different edicts by the same agency on the same subject, each proclamation attempting to satisfy the most vehement criticism of the day. "Public policy" on such matters is, therefore, somewhat erratic and must be observed over a number of years to be seen in perspective.

An example of protracted pressure by interested organizations and variable agency response concerns the issue of equal spending on intercollegiate athletics under Title IX (a statute forbidding sex discrimination in educational institutions).[58] After the statute was passed, colleges and universities became concerned that it might be interpreted to require equal spending on men's and women's intercollegiate sports. Colleges and universities, especially the sports "powers," believed that the success of

---

pictured by prophets of centralization; more like shopping mall with specialty shops catering to small segments of the populace); Sabatier, *Social Movements and Regulator Agencies: Toward a More Adequate—and Less Pessimistic—Theory of "Clientele Capture,"* 6 POL'Y SCI. 301 (1975); Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357 (J. Wilson ed. 1980) (distinct types of interest group politics).

58. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (current version at 20 U.S.C. §§ 1681-1686 (1976)).

immensely popular and lucrative men's sports—football, basketball, and hockey—depended upon heavy financial investment in scholarships and other functions. Equality would undermine the income-producing ability of these sports because enough new money to "level up," rather than "level down," was most unlikely.[59] In response to pressure, an amendment was introduced in the United States Senate exempting income-producing sports from coverage under Title IX.[60] This amendment was passed by the Senate, but was not incorporated in the final version of the bill. In its place, a statute was enacted that, reflecting the hot partisan debate over the issue, was deliberately ambiguous.[61]

Left with unclear direction, the Department of Health, Education, and Welfare (HEW) first issued a compromising regulation: equal expenditures were not required to demonstrate compliance, but failure to provide necessary funds could be a factor in a finding of noncompliance.[62] Shortly after the three-year period allowed for adjustment to this regulation, HEW suddenly changed course. A proposed guideline to the regulation declared that equal average per capita expenditures were required, unless specified extenuating circumstances could be demonstrated.[63] Not surprisingly, a storm of controversy erupted. Major universities and the NCAA deluged HEW with negative comments and petitions. Legal objections to the guideline were formulated and prepared for court. In the end, the final interpretation of the guideline seems to have left the position of income-producing sports secure, while mandating substantial equality elsewhere.[64]

The existence and flavor of outside, informal influence on agency decisions is well captured in the description by Joseph Califano, Secretary of HEW at the time, of a meeting with members of Congress on the Title IX athletic spending issue:

> As soon as word reached the Hill that I intended to send the regulations there, both the women's groups and the congressional leadership reacted. House Majority Whip John Brademas called to say that Speaker O'Neill, Majority Leader Jim Wright, and House Education Subcommittee Chairman Bill Ford wanted a

---

59. *See* Koch, *Title IX and The NCAA*, 3 W. ST. L. REV. 250, 258-60 (1976).

60. S. 1539, 93d Cong., 2d Sess. § 535 (1974), passed by voice in the Senate, 120 CONG. REC. 15,322-23 (1974).

61. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (current version at 20 U.S.C. § 1681 (1976)).

62. 40 Fed. Reg. 24,128 (1975).

63. 43 Fed. Reg. 58,070 (1978).

64. 44 Fed. Reg. 71,413, 71,415-16 (1979). Expenditures for scholarships are required to be proportional to the number of male and female participants in the athletic program. Greater numbers of male athletes may lead to a greater share of the scholarship budget going to men. At the University of Wisconsin, the scholarship split is supposedly about 60%-40%, male-female. Monetary differences in other athletic benefits (e.g., transportation, recruiting) need not be equal if based on the nature of the sport (e.g., football) or revenue-raising capacity (football, basketball, hockey). *Id.*

> quiet, off-the-record meeting. It was held in the Speaker's private suite on March 20, 1979. When I arrived, there sat Brademas, whose district embraced Notre Dame; Jim Wright, representing big-time Texas college football; Bill Ford, speaking for Michigan and Michigan State, and the Speaker, Tip O'Neill, perhaps my closest friend in the House, a strong supporter of Boston College.
>
> O'Neill sat me down to his right, puffed on his cigar, and asked, "Joe, how can you do this to your alma mater, Holy Cross? The Jesuits will never speak to you again." . . . Brademas mentioned Notre Dame, and both he and Bill Ford argued that sending the guidelines to the House for a vote posed an impossible political dilemma for Democratic congressmen: forcing them to vote to reject the position of women's groups or to take an unpopular stand against college football. . . . "All hell will break loose on the floor."
>
> "We could end up with Title IX gutted or repealed," Bill Ford said. Brademas agreed.
>
> "The people have had enough of HEW regulations," Wright added. "They are fed up with this kind of thing."
>
> "Joe," the Speaker said, "this is not the time for this. The last thing we need is a major controversy. . . . You'll never get cost containment for hospitals or your other bills."
>
> But it remained for the peppery and astute Bill Ford to drive the point home: "You can lose an election on the sports pages that you'll never lose on the front pages. And that's what you'll do with this interpretation of Title IX."[65]

The final compromise involved testing the proposed guidelines in the context of various kinds of institutions of higher education. Califano considered this exercise ultimately beneficial, because "somewhat different" guidelines promulgated by successor Patricia Harris "moved to fulfill the promise of Title IX."[66] It also is interesting to learn Califano's general summary of the influence of Congress in the implementation of civil rights policies seeking to remedy racial discrimination: "I cannot remember a call from a member of Congress to step up civil rights enforcement action in the racial area; I recall scores of pleas to slow down or blunt such enforcement."[67]

7. Influence on Legislatures to Obtain Changes in the Underlying Statute

Implementation begins with enactment of a statute, judicial decree, or executive order. At this point the goals of a social movement first are

---

65. J. CALIFANO, GOVERNING AMERICA 267-68 (1981).
66. *Id.* at 268.
67. *Id.* at 269.

enacted into law. At any time during the course of implementation, interested parties can, and frequently do, return to the underlying mandate to seek changes of policy. The underlying law is neither necessarily stable nor untouchable, although there probably are costs of frequent change and corresponding norms in favor of a degree of stability.[68]

It perhaps would be most logical to group all forms of "mandate change activity" together for purposes of a model of implementation. Practically speaking, however, the process of obtaining a change in a statute seems far different from the process of obtaining a change in a judicial decree or in an administrative action. Accordingly, in the last subsection, formal changes in administrative and judicial policy were discussed, while this subsection deals with legislative changes.

"Bureaucratic politics" is an apt term for the process of influencing regulating organizations, including courts. Before regulating organizations, regulated organizations attempt to obtain the cooperation of selected government officials that determine the official responsibilities of the regulated organizations and the major constraints on their actions. The pattern of influence is, therefore, relatively focused and "argumentative." In contrast, before legislatures the argument involves only general social interests and good public policy, and the process of influence is unique—appealing to interest groups, building coalitions, calling up past favors, and maneuvering through the formal legislative process.[69]

Moreover, a legislative victory may differ substantially from a victory in a regulating agency. While there are "technical amendments" going through legislatures at practically all times (usually sponsored in part by regulating agencies), the really significant legislative action from the standpoint of implementation is the revolutionary or "watershed" decision. Thus, there can be a quantum difference between legislative and regulatory changes. Regulatory changes are relatively refined and incremental. Legislative changes can be fundamental and even drastic.

As this Article is being written, the United States is experiencing a period of drastic legislative change sponsored by the Chief Executive. Programs that were changed incrementally over a period of ten to fifteen years are being eliminated, drastically cut, or consolidated in such a fundamental way that in practical terms the original program purposes have been lost.[70] This process is neither new nor accidental; a conservative reaction to liberal

---

68. *See* L. FULLER, THE MORALITY OF LAW 3-94 (rev. ed. 1969).

69. *See generally* S. BAILEY, EDUCATION INTEREST GROUPS IN THE NATION'S CAPITAL (1975); E. REDMAN, THE DANCE OF LEGISLATION (1973).

70. For example, a block grant established by chapter 2 of the Education Consolidation and Improvement Act of 1981 *permits*, but does not *require*, the obligatory purposes of ESEA titles II-VI and VIII-IX. Pub. L. No. 97-35, §§ 571-573 (consolidating Title V), §§ 576-577 (consolidating Titles IV-VI), §§ 581-583 (consolidating Titles III, VIII, IX), 95 Stat. 463, 472-73, 473-74, 475-77 (1981).

programs has happened before. For example, implementation of many social programs was disrupted during the Nixon Administration.[71]

A structural reason exists for periodic, drastic legislative change. Implementations tend to pit powerful social forces against each other.[72] When the political climate undergoes a fundamental shift in orientation, normal incremental change cannot satisfy the demand for drastic change. Thus, when powerful social forces oppose one another, wide fluctuations in policy are especially likely as each side alternately achieves predominance. These shifts in predominance occur in various ways. For instance, during the course of an implementation, a constant chorus of criticism is heard from those who completely disagree with the law. Implementation is always costly and its success is always problematical.[73] Critics can take advantage of problems by publicizing them. Criticisms seem to be retained in the polity until the electorate undergoes a sufficient shift to "throw the rascals out." The cycle tends to reverse itself when the social problems resulting from the lack of implementations are brought home to the people who had been led by the opposition to focus exclusively on the costs.

One of the practical consequences of political instability is that the participant in, and researcher of, implementation-type programs should expect periodic episodes of deliberate sabotage by the government.[74] This condition does not contribute greatly to the effectiveness of implemented social programs. On the other hand, once programs are established they tend to survive periods of retrenchment, though this tendency is by no means universal. The negative political consequences of total destruction of a program are much greater than the negative consequences of cutting it back. Thus, if a program serves a genuine use, any instability in its content tends to stem from peripheral changes rather than from alterations of the durable core of the program. An interesting question involves the nature of durable implementations as opposed to transient implementations. Medicare is probably here to stay. Can we say the same about federal aid for the education of disadvantaged children? If not, why not?[75]

---

71. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 68-105 (1977) (intervention in Model Cities program).

72. *See* Clune & Lindquist, *supra* note 1, at 1113-14. Another way of saying the same thing in terms of the compliance relationships is that both sides in that relationship have a high degree of legitimacy. *See* K. HAWKINS, ENVIRONMENT AND ENFORCEMENT: THE SOCIAL CONSTRUCTION OF POLLUTION (forthcoming).

73. *See* Clune & Lindquist, *supra* note 1, at 1113-14.

74. *See supra* note 71.

75. Analysis of why certain federal programs leave "deposits" while others do not may be found in Tyack, Kirst & Hansot, *Educational Reform: Retrospect and Prospect*, 81 TCHRS. C. REC. 253, 262 (1980). *See also* Berman & McLaughlin, *Federal Support for Improved Educational Practice*, in THE FEDERAL INTEREST IN FINANCING SCHOOLING 209, 213-19 (M. Timpane ed. 1978).

8. *The Interactions in Action*

a. Simultaneity

The foregoing typology of implementation interactions is arranged in a sequence that occurs only rarely in the real world. The sequence is both analytical and chronological, suggesting that decisions of greater generality and higher political authority occur earlier and causally constrain decisions of lesser generality and lower authority. Thus, it would seem from the model that the basic legal mandate occurs first, followed by the deployment of legal sanctions, reactions to incentives, and finally upward-cycle efforts to obtain changes in downward-cycle activities. This precise sequence probably is characteristic only of brand new policies. In the context of new policies, the sequence, which also resembles the "stage" theories of various organizational theorists, is probably apt.[76] Fundamental policy choices precede the implementation of regulations; deployment of concrete enforcement activities then follows. Each "level" of implementation also tends to involve a different level of the legal staff: from the elite level of policy makers (legislators, judges) to the middle level of policy specifiers (regulation drafters, judicial masters) to the lowest level of policy appliers (so-called street-level bureaucrats).[77]

---

76. Most implementation and organizational theories include theories about the "stages" of change. *See* Berman & McLaughlin, *Federal Support for Improved Educational Practice*, in THE FEDERAL INTEREST IN FINANCING SCHOOLING 209, 213-19 (M. Timpane ed. 1978). One scheme for classifying the stages of the implementation of a new law suggests four stages: intervention, mobilization, operationalization, and institutionalization. R. Lindquist with W. Clune, Systemic Enforcement: The Implementation of Equal Employment Opportunity Through Executive Order, at III.1-.165 (June 30, 1982) (unpublished manuscript on file with the author). *See generally* Jones, *Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process Under the Executive Order 11,246 as Amended*, 59 CHI.-KENT L. REV. 67 (1982).

77. The association of levels of personnel with stages of implementation may be grasped from the following chart in R. Lindquist with W. Clune, Systemic Enforcement: The Implementation of Equal Employment Opportunity Through Executive Order, at I.10 (June 30, 1982) (unpublished manuscript on file with the author).

Implementation
Stages and Characteristics

ROLES, PERSONNEL			
Leaders or Elite Staff	Policy Advisors	Program Managers	Street-Level Bureaucrats
ACTIVITIES			
Political	Technical	Managerial	Administrative
Assess and react to social forces	Formulate policy; allocate resources	Establish organizational 1) structure 2) ideology 3) personnel	Interact with enforcement environment to secure compliance

After the initial implementation of a policy, however, this concept of temporal and causal sequence becomes limiting and misleading. By including an upward cycle, which temporally follows one downward cycle and precedes another, the model itself suggests that the process must be considered "circular," involving "rounds" of interactions. Indeed, the idea of repeated rounds or sequences is suggested by the use of the term "cycles." Real processes, however, do not necessarily occur in the order indicated by the model. Actually, all the levels of interaction can and often do occur simultaneously and independently of one another. Changes in regulations and field-level behavior occur independently of mandate changes, and independently of each other. Moreover, changes in behavior can be initiated by actors at different levels of the process. A president, for example, can change the deployment of incentives without changing anything else, by replacing personnel, cutting or expanding the budget, or issuing new enforcement policies. At the same time, field-level operations may be changing endogenously or as a result of interactions with regulating agencies. Conversely, mandates and detailed regulations may be enacted without producing any field-level consequences.

The sequence suggested by the model retains a certain validity and, therefore, never can be discarded completely. To some extent, mandate changes continue to be followed by deployment changes, which are followed by response changes. That is, policy innovations in "classic sequence" continue to occur throughout implementation. But the classic sequence is far from the only one that occurs. In the case of simultaneous and independent occurrences, the model might be better understood to suggest the interactional "elements" of the implementation process, without specifying anything about temporal or causal ordering.

b. Degrees of Top Downness

The model certainly cannot be accused of an exclusively top-down orientation.[78] Instead, the model has been defined largely in contrast to a top-down perspective, which typically excludes such activities as upward-cycle influence and field-level interactions. The amount of variation in top downness that occurs in real implementations, however, has been omitted from the model.

In all implementations, there is a process of upper-level policy decisions filtering down and constraining street-level action. A reciprocal process in which street-level officers define a zone of discretion for themselves free from upper-level policy is also present. Street-level personnel, however, are both more and less resistant to upper-level control, depending on legal and organizational context.

---

78. For a discussion of the limitations of the top-down orientation, see Elmore, *Backward Mapping: Implemention Research and Policy Decisions*, 94 POL. SCI. Q. 601, 603-05 (1979-80). Elmore uses the term "forward mapping" to refer to what I am calling a top-down perspective. *Id.* at 602.

The police are a good example of high resistance. Police officers must respond to a multitude of demands that emanate from the community rather than from superior officers. In addition, a great many police functions are of a discretionary, coping variety and officially may be disapproved by society, which simultaneously requires them.[79] Thus, in a sheer technical sense, it would be difficult to exert extensive control over field-level police actions because of the spontaneous and unpredictable nature of police work. Furthermore, the street cop has an indigenous culture, a horizontally communicated set of norms that define how to behave. A part of this culture is a strong sense of the general irrelevance and unjustified nature of hierarchical control (the "street cop vs. management cop" syndrome[80]).

The difficulty of top-down control in police work might be contrasted with the relative ease of such control in prosecutorial work, particularly when prosecution involves a few big cases rather than a multitude of out-of-court settlements. Upper-level policy makers can pick and choose the cases to prosecute and when to prosecute them. Therefore, in an organization that is largely concerned with deciding when to issue complaints, official changes in the definition of violations and in enforcement policy may have a much greater effect than analogous directives to street cops to change their style of law enforcement.[81]

c. Trends

If the previous two points suggest less order or pattern to reality than is suggested by the model, an analysis of trends suggests that, in a different sense, reality is more orderly. Interactional elements or sequences say nothing about long-run, structured developments. In a sense, the model is a frozen "snapshot" of the kinds of interactions that are likely to occur at any point during implementation. Actual implementations tend to exhibit distinct trends or stages. Cycles or bundles of interactions at one stage become the prelude to a new type of interaction that is the next stage. In other words, there is long-run development, and implementations therefore have a developmental history. Development may be "evolutionary," in the sense that trial and error lead to improvement, refinement, maximum effectiveness, institutionalization, or at least a type of dynamic equilibrium.[82] Conversely, development might lead to the death

---

79. *See* H. GOLDSTEIN, POLICING A FREE SOCIETY 93-130 (1977).

80. *See generally* E. REUSS-IANNI AND F. IANNI, STREET COPS VS. MANAGEMENT COPS: THE SOCIAL ORGANIZATION OF THE POLICE PRECINCT (Inst. for Social Analysis, 1979).

81. Thus, institutionalization of upper-level policy decisions under the Federal Contract Compliance Program is probably at the more complete rather than the less complete end of the spectrum. *See supra* notes 76-77.

82. Title I of the ESEA is an example. *See generally* NAT'L INST. OF EDUC., ADMINISTRATION OF COMPENSATORY EDUCATION (1977); M. KIRST & R. JUNG, THE UTILITY OF A LONGITUDINAL APPROACH IN ASSESSING IMPLEMENTATION: A THIRTEEN YEAR VIEW OF TITLE I, ESEA (Inst. for Research on Educ. Fin. & Governance, Stanford Univ., Project Report No. 80-B18, 1980).

of the underlying policy through backlash, co-optation, attrition, or desuetude.[83] A nondevelopmental pattern is merely cyclical: waves of enthusiastic enforcement followed by periods of entropy, disillusionment, political sabotage, and retrenchment.[84] The point here is to indicate the existence of longitudinal patterns not represented by the model rather than to specify the various developmental types. Indeed, investigation of longitudinal trends is in itself one kind of implementation theory and research.

d. Multiple Institutions

The model in Table 2 is not specific about which, or how many, regulating and regulated organizations participate in implementation. While the preceding discussion may have suggested that all regulating organizations are similar and that all regulated organizations are similar, the reality is more complex. On the regulating side, the typical pattern is for one government agency to have primary responsibility for enforcement or law application. Outright conflicts of jurisdiction are confusing. Even when enforcement of the law is shared, as in the old organization under Executive Order 11,246, subdivisions of the jurisdiction into mutually exclusive areas are attempted.[85] Sometimes the primary enforcement agency has no other responsibilities; sometimes it has many. For example, compare a special-purpose agency, like the Environmental Protection Agency, with a more general-purpose agency like the Department of Labor or, most extremely, the police.

Of course, the amount of organizational resources and the effectiveness of the organization itself may vary independently of the formal responsibility of agencies. Single-purpose agencies tend to be more effective implementers than multiple-purpose agencies because of the implicit guarantee of enforcement resources; this, however, is not universally true.[86] The Department of Labor may or may not have a large, active, and effective

---

83. Prior to the Reagan Administration's campaigns against agencies like the Departments of Energy and Education, the most recent, notable instance of agency death was the demise of the Office of Economic Opportunity (OEO). *See* H. HIMMELMAN, THE FALL AND RISE OF THE OFFICE OF ECONOMIC OPPORTUNITY (Lawyers' Comm'n for Civil Rights Under Law, 1973). For a description of the role of the OEO in federal antipoverty programs, see generally A DECADE OF FEDERAL ANTIPOVERTY PROGRAMS (R. Haveman ed. 1977); D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING—COMMUNITY ACTION IN THE WAR ON POVERTY (1969).

84. *See generally* Banfield, *Making a New Federal Program: Model Cities, 1964-68*, in SOCIAL PROGRAM IMPLEMENTATION 183 (1976); Cronin, *Small Program, Big Troubles: Policy Making for a Small Great Society Program*, in AMERICAN POLITICS AND PUBLIC POLICY 77 (1978).

85. Problems with the old, fragmented organization are noted in U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, at 256-70, 271-99, 634-36.

86. Generally, the most effective implementers are agencies that support the statutory objectives and give the new programs high priority. *See* Sabatier & Mazmanian, *The Con-*

substaff assigned to the implementation of particular programs. Courts are multiple-purpose institutions; getting a court to pay more attention to a particular implementation may be a problem. Once a court agrees to take a case and implement a decree, however, there is an implicit guarantee of resources similar to those of a single-purpose agency. One problem with the police is that the multitude of enforcement responsibilities makes it difficult for them to concentrate on the implementation of any one legal policy.[87]

Even though primary enforcement responsibility is lodged in one agency, a variety of other regulating organizations may become regularly involved with peripheral, but important, issues. Probably the most important pattern is the involvement of courts reviewing administrative actions. When an administrative agency has "mainline" responsibility, and does make the vast preponderance of important decisions, there nevertheless may be important continuing or episodic involvement of courts with the same policy or policies. Lawyers regularly seek review of particular actions. *Adams v. Richardson*[88] represents a "two layer" enforcement structure, in which a court is deeply involved in an agency's supervision of regulated organizations. Not only do courts occasionally become involved in primarily legislative or administrative matters, but also the reciprocal is common. That is, when a court has primary responsibility, legislatures and administrative agencies often are drawn into the dispute.[89]

On the side of regulated organizations, there is a similar pattern of primary focus on one organization or type of organization, with the potential involvement of many different organizations. Sometimes a single regulated organization is involved—one particular prison, for example. More typically, similar *types* of organizations are regulated: "government contractors" or "corporations with more than one thousand employees trading on public stock exchanges."

The point of this reminder about multiple institutions is, again, that the analytical simplicity of the model should not be taken too literally. In order to understand the process, it is helpful to have a simplified schematic of its actors and their typical interactions. Nevertheless, the combinations of actors and actions that occur in real life are enormously varied.

---

ditions of Effective Implementation: A Guide to Accomplishing Policy Objectives, 5 POL'Y ANALYSIS 481, 489-90 (1979).

87. For a discussion of police discretion in the enforcement of law, see generally K. DAVIS, DISCRETIONARY JUSTICE (1969); Davis, *Police Rulemaking on Selective Enforcement: A Reply*, 125 U. PA. L. REV. 1167 (1977).

88. *See supra* note 56 and accompanying text.

89. School finance litigation is a good example. *See supra* note 21. When legislatures and administrative agencies are ordered by courts to do something, they frequently respond by issuing commands to other institutions (e.g., court orders legislature, which orders school districts). Thus, not only are the institutions multiple in a numerical sense, but there are often multiple layers of regulating and regulated organizations.

III. SOME IMPLICATIONS OF THE MODEL FOR PUBLIC POLICY AND RESEARCH

This part of the Article explores some of the important implications of the political model presented in part II. The usefulness of a model consists of asserting a limited number of characteristic propositions about reality. In that sense, the implications are not only of the model, but, more narrowly, of the important or characteristic propositions that the model asserts about reality. Of the primary theoretical characteristics of the model presented in part II, the characteristics with the most implications are these: (a) *Reformist political fabrication.* All important decisions and structures involved in implementation are the result of political struggle and compromise between social movements and the interest groups whose behaviors the social movements desire to change. (b) *Cybernetic interactionism.* Implementation is a continuous process of mutual adjustment among interested organizations in light of information that they receive about each other's actions. (c) *Recursiveness.* Implementation is not a one-way process with an end point. It is a "circular" (recurring) process that changes over time. The political forces that initiate implementation continue to interact at all levels of sociolegal action, including continuing disputes over the terms of the underlying legal mandate. (d) *Evolution.* Notwithstanding the open and manipulable character of recursiveness, implementation usually falls into characteristic long-run patterns and may reach stable, dynamic equilibrium.

Implications of the model fall into three main categories. First, implications for the design of public policy include the areas of partial prescriptions, abstractness versus contextualization, systemic prescriptions, and evaluation. Second, implications for research include the areas of longitudinal descriptions, longitudinal predictions, and research methodology. Finally, the model contains many implications for the changing roles of law and lawyers. The implications for public policy and research will be discussed in this part, and the implications for the changing roles of law and lawyers will be discussed in part IV.

A. Partial Prescriptions and Downward-Cycle Bias

The largest category of implementation research falls into what is called "sanction theory." Sanction theories posit a relationship between the type and intensity of governmental intervention and the degree and kind of compliance or noncompliance. In this sense, both theories of regulation (what type of legal mechanism works best) and theories of incentives and deterrence (the effect of rewards vs. the effect of punishments) are considered sanction theories. The general relationship explored by sanction theories is the one between governmental interventions with specified characteristics and resulting compliance responses.[90]

90. Some examples of sanction theory that are sensitive to the problems discussed here are the following:

The interactional and recursive aspects of implementation pose two general difficulties for any sanction theory. In the first place, the existence or nonexistence of effective sanctions is one of the things that is subjected to political struggle. That a particular sanction could be effective does not mean that it will be enacted; exactly the opposite may be true. It may not be adopted as law because it would be *too* effective. The second difficulty is that even when particular sanctions are adopted, they are not necessarily used, because the invocation and forbearance of sanctions are bargained for in the compliance interaction. Death, it is rightly said, is not an effective sanction for petty theft.[91] Thus, because they omit the political dimension, sanction theories are partial. They must be understood to articulate a hypothetical, contingent relationship: "if this were done, that would follow."

On rewards and punishments, see generally P. BERMAN, FROM COMPLIANCE TO LEARNING: IMPLEMENTING LEGALLY-INDUCED REFORM (Inst. for Research on Educ. Fin. & Governance, Stanford Univ., Project Report No. 81-A20, 1981); F. Doolittle, Intergovernmental Relations in Federal Grant Programs: The Case of Aid for Families With Dependent Children (unpublished manuscript on file with the author).

On regulation/deregulation, see generally C. SCHULTZE, THE PUBLIC USE OF THE PRIVATE INTEREST (1977); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549 (1979); Clune, *The Deregulation Critique of the Federal Role in Education*, in SCHOOL DAYS, RULE DAYS: REGULATION AND LEGALIZATION IN AMERICAN EDUCATION (D. Kirp ed., forthcoming); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

On the proper amount of detail and hierarchical control, see generally Berman, *Thinking About Programmed and Adaptive Implementation: Matching Strategies to Situations*, in WHY POLICIES SUCCEED OR FAIL 205 (1980); Elmore, *Complexity and Control, What Legislators and Administrators Can Do About Implementing Public Policy*, in HANDBOOK OF TEACHING AND POLICY 342 (1983); Elmore & McLaughlin, *Strategic Choice in Federal Education Policy: The Compliance-Assistance Tradeoff*, in POLICY MAKING IN EDUCATION, EIGHTY-FIRST YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION 159 (1982); Rabinovitz, Pressman & Rein, *Guidelines: A Plethora of Forms, Authors, and Functions*, 7 POL'Y SCI. 399 (1976).

A reading list of the various aspects of "legalism" follows.

Due process: *See generally* Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841 (1976); Yudof, *Law, Policy, and the Public Schools*, 79 MICH. L. REV. 774 (1981); Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891.

Universal rules: *See generally* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); R. KAGAN, REGULATING BUSINESS, REGULATING SCHOOLS: THE PROBLEM OF REGULATORY UNREASONABLENESS (Inst. for Research on Educ. Fin. & Governance, Stanford Univ., Project Report No. 81-A14, 1981); J. Murphy, Differential Treatment of the States, A Good Idea or Wishful Thinking? (Aug. 25, 1981) (unpublished manuscript on file with the author).

Paperwork: Bardach, *Educational Paperwork*, in SCHOOL DAYS, RULE DAYS: REGULATION AND LEGALIZATION IN AMERICAN EDUCATION (D. Kirp ed., forthcoming).

Conflicts between separate requirements and programs: *See generally* P. HILL, DO FEDERAL EDUCATION PROGRAMS INTERFERE WITH ONE ANOTHER? (Rand Corp. Paper Series No. P-6416, 1979).

91. *See generally* Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE—CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17 (1975).

This partialness is not misleading as long as it is recognized in some way. Knowledge about hypothetical relationships is useful, even in politics. The problem is what can be called "downward-cycle bias." Implementation literature tends to view the world from the standpoint of the regulator and to assume a much wider latitude for effective sanctions than actually exists. The political and interactional constraints on sanctions are difficult to incorporate into sanction theories. Institutionally, this characteristic exists because lawyers and policy analysts, as part of the elite group that recommends and imposes sanctions, find it contrary to self-interest to advertise the plastic manipulability of their trade. It is difficult to make the rules and also admit that people are always breaking and compromising them. It is better to let that happen by itself without extra encouragement.

An example of downward-cycle bias is teacher evaluation. Various characteristics not usually found in schools have been argued as important for an effective formative system of teacher evaluation (a system designed to help teachers *develop*, as opposed to a "summative" system, designed to evaluate teachers for personnel decisions). These characteristics include: participation of the teachers in developing the criteria of evaluation; a high degree of consensual, common sense validity of the criteria; a strong relationship of the criteria to shared conceptions of good education; a system of implementation which includes regular, reliable feedback and is supportive rather than judgmental; and allowance for individual differences and adaptation to different circumstances.[92]

Although it may not sound that way, this system is an example of what is called sanction theory. Assume that the postulated empirical relationships are absolutely true—that the system described would work beautifully as a formative system of evaluation. It is still possible that the system is politically or organizationally unrealistic. Without doing more than scratching the surface of the topic, the following questions might be raised about the suggested system: (1) Is effective teacher participation possible given authoritarian conceptions of school management? Participation could be blocked at either the enactment or the administration stage. (2) Could the formative system be successfully insulated from the summative functions of the school? If the system were used for judgmental purposes, it would be pushed in the direction of statistically reliable, procedurally fair, and objectively valid measurements (the exact opposite of a good formative system). It also would become a focal point of labor-management negotiations. (3) Is it possible to have any internally developed system of teacher development and growth, given the widespread use of packaged teaching materials, complete with standardized testing of pupil progress? Such an "informal national curriculum" may largely preempt the whole area of teacher evaluation, because teacher performance is judged

92. L. DARLING-HAMMOND, A. WISE & S. PEASE, TEACHER EVALUATION IN THE ORGANIZATIONAL CONTEXT: A REVIEW OF THE LITERATURE (Rand Corp. Working Draft No. 1695-NIE, 1982).

against the tests provided with the teaching materials. Teachers themselves, it is worth noting, may prefer the simplicity and clarity of the standardized approach, so that resistance could come from professional and organizational culture as well as outside political constraints.

B. Degrees of Abstractness and Contextualization

Sanction theories also are characterized by a high degree of abstraction. The idea that "carrots work better than sticks," for example, may be asserted as valid across all areas of substantive law and all institutional contexts. In theory, there is a neutral trade-off between abstractness and concreteness. Abstract theories sacrifice realism and contingent statements of how they apply in particular circumstances; but they provide power, may be generalized, and are easily communicated. Highly concrete theories are realistic and appropriately qualified to individual circumstances; but, because of their idiosyncracy, they may provide little useful general knowledge. Highly idiosyncratic knowledge is essentially secret.

One piece of wisdom that can be added to this equivocal chestnut is the exhortation to be self-conscious about the choice. Another is a presumption in favor of concreteness, because the risk of neglecting context is the greater of the two risks. The structure of regulating and regulated organizations almost always makes a profound difference to the nature of implementation. When regulating prison inmates' use of literature obtained through the mail, it must be understood that contraband and weapons often come with the reading material. Therefore, significant expenditures for inspections are required to guarantee safe literature.[93] Regulation of schools must proceed with the knowledge that it is rare for any aspect of teaching to respond to programmatic instructions from above.[94] Employees of business corporations respond to different incentives than civil servants.[95] Federal courts behave differently in school desegregation efforts than do state legislatures.[96] Regulation of health care must confront the complex equations of medical costs.[97]

On the other hand, good abstract theory is extremely useful. Abstract theory provides a broader perspective, and also generalizes from concrete research to prevent redundant particularized studies. For example, an exposition of theory such as Stephen Breyer's essay on "regulatory failure"

---

93. *See supra* note 38 and accompanying text.

94. *See supra* note 40 and accompanying text.

95. *See supra* note 43 and accompanying text.

96. *See generally* R. KLUGER, SIMPLE JUSTICE—THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); J. PELTASON, FIFTY-EIGHT LONELY MEN—SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961).

97. *See generally* Comment, *Cost Containment in the Health Care Industry: An Analysis of Physician Reimbursement Under Medicare and the Implication for Future Regulation in the Health Care Field*, 84 DICK. L. REV. 51 (1979).

helps us to avoid endless rediscovery of the limitations of various regulatory approaches in one concrete context after another.[98]

C. *Systemic Prescriptions*

One category of implementation research might be called the "systemic prescription." A prescription is an assertion of how implementation *should* be structured and managed in order to be effective. A systemic prescription suggests the conditions of effective implementation in the entire system, including the political factors. According to Sabatier and Mazmanian, conditions for an effective implementation include the following: clear standards, sufficient enforcement resources, a supportive regulatory agency, few parties whose consent is needed or who may veto, skillful leaders, active support by strong constituency groups, and lack of conflict with other programs or socioeconomic conditions.[99]

As a description of what makes implementation effective, this list is excellent. But to some extent the descriptive strengths translate into prescriptive weaknesses. Not all of the conditions are equally susceptible to policy manipulation, and no condition is completely within the power of program designers. Clear standards often are resisted, resources must be acquired painfully in the political process, and supportive constituency groups are difficult to mobilize. Thus, the conditions exist or do not exist independently of policy design. Taken as a totality, the conditions are uninformative because they specify the ideal case in which so many basically fortuitous conditions favor implementation that it could hardly fail.[100] On the other hand, the article does not distinguish between conditions that are more or less susceptible to policy manipulation, nor between conditions that are more or less important given suboptimal levels of other conditions.

It is tempting to reason that if a program went well, its features should be imitated in other programs. Whether those conditions can be imitated and, if not, whether it is possible to implement a different program, are

---

98. Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549 (1979); *see also* S. BREYER, REGULATION AND ITS REFORM (1982).

99. Sabatier & Mazmanian, *The Conditions of Effective Implementation: A Guide to Accomplishing Policy Objectives*, 5 POL'Y ANALYSIS 481, 484-500 (1979).

100. An example may be the curb cuts mandated by the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 502, 87 Stat. 355, 392 (current version at 29 U.S.C. § 792 (1976 & Supp. IV 1980)); *see* 36 C.F.R. § 1190.70 (1982). The rapid implementation of curb cuts probably occurred because: (1) there were clear standards of compliance; (2) the implementing agencies were highly organized and accustomed to incorporating incremental design changes (e.g., municipal construction departments); (3) the marginal cost of compliance was low; and (4) the requirement enjoyed widespread local support (not just support for the handicapped but support from the construction industry, bike riders, and others). My thoughts on the implementation of curb cuts began with a conversation with David Kirp.

questions not directly answered by the approach of systemic prescription. Interestingly, this shortcoming applies equally to negative systemic prescriptions: "Here is everything that went wrong, so don't try anything like it in the future."[101] A total failure may be just a manipulable condition or two away from being a substantial success.

D. Longitudinal Descriptions

Acceptance of implementation as an open, interactive, political process raises problems concerning how to describe it over time. If parties are prone to intervene at all levels during all phases of implementation, and if the political balance can shift suddenly, what structure can be seen in long-run developments? This problem has both a descriptive aspect, which is discussed in this section of the Article, and a predictive aspect, which is discussed in the next section.

The descriptive problem is simply how to tell an implementation story. Given the countless interactions that comprise an implementation, at what points does a narrator "stop" the system to construct a coherent portrayal? Many case studies of implementation are quite coherent, but they seldom, if ever, discuss how their stories were constructed. Most narrators work with two types of organizing concepts: (1) analysis of the legal issues in terms of the political forces that created them; and (2) the creation of some model of the stages and levels of implementation.

The central legal issues of an implementation can be thought of in terms of "policy conflicts," "watershed decisions," and "punts." Policy conflicts emerge from the political positions that are implicated intrinsically by any area of purposive social policy. When Social Movement *A* desires social change from Institution *B*, questions immediately arise about how far the law might extend to achieve the desired behavior and what blend of legal incentives will be selected to encourage compliance. Political confrontation is implicit, and even predictable, in any area of sociolegal change. The most important discrete interests of the affected parties can not only be seen in advance, but also inevitably will be the primary determinants of the political struggle over both a law and its ultimate implementation structure. "Interests" is another name for what is important to people, and what is important motivates to action.

Consider affirmative action in employment from an imaginary point in time before law was made. Any legally implemented campaign to increase the numbers of women and minority workers must compromise

---

101. Most of the best known implementation theorists seem to draw this conclusion. E. BARDACH, THE IMPLEMENTATION GAME—WHAT HAPPENS AFTER A BILL BECOMES A LAW 3-6 (1977); D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING—COMMUNITY ACTION IN THE WAR ON POVERTY xv-xvi, xxxi-xxxiii (1969); J. PRESSMAN & A. WILDAVSKY, IMPLEMENTATION 163-76 (2d ed. 1979); Derthick, *Washington: Angry Citizens and an Ambitious Plan*, in SOCIAL PROGRAM IMPLEMENTATION 219, 232-39 (1976).

and threaten certain readily identifiable groups and institutions. White males have an inevitable distributive interest, and employers have an interest in maintaining control of employment decisions. New groups in the workplace predictably will challenge informal organizational cultures developed in their absence.[102] The making and application of affirmative-action law, therefore, will structure itself around the policy conflicts that are most important to the opposing groups: devices that will produce the most jobs for women and minorities and devices that will cause the least trouble for opposing groups.

The law as actually made usually is analyzed in terms of what can be called "watershed decisions" and "punts." Watershed decisions are resolutions of major policy conflicts—decisions to do things in one way rather than in other possible ways—with a different social outcome resulting from the choice. In affirmative action, critical substantive watershed decisions were whether to impose absolute quotas or to allow excuses of various kinds, such as unavailability and good-faith effort.[103] Key enforcement decisions were whether to have a regulatory or complaint-triggered system and whether to adopt a persuasive or enforcement model.[104] Note that it is essential to the analysis of a watershed decision to consider not just what was done, but what could have been done and was not.

The alternative to the watershed decision occurs when the implementing process deliberately avoids deciding an issue, leaving resolution of it to some other institutional level or covertly accepting the status quo. Any law requiring "nondiscrimination" and no more, for example, is leaving an immense amount unsaid. Such evasions may be called "punts." Evasion is not necessarily bad for the social movement or an abdication of responsibility. Sometimes it makes sense to leave the details to be defined by some other institution and process.[105]

Stories of legal implementations tend to be told in terms of major legal issues—that is, the policy conflicts, watershed decisions, and punts. A case study implicitly "stops" the system to examine the movement when something important happens, including when an issue is evaded, postponed, or delegated. Note that law school coursebooks in public law areas usually tend to be organized the same way,[106] except that the sense of

---

102. *See* Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 64-70. *See generally* Newman & Vonhof, *"Separate But Equal"—Job Segregation and Pay Equity in the Wake of* Gunther, 1981 U. ILL. L. REV. 269; Powers, *The Shifting Parameters of Affirmative Action: "Pragmatic" Paternalism in Sex-Based Employment Discrimination Cases*, 26 WAYNE L. REV. 1281 (1980).

103. *See supra* notes 27-29 and accompanying text.

104. This was one of the decisions within the "mobilization" stage. *See supra* note 76.

105. *See* Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 463-64 (1982). *See generally* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

106. On the idea of public law, see Clune & Lindquist, *supra* note 1, at 1112-13 and part IV(C)(1), (2) of this Article (role of lawyers in public law).

chronological continuity is diminished and the background of political and organizational decision making is almost totally absent.

Mention of political and organizational context leads to the other principal organizing device of implementation descriptions, a sense of stages and levels of implementation. One characteristic of watershed decisions is that they tend to be made early, in what could be called a "mobilization stage." Even if they are not made early, they are made by people high in the policy-making process, like members of Congress, judges, and rule makers, as opposed to so-called "street-level bureaucrats."[107] A complete story of implementation must continue the analysis beyond and below the watershed decisions into the structure of regulating and regulated organizations and the myriad interactions between them. Normally, the watershed decisions profoundly affect the nature of these interactions, especially if resources and ideology are counted as watersheds, because the basic legal structure sets the outer limits of what may be done. But the lower levels and later stages have lives of their own, and their exact orientation toward the underlying legal issues is a priori unclear.

Complete implementation case studies usually trace watersheds some distance "toward the street," but it is difficult to describe major policy decisions plus street-level interactions in a study of manageable length. For this reason, street-level studies tend, in effect, to stop the system at one moment of implementation. This approach can be misleading. Among other things, it tends to exaggerate the scope of discretion because the researcher unconsciously takes the limits of social action set by the watershed decisions as given.[108] Even more clearly, a sense of long-run secular trends is lacking.[109]

E. Longitudinal Predictions

Even the most coherent narrative may be entirely post hoc. Identification of the important facets of an implementation does not mean that those facets were in any way predicted. Nevertheless, the process of identifying how to describe reality may be a necessary step in the predictive process. For example, watershed decisions might become part of the "dependent variable" of a predictive model.

---

107. *See supra* notes 76-77. For an analysis of the degree of "top downness" in the implementation interactions, see part II(B)(8)(b).

108. I would say that such exaggeration is characteristic of the work of Lipsky and Edelman. *See, e.g.*, M. EDELMAN, POLITICS AS SYMBOLIC ACTION (1964); M. LIPSKY, STREET-LEVEL BUREAUCRACY—DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980); Weatherly & Lipsky, *Street Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform*, 47 HARV. EDUC. REV. 171 (1977).

109. *See* M. KIRST & R. JUNG, THE UTILITY OF A LONGITUDINAL APPROACH IN ASSESSING IMPLEMENTATION: A THIRTEEN YEAR VIEW OF TITLE I, ESEA (Inst. for Research on Educ. Fin. & Governance, Stanford Univ., Project Report No. 80-B18, 1980).

Implementation research is far from developing any rigorously predictive theories. On the other hand, the most interesting general work on implementation tends to have elements of prediction. If the experience of finding a particular piece of research interesting is analyzed, usually it is a predictive element that is attractive. Rather than attempt a complete inventory of predictive elements scattered through various kinds of research, this Article suggests three of the more obvious categories: (a) *Organizational incentives during implementation.* This category of research on implementation attempts to identify the structural incentives toward various kinds of actions by various parties, during both the development of the law and the application of the law. When the self-interest of strategically placed parties is understood, prediction is possible, at least in the sense of identifying a number of plausible directions that the process might go. (b) *Political strength, resources, and strategic placement of interested parties.* A different, though complementary, analysis seeks to identify the overall power and specific strategic advantage of various kinds of interested parties.[110] (c) *Structural features of the legal intervention.* Once the early phase of political struggle is over and a legal intervention of a particular form has been selected, it is often possible to identify characteristics that usually lead to greater or lesser success. That is, it is possible to talk meaningfully about how well or how poorly a particular legal form is likely to produce results. The relationship of this category to "sanction theory" is obvious.[111]

These factors do not permit true prediction. They allow us to eliminate some implausible outcomes and specify a range of plausible futures. Because certainty tends to accumulate as unpredictable decisions are made one way or the other, in most important respects we remain in the unpredictive, post hoc position. The decisions with the greatest effect, sweeping interventions by the larger political system such as the conservative mandate of 1980, are the most difficult to predict of all.

F. Evaluation

Evaluation of implementations could hardly be more confused. One venerable tradition in the sociology of law essentially holds that all implementations fail because they result in compromises and unexpected consequences.[112] Another tradition holds that all succeed, at least in giving symbolic support to social movements.[113] Still another denies that evaluation is possible, because the system always produces exactly what

110. *See generally* J. CHUBB, INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY (1982); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

111. *See supra* note 90.

112. *See generally* M. EDELMAN, POLITICS AS SYMBOLIC ACTION (1964).

113. *See* S. SCHEINGOLD, THE POLITICS OF RIGHTS 15-16 (1974).

it was intended to produce.[114] These positions are a bewildering amalgam of analytical confusion and subtle differences about how factual outcomes are interpreted.

Nihilist scholars dine out by adopting the role of debunker and unmasker. It is an easy role to play, given a little elementary sociology of law, because the one thing we can be sure of, and therefore do not need research to demonstrate, is that neither side of a sociolegal conflict gets everything it wants. "Findings" that nothing is a complete success or failure obscure the more interesting, but harder to research, issue of relative success or failure.

Implementations do vary enormously along the dimension of success/failure. Some are no more than tokens, and feebles ones at that. Others make progress that is truly astonishing in light of the obstacles. The essential task of evaluation is to distinguish between degrees of relative success and failure. In order to do so, it is necessary to be careful about defining the evaluative question and to be balanced about synthesizing the evidence. Apparently, most critics would rather tacitly pose a question that begs for a preconceived answer and then systematically ignore falsifying evidence.[115] Much fashionable cost-benefit analysis, for example, thrives on the outrageous method of declaring costs excessive without measuring, or even discussing, the benefits.[116] Implementation is politically active, and evaluation is an extreme example of normative bias.[117]

1. Three Patterns of Relative Success

It is helpful when trying to think clearly about evaluation to isolate three prototypical situations as they actually occur in the real world. They are, from less to more successful: (a) the symbolic victory; (b) the fizzle; (c) the compromise.

Because implementations typically occur in difficult areas of social policy, it is quite common for the system to submit a purely symbolic resolution. Even these can be supportive of the social movement espousing the cause and may offer direct rewards, such as publicity and finan-

---

114. Etzioni, *Two Approaches to Organizational Analysis: A Critique and a Suggestion*, 5 AD. SCI. Q. 257, 261 (1960). *See generally* Campbell, *A Dubious Distinction? An Inquiry Into the Value and Use of Merton's Concepts of Manifest and Latent Function*, 47 AM. SOC. REV. 29 (1982).

115. *See, e.g.*, D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977). For a discussion of Horowitz' book, see Feeley, *Approaches to the Study of Court Impact*, in II SCHOOLS AND THE COURTS 12-16 (P. Piele ed. 1979).

116. Without any reference to benefits, Vice President Bush once declared that the costs of implementing or enforcing sex equality in education was "too much." *See* Clune, *The Deregulation Critique of the Federal Role in Education*, in SCHOOL DAYS, RULE DAYS: REGULATION AND LEGALIZATION IN AMERICAN EDUCATION (D. Kirp ed., forthcoming).

117. *See* Clune & Lindquist, *supra* note 1, at 1080-83, 1113-14.

cial contributions, to movement elites.[118] A symbol is better than nothing, at least from some points of view. A common example is the study commission such as the blue ribbon commission on educational excellence, whose scathing report was released in April 1983.[119] Notwithstanding extensive press coverage, whether anything substantive will result at the federal level from the committee report is doubtful. Actually doing something almost certainly would be difficult and expensive, qualities not consistent with the Reagan Administration's view of the federal role in education. The federal government is likely to offer the states intangibles like leadership, moral support, and technical assistance. What emerges probably will be a moral victory.

The fizzle is another common implementation pattern. Many programs start off absurdly feeble and fragmented relative to the problem they are intended to ameliorate. Characteristics that could be effective often have been bargained away in the political process because they would be too expensive or too controversial. Nevertheless, the program is not purely symbolic because implementation of *something* actually takes place. Money is spent, people are hired to carry out directives, and regulations are issued. The lack of pragmatic potential may be the result of idealism or cynicism.[120]

A compromise of competing values and interests is the best result that can be achieved by an implementation. In difficult sociolegal tasks, the social movement seeking change always must accommodate the status quo. Pollution control must recognize regulatory costs, desegregation must recognize the integrity of the educational process, and affirmative action must recognize the autonomy of employer institutions. Fundamental rights as declared in litigation ultimately must yield to fiscal constraints.[121] Yet,

---

118. *See* J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM—A THEORY OF LAW REFORM AND SOCIAL CHANGE 8-9, 17, 29-31 (1978); D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING—COMMUNITY ACTION IN THE WAR ON POVERTY 21-36 (1970); Komesar & Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, in PUBLIC INTEREST LAW—AN ECONOMIC AND INSTITUTIONAL ANALYSIS 80, 81 (1978).

119. The Commission was established in August 1981, *see* Educ. Daily, Aug. 27, 1981, at 1. One of the concerns of the Commission was higher standards. For a comment on a study by the staff of the Commission, see "Academic Courses Lose Favor," N.Y. Times, Apr. 26, 1983, at 17, col. 1. A text of the final report may be found in Educ. Week, Apr. 27, 1983, at 12.

120. Examples of "fizzles" include: The Economic Development Administration, *see* J. PRESSMAN & A. WILDAVSKY, IMPLEMENTATION (2d ed. 1979); the Model Cities Program, *see* E. BARDACH, THE IMPLEMENTATION GAME—WHAT HAPPENS AFTER A BILL BECOMES A LAW 80 (1977); Banfield, *Making a New Federal Program: Model Cities, 1964-68*, in SOCIAL PROGRAM IMPLEMENTATION 183 (1976); the Mohole Project, *see* E. BARDACH, *supra*, at 85-88; and the National Teachers Corps, *see* Cronin, *Small Program, Big Troubles: Policymaking for a Small Great Society Program*, in AMERICAN POLITICS AND PUBLIC POLICY 77 (1978).

121. According to Professor Chayes, courts in institutional litigation confronted with

in spite of the benighted atmosphere associated with implementation,[122] impressive results have been obtained in a great many areas. Desegregation does happen.[123] The quality of air and water improves.[124] Correctional and mental health systems become more humane.[125] Handicapped children who got no public education get some.[126] School finance reform yields more money for poorer districts.[127]

Even here, second order doubts are appropriate. Has desegregation resulted in better education? Will white flight resegregate schools? Is clean air worth it? Is education for the handicapped too expensive? Has affirmative action, changing values, or the marketplace produced new employment?[128] The debate over the ultimate efficacy of legal intervention is endless. The point here is simply that, in area after area, substantial progress apparently has been made in changing the conditions that have been defined as objectives of social reform movements. What activists tried to change did change—to a certain extent. In other words, there may be doubts about the more successful implementations, but they are not the doubts that apply to symbolic victories or fizzles.

2. *Evaluation of the Patterns in a Politicized Environment*

Contrary to the concept of several patterns of success, society as a whole seems to be preoccupied, perhaps even obsessed, with a more

---

clear, specific rejection of their orders by the democratic process, especially on fiscal grounds, invariably give way. Speech by Abram Chayes, University of Wisconsin Law School (Feb. 9, 1982).

122. *See supra* notes 84 & 101 and accompanying text.

123. *See generally* H. KALODNER & J. FISHMAN, LIMITS OF JUSTICE—THE COURTS' ROLE IN SCHOOL DESEGREGATION (1978); G. ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION—THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT (1969); H. RODGERS & C. BULLOCK, COERCION TO COMPLIANCE (1976).

124. To be more precise, overall water quality has not shown great improvement during the 1970's; but, despite rising population and GNP, quality has stopped deteriorating and has shown improvement in particular locations due to better control of industry effluents and wastewater treatment. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—1979, at 75-173.

125. *See generally* M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1976); Lottman, *Enforcement of Judicial Decrees: Now Comes The Hard Part*, MENTAL DISABILITY L. REP., July-Aug. 1976, at 69.

126. In Pennsylvania, the outreach program ordered by the court discovered about 7,400 children who had been excluded from any educational program. Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 63 (1974). Special education experts and advocates had estimated the number at least three times as high. *Id.* at 60 n.68.

127. *See* Clune with Lindquist, Serrano *and* Robinson: *Studies in the Implementation of Fiscal Equity and Effective Education in State Public Law Litigation*, in II SCHOOLS AND THE COURTS 67, 84-104 (P. Piele ed. 1979).

128. *See generally Evaluating the Impact of Affirmative Action: A Look at the Federal Contract Compliance Program*, 29 INDUS. & LAB. REL. REV. 485 (1976).

monolithic perspective on evaluation. For example, the thrust of both neoconservative and neoliberal politics is to ensure the feasibility of social programs and regulatory interventions. Apparently, many people consider it meaningful to inquire whether political programs succeed or fail in some absolute sense.

All political models, including the one suggested in this Article, complicate such simple evaluation. A jaundiced political eye would view the consideration of success or failure as essentially meaningless. After all, some people favor even the most useless program, and all implementations, regardless of how successful, have some mortal enemies. If various numbers of people always support or oppose all implementations, it cannot be justified to draw sharp distinctions among relative degrees of "success" (defined as realization of the purposes of the social movement).

Thus, the problem of evaluating political compromises is that one's appraisal of costs and benefits depends drastically on that person's point of view. An example of this problem is affirmative action in employment. A person strongly sympathetic to the plight of minorities and women probably will look at the drawbacks of legal intervention quite differently than the unsympathetic or indifferent person. The difficulty of demonstrating that affirmative action creates jobs probably will be seen as a problem of allocating risks, and the sympathizer will ask why the vulnerable should bear the risk of uncertainty. Put another way, employment for excluded groups seems to be the product of a variety of interacting causes including market forces, changing attitudes, and legal interventions. To the partisan, even if the law does not make much difference, each attempt to improve the position of those who have suffered discrimination is justified. To the nonpartisan, the uncertain quality and small size of the gain is more salient.

Point of view is most decisive on the issue of the dollar costs of intervention. Everyone can agree that dollars are scarce and should be spent wisely. But to the partisan, dollars spent on small gains for minorities and women *are* spent wisely. To be a sympathizer means that the social cause is high on one's list of priorities. The relatively unsympathetic person probably will view each job produced as very costly.

Thus, the political critique of evaluation is compelling; but, in a different sense, it seems drastically incomplete. As foolish as it may be to argue for a universally valid standard of evaluation, it is even more foolish to assert that there are no widely shared judgments concerning relative success and failure. Policy is not limited to transfers of "income" between groups whose self-interests are mutually exclusive.[129] Success is more than a reification of a cold, pluralistic ratio of insider benefits to outsider costs. How, then, can the partisan and consensus views of evaluation be recon-

129. *See generally* L. THUROW, THE ZERO-SUM SOCIETY—DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE (1981).

ciled? If, as the model suggests, evaluation should be analyzed as a political process rather than as a philosophical process, three distinct political interpretations of evaluation are possible, only one of which is strictly partisan.

The strictly partisan interpretation of evaluation is political rhetoric. People who are dissatisfied with a political compromise simply may refuse to accept it. Of course, total rejection of a compromise may be primarily for public consumption. Actually, advocates often are secretly pleased to take what they can get. On the other hand, we all have seen many bitterly disappointed idealists, people who are offended by anything falling short of the most pristine goals of a reform movement or a reactionary plank.

A more consensual political interpretation of evaluation is pragmatism. Both insiders and outsiders to the particular political dispute may try to evaluate the compromise *as* a compromise. If both sides achieve something important and meaningful out of the process, the compromise is deemed a success by each side. A failure in these terms is a compromise that makes almost no one happy, such as an expensive program that fizzles, or a compromise that is extremely biased to one side or the other. Heavily biased compromises are likely to increase the gross amount of dissatisfaction in society, thereby violating the pragmatist's sense of politically available gains in net welfare.

Even the pragmatic approach does not escape the utilitarian problem of a total lack of collective moral significance. For many of us, social programs such as racial integration and worker's compensation do not appear to be cold, political compromises. Even if we are not directly involved, such programs are intrinsically satisfying. How do we reconcile such moral sentiment with a political model? Is it merely a projection of our own politics?

This Article is not concerned with the philosophical problem of valid moral judgments. There is a third political interpretation of evaluation, however, that sheds light on the question: evaluation as developing moral consensus. Social movements are successful to the extent that they appeal to an audience beyond the target beneficiaries; in other words, they are successful when they appeal to mainstream values. The great power of the civil rights movement was getting the mainstream to believe in racial justice. Conversely, when social movements fail to reach the mainstream, they are not successful. Movements are least effective when the mainstream believes that movement activists are creating problems out of pure egotism (desire for fame, power, money). Social movements are also ineffective when they are perceived as fanatical, uncompromising, special interest groups.

Part of the social dramaturgy of implementations is a dialogue of trust and distrust between the mainstream and the activists: Is Jesse Jackson really doing some good or is he just on an ego trip? Can the environmentalists play fair and make pragmatic compromises, or will they resort to legalistic maneuvering over the smallest environmental consideration regardless of the cost to the rest of society? Can the establishment be trusted

to make a fair bargain, or should movement activists assume the worst and fight every step of the way? Are accusations of fanaticism in good faith, or are they cynical efforts to discredit the movement?

How social movements and established institutions manage the problem of distrust is an extremely interesting area of research and public policy. One facet of the problem, raised by the Jesse Jackson example, is the possible discrepancy between the welfare of the grass-roots membership and the psychology of movement leadership.[130] During the initial period in which the movement is struggling for minimal recognition, the membership may be well served by confrontational tactics and rigid principles. After the movement is better established, compromise and pragmatism may be more productive. Can the leadership adapt?

Another facet of the problem is the importance to movement leadership and membership of symbolic victories and moral superiority, as opposed to tangible success. In this respect, the black civil rights movement has been consistently pragmatic, while the environmental and consumer movements have included both ideological and pragmatic components. Ideological activism is indifferent to, or even incompatible with, tangible success. If principle is the only consideration, the mainstream is irrelevant. Indeed, offending the mainstream may be desirable. Moral superiority is best achieved by making it impossible for the other side to get credit for a reasonable compromise. Yet some degree of approval by the mainstream is essential to even the most sanctimonious activist. A total collapse of mainstream support raises questions about the ideology. Moral superiority is difficult to maintain while being universally ridiculed as an unrealistic, ineffective fanatic. Thus, ideological activists must maintain an uneasy balance between pragmatism and symbolism.

The idea that implementation is a process of appealing to the mainstream can be dramatized by thinking about the other way of dealing with minority status. Many counter cultural movements do not resort to the law as a medium of social change. As with the Amish, "exit," or isolation, may be the means of dealing with contrary mainstream values.[131] In this situation, legal relief is sought mainly as a means of protecting privacy, not as a means of achieving positive social change. Finally, as was obvious from the examples, consensus usually does not mean support that is both unanimous and enthusiastic. The extramural appeal of implementations varies enormously, from strong support from some members of the mainstream for a discrete minority, as in race policy, to weak support for movement activists by practically everyone in society, as in clean-air policy.

---

130. Michel's famous "iron law of oligarchy" concerns this problem. *See* F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS—WHY THEY SUCCEED, HOW THEY FAIL xxii-xxiii, 101-02, 322 (1979). *See also supra* note 118 and accompanying text.

131. *See* Tyack, Kirst & Hansot, *Educational Reform: Retrospect and Prospect*, 81 TCHRS. C. REC. 253, 266 (1980).

Moral consensus applies differently to each of the three evaluation patterns. Compromises benefitting both sides are most likely to be accepted because they achieve values on both sides that are approved by the larger society. The controversy over compromises, therefore, is almost exclusively over costs, or, more precisely, the ratio of benefits to costs. The compromise that looks bad is likely to seem too expensive for the relatively minor benefits provided. Fizzles are not likely to seem attractive to the mainstream. They do not achieve the values that the minority group is advocating and they are expensive. Symbolic victories are more acceptable to the mainstream because they are cheap. Although minority groups are unlikely to be satisfied with symbols, sometimes symbolic processes are mutually reassuring, a sort of inexpensive exchange of good will between outsiders and insiders.

Surely the most interesting aspect of developing moral consensus is the process by which minority values come to be accepted by wider audiences. Viewed from the perspective of the political model, even the most morally successful implementations must be evaluated politically. That is, the implementations must be evaluated through some structure of communication and dispute resolution. It is commonplace for groups and causes that are initially detested to achieve moral respect in the end.

Dispassionate commentators and researchers may attempt to keep the facts straight and the arguments honest, but the political process enforces its own kind of honesty. Advocates must allocate political resources to the programs they consider most valuable and convince skeptics of the intensity of their claims. Conversely, the good faith of skeptics may be tested. The role of the media in distorting matters, bringing new points of view to light, and preventing obvious evasions is one of the interesting features of implementations. In some cases, courts may come to the aid of particularly unprotected groups. In other cases, courts may protect the process itself. Protecting the possibility of moral persuasion by minorities is clearly the most, and perhaps the only, significant purpose of the first amendment. One of the factual issues tested by public debate is whether particular programs have been successes or failures. This important issue deserves discussion in a separate subsection.

3. Factual Disagreements over Which Pattern is Present

Compounding the normative difficulty of dealing with compromises is the presence of genuine or tactically fabricated disagreements over which pattern is present. Is a particular program a fizzle or a compromise? It is seldom easy to recognize. Not only that, but program advocates and opponents appear on unexpected sides of the argument and sometimes conceal their true perceptions.

Bilingual education is one example. Critics of bilingual education are frequently heard to say that the existing investment has not improved the verbal abilities of children. Defenders of the program often respond that bilingual education, like Christianity, has not failed because it has not

been tried. That is, existing programs have been so underfunded, half-hearted, diluted, and compromised that success could not be expected; the answer is *more* funding rather than less. Thus, program advocates may accept the characterization of the program as a preordained fizzle. Whether that characterization is fair and whether the conclusion of more funding follows from it are separate questions. For example, many of the structurally determined weaknesses of bilingual programs may be politically inevitable. Even if fluent, native-language speakers from the same social background as the children make the best teachers, will the education system, with its established structures of teacher certification and seniority rights, ever permit such people to enter teaching on a large scale? Practically speaking, if we must get along with our existing teaching corps, perhaps the potential for bilingual education must be evaluated in that light. Note, however, that one of the last things advocates are willing to accept is the inevitability of those ingrained aspects of the status quo that operate against their clients.

A slightly different example is Title I.[132] Allegedly, people in the Department of Education in charge of the evaluation of Title I were asked to omit negative findings about long-term effects and to stress positive findings about short-term effects in their report to Congress. The best justification for this request was the confidence of the staff that the Title I program had been improved continously from its outset and had not been managed well enough in the beginning to produce long-term effects that could be observed at the time of reporting. Although the program was first viewed as a fizzle, it has more recently been viewed as a promising long-term social experiment. This justification does not answer the question why Congress could not be trusted with the full truth. Program advocates undoubtedly were uncomfortable with allowing nuances of social science evidence to dominate political debate. Nevertheless, the tendency of program managers to protect programs by concealing negative evidence must be recognized as a regular occurrence. More blatant examples than Title I exist.[133]

The difficulty of finding the truth in evaluation is discouraging. One award-winning book by a distinguished author[134] in my opinion is nothing more than a single-minded demolition of the evidence in a prejudgmental direction. On the other hand, that book at least contains evidence. Much work condemning the efficaciousness of programs[135] is hollow rhetoric.

---

132. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

133. One example is the National Teachers Corps. *See generally* Cronin, *Small Program, Big Troubles: Policy Making for a Small Great Society Program*, in AMERICAN POLITICS AND PUBLIC POLICY 77 (1978).

134. D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

135. *E.g.*, L. GRAGLIA, DISASTER BY DECREE (1976). Graglia's book is largely a disputation of the values and reasoning involved in desegregation decisions. I do not want to claim that all value discussions (or all rhetoric) are hollow. Indeed, implementation

Perhaps implementation evaluation is something like criminal law: so much is at stake and such a great potential for bias exists that an adversary process must be encouraged. As politicians, members of Congress undoubtedly are sensitive to the political element in evaluation and compensate by opening their process to all comers. It also would help considerably if more academics tried to be objective, not in the sense of being policy-neutral, but in the senses of clarifying how point of view enters the argument and being fair to the evidence. Finally, even advocates would do well to temper their more expedient instincts. It always seemed to me that one of the principal reasons for the success of the civil rights and anti-Viet Nam war movements was their insistence on telling the truth about social facts and puncturing convenient social illusions. Again, social movements succeed by appealing to something in the mainstream of society. In this sense, truth, as well as falsehood, has tremendous power and attractiveness.

G. Research Methodology

The model of implementation presented in this Article has important implications for research methodology. In general, one may think of three aspects of a research project that influence methodology: the subject matter studied, the theory brought to bear on the subject matter, and the technical question of reliable and valid procedures or techniques.[136] The idea of methodology often is equated with technique—how to design a survey instrument, draw statistically reliable samples, and conduct open-ended interviews. While concerns about technique are quite important, they are probably the least consequential of the three. Subject matter and theory have a much greater impact on methodology, because they affect the choice of research method, not merely the proper execution of a method once it is selected. Furthermore, methodological aspects of theory and subject matter are difficult to articulate; decisions about them may be made intuitively, subconsciously, or by default. Finally, most of the important implications of the model for methodology occur in the areas of subject matter and theory.

Regarding subject matter, the model demonstrates that the entire pro-

---

rests on a foundation of competing value positions. However, Graglia's book seems notably tendentious and obtuse about other points of view. On the difficult boundary between nondiscrimination and reverse discrimination, see generally Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Fiss, *The Fate of an Idea Whose Time Has Come*, 41 U. CHI. L. REV. 742 (1974). On the complexities of defining and limiting remedies in race cases, even assuming a "limited" definition of liability, see generally Kirp & Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313 (1981).

136. "It [methodology] implies that concrete studies are being scrutinized as to the procedures they use, the underlying assumptions they make, the modes of explanation they consider satisfactory." THE LANGUAGE OF SOCIAL RESEARCH 4 (P. Lazarsfeld & M. Rosenberg eds. 1955).

cess of implementation involves very different kinds of activities, such as the history of social movements, their influence on legislation, the details of regulations, field-level interactions between inspectors and regulated organizations, and key structural characteristics of various kinds of regulated organizations. There may be no invariable link between an activity and the research method used to study it. Nevertheless, the thought processes used to analyze some activities, such as historical influence, seem quite different than those used for others, such as the meaning of legal regulations. Conventional academic usage reflects and reinforces this methodological difference by defining history and law as separate disciplines.

The nature of the activity studied has a more subtle influence on method than does the academic discipline involved. One form of research technique may be better suited to investigate a particular aspect of the process than others. For example, if one wants an overview of how the process works, it may be helpful to arrange open-ended interviews with elite members of participating institutions. Such persons are exceptionally well-placed in terms of how the system works at a general level—they are "insiders." On the other hand, if one desires to understand the actual compromises that are made by these insiders, the deals that are cut rather than an overview of the process, or substantial amounts about real processes at the field level, it is probably necessary to spend time actually doing ethnographic observation. Elite insiders tend to give a "reconstructed" view of reality, out of which the ideologically unacceptable variants of their own conduct are censored. They also tend to speak at a fairly high level of abstraction rather than in terms of field-level interactions. In other words, if all other things are equal—especially cost—do not rely on hearsay; if you want to report findings about an activity, observe it directly.

Theory plays just as important a role as subject matter in the choice of research method. Theory is anything that specifies what is interesting or significant about reality. For practical purposes, reality is infinitely complex, and the human mind can think about reality in an infinite number of ways. Any kind of coherent presentation necessarily involves some system of selection, simplification, and ordering. Such a system is called theory, although the word sometimes is applied in a more limited way to formal systems. In that sense, theory is not academic or esoteric; it is simply inevitable, although it may be done unconsciously or badly.

The importance of theory to method may be illustrated by a comparison of two types of research projects. The first is quantitatively oriented sanction theory. This research tries to establish an estimate of the amount of compliance that is produced by sanctions of different kinds and intensities. Research on the deterrent effect of police enforcement or the additive effect of grants-in-aid are both good examples.[137] The second kind of

137. *See generally* Wilson & Boland, *The Effect of the Police on Crime: A Response to Jacob and Rich*, 16 LAW & SOC'Y REV. 163 (1981-82); S. Barro, The Impact of Intergovern-

research is the implementation case study. As previously discussed in this Article, case studies typically proceed by describing what can be called "watershed decisions."[138] Watershed decisions are decisions to do or not to do certain aspects of a legal intervention, decisions which substantially affect the results of the intervention vis-a-vis the underlying social purposes. Methodologically speaking, tellers of case histories consciously or unconsciously try to identify the crucial watersheds, or turning points, and organize the case history around these events.

The research methods which complement these two kinds of theories are profoundly different. Quantitative sanction theory typically requires the development of a mathematical model as a means of comparing and measuring the relative influence of sanctions and the other factors that may influence behavior. As a consequence, the world of legally oriented action must be simplified and reduced into categories that can be counted (for example, compliance and noncompliance). The process of simplification quantification is both highly formal—hence, "critiqueable"—and highly oversimplified.

By contrast, implementation case studies seem to involve a highly impressionistic, usually unarticulated, analytical process that includes identifying important social forces and matching them up with "key" legal developments. The identification of key legal developments involves a tacit methodological operation. Presumably, a legal development or nondevelopment is important because of the consequences that it produced or could have produced. Thus, the identification of important watersheds implies an intuitive statement about causal relationships between law and social change. The strength of case studies is due to the intuitively satisfying and comprehensive picture they can provide of the integrated system of social forces. The frustrating part of case studies is the inaccessibility of the judgments that contributed to the selection of key events. Absent a formal description of how it was determined that certain events were consequential, we usually are left with nagging questions about what was not observed and explained.

The important point here has nothing to do with the relative advantages of the two research methods. Rather, the comparison was meant to illustrate how the nature of theory can force a researcher into thinking about reality in completely different ways and observing and reporting completely different things. Theory has a profound influence on method.

Having considered the influence of subject matter and theory on method, we come to technique. If participant observation at the field level is selected, the question of how to do it right remains. Interviews of elite participants may be done well or poorly. Measurement of compliance/non-

---

mental Aid on Public School Spending 59-66 (May 1974) (unpublished manuscript on file with the author).

138. For a discussion of watershed decisions as part of longitudinal descriptions, see part III(D).

compliance, however well-defined, requires skill and care, as does the mathematics that estimates the relative influence of different factors. Generally, the model presented in this Article has no special implications for technique in the sense of standard research methods. The model does clearly show, however, that many kinds of standard implementation research, such as the case study, involve unconventional and, therefore, mostly unanalyzed techniques. There are helpful treatments of analogous methodological processes such as grounded theory and ethnographic reconstruction.[139] Because the interaction of law with social systems involves social processes and linkages that are unique, however, the methodological questions are distinctive. The space here cannot even begin to explore this important issue. As a sampling of the territory to be explored, the reader again might consider how a standard law coursebook in a public law area is put together. What are the criteria of importance that guide inclusion and exclusion of material? If one criterion is effect on the competing social interests or on society as a whole, how do the casebook authors know about such effects?

A final word needs to be said about the interdisciplinary challenge of research on implementation. The research that goes into any reasonably comprehensive description of implementation must involve not merely distinctive and heretofore unanalyzed research methods, but also a range of traditional methods whose specialists occupy different academic disciplines. As a consequence, this kind of research typically lacks the rigor of research that is defined by a specialized methodology, and practitioners of the research frequently find themselves feeling tentative and insecure about what to do. Unfortunately, no easy or comfortable answer to the challenge exists. It is often essential to study the process as a whole and not as methodologically convenient subparts. We certainly do not want to discourage vital varieties of research because methodological generalists are rare. Yet blanket permissiveness is not the answer either, because much well-intentioned research is rendered useless by faulty methodology. The prevailing approaches to interdisciplinary research seem to be the most worthwhile—interdisciplinary training of researchers (formal or practical), collaboration, selective consulting, and review of research by interdisciplinary teams capable of spotting methodological oversights. Also, we must keep alive the dream of special training in "legal studies."[140]

IV. CHANGING ROLES OF LAW AND LAWYERS

The implications of the model for changes in the role of law and

---

139. *See generally* H. BECKER, SOCIOLOGICAL WORK (1970); B. GLASER & A. STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH (1967); ISSUES IN PARTICIPANT OBSERVATION (G. McCall & J. Simmons eds. 1969); L. SCHATZMAN & A. STRAUSS, FIELD RESEARCH (1973).

140. On the importance of not limiting subject matter and point of view because of narrow methodological "proselytizing," see H. BECKER, SOCIOLOGICAL WORK 3 (1970).

lawyers derives from the fact that implementation is the characteristic form of modern or postmodern law.[141] Considered separately, implementations constitute the microlevel of modern law, the interactions between organizations over particular social programs. New roles for law and lawyers typically are experienced at this level, the level of purposive action and political conflict. Taken collectively, implementations constitute the modern state. Multiply any particular implementation in the diverse areas of substantive policy by ten thousand, and the result is the welfare and regulatory state. Implementations are the alluvial formative process of the modern state, and law-as-state is the sum total of the structures and continuing interactions left as deposits by a multitude of separate implementations. Law in the modern state consists of organizations confronting each other in legalized sectors of public policy—sectors of government interacting with shadow governments created to cope with them. Because modern law at the macro level concerns the coordination and legitimation of this legion of substantive interactions, new legal roles at the macro level typically are experienced by upper-level political representatives and judges, as well as by informational elites.[142] In the rest of this discussion, it will be convenient to consider first some important changes in modern law centrally related to the nature of implementation as described in this Article, and then the somewhat derivative topic of new roles for lawyers.

A. Diminished Sense of the Autonomy of Law

As currently viewed, the dominant characteristic of premodern law was a sense of autonomy. Law seemed to be both a source of values for solving problems and the source of new values. Lawyers and judges had a special kind of normative expertise derived from autonomous law, the ability to apply law to new situations. Law also was authoritative—a source of security. A legal right was durable, permanent; the only way to lose it was to give it away. Legal rights were vested rights. The next subsection will discuss the characteristics of modern law identified by the model

---

141. Social theorists tend to use the term "postmodern" to describe the law of today. Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 243 (1983). The reason for the use of this term is that, in the Weberian tradition, the law associated with the birth of modernism was considered "modern," and contemporary law is considered quite different. The terms "autonomous" and "responsive" are used by Nonet and Silznick for these two types of modern law. P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION 16 *passim* (1978). "Reflexive" law is apparently Teubner's term. Teubner, *supra*, at 266. *See generally* N. LUHMANN, THE DIFFERENTIATION OF SOCIETY (1982). In this Article, such careful distinctions do not seem worthwhile, and I will refer to the law of today simply as "modern law."

Much of the discussion of this part is indebted to the concise, lucid article by Gunther Teubner, *supra*. Teubner paraphrases and analyzes material, such as the work of Habermas, which I find very difficult (even in translation).

142. We only gradually are catching up on the role of the media in the modern state as legitimizing, delegitimizing, and reconstructing institutions. *See infra* note 167 and accompanying text.

that diminish this sense of legal autonomy. Following subsections will give examples of diminished autonomy of law as a source of values and a source of security, and the concluding discussion will address surviving and new sources of legal autonomy.

1. Qualities of Modern Law That Diminish Autonomy

Four characteristics of modern law as described by the model operate to diminish the sense of legal autonomy: consequentialism (or substantive rationality), political origins, compromisability, and renegotiability. First, consequentialism, or substantive rationality, is the idea that law should be used to solve social problems. It is the idea of law as "social engineering."[143] Consequentialism is inconsistent with autonomy because, under it, law is only a tool.[144] If problems are not being solved by autonomous norms, or more important problems come along, law can be changed. Note also the collective and legislative emphasis of "social problems"; law as a sense of security implied *individual* rights.

Second, the origin of law in the political activities of interest groups is obvious to modern people. Values originate in the substantive purposes of social groups and are transformed into law by a process of political compromise. Of course, once struck, each political compromise becomes "the law" and is, in that sense, a source of values. But this sense is limited and transient compared to the idea that answers to new social situations could be found in the existing law or its operations. For this reason, even as morally persuasive a claim as desegregation can seem too "political."[145]

---

143. *See* Clune & Lindquist, *supra* note 1, at 1045 n.2.

144. *See* N. LUHMANN, THE DIFFERENTIATION OF SOCIETY 133-35 (1982).

145. The possibility that regulation in the United States is markedly more legalistic than in Britain was discussed at the Keith Hawkins colloquium. K. Hawkins, The Compliance Strategy, (Interdisciplinary Legal Studies Colloquium, Univ. of Wis. Law School, Nov. 6, 1981). *See* D. KIRP, DOING GOOD BY DOING LITTLE: RACE AND SCHOOLING IN BRITAIN 115-23 (1979); Kirp, *Professionalization as a Policy Choice: British Special Education in Comparative Perspective*, 34 WORLD POL. 137, 173 (1982). The idea of a less legalistic, yet more effective, style of regulation in Europe was raised independently concerning different countries (Germany, France) and areas of regulation by Professor Norbert Reich in another colloquium. N. Reich, Problems in F.T.C. Rulemaking: Some Remarks on Regulatory Failure (Interdisciplinary Legal Studies Colloquium, Univ. of Wis. Law School, June 16, 1982).

The possibility of more effective, less legalistic regulation is very important and theoretically interesting. In asking hard questions about the transatlantic comparison, one discovers first hand the complexities of comparative sociolegal research. For example, four questions arise immediately: (1) Are the European countries as aggressive in trying to "move the system" from the status quo as the Americans? (2) What happens if, as appears to be the case, the status quo is different? For example, the United States seems generally more *laissez faire* in culture and government than many European countries. (3) Are the nonlegalistic cultural means of governmental influence available in Europe also available in the United States—for example, relationships of trust with the bureaucracy and effective informal pressure through the mass media? (4) How effective is the European system at actually changing behavior, as opposed to conveying an ideological impression of effectiveness?

Third, law seems highly compromised, the end result of interest groups cutting deals. Deals are not sacred sources of values, and they are not especially durable. Finally, the law is obviously renegotiable: If price supports are not good enough this year, then create a lobbying effort to get them changed next year. If affirmative action is bothersome, go for deregulation. Is social security a vested right? That depends on how politicians solve the current crisis of solvency.

2. Example of the Decline of the Autonomy of Law as a Source of Values: the Judicial Defense Industry

The best example of concern about law as a source of values is what might be called "the judicial defense industry." At a frantic pace, legal scholars are producing articles and books designed to show that there is a legitimate method by which judges can derive values from cognition. At the same time, the authorities are in conflict with each other, one discrediting the efforts of the other. Included here is the awesomely prolific ongoing debate about the legitimacy of judicial review in constitutional law,[146] as well as the debate, recently recognized as a parallel issue, about the common law itself.[147]

A specific example raises the competing considerations in this debate over the appropriate judicial role in the implementation of social policy. School finance litigation, as a prime example of institutional litigation, fits this Article's model of implementation perfectly.[148] The predicament judges and lawyers experience, and the strong tendency for doctrine to become politicized, can be appreciated from the position of courts in this type of litigation.

An action has been filed against the State of Wisconsin that, if successful, would require more than a billion dollars of new revenue for education.[149] In constitutional theory, a court should consider whether

---

146. *See generally* Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787 (1981); Bobbitt, *A Reply to Professor Ball*, 59 TEX. L. REV. 829 (1981); Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Tushnet, *Deviant Science in Constitutional Law*, 59 TEX. L. REV. 815 (1981). Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982).

I would interpret this almost frenzied activity as the shipwreck of autonomous law, with the scholars as crew members tossing conceptual life preservers to bewildered passengers floundering in the sea of modern law. If this is the proper metaphor, I suppose that my colleague, Mark Tushnet, must be pictured as zooming around in a speedboat, making waves. *See also infra* note 152.

147. *See generally* Rees, *Cathedral Without Walls: A View from the Outside*, 61 TEX. L. REV. 347 (1982). That part of the law and economics movement which attempts to justify the common law on grounds of efficiency also may be seen as part of the judicial defense industry. For an analysis of the expanding judicial role outside of constitutional law, see generally Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1 (1983).

148. On school finance and institutional litigation, see *supra* notes 13 & 21.

149. Kukor v. Thompson, No. 79 C.V. 5252 (Dane County Cir. Ct., Madison, Wis.,

the Wisconsin Constitution requires the relief requested. Fiscal problems should enter the equation, if at all, only as a limit on feasibility, because a court cannot manufacture money.[150] The questions are whether courts can remain oblivious to the bigger budgetary situation and what happens to the sense of law if they begin to take budget trade-offs into account.

The broader budgetary dimensions go far beyond education. The State of Wisconsin currently is cutting social welfare programs on a wide scale, making painful and extremely careful trade-offs among the various programs. Does it make sense for a court to order a billion dollars of new revenue for elementary and secondary education in this climate, not on the basis of a legislative evaluation of priorities, but because of an autonomous legal right expressed ambiguously in a constitution written one hundred years ago? Perhaps some court would think so, but the pressures in the other direction are immense. Once a court seriously involves itself in the question of how much new revenue realistically should be raised for elementary and secondary education, a great deal of the sense of law as an autonomous source of rights has been lost. It is possible, and indeed proper, for courts to embrace the new political role of law; the process, however, may be unfamiliar and uncomfortable.

3. Decline of the Autonomy of Law as a Source of Security

Modern law also contains a diminished sense of law as a source of security and commitment (or vesting). Ultimately, the idea that a legal right is fixed because the law says so is obviously dependent on law including a certain amount of autonomous force. Yet one of the central features of implementation, as outlined in this Article, is the sense of the renegotiability of law.

A good example of the relationship of autonomy and vesting comes from the law of property, in both its constitutional and its nonconstitutional aspects. In the original constitutional understanding, it was important for property to be a constitutionally defined status protected from state interference. Gradual historical change almost has reversed the assumptions of the Founders about the proper relationship of property to the state.[151] Modern property—things like partially insured income

---

filed Oct. 15, 1980). For another example of school finance litigation, see Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

150. On the practicalities of relief as embodied in doctrines of justiciability, see Clune with Lindquist, Serrano *and* Robinson: *Studies in the Implementation of Fiscal Equity and Effective Education in State Public Law Litigation*, in II SCHOOLS AND THE COURTS 67, 104-06 (P. Piele ed. 1979). Fiscal dimensions of relief loomed large in the Texas illegal-alien tuition case, one of the more important education cases decided in many years. *See* Plyler v. Doe, 457 U.S. 202, 228-29 (1982); *id.* at 249-50 (Burger, C.J., dissenting).

151. Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 354-58 (1982); J. Nedelsky, The Future of Property in Light of Its Past (Interdisciplinary Legal Studies Colloquium, Univ. of Wis. Law School, Apr. 27, 1982).

streams and welfare benefits—tends to be a fluid, nonvested experience, depending dramatically *on* the state, rather than representing freedom *from* the state.

Even the prototype of property, the fee simple absolute in a home, is not immune from the inroads of modern law. In our society, the financial position of persons with respect to home ownership is affected dramatically by their age. A person around the age of fifty may be paying $150 or less per month for a house with a current market value of $150,000 or more. A forty-year-old tends to pay $600 per month for the same house, and is thankful for it, because a twenty-five-year-old must pay more like $1200. What accounts for this ten-to-one difference of circumstance? Nothing other than vested property rights in real estate and in mortgage or other land contracts, as affected by prolonged, unexpected inflation.

Items have begun to crop up in the media questioning the fairness of this situation. Criticisms tend to be couched in terms deeply rooted in the modern, substantively rational welfare state. What sense does it make, from the perspective of a national housing policy, for young persons at the low end of the earning cycle to be paying ten times as much for equivalent housing as older persons at the high end? From that point of view, the answer that property rights historically have been vested seems almost quaint. Vesting comes from autonomous law, not from substantive rationality.

As in the school finance example, pressure is exerted on the state from extraneous budgetary sources. For this reason, age-related housing privilege may not be left alone as an idiosyncratic specimen of fossilized privilege. Demands will be made on the state to do something about the plight of young persons trying to buy homes. If government subsidies are made available to homeowners, the construction industry, or savings and loan associations, an indirect redistribution from more wealthy to less wealthy homeowners occurs. Direct redistribution would occur with the complete abrogation of vested rights. Why not "renegotiate" those favorable mortgages? When everyone else is bearing a fair share of the national housing policy, why should this particular group get a fabulous windfall? Should we allow the collapse of financial institutions vital to the community welfare? Of course, the process by which a formerly sacred status, the vested right in property, can be seen as irrational occurs precisely because of the historical transformation of autonomous law to modern, substantively rational law. Central to the transformation is the aggregation, over a long period of time, of various ongoing, implemented social programs that fairly may be called a "national housing policy." In other words, the new form of law exerts a gradual pressure in the direction of absorbing the old and, hence, has its own, modern form of autonomy.[152]

---

152. A small example of media pressure on old mortgages is Martin, *It Pays to be New in S&L Business*, WIS. ST. J., June 19, 1982, § 4, at 1.

The decline of autonomous law easily could be overstated. A variety of qualifications

4. A Note on Surviving and New Sources of Autonomy and the Problem of Reductionism

If law were nothing more than the most recently cut political deal,

---

are necessary to see the trend in proper perspective. First, the historical trend is nascent and incomplete. Second, new forms of legal culture do not completely replace the old. *See* P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION 116 (1978). One reason for this is that some degree of legal autonomy is probably necessary for the state. *See* L. FULLER, THE MORALITY OF LAW 33-94 (rev. ed. 1969). Third, there is an enormous role for law and lawyers in the modern state, roles that might easily be confused with the historical role of autonomous law. See the discussion of law prophets, formalists, legalists, and rational managers in part IV(C)(1). In this sense, law, law jobs, and legal training already have made an adjustment to modern law, and most people probably will not notice the difference.

From a law teacher's perspective, much of the content, teaching, and scholarship in constitutional law, notwithstanding the crisis referred to in part IV(A)(2), is evolving toward development of new skills for the political law system. Such concepts as level-of-scrutiny, means-ends analysis, and intent-effect analysis are enormously useful as policy-analysis paradigms (cognitive devices for quick, efficient assessment of policy problems). The open-endedness and indeterminacy of these ideas from the point of view of deriving the answer to a particular problem, much noted in legal literature, are strengths rather than weaknesses in policy analysis. They are aspects of the purely procedural law referred to below. *See infra* note 158.

Moreover, the rise of policy analysis, as part of political law, does not detract from the role of courts in constitutional law. Courts simply become part of the reflexive process of modern law, *see supra* note 141, as, for example, in institutional litigation, *see supra* notes 13 & 21 and accompanying text; *see also supra* text accompanying note 88 (*Adams v. Richardson* litigation).

The new form of savvy, policy-oriented, bureaucratically sensitized constitutional scholarship is endemic. The hallmark of the new approach is construction of simultaneous conceptual equations for balancing substantive values and administrative costs. Of course, stress caused by the decline of autonomous law and the degree of autonomy that remains, as illustrated by part IV(A)(4), also must be accommodated. A short list of high quality readings illustrative of these themes is: Hellerstein, *Constitutional Limitations on State Tax Exportation*, 1982 AM. B. FOUND. RESEARCH J. 5; Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981); Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 1981 DUKE L.J. 181; Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Follow-ups on the Westen equality article include: Burton, *Comment on "Empty Ideas": Logical Positivist Analysis of Equality and Rules*, 91 YALE L.J. 1136 (1982); Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Westen, *The Meaning of Equality in Law, Science, Math, and Morals*, 81 MICH. L. REV. 604 (1983); and Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1183 (1982).

If I am right that such scholarship is part of the reconstruction of law to conform to new social conditions, such scholars are modern versions of what Weber called "legal honoratiores," or notables. 2 M. WEBER, ECONOMY AND SOCIETY 784-802 (G. Roth & C. Wittich eds. 1978) (academically trained and employed lawyers involved in the rationalization of law). Also, since many scholars regard their mission as the preservation of autonomous law (in the form of fundamental rights in the liberal state), and if they are really preparing the way for political or reflexive law, their labors satisfy Weber's paradox of intention and result. Similarly, monks, seeking a more mystical and less secularized

it would have no autonomy and could not be differentiated from politics.[153] This problem is sometimes called "reductionism." Although most of the characteristics of law discussed here tend to militate against autonomy, this Article should not be understood to take the extreme reductionist position. Although every page of the Federal Register may be basically the record of a negotiation between interest groups, that perception badly needs some qualification. Politics is the norm, but autonomy modifies politics.

Because this Article is not about legal autonomy in the modern state, the subject cannot be treated with any sophistication or detail.[154] To help dispel the reductionist fallacy, a terse list of the reasons that law requires automony from politics must suffice here. First, the process of political negotiation itself—that is, the involvement of interest groups with the intricacies of legislatures, courts, and administrative agencies—shapes the content and structure of political agreements. Second, massive discretion is created by the indeterminacy of the operating legal system, including everything from the need to adjudicate particular cases to the unsupervised field-level discretion of administrative agents. Third, some autonomous legal norms exist, such as consistency and equality. Fourth, major political compromises, such as the National Labor Relations Act,[155] have immense inertial stability. Better compromises might be possible, but a new, basic compromise would be prohibitively expensive to negotiate. Fifth, radical normative freedom associated with a politicized system leads to a sense on the part of legal actors that they are normatively free to develop more just, creative, and stable solutions than those suggested by political interest groups. Sixth, an elite class exists, in alliance with purely altruistic actors, for whom some form of stable, long-term solution takes precedence over any more narrow political interests.[156] Last, a sense develops of legitimacy

---

communion with God, by their methodical approach to asceticism, routinization of work and prayer, scientific agriculture, and orderly record keeping, contributed to the demagification and systematization of religion and society and the ultimate disenchantment of modern secularism. *Id.* at 1164-70, 1181-85.

The result of politicizing doctrine, at odds with the labors of the judicial defense industry as explained in part IV(A)(2), may turn out to be absolute deference to the legislature, in other words, the destruction of constitutionalism. See the attacks on interest balancing in Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 49-57, 61-66, 82-83 (legislature is sole source of constitutionally legitimate value judgments); Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 89-94, 125 ("unrestrained interest balancing"); Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 191-94 (balancing competing interests is unpredictable). *But cf.* Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 127-31 ("general principles" vs. "endless tinkering").

153. *See* N. LUHMANN, THE DIFFERENTIATION OF SOCIETY 122-37 (1982).

154. *See id.; see also* R. UNGER, LAW IN MODERN SOCIETY 52-53 (1976) (defining autonomy); Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571, 585-87 (1977).

155. Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-187 (1976)).

156. Block, *The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State*, SOCIALIST REV., May-June 1977, at 26-27; *see infra* note 197.

of the political process itself, the idea that democracy is the only fair way to compromise fundamentally irreconcilable values.

The most familiar example of the problem of reductionism is this last mentioned issue of procedural legitimacy, whether judicial or legislative. What are judges doing, if not "finding" law in an impartial manner through the exercise of judicial temperament? The obvious answer is that they are responding to serious demands of legitimate social groups based on values that *are* emphasized in the Constitution. Law may be considered legitimate to the extent that it is open to morally persuasive claims rooted in the Constitution or other laws.[157] In that respect, the political responsiveness of implementation is a source of legitimacy rather than a drawback. The essence of implementation is that two or more morally legitimate groups compete for recognition through the law. Moral legitimacy is defined here in terms of prevailing social values: many people in society believe that the status quo should be changed, while others believe that change should be resisted.

The modern view of substantive legitimacy is a combination of substance and process.[158] In situations of social conflict, prior to the give and take of politics no clear, substantive result can be identified as just. Even advocates of competing positions usually concede that some adjustment to the opposite point of view may be justified, and a variety of adjustments might be acceptable. In this sense the process of access and compromise is itself the source of legitimacy. On the other hand, not every political process is considered legitimate. The process must struggle with the issues fairly, and will be judged according to both the seriousness with

---

157. This kind of notion is applied in Clune, *The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment*, 1975 SUP. CT. REV. 289. Law that is not open to moral claims has been called formalistic rather than legalistic. *Id.* at 291 & n.4. *See* J. SHKLAR, LEGALISM 1, 10, 36-38 (1964).

158. *See* J. DEWEY, PHILOSOPHY AND CIVILIZATION 13-35, 126-40, 271-98 (1931); Yudof, *Plato's Ideal and the Perversity of Politics* (Book Review), 81 MICH. L. REV. 730, 742-45 (1983) (comparing Lindblom & Cohen's "interactive" method of decision making with analytic methods). *See also* Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 269 (1983). Teubner states:

> In Habermas' view, only a "discursive" rationality emerging from autonomous evolutionary processes in the normative sphere could finally resolve the legitimation problems of the modern state . . . . This view is based on a theory of political legitimation which asserts that irreversible developments in the normative sphere mean that modern principles of legitimation must be procedural[]: "[quoting Habermas] Since ultimate grounds can no longer be made plausible, the *formal conditions of justification themselves obtain legitimating force.* The procedures and presuppositions of rational agreement themselves become principles."

Id. (citations omitted) (emphasis original).

For an analysis of an area of modern law designed to work in the way described, and the problems involved with trying to be purely procedural, see generally Clune & Hyde, *Final Offer Interest Arbitration in Wisconsin: Legislative History, Participant Attitudes, Future Trends*, 64 MARQ. L. REV. 455 (1981).

which the claims were considered and the substance of the end result. Either a superficial process or a biased outcome may polarize the participants and disgust observers. In a sense, the modern view of legitimacy looks to how the system struggles with an issue. If, as in civil rights and Watergate, the system behaves responsibly, a rough sense of legitimacy is obtained. This legitimacy results although some flaws in both process and result exist in even the most legitimate of processes. People do not expect perfection from struggle.

B. Conflict Between Substantive Rationality and Political Participation: Positive Tendencies and Contradictions in Modern Law

The second major characteristic of modern law that can be implied from the model is a conflict between substantive rationality and political participation, leading to positive tendencies and contradictions. The dominant characteristics of modern law are substantive purposiveness and political fragmentation. Substantive purposiveness is like Max Weber's substantive rationality[159] because law is regarded as the means of achieving positive social purposes. Conscious goal seeking through law has been defined throughout this Article as the essence of implementation.[160] Weber's substantive rationality, however, assumed a single source of purposiveness. It was the state, in some coherent sense, that was substantively rational across all its enterprises. The second characteristic of modern law, political fragmentation, obliterates any sense of coordinated substantive purpose. Instead, a multitude of different and often conflicting substantive purposes interact politically in the fashion modeled in this Article. Political participation is a fundamental issue because of the multiplicity of groups, all of whom must communicate and bargain with each other in order to be effective. Increased substantive purposiveness is referred to by European social theorists as the "rematerialization" of law. Political fragmentation is seen as a conflicting tendency because of its procedural emphasis.[161]

The coming of implementation as a way of life has created a characteristic set of positive and negative experiences. These goods and

---

159. *See* 1 M. WEBER, ECONOMY AND SOCIETY 85-86 (G. Roth & C. Wittich eds. 1978); 2 *id.* at 809-16.

160. *See* Clune & Lindquist, *supra* note 1, at 1094-1104.

161. At this moment, society seems to be reassessing its commitment to purposive law and to the bureaucratic and legal structures that are associated with it. The classical models of law and state which we inherited from the nineteenth century stressed what Max Weber called "formal rationality" . . . . A formal rational legal system creates and applies a body of universal rules, and formal rational law relies on a body of legal professionals who employ peculiarly legal reasoning to resolve specific conflicts. With the coming of the welfare and regulatory state, greater stress has been placed on substantively rational law, i.e., on law used as an instrument for purposive, goal-oriented intervention . . . . Since substantively rational law is designed to achieve specific goals in concrete situations,

bads of modern law grow directly out of the conflict between substantive purposiveness and political fragmentation. They are experienced directly; they are not speculative constructs of social theory. Nothing is more common as a subjective experience of implementation, whether as participant or researcher, than the schizophrenic perception of great practical potential combined with irrationally low achievement. Problems of excessive legalism and regulatory unreasonableness, for example, are baffling precisely because they seem theoretically unnecessary while being practically ubiquitous. Such frequently encountered sticking points are an indication of the limitations that culture places on policy.

Table 3 is a graphic summary of these problems at the "retail" level of implementation, representing interactions between the government and regulated organizations:

TABLE 3

POSITIVE TENDENCIES AND CONTRADICTIONS IN MODERN LAW

("Retail" Level: Interorganizational Action)

QUALITY OF MODERN LAW	DIRECTION OF TENDENCY	
	Positive Tendency	*Contradiction*
Substantive Aspect: Fragmented Substantive Rationality	Pragmatic, piecemeal, problem solving—realism.	Conflicting substance—compromise, dilution, and deflection.
Formal Aspect: Law As Politics	"Responsive" law, institutional design.	Political conflict, distrust, legalism, duplicity, sociopathy, manipulation, loss of occupational autonomy and self-esteem.

As Table 3 indicates, each essential characteristic of modern, implementation-style law is associated with a positive tendency and a contradiction—a negative characteristic of a special sort that prevents the positive tendency from being fully realized. The first characteristic is fragmented substantive rationality. Substantive rationality is responsible for the positive ten-

---

it tends to be more general and open-ended, yet at the same time more particularistic, than classical formal law.

European scholars have called this trend away from formality the "rematerialization of the law."

Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 240 (1983) (citations omitted).

dency. Substantive rationality means that law is resorted to for positive social purposes—social welfare purposes. This approach produces a kind of healthy realism in law and results, under the proper circumstances, in pragmatic problem solving on a piecemeal basis. But substantive rationality is also fragmented. Implementation consists of groups with opposing positive social purposes in a situation of social conflict. The contradiction flows out of this oppositional tendency. Pragmatism often is frustrated by the results of political struggle—conflicting substance, compromise, dilution, and deflection of goals.

The second characteristic of modern law is law as politics. Politics is the recursiveness, negotiability, and renegotiability of law as well as the institutional structures and routines that arise in implementation settings to accommodate bargaining. Under positive circumstances, the political character of law results in "reflexive" or "responsive" law.[162] An example of responsive law is good-faith bargaining: parties with opposing views and interests bargain peacefully and productively in a mature institutional structure. The contradiction results from the alienation of politics—the tendency to view the opposing side as an object to be manipulated for one's own good. The contradictory side of law as politics is experienced deeply and intensely by the participants in implementation. Enormous amounts of complaining are done by those that participate in implementation about the relationship of distrust underlying such behaviors as excessive legalism, duplicity, manipulativeness (bordering at times on sociopathy), and the loss of occupational autonomy and self-esteem which results from being distrusted, manipulated, and over-regulated.[163]

In sum, modern law produces good and bad results (the substantive aspect) as well as good and bad relationships (the formal aspect). Social theorists who predict an evolution toward the purely positive tendencies of modern law seem unrealistic.[164] The more realistic question is whether the condition of positive tendency and contradiction can persist, in a sort of mildly unhappy and improbably feasible mix of disconnected substantive goals and programs, or whether it will reach some insupportable condition of entropy and confusion.[165] This question, however, does not exist at the retail level of implementation (the level at which the implementa-

162. P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION 73-113 (1978); Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 243 (1983).

163. For a good discussion of the problems of legalism in regulation, see generally E. BARDACH & R. KAGAN, GOING BY THE BOOK—THE PROBLEM OF REGULATORY UNREASONABLENESS (1982); Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INTEREST 104 (1975); Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977); *see also supra* note 157 and accompanying text (courts respond to morally persuasive claims founded in constitution).

164. *See supra* note 162.

165. *See* T. LOWI, THE END OF LIBERALISM—THE SECOND REPUBLIC OF THE UNITED STATES 50-63, 271-94 (2d ed. 1979).

tion process often seems feasible), but rather exists at the wholesale, or societal, level. For a quick look at the positive tendencies of modern law at that level, Table 4 will be helpful:

TABLE 4

POSITIVE TENDENCIES AND CONTRADICTIONS IN MODERN LAW

("Wholesale" level)

SYSTEM FUNCTION	DIRECTION OF TENDENCY	
	Positive Tendency	*Contradiction*
System Integration	Successful welfare state	Coordination problems: budget, conflicting programs
System Justification	Provider image	"Wimp," temporizer image; or fanatic, simpleton image

The wholesale or societal level of the modern state is the level above all particular implementations. Implementations are relatively confined interactions between groups with relatively specific goals, and there are thousands of such interactions. Someone or something must worry about how all these interactions fit together (for example, whether there are enough resources to go around). Thus, one essential characteristic of modern law at the societal level is system coordination.[166] When coordination is working well, the successful welfare state results: lots of painful trade-offs, but in the end a workable compromise. When coordination breaks down, it tends to do so in either a budgetary or a programmatic crisis. A budgetary crisis occurs when the compromises worked out by the thousands of separate implementations are simply too costly, and it is difficult for the larger system to identify acceptable interprogram trade-offs. A programmatic crisis occurs when the goals of one set of implementations are inconsistent with the goals of another (for example, energy and full employment versus a stable economy and a clean environment).

The other essential characteristic of modern law at the societal level is system justification. In a sense, difficulties with system coordination only become genuine problems when they evolve into difficulties with system justification, because many compromises are theoretically possible for any difficulty with coordination; the problem is to sell the com-

166. Habermas proposes three dimensions of legal rationality: internal rationality (what Weber meant by formal rationality), system rationality (capacity of the legal order to respond to control problems of society at large), and norm rationality (fundamental principles that dictate how legal norms should govern human action). Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 252 (1983). The problems I refer to as system integration and justification in Table 4 seem to correspond to the latter two dimensions.

promises politically. When system justification is working well, the modern welfare state has a "provider" image (which Americans tend to personify in Franklin Delano Roosevelt). When system justification breaks down, two different negative images are possible: the temporizer and the fanatic. The temporizer is an excessively expedient person, seemingly without principles or goals, who runs from one implemented sector to another trying to forestall collapse by temporary bargains, only to confront worsening problems as the complexity of the system of bargains grows and grows. The opposite image is the fanatic, or simpleton, who treats all specific implementations crudely relative to their own internal goals by imposing some internally consistent second-order solution on the system of implementations. As an example, cutting education spending by thirty percent makes no sense relative to educational goals and can be ridiculed from that point of view.

Modern American presidents tend to become trapped in one or the other of these two images. President Carter was labeled the temporizing "wimp"; President Reagan is dubbed the insensitive "ideologue." This Article makes no comment about the actual personalities of these men, and indeed, the relationship between personality and social stereotype is tricky—the social system may select people who fit stereotypes, force people to adopt social roles, or impose labels on people with no relationship to their personality or behavior. The key point is that neither role is very attractive, and the mass media seem bound to capitalize on the potential for criticism.[167]

---

167. On the media and presidents, see generally M. GROSSMAN & M. KUMAR, PORTRAYING THE PRESIDENT—THE WHITE HOUSE AND THE NEWS MEDIA (1981); R. RUBIN, PRESS, PARTY, AND PRESIDENCY (1981). On breakdowns in setting the budget, see Nordhaus, *All Tied Up by the Business Cycles*, N.Y. Times, June 13, 1982, at F3, col. 1 (arguing that, although fiscal policy is the economically preferred means of stabilizing the economy, political confusion renders it useless, forcing reliance on less desirable monetary policy). Of course, the independence of the Federal Reserve is again under attack. Politicians cannot decide whether it is better to keep the Fed as a scapegoat or bring it under executive control as a means of exerting system coordination.

On confusion in the budget process, recall Greider, *The Education of David Stockman*, ATL. MONTHLY, Dec. 1981, at 27. Anyone worried about a possible crisis in system coordination might choose now to push the panic button. The new budget process has apparently achieved grid lock, producing months of continuation spending (reliance on old budgets). *See generally* A. SCHICK, CONGRESS AND MONEY—BUDGETING, SPENDING AND TAXING (1980).

The need for control is such that conservative Republicans may have an insurmountable advantage under current party ideologies (control before compassion). Perhaps I am an alarmist, but the pressure of these circumstances toward a more centralized, less democratic form of government seems immense (one of the contradictions in the conservative political philosophy, it might be added). *See* T. LOWI, THE END OF LIBERALISM—THE SECOND REPUBLIC OF THE UNITED STATES xi-xiii, 274-79 (2d ed. 1979); McWilliams, *Carey's Warning*, 232 THE NATION 780, 780-81 (1981). Of course, given the pragmatic genius of American politics, perhaps the required centralization will occur through informal adaptations of existing institutions, such as new patterns of congressional leadership and cooperation.

The societal-level difficulties outlined above are rough versions of at least part of what Habermas means by the "legitimation crisis."[168] Again, the crucial question is whether we can blunder along in these difficult conditions indefinitely (so that system justification in the modern state is just one of the imperfections of the human condition), or whether some sort of crisis is brewing. Do we have a crisis or just a chronic problem?

A crisis cannot be inferred merely from historically experienced difficulties of system coordination and justification, because we have managed. A mildly chaotic system has many costs, but it also has many benefits because, through it, a great many people and interests are represented effectively. For a crisis to occur, there would have to be something pushing the system over time in a direction that makes coordination and justification increasingly difficult. James O'Connor seems to think that capitalism works this type of mischief.[169] According to O'Connor, the growth dynamics of capitalism require expansion of the role of the state, yet gradually starve the state of resources. Irrational political conflict results from increasing demands on shrinking resources.

O'Connor analyzes the flow of capitalist economies in the following way: Contrary to the conventional views of both liberals and conservatives, in late capitalism, capital requires large investments by the state in order to become more profitable. More investment in education is needed, for example, both to increase the productivity of labor and to stimulate technological innovation, a mainstay of the productivity of capital. Increased productivity of capital, achieved by larger expenditures, displaces workers, leading to unemployment and marginal employment. Unemployment requires further expenditures by the state in the form of income transfers. Both income transfers and the investment in private capital accumulation reduce the tax base. Reduction of the tax base makes it more difficult to pay for the necessary investments in improved productivity.

The most relevant point for purposes of this Article is the generation of political conflict. The squeeze on the tax base leads to government debt, inflation (monetized debt), and serious strains on the political process, as the various claimants for public funds clash and try to discredit each other. Political controversy grows more strident in proportion to the scarcity of resources and the corresponding unavailability of political solutions. In this dark vision, liberals and libertarians confront each other in a downward spiral of mutual recrimination, blaming innocent human actors for the futility of politics neither can understand. Viewed historically, the rationalizing and harmonizing forces of private competition, characteristic of early capitalism, gradually are replaced by irrational political maneuvering.

Intuitively, O'Connor's analysis makes more sense to the extent that

---

168. *See supra* note 166. *See generally* J. HABERMAS, LEGITIMATION CRISIS (1973).
169. *See generally* J. O'CONNOR, THE FISCAL CRISIS OF THE STATE (1973).

it incorporates ideas of diminishing returns. If the social investments in capital accumulation pay off handsomely, there could be no fiscal crisis, because the abundant returns to capital could be taxed. Various kinds of diminishing returns are possible. O'Connor mentions that late capitalistic investments in things like education may not be very productive.[170] Another idea is that the ever-rising material standard of living, implicit in ever-increasing consumer demand, must at some point confront shrinking natural resources.[171]

O'Connor's analysis, though difficult for one unfamiliar with complicated macroeconomic theory, is appealing because he attempts to explain some important, readily observable, and otherwise unexplained facts. Budgetary, monetary, and social policies in the United States do seem to be operating under a set of common resource constraints related to expanding demands on the state and a low-growth economy. Political energy and rhetoric across a wide range of issues reduce to a struggle between various groups for limited tax resources. Radical conservative solutions, like deregulation and massive tax reductions, seem politically naive. Therefore, it is crucial to consider connections between developments in the economy and political contradictions. O'Connor may not have the right answers, but he asks a question of primary importance.

A different point is that either a crisis or a chronic problem may lead to a major system adjustment instead of a breakdown. The pressure of system difficulties already may be forcing a long-term solution. Implementation as a way of life implies a certain amount of corporatism (individuals identifying with institutions, groups, and causes).[172] Perhaps in the end this process will result in simplification. For example, many modern employers in the United States already may be much closer to the famed paternalistic Japanese companies than we have recognized. Several forms of income-continuation insurance, health insurance (complete with cost controls), and life insurance are likely to be associated with employment. Transportation and even housing are perhaps not far behind.[173] While the subject of long-term societal trends goes far beyond the scope of this Article, it is extremely useful to demonstrate how the mid-range

---

170. *Id.* at 51-58.

171. *See* Firebaugh, *Scale Economy or Scale Entropy? Country Size and Rate of Economic Growth*, 48 AM. SOC. REV. 257, 259-60 (1983).

172. *See* R. UNGER, LAW IN MODERN SOCIETY 192-216, 238-42 (1976).

173. I am not sure whether O'Connor would regard these trends as part of the solution or part of the problem. Clearly, he views massive social insurance schemes, like Social Security, as part of "social consumption expenditures" arising out of economic insecurity and contributing to the fiscal crisis. J. O'CONNOR, THE FISCAL CRISIS OF THE STATE 137 (1973). In the more localized arrangements mentioned in the text, I see elements of collectively devised solutions, cost savings (rather than increased consumption), and redistribution that cut against the individualist ethic. Health insurance paid for by employers, for example, is much more egalitarian than wages, is tied to conceptions of need, and is often associated with cost controls over the more economically acquisitive elements of the health-care industry.

phenomenon of implementation discussed in this Article relates to, and indeed, is a constitutent part of, larger sociolegal trends.

C. New Roles for Lawyers

Implementation as a prevalent form of law creates new roles for lawyers. The older roles have persisted, however, and thus the process has been one of addition rather than one of substitution. The older roles tend to be associated with private law—the law produced by liability systems—and involve both counseling and post hoc dispute resolution, primarily in the courts.[174] The newer roles are associated with public law and regulatory systems, and involve an ongoing legal and political interaction of the type described in this Article.[175] In this section, three aspects of the changing role of the lawyer will be discussed: new public-law roles, new private-law roles, and the cultural conflict between the two roles (the conflict between modernism and traditionalism).

---

174. On the distinction between liability systems and implementation, see Clune & Lindquist, *supra* note 1, at 1083-88.

175. A good way to picture the new roles for lawyers is to picture implementation as a process by which the law periodically and unpredictably "legalizes" areas of private and public administration. This important insight came from John Meyer. J. Meyer, Organizational Factors Affecting Legalization in Education 2-8 (Oct. 1980) (unpublished manuscript on file with the author). See *supra* note 48 for citations to related work of Meyer.

Organizations that are accustomed to autonomous operation, whether IBM or the Division of Corrections, find that part of their operations must respond to legal directives. Rights created by courts and legislatures transform areas of administration into legalized subsectors. Note that we can legitimately speak of legalizing an area of public law which starts as entirely the creature of law (e.g., public education). *See* Friedman, *Limited Monarch: The Rise and Fall of Student Rights*, in SCHOOL DAYS, RULE DAYS: REGULATION AND LEGALIZATION IN AMERICAN EDUCATION (D. Kirp ed., forthcoming). The shift produced by legalization typically is from internal bureaucratic and professional discretion toward, to some degree, external, legalistic control. Public bureaucracies develop organizational structures and decision routines designed to respond to legalization. "Rights" become a normal, though episodic and unpredictable, aspect of policy making.

The boundary between "law" and "nonlaw" has special characteristics in the situation of legalized administration. Much of the "Macaulay tradition" in sociolegal studies, for example, concerns itself with the marginal significance of law in business transactions. *See, e.g.*, Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contracts*, 11 LAW & SOC'Y REV. 507 (1977). Research in this tradition tends to be skeptical about the policy deliberations of appellate opinions because of the slim evidence that private action responds in anything like the way pictured by judges.

In public law, the law-nonlaw boundary problem is analogous but different. First, all implementations, regardless of whether the regulated sector is private or public, necessarily involve a greater degree of supervision and control than does facilitative, or private, law. Although the actual impact of law is still a paramount question in public law, the powerful instrusiveness of many interventions makes it unlikely that the regulated sector practically can ignore the law, as Macaulay suggests businesses do the law of contracts. If the purposes of public law are deflected, the deflection probably would be accomplished through a series of intensive interactions between regulating and regulated organizations, not indifferent ignorance. Thus, in terms of lawyers' roles, public law, at a minimum,

1. New Public-Law Roles

Generally speaking, public-law roles include all of the private-law roles and others. Thus, lawyers in public law will be active in post hoc dispute resolution *and* ongoing interaction, in courts *and* regulatory agencies and legislatures. With that caveat in mind, the following table, which distinguishes the role of private-law lawyers from the role of public-law lawyers, may be helpful:

TABLE 5

DIFFERENCES IN LAWYERS' ROLES BETWEEN IMPLEMENTATION AND NONIMPLEMENTATION

Names for Field	NONIMPLEMENTATION (PRIVATE LAW) (FACILITATION)	IMPLEMENTATION (PUBLIC LAW) (REGULATION)
		Involves all of the first column, plus the following:
Institutions Involved	Courts	Legislatures, Bureaucracies
Identity of Persons Asserting Rights	Lawyers	Self-Help
Identity of Right Holders	Corporations, Wealthy Individuals	Clients of Corporate State
Nature of Expertise	Legal Methodology	Organizational, Institutional, and Technical Knowledge
Method of Influence	Litigation	Negotiation, Bargaining, Politics
Identity of Experts	Lawyers	Policy Analysts

---

intensively involves lawyers in the affairs of "technical organizations," and that means lawyers cannot be dominant. The dominance of lawyers in private law is a consequence of the fact that, contrary to rhetoric, judicial cases tend to involve a post hoc balancing of equities rather than goal-directed social control.

The legalization of public administration is often done by law prophets. *See infra* text accompanying notes 176-79. The role of special-purpose regulation of general-purpose legal institutions is awkward. For example, in the early days, law reform litigation involved a meeting between the focused, but substantively ignorant, idealist lawyer and the seasoned, technical administrator, who was disappointed to learn that he had not been following the law all along. The lawyer may have found it difficult to explain the legitimacy of novel

The public-law roles of lawyers are much less dominant and clear cut than private-law roles, although the amount of public law is far greater than private law and plenty of jobs for lawyers exist. Lawyers are less dominant because the main business of implementation—planning, monitoring, and dispute resolution—is carried on extensively by both lawyers and nonlawyers. Any public-law area, such as the environment, incomes policy, education, securities regulation, energy, or workplace safety, serves as an example. At least four kinds of "experts" play powerful roles in these areas: nonlawyer bureaucrats with programmatic and institutional knowledge (e.g., budget officers, forest rangers), technical experts whose expertise is founded in the workings of the regulated sector (e.g., educators, educational psychologists), "technical generalists" who have something to say about program effectiveness across substantive areas (e.g., economists, management consultants, policy analysts), and politicians (because of the highly active political nature of all implementations).

New lawyers' roles in this eclectic, "interdisciplinary" consortium of public-law making may be observed effectively in a large public bureaucracy like the Department of Health and Human Services (formerly the Department of Health, Education, and Welfare). For convenience, four roles might be distinguished: the law prophet, the formalist, the rational manager, and the legalist.

The law prophet is a lawyer or group of lawyers who advocates a major new theory of legal obligations. One of the recurring events in the world of implementation is law reform litigation, either constitutional or statutory.[176] Such lawsuits attempt to conform existing practice to some relatively far-reaching theory of justice, substantive or procedural. The prototype of substantive prophecy obviously is the black civil rights movement.[177] A great deal of constitutional law scholarship is an effort to prophesy new substantive rights or to discredit some prophecy. A good procedural model is the environmental movement, with its tenacious husbandry of impact statements and associated devices.[178] Administrative

---

constitutional theories to stalwart servants of the state. "Second generation" administrative law reformers have acquired technical and bureaucratic expertise and are able to work more effectively and congenially with public administrators. Thus, the acceptance of new social policy goals may be in the process of acceptance by administrators, who then incorporate the goals as a part of normal policy making, as discussed in parts IV(C)(2) and V.

176. See generally the various essays describing the activities of public-interest law firms in PUBLIC INTEREST LAW—AN ECONOMIC AND INSTITUTIONAL ANALYSIS (1978).

177. *See supra* note 96.

178. *See generally* S. TAYLOR, ENVIRONMENTAL ANALYSTS IN THE BUREAUCRACY: THE IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM (forthcoming); Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511 (1973); Trubek, *Environmental Defense, I: Introduction to Interest Group Advocacy*, in PUBLIC INTEREST LAW—AN ECONOMIC AND INSTITUTIONAL ANALYSIS 151 (1978); Trubek & Gillen, *Environmental Defense, II: Examining the Limits of Interest Group Advocacy in Complex Disputes*, in *id.* at 195.

law scholarship generally is full of procedural prophecies.[179]

The formalist is like the law prophet in asserting that the answers to substantive problems are "in" the law. The formalist, however, invokes a technical sense of legal obligation rather than a broad theory of justice. Often, a bureaucracy finds itself considering a new course of action (e.g., whether to distribute grants on a geographical basis as well as on a merit basis). When the legality of a proposed action is not clear, the formalist lawyer, nevertheless, will go to almost any length to "find" the law. If the Supreme Court has not ruled on the issue, any court will do—even if it is only a federal district court, whose decision strictly is not binding outside its own district. If no court has decided the question, a legal interpretation, even of obscure and ambiguous language, is still superior to deciding the question on substantive grounds. The formalist conviction that the law must hold the answer also leads to the peculiar but widespread behavior of agency lawyers themselves drafting regulations and then claiming, over substantive objections, that the law prohibits a proposed course of action.

The social basis of formalism varies. Sometimes, through relatively self-conscious power politics, ideological lawyers invoke the law to get their way. Again, evolution has occurred between lawyers and other experts. Nonlawyers are much less likely now than ten years ago to accept naive legal opinions as given. At other times, unsophisticated lawyers may believe the formalist training they have received in law school. The appellate opinions studied by law students usually are reasoned as though judges are finding existing law, no matter how profoundly obscure the question actually may be. At still other times, an organizational need for formalist legitimacy exists. The risk of rebuke posed by a novel substantive course of action may be reduced greatly even through an implausible opinion that "the law says so."

A "rational manager" is the type of lawyer who is hired at top levels of administration to help things run smoothly. When Joseph Califano was Secretary of HEW, not only was he a "high-powered" Washington lawyer, but so were practically all of his assistants.[180] We may not understand

---

179. *See generally* R. RABIN, PERSPECTIVES ON THE ADMINISTRATIVE PROCESS 264-302 (1979) (procedural models); Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466 (1980); Ackerman & Hassler, *Beyond the New Deal: Reply*, 90 YALE L.J. 1412 (1981); Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Smith & Randle, *Comment on* Beyond the New Deal, 90 YALE L.J. 1398 (1981); Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256 (1981); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982).

180. Califano's staff included Ben Heineman, Jr., first the Executive Assistant and later the Assistant Secretary for Health Policy, who later became a partner in the Califano law firm and now is with Sidley & Austin in Washington, D.C.; Richard Beattie, Executive Assistant after Heineman and then General Counsel, who now is with Simpson, Thacher & Bartlett in New York City; Peter Hamilton, Executive Assistant after Beattie and earlier

the value of such lawyers particularly well, but in general, their function in agencies seems almost the opposite of that of the formalists. Elite lawyers are valuable because they are sophisticated about how to shape law effectively in service of substantive ends. In addition, the intelligence, productivity, and logical mental discipline of elite lawyers make them candidates for the difficult job of imposing some degree of formal rationality on sprawling, unruly agencies and regulated institutions. Moreover, because law students and lawyers are given the impression that they can learn anything in a short period of saturation, lawyers sometimes are willing to take the risk of interdisciplinary work out of which many nonlawyer experts are socialized by their academic training. The generalist role is both grandiose and surprisingly feasible. Finally, because lawyers are encouraged to "wing it" when they really do not know enough, with the proper person law training can produce just the right antidote to formal rational planning. The result may be a willingness to decide when a decision is necessary, to muddle through, and generally to participate effectively in the incremental aspects of organizational decision making.

"Legalists" are those who assert the minimum requirements of legality in Fuller's sense.[181] Legality thus includes consistency of treatment across similar situations, prospective application of rules, the opportunity to be heard in disputed situations, and the right to challenge action that is not in accordance with law. Notwithstanding fashionable skepticism about such things among intellectual legal realists, demands for legality emanate from a great many sources in real bureaucratic systems. People in regulated institutions feel wronged by "unfair" treatment, and they sometimes are willing to feign injury for strategic purposes. When field-level inspectors indulge in ideologically motivated, extralegal action, they are a threat for several reasons. The inspectors are vulnerable to challenge by regulated organizations because they upset the delicate compromise imbedded in the implementation structure, a compromise that has been worked out by people with greater political power. The inspectors are also a danger to program managers, because autonomous field-level action challenges the legitimacy of formal organizational control.[182]

Because of the demand for legality in the sense of legal authorization, an ongoing struggle between lawyers in the General Counsel's office

---

Deputy General Counsel, who later was a partner at Califano, Ross & Heineman; Dan Meltzer, Special Assistant, who now is on the Harvard Law Faculty; and Myles Lynk, Special Assistant after Meltzer, who later was an associate at Califano, Ross & Heineman and now is with Califano at Dewey, Ballantine, Bushby, Palmer & Wood in Washington. The position of executive assistant is an interesting one from the standpoint of the text. The executive assistant typically decides who gets on the Secretary's calendar, clears every important public statement, and is the only person, other than the Secretary and the Under Secretary, who is presumed by the White House to speak for the Secretary.

181. *See* L. FULLER, THE MORALITY OF LAW 33-94 (rev. ed. 1969).

182. *See* P. SELZNICK, TVA AND THE GRASS ROOTS 205-13 (1953).

and field-level inspectors is common in large agencies.[183] Lawyers in this situation play a conservative role asserting the priority of formal organizational purposes and the legitimacy of hierarchical control. Note that legalists, who assert the necessity of legal authorization, are not the same as formalists, who assert that such authorization actually exists in unlikely situations. Legalists would be attentive to situations covered inadequately by existing law and would seek to remedy that situation by creating law (such as regulations). In other words, legalists are quite willing to be substantively rational (get the social job of the agency done), but they insist on Fuller-like qualities as the operative means.

2. *New Private-Law Roles*

In the preceding subsection, new public-law roles were equated with jobs in the bureaucracy. This approach was convenient, but misleading. The shift from private law to public law has had an equally profound effect on many lawyers that represent clients. An example of a lawyer with new private-law roles is a friend of mine who has the admittedly nontraditional role of representing the state teachers' union and many individual teachers. A partial list of the activities of this lawyer, observed casually rather than through any systematic inquiry, is as follows: (1) representing disciplined or dismissed teachers before administrators, school boards, and courts; (2) bringing institutional litigation to obtain sweeping changes in state law, including the use of expert witnesses and the development of sophisticated statistical data; (3) intensive lobbying in the state legislature across an enormous spectrum of issues, from school finance to the organization of teachers in higher education; (4) sponsoring workshops and other educational enterprises to inform teachers and union representatives about the law and to acquire credibility in public forums; (5) developing a typology of roles of school board members that can be used to select styles of argumentation before school boards and that can predict successful arguments.

The interesting thing is that both old and new style lawyers seem to coexist side by side—politicized and nonpoliticized lawyers, if you will. For example, many lawyers representing individual clients in insurance law matters regard as bizarre any suggestion that they intervene in legislation or rule making in the general interests of their clients. This attitude exists even though insurance company lawyers concerned with exactly the same issues are highly politicized. The most important operative distinction may be between lawyers that represent individual clients, especially in general practice, and corporatist lawyers—that is, lawyers acting within a highly differentiated organization.[184]

---

183. *See supra* note 36.

184. *See* Clune & Lindquist, *supra* note 1, at 1083-94. *See generally Legal Remedies in a Society of Large-Scale Organizations*, 1981 WIS. L. REV. 861.

3. Cultural Conflict Between Old and New Roles

One of the baffling experiences of modern law, intensively present on law school faculties (but also in town/gown conflicts, Supreme Court opinions and critiques, and elsewhere), is the cultural conflict between the old and new roles of law and lawyers.[185] The underlying cultural organization is a felt distinction between "real" law and "real" lawyers and social scientists, ideologues, and policy makers. The conflict has active (conflictual) and passive (disintegrating) dimensions.

While the active conflict is, at bottom, somewhat humorous, it can be bitter, taking on the dimensions of a classic confrontation between modernism and traditionalism. Modernists begin to see traditionalists as reactionary, either quaintly old-fashioned, obtuse, or militantly fundamentalist (the New Right of law). Traditionalists see modernists as inept, lacking genuine lawyers' skills, degenerate, rejecting the existence of an autonomous legal order, and traitorous, selling law out to the infamously vacuous social sciences. Traditionalists see themselves as loyalists, adhering to common sense and a revered professional and oral tradition (including anecdotes). Modernists are both insufficiently and excessively rational, on the one hand relying on subjective values and emotion, while on the other keeping the company of specialists who have rejected the possibility of folk knowledge.

The passive conflict is more damaging than the active conflict, for it involves the erosion of a core legal culture. Criticism from the opposing camp delegitimates each side of the controversy, and neither can be very successful at establishing a new position. Traditionalists must isolate themselves from developments by defining changes as "nonlaw." Modernists must suffer the humiliating loss of the mystique of autonomous legal values. In finding that many nonlawyers know more about problems than they do, modernists are disarmed in their struggle for status with traditionalists. By retreating into formalism as the nature of legal expertise, traditionalists are left with technicalities. If legal rules are sacred, it is important to escape both policy and politics.

Thus, in tax law, modernists find themselves concerned with economics, while traditionalists are absorbed with loopholes. Economics is powerful, but other people are better at it. Loopholes are lawyerly, but they come and go, manipulated by powerful people off the traditional legal stage, in light of considerations beyond the scope of traditional legal expertise. Relevance comes at the price of demystification; expertise comes at

185. For an example involving the Supreme Court, its supporters, and its critics, see generally Kurland, *Earl Warren: Master of the Revels* (Book Review), 96 HARV. L. REV. 331 (1982). For a discussion of how the conflict is not just a matter of changing roles of lawyers (people who bring litigation vs. those who do not) but also is about the changing role of law as well (law as an autonomous source of values), see part IV(A)(2). The loss of the autonomy of legal values defined as the collapse of formalism is discussed by Unger. *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564-65, 570-76 (1983).

the price of ignorance and helplessness. Note that conflict may be felt within the same person, as when a law professor consciously chooses to teach and study both a "hard" and a "soft" field of law.

These distinctions are as powerful as they are illogical. Once, a representative of the ABA contacted me to do a presentation on school law. I suggested that the regulation of educational quality would be an interesting topic. She said she wanted something *legal*. I responded that there is a great deal of law on the subject: statutes, court decrees, administrative rules. She repeated: the audience would be interested in *law*—like budget caps on local school district spending, because these might be argued to be in conflict with constitutional test cases on school finance (and school finance litigation was the last "real" law for which I was known). She was groping, I think, for this core of old law, real law: analytically decomposable rules dealing with something abstract, like money, rather than vague standards, hardly distinguishable from bureaucratic orders, about something specific and fluid, like school teaching. She wanted something that could inspire a lawsuit—a violation of an autonomous rule of law.

One of the oldest manifestations of the conflict is in conceptions of true legal method and core and periphery in the law school curriculum. As already discussed, the traditional doctrinal method of teaching and learning law is based on the formalist idea that answers to problems are found, through precedent, in the law. The new form of law embedded in politics is difficult to teach not only because it is new, but also because it leaves the nature of legal expertise in a problematic and, therefore, subjectively threatened condition.[186] The sometimes panicky or angry resistance of law students to "policy courses" and "policy arguments," not to mention a political, historical, or sociological presentation of law, originates, I believe, in this tension between autonomous and political law.[187]

Core and periphery conflicts are even more interesting. The core is common law, constitutional law, litigation, and private practice. It does not seem to matter that the overwhelming bulk of law is in the "soft" periphery: the budget process, protective labor legislation, income transfers,

---

186. *See generally* Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175 (1973); Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981).

187. I think I see a shift away from autonomous law toward politics in the shift from a doctrinal to a regulatory perspective in insurance law (e.g., from formal contract doctrines, like promissory estoppel, to the doctrine of the reasonable expectations of policyholders and applicants). *See* R. KEETON, BASIC TEXT ON INSURANCE LAW § 6.3 (1971). The new doctrine generates plenty of litigation and other leval activity (e.g., standard clauses) because it is, in the words of social theorists, open-ended yet particularistic. *See* R. UNGER, LAW IN MODERN SOCIETY 193-200 (1976); *supra* note 158. A contrary example, in terms of litigation potential, might be commerce clause limitations on state taxation of commerce, in which economic realism seems to correspond with lack of a judicial role. *See* Hellerstein, *Constitutional Limitations on State Tax Exportation*, 1982 AM. BAR FOUND. RESEARCH J. 3, 5.

and school law. A lawyer I met in Florida told me that his local law school would not allow him to teach a course in health law because it was too esoteric. Instead, he taught the course to an enthusiastic audience of professionals in a medical school.

Institutional litigation is a kind of token compromise or transitional object between the old and new conceptions of law and between core and periphery in the curriculum. It is traditional because it involves a court that applies apparently autonomous, even sacred, values of constitutional law. It is modern because it is public-law litigation—remedial rather than judgmental, and concerned with organizational and political behavior rather than individual entitlements. The real question is whether a new core culture is developing. Unlike some, I am very optimistic about that, because lawyers and legal skills seem able to make great contributions in interdisciplinary contexts—academic and political. Political-legal-social scientific interactions are exhilarating. Once shed, the mystique of formalism seems confining and silly, but elements of formalism reappear as important policy considerations.

V. CONCLUSION

No final, logical conclusion could possibly be drawn from a piece such as this Article, which derives selected implications from a description of a complex social process. One fitting conclusion dwells on the central theme of the Article, law as politics. The generalization that law is affected by politics is old hat; but the extent of the influence portrayed in this Article may be surprising. To demonstrate this influence, a comparison with the prototype of politically dominated law may be instructive. Provocative articles have appeared recently on the role of law in communist countries, acquainting us with the profound submersion of law in the politics of Eastern Europe and the Soviet Union.[188] This Article suggests the countercultural perception that our law may be equally, or at least comparably, submerged, though in a very different form of politics.

The submersion of law in politics leads in divergent policy directions. The instinctive reaction, in the heritage of legal realism, is cynicism, unmasking, and debunkery.[189] Clearly, a measure of that attitude is justified. Law is constrained severely by politics. The frustration of policy by politics is the story of implementation. Compromise is encountered at every step and every level of the system, from the negotiation and renegotiation of legal mandates to the social construction of reality at the field level.

---

188. *See generally* Ioffe, *Law and Economy in the U.S.S.R.*, 95 HARV. L. REV. 1591 (1982); Markovits, *Law or Order—Constitutionalism and Legality in Eastern Europe*, 34 STAN. L. REV. 513 (1982).

189. A. MACINTYRE, AFTER VIRTUE 68-70 (1981) (relationship of modern behaviors of debunking, unmasking, protest, and indignation to positivism in ethics); R. UNGER, LAW IN MODERN SOCIETY 173-76 (1976).

The picture of law, however, as a passive medium of exchange for power brokers, as a transmission belt for social interests, is almost as false as the idea of fully autonomous law. Because law is politics, enormous room for creativity, adaptation, and negotiation exists. Political law can be liberating; autonomous law (if it really existed other than as an ideology) would be confining. Political law begins with the ferment of social movements, continues in the "dance of legislation"[190] (or the drama of institutional litigation), and culminates in the free-flowing field-level social construction of compliance. Ideological colors brighten the landscape. The modern, implementation-style lawyer is a pioneer, with a job that is alternately exciting and maddening. A good example is an acquaintance of mine who represents the handicapped in special education matters. For this lawyer, the right to an appropriate education under federal law serves one purpose and one purpose only: it gets the attention of the school bureaucracy and sets the stage for serious consideration of the best educational options by a multidisciplinary planning team.

The ultimate in skillful exploitation of political law probably occurs in the creation of "reflexive" legal structures.[191] These structures are institutions and processes that allow contending groups to bargain effectively (and, especially, not to sink into one of the pathological conditions of modern law). A clear example, because it has an organizational incarnation, is the creation of legal structures for bargain and exchange. Diverse examples include the pollution market in environmental law,[192] education vouchers,[193] and final-offer interest arbitration in the field of labor-management relations.[194] However, the development of pragmatic solutions in any area of social policy may satisfy the criteria of reflexive law. For example, various schemes have been proposed to prevent legalistic accounting requirements from interfering with good compensatory education.[195] Like my special education lawyer acquaintance, these proposals utilize legal rights to set the stage for creative and adaptive social programs. In these situations, political management of law is resorted to in order to combat counterproductive legalism.

Another logical place to end is with a reminder of what has been left out. The Article could be faulted for its close focus on counterestablishment sociolegal movements. No attention is paid to the occasional proestablishment implementation, such as laws obtained by insurance companies

---

190. *See generally* E. REDMAN, THE DANCE OF LEGISLATION (1973).

191. *See supra* note 141.

192. An excellent discussion of alternative pollution regulation schemes is E. BARDACH & R. KAGAN, GOING BY THE BOOK 292-99 (1982).

193. *See* J. COONS & S. SUGARMAN, EDUCATION BY CHOICE—THE CASE FOR FAMILY CONTROL 45-51 (1978).

194. *See generally* Clune & Hyde, *Final Offer Interest Arbitration in Wisconsin: Legislative History, Participant Attitudes, Future Trends*, 64 MARQ. L. REV. 455 (1981).

195. *See supra* note 47.

to prevent "excessive" competition.[196] The role of the establishment as a passive resister of implemented change is, of course, central to my model. A related oversight is the picture of the modern state as a seething mass of uncoordinated implementations, or, in a borrowed metaphor, as a ship that is all sails and no anchor. This approach, it seems on reflection, ignores the existence of an elite interested in the orderly management of the state perhaps above any other consideration.[197] Centralized, Weberian-style substantive rationality is more common in our system than this Article would suggest.[198]

If the most powerful in our society have been given misleadingly passive roles, the powerless have been ignored. I have grown accustomed to thinking of implementation as countermajoritarian or at least countercultural.[199] Yet, in retrospect, the myriad connections of implementations with the status quo seem equally important. Not only must social movements appeal to mainstream values, they also must interact with established organizations over a long period of time. All the intensive and intricate efforts to produce change must be accommodated and absorbed, at

---

196. *See generally* A. TOBIAS, THE INVISIBLE BANKERS—EVERYTHING THE INSURANCE INDUSTRY NEVER WANTED YOU TO KNOW 167-69 (1982) (politics of state-run workers' compensation insurance); *id.* at 163-66 (politics of antirebate laws); Kimball & Boyce, *The Adequacy of State Insurance Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545 (1958) (analyzing conflicting policies of antiprice fixing, anti-excessive competition, and adequacy of insurance rates).

Another whole category of law making left out of this Article is "greed law" (or "trough law"), the process of obtaining financial benefits through the state. Sometimes such law takes the form of implementation (carefully constructed legal intervention) and sometimes it is much more straightforward. *See* Clune & Lindquist, *supra* note 1, at 1099-1100.

197. *See generally* Block, *The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State*, SOCIALIST REV., May-June 1977, at 6; Roy, *The Unfolding of the Interlocking Directorate Structure of the United States*, 48 AM. SOC. REV. 248 (1983) (development of elite class in United States at turn of the century). Although the Block article is self-consciously Marxist, it considers the universally understood fact that some people in western capitalist democracies pursue the short-run interest of businesses, while others pursue the long-run preservation of the system. Traditional economic ideas of "market failure," for example, presume that someone or something succeeds in getting the state to act against the short-run interests of some market participants. *See* M. OLSON, THE LOGIC OF COLLECTIVE ACTION—PUBLIC GOODS AND THE THEORY OF GROUPS 13-16 (1971); G. TULLOCK, PRIVATE WANTS AND PUBLIC MEANS—AN ECONOMIC ANALYSIS OF THE DESIRABLE SCOPE OF GOVERNMENT 3-28 (1970); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549, 552-60 (1979).

198. Indeed, functionalist and Marxist theories tend to portray societies as "smart" (well-coordinated), whereas organizational theorists portray organizations as "dumb" ("anarchies"). DiMaggio & Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 156 (1983). In my opinion, if the comparison is meaningful at all, the supposed greater coordination of societies can result only from lower expectations. Organizations know what they want better than societies and also probably are better equipped to pursue goals efficiently.

199. *See* Clune & Lindquist, *supra* note 1, at 1113-14.

least partially.[200] In that sense, we realize that implementations do not represent outlaws, fugitives, alienated populations, secluded deviants, revolutionaries, exiles, or even splinter groups. Perhaps it is best to conclude that implementation, as sketched here, is the process of achieving greater participation through law—for strong minority groups, and for organized activists representing diffuse majorities.

---

200. For a discussion of the accommodation of goals to mainstream values, see part III(F)(2).