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THE UNINTENDED CULTURAL CONSEQUENCES OF PUBLIC POLICY: A COMMENT ON THE SYMPOSIUM

*Richard H. Pildes**

Common to many articles in this Symposium is a concern that the much vaunted "New Public Law" scholarship strikingly resembles the old. With broadranging ambitions, New Public Law scholars have turned to political science, policy analysis, economics, social science, and other areas for insight into the pathologies of the modern regulatory state. But as the contributions of Professors Eskridge, Peller,¹ and Rubin² recognize, these quests principally have yielded suggestions for only marginal refinements in the practices of courts. Seemingly peripheral concerns — for proper methods and resources of statutory interpretation, or, as in the contribution of Professors Farber and Frickey, for the relevance of statutory law for common law decisionmaking — have dominated New Public Law scholarship to date.

These concerns are significant. But they nonetheless appear remote from the profound institutional and cultural failings these same public law scholars depict. Aims and achievements, diagnoses and cures, remain disturbingly distant. Cass Sunstein's *After the Rights Revolution*,³ for example, among the most significant works in the field, opens with a powerful taxonomy of regulatory failures and aims to defend and reconceive governmental action in light of these failures. Yet its principal recommendations are for improved methods of statutory interpretation.⁴ Are we public law scholars destined to be only so many Neros, fiddling before courts while the republic burns?

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1. Eskridge & Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991).

2. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792 (1991).

3. C. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990).

4. Sunstein recognizes that improving these practices can only be a "partial corrective" to the pathologies of regulatory legislation. *Id.* at 10.

Implicit in New Public Law scholarship is a struggle to find ways to incorporate the most provocative insights it has spawned. Most arresting among these is the understanding that private preferences and public values are not static, but rather partially forged by the ongoing content and experience of public policy itself. Under this view preferences can be "adaptive," or "endogenous," or in the catch phrase of the New Left, politics is transformative: of values, experiences, understandings, and norms. New Public Law scholars have posed profound theoretical challenges to the traditional pluralist and modern Paretian-welfarist view that an ideal public policy should simply mirror existing values of individual citizens. Such insights expose the constitutive role of law and the cultural dimensions more generally of law and policy. They also expand the potential sites on which public law thought might focus, for if policy and culture are mutually defining, the causes and consequences of policy are pervasive. In the words of Professors Eskridge and Peller, "[l]aw is part of a web of sociopolitical structures that are constitutive — and reconstitutive — of our community."⁵ Yet when scholarship turns to concrete policy recommendations, this insight seems difficult to domesticate.

In this essay, I want to try to build on it in order to suggest forms a genuinely New Public Law scholarship might take. My aim is to embrace much of what New Public Law thought has urged: the marginality of common law doctrine or judicial decisionmaking; the need to attend to profound disaffections with the modern regulatory state; an acceptance of the complex, dynamic relationship of public policy and private understandings; a recognition that public values are constituted not only at the grandest levels of policy formation, but also in the myriad microscopic day-to-day experiences of policy. In my view, taking these insights seriously requires neither new, formal, analytical definitions of law nor further abstract efforts to determine whether there "is" a New Public Law scholarship and how we might know it. Instead, incorporating these developments ought to lead to immersion in the concrete structures of specific public programs and policymaking techniques. Thus, this essay not only explores several contemporary areas of policy concern, including welfare, medical care, pro bono legal services, and military conscription, but also looks more generally at the characteristic tools of current approaches to the making of public policy.

The perspective that emerges is organized around a theme that might be called the "unintended cultural consequences" of public pol-

5. Eskridge & Peller, *supra* note 1, at 748.

icy. Economic analysts have long been fond of pointing out various unintended instrumental consequences of government action. Many argue, for example, that regulating the price of housing to protect the poor will reduce the quantity and quality of affordable housing. But New Public Law scholars have suggested that law can interact in more complex and subtle ways with public and private understandings, norms, and ideals. If so, then some of these effects, too, can be unforeseen and unappreciated. Indeed, the very recommendations of economists, or some public law scholars, designed to avoid the now more familiar unintended, instrumental consequences of policy, might themselves turn out to have unintended cultural consequences. We might then conceive of the need for tradeoffs between these different, unintended, dynamic effects.

The distinction I have in mind is this: Some goals of public policy can be achieved only through certain self-understandings and more widely shared social understandings; these understandings are constitutive of the goal itself. For example, if one goal of civil rights legislation is the social attainment of individual dignity for members of previously oppressed groups, only actions consistent with cultural understandings of dignity can realize this goal. The relevant aims cannot be reached except by affecting these understandings. (This is one reason the interpretation of many legal norms ought to change over time, for the cultural understandings through which some norms work themselves evolve. If understandings of dignity shift, legal norms whose purpose is assuring dignity must be reinterpreted to remain faithful to their original aim.) But other policy goals can be achieved in ways independent of such mental states. For example, increasing the hours of legal service devoted to the indigent or the quantity of welfare benefits delivered to eligible recipients is a policy objective definable largely apart from any self-understandings and cultural meanings; we can tell whether these aims have been realized by looking at the quantity of goods delivered. By cultural consequences I mean the effects of public policy on social understandings, norms, and meanings. Instrumental consequences, in contrast, are produced through causal processes that do not need to work through the subjective experience of such understandings.⁶

My claim is that cultural consequences are a significant, but fre-

6. The concerns I raise do address the *effects* of policy choices and for that reason others might be inclined to describe them as "merely" one more type of instrumental consequence. I do not view much as hinging on this choice of language, though I offer two reasons for the distinction I draw. First, "cultural consequences" highlights specific, distinct, difficult to express mechanisms (social understandings) through which the effects of policy can work. Second, on the alternative description, all policy concerns become instrumentalist; that concept itself becomes so

quently ignored, dimension of public policy. Instead, exclusive concern for instrumental outcomes dominates modern policy and public law thought. Yet many of the goals of public programs are better conceived, at least in part, in cultural terms. And even where goals are purely instrumental, the cultural consequences of the means selected to pursue those instrumental goals can undermine their realization.

Professors Eskridge and Peller view this Symposium as a sign that New Public Law scholarship is at a "critical stage."⁷ And Professor Shane, looking primarily at constitutional law, wonders whether any emerging, distinct "ideological commitments" as to the point of governmental activity characterize a New Public Law system of thought.⁸ These two observations, in my view, are linked. As legal scholarship makes yet another of its post-Realist attempts to come to terms with the modern regulatory state, a central question is whether this work will simply replicate the methods of analysis and modes of thought characteristic of instrumentally oriented policy science. If so, there will be no New Public Law thought, only a disciplinary reshuffling of technocratic analysis from economics departments and public policy schools to the law schools. But New Public Law scholarship has already generated the foundational insights upon which a distinct New Public Law vision of "the point" and consequences of public policy might be built. Developing these insights in the context of specific public programs, a task to which this essay attempts to contribute, will determine whether legal scholarship can offer a conception of the grounding of law in deeper cultural understandings — a genuinely New Public Law.

By focusing on the theme of "unintended cultural consequences," I mean only to name and make self-conscious what I think is nascent but obscured in much New Public Law scholarship. This essay offers three variations on that central theme, played out through a number of disparate, specific public programs and policy issues. No special sig-

expansive as to be of little use (much in the way "self-interest" becomes tautological and vacuous in the hands of some economists).

More generally, descriptions, categories, and concepts are meaningful only insofar as they are pragmatically useful in navigating our way through social, moral, and political space. In that sense, I believe the distinction between instrumental and cultural consequences captures real differences difficult to articulate but important to notice. Whatever the label, contemporary public policy and public law thought seems dominated by a focus on one set of concerns; my aim is to reorient attention to significant concerns seemingly neglected at present. To the extent distinguishing instrumental from cultural consequences makes it easier to see certain obscured concerns — to the extent the contrast more incisively illuminates particular aspects of policy — the distinction serves its purposes.

7. Eskridge & Peller, *supra* note 1, at 707.

8. Shane, *Structure, Relationship, Ideology, or How Would We Know a "New Public Law" If We Saw It?*, 89 MICH. L. REV. 837, 864 (1991).

nificance lies in the particular three ways I have chosen to elaborate this theme; I do not view them as the most pressing concerns a culturally oriented New Public Law might address. Nor can my treatment of particular problems in any sense be complete. I hope only to be suggestive, sketching enough of an outline for the theme of unintended cultural consequences to provoke interest at this "critical stage" in such a reorientation of New Public Law scholarship.

I. THE CULTURAL DIMENSIONS OF POLICY I: THE MEANING OF DISTRIBUTIONAL STRUCTURES AND PUBLIC PROGRAMS

Public benefits, such as welfare or various types of social insurance, can be distributed through widely varying institutional and social structures. Similarly, those who provide public services, such as pro bono legal work or military duty, can be induced to do so through a variety of means, including economic incentives, centralized state commands, social and professional norms, and the like. These alternative structures and techniques have traditionally been assessed largely in terms of what might be called their output capacity: how effectively and efficiently they deliver benefits to the intended recipients. If legal assistance would be provided to a larger number of indigent clients most cost effectively through a particular type of pro bono system, that system should be preferred; if a particular distributional structure can effectively deliver welfare benefits at least public cost, policy analysts advocate that structure.

On this view, structures of distribution are important primarily in terms of their capacity to deliver the relevant goods. Yet the choice among alternative structures of distribution is meaningful for other reasons. Like many policies, this choice is of consequence not only instrumentally, but culturally: such structures play a role in creating social understandings and fostering particular types of social relationships. Defining the effectiveness of public programs requires considering these consequences, in part because of their independent significance, and in part because they, in turn, influence the instrumental effectiveness of policy.

The causal relationship I have in mind between public programs and social understandings can best be observed through study of concrete programs. But a few initial, abstract observations can help frame the analysis. First, implicit in all public programs and institutions are norms that inform their design and aims. By expressing and embodying such norms, policy outcomes necessarily consecrate certain values

and exclude others.⁹ The public validation of certain norms contributes to a broader political culture characterized by those particular understandings and commitments. Second, the experience of policy touches not just the recipients of benefits and services, but providers and distributors as well; workplace experiences socialize adults into the values and goals of particular institutions, roles, and programs.¹⁰ The structures of public programs define norms concerning the appropriate relationship of workers to each other, to superiors, to program beneficiaries, to citizens more generally, to the state, and even to norms themselves (are administrators to be distrusted, hence cabined in with categorical, rigid, rule-like norms, or trusted as capable enough to be provided more open-ended standards and goals to administer). These understandings are central to the ways formal public policy will be implemented and translated into actual experience.¹¹ Third, these programs not only provide goods and services to beneficiaries, but mediate and construct relationships between them and the state; indeed, for many individuals, such programs will be their princi-

9. Hence efforts to defend the liberal state as generally "neutral" among competing moral ideas or values cannot be sustained. Political institutions and policy choices necessarily reflect a commitment between competing substantive ideals and values, even if those values are familiar liberal ones of tolerance, pluralism, individual autonomy, or equality. Strongly communitarian cultures typically illuminate most sharply the role of public choice in constructing cultural understandings, both because of greater social self-consciousness regarding the role of these understandings and the contrast such cultures provide to our own society. For example, although Amish culture is often viewed as hostile to all forms of modern technology, in fact, complex communal decisions are continuously made about which technologies can be adopted consistent with preservation of the culture's sense of its own integrity — decisions that cannot be reduced to narrow, instrumental calculations of need. Kidder & Hostetler, *Managing Ideologies: Harmony as Ideology in Amish and Japanese Societies*, 24 LAW & SOC. REV. 895 (1990). Modern, liberal, pluralistic cultures similarly express and create values through their public choices, even if this process is more obscured to its participants. See Yack, *Liberalism and its Communitarian Critics: Does Liberal Practice "Live Down" to Liberal Theory*, in COMMUNITY IN AMERICA 147, 147-69 (C. Reynolds & R. Norman eds. 1988). For the argument that liberalism need not even theoretically be understood to require state neutrality between competing conceptions of the good or between competing moral ideals in general, see Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. (forthcoming 1991).

10. For studies of the ways in which work environments are important sites of socialization, learning, and preference formation, see POLITICAL LEARNING IN ADULTHOOD 89-265 (R. Sigel ed. 1989). For an argument that private employment structures and incentives shape women's preferences for different types of work, see Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

11. For one intriguing case study of this process, see Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC. REV. 1041 (1990). Calavita argues that the failure of recent immigration law amendments to ensure meaningful employer compliance with restrictions on hiring illegal aliens stems from more than the fact that white-collar employers take Holmes' "bad man," positivistic stance toward the costs and benefits of noncompliance — a well-known general phenomenon in the corporate crime area. Equally important, in her view, are understandings the statute itself has fostered as to what constitutes compliance, which lead employers to view themselves as complying even when they act in ways directly at odds with the statute's basic objectives.

pal point of contact with the state. Thus, the structure of public programs can influence the ways in which program beneficiaries perceive themselves, broader social relations, and their relationship to the state — a point recognized, for example, in procedural due process literature from the 1970s emphasizing the noninstrumental role of predeprivation notice and hearings.¹²

Public programs, in other words, do not just *do* things in the sense of providing benefits or offering services. They also *mean* something, whether this meaning is talked about in terms of their expressive character, their role in sustaining and creating a particular public culture, or the way in which understandings of public programs directly influences their implementation. Concern for the meanings of public programs might be bolstered by citation to a traditional source of validation in law, the authority of the past: the Framers of the Constitution were absolutely obsessed with the consequences of government action and structure on public understandings, personal character, and social relationships.¹³

Contemporary obsessions run in other directions. The principal concern of modern policy science, or economic approaches to regulatory policy, seems exclusively to be the instrumental, end-state effectiveness of public programs. Partially in response to these concerns, a central development of modern policy is what might be called the “contractualization” of public programs. By contractualization, I mean a policy permitting individuals to contract their way out through various means (payment of taxes, payment of others to provide services) from direct participation in public programs, where doing so arguably promotes more efficient or cost-effective delivery of the relevant public goods.

By focusing on the unintended cultural consequences of public policy, a New Public Law scholarship might assess the social costs from the current contractualization of public programs.¹⁴ Even if this

12. Mashaw, *The Supreme Court's Due Process Calculus For Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Michelman, *Formal and Associational Aims in Procedural Due Process*, XVIII NOMOS 126 (1977).

13. See R. WIEBE, *THE OPENING OF AMERICAN SOCIETY* 35-67 (1984); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 91-125 (1969). The brilliance of De Toqueville's sociological insights into the workings of American democracy in the Jacksonian period resides precisely in his subtle appreciation of these complex dynamics between public law, cultural understandings, and material consequences. See, in particular, his discussion of the cultural and material consequences of democratic laws of inheritance. A. DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 48-55, 50 (H. Reeves trans. 1945) (“The law of equal distribution proceeds by two methods: by acting upon things, it acts upon persons; by influencing persons, it affects things.”).

14. Emphasizing this dimension of public choice is the aim of Binder, *Beyond Criticism*, 155

method promotes more effective delivery of the relevant benefits, its cultural consequences make contractualizing inappropriate for some programs. In this section, I suggest that might be so for certain forms of military conscription, mandatory pro bono requirements, and welfare distribution.

A. *Military Service*

The choice of means for allocating responsibility to provide military service is a poignant and therefore easily recognizable illustration of the ways in which the structure of public programs reflects and shapes cultural understandings. Looking at the history of public choices in this area illuminates the kinds of cultural consequences policy can bring about and the way those consequences can, after the fact, be observed. The stakes in public policy choices are never more profound: which citizens will be subjected to the risk of injury or death in order to provide the central public good of collective security. And a wide array of means exists for making these choices: market allocation systems (either in the form of paid volunteers or conscription with an option to buy out from serving); politically accountable systems, which can take diverse forms including conscription with narrow, effectiveness-related exemptions (exclude only those unfit to serve); or conscription with broader policy-related exemptions (exclude those who can perform more "worthy" roles elsewhere in society); or purely private systems, such as voluntary service without monetary compensation. Thus the choice among alternatives becomes symbolic public action of the most tragic and powerful sort.¹⁵ Riots can be sparked from the choice among these options and, in this country, have been.

But noting the dramaturgical dimension of these choices still understates their cultural significance. For these choices profoundly affect not just those immediately involved, but larger social and political understandings. Because the stakes are high, the structure of military service expresses, but more importantly, shapes norms of social and political relationship more broadly. Conceptions of equality, obligation, fairness, authority, and the like are constructed in part by these

U. CHI. L. REV. 888 (1988). Although I reject certain claims Binder makes with regard to the indeterminacy of defining the instrumental consequences policy brings about, his arguments have helped considerably in formulating my own.

15. Michael Walzer describes soldiering as "socially necessary, at least sometimes; and when it is, the necessity is visible and dramatic." For these reasons, Walzer argues that mandatory conscription has a moral purpose beyond providing the substantial troops used in modern warfare, that purpose being, in his words, "to universalize or randomize the risks of war over a given generation of young men." M. WALZER, *SPHERES OF JUSTICE* 169 (1983).

choices. Women who seek the right to participate in combat duty have recognized as much,¹⁶ as have African-Americans, for whom shared participation in the risk of injury and death has played a role in political transformations such as abolition and desegregation.¹⁷ More generally, the history of military-service policies reveals the cultural significance of public programs, for it involves repeated shifts in the structure of military service, including periods in which service was contractualized,¹⁸ followed by visible and intense public responses.¹⁹

No national draft existed in the United States before the Civil War. The War of 1812 with the British, and the Mexican-American War in 1845, were fought with volunteers and members of state militias. Although early Civil War recruitment efforts generated more than 400,000 Union volunteers, Congress soon passed the Militia Act of 1862, instituting the United States' first draft. The Act contained a provision authorizing a draftee to hire a substitute, thus contractualizing service by permitting a citizen to comply by offering another in his place. Economic analyses might suggest the efficiency of such a provision:²⁰ it permits Pareto-superior private transactions; arguably those

16. The Supreme Court has upheld against constitutional challenge the exclusion of women from current draft registration requirements on the rationale that current policy precludes women from serving in combat duty. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

17. See, e.g., E. FONER, *RECONSTRUCTION* 8-10 (1988) (summarizing individual and political ramifications from role of black soldiers during the Civil War). In England, the entire welfare state itself emerged as a response to World War II: social policies developed during the War were implemented in its aftermath to provide general security against illness, unemployment, disability, old age, and poverty. Indeed, the term "welfare state" first emerged in England in this period to contrast English public philosophy and commitments with those of the Nazi "warfare state." Amenta & Skocpol, *Redefining the New Deal: World War II and the Development of Social Provision in the United States*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 81, 82 (1988) (quoting Flora & Heidenheimer, *The Historical Core and Changing Boundaries of the Welfare State*, in *THE DEVELOPMENT OF WELFARE STATES IN EUROPE AND AMERICA* 19 (1981)).

18. See *infra* introduction to Part II.

19. The particular history of Civil War conscription and military service policies is drawn from E. MURDOCK, *ONE MILLION MEN: THE CIVIL WAR DRAFT IN THE NORTH* (1971); E. MURDOCK, *PATRIOTISM LIMITED 1862-1865: THE CIVIL WAR DRAFT AND THE BOUNTY SYSTEM* (1967); Earnhart, *Communitation: Democratic or Undemocratic?*, 12 *CIVIL WAR HIST.* 132 (1966); Geary, *Civil War Conscription in the North: An Historiographical Review*, 32 *CIVIL WAR HIST.* 208 (1986); Levine, *Draft Evasion in the North During the Civil War, 1863-1865*, 67 *J. AM. HIST.* 816 (1981); Murdock, *Was it a "Poor Man's Fight"?*, 10 *CIVIL WAR HIST.* 241 (1964). For the more general history of conscription and military service in the United States, I have relied upon G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 157-67 (1978).

20. For a recent argument by an economist that it is more efficient to raise an army through an all-volunteer system rather than conscription, see T. Ross, *Raising an Army: A Positive Theory of Military Recruitment*, at 2-3 (unpublished draft dated Dec. 6, 1990) ("By selecting people at random, a lottery-style conscription fails to provide the social cost minimizing set of candidates. . . . [T]he idea that there are serious allocative inefficiencies associated with conscription must be ancient."); see also *id.* at 7 ("Conscription puts the 'wrong' people in the military; wrong in the sense that they will not represent the opportunity cost minimizing set of soldiers."). Ross does acknowledge, however, that efficiency might not be the only concern appropriately informing this choice.

more able or committed to serving will end up doing so; those to whom the value of pursuing other ends or obligations is highest, such as heads of families, will remain available for those pursuits. In the actual historical and political context, however, such efficiency-based arguments failed to find public acceptance.²¹ According to Calabresi and Bobbitt, public reaction to this draft was "immediate and unfavorable."²² Voluntary enlistment ceased. Public hostility centered on the hiring-out provision, which induced a market in substitutes with prices as high as \$1500 in some places.

In response, Congress passed a new Act the following year.²³ Again, contractualization out of service remained an option, but this time through a flat fee of \$300 set by statute.²⁴ Setting a flat fee eliminated the trade in substitutes; the money from exemption payments was to be used to encourage voluntary enlistment and reenlistment. With the fee set at this greatly reduced level, exemption was also brought within broader reach.²⁵ Again, efficiency arguments might justify this structure. And again, but with much greater violence, this way of structuring military service generated vehement public resistance. Draft riots in New York City led to more than 1000 deaths, and in Midwestern States, officers conducting the draft were murdered, records destroyed, and draft resisters fired upon by federal troops. By the end of the War, the possibility of contracting out of military service had been eliminated. Evidently the open pricing of military service had come to violate emerging cultural and political understandings concerning the meaning of citizenship and the nature of American egalitarianism.

The subsequent history of military service reveals a variety of other approaches. World War I invoked conscription, with some exemptions, including ones for those in certain occupations and men with dependents. Among the pool of eligible men, aged 21-31, selection occurred through lottery. This draft is viewed as having successfully

21. At the level of theory, the efficiency based arguments discussed here are indeterminate, as such arguments frequently are, for one can also imagine efficiency arguments against these sorts of contractualization provisions. The quality of service might be lower from those willing to be bought off to serve: they might be less loyal, less competent, less integrated into society and hence less willing to follow commands, and the like.

22. CALABRESI & BOBBITT, *supra* note 19, at 159 (quoting Friedman, *United States Compulsory Service Systems*, in *COMPULSORY SERVICE SYSTEMS* 9 (1968)).

23. Act of Mar. 3, 1863, ch. 75, 12 Stat. 731.

24. Technically, this was an annual fee, payment of which only "commuted" service obligations for one draft year. See G. CALABRESI & P. BOBBITT, *supra* note 19, at 160.

25. This fee still appears, however, to have been the equivalent of about one-year's wages for the average workingman. E. MURDOCK, *PATRIOTISM LIMITED 1862-1865: THE CIVIL WAR DRAFT AND THE BOUNTY SYSTEM* 9 (1967).

realized its aims, including substantial registration, with that result generally attributed to perceptions of the "scrupulous fairness" of the system and its implementation.²⁶ Yet given the decline of traditional family-oriented lifestyles and the social legitimacy of more individualistically oriented ways of life, a draft today exempting those with dependents might not be as politically acceptable.²⁷ By World War II, voluntary enlistments were severely restricted and those registered were called in order of birth rather than through lottery. At the time of the Vietnam War, the conscription system had evolved toward broad eligibility standards with an elaborate, somewhat vague set of deferments. The manipulability of the criteria for deferment by local draft boards and lawyers, as well as controversy over many of the substantive criteria for deferment, generated substantial conflict over the legitimacy of the draft.

By 1973, this conflict propelled movement toward an essentially all volunteer army. To generate such a force, pay at the lower enlisted levels was increased substantially. Thus, for over 100 years beginning with the Civil War, conscription policy responded to public pressure by eliminating earlier traditions which had permitted contractualizing the obligation to serve; yet today, military service is structured entirely around the concept of contractualization. The difference is between a system permitting contracting *out* of required service and one structured around "voluntary" contracting *in* to serve; this difference is not a mere formal one, for significant support for the all-voluntary military since 1977 suggests the difference carries real moral and cultural weight (in general, what constitutes a "mere" formal difference among public policies and what is regarded as a "genuine" substantive difference is not inherent, but rather itself rooted in cultural understandings).

Yet social meanings of public programs continue to evolve and the legitimacy of this distinction is now being called into question. Contracting in as the means of filling military needs generated less concern when the all-volunteer force served in essence as a public employment and job training program, with little risk of actual military combat duty. But as the latent threat of personal sacrifice always associated with military service has recently resurfaced, the skewed socioeconomic and racial distributions in a hired military are beginning to undermine the legitimacy of current policy. The meaning and dangers of military service themselves have changed, with the result that the cul-

26. G. CALABRESI & P. BOBBITT, *supra* note 19, at 161.

27. Indeed, by 1971, paternity deferments began to be phased out, Exec. Order No. 11,527, 3 C.F.R. 925, 926 (1966-1970), a process cut short by the end of the draft in 1973.

tural consequences of the means for eliciting service are also beginning to shift.

The history of military-service policies and of public responses to them provides a starting point for considering the cultural consequences of public law. Historical perspectives are central to this task for two reasons. First, predicting cultural consequences *ex ante* requires making subtle judgments about the social understandings particular policies are likely to have, as well as the further ramifications of those understandings; for this reason, no formal, axiomatic "laws" of cultural consequences can be developed. The necessary judgments must build upon historical appreciation of the kinds of understandings past policies have tended to create. Second, evaluating cultural consequences *ex post* cannot readily be accomplished through the quantitative, materially oriented measures used to gauge instrumental effects. Historical perspectives, which seek more broadly to capture the meanings and public understandings associated with past actions, thus become an important source of empirical information for assessing the cultural consequences of earlier choices.

More generally, appreciating these kinds of consequences is difficult; historical proof is the most convincing means of overcoming skepticism. In the context of military-service policies, the stakes are so high and the history of public reactions so dramatic that the cultural dimensions involved are hard to miss. But this history only accentuates the kinds of cultural consequences regularly, if less dramatically, implicated in public choice. Recognizing the centrality of these consequences opens possibilities for reconceiving public programs — as I now try to suggest by questioning current methods of distributing pro bono legal services and public financial assistance.

B. *Pro Bono Legal Services*

The decline in federal financial support of legal services during the 1980s has led a number of state bar associations and judicial officials to renew emphasis on the organized bar's responsibility to provide such services. After aggressive appeals by the Chief Judge of Maryland's highest court, for example, Maryland has tripled, at least temporarily, the number of lawyers voluntarily willing to provide pro bono services to the poor.²⁸ Other states, such as North Dakota, Massachusetts, Hawaii, and Illinois, are considering imposing mandatory pro bono requirements.²⁹

28. Chambers, *Lawyers Find Loopholes in Pro Bono*, Natl. L.J., Oct. 1, 1990, at 13, 14.

29. *Final Report to the Chief Judge of the State of New York, Committee to Improve the*

The most radical developments to date, however, are taking place in New York, which is contemplating a mandatory pro bono requirement for the state's 88,000 lawyers, that requirement to be imposed through administrative regulation of the New York Court of Appeals. As a prelude to such a requirement, an officially appointed commission has reported out a detailed proposed structure for the program. For now, Chief Judge Wachtler of the New York Court of Appeals has suspended adoption of the commission's recommendations for two years, leaving them hanging over the organized bar in an effort to induce serious voluntary compliance efforts. Adoption of a mandatory program somewhere seems more likely today than ever; such a program would constitute a major new policy initiative for the redistribution of important social goods. The New York commission's report represents the most detailed attempt to structure a mandatory pro bono program. But from the perspective developed in this essay, the proposed structure, which might stand as a model for other states, ignores important cultural dimensions of mandatory pro bono programs.

As proposed, all lawyers admitted and registered in New York would be required every two years to provide a minimum of forty hours of work qualifying as pro bono. The scope of proposed coverage is broad: government lawyers, law professors, legal services and public interest lawyers are included along with corporate lawyers; only judges and nonpracticing or retired lawyers are exempt. But the broad obligation of individual service is qualified by two substantial exceptions. First, solo practitioners or those in firms of fewer than ten lawyers (who comprise nearly 70% of New York lawyers) can satisfy their obligations by paying \$50 per hour of required service to an eligible legal services or public interest organization. Second, lawyers in firms or others organized together for this purpose can pool their hours and delegate their service obligation to some member; the commission calls this "group service," which in fact signifies that some individuals can stand in for others.³⁰

Both these exceptions contractualize the program by permitting individuals through purchase or hire to opt out of direct, personal participation. The second exception, however, is more troubling than the first, for convincing policy justifications for the first might well be available: small business exemptions from regulatory requirements are

Availability of Legal Services, 150-52 (1990) [hereinafter *Final Report*]; see also *New York Panel Urges Lawyers to Aid the Poor*, N.Y. Times, July 11, 1989, at 1, col. 1.

30. These exceptions do not apply to lawyers who have been admitted to practice for less than two years. *Final Report*, *supra* note 29, at 58-59.

common and not typically troubling.³¹ Contractualizing public distributional programs does not inherently corrupt them; everything depends on the justifications for permitting particular forms of opting out and the effects of doing so in particular contexts. But the temptations to permit contracting out are always strong, given that the benefits — more efficient allocations of service responsibilities, as viewed from the subjective perspective of participants — will seem obvious. And the costs of indulging this temptation will often be obscured, for they lie in the much more difficult to articulate, but very real, domain of social understandings and cultural experiences of public programs.

Just such a misconceived tradeoff seems to underlie the exception for those who delegate their obligations to others. Perhaps “group service” will more effectively serve clients in the most immediate sense of providing assistance. Abstract efficiency arguments for this view can easily be marshalled. Permitting voluntary redistribution of service obligations through private negotiation might put at the service of indigent clients those lawyers with the most experience, knowledge, or commitment to the task. Of course, these redistributions will not be voluntary in any meaningful sense, for as the commission recognizes, delegations will likely reflect existing relationships of power and authority: associates will find themselves facing offers from senior partners they cannot refuse. Even so, the efficiency of less-than-voluntary delegations can still be defended; perhaps the time of senior partners is more valuable in some social (as well as the obvious economic) sense, so that opportunity costs are minimized if pro bono work is delegated to less senior attorneys. Yet just as these sorts of arguments eventually were rejected in the context of the military draft, they should be rejected here.

The meaning of pro bono work, the perception of the mandatory pro bono program, and the professional self-understanding of lawyers will be differently constructed by a program that prohibits rather than permits hiring out.³² Moreover, the policy objectives of such a program, which transcend the immediate instrumental end of delivering

31. Without examining information concerning the projected practical burdens these mandatory pro bono requirements would impose on solo practitioners or smaller firms, the persuasiveness of these justifications cannot intelligibly be assessed. Such lawyers might well be the most appropriate for pro bono tasks, since they might have the most experience with the sorts of cases and issues likely to involve indigent clients; the burdens on smaller practices of 20 hours per year of pro bono service might be greatly exaggerated.

32. New York's deference to existing private preferences, and its failure to appreciate fully the way such preferences can be shaped by the structure of public programs themselves, is reflected in the following defense of the group-service concept: “The group services concept acknowledges that some attorneys are more personally or professionally inclined . . . to provide pro bono services” *Final Report, supra* note 29, at 58.

enhanced legal services in the short run, are likely to be eroded where hiring out is permitted.

Pro bono work can be satisfying, but is often romanticized, and mandatory duties in particular might be experienced by many as hard, tedious, frustrating or boring; yet New York has concluded it is socially necessary work to be done. Presumably the state aims to enhance the perceived social and professional value of such difficult work, for further voluntary commitments beyond the minimal state-imposed requirements will be necessary to meet the legal needs of the poor. Such aims are appropriate, indeed central, for public programs: the way in which various activities are valued is a matter of social understandings (beyond those embodied in market norms) and the structure of public programs partly constructs those understandings. But confining pro bono obligations to those of lowest professional status, as the group-service exemption is likely to do, will devalue the work professionally. Keeping the work out of sight in a ghetto of the least powerful makes it merely one more burden to be endured, one more hoop to jump through while waiting ascent up the professional hierarchy. Indeed, escape from pro bono work might mark the course of that ascent.

Beyond enhancing the dignity and value of pro bono work, New York also explicitly seeks to transform norms of professional duty. According to the New York report, "public interest service by lawyers should be thought of, not as an individual charity, but as a professional duty."³³ But imposing the formal requirement of serving, while permitting the hiring out of service, is not likely to create any transformed social sense of professional duty. Shared, direct experience, not the distant formality of indirect, legally validated participation, is necessary. Norms are more likely to be internalized when embodied in personal performance — not when performance can be shirked off to those lower in an organizational hierarchy.

Finally, though perhaps paradoxically, support for New York's program might well be greater the more widely shared its burdens. Where the state imposes obligations to perform socially necessary but hard work, resentment will likely be greater when the burdens are distributed unequally. Resentment over these inequalities becomes resentment of the program and the tasks themselves; the meaning of the work is onerous. If instead the burden of performing this work is distributed more broadly, the social meaning of providing it can shift as well. Legal assistance to the poor might be more likely to be exper-

33. Dean, *Voluntary or Mandatory Service?*, N.Y. L.J., May 21, 1990, at 3.

ienced as participation in a common professional and social project, a necessary cooperative enterprise to which everyone contributes an equal and equally meaningful share.³⁴

Perhaps the gains in effective provision of legal services are worth these costs in social and professional understandings. But I doubt it. Given the emphasis on efficiency and the role of contractual arrangements in our society, public policy analysts rarely appraise these costs with enough appreciation. Yet the structure of mandatory pro bono obligations is likely to color not only norms of professional responsibility but the meaning and experience of pro bono work itself.

C. *Welfare and the Distribution of Public Benefits*

Mandatory pro bono proposals raise focused, discrete policy questions and, in their currently contractualized structure, strikingly resemble early conscription efforts. Conclusions about their likely cultural consequences are therefore easier to suggest. But once attention is generally directed toward these types of consequences, more complex public programs can also be reexamined. In addition, more obscured forms of contractualizing public programs can be discerned, the cultural consequences of which need to be explored. This Section attempts to do so by uncovering the way in which current public-assistance programs have become contractualized and by questioning the cultural effects of this choice.³⁵

The national welfare state replaced something. Before public welfare, communal organizations (religious organizations, almshouses), private philanthropies, and social structures provided assistance of various sorts to the poor. To be sure, problems abounded with these nonstate forms of provision to "paupers": complete gaps in coverage and unstable reliability; drastic inequalities in provision across different communities; the creation of potentially degrading relationships of personal power and dependency. Nationalization and legalization of

34. In slightly more formal language, we might describe lawyers as having initial, first-order preferences regarding pro bono work (these "preferences" might place it much lower in a lawyer's ranking system than many other forms of work). But lawyers also have preferences to be respected members of the profession, which can lead to judgments about which of their initial preferences they ought to follow and which to revise. Norms of professional duty can shape these more basic initial preferences. Such norms are examples of what Cass Sunstein calls second-order, or higher, preferences. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). Because the way in which pro bono programs are structured will affect the understanding of what these higher norms are, those structures will also influence how lawyers view pro bono obligations, both mandatory and voluntary ones.

35. The following discussion draws directly on Walzer, *Socializing the Welfare State*, in DEMOCRACY AND THE WELFARE STATE 13 (A. Gutmann ed. 1988), whose ideas about welfare reform I seek to integrate into a more general theoretical framework for thinking about transformations in the way public policy is conceived and institutionalized.

welfare transformed it into a legal entitlement to be provided reliably across jurisdictional lines through impersonalized state structures.

But the creation of a national welfare state was conceived as more than simply delivering needed assistance more effectively and fairly. It also expressed "a sense of the nation-state as a community committed to its citizens — or, more accurately, as a community constituted by citizens committed to one another. The welfare state was imagined as a systematic form of mutual assistance, replacing the unsystematic (and unreliable) forms that had existed before."³⁶ Rather than seeing its role only instrumentally, we might view the welfare state as designed to embody a particular public philosophy and to aspire to the creation of a particular set of social relationships.

Yet the structures that have evolved for distributing welfare might have unintentionally undermined these goals. The participation of most citizens in the collection and distribution of welfare is limited to the payment of taxes, with more palpable participation in providing actual benefits confined to a full-time, professionalized state bureaucracy. Paying taxes, rather than providing services or working with recipients, is a form of contractualizing public programs: while complying with the relevant formal participation requirements, citizens in actual experience can effectively opt out. Payment of taxes is surely better than earlier Social Darwinist approaches to the poor, but it allows most citizens to escape the meaning and effects of direct involvement with the needy. The cultural consequences of welfare as currently distributed might further social atomization, rather than the hoped for strengthening of communal bonds. Worse, since nationalized welfare distribution has partly displaced preexisting community structures for such provision,³⁷ nationalizing distribution while curtailing direct participation might have furthered the sense of social dissolution.

Might dissatisfaction with the welfare state trace, at least to some extent, to the completely contractualized structure of current distributional arrangements? Although most contemporary public debate about the welfare system focuses on concerns about its incentive-altering effects on recipients, attending to the cultural consequences of who participates in providing benefits and in what ways might lead to revised distributional structures that would sustain greater public sup-

36. *Id.* at 16.

37. Western European states, for example, have reportedly witnessed a decline in voluntary contributions of time, work, and financial contributions with the rise in state run welfare systems. As an extreme example, "friendly societies" once found in working-class areas, which provided forms of social security, have largely disappeared. P. GOSDEN, *SELF-HELP: VOLUNTARY ASSOCIATIONS IN THE 19TH CENTURY* (1973).

port for the welfare state. We might aim for a more decentralized, more widely participatory, less professionalized and state controlled welfare system.³⁸

Suppose this system were reconstituted to engage considerably more widespread, direct citizen participation through devotion of time and energy rather than money. This could be implemented in a variety of ways, such as creating incentives for participation, or a temporary national service program (as both conservatives and those on the left are increasingly proposing³⁹), or mixtures of voluntary/compulsory/incentive-induced participation. To make such participation attractive and meaningful, more power to administer the system might need to be devolved to local welfare bodies. Effectively doing so might require less rigid, uniform national eligibility standards, or at least less intensive national supervision of the implementation of such standards. Perhaps the meaning of welfare and the welfare state might shift; social relationships, as well, would likely be affected. Citizens might come to feel more of a shared stake in public assistance pro-

38. See, e.g., N. GILBERT, CAPITALISM AND THE WELFARE STATE 168-70 (1983). These proposals might in a very general way be viewed as an analogue in the public assistance and insurance sphere to Richard Stewart's conceptions for reconstituting the regulatory structures through which environmental regulation is developed and enforced. See Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986). Stewart's work is one example of New Public Law scholarship that does seek to come to terms with the substantive direction and content of public programs and structures. Although Peller and Eskridge correctly note that Stewart's emphasis is institutional, and to that extent a reflection of earlier Legal Process era concerns, see Peller & Eskridge, *supra* note 1, at 732-33, a progressive and realistic philosophy of public law scholarship ought to recognize the ways in which institutional structures influence both the substantive content of policy and the social meaning of public programs.

Indeed, Peller and Eskridge's critiques of this sort of New Public Law scholarship seem ironically misplaced. The obsessions of Legal Process era scholarship with allocating decisionmaking authority to appropriate institutional structures, already assumed to exist and be in place, have been properly attacked over the past 20 years. The era's institutional competence assumptions complacently viewed processes of decisionmaking as capable of being designed in line with widespread social consensus (which existing institutions were treated as already reflecting), and capable of remaining neutral with respect to substantive outcomes. But the response to critiques of these assumptions should not be complete repudiation of institutional design concerns in order to focus directly and exclusively on substantive questions concerning the content of public policies. Institutional design or the structure of public policy programs is itself a principal vehicle through which substantive values can be realized — indeed, this might be viewed as one of the central interpretations of the critical onslaught against Legal Process thought. Some of the most radical of these critiques, in fact, take just such an institutional and process oriented form. See, e.g., Parker, *The Past of Constitutional Theory — and Its Future*, 42 OHIO ST. L.J. 223 (1981). New Public Law scholarship that offers reconceived public institutions or structures for distributing public benefits and services, when done with self-conscious efforts to promote certain substantive ends, themselves acknowledged to be subject to political conflict and disagreement, ought to be welcomed as a real contribution, rather than viewed as mere warmed over Legal Process thought for its focus on institutions and processes.

39. See, e.g., W. BUCKLEY, GRATITUDE: REFLECTIONS ON WHAT WE OWE TO OUR COUNTRY 21 (1990) ("The idea of national service needs to be popularized."); Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 456 (1987) ("many communitarian liberals — I among them — believe that a properly organized program of compulsory national service would be good for the country and for those who would serve").

grams. Recipients might feel less trapped in a dense maze of impersonalized rules bureaucratically administered by overburdened state workers. State-structured public assistance might generally be experienced as something more akin to now lost communal networks that genuinely expressed and created a world of mutual recognition and assistance.

I am mindful of a host of questions such proposals spawn. The structure of the current welfare system is a response in part to genuine problems with prior public and private means of offering assistance to the needy. Seriously considering the sort of structural changes barely sketched here would require assessing a number of possible costs. Decentralization and less intrusive national supervision might open up unacceptable possibilities for personal discretion, exploitation, and inequality in the administration of benefits. Yet if not accompanied by considerable scope for personal autonomy and flexibility, broadening participation in benefit administration might breed resentment and backlash against public benefit programs. Perhaps the costs of such proposals would not be worth the gain in social understandings and relationships. Perhaps such proposals cannot be practically implemented. Perhaps the hoped for gains are merely utopian fantasies.

At the least, though, a substantively oriented, genuinely New Public Law scholarship — one attuned to the general cultural consequences rather than simply the immediate instrumental ends of public programs — might begin developing answers to such questions. Once cultural consequences are brought into focus, methods to explore them must include not only culturally informed case studies, but historical and comparative ones as well, for these consequences turn on the social meaning of public action, which make them functions of specific contexts, histories, and contingencies. At the same time, normative work will also be required: How should we assess needs for tradeoffs that might emerge between these broader concerns and more traditional ones of delivering goods and services effectively? Until public law thought is reoriented toward these questions, though, policy will remain oddly detached from its own meaning and effects.

II. THE CULTURAL DIMENSIONS OF POLICY II: VALUES, CONSEQUENCES, AND THE CULTURAL FAILINGS OF COST-BENEFIT ANALYSES

The cultural matrix of public policy is generally ignored when traditional cost-benefit analyses are applied to determine the appropriate extent of regulating environmental, workplace, and other risks to health and safety. Any acceptable approach to policymaking or moral

choice, of course, will need to take consequences into account and in that sense consider costs and benefits. The crucial question is *how* different approaches engage in this process — which considerations determine what counts as a cost and benefit, who has the power to make those determinations, and, once costs and benefits are defined, how comparisons between them are made. The traditional cost-benefit techniques of public policy analysts exist as distinct tools of policy because they rest on specific answers to these moral and political questions.⁴⁰ Many criticisms of these techniques are by now familiar and I do not intend to replay them. But deeper and less familiar concerns remain to be expressed, for the inherent structure of cost-benefit analyses does violence to cultural understandings that public policy ought to respect. For those concerned with the cultural consequences of public policy, articulating these concerns — and conceiving new institutional structures for making policy responsive to them — stands as a central task.

Cost-benefit analysis has long been charged with understating the benefit side of government action. These benefits typically include

40. The cost-benefit approaches used in policy analysis with which I am familiar include commitments to at least one of the following propositions:

- (1) That costs and benefits should be measured in terms of willingness to pay;
- (2) That the various *kinds* and *types* of benefits or costs can be aggregated along a single, common dimension and quantitatively expressed in a common numerical value;
- (3) That costs and benefits can then be commensurated and compared through this common numerical value;
- (4) That distributional effects of policy choices can be put to the side;
- (5) That all "real" costs and benefits must be taken into account without regard to the reasons people have for viewing something as a cost or benefit (that preferences, without regard to the reasons and justifications for them, are all to be counted equally);
- (6) That the same public priorities or rankings of values should apply consistently across different social contexts, without regard to how those contexts might be characterized — without regard, for example, to whether people's choices are viewed as voluntary or not, generated under conditions of autonomy or not, or reflect particular distributions of power;
- (7) That all relevant moral and political considerations must be fitted into the pre-established cost-benefit formula (there can be no prior commitments to principles such as the government must always respect the lives of its citizens);
- (8) That ordinary people's values and understandings about what it is reasonable to do must be fitted into a utility formula treating risks and uncertainties as statistically expressed, discounted probabilities with a linear discount rate;
- (9) That whatever is a cost or benefit in one domain of public policy is equally a cost or benefit in some other domain, regardless of the kind of policymaking institution involved, the level of government, or other institutional considerations.

By "cost-benefit analysis" or "traditional cost-benefit analysis" I mean any decisionmaking approach that accepts at least one of these understandings; as currently practiced, most cost-benefit analysis accepts many or even all of these tenets. See, e.g., E. GRAMLICH, *A GUIDE TO BENEFIT-COST ANALYSIS* (2d ed. 1990); E. MISHAN, *COST-BENEFIT ANALYSIS* (4th ed. 1988). Centralizing cost-benefit analyses in a single entity that deals with widely different regulatory regimes virtually inherently strengthens commitments to many of these tenets.

Most critiques of cost-benefit analysis focus on propositions 1, 2, 3, and 4; the cultural criticisms I develop here are principally directed at propositions 6, 7, 8, and secondarily at propositions 2 and 4. My target is the *specific* method of taking costs and benefits into account through tenets 1 to 9.

"soft" variables, such as better health, cleaner air, or higher quality life, that are difficult to assign a dollar value or precise quantitative "weight." Because these kinds of benefits are often more difficult to quantify than regulatory costs, they tend to get undervalued. In addition, to the extent such analyses proceed from imputed willingness-to-pay figures, they are obviously sensitive to the preexisting distribution of wealth; forced to pay to avoid toxic chemical exposure, blue-collar workers will appear to value their health less than higher earning professionals. But sophisticated public policy analysts now attempt, perhaps with some success, to account for these and similar concerns.

Once these more sophisticated analyses are completed — and health, or clean air, or the preservation of life, has implicitly been assigned some rough value that reflects what society seems prepared to spend or forgo to achieve it — the argument then becomes that policy ought to honor those values consistently.⁴¹ Yet when the costs and benefits of regulatory programs are examined, extreme variations in such imputed valuations emerge. Two manifestations of this "failing" have been noted. First, there are wide disparities in required risk-reduction investments across various hazards. For example, EPA regulations of uranium mine tailing levels require industry to spend approximately \$55 million for every life saved; OSHA regulations of ethylene oxide levels in the workplace require \$1.1 to \$9 million per life saved; the 55 mile-per-hour speed limit imposed costs of only \$59,000 for each life saved.⁴² Second, there are policy choices that seem irrationally to prefer certain technologies or regulatory strategies to others. Some public law writers, for example, note that generating electricity from coal-fired power plants is statistically likely to cause substantially more deaths, illnesses, and injuries than the same level of electricity generated through nuclear power.⁴³ From this and similar

41. See, e.g., MacLean, *Introduction*, in *VALUES AT RISK* 1, 2 (D. MacLean ed. 1986) ("The estimated cost of saving a life should no doubt be brought more into line across different programs, not only for reasons of equity, but also for reasons of efficiency.").

An application of this view is described in J. MASHAW & D. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 216-17 (1990). In seeking to convince regulators to require that automobiles be equipped with passive restraint systems, insurance companies offered a cost-benefit analysis in which the major benefits were lives saved and injuries avoided. To attempt to monetize these benefits so that they could be compared to costs, the companies assessed the imputed value per life saved of various regulatory programs, ranging from Medicare payments for dialysis treatment to workplace safety regulations. From these figures (which varied by a factor of 10,000 — from \$93,000 to \$989,000,000) the companies then computed an "average social value" for saving a human life of \$520,000. They then argued that this was the figure that regulators should use to decide whether legally requiring passive restraint systems was cost-justified.

42. These figures are in 1985 dollars and are taken from C. SUNSTEIN, *supra* note 3, at 240-41, which contains a table compiling figures for expenditures required per life saved for various regulations. Sunstein describes the results as "seemingly irrational." *Id.* at 241.

43. See, e.g., Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Contro-*

data, those purportedly concerned with preserving human health and safety are said to act inconsistently in opposing nuclear power. Indeed, many argue that such widely different values across different policy areas for human life and health, or the persistence of opposition to "new risks" that seem to pose greater hazards than old ones,⁴⁴ exposes the irrationality or technical ignorance of citizens and public policymakers. On this view, whatever the scope of political disagreements, at least we always ought to prefer to save more lives rather than fewer; we similarly ought to value health and life reasonably consistently in different contexts.

Economists, public policy analysts, and public law scholars are continually frustrated by the failure of public policy to meet what they view as seemingly noncontroversial demands for consistency and rationality. To infuse such rationality into public policy, some public law scholars support increasingly centralized institutions designed to enhance the likelihood that government will apply cost-benefit analysis consistently across different regulatory domains. Professors Sunstein and Strauss, for example, endorse President Reagan's Executive Order requiring (except where barred by statute) cost-benefit review of all proposed agency regulations by one centralized entity, the Office of Management and Budget within the Executive Branch.⁴⁵

These efforts to "rationalize" public policy, however, fundamentally misconceive the values at stake in public decisions, as well as the role of democratic politics in determining those values. The general, if abstract reason, is that "costs" and "benefits" cannot be defined in a cultural vacuum.⁴⁶ For example, what is valued as a benefit, what about it is valued, and how that value is to be realized depend upon cultural understandings and meanings. But cost-benefit analyses, even in their more sophisticated variants, cannot legitimately assign these understandings and meanings where they are controversial: only democratic politics can. Indeed, the very structure of cost-benefit analysis

versy, 91 HARV. L. REV. 1833, 1835 (1978) (using figures of 7 to 12 times the number of deaths from coal plants and 4 to 6 times as much sickness and injury); Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 418 (1990).

The reliance of public law scholars on such analyses of this problem is ironic, because even public policy analysts generally disposed toward cost-benefit techniques have begun to view them as inappropriate for decisionmaking about generating electricity through nuclear power. See, e.g., Leonard & Zeckhauser, *Cost-Benefit Analysis Applied to Risks: Its Philosophy and Legitimacy*, in VALUES AT RISK, *supra* note 41, at 31, 42 ("Because of its associations with worldwide devastation, the question of whether to use nuclear power appears at this point, at least in many circles, to be beyond the realm of analysis of costs and benefits.").

44. See, e.g., Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025 (1983).

45. See Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986).

46. See *supra* note 40 for a more structured, specific set of descriptions of this failing.

runs roughshod over these understandings, for it requires that they be reduced to some single, common dimension before being aggregated, commensurated, and weighed against costs. These general points can be elaborated in three more specific ways.

First, no objective value ("the" value of clean air, or a workplace free of a particular risk) inheres *in* any state of affairs. Things are valued as parts of social contexts; their value cannot be abstracted from these contexts. But the appropriate context and its meaning is a matter of clutural understandings, to be settled through collective choice. Thus, it makes little sense to ask how much we ought to spend or forgo *in general* to avoid "the risk" of exposure to a particular pollutant, or toxic chemical, or type of injury. The same objective level of risk will have different meanings in distinct contexts. As people actually experience it, the nature and value of reducing any risk will vary with the setting in which it arises.

For example, even if the marginal health/cost tradeoff is the same for equivalent reductions in particulates emitted by woodburning stoves and electric utility plants, people might not only value the harms differently, but resist regulation of the first while demanding it of the second. At stake in these choices, in part, is how much the activities of woodburning stoves and electric power production are valued in themselves (as well as how much other activities associated with them are valued). Generating heat through burning wood might be particularly valued socially, perhaps because it is associated with values such as self-reliance, or types of social relationships such as community-based rural life, that are viewed as distinctly worth respecting or preserving. If so, reducing emissions from such sources might simply be viewed differently than similar reductions from large-scale utilities. These views are hardly "irrational," for beyond the cost and benefits of achieving "the same" level of risk reduction, the choice among these alternatives will construct different social landscapes. Such culturally constitutive dimensions of choice cannot be assessed through the incremental tools of cost-benefit analysis; political settings are required to socially *define* what *is* at stake and how those stakes ought to be understood and valued.

Taking seriously people's own accounts of how they value various risks makes clear that social contexts are central to the actual experience of risk. Extensive interviews with a variety of workers, for example, suggest that their valuations of workplace risks depend upon such matters as the nature of their jobs and the overall structure of work-

place relations.⁴⁷ When workers view themselves as pursuing highly valued callings and exercising significant control over the risks facing them, they interpret those risks differently. For example, the same objective level of exposure to certain chemicals is understood and valued differently by research scientists, exposed during the course of carrying out basic research, than by laboratory assistants, who clean the hazards up after an experiment is complete. To the former, the risk's association with professional work that is highly valued socially, personally rewarding, voluntarily assumed, and connected to traditions of scientific inquiry might make eliminating that risk less pressing — particularly if the methods needed to do so (such as wearing certain equipment) would undermine valued aspects of a research career. From the external perspective of a policy analyst, the risk might seem the same, but from the inside, the risk involved has a different *meaning*; as a result, its reduction is *valued* differently. In general, interviews suggest that

[w]orkers find the risks they encounter more acceptable the more their managers have established relations of trust with them, the more they exercise causal control over their risks, and the more voice they have in determining the circumstances of risk (the precautions to be taken, the assignment of responsibilities for safety, and so forth).⁴⁸

These are real values, real experiences, to which democratic decision-making ought to be responsive; but the structure of cost-benefit analysis, especially when applied through centralized, elite governmental institutions, tends to preclude taking them into account.⁴⁹

Second, because the values we associate with health, safety, or life depend on contexts, demanding "consistent" valuations in different contexts is itself irrational. When comparisons are made between the imputed value of saving lives associated with different types of regulation, "the value" of safety and life is necessarily abstracted from different contexts. But "the value" of safety or life simply has no meaning abstracted in this way.

For example, social and legal norms require automobile manufacturers to spend substantial amounts of money to recall and repair defectively designed vehicles, yet do not necessarily require spending the same amount of money to improve nondefectively designed ones —

47. See D. NELKIN & M. BROWN, *WORKERS AT RISK* (1984) (collecting interviews about workplace risks). The discussion in this paragraph draws directly from Anderson, *Values, Risks, and Market Norms*, 17 PHIL. & PUB. AFF. 54 (1988).

48. Anderson, *supra* note 47, at 60 (citation omitted).

49. Again, I am *not* saying a policymaking approach sensitive to costs and benefits cannot be responsive to such concerns, but that this kind of responsiveness requires abandoning traditional forms of expert cost-benefit assessment. See *supra* note 40.

even if the same objective risk reduction for drivers would result. A manufacturer's failure to enhance safety significantly through investing another \$11 per ordinary car in precautionary equipment is not treated as irresponsible or illegal, but Ford's failure to spend that much to repair the defectively designed Pinto generated tort liability, criminal prosecution, and appropriate public outrage.⁵⁰ Qualitative distinctions between these contexts, central to our social and moral experience but not capable of being captured in cost-benefit analyses, account for the difference. Through legal norms and public policies, we have defined and created a baseline of legitimate expectations regarding the risks associated with driving ordinary automobiles; moreover, these baselines lead the resulting risks to be commonly viewed as voluntary. Against these baselines, *omitting* to take steps to make a car safer is not viewed as expressing contempt for human life. But a manufacturer that drops below this baseline through the undisclosed *act* of designing a defective car is perceived as acting reprehensibly, in part because the hidden defect negates the social characterization of the risk as voluntary. A cost-benefit calculus might justify similar safety expenditures, but the social meaning of refusing to make these expenditures in the two contexts differs radically. Human life is not being implicitly and irrationally assigned a different and grossly inconsistent value in these contexts; within our cultural understandings, the actions involved are viewed as qualitatively different in the most profound way — one respects human life and the other does not.

For similar reasons, consistent imputed values for health and safety need not be an item on a New Public Law agenda. From a social and political perspective, reducing workplace hazards rather than those associated with driving might be more valued, because the contexts of risk imposition are experienced as morally different. The settings contrast in their distributions of risk; the latter involves a more egalitarian distribution, while the former involves risks highly concentrated on the group of workers exposed. In addition, concentrated risks might generally be disvalued more than widely shared ones. Alternatively, blue-collar workers might be viewed as lacking sufficient options to treat them as having voluntarily assumed certain workplace risks, while we might characterize risks of driving as voluntarily assumed. These differences in moral and political judgment can rationally translate into different social valuations of the risks involved. (Here the problem is not the method of cost-benefit analysis

50. For an extended discussion of this example in the context of the well known Ford Pinto controversy, see Pildes & Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2150-51 (1990).

per se, but its extension by those who seek to "rationalize" public policy across different contexts.)

Consider again the differences noted above in the apparent social valuation of life reflected in speed limit (\$59,000) and certain workplace safety regulation (\$1.1 to \$9 million). What point is cataloguing these sorts of comparisons supposed to make? That the most cost effective way of saving life would be continued reductions in speed limits, rather than regulating exposure to toxic chemicals in the workplace? That we could save more lives at lower cost by eliminating automobiles? That we should eliminate workplace safety regulation altogether and concentrate on automobiles? But pursuing these "more rational" strategies for risk reduction would, of course, have enormous consequences for both the way we live and the values that structure our lives. Reducing maximum speeds to 30 miles per hour would radically alter mobility, urban living patterns, work and social relationships, perceptions of freedom, and much more.

Some of these consequences might readily be quantified along a single dimension, totalled, and compared, but many of the cultural and social considerations cannot be aggregated and evaluated this way. Deciding which changes are costs and which are benefits, as well as how to value and compare these changes, requires democratic choice. People can rationally choose to reject these social transformations, even while accepting more costly safety regulation that carries different social consequences and meaning. That is not to endorse the regulatory status quo, for particular existing regulations might well be the product of agency capture, information distortions, or other illegitimate factors. But to generally demand consistent health/cost trade-offs in different contexts is to violate the right of democratic citizens to define the kinds of cultural contexts they value.⁵¹

A third way of describing the cultural insensitivity of even progressive cost-benefit analyses is that they ignore the social meaning of *transitions* from one policy regime to another. Reflecting its origins in utilitarian thought and welfare economics, cost-benefit analyses involve comparisons of total welfare⁵² between two static states: that

51. See MacLean, *Risk and Consent*, in *VALUES AT RISK*, *supra* note 41, at 29 ("Perhaps the fear and opposition to certain large-scale projects has been misperceived because our attention has focused exclusively on safety risks. Perhaps the sources of the fear in some cases is about different kinds of risks to society, or the opposition may be to the way these decisions are being made."). For discussion of differences between expert and lay characterizations of risk, see Gillette & Krier, *Risks, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1070-86 (1990).

52. This, of course, leaves to the side questions about the relationship of actual welfare to the surrogates for welfare used in cost-benefit analysis, which are typically monetized estimates of costs and benefits.

without the proposed governmental action and that with it. If total benefits would exceed costs from constructing a new dam to generate hydroelectric power (taking actual environmental costs fully into account), cost-benefit analysis suggests construction ought to occur.

But the very act of publicly choosing to make this change can have significant expressive and cultural content. Under some circumstances, construction might widely be perceived to signal government's abandonment of environmental values and to raise the specter that this reduced public commitment will shape future public and private preferences on environmental and development conflicts. Perhaps people's preferences will adapt to the changed status quo; perhaps people will become less willing to sacrifice for environmental ends when they no longer perceive themselves as members of communities making mutual sacrifices; perhaps, as Brandeis said, government is the great educator, of citizens and bureaucrats alike. Public decisionmaking often implicates more than a quantum jump between two alternative end states: where the transition itself has social meaning, such as *affirmation* of new commitments, *abandonment* of prior obligations, or *recharacterization* of public priorities, cost-benefit analysis cannot capture its significance.⁵³

These cultural dimensions are often at stake in routine policy choices.⁵⁴ But suppose, for example, the choice arises during a time of particularly fevered conflict between environmentalists and developers. Then it might also be recognized as a symbolic (which means very

53. These consequences, of course, might lead in many directions, including toward a popular backlash against the government's apparent abandonment of prior public commitments; the result of the government's initial retreat might thus be even more fervent public environmental commitment. My point is only that, whatever the direction of these cultural and political consequences, cost-benefit analysis simply cannot take them into account. Nonetheless, they remain an important — perhaps central — dimension of many policy choices.

Legal transitions frequently involve the sort of expressive dimensions briefly noted in the text. This is one of the reasons an economic analysis of public compensation policies for legal transitions fails to explain actual compensation practices. See Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986). As an extreme, but telling, example, after extensive political debate, compensation was not paid for the legal abolition of slavery (at least to members of the Confederacy), for the meaning of the Civil War and abolition made compensation a morally "discredited" idea. See E. FONER, *supra* note 17, at 74. For a fuller analysis of the expressive dimensions of the choice to compensate and the forms compensation might take, see R. Pildes, *Law's Meaning: A Non-Economic Analysis of Legal Transitions* (unpublished manuscript).

54. Yale Kamisar, for example, has pointed out that contemporary debate over whether *Miranda v. Arizona*, 384 U.S. 436 (1966), ought to be overruled assumes that question to be identical to whether *Miranda* ought to have been decided as it was in the first place. But as Kamisar argues, overruling *Miranda* today would not merely restore a *status quo ante*; given the cultural role of *Miranda* since its inception, its demise would likely have widely perceived implications for police and public understandings regarding legitimate police practices more generally. See Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 MICH. J.L. REF. 537, 584-89 (1990).

real⁵⁵) test of the political power and support of the competing interests — not just as interests, but as representatives of conflicting values. Both might seek to use the conflict to enlist further supporters and financial contributions; more interestingly, both advocate distinct ways of characterizing public choices, of resolving conflicts in values, and of defining the appropriate aims of social choice. The outcome might well affect the future distribution of political power between the clashing groups. That is, specific political choices today are partly about the distribution of political power tomorrow: politics itself redistributes political power.

Logrolling and vote-trading, of course, have such effects, but these effects are more immediate, concrete, narrowly focused, and limited in scope and time than the ones I mean to emphasize. Political outcomes can more profoundly change the distribution of power for future political conflict by endowing today's victors with greater resources of several types for future struggles. The enhanced resources might be material: the byproducts of public policies and legal decisions, at times intended and at times not, are often redistributions of economic power. Sometimes these redistributions are immediately visible at macroscopic levels; sometimes they can be seen only microscopically, but the cumulation of such changes is still significant. Or the enhanced resources might be political: internally, success can enhance the credibility of a political group and the commitment of its members; externally, success can forge more enduring relations with politically influential public officials. Most important for my purposes here, the enhanced future resources flowing from today's political successes are often cultural: current decisions can structure the ways certain problems will be characterized in the future, the definition of what constitutes a problem at all, or the appropriate processes for resolving similar conflicts of value. Public choice today can crystallize social understandings in ways that structure the perceived context, meaning, and appropriate outcomes of choices to be made tomorrow.⁵⁶

55. My concern with the cultural dimensions of policy should be distinguished from Edelman's concept of "symbolic politics." See M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 7 (1964) ("Practically every political act that is controversial . . . is bound to serve in part as a condensation symbol. It evokes a quiescent or an aroused mass response because it symbolizes a threat or reassurance."). Edelman emphasizes the mass affective or psychological response to public choices and generally views "symbolic" political action as that which has little substantive, material effect but powerful emotional resonance. See also H. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* (1930). My focus is not solely the expressive dimensions of public policies, but the cultural consequences policies produce; on the ways day-to-day experience of these consequences after policies are adopted affects the policies themselves as well as social relationships; on the relationship between technocratic and democratic conceptions of value; and on the ex ante design of policy and policymaking institutions in ways that incorporate these concerns.

56. Closure, of course, is never achieved, which is why in both politics and law precedent is

Thus, the dynamic construction of norms as well as complex distributions of power are at stake in discrete policy choices. But to the cost-benefit analyst, whether a dam should be built has nothing to do with these considerations or the contingent political circumstances present at the time the choice is confronted. If more total social welfare will be found "in" State *B* than in State *A*, State *B* should be chosen. Seen in this light, even the most progressive cost-benefit analyses appear as a technocratic damper on the ongoing political and value struggles characteristic of vibrant democracies.

If these concerns are telling, they carry institutional implications. They suggest that efforts of some progressive public law scholars to ensure consistent cost-benefit assessments through more centralized decisionmaking are not only misconceived, but dangerous.⁵⁷ "Rationalizing" policy within and across different regulatory domains by making it even more responsive to the calculations of "experts" will only further collapse morally and politically relevant understandings into single-dimensional calculations; as a result, those understandings will be undermined and policy further distanced from the concerns of those affected. Instead, we need to find institutional frameworks that permit those affected to debate and define their own characterizations of the values at stake, their own valuations of those values, and the social and political meaning of the actions contemplated.

At this stage, I can only suggest in general terms the form such structures might take. Most important, they should be decentralized enough to facilitate more direct participation and voice for those whom policy will affect. This conceptual search should aim to create institutional understandings through which decisionmaking officials will recognize that policy expresses and therefore should partially reflect social understandings and cultural norms; that values are defined through these understandings and norms; that ordinary ethical experi-

at best momentarily stable. The important point is that present choices redistribute the capacity to influence future ones. To political actors this will hardly sound surprising, but it might partially explain the widespread resistance to cost-benefit techniques. That past choices influence the culture of future choices is not to be lamented, for democratic politics *is* continual redefinition of the values, understandings, and aims that constitute a particular society; democracy is about the development of ends, not merely the means to realize predefined ends, and this ongoing process typically works from within the understandings and values embodied in prior decisions. The extent to which "a society" is self-conscious of this aspect of democratic politics likely reflects the degree of social conflict or consensus perceived among its relevant groups, but the process takes place nonetheless.

57. As an extreme example of progressive new public law scholars pursuing strategies of "rationalizing" public policy through use of cost-benefit techniques, see Christopher Edley's casual suggestion that courts might *require* agencies "to evaluate regulatory alternatives using cost-benefit analysis." C. EDLEY, ADMINISTRATIVE LAW 231 (1990). For a critique of Edley's suggestion which recognizes the dimensions of public choice obscured in cost-benefit techniques, see Sargentich, *The Future of Administrative Law*, 104 HARV. L. REV. 769, 785 (1991).

ence is therefore central to determining the costs and benefits of policy; and that policy should respect meaningful differences between social contexts.⁵⁸

Lest these only briefly developed criticisms be misunderstood, I do not mean that sophisticated cost-benefit assessments have no appropriate role. Such calculations can help give more determinate content to *some* dimensions of the tradeoffs at stake in policy choices. Perhaps for some projects whose consequences are widely viewed as only instrumental, these assessments will incorporate all the relevant values and concerns. More generally, cost-benefit assessments provide one perspective on necessary tradeoffs, but they should be recognized as merely that: one of many, potentially competing, perspectives for democratic decisionmaking to address. In particular settings, cost-benefit proponents might convince others to accept their implicit characterizations of value. But only public debate and decision, rather than coercive appeals to the objectivity of cost-benefit assessments, should be permitted to determine the appropriate role of these techniques in specific contexts.

Many questions remain about how more participatory approaches to public policy might be channeled and structured.⁵⁹ I neither offer a comprehensive normative framework meant to close off further debate nor trust efforts to do so. My aspirations are more limited (hence, I would claim, more useful) and more pragmatic than that. As currently institutionalized, understood, and applied, cost-benefit approaches tend to impose expert assessments of "objective value" on the legitimate social experience of values. Hence policymaking increasingly seems in the hands of a narrow few; substantive policies often seem at war with the understandings and values of those affected. Demanding consistent implicit valuations of health and safety

58. For a proposal to this effect, see J. CAMPEN, *BENEFIT, COST, AND BEYOND* 191-212 (1986). Some cost-benefit proponents recognize the value of more participatory policymaking settings likely to generate decisions at odds with those dictated by traditional cost-benefit techniques. See Leonard & Zeckhauser, *supra* note 43, at 43 ("[I]t is not obvious that the [cost-benefit] mechanism is in fact better operated by 'technocrats.' We are not sure why centralized assessments, whether by technicians, bureaucrats, or consultants, should be presumed to be better than those of members of the community at large."). Although Leonard and Zeckhauser endorse more decentralized cost-benefit assessment processes, this essay offers a quite different understanding and justification for why those affected by policy ought to be more directly involved in its development. The transaction and administrative costs of more participatory forms of decisionmaking are well known and necessary to consider but cannot be addressed here. In addition, certain public risks pose special challenges for democratic institutional design; first, their effects may be irreversible yet latent for many years, calling into question the incremental and trial-and-error strategies characteristically associated with democratic decision, and second, the geographic scope of certain public risks does not neatly fit existing political jurisdictions. See Gillette & Krier, *supra* note 51, at 1105-09.

59. I address one such question *infra* at text accompanying notes 80-81.

in different contexts, for example, erodes what are experienced as important moral differences between those contexts.

Given current policymaking practice and advocacy, the need is to *begin* to have the actual, diverse experiences of value in discrete contexts taken *more* seriously. Undermining the familiar technocratic view that value is objective seems a useful place to start. Whether the *theory* of cost-benefit analysis might be reconceived to accommodate my concerns is too complex to address.⁶⁰ The fact is, current practices do not. It is to those practices that my current arguments respond. Once policymaking begins to take the actual experience of values more seriously, there will be time enough to refine and qualify as more subtle concerns emerge. That is a claim about the relation of theory to practice: we need not survey all the topography ahead to begin moving in the right direction.

III. THE CULTURAL DIMENSIONS OF POLICY III: THE SOCIAL DEGRADATION OF WORK THROUGH PROGRESSIVE LEGAL CHANGE

The structure of public programs not only shapes their general social meaning. Legal norms and public policies also condition the local experience of work itself, both for those in public programs and for private workers whose environment is increasingly determined by changes in the legal background. So, too, the interactions between public administrators and the clients with whom they deal are structured through legal norms. In some general sense, law today is experienced as more pervasive, more demanding, more imbricated in the day-to-day contexts of work for more people.⁶¹ This increasing reach of law has often been prompted by genuine failures in public and private institutions: lack of accountability, refusals to honor rights, inefficiencies, inequalities in treatment, rampant subjectivity, inconsistent actions, and the like. Nonetheless, we are increasingly recognizing

60. In significant part, the answer depends on how "cost-benefit" theory is defined. If defined as it is in almost all contemporary policy-science approaches, the answer is no. See *supra* note 40.

61. In a theoretical sense, of course, law has always structured public and private work settings. Even Legal Realists, who had little sense of the culturally constitutive role of law, recognized as a logical matter that law necessarily defines the entitlements and contours within which social and economic interaction take place. See, e.g., Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). In this conceptual sense, there can never be "more" or "less" law in any environment, public or private, because the failure to exercise the potentiality of law is itself an aspect of law. I am speaking instead of the actual experience, the felt sense, of the reach of law. Changes in common law doctrine from negligence to strict liability that impose more stringent obligations on defendants, for example, do not conceptually increase the "net amount" of law, but seem likely to be experienced as doing so.

that unintended, but troubling, cultural consequences can ensue from legal strategies for dealing with these failures.

In legal scholarship, this story has been told with the most detail and sophisticated sensibility in William Simon's work on the transformation since the 1960s of the welfare system.⁶² During the 1960s, liberal reformers became concerned with the discretionary powers that welfare caseworkers exercised. Caseworkers used these powers to create relations of personal dependency, to impose their own conceptions of morality on benefit recipients, and to deny benefits on racist grounds. Some of these concerns could be traced to the substantive norms of statutory law then prevailing; others were viewed as agency costs facilitated by the administrative discretion for line-level caseworkers built into the system. During the 1970s, conservatives became increasingly vocal about other perceived problems, including inefficiencies and waste in the system.

The confluence of these demands led to the legal restructuring of welfare administration. As Simon emphasizes, these restructurings not only were codified *through* law, but *reflected* a general, widely shared⁶³ vision of legality and administrative organization. This vision embraced and sought to institutionalize the values of formality, equality, consistency, and privacy.

To reduce discretionary decisionmaking, the substantive eligibility standards were formalized as entitlements in more rule-like, categorical terms, with more tightly specified, objective triggering criteria determining eligibility. To reduce oppressive moralizing as well as gain tighter control over benefit payouts, tasks were specialized and labor divided; counseling and financial assistance roles were parceled out so that caseworkers would occupy only the latter. To control waste, productivity standards were developed and enforced. To enhance equality, consistency, and efficiency, an elaborate quality control system, based on business management techniques, was imposed. With the use of statistical methods, fiscal sanctions, and extensive oversight by higher levels in an increasingly stratified administrative structure, caseworker decisions were more aggressively supervised.

In sum, Simon describes an increasingly Weberian bureaucracy — one characterized by a rigidly hierarchical organizational structure and driven by aspirations to legal rationality and formality. Whatever the benefits of these changes, they also transformed the experience of

62. See Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

63. At least among lawyers, including lawyers and legal reformers with quite different political orientations.

both caseworkers and program beneficiaries. Some of these specific changes were intended, but the broader transformations were not.

The relationship of caseworker to client changed from a personal one involving professional judgment and, in good circumstances, some degree of care, counseling, and trust, to a more impersonal stance. Because the performance of caseworkers was measured against general standards whose application in individual cases was interpreted by administrative supervisors, the incentives of caseworkers and hence their understanding of their roles came to be defined in terms of general, overarching, programmatic goals rather than in terms of individualized client needs. While professionally trained social workers had previously sought and filled caseworker positions, caseworkers came to be "socialized to think of the role as characterized by routine, unreflective judgment and responsibility only to hierarchical organizational authority" — in the words of one observer, "bank tellers" replaced social workers.⁶⁴

As experienced by claimants, the system became less able to take into account their individual circumstances, more mysterious, and more Kafkaesque.⁶⁵ Division and specialization of labor meant that claimants lost the continuity of personal connections and began to be shunted from one office to another. Objectifying entitlement conditions led to extensive, often senseless documentation requirements replacing more informal modes of presenting evidence. Because caseworkers were explicitly taught and implicitly moved to redefine their role away from purposeful interpretation of norms in individual cases, for claimants "the system" became a system: uninterested in their particular needs, individuality, and circumstances.

These changes, it must be emphasized, might have been byproducts of genuine improvements in the administration of welfare. Such costs might have been worth the gains.⁶⁶ But they might not be, and at the least we ought to recognize the reconstructed system as a second-best rather than some costless ideal of legality (leaving aside, as this discussion does, debate over substantive welfare policy). More generally, Simon's microscopic history of welfare reform offers two general cautionary tales that New Public Law scholarship might pursue.

First, traditional legal values such as consistency, generality, objec-

64. Simon, *supra* note 62, at 1216 (quoting the Director of Labor Relations of the Massachusetts Welfare Department).

65. *Id.* at 1199.

66. Simon argues that in fact these reforms did little to realize their stated goals, but I find his analysis on this point less developed and, partly for that reason, less persuasive.

tivity, or equality are not the only values at stake in public programs. At times, single-minded pursuit of these values erodes others. This has increasingly come to be recognized in the regulatory field,⁶⁷ but it applies to public benefit programs and elsewhere. Indeed, the problem is as much cultural as legal, for efforts outside public law to "rationalize" various institutions and practices to ensure consistent compliance with highly general and objective norms are increasingly common. In many areas, the nonquantifiable consequences of these reforms are bleak.⁶⁸ Legal reformers, in particular, need to become attuned to the danger of myopic professional arrogance about the dominance of traditional legal values; policymakers and legal advocates often work at the most rarified levels of public programs, rarely forced to confront the ground level cultural reverberations of their triumphs.⁶⁹

Second, the rules/standards debate in law over the appropriate form of legal norms needs to be enriched to include the sociological, psychological, and dynamic consequences of these choices in different contexts. Much of the scholarship in this area focuses on epistemological questions about the possibility that norms can be expressed in rule-like form. Other work focuses on the relative efficiency of rules and standards. Still other work asks whether rules or standards "better" comport with abstract concerns of institutional role and competence. These types of inquiries, however, ignore what seems the most significant dimension of the choice for the actual implementation of public programs: how the form in which public norms are expressed shapes the understandings and experiences of those carrying out as well as those touched by public programs, and hence ultimately colors the general experience and success of policy itself.

67. See E. BARDACH & R. KAGAN, *GOING BY THE BOOK* 3-119 (1982) (describing detrimental consequences from the formalization of OSHA inspection policies, which required line-level inspectors to "go by the book" in implementing regulatory norms); Stewart, *supra* note 38.

68. For one such account in a surprising field, consider the transformations in professional basketball officiating described by Earl Strom, recently retired and highly respected in his professional role. According to Strom's account, recent efforts to ensure "consistency" of decisions among referees, including requiring that the rules of the game be applied in the most acontextual, objective, categorical ways and that superiors extensively review decisions to ensure that the rules are being applied this way, have not only eroded the sense of professionalism among referees, but subtly eroded the quality of the sport itself. Strom & Johnson, *How to Call 'Em Like a Pro*, *SPORTS ILLUSTRATED*, Nov. 5, 1990, at 124.

69. For example, Richard Pierce advocates that courts cede to centralized political actors greater discretion to impose on Administrative Law Judges techniques of "management science and quality control" which seek to enhance the consistency and productivity of their decisions. Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 501-15 (1990). Whatever the merits of such proposals, their failure to address the sorts of nontechnocratic, cultural concerns raised by Simon's careful case study suggests current public law scholars have yet to absorb such perspectives on policy.

One unexplored area to which public law scholars might apply these perspectives is the recent legal and regulatory transformation of American medicine.⁷⁰ Law, policy, and economic forces are radically restructuring that profession — in ways and with consequences that resonate with Simon's depiction of welfare administration. Yet legal scholarship has not begun to address the role of law in reshaping the cultural matrix within which medical care is provided. Perhaps public law academics view doctors as privileged elites, or these changes as merely working desirable economic redistributions, or nationalized health care as the only debate worth engaging in this area. But significant social consequences loom, manifested in part by the remarkable twenty-nine percent decline in medical school applications between 1974 and 1988 — a decline anecdotally attributed to the changing context of care, with current doctors and others reportedly having tried to dissuade eighty percent of even those who nonetheless decided to enroll.⁷¹

Briefly put, the major changes include the law of malpractice and, more important, the culture of malpractice law;⁷² increasingly aggressive oversight of the exercise of professional judgment by large institutions, including the government and private insurers; and the more general emerging influence and control of the field by large, often distant and hierarchically structured corporate entities.⁷³ The legal

70. The "public law" label is particularly obscuring here, for public institutions, of course, are involved in restructuring the private practice of medicine. Empty public/private distinctions aside, the area remains one worthy of serious legal attention.

71. Johnson, *The Gates to Medical School Open Wider as Fewer Knock*, N.Y. Times, Aug. 14, 1988, at 1, col. 1; see also Libov, *The Medical Profession Has Changed*, N.Y. Times, Sept. 18, 1988, § 12CN, at 3, col. 1.

72. This story is too complex to tell here, but changes in the substantive legal norms governing medical practice are not as significant as is often assumed. Of such changes, the most important seem to be those making the duty of care less a "local community" standard (thus not only imposing more stringent standards of liability but enhancing the pool of doctors available as witnesses for plaintiffs), some slight changes in the application of *res ipsa loquitur*, and more aggressive interpretations of informed consent requirements. The most significant practical effect of the latter seems not to be in legal outcomes, since these cases reportedly only rarely result in plaintiffs' victories, but in the nature of the doctor-patient interaction and in testing, documentation, and consultation practices.

More important changes might be described as cultural, such as the willingness of doctors to testify against each other and the erosion among patients of norms of deference to professional expertise and authority. I also suspect (though this would be difficult to document) that changes in the underlying understanding of the goals and justifications for tort law, reflected in the general emergence of products liability law and the rebirth of strict liability, affect judicial attitudes even in negligence cases — as in medical malpractice — on issues such as directed verdicts, judgments notwithstanding the verdict, and the like.

73. Evidence of the development of these practices — and emerging legal responses to them — is chronicled in *Wilson v. Blue Cross of S. Cal.*, 222 Cal. App. 3d 660, 271 Cal. Rptr. 876 (1990). There a treating physician concluded that a patient suffering from major depression, drug dependency, and anorexia needed three to four weeks of in-patient care. After 10 days, the patient's insurance company determined that further hospitalization was "not justified." Be-

dimensions of these changes reflect progressive goals, such as making doctors more accountable, responding to market failures from third-party insurance schemes, and generally assuring that public and private funds are well spent. But pursuit of these progressive aims has generated unintended cultural consequences, many of them similar to those in welfare administration.

The doctor-patient relationship has reportedly become less personal and more adversarial. Government insurance programs are structured through categorical, rule-like coverage limitations, leaving little room for the exercise of professional judgments in individual cases; for example, certain procedures not generally viewed as medically necessary will not be reimbursed even when doctors view them as medically appropriate in specific, unusual contexts. Efforts to avoid unnecessary expenses have led to demands for consistency in treatments and costs across patients. To enforce these demands, a form of "quality control" has emerged, known as "utilization review," which requires doctors to justify their treatment and hospitalization decisions to members of public and private bureaucracies who face their own organizational incentives.⁷⁴ In turn, to meet these demands doctors now devote considerable resources to consulting with each other, extensively documenting their actions, and justifying their exercise of professional judgment to others.⁷⁵ Declining interest in careers as doctors, disaffection among those already practicing, and increasing dissatisfaction among patients and doctors with their relationships appear among the results.⁷⁶

As in the welfare area, I cannot assess whether the changes in the

cause the patient had no other insurance coverage, he was discharged; 20 days later he committed suicide. The court reversed summary judgment for the defendant and held that an insurance company can be liable in tort if it negligently overrides a treating physician's professional judgment, and if that negligence is a substantial factor in causing injury.

74. See, e.g., *Insurers vs. Doctors: Who Knows Best?*, BUS. WK., Feb. 18, 1991, at 64-65 (describing corporate efforts to make medical decisions more "scientific," including the emergence of "review companies" that compile data on treatment strategies in different regions and hospitals and then assist insurers in enforcing demands for nationally uniform, consistent treatment decisions).

75. Because there has been little legal writing on these issues to date, the information in this paragraph rests in significant part on private conversations and anecdotal evidence. For some published confirmation, see Cohen, Wade & Woodward, *Medical-Legal Concerns among Canadian Anaesthetists*, 37 CANADIAN J. ANAESTHESIA 102 (1990); see also Johnson, *supra* note 72. According to one *New York Times* article, patients report increasing problems with doctors. "The doctor has an uncaring attitude. He's gruff. He's brusque. He's arrogant. He doesn't listen." The changes described in text are cited as offering some explanation for these apparent changes. Libov, *supra* note 72.

76. At this stage, I only mean to raise concerns for legal scholars about the possible cultural consequences of changes in the background conditions of medicine; I cannot establish that the claimed causal connections do exist. Certainly doctors' incomes are also affected by these changes, but I am not concerned with that shift or its effects.

ways doctors experience their profession or patients and doctors experience their mutual relationship justify the benefits associated with the regulatory and legal sides of the transformation of medicine. I am convinced, however, that we need more work examining the personal and social implications of legal change in different contexts. But as a general agenda, public law scholars might begin to focus on the cultural costs wrought through imposition of the universal and abstract legal values of formality, consistency, equality, efficiency, and the institutional forms — bureaucratic, hierarchically structured, rule-enforcing primary or supervisory organizations — this dominant vision of legality tends to reflect and generate.

IV. TECHNOCRACY, DEMOCRACY, AND ANTICIPATED CONCERNS

The ideas offered here are meant to be speculative and suggestive, rather than fully developed and justified. In general, I am skeptical of the search for comprehensive normative frameworks to guide public policy, frameworks designed in advance of specific problems to dissolve all potential ambiguities or settle all doubts. Public policy issues seem too contextual, too refractory to yield to such frameworks; at most, I believe, public law scholarship can pragmatically strive to reorient policy debate toward values and perspectives inappropriately neglected under current circumstances. Even so, certain likely challenges can be anticipated. Perhaps a few initial words in response will help clarify the theory and justifications underlying the specific proposals in this essay.

A. *Isn't It Dangerous To Advocate Replacing "Objective Value" with Actual, Diverse, Individual Experiences of Value?*

I have argued against the view that any objective value can be assigned to particular policy outcomes. Instead, "the value" associated with any state of affairs depends on how that state is experienced, characterized, historicized, and interpreted by those affected. From that theory of value, I have moved to embracing more democratic institutional structures than those relying on policymaking expertise.

But extolling the "subjective experience of value" might lead to concern that policy will be held hostage to the unmediated private preferences of individuals. Cognitive psychologists, economists, and social philosophers have chronicled numerous ways in which the legitimacy of relying on these preferences might be questioned: they might reflect the particular history and conditions under which they were formed, limitations on information or information-processing capacity, cognitive biases and the like. In this sense, private preferences

might be "irrational" or "distorted." Moreover, the legitimacy and justice of democratic choice in general is complex, given concerns for minority interests and the preservation of certain substantive values associated with individual dignity and self-development; for example, direct democracy, in the form of voter initiatives and referenda, has been challenged on just these grounds.⁷⁷ Don't these limitations to democracy pose substantial difficulties for the proposals in this essay?

These kinds of objections do not seem to challenge the epistemological foundations of my claim as much as its prudence. That is, even accepting that value cannot be objective, perhaps institutions should be designed as if it is; the resulting policies might likely be "better" than those from other means of public choice.

Two partial responses, however, can be quickly noted. First, the characteristic concerns of democratic theory for minority interests and individual rights remain ones for all democratic institutions: representative ones, directly democratic ones, or elite ones ultimately subject to democratic control. Institutional checks and substantive guarantees have been devised to attempt to deal with these concerns in some contexts; no *a priori* reason suggests they could not be similarly designed for a more participatory public policy.

Second, challenges to the potential "irrationality" and "distortion" of individual preferences potentially extend to expert valuations as well.⁷⁸ Nothing yet suggests experts are more immune than others to such potential distortions as adaptive preferences, counter-adaptive preferences, and the like. Thus, noting potential defects in preference formation in general is not in itself an argument *for* any particular means of public choice. Moreover, the kind of preference that should be viewed as "irrational" or "distorted" is part of what I mean to call into question; merely because an outside "expert" would declare a view irrational does not make it so. For example, in marginal cost-benefit terms it might not be rational to reduce a risk below a certain level, given the "objective" remaining risk to health. But if the result-

77. See, e.g., Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978). But see B. BARBER, *STRONG DEMOCRACY* 282-83 (1984) ("While Madisonian theorists have stood trembling at the prospects of a leviathan public running amok in schoolrooms filled with voting machines, students of the referendum's practical effects have been offering more soothing pictures."). Barber's study, of course, predates more recent and perhaps more troubling experience with referenda in states like California.

78. See Gillette & Krier, *supra* note 51, at 1093-99 (summarizing studies showing distortions in expert assessments of risks). In addition, even "undistorted" expert evaluations of risk rest on certain conceptions of rationality apparently not widely shared; privileging these expert conceptions of rationality (over ones more generally relied upon in ordinary decisionmaking) requires independent justification. See Noll & Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 778 n.42 (1990).

ing level of risk still generates considerable anxiety and fear, that actual experience and perception might nonetheless justify further reductions. Diminishing anxiety and fear are not necessarily irrational aims of public policy — whether those fears themselves are “rationally” grounded or not. That is not to say such fears necessarily should be relevant to public decisions, for relevance cannot be assessed abstractly but only in the context of specific choices. At the least, though, actual experiences like these should not be dismissed in advance.

More generally, expanded participation in policy tradeoffs can still be institutionally channeled and structured. Just as the Constitution was designed to facilitate deliberative decisionmaking at the level of representative political institutions, for example, structures for more democratic public choice ought to encourage deliberation as well. Experiences of value depend on how the setting of choice is characterized: its history, meaning, and significance. Those characterizations should be part of public debate, rather than precluded by characterizations implicit in the perspectives of experts, but debate is still required to decide which characterizations to accept. The illusory spectra of policy dominated by unmediated, unjustified, rampant subjectivity of experience and value need not validate decisionmaking by trained elites.

B. Isn't There a Fundamental Inconsistency Between the Justifications for My Different Critiques and Proposals?

Arguing against the possibility of objective assessments of value in Part II might seem to undermine the critiques of specific public policies developed in Parts I and III. If public values cannot be objectively assessed, where is the critical leverage for the reforms I suggest; in what sense can they be justified? Doesn't accepting the arguments in Part II erode the possibility of objective, critical standards against which public policy can be evaluated? A similar challenge can be put from another direction. Emphasizing the relevance of ordinary understandings to public decisions suggests that policy should reflect existing perspectives; yet several proposals in this essay seem to override the values already expressed in current public programs. To turn my own language against me, perhaps many people today are “contractarians” who value living in a political culture that permits them to buy in and out of public programs. Doesn't abandoning commitment to objective conceptions of value erode the legitimacy of challenging *those* preferences?

Two conceptions of objectivity must be distinguished to disentangle

gle these concerns. Values might be objective if they could be derived through demonstrative, logical proof that begins from uncontroversial axioms or unmediated sensory experience. Rejecting this traditional foundationalist view need not, however, entail lapsing into a wholly relativistic stance in which values are seen as nothing more than purely subjective, unjustified and unjustifiable private tastes. Instead, we can conceive a middle course between these poles, one that might be described either as transcending the traditional objectivity/subjectivity dichotomy or, instead, as offering an alternative conception of objectivity.⁷⁹ In this alternative, the only meaningful sense in which values can be objective is that they are embraced, affirmed, and respected *within* the understandings, practices, norms, and institutions of a particular political community. That is, criteria remain available for evaluating public policies or legal norms, but these criteria are internal to our own political culture: to other widely accepted public programs, to traditional understandings still affirmed today, and the like.

I mean to reject the first conception of objectivity and endorse the second. Cost-benefit theory also purports to reject the first conception, yet interestingly turns out implicitly to depend on it. The theory, offered as a pragmatic, hardheaded, anti-ideological approach to policymaking, seems to abandon "objective" theories of value in making costs and benefits rest on subjective, contingent valuations, such as willingness to pay (explicit or imputed). But as I have tried to show, the technique necessarily requires that the complex characterizations implicated in public decisions — the values perceived to be at stake, the contextual meaning of the decision against the history that conditions it — be aggregated along a single dimension and then commensurated with each other. At its core, then, cost-benefit theory is committed to the view that the apparent diversity of public values can be reduced and redescribed in this single dimensional way. To justify this commitment, cost-benefit theory must assume there is a right way to characterize the context of public choice and to fold apparently diverse considerations into a single dimension; belief that these are uncontroversial assumptions sustains cost-benefit techniques. In this sense, then, faith in the possibility of objective *characterizations* of choices and objective *means* of aggregating and commensurating values is central to cost-benefit approaches.

79. The attempt to develop such alternatives links the various "reconciliatory projects" in contemporary intellectual thought that Frank Michelman chronicles in Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 31-36 (1986), discussed in Eskridge & Peller, *supra* note 1, at 758-761.

If these views were widely shared and validated in publicly accepted norms and practices, they would be objective in the sense I find meaningful. But the kinds of characterizations and techniques in cost-benefit methods in fact embody a complex set of moral, cultural, and political judgments that are deeply controversial and far from shared.⁸⁰ Indeed, much to the frustration of policy analysts, cost-benefit approaches are consistently viewed as wreaking havoc with ordinary understandings and public aims; Congress continues to reject them in most regulatory contexts. In every setting, then, such approaches need to be justified and democratically approved as the basis for choice, rather than being coercively imposed in the name of rationality.

The second, internal conception of objectivity not only informs the critique of cost-benefit analysis in Part II, but the constructive policy agenda in Parts I and III. My suggestions draw on understandings embedded in past public decisions and appeal to values and concerns widely affirmed but often ignored in policy. By looking to the history of military-service plans to formulate challenges to current mandatory *pro bono* proposals, for example, I mean to confirm that structures of public programs have an expressive meaning and that choices more consistent with general cultural values can generate more support for programs, more satisfaction with serving in them, and more effective delivery of goods. The justification for such choices, then, is neither some general, external set of objective criteria nor a static appeal to what people today — before legitimate experience of these programs — would endorse.

I believe my proposed reorientation of public law thinking draws on values broadly shared if underappreciated in scholarly and policymaking circles. Even so, further, more difficult epistemological challenges remain. For example, current contractualized structures do find significant support. Similarly, while I believe many would accept my critique of cost-benefit techniques, those techniques are also widely advocated. In conceiving objectivity as I do and in appealing not just to existing values but to those that different policy choices might bring about, I recognize that values are in flux. At base, then, the demand that my proposals be “consistent” is a demand that I provide a general, theoretical answer as to which preferences or values

80. Indeed, I have argued at length that the ways in which many public values are actually understood and experienced in our culture does preclude their being able to be aggregated and commensurated in the way cost-benefit analyses, or economic analyses more generally, require. See Pildes & Anderson, *supra* note 50, at 2145-66.

policy ought to follow, when the values at stake are dynamic and perhaps adaptive to the choices we are trying to make.

In my view, that poses the most significant philosophical problem of our time: how can collective decisions be justified in the absence of external standards for justification and with the knowledge that current values can be endogenous to the very decisions we are seeking to justify. I have no answer to it. I am skeptical, again, of any effort to answer it through general, consistent, theoretical formulations. But time seems an important touchstone; if reconceived public structures fail — not initially but after experience under appropriate conditions — to elicit significant support, I would offer no further justifications to bolster them. Yet critics should note that, so too, if cost-benefit techniques fail to find general acceptance, despite their advocacy and frequent use, those techniques ought to be abandoned. Beyond that, I have no general, overarching, externally “objective,” critical framework that consistently rationalizes my proposals and critiques. But it might be worth reflecting whether such demands for consistency contribute to creative rethinking of the regulatory state’s pathologies.⁸¹

CONCLUSION

This Symposium reflects skepticism about whether a New Public Law scholarship is emerging, what its philosophical, ideological, and policy commitments might be, and whether legal academics have the resources to generate distinctly legal perspectives on public policy. A common tenor in many of the articles is uncertainty about how these challenges should be resolved. In my view, it is still too early to seek the answers, for until we begin the hard work of examining concrete public programs and policymaking techniques, our ability to incorporate general, theoretical insights into a reconceived public policy will remain unknown.

Others in this Symposium similarly urge a more specific, “policy-based scholarship.”⁸² But their aspirations seem to be for legal scholarship that competently replicates the familiar, instrumental, technocratic thought of traditional policy science — albeit with a focus on problems peculiarly of interest to lawyers. Developing New Public Law scholarship in this direction, however, is unlikely to address disaffection with the modern regulatory state: as I have tried to argue,

81. Cf. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 478 n.70 (1974) (“there is no meta-ethical rule that morality be logically elegant . . .”).

82. See Rubin, *supra* note 2, at 831.

exclusive focus on the instrumental consequences of policy *is* one of the pathologies of the current regulatory state.

Taking cultural consequences seriously affords another possibility. Pursuing that possibility would not only draw on the distinct insights of modern legal thought, but might be a special obligation of legal academics. For, as this essay has suggested, past success at institutionalizing traditional legal approaches and values is one of the principal sources of the disturbing, unintended cultural consequences of contemporary policy. Yet, perhaps paradoxically, contemporary legal scholarship, far more than economics or public policy thought, is aware of the plurality and conflict of values beneath public decisions and the constructive character of public law. Developing these central insights into specific critiques of actual public programs, policymaking techniques, and decisionmaking institutions will determine, I believe, whether we see the emergence of a genuinely New Public Law.