Legislation Distribution I

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http://hdl.handle.net/2144/20677

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CHAPTER III
METHODOLOGIES FOR CRITIQUING AND JUSTIFYING LEGISLATION

INTRODUCTION

PROBLEM

From: Director, Drafting Section.
To: Drafter.

Senator McQuade has asked us to consider the problem of youth unemployment. That unemployment among young people, especially black, has reached crisis proportions, hardly needs additional demonstration. The Senator wants legislation to address that problem. Please give me a memorandum suggesting legislation to answer the Senator's request.

NOTES AND PROBLEMS

1. To answer the Director's memorandum, what steps would you undertake, and in what order? Answering that question constitutes the theme of this Chapter.

2. An adequate check list for writing a competent memorandum supporting legislation tells the author what information to include (and what to exclude) from the memorandum. As appears in the succeeding Reading, as its principal function, theory ought to guide a decision-maker to determine what factors merit investigation. An adequate theory of legislation, therefore, ought to serve both purposes. In this Chapter, we begin the investigation of an adequate theory of legislation.

3. What does it mean to "think like a lawyer" about legislation? All efficient thinking requires —

(a) an agenda that, if followed, likely leads to useful solutions to the sorts of problems addressed;

(b) an overall perspective that explains how things work in ways relevant to the subject-matter; and

(c) a set of concepts (vocabulary, categories) appropriate to the subject matter.

As Seidman discusses in the next Reading, these same three elements constitute a "theory".

3. In this Chapter we discuss alternative methodologies -- ends-means, creeping incrementalism and problem-solving.
Throughout, this book presents alternative theories and analyses, and try to induce the reader to debate them and finally which makes the most sense for our purposes.

Why does the book discuss alternatives instead of telling the student what the editor thinks best? The book does this for two principal reasons: First, teachers have a moral obligation not to impose their judgments of what is good upon their students. Of course the editor, like all teachers, has his own view of which of these methodologies best serves the purpose of designing competent legislative programs -- this book settles upon the problem-solving methodology, and uses it throughout the volume. The reader, however, may disagree -- many practitioners do disagree. The book attempts to give the reader an opportunity to make up her own mind. It cannot do that unless, as fairly as possible, it presents the reader with these alternatives.

Second, as a matter of good teaching, students learn in the context of debate and controversy. Students should actively argue over which of these theories will best serve the purposes for which we employ them. Only so can students learn the critical habit of mind -- and without that habit of mind, they will never think creatively. Without critical, creative thinking, a lawyer in the legislative system hardly contributes very much.

THE MEMORANDUM OF LAW AND LEGISLATIVE THEORY:
AN INSTITUTIONALIST APPROACH
Robert B. Seidman

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C. THEORY.

This subsection discusses, first, two general criteria for an adequate theory that addresses the ideal element in legislation; second, the function of such a theory; and, third, the difficulty that such a theory must address. The succeeding section discusses the elements of theory.

1. Criteria. What constitutes the criteria of an adequate justification? This section identifies two overriding criteria: It build in the potential for self-correction, and it must have at its foundation reason informed by experience.

What people believe constitutes an adequate justification differs from era to era. In ancient Greece, many believed that a decision had adequate grounding if it came from the babbling of a crazed old lady at the Oracle of Delphi. In more recent times, people have believed that it validated a decision that a Great Leader made it.
World-wide social experience, however, teaches that some rather than other justifications lead to better decisions. In particular, in our time, in social affairs, decisions based on practical reason — that is, reason informed by experience — have proven their power to come to sound conclusions more reliably than any other. By such a decision I mean one which rests upon propositions that experience warrants. Whoever decided that a hammer might take the marvelously different forms it does — the carpenter's claw hammer, the ball peen hammer, the lather's hammer, the cabinet-maker's Warrington Pattern hammer, the furniture-makers magnetic tack hammer, and so on and on and on? Without experience, nobody ever dreamed that a hammer ought to take another shape. Always, the decision to redesign the hammer rested on reason reflecting upon experience. "We are not bemused by the fact that a hammer is an instrument devised in action for the purposes of action, and improved in action for the purposes of action that themselves improve with the improved possibilities that the hammer's improvement opens up." ¹

So it might become with our notions of what counts as an adequate grounding for a policy decision. "The evaluatory enterprise, like that of science, can have a humanly significant, ongoing, self-corrective career." ² Mostly, however, it does not. To learn from experience not only about hammers but also about policy requires that policy find its basis not merely in power, but in reason reflecting upon experience. That denies social power-structures.

Almost all decision-making institutions in our society have a hierarchical structure. We are born in hierarchically-organized hospitals, we receive our education in hierarchically-organized schools, we work in hierarchically-organized enterprises, when we die we go to rest in hierarchically-organized cemeteries. The very conditions of property ownership give a few individuals, the owners, with power to determine ends, and the rest of us, at best the power to determine means. Despite our democratic pretensions, we extrapolate from daily life to the

¹ N.E. Long, Foreword to E.J. Meehan, Value Judgment and Social Science (Hopewood, Illinois: Dorsey Press, 1969) v, vii; cf. Gadamer, note xx, at 355 (experienced person proves to be not someone who knows everything and knows better than others, but a person "radically undogmatic; who, because of the many experiences he has had and the knowledge he has drawn from them, is particularly well equipped to have new experiences and to learn from them. The dialectic of experience has its proper fulfillment not in definitive knowledge but in the openness to experience that is made possible by experience itself."

² Long, supra n. xx, at vii
political order, and reaffirm in our social practices Ulpian's dictum that "because it pleases the prince, it has the force of law." The rejection of rationality in favor of power as the principal mode of policy-making reflects the interests of power and privilege.

Most legislative decision-making agendas respond to those interests. Most rest upon a positivist epistemology and its correlate, an ends-means methodology. Both assert that in the end policy cannot help but rest not upon reason but power. Positivism tells us that we cannot use experience to discipline value-choice. Ends-means orders the drafter to seek ends prescribed higher authority, and places them outside the range of interrogation by research. Both respond to hierarchy, in which superiors give orders to subordinates, and the subordinates can only determine the best way to carry out the superior's orders.

Drafters have no legitimate authority. In practice, however, They cannot justify their bills by ipse dixit, but only by persuasion in a rational mode. As its first criterion, an adequate theory for decision-making in a rational mode must provide devices for its own constant testing against experience, and improvement in the light of reason informed by experience.

The second criterion derives from our social experience with decision-making. The track record of decisions resting on reason informed by experience seems better than the record of those based on irrational justifications. We generally do better deciding about what sort of hammer to create than what sort of public policy to adopt. Most people would not want to return policy to the Oracle of Delphi.

"Reason informed by experience" implies that decisions and their groundings must have a basis both in reason and experience (that is, data). What constitutes an adequate justification in terms of reason grounded by experience? To answer that question requires an understanding of theory's function.

2. Function. No general agreement exists upon the appropriate function of theory. In practice, whether admitted or not, all legal theory has, among others, a normative function: Explicitly or not, (usually explicitly), their authors perceive theory as a guide to legal actors, whether in their judicial,


4 See below, text at n. xx.

5 See below, text at fns. xx to xx.
legislative or administrative roles. This section discusses three perceptions of how theory guides law-making: Metaphorical, critical, and heuristic.

a. The Metaphorical Function. Some writers -- law and economics theorists seem especially prone -- justify policy proposals by appeal only to a logical construct that they call their theory.6 The formula that computes the acceleration of an object falling in an absolute vacuum (which never exists in reality), nevertheless predicts fairly accurately the speed of heavy objects falling in the atmosphere. In the same way, in policy-making by metaphor, the decision-maker's construct need bear no relationship to reality. Its test has a dual thrust: the theory's logical coherence, and its capacity to predict most of the time.7 Policy-makers in this tradition examine an existing situation, decide that it resembles in some aspects their logical construct of a competitive market, and then propose a legislative solution based on that construct. They take their construct of a free market as a metaphor for the existential situation -- the real world behaves "as if" it were their construct -- and then propose policies based, not on the real-world position but the metaphor.8 Professor Makgetla9 wrote that it as if a swain said that his love was like a red, red rose, and then wooed her with dew and well-rotted fertilizer.10


7 Friedman; Posner; but see critics [mentioned in Makgetla and Seidman on L & E]. Even the analogy to the free-falling object, beloved of writers in this strain, see, e.g., Posner. . . . does not hold. A ballistic missile in whose design the engineer did not take atmospheric forces into account would miss the target, and likely the engineer would soon be sending out job resumes.

8 McCluskey


10 Cf. Kronman, in 99 Yale, supra n. xx, at 1057 (referring to Edmund Burke's criticisms of the "coxcombs of philosophy" who, "viewing every political question 'in all the nakedness and solitude of metaphysical abstraction' presume to kind, in their powers of rational reflection, everything they need to answer them. That is a foolish presumption and one, Burke thinks, that is certain in the long run to diminish the happiness of the human beings who live in any regime that adopts it.")
For three reasons, a justification for a proposed solution for a specific social problem must find its principal foundation, not in theory or the intuitions of the drafter, but in the facts of the specific social problem addressed. (Most of this paper consists of an attempt to show how that unfashionable proposition does not state an impossibility). First, an adequate justification must persuade the reader that its propositions make sense. Except for those who already have bought into the same logical construct or who own the same intuition, a drafter cannot legitimate legislation because a particular construct commands her allegiance, or because it resonates with her personal intuitions of justice. She can legitimate it ultimately only by appeal to the facts of the case at hand.

Second, the uniqueness of human experience makes it dangerous to rely solely on theory to justify a proposal for intervention. In the physical sciences, the subject-matter of theory usually behaves the same way in similar situations. E=mc² holds in every time and place. Atoms do not have individual personalities. Human beings, however, do. Every human situation has its own unique qualities. Nobody sees the moon from the same angle that I do. Without empirical research into the specific existential situation at hand, no drafter can assure her client that her proposed solution will work.

Finally, the human mind can dream up explanations and solutions for problems seemingly logical but practically useless. (Remember the imaginary solutions for algebraic formulae, involving the square root of -1? Or long-discarded scientific theories, that once ruled the scientific enterprise, like the phlogiston and caloric theories?) Without empirical warrant in the specific situation, how can a drafter assert that her solution is not imaginary?

That theory cannot substitute for the search for facts does not mean, of course, that a drafter can "prove" rigorously the desirability of legislation. It does say that to justify legislation, drafters must so far as possible rely upon evidence


12 WINCH, THE IDEA OF A SOCIAL SCIENCE....

13 Cf. Hanson, OBSERVATION AND EXPLANATION: A GUIDE TO PHILOSOPHY OF SCIENCE (1971) 12 et seq.

14 Cf. Majone, supra n. xx, at 22.
of what goes on the world, not what goes on in an ideal type. What, then, constitutes theory's true function in the enterprise of practical reason?

b. The Critical Function. The critical mode derives theory from an approach that is "pragmatic rather than descriptive or normative. It is designed to bring to light the values implicit in our own social practices and then to advance those values incrementally, by a process of self-reflection."15 So did Max Weber design his ideal type: Like Rubin's, an intellectual construct based on the theorist's apprehension of reality, distorting reality to emphasize what the theorist counts as important.16 By definition, empirical data cannot warrant or diswarrant an ideal-type -- as Professor Rubin says, his theory does not claim to be "descriptive". Its function becomes to deepen conversation about the subject-matter. It can do that precisely because it caricatures reality (that is, it exaggerates the aspects of reality the theorist deems important).

The critical function of theory appeals particularly to academics, with time and space to contemplate social practice, as it were, from the outside. Practitioners need more functional versions of theory that they can use to guide their everyday operations. Without denigrating the critical function of theory, here I propose another, more directly utilitarian function, that is, as the source of heuristic propositions to guide policy-oriented research into specific social problems.

c. The Heuristic Function. As already argued, a proposal for new legislation must find its justification in the specific existential social problem at issue. The human condition requires that, in Deng Xiaoping's phrase, we must "learn from the facts". 

15 Id. at 370; cf Habermas and ....

16 Weber, Methodology in the Social Sciences; [book on the ideal type]. In order to make his point, Professor Rubin subsumes in his model only highly intransitive legislation (that is, legislation granting the administrative agency great power and discretion to create laws). Supra, n. 3, at xx That view of legislation distorts reality -- in fact, a great deal of legislation, especially on the state level, details the desired behavior by the ultimate addressee. Professor Rubin's emphasis on the intransitiveness of legislation, while distorting reality, helps our understanding of the problems associated with that sort of legislation, and the dangers of using the same rules of judicial control over legislation for that as for highly transitive legislation.
For two reasons, literally construed, Deng's aphorism states an impossibility. First, if no human situation constitutes a homologue for another, in what sense can we "learn" from those facts? One learns something only to the extent that it makes one better able to deal with a new, emergent situation. But if the earlier situation does not resemble the later one, how can a theory based on the earlier situation help determine an appropriate policy to resolve the later social problem?

Second, if by his aphorism Deng means that we can merely look at the "facts" and read from them by induction what we need to learn, he errs. Because reality always vastly overwhelms our capacity to see, the facts we choose to take into account always constitute a select portion of reality. Research resources always come in short supply. Whatever data a researcher collects, it will fall far short of the total experience. The research ditty-bag cannot resemble that of an idiot, full of feathers, brightly-colored glass, and curious pebbles. Even if resources sufficed, nobody could make sense out of a randomly-collected bag of data. The facts we choose to see depends upon an interaction between what lies "out there", and the blinders we use to focus our attention. We do not merely experience reality; in a real sense we construct it out of the boundless reaches of the existential world.

Without bounded rationality, the research enterprise becomes impossible. We need some systematic way of deciding in advance which part of the domain will likely prove fertile, and which barren. We need not construct our reality blindly. Research requires criteria of relevance. Theory provides one way of deriving those criteria.

Whence does theory derive those criteria of relevance? Theorists generate their propositions by an interplay between logic and experience, in which the theorist formulates logically linked propositions in the light of experience drawn from

17 In this sense, all history constitutes fiction. Just as an author must select the details to include in a novel, so must an historian choose the facts to include in a history. So must a researcher examining legislation choose the facts relevant to her research and therefore to include in her memorandum.

18 ....,Knowledge for What?

19 See Herbert March. . .
particular past situations. She teases "middle level" propositions that her theory teaches explains the present difficulty. These middle level propositions become hypotheses, that she will put to empirical test using data from that difficulty. To the extent that the theory generates middle-level propositions that the new empirical situation, does not falsify, the research tends to warrant the theory itself. Thus does theory arise out of reason informed by experience.

In contrast to the metaphorical and critical notions of the uses of theory, in the perspective we discuss here those linked propositions become guidelines for the investigation of the new, unique situation presently at hand. Those guidelines can never say more than this, that in the past this and not that part of the field proved worthy of the plow, and therefore in the new situation it will likely economize research resources to start in the same part of the field. Instead of treating theory as metaphor or source of conversation, in this view theory serves an heuristic function -- that is, as a source of propositions telling the researcher where to look in the specific social problem at hand. Thus does practical reason -- reason informed by experience -- guide the search for policy.

For example, suppose a policy-maker adhering to a market model of the economy investigates the social problems concerning the adoption of babies. Using theory in the metaphorical mode, the policy-maker would identify the problem in the real world, consult the model, determine what solution would solve a similar problem in the logical world of the model, and then recommend that solution to solve the real-world difficulty. Using theory in the critical mode, the policy-maker would use the model to construct an ideal type of the adoption system, exaggerating reality in ways that seemed fruitful for further conversation. Using theory in the heuristic mode, she would consult the model to tease out of it some hypotheses about what likely caused the difficulties she identified, and then investigate the real world situation to see if those hypotheses hold in the existential situation.

20 This holds even for ideal types. The great ideal types -- the economist's model of the perfectly competitive market, Max Weber's construct of bureaucracy, Hans Kelsen's model of a legal system -- all come from scholars with deep knowledge of how those institutions operated in the real world. They constructed their ideal types with that reality always in view.

21 See, e.g., Posner [in BU Law Review].

22 See, e.g., Cohen, [in BU law Review] [CHECK whether this cite is an example of critical use of the model!]
In writing a memorandum in support of legislation, too, a drafter must decide what aspects of reality to include. Explicitly or implicitly, her theory therefore underpins the memorandum, providing criteria by which the drafter determines what the memorandum includes, and what it omits. The criteria that a theory supplies, however, depend upon the sort of problem the theory generally addresses.

3. The Difficulty that Legislative Theory Must Address.
Theory always arises to solve perceived, existential problems. A theory of legislation that might help a legislative drafter must address the sorts of problems that she faces.

Nobody writes legislation merely for their own amusement. In its instrumental function, legislation arises because its sponsor perceived a social problem. All social problems consist of some repetitive pattern of social behaviors that somebody defines as undesirable. Superficially, the social problem may appear as an abstraction -- inflation, the money supply, environmental pollution, or energy supply. All, nevertheless, result from human, social behaviors. Sellers increase prices; bank managers make too many loans; industrial managers release toxic wastes; the managers of electricity companies have not anticipated rising demands for energy.

23 Peter Dorner

24 That all legislation incorporates some symbolic functions, see above, text at n. xx.

25 Friedman and Ball? Most legislation performs one of two functions: the institution-changing function, and the salvage function. The institution-changing function looks to preventing social messes from arising; the salvage function looks to repairing a social mess after it has occurred. We use criminal punishment supposedly to deter criminal behavior, hopefully to prevent a social mess from arising. We conceive that alimony serves not to deter husbands from improper behavior, but to salvage the social mess that arises when a family dissolves. Both functions address social problems; both require changed behavior (if only by requiring some individuals to pay money to others), so that the theory advanced in the text applies to both functions.
To solve a social problem therefore requires that these behaviors change. Ostensibly, all legislation, therefore, aims at changing them. In that sense, all polities today legitimate legislation on instrumental grounds. As we have seen, willy nilly, the drafter usually must make many, sometimes most, of the substantive decisions about the bill, and justify those decisions. To aid a drafter make and justify those decisions, an adequate theory concerning the substance of legislation must teach her where to look to find useful data. Since such a prescription must rest upon knowledge of how law influences behavior, a theory of legislation must provide a guide for investigating social behavior in its relationship to law (in this it resonates with sociology of law). The three elements that comprise an adequate theory contribute to providing that guide.

I. THE ELEMENTS OF THEORY

Theory provides an heuristic guide to investigations looking to provide a legislative response to a specified social problem. It does that by winnowing the relevant from the irrelevant, focussing the researcher's attention on the data that will likely prove helpful in analyzing and solving the social problem at hand.

For these purposes, theory includes ideal-types ("models", "paradigms") which become the source of categories for directing research and classifying data, but it includes more than that. Three factors combine to perform theory's heuristic function: Methodology, perspectives and categories. For our purposes, no theory suffices without all three elements, but pride of place belongs to methodology.

NOTES AND QUESTIONS

1. To what extent, if at all, does the methodology for deciding about legislation differ from policy-making methodologies in general? Writing of judicial law-making, Nonet

29 For the history of this notion, see Eskridge and Frickey, supra n. 3. In the original "legal process" paradigm, see H. HART AND A. SACKS, THE LEGAL PROCESS, BASIC MATERIALS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958), the authors held that "Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the law and inadmissible". Eskridge and Frickey, supra this note, at 1156. By a "purposive" act the authors meant "a continuous striving to solve the basic problems of social living." Id. at 162. Even its detractors agree that the instrumentalist perception of the law constitutes the modern "legal ideology".
and Selznick wrote that "with the growth of purposiveness in law it becomes ever more difficult to distinguish legal analysis from policy analysis, legal rationality from other forms of systematic decision-making." Nonet and Selznick, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978) 82-83. Surely a wide overlap exists. and we may glean what we may from the policy-making literature.

James S. Coleman, in "Problems of Conceptualization and Measurement in Studying Policy Impacts"30 suggested some special constraints on policy-oriented as opposed to academic research:

1. "For policy research, partial information available at the time when action must be taken is better than complete information after that time."

2. "For policy research, the ultimate product is not a 'contribution to existing knowledge' in the literature, but a social policy modified by research."

3. "For policy research, it is necessary to treat differently policy variables that are subject to policy manipulation, and situational variables that are not."

4. "For policy research, the research problem enters from outside any academic discipline."

Does the fact that our concern lies in legislation impose any additional constraints, or require us to give a specific form to any of Coleman's principles? For example, consider Coleman's Principle 3. In research looking towards legislation, the law itself constitutes the manipulable variable. Therefore, we can restate Coleman's third principle thus: "In research looking towards a legislative solution, the manipulable variable consists of the legal order. Therefore, the research must always consider how the existing legal order contributes to the existence of the difficulty or trouble that falls for explanation and solution.

Can you think of any additional principles for research looking towards a legislative solution that you would want to add to Coleman's list?

Consider Coleman's Principle 2. Bear it in mind when you consider the three problem-solving methodologies below. Can ends-means or creeping incrementalism ever produce in Coleman's

30 In Dolbeare, PUBLIC POLICY EVALUATION 19 (1975).
sense a "contribution to knowledge"? In problem-solving, can it ever fail to do so? In short, does Coleman assume an ends-means methodology?

3. As Dolbeare states in his Introduction, Coleman's fourth principle "frankly acknowledges the need to accept policymakers' problem definitions. . . ." That raises issues that have ethical as well as practical dimensions. To what extent does or should the lawyer involved in the legislative process become a hired gun, prepared to write any legislation on order? To what extent can and should she retain her professional independence? If the client defines a problem in a particular way, to what extent ought the lawyer accept that definition? If the client insists that the lawyer draft legislation that solves a problem within a given institutional structure, to what extent should the drafter abide by that instruction, when her best professional knowledge calls for solving the problem by changing the institution?

This problem occurs repeatedly throughout this book. In particular we must beware lest we answer the moral issues involved sub silentio. For example, as we shall see in succeeding sections of this chapter, methodologies that call into question existing institutions incorporate different agendas than ones that do not. To adopt the one sort of methodology rather than the other may resolve a moral dilemma under the guise of a technological solutions -- surely an undesirable form of moral discourse.

II

THREE KINDS OF METHODOLOGIES

This section discusses three sorts of methodologies: Ends-means, creeping incrementalism, and problem-solving. Ask yourself: Which of these better serves a legislative drafter, and why?
B. ENDS-MEANS METHODOLOGIES

C. E. LINDBLOM, THE POLICY MAKING PROCESS

"classical" formulation of a decision-making agenda:

runs something like this:

1. Faced with a given problem.
2. A rational man first clarifies his goals, values, or objectives, and then ranks or otherwise organizes them in his mind:
3. He then lists all important possible ways of—policies for—achieving his goals.
4. And investigates all the important consequences that would follow from each of the alternative policies.
5. At which point he is in a position to compare consequences of each policy with goals.
6. And so choose the policy with consequences most closely matching his goals.

Some people define a rational choice as one that meets these conditions. Others have merely claimed that these are the steps that any rational problem-solver should take. Either way, these steps constitute a classical model of rational decision.

E. STOKEY AND R. ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS

Our Approach to Policy Analysis

The approach to policy analysis throughout this Primer is that of the rational decision maker who lays out goals and uses logical processes to explore the best way to reach those goals. He may perform the analysis himself or he may commission others to do parts or all of it for him. The decision maker may be an individual or a group that acts essentially as a unit. We will not consider explicitly the situations in which several decision makers with conflicting objectives participate in a decision. Nonetheless, our approach should prove helpful to an individual who takes part in such a process of shared decision making, whether as a legislator deciding how to vote or as a bureaucrat trying to line up support for a proposal.
A Framework for Analysis

What do you do when a complicated policy issue lands on your desk? Suppose it's your first day on the job as a policy analyst in a New York State agency; you are directed to investigate and evaluate alternative pollution control measures for the Hudson River. The problem has so many ramifications you wonder how you will ever sort them out—and even where to begin. You can always muddle along, hoping eventually to develop a feel for the situation, but such a hit-or-miss approach rather goes against the grain. You would prefer to have a standard procedure that will at least help you make a start on digging into a complex policy issue.

Many policy analysts have experimented with a variety of ways to structure complex problems like this one. We suggest the following five-part framework as a starting point. As you gain experience in thinking analytically about policy choices, you will perhaps wish to revise it to suit your own operational style: so much the better.

1. Establishing the Context. What is the underlying problem that must be dealt with? What specific objectives are to be pursued in confronting this problem?
2. Laying Out the Alternatives. What are the alternative courses of action? What are the possibilities for gathering further information?
3. Predicting the Consequences. What are the consequences of each of the alternative actions? What techniques are relevant for predicting these consequences? If outcomes are uncertain, what is the estimated likelihood of each?
4. Valuing the Outcomes. By what criteria should we measure success in pursuing each objective? Recognizing that inevitably some alternatives will be superior with respect to certain objectives and inferior with respect to others, how should different combinations of valued objectives be compared with one another?
5. Making a Choice. Drawing all aspects of the analysis together, what is the preferred course of action?
The public decision maker has a difficult task. He confronts all the problems of an individual choosing for himself and, because he is acting on behalf of others, many additional problems as well. The environment in which he makes his choices is restricted in a multitude of ways. Resources—whether tax dollars, available space, or talented personnel—are scarce, and their effective allocation may be constrained by political considerations or the limited capabilities of sluggish bureaucracies. Nevertheless, the essence of the public decision problem is that described in the model of choice which was introduced elsewhere. There we showed how effective choices can be made when two essential ingredients can be identified: (1) the alternatives that are available, including a description of the attributes, and (2) the decision maker's preferences among alternative combinations of those attributes.

Chapter 1 of this Primer set the stage for an analytic approach to public decision making, and outlined a five-step sequence for thinking about policy problems: establishing the context, laying out the alternatives, predicting the consequences, valuing the outcomes, and making a choice. Now let’s go back and see how the materials in this volume flesh out that framework.

Establishing the Context

What is the underlying problem that must be dealt with? When contemplating action in any policy area, the first step is to determine whether and...
there is a problem at all. In a market-oriented society, the question becomes: Is the market performing satisfactorily in this area, and if not, why not? When you began this book, you perhaps thought of policy problems in rather concrete terms such as cleaning up rivers, protecting consumers from dangerous products or shoddy warranties, or holding down electricity rates. We hope that by now you will see these problems on a more conceptual level, and will perceive them in terms of externalities, or the imperfect flow of information, or market power. It may be helpful to review the range of possible explanations for unsatisfactory market performance.

1. Information is not shared costlessly among all prospective participants in the market.
2. Transactions costs significantly impede the conduct of beneficial trades.
3. The relevant markets do not exist.
4. Some of the participants in the market exercise market power.
5. Externalities are present, so that the actions of one individual (whether a person or an organization) affect the welfare of another.
6. The commodity involved in the policy choice is a public good.
Under any of these conditions, or if a compelling distributional objective will be served, government intervention may be appropriate. A policy analysis is then merited.

Defining the context of a problem, then, involves moving from the mundane details to a more abstract, conceptual plane. We must diagnose the form of market failure that is encountered. For example, a state environmental commission analyst who is investigating alternative pollution control measures for the Hudson River will undoubtedly find that the essential market failure occurs in the form of externalities. Factories dump industrial wastes, and cities and towns dump untreated sewage into the river, thereby imposing costs on all who would like to enjoy it.

Having identified the nature of the problem, what objectives are we to pursue in confronting it? Too often we lose sight of objectives when we get into the nitty-gritty of a problem. Requiring ourselves to identify the relevant failure of the market is one way to make sure we keep the big picture in mind. Paying careful attention to objectives is another. Consider, for example, the rather commonplace notion that we should “improve” the geographic distribution of physicians. Yet spreading out the doctors is merely a means to an end. The objective, frequently overlooked, is to improve people’s health. It is all too easy to imagine a decision maker so concerned with geographic distribution that he blindly pursues some measure of dispersion, while the health of the population becomes a side issue.

Explicit attention to objectives moves us away from platitudes. In the Hudson River problem, we already know the river is dirty because of the externalities; factories and towns have few incentives to restrict their
dumping. The next step is to determine what we are trying to accomplish. It may be tempting to say, "We're trying to clean up the river"; certainly it makes for a favorable press. But such a general statement, however well-intentioned, offers little specific guidance; we need to know much more precisely just what we are trying to accomplish. How clean is clean enough? Are we simply trying to create a more attractive environment, or might fishing or swimming be the objective? How much attention should be paid to efforts to keep or attract industry? How critical are the costs imposed on cities and towns? Perhaps these questions cannot be fully answered at this stage of the analysis; much will depend on the tradeoffs that are available and acceptable to society. But the questions must be asked, and subsequent analysis must help to answer them, or we may find years later that we have solved the wrong problem.

Laying Out the Alternatives

With the context of the problem clearly in mind, we can proceed to the second step: What are the alternative courses of action? The alternatives for policy choice are often much broader than they first seem.

Government intervention can take many forms; in any particular situation it is important to determine which type is most appropriate.

Let's stick with the Hudson River a little longer. Practically speaking, the types of pollution control measures that are to be evaluated will probably be narrowly delineated before any analyst arrives on the scene, and he will have to work within those alternatives. Perhaps he is simply to choose one of three possible sites for an aeration plant; perhaps his task is to recommend emissions standards for stationary pollution sources. Still, it would be worth his while to spend an hour or two thinking about all the kinds of interventions that might be undertaken, for his understanding of and approach to the entire problem will be improved if he first thinks about it in a broader context.

Doing nothing at all about the Hudson is one possibility, but the very creation of a commission suggests that positive intervention is desired. Many types of alternatives remain, however, that may perhaps be overlooked if they are not sought out for consideration. In most practical decision contexts, dramatic new approaches may not be feasible for political or historical reasons; still, consider the following possibilities:

1. The government may attempt to improve the working of the market. For the Hudson River, to be sure, this is a tall order. No market for clean water presently exists; "improving the market" would mean establishing one from scratch. Clearly impossible, you say: the river is too big, the sources of pollution too diverse, the population affected has too many different interests. We agree—but we remind you that for a less extensive problem, granting or selling property rights (i.e., arranging matters so that someone owns the water) so that a market can develop may
indeed be a viable alternative. In other situations, where a market already exists, improving the market (by providing information, for instance) may be a relatively easy and surprisingly effective mode of intervention.

2. The government may require people to behave in specified ways. One obvious, if crude, approach is an outright order: STOP DUMPING! Or restrictions may be imposed on the amount of dumping or level of pollution permitted. Directives of this type require that standards be set, performances monitored, penalties established, and regulations enforced. None of these tasks is easy or inexpensive, especially if the number of polluters is large. But to many the approach is esthetically pleasing: it attacks the "right" targets—the polluters are the bad guys and in no uncertain terms. It is quite likely that the Albany analyst would be instructed to concentrate his efforts on interventions of this type. He would then be asked to describe possibilities for action in terms of such specifics as stringency of standards, kinds of pollution, penalties for violations, and monitoring and enforcement procedures.

3. The government can provide incentives that influence the decisions of individuals and organizations. Much of the more technical literature on methods of pollution control deals with various incentive schemes of two general types. In one approach, effluent charges are imposed on polluters: the heavier their discharges, the more they are required to pay and the greater the inducement to install pollution control devices. The second approach is to allow polluters to purchase rights to discharge a certain quantity of pollutants, while all other discharges are prohibited. In many, many fields incentives schemes are the preeminent means for influencing private decisions. Soil bank payments, investment credits, taxes on alcohol and tobacco, and the proposed escalating taxes on gasoline are all aimed at pushing private choices in a desired direction.

4. The government can engage directly in the provision of goods and services. In this case, the State of New York could go to work and clean up the river itself, removing the noxious substances that others dump. Given the present technology, the prospects for such an approach are not promising. But direct action might be a plausible course of action in another situation, such as cleaning up roadside litter.

Laying out alternatives frequently offers a chance for creative thought as well as hard work. Too often the process is treated as a mechanical exercise: opportunities are lost, and attractive policies are overlooked.

\*As a simple example, abutters on a small stream might be granted rights to clean water. They would then have the right to sue an upstream polluter. This arrangement creates the potential for beneficial trades, as abutters could demand compensation for permitting polluters to dump.

\*The merits and drawbacks of effluent charges and pollution rights are well beyond the scope of this book. In theory, both are far more efficient than the direct approach of setting standards because, if properly administered, they insure that the desired reductions in pollution are undertaken by those who can do them at least cost. Their opponents claim that proper administration is a pipe dream, and that allowing polluters to continue their nefarious practices—for a price—is morally reprehensible.
altogether. On the simplest level, it is important to allow enough time for this review. When starting to consider a policy problem on which you will spend two or three weeks, it is almost certainly worthwhile to take a day or two to explore the available alternatives. The analyst who makes the most traditional allocation of half an hour may miss a great deal; the best option will not always be immediately apparent.

New alternatives may be developed during the analysis; these need not represent major changes in approach. In Chapter 3 we examined a town's choice between tennis courts and softball diamonds. Perhaps a third alternative is possible: tennis courts convertible to hockey rinks or basketball courts in the winter. Sometimes a new alternative involves no more than a change in timing. For example, the town may accept the additional costs of fast-track construction in order to have the courts available for early rather than late summer. Or the new alternative may involve a change in scale; perhaps a 3000-gallon-per-hour aeration plant should be substituted for the planned 5000-gallon plant that gets the water only slightly cleaner.

We make no claims as to which of the alternatives for pollution control—or even which type of intervention—is to be preferred. Indeed, the alternatives have been painted with a very broad brush; a genuine analysis would have to spell them out in much greater detail. Frequently, refinement of alternatives will continue throughout the analysis, as difficulties are identified and more information becomes available.

*Can the alternative courses of action be designed so as to take advantage of additional information as it becomes available? A flexible decision process will enable the decision maker to change his course of action as he learns more about the real world in which he must operate.*

For example, a municipal sewage system often incorporates the town's storm sewers. When rains are heavy, so much additional water floods through the system that the sewage treatment plant can't handle it; raw sewage must then be discharged into the river. Many towns are now trying to correct this condition (with financial assistance from the federal government) by installing separate systems for storm drainage. Alternative plans for pollution control should be designed for easy revision if the separate storm sewers turn out to reduce significantly the pollution caused by the municipal sewage system. Similarly, future technological advances may make it possible to treat discharges of a toxic substance so as to render them harmless at a reasonable cost. Pollution control strategies should not lock decision makers into assumptions based on the existing technology.

Good policy analysis is an iterative process; rarely does it proceed in a straightforward fashion from the definition of the problem to the selection of the preferred action. Rather, it works backward and forward as one's understanding of the problem deepens.

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8 Flexibility of this sort is explicitly incorporated in the decision tree, which highlights the feedback aspects of decision processes. Much of Chapter 12 was devoted to the use of information to make decisions in a sequential manner.
Predicting the Consequences

Once the problem is well-defined and the alternative courses of action delineated, the policy analyst must try to predict what will happen. What are the consequences of each of the alternative actions? Occasionally, mere reflection will be sufficient to trace the course from actions to outcomes. But in many circumstances unaided intuition may well go astray—or simply run into a blank wall. What techniques are then relevant for predicting consequences? The analyst will turn to a model, an abstraction of the real world designed to capture the essential elements of the problem.

In some situations, the model will serve as little more than an intellectual guide. Suppose the director of an outpatient clinic finds that unacceptably long lines of people are regularly waiting for service. She knows that she must work to reduce arrivals, speed up service times, increase the number of servers, or reorganize the way lines are formed and priorities assigned. Just understanding how these elements are likely to interact in a queuing model may be enough to put her on the right track.

The models needed for the pollution control problem—and certainly there will be several—are far more complex. First of all, the analyst must develop a model of how water quality in the Hudson River responds to various types and amounts of discharges and weather conditions. (Realistically, he would probably commission someone with more specialized knowledge to develop it.) Only then can he predict the likely outcomes, in terms of water quality, of alternative methods and degrees of control. A computer simulation is likely to be the most useful type of model in such a situation.

But the impact of various control measures on water quality is only one part of the outcome. The analyst must also try to predict their impact on the individuals and firms affected by them. The economic effects may be substantial, particularly if firms are placed at a serious disadvantage vis-à-vis their out-of-state competitors. Cities and towns may be hard pressed to come up with the necessary funds for sewer improvements. In short, all the effects of proposed policies must be considered, not just the effects desired by the decision maker.

If outcomes are uncertain, what is the estimated likelihood of each? If the consequences of a policy choice are uncertain, and especially if the possible results differ widely from one another, the policy maker may wish to construct a decision tree and estimate the probability of each outcome. Uncertainties are always with us; in the Hudson pollution case, for instance, it will not be possible to predict with complete accuracy either the weather or future developments in pollution control technology, or the vagaries of the political process.

If the pollution control strategy ultimately chosen must be referred to the legislature or another political body, thorough political analysis is in order. A naive study that overlooks political realities might conclude that the best way to reduce discharges into the Hudson is to institute some sort
of incentive scheme, even though the legislature has in the past been noted for its lack of enthusiasm for such schemes. The most magnificently conceived plan is useless if the first legislative committee遇到 it down or mangles it beyond recognition. If implementing the policy control requires reliance on the state bureaucracy—present or future—too much must be included in the analysis. Too many plausible policy changes have been effectively sabotaged by bureaucrats who feel threatened by changes in policy or increased workloads.

In short, when you build your models, be sure you understand what goes on out there, how the world really works. And understanding the real world is not simply a matter of gauging relationships; it's also a matter of getting the facts right. The effective analyst should check out the conventional wisdom and talk to the experts in the field. At the same time, he should look for independent corroboration before relying on those whose past experiences may commit them to particular policies. He should ask questions—tactfully. "How often do the storm sewers overflow?" "How long do the effects last?" "How long would it take to inspect Plant X?" "How often must a plant be inspected to ensure compliance?" Painstaking though it may be, he should master the empirical details, even though they may seem almost irrelevant to the decision. Not knowing what sulfates are when discussing air pollution, or what common mode failures are when considering nuclear power, or how reimbursement systems work when arguing about new equipment for a hospital, may fatally damage his credibility as an analyst. Above all, it is important to understand the assumptions that are implicit in the models and the definitions that lie behind the data.

Valuing the Outcomes

An individual making a personal decision can define his preferences through introspection. The policy analyst's task is more complicated. Because one of his primary responsibilities is to help the decision maker define his preference function, a substantial part of this book has been devoted to methods for carrying out that task.

These techniques are not natural laws, nor were they divinely revealed. Rather, they have been derived from a number of basic philosophical principles relating to the fundamental question: What are the ends of public choice? Or, to put the same question in a decision context, what is the standard against which policy choices should be evaluated? The ultimate answer to this question has eluded us, as it has thousands of philosophers, political theorists, economists, and public decision makers. Indeed, however the question is framed, there can be no definitive answer.
Valuation is often exceedingly difficult. Sometimes analysts try to avoid it altogether, although it should be clear that rational policy choice is not possible unless the relative merits of alternative options are compared. Because valuation requires considerable sophistication, we have repeatedly returned to the subject in this volume, hoping each time to add a new level of understanding.

*How should we measure success in pursuing each objective?* Consider an everyday example of a valuation problem. Massport, the agency that runs Boston's airport, recently investigated an increase in parking rates as a means of limiting airport traffic, which was so heavy as to create a serious externality in the form of congestion. One portion of the analysis conducted for Massport predicted the consequences of alternative price increases on the number of cars coming to the airport. But this alone told them little of what they needed to know: What is the value of a given reduction in congestion? The question is a difficult one to answer. Still, Massport's decision to raise parking rates by $1 or $2, or not at all, should certainly depend on how it values the results of each choice. Otherwise it might as well set its parking fees by the roll of a die.

If the Hudson River analyst is to recommend a rational decision, he must find some way to value the various possible degrees of improvement in water quality. Similarly, if pollution controls impose costs on people (say, by blocking a scenic vista with a treatment plant), those costs also must be valued. In principle the appropriate value is people's willingness to pay to accomplish improvements in water quality on the one hand or to avoid the costs imposed on the other, although estimating that willingness may require considerable ingenuity. Because the impacts of pollution controls will extend over many years, streams of benefits and costs must be discounted.

Some valuation problems, particularly those that involve intangibles, do not lend themselves to quantification. In such a case, analysis can address the issue descriptively. Perhaps a proposed welfare program is perceived as damaging the dignity of the recipients; that fact should be included in the analysis as one output of the program, just as the total dollar cost would be. Identifying the key intangibles is as much a part of the analyst's job as setting forth the hard numbers. Because even honest and well-meaning people can never fully agree, questions of valuation will always be argued. The analyst's job is to increase the probability that debate will be orderly and relevant by making sure that values are assigned openly and explicitly.

*Recognizing that an alternative will inevitably be superior with respect to certain objectives and inferior with respect to others, how should different combinations of valued objectives be compared with one another?* Assigning values to specific attributes is only a small part of the difficulty in defining preferences. In almost every serious policy choice, painful
Tradeoffs must be made among valued attributes: Cleaning up the Hudson is no exception. Improvements in water quality will be accomplished only at considerable sacrifice. Manufacturing costs will rise; some plants may have to reduce output; some may even close down altogether. Employment in the region may fall, although some job losses may be offset by jobs in constructing new facilities or providing new pollution control services. New sewers and treatment plants are costly for cities and towns; tax rates and/or borrowings will rise. The state may incur substantial costs in administering the pollution controls. The decision will almost certainly have distributional implications: the benefits of pollution control may be enjoyed by one group of citizens, while the costs are borne largely by another. The public decision maker is elected or appointed to make the tough choices among competing objectives such as these. He will have to decide on behalf of the society how much improvement in water quality its members would choose if they were as knowledgeable about the whole situation as he is.

* * * *

Making a Choice

When all aspects of the analysis are drawn together, what is the preferred course of action? The last step in policy analysis is a most satisfying one, for the sole objective of that analysis has been to make a better decision. Having struggled hard with defining the problem, specifying the objectives, constructing the necessary models, and valuing the alternative outcomes, the policy maker now pulls everything together to make the preferred choice. The situation may be so straightforward he can simply look at the consequences predicted for each alternative and select the one that is best. At the opposite extreme, it may be so complex that he will have to rely on a computer to keep track of what the options are, how the world will behave in response to the possible choices, and what his preferences are among possible outcomes.

* * * *

The choice among competing policy alternatives is never easy, for the future is always uncertain and the inescapable tradeoffs painful. The methods set forth here cannot eliminate these difficulties, but they can help us manage them. By improving our ability to predict the consequences of alternative policies, and providing a framework for valuing those consequences, the techniques of policy analysis lead us toward better decisions.
NOTES AND QUESTIONS

1. Compare and contrast Lindblom's with Stokey and Zeckhauser's formulations of the ends-means methodology. Lindblom wrote his formulation in order to demonstrate its inadequacy — a criticism we consider in the next section. How do these two formulations differ, if at all? Which seems to you the most useful?

2. "Organized systems of thought are results of man's efforts to cope with experienced difficulties. The configurations of such a system of thought will be different if establishment of basic institutions is a key issue, in contrast to the system of thought that emerges from inquiry into policy issues that arise within an established and accepted institutional framework." P. Dorner, "Needed Redirations in Economic Institutional Framework for Agricultural Development", in P. Dorener (ed.), Land Reform in Latin America (Madison Wisconsin: Land Economics, 1972) p. 5.

Into which of these two systems of thought does Stokey's and Zeckhauser's methodology fall?

3. To discover the objectives of policy, where — if at all — to Stokey and Zeckhauser advise the policy-maker to search? Whence do they derive their means? How would you do research on the desirability of ends? of means?

4. Stokey and Zeckhauser state that, in a "market-oriented
society" every question can be reduced to this: Whether the market is working satisfactorily. Do you agree? What use is this in an economy aspects of which operate in terms of the market, but in which the dominant aspects operate in accordance with a Plan? Where do Stokey and Zeckhauser take problems of distribution of income into account?

THE MEMORANDUM OF LAW AND LEGISLATIVE THEORY:
AN INSTITUTIONALIST APPROACH
Robert B. Seidman

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1. Ends-means. The ends-means methodology effectively places a critical aspect of decision-making -- the determination of ends -- outside the purview of empirical research. It argues that "in order to decide rationally, the policy-maker must specify his objectives; lay out the alternatives by which the objectives may be accomplished; evaluate the consequences of each alternative; and choose the action that maximizes net benefits." It rests upon positivist notions of the discontinuity between "values" and "facts". It posits the desirability of a defined state of affairs. Because that involves "values", research cannot test...

1 John Dewey distinguishes between "generalized ends" and "ends-in-view". A generalized end constitutes the flip side of a discontent: That I want new housing only shows discontent with my present housing. An end-in-view constitutes the proposal that emerges from a careful consideration of the constraints and resources available -- the plan for the new house. Dewey, . . . . The ends-means methodology always demands an end-in-view as the "end" specified in the methodology, for otherwise it becomes impossible to measure success or failure in the enterprise.

2 Majone, supra n. xx, at 12 (Majone uses the term "decisionism" to denote what "ends-means" here denotes); see also LINDBLOM, THE POLICY-MAKING PROCESS (19XX) at xx. As Majone points out, ends-means assimilates economic and political decision-making. That lends itself readily to rational-choice theory. See, e.g., Tulloch....Buchanan....; Stokey and Zeckhauser

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the choice of ends.\(^3\) Research can only help by searching out efficient means to accomplish the desired ends. In a famous essay, Max Weber said that a social scientist can only help a policy-maker by showing him the consequences of alternative possible courses of action. Which course the decision-maker adopts depends upon the sort of person he is.\(^4\) By placing the ends of legislation -- plainly an important question in considering any intervention -- beyond the scope of research ends-means makes it impossible for a drafter to justify them.\(^5\) As we have seen, that resonates with hierarchy and power, not justification through reason informed by experience.

Because the only question for the drafter posed by ends-means methodology consists of discovering an efficient means, the drafter usually need not seek nor warrant any explanation for the social problem at hand. As usually articulated, in the ends-means methodology, the decision-maker leaps from the difficulty whose resolution constitutes the end directly to alternative possible solutions, without an intervening search for explanations. That divorces "academic" from "policy" research,\(^6\) and thus divorces the drafter from the benefits of academic research. The core of the academic enterprise lies in explaining social phenomena -- in the sociology of law, explaining how the law relates to social behaviors and institutions. That explanatory step becomes unnecessary for the drafter locked into an ends-means methodology.

\(^3\) Cf. Long, "Foreword" to MEEHAN, VALUE JUDGMENT AND SOCIAL SCIENCE (1969) v (Extreme positivist view puts social scientists "in the unhappy position of seeming to believe that reason and evidence have persuasive roles in scientific inquiry but are somehow either absent, or radically different in efficacy in evaluation. Since it is through evaluation that we determine what is important, it comes perilously close to saying of the important that we have nothing to say.")


\(^5\) Cf. Majone, supra n. xx, at 24 ("In the decisionist view rational policy analysis can begin only after the relevant values have been authoritatively determined. In fact, these values are neither given nor constant, but are themselves a function of the policy-making process that they are supposed to guide.")

\(^6\) Of course, many decision-makers who purport to follow an ends-means methodology in fact transform it into a problem-solving methodology by denoting as their "end" a "generalized end". To determine the "means", they must of course first address the question of explanations -- as the problem-solving methodology teaches.
Drafters, however, have no hierarchical superiority. They must justify conformably to a democratic tradition that endows nobody within the legislative system with unchallengeable, hierarchical authority. Because at the end of the day ends-means justifies only because of the hierarchical authority of the person who sets the ends, and because the drafter's role requires her to justify her legislation on grounds not of authority, but reason informed by experience, ends-means cannot serve a drafter as a methodology for either justification or decision-making.

C. MUDDLING THROUGH: CREEPING INCREMENTALISM

C.E. LINDBLOM, THE POLICY-MAKING PROCESS
pp. 13-27

[After setting forth the "classical" mode of decision-making that we reproduced above, pp. IV, the author proceeds to argue its inadequacies].

Defining the Policy Problem

Policy makers are not faced with a given problem. Instead they have to identify and formulate their problem. Rioting breaks out in dozens of American cities. What is the problem? Maintaining law and order? Racial discrimination? Impatience of the Negroes with the pace of reform now that reform has gone far enough to give them hope? Incipient revolution? Black power? Low income? Lawlessness at the fringe of an otherwise relatively peaceful reform movement? Urban disorganization? Alienation?

To all these formulations, you may reply: The concrete observable problem is the riot itself. But perhaps the riots are merely symptomatic of "real" problems to be solved. Then, the question arises again: What is the "real" problem? During the summer riots of 1967, President Johnson appointed a commission not to solve the problem but first to find out what it was.

Even familiar problems require formulation. A problem like inequality in income distribution can be formulated as one big problem or as many relatively independent smaller problems such as:

inadequate education for the children of low- and middle-income families, for whom we have developed free public education;


2 We shall follow the critique of the "classical" model developed in D. Braybrooke and C. E. Lindblom, A Strategy of Decision (New York: The Free Press, 1963), Part I.
inadequate retirement income, for which we have developed old-age assistance and insurance;
inadequate income for broken families, for whom we have developed aid to dependent children and special benefits through social insurance;
low earnings of the unskilled, for whom we have developed occupational training.

Moreover, there is a large class of problems that needs to be invented when new means or opportunities make new goals possible. Landing a man on the moon never used to be a problem for the U.S. We made it a problem when we began to develop a technology for space exploration that made such a problem possible. A problem is often a new opportunity, not an old sore.

For all these reasons, there is all kinds of room for controversy over what "the problem" is, and no way to settle the controversy by analysis. Here already, then, is a limit on analytic policy making, and a necessary point of entry for "politics" and other "irrationalities" in policy making. 8

Complexity and Inadequate Information

It is also generally recognized that not one of the above steps 2 through 6 in "classical" problem-solving can actually be completed for complex problems, even with the help of new techniques and electronic computation. A wise policy maker will not even try for completion. To clarify and organize all relevant values, to take an inventory of all important possible policy alternatives, to track down the endless possible consequences of each possible alternative, then to match the multifold consequences of each with the statement of goals—all this runs beyond the capacity of the human mind, beyond the time and energy that a decision maker can afford to devote to problem solving, and in fact beyond the information that he has available. A policy maker, whether an individual or an organization, will become exhausted long before the analysis is exhausted. Hence for complex policy problems, analysis can never be finished; it will always therefore fail to prove that the right policy has been found and will always be subject to challenge. And since it is inconclusive, men will have to fight over the issues remaining to be settled.

Because in Pakistan, as well as in most of the other underdeveloped countries to which we offer aid, the U.S. is engaged in no less ambitious a program than assisting the transformation of an entire society, it cannot possibly complete an analysis of required policy. Even if in the U.S. we see no alternative but to assist such an effort, we still do not know how to effect such a transformation. Although we are trying to achieve such a transformation in many places in the world, we have never yet achieved one. We make only an informed guess that economic improvement, toward which we can make concrete contributions, is a means to the desired transformation. We believe, but we do not know, that American participation in the solution of Pakistan's problems will not undercut Pakistan's own energies. As for the magnitude of our assistance, we do not know any way to analyze with any conclusive result such a straightforward question as whether an aid level, say, four times the present level, would or would not better accomplish Pakistan's transformation.

To be sure, analysis can clarify these issues to a point, and even educated guesses are much to be prized in policy making. For such a policy problem, however, analysis remains forever unfinished, and may also run into error.

**Time limits.** Moreover, even if it were possible for men to gather and organize enough information to solve conclusively a complex problem, in actual political life they will often be asked for a decision long before an analysis can be completed. The U.S. could not have settled down to a conclusive analysis of the merits of defending South Korea when it was invaded. 4 Nor can the Soviets patiently wait for the construction of a table of input-output coefficients before they settle on next year's production policies. Nor did Nasser have time for a serene analysis of the Egyptian bureaucracy's capacity to administer the Suez Canal just before he took control of it from Britain.

**Costliness of analysis.** It would be easy to spend half a million dollars to explore the effects on business profitability, on shoppers' convenience, and on efficient traffic flows, of making automobile traffic on Church Street in New Haven flow exclusively south instead of north (or of reopening the street to two-way traffic). But no one but an eccentric could think the possible improvement would be worth the cost of the analysis. To be sure, some analysis was undertaken before reaching the decision that now routes all cars north, but analysis had to be supplemented by other forms of decision making, including guessing. On every hand, we can find examples of complexities for which conclusive analysis, if it were possible, would not be worth the cost.

**Difficulties in Organizing Goals or Values**

Another conspicuous difficulty in analysis is finding appropriate values to guide policy choices; disagreement is inevitable. In the Pakistan case, again, AID officials in Washington will not wholly accept any analyses sent in from the Pakistan Mission, since they know that the on-the-spot involvement of Americans in Pakistan often tends to pull their sympathies toward Pakistan. (Conversely, the Mission rejects the degree the analysis of the Washington officials, whom they believe undervalue Pakistan.) Similarly, the President, who has the responsibility for achieving all kinds of policy objectives, fears that AID as a whole overvalues foreign aid. And AID and the Bureau of the Budget distrust each other, the one because of preoccupation with economic growth, and the other due to preoccupation with economy in the expenditure of public funds. In short, each important participant in policy making on the aid level to Pakistan will assume that analyses undertaken by other participants can at best show how to achieve values significantly different from those he himself wishes to achieve.

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Let us try to get at the root of the trouble, for the problem is not only disagreement on values, but the difficulties any one analyst has with his own values. Contemporary social science draws a sharp distinction between fact and value. Values cannot be empirically tested. Analysis can therefore neither verify any one person’s values nor command agreement among persons on their values.

To be sure, many evaluative statements can be interpreted as empirical propositions and can thus be objectively tested. These are statements intended to be taken as true or false in the light of some accepted criteria. Take for instance the statement, “Everyone should have a good job.” If I defend this statement simply by declaring that it formulates one of my ultimate values, then, according to the canons of contemporary social science, the statement cannot be objectively verified. I may, however, be appealing to another value. I may believe, for example, that everyone should have a good job because everyone ought to be well fed and housed. If so, the statement can then be interpreted to mean that people with good jobs will in fact be well fed and well housed. Whether that is true or false can be empirically tested.

Similarly, one can, under some circumstances, test the proposition that everyone ought to be well fed and well housed. Again, if proposed as a declaration of ultimate value, it is not empirically verifiable. But if it is defended by reference to some further proposition such as that everyone should be happy, then the proposition that everyone should be well fed and housed is equivalent to the proposition: “People who are well fed and housed will be happy.” This is an empirical proposition in form, hence in principle empirically verifiable.

As we move on and on through such chains or linkages, however, we will increasingly run into woozy abstractions like “happiness” that make empirical propositions containing them impossible to confirm in practice, even though in principle they are verifiable. And in any case, one eventually arrives at the end of the line, whereat some final evaluative propositions, because they cannot be examined in the light of still some further linked proposition, are impossible to verify empirically even in principle. The dominant view in contemporary social science is that these end-of-the-line propositions are impossible to verify both in principle and practice. Such propositions have to be simply postulated, taken as axioms, or declared by one who uses them to express his wants, or at least what he wants to recommend to others. Since no empirical proof of any of them is possible, analysis will neither verify them for any one analysis, or bring various analysts into agreement on them.5

The older view—taken by Plato, for example—is that the truth of these end-of-the-line propositions is discoverable by a kind of “empirical” observation of the nature of man and universe. But no one has yet discovered all of them, nor have competing would-be discoverers (philosophers) agreed on them. So as a practical matter, any one policy analyst may be uncertain, and any group will disagree. Their analyses will consequently remain inconclusive and disputed.6

But even if end-of-the-line values cannot be objectively verified, might not everyone nevertheless agree on a sufficient number of them so that policy analysts can be guided by them? Do we not all agree, for example, on the value of human life, of freedom, of progress, of reduction of pain, of honesty, and of self-expression? The fact is that the Nazis did not, and many policy makers in communist systems do not. Nor do all Americans accept these values for Negroes. Moreover, even those of us who generally endorse them make important exceptions to some or all of them. We sanction the taking of life in some circumstances, at least as a matter of practical policy. Or we sanction the dishonesty that is essential to political bargaining and negotiation, including negotiation between nations. And we disagree on the exceptions.

In any case, a policy analyst has to descend from a high level of abstraction-like freedom to lower-level values like elimination of capital punishment, equality of educational opportunity, coexistence with the U.S.S.R., or full employment. At this level clearly we do not all agree; and, as a further complication for any one person, values at this level are very much in conflict with each other. Some values have to be sacrificed to achieve others, as when we sacrifice some possibilities for employment by holding down inflation, or suffer some inflation in order to achieve fuller employment.

Does the concept of the public interest provide an agreed criteria for policy analysis? Clearly, there is no general agreement on what constitutes the public interest.7 It is a useful concept, to be sure. For you to say, “Air pollution control is in the public interest,” is a short, convenient way to say that air pollution is bad not just for you but for many other people and that you think the gains from control of air pollution would be worth their cost. That kind of

5 For a survey and analysis of this and competing views on the problem of verifying values, see A. Brecht, Political Theory (Princeton: Princeton University Press, 1959).

6 A useful exposition of the various meanings of the “public interest” is W. A. R. Leys and C. M. Perry, Philosophy and the Public Interest (Chicago: Committee To Advance Original Work in Philosophy, 1959).
statement, however, does not mean that anyone agrees with you on the value of air pollution control. "Public interest" does not denote an agreed-upon interest; it only denotes what is, in someone's opinion, good for the public.

Sometimes "public interest" is used to refer to the common good—that is, to values that could be agreed to by almost everyone in the society and that would therefore not be disputed by informed and rational men. One view in political philosophy is that, since the universe is a cosmos (that is, orderly and harmonious), the common good encompasses all legitimate values that we might pursue in political life. A more common contemporary view is that since the universe is not harmonious, values that can be agreed to are only some fraction of all the values we might pursue; on other values men will inevitably be in conflict. Either way, however, we do not in fact know or agree on which values are embraced in the common good.

Whichever way we turn, these problems of clarifying and organizing values or goals remain intractable. On this count alone, the analysis of policy cannot conclusively settle a policy issue; and what the President wants, the Senate will oppose—or what you want I will oppose—because the disputing parties agree neither on values nor on precisely how they are to enter into their own respective analyses of policy.  

Resistance to Analysis

The limits on analysis that we have so far discussed are of a particular kind. They indicate how far man might go, if he tried, toward settling policy disputes by investigating their merits—that is, by studying and reasoning about policy instead of fighting over it. Often, however, he does not even try. Why?

Irrationality. Men turn an indifferent or hostile eye on policy analysis because they are not wholly rational. Because, specifically, it is easier to feel than to think. Because they cling to beliefs that serve the needs of their personalities. Because words or symbols with which they talk about politics come to be more dear to them than the things to which the symbols refer. Because sometimes it pains them to change their minds. Because they have picked up all kinds of beliefs from their families, friends, churches, and other groups—beliefs that give them a comforting orientation to the world about them and which they consequently dare not challenge. Because it may not have occurred to them that policy analysis is of potential great value.

Our preoccupation in these chapters with exploring the possibilities of analysis should not blind us to man's mountainous indifference (and sometimes his troubled hostility) to it. Policy analysis of the kind we have been discussing seems destined never to go very far because men do not want it to.

Assaults on the mind. Moreover, man is forever assaulted by a barrage of communications from other men who want to manipulate him. If he wants to pursue analysis, or encourage those who do, he must fight off the seductive irrational and nonrational appeals of political parties, candidates for office, interest groups, and propagandists of other kinds. They everywhere tug at his attention and try to commit his mind before he has had time to think. They are always at his ear.

Men who "know" what they want. And those at his ear may not want to analyze policy either, for they may have decided that they already know what they want. Senator Joseph McCarthy wanted no analysis of the threat of internal communism in the U. S.; he wanted to proceed directly against a whole class of people he indiscriminately associated with communism, socialism, liberalism, and internationalism. Similarly, most taxpayers' councils scattered around the United States want only limited analysis of government fiscal policy; on their basic antagonism to government expenditures they have already made up their minds: on that issue, they feel, the less discussion and the less study, the better.

Reasoned grounds for rejection. Even those people most interested in analysis will know that analysis will always be influenced by the biases of the analysts and by their incompetences, and that hence it is not always to be trusted. And they will know that, since most analysis takes place in organizations, it will always be marred by organizational biases, rigidities, and other incompetence. Take for example the unhappy failure of organizations to define relevant problems. An organization like the Air Force is primarily established to exploit the usefulness of aircraft for national defense. Its policy problems therefore revolve around the question: How best to use aircraft for defense? As an organization, however, it is most unlikely ever to ask the question (which as time passes and new techniques of warfare are developed comes to be a critical question): Should aircraft give way to missiles? And the organization may even try to suppress the question elsewhere in the Department of Defense.
Organizational obstacles to satisfactory analysis constitute a subject in themselves. Differences of rank in organizations obstruct communication; the generalist's rivalry with the specialist sows distrust and becomes a source of bias; the organization's hiring policies may not attract competent personnel; promotion may be based on fitting in with the organization rather than on analytical skill; and so on. No few examples, however, can represent the luxuriant variety of organizational barriers to analysis.\footnote{For a survey and analysis, see H. L. Wilensky, Organizational Intelligence (New York: Basic Books, 1967), pp. 175-178.}

**Making the Most of Analysis**

If beyond some limits the policy analyst inevitably founders in a bog of complexity, and cannot find satisfactory criteria for a reasoned solution, nevertheless he has ingeniously picked up many techniques to stretch his capacities. They are all the more important because a group of them change in surprising ways the character of policy analysis.
Universal Tools

Many of man's elementary cultural accomplishments are, of course, methods of extending his problem-solving capacities. Think of archetypal man. Beyond speech itself, what has he devised, discovered, or blundered onto that has significantly enlarged his problem-solving capacity, and hence his capacity to analyze public policy? One might first mention a written language, with all that it implies for the possibility of communication, for storage of information, and for so precious a gain as recording solutions so that man can be spared the trouble of having to solve the same problems over and over again. Secondly, one might think of quantification, for without the skill in measurement and comparison that numbers make possible, man's mind would be crippled. Thirdly, one might mention "factoring out"—that is, dividing a problem into parts that can be independently analyzed.1

Other powerful extenders of man's analytical capacities are specific processes for formal rigorous analysis: mathematics and logic, and the whole collection of sophisticated techniques subsumed under the term "scientific method." One can add this list by further detailing. For example: probability theory, through which man has extraordinarily extended his capacity to cope with inadequately information and an uncertain future; the powerful tool of double-entry bookkeeping, developed in about the thirteenth century; high-speed electronic computation, an accomplishment of the twentieth century; and the techniques mentioned in Chapter Two.

Clearly, the limits on analytic policy making are in some large part culturally determined. And the limits are probably receding somewhat faster than ever before. The use of complex written languages and of special codes for information storage, for example, is still only in its infancy. At the hands of mathematicians, formal analytical techniques are growing apace. Moreover, we are increasingly coming to perceive that "the scientific method" is less a name for a standardized set of investigatory techniques than for an expanding universe of them.2

It is hard to know where to stop looking for devices that stretch man's analytic capacities. For example, a serious emergency, a crisis, often has the effect of transforming a policy analyst's perceptions (and sometimes also of galvanizing his energies), with the result that he gets a new grasp on his problem.3 If usually we think of a crisis as something to be avoided, some kinds of crises can be produced deliberately in order to stimulate the policy maker. Annual budgeting, for example, can be managed to create an annual crisis; it can compel a policy maker to reach major decisions under a sometimes frightening time pressure.

Ideology is a conspicuous specialized aid to the analysis of public policy. A troublesome word, "ideology" has come to mean many things. It may denote any interlocked set of important generalizations about social organization, like the American ideology that associates ideas about democracy, liberty, pluralism, private enterprise, individualism, and social responsibility in a way that guides an American's thinking about public policy. Or it may denote a more formal and highly organized set of such beliefs, like the Marxist-Leninist principles that give a good deal of guidance to policy in the U.S.S.R. and Communist China. Some people who use the term would say, however, that Marxism-Leninism is an ideology not because it is formal and highly organized but because, in addition, it constitutes a set of principles guiding the transformation of society. In their view, "ideology" always refers to a set of revolutionary ideas.4

All that we mean to say here is that any even loosely organized set of interlocking generalizations or principles about social organization—or, more specifically, about politico-economic organization—is of enormous help to policy analysis; and probably it is indispensable.5 It appears that all policy analysis rests to a degree on ideology so defined. A working commitment, even if not dogmatic, to pluralist democracy and corporate enterprise, for example, permits a policy analyst greatly to restrict his search for policies and generally to simplify his analysis so that he can better grasp it.

In effect an ideology takes certain beliefs out of the gunfire of criticism—or at least throws up some argument to defend them. These beliefs, verification of which would require impossible feats of fact-gathering and analysis, can therefore be introduced into policy analysis as though they were settled fact.

What if the beliefs are mistaken? Even mistaken beliefs can serve to organize and simplify policy analysis. Whether the American faith in private enterprise is mistaken or not, we tend to analyze monopoly policy on the assumption of private enterprise, and we reach conclusions that are helpful to the determination of policy. The policies may be mistaken; but if, because we share a common set of assumptions, we believe them to be correct, we accept them. All that we in effect ask of analysis is that it take us from the assumption, which is to be left unquestioned, to a policy.

If the ideology is far enough from fact, however, it can cripple policy analysis. It may generate agreed-on policies that nevertheless do not work—as, for example, our budget balancing policies at the onset of the Great Depression of the thirties. Ideologically correct, they prolonged the Depression rather than shortened it.

The explicitness, detail, and completeness of communist ideology in

3 For strengths and weaknesses of crisis decision-making, see H. C. Hart, "Crisis, Community, and Consent in Water Politics," 22 Law and Contemporary Problems (Winter, 1957). See also, on the possibility that crisis improves the decision capacity of organizations, H. L. Wilensky, Organizational Intelligence (New York: Basic Books, Inc., 1967), pp. 76f.
China or the Soviet Union simplify analysis much more than the loose ideologies of democratic systems. When the incompleteness of a democratic ideology compels the policy analyst to investigate practical virtues and defects of competing policy alternatives, a communist policy maker will sometimes find that his ideology gives him a reasonably full justification for a policy choice. Policy analysis may therefore be quicker and surer in a communist society, but the risks of policy error derived directly from mistaken ideology are correspondingly greater.

**Strategies or Dodges**

It is not, however, man's use of language, of quantification, of other universal tools, or of ideology that changes the character of policy analysis in surprising ways. We begin to see a somewhat unexpected new face on policy analysis only when we look at certain strategies or dodges that man has developed for dealing with very complex problems—strategies that are especially well adapted to public policy analysis. Some of the most important are as follows:

**SATISFICING**

In the conventional ideal of a rational decision, a decision maker maximizes something—utility or want satisfaction, income, national security, the general welfare, or some other such value. But, as we have already noted, an exhaustive search for the maximum, for the best of all possible policies, is not usually worth what it costs, and may in fact be impossible of accomplishment. An alternative strategy, therefore, is not to try too hard—to decide instead on some acceptable level of goal accomplishment short of maximization, and then pursue the search until a policy is found that attains that level. One "satisfices" instead of maximizes.6

**THE NEXT CHANCE**

Sometimes policy analysts deliberately make little mistakes to avoid big ones. One can deliberately choose a policy (knowing that it is not quite the right policy) that leaves open the possibility of doing better in a next step, instead of a policy designed to be on target but difficult to amend. While an Indian civil servant, for example, is inclined to shoot for his target with little thought of a second chance, an American civil servant never expects to be wholly right and values a second chance. In as relatively simple a policy problem as routing New Haven traffic, to try out one-way traffic going south and stand ready, if that is unsuccessful, to try a northbound flow may be better than to gamble, through an a priori study of traffic flows, on a permanent installation of expensive controls to inaugurate southbound one-way movement.

**FEEDBACK**

A policy analyst may want to deal inconclusively with a problem—that is, keep a next chance open because he thinks that with the passage of time he will come to know more. But if he can choose a policy that will, as in the traffic example, itself feed back information necessary to a better choice of policy, so much the better. Policy feedback is of course a commonplace phenomenon: it is hard to imagine a policy that feeds back no useful information at all. Monetary and fiscal policy is an example of especially quick and powerful feedback because of its immediate impact on business activity. But policy-making systems differ in sensitivity to feedback and in the skill with which they choose policies in order to induce feedback. A policy chosen because it is ideologically correct—like Soviet policy on collective farms—may persist for years in spite of failure, with its advocates blind to feedback.7

In the classical model of rational decision making a policy analyst concerned about American Negroes would be required to formulate in his mind an organized set of policy aspirations and to specify for various dates in the future the income, educational, status, and other social and cultural goals at which policy should aim. In actual fact, some policy analysts greatly simplify this otherwise impossible goal-setting task by refusing to look very far ahead—focusing instead on the removal of all-too-observable disadvantages now suffered by the Negroes. That is, if they cannot decide with any precision the state of affairs they want to achieve, they can at least specify the state of affairs from which they want to escape. They deal more confidently with what is wrong than with what in the future may or may not be right.

Critics will say that policy would be more rational if it were guided by positive instead of negative objectives, but it is not at all certain that positive objectives could win assent, or that they would be as operational as negative objectives. It is not clear what sort of policies should now be chosen to achieve such an objective as equality for the Negro, but what is required to ameliorate his generally poor housing, schooling, and job-opportunity situations, as well as his being on the short end of some of the most egregious forms of social discrimination is reasonably clear—even if we do not know or agree on what ideal housing, education, job markets, and social relations are. Similarly, in another context, the government of India does not know much about how to get high production from its farmers, but it does know how to go about eliminating some of the obvious obstacles to production, such as poor seeds, inadequate water supplies, and a price structure that discourages initiative. If in this sense policy analysts look backward instead of forward, they sometimes gain rather than lose competence.

A policy analyst who appreciates a next chance, exploits feedback, and keeps his eye on ills to be remedied will come to take for granted that policy making is typically serial, or sequential. He will see that policy making is typically a never-ending process of successive steps in which continual nibbling is a substitute for a good bite. He will design policy not merely on the expectation of a second step but on the projection of a third, or a fourth—of an

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7 Feedback as an aid to decision making has been given its most precise formulation by those who have tried to describe social processes generally as communications processes, taking their lead from N. Wiener, The Human Use of Human Beings (Boston: Houghton Mifflin Company, 1950). For a brief formulation of theory of this type, see K. W. Deutsch, The Nerves of Government (New York: The Free Press, 1963), Ch. 5, "A Simple Cybernetic Model."
endless series. In this style of policy analysis, he sees possibilities for revising both policies and objectives, and he comes to treat policy making as open-ended in all its aspects. He and any political system of this style may therefore develop a high level of flexibility, resilience, and pertinacity that greatly raises his or its ability to make good policy in the face of complexity. In a system in which policy making is frankly recognized to be serial or sequential, the whole system may be tailored to rapid sequences so that, though no one policy move is great, the frequency of small moves makes rapid social change possible.

In the U.S., policy analysts nibble endlessly at taxation, social security, national defense, conservation, foreign aid, and the like. Policy analysts assume that these problems are never solved, and hold themselves in readiness to return to them again and again. That kind of persistence in policy making has transformed the society. America, observers say, has gone through an industrial revolution, an organizational revolution, a revolution in economic organization (from laissez faire to a highly regulated economy), and a revolution in the role of the family—but all through policy sequences so undramatic as to obscure the magnitude of change.

**Bottlenecks**

Every policy analyst—and you and I in our personal problems—makes frequent use of the tactic of bottleneck breaking to simplify complex problems. On a superficial view of policy making, a bottleneck is nothing more than clear evidence of a breakdown in decision making. If something is running behind schedule, or something necessary to action is missing, or there is a congestion, we say a bottleneck exists. But since bottlenecks are inevitable for complex policy making, policy analysts have discovered how to use them to make the best of a less-than-ideal situation.

Wartime planning of the allocation of labor and other resources is a dramatic example. It was not possible in World War II for the American government to achieve a comprehensive control over resource allocation for staffing, supplying, and producing for the military services; the task was too complex. Allocations were therefore planned around the bottlenecks—the scarcest of the resources. The Controlled Materials Plan was organized around steel, copper, and aluminum. In addition, as other bottlenecks appeared, as they did in rubber and transportation, the President appointed temporary “czars” to do whatever necessary to adjust other resources demands and supplies to the bottleneck items. In the U.K., where labor was an especially scarce item, much of wartime resource planning was in labor allocations.

At an extreme, one can see the two contrasting possibilities for policy analysis: on the one hand, plan everything to fit with everything else; on the other, plan to break specific bottlenecks as they arise. The first is impossible; the second, though far from ideal, works.

**Incrementalism**

Usually—though not always—what is feasible politically is policy only incrementally, or marginally, different from existing policies. Drastically different policies fall beyond the pale. That aside, a preoccupation with no more than incremental or marginal changes in policy often serves for still other reasons to raise the level of competence of policy. Where applicable, such a strategy:

1. concentrates the policy-maker’s analysis on familiar, better-known experience;
2. sharply reduces the number of different alternative policies to be explored, and
3. sharply reduces the number and complexity of factors he has to analyze.

For a regulation of industrial monopoly, for example, a policy analyst may be able to make analytic headway if he restricts his analysis, as does the Antitrust Division of the Department of Justice, to policies like present ones—to proposals, say, for new curbs on corporate mergers, or new restrictions on corporate price policies. For he will thus concentrate his attention on a not impossibly long list of policies. He will also be able to draw on a great deal of experience that the Antitrust Division and the courts have had with past controls over mergers and prices. And he will avoid the complex analysis of more sweeping changes like public ownership of corporate enterprise. On such a big policy change as public ownership, American experience has very little to offer him as a guide to his analysis.

**Significance of the Strategy**

What is the ordinary interpretation put on these strategies or dodges? On superficial examination they are often dismissed as irrational. For they are seen as indecisiveness, patching up, timidity, triviality, narrowness of view, inconclusiveness, caution, and procrastination. But we have seen them to be useful devices for stretching man’s analytic capacities. Man has had to be devilishly inventive to cope with the staggering difficulties he faces. His analytical methods cannot be restricted to tidy scholarly procedures. The piecemeal, remedial incrementalist or satisficer may not look like an heroic figure. He is nevertheless a shrewd, resourceful problem-solver who is wrestling bravely with a universe that he is wise enough to know is too big for him.

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NOTES AND QUESTIONS

1. Consider again the quotation from Peter Dorner, supra, II- note 2. How would you characterize Lindblom's position?

2. Consider again the dispute between Buchanan and Samuels over Miller v. Schoene supra p. I- You will recall that in that debate, Buchanan argued that governments ought not to intervene in institutional processes, that the "market" could achieve its wonders only if its institutional framework remained stable. Does not Lindblom reach the same result, except that for "ought not" Lindblom would substitute "cannot"?

3. Consider Lindblom's argument, p. II- concerning urban rioting.

Does Lindblom here accept the distinction between "values" and "facts," so that the choice of "ends" becomes a matter of "irrationality" and "politics," and only the choice of means a matter of rational policy analysis? How accurate does that seem to you? For example, whether racial discrimination constitutes the "real" problem in connection with urban rioting depends upon whether a causal connection exists between racial discrimination and rioting. Cannot social science determine whether that causal connection exists? Or again: Whether inadequate education constitutes a "real" problem with respect to inequality in income distribution depends upon whether a causal connection exists between education levels and income distribution. That does not seem beyond the capability of social science to discover. If social science can discover these causes, does that mean that social science can help in the discovery of what "ends" we ought to pursue? That is, can we not use the disciplined study of experience to decide what ends society ought to seek to achieve? That notion lies at the heart of the problem-solving methodology that follows.

C. PROBLEM-SOLVING

THE MEMORANDUM OF LAW AND LEGISLATIVE THEORY: AN INSTITUTIONALIST APPROACH
Robert B. Seidman

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3. Problem-solving. Problem-solving rests upon a variety of philosophical positions that contradict sharply those implicit in both ends-means and incrementalism: That "facts" and "values" form not discontinuous concepts, but continuous ones, so deeply intermingled that each affects the other;¹ that human beings can apprehend the real world sufficiently to bring their concepts and ideas progressively in closer alignment with reality; and that unless solutions aim at the causes of social problems, they will likely do no more than bandage the wound.

Problem-solving has four steps. It begins with a statement of the social problem -- the difficulty which the legislation aims to help resolve.² Second, the researcher must propose alternative possible explanations for the difficulty, and then choose between them on the basis of data. Third, the researcher must propose a variety of possible legislative solutions for the difficulty,³ each addressed to the cause (or causes) that survive the effort to falsify the proposed explanations, and choose between them on the basis of a cost-benefit analysis that includes frequently hard-to-quantify social consequences. Finally, the agenda requires the implementation and monitoring of the proposed solutions. Since no legislation ever works completely as anticipated, the fourth step always discloses a new social problem, and the process begins all over again.

Better than either ends-means or incrementalism, problem-solving meets the requirements of a drafter for an agenda for

¹ John Dewey....

² In some versions, this discontent becomes a "generalized end". See above, fn. xx. The statement of a social problem always involves a discussion of who benefits and who loses from the problem's existence.

³ These constitute ends-in-view; see above, n. xx. The "proposal for solution" -- here a mid-point in the investigation -- constitutes the beginning of the ends-means research.
decision-making and for justifying decisions. It calls for 
empirical research at every step of the process -- to determine 
whether the difficulty at hand constitutes a true or an imagined 
social problem, to choose between potential explanations, to 
determine the most socially efficient solution, and to determine 
the actual consequences of implementation. The first two steps -- 
issue-identification and explanations -- constitute the core of 
the academic enterprise; problem-solving makes academic research 
available and useful to the drafter. Because it calls into 
question every aspect of the research enterprise -- issues, 
explanations, solutions, implementation -- it requires a 
democratic rather than an hierarchical decision-making structure. 
Finally, it has no preconceived bias against radical solutions, 
although in practice problem-solving's emphasis on the costs and 
benefits of solutions frequently teaches the expense of radical 
changes to solve relatively minor social problems.

* * * *

JUSTIFYING LEGISLATION: THE MEMORANDUM OF LAW

Decision-making and justifications march together. This section addresses in more particularity the problems of 
justifications, thus giving flesh to the theory just suggested. 
It does so in terms of the problem-solving agenda: Difficulty, 
explanations, proposals for solution, and implementation and 
monitoring.

A. THE DIFFICULTY

That every legislation aims at solving a social problem has a variety of implications for the memorandum of Law. This 
subsection discusses in turn (1) problem-identification; (2)history; (3) cui bono? and (4) empirical warrant.

1. Problem-identification. The first task of the memorandum 
consists in identifying precisely whose and what behavior 
constitutes the social problem that the legislation aims to 
remedy.

The difficulty never consists of existing legal rules -- it always consists of some repetitive social behaviors. (The rules always help explain the behavior). If a drafter's client asks her to prepare a revision of existing law, that request invariably

4 A principal difference between academic research and policy research lies in the time constraints usually imposed on policy research. Academics have the luxury of delaying publication until they have satisfied themselves with the amount of research completed; policy research always falls under the guns of time. See Coleman. . . .
arises because the existing legislation permits or encourages undesirable behavior (if only the difficulty of official and lay role occupants in understanding what the law requires). The existing law always plays a part in explaining existing behavior; it never constitutes part of the social problem itself.

Identifying whose and what behavior constitutes the social problem at hand frequently calls for careful unpacking of the social problem. For example, if the difficulty consists of teenage pregnancy, exactly which role occupants constitute the problem (teen-age mothers? or must the drafter include in her purview the fathers of the infants?) From what population categories do these parents come? (Lower class or upper class? Levels of education? Employed or unemployed? Minority vs white parents?)

3. Empirical Warrant. Propositions concerning issue-identification, history and who benefits require empirical warrant. In some cases, the main thrust of the research concerns these issues. In some, perhaps most, however, the main thrust comes at the explanation stage.

NOTES AND QUESTIONS

1. At the heart of the problem-solving methodology put forward in the preceding Reading lie the interrelated concepts of causality and explanation. Why do these concepts play so central a role in an adequate methodology of legislation?

"The validity of this agenda (and therefore the validity of both of the propositions of reliable knowledge and policy recommendations that it produces) depends upon the special meaning that it attaches to the word "cause". . . . Most social scientists today accept the central proposition of the dialectic, that all the world constitutes an interrelated, mutually interacting set of actors and forces.

5 Note that these categories already begin to structure explanations and therefore to preform solutions. The researcher ought to justify the categories chosen, best done in terms of Grand Theory.
Marxists addressed this in the counter-intuitive assertion of the unity of opposites. Even though superficially phenomena seem antagonistic, they have an underlying relationship. Whatever their ideological convictions, practically all social scientists today accept the notion of interrelatedness.

The startling proposition of the unity of opposites wars with the methodology by which we ordinarily seek to comprehend phenomena. Most social scientists look for hypotheses that identify an independent and a dependent variable. In that view, one set of events determines another set of events, in a causal relationship that travels only one way.

This determinism denies human choice, for it supposes that given a particular independent variable, human actors can act in only the way that the hypothesis predicts. Thus, a person may hold to the notion that the mode of production (in Marxist thought, the base) determines the legal order (part of the superstructure). At independence, Tanzania had a colonial capitalist mode of production. Following the one-way, causal notion, that base determines the superstructure, Tanzania's failure to use the law and the state fully to restructure its mode of production becomes inevitable.

That denies the dialectic's command. If all social behavior interrelates, then just as the activity that constitutes the mode of production "causes" the activity that constitutes the legal order, so the legal order "causes" the mode of production. That leads to an intellectual cul-de-sac. If everything determines everything, how to understand anything? I suggest that an answer to that question depends upon an analysis of action.

Action implies choice. Psychologists have an interest in instinctive, reflexive behavior. Social scientists and historians study action — that is, behavior involving choice. The simplest model of society consists of people and collectivities choosing within a world they did not choose.

In that mode the constraints and resources of their arena of choice channels people's action. It is as though the actor walked through a forest with trees, rocks, swamps, ponds, rivers. He must choose his path. That choice he makes within the constraints and resources embodied in the forest. Without divine intervention, he cannot easily pass through a rock wall, nor walk on water. By describing the structure of the traveler's world — the external forest and his subjective appreciation of it — we can explain his actions. In this special sense, we can state the causes of his behavior. Based on that explanation, we can propose ways to rearrange his milieu — by driving a tunnel through a rock wall, perhaps, or bridging a river — and thus to restructure his arena...
of choice. The material world constrains choice and thus constrains the range of outcomes; thus behavior depends upon the real world. Because within the arena of choice people can choose, they can by their actions change the world. People choose amidst the constraints and resources of the world. We explain their behavior by explicating their arenas of choice."


2. What do we mean by "explanation?" Consider the following two different (fictional) explanations for why a particular (also fictional) city, Plainsville, is where it is:

I. "a. Cities usually are located on well-travelled trade routes near a good supply of fresh water.

b. Plainsville lies at the intersection of two well-travelled trade routes on a river.

c. Therefore, Plainsville is where it is."

This form of explanation takes a syllogistic form. The major premise constitutes a general rule or hypothesis concerning phenomena of this class; the minor premise, the facts of the case at hand; the conclusion, the state of affairs calling for explanation.

A very different sort of explanation focuses on the particular historical facts at hand. For example:

II. "a. In 1848, Jonathan Smith and his family traveled across the plains towards California, and near Plainsville's present site his left off ox lamed himself. As winter was approaching, Smith threw up a sod shanty and put in a quick crop of winter wheat."
b. The day before the snows came, the Wilbur Whimple family arrived on foot, having lost all their wagons and cattle in a freshet, more dead than alive. The Jonathan Smiths took them in and kept them alive through that winter.

c. That spring, Willie Jones came by, making his way to California. He stopped and fell in love with Jonathan's daughter Mary, whom he married after a whirlwind courtship. Now three families had sod shanties next to each other.

d. A number of parties passed by on their way to California. Jonathan was clever with tools, and quickly developed a nice trade in repairing carriages. All three families decided to stay where they were.

e. That Spring, yet another family, the Martins came by. They decided that the soil looked good, and they had become dead bored with travelling. That made four sod shanties.

f. In July, another family ...

And therefore Plainsville is where it is."

Which sort of explanation better serves a lawyer involved in the legislative process? In answering that question, consider the central paradox with which we began this section, that is, "how do we learn from always unique experience something helpful about a new situation which is itself necessarily unique?"

3. If one uses the first sort of explanation, whence come the major premise? Consider the following alternative possible major premises for an explanation for economic stratification:

a. (A Calvinist explanation):

God exists; existing, He loves, watches, intervenes, and punishes the bad and rewards the good.

Our society contains good people and bad people. Therefore our society contains rich people and poor people.
b. (A neo-classical explanation)

In every society, market forces tend to reward the able and disreward the incompetent.
Our society contains able people and incompetent people.
Therefore, our society contains rich people and poor people.

c. (A Marxist explanation)

In every society whose economy produces antagonistic economic classes, the economic ruling class seizes control of the State and its monopoly of legitimate violence, and uses it to ensure its own power and privilege.

Our society has an economy that produces antagonistic economic classes.

Therefore, our society contains rich people and poor people.

In the main, we look to general social, economic and political theory as a source for major premises. (In the example given above, the explanation labeled — rather loosely — as "Calvinist" constitutes in context a socio-political, not a religious theory.) Devising a major premise, —that is, a hypothesis — however, always constitutes an exercise in creativity. General theory will rarely yield an explicit hypothesis to explain particular phenomena. The researcher must tease out of the general contours of the theory a particular hypothesis suited for the task at hand.

The problem-solving methodology fashions the remedy — that is, the proposed new legislation — upon the cause revealed by the explanation. For example, if one adopts the Calvinist explanation, the new legislation should create Sunday schools, to make the poor more moral; if one adopts
the neo-classical explanation, it should create more vocational training schools, to make the poor more competent; if one adopts the Marxist explanation, one should organize the poor to revolution, so that they can seize the State from the present ruling class. The solution therefore depends upon the hypothesis affirmed; and the hypothesis affirmed depends in part upon the range of hypotheses considered. If one begins and ends, say, with a neo-classical economic theory, and only considers hypotheses drawn from that body of theory, that choice of theory pre-forms the outcomes. In the next chapter, we suggest ways of using data to test bodies of theory even as overarching as the three we mention in this Note. Here, we suggest only that in considering any problem, the path of wisdom requires the researcher to think explicitly of different bodies of theory, and ask what particular hypothesis he might tease out of that theory. Faced by the question of youth unemployment, for example, a researcher might wear his neo-classical hat, and tease out an explanatory hypothesis; he might put on his Marxist hat, and tease out another hypothesis; he might don his Weberian hat, and tease out still a third hypothesis. Only by so doing can the researcher ensure that his own ideological blinders will not prejudice the research in advance.

4. What characterizes an adequate explanation? Without attempting a complete catalogue, three criteria have proven useful in practice:
(1) The explanation must have a logical form; (2) it must in principle be subject to falsification by data (i.e., by experience); and (3) a conscientious search for falsifying data turns up none.

**Logical Form:** Suppose that a researcher must find a solution for the refusal of reasonable bail for very many black persons accused of crime in the Plainville Municipal Court. Criticize the following explanation:

1. On May 10, 1984, that court dealt with the bail of ten black persons accused of crime.
2. A was charged with atrocious assault and was denied bail;
3. B had a bad record, and was denied bail;
4. C had no permanent place of abode, and was denied bail
5. D had no fixed employment, and was denied bail.
6. E had threatened a witness in his case, and was denied bail.
7. F had that day received a passport and had bought an airplane ticket to Panama, and was denied bail.
8. G had no fixed place of abode, and was denied bail.
9. The remaining black accused persons received bail.

And therefore a high proportion of the black persons accused of crime did not receive bail.

Could one structure a solution based on that explanation?

Self-evidently, only by transforming it into an explanation with a logical structure, for example:
The Plainsville Municipal Court denies black persons bail on any of the following grounds:

1. seriousness of crime charged;
2. previous criminal record;
3. no permanent place of abode;
4. no fixed employment;
5. threat to tamper with a witness; and
6. possibility of absconding.

A high percentage of black accused persons committed serious crimes, had a previous criminal record, had no permanent place of abode, had no fixed employment, threatened to tamper with a witness, or seemed likely to abscond.

And therefore a high proportion of the black persons accused of crime did not receive bail.

Stated in a logical form, one can begin to think about solutions — e.g., that persons ought to receive bail even if unemployed, or even if they have no fixed place of abode. Unless an explanation has a major and minor premise, it becomes difficult to identify the "cause" — and unless we identify "causes," we cannot fashion adequate remedies.

(Parenthetically, this criterion makes possible the transfer of learning from one unique historical situation to another. If the major premise holds in this case, it becomes a heuristic that may apply to the next problem that arises. See above, p. II-)

Subject to falsification. An explanation may fail because in principle nobody could falsify it. That usually happens for either of two reasons: The explanation only restates the problem, usually by redefining it as a matter of "values and attitudes;" it identifies as a "cause" the absence of the desired remedy. Consider the following explanation for the violation of drug abuse statutes:
People smoke marijuana because they like to smoke it.

Many people like to smoke marijuana.

Therefore, many people smoke marijuana.

That "explanation," of course, runs in circles. The evidence reveals that many people smoke marijuana in violation of the law. We want to explain that behavior. We do so by asserting that people smoke marijuana because they like to do so. How do we prove that hypothesis? By pointing to the fact that many people smoke marijuana in violation of the law — i.e., the very evidence that demonstrates the problem with which we began. The purported "explanation" only restates the problem.

Or consider the following "explanation" for the same phenomenon:

"People will smoke marijuana where they are not subject to a penalty of five years or more in prison.

In this jurisdiction, for smoking marijuana people are not subject to a penalty of five years or more in prison.

Therefore, people smoke marijuana.

Obviously, the evidence that demonstrates that a trouble exists also demonstrates the major premise. On the facts of the case at hand, nobody could falsify it. In general, an "explanation" that merely states the absence of a proposed remedy never states a cause.

Absence of falsifying data. A proposed hypothesis must resonate with the available data. In general, we search for falsifying data, not confirming data. As Karl Popper pointed out, we do not learn from confirming data. For example, we begin with the hypothesis that water boils at 100° Centigrade. We make that hypothesis not out of the blue sky, but out of at least a strong hunch that it represents the truth.
If we boil water in an open pot at sea level from now until doomsday, we will learn only that water boils at 100° Centigrade. The confirming evidence has basically taught us nothing. We need boil water only once in a closed pot, or at a higher altitude, to learn that water does not always boil at 100° Centigrade. Out of that falsifying data we can construct more interesting hypotheses relating the boiling point of water to atmospheric pressure. We must therefore make every effort to falsify our hypotheses, not merely to search for confirming data.

The same holds for social experiments. Jeremy Bentham (1748-1832), the father of Utilitarianism, wrote:

From the facts of their times, much information may be derived—from the opinions, little or none. As to opinions, it is rather from those which were foolish, than from those which were well grounded, that any instruction can be derived. From foolish opinions comes foolish conduct; from the most foolish conduct, the severest disaster; and from the severest disaster, the most useful warning. It is from the folly, not from the wisdom of our ancestors, that we have so much to learn . . . .

This book does not purport to teach methods of catching data, and how to ensure that one has made a conscientious effort to discover falsifying data. That we leave for other courses to teach, although of course lawyers engaged in the legislative process must become sophisticated about those matters.

5. One can enter the problem-solving agenda at any point. For example, if asked to criticize a draft bill, it frequently will prove useful to regard the draft as a proposal for solution (step 3 in the agenda). You must then discover what difficulty it purports to solve, and what hypothesis it assumes explains the difficulty. You can then assess the proposed bill in terms of the problem addressed, and the explanation given. For example, suppose a proposed bill provides that before appointment, a judge of the Plainsville Municipal Court shall attend classes in race relations for a period of not less than thirty
days and receive a passing grade in the course. What difficulty does that suggest the bill aims at? What explanation?

6. Frequently, critics argue that in fact problem-solving merely disguises ends means. The assertion that a given state of affairs calls for solution, they argue, does not differ from the assertion that the objective or end of the legislation lies in solving that very difficulty. Do you agree?

7. How does the problem-solving methodology deal with the supposed fact-value dichotomy?

8. In this agenda, the process of generating potential major premises explaining the phenomenon at issue, and testing them, becomes the core enterprise. Those hypotheses do not arise by inspection of the data, but out of existing knowledge -- large scale ideology, as we have suggested, our from middle-level heuristics derived from other study and experience. Deriving them constitutes a creative act. For example, suppose that concerned with problems of tobacco-smoking, a legislator asks you to generate some devices for reducing the level of cigarette-smoking in this country. What explanations for continued cigarette-smoking can you suggest? We concern ourselves here with problem-solving inquiry whose outcomes consist of proposals for new legislation. Proposals for solution must address the "causes" revealed in the explanation. That means that we must in the final analysis seek to explain behaviour in terms of the legal order itself. For example, in what sense can one say that the legal order "causes" discrimination against academic women to continue? In what sense can one say that the legal order "causes" cigarette smoking?

III

A CASE STUDY: THE YOUTH DIFFERENTIAL AMENDMENT

In the last part of this Chapter, the Readings ask you to consider an article justifying legislation. What methodology does the writer use? What methodology lies implicit in Representative Hawkin's critique? What methodology can you tease out of the Congressional committee reports?
NOTE

A MODEL YOUTH DIFFERENTIAL AMENDMENT: REDUCING YOUTH UNEMPLOYMENT THROUGH A LOWER MINIMUM WAGE FOR THE YOUNG

DAVID H. SOLOMON*

* * * *

The problem of youth unemployment in the United States is manifest, but its solution continues to evade policymakers. The official unemployment figures published by the Bureau of Labor Statistics (BLS) indicate the severity of the problem. During 1981, the unemployment rate for youths aged sixteen through nineteen averaged 19.6%, more than twice the average rate of 7.6% for the general civilian population. This means that an average of 1.7 million youths were seeking but could not obtain employment. An average of 121,000 more had stopped looking for a job during the fourth quarter of 1981 because they believed they could not find one. Painting an even bleaker picture, a BLS report has concluded that the Bureau's statistics understate the extent of youth unemployment because of the failure to count all the youths in the labor force.

These figures are troubling because youth unemployment has serious long-term effects on our society.

Programs initiated by the federal government to reduce youth unemployment have not offered a comprehensive solution to the problem. In fiscal year 1980 alone, Congress appropriated $4.7 billion for the training and hiring of youths, but these programs have at best acted as stopgap measures to slow the increase in the youth unemployment rate. This rate, which has remained above 10% since 1954, averaged 14.5% in the 1960's, climbed to an average of 16.8% in the 1970's, and climbed again to 17.8% in 1980. While growth in the teenage population may have exacerbated youth unemployment, the youth unemployment rate has stayed high even though the number of teenagers as a proportion of the general population peaked in 1975. The Congressional Budget Office (CBO) has warned that the future decline in the size of the youth population "is not likely to have a dramatic effect on youth unemployment rates." The future therefore promises a continuation of the
high unemployment rates of the past in the absence of governmental action.

One proposal for such action has been the enactment by Congress of a "youth differential," which would create a lower minimum wage for youths than for adults. This Note advocates the enactment of a youth differential to combat the stubborn problem of youth unemployment. Section I describes the considerable theoretical and statistical support for the conclusion that a minimum wage increases youth unemployment over what it would otherwise be. The studies discussed in Section I demonstrate how lowering the minimum wage for youths can increase their employment by lowering the costs of their labor.

Section II discusses how this theory of a wage differential has been translated into congressional action. This section explains the provisions of Section 14 of the Fair Labor Standards Act (FLSA), which permits a lower minimum wage to be paid to students, learners, and apprentices. These provisions evince an intent on the part of Congress to allow special treatment of youths disadvantaged by the minimum wage, but are too limited to give the relief which a general youth differential would supply. Section II also describes in more detail the legislative histories of past youth differential proposals as a prelude to discussing the youth differential advocated by this Note.

Section III sets forth the basic provisions of this Note's proposal and explains how they meet the major criticisms leveled against a lower minimum wage for youths: its discrimination against young workers and the opportunity for its abuse by employers seeking either to replace more highly paid workers or to reduce the wages of youths currently employed. The Appendix contains the text of the proposal, a Model Youth Differential Amendment.

I. THE CORRELATION BETWEEN THE MINIMUM WAGE AND YOUTH UNEMPLOYMENT

Economic theory and statistical evidence together establish that the minimum wage is a major cause of youth unemployment. While other factors contribute to the inability of youths to find jobs, for example, racial discrimination, this Note focuses solely on one cause — the minimum wage. The Model
Amendment is designed to eliminate the component of youth unemployment caused by the minimum wage because that cause is readily identified and easily corrected. Commentators agree that reducing the minimum wage for youths would increase the number of job openings. According to the CBO, "[t]here is a general consensus that the minimum wage reduces employment [for teenagers] somewhat below what it would otherwise be . . . ." The New York Times has reported that economists agree "on one central point: The minimum wage means fewer jobs for the young . . . ."  

A. Theoretical Underpinnings

The theory of the correlation between the minimum wage and youth unemployment is a simple one. A minimum wage increases the costs of employing low-wage workers and induces employers to substitute other productive inputs for this kind of labor. Employment of low-wage workers falls as employers decide to employ fewer of them or to keep the same number at fewer hours per week. Employers replace low-wage workers by hiring more high-skilled workers or by making greater investments in capital. Young workers are particularly vulnerable to this substitution process because the costs of their employment are likely to be high. The costs of training and supervising youths will often be significant because they are typically inexperienced and require extensive on-the-job training. 

A minimum wage prevents youths from lowering the costs of their employment by offering to work for a salary lower than the legally mandated minimum. A youth differential is therefore sound in theory because it aims to increase the amount of youth labor demanded by employers by decreasing the costs of that labor.
B. Statistical Support

Economists' studies of the statistical relationship between the minimum wage and youth unemployment indicate that a youth differential will work in practice to reduce the level of youth unemployment. This conclusion follows from the finding made in nearly all the studies published since 1970 that a statistically significant relationship exists between increases in the minimum wage and either decreases in youth employment or increases in youth unemployment.³⁶ Three studies have found this correlation through their examination of the effects of actual minimum-wage laws. Gramlich's 1976 study for the Brookings Institution, probably the most comprehensive work in the literature, concluded that the 1974 increase in the minimum wage of twenty-five percent³⁷ boosted the teenage unemployment rate by two percentage points.³⁸ Ragan's 1977 study of the Fair Labor Standards Amendments of 1966 found that the twelve percent increase in the minimum wage mandated by that act increased teenage unemployment by 3.8 percentage points.³⁹ Similarly, state minimum-wage laws were found to produce a similar effect by reducing the employment of youths in large cities by five percent.⁴⁰

Other studies, which estimate the effects of hypothetical minimum-wage increases, agree on the existence of a correlation between the minimum wage and youth unemployment or employment, but disagree on its extent. A survey of the literature prepared for the Minimum Wage Study Commission stated that studies had generally found a ten percent minimum-wage increase to reduce teenage employment by anywhere from one to six percent.⁴¹ Hamermesh has concluded that a ten percent minimum-wage increase would reduce teenage employment by approximately one percent,⁴² and an analysis by the Commission staff of a study by Meyer and Wise showed that the same increase would lead to a 3.6% decrease in teenage employment.⁴³ The Commission staff itself found that a ten percent increase would reduce youth employment by either 1.0 or 1.8%.⁴⁴ Similarly, two studies by Adie have found that a ten percent increase in the minimum wage would boost teenage unemployment by one-half of a percentage point.⁴⁵ The staff of the Commission has estimated that an increase in the teenage unemployment rate of one-tenth of a percentage point would result from a ten percent minimum-wage increase.⁴⁶ Predictions as to the effect of a twenty-five percent increase in the minimum wage include the estimate by Levitan and Belous that youth employment would decline by 3.5 to 5.5%.,⁴⁷ and the CBO's summary of recent studies indicating a three to six percent drop
in youth employment. Studies made by Betsey and Dunson, Mincer, Moore, and Welch and his collaborators have also found that higher minimum-wage rates would contribute to a reduction in youth employment or an increase in youth unemployment.

In contrast, only three studies have found no such correlation, and their conclusions are limited. Lovell found "tentatively" and "reluctantly" that the minimum wage has "no impact" on teenage unemployment. Cotterill and Wadycki saw "little evidence" that higher minimum-wage rates reduce youth employment, but confined their study to retail trade establishments in selected urban areas between 1961 and 1967. A 1970 BLS study by Kaitz found no evidence to support "confident conclusions about the effect of minimum wage laws on the employment experience of teenagers," but stated that "it should not be concluded that minimum wage laws have no effect" on teenage unemployment.

Two inherent biases in the unemployment data help to account for the varying findings on the effect of a minimum-wage increase. First, the BLS statistics do not count as unemployed the number of youths who stop looking for work. An increase in minimum-wage rates and the consequent decrease in job opportunities could cause so many youths to withdraw from the labor force that neither the number of youths "unemployed" nor the youth unemployment rate would drop. Conversely, a youth differential might attract so many youths back into the work force that the youth unemployment rate would not drop, but the number of youths employed would be much greater. This possibility explains the finding of a small effect on the youth unemployment rate in some studies.

Second, an unemployment rate does not indicate how many hours each employee works and hence does not reflect the fact that minimum wages force teenagers from full-time to part-time employment. Gramlich, pointing to this factor, has stated:

If this is why disemployment is so slight, the most reasonable verdict is that teenagers have more to lose than to gain from higher minimum wages: they appear to be forced out of the better jobs, denied full-time work, and paid lower hourly wage rates: and all these developments are probably detrimental to their income prospects in both the short and the long run.
It follows that if a minimum wage reduces teenage employment, a youth differential will increase it. An analysis by Hamer mesh supports this conclusion. He estimated that lowering the minimum wage for youths by twenty-five percent would increase youth employment by three percent, or 250,000 jobs. Another analysis of the same data concluded that a twenty-five percent youth differential would increase youth employment by four to five percent, or 400,000 to 450,000 jobs. If 450,000 such jobs were taken by unemployed youths, the youth unemployment rate would drop from 21.7 to 16.4%.

II. Wage Differentials Enacted and Proposed

This relationship between the minimum wage and youth unemployment has not gone unnoticed by the federal government. Congress has acted to enable employers to pay special wage rates to "learners," "apprentices," and "students," with certain limitations. Despite the failure of these programs to provide a lower minimum wage for a large number of youths, Congress has resisted the persistent attempts by proponents of a youth differential to enact a differential wage available to all youths.

A. Existing Wage Differentials

Under present law, an employer may pay a worker at a wage rate lower than the legal minimum if he qualifies under any of three categories: learner, apprentice, or student. The exceptions for learners and apprentices are both intended to encourage the employment of inexperienced workers who are not yet valuable enough to earn the minimum wage. Both categories originated in section 14 of the Fair Labor Standards Act of 1938, which, in its current form, authorizes the Secretary of Labor to issue special certificates to employers that permit the payment of a lower minimum wage. Rather than defining these two categories of workers, the act instructs the Secretary to issue certificates and to promulgate regulations "to the extent necessary to prevent curtailment of opportunities for employment . . . . " The Secretary has the discretion, in granting certificates, to prescribe "limitations as to time, number, proportion, and length of service." The Labor Department has used its authority under the statute to circumscribe the potentially broad reach of these provisions. Labor Department regulations have divided the learner program into two distinct categories: "student-learners" and "learners." The student-learner classification permits a wage rate of seventy-five percent of the minimum wage for any student "who is receiving instruction in an accredited school, college or university and who is employed on a part-time basis, pursuant to a bona fide vocational training program." As a condition
for the issuance of the certificates necessary for individual students, the regulations also require that the contemplated employment meet four criteria: it (1) must be "necessary to prevent curtailment of opportunities for employment"; (2) must not have "the effect of displacing a worker employed in the establishment"; (3) must require "a sufficient degree of skill to necessitate a substantial learning period"; and (4) must not depress the wages or working standards for similar work done by adults. The Secretary issued certificates for the employment of an average of only 5,343 student-learners from fiscal years 1977 through 1980.

Much like those for student-learners, certificates in the learner subcategory are available only if (1) "[a]n adequate supply of qualified workers is not available"; (2) "the granting of a certificate is necessary in order to prevent curtailment of opportunities for employment"; and (3) the issuance of the certificate will not depress wages or working standards for similar work done by adults. The differential wage and other certification conditions vary among the covered industries. The issuance of learner certificates during fiscal years 1977 through 1980 permitted the employment of an average of only 937 workers.

The Labor Department has administered the apprenticeship program even more restrictively than the learner program. The regulations governing the apprenticeship exception to the minimum wage have so limited its reach that in 1980 only 17 workers, all residing in Puerto Rico, received apprenticeship certificates. This result followed from the Labor Department's policy, contrary to the goal of the FLSA, of "not promoting apprenticeship programs on the mainland which provide a starting rate below the statutory minimum . . . ."

The most widely used of the three certification programs has been the student differential, first enacted in the Fair Labor Standards Amendments of 1961. This program currently allows employers to pay eighty-five percent of the minimum wage to students working in retail, service, or agricultural jobs or employed by their institutions of higher education. A student can work at the special rate only part-time during the school term or full-time during school vacations. As with the learner and apprentice differentials, the Secretary of Labor must issue special certificates, in accordance with regulations promulgated by him, before an employer can pay the lower rate. The Secretary can allow the student differential to operate generally only "to the extent necessary in order to prevent curtailment
of opportunities for employment. He cannot grant a certificate in any case unless he finds that the "employment will not create a substantial probability of reducing the full-time employment opportunities" of other workers, except that an employer may hire up to six students at the special rate without meeting this requirement. Labor Department regulations provide that the certificates will be effective for only one year and that no student already employed when the certificate is issued shall have his wages reduced by virtue of certification. The differential applies to all eligible full-time students, regardless of age.

The student differential has proven more successful than the differentials for learners and apprentices in reaching youths willing to work at a wage lower than the current minimum. From 1977 through 1980, the Secretary issued certificates authorizing the employment of an average of approximately 470,000 students at the special rate. Nonetheless, the student differential has not proven sufficient to reduce or even to halt the steadily increasing rate of youth unemployment.

III. A Model Youth Differential Amendment

Congress should go beyond existing wage differentials by enacting the Model Youth Differential Amendment, as set forth in the Appendix. The Model Amendment draws on the correlation between the minimum wage and youth unemployment to devise a youth differential which will induce the employment of youths, but avoid the mistakes made in drafting other wage differentials. The Model Amendment would amend section 14(b) of the Fair Labor Standards Act of 1938 to allow employers to pay youths under the age of twenty at a wage rate set at eighty-five percent of the minimum wage. An employer could use the youth minimum wage created by the Amendment for an average of ten workers or fifteen percent of his work force, whichever is higher. The Model Amendment prohibits an employer from discharging any worker for the purpose of hiring a youth at the special rate, and also prohibits him from using the special rate to reduce the wages of a person employed prior to or at the time of the Amendment's effective date. The Amendment requires no certification by the Secretary of Labor, but does call for an employer paying the youth rate to make reports to the Secretary in order that the Secretary may enforce the prohibitions of the Amendment. The Model Amendment also directs the Secretary to report to Congress within four years on the impact of its provisions on youth and adult employment. The differential will remain in effect for only five years, subject to reenactment by Congress.

As the following discussion indicates, these measures will enable youths and employers to reap the benefits of a lower minimum wage applicable to all youths while guarding against the abuses to which a youth differential is subject. The drafting
of the Model Amendment aims to minimize three particular problems inherent in all youth differentials: undue discrimination against youths, the displacement of current employees by youths paid at the special rate, and the reduction of wages paid to currently employed youths.

A. Discrimination Against Youths

A common argument against any youth differential is that by its terms it discriminates against youths.

It is obvious that the Model Amendment does allow differences in treatment on the basis of age because its central purpose is to permit an employer to pay lower wages to a young worker than he could pay to an adult. However, a peremptory denunciation of this provision as age discrimination ignores the social benefit to be gained by tuning public policy to the needs of the different groups within the polity. Attention to age in social and economic programs is neither uncommon nor illegal per se. Instead of blindly condemning the youth differential, one should examine its provisions carefully to determine whether its discriminatory effects are tolerable, or even desirable.

As a preliminary matter, it is important to note what the Model Amendment does and does not do.

It does not mandate a scheme of age discrimination: rather, it allows employers and youths to avail themselves of a lower wage. Like the existing student differential and all the youth differentials proposed in Congress, nothing in the Model Amendment would prohibit employers from hiring youths at wages above the special rate. In order to ensure that employers, employees, and policymakers are not misled, the Model Amendment states: "Nothing in this subsection shall be interpreted to limit any employer's authority to employ persons covered under this subsection at wages higher than those provided by this subsection."

In allowing a differential wage to be paid, the Model Amendment aims not to discriminate against, but to work for, the benefit of young workers. As discussed in section 1, a youth differential would lead employers to hire youths, thereby providing them not only with added income, but also with work experience and training. These gains will serve to enhance a youth's prospective earnings.
In providing for a uniform youth differential, the Model Amendment may treat youths differently from adults, but it would end the student differential's discrimination against non-students. Under current law, a nineteen-year-old college student may work at a lower wage and thus may secure employment more easily than a nineteen-year-old who has left school and is seeking to support himself.

The student differential discriminates against these non-student youths because it allows students a wider range of options in seeking employment. In operation, the student differential has benefited college students, who have accounted for more than half the students working under the program, rather than the poorer youths more in need of help.

Allowing all college students to work at a special rate ignores the statistics demonstrating that the unemployment problem is less serious for older youths. It also ignores the evidence showing that the disemployment effects of the minimum wage are less significant for individuals aged twenty to twenty-four than for those aged sixteen to nineteen.

The Model Amendment would eliminate the student differential and replace it with a wage differential limited to all youths under twenty, without regard to student status.

The Model Amendment also sets no limit on the number of hours which youths can work at the special rate. Limiting all youths to twenty hours of work per week, as the student differential now does for students during the school term, would perpetuate the discrimination against poor youths, who must work longer hours to support themselves.

Opponents of a youth differential legitimately may fear that it would allow employers to pay wages lower than necessary to provide a decent standard of living for a young worker and his dependents. However, a closer analysis shows that this fear is unfounded when applied to the Model Amendment.
A youth differential may lead employers to pay lower wages to youths, but it will not inexorably lead young workers into undue hardship. Poverty is not a static condition; the poverty line varies according to family size. In 1980, for example, the poverty line for a family of four was $8385, but only $4184 for a single person. If a full-time worker earning the 1980 minimum wage of $3.10 per hour had provided the sole income for the family of four, that family would have fallen below the poverty line: the worker's annual income would have totaled $6448, or seventy-seven percent of the poverty level. The same income for a single worker, though, would have put him at 154% of the poverty level because he does not incur the additional expenses necessary to care for others besides himself.

The Model Amendment draws on this relationship between poverty and family size to continue to fulfill what has been one of the central purposes of the minimum wage: to attack poverty. By setting the differential wage at eighty-five percent of the minimum wage and limiting its use to youths under twenty, the Model Amendment allows almost every youth eligible for the special rate to reach the relevant poverty line if he works forty hours per week at that rate.

The choice of eighty-five percent for the special rate, the rate most often proposed for youth differentials, guarantees that a full-time youth worker supporting himself and one other person will provide an annual income for this household above the poverty level. A worker earning eighty-five percent of the 1980 minimum wage ($3.10) would have had an annual salary of $5481. This amount is equivalent to 131% of the 1980 poverty level for one person ($4184) and 103% of the poverty level for a family of two ($5338).

Restricting the differential to youths under twenty makes certain that very few individuals supporting more than one person in addition to themselves would be working at the special rate. The Model Amendment seeks to keep the number of these individuals to a minimum because its differential wage would
not suffice to keep households of more than two persons above the poverty level. The same income of $5481 earned at the special rate would have amounted to only eighty-four percent of the poverty level for a family of three ($6539). Teenagers will rarely provide for families of this size, however, because they have considerably fewer support obligations than even their immediate elders. While twenty-nine percent of persons aged twenty to twenty-four are heads of households, only 2.5%, or 607,000, of all those under age twenty are household heads. This figure includes youths living alone, who account for nearly one-third of this number. The teenagers who are not heads of households, 97.5% of the total, are neither solely responsible for the support of another, nor totally dependent on their own earnings to keep themselves above the poverty level. The Model Amendment will not force into poverty even the small number of youths who must support at least two others because it does not prevent youths from being paid wages higher than the differential wage.

B. Displacement of Currently Employed Workers

Beyond providing for a differential wage and guarding against its potentially undesirable effects on the youths covered by it, a youth differential proposal must also guard against a negative impact on those not eligible for the youth rate. The opponents of the youth differential argue most commonly that employers will fire their current workers who can be paid no lower than the minimum wage and replace them with youths who can be paid the differential wage, solely to take advantage of the lower rate. An employer might seek to reduce costs by replacing both adult workers and youths who had been paid the differential wage, but who have grown too old for it to apply.

The structure of the labor market provides a barrier against a thoroughgoing substitution of older workers. However, the fact that the job markets for youths and adults are to some degree different will minimize the likelihood of adult displacement. As a rule, adults are members of the "primary" labor market, which offers higher wages, better working conditions, and more stable employment than the "secondary" or "peripheral" labor market into which youths fall. To the extent these markets are separate, youths and adults will compete for jobs among themselves rather than with workers in the other group. Research does indicate that the existence of this dual labor market would limit the displacement of adult workers which might occur with the enactment of a youth differential.

Nevertheless, some displacement is bound to occur because the labor market is not entirely segmented. Minimizing this displacement is necessary to make a youth differential politically palatable to the Congressmen who must enact it. It is also necessary to achieve the Model Amendment's goal of alleviating
the unemployment problem, not merely shifting it from youths to adults. The injustice done to workers fired solely because of the existence of a youth differential weighs heavily against the social benefit gained from increasing the employment of youths. A youth differential proposal must perform an untidy task — balancing the gain for youths against the harm to adults. This balancing is made all the more difficult because neither the proponents nor the opponents of the youth differential have defined what amount of displacement would be acceptable and what amount unacceptable. The statistical studies have provided little assistance because they give no firm estimates of the displacement which a youth differential would occasion. 202

The Model Amendment provides separate measures to counter the two types of displacement: the firing of workers to hire youths at the differential wage, which will be referred to as "direct displacement," and the more gradual shift in an employer’s work force to young workers through filling vacancies and new positions with employees hired at the youth rate, which will be referred to as "indirect displacement."

The Model Amendment provides clear standards to facilitate the policing of its prohibitions and to encourage employers to make legitimate use of the special rate.

1. Direct Displacement

The Model Amendment outlaws direct displacement in specific terms: "No employer shall discharge any employee for the purpose of employing a person under the age of twenty pursuant to this subsection." 204 This language is broad enough to outlaw both the immediate discharge of adult workers and the dismissal of youths working at the special rate upon their reaching the age of twenty. The Model Amendment 205 enforces this prohibition by making a violation of this and every other provision of the Amendment a prohibited act under section 15 of the FLSA 206 and therefore punishable by the penalties set forth in section 16 of the FLSA. 207 These sections make every violator subject to a fine of up to $10,000, or six months in prison, and liable for the payment of back pay at the minimum wage rate and an additional amount for liquidated damages. 208 The Model Amendment adds that any worker illegally discharged shall be reinstated if he so desires. 209
This language in the Model Amendment marks a clean break from the more diffuse attempts to control displacement under the student differential program and other youth differential proposals. The primary form of control over direct displacement under the student differential is the requirement that before an employer can hire a student at the special rate, the Secretary of Labor certify that the "employment of such student will not create a substantial probability of reducing the full-time employment opportunities" of other workers.\(^\text{210}\)

The vagueness of this language insures that it will not deal effectively with the problem of direct displacement.\(^\text{211}\) If an employer fires an adult worker and applies to the Secretary for permission to hire a student at the special rate, it is not clear that the student's employment would reduce the "full-time employment opportunities" of the adult worker. It was the firing of the adult which did so, not the subsequent hiring of the student, and it may be hard to prove any connection between the two events. Furthermore, nothing in the FLSA provides the Secretary with information sufficient for him to judge whether an employer is terminating older workers in order to replace them with students.

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Because of the failure of this process, the Model Amendment provides explicitly: "No prior or special certification by the Secretary of Labor shall be required for employment pursuant to this subsection."\(^\text{213}\) The Amendment instead allows the Secretary to determine an employer's compliance with its dictates by requiring that all employers paying the special rate make reports to the Secretary under penalty of perjury.\(^\text{216}\) These reports, which must be made every six months, must include a list of the persons discharged by the employer within that period of time, accompanied by a statement of the reason for each discharge.\(^\text{217}\)

These provisions improve on the student differential program in several ways. First, besides helping to deter employer misconduct, the reports will give the Secretary the information he needs in order to respond to complaints made by discharged employees and to instigate investigations on his own authority. Second, the Model Amendment simplifies the relevant inquiry, although the difficulties of proof will persist. It is easier to inquire into the existence of an unlawful intent after the discharge has taken place than it is to guess about the probability of the occurrence of that discharge beforehand. Third, the Model Amendment reduces the paperwork burdens on employers by requiring a standard report every six months instead of requiring a new application for certification whenever an em-
employer seeks to increase his authorized employment of students at the special rate. The language of the Model Amendment ensures that the reporting requirements will not become more burdensome in the future because it limits the Secretary's authority to request information to the items specified in the Amendment. 221

2. Indirect Displacement

Controlling the indirect displacement of workers not eligible for the youth differential is more problematic than preventing direct displacement because it looks to a period of an employer's operations rather than to individual hiring and firing decisions. Determining what amount of indirect displacement is permissible and policing the standard settled upon are more difficult than for direct displacement. Further, while it is easy to identify the straightforward trade of one adult worker for one youth, it is difficult to determine whether an employer is shifting the composition of his work force from older to younger workers. The underlying assumption condemning both practices is the same, however. Youths paid the differential wage should hold jobs created by virtue of the youth differential, and an employer should not be able to use its enactment to replace adults with youths, however gradually the replacement takes place.

The certification process of the student differential provides no better control over indirect displacement than it does over direct displacement, although its standard applies more clearly to the former. The vagueness of its wording gives no principled basis for deciding what is an intolerable level of indirect displacement. The student differential gives the Secretary of Labor the unbridled power to decide when the probability of reducing the employment of other workers will be "substantial" and to refuse certification for students on the basis of this finding. Employers can look to no clear standards indicating what level of employment at the special rate will be approved.

The Cornell-Simon amendment of 1977 rejected this certification procedure and directly prohibited two sorts of employer
action. The amendment made it a violation of the FLSA for an employer using the youth differential to engage in a "pattern and practice" of "substituting younger workers employed at less than the minimum wage for older workers employed at or above the minimum wage" or of "terminating the employment of youth employees after [the period of the youth differential's applicability] . . . and employing other youth employees . . . in order to gain continual advantage" of the differential wage. This language has become the most commonly offered solution to the displacement problem and has been incorporated into several subsequent proposals.

Despite its widespread acceptance, the impact this proposal would have on indirect displacement is ambiguous.

The 1973 proposal of Secretary Brennan took a more direct approach. He suggested that an employer be limited to using the special rate for no more than six youths, or twelve percent of his work force, whichever was higher. While this prohibition would not prevent by itself a certain amount of direct displacement, it would set a clear limit for the tolerable level of indirect displacement. In this respect it improves on the fuzzy standards of the student differential and the Cornell-Simon amendment. Although these specific limits have no empirical or theoretical base, their fixed nature is preferable to the uncertainties of the prohibitions of the student differential.

The Model Amendment follows the approach of this plan and contains indirect displacement by limiting use of the youth differential. The Amendment provides: "No employer shall, during a six-month period, employ at the rate provided in this subsection more than an average of ten employees or a number of employees equivalent to an average of more than fifteen percent of his work force, whichever is higher." While the precise figures chosen for these limits cannot be justified in detail, they should permit a significant increase in youth employment without undue harm to adult employment. This uncertainty over specifics is one of the main reasons the Model Amendment provides that its youth differential program will automatically lapse after five years, unless Congress expressly reauthorizes the program. The current provision will
prevent extreme abuses of the youth differential through both direct and indirect displacement and will give Congress a benchmark by which to judge the effectiveness of the Model Amendment in minimizing the adverse effects of a youth differential. If indirect displacement reaches an unacceptable level, Congress can amend the Model Amendment to lower the number of jobs which can be filled at the special rate, try an entirely different approach, or let the Model Amendment lapse. 

In order to assist Congress in measuring the amount of displacement and in choosing among these alternatives, the Model Amendment requires the Secretary of Labor to issue within four years a report describing the effects of the program and giving his recommendations for its continuation or amendment. The information contained in the employers' reports will help the Secretary evaluate the provisions of the Amendment dealing with displacement.

C. Reduction of Wages of Currently Employed Youths

The third problem raised by a youth differential, the possibility that an employer will use the differential to lower the wages of a youth already employed by him, is similar to the problem of displacement. In both cases the employer is exploiting an opportunity to increase his profits by lowering the wages he pays. No youths benefit by the creation of additional jobs, and individual youths are hurt directly by a reduction in their income. Since the employer's action does not amount to a discharge of the youth, however, a youth differential proposal must make special provision to prevent this type of abuse. The Model Amendment states: "No persons shall be employed pursuant to this subsection by any employer by whom he is employed on the effective date of this subsection or by whom he has been employed prior to the effective date of this subsection." The Amendment implements this provision by mandating that the employer's reports to the Secretary include a list of the youths employed at the special rate and the dates on which they have been employed by the same employer at any wage rate.

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D. Miscellaneous Provisions

The Model Amendment allows youths to work at the differential rate until they reach the age of twenty. It rejects any other limitation on the length of coverage, as suggested in proposals to end a youth’s eligibility for the special rate after six weeks or six months. The youth differential does presume that its lower wages should not apply indefinitely to a worker because he will gain enough experience to be worth the full minimum wage. However, this change will not necessarily take place after six months or any set length of time. In fact, the student differential program sets no limit on the length of time an otherwise eligible student can continue to work at the differential rate. The apparent assumptions are that it may take a considerable length of time for students to merit higher pay and that the law should impose no arbitrary limit on this process. Setting the limit too low might alienate young workers misled into believing that they have marketable skills at the minimum wage at a time when they do not.

Omitting a limitation on coverage also avoids a variety of other problems. If the limit applied to the youth, employers would have to inquire into a potential employee’s employment history. The potential for fraud would be great. If, on the other hand, the limit applied to the employer, youths who switched from one employer to another during the period of coverage would be treated differently from the youths who remained six months in the same job.

The Model Amendment also sets no limits on the application of the youth differential to all the fields of employment in which youths are otherwise eligible to work under the Fair Labor Standards Act, as has every youth differential proposal. There is no clear reason for the current limitation of the student differential to students with jobs in the retail, service, agricultural, and higher-education fields. Indeed, evidence suggests that adult displacement would be negligible were a youth differential to apply to construction, manufacturing, and government jobs.

Handling two final details, the Model Amendment includes special language integrating the youth differential with the existing special rates for Puerto Rico and the Virgin Islands to create a fifteen percent differential between the minimum wage and the youth minimum wage in those places. The Amendment also makes a technical change in the exemptions section of the FLSA so that the youth differential will be incorporated into the entire text of the FLSA.

Conclusion

It is undeniable that youth unemployment is a serious problem in the United States. The operation of the economy and of government programs has failed to provide work for a steadily increasing number of youths; at present, more than one out of every five youths between the ages of sixteen and nineteen is unemployed. The growing unemployment among youths pre-
sents a challenge to policymakers to develop new governmental initiatives.

One initiative should be the enactment of a lower minimum wage for youths than for adults, and the Model Amendment proposed by this Note shows the form which this action should take. A youth differential is not the intellectual property of one political party or one political ideology, but a proposal which makes sense intuitively; it will ease the youth unemployment problem by inducing employers to hire more youths, whose labor is made less expensive. The economists' studies cited in this Note bear out this intuition. As related in section I, they have found that a minimum wage decreases employment and that a youth differential would increase the employment of youths over what it would otherwise be.

The Fair Labor Standards Act, as presently amended, and the legislative histories of the proposed youth differentials show the base upon which Congress must build in enacting a youth differential. Congress has repeatedly rejected attempts to enact a differential wage available to all youths. The student differential and other wage differentials which Congress has created have not gone far enough in aiding the employment of youths. The Model Amendment responds to the criticisms levied against past youth differential proposals and contains specific provisions that accomplish everything a youth differential should do while preventing everything a youth differential should avoid. The Model Amendment is one government program which will help youths as much as possible with a minimum of undesirable side effects.

APPENDIX

A MODEL YOUTH DIFFERENTIAL AMENDMENT

Sec. 1. Section 14(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 214(b)) is amended to read as follows:

"(b)(l)(A) An employer may employ any person who has not attained the age of twenty at a wage rate not less than 85 per centum of the otherwise applicable minimum wage rate in effect under section 6 (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6(e)), provided that such employment is in compliance with otherwise applicable child labor laws."
(B) No prior or special certification by the Secretary of Labor shall be required for employment pursuant to this subsection.

(2) No person shall be employed pursuant to this subsection by any employer by whom he is employed on the effective date of this subsection or by whom he has been employed prior to the effective date of this subsection.

(3) No employer shall discharge any employee for the purpose of employing a person under the age of twenty pursuant to this subsection.

(4)(A) No employer shall, during a six-month period, employ at the rate provided in this subsection more than an average of ten employees or a number of employees equivalent to an average of more than 15 per centum of his work force, whichever is higher.

(B) The dates for any such six-month period shall be congruent with the dates established by the Secretary for the reporting requirements of paragraph (5) of this subsection.

(5)(A) In order to insure compliance with the provisions of this subsection, any employer who, during the previous six months, has employed persons pursuant to this subsection, shall provide to the Secretary, under penalty of perjury, the following information, pursuant to regulations to be issued by the Secretary:

(i) a list of the persons employed by the employer pursuant to this subsection during the previous six months, and the dates they have been employed, at any wage rate, by that employer,

(ii) the average number of persons employed by the employer pursuant to this subsection during the previous six months and the percentage of his average total work force represented by this number,

(iii) the birth date of the persons employed by the employer pursuant to this subsection during the previous six months, through reference to a source of information approved by the Secretary pursuant to the provisions of subparagraph (B), and

(iv) a list of persons who were discharged by the employer during the previous six months, with an indication of the reason for each such discharge.

(B) For the purposes of this paragraph, a source of information relative to age shall be approved by the Secretary if it is not a statement from the person whose age is at issue, and is:

(i) a valid license to operate a motor vehicle,

(ii) a certified copy of a birth certificate, or

(iii) any other form of proof of age approved by the Secretary in regulations issued pursuant to this subsection.

(6) Nothing in this subsection shall be interpreted to limit any employer's authority to employ persons covered under this subsection at wages higher than those provided by this subsection.

Sec. 2. Section 15(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 215(a)) is amended as follows:
Comment: Upon amendment, this subsection of the Act will read as follows:

"§ 215. PROHIBITED ACTS; PRIMA FACIE EVIDENCE

"(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person —

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206. (or) section 207 or section 214 of this title, or in violation of any regulation or order of the Secretary issued under section 214 of this title; ...

"(2) to violate any of the provisions of section 206. (or) section 207 or section 214 of this title, or any of the provisions of any regulation or order of the Secretary issued under section 214 of this title; ...

Sec. 3. Section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 216(b)) is amended as follows:

Comment: Upon amendment, this subsection of the Act will read as follows:

"§ 216. PENALTIES: CIVIL AND CRIMINAL LIABILITY: ...

"(b) Any employer who violates the provisions of section 206. (or) section 207, or section 214, or any of the provisions of any regulation, order, or certificate of the Secretary issued under section 214 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. Any employer who discharges any employee in violation of the provisions of section 214 shall be required, in addition, to reinstate such employee if the employee so desires. An action to recover the liability ... may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by one or more employees for and in behalf of himself or themselves and other employees similarly situated ...

Sec. 4. Section 13(a)(7) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 213(a)(7)) is amended to read as follows:

* In the passage that follows, the Amendment adds the italicized material, deletes the bracketed material, and leaves the rest of the material unchanged.
Comment: The subsection of the Act will be affected as follows:

"§ 213. Exemptions

(a) The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

(7) any employee to the extent that such employee is exempted by the provisions of section 214, or any of the provisions of any regulation(s), order or certificate of the Secretary issued under section 214 of this title."

Sec. 5. The provisions of sections 1, 2, and 3 of this Amendment shall remain in effect for five years subsequent to the date on which they take effect, at which time they shall cease to be in effect.

Sec. 6. No later than four years after the effective date of this Amendment, and additionally as he deems appropriate, the Secretary shall report to the Congress on the impact of this Amendment on employment and unemployment among youths and adults, and shall make recommendations to the Congress on the continuation or improvement of the program authorized under this Amendment.

Sec. 7. This Amendment may be referred to as "The Model Youth Differential Amendment."
Promoting Jobs For Youth

By Augustus F. Hawkins

WASHINGTON — The persistently high level of youth unemployment has elicited two kinds of responses: those that call for a federally funded comprehensive youth-employment program, and those that call for a subminimum wage for youth, and those calling for a federally funded comprehensive youth-employment program. Only a full program will cope with the complexity of the problem.

Youth unemployment has been the subject of extensive research. There is a remarkable consensus on the nature of the problem. Virtually all the studies agree, first, that minority youth, particularly blacks, suffer more from unemployment than white youth; second, that high school dropouts are more likely to be unemployed than graduates; third, that those most likely to be unemployed are economically disadvantaged black high school dropouts.

These general points of agreement suggest the contents of any effective response. Because dropouts are more likely to be unemployed than graduates, it is clear that a lack of basic skills impedes success in the job market. Thus, any proposal must attempt to keep potential dropouts in school and create an incentive for dropouts to return. In addition, because certain groups suffer a greater amount of unemployment than others, the program must be focused on them.

Measured against these criteria, the Administration's approach is inadequate. It seeks to create a separate wage category for unemployed youth under the age of 20, reducing the Federal hourly minimum wage from $3.35 to $2.50. But it does not provide remedial and educational services and thus does not address the correlation between educational deficiency and unemployment. Dropouts and potential dropouts would have no opportunity or incentive to acquire the basic educational skills crucial to success in the job market.

The subminimum wage would apply to all youths under the age of 20. This cannot target those youths and geographic areas most in need of assistance. While black youth unemployment is 2.5 times higher than white youth unemployment, blacks account for less than 10 percent of the youth labor force. White youths would thus get the bulk of the jobs offered to teenagers as a result of the subminimum wage. Disadvantaged black teenagers, who are most in need of jobs, would be the least likely to receive them.

It is clear that a subminimum wage would create new jobs. With 11 million to 13 million minimum-wage workers in this country, employers would have strong incentives to hire less expensive subminimum wage workers. It is thus impossible to determine how many new jobs would be created, and how many would merely be taken from fathers and mothers and given to sons and daughters. With youth unemployment at staggering levels, an experiment with little chance for success jeopardizes the future of those it is allegedly designed to help.

A wiser approach lies in the Youth Incentive Employment Act, which is under consideration by the Congress. Under it, jobs would be provided to youth who agree to return to school or stay there and work toward a high school diploma or its equivalent. Participating youth would be employed under strict supervision by public agencies and private nonprofit and for-profit employers, and would have to maintain performance standards at school and work. These opportunities would allow youth to obtain the basic education, training and motivation needed to improve their long-term prospects.

Also, unlike the subminimum wage proposal, the Youth Incentive Employment Act is highly targeted to individuals and areas most in need. Funds would go to communities with high concentrations of jobless, economically disadvantaged youth, and eligibility for jobs would be restricted to those who are 16 to 19, with special outreach efforts to attract dropouts, who suffer disproportionately from unemployment.

The act is based on a demonstrably effective 30-month experimental project in 17 cities across the nation, during which 56 percent of those eligible to participate took advantage of the jobs offered. By the program's end, employment for youths during the school year increased 8 percent over what it would have been otherwise.

The number and variety of voices contributing to the cry for action on youth unemployment is encouraging. The Government's answer must be swift, cost-effective and, most important, must directly address the specific characteristics of the problem. The Administration's subminimum wage does not do this. The Youth Incentive Employment Act does. Passage of this measure, more than any other proposal pending before Congress, would be a major step toward giving jobless youth hope for the future.
The Better Way to Promote Youth Employment

To the Editor:

Representative Augustus Hawkins may have confused many of your readers in his sweeping condemnation of the Administration's Youth Employment Opportunity Wage (YEOW) program ["Promoting Jobs for Youth," Op-Ed June 26].

Hawkins charges that the Administration's youth wage bill is an "inadequate" response to teen-age unemployment because (1) it is not specifically targeted to individuals and communities most in need, and (2) it does not "provide remedial and educational services to address the correlation between educational deficiency and unemployment." The "answer" to youth unemployment, Hawkins claims, is a $2 billion proposal called the Youth Incentive Employment Act, which would serve only the economically and educationally disadvantaged.

Hawkins's arguments convey the erroneous and overly simplistic impression that the choice between these two pieces of legislation is a choice between right and wrong. The real question is, Which bill has the greatest potential to help youths on a large, nationwide scale at a price our country can afford? The answer: YEOW.

By allowing employers to hire youths aged 19 and under at 75 percent of the regular $3.35 Federal minimum wage — i.e., $2.50 an hour — during the summer months, we estimate that YEOW would result in 400,000 new jobs. These jobs would be created at no cost to the Government or taxpayers and without jeopardizing the employment status of adult workers or teen-agers already employed at the full minimum wage for 90 days before May 1 each year.

Strong penalties, including fines and imprisonment, would be imposed on employers who displace workers or cut wages in favor of hiring youths at the lower rate. Enforcement would be carried out by the Labor Department's more than 300 Wage and Hour Division offices. No new bureaucracy would be required to administer the program. No special paperwork or administrative burdens would be required of employers, so that businesses would not be discouraged from participating.

Contrary to Hawkins's assertions, YEOW is just as likely to create jobs for black youths as for whites or any other group. I make no apology for the fact that the bill is not targeted specifically on economically disadvantaged teen-agers. At a time when our nation's jobless rate stands at almost 20 percent for all people aged 16 to 19 and close to 50 percent for black teen-agers, there is little point in limiting the scope and potential of this employment incentive.

YEOW has been endorsed by a number of individuals and groups that specifically represent the interests of economically disadvantaged young people — and for good reasons. While a relatively select group of economically disadvantaged young people await completion of the processing and paperwork needed to enroll in federally funded programs such as the one Hawkins supports, YEOW can put hundreds of thousands across the country to work immediately — from May 1 through Sept. 30 each year — without processing, paperwork or delay. While YEOW participants are earning $2.50 an hour in real jobs, they will be gaining skills, experience and good work habits that will enable them to command better jobs at higher pay in the future.

Billions of dollars have been spent in the past on a vast array of Federal programs designed to encourage youths to stay in or return to school and to provide them with job training and work experience. Meanwhile, youth unemployment has continued its relentless climb. The time has come for a new approach — the approach we are seeking with YEOW.

The Administration recognizes that YEOW cannot be the only approach. If enacted, it would become part of a package of programs already under way to assist jobless youths. These include some $2 billion in programs under the Administration's Job Training Partnership Act, the Summer Youth Employment Program, the Job Corps and the Targeted Jobs Tax Credit.

Representative Hawkins states that the Government's "answer" to youth unemployment must be "swift, cost-effective and, most important, must directly address the characteristics of the problem."

At a time when millions of unskilled, inexperienced youths are priced out of a competitive job market by a $3.35 Federal minimum wage, YEOW is a cost-effective answer that they desperately need.

RAYMOND J. DONOVAN
Secretary of Labor
Washington, July 13, 1984
AN ADDENDUM TO THE YOUTH DIFFERENTIAL AMENDMENT
(Insert in Readings, p. III-51)

In 1989, Congress amended the Fair Labor Standards Act of 1938 to permit a Youth Differential Amendment. This Addendum includes the relevant portions from the Senate Committee Report, the relevant section of the Amendment, and a brief report on some empirical research that followed enactment. The Act raised the national minimum wage for the first time since 1981. Most of the Senate and House Reports concerned that increase, not the Training Wage differential. We concern ourselves here only with that differential (Section 6 of the 1989 Act).

REPORT OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

I. TRAINING WAGE

Section 6 of S. 1182 provides for a training wage for workers with little or no experience. An inexperienced worker may be paid the lower rate ($3.35 or 85 percent of the applicable section 6(a)(1) rate, whichever is higher) while receiving on-the-job-training for the first 60 days of their cumulative work experience. This section specifies that on-the-job-training should last at least 30 days. The committee recommends that short-term job designed to last less than 30 days should be presumptively ineligible for the training wage.

This section contains safeguards and remedies for the displacement of existing employees for the purpose of hiring at the lower rate, and no employer may pay the lower rate for more than 25% of the hours worked in the establishment. All employees to be paid the lower rate must be provided with a notice prepared and distributed by the Secretary of Labor of their rights and remedies, and the training wage will be enforced through the existing provisions of the Act. Migrant and seasonal farmworkers and non-immigrant aliens admitted to perform temporary farm labor under the (H)(ii)(a) program are not eligible for the training wage.

Section 6(d)(2) prohibits displacement of current employees for purposes of hiring individuals at the subminimum training wage. Employees displaced in violation of this section shall have the same remedies available to employees discharged under section 15(a)(3) of the FLSA. In addition, the Secretary must disqualify any employer found in violation of section 6(d)(2) from employing individuals at the subminimum wage.

Section 6(e) provides that each employer and any employee who is being paid the subminimum be provided with written notice of the training wage requirements and remedies. Employees who may be potentially displaced in violation of this section also should be informed of their rights and remedies. The committee expects the Secretary of Labor to ensure that such information is available to displaced employees.

The individual is responsible for providing the requisite proof of previous employment durations, and an employer's good faith reliance on proof provided by the individual is a defense to a charge that the employer violated the 60 day limitation on eligibility.

The Secretary shall issue regulations defining the requisite proof required, and the committee urges the Secretary to provide that an accurate list of previous employers with the dates and durations of employment would satisfy the proof standard to be met by the individual. The Secretary shall also report to Congress on the effectiveness of this provision in providing inexperienced workers with actual training and employment opportunities, on the nature and duration of such training, on the extent of the utilization of the lower rate by employers, and on any adverse impact on ineligible employees resulting from the hiring of others at the lower rate.

Proponents of the training wage argue that a reduced wage for a limited period of time is a necessary inducement for employers to hire unskilled workers and that the training period is necessary to provide such workers with the minimal skills needed to perform productive work. In acquiescing to a training wage, the committee firmly believes that the period authorized for a reduced wage should be used for real training that enhances the skills, productivity and future employability of the employee. This section incorporates a definition of the term "on-the-job training" which has been the Department of Labor's operative definition for "on-the-job training" provided under Federal job training programs included in the Comprehensive Employment and Training Act and included by reference in the Job Training Partnership Act. The Department's long experience in the application of this term should facilitate the administration of the training wage provision.

The bill adds "personal skills" as one of the elements which must be provided as part of "on-the-job training". The committee notes that inculcation of personal skills such as appropriate dress and demeanor, punctuality and other work habits must be accompanied by technical and other job related skills training in order to be in compliance with the requirements of this section.

The committee has serious reservations as to the efficacy of a training wage in either increasing actual training or increasing employment opportunities. Nevertheless, largely as an accommodation to the Administration's insistence on a training wage, the committee is willing to authorize this provision on a trial basis, and will closely examine the results of the studies, the enforcement data, and the report by the Secretary of Labor as to the impact of this section.

Recent work by the General Accounting Office and Congressional Oversight persuade the managers that adequate enforcement of the training wage will not be possible unless the Wage and Hour division receives significant new resources. The committee strongly urges the Secretary to seek funds for the necessary additional enforcement personnel.

In addition, the committee urges the Secretary to undertake a review of Wage and Hour regulations to determine whether current record-keeping requirements and enforcement procedures are sufficient to adequately prevent illegal exploitation at the subminimum wage.
O. THE ADMINISTRATION'S POSITION

On March 3, 1989, Secretary of Labor Elizabeth Hanford Dole presented the Bush Administration's position on the minimum wage. The Administration's position, as presented in the Secretary's testimony, is:

A meaningful training wage that would apply universally to all new hires, whether or not this is their first job, for six months at the $3.35 level of the current minimum wage;

It is the Committee's view that the Administration's proposal is seriously deficient in several respects.

A more disturbing aspect of the Administration proposal is their "training wage." The Administration proposes that employers be granted the discretion to pay a subminimum wage, of $3.35, to all new hires for a period of six months. It is unclear as to why the Administration refers to this subminimum as a "training" wage; the subminimum would require absolutely no training, it would apply to industries that offer little or no training, and it would apply to employees who have already been trained in the skills required to perform their jobs.

The Department of Labor provides detailed data on training time periods for thousands of occupations in their Dictionary of Occupational Titles. Almost all of the occupations found at or near the minimum wage require training periods of no more than thirty days. Recently the General Accounting Office criticized JTPA for granting training contracts for dishwashers, food service workers, custodians, and laundry workers at twice the DOL recommended 30 day periods.

The Committee is concerned that a six month subminimum option would give substantial economic incentive to pay new employees at the subminimum wage regardless of their skills or abilities, without the remotest relationship to actual training provided or necessary.

Another concern is raised when one considers the turnover rate in most minimum wage jobs. It is the Committee's view that many of the minimum wage workers change jobs more often than every six months. For example, the fast food industry, which employs millions at or near the minimum wage, has an annual turnover rate in excess of 300%. Under the Administration proposal, the average worker in these or many other minimum wage jobs would never receive the proposed increase.

Finally, the Administration's subminimum wage provision would, the Committee believes, provide substantial incentive for employers to cause unnatural turnover; that is that employers might fire employees or cause such employees to quit at or near the expiration of the six month subminimum wage eligibility.
NOTES AND QUESTIONS

1. The House Report made similar comments on the provision as did the Senate Report.

2. Additional Views of Rep. Roukema:

ADDITIONAL VIEWS OF HON. MARGE ROUKEMA

There can be no question but that an increase in the minimum wage is long overdue. That we are revisiting this issue, and as of this writing appear no closer to fashioning a minimum wage proposal that the Congress will pass and the President can sign, indicates clearly that politics has taken precedence over our responsibility to set a fair and equitable minimum wage. A fair minimum wage is one that reflects consistent policy, and is not a deterrent to job formation. Instead, it provides incentives for the development of a skilled workforce where labor shortages now exist.

My conviction is that the real policy debate is not over the wage rate per se, but over the duration and scope of a training wage—more properly, an apprenticeship wage. While I appreciate President Bush's view that an unsustainable raise in the minimum wage could retard job creation at the entry level, I have grave concerns about the "new hire" provisions of his proposal and their potential for misapplication and abuse. In my view, this proposal for a 6-month "new hire" training wage would be a "loophole," leading to the development of an entire class of perpetual new hires. Thus, it has no real relationship to job training for younger workers or new entrants to the workforce. H.R. 2710, at least in the wage rate of $4.25 per hour over 2 years, begins to resemble the President's proposal and gives us hope for a compromise. But, it contains a 60-

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4 Id. at 731.
day first hire training wage which is equally deficient in failing to
address the problem of retaining the entry-level jobs that are inevi-
tably at risk with an increase in the wage rate.

In short, the training wage debate centers around the necessity
of retaining entry-level job opportunities; training unskilled work-
ers to meet critical labor shortages; and making it cost effective for
employers to hire teenagers or inexperienced workers while pre-
venting the possibility of abuse of the apprenticeship wage through
the manipulation of "loopholes." Simple common sense should re-
solve the question.

We can fashion a genuine training wage provision with a realistic
duration of 90 days for new entrants into the workforce, and one additional period of 90 days for those who do not have more
than 90 days' experience in an industry or occupation similar to
that of their new employer.

The maximum time an employee would be paid a training wage
under this proposal would be 180 days or six months. And the addi-
tional 90 days training period would be available to an employer if,
and only if, an employee did not have 90 days experience in a new
industry or occupation. Such a training wage would require on-the-
job training, and give workers and employers clear notice of what
constituted proof of prior work experience. In this regard, although
employers would have to take the initiative to avail themselves of
the additional 90 days training period, they could rely in good faith
in an employee's written documentation of their work history.
Therefore, paperwork and regulations would be negligible.

While it has been estimated that only 6.5 percent of hourly wage
workers earned that minimum wage in 1988, we must bear in mind
that these employees tend to be teenagers, specifically minority
youth who continue to experience unconscionably high unemploy-
ment rates. Unskilled older workers and new entrants into the
workforce also make up a significant proportion of minimum wage
earners. Any training wage proposal must balance the need to
retain entry-level jobs while moving employees ahead to the stand-
ard minimum so that trained and qualified people are not unfairly
penalized.

Currently, a full-time worker earning the minimum wage brings
about $7,000 a year—less than two-thirds of the government's offi-
cial poverty floor for a family of four. We will not bring the pur-
chasing power of the minimum wage up to par by the increase cur-
rently contemplated under H.R. 2710 or the President's proposal.
However, it is essential that we make a policy decision on the
training wage that encourages job training, and job retention, and
on which reasonable people can agree.

MARGE ROUKEMA, M.C.
The agreement in this bill on a training wage for teenagers is an historic step. Through much of this decade, resistance to a training differential has stalled efforts to enact any minimum wage increase.

H.R. 2710 balances the widespread sentiment for an increase in the minimum wage with the very justifiable concerns of employers, particularly small businesses, about the effects of higher costs, and at the same time provides protection for young workers' job opportunities. On average, our growing economy has created a quarter million jobs a month, every month, for the last 7 years—most of them in small businesses. By expanding and increasing the FLSA small business exemption, we have done much to preserve the admirable capacity of American entrepreneurs to grow from today's small employers into the larger employers of tomorrow. That is good for the economy; it is good for America's work force.

**FAIR LABOR STANDARDS AMENDMENTS OF 1989**

SEC. 8. TRAINING WAGE.

(a) IN GENERAL—

(1) AUTHORITY.—Any employer may, in lieu of the minimum wage prescribed by section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206), pay an eligible employee the wage prescribed by paragraph (2).

(A) while such employee is employed for the period authorized by subsection (g)(1)(B), or

(B) while such employee is engaged in on-the-job training for the period authorized by subsection (g)(1)(B(i)).

(2) WAGE RATE.—The wage referred to in paragraph (1) shall be a wage—

(A) of not less than $3.35 an hour during the year beginning April 1, 1990; and

(B) beginning April 1, 1991, of not less than $3.35 an hour or 85 percent of the wage prescribed by section 6 of such Act, whichever is greater.

(b) WAGE PERIOD.—An employer may pay an eligible employee the wage authorized by subsection (a) for a period that—

(1) begins on or after April 1, 1990;

(2) does not exceed the maximum period during which an employee may be paid such wage as determined under subsection (g)(1)(B); and

(3) ends before April 1, 1993.

(c) WAGE CONDITIONS.—No eligible employee may be paid the wage authorized by subsection (a) by an employer if—

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5 Id. at 733.

(1) any other individual has been laid off by such employer from the position to be filled by such eligible employee or from any substantially equivalent position; or
(2) such employer has terminated the employment of any regular employee or other to reduce the number of employees with the intention of filling the vacancy so created by hiring an employee to be paid such wage.

(d) LIMITATIONS.—

(1) EMPLOYEE HOURS.—During any month in which employees are to be employed in an establishment under this section, the proportion of employee hours of employment to the total hours of employment of all employees in such establishment may not exceed a proportion equal to one-ninth of the total hours of employment of all employees in such establishment.

(2) DISPLACEMENT.—

(A) PROHIBITION.—No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in subsection (a).

(B) DISQUALIFICATION.—If the Secretary determines that an employer has taken an action in violation of subparagraph (A), the Secretary shall issue an order disqualifying such employer from employing any individual at such wage.

(e) Notice.—Each employer shall provide to any eligible employee who is to be paid the wage authorized by subsection (a) a written notice before employment stating the requirements of this section and the remedies provided by subsection (f) for violations of this section. The Secretary shall provide to employers the text of the notice to be provided under this subsection.

(f) ENFORCEMENT.—An employer who violates this section shall be considered to have violated section 18(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)). Sections 16 and 17 of such Act (29 U.S.C. 216 and 217) shall apply with respect to the violation.

(g) DEFINITIONS.—For purposes of this section:

(1) ELIGIBLE EMPLOYEE.—

(A) IN GENERAL.—The term "eligible employee" means with respect to an employer an individual who—

(i) is not a migrant agricultural worker or a seasonal agricultural worker (as defined in paragraphs (B) and (D) of section 3 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1532 (8) and (10)) without regard to subparagraph (B) of such paragraph and is not a nonimmigrant described in section 101(a)(15)(H)(ii)(A) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(A));

(ii) has not attained the age of 20 years; and

(iii) is eligible to be paid the wage authorized by subsection (a) as determined under subparagraph (B).

(B) DURATION.—

(i) An employee shall initially be eligible to be paid the wage authorized by subsection (a) until the employee has been employed a cumulative total of 90 days at such wage.

(ii) An employee who has been employed by an employer at the wage authorized by subsection (a) for the period authorized by clause (i) may be employed by any other employer for an additional 90 days if the employer meets the requirements of subsection (h).

(iii) The total period, as authorized by clauses (i) and (ii), that an employee may be paid the wage authorized by subsection (a) may not exceed 180 days.

(iv) For purposes of this subparagraph, the term "employer" means with respect to an employee an employer who is required to withhold payroll taxes for such employee.

(C) PREFERENCE.—

(i) IN GENERAL.—An individual is responsible for providing the requisite proof of previous period or periods of employment with other employers. An employer's good faith reliance on the proof presented to the employer by an individual shall constitute a complete defense to a charge that the employer has violated section 18(a)(3) with respect to such individual.

(ii) REGULATIONS.—The Secretary of Labor shall issue regulations defining the requisite proof required of an individual. Such regulations shall establish minimal requirements for requisite proof and may prescribe that an accurate list of the individual's employers and a statement of the dates and duration of employment with each employer constitute requisite proof.

(2) ON-THE-JOB TRAINING.—The term "on-the-job training" means training that is offered to an individual while employed in productive work that provides training, technical and other related skills, and personal skills that are essential to the full and adequate performance of such employment.

(h) EMPLOYER REQUIREMENTS.—An employer who wants to employ employees at the wage authorized by subsection (a) for the period authorized by subsection (g)(1)(ii) shall—

(1) notify the Secretary annually of the positions at which such employees are to be employed at such wage,

(2) provide on-the-job training to such employers which meets general criteria of the Secretary issued by regulation after consultation with the Committee on Labor and Human Resources of the Senate and the Committee on Education and Labor of the House of Representatives and other interested persons,

(3) keep on file a copy of the training program which the employer will provide such employees,

(4) provide a copy of the training program to the employees,

(5) post in a conspicuous place in places of employment a notice of the types of jobs for which the employer is providing on-the-job training; and

(6) send to the Secretary on an annual basis a copy of such notice.

The Secretary shall make available to the public upon request notices provided to the Secretary by employers in accordance with paragraph (f).

Records.

Public information.
FEW CONCERNS USE SUB-MINIMUM WAGE

Problems on Teen-Agers' Pay Cited by Fast-Food Chains

By LOUIS UCHITELLE
Special to The New York Times

WASHINGTON, Dec. 30 — Although a law that took effect on April 1 allows employers to hire teen-agers at less than the minimum wage of $3.80 an hour, few companies have elected to go below this level, an initial survey has found.

A survey of 167 fast-food restaurants by two university economists found that only two were taking advantage of the $3.50-an-hour wage floor for teen-agers, while one more is paying $3.50. Executives at 83 percent of the restaurants, all part of the Burger King, Kentucky Fried Chicken or Wendy's chains, said they did not think they could attract acceptable workers at that wage.

They also expressed concern that paying some young employees less than others would be demoralizing and disruptive — a criticism the leaders of the American Federation of Labor and Congress of Industrial Organizations have often leveled at the concept of two-tier pay scales.

The behavior of the companies is a sharp contrast to the importance President Bush attached to the sub-minimum wage. When Congress passed a bill last year that raised the minimum wage to $3.80 on April 1, 1990, and $4.25 next April 1, Mr. Bush threatened a veto unless a sub-minimum wage was provided for teen-agers. Congress agreed to include that provision for three years.

The President contended that companies would resist hiring and training disadvantaged teen-agers unless they were allowed to pay less than the new minimum for the first six months of the new worker's employment.

A White House spokesman, Stephen Hart, declined to comment today on the survey, which studied the 167 restaurants in Texas, where many fast-food outlets have historically paid young workers no more than Federal law requires. Fast-food companies have been among the supporters of the separate wage scale for teen-agers.

Lawrence F. Katz, a Harvard University labor economist, and Alan B. Krueger of Princeton University, the co-authors of the survey, said the response of the fast-food restaurants suggested that the minimum wage played a social role beyond the supply-and-demand laws of economics. The Federal minimum wage has come to be accepted by most employers and employees as a sort of guide to the least that should be paid for the most menial jobs, they added.

Officials at the Labor Department's Bureau of Labor Statistics said they knew of no other study that had attempted to measure the use of the new sub-minimum wage. Indeed, future studies might turn up more use of the sub-minimum wage. But the bureau's wage and employment data tend to confirm the survey's findings.

Loopholes or Violations

Month after month, for example, bureau data show that about 2 percent of the nation's employed workers earn less than the minimum wage, including 8 percent of the 16- to 19-year-old wage group, the one most affected by the sub-minimum wage. This 2 percent receives less than the legal minimum because of loopholes in the law or violations of it. And since April 1, the percentage has not risen.

The bureau's unemployment data

7 NEW YORK TIMES, 1 January 1989.

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also fails to turn up evidence bearing out the Administration's concern that joblessness would rise among teenagers without the sub-minimum wage to offset the April 1 rise in the minimum to $3.80 an hour, from $3.35.

No Unusual Changes Reported

Although few employers appear to have resorted to the sub-minimum wage, the teen-age unemployment rate remained unchanged until late summer. Bureau officials and most private economists attribute the increase not to wage levels, but to the downturn in the national economy.

Mr. Katz and Mr. Krueger, who presented their survey at the annual conference of the American Economic Association, which ended here today, found that the fast-food outlets they surveyed did not report unusual changes in employment levels and hours worked after the new minimum wage went into effect.

Nor did they report cutbacks in fringe benefits, although a majority of the employees at fast-food restaurants work part-time and do not qualify for health insurance and other benefits.

Still, some economists argue that the April 1 increase in the minimum wage put relatively little pressure on employer costs because the minimum had remained at the old level, $3.35 an hour, since 1981, and during that unusually long period many companies found themselves moving their wage scales above the minimum. In this view, the minimum might begin to hurt employers when it rises to $4.25 an hour on April 1. That might prompt more companies to resort to the sub-minimum, which will rise at that time to $3.90 an hour, some economists say.

Little Training Required

Finally, most people earning only the minimum wage are in retail trades, with a heavy concentration among fast-food outlets. The jobs they occupy usually require only a few days of training to master. The sub-minimum wage provision, on the other hand, allows an employer to pay a teen-ager $3.35 to $3.80 an hour for the first three months on the job, even without offering training. To extend this special pay level pay for an additional three months, training must be involved.

"The fact there is very little use of the sub-minimum means that employers are not chomping at the bit to train young people and being prevented from doing so by the minimum wage," Mr. Krueger said.

Sixty of the 167 outlets surveyed had been paying the old minimum of $3.35 an hour and they reported jumping to $3.80 an hour on April 1. Most of the rest had been paying above the old minimum to teen-agers and they generally increased their wages by enough to keep their pay above the new minimum.

Upward Shift for Thousands

The hourly wages of thousands of people earning just above the minimum shift upward when the minimum does. The Texas survey found this phenomenon and other studies, in the past, have also reported it.

Mr. Katz and Mr. Krueger selected Texas because it is one of the 25 states that does not have a minimum wage law that could override the national minimum.

The new sub-minimum wage scale replaces one that had been in existence since 1961 but was limited to full-time students who worked part-time. Studies showed that the only employers to use that wage were universities and movie-theater chains.


4. What methodology does the author of the principal note use? How well does the author persuade you of the merits of his proposal?


6. What methodology would you argue underpins the Congressional reports?