Law Reform
and the
Problem of Unintended Consequences

by
George Kevin Weber

B. A. Lehigh University (1972)
J. D. Antioch College (1975)

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Signature of Author: ______________________
Department of Urban Studies and Planning
April 9, 1985

Certified by: ________________________
Gary T. Marx
Thesis Supervisor

Accepted by: ________________________
Lawrence Susskind
Chairman, Departmental Graduate Committee
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PREFACE

This dissertation closes what has become for me a rather sobering period of years. It is a period that began sometime back in the late 1960s when, as a college student, I, like a number of others in my generation, decided to become a lawyer who would use the law for reform purposes. I made this decision to become a reform lawyer with a great deal of enthusiasm and optimism about what a future in reform work would accomplish. Later, while in law school, my high hopes remained undiminished.

My optimism began to dampen, however, several years into my first efforts as a licensed lawyer. These efforts took place in the South and Southwest where I was litigating minimum wage, worker safety, and various kinds of discrimination suits for the United States Department of Labor. And by the time five years at this work had elapsed I had come full circle to the point where feelings of disillusionment, and not enthusiasm, were predominant insofar as my view of law reform work was concerned.

A number of factors contributed to this disillusionment. The biases of some judges, for example, made law reform work seem hopeless. And so did the disparity between the scant legal resources that reformers bring to court and the...
abundant legal resources upon which the powerful can rely. (In one of the first cases I argued I represented one party on my own while the other party, a large and wealthy organization, was represented by a handful of lawyers.) But if judicial bias and the unequal resources that parties bring to a lawsuit were the cause for some disillusionment, even more disillusioning was the nagging and increasingly likely possibility that law reform lawyers through their reform efforts unintentionally cause as much harm as good. Weighed down by this possibility, I eventually headed back to school intent on trying to answer two questions: (1) how did I reach the point where I was not only a lawyer but one who started out with such high hopes for law reform?; and (2) does the problem of unintended consequences make high hopes for law reform a quite unrealistic view? This dissertation presents my initial and, as I have already intimated, sobering findings to these questions.

In undertaking my studies I have received assistance from many staff and faculty in M.I.T.'s Department of Urban Studies and Planning and Department of Political Science. My thanks to all. I am particularly grateful to the members of my dissertation committee, each of whom I respect as individuals as well as teachers. The committee included: Dr. Suzann Buckle; Dr. Leonard Buckle; Dr. Louis Menand; and Dr. Gary Marx. Dr. Menand and the Buckles have been supportive of my efforts. Professor Marx served as Dissertation
Chairman and has been very kind and helpful in innumerable ways.

My thanks also to my parents--Mr. George Joseph Weber and Mrs. Dorothy Henry Weber--who taught me to pursue and value knowledge. I also appreciate and here acknowledge the encouragement I have received from by beloved brothers: Robert W. Weber; James P. Weber; and Thomas M. Weber. Finally, my thanks to my true friend Andrea L. Anderson who typed the dissertation and made many useful suggestions.
This dissertation is
dedicated to my late sister Eileen
whose gentleness and unhesitating generosity
will be remembered always.
INTRODUCTION

Recently it has been reported that after over a decade of litigation the famed Boston school desegregation suit is having "the opposite effect of the one . . . intended. Whites continue to flee the system, enforcing the vicious cycle--more and more segregated buses, fewer and fewer integrated classrooms." ¹ Similarly, there have been recent reports that higher local telephone rates apparently are an unintended effect of a consent order issued in the thirteen year old antitrust litigation against AT&T.² And, in a small Massachusetts town, a recent suit that is intended to make sure that police officers arrest drunk drivers allegedly may actually be encouraging police officers to look the other way when they encounter such drivers.³ Furthermore, not only have there been numerous recent claims that litigation is producing unintended effects. There also have been recent reports that legislative activity is producing similar results. In New York City, legislation intended to improve the

safety of building facades is allegedly having the unintended outcome of encouraging building owners to shear off cornices and other ornate additions to the facades thereby destroying beautiful and historically important parts of facades. Meanwhile, recent legislation deregulating federal control of airlines has spurred the growth of so many new airline companies that there are not enough experienced pilots to go around and thus some new airlines are forced to employ inexperienced pilots. As a result, there have been recent claims that an unintended effect of the airline deregulation legislation is that passenger safety may be suffering due to the use of inexperienced pilots.

The type of law-related unintended consequences referred to above is the subject of this dissertation. Such consequences are studied in connection with law reform movements, particularly the law reform movement of the late 1960s and early 1970s. The law reform movement of the 1960s and early 1970s is, for the present author, among the more useful and intriguing contexts in which to look for and study the problem of law-related unintended consequences, a problem we define in more


detail at a later point, but which may be generally understood to refer to the usually unexpected and the unintended effects that sometimes follow legal action. It is especially instructive and interesting to examine law-related unintended consequences in the context of the 1960s-1970s law reform movement because perhaps in no other undertaking in recent history has the law been used with such clear social change purposes or intentions and, as we shall see, it is advantageous to investigate the problem of unintended consequences when initial purposes or intentions are clear. In stating that the 1960s-1970s law reform movement is an excellent context in which to try to detect and observe law-related unintended consequences, I do not mean to imply that there was a great deal of discussion of the issue of unintended consequences in that movement. In fact, as we, in chapter one of this dissertation, develop the context of our study by reviewing various features of the 1960s-1970s law reform movement, we find that these features tended to disregard the issue of unintended consequences.

Among the features of the 1960s-1970s law reform movement at which we take a careful look in chapter one and which apparently disregarded the matter of unintended consequences is the movement's voluminous literature. In disregarding or at least deemphasizing the difficulties for law reform presented by the issue of unintended consequences,
the literature of the 1960s-1970s law reform movement permitted some inflated and overconfident views of law reform to develop and flourish. This dissertation seeks to temper the effect of the sometimes grandiloquent writings of the literature of the law reform movement by calling attention to the limitations placed on law reform by the phenomenon of unintended consequences.

We also look carefully in chapter one at other features of the 1960s-1970s law reform movement that, like the literature of the movement, gave but scant regard to the problem of unintended consequences. We argue that these other features of the movement, together with its literature, helped attract or call young people to the movement. Moreover, we contend that the attraction issued by these features was somewhat deceptive because, as we have said, the features failed to fully acknowledge the problems presented for law reform by the matter of unintended consequences.

Demonstrating that the literature and various other features of the 1960s-1970s law reform movement were inattentive to the problems for reform raised by the issue of unintended consequences enables us, however, to argue more than that such inattention made the literature overconfident and made the movement as a whole deceptively attractive to young people with reform interests. It also enables us to contend that because of such inattention to the problem of unintended
consequences the law reform efforts of the young people who actually joined the movement may have at times had seriously negative repercussions for poor people and other clients of the movement. In particular, we argue, as will be seen, that inattention to the problem of unintended consequences may sometimes have led to the situation where law reform efforts by young activists have in fact aggravated rather than bettered the condition of poor people and other clients on whose behalf reform efforts have been made.

We analyze the problem of unintended consequences in relation to the law reform movement of the 1960s and early 1970s in order to make another point, one concerning the manner in which scholarly accountings or evaluations of that movement should be made. The point is this: any such accountings or evaluations must include an attempt to assess unintended consequences. Accountings or evaluations that fail to consider the unintended consequences of law reform efforts of the past two decades will, it is submitted, be incomplete and inaccurate tallies of the true impact of such reform efforts. Of course, incorporating the concept of unintended consequences into accountings or evaluations of the 1960s-1970s law reform efforts is not a simple matter for, as we discuss in the next chapter, use of the concept entails a number of definitional and measurement problems.
The bulk of our observations regarding what the problem of unintended consequences may mean for the 1960s-1970s law reform movement and for efforts to evaluate that movement are made in chapter one and in chapter five. In chapters two, three, and four, we are concerned with unintended consequences of legal action on a more general level. Acknowledging the measurement and definitional problems, and the somewhat fragmentary and suggestive character of the evidence adduced, this dissertation makes, in these middle chapters and in part of chapter five, the general argument that a wide variety of law reform efforts of the modern era, and not just those associated with the 1960s-1970s law reform movement, have at times apparently been seriously undercut by the problem of unintended consequences. To support this overall argument that the problem of unintended consequences presents trouble both for law reform efforts related to the movement that gained momentum in the 1960s and early 1970s and for other similar efforts of recent years, this dissertation extensively reviews different types of unintended consequences that have been triggered by legal action in the form of legislation and litigation. The dissertation also examines the features of successful legal action and discusses how the absence of such features in any particular legal action may be linked to the appearance of unintended consequences in that action. Still further,
this dissertation considers questions for future research regarding law-related unintended consequences.

We have outlined above most of the key issues this dissertation discusses and most of the major arguments it makes. The remaining, and less central, issues and arguments raised in the dissertation are best introduced by contrasting them with arguments that the dissertation does not make. For example, the dissertation does not argue that the problem of unintended consequences inhibits the law from achieving only overblown reform goals such as those that, as we shall see, were set for it in the law reform movement of the 1960s and 1970s. Rather, the dissertation argues that because of unintended consequences law and lawyering can at times have difficulty meeting moderate and even simple reform goals. And, relatedly, it should not be misunderstood that we are contending that unintended consequences arise only in regard to reform actions (as distinct from reform goals) that take place on a large scale such as class action reform lawsuits or sweeping reform legislation. Instead, it is contended that even the smallest, most unambitious and narrowly drawn lawsuits and legislation can precipitate unintended consequences.

There are additional potential misconceptions that should be dispelled at the outset. Though it is about law
and lawsuits that go awry in the sense that they exhibit unintended consequences and side effects, this dissertation is not aimed at suggesting that law can never be an instrument of reform. Nor, as we discuss more fully in chapter two, should there be any mistaken impression that it is maintained in this dissertation that unintended consequences that arise following legal action are necessarily bad or negative. Legal actions can also produce unexpected and unintended results that are positive or good from the viewpoint of those who initiate the actions or that are good from some other viewpoint. These caveats aside, the dissertation does conclude, nevertheless, that in looking at the overall situation the problem of unintended consequences may well be a fundamental flaw in schemes designed to use law as an instrument of reform. To put it another way, if, as is often said, legislation, litigation, and other types of legal action are vehicles for reform, then the problem of unintended consequences ices the road to reform sometimes causing those vehicles to spin their wheels and other times to slide off the path entirely.
PART ONE

THE OPTIMISTIC LAW REFORM MOVEMENT OF THE 1960s AND 1970s
CHAPTER I

LAW, LAWYERING, AND YOUNG ACTIVISTS: THEIR CALL TO REFORM AND THE ISSUE OF UNINTENDED CONSEQUENCES

In Shakespeare's *King Henry the Sixth*, a group of "commons" arm themselves for rebellion and as they begin their revolution one among their number, named Dick the Butcher, cries to his comrades "the first thing we do, let's kill all the lawyers."¹ From his desire to promptly extinguish the lives of all lawyers, it is apparent that Dick viewed the legal profession as a key group among those who structured and operated what he and his collaborators believed was an oppressive society. This perception by Dick the Butcher of lawyers as archvillains serves as a neat counterpoint to the more respected place the legal profession seems to have been assigned in our own most recent experience with social upheaval in the so-called "turbulent 1960s." True, as Jerold Auerbach has reported in his social history of the legal profession, some segments of the profession were exposed in the tumultuous 1960s as participating in the perpetuation of a system of justice that, among other inequities, discriminated between

blacks and whites and between rich and poor. But, in apparent disregard of the abuses fostered by some elements of the legal profession, the rebellious young of the 1960s looked upon the profession in general with such favor that they designated it as offering one of the most attractive vocational choices available. Hence, as numerous authors have noted, many idealistic young men and women entered the practice of law in the 1960s and early 1970s and they did so with what seemingly was a hope of using law as a means to bring about social change. Berman and Cahn, for example, were describing this trend when they wrote that:

Deeply aware of the legal profession's inadequate commitment of time and resources to the solution of social problems, many [law students] have decided to become full time advocates for the unrepresented: poor people, racial minorities, unorganized consumers.

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3 The phrase "1960s and early 1970s" is used repeatedly in this chapter. In using the phrase, I am in general referring to the period 1964 to 1974.


5 Berman and Cahn, Ibid.
Auerbach described the situation this way:

During the 1960s observers detected 'a new generation of law students and recent graduates more conscious of the urgency of social reform than any past generation of lawyers.' Young lawyers in significant numbers repudiated private gain for public service and searched for opportunities to combine social professionalism with social activism in the public interest.6

There is some doubt regarding just how many of these young lawyers entering reform-oriented work during the 1960s and early 1970s actually had prior activist views and experience, but some clearly did.7 It is also clear that the total number of lawyers engaging in reform work was greater than in previous years if only because the number of available reform positions, with such organizations as legal services programs and public interest firms, was, as we shall see, itself expanding greatly. Thus while Shakespeare's fictitious rebel Dick the Butcher would dispose of all lawyers in order to attack oppression in his society, ironically some of the rebels of the 1960s wanted not to dispose of the legal profession but to enlist in its ranks even though

6Auerbach, Chap. 9.

7See the data in H. S. Erlanger, "Lawyers and Neighborhood Legal Services: Social Background and the Impetus for Reform," Law and Society Review 12 (1978): 253, who, writing in regard to just the Legal Services Program, maintains that the number of activists who entered the program is not as great as often thought. See also Katz, Poor People's Lawyers, p. 107, who argues that some of the figures cited by Erlanger "... greatly underrepresent moral activism in the perspectives of early Legal Services lawyers."
the profession had been shown to be a key contributor to the racial and economic injustices that the 1960s rebels found reprehensible. Once in the profession, these rebels joined forces with various disenchanted young lawyers who had no prior activist experience and together these two groups undertook what was, as we shall also see, a much ballyhooed campaign of law reform often considered to be in the vanguard of all social change efforts of the 1960s-1970s period.

The Call to Reform in the 1960s and early 1970s

The young people with activist inclinations who began moving into the legal profession in the 1960s and early 1970s were apparently heeding a call that was resounding throughout America. It was a call to use law and lawyering as a means for reform. Many voices contributed to the call including those of politicians, practicing lawyers, and scholars. By their speeches, writings, and other actions these politicians, lawyers, and scholars made a collective call to "use the system," especially the legal system, "to change the system," and furthermore, their activities created a kind of ambience in which law was made out to be something of a panacea particularly to those unschooled in the details of the law's workings and its idiosyncracies.
The weaknesses, limits, and paradoxes of the law, such as the problem of unintended consequences, were downplayed, if not ignored.

In what follows below we consider in detail the various aspects of the call to law reform in the 1960s and early 1970s. Our purpose is to show how the call drew young activist oriented individuals into the legal profession and to also show, what is more important for this dissertation, how the call neglected a particular shortcoming of law-related action, namely the problem of unintended consequences, thereby, incidentally, making the attraction of these young people into the profession all the more possible. Ultimately we argue that the call to reform was overstated and misleading partially in its own right and partially because of its failure to fully assess the constraints on reform action that arise from the problem of unintended consequences.

Politicians, Legislation, and Reform

As indicated above, politicians contributed to the call in the 1960s and early 1970s to use law as a tool of reform. During this time, they called for the use of law, and in fact did use law, to attack nearly every major problem that was confronting the country. In reviewing below some of the legislative actions politicians called for and
took in this period, it is apparent that these politicians had a high degree of faith in the reform power of law for they literally set out to use the law to transform America. It was a faith in law among politicians that, it is submitted, may have spilled over onto the young people of the times inspiring such young people to try their hands at law-related work. Furthermore, from the heavy reliance of politicians on law, it is also apparent that these politicians were not much troubled by the idea that laws might unexpectedly and unintentionally exacerbate rather than ameliorate a particular problem. As previously suggested and as we shall eventually see, however, there was little in the scholarly literature on law reforming that could have alerted politicians of the period to the problem of unexpected or unintended consequences.

Among the many issue areas in which politicians of the 1960s and early 1970s legislated were race relations, the environment, consumer problems, and discrimination against women and older individuals. We look first at race relations legislation which many felt was urgently needed during these times in light of race-related sit-ins, marches on Washington, and riots. In our look at race relations legislation we can clearly see the above referred to deep confidence of politicians in the reform power of law. This
confidence is evident in the race relations enactments of the period because those enactments attempted no less than to legislate reform in the racial practices and attitudes of a large segment of the white population.\textsuperscript{8} Though an act was passed in 1960,\textsuperscript{9} the really significant reform legislation in the race relations area began with the Civil Rights Act of 1964\textsuperscript{10} which has recently been called "... the most significant civil rights legislation since the post Civil War period."\textsuperscript{11} The 1964 Act, under Title II, bars discrimination in public accommodations. Title VI of its provisions bars discrimination in any program receiving federal assistance and Title VII made it unlawful to discriminate against any individual in regard to employment because of such individual's race. Another piece of significant race relations legislation immediately followed in the form of the Voting Rights Act of 1965.\textsuperscript{12} Professor Schwartz has written that the Act

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"... is, in many ways, the most drastic civil rights statute ever enacted by Congress. ..."13 In brief, the 1965 Act contains provisions permitting Federal voting examiners to be appointed thereby supplanting the authority of local registrars whose notoriously discriminatory practices in the South had been artificially reducing the number of registered black voters. Other provisions of the Voting Rights Act outlawed discriminatory voting tests regarding qualifications to vote. The Act has often been acclaimed for its success in prompting new voter registrations.14 Attack on the race problem continued in the 1960s with passage of still another noteworthy civil rights act in 1968. The provisions of the 1968 act outlawed, in phases, various aspects of housing discrimination.15

As previously suggested, it is not only the above described race relations enactments that evince the strong belief in the reform power of law that was held by politicians in the 1960s and early 1970s and that may have affected young people of the times causing them to be moved to undertake law-related work. A similarly strong belief in law also is evident in the calls of politicians to use law, and again

13 Schwartz, p. 1469.


15 82 Stat. 73 (1968).
in their willingness to in fact use it, to battle a whole host of other social ills. Thus, in regard to environmental problems, politicians of the period took action in the form of the Clean Air Act\textsuperscript{16} and the National Environmental Policy Act.\textsuperscript{17} Consumer problems, meanwhile, were attacked as in, for example, the Consumer Credit Protection Act.\textsuperscript{18} Further, to combat discrimination in employment against women and older workers the Equal Pay Act of 1963\textsuperscript{19} and the Age Discrimination in Employment Act of 1967\textsuperscript{20} were passed, respectively. These various legislative actions by our elected leaders, as well as many other similar legislative actions taken in the 1960s and early 1970s, and the publicity surrounding the actions, helped create an aura about the competence of law as a technique for solving social problems. It seems unlikely that the young people of the times could have avoided being aroused by this enormous respect for law and belief in its power that was so evident among our political officials, a respect and belief that seemed to disavow or overlook the thought that

\textsuperscript{17}83 Stat. 852 (1969).
\textsuperscript{18}82 Stat. 146 (1968).
\textsuperscript{19}77 Stat. 56 (1963).
\textsuperscript{20}77 Stat. 602 (1967).
law could unexpectedly cause harm as much as it might help. Some young individuals of the period reacted to ubiquitous respect for the law and belief in its power by attempting to undermine and flout the law while others no doubt saw the possibility to turn the law's might to their own reformist goals. For those who chose the latter path a logical first step was to become a lawyer. As is well known, it is lawyers who are often most instrumental in the passage of legislation whether they be the lawyers who draft the legislation or the lawyers who typically make up more than a majority of most legislatures.

Lawyers and Reform

Lawyers, as well as politicians, contributed to the call in the 1960s and the first years of the 1970s to use law as a means of reform. Acting primarily in their capacities as independent professionals and not as politicians and legislators, lawyers contributed to the call to reform by creating a set of circumstances that fueled the call and gave it strength and purpose. First of all, as is discussed more fully below, lawyers were pressing for, and with the help of federal and foundation funding, were successful in greatly expanding the number
and the size of law reform related organizations and institutions and in expanding, in particular, the number of law reform jobs available in such organizations and institutions. An increased supply of reform institutions and of reform-oriented jobs contributed to the call to reform in the sense that it gave the call the chance to become something more than an empty cry. Institutions and jobs could be used by those making and heeding the call to turn its promises into concrete results. Second, as is also discussed below, lawyers were developing new theories and strategies of law reform, or dusting off and adapting old ones. These theories and strategies gave direction and intellectual substance to the call to reform. Third, lawyers, by their writings and speeches, were widely spreading an extraordinary confidence and belief in the reform power of law, a belief not unlike that exhibited by politicians in legislating many ambitious new laws. In order to show the full measure, at the time, of the legal profession's belief in the power of law for reform I will eventually detail one example of its expression by means of a case study of the comments made regarding the Legal Services Program. This belief in the law's reform power was the very foundation of the call to reform. Without such a belief it is unlikely that any individual
would have been moved to call for the use of law for reform purposes and, in turn, without individuals being so moved, there would have been no collective call to reform in the 1960s and early 1970s.

Each of the three circumstances that lawyers helped create—expanded law reform job opportunities, newly available theories of law reform action, and a spreading and powerful belief in the reform competence of law and lawyering—can be viewed not only, as argued above, as contributions to the call to reform but also as enticements that helped draw young activist oriented individuals to the practice of law. The way in which each of these three circumstances helped attract such young people to the legal profession is discussed at length below but, for purposes of giving the reader an overview, is also briefly stated here. To begin with, the increased law reform job opportunities created by lawyers probably were seductive to young activists contemplating a legal career. These reform jobs ostensibly offered a means to express, and to financially support, one's activism. Next, the new and apparently appealing theories and strategies of law reform action being formulated by lawyers at the time, such as that developed by Ralph Nader, may well have attracted activist
inclined young people to legal practice in that it was through legal practice that such young people would have the opportunity to deploy one of these law reform theories and strategies. Finally, the powerful belief in the reform competence of law and lawyering that lawyers were propagating at the time may have influenced young people with a reformist bent attracting them to a career as a law reformer.

The expanding number of reform oriented jobs, the developing new theories and strategies of law reform action, and the spreading belief in the reform power of law, all of which we outlined above, are three circumstances that are also discussed or reflected in the literature on law and reform of the 1960s and early 1970s. Hence, our attempt below to more fully consider these circumstances and the ways in which each induced young people into the legal profession will enable us to also review in some detail the law and reform literature in which our three circumstances are discussed or reflected and to point out, as has been mentioned on several occasions, how that literature downplays the law's limitations such as the problem of unintended consequences.

**Increased Opportunities for Law Reform Practice**

It was suggested above that young activists of the 1960s were called to the legal profession partially by the
lure of increased opportunities to practice reform law. Before detailing these increased reform opportunities that were arising in the 1960s, however, it should be noted by way of contrast that, in the years prior to the 1960s-1970s law reform movement, the history of the legal profession cannot be characterized as one in which reformist or progressive activities were encouraged. The evidence in this regard has recently been reviewed by Professor Auerbach and seems to be conclusive.21 Alexis De Tocqueville's remarks made about 150 years ago probably describe with accuracy what in actuality is the history of lawyers in America rather than merely their role in society at the time of his visit. Tocqueville told us that:

I do not, then, assert that all members of the legal profession are at all times the friends of order, and the opponents of innovation, but merely that most of them are usually so. [Lawyers are] . . . eminently conservative and anti-democratic [and] . . . are attached to public order beyond every other consideration.22

However tempted to use Tocqueville's remarks as a general description of the history of lawyers in the United States, it must be admitted that there have been some periods, in

21Auerbach, Unequal Justice.

addition to the 1960s and 1970s, during which lawyers have been influential in reform movements and even in revolution. For example, members of the legal profession participated in the revolution that brought our nation into being: more than half of the signatures on the Declaration of Independence are those of lawyers. 23 And, in regard to reform movements, lawyer, and later Supreme Court judge, Felix Frankfurter and his proteges are often said to have had considerable influence in New Deal era reform efforts. 24 Thus when lawyers began turning to reform in the 1960s and 1970s it was an unusual move if one thinks in terms of the legal profession's entire history but yet it was not a move wholly without historical precedent.

I have remarked that the involvement of lawyers in reform in the 1960s and 1970s was accompanied by a tremendous explosion in the number and size of law reform related institutions and, thus, in the number of available law reform oriented jobs. Naturally enough, there was


24 Auerbach, Chap. 7.
also a concomitant explosion in law reform litigation. As one observer of the general time period has written:

"... Only from the late 1950s on has the use of litigation as an instrument of social reform become so widespread that it can be called a movement."^25

To some extent this growth in reform litigation mirrored a pattern evident in society in general. For example, writing of litigation brought by society through its government, Charles Black could say as early as 1960 that:

"In our society, government works in great part, and public policy is implemented in great part by the bringing of law suits--criminal and civil."^26

But, perhaps because of the visibility that came with the publicity in which law reform law suits were often enveloped, the increase in such reform suits in the 1960s and early 1970s seemed to outstrip similar increases in government and non-reform related private suits. In addition to the reform suits themselves, institutions bringing reform suits also became highly visible to the

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public eye in this period and statistics indicating the proliferation of these institutions demonstrate that their increased visibility was real and definitely not merely a matter of publicity. As an example of the proliferation of reform institutions during these times, consider the growth in the number of reform-oriented legal aid offices which was clearly a growth unparalleled at any point in history. We will now detail the explosive growth of such legal aid organizations, and of similar reform organizations, in order to show the increased law reform opportunities that were available in the 1960s and early 1970s and that may have called or attracted young people of that period to the legal profession.

Legal aid organizations have long been a part of the American scene. The very first legal aid organization was incorporated in 1876 in New York City by a group of merchants and other citizens concerned with the welfare of certain immigrants.\(^{27}\) In its initial year of operation, the organization (which later became known as the New York Legal Aid Society) provided legal aid in 212 cases.\(^{28}\) By


\(^{28}\)Ibid., p. 135.
1914 there were twenty-eight legal aid societies in the United States\textsuperscript{29} and in the 1960s the number jumped to 236.\textsuperscript{30} In the mid and late 1960s, however, during which time the federal government began funding various local legal aid programs, the expansion was at a highly accelerated rate. In 1965, just prior to federal funding, the total budget for all traditional legal aid societies was just over $5 million dollars and there were about 400 full time legal aid lawyers.\textsuperscript{31} By June 1968, federal funding by the Office of Economic Opportunity added $40 million more dollars and 2,000 new lawyers to the totals.\textsuperscript{32} Further, and more important for our purposes than the growth itself in the total number of legal aid positions, is the fact that the new positions funded by federal monies were created expressly, as we shall see more fully at a later point, to provide opportunities for lawyers to pursue reform litigation, including large scale class suits, while traditional legal aid programs usually emphasized service to individual clients without regard to reform issues.

\textsuperscript{29}\textit{Ibid.}, p. 147.


\textsuperscript{31}\textit{Ibid.}, p. 188.

\textsuperscript{32}\textit{Ibid.}
Young activist oriented individuals were probably
drawn to the legal profession in the 1960s and early 1970s
not only by the opportunity to obtain one of the above men-
tioned newly created reform positions available in federally
funded legal aid programs but also by the opportunity to
secure one of the new positions which other reform organiza-
tions had to fill as a result of their own growth during
this period. For example, the NAACP and ACLU experienced
marked growth during these times and thus had jobs to offer.
The NAACP, formed in 1909, and the NAACP Legal Defense Fund
(LDF), which became a separate entity in 1939, had long been
involved in reform litigation most notably under the brilliant
leadership of Charles Houston and later Thurgood Marshall.33
Though initially a small office, by the 1960s the LDF had
expanded to the point where it had to keep some thirty staff
attorney positions filled.34 The LDF also offered an oppor-
tunity to participate in a network of cooperating attorneys
that was created for the purpose of providing aid to LDF
staff attorneys in local jurisdictions. Meanwhile, the

33The history of the NAACP is told in C.F. Kellogg, 
NAACP: A History of the National Association for the 
Advancement of Colored People (Baltimore: Johns Hopkins 
Press, 1967) and in the very readable work of R. Kluger, 

34Robert L. Rabin, "Lawyers for Social Change: 
Perspectives on Public Interest Law," Stanford Law Review 
American Civil Liberties Union presented young activists considering a legal career with similarly expanded opportunities, should such activists become lawyers, to engage in reform-type practice. Originally the ACLU carried out its litigation on a voluntary basis but by 1974 it offered the opportunity to be one of 34 full time lawyers employed in its 19 local offices or one of 18 lawyers employed in the ACLU headquarters. In addition, at that time the ACLU also offered the opportunity to join some five thousand fellow attorneys willing to voluntarily aid the ACLU cause.

Young people contemplating entering the legal profession to do reform work could also look to the prospect of landing one of the reform law positions available in the multiplying public interest law firms of the times. These firms were a mixed bag but some typical features can be described. They generally received operating funds from one or a combination of the following sources: private foundations, private donations, and paying clients. They

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36 Rabin, p. 212.

37 Ibid.

sometimes liked to be identified with particular movements, such as the environmental or consumer movement, and, to accomplish such, they would focus their litigation on their chosen area. Other public interest firms, however, litigated in many areas. 39

Beyond legal aid, the ACLU, the NAACP, and the public interest firms, another possibility for law reform practice in the 1960s and early 1970s was the opportunity to join one of a small number of law communes that popped up around the country. Typically devoted to representing militants, these communes tried to survive by combining free work for the militants with other work for a collection of paying clients. Besides the psychological rewards of helping keep radicals out of jail and on the streets, these law communes also offered a counterculture lifestyle. There are reports that communes attempted such innovations as disbursing remuneration according to need and not according to performance demonstrated or fees collected and there are further reports that, as the term commune implies, efforts were made at living as well as practicing together. 40

Considered as a whole, the various organizations described above were offering expanded, and in some cases,


refreshingly innovative opportunities to try law reform to those young people of the period who were mulling over the possibility of a legal career.

Theories and Strategies for Law Reform

In addition to the increased reform related job opportunities, that we have just reviewed, a second circumstance that may have attracted young activist oriented individuals to the legal profession in the 1960s and early 1970s was the chance to implement one of the exciting, and apparently promising, new theories and strategies of law reform (or remodeled old ones) that lawyers, such as Ralph Nader, were developing during these times. Young activists pondering the idea of beginning a legal career probably envisioned that, by participating in the implementation of these theories and strategies, they would be joining those on the cutting edge of the law reform movement. Unfortunately, as intimated earlier and as will be apparent from a review of their terms, these theories and strategies tended to soft-pedal the problem of unintended consequences and thus they may have caused young people who reviewed and relied on them to conjure up unduly optimistic images of what it means to use law and lawyering for reform purposes.

The theories and strategies that were afoot in the law reform movement of the 1960s and early 1970s have been
discussed at length many times in the literature. 41 I will not repeat here such lengthy discussions but rather will briefly present several of the significant theories and strategies of the times that may have had some allure for those young activists thinking about becoming lawyers. One such theory of reform was articulated in an important article by Jean and Edgar Cahn. 42 The theory or strategy espoused by the Cahns had four basic tenants. First, they stated that many of the problems of the poor were legal in nature. Second, they urged reform lawyers to become spokesmen for the poor especially in relation to public officials who should be aiding the poor. Thus, for example, these lawyers were to articulate and advocate the perspectives and policy positions of the civilians (i.e. the poor) who were the intended beneficiaries of the War on Poverty being waged by bureaucrats. Third, the spokesmen/lawyers would be located in and become a part of the neighborhood and community they represented. Fourth, not only as spokesmen for the poor in legal forums but also through other activities associated with law practice (i.e. negotiation, drafting

41For example, see Comment, "The New Public Interest Lawyers," Yale Law Journal.

of documents, business formation, and consultation), these lawyers would help ameliorate the conditions of poverty in which their clients were trapped.

Besides the Cahns' strategy, there were other major strategies that may have appeared sufficiently promising to the rebellious young of the 1960s and early 1970s to help draw them to the legal profession. A second strategy of the times that the young may have responded to in this way revolved around the idea of test or impact cases and Edward Sparer is often said to have been a leading advocate of this approach to law reform. In essence this second theory or strategy required careful, even scholarly, analysis of the legal status of a particular problem area (e.g. welfare rights) to uncover appropriate points for challenge. Then a series of test cases were designed and brought in the courts in the hope of eventually transforming the law in that area. The NAACP Legal Defense Fund is generally said to have used such a strategy in carefully dismantling the legal underpinnings of the "separate but equal" doctrine prior to its ultimate destruction in Brown v. Board of Education.

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43 Earl Johnson, Jr., p. 23 describes Sparer's initial strategies and activities.

Still a third strategy or theory of the period may have seemed promising to young activists considering a legal career. This third strategy or theory centered on, somewhat like the Cahns' theory, the concept of accountability and the notion of access. It is a strategy or theory, one identifiable in the work of public interest lawyers, that saw reform as giving voice to the public interest in forums which previously had been closed to the public or in which the general public did not usually appear equipped with the law and lawyers. Further, this strategy for law reform apparently accepted the idea that the actions of interest groups determine the contours of our political struggles and the ultimate distribution of costs and benefits by the political system. Accordingly, the reformers involved in the implementation of this strategy, including Ralph Nader and others, sought, and in some instances continue to this day, to represent the public interest in various rule making administrative forums (e.g. FTC, FDA, etc.) which they felt were unresponsive to the general public though sensitively attuned, so the argument went,

to the needs of powerful interest groups usually those the administrative body was supposed to regulate not coddle. Though these public interest reformers of the period believed in a strategic lawsuit here and there, litigation was not, unlike in the Cahns' theory and in the test case theory, a key to the overall public interest strategy. Rather public interest reformers placed their faith in advocacy before administrative rule making bodies.

A fourth strategy, the final one we review here, was allegedly adopted by the Legal Services Program and it involved the decision to employ a mix of devices to achieve reform.46 According to this strategy, the reformers would attempt reform by stretching their resources to cover a variety of techniques including test cases, routine cases generated in neighborhood law offices, group representation, and legislative advocacy.

It should be readily seen that to any young 1960s-1970s activist ruminating over the prospect of a legal career, the foregoing four strategies or theories for law reform, which along with their proponents were highly publicized, gave such young people ample reason to believe that pursuit of a reformist legal career would not be without theoretical and strategic guidance.

Belief in the Reform Power of Law and Lawyering

Besides having theories and strategies, such as those discussed above, to guide their reform actions and having expanded opportunities to actually obtain a reform-oriented job, a third factor or circumstance—widespread belief in the reform power of law and lawyering—may have also attracted or called the young to the legal profession in the 1960s and early 1970s. Though typically not in a form that reached the level of a theory or a strategy, many lawyers and legal commentators, as we shall see immediately below, expressed this belief in the reform power of law and lawyering. In fact, I think a firm belief in the reform competence of law and lawyering characterized the legal profession in general during this period, but to substantiate the point it would be necessary to closely examine here most, or a good portion, of all the public statements and writings that bar officials, legal scholars, and practitioners made in regard to law reform in this era. Such an effort is beyond the scope of the present work. As an alternative, I have chosen to just generally review much of the law reform literature of the times while keenly looking at an important and representative segment, that being, the literature and statements surrounding the Legal Services Program. An intense review, or case study if you will, of
the statements and writings relating to the Legal Services Program will permit me to show, in several of its forms and in all its grandeur, the extraordinary belief in the reform power of law and lawyering that was common among a wide assortment of lawyers in the 1960s and 1970s. Our study of the writings that discussed the Legal Services Program will also permit me to hint at in this chapter and flesh out in later chapters the stark contrast between the picture of law reforming that is developed in some of these Legal Services writings and the picture of law reforming that develops when one includes the concept of unintended consequences.

Belief in the Power of Law and Lawyering: The Case of the Legal Services Program

From its origins in a War on Poverty program operated by the now defunct Office of Economic Opportunity (OEO) to its 1974 incorporation as the supposedly politically independent Legal Services Corporation, the tempestuous early political history of the federally funded Legal Services Program has been much chronicled. In its more recent past, the program has grown in size, but some of

its key activities (e.g. class action suits and appeals) have continued to come under political attack.48 And currently, as President Reagan cuts back Great Society programs, the Legal Services Program is again the subject of political controversy and will either lose financial support or may even perish entirely. Much of the turbulent history of the Legal Services Program can be explained and understood in terms of what I submit has been the underlying and deeply held belief by the relevant actors in this history that law and lawyering are extremely potent reform tools which Legal Services lawyers might use, or misuse depending on the perspective you take, to alter social and economic structures in America. Such a strong belief in the reform power of law and lawyering is, as we shall see below, apparent in the goals the Legal Services Program set for itself, in the laudatory statements observers of the program made about the capabilities of lawyers and about the early accomplishments of the program, and in the caustic criticisms of the program's opponents which were laden with fear about the enormous changes in society that were imminent if the program were allowed to continue to function unbridled.

The goals of the Legal Services Program. Among the various features of the Legal Services Program, the goals set for the program in the 1960s most clearly reflect the strong belief in the reform power of law that influenced young activists and attracted them to legal careers.

Though the literature of the period indicates that antipoverty lawyers in the Legal Services Program, and in related efforts, had a series of subordinate goals, the primary goal was no less than to help banish poverty forever. The head of OEO, Sargent Shriver, himself a lawyer, set the standard in 1965:

... There is a new appreciation of the contribution legal services can make, not simply to get poor people out of a particular jam, but to get them out of poverty once and for all.

Taking this cue, E. Clinton Bamberger, appointed by Shriver as the first director of the OEO Legal Services Program, wrote that:

The OEO program marshals the forces of law and the power of lawyers in the War on Poverty to defeat the causes and effects of poverty.

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49 In using the general term "the literature of the Legal Services Program" I usually mean to include not only the literature that deals specifically with the Legal Services Program but also the small amount of literature that considers related antipoverty lawyering efforts such as those undertaken by the Mobilization For Youth.


On another occasion Bamberger said:

Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes and effects of poverty. Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope and ambition. 52

Moreover, the goal of helping wipe out poverty forever was not mere rhetoric, it was a goal that was apparently taken very seriously. For example, Bamberger stated, "I ask myself each day--how will lawyers representing poor people defeat the cycle of poverty?" 53 And Jack Katz reports that originally the Legal Services Program had to annually report to OEO on "the year's progress in reducing poverty . . . ." 54

To implement the overriding goal of first reducing and then finally eradicating poverty, antipoverty lawyers of the times had a set of sub-goals. First among these sub-goals was a new emphasis on reform activities having far-reaching impact. As previously mentioned, traditional (i.e. the pre-federally funded) legal aid societies had allegedly underscored the importance of individual service. 55


54 Katz, p. 266.

The 1960s antipoverty lawyers in the federally funded Legal Services Program, however, realized the importance of individual service but also had other ambitions as well. Director Bamberger wrote in this regard:

Certainly the individual client's case and his needs must always be the focal point of the lawyer's work. Legal service in the context of the War on Poverty, however, must mean something more . . . . I speak of results with long range significance for large numbers of people, not just individual service of limited impact.56

Thus, the leadership of the Legal Services Program urged the offices it funded to ferret out opportunities to pursue reform litigation or reform-oriented legislative advocacy of major impact.57

Either through such reform activities or through a gradual wearing down by the filing of hundreds of similar individual cases, antipoverty lawyers hoped to achieve a second sub-goal: the transformation of individual institutions from adversaries to benefactors of the poor. For example, the leading article, to which many antipoverty lawyers no doubt looked for guidance and goals, written by the Cahns argued that "sometimes effectuating legal and constitutional mandates can prompt institutional innovation."58

And I think it is fair to say that institutional change is

56E. Clinton Bamberger, Jr., pp. 848-849.
57Earl Johnson, Jr., p. 132 and Chapter 7.
58Cahn and Cahn, p. 1338.
what Bamberger had in mind when he stated, in the message quoted at length above, that among the responsibilities of antipoverty lawyers is the duty to "... remodel the systems which generate the cycle of poverty." 59 Rothwax meanwhile argued that such institutional change, if it comes at all, would be brought about not by the reform oriented advocacy Bamberger favored but by what Rothwax called "the power of the case-load"—the attrition accompanying a crush of similar cases. 60

Besides the goal of changing existing institutions, other subordinate yet nonetheless ambitious goals that, from the relevant literature, it appears antipoverty lawyers of the period set for themselves included the desire to aid in the construction of wholly new institutions, especially ones devoted to economic development of the ghetto. 61 According to the requirements of this goal, lawyers would help form businesses, credit unions and the like for the poor just as, historically, lawyers have often handled incorporations and other organizational matters for the rich. The issue of


61 Cahn and Cahn, pp. 1338-1339; Earl Johnson, Jr., pp. 128-130.
resources to give life to these organizations for the poor was somewhat glossed over. A fourth and related subordinate goal—in addition to emphasizing reform activities, transforming existing institutions, and incorporating new ones—had lawyers setting out to politically organize the poor. Thus Stephen Wexler bluntly stated: "... the object of practicing poverty law must be to organize poor people..."62 The importance of political organizing work by poverty lawyers is an idea also discernible in the comments of others including Bellow, Edelman, and Clark.63

A final subordinate goal of the 1960s and early 1970s antipoverty lawyers was to play a part in relieving, and perhaps overtaking, the sense of despair that afflicts many poor people. By showing a poor person that he or she had legal rights that could be vindicated, poverty lawyers hoped to aid in the conversion of a depressed and despairing individual into one who would take control of his or her destiny and thus thrust off the shackles of poverty. This goal of overcoming despair is implicit, for example,


in the comments of Edward Sparer, an early supporter of poverty lawyering. Sparer spoke approvingly of how an anti-poverty case "affects the quality and independence of life for the human being involved. It makes real . . . the knowledge that he or she is not simply an object to be manipulated or forgotten." 64 And the Cahns' hope of using lawyers in the battle against despair is also evident. The Cahns contended that a lawsuit "... might help a community or an individual to shake off a paralyzing sense of despair and helplessness." 65 Similarly, the Cahns wrote:

Action, even in a limited context, can be a significant antidote to despair and apathy. . . . The assertion of a legal right holds the potential not only for lessening one's sense of alienation from society but also for affecting one's self-image and aspirations. 66

Before the thread of our argument begins to unwind, we should pull some loose ends together. We have seen that Legal Services had enterprising and ennobling sub-goals ranging, to mention two, from attempts to relieve despair to efforts to transform institutions. We have also noted that these sub-goals were techniques for ultimately


65Cahn and Cahn, p. 1346.

66Cahn and Cahn, p. 1340.
achieving the overriding or primary goal of helping eliminate poverty which, of course, is itself no mean task. Our purpose in reviewing the goals of Legal Services in detail was to try to show how they reflect the strong belief in the reform power of lawyering that attracted young activists to the legal profession in the 1960s. And, indeed, in suggesting lofty goals that seemingly disregard problems like unintended consequences, antipoverty lawyers and their supporters clearly indicated an immense belief in the reform power of law and lawyering.

We go on below to describe other aspects of Legal Services that reflect the strong belief in law and lawyering that drew the young to the legal profession. Before going on, however, it should first be mentioned that there was an additional, and as yet undiscussed, goal of Legal Services that I think also proved most fetching to young activists thinking of becoming lawyers. It was a largely unarticulated yet very real goal. Perhaps it is better characterized initially as an unspoken assumption rather than as a goal. The assumption was that antipoverty lawyering in the Legal Services Program and elsewhere was aligned with the so-called "Movement." And, in accordance with that assumption, the underlying goal was to somehow merge the efforts of poverty lawyers
with the other diverse efforts of the Movement (e.g. anti-war and women's rights activities) to transform America though the details of the America that would emerge from such efforts were vague, and more often, non-existent.

A number of writers seem to have detected this kinship between Legal Services type work and the Movement. For example, I believe Johnson may have been speaking of the close relationship between the two when he reports that the most attractive element of the OEO Legal Services Program for young lawyers was its "activist image"\textsuperscript{67} and perhaps recognition of the connection between Legal Services work and the Movement underlies his comment (with Caplan) that: "It [i.e. Legal Services] provides an alternative to manning the barricades, to violence in the streets, to passive resistance outside the law."\textsuperscript{68} Regardless what Johnson, or Johnson and Caplan, may have meant to be the precise import of the above quoted statements, Jack Katz has unmistakenly recognized the relationship between poverty lawyering and the activities that made up the Movement. Katz has written:

Many young, recent law graduates... were drawn to Legal Services by its perceived affinity to war resistance, the civil rights movement, the Peace Corps, the

\textsuperscript{67}Earl Johnson, Jr., p. 189.

counterculture, university student rebellion, anti-"machine" politics, and religious social activism. 69

Optimism regarding achievement of Legal Services' Goals. The high regard in the legal profession for the reform power of law that helped attract young activists to the profession in the 1960s is apparent not only in the inflated antipoverty and Movement-related goals of the Legal Services Program. The same high regard for the reform competence of law also is apparent in: 1) the optimistic, even narcissistic, assessments made concerning the power and abilities that poverty lawyers brought to the task of trying to actually reach the high goals they set; and in 2) the informal assessments made of the initial impact of their antipoverty efforts.

In the 1960s and early 1970s poverty law literature there is a good deal of narcissistic talk about the capabilities of lawyers. Furthermore, quite a variety of lawyers indulged themselves in this professional vanity. Writing of the skills that lawyers brought to the War on Poverty, Legal Services Director Bamberger said that ". . . we are engaged in giving arms, not alms, to the poor." 70 Similarly, a firm faith in the abilities of

69Katz, p. 132.

70E. Clinton Bamberger, Jr., p. 848.
lawyers seems to be one of the notions that is at the
bottom of a statement by the second director of the Legal
Services Program, Earl Johnson, Jr., who said: "... law-
yers are in the best position to deal with social discon-
tent."71 Law professor A. K. Pye and lawyer R. F. Garraty
also showed their extremely high estimation of the powers
and abilities of lawyers by pointing out, not unapprovingly,
that in legal services programs lawyers would be "asked to
serve as the architects of a social revolution."72 Pye and
Garraty also apparently felt that lawyers would be the key
contributors to the War on Poverty in that they wrote:
"... lawyers must be involved if the war [on poverty] is
to end in victory."73 The Attorney General of the United
States, Robert Kennedy, also conveyed, though in a more
tame manner, his belief in the importance of legal skills
in the effort against poverty: "In the final analysis,
poverty is a condition of helplessness... It is time to
recognize that lawyers have a very special role to play in
dealing with this helplessness."74 Even Justice Brennan

71 Earl Johnson, Jr., "An Analysis of the OEO Legal
74 Quoted in Cahn and Cahn, p. 1336, footnote 27.
felt compelled during this period to pen some flattering remarks about his own profession in regard to the same general context. Writing in 1968, Justice Brennan contended that "today, the lawyer is still the indispensable middleman of our social progress."75

Statements such as those by Justice Brennan and the others quoted above show that members of the legal profession had not a little optimism when it came to assessing the abilities that lawyers qua lawyers could call upon in efforts to achieve reform goals including the goals of the poverty law movement. Surely their quoted comments seem light years away from the idea that law and lawyering are sometimes uncertain tools that can unexpectedly produce negative results. As suggested earlier, a similar faith in law reforming is also evident in some informal assessments of the actual efforts (as distinguished from the inherent capabilities) of poverty lawyers. For example, Senator Pearson of Kansas, himself a lawyer, assessed in 1971 the accomplishments of the lawyers in the Legal Services Program as follows:

These benefits are clearly measurable by the sizeable increased wages, food stamp and welfare payments [no exact figures given] that successful suits have brought

to the indigent. But of even greater value in my judgment, have been both the continuing protection from consumer frauds and housing inequities and the landmark legal decisions that benefitted millions of poor American people. [Furthermore, Legal Services lawyers engage . . . in the daily tasks of resolving unhappy family situations, preventing evictions, and alleviating wage garnishments. . . .] 76

As we shall see, the problem of unintended consequences makes lawyering in behalf of the poor a much more mixed blessing than Senator Pearson's statement implies. The Senator's statement has been quoted at length here, however, in order to show the kind of casual assessments of the work of Legal Services lawyers that apparently indicate a firm belief in the power of lawyers to undertake reform. The optimism of such early assessments of what Legal Services was achieving, and the earlier discussed general optimism about the inherent capabilities of lawyers as reform agents, both demonstrate a faith in law as a tool for reform that must have seemed promising to anyone thinking through the benefits of a legal career.

Fear laden criticisms of the reform potential of the Legal Services Program. There is one remaining aspect of the Legal Services story that I think also mirrors the legal profession's high evaluation during this period of

the reform power of law and lawyers. This last aspect is the sharp criticisms of the program by some prominent members of the bar which seem to have been founded on the ground that Legal Services lawyers, because they have the tools of law and lawyering at their disposal, might be able to drastically revamp the society in which the critics had achieved prominence. Further, these criticisms seem paranoid in retrospect if one accepts the idea—that is argued in this dissertation—that the weapons for change that reformers in Legal Services could call upon, namely, law and lawyering, are not always smoothly functioning and effective weapons but rather are weapons that sometimes recoil against their users and against the users' purposes.

The comments of a previously exalted member of the bar, Spiro T. Agnew, illustrate the harsh, and fearful in tone, criticisms that were levelled at Legal Services in the 1960s and early 1970s period with which we are concerned. Agnew wrote that the Legal Services Program was "... manned by ideological vigilantes," though ironically that description apparently proved to a more apt characterization of the Nixon Administration of which he was a part than it was of

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Legal Services. These alleged vigilantes had, according to Agnew:

... gone way beyond the idea of a governmentally funded program to make legal remedies available to the indigent. ... We are dealing, in large part, with a systematic effort to redistribute societal advantages and disadvantages, penalties and rewards, rights and resources.78

Agnew added that Legal Services lawyers are "... heavily involved in every social issue of the day" and are apparently engaged in "social engineering on a grand scale..."79

Agnew was not the only person during these times characterizing Legal Services lawyers as immersed in efforts to radically change society. For example, one congressman was quoted as calling California Legal Services lawyers "self-styled revolutionaries."80 Such political attacks, among other events, caused governors to veto refunding of legal services programs in California, Florida, Connecticut, Arizona, and Missouri.81

While Agnew and others were apprehensive of the changes Legal Services lawyers were attempting in society

78Agnew, p. 930.
79Agnew, pp. 931-932.
81Earl Johnson, Jr., Justice and Reform, p. 193.
at large, still other critics made foreboding and vitriolic comments about the impact of the Legal Services Program on the legal profession itself. For example, writing in 1965, the President and Executive Secretary of the Tennessee Bar Association described Legal Services: "... as a program which encompasses within its very being the destruction of the free, vital and independent protector of human rights... the legal profession."82 Other local bar organizations and officials reviled Legal Services as well. Earl Johnson, Jr., reports that the North Carolina bar threatened to disbar any lawyer who joined the staff of the newly organized Winston-Salem or Charlotte Legal Services offices.83

The strident verbal assaults, the threats of disbarment, and the attempts to veto funding which we have briefly noted above were all to some degree prompted by the overstated claims by the proponents of Legal Services regarding the goals of the program. By proposing sweeping changes, Legal Services lawyers invited attack from those who supported the status quo. But the various actions taken against Legal Services by Agnew and other critics in the bar also exemplify the belief among members of the legal profession that the law and lawyering are mighty tools.


83Earl Johnson, Jr., Justice and Reform, p. 95.
which if put in a few wrong hands— in this case the hands of the small number of antipoverty attorneys— could wreck havoc on the nation.

We have now completed our detailed examination of various statements and writings concerning the Legal Services Program though we will have occasion to refer below to additional aspects of the program and its literature from time to time. We undertook our perusal of various statements and writings regarding Legal Services in order to illustrate the widespread and deeply held belief in the reform power of law and lawyering that, together with other circumstances created by lawyers in the 1960s, may have attracted young activists to the legal profession. And, indeed, we have seen that just such a strong belief in the reform power of law and lawyering is evident in: the hyperbolic goals that were set for Legal Services; the confident statements about the capabilities of its lawyers; the optimistic early assessments of the actual efforts of its lawyers; and the fearful criticisms regarding the great changes its lawyers would make. Moreover, along the way we have had occasion to note that the foregoing aspects of the Legal Services Program and of its literature presented an image of law and lawyering as extremely powerful tools which may have entranced young people considering a legal
career but which is an image of law and lawyering that seems at odds with a concept of reform-oriented legal action that accounts for the limitations that derive from the problem of unintended consequences.

By reviewing the comments of a wide variety of lawyers including both opponents and proponents of the program, I have tried in our look at Legal Services to demonstrate that a strong belief in the reform power of law and lawyers was not uncommon in all segments of the legal profession in the 1960s and early 1970s. The same point—that such a strong belief was not uncommon—could be made by inspecting the statements and writings regarding reform efforts other than the Legal Services movement. As was stated earlier, an extended review of these additional reform efforts is beyond the boundaries of this work and therefore we will have to settle for a quick glance at such other reform movements. From our quick glance, however, it becomes apparent that those involved in these other reform movements also adhered to a deep belief in the reform capacities of law and lawyers. It was a belief, like that of antipoverty lawyers, that may have attracted young activists to the legal profession. And, again similar to their counterparts in the poverty law movement, these reformers in other movements also, as we shall see, projected a belief in law and
lawyering that generally gives but short shrift to the problem of unintended consequences.

Among the other reform movements that, in addition to the Legal Services movement, seems to have been caught up in a powerful belief in the reform potency of law is the public interest law movement. For example, a forceful belief in the reform power of law is evident in an article Halpern and Cunningham, leaders of the public interest law movement, wrote expressly to "... be useful to that considerable number of young lawyers who contemplate embarking on public interest practice themselves." Not unlike the hyperbolic goals of the Legal Services Program, Halpern and Cunningham in their 1971 article set for public interest lawyering ambitious goals that display the authors' underlying strong belief in the reform power of law. Regarding their goals they wrote that: "Public interest law shares with its forebears a common goal of fundamental legal and social reform. . . ." Again like the literature regarding Legal Services, Halpern and Cunningham have an unmistakable confidence in the abilities of lawyers when it comes to reform. In discussing public interest lawyers representing consumer and environmental action organizations, the authors

84 Halpern and Cunningham, p. 1096.
85 Halpern and Cunningham, p. 1116.
claim that the potential of such lawyers "... in contributing to social change is clear. ..."\(^86\) Later in the article the authors once again demonstrate their strong faith in the abilities of lawyers when they add, writing of themselves and others engaged in similar pursuits, that: "Public interest lawyers believe they have discovered a promising path for social reform through legal action."\(^87\) And, also like the Legal Services literature, public interest lawyers Halpern and Cunningham make optimistic early assessments of public interest lawyering: "Public interest litigation appears already to have played a significant role in bringing about institutional change."\(^88\)

The faith which public interest lawyers such as Halpern and Cunningham and antipoverty lawyers had in the reform power of law is noteworthy and somewhat unexpected because of the unusually high degree to which their faith was apparently held. It would not be surprising for public interest and antipoverty lawyers to have a minimal or even reasonable amount of such faith in that law and reform is what antipoverty and public interest lawyering is really

\(^{86}\)Halpern and Cunningham, p. 1102.

\(^{87}\)Halpern and Cunningham, p. 1116.

\(^{88}\)Halpern and Cunningham, p. 1118.
all about. On the other hand, for a public interest or antipoverty lawyer to wholly doubt the reform potential of law and legal institutions would again be unexpected in that in essence it would mean that such a lawyer was doubting his or her chosen work, and to do so would be to doubt his or her very self insofar as one's identity is wrapped up in one's work. We cannot, however, make the same observations about radical lawyers. We would expect radical lawyers, by definition, to be interested in the uses of law for more than incremental reform and we would expect them to doubt the value of lawyering and any other activity that takes place within existing, and by their account, corrupt institutions. Yet, in apparent tribute to the faith in the power of lawyering which was so pervasive in the 1960s and early 1970s, we find even an occasional individual in the radical law movement having good things to say about lawyering. Thus radical lawyer Gerald Lefcourt could write "... the skills of an attorney are a valuable asset to a movement in struggle. ..."89 And observers of radicals issued reports that may have helped spread the faith in the power of lawyering. Hakman, for example,

reported that "... resourceful radicals, their attorneys, and their sympathizers have developed imaginative and productive ways of using litigation to advance the revolutionary cause."90

The remarks we have reviewed that were made by lawyers in regard to the public interest, radical, and especially the antipoverty law movements all suggest that a strong belief in the reform power of law and lawyering was not rare among members of the legal profession in the 1960s and early 1970s (though there were, as we shall see, some skeptics). A firm belief in the reform competence of law and lawyering even reached into the halls of some prestigious private law firms who initiated reform projects of their own including, for example, the opening of free legal clinics in ghettos or the establishment of office policies that permitted members of the firms to devote part of their time to pro bono work.91 Berman and Cahn cite an internal memorandum of one prominent firm that suggest this strong


faith of some firms of the private bar in the reform power of lawyering. The memo, written in 1969 in the Washington, D.C. firm of Hogan and Hartson, refers to the events of those days "on the campuses and in the ghettos" and states that: "As lawyers, we have a unique opportunity to ameliorate some of the evils which prevail in our society." 92 Whatever the case may have been in the private bar, it is enough, however, to have shown that such a strong belief in law and lawyering was common in at least the reform-oriented segments of the bar for it is in those segments that guidance would have been sought by young activists of the 1960s whom we have contended may have been induced by the belief, among other factors, to enter the legal profession.

We may at this point bring to a close that part of chapter one that has discussed the factors or circumstances created by lawyers that may have attracted young activist oriented individuals to the legal profession in the 1960s and early 1970s. No one knows for sure why these young individuals entered the legal profession but we have argued that it seems not unlikely that such young people were at least partially moved to enter the profession by three

particular circumstances for which lawyers were primarily responsible: increased opportunities to practice law reform; the availability of new theories and strategies of law reform action; and a widespread belief in the reform power of law and lawyering. Specifically, we have contended that the newly expanded job opportunities of the times in legal aid, the NAACP and elsewhere must have seemed inviting to young activists thus causing them to seriously consider a legal career. Secondly, we contended that activists were probably also drawn to a legal career by the chance to play a part in carrying out one of the new theories or strategies of law reform action that were receiving attention in this period. Thirdly, we have argued that the belief in the reform power of law and lawyering that was so easily seen in our study of Legal Services and of other reform movements may have been a belief that was so widespread and so powerful that it influenced young activists causing them to gravitate to the legal profession. Finally, we have had the occasion to note that lack of attention to the problem of unintended consequences, which is discussed more fully at a later point, may have made the law reform job opportunities, the new theories of law reform action, and the spreading belief in the
reform power of law seem more promising to young activists considering careers as law reformers than should have been the case.

Skepticism in Nirvana

Efforts at scholarship require, of course, that one resist the temptation to make a point by distorting the evidence. We have extensively reviewed the antipoverty and other law reform writings that reflect a powerful belief in the capacity of law to effectuate reform. But obviously not all writers of the period thought they lived in a nirvana where law and lawyering were always effective antidotes to the poisonous problems that sometimes infect society. To balance the description we have sketched thus far, we should, therefore, also take an equally extensive look at that portion of the antipoverty and other reform literature of the period which, by comparison to the pro-reform portion, is more skeptical of the power of law and which perhaps should have tempered enthusiasm for the law among young activists. Moreover, our struggle for a balanced perspective demands that we also briefly glance at two other parts of the law-related literature, one part dealing with what I call, for lack of a better name,
the limits of the law and the other part dealing with the impact of legal decisions. These two additional bodies of literature also in part exhibit a note of skepticism about law and thus perhaps should likewise have dampened enthusiasm among the young in the 1960s for activist legal careers.

Besides the desire to make a balanced presentation, there is another and equally important reason for carefully reviewing the skeptical segments of the law reform literature. Such a review is also crucial because we eventually compare the skeptical portion of the reform literature with the more optimistic portion and reach this conclusion: that insofar as such a generalization is possible, and notwithstanding the numerous problems noted by skeptics, the law reform literature of the 1960s and early 1970s paints a fairly rosy picture of law and lawyering as tools for reform. Moreover as we shall see this conclusion about the rosy picture of law reforming drawn in the literature is itself the starting off point for one of our primary arguments in this chapter: that the picture of law reforming was made even rosier by the literature's practice, mentioned before and seen more fully below, of generally blotting out the problem of unintended consequences.
Before beginning our review of the skeptical segments of the law reform literature, we should first be careful to distinguish the skeptics who authored such skeptical segments from the various critics of law reform, like Agnew, at whose works we have already glanced. Generally, the critics and their comments seem not to doubt the power of law and lawyers to achieve reform, but rather to doubt the value of the goals toward which the reform is directed. The skeptics meanwhile often indicate approval of the reform goals at hand but perceive some obstacle that rests in the path to achievement of those goals. It should also be noted that I use the characterization as a "skeptic" rather loosely; it does not mean that a writer classified as a skeptic did not occasionally include in his or her work some remark that reflects an underlying hope that reformers would actually achieve their goals despite the obstacles that must be overcome. In fact, there is often a hopeful remark or two about law reform embedded in the works of the skeptics.

Just as skeptics at times are hopeful so too optimists are occasionally skeptical. We find, therefore, that even the most eloquent and forceful proponents of law reform in the 1960s and early 1970s had moments of restraint and sometimes of skepticism. In regard to the poverty law
reform movement, for example, take the Cahns' first article which overall spoke glowingly of the use of law and lawyering in the War on Poverty: it also contains the side note that legal representation is "... limited in the changes it can effect, and particularly in the redistribution of resources and the increased resources which it can bring about."93 Furthermore, the Cahns' subsequent articles are much more restrained in tone than their first though even in these subsequent articles there are hopeful references to the reform power of lawyering. Thus in one of these later articles, for example, a careful remark underscoring that they do not believe that neighborhood antipoverty firms are a "panacea" is juxtaposed with a more encouraging note about "the significant contribution that ... neighborhood law firms have begun to make and will continue to make. ... "94

Like the Cahns, Edward Sparer was, as we have mentioned, an early and leading supporter of law reform in the 1960s. However, as Samuel Krislov has noted, Sparer apparently became, even more so than the Cahns, increasingly

93Cahn and Cahn, p. 1344.
disillusioned with reform through lawyering. In a statement that expresses his disillusionment, Sparer wrote that in regard to being a lawyer who represents welfare recipients such a lawyer is:

No more a significant participant in grand change, he appears reduced to what the revolutionist has often accused the lawyer of being—a technical aid who smooths the functioning of an inadequate system and thereby helps perpetuate it.

The kind of profound disillusionment, even despair, that is evident in Sparer's remark quoted above is generally absent in that part of the law reform literature of the 1960s and early 1970s which is nevertheless sufficiently incredulous of the power of law reforming to be classified as "skeptical" for our purposes. Rather, the extent of the skepticism in most cases is mild and usually is rooted in a particular problem that the author determined the law reform movement would be likely to encounter. In the poverty law literature, for example, a number of problems were detailed that reflected some skepticism about the poverty law reform movement. In order to show the nature of such skepticism, we now begin a painstaking review of the

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96 Ibid., p. 241.
specific problems that were discussed—problems that perhaps should have caused young people of the times to have second thoughts about pursuing futures as antipoverty lawyers. Thus, Silver97 and Clark,98 in separate articles, saw the antipoverty efforts of the Legal Services Program as seriously hampered by the enormous caseloads that its attorneys had to shoulder. Typically, those concerned with the effects of such caseloads pointed out that they prevented clients from receiving careful and thorough service or that such caseloads did not leave Legal Services attorneys with sufficient hours to work on the time consuming major cases (e.g. class actions) from which the poor are supposed to stand the greatest chance of taking away significant benefits. Others suggested that the burdensome and routinized caseloads may increase attorney turnover and burnout with corresponding effects on the quality of the Legal


98L. D. Clark, "Legal Services Programs—the Caseload Problem, or How to Avoid Becoming the New Welfare Department," Journal of Urban Law 47 (1969-1970):797; in a later article, Handler, Hollingsworth, and Erlanger, (p. 62), showed the dimensions of the caseload problem when they reported that Legal Services lawyers handle approximately 400 cases a year while the average private practitioner carries a yearly caseload in the neighborhood of 50-100 cases.
Services staff and thus on the overall impact of the program. 99

The poverty law literature of the 1960s and early 1970s discussed other problems that also raised skepticism about the potential effectiveness of the Legal Services Program and similar efforts in the battle against poverty. Several articles saw the problem of political interference and political attacks as seriously handicapping the Legal Services Program and thus a call went up for the program to be ensconced in a politically neutral and quasi-independent corporation. 100 Other articles meanwhile discussed still additional problems that were largely political in nature and that caused some skeptical brows to be lifted regarding the future of Legal Services. There was, for example, the thorny issue of who would be declared eligible for the aid rendered by the program. 101 Certain observers of Legal


Services contended that if the income eligibility cutoff point drastically limited who could receive aid such that only the desperately poor qualified, then the program obviously would not have any impact among the millions of moderately (but not desperately) poor people in America who also needed legal assistance. On the other hand, other observers replied: that a liberal eligibility cutoff point would likely bring in some clients seeking free aid who had previously paid inexpensive private lawyers to handle their legal matters; that such inexpensive lawyers would bristle with indignation at the prospect of losing clients to the Legal Services Program; and that, if sufficient inroads were made by Legal Services into the livelihoods of inexpensive lawyers, these inexpensive lawyers might, as a group, be moved not only to politically oppose any liberal eligibility standards the program tried to install but also to even challenge Legal Services' very existence. And there was the related issue regarding how, once eligibility standards were determined, the actual services would be delivered.102

Some argued that the establishment of staff offices, such as those utilized by traditional legal aid programs, would be the ideal mode of operation for the newly created Legal Services offices in that lawyers working in staff offices develop an expertise in the problems of the poor who are their exclusive clients. It was further argued that development of such expertise in Legal Services lawyers would be essential to the program's ability to provide effective service. The argument continued that no such expertise would develop and could be drawn upon by poor people if, rather than adopting the staff office delivery model, Legal Services deployed any of the so-called private plans, such as judicare and voucher arrangements, in which private lawyers are compensated by Legal Services for counsel given to indigents. It was maintained that under such private plans a large number of private lawyers typically provide counsel to only an occasional indigent as well as to their regular flow of middle class customers and thus these private lawyers see too few indigents to acquire an expertise in their problems. But, meanwhile, the advocates of the private plans discerned other advantages in such plans. For example, these private plans were said to give a poor person the freedom to choose any private attorney participating in the plan while in staff office programs poor people are required to accept the services of whichever staff lawyers
are assigned to their cases. Furthermore, the proponents of the private plans contended that, for legislators, private plans represent a politically appealing alternative in that such plans allow legislators to provide those constituents who are private lawyers with an additional source of income. Hence, the proponents of the private plans concluded that the features of such plans would not undermine, as some claimed, but rather would enhance the chances for Legal Services' survival and success.

Besides the matter of selecting an appropriate plan to deliver services, still other essentially political problems were discussed in the literature and were sufficiently troublesome to prompt some skepticism about the possible effectiveness and future of the antipoverty movement in Legal Services. Thus there was the political issue of how much federal control was to be exercised over local legal aid projects funded by the Legal Services Program. Some contended that a good deal of federal control was necessary to prevent conservative local bar associations from capturing the local Legal Services projects and then undermining any reform goals the local projects were considering. These same individuals further contended that establishing federal dominance was an uphill battle and thus saw a

rather bleak future for Legal Services. Others, however, felt to the contrary that local rather than federal control was essential in that local control ensured local backing for a project and, according to the argument, without such local backing no project could survive. There was also a political problem regarding whether, and in what way, indigents should participate in the governance of the individual legal aid projects operated at the local level. One side argued that such participation was indispensable if local projects were to be responsive and accountable to the true needs of each individual poor person and to the needs of the community of poor people as a whole. Without such responsiveness and accountability, the success of the Legal Services Program, it was argued, would be in doubt. The other side maintained, however, that such participation in governance by indigents constituted a breach of the traditional ethical principle that lay intermediaries shall not control attorneys. Various additional ethical problems were also discussed in the poverty law literature of the 1960s and early 1970s including issues involving unauthorized practice of the law, impermissible advertising, and solicitation.


Solicitation was a particularly sensitive issue because, as the opponents and proponents of Legal Services both well knew, without a client willing to come forward to register a complaint there was little that Legal Services attorneys could do. Some, such as Bellow and Clark, went further and argued that even once you had a client and a case you were unlikely to accomplish much unless you supported the case and client with some form of political and economic mobilization.106 A quote from Marian W. Edelman underscores how she too was skeptical of legal efforts that lacked political and economic backing:

The thing I understood after six months . . . was that you could file all the suits you wanted to, but unless you had a community base you weren't going to get anywhere.107

Though some skepticism in the literature, such as that reviewed above, focused on particular problems that the poverty law effort would have to beat or on particular needs that would have to be met, other skeptical comments indicated a more broadly based doubt about the power of law and lawyering for reform. Harold Rothwax, for example, wrote that "ultimately law is not a solution to the problems of the poor; money is."108 The head of a legal

106See citations in footnote 63.
107Ibid.
108Rothwax, p. 144.
services office exhibited a similarly broad questioning of the power of law and lawyering in remarks that are reported by Finman:

The basic question I have is whether we are going to do a meaningful job in breaking the poverty cycle... It seems like bringing up a popgun to kill an elephant.109

Professor Galanter, in a sensible article, also raised considerable doubt about the power of law and lawyering to induce change. He noted that redistributive justice was not likely to flow from rule change alone and emphasized the need for several types of accompanying institutional change.110 Professor Hazard also seriously questioned the likelihood that significant redistributive justice could be achieved by lawyering.111 Meanwhile, Lisle Carter showed some general skepticism about the reform power of law when he wrote that "... law, like other technical competencies, can only do so much."112 And Clark wrote questioningly about the power of a lawsuit and looked with askance at


111 Hazard, University of Chicago Law Review.

"laymen [who] expect the suit to adequately contain, clearly define and promptly ameliorate deep rooted social and economic conditions."\textsuperscript{113}

We have sampled the skepticism that marked part of the poverty law literature of the 1960s and early 1970s and that perhaps should have lessened enthusiasm among young people for vocations in poverty law. Some skepticism, however, is also evident in the literature of reform movements other than the poverty law movement. Thus, for example, we can find a limited skepticism in portions of the public interest law literature. Like its cousin in the poverty law literature, skepticism in the public interest law reform literature of the period revolved around an assortment of problems that, it was contended, might confuse, inhibit, or even block reform efforts. First of all, the public interest law reform literature raised the problem of defining "the public interest."\textsuperscript{114} It was argued in the literature that the public interest law movement cannot be effective unless it knows what the public interest is and thus once known can work toward it. The problem, of course, is that defining the public interest is a virtually

\textsuperscript{113}Clark, Kansas Law Review, p. 470.

impossible task. And another significant difficulty arises if an attempt is made to try to solve the dilemma by designating the interests of one or two large groups, for example consumer advocates or environmentalists, as constituting the public interest. In essence, the problem then becomes that in selecting one or several groups as representing the public interest you have done so at the expense of other groups which may mount a collateral attack on your reform efforts. Thus public interest law firms of the period who chose to provide their services to consumer and environmental groups had to overcome a collateral attack that took the form of an accusation by antipoverty groups that such public interest firms were siphoning off precious resources from the poverty law reform movement. According to the terms of this accusation, the resources available for all law reform efforts at that time were greater than those previously available but were, nonetheless, limited. Thus, giving public interest law firms who counsel consumer and environmental groups a slice of the finite pie reduced the amount of resources available for work with indigents who, so the argument went, needed the aid much more desperately than the largely middle class consumers and environmentalists who benefitted from the work of the public interest firms.

Even without regard to the issue of depriving the poor of resources, the question of whether public interest firms would have sufficient resources for continued financial viability was a big one in the literature, one that should have modified enthusiasm about the future of the public interest law reform movement.

Like certain public interest lawyers, there were radicals too who saw problems that caused them to add a full measure of skepticism or doubt to their estimations of the power of law for change. Radical Ann Fagan Ginger, for example, wrote:

I do believe that the law can be a tool for social change, but we must recognize its limitations. Law is an instrument for the exercise and the restraint of power and defines power relationships. It does not determine who has the power. Similarly, another radical commentator showed his skepticism about the amount and the worthwhileness of the kind of change that law can effectuate when he wrote regarding legal aid activities that:

The belief that sufficient funds for legal services would considerably alter the economic status of the poor ignores the harsh reality that legal assistance cannot change the existing social, economic, and political relationships.


Some skepticism about the power of law as a tool for change is apparent not only, as we have seen, in various parts of the law reform and radical literature, but also as noted earlier, in the more general literature dealing with the so-called "limits of law" and in the vastly expanding literature on the impact of legal decisions. A portion of the literature on the limits of law predates the 1960s law reform movement but this fact only highlights that such literature was available to law reformers of that time and perhaps should have tempered their views on the power of legal action. Roscoe Pound is among those who wrote on the limits of law and lawyering. Though Pound saw "in legal history . . . a continuously more efficacious social engineering,"119 he was also aware that there were "limits of effective legal action."120 Pound, in a warning that perhaps all law reformers should heed, concluded that the limitations of law "preclude complete securing through law of all interests which ethical considerations or social ideals indicate as proper to be secured."121 Another leading figure among legal commentators, Lon Fuller, also reminds us of limits though, as we shall see in more


detail in a later chapter, he stressed the limits on the use of adjudicatory mechanisms in our legal system.\textsuperscript{122}

There were, in the 1960s and early 1970s, social scientists, writing often in the so-called impact literature,\textsuperscript{123} who also hastened to point out the limits of change by legal action and who in particular appeared to be skeptical about using judicial decisions to achieve reform. In this impact literature, social scientists frequently described a large discrepancy between the change that a court or other legal institution ordered and the actual impact of the order. A classic case would be Brown v. The Board of Education\textsuperscript{124} wherein the Supreme Court directed that school desegregation proceed "with all deliberate speed" while, as is well known, actual desegregation either was not forthcoming at all or proceeded at a snail's pace. According to the impact literature, whether change in fact follows from a court's order is governed by a panoply of factors including among others:


\textsuperscript{124} U.S. 483 (1954); 349 U.S. 294
the clarity and persuasiveness of the court's order; the amount and kind of change required by the order; the means selected for enforcement and the character of the enforcers of the court's order; the political environment (e.g. opinions of local political elites) into which the court's order is received; and the resources that the parties to the case can muster to encourage compliance with the court's order. Factors such as those listed were used to analyze and explain why changes ordered by the courts in the school prayer decisions125 and in numerous other cases have not always become a reality.

In addition to those social scientists writing about the impact of particular court decisions, other social scientists emphasized additional factors that reformers in the 1960s and early 1970s should have recognized as having the potential to greatly impede reform through law and courts. For example, there was the problem of judicial attitudes, values, role perceptions, and bias.126 Thus, Professor


Grossman wrote regarding the effect of the characteristics of judges on social change:

That the personal values and background of the individual justices constitute an important variable is no longer open to question.\textsuperscript{127}

Sociologist William Evan, meanwhile, argued that to cause change in the face of resistance, the law's educatory function had to work smoothly. He delineated seven conditions necessary to aid in the smooth operation of the law's educatory function but concluded that these conditions are rarely fulfilled at any one point.\textsuperscript{128} Austin Turk saw law as a weapon of power but also saw that law was not all powerful especially, for example, when it gets at a problem's symptoms rather than its causes.\textsuperscript{129} Finally, as we come full circle back to the poverty law literature, political scientist Samuel Krislov, pointed out, among other things, that the timing of poverty law reform efforts could affect their eventual outcome.\textsuperscript{130}

We have seen that a number of authors in the law reform, social science, and other related literature, discussed various problems and constraints that confronted


\textsuperscript{130}Krislov, p. 211.
law reform efforts in the 1960s and early 1970s and that led these authors to develop a somewhat skeptical attitude regarding the chances of such efforts for success, an attitude which, in turn, possibly should have influenced and, in particular, discouraged young activists who were so excited about becoming reform lawyers. Thus having reviewed the skeptical portion of the literature and having, in an earlier section of this chapter, reviewed the more optimistic portion we are now almost in a position to make, as promised, some overall observations about the law reform literature of the 1960s and early 1970s. All that remains to be done is to note and discuss, as we do below, how the skeptics did not make much mention of the problem of unintended consequences as a basis for their skepticism. Nor for that matter, as we have repeatedly pointed out and as we shall see, did anyone else much concern themselves with the problems for law reform presented by unintended consequences.

The Problem of Unintended Consequences in the Law Reform Literature

The problem of unintended consequences was one given perhaps the least careful description and analysis among those difficulties for the law reform movement that were unearthed by the skeptics and that perhaps should have decreased the great enthusiasm among young 1960s-1970s activists for lawyering as a career. I do not mean, however,
that the issue of unintended consequences of legal action was totally ignored in the law reform literature of the period. In fact both the skeptics of law reform and even the most persuasive of early supporters of law reform paid their respects to the matter of unintended consequences. Among those in the latter category were the articulate poverty law leaders Jean and Edgar Cahn who showed their awareness of the problem of unintended consequences when they wrote that "... victory and vindication can be Pyrrhic ..." and a similar awareness is evident in their comment that "... the cost of the remedy frequently exceeds its worth." Another early poverty law supporter, Earl Johnson, Jr., also showed his familiarity with the problem of unintended consequences. Referring to economic oriented legal action, he wrote, for example, that:

Dropped in the middle of a fluid market, a new rule may generate unintended, even, counterproductive economic ripples.

Johnson, however, seems to have been largely responding to the earlier insights of Professor Hazard on the issue of unintended consequences. Public interest law advocates

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133 Earl Johnson, Jr., Justice and Reform, p. 208.

134 Hazard, p. 699.
Halpern and Cunningham also seemed to be familiar with unintended consequences. They pointed out that an unintended effect of vigorous public interest representation may be to exacerbate delays that already attend administrative agency action or "... may even be to create an unmanageable burden for [such] administrative agencies ... bring[ing] administrative process to a grinding halt. ..."

As previously indicated, some recognition of the problem of unintended consequences is evident not only in vigorously pro-reform articles such as that by Halpern and Cunningham or the Cahns' first piece but also in those articles that seemed more skeptical of the reform power of law. Rothwax, for example, who, as we have said, was restrained or skeptical in his views about the potential accomplishments of reform lawyering, evinced his concern for the problem of unintended consequences when he wrote that a lawsuit could be a "pyrrhic victory." Clark, another whose article regarding reform lawyering was somewhat restrained in tone, was also apparently aware of unintended consequences as is suggested by his reference to lawsuits that proved to be "illusory victories." But

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135Halpern and Cunningham, p. 1114.
136Rothwax, p. 142.
137Clark, Kansas Law Review, p. 469.
whether the author is one whose writings as a whole are skeptical or are optimistic about the power of law for reform, the treatment typically given to the problem of unintended consequences is generally limited to a single phrase, a sentence or a paragraph or two. Indeed, even if we look beyond the literature of the 1960s and early 1970s that specifically dealt with law reform and include all law-related literature of any period, we find that apparently there is very little of substance written on the problem of unintended consequences of legal action.\footnote{138}

Concluding Remarks

Neglect of the problem of unintended consequences in the law reform literature of the 1960s and early 1970s is one of the reasons why it is safe to conclude that that literature as a whole is exaggerated in nature. There are, as becomes evident upon a moment's reflection, other reasons for reaching the same conclusion, a conclusion that apparently was reached by Professor Hazard at an earlier date in regard to at least part of the same literature. The exaggerated nature of the literature of the period is also obvious, as we have seen and hopefully is recalled, in the statements of hyperbolic goals for law reform, in the highly optimistic assessments of the power of lawyers to potentially achieve those goals, in the similarly optimistic early tallies of the actual accomplishments of reform lawyers, and in the vituperative criticisms of the law reform effort that veiled a likewise inflated estimate among the critics of the power of reform lawyers to fully meet their goals. True, there was, as we have also seen, some skepticism about the reform power of law and lawyering but the overall exaggerated optimism of the

139Geoffrey C. Hazard, "Law Reforming in the Anti-Poverty Effort," University of Chicago Law Review 37 (1970): 244. Professor Hazard raises the question whether some of the antipoverty law reform literature is "exaggerated" and apparently answers in the affirmative.
literature emerges only partially moderated by such skepticism because of the overpowering force and eloquence of the optimism itself, because the skepticism was often cushioned by an occasional hopeful remark about the future of law reform,¹⁴⁰ and because the skepticism only lightly touched on the problem of unintended consequences. The state of the literature of the period—a slight skepticism ultimately swallowed up in an underlying and more profound optimism about law reform—is perhaps typified by this remark by Justice Brennan regarding reform efforts:

Lawyers obviously cannot do it all, but their potential contribution is great.¹⁴¹

That the literature of the 1960s and early 1970s reflected an exaggerated optimism concerning the potential of law and lawyering for reform is not an insignificant conclusion. It embodies nothing less than the notion that law reformers of that time apparently rejected outright the view that law and lawyering are by nature conservative, a

¹⁴⁰For example, compare the skeptical and optimistic comments made by the Cahns in an article that is quoted in the text at footnote 94; also compare the skeptical comment by Clark (quoted in the text at footnote 113) regarding the use of legal action for reform with this additional comment in which there seems to be a barely recognizable optimism: "Hopefully, however, lawyers will increasingly devise ways to make the legal process responsive to the demand that gross injustices end . . ." (from Clark, Kansas Law Review, p. 473).

¹⁴¹Brennan, p. 122.
view held, at least in regard to lawyering, by, as we have seen, as distinguished an observer as Tocqueville. Even in more recent times a political scientist as noteworthy as Hans Morgenthau has described, and apparently subscribes to, the view of law and lawyering as conservative. Professor Morgenthau writes that "... a given status quo is stabilized and perpetuated in a legal system" and he adds that courts are "agents of the status quo." The rejection by 1960s law reformers of the idea of law and lawyering as fundamentally conservative is not only suggested by the overall exaggeratedly optimistic nature of the law reform literature of the period but also by an explicit statement to that effect by a leading law reformer, E. Clinton Bamberger, who said that:

It is fallacious to think of lawyers as guardians of tradition--rather we are the guardians and watchdogs of orderly change.

Besides the fact that it represents an apparent rejection of the idea that law and lawyering are by nature conservative, there is another reason why it is not insignificant to conclude, as we have, that the law reform literature of the 1960s and early 1970s is exaggeratedly optimistic. Such is also an important conclusion because it means that

142 See text at footnote 22.


those young activists who we have seen were called into the law reform movement of the 1960s and 1970s probably had, as a result of the optimism spread by the literature of the movement, excessively high hopes for law reform efforts. And, unrealistically high hopes mean that, for those holding such hopes, there would be a long and potentially destructive fall to reality if, because of difficulties such as those presented by unintended consequences, reform efforts proved to be less than useful and perhaps even counterproductive.

The stage for our study is set. In the 1960s and early 1970s a call went up for reform through law and lawyering. Politicians, lawyers, and legal commentators sounded the call. By their actions, politicians showed their belief in reform through law. They enacted, with fury, an abundance of laws which taken together were designed to reform a nation. These laws attacked environmental, consumer, and racial problems to name just a few. Lawyers and legal commentators too sounded the call to reform through law. They propogated a literature—complete with theories of action—that exaggerated the power of law and lawyering and that invited use of this alleged power for reform purposes. They also pressed for increased job opportunities to practice law reform. The young activists of the 1960s and early 1970s apparently heeded the calls to reform through law by becoming lawyers. These young activists apparently entered the legal profession in search of
a means to express their hope for a new, a better, a reformed America.

This dissertation argues that the call to reform that went up was seriously overstated. Law and lawyering, as I have already acknowledged can be used to effectuate reform and can succeed in accomplishing much that is worthwhile. However, law and lawyering are also, it is argued, frequently instruments out of control. They are instruments that can, despite good intentions, cause as much misery as aid for those on whose behalf they are used. It is submitted in this dissertation, therefore, that what awaited young activists entering the legal profession in the 1960s and early 1970s were vessels--law and lawyering--that sometimes are sturdy ships in which to sail the seas of reform but which also at times are mere rudderless dinghies about as likely to be swamped, taking down crew and passengers, as to reach home port.

In that the conclusion is reached herein that law reform techniques are sometimes instruments out of control--a conclusion I attempt to support in the next four chapters--one perhaps may suspect that this author is an opponent of law reform and of the goals that the law reform movement of the 1960s and early 1970s set out to achieve. Nothing could be further from the truth. Among the wide range of clients and interests that lawyers can represent I personally find no work that is more ennobling to an individual lawyer or to the legal profession as a whole than to represent indigents, victims of discrimination, defrauded consumers, or
those who seek to protect the beauty of our environment. The desire to represent such clients and such interests which flourished in the 1960s and early 1970s was, it is suggested, a glorious moment in the history of the legal profession. It was a moment when the profession finally responded seriously to Charles Evan Hughes who many years earlier had admonished that the profession had an obligation to ensure that "no man shall suffer in the enforcement of his legal rights for want of a skilled protector, able, fearless, and incorruptible." It was I think also a moment that itself reflected a hopeful time in America when Americans toyed with the idea of moving to a new plane of existence in which materialism and self-interest took a back seat to a concern for the welfare of each of our fellow citizens. The hope of that time has since been snuffed out in the present era as we seemingly regress as a country to a preoccupation with materialism, self-interest and with, not the welfare of our fellow citizens, but the building of the means of their potential annihilation by nuclear war. Is it not just such self-interest or self-centeredness, perhaps in maintaining our jobs and our personal causes, that would lead law reformers to hold onto law reform even if it is as harmful as it is helpful to those we want to aid?

Just as the law reform movement raised, as noted earlier, the expectations of young activists about what they could accomplish through the legal system, so too the law reform movement raised the expectations of the poor and of the movement's other intended beneficiaries. The true aide-de-camp of the Reagan anti-law-reform forces is not the individual who may point out that in some cases reform efforts hurt as much as help intended beneficiaries rather it is the individual who silently acquiesces to such a tragedy and thereby permits the supposed beneficiaries to continue to have unrealistic expectations regarding the reform power of law and lawyering. If law reform techniques are not working, we serve the poor and others who are supposed to benefit from law reform by admitting its failures and urging the intended beneficiaries to seek means other than law reform to redress the all too obviously legitimate claims they have against society. Moreover, to allow the intended beneficiaries of law reform to continue to hold a blind faith in the legal system regardless of that system's actual performance is to undermine trust in the system in the long run.

My quarrel then is not with the goals of law reform but with the capacity of the legal system to reach those goals and with the effects, in terms of increased disillusionment among the poor, young activists, and other supporters of law reform, of ignoring the inadequacies of the legal system if indeed it is not achieving as much as is often thought.
My aim is to create a better fit between the concept of law reform action and the reality of its accomplishments. I hope, by emphasizing herein the not infrequent discrepancy between the well-intentioned goals and the actually negative effects of law reform, that law reformers will become more sensitive to the problem of unintended consequences and devise means, if possible, to eradicate the problem or lessen its impact.

Yet it would be misleading to suggest that my primary motive for undertaking the present study is this hope that any law reformers who review the study will become newly sensitized to the problem of unintended consequences and thus be prompted to come up with strategies to undercut such potential consequences. However fervently I may wish that law reformers will be able to take such corrective action I am not, as we shall see, particularly sanguine about their chances. Rather, my primary reason for carrying out this study must be based other than in the hope that it will prompt law reformers into recognizing and eventually overcoming unintended consequences. I believe the actual motivation for the study rests in my own understanding of my duty as a member of the two groups to which this work is primarily addressed: the legal profession and social science students of law reform. Under Canon 7 of the Code of Professional Responsibility it is the duty of a member of the legal profession to set forth to his or her clients alternative courses of action and the probable consequences
of each. In order in the future to fulfill this duty to describe to law reform clients the potential consequences of legal action, I feel compelled to learn more about the problem of unintended consequences and, hence, I undertake this study. I am similarly moved by my duty as a student of law reform. Such a student, like any student, has a duty to search for truth. One of the questions of truth, the answer to which students of law reform must seek, is whether law reform efforts cause more harm than good. Confronting the truth on this issue may be painful for those of us who have been committed to law reform but the pain does not free us from the duty to find the truth. Though I will have some general comments to make on the issue of whether law reform efforts cause more harm than good, it would, of course, be sophomoric to even suggest that this study will state the ultimate truth on this issue or any other issue. Rather, we will have to set our sights on something short of ultimate truth. What I have in mind is complexity; I hope to highlight that a particular phenomenon seems to be more complex than our search for truth has previously led us to admit. In short, this dissertation hopes to show that the relationship between law and

reform is apparently more seriously complicated by the problem of unintended consequences than has been fully acknowledged to date.
PART TWO
THE CHALLENGE FOR ANY LAW REFORM MOVEMENT: THE PROBLEM OF UNINTENDED CONSEQUENCES
CHAPTER II

THE PROBLEM OF UNINTENDED CONSEQUENCES:
A BRIEF REVIEW OF THE PROBLEM IN CONTEXTS OTHER THAN LAW REFORM AND A DISCUSSION OF PERTINENT CONCEPTUAL AND METHODOLOGICAL ISSUES

In chapter one an attempt was made to show that the law reform movement of the 1960s and early 1970s attracted hopeful young activists and in the process disregarded the problem of unintended consequences. Chapter one also suggested that this disregard of unintended consequences may be having serious, and potentially disillusioning, ramifications for such young activists and for their clients. In chapters three and four we will carefully examine the specific types of unintended consequences that may be troubling the law reform movement and similar reform efforts. Before doing so, however, we take time to clear up an erroneous impression that may have developed. Our focus to this point, and indeed throughout the dissertation, on unintended consequences in the context of law reform may have inadvertently and incorrectly suggested that unintended consequences are a serious problem only in regard to that context. In order to make plain that the problem of unintended consequences
is a problem in many contexts, we use the first part of chapter two to show some of the different situations in which unintended consequences have been observed. We make such a showing by reviewing the comments that scholars have made about unintended consequences, comments that reflect the situations in which unintended consequences have been detected. Moreover, reviewing the comments of scholars regarding unintended consequences will not only enable us to see that unintended consequences are a problem in numerous contexts other than law reform, it will also enable us to see that quite a variety of noteworthy scholars have been engaged in making comments about unintended consequences. And still further, examining the comments made by scholars regarding unintended consequences also allows us to introduce some conceptual distinctions that are implicit in the scholars' comments and that must be raised in any serious consideration of the idea of unintended consequences. We later return, in the last half of chapter two, to these conceptual distinctions and give them, and several related conceptual and methodological matters, a thorough analysis and discussion.

Unintended Consequences in Contexts Other Than Law Reform

Down through history many keen minds have wrestled with the problem of unintended consequences. Indeed, Robert Merton, writing in 1936, remarked that the problem
"has been treated by virtually every substantial contributor to the long history of social thought."¹ We shall find, as becomes obvious below, that the eminent individuals who have grappled with the problem of unintended consequences have done so in many contexts including in relation to political, economic, religious, and other types of action. We shall even find, as also becomes obvious below, that not only highly respected students and theorists of political, economic, and other types of action, but also prominent individuals involved in the creative arts, including esteemed literary figures, have pondered the problem of unintended consequences.

As suggested above, economic activity is one of the contexts in which the problem of unintended consequences has been noted. Though, of course, better known for their observations on religious and moral matters, the authors of the Bible have commented on certain economic activities that may trigger unintended consequences. Thus in Proverbs they tell us that the economic practice of pursuing wealth through oppression of the poor may lead to a paradoxical and no doubt unintended end:

He who oppresses the poor to increase his own wealth . . . will only come to want.²


²Proverbs 22:16
Much more in the mainstream of economic writers is Karl Marx who, too, saw that economic activities can produce unintended consequences. For example, a key Marxian principle is that pursuit of capitalism unintentionally involves pursuit of capitalism's own demise. This notion that capitalistic activity contains the seeds of its own destruction is evident in Marx's observation in 1867 that "... capitalistic production begets, with the inexorability of a law of Nature, its own negation."³

Marx knew not only that certain economic actions have the unintended consequence of destroying themselves, he also knew that economic actions can have unintended spillover or side effects even as the primary action itself continues to exist and be carried out. Thus Marx writes that division of labor, longer working hours, use of machinery, use of child labor, and other economic moves intended to increase productivity all have spillover effects for the main body of adult workers, effects which Marx must have seen were undesigned:

into a hated toil, they estrange from him the intellectual potentialities of the labour-process in the same proportion as science is incorporated in it as an independent power; they distort the conditions under which he works, subject him during the labour-process to a despotism the more hateful for its meanness; they transform his life-time into working-time, and drag his wife and child beneath the wheels of the Juggernaut of capital.4

Like Marx, another noteworthy observer of economic activities, Max Weber, understood that such activities could generate unexpected and unintended consequences. Writing in the first decade of the twentieth century, Weber notes that attempts to improve worker efficiency by increasing the wage paid per unit produced by each worker may have the ironic and unintended effect of actually decreasing the speed at which workers carry out their duties. Thus Weber writes:

... the attempt has again and again been made, by increasing piece-rates of the workmen, thereby giving them an opportunity to earn what is for them a very big wage, to interest them in increasing their own efficiency. But a peculiar difficulty has been met with surprising frequency: raising the piece-rates has often had the result that not more but less has been accomplished in the same time, because the worker reacted to the increase not by increasing but by decreasing the amount of his work.5

And Weber further notes that unintended results can be engendered by the reverse strategy of lowering rather than raising wage rates in order to make it necessary for workers

4Ibid., p. 430.

to work more efficiently if they are to earn the same amount of pay per day as they did before the rates were lowered. In this connection, Weber states:

Another obvious possibility, to return to our example, since the appeal to the acquisitive instinct through higher wage-rates failed, would have been to try the opposite policy, to force the worker by reduction of his high wage-rates to work harder to earn the same amount than he did before. . . . But the effectiveness of this apparently so efficient method has its limits. . . . Low wages fail even from a purely business point of view wherever it is a question of producing goods which require any sort of skilled labour, or the use of expensive machinery which is easily damaged, or in general wherever any great amount of sharp attention or initiative is required. Here low wages do not pay, and their effect is the opposite of what was intended. For not only is a developed sense of responsibility absolutely indispensable, but in general also an attitude which, at least during working hours, is freed from continual calculations of how the customary wage may be earned with the maximum of comfort and a minimum of exertion. 6

Though she commented on many other features of society, as may also be said of Weber and Marx, Hannah Arendt is another who perceived unintended consequences as following from particular economic policies. Thus she envisioned the policy of seeking a job for everyone as unintentionally defeating itself. She wrote:

The modern age has carried with it a theoretical glorification of labor and has resulted in a factual transformation of the whole of society into a laboring society. The fulfillment of the wish, therefore, like

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6Ibid., pp. 60-62.
the fulfillment of wishes in fairy tales, comes at a moment when it can only be self-defeating. It is a society of laborers which is about to be liberated from the fetters of labor. . . .

At the outset of chapter 2 we indicated that this chapter would show, among other things, that the problem of unintended consequences is a problem in many contexts besides law reform. We have seen that several noteworthy individuals have commented on the damage the problem of unintended consequences can do in the context of economic activities. Similarly, we find that prominent students of religious activities have also viewed unintended consequences as a significant problem. Turning again to Max Weber, we see that he was one such student. For example, Weber's remark about a particular religious movement--the Reformation--makes it evident that he understood that such movements can unleash unintended consequences that are likely to be annoying to those who initiated the movements. Thus in this regard Weber wrote:

We shall have to admit that the cultural consequences of the Reformation were to a great extent, perhaps in the particular aspects with which we are dealing predominately, unforeseen and even unwished for results of the labour of the reformers.8


Unintended consequences are a problem not only for religious activity, and economic activity, but also for political activity as well. For example, writing in about 1513, Machiavelli directs attention to the unintended consequences in which a variety of political actions can become entangled. Thus Machiavelli tells us that taking up arms to change masters can unintentionally make matters worse for those who initiate the change:

> Men willingly change masters, believing to better themselves, and this belief makes them take up arms against their master, but in this they deceive themselves, because eventually with experience they see that things have gotten worse.\(^9\)

Another political move that Machiavelli indicates can have unintended effects is the use of mercenary troops. As an example, Machiavelli writes of an occasion on which such troops ironically turned against those who had hired them:

> The Milanese, after the death of Philip, hired Francesco Storza to fight against the Venetians; once he had overthrown the enemy at Carvaggio, he joined forces with them in order to oppress the Milanese, his masters.\(^{10}\)

And Machiavelli also writes of the prince whose reign is ironically and unintentionally ended because of the prince's generosity. According to Machiavelli, the prince who as a matter of policy is generous, creates a need, unintentionally,


\(^{10}\) Ibid., p. 103.
for burdensome taxes to finance his generosity. Such taxes, in turn, displease the people and, so the argument goes, leads to the prince's downfall.\textsuperscript{11}

Machiavelli gives other examples of political actions that precipitate unintended consequences.\textsuperscript{12} In fact, a statement he wrote regarding corrective actions that paradoxically result in raising new problems, which is just another way of referring to the problem of unintended consequences, makes it evident that Machiavelli viewed unintended consequences as a problem for much political activity:

Nor let any state ever believe that it can always adopt safe policies, rather let it think that they will all be uncertain; for this is what we find to be the order of things: that we never try to escape one difficulty without running into another; but prudence consists in knowing how to recognize the nature of the difficulties and how to choose the least bad as good.\textsuperscript{13}

Besides Machiavelli, Max Weber also saw, as he did for economic and religious activities, that political activity often leads to unintended consequences. In \textit{Politics as a Vocation}, Weber states that:

The final result of political action often, no, even regularly, stands in completely inadequate and often even paradoxical relation to its original meaning. This is fundamental to all history. . . .\textsuperscript{14}

\textsuperscript{11}Ibid., p. 131.

\textsuperscript{12}See, for example, pages 19 and 137 of \textit{The Prince}.

\textsuperscript{13}Ibid., p. 191.

Weber gives as an example the "actions" of the "syndicalist" which seek to improve the lot of the syndicalist's own class but which actually "... result in increasing the opportunities of reaction, in increasing the oppression of his class and obstructing its ascent. ..."\textsuperscript{15}

In more recent times, Brandeis too wrote of apparently unintended results that can arise in the context of political action. Thus in a case involving government wiretapping, Brandeis argues that well-intentioned efforts can go astray thereby having negative effects for personal liberty:

\begin{quote}
... Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. Men born of freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.\textsuperscript{16}
\end{quote}

Noteworthy scholars have observed unintended consequences not only in relation to political, economic, and religious behavior but also in regard to law-related activity. Though, as we argued in chapter 1, the literature of the 1960s-1970s law reform movement greatly neglected the problem of unintended consequences, a not insignificant

\begin{flushright}
\textsuperscript{15}Ibid., pp. 120-121.
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number of scholars have at other points in history commented generally on the unintended consequences that sometimes follow legal action. In admitting that there have been a fair number of very general comments about and references to law-related unintended consequences, we do not intend to contradict, and indeed we here reaffirm, our earlier stated position that there has apparently been very little extended or thorough writing about law-related unintended consequences.

Among those who have made broad comments that seem to touch on the unintended effects that legal action can sometimes produce is no less a figure than Aristotle. Aristotle wrote of how changing the laws can have an impact upon the way citizens look at their government, an impact which he probably felt was unintended:

But while . . . arguments go to show that in some cases, and at some times law ought to be changed, there is another point of view from which it would appear that change is a matter which needs great caution. When we reflect that the improvement likely to be effected may be small, and that it is a bad thing to accustom men to abrogate laws lightheartedly, it becomes clear that there are some defects, both in legislation and in government which had better be left untouched. The benefit of change will be less than the loss which is likely to result if men fall into the habit of disobeying the government. 17

The renowned English legal historian, F. W. Maitland, is another who has commented on the unintended and undesirable ends that can result from law-related activity. Referring to

English law and the English legal system, and writing in 1906, Maitland states that:

Some of our ideas seem to be antiquated, some of our machinery seems to me cumbrous and rusty, some of our weapons, I would liken to blunderbusses, apt to go off at the wrong end.\(^\text{18}\)

Perhaps moreso than any other scholar to date, Jeremy Bentham also wrote about the unintended consequences that at times accompany legal action. Bentham, of course, was a man fascinated by the consequences of action in general. This fascination regarding the consequences of action is, for example, evident because of his interest in the concept of utility. Interest in the concept of utility means interest in consequences in that, as one student of Bentham has written, the idea of "utility ... takes into account the circumstances and consequences of the measures contemplated."\(^\text{19}\) In applying the concept of utility, Bentham would, therefore, evaluate actions in terms of their good and bad consequences:

\[ \text{The general tendency of an act is more or less pernicious according to the sum total of its consequences: that is according to the difference between the sum of such as are good, and the sum of such as are evil.} \]


Bentham apparently used this same technique to evaluate the actions of lawyers and he especially liked to underscore the bad consequences their actions produced. The very low regard in which the efforts of lawyers were held by him is perhaps obvious in this remark:

The professional services lawyers do perform and for which they are rewarded have consequences that are demonstrably public disservices.21

Bentham knew more, however, than that actions, including those of lawyers, had good and bad consequences. He knew too that such consequences could be unintended. For example, that Bentham was conscious of the problem of unintended consequences seems implicit in this statement of his:

It is also to be observed, that into the account of the consequences of the act, are to be taken not such only as might have ensued, were intention out of the question, but such also as depend upon the connexion there may be between these first-mentioned and the intention.22

And that Bentham recognized that unintended consequences could trouble law-related activity seems evident because, in discussing legislation, he distinguishes between legislation's "... eventual end, which is a matter of chance [and] ... the intended end, which is a matter of design."23

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Furthermore, Bentham understood the point—a point about which we will have more to say later—that consequences that flow from a law can be not only unintended but also at the same time beneficial and beneficial from more than one perspective. Hence Bentham states:

Whether a party on whom it is the intention of the law to confer a benefit, shall really enjoy that or any other benefit, may depend indeed upon the event. It may design to benefit without benefiting him: it may benefit him without designing it: it may design to benefit one man and eventually benefit another.²⁴

Just as Bentham saw that a law's unintended consequences could be beneficial so too he clearly saw that a law's unintended consequences could be harmful. He referred to these harmful unintended consequences, even apparently if they were extremely harmful, as the "mischief" a law can cause.²⁵ For example, in describing the "mischief" caused by usury laws Bentham gives an example of a law that apparently had seriously deleterious effects—effects, incidentally, which he could not but helped to have seen were unintended. These effects included, according to Bentham, not only depriving individuals of loan monies that were desperately needed but also forcing such individuals to get the funds they required by selling their personal effects

²⁴Bentham, The Limits of Jurisprudence Defined, p. 140.

at terms more unfavorable than even the high interest rates they might have had to pay if there were no usury laws.

Quoting Bentham's writings directly, he puts his view of the impact of usury laws this way:

"... There are no ways in which those laws can do any good. But there are several in which they cannot but do mischief.

The first I shall mention is that of precluding so many people altogether from getting the money they stand in need of, to answer their respective exigencies. ...

A second mischief is that of rendering the terms so much the worse, to a multitude of those whose circumstances exempt them from being precluded altogether from getting the money they have occasion for. ... Those who cannot borrow may get what they want, so long as they have anything to sell. But while, out of loving-kindness or whatsoever other motive, the law precludes a man from borrowing upon terms which it deems disadvantageous, it does not preclude a man from borrowing upon terms which it deems too disadvantageous, it does not preclude him from selling, upon any term, howsoever disadvantageous. Everybody knows that forced sales are attended with a loss: and to this loss, what would be deemed a most extravagant interest bears in general no proportion. When a man's moveables are taken in execution, they are, I believe, pretty well sold, if, after all expenses paid, the produce amounts to two-thirds of what it would cost to replace them. In this way, the providence and loving-kindness of the law costs him 33 percent and no more, supposing, what is seldom the case, that no more of the effects are taken than what is barely necessary to make up the money due."

Finally, Bentham, who we again point out referred to unintended consequences as "mischief," was apparently not too optimistic at times about overcoming the problems raised

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by a law's mischief and part of this lack of optimism apparently followed from Bentham's belief that some such mischief/unintended consequences caused damage of which we probably never even become aware:

... A law, how beneficial soever it may be upon the whole may, over and above the mischief it does by restraint it lays liberty, do a deal of mischief which is seen but can not be helped, as well as a good deal which perhaps can be neither helped nor seen.27

Looking beyond Aristotle, Maitland, and Bentham to scholars of more recent times, we find that there are others who have commented on the unintended consequences of law-related activity though none who, apparently, have done so as extensively as Bentham. Max Weber, for example, as he had in the case of political, economic, and religious action, noted that legal action could produce unintended effects. Weber's familiarity with the unintended consequences that sometimes trouble a law is readily seen in a statement that also suggests how those consequences might come about:

In an economy based on all embracing interdependence in the market the possible and unintended repercussions of a legal measure must to a large extent escape the foresight of the legislator simply because they depend upon private interested parties. It is those private interested parties who are in a position to distort the intended meaning of a legal norm to the point of turning it into its very opposite, as has often happened in the past.28


Another, even more modern scholar, Paul Freund, also is apparently highly familiar with the unintended consequences of legal action. This familiarity is suggested by Professor Freund's comment that:

Great developments in the law are often the unforeseen consequences, the implications of more immediate and narrow concerns.29

A number of other individuals have also commented in recent years on the unintended consequences that sometimes follow hand in hand with law-related activity. Most such individuals, we reiterate, have commented very generally.30 An exception is Gary T. Marx. Professor Marx has undertaken a thorough analysis of social control efforts by law enforcement agents and reached the not unimportant conclusion that such efforts can, ironically and sometimes unintentionally, contribute to law breaking.31

In addition to students of law-related activity, such as Weber, Freund and G. T. Marx, and students of economic, political, and religious behavior, such as those we reviewed earlier, there have also been literary figures and individuals involved in other creative arts who have noted


30The least general, relatively speaking, and most useful comments are found in works listed in footnote #138 in chapter 1.

the phenomenon of unintended consequences. For example, the eighteenth century Scottish poet Robert Burns is in essence commenting on the problem of unintended consequences in his famous lines, set forth below, that inspired the theme and title of Steinbeck's novel *Of Mice and Men*: 32

The best laid schemes of Mice and Men
Gang aft agley *(i.e. Go oft awry)*,
And leave us nought but grief and pain,
For promised joy! 33

And another significant literary figure, William Wordsworth, seems to be both commenting about laws with effects that are unintended and pointing out a source of such effects when he writes that:

... Law, in conformity with theories of political economy which, whether right or wrong in the abstract, have proved a scourge to tens of thousands, by the abruptness with which they have been carried into practice. 34

Even in the cinematic arts we find references to the problem of unintended consequences. Just such a reference is made in the Humphrey Bogart movie *Key Largo* by Bogart's co-star Lionel Barrymore who played the character called


Mr. Temple. Commenting on the sad irony that the Indians who came to his hotel for protection ended up losing their lives there, Mr. Temple says:

It seems we can't do anything but harm those people when we go to help them.

Looking back over all of those whose comments about unintended consequences we have reviewed thus far, we can see that most made their comments in reference to a certain kind of action—legal, political, economic, or religious. Other students of unintended consequences, however, have, in some of their writings, made observations about unintended consequences not tied to any specific kind of action. For example, Robert Merton, writing in an article mentioned earlier, and apparently not referring to any particular type of action, identifies several common factors that he suggests help transform actions in such a way that they give rise to unintended consequences. These common factors that, according to Merton, aid in turning actions to unintended ends include: error, ignorance, concern with acting immediately, values, and the actions themselves. Thus, to consider one such factor, Merton contemplates that unintended consequences can arise from "error" such as the error of designing courses of action that attend "to only one or some of the pertinent aspects of the situation which influence the outcome of the action." And, to consider one more
of the factors he mentions, Merton also argues that unintended consequences can be brought on when we need to act expeditiously and in fact do so even though we have not had time to acquire complete information about the situation at hand.35

Like Merton, Sam Sieber is another who has made some observations about unintended consequences that are not confined to those consequences that flow from a particular kind of action. Looking at a variety of actions or interventions, Sieber identifies seven "conversion mechanisms" that have affected those actions such that they resulted in unintended reverse effects. Sieber labels these mechanisms as: functional disruption, exploration, goal displacement, provocation, classification, overcommitment, and placation. Time and space permit us to review only a few of these so-called conversion mechanisms. Provocation, for example, refers to a number of situations including that in which an intervention unintentionally provokes a hostile reaction such as reassertion, with renewed vigor, of a course of conduct sought to be controlled by the initial intervention or action. Goal displacement, meanwhile, may be understood as describing, among other things, the situation where an instrumental

35Merton, pp. 898-904.
value has unintentionally ended up becoming a terminal value.36

I have emphasized that, in some of their writings, Sieber and Merton have attempted to develop an overall perspective on the problem of unintended consequences that is not wedded to unintended consequences that have been produced by a single type of action. In emphasizing this point my sole purpose has been to contrast these writings by Merton and Sieber with other comments about unintended consequences that are linked to a single kind of action. I have not meant to imply that either Merton or Sieber is oblivious to the advantages that can derive from studying unintended consequences in relation to a particular type of action. Indeed, Merton, for example, has explicitly acknowledged these advantages—advantages about which we will have more to say at a later point.37

Our review in the foregoing pages of some of the comments that have been made down through the years about unintended consequences allows us to make several points. First, it permits us to point out that unintended consequences have been observed in many contexts and that, therefore, despite our focus in the present study on unintended consequences and law reform no one reading this study


37Merton, p. 904.
should erroneously believe that unintended consequences are a problem only in the law reform context. Second, our review of some of the comments that have been made about unintended consequences also allows us to emphasize, as I have done repeatedly, that unintended consequences are a problem that has fascinated many astute thinkers. And if the problem of unintended consequences has in the past been fascinating to great thinkers in the different contexts in which they have looked at it, then we suggest, enticingly we hope, that it may be fascinating in the law reform context in which we will soon examine it more closely in this dissertation. Finally, our review of comments about unintended consequences allows us to point out, relatively easily, that there are various conceptual issues that complicate consideration of the problem of unintended consequences. One such issue, for example, can be readily seen by quickly referring back to our look at Bentham's comments about unintended consequences. As will be recalled, Bentham distinguished between, on the one hand, laws that are intended to benefit a person in a particular way but end up benefiting him or her in unexpected ways and, on the other hand, laws that are not intended to benefit a person but which do so nevertheless. This distinction raises the conceptual issue regarding whose perspective to adopt in identifying and assessing the 'unintended benefits of a law. Are the unintended benefits of a law those that accrue in unexpected
ways to individuals who were supposed to benefit from the law in one particular way or should the term "unintended benefits of a law" be used more expansively to refer to the unintended benefits that accrue to any person however tenuous those benefits might be and regardless whether that person was supposed to be affected by the law in the first place? Our review of scholars' comments about unintended consequences allows us to point up other possibly troublesome conceptual issues as well. Thus, to take one more example, we can readily see a potentially complicating conceptual issue by simply recalling that in the comments we reviewed some scholars referred to "unforeseen" consequences while in this dissertation we have more often used the term "unintended" consequences. The question arises, therefore, whether there is any important difference between unforeseen and unintended consequences and, if not, just what is the relationship between the intentions that underlie an act and the foreseeability of its consequences. These kinds of conceptual issues, which are easily discerned by recalling some of the scholars' comments we reviewed, must be fully aired if we are to proceed in an intelligible manner. Accordingly, the second half of chapter 2, which begins immediately below, is devoted to a careful discussion of the relevant conceptual matters, and related methodological problems, that arise in working with the notion of unintended consequences.
Conceptual Issues

Though in chapter one we gave a preliminary definition to the term "unintended consequences" and though our general understanding of that term may have been added to by our review, in the preceding pages of this chapter, of scholars' comments about unintended consequences, we still need further clarification of the term in order to effectively deal with it in the remainder of this dissertation. The first conceptual issue we take up, therefore, is the matter of providing a more precise definition of "unintended consequences."

Defining "unintended consequences" is a difficult undertaking in that such consequences appear in so many forms and in so many situations. However, from this point on in this study of unintended consequences in the context of law reform, the term "unintended consequences" may be understood to refer to the undesigned and unanticipated effects, including side effects, that flow from a law or from a use of the legal process. This definition, as seems true of most definitions, could perhaps stand even further clarification. Some illumination may be provided by pointing out that, although it may fall within the apparent reach of the phrase, I do not in referring in the definition of unintended consequences to "undesigned and unanticipated effects" mean to include the situation where the effect of a law or of a use of the legal process is mere failure to
accomplish what was desired. Though such failures may be undesigned and in a certain sense unanticipated they are of no interest to me in the present study. Relatedly, it should be noted, though it may be obvious, that I have meant to exclude from our definition of unintended consequences, as I believe the definition's literal terms do, the situation which might be called the "ordinary success." By ordinary success I mean those instances in which a law or a use of the legal process achieves what was hoped for and has no other accompanying effects of any import. Such successes generally are designed and anticipated and therefore fall beyond the purview of the definition of unintended consequences I have drawn. But while it is not within the definition of unintended consequences, the ordinary or "typical" success is of interest in this work. As I have already indicated, I discuss, in future chapters, the features of the typical piece of successful legal action and attempt to show how the absence of such features can result in the production of unintended consequences by a legal action.

Having underscored that typical or ordinary successes and simple failures are kinds of results or effects of legal action that we have not meant to include in our definition of unintended consequences, it is important, on the other hand, to clarify those results or effects that are within our definition of unintended consequences and that are,
therefore, the subject of this study. The definition itself, of course, provides the best indication of the types of effects that fall within its boundaries and that are, thus, a matter of interest. It bears repeating therefore that the definition refers to "undesigned and unanticipated effects." The definition does not, however, indicate just from whose perspective these effects can be said to be undesigned and unanticipated. This problem can be rectified by pointing out that the effects of a law or of a use of the legal process that interest us here are those that are undesigned and unanticipated from the perspective of the individuals who proposed the law in question or who triggered the use of the legal process in question. Of course being able to say that the effects of a law or of a use of the legal process are undesigned and unanticipated from this perspective requires that we know the original intentions of those who proposed that law or who started up that use of the legal process and that we also know their original estimations of the likely effects of their actions. In the next section of this chapter we will set out how one can go about trying to determine the original intentions that are behind particular actions and what we write there will apply also to efforts to determine the original estimates of an action's likely effects.

Moving beyond the general point that they are undesigned and unanticipated from the perspective of those
who initiated the action, the effects of legal action that interest us in this work can also be more specifically described as being either: (1) regressive outcomes, (2) results that are beneficial in an unexpectedly exaggerated way, or (3) side effects. Each of these types of effects, which may appear alone or in combination with each other, requires some elucidation. To begin with, in referring to regressive outcomes I mean the situation in which a law or a use of the legal process unexpectedly exacerbates a particular problem that the law or the use of the legal process was supposed to ameliorate. Next, in referring to exaggeratedly beneficial outcomes I mean the situation in which a law or the legal process is used to correct a problem and is significantly more successful than was planned. Finally, by side effects I mean the situation in which a law or the legal process is used to attack a specific problem and, regardless of its impact on that problem, its use produces significant new problems or benefits that were neither supposed to come about nor were otherwise expected and that are only marginally, if at all, related to the original problem under attack. And, furthermore, as I use it, the term side effects means new problems and benefits that fall into the lap of almost anyone even those individuals who were

38 Though "regressive outcome" is a common phrase, I should acknowledge that it is used repeatedly in Sieber's book Fatal Remedies and my reading of the book may have led me to use the term here.
not supposed to be affected in the first place in any way by the law or by the use of the legal process that is creating the new problems or benefits.

At this juncture, two somewhat digressive observations should be made regarding the kinds of effects—regressive outcomes, exaggeratedly beneficial outcomes, and side effects—that interest us in the present study. First of all, it may seem, especially considering the broad reach we have given to the term "side effects," that we have cast our nets too widely and thus are attempting to study a bit more than is feasible. In this connection, it should be noted, however, that I will not attempt to discuss in the remainder of this work all possible regressive outcomes, exaggeratedly beneficial outcomes, and side effects that can arise from a law or from use of the legal process but rather I shall discuss only those of such outcomes and effects that are most common and troublesome. Second, though I have in this chapter referred to the effects of legal action that interest me by the terms "regressive outcomes," "exaggeratedly beneficial outcomes," and "side effects," I shall not repeatedly use this same terminology in succeeding chapters. I have introduced and drawn distinctions between these terms because they are the terms which best describe the very general categories of unintended consequences studied in this work. In future chapters, however, the effects or consequences of the legal
actions we examine are described by terms that separate such effects into what could be called more specific subcategories of the general categories described in this chapter.

Putting behind us the issue of what kinds of effects or outcomes fall under our previously stated definition of unintended consequences, there is one other aspect of the definition that also requires explanation. That definition, it will be recalled, made reference to effects of a "law" or of the use of the "legal process." We have not yet delineated exactly what we have in mind when we use the terms "law" and "legal process." However, we can remedy this situation quickly. Though volumes have been written in efforts to define "law," we attempt no extended and esoteric discussion here for any such an attempt would be outside the scope of this work. Instead, we simply but directly state that for our purposes the term "law" is used in the sense it is most commonly understood: that is, to refer to a legislative enactment. The specific kinds of legislative enactments that are the subject of concern are spelled out in the next section of the present chapter.

Just as an extended and pedantic discussion of the definition of "law" would be outside the boundaries of this study, so too would we be going far afield if we attempted
any lengthy discussion of the definition of "legal process." Rather than undertake such a lengthy discussion on the definition of "legal process," we also give it a common meaning. We use it to refer to the legislative, administrative, and judicial processes with which most of us in this country are familiar. Furthermore, we are particularly interested in this work in one of these processes, the judicial process, and in how its use, in the form of litigation, sometimes produces unintended consequences.

In the foregoing discussion I have tried to explain precisely what will be meant when, in the remaining parts of this dissertation, we refer to the term "unintended consequences." Our effort in this regard having been completed, we can now turn to other, and related, conceptual issues. For example, there is a conceptual issue regarding why general references are made in this dissertation to the "problem of unintended consequences" even though, as indicated earlier, some unintended consequences can be beneficial. It is true, and indeed we again emphasize, that unintended consequences can be beneficial; however, the expression "the problem of unintended consequences" is appropriate nonetheless. This is so because at the point at which legal action is initiated it is unclear to the relevant actors whether any unintended consequences that may follow from the action in question will
be harmful or beneficial and thus these possible unintended consequences are a problem in that they represent an uncertainty about the outcome of action that the actors must heed and for which they must prepare themselves in the event the outcome or consequences are negative.

Still another conceptual issue, one we briefly referred to earlier, involves the distinction between "unforeseen consequences" and "unintended consequences" as we have defined the latter term. Generally, unintended consequences are unforeseen. However, it is, of course, possible for an unintended consequence to be foreseen. Take the situation where legal action may have effects that, for example, legislators or litigants can foresee as possible but which they indicate they hope will not happen and which they suggest are not likely to happen. In such cases, if the legislators or litigants proceed with the actions in question and the undesired consequences occur to everyone's apparent surprise, we would still designate these consequences, despite their foreseeability, as unintended. Of course we might have some doubts that the consequences were actually unintended and we might try to gather evidence to the contrary. But without such evidence indicating that the legislators' or litigants' true intentions were to reach and not, as they said publicly, to
avoid the consequences at issue, then those consequences, again notwithstanding being foreseeable, would remain unintended under the terms of our definition.

There is a final insight, one drawn from an article by Richard Vernon, that should be mentioned regarding the foreseeability of unintended consequences. The degree of foreseeability seems to be the touchstone we use in determining whether to excuse someone for having created a harmful but unintended consequence. When the harmful but unintended consequence is one that should easily have been foreseen as likely to arise from the action being taken, we tend to be less than willing to excuse the fact that that consequence is causing us some inconvenience or trouble. On the other hand, when the harmful but unintended consequence is one that could not have been easily foreseen, we tend to shrug it off as one of those imponderable occurrences that seem to plague us all from time to time.

Methodological Issues and Problems

Besides the various conceptual issues discussed above, studying unintended consequences also involves a number of knotty methodological issues and problems. Of these methodological issues and problems, the first to be reviewed here is the problem, briefly mentioned earlier,

of determining the true intents or purposes of the actors whose actions have produced apparently unintended consequences. Being able to determine such intents or purposes is, as we also mentioned earlier, both important in the study of unintended consequences and not always an easy task. Determining the true intents that lie behind actions that release what are suspected to be unintended consequences is important for the quite obvious and simple reason that it can be said with some certainty that such consequences are unintended only if we know, or can readily surmise, the true intents of those who initiated the actions. More complicated are the reasons why determining these true intents is not always an easy undertaking.

First of all, determining the true intents or purposes that underlie an action can be a tough task because in some instances there are no available sources of evidence of true intents except the bare fact that the action itself was carried out. In such instances, there are no available documents or other tangible pieces of evidence that indicate the purpose of the action in question nor are there any actors who were involved in the action who are willing to discuss why they took the action. Relevant documents may be unavailable because, to take two examples, they have been inadvertently destroyed or because they have been classified as confidential. And actors involved in an
action may have many grounds for being unwilling to discuss the action including the desire to avoid any embarrassing admission that the action has produced undesired and unintended consequences. Secondly, in other instances, determining the true intents behind an action can be difficult not because the actors involved in the action are uncooperative and unwilling to talk nor because the evidence is otherwise inaccessible or insufficient but instead because the existing and freely available evidence, perhaps coming from several different sources, indicates that the actors who took the action had multiple intents or purposes that in retrospect appear, and that may even have actually been at the time of the action, either confusing or contradictory. It can be a great challenge just to sort through and arrange in some comprehensible order this evidence of an action's multiple and conflicting purposes that is coming from several sources.

There is no ready means to completely eliminate these difficulties that can be involved in determining the true intentions upon which actions are founded. However, these difficulties may not, in our study, be as troublesome as may at first seem. Merton states that the problem of determining intents or purposes is "... significantly reduced in cases of organized group action..." and, furthermore, he concludes that such "formally organized" group actions apparently "... afford a better opportunity
for sociological analysis . . ." of the problem of unintended consequences. Merton's reference to formally organized group actions would seem to include the two types of action that concern us in this work: legislation and litigation. Legislation clearly appears to be formally organized group action: it is organized, as reflected in its elaborate rules of procedure, and it is also group activity both in the sense that it derives authority from a group (i.e. the members of society) and in the sense that it is carried out on a day to day basis by a group of individuals (i.e. legislators). Much of the same can be said about litigation: it is highly and formally organized, as is suggested by its rules of evidence and procedure, and it is group action which in this case is used to resolve disputes between two or more individuals. Therefore, if Merton is correct that determining the true intents behind an action is less problematic than usual in the case of formally organized group action and if, as it certainly appears, litigation and legislation are the kind of formally organized group action to which Merton makes reference, then we should not be confronted with insurmountable problems in determining the true intents at the bottom of each of the particular examples of litigation and legislation that we study in this work.

40Merton, pp. 896-897.
The question arises, however, regarding just why it is easier to determine the true intents behind formally organized group action than it is to determine the intents behind other types of action. Merton argues that identifying the true intents that lie behind an action is less difficult than usual "... in cases of organized group action since the circumstance of organized action customarily demands explicit ... statements of goal and procedure." As Merton suggests, organized group action does appear to usually include statements of goal and procedure. For example, the organized group actions in which we have an interest here—litigation and legislation—involve, as already mentioned, explicitly stated and intricate rules of procedure such as, to name a few, the rules in litigation on how an appeal can be taken or the rules in legislation on how to present a bill for consideration. Litigation and legislation also entail explicit statements of goals: in the form of pleadings in the case of litigation and in the form of the preambles that are typically a part of each piece of legislation. In addition, not only does it appear that Merton is on the mark in suggesting that formally organized group actions, including, we have argued, litigation and legislation, involve statements of goal and procedure but also it appears that he is on target in suggesting

41 Merton, p. 897.
that it is easier, as compared to the case for other types of action, to determine the true intents or purposes behind formally organized group actions because such organized group actions require these statements of goal and procedure. Thus, for example, the statements of goal and procedure that are usually required in formally organized group action make it easier, than it is in other cases, to determine the true intents or purposes behind formally organized group action simply because the statements serve as readily available sources of evidence of the true intents or purposes. Furthermore, in some instances, a formally organized group action's statement of goals (as distinct from its statement of procedure) is not just an available source of evidence of the action's true purposes but a conclusive one that makes it extremely easy for an investigator to determine those true purposes. This happens where the statement of goals is complete and accurate for in that case it becomes just what the investigator is looking for: a list of true purposes behind the action. On the other hand, when a formally organized group action's statement of goals seems, upon analysis, to be incomplete or inaccurate, then the action's statement of procedure becomes a particularly useful source of evidence. In this circumstance, rather than rely on the action's apparently misleading statement of goals, an investigator attempting to ascertain the true intentions or
purposes behind the action can use the statement of procedure to examine how each step of the procedure in the action has been shaped and a determination of the shape of each step of the procedure will, in turn, give the investigator what he or she wants—some accurate impressions of actual purposes that the procedure, and thus the action, were designed to accomplish.

Going back once more to formally organized group action that involves a statement of goals that is accurate and complete rather than one that is misleading, note that this accurate and complete statement of goals is an important source of evidence to our hypothetical investigator not only because it gives the investigator conclusive evidence of the action's true purposes but also because it helps the investigator to recognize the previously mentioned situation where an action is based on multiple intents or purposes that conflict with each other. When in evaluating an action an investigator can look to one particular place and find an accurate and complete statement of an action's goals or purposes, it is a relatively simple matter to analyze that statement so that conflicts in the goals stated there can be detected. At least it is a simple matter in comparison to the case where the investigator must cull through evidence from numerous sources in search of possible conflicts in an action's purposes. And, as an aside, also
note that when an investigator has an accurate and complete statement of an action's goals not only is it easier for him or her to recognize conflicting goals because he or she has the explicit list or statement of those goals to look to, but also it seems less likely that goals or purposes that conflict with each other will be listed in the first place. Actions requiring explicit statements of goals or purposes in essence require those who would take such actions to think through and write down their goals or purposes and this process of thinking through their purposes should cause the prospective actors to become aware of and eliminate any conflicting purposes they might have.

But, as still a further aside, let us for the moment assume the worst: that an investigator trying to nail down an action's true intents or purposes concludes that the action is indeed based on multiple goals or purposes that are in conflict. We have yet to say what this means if the investigator is also trying to determine whether the consequences produced by the action in question are unintended. Our answer in this regard depends upon the nature of the action's conflicting goals or purposes. First, let us suppose that the available evidence indicates that the multiple and conflicting goals or purposes that the action is based upon are, in the eyes of those taking the action, goals or purposes that are of equal
importance. And still further, let us also suppose that at least one of these multiple goals or purposes that are of equal importance to the actors makes the action's consequences seem sought after or intended and another goal or purpose makes the consequences seem unsought after or unintended. In these circumstances, an investigator who is trying to definitively ascertain whether the consequences of the action are unintended can reach only one correct conclusion: that he or she is stymied and can neither say that the action's consequences are intended nor that they are unintended.

However, if we slightly vary our assumptions about the nature of an action's multiple and conflicting purposes, we can see that that action can be effectively analyzed by an investigator who is attempting to decide if the consequences triggered by the action are unintended. Let us assume not that an action is based on multiple and conflicting purposes of equal importance but instead that it is based on multiple and conflicting purposes one of which is predominant in its importance and the others of which are of subordinate importance. In these circumstances, the investigator can accurately judge whether the action's consequences are unintended by comparing them to the action's predominant purpose and, if the consequences are unintended in light of that purpose, the investigator can then look to
the action's subordinate purposes that conflict with the predominant purpose and consider whether those subordinate purposes are factors that helped give rise to the unintended consequences.

Leaving this complicated issue regarding how, in dealing with actions based on multiple and conflicting intents, one decides whether the consequences of such actions are unintended, we can now return to our previously initiated discussion about the statements of goal and procedure that are often a part of formally organized group actions. We have argued, as Merton seems to have done previously, that these statements of goal and procedure that are included in formally organized group actions typically serve as very useful sources of evidence to an investigator who is trying to determine the true purposes of those actions. We have also argued, therefore, that the matter of determining the true intents or purposes behind an action is easier for an investigator in the case of formally organized group actions, like litigation and legislation, that count explicit statements of goal and procedure among their features, than it is for other actions. Too much, however, can be made of this point. In other words, we would be remiss if we did not acknowledge that even for actions that require statements of goal and procedure there can be problems insofar as determining the true purposes of
those actions is concerned. In admitting this, what, in particular, we have in mind is legislative action for although legislative action, as we have repeatedly noted, usually involves a statement of goal and procedure, there are nonetheless several identifiable pitfalls that make it quite a challenge to determine the true intents or purposes behind each case of such action. The two most important of these pitfalls are discussed immediately below.

One of the pitfalls that we will have to avoid in determining the true intents or purposes behind particular legislative enactments has to do with the previously mentioned situation involving sabotage. At many stages during the course of its life, efforts may be made to sabotage a piece of legislation. Bardach emphasizes that the implementation stage that follows adoption of a law is one time when attempts are made to undermine a law:

> Indeed, interests opposed to the goals of the mandate might have stayed quiet during the adoption contest precisely because they counted on subsequent opportunities to achieve more decisive, and less publicized, victories during the struggle over implementation. 42

Sabotage may take one of many forms during implementation of a law. Thus, to take a familiar example, an administrator charged with implementing or enforcing a loosely worded law may have sufficient discretion and power under that law

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to in effect sabotage it by designing enforcement goals and procedures for the law which are inconsistent with or perhaps even in contradiction of the goals and procedures explicitly stated in the law's original language. And, as we have said, it is not only during the enforcement or implementation stage that sabotage of a law can be tried. After a law's enactment and initial implementation, changes in the law may be proposed on the ground that the changes are in the public interest even though the real purpose of the changes is to subvert the law in question. Aristotle seems to have had something like this situation in mind, apparently on a larger scale, when he wrote:

... Changes which are really subversive of the laws, or of the constitution, may be proposed on the plea that they tend to the common good.43

However, whether the effort to sabotage a law comes during the law's initial implementation or during subsequent attempts to change the law by amendment, the pitfall to be avoided is the same insofar as we are concerned in this study. Specifically, the pitfall to be avoided is this: we must not, in determining the true intents or purposes behind laws that have been sabotaged, fail to distinguish between the intents or purposes of the original proponents of the law and the intents or purposes of the saboteurs. If we do fail to make and underscore that distinction and then proceed

to make the claim that any adverse consequences produced by a sabotaged law are unintended we in effect open ourselves to the criticism that the adverse consequences of the law are not really unintended because they were intended by the saboteurs. To put it another way, we can safely say that adverse consequences that arise from a sabotaged law are unintended only if we separate out the intents or purposes of the initial proponents of the law and use these intents or purposes as the standard against which to test the intentionality of the law's consequences.

Being careful to distinguish between the intents of the original proponents of a piece of legislation and the intents of the legislation's saboteurs is not the only pitfall that seems particularly troublesome in the specific situation where one is trying to determine the true intents or purposes upon which legislative action is founded. A pitfall also arises when legislative action is largely symbolic. By symbolic legislation I mean a law that actually has very little force even though it is engulfed in rhetoric claiming it will thoroughly redress a particular problem and that is actually designed to dissipate the concerns of those interested in the problem by lulling them into thinking that, because a law of some kind has been passed, the problem in question has been corrected. Symbolic laws differ from sabotaged laws in that while symbolic laws are never concerned
with making more than cosmetic changes, sabotaged laws originally set out to achieve significant change but are thrown off their course by the sabotage. The pitfall to be avoided in the case of symbolic laws is failure to cut through the rhetoric and see that a symbolic law's true purpose is not to correct a problem but to defuse the energies of those concerned with the problem. And if we fail to see this, we may mistakenly categorize any actual defusing of concern over a problem as an unintended rather than as an intended effect of the law in question. Of course the issue arises regarding just how one can knife through rhetoric to see that a law really is nothing more than an attempt to symbolically reassure a group of citizens that a problem is being treated when in fact that problem is not being treated. However, we can offer no foolproof guidelines on how to detect symbolic laws. All we can say is that one must carefully weigh the available evidence, including the strength of the procedures involved in a statute and the level of funding a statute receives, and using this evidence make the best effort possible to determine whether the true intent or purpose behind the statute is merely to make a largely symbolic stab at solving a problem.

This closes our discussion of the methodological problem of finding the true intents or purposes behind an action. To recapitulate, we have tried to make the following
points: (1) that being able to identify the true intents or purposes underlying an action is essential if we are going to be able to say whether or not the action's consequences are intented or unintended; (2) that in general determining the true intents or purposes behind an action is a difficult problem though perhaps not an insoluble one in the case of formally organized group action because such action typically includes, among its characteristics, an explicit statement of goal and procedure; (3) that these statements of goal and procedure are useful sources of evidence that can reveal a formally organized group action's true purposes and that can help one recognize the situation where an action is based on multiple and conflicting purposes; (4) that legislation and litigation are formally organized group action that involve explicit statement of goal and procedure and that, therefore, we should not be faced with insuperable problems when it comes to determining the true purpose behind each of the examples of legislation and litigation that we examine in the present work; (5) and finally that while the problem of determining true intents or purposes behind an action is not insuperable in the case of legislative action some pitfalls remain in this connection particularly if the legislative action is largely symbolic or has been sabotaged.

In addition to the problem of determining the true intent or purpose behind an action, there are other
methodological problems that must be overcome in studying the unintended consequences of action. These other methodological problems can be discussed more succinctly than the problem of determining an action's true purpose but this should not be taken to imply that they are any less troubling to efforts to systematically study unintended consequences. Among these other methodological problems is the problem of causation. By "the problem of causation" I mean this: in designating the consequences of an action as unintended one must make sure that the consequences in question have in fact been caused by the action in question and not by some intervening force such as an entirely different action or combination of different actions. Furthermore, it should be apparent that this problem of accurately linking an action with its consequences is greatly accentuated when the action takes place in an uncontrolled and confusingly complicated context in which many intervening outside forces are at work. In such a context, it becomes difficult to tell which of the consequences that can be observed are attributable to the action in question and which are the by-product of forces intervening in the context. On the other hand, if an action's context is highly structured, much studied, and well understood rather than uncontrolled and confusingly complicated, then it is more likely that we will be able to distinguish between the
consequences produced by the particular action of interest and those consequences produced by intervening forces. The contexts in which litigation and legislation take place are highly structured, much studied, and, as we shall see, fairly well understood. It should, therefore, be possible in the present work to differentiate between consequences produced by legislative action and litigation and those produced by other forces intervening in the contexts in which legislation and litigation take place. In other words, the problem of causation in this work should be less troublesome than would be the case if we were studying actions that take place in contexts not as well understood as the contexts of legislative action and litigation.

Besides the problem of causation and the problem of determining the true purposes behind actions, a third methodological problem in the study of unintended consequences is the problem of identifying consequences. Before you can say that something is a consequence that is unintended you must first know that it is in fact a consequence. Identifying consequences, however, can be a problem because it is at times difficult to distinguish between consequences and action. For example, when an action is designed to take place in phases unless an individual has full knowledge of the phasing plan it is easy for him or her to mistakenly label later phases not as phases of the overall
action but as consequences that were triggered by earlier phases. And note that this problem of confusing actions and consequences can be particularly acute in the case of legislation since a consequence of legislating a new law may be that it is used in unexpected ways. Hence, in this instance an action—use of a law in an unexpected way—becomes a consequence of the law. There is no easy remedy to the problem of confusing actions and consequences. One must simply be alert to the possibility and try to avoid it.

Nor is there any easy remedy to a fourth methodological problem that can become involved in the study of unintended consequences. This fourth methodological problem is inability to verify the existence of previously observed consequences because those consequences are the product of complicated factors that have since changed, thus causing the consequences themselves to change or even disappear before verification could be accomplished. Should such a verification problem arise it is a serious matter for any student of the consequences of action in that if a student is unable, in subsequent studies, to verify the existence of consequences observed in an earlier study, then doubts may be raised whether the student ever observed the consequences in the first place. Furthermore, we emphasize the dangers of this problem here because the law-related consequences in which we have an interest in this work are the kind of
consequences that can be difficult to verify. This is true because such law-related consequences are not infrequently the by-product of a complicated interaction between a legal action and almost daily changing social, economic, and political conditions. These conditions may be expected to have changed by the time verification is attempted and, when they do change, they typically produce, as a result of their interaction with the legal action in question, new consequences that wipe out the originally observed consequences thus making verification of those originally observed consequences impossible. But, despite the fact that the verification problem is a real threat in relation to the kind of law-related consequences in which we have an interest in the present study, there is, as already stated, no ready solution to the problem. Rather, this verification problem is simply one of the hazards that must be risked when one enters the study of law-related consequences.

Keeping the four above described methodological problems in mind, though not again explicitly discussing them, I will in the next two chapters set forth what I believe are specific examples of law reform related unintended consequences. Before moving on to our review of these examples, however, I would like to specify the kind of examples that they are and I would like to make some comments on the
sources of the examples, the quality of evidence that supports them, and on the fact that they are presented as part of two typologies which will be drawn.

It will be noticed that the kind of examples of unintended consequences to be examined in this work are examples that thus far have been described as "law reform related." I have yet to say, however, what exactly is meant, in the present context, by "law reform related." Roughly speaking, when I use that term to refer to examples of unintended consequences I mean that those examples are based upon legal activity (i.e. legislation or litigation) that has sought reform of a politically liberal nature in one of the following fields: poverty law; race or age discrimination; women's rights; and worker, consumer, and environmental protection. Further note, however, that while most of the examples of unintended consequences discussed in the remainder of this work are drawn from legal activities in the fields just listed, I do not hesitate to refer, where necessary to make some point, to examples which depict unintended consequences that have been produced by legal activities in fields other than those listed including fields that have little or no relation to any type of law reform.

We have turned to three sources to find our examples of the kind of law reform related unintended consequences.
that we have just specified. First, some examples have been gathered from discussions and interviews with Boston and Cambridge area law reform lawyers. Second, other examples of the kind of law reform related unintended consequences that interest us have been drawn from my own approximately five years of experience as a trial lawyer engaged in litigating minimum wage and discrimination suits for the United States Department of Labor. Third, still other relevant examples of law reform related unintended consequences have been taken from the legal and social science literature. Though, as repeatedly mentioned, this literature contains very few extended analyses of the problem of law reform related unintended consequences, it does contain a sprinkling of examples of such consequences.

The examples of law reform related unintended consequences that come from the three aforementioned sources are supported by evidence of varying quality, depending upon the example. In some of the examples, the evidence of an unintended consequence is convincing but in the case of other examples a measure of faith is required before one can agree that the unintended consequence does in fact exist. This state of affairs, however, is not inconsistent with the present study's essential purpose. Our study seeks only to generally sketch and explore the major types of unintended consequences that may be troubling law reform
efforts. The study does not seek to provide definitive and exhaustive evidence of each such consequence. Providing definitive and exhaustive evidence of law reform related unintended consequences is an extremely time consuming task that is out of place in an initial and exploratory study such as ours and that must, therefore, await future studies. In other words, insofar as law-related unintended consequences are concerned, it can be said, to quote Holmes, "that at this time we need education in the obvious more than investigation of the obscure." 44

Finally, note that our examples of law reform related unintended consequences are presented in the course of drawing two typologies. One of the typologies is a typology of the unintended consequences that can arise from legislation and the other is a typology of unintended consequences that can be triggered by litigation. The potential for overlap between these two typologies is acknowledged here and will be discussed in the next chapter.

The decision to use typologies is based on their perceived value as analytical tools. In essence, a typology is an abstract construct that seeks to extract and display important or idiosyncratic features of certain phenomena.

In so doing, the typology makes these key features of the phenomena more accessible for intense scrutiny by students of the phenomena and, hopefully, this intense scrutiny, in turn, leads to understanding. If our own typologies work in this way, we will then come to a better understanding of the phenomena of law reform related unintended consequences.
CHAPTER III

LEGISLATION AND UNINTENDED CONSEQUENCES

The heavy reliance of the 1960s-1970s law reform movement on the use of legislative enactments (i.e. laws) to address social problems has already been described in an earlier chapter. The present chapter is an attempt to draw a typology of the unintended consequences that can arise when the law is used for such social reform purposes. Ten types of unintended consequences of this sort are set forth. The discussion of each type includes a description of the type, examples of it, and, where necessary, some observations on how each type differs from the other types presented. The chapter then closes with a discussion that shows how unintended consequences can arise from legislation when the legislation lacks one or more of the typical features of successful legislation.

Legislation and Unintended Consequences: A Typology

Type One: Laws and Shifted Costs or Burdens

In the type one situation the unintended effect of a law is that the costs or burdens imposed by that law on a particular party or segment of society end up being shifted, in whole or in part, so that the law's costs or
burdens come to rest on some other party or segment of society.

An example of this type of situation is the minimum wage law which was first enacted in 1938 but which was also significantly expanded in the 1960s War on Poverty era that is of interest in this work.¹ In an attempt to ensure that no worker earns an indecently low wage, the minimum wage law imposes wage levels on employers that can be higher than the wage levels that would result from the free play of the market economic system. However, an unintended effect of the law has apparently been that, depending upon market conditions, some employers are able to shift at least part of the cost or burden of the law to the shoulders of marginal workers such as teenagers.² Rather than allow total wage payments to go up because of the higher rates dictated by the minimum wage law, some employers seem instead to be able to keep total wage payments down by paying the minimum wage but also employing a smaller number of marginal teenage workers. Thus while some employees may, under the minimum wage law, enjoy higher wages than the market would bear on its own, the

¹29 U.S.C. 201 et seq.

cost or burden of such higher wages has been shifted by the employer to the marginal teenage employees whose jobs are sacrificed to finance the higher rates of the other employees.

The occurrence of this shifting of burdens from employers to teenagers who lose their jobs is now fairly well established. The bipartisan Minimum Wage Study Commission reported in 1981 that:

A review of teenage employment and unemployment time-series studies completed by 1979 . . . found that a 10 percent increase in the minimum wage would reduce teenage employment between 0.5 and 3.0 percent with most studies finding 1.0 to 2.5 percent reductions. The latter translates into a loss of 80,000 to 200,000 jobs from a base of 8 million. . . . Commission staff attempted to update the studies through the fourth quarter of 1979 to explore the sensitivity of the estimates to differences in the variables held constant in estimating the minimum wage effects and to analyze other more technical issues. . . . In general, the updated estimates were quite consistently in the lower range of estimates suggested in the earlier literature. The staff estimated that a 10 percent increase in the minimum wage would reduce teenage employment about 1 percent. Other staff estimates with alternative models were quite regularly in the 0.5 to 1.5 percent range.3

This shifting of part of the minimum wage law's burdens or costs to marginal teenage employees whose jobs are sacrificed to support the higher than market wage rate mandated by the law is clearly a shifting of burdens or

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costs that is unintended as is evident from the below discussed legislative history of the original law and of its amendments. And that this shifting of burdens to teenagers is an unintended event is no less clear despite the fact that down through the years the minimum wage law's detractors have warned that increased teenage unemployment and other adverse effects would be the by-products of the law. An example of those who opposed the law and who raised the spectre of the supposedly negative consequences it would produce is Senator Vandenberg who noted in the debate in 1937 on the original law that:

I emphatically concur, as I am sure all other Senators will concur, in the notably humane objective the Senator from Alabama voiced and to which this bill is addressed. But, Mr. President, good intentions and high motives alone are not enough. Practical legislators must ask themselves practical questions in respect to a practical matter of this nature. To begin with, will the bill do what it purports to do? Then, in the attempt to do what it purports to do, will it not create more problems than it solves? 4

Meanwhile, Representative McClellan, also speaking in the debate on the original law, made clear that among the problems that it was feared the minimum wage law would create

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was increased unemployment: "I want to help labor, but what we are asked to do here will, in fact, create more unemployment. It [the law] will do more harm than good."\(^5\)

In later years, as attempts were made to increase the amount and expand the reach of the minimum wage law, its detractors again and again argued that the law triggered negative effects. In debate on amendments in the 1960s Representative Martin contended: "Who suffers most when the minimum wage is raised? The very people whom the higher wage is intended to help—Negroes, Puerto Ricans, unskilled workers and teenagers."\(^6\) Similarly, in debate over amendments proposed in the 1970s, Senator Buckley was referring to the minimum wage law's negative employment effects on low income workers when he said: "... as so often happens when we try to repeal the laws of economics by Federal decree, the intended beneficiary becomes the victim."\(^7\)

If, as is true, the scope of the law and the amount of the minimum wage it set continued to be increased despite

\(^{5}\)U.S. Congress, House, Representative McClellan speaking against S. 2475, 75th Cong., 2nd sess., 17 December 1937, Congressional Record 82:1813.

\(^{6}\)U.S. Congress, House, Representative Martin speaking against H.R. 13712, 89th Cong., 2nd sess., 24 May 1966, Congressional Record 112:11270.

\(^{7}\)U.S. Congress, Senate, Senator Buckley speaking against S. 2747, 93rd Cong., 2nd sess., 28 March 1974, Congressional Record 120:8768.
admonitions by the law's opponents regarding the law's negative consequences, then one might reasonably ask how can such negative consequences be said to be unintended and not intended. It will be recalled, from chapter two, that whether the effects of a law are to be classified as intended or unintended is to be determined from the perspective of the proponents of the law. When the consequence of a law is undesigned and unexpected from the point of view of its proponents, then that consequence is unintended for purposes of this study even if the law's opponents may have foreseen and warned against the consequence in question. Insofar as the minimum wage law is concerned, it is clear from their comments during the debate over the law that its original proponents never designed the law to produce negative effects. For example, consider these 1937 comments by Congressman Bradley, a minimum wage law proponent:

Mr. Chairman, we have been subjected to a barrage of propaganda from the opponents of this measure who seek to instill fear, who seek to intimidate Members of Congress by saying that if this bill passes it will disrupt industry and will create further unemployment. I do not think we have any need to worry about disturbing industry or increasing unemployment. The only disturbance that will be caused by a bill which seeks to correct intolerable conditions will be a disturbance of the nefarious practices some people seek to perpetuate through low wages and substandard wages throughout the United States.  

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And, in regard to the particular problem of teenage unemployment, it is also clear that the supporters of the minimum wage law never designed the law to produce such a problem nor did they expect that problem as an unintended side effect of the law. As late as the mid-1970s we find backers of the minimum wage law making statements steadfastly denying that the law increased teenage unemployment. For example, Senator Williams, a long time supporter of minimum wage legislation, argued in July of 1973 that:

"... experience following previous raises in the minimum wage does not show any connection between minimum wage levels and youth unemployment."9 Furthermore, the view in the mid-1970s that the minimum wage law did not increase teenage unemployment was not restricted to just one or two staunch supporters of the law but rather was apparently common among those who favored and backed the law. Such a view as to the lack of effect of the law on teenage unemployment was apparently held by enough members of the Senate Committee on Labor and Public Welfare, which considers amendments to the law, to justify the following statement in a June 1972 report by the Committee: "The

Committee was also unconvinced that an increase in the minimum wage rate would result in aggravating youth unemployment. Thus, in later years, supporters of the minimum wage law must have looked on with a mixture of bewilderment and irony as the empirical evidence that the law increased teenage unemployment began to gather, culminating in the 1981 report to that effect issued by the bipartisan Minimum Wage Study Commission.

The minimum wage law is not the only law the unintended effect of which is that its burdens or costs are shifted to some unsuspecting party or group in society. Consider, for example, housing codes designed to compel landlords to use a portion of their profits to maintain or upgrade the housing they lease. Though it is intensely debated, there are those who argue that the costs imposed on landlords by such housing codes are costs that landlords meet not by reducing their profits but instead by shifting the costs to unsuspecting tenants. As Professor Ackerman


has indicated, the supporters of this line of thinking fear:

... that landlords who are required to improve their properties to code standards will simply pass on the added costs to their tenants by increasing rents or that they [i.e. landlords] will abandon the properties entirely, thereby depriving tenants of even sub-code accommodations.\(^\text{12}\)

There is some evidence to support this contention that the true costs of housing codes are shifted by landlords to tenants whose rents are raised or whose buildings are abandoned as a consequence. Professor Grigsby has observed the latter phenomena--code induced abandonment. "In Philadelphia, for example, code enforcement has literally wiped out entire blocks where the intent of the City has been just the opposite--to revivify them."\(^\text{13}\) He concluded that when housing market conditions are as unfavorable as they were in Philadelphia when his observations were made "... it is clear that code-enforcement programs are frequently not simply ineffectual but actually perverse in their impact on housing quality and neighborhood environment. ..."\(^\text{14}\) And insofar as whether landlords shift the costs of code compliance to tenants by raising rents, Professor Hirsch has gathered evidence indicating

\(^{12}\)Ackerman, p. 1095.


\(^{14}\)Ibid., p. 536.
that where the code enforcement law in question has a receivership remedy "its [i.e. the receivership remedy] presence was found to be associated with a statistically significant increase in rental expenditures. ..."\textsuperscript{15}

Like housing codes, rent control laws are also alleged by some to purport to impose costs on landlords when in fact those costs end up being shifted to tenants.\textsuperscript{16} In this case, the argument is that the burdens imposed by rent control laws designed to put a ceiling on landlord profits are burdens that the landlord shifts to tenants when the landlord, notwithstanding the rent ceilings, keeps his profits high by cutting building maintenance and the expenditures associated therewith. Whether under a rent control law a landlord reduces building maintenance and thus shifts the burden of the law to the shoulders of tenants may in actuality be determined by the stringency of the rent controls enacted.\textsuperscript{17}


\textsuperscript{16}See references in "Rethinking Rent Control: An Analysis of 'Fair Return,'" Rutgers Law Journal 12 no. 3 (Spring 1981):625.

Type Two: Laws and Their Long Run Transformations

As mentioned earlier, though there can be some overlap between each type and though types may appear in combination with each other, basically each type set forth in this dissertation highlights a distinctive and unintended characteristic that a law can display. Thus, as we have seen, the distinctive feature in a type one situation is that the costs or burdens imposed by a law and intended for one party can end up being shifted to some other party. In the type two situation, the distinctive and unintended feature of some laws that we focus on is the long run transformation that can occur insofar as the use and meaning of those laws are concerned. As far back as Bentham, it has been observed that laws can undergo such unintended long run transformations. "This irrevocable law, whether good or bad at the moment of its enactment, is found at some succeeding period to be productive of mischief--uncompensated mischief--to any amount."18

Professor Freund, meanwhile, has noted such a long run transformation in relation to Magna Carta:

When we celebrated this year the 750th anniversary of Magna Carta, we are not commemorating a covenant between a reluctant king and the chief barons of the realm over their special privileges and prerogatives,

we were celebrating what Magna Carta had become by extension, a charter of liberties of the citizen against even a representative government.\textsuperscript{19}

Our own Fourteenth Amendment has undergone also, some would argue, rather dramatic long run transformations in regard to its meaning and the ends to which it is put to use. Consider, for example, the argument that the Fourteenth Amendment was enacted over one hundred years ago and long before the system of compulsory education was well established and thus was never intended, at the time of its adoption, to be used to authorize desegregation of public schools as was done in \textit{Brown vs. Board of Education}.\textsuperscript{20}

\textbf{Type Three: Laws That Augment Rather Than Regulate Power: The Capture Phenomenon}

An unintended effect of some laws is that they augment rather than regulate the power of a group or entity in society because that group or entity is able to capture, and use for its own advantage, the enforcement mechanism set up a part of these laws. Upon capturing the enforcement mechanism designed to regulate them, one of the ways that the regulated can use that mechanism to their own


advantage is by turning it against their opponents and competitors. In a very real sense then, the burden or impact of the laws in this type three situation can be described as having been shifted to some unsuspecting group. It will be recalled that such a shifting of the impact or burden of a law is also a feature of the laws in the type one situation. But what differentiates the type one and the type three situations is, as we shall see, the capture phenomenon exhibited by the latter.

One kind of enforcement mechanism that is set up by some laws and that is often said to end up captured is the administrative agency:

The tendency of administrative agencies to become the captives of those they ostensibly regulate has long been noticed. . . . 21

Few dimensions of public administration have been more thoroughly explored or deplored during the past twenty years than the capture of regulatory agencies by special interests that then use the system as a cartel for their own benefit. 22

Most administrative agencies have been charged with being captured including the CAB, the ICC, the FDA and the FTC. 23


Most recently, there have been highly publicized charges that President Reagan has permitted EPA and OSHA to become captives of the business community they regulate.\textsuperscript{24}

The evidence is sometimes quite convincing that a captured agency has been used by the intended regulatees who capture it to achieve significant benefits. Consider, for example, the ICC which is frequently alleged to be a captive of the railroad industry that the ICC is supposed to regulate. Green and Nader point out that the actions of the captured ICC show a distinct pattern in favor of the railroads in regard to mergers: "The ICC has approved thirty of thirty-four major railroad mergers it has considered."\textsuperscript{25} Similarly, at least prior to the recent deregulation of the airline industry, the CAB demonstrated a clear inclination toward conducting its regulatory activities in a manner that aided its alleged captors—the major airline companies. Specifically, as Green and Nader also point out, the CAB sheltered these established airline companies from any new, and perhaps stiff, competition by excluding potential competitors from the interstate air service market:

\textit{The CAB has not certified a new trunk carrier since immediately after its creation in 1938. [By contrast] ... within the confines of}


\textsuperscript{25}Green and Nader, p. 880.
California, where CAB jurisdiction does not extend, sixteen intrastate carriers entered the market between 1946 and 1965.26

Administrative agencies are not the only type of enforcement mechanism that laws establish and that can be captured and used for advantage by those supposed to be the subject of the laws' regulation. For example, Carlin et al cite a small claims court that "in the view of its founders" was established as a mechanism by which "the poor plaintiff... would be able to pursue his legal rights and remedies" against small businesses and others. Carlin et al report:

The data indicate, however, that the court has been captured by business interests who find it a useful tool in the collection of debts against the poor. A recent study of the Oakland-Piedmont Small Claims Court showed that two out of three users were either business firms (jewelry and department stores, mail order houses, finance companies) or, to a lesser extent local government agencies (principally the County of Alameda with claims for hospital services rendered and for unpaid taxes.) Most (85 percent) of these organization plaintiffs filed several claims at a time, and most were frequent users of the court. It is, thus, principally the business community, not the poor, that reaps the advantage of... (the small claims court).27

There are, of course, critics of the capture concept. In regard to administrative agencies and other

26Green and Nader, p. 879.
institutions established as mechanisms to enforce the terms of certain laws and alleged to be captured, critics of the capture concept typically admit that these agencies or other institutions show in their behavior a pattern of bias in favor of those supposed to be the subject of regulation under the laws. The critics contend, however, that the extent of the bias is overstated and does not reach the level of near total domination alleged by the proponents of the capture concept. The critics of the capture concept also maintain that the laws creating agencies or other institutions that show a bias in favor of the interest groups to be regulated are not infrequently laws that were purposely designed to establish agencies that coddle and otherwise foster the growth of the regulated interest groups. Therefore, the critics argue further, the bias shown in favor of the regulated interests by these allegedly captured agencies and institutions is a bias that is intended rather than unintended as claimed by the disciples of the capture concept.28

These disputes between the proponents of the capture concept and their critics are not for us to resolve here. Rather our more limited purpose is to highlight one

significant fact to those individuals who are considering the future use of the law as a means of reform. This fact is that there are numerous observers who contend that, contrary to the intention of the laws' enactors, the administrative agencies and other mechanisms created by some laws to enforce the provisions of those laws end up captured and used to advantage by the interest groups the laws seek to regulate. If so, these laws, ironically, augment rather than curb the power exerted by these interest groups.

Type Four: Self Inhibiting and Self Destructive Laws

A law can contain a provision that, from the perspective of the enactors of the provision, unintentionally inhibits the law from fulfilling its primary goal. Consider, for example, the Age Discrimination in Employment Act of 1968 (the ADEA).\(^{29}\) The ADEA's primary goal clearly is to outlaw age discrimination in employment and to create a legal remedy that enables those who suffer such discrimination to file in court for judicial relief. The ADEA, however, also has a provision requiring that a conciliation conference be held between the opposing parties before any suit alleging age discrimination in employment

\(^{29}\)29 U.S.C. 621 et seq.
can be initiated. This conciliation requirement has been designed by Congress as a means to encourage discussion between workers and employers so that together these groups can "find ways of meeting problems arising from the impact of age on employment." In reality, unfortunately, the conciliation conference requirement has become a significant procedural hurdle for those who claim to be victims of employment related age discrimination. Courts have held that if the conciliation conference is not conducted with careful and exhaustive attention to rigorous legal standards, then even meritorious claims of age discrimination are barred from court. In short, the conciliation conference requirement is a procedural nightmare that in effect has inhibited the ADEA in regard to its ability to fulfill its principal goal of providing victims of age discrimination with a swift and effective means of seeking judicial relief.

There is no substantial evidence that this unfortunate effect of the conciliation requirement is anything but unintended. In other words, there does not seem to be any basis for concluding that the conciliation conference

3029 U.S.C. 626(d).
3129 U.S.C. 621(b).
requirement was made a provision of the ADEA in order to subvert deliberately the ADEA's primary goal though one must wonder if this is not true given the damage caused by the requirement. Rather than deliberate sabotage, the problem seems to be one of competing goals. As indicated above, Congress enacted the conciliation conference requirement in the hope that the discussions generated in conciliation conferences would help employees and workers explore and resolve the problems of an aging workforce. Unhappily, this competing goal of giving employers and workers, through conciliation conferences, a mechanism for exploring age discrimination problems has led instead to procedural entanglements that have crippled the ADEA.

Finally, it should be observed that the procedural road block thrown up by the ADEA's conciliation requirement does not completely negate the potential effectiveness of the ADEA it only limits that effectiveness. It is, however, entirely conceivable that legislators could unintentionally include among a law's provisions one that completely prevents that law from being effective. Such a law would be properly referred to as self-destructive rather than just self-inhibiting as is the ADEA.

Type Five: Laws With Unintended Combined and/or Cumulative and/or Synergistic Effects

When, as a result of general legislative activity or specific reform efforts, a new law is enacted it is
added to and becomes a part of the complex web of existing law. In taking its place in the body of existing law, the new law can combine with earlier laws to produce perplexing and unintended effects. For example, when a new law prohibiting an act involving no victim (e.g., a law against smoking marijuana) is added to the main body of criminal law an unintended combined effect is produced. Specifically, it is often said that the enactment of so-called victimless crime laws and the imposition on the police of the duty to enforce such laws means, at least if there is no concomitant increase in police resources, that the police must divert resources from the enforcement of laws involving more serious crimes in order to enforce the new victimless crime law. Thus, it may be said that one of the combined effects of victimless crime laws and laws involving more serious crimes with victims is that some serious crimes, perhaps even murders, go unresolved because police are utilizing part of their scarce resources to enforce the victimless crime laws.

The kind of combined effect described above which is produced when a victimless crime law is added to the main body of criminal law is not, it would seem, the only type of unintended effect that can arise from the chemical like reaction that takes place when new laws are added to old laws. At least as a matter of theory it would appear
that the enactment of a new law that is similar to, but
does not replace, an existing law could cause a unique
type of unintended effect, something in the nature of an
unintended cumulative effect. For example, it would seem
that when a state adds a new law against sex discrimina-
tion to an existing federal law the two laws operating
together and reinforcing each other might be more effective
in combating sex discrimination than was hoped by the
enactors of either law. A kind of unintended cumulative
effect would have arisen from the addition of the state law
to the federal law.

In this example, the addition of the new state sex
discrimination law to an existing federal sex discrimina-
tion law, and the two laws operating in conjunction with
each other, could cause more than the moderate and unintended increase in effectiveness of each law that I have in mind when I write of an unintended cumulative effect.
The addition of the state sex discrimination law to the
federal sex discrimination law and the working of the two
together could cause an unintended explosion in the effec-
tiveness of each law. Such an explosion in the effective-
ness of each would be a type of unintended synergistic
effect in the sense that together the two laws would add up to be much more effective anti-sex discrimination tools than one would suppose would be the case when considering
the two laws separately. And, as an aside, note that an
unintended synergistic effect can arise not only from the
melding of two laws but also from the melding of a single
law and private voluntary action. For example, the Voting
Rights Act and extensive private efforts to register voters
were far more successful together in enfranchising black
voters in the South in the 1960s than either the Voting
Rights Act or the private registration efforts was likely
to have been by itself.33

Type Six: Laws With Unequal Impact

A law can have an unequal impact in the sense that
it has a more onerous effect on some individuals than it
does on others. This kind of unequal impact that I have
in mind in the type six situation is not produced because
of any action taken by those who are supposed to fall under
the reach of the law that has the unequal effect. Thus,
the unequal effect in type six cases is not, for example,
produced because the intended subjects of the law have
acted to shift the burden of the law to some unsuspecting
group as in the type one situation. Nor is the kind of
unequal effect that concerns us here produced because, as
in the type three situation, the intended subject of the
law in question captures the mechanism by which the law is

33Morroe Berger, Equality by Statute, revised ed.,
(Garden City, N.Y.: Doubleday and Company, Inc., 1967),
p. 51.
to be enforced. Rather, the unequal impact of laws in the type six situation is an impact that arises even though the subjects of the laws are entirely passive. The unequal effect of a type six law is produced simply because the subjects of these laws possess different material resources.

The unequal impact that particular laws can have has long been the subject of derisive comment. For example in 1792, Jeremy Bentham sarcastically described a law with unequal impact:

I sow corn: partridges eat it, and if I attempt to defend it against the partridges, I am fined or sent to jail: all this, for fear a great man, who is above sowing corn, should be in want of partridges.34

Similarly, Anatole Francois Thibout, the 1921 Nobel Prize for literature winner, wrote with bitter irony that:

The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.35

More recent commentators too have noted the unequal impact that a law can have. Carlin et al describe the unequal effect of an American draft law:

The draft law illustrates de facto bias in the law. . . . Poor persons are less likely to have jobs which qualify them for deferment on occupational grounds, and they are less likely to be

students (who are also entitled to deferments). Moreover, they are less likely to know about the legal status of conscientious objector and to be articulate enough to qualify for that status.  

Carlin et al also outline the unequal effect that divorce laws in New York State had, at the time the article was written, on the poor as compared to the wealthy:

New York's highly restrictive divorce laws are presumably applicable to all classes in society. In practice, however, they are more likely to prevent the poor, than the rich, from legally terminating their marriages, because poor people lack the resources to obtain out-of-state divorces. According to O'Gorman a "migratory divorce" is one means of evading the proscriptions of New York law, but he says: "Since a migratory divorce is usually more expensive than one secured locally, this pattern of evasion is not equally open to all New Yorkers. If the state laws are easily avoided by financially independent residents, they can be avoided by others only at some sacrifice, and avoided not at all by those with low income. In this sense, the laws impinge differentially on the population. They are more binding on some groups than others." As a result the poor may resort to either a fraudulent New York action or more commonly desertion.

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Only the very cynical would contend the disastrous effects the draft and divorce laws described above had on the poor were effects that were intended by the makers of


37Carlin et al, p. 22.
those laws. On the other hand, it is now becoming fairly well understood among legislators, and in society in general, that laws affect different individuals in different ways. Law reformers should never lose sight of this problem.

Type Seven: "Within the Letter But Not the Spirit of the Law"

The written terms of a law sometimes apply in situations in which it was not originally contemplated that those terms would apply. For example, in the 1970s I knew of upwardly mobile graduate students receiving tuition scholarships who while enrolled in school were able to obtain food stamps by declaring themselves to be financially independent of their middle class parents and by further declaring themselves to be without a source of income. These students received food stamps apparently because their applications qualified under the written terms, or letter, of the food stamps law. The granting of such benefits to graduate students seems, however, to fly in the face of the underlying spirit of the food stamps law. Most would agree that the food stamps law is intended to aid the truly needy and not those who, like graduate students, are only temporarily without funds and who, if they so desired, could turn to their parents for aid.
Laws creating entitlements, such as food stamp laws, are not the only type of laws the terms of which sometimes apply in situations not contemplated by the laws' enactors thus creating curious results. Laws establishing prohibitions also can apply in situations not foreseen by the laws' creators. For example, the terms of laws prohibiting the possession of marijuana apparently outlaw its possession even for medicinal purposes such as relief from the side effects of chemotherapy.\(^3^8\) However, such a prohibition against possession of marijuana for medicinal use seems unintended and beyond the underlying spirit of the marijuana laws which is to regulate allegedly deviant use of marijuana.

The kind of unintended effects described in this type seven situation arise not due to any abuse of discretion by those charged with enforcing the laws in question. Rather such effects come about because, as we have seen, the terms of the laws, as properly read by their enforcement agents, apply in situations not contemplated by the enactors of the laws. This contrasts with the next two types of unintended consequences reviewed. In these next two types, the unintended consequences arise because lawyers or enforcement agents use the laws in abusive or otherwise improper ways.

\(^{38}\)"A Fix for Pain?" Newsweek, 91 (January 1978): 41.
Type Eight: Abusive Uses to Which Laws Are Put by Lawyers

Lawyers sometimes use laws abusively. Obviously, such uses are not intended by the enactors of the laws.39 Probably the most common abuse of the law by lawyers is the filing of frivolous lawsuits. It appears that typically such a suit is filed in the hope that, rather than going to the enormous expense in legal fees of defending the suit, the opposing party will offer to pay in settlement a small sum representing the nuisance value of the suit.

It is not only the prospect of obtaining nuisance value settlement sums that cause lawyers to abuse the law by filing frivolous suits. Such suits can also be filed for a wide variety of other reasons including the simple desire to harass a foe, to secure publicity for a cause, or to achieve political or religious goals. For example, a mixture of political and religious goals seems to underlie the filing of the much publicized and spurious Baby Jane Doe case. In that case a lawyer, on his own initiative, used the law to file a suit which sought to compel

39Some may argue that the abuse of a law by lawyers, such as the filing of a frivolous suit under that law, is such a common and expected practice that it cannot be said to be an unintended effect of the law as I have defined the term "unintended" in this work. However, whether an abuse of a particular law is expected, and thus not "unintended" for our purposes, depends upon the particular abuse in question. For example, the Baby Jane Doe matter, which is discussed at a later point in the text, seems to me a case of a wholly unexpected abuse of a law and, therefore, a case that can be said to be "unintended".
the parents of Baby Jane Doe to provide Baby Jane with surgery that might prolong her life despite her numerous and serious birth defects. The highest court of the State of New York held in the case that there was absolutely no basis in the law for the suit brought against the parents. The court's unusually strong language in its opinion indicates the court's view that the law upon which the suit had been based was abused. Specifically, the court wrote that the suit was "distressing" and "offensive".40

Type Nine: Unintended Discretionary Uses by State Enforcement Agents

When, as described in type 8 above, private lawyers abuse a law by using it to file a frivolous lawsuit, the kind of laws usually involved are laws creating general rights of action. Such laws enable any private citizen aggrieved under those laws, or any lawyer on the aggrieved citizen's behalf, to file suit. Other laws do not allow any citizen, or his or her lawyer, to file suit to enforce the laws' provisions but rather designate specific agents as those who have the sole authority to initiate legal action. Typically, the agents designated are agents of the state. For example, agents of the state (i.e. the

Police and public prosecutors) are generally the group authorized to sue under and otherwise enforce our criminal laws. No other group is given similar powers.

Not uncommonly state agents are given more than the exclusive right to enforce a particular law. State agents often are also given wide discretion in determining how that law is to be enforced. In enforcing criminal laws, for example, the police have discretion to decide which incidents to investigate, how many resources to devote to a particular investigation, and whether to present the incident to the public prosecutor.

Just as private lawyers acting on behalf of themselves or on behalf of private citizens sometimes abuse the law by instituting frivolous suits, similarly agents of the state at times abuse the law by misusing the discretion the law bestows upon them. Such abuses by agents of the state are well known.41 We are all familiar with incidents in which the police, acting under color of law, brutalized a citizen or fabricated charges which nevertheless resulted in an unjust public prosecution against the

41 The comment made in footnote 39 also applies here. Whether an abuse of a law is so common as to be expected, and thus cannot be said to be unintended as that term is defined herein, turns on the nature of the particular abuse in question. It seems unreasonable to contend that a highly outrageous abuse of a law is expected and thus not "unintended" within the meaning of that term as used in this work.
citizen. But, as compared to the abusive suits filed by private lawyers, what distinguishes these unintended uses of the law by state agents and what makes them so much more offensive is that they are brought in the name of the state.

Not every use of a law by state agents that is an unintended use from the perspective of the enactors of the law is, however, wholly repugnant to the general public. For example, Silbey and Bittner report that certain Massachusetts law enforcement agents, despite having insufficient or very limited evidence to prosecute under a particular law, at times hint at their intention to nevertheless prosecute under that law in the hope of persuading the subject of the prospective prosecution to come into compliance with the terms of some entirely different law. Such use of the particular law under which the threat of prosecution is made probably is a use not intended by the law's enactors. Yet, this use of the law no doubt strikes some of us as something less than offensive.

42 Recently, there have even been reports that police have abused citizens who, at the request of the police, had been cooperating in police sting operations directed at individuals suspected of criminal activity. New York Times, 6 December 1982, p. A18.

Type Ten: Reciprocal Immunities

In type ten the unintended effect produced by a law is what Professor Friedman has called "reciprocal immunities". These reciprocal immunities arise when threats of action under law are made against one another by two parties each of whom is in violation of some requirement enforceable by law. The result of this exchange of threats is that neither party actually takes legal action for fear that the other party's responsive action will prove too damaging. For example, a standoff with no actual filing of legal action could result between a tenant with a roof leak in his apartment who threatens to take action against the landlord under the local housing code if that landlord makes good on his threats to turn in the tenant for smoking marijuana in the apartment. In this example it can be seen that the individuals who have been deterred from taking action are the most likely individuals to report a violation of the law (i.e. a tenant is most likely to report a landlord's code violation and a landlord is most likely to report drug violations in his tenant's apartment). Both parties are now immune (and hence the term "reciprocal immunities") in the sense that each by his or her threat of legal action has deterred the person most likely to report them for a violation of law.

Furthermore, and more interestingly, note that reciprocal immunities can arise even if no threat of legal action is articulated—the prospect of such action can be sufficient. Thus to return to our earlier example, the tenant, without any threats passing between him and the landlord, may overlook the leaking roof while implicitly expecting that the landlord in return will close his eyes to the drug violations that go on behind closed doors. The mere prospect that the tenant could act on the code violations may be sufficient cause to mollify the landlord and thus deter him from reporting the drug violations. And, the other side of the coin is that, the prospect that the landlord might act on the drug violations deters the tenant from reporting the code violations. Again, therefore, the individuals most likely to report the relevant violations have been deterred from acting and a kind of reciprocal immunity is created.

Such reciprocal immunities are not abstract constructs. Professor Moore has described an actual situation in which such immunities have arisen between union representatives and contractors in the garment industry both of whom:

Regularly violate . . . legally enforceable provisions of their union contracts. They both recognize the business necessity of
doing so and engage in repeated exchanges that demonstrate mutual trust.45 Reformers who enact a law in pursuit of some noble end should not be unmindful that that very law may be used as leverage to make certain individuals relatively immune from the proscriptions of some other, and perhaps equally important, law.

Besides the above described ten types there are additional types of unintended consequences that can be triggered by legislation. For each of these additional types of unintended consequences that are produced by legislation there is a very similar type of unintended consequence that can be unleashed by litigation. Rather than review the additional legislation related types of unintended consequences in the present chapter I have chosen to review in the next chapter the similar types produced by litigation. Discussion of both the additional types of legislation produced unintended consequences and their litigation counterparts would involve too much duplication to be acceptable.

"Typically Successful Legislation" and Legislation Exhibiting Unintended Consequences

Delineation of the characteristics of each of the above described examples of legislation exhibiting unintended

consequences and careful comparison of the characteristics of each example to the characteristics of a similar piece of legislation not displaying unintended consequences might reveal the aspects of the examples of legislation exhibiting unintended consequences that cause such consequences. Unfortunately, such a demanding study of each previously described example of unintended consequences is impracticable here and thus must await future efforts. What is possible is to identify the attributes of the typical piece of "successful legislation" and then to discuss each such attribute in order to show how its absence from any piece of legislation can contribute to the appearance of unintended consequences such as those described in our ten types. In identifying these attributes of "successful legislation" that do not trigger unintended consequences I will draw upon the observations of distinguished observers of legislation as well as my own views.

Appropriately Precise Language

Language often is imprecise inherently. Legislation is composed of language and thus the drafting of precise legislation is a considerable challenge. Furthermore, the challenge of writing precise legislation is made greater because legislation typically is intended to apply in many situations. Ensuring that legislation covers all
the necessary situations encourages the drafting of legislation in broadly applicable rather than precise terms. In this connection, Aristotle has written "... it is impossible for every rule to be written down precisely: rules must be expressed in general terms..." Aristotle continues, in the same clause, however, by noting that "... actions are concerned with particulars," thus reminding us I believe that while legislation or other rules must be written broadly enough to apply in many situations such legislation or rules must also be drawn in sufficiently narrow form to enable them to be applied effectively in any one particular situation.46

These observations of Aristotle suggest that successful legislation is legislation that is written in terms that are balanced between being broad enough to cover all relevant situations and yet sufficiently narrowly drawn to allow the terms to be profitably applied in any particular instance. Legislation that lacks the requisite level of precision and that is thus drawn in overly broad and vague terms is susceptible to being twisted to ends other than those intended by the drafters of the legislation. For example, the more broad and thus vague the terms of a piece of legislation the more likely that over time those

terms will be directed to unintended ends as in the type two situation above or the more likely that the terms of the legislation will be used in a way that is conceivably consistent with the letter but not the spirit of the legislation as in type seven above. And, to take one more example, the more imprecise the terms of the legislation the more likely some unscrupulous lawyer may try to use a strained interpretation of those terms to support some frivolous lawsuit as in type eight.

Appropriately Limited Discretion

In *Statesman*, Plato writes that "the law cannot comprehend exactly what is the noblest or most just, or at once ordain what is best for all" and this is because of "the difference of men and action, and the endless and irregular movement of human things." This limitation of law—that how it should be applied in any one instance is not always readily apparent—which Plato, and many others, have observed suggests that successful legislation is legislation in which appropriately limited discretion is granted to those charged with enforcing the law. Discretion granted under an enactment to the enforcers of the enactment enables those enforcers to do justice by

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applying the enactment in a flexible manner best suited to the exigencies of any one of innumerable situations that might arise.

On the other hand, discretion should not be unbri- dled and, therefore, it is "appropriately limited" discretion that is an attribute of successful legislation. If the discretion granted to the enforcers of an enactment is not circumscribed, then, compared to the case in which their discretion is limited, the enforcers have a greater opportunity to use their discretion to turn the enactment toward unintended ends such as in the type nine situation described above in which state law enforcement agents abuse their discretion under law. Furthermore, if the discretion granted under a law is not carefully limited and if the mechanism by which that law is enforced is captured by opponents of the law, then those opponents can use that unbounded discretion and that captured mechanism to turn the law toward completely unintended ends as is true in the capture situations described in type three above.

An Effective Compromise

Typically, a piece of legislation is enacted as a result of compromise among legislators. An attribute of

successful legislation is that it is legislation in regard to which an effective compromise has been reached. By an effective compromise, I mean a compromise that does not undermine significantly the overall purpose of the legislation as that purpose is envisioned by the proponents of the legislation.

When legislators are unable to hammer out an effective compromise regarding how the legislation is to work, they may be forced to enact broad and vaguely written legislation the meaning of which is left undetermined. As discussed above, such imprecision in the language of legislation can increase the chances that a problem with unintended consequences will arise.

Furthermore, an effective compromise as I have defined it may not be reached because the proponents of the legislation, as part of the compromise ultimately forged, may agree unwittingly to include in the legislation provisions which are fashioned by the opponent's of the legislation and which ultimately undercut the fundamental purpose of the legislation intended by the proponents. In short, proponents of legislation sometimes make mistakes by agreeing to include in their legislation provisions which they do not expect to damage the legislation but which in fact do become damaging. As a result of including such provisions in the legislation it becomes self-inhibiting
or self-destructive not unlike the legislation described in type four above.

Equal Effect

Besides embodying an effective legislative compromise, being composed of appropriately precise language and bestowing appropriately limited discretion upon its enforcers, another characteristic of successful legislation is that it has the same effect, relatively speaking, on each individual. In order to ensure that a piece of legislation has an equal impact on all, in the relative sense, it may be necessary to design the legislation in a way that makes some adjustment for differences in human wealth and skills. For example, so that they do not deprive the poor of the funds needed to purchase the basic necessities of life and otherwise affect the poor in relatively the same way as they affect the rich, tax laws are designed generally to have the poor pay a lower percentage of their income as tax than is true for the more wealthy.

When legislative enactments of general application are not designed to account for differences in the resources citizens possess, then unintended consequences may follow from such enactments. This is true in the type one situation where we saw that the burdens of the minimum wage legislation can be shifted to teenagers who bring fewer skills to the job market and who thus are the first to have their
jobs sacrificed to support the higher rates for some workers dictated by the minimum wage legislation. Furthermore, type six above, entitled "Laws with Unequal Impact," provides additional examples of unintended consequences produced by legislation that fails to accommodate for the material and other differences among individuals in a capitalistic society.

Able to Accommodate Changes in Society

A fifth quality of successful legislation as I define it here is that such legislation is either unaffected by changes in society or is capable of having its meaning adjusted to accommodate such changes without disregarding or betraying its fundamental terms and purpose. An enactment outlawing the running of red traffic lights is an example of successful legislation that largely is unaffected by changes in society. Such laws are obeyed typically in a country regardless whether its citizens experience changes in political or social views.

If a legislative enactment, however, involves not a simple uncontroversial command like the outlawing of running red lights but rather involves a more complex and controversial matter, then that enactment, if it is to survive and succeed, must have a seamless quality that enables its meaning to adjust or grow by logical extension as prevailing
political and social beliefs held in a society change and grow. The Equal Protection Clause of the Fourteenth Amendment is often said to be an enactment the meaning of which is capable of such growth. For example, as Americans became less tolerant of racial segregation the United States Supreme Court, in Brown v. Board of Education, extended the reach and meaning of the Equal Protection Clause so as to hold that it outlawed segregation in public schools.49 Such an application of the Equal Protection Clause no doubt was never specifically contemplated by the enactors of the Fourteenth Amendment given the fact that the Amendment was adopted some one hundred years before a public school system was even developed. Yet, as others have argued at length, the language of the Equal Protection Clause is highly flexible language that appears to have been designed to be capable of having its meaning logically extended as views in society change.50 If this is indeed true, then the result in Brown does not seem surprising. Rather, the result appears to be a mid-twentieth century extension of the Clause which extension is consistent with the notion of fundamental equality that has always been embodied in the Clause.


When legislative enactments are not capable of having their meanings adjust to changes in society without forsaking their original basic purpose or are not unaffected by such changes, then, as society changes, such enactments will suffer one of two fates. Either they are ignored and thus become dead letter law or, because of the pressures arising from the changes in society, their language is twisted mercilessly toward ends that were not intended by their enactors but which are consistent with the changes in society. Enactments which are directed, as society changes over time, toward unintended ends are described above in type two entitled "Laws and Their Long Run Transformations."

Respect Engendering

It is not the police or other enforcement agents but rather respect for the law in general that causes most citizens to abide by the terms of a particular law. To successfully achieve its goal, a final attribute that an enactment should have is that it should be capable of commanding respect. It seems probable that, compared to respected laws, laws which are not respected are more likely to be put to unintended uses such as the abusive uses of law by lawyers described in type eight above or the

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abusive uses of law by state law enforcement officials described in type 9 above. For example, is it not more likely that an enforcement agent will attempt to abuse his or her discretion in regard to the enforcement of marijuana laws which generally command little respect in the community than abuse his or her discretion in regard to enforcement of much respected murder laws. Abuse of the marijuana laws seems more probable because in so doing the enforcement agent does not risk being subjected to the moral outrage which might follow his or her abuse of the murder law should that abuse be discovered.
CHAPTER IV

LITIGATION AND UNINTENDED CONSEQUENCES

As is detailed in earlier chapters, litigation has been a favorite tool of law reformers. This chapter suggests that, in light of problems with unintended consequences, litigation as a reform tool has been held in too high regard by reformers. Seven types of unintended consequences that can flow from litigation are presented below. The discussion of each type includes a description of the type, examples of it, and, where necessary, some explanation of how the types differ from one another. The chapter closes with a discussion that shows how unintended consequences can arise from litigation when the litigation lacks one or more of the typical attributes of successful litigation.

Litigation and Unintended Consequences: A Typology

Type One: Cases Exacerbating a Problem

In the type one situation the plaintiff initiates litigation in order to remedy a perceived problem but the unintended effect of the litigation is that it ends up aggravating the problem under attack. A case drawn from
my own experience as a trial lawyer for the United States Department of Labor provides an example of this type of unintended consequence produced by litigation.

The case in question was based upon an investigation by field representatives of the Department of Labor. The investigation showed that an Oklahoma City ambulance company was failing to pay its employees the minimum wages and overtime pay required by the Fair Labor Standards Act. Following the investigation, I instituted a suit in federal district court against the ambulance company. In the suit, the Department of Labor sought injunctive relief requiring the ambulance company to pay minimum wages and overtime in the future and ordering the company to pay back wages to past and present employees. The back wages sought were in an amount equal to the difference between the wages employees actually had been receiving and the wages they should have received had they been paid the minimum wages and overtime required by law. In short, the suit was intended to raise wages, retrospectively and prospectively, for a group of employees.

As a result of the investigation and suit, the ambulance company did begin paying its current employees the higher wages necessary to comply with the minimum wage

129 U.S.C. 201 et seq.
and overtime provisions of the law. Not long after this change, however, the ambulance company went bankrupt because of the added wage expenses it had to shoulder. Thus, through an investigation and suit which were intended to raise wage levels for the employees of the ambulance company, the Department of Labor managed to aggravate the problem of low wages for those employees by forcing their employer out of business and thereby leaving those employees without wages of any kind. To make matters worse, most of the employees who worked for the ambulance company were not easily reemployed. Many were students or workers moonlighting for extra income. These individuals found to their liking the twenty-four hours on—twenty-four hours off work schedule of the ambulance company under which part of the time for which they were paid actually was spent sleeping while they awaited infrequent night time emergency calls for ambulance service.

Furthermore, the unintended effects of the case were not limited to aggravating the low wage problem of the ambulance company employees by causing the employees to lose their jobs entirely when their employer went bankrupt. The ambulances that the company used were repossessed by a bank and no similar service reopened. Thus, another unintended consequence of the case was that, after the
company that was the subject of the suit became defunct, Oklahoma City was left with just one operating ambulance service. At least one state senator suggested publicly that the reduction in ambulance service that followed the closing of the company in the suit presented a life threatening situation for those who required ambulance service in the Oklahoma City area.

Type Two: Cases Producing an Ambiguous Outcome

In the type two situation, the unintended effect of the litigation is that while the plaintiff receives a favorable decision on paper, as a practical matter the litigation has a highly ambiguous outcome. A lawyer with Greater Boston Legal Services described a case, entitled *Cornelius v. Minter*, in which there arose this problem of a cloud of ambiguity and confusion appearing regarding the actual effects of an ostensibly successful suit.

In *Cornelius*, the named plaintiff and a class of similarly situated individuals brought suit against the State Commissioner of Public Welfare and the State Secretary of the Office of Human Services alleging that these defendants had failed to provide essential and supportive welfare services with reasonable promptness in violation

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of the Social Security Act and the Equal Protection and Due Process Clauses of the United States Constitution. The facts in the case showed that plaintiff and the class she represented were so-called "uncovered" welfare cases in that no specific social workers were assigned to those cases to process requests for welfare services while in "covered" cases specific social workers were assigned. The facts further showed that when an applicant's case was covered the applicant generally received welfare services for which he or she was eligible in as short a time as two to three weeks while applicants, such as the plaintiff and her class, whose cases were uncovered had to wait two to six months to receive requested services.

In ruling on the case, the court found that defendants' practices regarding uncovered cases violated the requirement of the Social Security Act that services be provided with "reasonable promptness". In fashioning its relief, the court issued an order directing defendants to reform their ways and setting up specific time requirements for delivery of welfare services. The court's order also made an attempt to set up a mechanism to monitor defendants' compliance with the time requirements by direct- that certain data be made available showing the time periods within which requests for services were being handled.
When I discussed Cornelius with the attorney handling the case, she indicated that, despite the court's attempt to deal with the monitoring problem by requiring defendants to produce certain data periodically, there has been doubt regarding whether defendants have been complying with the standards for "reasonable promptness" set out in the court's order. Apparently for at least part of the time after the order was issued, defendants were not technically able to provide the information required by the court regarding the promptness with which they handle requests for welfare services. After juggling computer programs defendants were able to come up with the data, but plaintiffs' attorney indicated to me at the time that the data may be unreliable.

Furthermore, the confusion about the defendants' compliance with the time limits set in the court's order seems inescapable given the type of key defendant--a large bureaucracy--involved in the case. To be effective, an order to deliver services with reasonable promptness must filter down into the lower levels of the bureaucracy to the workers who actually provide services. At these lower levels the number of workers implementing the order is great as are the number of everyday worker actions or decisions that are affected by the order. Given the large number of workers and the large number of their
actions and decisions that are affected by the order, monitoring compliance with the order becomes virtually impossible. It simply is not possible to have someone looking over each worker's shoulder to insure that he or she complies with the order. Thus, in this situation, the unintended effect of the litigation from the plaintiff's perspective is that while plaintiff has won the case on paper, as a matter of fact there can be a cloud of ambiguity as to whether the litigation actually has had the desired result.

Similarly, Handler describes a case the consequences of which apparently have been largely unclear. According to Handler, the Wilderness Society brought suit under the National Environmental Policy Act against the Trans-Alaskan Pipeline Group, a collection of oil companies that had been granted a license to construct the trans-Alaskan oil pipeline. The court issued a temporary injunction halting construction of the pipeline until the outcome of the litigation was determined. During the litigation, the parties negotiated various settlement stipulations. These stipulations set detailed standards for the design, construction and maintenance of the pipeline all of which seemed to limit the potential for environmental damage. The stipulations also required the Alyeska Pipeline Service
Company, representing the oil companies, and certain state and federal agencies, to take actions to ensure compliance with the various agreements in the stipulations. ³

From the outset there were reports that the environmental standards set by the stipulations were being violated. Overall, however, it appears that the consequences of the stipulations were frequently unclear or wholly unknown. A General Accounting Office report determined that two-thirds of the pipeline construction activity was not seen by the federal agencies charged with oversight responsibilities pursuant to the stipulations. The environmentalists themselves tried to determine whether there was compliance with the stipulations but the environmentalists reportedly were refused access to and information regarding the construction activity. As Handler writes, the reformers "lacked the technical, professional, and financial resources to follow-up" and ensure that the stipulations were being implemented. ⁴

The problem of unclear consequences in ostensibly successful litigation, however, appears in this case not only because of a lack of resources for oversight and a


⁴Ibid.
lack of cooperation among the parties; it appears also because it seems to inhere in the complexity of the issues involved in the suit. The stipulations of the parties called for construction plans that were "technically complex" and implementation of the plans required "discretionary decisions" made at the "lower levels of bureaucracy." Just as it was virtually impossible for the plaintiffs in the preceding case to monitor all of the individuals affected by the court's order to provide welfare services with reasonable promptness, in the present case the great complexity and large number of discretionary decisions entailed in construction of the pipeline made it virtually impossible for the environmental reformers, whatever their resources, to have monitored the environmental impact of all those discretionary decisions. And, of course, the whole monitoring situation was made worse by the fact that construction was taking place in the far away and bitterly cold tundra. As a result of all of these factors, there necessarily has been doubt about the actual effects of the litigation.

Type Three: Cases Prompting Their Own Reversal by the Legislature

In type three the unintended outcome of the litigation is that the court's ruling in the litigation prompts
the legislature to reverse that ruling. This was the fate of a ruling in a case, styled Robinson v. Pratt, which was brought by the Elderly Unit of Greater Boston Legal Services and which was described to me by the Director and Senior Attorney of the Unit.\

In Robinson, plaintiff filed a class action seeking to set aside the "transfer of assets" regulation of the Massachusetts medical assistance program. This regulation required the withholding of Medicaid assistance from applicants who, at any time within one year immediately prior to the filing of an application, had made an assignment or transfer of real or personal property for the purpose of rendering himself or herself eligible for such assistance. Plaintiffs claimed that in denying them Medicaid assistance, the Massachusetts regulation violated the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs further claimed that the regulation unlawfully created additional eligibility requirements not authorized by the federal Medicaid statutory scheme under which the Massachusetts program is funded and operated. The court agreed with the latter claim and eventually issued an order.\

directing the federal government (i.e. the Secretary of Health and Human Services) to take action to ensure that the Massachusetts regulation would be taken out of operation.

The attorneys in the Elderly Unit report, however, that the ruling in Robinson v. Pratt, perhaps in conjunction with the rulings in similar cases in two other states, prompted Congress to reverse those rulings. Specifically, Congress amended the federal Medicaid law so that it authorized "transfer of assets" rules such as the rule that had been in effect in Massachusetts. Furthermore, while the Massachusetts rule had withheld Medicaid benefits from any applicant who had transferred assets within a one year period prior to the date of the Medicaid application, the new rule adopted by Congress prohibited the awarding of benefits to anyone who had transferred assets within two years prior to the Medicaid application.

Like Robinson v. Pratt, other court rulings over the years have had the unintended effect of triggering their own reversals. As part of a somewhat broader study, Dahl examined fifteen cases involving major policy decisions in which the Supreme Court of the United States declared legislation unconstitutional within four years of the date each piece of legislation at issue had been adopted. Of the rulings in these fifteen cases, ten rulings prompted
their own reversal by Congressional action. Furthermore, as Dahl reports, some of the battles between the Supreme Court and Congress over particular rulings were extended battles involving a series of reversals. For example, in 1918 the Supreme Court declared unconstitutional a child labor law that Congress had enacted under its commerce clause power. The ruling prompted Congress to pass immediately a new child labor law this time based on the tax power rather than the commerce clause power. The Supreme Court set aside this new law in a 1922 case. This 1922 ruling triggered an attempt to pass a constitutional amendment prohibiting child labor. The amendment failed but in 1938 a third child labor law was enacted by Congress and this third edition withstood constitutional challenge.6

In very recent times, various suits have unintentionally prompted the Reagan Administration to try to undo the rulings in those suits by legislative action. For example, consider a suit brought by the Sierra Club in connection with antipollution standards for coal-fired power plants. In the case, the Sierra Club established the precedent that, despite losing its case, a party could recover attorneys fees from the Government if the suit for

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which fees are sought aided in the interpretation and development of federal law. The Reagan Administration responded to this precedent by introducing legislation that would prohibit a party who lost its case against the Government from recovering attorneys fees from the Government regardless whether the case helped clarify important law.  

The rulings in various recently decided controversial suits have also unintentionally triggered attempts by Reagan opponents to reverse those rulings by means of legislation. For instance, the Supreme Court's 1984 ruling in Grove City College v. Bell has led to attempts by the Reagan opposition to overturn that ruling by enactment of the "Civil Rights Restoration Act of 1985." In Grove City College, the Supreme Court held that 1972 legislation banning sex discrimination by educational institutions receiving federal funds applies only to the specific program receiving the funds, not to the entire institution.

**Type Four: Cases of Evasive Noncompliance**

In the type four situation the unintended effect of litigation is that it triggers a pattern of evasive

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noncompliance with the court's ruling by the losing party so that the ruling is rendered almost useless to the prevailing party. A good example of this problem is furnished by a case I brought as an attorney for the U.S. Department of Labor.

Because the tactics adopted to evade the court's order show the individual involved in the case in such an unflattering light, I will refrain from using his name or the name of his companies even though the case is published and a matter of public record. In this case, a highly educated individual was charged in 1968 with failure to pay his employees, at what I will call Company A, the minimum wages and overtime compensation required by law. Company A was engaged in the provision of extermination and janitorial services and employed a large number of individuals in the southern part of Texas. The court found that the individual in question, acting through Company A, indeed had not paid his employees the wages required by law and issued an injunction ordering payment of past wages due and requiring Company A to pay minimum wages and overtime in the future to its employees. Several years later, in 1975, the same individual was again investigated and again found by the Labor Department to be in violation of the minimum wage...
and overtime law. He apparently had attempted to evade compliance with the law by dissolving Company A and creating a new business, hereinafter referred to as Company B. Company B provided basically the same services as Company A except that Company B added several new operations. Company B also paid its employees pursuant to a complicated new scheme that attempted to pay janitors and exterminators on a commission basis. Suit was filed against Company B and the court decided the case in 1977. The court found that the new pay scheme was a subterfuge to evade the minimum wage law and issued an injunction against both the individual and Company B and further ordered them to pay wages due their employees. In 1980, after I left the Department of Labor, the same individual and Company B were again found in violation of the minimum wage law and were again required to pay back wages to their employees. This time the individual in question was also held in contempt of court.

From the foregoing it is apparent that the individual involved continued over a twelve year period to cheat his employees by depriving them of part of their wages until a court ordered him to pay. In effect, therefore, by forming a new corporation, designing new pay schemes and otherwise taking seemingly evasive actions, this individual managed
to render almost meaningless those parts of the courts' orders that required him to pay promptly, each and every work week, the minimum wage and overtime required by law.

The famous white primary cases are another example of litigation the unintended effect of which is that it does little more than trigger a pattern of evasive noncompliance with a court ruling by the losing party such that the ruling is rendered almost meaningless. In the white primary cases, however, the evasive actions were taken by a group of officials of the Texas Democratic Party and others rather than by a single individual as in the previous example.

The first white primary case was *Nixon v. Herndon* in which the Supreme Court held that a state law banning blacks from the primaries violated the Fourteenth Amendment.\(^9\) The protections of the Fourteenth Amendment, however, are available to individuals only in regard to actions by the state. The State of Texas, therefore, attempted to turn the primaries into private rather than state matters by giving the state political parties the power to determine who should vote in primaries. Upon receiving this power, the Texas Democratic Party's executive committee immediately issued a rule which provided that only whites

could vote. Undaunted, the plaintiff in the first case, Dr. A.L. Nixon, initiated the second white primary case, entitled *Nixon v. Condon*.\(^{10}\) Again the Supreme Court found that Dr. Nixon's exclusion from the primaries violated the Constitution. The Court reasoned that, though the primary was conducted by a private entity, the executive committee of the Texas Democratic Party, that committee was so entangled with the state that its actions constituted state action and thus the protections of the Fourteenth Amendment could be invoked to overturn the committee's rule excluding blacks.

But the Texas Democratic Party too was unwilling to give up. A few weeks after the 1932 decision in *Nixon v. Condon*, the Texas Democratic Party called a convention and, instead of relying on a rule of its executive committee, which the Court had found to be entangled with the state, the Party instead adopted a resolution of the entire convention that likewise excluded blacks from the primaries. Thus, once again Dr. Nixon could not vote in a primary. As a result of the action taken at the convention, a third white primary case was filed, this time by one William Grovey, and the case was decided in 1936.\(^{11}\) It was, however,

\(^{10}\) *Nixon v. Condon*, 286 U.S. 73 (1932).

for various reasons, even less successful than Dr. Nixon's efforts, which you will recall, had begun some ten years earlier. These white primary cases thus show how evasive noncompliance with a court order by the losing party can be the unintended outcome of litigation from the perspective of an ostensibly successful party such as Dr. Nixon.

Type Five: Cases of Late Relief

In type five the unintended effect of litigation is that a ruling favorable to a party is rendered meaningless though not, as in type four, because the ruling is evaded by the losing party but simply because the ruling comes so long after the events that gave rise to the litigation.

A case I handled at the U.S. Department of Labor, entitled Secretary of Labor v. Lincoln School District, demonstrates this type of unintended effect.\[12\] In Lincoln School District, the Labor Department filed suit on behalf of four cafeteria workers claiming that the workers had been discharged for exercising rights protected by federal statute. The discharge by the defendant school district had taken effect on May 13, 1975. After trial, the federal

\[12\]Secretary of Labor v. Lincoln School District, 600 F. 2d 147 (8th Cir., 1979), cert. denied, 87 L.Ed. 33, 861.
district court ruled that the women had been dismissed as part of a planned reduction-in-force and not because they had exercised federally protected rights. The Labor Department appealed to the United States Court of Appeals for the Eighth Circuit. After arguments, the Eighth Circuit ruled on June 7, 1979, that indeed the cafeteria workers' discharge had been for exercising rights protected by federal law and that thus the workers were entitled to reinstatement in their former jobs and to back pay. The four cafeteria workers had asked the Labor Department to bring suit primarily in the hope of getting their former jobs back. When the reinstatement order was finally granted more than four years had elapsed. By that time all of the workers, as a matter of financial necessity, had obtained other work and were no longer interested in going back to the cafeteria. Thus, because the courts moved so slowly in granting relief, by the time the relief was granted a significant portion of it—the reinstatement—no longer had much value to those who had initiated the suit.

Horowitz describes another case the unintended effect of which apparently was that the relief granted came so late after the case was initiated that that relief virtually was meaningless. In this case described by Horowitz, entitled North City Area-Wide Council v. Romney,
an organization, however, was the party adversely affected by the lateness of the relief rather than individuals such as the cafeteria workers in the preceding case. In *North City Area-Wide Council*, plaintiff brought suit to define the meaning of the "citizen participation" requirement of the Model Cities program and to secure an order designating it as the sole citizen participation organization for the north Philadelphia Model Cities program. Several trips to the courts of appeal were made and thus some three years elapsed before plaintiff, the Area-Wide Council, got the relief it was after. By this time the Council itself was in shambles. While the suit was pending, one of defendant's regional field officers had lured several of the Council's members into a rival group that had begun assuming an active role in the Model Cities program. Thus, the Council obtained the relief it wanted but, because the courts had granted that relief in such an untimely manner, by the time the relief was secured the Council had fallen apart and lacked the strength to use the relief in any worthwhile manner.

A well publicized ongoing case brought by miners in McArthur, Ohio seems to be developing along lines similar to the *North City Area-Wide Council* case. In the miners' suit,

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the miners claim that their employer's unfair electioneering practices impeded efforts to organize a union. Just as in the North City Area-Wide Council case the Council had to wait a long period for a favorable ruling, so too the miners, several years after initiating their case, are continuing to wait for a final ruling. And, just as the unintended effect of the litigation in the North City Area-Wide Council case was that the Council could not use the favorable ruling in the litigation to the Council's advantage because the ruling came so late that by the time it was issued the Council had fallen apart, so too it appears that the miners' litigation will come to the same end. According to newspaper accounts, the union, at this late date after it instituted litigation, "has no strength" and thus if it receives a favorable decision in its litigation the decision apparently will be useless to the union because it lacks the wherewithal to use such a decision advantageously. 14

Type Six: Cases that Precipitate Threats of Violence or Actual Violence

In the type six situation the unintended effect of litigation is that it triggers violence or threats of violence by the losing party in the litigation.

No lengthy discussion of examples of this type of unintended outcome of litigation is necessary. We are all familiar with much publicized instances of litigation that produce violence such as the Boston desegregation suit. The problem, however, does not appear to be limited to a few highly visible cases. Discussions with other lawyers and my own experience suggest that threats and violence are not an infrequent part of litigation. Nor is the problem limited to suits of wide concern such as a suit to desegregate the entire school system of a large city. For example, the lawyers at the Boston Housing Authority (BHA) who are involved in instituting legal proceedings to evict individual drug dealing or otherwise lawbreaking tenants from public housing units, report that these legal proceedings sometimes result in numerous threats of violence by the tenant against BHA officials. Threats of violence also were made by several of the individual employers who were defendants in otherwise routine minimum wage cases that I brought on behalf of the Department of Labor.

It is extremely distressing that threats of violence and actual violence at times are the unintended effect of litigation. The threats and the violence are, of course, themselves distressing. For example, many
Americans were appalled to watch on television as innocent children suffered injuries in the violence resulting from the Boston desegregation suit. The threats and violence that sometimes are precipitated by litigation are distressing also because they signal that a fellow citizen has chosen to abandon one of the processes that must be relied upon by all if we are to be a truly civilized society—the process of resolving disputes without recourse to violence. Finally, the violence or threats that at times are the unintended outcome of litigation are distressing because of what they encourage. Enduring threats of violence or actual violence is a high price for an individual to pay for vindication in our courts of his or her rights. When such a price is extracted from those who seek justice through the courts, we encourage those individuals to themselves cast aside the courts and to take up violence as the means to achieve their ends.

Type Seven: Cases Producing a Domino Effect

In the type seven situation the unintended outcome of the litigation is that the ruling in the litigation not only prompts the subject of the litigation to comply with the law or to take some action but also prompts other entities, not a party to the suit, to comply with that law or to take that action. Thus in this situation a
plaintiff might file suit against Company One with the sole purpose of obtaining a court ruling requiring Company One to comply with Law A. But the unintended consequence of the suit is that Companies Two, Three, and Four, who are not parties to the suit, upon observing the outcome of the suit, begin to comply with Law A.

This type seven situation should be distinguished from the so-called test case. Unlike in the type seven situation, in a test case the party initiating the suit actually intends that the ruling in the suit result in compliance with a particular law not only by the party defending the suit but also by other similarly suited non-party entities against whom a suit of the same kind could be brought.

My experience at the Labor Department provides an example of the type seven situation. While at the Labor Department, I initiated a suit against Exxon Corporation alleging that Exxon had forced nine individuals to retire early because of their age in violation of the Age Discrimination in Employment Act.\textsuperscript{15} For a period of more than a year, the litigation was contested hotly with considerable discovery being undertaken by each side. As the case proceeded, the Labor Department obtained a successful result

\textsuperscript{15}29 U.S.C. 621 et seq.
in an age discrimination case which was wholly unrelated to the Exxon suit and which took place in a different state than the Exxon suit. This other case had been brought by the Labor Department against Sandia Corporation for the purpose of obtaining a court ruling setting aside a Sandia Corporation reduction in force which the Labor Department contended was implemented in an age discriminatory manner. Upon learning of the Sandia case, an attorney for Exxon took what in my experience is the unusual step of visiting the court where the Sandia case had been heard in order to review the pleadings in the case. Exxon lawyers, after reviewing the Sandia case pleadings, apparently were impressed by the extent of the effort made by the Labor Department in the Sandia case for shortly after the review of those pleadings Exxon lawyers began serious settlement discussions in the Exxon case for the first time. These settlement discussions resulted in Exxon agreeing to pay $375,000.00 in lost wages to the nine individuals on whose behalf the Labor Department had initiated the Exxon suit. Though the Sandia age discrimination case was not expected or designed by Labor Department lawyers to affect the Exxon age discrimination case in any manner, I believe that an unintended outcome of the Sandia case was that it had a kind of domino effect on Exxon in
the sense that the Labor Department's impressive work in
the Sandia case helped persuade Exxon to give up its battle
with the Labor Department and to come into compliance with
the age discrimination law by agreeing to settle the Exxon
case by paying lost wages to the affected employees.

"Typically Successful" Litigation vs. Litigation
Producing Unintended Consequences

Drawing upon my own observations and upon the
observations of distinguished observers of litigation, I
set out below various characteristics of the "typical"
piece of successful litigation. These characteristics of
successful litigation are identified and discussed in order
to show how the absence in a piece of litigation of one
such characteristic can contribute to the appearance of
unintended consequences of the types described above.

Attention to Consequences As Well As Rights

Many have observed that lawyers and judges have a
tendency in their work to focus on rights rather than con-
sequences.16 Lawyers, by training, are rights oriented.
Lawyers analyze problems in terms of the rights of clients.
Lawyers focus on securing those rights while typically

16Stuart Scheingold, The Politics of Rights: Law-
v ers, Public Policy and Political Change (New Haven: Yale
University Press, 1974), chap. 10.
giving little consideration to any side effect that might arise in the process. Judges behave in a similar manner. In reaching a decision in a case, judges primarily focus on the rights of the respective parties. Only secondarily, if at all, do judges pause to consider the consequences of their decisions.

A way of highlighting the preoccupation of lawyers with rights is to compare the analytical frameworks lawyers bring to their work with the frameworks employed by other professionals.\textsuperscript{17} For example, one of the intellectual techniques that a wide range of professional social scientists now use is the cost-benefit method of analysis. Simply stated, under the cost-benefit method, the social scientist piles up the potential costs of a course of action, including negative consequences, on one side of the scale and the potential benefits, including positive spillover effects, on the other side. Intervention by means of the course of action under consideration is justified only if, overall, the scales are tipped to the benefit side. Lawyers attempt no such balancing act. They madly dash ahead seeking to secure rights without pausing to consider the wide range of potential consequences.\textsuperscript{18}

\footnotesize\textsuperscript{17}Horowitz, chaps. 2 and 7.
\footnotesize\textsuperscript{18}Ibid.
The preoccupation with rights shown by lawyers and judges is not at all very surprising given that in the American system of justice the outcome of litigation is supposed to be determined by the respective rights of the parties. Successful litigation, however, is litigation in which attention is given, as appropriate, to consequences as well as rights, particularly in connection with the remedy stage of the litigation. This giving attention to consequences can mean various things for the prevailing party in the litigation and for his or her lawyer. For example, it can mean that prior to filing the litigation they pondered the potentially resource exhausting effects of engaging in the litigation process and, therefore, as necessary, planned action to bolster resources. Or, to take another example, giving attention to consequences can mean that the prevailing party and his or her lawyer have pondered the possible effects, including unintended effects, that might arise from a remedial order securing the rights of the prevailing party and thus, as necessary, the prevailing party and his or her lawyer have devised a scheme to monitor the effects of the order. And, insofar as judges are concerned, giving attention to consequences primarily means that once a judge, by analyzing the rights of the respective parties, has determined who should prevail
in the litigation, the judge considers the possible effects of constructing the remedial order in favor of the prevailing party in one way as opposed to another.

If the lawyers, parties and judges engaged in litigation do not give attention to consequences as well as rights, unintended effects can arise from the litigation. For example, in the ambulance company minimum wage case which was discussed above in type one, the individual who initially registered with the Labor Department the underlying minimum wage complaint that resulted in the suit against the ambulance company did not give much attention to the potential range of consequences of securing the minimum wage rights of the employees of the ambulance company in question. Nor did the Labor Department lawyers who filed the case give much attention to the potential consequences of the case. As a result, legal action was initiated that unintentionally exacerbated rather than aided the problems of those employees. Specifically, as indicated previously, the employees' low wages temporarily were raised to the minimum in response to the suit but ultimately fell to zero when the employees lost their jobs. The jobs were lost because the employer had to close the business and file for bankruptcy due to the employer's inability to meet the higher wage expenses dictated by the suit.
Sufficient Resources to Monitor Consequences

For litigation to be successful it is not enough to give attention to the potential unintended consequences of the litigation and to plan to monitor those consequences. Rather, for the litigation to be successful typically there also must be sufficient resources to actually implement a monitoring plan.\(^1\) The kind of monitoring resources needed in any particular case depends upon the circumstances. For example, if the case simply involves an order directing A to make a one-time payment to B of $1,000.00, then no significant monitoring resources are required. B himself or herself knows whether he or she has received the $1,000.00 payment. The only resource required to insure compliance with the order is sufficient funds to pay a lawyer to force A back into court if A does not make the payment promptly to B. By comparison, greater resources and expenses can be required for monitoring in some cases. Thus, for example, in a school desegregation case it is useful to have the services of a statistician who can track whether the racial mix of students is increasing in the school system following an order to desegregate.

Unintended consequences can result from litigation if there are insufficient resources to monitor the effects

\(^{19}\)Handler, p. 25.
of the litigation and to call those effects to the attention of the court. For example, if there are insufficient resources to monitor the outcome of litigation, an unintended result can be that the litigation does little more than trigger a pattern of evasive noncompliance with the order such as the evasive noncompliance demonstrated in the Company A and Company B minimum wage case and in the white primary cases described in type four above.

A Party That Actually Can Be Monitored

Besides the attention that the prevailing parties give to the consequences of the litigation and the availability of sufficient resources to implement a plan to monitor those consequences, a third characteristic of successful litigation is that typically the party that is required to take some action pursuant to the court's order in the litigation is a party that actually can be monitored by the prevailing party in the litigation. 20 If the party compelled by the court's order to take action is made up of the numerous employees of a large bureaucracy, then ordinarily that party cannot be monitored by the prevailing party even if the prevailing party has considerable resources available for monitoring. This is so because,

20 Handler, p. 18.
as previously discussed, it is wholly impractical to have an individual looking over the shoulder of each of the numerous employees of a large bureaucracy for the purpose of trying to determine if each such employee is complying with the court's order. Attempts to overcome the problems associated with monitoring a party made up of the employees of a large bureaucracy usually consist of requiring the employees to file reports showing that certain actions have been taken. Such reports, however, are fabricated easily.

Unintended consequences can result from litigation in which the party required to take action under the court's order in the litigation is a party not susceptible to monitoring because that party is made up of the numerous workers of a large bureaucracy. For example, in type two above, we saw litigation involving the employees of a large bureaucracy in which an unintended effect of the litigation was that a cloud of ambiguity had arisen regarding whether the employees were carrying out the court's order in the case requiring that the employees provide welfare services with reasonable promptness.

A Kind of Action That Can Be Monitored

In successful litigation, not only is the party compelled by the court to take some action typically a
party of the type that can be monitored by the prevailing party in the case, but also the kind of action taken under the order is action of the type that can be monitored effectively.\textsuperscript{21} If the action which must be taken under the court order is a long term course of conduct entailing numerous and regular discretionary decisions, then monitoring of such action by the prevailing party virtually is impossible. This is true even if ample resources for monitoring are available to the prevailing party and even if the party that is to be monitored is a single individual rather than the numerous employees of a large bureaucracy. Monitoring action involving even a single individual regularly making numerous discretionary decisions usually is impossible because monitoring such action requires having someone participate daily in each discretionary decision and over the long term this is not practical.

Unintended consequences can result from litigation in which the action required to be taken under the court's order in the litigation is action not monitored readily because that action entails numerous and regular discretionary decisions. For example, in type two above, we saw that the unintended effect of an environmental protection case apparently was that considerable ambiguity arose

\textsuperscript{21}Ibid.
regarding whether all reasonable measures to protect the environment were attempted by the parties, who pursuant to a court sanctioned agreement, were required to institute environmental safeguards in constructing the Alaskan oil pipeline. This apparent ambiguity, concerning whether all reasonable environmental protection measures were taken, arose because so many not easily monitored discretionary decisions, it turned out, were involved in the actions to protect the environment required of particular parties under the agreement.

Sufficient Resources to Withstand the Hardships of Litigation

As already indicated above, for litigation to be successful sufficient resources for monitoring the consequences of the litigation must be available to the prevailing party. In addition, if the litigation is to be successful the prevailing party must have sufficient resources to withstand the hardships imposed by the litigation process itself.

The burdens the litigation process places on the litigants are well known. Ambrose Bierce perhaps best imparted a sense of these burdens when he wrote that a prospective litigant is a "person about to give up his skin for the hope of retaining his bones." 22 Chief among

the specific hardships that litigants must endure is doing without the relief sought in the case for the several years it typically takes for litigation to come to a conclusion. What is necessary to be able to survive without the relief sought in a case depends, of course, on the nature of the relief itself. For example, if the relief sought is compensation in the form of a sum of money, then in order to survive until this relief arrives a litigant might need sufficient resources (e.g. collateral) to borrow funds for the interim. Besides having to survive, during the pendency of litigation, without the relief sought in the case, another hardship litigants must endure is the day-to-day expense that is part of litigation. Though some very poor litigants can obtain free legal assistance, most litigants must bear the expenses associated with litigation at least until those expenses are recovered, if at all, from the losing party in the case. These litigation expenses typically include attorneys fees, court filing fees, court transcript and court reporter fees, witness fees and fees for investigative and/or expert assistance.23

Unintended consequences can result from litigation in which a party has insufficient resources to withstand

the burdens imposed by the litigation process itself. Consider, for example, the Area-Wide Council case that was discussed in type five above. It will be recalled that the relief the Council sought in court was designation of the Council as the sole Model Cities citizen participation group for North Philadelphia. The litigation, however, dragged on and, therefore, the relief sought was not immediately forthcoming. This denial of the desired relief during the pendency of the protracted litigation was a burden imposed by the litigation that the Council could not shoulder. Without the designation as a Model Cities citizen participation group, the Council was unable to maintain the interest of its members and thus the membership declined. Because the Council lacked the resources to maintain its organizational strength in face of a burden—in this case denial of the relief sought during the pendency of the litigation—that is imposed by the litigation process, the unintended effect of the Council's case was that when the relief finally was granted after years of litigation the Council lacked the strength to use the relief in any advantageous manner.

No Predominant Polycentric Elements

In his work, Professor Fuller discusses what he calls "the polycentric situation" and the uneven results
that can arise when action is taken in such a situation:

We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered"—each crossing of strands is a distinct center for distributing tensions.24

Fuller goes on to point out that "there are polycentric elements in almost all problems submitted to litigation." He also implies that successful litigation is litigation in which "the 'polycentric' elements" of the problem submitted to litigation are not "so significant and predominant that the proper limits of adjudication have been reached." Fuller gives a hypothetical example of litigation which probably would not be successful because it involves a problem in which the polycentric elements of the problem predominate:

Suppose, again it were decided to assign players on a football team to their positions by a process of adjudication. I assume that we would agree that this is also an unwise application of adjudication.

It is not merely a matter of eleven different men being possibly affected; each shift of any one player might have a different set of repercussions on the remaining players: putting Jones in as quarterback would have one set of carryover effects, putting him in as left end, another. Here, again, we are dealing with a situation of interacting points of influence and therefore with a polycentric problem beyond the proper limits of adjudication. 25

When the polycentric elements of the problem submitted to litigation are predominant, then not only is it likely, as Fuller suggests, that the litigation will be unsuccessful but also unintended consequences can result from the litigation. For example, the earlier discussed ambulance case that ended with unintended effects involved a wage problem with predominant polycentric elements. The ambulance company was a marginal business with little operating reserve. Wage levels necessarily were tied inextricably to other financial expenses that the ambulance company faced including overhead expenses associated with operating a business that had to provide service on a twenty-four hour basis and expenses for payment of the notes on the ambulances themselves. Because only very limited reserve funds were available to meet unexpected expenses, an increase in one category of expense meant a corresponding decrease in payment on other financial

25 Ibid.
obligations. Thus, when the minimum wage suit forced higher wage payments this had the unintended effect of causing the company to reduce payments for other expenses and the reduction in these other payments resulted, as we have already discussed, in ambulances being repossessed and eventually in the company being compelled to close its doors in bankruptcy.
CHAPTER V

CONCLUSION: QUESTIONS FOR FUTURE RESEARCH
AND IMPLICATIONS FOR THEORY, THE
JUDICIARY AND LAW REFORM

This work suggests future research questions which
are described briefly below. Also following is a discus-
sion of the implications of this work for various theoret-
ical debates, the judiciary and law reform.

Questions for Future Research

As stated at the outset, this dissertation is
exploratory in nature. It seeks to make a preliminary
exploration of a subject that has not received much
attention. As part of this exploration, the subject of
law-related unintended consequences has been introduced,
methodological and conceptual issues in the study of
law-related unintended consequences have been examined
and different types of law-related unintended consequences
have been identified. From this groundwork completed in
the present study, new research projects can be launched.
Among the questions for future research that are logical
outgrowths of this dissertation are those questions
listed below.
How Frequently Do Unintended Consequences Arise In Connection With Legal Action and Are the Unintended Consequences That Arise More Often Negative Or Positive Consequences

Some writers have suggested that unintended consequences arise frequently in the context of legal action. For example, in regard to legal action in the form of legislation Sally Falk Moore has written:

_Much legislation today either does not achieve what it purports to set out to do, or when it does achieve specified goals, also spins off many side-effects that were not anticipated._ (Italics mine.)

Such comments suggesting that unintended consequences commonly appear in connection with legal action are not backed by any firm data. The necessary data could be compiled, however, by studying a sizeable representative sample of cases of legal action. From an examination of a representative sample of such cases, it would be possible to determine the percentage of those cases in which unintended consequences had appeared.

Related to the question of how frequently law-related unintended consequences arise is the question of whether those that do arise are more frequently negative or positive consequences from the perspective of those who initiated the action producing the unintended consequences. Again, various individuals have opined on the subject. For example, Professor Jones, in connection with law-related unintended consequences,

has written that: "My guess is that unintended consequences are more likely to be negative rather than positive." In addition to indicating how frequently unintended consequences arise in legal action, a study of a representative sample of cases of legal action also could confirm or rebut the opinions that have been ventured regarding whether unintended consequences of legal action are more often positive or negative consequences.

What Causes Unintended Consequences In Connection With Legal Action

Besides research that focused on the above questions, other research for the future that would be a logical extension of the present work is research that attempts a more careful examination of the question of what causes law-related unintended consequences. As discussed in chapter 2, determining what causes legal action to produce unintended consequences is problematic. In this dissertation, I have taken a first pass at the causation problem. I have discussed how the absence in legal action (i.e., legislation and litigation) of particular attributes of typically successful legal action can lead to unintended consequences. Thus, for example, we saw that having sufficient resources for monitoring the outcome of litigation is an attribute of successful litigation and that the absence of such monitoring resources can lead to unintended consequences.

More extensive studies of the causes of unintended consequences of legal action than that undertaken in this work clearly are possible and warranted. A potentially effective approach is a comparative study of a particular example of legal action that produced unintended consequences and of a particular example of otherwise similar legal action that produced no unintended consequences. By comparing the features of a legal action that produced unintended consequences to the features of a legal action that did not produce any such consequences, it may be possible to single out, in the action that produced unintended consequences, those features of that action which actually caused the unintended consequences.

Which Groups In Society Benefit Overall From the Unintended Consequences of Legal Action

Which group, if any, benefits most from the unintended consequences of legal action is a third question for future research that follows naturally from a preliminary study of unintended consequences such as the present work. Do the rich or poor, the liberals or conservatives, blacks or whites benefit most? The present study has implied that those who seek reform through legal action are not likely to benefit from the unintended consequences of such action but rather that the supporters of the status quo are likely to benefit. Indeed, this has been my own experience and
my experience has been confirmed informally in my conversations with other lawyers. Nevertheless, data from a study of a representative sample of cases of legal action should be compiled in order to determine just who, if anyone, benefits overall from the unintended consequences of legal action.

Do Unintended Consequences Arise More Often In Connection With Legal Action Involving One Kind Of Issue Rather Than Another Kind Of Issue

Still another future research question that logically arises out of the present work is whether unintended consequences appear more often in connection with legal action involving one type of issue as opposed to other types of issues. For example, do unintended consequences arise more often when the legal action involves housing issues, or consumer issues, or civil rights issues? Once again, a study of a representative sample of all types of legal action might produce the data needed.

Implications For Specific Legal Studies and Theories

In addition to suggesting future research questions such as those outlined above, this work has implications for specific fields of academic study relating to law and legal institutions. For example, the basic premise of this work—that legal action can result in unintended consequences—has implications for the earlier mentioned
emerging field of study known as judicial impact analysis. In seeking to determine the impact of judicial decisions, practitioners of judicial impact analysis have focused on whether judicial pronouncements actually are obeyed. Thus Dolbeare and Hammond conducted an analysis of whether, in a particular midwestern city, the local school system implemented the U.S. Supreme Court's ban against prayer in public schools. The present work suggests, however, that if practitioners of judicial impact analysis desire to determine comprehensively the actual impact of judicial pronouncements those practitioners must look beyond the issue of whether the pronouncements are obeyed. These practitioners must also begin to assess the impact of the untoward effects that can arise even when the pronouncements are obeyed.

Besides its implications for specific fields of law-related study such as judicial impact analysis, this work has implications for various theoretical debates regarding the role that courts and judges should play in society. One such debate primarily centers on whether

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courts and judges should play an activist role in society, meaning that they would intervene freely in issues of public policy, or whether a more restrained role should be assumed. Given, as shown in this dissertation, that legal action can result in unintended consequences, the widespread use of legal action to intervene in public policy matters may no longer be a tenable suggestion. Thus, the proponents of an activist role for courts may want to reassess the pro-activist position.

Like the judicial activist-judicial restraint debate, another theoretical debate regarding the role of courts in society for which the present work has implications is the debate over the method of analysis that courts should utilize in interpreting the Constitution. Some favor a strict constructionist approach in which courts rely heavily on a narrow and consistent reading of the Constitution itself to decide significant issues.


in the development of legal doctrine. Others argue that courts should have a free hand to read the language of the Constitution broadly and, as conditions in society change, to reinterpret that language perhaps even in a manner inconsistent with earlier interpretations. In light of the unintended consequences that this work has shown can arise from legal action, the strict constructionist approach seems a less acceptable alternative. As Professor Fuller has written, courts must have the freedom to reshape and clarify legal doctrines as the unforeseen consequences of those doctrines become known. As Professor Fuller has written, courts must have the freedom to reshape and clarify legal doctrines as the unforeseen consequences of those doctrines become known. Courts are less able to refine their doctrines, and in the process eliminate the unintended effects of those doctrines, if, as required by the strict constructionist approach, courts must explain each doctrinal modification solely in terms of narrow and logically consistent readings of the unchanging language of the Constitution.

Implications For the Judiciary

While the present work has implications, as discussed above, for theoretical debates concerning the role of courts in society, this work also has practical implications for judges in regard to their everyday duties as

decision makers. In view of the showing in this work that unintended consequences can follow from legal action, judges would be wise to begin to more carefully consider whether the decisions they render daily are likely to result in unintended consequences. Of course, as Frankfurter has written, estimating in advance the consequences of their decisions is among the most onerous tasks judges face and it is a task to which they are not particularly well-suited:

A judge... should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop.8

Though estimating whether unintended consequences might possibly arise from their decisions is not likely to be easy for judges, the means for proceeding with such an undertaking are not wholly unclear. For example, in this work I have suggested that unintended consequences can result from litigation if that litigation is missing one of the features of typically successful litigation.

Judges can make an effort to determine the absence of such features in any litigation and compensate accordingly. Thus, if in rendering a decision a judge determines that, unlike in typically successful litigation, the prevailing party in a case has insufficient resources for monitoring compliance with the decision, then the judge might attempt to compensate by utilizing some of his or her own limited monitoring resources. These limited monitoring resources include the power of the judge to appoint a master to oversee compliance with a decision.

Judges have compelling reasons to minimize the unintended consequences that result from judicial decisions. The principal duty of any judge is, of course, to do justice. If a judge determines that justice requires that his or her decision in a case produce a certain outcome but instead the decision produces an unintended outcome, then justice is not achieved. Therefore, to do justice consistently, judges must eliminate or at least minimize the problem of unintended consequences. Another reason for judges to minimize the unintended consequences produced by judicial decisions is because when such consequences result from judicial decisions judges are apt to be less respected and this can have ominous ramifications for society. Judges are likely to be less respected when
their decisions trigger unintended consequences because in that situation judges are viewed as not able to control the judicial system. As judges lose respect, individuals are less inclined to submit their disputes to judges and instead may resort to less orderly means of resolving differences.

Implications For Law Reform

Besides the above described implications for the judiciary, the present work also has implications for law reform. By its showing of unintended consequences that can flow from legal action, this work indicates that the problem of unintended consequences is a serious shortcoming in the use of legal action as a means of reform. Specifically, this work shows that when legal action is used as a means to pursue reform goals, the legal action not only may be unsuccessful it also may produce wholly unexpected, undesigned and undesired ends.

Given this showing that the problem of unintended consequences is a flaw in the use of law as a means of reform, politicians and lawyers should refrain from making grandiose claims, such as those made in the late 1960s and early 1970s, regarding the power of law as a reform tool. Although such claims may prompt individuals to lend their
support to reform efforts, the claims, in the long run, may do more harm than good. Overstated claims about the reform power of legal action may lead to serious disillusionment among those individuals influenced by the claims, and abandonment of reform efforts by those individuals, when they discover that legal action not only serves as a reform tool but also produces unintended effects that can be uncontrollably destructive.

Furthermore, the showing in this dissertation that the problem of unintended consequences is a flaw in the use of law as a reform tool, suggests not only that politicians and lawyers should temper their claims regarding the reform power of legal action, but also that politicians and lawyers actually should limit their efforts to use legal action for reform purposes. Politicians and lawyers should no longer attempt to solve every social problem by legal action be it litigation or legislation. As already discussed above, it is important for judges to act cautiously in connection with litigation that lacks one of the features of successful litigation. Similarly, it is important that lawyers and politicians show restraint in using legal action (i.e. legislation or litigation) as a reform tool in situations where one of the features of typically successful legal action is absent. Extraordinary
restraint by politicians and lawyers is required in such situations because, as already discussed in this dissertation, the absence in legal action of one of the attributes of typically successful legal action can lead to unintended consequences.

A New Burden and a New Challenge For Those Who Heeded the Call To Reform

Many of the law reformers of today who began their law reform efforts in response to the call to reform of the late 1960s and early 1970s have had to endure various burdens such as low pay and heavy work loads. Now these law reformers must face a new burden. This burden is the knowledge that each time they institute legal action for reform purposes unintended consequences that create a host of problems may be triggered. Furthermore, the burden of this knowledge is likely to weigh down those who responded to the 1960s-1970s call to law reform in that these individuals took up law reform thinking it was a means to achieve noble ends. With the realization that law reform efforts unintentionally can cause problems rather than alleviate them, these law reformers may abandon their law reform activities in dismay.

As already indicated above, in view of the problem of unintended consequences, politicians and lawyers should
be more circumspect in their use of legal action for reform purposes particularly where not all the elements of successful legal action are present. This warning applies as well to those who heeded the 1960s-1970s call to law reform. But neither these law reformers whose activities date from the 1960s, nor anyone else, should consider the warning to be more circumspect in the use of law reform as a suggestion that law reform efforts should be forsaken completely. Rather than abandoning law reform because of the problem of unintended consequences, those who responded to the 1960s-1970s call to reform should bring the same creative energies to the challenge of controlling law-related unintended consequences as these individuals brought to law reform in the first place.
SELECTED BIBLIOGRAPHY

A. Books


Proverbs 22:16.


B. Articles


