

The Federal Safety Net: Effective but Vulnerable Programs

by Janet Currie

[Editor's Note: This issue of Focus explores the legal and political dimensions of federal government regulation for a variety of policy areas, including the social safety net, public schools, hate speech, the environment, and the pharmaceutical industry. The contributing authors also address the efficacy and impact of the regulations in the United States and, in several cases, Europe.]

The fight over the reauthorization of the State Children's Health Insurance Program (SCHIP) in Summer/Fall 2007 highlights the fragility of the U.S. safety net. Ballooning federal deficits threaten all social spending in this country, but programs for vulnerable women and children may be most at risk. Unlike Social Security, most of these programs must be periodically reauthorized in order to continue to exist. Most Americans do not realize that the majority of aid to poor families is offered in the form of in-kind programs such as SCHIP, rather than in cash. Currently, less than 10 percent of the support received by poor families is in the form of traditional cash welfare, while over 30 million people participate in in-kind safety net programs including Medicaid, school nutrition programs (the National School Lunch and the School Breakfast programs), WIC (Special Supplemental Nutrition Program for

Women, Infants, and Children), Head Start, and child care subsidy programs.

In recent years, safety net programs have been systematically attacked as they have come up for renewal. The attacks are remarkably similar and hinge on three fallacious arguments: (1) the programs don't work, (2) they are riddled with fraud and abuse, and (3) support for the poor would be better handled by the states. As I will argue below, each of these arguments is incorrect.

Take the argument that in-kind antipoverty programs don't work. SCHIP is the latest in a series of social programs that have, in fact, worked remarkably well. Indeed, it is thanks to them that the war on poverty, contrary to widespread belief, has not failed. Instead, we have redefined what it means to be poor—for the most part, poverty in America no longer means starving in a slum without medical care.

One reason for the perception of failure in the war on poverty is a statistical artifact: Official poverty statistics do not include in-kind benefits, so no matter how much aid is given to a family in this form, it will never raise them above the poverty line. In fact, families do effectively rise above the poverty line—or at least, linger much less far below it—as the result of in-kind programs.

More substantively, many commentators focus on the wrong question. If we see, for example, that children who attended Head Start are still more likely to drop out of school than the average child, this tends to confirm our worst suspicions about the futility of intervention to break the cycle of poverty. However, the more relevant question is: Are these particular children less likely to drop out than they

would have been without Head Start? That is, a sensible analysis of the effects of government antipoverty programs has to take account of the fact that these programs typically serve the most disadvantaged families and target children who would be expected to have the worst outcomes in the absence of any intervention.

Sensible analyses do find significant positive effects of in-kind antipoverty programs (see Currie, 2006 for an in-depth discussion of the evidence). Head Start has lasting effects on the prospects of many children, increasing the probability of graduating from high school and attending college, and reducing the probability of being involved in crime.

Expansions of Medicaid to low-income children and pregnant women have reduced infant mortality and improved access to medical care for millions of children. In 1960, more than 25 children out of every 1,000 born died before their first birthday; those who died were disproportionately poor and African American. By 2004, this rate had dropped to fewer than seven deaths per 1,000 live births. Much of this improvement was driven by improved access to medical care, paid for by

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Janet Currie (janet.currie@columbia.edu) is chair of the Department of Economics at Columbia University, New York, NY 10027. She is a Fellow of the Society of Labor Economists, a research associate at the National Bureau of Economic Research, and on the advisory board of the National Children's Study. She is the author of The Invisible Safety Net: Protecting the Nation's Poor Children and Families (Princeton University Press, 2006).

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No Child Left Behind and the Federal Regulation of Schools

by Patrick McGuinn

The passage of the No Child Left Behind Act of 2001 (NCLB) inaugurated a new era of educational governance in the United States, which features a substantially larger and different role for the federal government in regulating the nation's schools. Many interpretations of the origins of NCLB underestimate the cause and extent of the political shifts in the Democratic and Republican parties, which enabled the law to be passed and are likely to sustain federal activism in education over the long term. If NCLB was really just a response to short-term political factors, did not reflect a new bipartisan consensus on federal education policy, or was dependent on state preferences, then the law's political future—and its ability to survive what will be a long and painful implementation process—would clearly be suspect. But No Child Left Behind represents a transformative shift—not merely a new policy but a new policy *regime* as it embodies a different set of ideas, interests, and institutions for federal education policy. The origins and future prospects of this new policy regime can only be fully understood in the context of a variety of developments in education, electoral politics, and federalism that have unfolded over time and in a way that makes it unlikely that the core approach of this new regime will be replaced in the near future.

The country's powerful traditions of states' rights and local control of schools precluded any substantial role for the national government in education until the latter half of the 20th century. With the Elementary and Secondary Education Act (ESEA) of 1965, the federal government began to provide financial assistance and supplemental programs to high poverty school districts. During the 1970s, Congress enacted a number of grant-in-aid conditions that required states to adhere to federal mandates concerning school ac-

cess and inputs in order to receive federal funds. But the ESEA did not seek to influence core policies concerning school governance, curriculum, assessment, or accountability. By the 1980s, however, the continuing existence of large racial and socioeconomic achievement gaps and the release of the widely publicized *A Nation at Risk* report—which warned that America's global economic competitiveness was threatened by underperforming schools—resulted in increased attention to education by citizens, the media, and national policymakers.

Responding to the newfound sense of a national education crisis, Democrats called for additional federal spending and regulation, while President Reagan and the Republican Party argued that federal programs and regulations had been ineffective and even counterproductive and called for private school vouchers and the elimination of the U.S. Department of Education. President George H. W. Bush took a different approach, and one strongly supported by the business community, when he advocated national academic standards and a greater national focus on student achievement. Bush was unable to enact his America 2000 proposal, however, due to continuing GOP opposition to federal influence in education and Democrats' focus on increasing and equalizing school funding. President Clinton, a New Democrat, pushed Democrats to embrace a more centrist position on education and gained passage of two major school reform bills in 1994—Goals 2000 and the Improving America's Schools Act (IASA). Many of the reform ideas that would later form the core of NCLB—such as standards, assessments, adequate yearly progress, school report cards, and corrective action—found their first expression in the 1994 ESEA reauthorization. Though the new laws did not include many mandates for states, they nonetheless signified a sea change in federal education policy and codified the shift from the historical focus on ensuring resource equity for disadvantaged students to a new commitment to improve the academic performance of all students. IASA ostensibly required states to adopt standards, assessment, and accountability policies but

was weakly enforced, and by 2002 only 16 states had fully met its requirements.

Under the leadership of Speaker Gingrich, Republicans in the mid-1990s once again tried to reduce federal involvement in education by cutting federal spending, by converting it into block grants or vouchers, and by eliminating the Department of Education entirely. These conservative positions on education, while popular with the party's base, proved extremely unpopular with the general public and particularly with moderate swing voters. The extent of public displeasure with the conservative agenda on education was revealed forcefully in the 1996 presidential election, when voters favored Clinton over Dole on the issue by more than a two-to-one margin. The partisan education gap became increasingly costly for the GOP because by the end of the 1990s, education had risen to the top of the public agenda and become a decisive national electoral issue. In addition, the failure of most states to com-

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Patrick McGuinn (pmcguinn@drew.edu) is assistant professor of Political Science at Drew University, 36 Madison Ave., Madison, NJ 07940; he is the author of *No Child Left Behind and the Transformation of Federal Education Policy, 1965–2005* (Lawrence: University Press of Kansas, 2006).

ply with the 1994 federal mandates or to make significant progress in closing achievement gaps despite greatly increased federal and state education spending put pressure on national policymakers to undertake more substantive education reform. The unpopularity of the earlier Republican focus on deregulation and privatization and the discrediting of the Democratic focus on resources and process regulation led to a new bipartisan consensus on standards, testing, and accountability. In the 2000 election, voters ranked education as the single most important issue of the election, and presidential candidates Bush and Gore proposed remarkably similar plans for an expanded federal role in schools that became the basis for NCLB.

The centerpiece of NCLB is the requirement that states, as a condition of accepting federal funds, establish academic standards to guide their curricula and adopt a testing regime that is aligned with those standards. States have to test all students in math and reading in grades 3–8 every year as well as once in high school. States are free to develop and use their own standards and tests, but every school, school district, and state has to make student test results publicly available and disaggregated for certain groups of students including: major racial and ethnic groups, major income groups, students with a disability, students with limited English proficiency, and migrant students. States also have to administer the math and reading portions of a national test, the National Assessment of Educational Progress (NAEP), every other year to a sample of their students in grades 4 and 8 to check the effectiveness of state standards and to provide a means of comparability of student performance across states.

NCLB also requires states to have a “highly qualified teacher” in every classroom where core academic subjects are taught. “Highly qualified” is specified as meaning that a teacher must be fully certified or licensed, have a bachelor’s degree, and show competence in subject knowledge and teaching skills. NCLB mandates that every state and school district issue report cards that detail student test scores and identify those schools that have failed to meet proficiency targets and are in need of “program improvement.” NCLB explicitly requires that states use this information to track their efforts to close the achievement gaps in reading and math be-

tween different student groups. States are required to establish a timeline (with regular benchmarks) for making “adequate yearly progress” toward eliminating these gaps and moving all students to state proficiency levels by 2014.

The law’s accountability provisions require states to take a number of escalating actions with Title I (high poverty) schools that do not reach state performance objectives. A school that fails to meet state performance targets for two consecutive years must be given technical assistance from the district to help it improve, and students in that school must be given the option to transfer to another public school in the district. If a school does not improve in the third year, students will also be given the option of using their share of Title I funds to pay for tutoring or other supplemental educational services (which can be provided by private companies). Schools that fail for four consecutive years must implement corrective actions such as replacing staff or adopting a new curriculum, and in the fifth year the failing school must be reconstituted with a new governance structure (e.g., reopening as a charter school). In exchange for meeting these new federal demands, NCLB provided a significant increase (approximately 49 percent in its first year) in federal education spending and new flexibility in how states can spend it.

NCLB has now been in effect for five years, but has it been successful? It re-

mains a very difficult question to answer, in part because there is substantial disagreement over what “success” would look like. In the narrowest sense, success might be demonstrated by a closing of the racial and socioeconomic achievement gaps or by increases in the number of students who meet state proficiency standards. There has been some evidence that both of these things have occurred, but the test data—as well as the efficacy of testing generally—has been fiercely contested by supporters and opponents of the law, and observers point to a number of additional costs and benefits of the law that should be included in any evaluation. Advocates of the law highlight the increased attention and resources that have been devoted to disadvantaged students and the new focus on achievement and transparency. Opponents of NCLB argue that it has pushed schools to narrow the curriculum and teach to the test and that it does not adequately address the shortage of funding, good teachers, and family support in disadvantaged communities. What is clear is that teachers and administrators across the country have struggled mightily to comply with NCLB’s mandates—particularly those regarding testing and data collection and dissemination—and to meet the law’s timetable for raising student achievement. Large numbers of schools have been labeled “in need of improvement” for failing to make “adequate yearly progress” since the law’s enactment,

For Further Reading

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Beyond the Myths: A Closer Look at Hate Speech Regulation

by Jon B. Gould

It has been nearly 20 years now since so-called college “hate speech codes” first arrived on the national scene, yet the controversy over their reach and necessity continues. There are certainly good reasons to debate the worth of these measures—after all, restrictions on speech at institutions of higher learning warrant a delicate hand. But, much of the discussion over the years, especially from the codes’ detractors, has tended to demonize the measures as politically correct restrictions. My own research, however, suggests that the codes are nowhere near as prevalent as many believe, adopted largely for instrumental, not ideological, reasons, and less pervasive than other hate speech restrictions in civil society.

What Is Hate Speech?

It is interesting that the college policies have been dubbed “hate speech codes,” for few mention the term “hate speech,” nor does American law provide a ready definition. A classic example of a policy comes from the University of Michigan, whose original rule prohibited:

Verbal or physical behavior ... that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status ... and that creates an intimidating, hostile or demeaning environment for educational pursuits, employment or participation in University sponsored extracurricular activities.¹

Hate speech is largely a creation of commentators and opponents of the speech policies, although the expression has become commonplace in everyday society. The term “hate” is also a misnomer of sorts. I may hate my neighbor, and I

Jon B. Gould (jbgould@gmu.edu) is director of the Center for Justice, Law & Society at George Mason University and an associate professor in the Department of Administration of Justice. He is the author of Speak No Evil: The Triumph of Hate Speech Regulation (University of Chicago, 2005), which was a co-winner of the Herbert Jacob book award from the Law & Society Association.

may tell him so, but vitriol alone does not make an argument “hate speech.” Hate speech is generally reserved for verbal attacks that target people on the basis of their immutable characteristics, or any form of “speech attacks based on race, ethnicity, religion, and sexual orientation or preference.”² Hate speech is closely connected to the Supreme Court’s category of fighting words—those expressions that by their very nature are likely to bring people to blows³—but the two are not completely analogous. Where a nasty insult might well precipitate a brawl, jeers would not normally rise to the level of hate speech, which implies some sort of attack against an individual’s immutable characteristics. Termed “race hate” in the 1920s and 1930s and “group libel” in the 1940s, “hate speech” or “racist speech” became the common terms in the 1980s as other characteristics, including sexual orientation, were included within its bounds.⁴

That hate speech usually involves immutable characteristics is but part of the definition, for the term also connotes an attack against minority status. There are some who find this “double-standard” unfair—that minority groups can use certain terms among themselves without criticism, but that if others seek to apply the same words for similar purposes, they are assailed.⁵ However, the key elements at work here are the historic power differences between social groups and the fact that certain words are associated with the exclusion of minority groups by others. These are central questions in the hate speech debate, ones that do not have easy answers. Among those who have written on hate speech, the prevailing view is that hate speech turns on the intent of the speaker.⁶ Where an individual seeks a legitimate debate, even on controversial questions, his or her message should not count as hate speech. But when the purpose is to offend, to silence, to marginalize, then speech becomes hateful. Admittedly, these lines are malleable, but the principle is worth considering.

How Prevalent Are College Hate Speech Codes?

Perhaps the most vocal foe of college hate speech codes has been the Foundation for

Individual Rights in Education (FIRE), which in 2006 reported that 93 percent of top-ranked colleges and universities “prohibit speech that is protected by the First Amendment.”⁷ Unfortunately, FIRE seems to have overstated by a factor of two, failing to distinguish enforceable rules from exhortative statements, confusing examples with definitions, and taking statements out of context. Several years ago, I conducted an in-depth study of college hate speech codes, applying categories previously tested by Vanderbilt University’s First Amendment Center. Using stratified random sampling, I found that 46 percent of four-year institutions had policies that could be used to restrict “hate speech,” meaning verbal attacks that target others on the basis of their immutable characteristics. However, only 23 percent of schools—not FIRE’s 93 percent—had rules that were inconsistent with the First Amendment. Yet, even this number must be narrowed. Generally, only public institutions are held to the First Amendment (although private colleges in California are also held to that standard as a result of a law passed in 1992). Considered more precisely, just 9 percent of American colleges and universities had unconstitutional speech policies at the time of my study.

FIRE responds that it sampled a larger group of schools than I did (~300 vs. 100), thus making its estimate more accurate. But FIRE neglects to mention that its population of schools was far from random—the group only surveyed those institutions it considers prestigious—and that it failed to follow Vanderbilt’s coding rules for the speech policies. As Robert O’Neil, director of the Thomas Jefferson Center for the Protection of Free Expression and former president of the University of Virginia, has said of FIRE’s claims, “I just can’t believe there is anything like that number of genuine speech codes.”⁸

Why Were Codes Created?

When college hate speech codes first came on the national scene in the late 1980s and early 1990s, critics depicted them as political correctness run amuck. When describing the policies’ genesis, popular interpretations portrayed cohorts

of campus radicals—adherents of critical race theory, feminism, and critical legal studies—mobilizing to advance a liberal form of “thought control” in America’s ivory towers.

Although it is true that some of the first hate speech codes were created at liberal institutions, my research suggests that the policies were advanced by college administrators, top-level officials at that, who were largely acting on utilitarian or instrumental motives. For the most part, administrators were motivated by their desires to diffuse existing racial unrest on campus, to mollify alumni or improve press coverage, or to maintain pace with what they saw as the “mainstream” of American higher education administration. Certainly, some administrators were sincere supporters of the hate speech policies and believed in the aims of speech regulation, but these officials were concentrated more heavily at the bottom of college administrations—and then, most predominantly in student services offices. The higher the level of policy adoption, the more likely those administrators acted on utilitarian motives. Indeed, one might even go so far as to say that the policies were intended as symbolic, perhaps even cynical, measures at some schools, adopted so that officials could say they had taken action against incidents of racial harassment on campus while comfortably assured that the policies would rarely be invoked.

The Larger Reach of Hate Speech Regulation

For all the attention to college hate speech codes, critics threaten to miss the more significant fact that hate speech regulation is increasingly the norm among influential institutions of civil society, from higher education to the news media to Internet service providers.

In this respect, it is interesting that many media outlets now restrict hate speech on their own. The most common examples are newspapers and broadcast media that no longer air racial epithets. The O.J. Simpson trial showcased this dilemma, as many news organizations struggled with whether, and how, to depict Mark Fuhrman’s slur against African Americans. CNN began by saying the “n-word” or “racial epithet” on its broadcasts, only later choosing to air the word in its entirety, but several other journalists chose not to repeat the slur.⁹ Of course, journalists

might well have excised the term as profane, using the cloak of a “family newspaper” to edit out coarse language of all stripes. But in considering Fuhrman’s slur, editors sounded remarkably like critical race theorists, who have warned about the dangers of racist speech for years. “I know [the word’s] power,” said a managing editor of a southern paper, “because I know history and how it would be used. It was meant to degrade people.”¹⁰ “Pain” and “history” figured prominently in journalists’ explanations. “I talked to a colleague,” said another editor, who reported that, “Every time I see that word in print, it’s a slap in my face.’ ... It’s not the paper’s place to be slapping our readers.” People may be “saying it in their living rooms,” said an observer, “but that doesn’t mean they want to read it on the front page of the *New York Times*.”¹¹

The Fuhrman flap is only one of many occasions in which reporters and journalists must make subjective decisions about potentially offensive expression. Several papers have adopted policies to handle racial slurs, deciding “to use them only in direct quotations if they are essential to the story.”¹² Other papers have applied such logic in refusing to name sports mascots. The *Minneapolis Star Tribune* and the *Oregonian*, for example, refuse to print “racist Native [American] mascots” and names.¹³ Tim McGuire, Editor of the *Star Tribune*, explained that “the decision to stop using mascots was based on a ‘humane gesture to my fellow man.’”¹⁴ In 2001, the *Kansas City Star* stopped printing the Cleveland Indians’ mascot, Chief Wahoo. Echoing McGuire’s rationale, Mark Zieman of the *Star* said, “Chief Wahoo is a ridiculous, offensive, racist caricature. We would be ashamed to run it as an editorial cartoon or comic strip, so why should we repeatedly publish it in the sports pages of our newspaper?”¹⁵

If newspapers—one of the “old line” media—are willing to reject hate speech, the new online media impose even greater restrictions on hate speech. This may be surprising to many, since the Internet has been touted as “the ultimate soapbox,” allowing users “to communicate their viewpoints to the world.”¹⁶ Yet many online service providers explicitly restrict hate speech. None is more adamant about this prohibition than America On Line (AOL), which states in its “Rules of User Conduct” that users may not: “upload,

post or otherwise distribute [content that] victimizes, harasses, or degrades an individual or group of individuals on the basis of religion, gender, sexual orientation, race, ethnicity, age or disability.”¹⁷ Another major Internet player, Verizon Online, includes similar language in its Website Use Agreement.

Unlike some of the college speech policies, Internet service providers are often willing to enforce the terms of these rules. Explains AOL spokesman Nicholas Graham, “We have zero tolerance for hate speech on the service, anywhere on the service. So, whether it’s on chat rooms or message boards, if we are made aware of hate speech, we will actively remove it, and we will reprimand the member who posted it.”¹⁸ As if to prove Mr. Graham’s point, AOL quickly removed a message board about Rosie O’Donnell’s talk show when it was flooded with disparaging remarks about the actress’ sexual orientation.¹⁹ Nor is AOL alone in its regulation of the Internet. The very fact that the Web is worldwide puts Americans in touch with European laws and practices that not only prohibit hate speech but also penalize providers and users for its dissemination.²⁰

Conclusion

In my book on the subject, I claim that hate speech regulation has “triumphed” in civil society—that the public has come to accept and endorse restrictions on the expression of hate speech.²¹ I will leave to others the continuing debate about the merits of such limitations, but I think it is important that we understand how we got to this place. Neither advanced by “tenured radicals”²² nor limited to academe, hate speech regulation not only continues, it is increasingly the norm in our society. ■

End Notes

¹ *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

² Samuel Walker, *Hate Speech: The History of an American Controversy*. Lincoln, NB: University of Nebraska Press (1994) 8.

³ According to the Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), fighting words are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

⁴ Walker, *Hate Speech* 8.

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The Right to Pollute and the Problem of Hotspots: From the Common Law to Pollution Markets

by Noga Morag-Levine

Since the industrial revolution, pollution in the United States was governed largely within the framework of common law adjudication of nuisance disputes. But by the 1970s, growing public dissatisfaction with nuisance-based responses to environmental harms led to the creation of a new federal regime under the Clean Air Act. The new regime was soon criticized for what its detractors labeled a “command and control” approach to regulation. In lieu of direct, or standards-based, regulation of all pollution sources, this wave of reformers called for greater reliance on economic incentives and market-based approaches such as emissions trading. The latter, unlike uniform direct regulation, gives regulated sources the option of buying pollution rights from other sources rather than controlling their own emissions. Through such trading, firms with high compliance costs are able to transfer their pollution-reduction obligation to others in exchange for payment. The economic benefits of this approach have led the EPA to incorporate tradable permits into a growing number of its pollution control programs.

The efficiency gains that pollution markets confer come, however, with a potential distributive downside. Where sources choose to purchase pollution rights rather than control their emissions, local air quality is liable to suffer. The issue does not arise in the case of greenhouse gases and other locally fungible pollutants. But where, as is most often the case, pollutants impose a localized impact, the contribution of emissions trading to pollution hotspots is of serious concern. The matter has recently come to a head in connection with an EPA rule that allowed for trading

in mercury from power plants. Mercury is a toxic air pollutant that accumulates in the food chain and is linked to a variety of neurological impairments. In suits that are currently pending before the D.C. Circuit, a coalition of states, as well as a number of environmental groups, have challenged the mercury rule partially on the basis of the potential for dangerous hotspots where power plants opt to forgo controls through the purchase of pollution credits. In calling attention to the problem of hotspots in the context of mercury trading, the dispute has cast a pall on the future of a host of other emissions trading regimes.

Defenders of pollution markets correctly point out that pollution hotspots exist in the vicinity of many industrial sources irrespective of the existence of trading. This can be due to the presence of residual pollution notwithstanding the implementation of required control technology, or to the concentration of a number of industrial sources in close proximity. What distinguishes pollution markets in this regard, however, is that they leave in place pollution that across-the-board demands for control would have reduced or eliminated. Within the framework of pollution markets, the right to pollute amounts to a right *not to utilize* available mitigation measures, which would presumably have cost more than the price charged for the right. But the flexibility that this regulatory instrument confers on pollution sources regarding the timing and extent of actual controls implicitly endorses variation in pollution mitigation levels across locales. In opting for this trade-off against the alternative of across-the-board controls, I argue, pollution markets realign contemporary regulatory policy with core suppositions of the common law regime—the very regime whose perceived deficiencies prompted the creation of a federal administrative alternative in the first place.

The absence of an a priori requirement for pollution mitigation across all sources was a defining feature of the nuisance doctrines that governed air pollution disputes under common law at least since the 17th century. Under what is sometimes referred to as the “locality doctrine,” the

common law varied applicable regulatory standards in reference to the prevailing sociodemographic conditions in affected areas. Sources located in residential areas, particularly upscale ones, were at times forced to undertake extensive mitigation or to relocate. One such example is an 1875 Michigan Supreme Court opinion that enjoined a metal forger who was located in a Detroit neighborhood marked by “costly and substantial” buildings and “expensively improved” grounds (*Robinson v. Baugh*). By contrast, sources located in industrial areas often escaped demands for pollution control, even where feasible means of mitigation existed. An important example in this regard was the failure of English Alkali manufacturers prior to the enactment of parliamentary legislation during the 1860s to utilize an inexpensive pollution control device for the control of hydrochloric acid that had been available since 1836 (Ashby and Anderson 1981:20). Where judges refused to intervene in the face of evident, often overwhelming levels of pollution, they faced the task of justifying their decision to the plaintiffs and others who were similarly exposed to localized pollution in the vicinity of industrial sources. Often they invoked scientific uncertainty regarding the pollution’s health effects to explain their inaction. Localized pollution hotspots were defined in this fashion as a “trifling inconvenience” that residents of industrial areas would have to tolerate.

On their face, pollution markets bear little resemblance to nuisance law’s reactive and court-based model of air pollution regulation. They depend for their operation on an extensive administrative apparatus to set the overall targets, oversee the trades, and ensure compliance. What these markets nonetheless share with the common law is the core concept of a legally protected “right to pollute.” In rejecting the ideal of uniform pollution reductions in favor of greater flexibility in the location and scope of pollution mitigation, pollution markets are consistent with a central tenet of nuisance law. Pollution markets and common law nuisance doctrine embody in this fashion the same trade-off. Both offer flexibility in levels of pollution

Noga Morag-Levine (nmorag@law.msu.edu) is associate professor at the Michigan State College of Law; she is the author of Chasing the Wind: Regulating Air Pollution in the Common Law State (Princeton University Press, 2003). This article draws on Noga Morag-Levine “The Problem of Pollution Hotspots: Common Law, Coase, and Pollution Markets.” 17 (1) Cornell Journal of Law and Public Policy (2007, forthcoming).

control and sensitivity to differences in the costs and benefits of pollution control across locales. At the same time, in rejecting the option of across-the-board controls, both pollution markets and common law may leave in place uncontrolled localized pollution, notwithstanding the presence of feasible means of control.

The similarity is not coincidental. It is indicative of the shared regulatory paradigm linking today's pollution markets with the common law. The alternative paradigm from which both pollution markets and the common law depart is based in continental civil law principles and the administrative police tradition that developed in France and Germany during the 18th and 19th centuries. The defining feature of this continental approach is reliance on across-the-board, technology-based demands for pollution control.

Ronald Coase's 1960 article, "The Problem of Social Cost," provides important evidence on the connection between pollution markets and common law. The policy literature credits Coase as the inspiration behind the idea of pollution markets. At the same time, Coase's article devoted a significant portion of the article to discussion of nuisance law. Coase invoked the common law's propensity to balance opposing economic interests in the course of adjudicating nuisance disputes in order to show that his argument—while novel in his day—came with a respectable legal pedigree. The core concept that subsequent early writers on emissions trading such as Thomas D. Crocker and J. H. Dales appeared to borrow from Coase—the potential for legally protected rights to pollute where the balance of economic interests supports such a right—was the central insight which Coase himself took from the common law.

In "The Problem of Social Cost," Coase sought to expose what he perceived to be a fundamental error in the prevailing economic theory regarding harmful business activity such as smoke. Economists, following Pigou, had treated such harms as negative externalities, a market failure whose existence required government intervention. Based on this reasoning, the customary economic prescription was that industrial sources, irrespective of circumstances, either take precautions not to harm others or pay for any harm they inflict. This conclusion, Coase argued, was based on faulty reasoning because it failed to recognize that the harm in question was

reciprocal, rather than unidirectional. Neither wandering cattle where there were no farmers, nor pollution sources devoid of neighbors, would impose a social cost. And because, under the logic of *reciprocal causation*, no one party bore responsibility for the harm thus suffered, neither merited a priori protection. Since one party, or the other, would inevitably be harmed, the proper goal was to avoid the more serious harm, i.e., those harms that inflict greater losses than benefits. Balancing of this sort is what Coase meant when he called for a regulatory regime focused on "total effect" (1960:44). Properly functioning markets maximized the relevant total effect through free exchange. In the absence of such markets, the role of government was to replicate, as far as possible, the outcome that well-functioning markets would have produced. Some business-inflicted harms may justify corrective action under this criterion whereas others may not. Applied to pollution, this line of analysis suggested the absence of rationale for regulatory intervention where the costs of control exceeded its environmental benefits. The conclusion cut against the view that producers must internalize the cost of pollution irrespective of cost-benefit calculations but, as Coase went on to show, was compatible with the historical practice under common law.

Unlike contemporary economists, Coase argued, common law judges were aware of the reciprocal nature of the problem and as such refrained from granting remedies against pollution where the balance between pertinent costs and benefits pointed towards maintenance of the status quo. In these cases, the proper legal response was to leave things alone. In such instances it may well be said that the common law conferred on industrial sources a right to pollute, to borrow Coase's formulation. That right amounted to a right to inflict harm in the course of one's business activities, a harm that Coase justified, in turn, through the argument from reciprocal causation.

In conceiving of the possibility of "rights to pollute," the architects of emissions trading built on Coase, and through him, common law. But in the face of accumulating evidence on the health effects of pollution, the policy imperative of preventing localized hotspots has become far more evident. As a result, proponents of emissions trading labor under the contradiction between the logic of differentiated responses to pol-

lution on the one hand and the commitments of a regulatory regime pledged in principle to the protection of all citizens everywhere on the other.

Over several centuries, English, and later American, pollution control policy was characterized by a back-and-forth swing between two regulatory paradigms—one, based in common law, was tolerant of variations in levels of control as it geared at regulation tailored to the circumstances of differing pollution sources and locales. The other, building upon continental administrative paradigms, pursued feasible mitigation of pollution across all sources. These historical paradigms continue to vie for position in current debates over environmental policy. The commonality between emissions trading and earlier common law approaches does not inherently strengthen or weaken the case for current incentive-based approaches. Like Coase, some will find in the common law pedigree a supportive precedent and reassuring evidence that inherited Anglo-American legal wisdom is consistent with spatially varying demands for pollution mitigation. Others will view the neglect of hotspots that could be mitigated with feasible technologies as the inherent flaw of both common law nuisance doctrines and their contemporary market-based progeny. ■

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Pharmaceutical Regulation in the United States and Europe

by Arthur Daemrlich

Drug regulation is the oldest recorded form of government control over private enterprise. In fact, Peter Barton Hutt, former chief counsel for the U.S. Food and Drug Administration (FDA), argues, “Ancient laws written on Sumerian clay tablets contain requirements for food and drugs that are present in substantially the same form in our laws today” (Hutt, 2007). These laws mandated purity and safety of compounds sold for medical uses. By the latter third of the 20th century, regulatory laws in the United States, Europe, and elsewhere were expanded to also include efficacy as a pre-market criterion.

While the fundamental legal framework for pharmaceutical safety has deep historical roots, methods for testing compounds in humans before they reach market and approaches to monitoring post-market drug use have undergone significant change in the past fifty 50 years. Put succinctly, both arenas have shifted from individual case analysis to large-scale statistical study. Yet that seeming triumph of a more rigorous quantitative approach has been uneven, marked by significant national differences and important tensions in balancing access to potentially life-saving therapies against the desire for rigorous testing.

The shift from acutely dangerous contagious disease, a major focus of medicine and industry through the mid-1950s, to today’s orientation to risk and chronic disease (all of the top 10 selling pharmaceuticals in 2006 were for chronic conditions) has also shifted dynamics among physicians, patients, government regulators, and the pharmaceutical industry. Thanks to a potent mix of therapeutic advances, marketing, and lifestyle changes, some 40 percent of Americans today take at least one prescription drug, and 17 percent take three or more. Two especially salient “side-effects” have accompanied this evo-

lution in therapeutics: First, patients on medications for the rest of their lives forge connections and adopt group identities that lead to demands on the other actors in ways quite different from patients using medicines to cure contagious disease; second, it has put severe strains on the ability of short-duration clinical trials to model the real-world of drug use.

In the United States, the FDA appears trapped in semiconstant crisis brought on by competing interests among the key players. Officials that act too slowly while reviewing mountains of documents—new drug applications are typically 200,000 pages or longer—face complaints from patients, disease-based organizations, physicians, and politicians articulating antiregulatory views. When they decide against approval, they are accused of undermining a key business sector that provides employment to thousands of skilled workers and serves the public interest by inventing new medicines. Approve a drug that later causes adverse reactions, however, and regulators are condemned in the press, made to testify on their decisions in front of Congress, and told to tighten controls.

Europe, both at the European Union (EU) level and within individual countries, has seen extensive debates over price controls and competition, but comparatively little dispute over regulatory procedures and drug safety. With 30 percent of global pharmaceutical sales, second only to North America’s 48 percent, and home to four of the top ten global pharmaceutical companies, Europe offers useful comparative perspective. Why is pharmaceutical regulation so contentious in the United States when contrasted with Europe?

Following arguments first presented in my 2004 book, *Pharmacopolitics*, I contend that the answer lies in different approaches to identifying and responding to risk. These, in turn, correlate to a distinctive set of institutionalized relationships among the state, industry, physicians, and organizations representing patients. As a result, the FDA is caught in a dilemma between the visible individual patient and abstract statistical results. A more paternalistic medical profession and broader healthcare coverage found across Europe

has allowed European regulatory bodies and the decade-old European Agency for the Evaluation of Medicinal Products (EMA) to define their regulatory role more narrowly. Put differently, FDA is responding to broader publics than its European counterparts, including patient activists and challenges from individuals, even while it has promoted controlled clinical trials, separation of data collection from analysis, and quantification of test results. A stronger medical profession in many European countries has maintained a more significant role for expert judgment and less contention when balancing individual cases and statistical abstractions.

Two recent regulatory controversies have hinged on the distinction between the individual and the statistical patient: the first concerns identifying side effects of drugs on the market; the second involves “compassionate use” of medicines still in premarket clinical testing. In both cases, contrasts between the United States and Europe exemplify differences in risk definition and institutional responses.

In September 2004, a large clinical trial run by Merck on its COX-2 inhibitor rofecoxib, Vioxx, that was testing its deterrent effect on the recurrence of a potentially cancerous type of polyp revealed an increase in cardiovascular problems. Merck then withdrew Vioxx from markets worldwide. The drug was initially approved by the FDA for osteoarthritis in May 1999, based on eight double-blind, placebo-controlled clinical trials encompassing 5,400 patients. In the ensuing controversy in the United States, every aspect of data collection and analysis by the company came under critical scrutiny, and significant personal injury litigation is still pending. Key issues of dispute included characterization of heart attacks during the trials, how the FDA reviewed clinical trial data, and the accuracy and methodological rigor of meta-analyses carried out using various databases from health providers after Merck withdrew the drug.

Within a short time, critics were pointing to a crisis at the FDA in both its premarket review and enforcement of post-market monitoring, also known as pharmacovigilance. Legislation was proposed

Arthur Daemrlich (adaemrlich@hbs.edu) is an assistant professor in Business, Government, and the International Economy at Harvard Business School; he is the author of Pharmacopolitics: Drug Regulation in the United States and Germany (University of North Carolina Press, 2004).

that would split premarket and postmarket regulation by FDA. In May 2007, the Senate overwhelmingly passed the FDA Revitalization Act. Among other provisions, it would mandate FDA participation in public-private partnerships to create massive risk identification databases, a “risk evaluation and mitigation strategy” for drugs found to cause serious adverse events, and greater government control over direct-to-consumer ads. The House passed a different version of this bill in July; the House and Senate next will conference the two bills to attempt to reconcile differences, so the exact legislative outcome is pending.

Europe has seen a more muted degree of publicity and dispute regarding COX-2 inhibitors, although the Vioxx case did generate discussion of pharmaceutical safety and methods for pharmacovigilance. Vioxx was first authorized in the U.K. in 1999 and subsequently in other EU member states. In July 2002, France initiated a formal review of approved COX-2 inhibitor drugs by EMEA’s Committee for Proprietary Medicinal Products, when its representative raised concerns about gastrointestinal and cardiovascular safety. In November 2003, EMEA ruled that benefits outweighed side effects in the specific patient population for which the drug was intended. No major legislative push has followed the Vioxx withdrawal in Europe, and concerns about drug safety do not appear to be stimulating proposals for large postmarket studies.

Between 1999 and 2004, an estimated 80 million people worldwide took Vioxx, including 20 million in the United States. Yet nearly all of the statistical evaluations of this patient pool, including those done by epidemiologists and other researchers in Europe, were carried out using data sources from the United States and Canada. The Vioxx case has many important dimensions, but examining the sequence internationally illustrates that legislative and regulatory changes happen comparatively quickly in the United States. At the same time, a tension between individual patient and statistical patient is especially prominent in the United States, both in regulatory debates and in subsequent liability suits. Very few adverse event reports were filed with the company or with regulatory authorities in Europe or the United States. Yet European regulatory responses retain a bias toward individual reporting

over the statistical. In the United States, efforts are intensifying for pharmacovigilance with comparatively less attention to the doctor-patient relationship as a source of adverse event information.

In a second area of current regulatory concern, the compassionate use of pharmaceuticals still in various stages of premarket testing is engaging patient groups, regulators, and the courts in ways that further illustrate the tension between the individual and the statistical patient in the United States and Europe. Patients with terminal diseases have long occupied a special status; despite stronger regulatory controls implemented over the course of the 20th century, physicians have retained the right to prescribe medicines for off-label uses. Until a drug has FDA approval, it is banned from the market, except for clinical trials. In the late 1980s, AIDS activists in the United States brought attention to the difficulties of accessing promising drugs that were in late-stage clinical trials. The FDA responded in 1987 with modified regulations for investigational new drugs (IND), under which companies could make medicines available to patients with life-threatening diseases so long as there was a reasonable basis for concluding the drug was effective. Revisions to the treatment IND regulations and the 1992 system for parallel track review made it possible for physicians to get drugs to patients not taking part in clinical trials.

Citing several tragic cases of terminally ill patients who failed to qualify for clinical trials of new anticancer agents due to their advanced disease, the Abigail Alliance filed a lawsuit in the D.C. federal district court in 2003. Specifically, the Alliance sought to change the law to make available any drug that had cleared phase I trials (which collect data about a chemical’s pharmacological properties in small numbers of healthy subjects; they generally do not determine dosage or efficacy in patients with the disease). In May 2006, the D.C. district court upheld the Abigail Alliance argument on appeal, with the majority finding that a terminally ill patient has the fundamental right to choose medication, even though the safety and efficacy of the therapy may be under question and the FDA has not yet approved the drug. A major feature of the subsequent firestorm of commentary was the dilemma this posed for structured clinical trials. In the United States it is now widely held

that good data about drugs requires large, double-blinded, placebo-controlled studies. In this framework, the individual is served best by statistical analysis of large populations and access to medicines outside of clinical trials would undermine incentives for patients to enroll in them. When the D.C. district court heard the case en banc in 2007, justices reversed the 2006 decision, finding that all phases of testing are necessary and that the “government has a rational basis for ensuring that there is a scientifically and medically acceptable level of knowledge about the risks and benefits” of new drugs (*Abigail Alliance v. von Eschenbach*, 2007).

In Europe, access to drugs prior to completion of testing and regulatory review is more explicitly the responsibility of physicians and pharmacists, with a more diminished role for government agencies. As a consequence, the issue does not feature as prominently in legal circles or media coverage of pharmaceutical regulation. To date, EMEA has not issued a final harmonized ruling, leaving member countries to base procedures largely on their individual histories. In Germany, for example, the prescribing physician performs an individual benefit-risk analysis, and the pharmacy checks whether the drug qualifies for commerce, specifically whether it is defined as “hazardous” under § 5 of the *Arzneimittelgesetz* (drug law). Driven in part by the emergence of alliances for patients with rare and fatal diseases across Europe, the EU currently is developing new legislation for compassionate use programs. A guideline issued by EMEA in July 2007 emphasized that compassionate use should not “slow down the implementation or continuation of clinical trials” but gave countries space to define programs in line with their medical norms.

Analogous to the current crisis in pharmacovigilance, access to drugs still in clinical trials has been an area of regulatory contention and change in the United States and comparatively subdued harmonization efforts in Europe. Physicians and pharmacists act as expert gatekeepers in most European countries, whereas FDA officials are thrust into this role in the United States. An important outcome of this difference is a greater tension in the United States between the individual patient and large “n” populations needed for clinical trials.

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The Federal Safety Net

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federal programs, including expansions of the Medicaid program to cover all poor children and the creation of SCHIP.

School nutrition programs generally provide healthier meals than students would otherwise receive, and WIC improves the health of newborns and reduces hospital costs. The 1968 “Hunger in America” report to Congress by a group of physicians exposed levels of nutritional deficiencies and associated diseases (such as rickets and skeletal deformities) comparable to what prevailed in the third world (U.S. Senate, 1968). Today, with the food safety net in place, we no longer worry about chronic malnutrition and starvation in the U.S., but about missed meals, insufficient food, or unhealthy food. These are serious problems, but real progress has been made.

Even public housing, which may have the worst reputation of any large government program, has been shown to have some positive effects on children, and the program as a whole may have been unjustly tarred by hellish conditions in a few of the worst large-scale projects. Lengthy waiting lists for public housing in most cities attest to the demand for the program. Again, to see if there have been positive effects, the question to ask is not: How is public housing compared to the housing the average child enjoys? It is: Is public housing better than the alternative—which might be homelessness—for the children it aids?

Research has established that safety net programs effectively benefit the women and children they are designed to help. But in this era of federal deficits, success is no guarantee of continued support. Critics who grudgingly agree that federal programs may have positive effects, at least in some cases, invariably allege that they are nevertheless marred by large-scale fraud and abuse. Virtually every program that has come up for reauthorization in recent years has been attacked in this way. In 2000, Congress was incensed by the fact that the number of people enrolled in WIC exceeded the number the Department of Agriculture thought were eligible. A National Academy of Sciences panel was convened to investigate the problem (National Research Council, 2001). It turned out that whole classes of eligible

women, infants, and children were excluded from the government’s calculations and that, in fact, many eligible women and especially children were not being served.

In 2004, the Agriculture Department conducted a number of studies to investigate alleged widespread fraud in the school nutrition programs (Burghardt, Silva, and Hulsey, 2004; Burghardt et al. 2004). Again, these studies showed that most participants were actually eligible, and that nonparticipation by eligible children was a larger issue than “fraudulent” participation by children whose incomes were slightly above the program thresholds. In the end, the Child Nutrition and WIC Reauthorization Act of 2004 adopted several measures, such as certifying children for the entire academic year and making participants in other programs automatically eligible, which simplified the application process and made it easier for children to receive benefits.

The cases of fraud that do occur make headlines, creating the impression that abuse is typical. For example, in 2003, an exposé in the *Kansas City Star* reported that one Head Start executive had a \$300,000 salary and a leased Mercedes sport-utility vehicle paid for by Head Start funds (Smith and Margolies, 2003). This case led Congress to request a General Accounting Office study of the more than thirty-five hundred local agencies that administer Head Start. The study disclosed only three cases in which Head Start executives were earning more than \$230,000 (and in those cases, 30 percent of that compensation came from sources other than Head Start). Indeed, the average salary for a Head Start director was only \$36,876, suggesting that the pay might actually be too *low* to attract the most qualified applicants (U.S. House of Representatives, 2004).

These examples suggest that the perception that government programs are riddled with fraud is generally inaccurate, and that nonparticipation by eligible individuals is often a larger problem. It is heartening that in the case of WIC and the school nutrition programs, Congress was swayed by the evidence to address the fact that many poor children were not receiving benefits.

A final line of attack on the federal safety net is to argue that responsibility for anti-poverty programs should devolve to the states. An alternative vision of the safety

net would take the money set aside for federal programs, give each state a “block grant,” and allow considerable flexibility in the spending of that grant. A major practical difficulty is that most states cannot run budget deficits. Under the current system, more people are eligible and entitled to assistance when times are bad. If state revenues fall as need grows, then there will be cutbacks in state-financed services during recessions. This is exactly what we have seen with regard to SCHIP (the State Children’s Health Insurance Program), where thousands of children were dropped from state rolls when states had budget difficulties in the early 2000s.

A second issue is that many “federal” programs are, in fact, already administered at the state or local level. For example, public housing is run by local housing authorities, and Head Start is run by many small local agencies. In these cases, eliminating the federal program might further centralize rather than decentralize control over local programs.

But the most fundamental objection to the block grant approach is that it would abandon any pretext of a national safety net for low-income children. If we truly believe that no American child should be malnourished, that all children should have access to necessary medical care, and that every child should have good quality child care, if needed, then it makes sense for the federal government to specify minimum standards for these services and to make sure that even the poorest states have the resources to provide them. Congress ought to reauthorize, and in some cases expand, the safety net of in-kind programs for poor women and children. The poor, especially poor children, should not be expected to bear the brunt of national belt tightening.

In 2002, the cost of in-kind programs benefiting women and children was approximately \$120 billion. Contrast that with \$514 billion on Social Security and \$306 billion on Medicare for the elderly in 2005. The point is not that we should spend less on the elderly, but that spending on programs for children is relatively cheap and effective, especially compared to the costs of letting children grow up without adequate food, housing, medical care, and supervision. It would be penny-wise and pound-foolish indeed to starve successful federal safety net programs of the funds they require. ■

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Endnotes

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⁵ Consider, for example, Heather Moos, "N-word results in double standard," *Daily Trojan*, February 19, 1997, 4–5.

⁶ Mayo Moran, "Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech," *Wisconsin Law Review* (1994)1425–1514; Richard A. Glenn and Otis H. Stephens, "Campus Hate Speech And Equal Protection: Competing Constitutional Values," *Widener Journal of Public Law* 6 (1997) 349–384; Laura Leets, "Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?" *Communication Law & Policy* 6 (2001) 287–317. Charles Lawrence, one of the most prolific writers on hate speech, has criticized those who would oppose restrictions on "intentional face-to-face insults" (Charles R. Lawrence, III, "The Debates Over Placing Limits on Racist Speech Must Not Ignore the Damage It Does to Its Victims," *Chronicle of Higher Education*, October 25, 1989, B1).

⁷ Sara Lipka, "Campus Speech Codes Often Violate Constitutional Rights, Watchdog Group Says," *Chronicle of Higher Education* (Daily Briefing Online), December 7, 2006.

⁸ Beth McMurtrie, "War of Words," *Chronicle of Higher Education* (May 23, 2003), A32.

⁹ Keith Woods, "'Nigger': A Case Study in Using a Racial Epithet." The Poynter Institute for Media Studies (1995), <http://www.media-awareness.ca/eng/issues/minrep/journal/nigger.htm> (last accessed December 1, 2004).

¹⁰ Woods, "A Case Study."

¹¹ *Ibid.*

¹² Gina Lubrano, "Readers, editors respond to issues," *San Diego Union-Tribune*, April 2, 2001, B7.

¹³ Native American Journalists Association, "Say 'No' to Racism in the Media," 2002, http://aim_support.tripod.com/No-racism-in-media.htm (last accessed December 1, 2004).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ http://www.consumerdvreviews.com/news/0703/07162003_01.asp (last accessed December 1, 2004).

¹⁷ AOL Agreement to Rules of User Conduct, <http://site.aol.com/copyright/rules.html> (last accessed August 1, 2007).

¹⁸ "Jeannette Walls Delivers the Scoop," MSNBC, May 23, 2002, <http://www.msnbc.com/news/756044.asp> (last accessed December 1, 2004).

¹⁹ *Ibid.*

²⁰ Consider that in 1992 a German court fined British historian David Irving for claiming that the Holocaust did not occur. (Jay Rayner, "Munich Court Fines Irving for Bierkeller Speech," *The London Guardian*, May 6, 1992, 9).

²¹ Jon B. Gould, *Speak No Evil: The Triumph of Hate Speech Regulation*. Chicago: University of Chicago Press (2005).

²² Roger Kimball, *Tenured Radicals: How Politics Has Corrupted Our Higher Education*. Chicago: Elephant Paperbacks (1998).

Pharmaceutical Regulation

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M. N. G. Dukes, a leading expert on side effects, noted a quarter century ago that physicians, the pharmaceutical industry, and government regulators are in an awkward dance trapped by a "love-hate relationship which exists between the public and its drugs—substances which are hailed one moment as the solution to every problem and castigated the next as the cause of every ill ... in such an unstable situation, a mere spark of suspicion can at any moment lead to a conflagration" (Dukes, 1979). Pharmaceutical policy in the United States today is in a period of conflagration. Yet policymakers are confronted with offsetting risks: Stronger regulation may lead to fewer medicines, weaker regulation may lead to more drug disasters; strong enforcement of clinical trial restrictions will exclude suffering patients from potential care, looser boundaries may undermine statistical analysis critical to regulatory decisions; intensified postmarket monitoring will identify more adverse reactions, but absent application of methods for differentiating patients at risk from those who benefit, fewer drugs will be available. The path ahead requires better targeting of therapeutics, innovation in the use of both quantified results and patient case histories in regulatory decisions, and a renewed focus by industry, regulators, and physicians on the diversity of patients' experiences with medicines. ■

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No Child Left Behind

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and increasingly large numbers of schools are now required under the law to offer tutoring or school choice or to adopt corrective actions or restructuring. State education agencies report that they do not have sufficient staff or resources to assist struggling schools or to ensure effective compliance with federal mandates.

The political future of NCLB and the new, more assertive federal role in education will likely be determined by the extent and pace of school improvement, whether the public continues to support federal activism in schools, and the degree to which the bipartisan congressional consensus behind the law can continue to be sustained. Global economic competition and the shift to a skills-based economy have also made educational quality and attainment even more important to individual and national economic success. As long as schools continue to be perceived as underperforming and education reform remains high on the public agenda, the pressure on elected national officeholders to maintain and even increase federal influence over schools is likely to be intense.

NCLB is scheduled for reauthorization in 2007, and Congress is currently debating how it should be modified. The crucial—and most contentious—debates will be over proposals to de-emphasize the role of standardized tests, provide greater flexibility to states in dealing with underperforming schools, and extend the time states have to get all students up to academic proficiency. Despite strenuous opposition to the law from some quarters, early indications are that the bipartisan consensus on standards, testing, and accountability remains intact and that the central elements of the law are likely to be preserved (notwithstanding sharp criticisms of the law in the presidential primary campaign, especially among Democratic candidates). The new federal focus on accountability and the extension of federal policy to cover every student and every school in the country mark a major shift in the governance of elementary and secondary education in the United States. The breadth and depth of the new federal involvement in schools is a remarkable development, and the impact of NCLB on educational leaders and public schools will continue to be substantial. Whether or not NCLB ultimately succeeds in improving school performance remains to be seen. ■



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