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Solving Problems V. Claiming Rights: The Pragmatist Challenge to Legal Liberalism

William H. Simon
Columbia Law School, wsimon@law.columbia.edu

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BY:

PROFESSOR WILLIAM H. SIMON
COLUMBIA LAW SCHOOL

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The Pragmatist Challenge to Legal Liberalism

William H. Simon*

Recent developments in both theory and practice have inspired a new understanding of public interest lawyering. The theoretical development is an intensified interest in Pragmatism. The practical development is the emergence of a style of social reform that seeks to institutionalize the Pragmatist vision of democratic governance as learning and experimentation. This style is reflected in a variety of innovative responses to social problems, including drug courts, ecosystem management, and "new accountability" educational reform. The new understanding represents a significant challenge to an influential view of law among politically liberal lawyers over the past 50 years. That view – Legal Liberalism – is less a creature of academic theory than an implicit popular jurisprudence of practicing lawyers. It consists of a cluster of ideas associated with the Warren Court, the ACLU, the NAACP Legal Defense Fund, Ralph Nader, and the legal aid and public defender movements. This essay seeks to reconsider Legal Liberalism in the light of the Pragmatist approach and to offer a tentative appraisal of the newcomer. It begins by explicating the sometimes-tacit premises of Legal Liberalism and exploring its shortcomings. It then introduces the contrasting premises of the Pragmatist approach as they appear in a variety of recent works of legal scholarship. It illustrates the Pragmatist approach with a discussion of two case studies – one of drug courts and one of "second generation" employment discrimination remedies. It concludes with some comments about ambiguities and limitations of Legal Pragmatism.

* Arthur Levitt Professor of Law, Columbia University.

I. Introduction
II. Legal Liberalism – An Exposition
    A. Background Premises
        1. The Victim Perspective
        2. Populism
        3. The Priority of Rights
    B. Operating Premises
        1. Procedural Individuation and Differentiation
        2. Rules and Standards
        3. Confidentiality and Bilateral Information Control
III. A Liberal Critique of Legal Liberalism
    A. The Anti-Policy Bias of Rights Talk
        1. Community Policing
        2. Tort Reform
    B. The Inhibition of Civic Organization
        1. Social Policy Design
        2. Professional Responsibility and Legal Aid
    C. Minimizing Lawyer Accountability to Clients
    D. Diseconomies of Information
        1. Disincentives for Producing Information
        2. Lack of Coordination of Dispute Resolution and Regulation
    E. Rule and Standard Pathologies
IV. Legal Pragmatism
    A. Background Premises
        1. The Citizen Perspective
        2. Associative Democracy
        3. The Priority of Solutions
    B. Operating Premises
        1. Stakeholder Negotiation
        2. Rolling Rule Regimes
        3. Transparency
V. Two Case Studies
    A. Drug Courts
    B. Second Generation Employment Discrimination
VI. Limits and Ambiguities
    A. Vagueness About Domain
    B. Incomplete Sublimation of Distributive Issues
    C. The Problem of Interest Representation

D. The Reversion Danger

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I. Introduction

The conventions of judicial and academic discourse encourage legal writing to affect a position above politics. The writer appeals to interpretations of authoritative texts and public values as if they were shared across political perspectives. In fact, of course, both premises and conclusions are hotly contested in most areas of legal discussion, and in many, they correlate strongly with recognizable political positions. We often think of the political distinction between conservatives and liberals as a central axis of legal controversy.

In this Article, I propose to relax the conventions and focus directly and explicitly on the liberal political perspective from which a large fraction of the bar and an even larger fraction of the academy argue in order to examine an interesting development within that perspective. This is the emergence of a new liberal approach to legal issues in substantial tension with, and sometimes openly hostile to, the best-known older approach. The older approach can be called Legal Liberalism. There is no canonical definition of Legal Liberalism, but we know it when we see it. Its tacit indicia include predispositions in favor of plaintiffs in tort and civil rights cases, defendants in criminal cases, consumers in commercial cases, and workers in employment cases. Its explicit elements include the positions and ideas conventionally associated with the Warren Court, the ACLU, the NAACP Legal Defense Fund, Ralph Nader, and the legal aid and public defender movements.

Until recently, criticism of these ideas has tended to come from outside the more general political orientation with which Legal Liberalism is associated. Legal liberals are liberals in the broader political sense that connotes, first, a scheme of values that gives priority to moderate versions of equality and liberty, and second, a position on the American political spectrum between the middle and the far left. Most criticism of Legal Liberalism has come from conservatives, who tend to dispute the priority liberalism gives to liberty or equality, or from radicals, who tend to dispute liberalism's moderation.

There have been occasional episodes in which a particular tenet of Legal Liberalism has been challenged from within political liberalism. Such disputes tend to generate a good deal of interest and tension. For example, in 1976, Derrick Bell criticized the NAACP's school desegregation strategy as sacrificing the interests of urban blacks in sounds education and political efficacy to an ineffectual and dogmatic conception of rights.[1] More recently, a liberal critique has argued that due process protections for criminal defendants associated with the Warren Court unjustifiably impede minority communities from organizing to protect vital interests in neighborhood security.[2]

A more comprehensive critique in a spirit similar to these is implicit in a growing body of legal studies invoking or reflecting the tenets of Pragmatism. As philosophical doctrine, Pragmatism is noted for its insistence that thought is instrumental (the truth or value of an assertion lies, not in its correspondence with some ultimate reality, but in what it can do for us) and contextual (assertions should be interpreted in the social circumstances in which they arise). As political theory, especially as elaborated by John Dewey, pragmatism is noted for its commitment to and understanding of democracy as a process of collaborative inquiry and learning.[3] Its theoretical commitments lead Pragmatism to resist approaches to legal issues that rely primarily on abstract analytical schemes and methods. Its institutional commitments lead it to resist arrangements that are either centralized and unaccountable on the one hand or anarchically diffuse on the other.

It is doubtful whether, in the abstract, any of these precepts poses serious trouble for Legal Liberalism. But some recent writing has pursued them, not in the abstract, but through studies of innovative responses to social problems. The studies find the Pragmatist spirit in a variety of experiments, including drug courts, ecosystem management, "new accountability" educational reform, community policing, international labor standards enforcement, employment discrimination remediation regimes, and health disparity collaboratives, among many

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1 Derrick A. Bell, Jr., "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," 85 Yale Law Journal 470 (1976).

2 E.g., Tracey Meares and Dan Kahan, Urgent Times: Policing and Rights in Inner City Communities (1999).

3 See generally, Robert Westbrook, John Dewey and American Democracy 150-194, 319-76 (1991); John Dewey, The Public and Its Problems 143-232 (1927).

others. The studies have led to both particular conclusions and a general programmatic approach that does challenge Legal Liberal premises. The perspective of these studies is by no means the only possible legal version of Pragmatism, but it is the most fully elaborated one.[4]

In Part II, I offer a picture of Legal Liberalism, inferred from the dominant tendencies of liberal lawyers' rhetoric of the last 50 years. Since I am interested in the implicit jurisprudence of practicing lawyers more than in academic theory, I've relied as much on journalism and casual observation as on scholarship. In Part III, I formulate some of the principal objections to this doctrine from a variety of perspectives, more

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[4] My picture of Legal Pragmatism is based on the following works. Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Regulation Debate (1997); Abram Chayes and Antonia Handler Chayes, The New Sovereignty: Compliance With International Regulatory Agreements (1995); Michael Dorf and Charles F. Sabel, "Drug Treatment Courts and Experimentalist Government," 53 Vanderbilt Law Review 831 (2000); Michael C. Dorf and Charles F. Sabel, "A Constitution of Democratic Experimentalism," 98 Columbia Law Review 267 (1998); Jody Freeman, "Collaborative Governance in the Administrative State," 45 UCLA Law Review 1 (1997); Deepening Democracy (Archon Fung and Erik Olin Wright, ed.s 2003); Bradley C Karkkainen, "Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?," 89 Georgetown Law Journal 257 (2001); James S. Liebman and Charles F. Sabel, "A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform," NYU Journal of Law and Social Reform (forthcoming); Debra Livingston, "Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing," 97 Columbia Law Review 551 (1997); Dara O'Rourke, "Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring", Policy Studies Journal (2003); Joanne Scott and David Trubek, "Mind the Gap: New Approaches to Governance in the European Union," 8 European Law Journal 1 (2002); Susan Sturm, "Second Generation Employment Discrimination: A Structural Approach," 101 Columbia Law Review 458 (2001); Louise Trubek and Maya Das, "Achieving Equality and Health: Health Care Governance in Transition," American Journal of Law & Medicine (forthcoming 2003); Robert Managabeira Unger, Democracy Realized: The Progressive Alternative (1995).

A less specifically elaborated perspective with some kinship to these works is Daniel Farber, "Reinventing Brandeis: Legal Pragmatism for the 21st Century," 1995 University of Illinois Law Review 163.

My apologies to authors included here who feel that my portrait of Legal Pragmatism does not do justice to the distinctive virtues of their works, and to the authors of many works omitted who might plausibly identify their efforts with it.

I have deliberately omitted those for whom the term pragmatism is simply a synonym for utilitarianism, Ronald Dworkin, Law's Empire 151-53 (1986), or for philistinism, Richard Posner, Law Pragmatism, and Democracy (2003).

or less pragmatist in spirit. Part IV elaborates the alternative perspective of Legal Pragmatism, and Part V illustrates it with two of the Columbia studies – one of drug courts by Michael Dorf and Charles Sabel and another of sexual harassment litigation by Susan Sturm. In Part VI, I consider some limitations of or objections to the pragmatist approach, and its Columbia formulation in particular.

I. Legal Liberalism: An Exposition

Legal Liberalism consists of six mutually reinforcing premises. Three are background premises – the Victim Perspective, Populism, and the Priority of Rights. Three are practical and strategic; they involve orientations toward the control of information; the choice of legal form between rules and standards, and the structure of procedure.[5]

A. Background Premises

1. The Victim Perspective. Legal liberalism sees law as fundamentally concerned with the needs of the wounded and vulnerable. It tends to conflate the realm of law with that of compassion. Among traditional litigants, it is presumptively solicitous of tort plaintiffs and criminal defendants. More recently, the presumption has been extended to civil rights plaintiffs. And it has sought to extend legal protection to successive new classes of wounded and vulnerable—abused women, children, the elderly, the mentally ill, the disabled, mistreated worker and tenants, and welfare recipients.[6]

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[5] Legal Liberalism is a heuristic designed to capture the more prominent tendencies in the discourse of liberal lawyers. Although I think Legal Liberalism is the most influential perspective, I do not suggest it has been the only perspective among liberal lawyers. And just as not all liberal lawyers accept this perspective, all those who accept it are not liberals. Indeed, in my experience, politically radical lawyers, who reject the broader political orientation of liberalism, usually think of lawyering in Legal Liberal terms. There is no more reliable expounder of Legal Liberalism than The Guild Practitioner, the journal of the National Lawyers' Guild. Radical lawyers have never developed a distinctive conception of practice.

[6] The victim perspective is most often an unstated assumption, but there is a substantial literature arguing for it explicitly. E.g., see Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations," 22 Harvard Civil Rights-Civil Liberties Law Review 323 (1987); for an overview of the literature, see Devon W. Carbado, "Race to the Bottom," 49 UCLA Law Review 1283 (2002).

The Victim Perspective does not exactly repudiate the traditional premise that law must do justice even when justice is in tension with compassion. But its solicitude for the weak and injured plays a strong background role. It motivates the expansion of law into new domains. And it operates as a presumption in cases of ambiguity or uncertainty. For example, there is uncertainty about social facts, such as whether the death penalty deters crime or welfare causes family break-up or unemployment. The victim perspective resolves such doubts in favor of defendants and recipients generally. Then there are adjudicative facts—the facts of particular disputes, such as whether Clarence Thomas harassed Anita Hill in the manner she alleged. The victim perspective resolves such doubts in favor of the more vulnerable contestant. Finally, the victim perspective tends to privilege the interpretive constructs that vulnerable people apply to the world over those more commonly adopted by the less vulnerable. If, for example, women experience sexual harassment as part of an organized structure of systemic disadvantage at work, while their employers understand it as a series of isolated, aberrant misfortunes, the former fact alone supports adopting the systemic view.

The Victim Perspective is so engrained in the discourse of liberal lawyers that we may forget that it is a recent innovation, even within liberalism. In the liberalism of the 18th and 19th century, legal rights were associated most basically with the bourgeois property owner. The 19th century labor movement was ambivalent as to whether its members' interests would be served by conceiving and protecting them as legal rights.[7] But however it came out on this issue, the labor movement's core projects of organization and bargaining were not designed to protect the most vulnerable members of society, at least not directly; these projects were designed mainly for able-bodied working-age adults (and more often than not only white, male, and skilled ones). Often, the movement anticipated many indirect and long-term benefits to others from its projects, but it also recognized that these projects imposed short-term costs on some of the most vulnerable people. (For example, the exclusionary work and immigration practices it favored deprived some of employment for the benefit of better-off workers.) The idea that rights have a distinctive affinity with extreme vulnerability is entirely foreign to this perspective. The Progressives of the late 19th and early

[7] See William Forbath, Law and the Shaping of the American Labor Movement (1991).

20th centuries did focus on the protection of vulnerable groups such as the unemployed, women, children, the elderly, and mentally ill. But as recent liberals complain insistently, the Progressives tended not to formulate their projects in terms of legal rights, as Legal Liberalism understands them.[8]

2. Populism. The second predisposition of Legal Liberalism is a deep distrust of large institutions, especially governments and big business corporations. This distrust generates extreme sensitivity to the corruptions of power and wealth. The stereotypes of the government official and the corporate executive portray the primary motivation of the former as power-lust and that of the latter as greed.

"Today it is the combined power of the government and the corporations that weighs upon the individual," Charles Reich wrote in the seminal academic contribution to Legal Liberalism.[9] The closing arguments and after-dinner speeches of tort plaintiff's lawyers routinely contrast the virtues and vulnerabilities of "the people" or "the little man" with the rapacities of corporations or the state.[10] The philosopher David Luban, a leading theorist of legal ethics, asserts that "the real value of advocacy is the protection against institutions that pose chronic threats to well-being," a category in which he includes all government and big business institutions.[11]

The political doctrine that emphasizes the pervasive corruption of institutions is populism. Populism juxtaposes to the corruption of institutions the virtue of unorganized individuals, and it portrays the role of the political leaders as largely defensive and redistributive, checking the excesses of organized elites in order to provide benefits for

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[8] See, e.g., Anthony Platt, The Child Savers: The Invention of Delinquency (1977).

[9] Charles Reich, "The New Property", 73 Yale Law Journal 733, 773 (1964).

[10] E.g.:

> [W]hen a warrior for the people demonstrates he can sometimes beat the king's favorites, the corporate giant, the money makers, that he can free the accused once safely in the clutches of the king [i.e., the state] – such a warrior stands for the proposition that the little men can win and little warriors for the people can survive in the courtroom…."

Gerry Spence, Gunning for Justice 386 (1982).

[11] David Luban, "Partisanship, Betrayal, and Autonomy in the Lawyer-Client Relationship," 90 Columbia Law Review 1004, 1128 (1990); see also id. at 1019.

unorganized citizens. There is some analogy to the role of unorganized citizens and political leaders in the Populist political vision in the role of trial lawyers, perhaps judges, and above all, juries, in Legal Liberalism. Trial lawyers, judges, and juries have in common their relative independence from the constraints, and presumably corruptions, of large institutions. In particular, the jury — as a temporary assembly of ordinary individuals, only minimally accountable to surrounding institutions — incarnates the Populist anti-institutional ideal.

3. The Priority of Rights. We also find in legal liberalism a commitment to formulating certain fundamental norms as rights and to insisting on the priority of these norms over other values. Rights are analytical, individualistic, categorical, judicially enforceable, and corrective.

Rights are derived analytically by the application of legal reasoning to authoritative sources. They are ultimately grounded in social consensus, but the derivation of specific conclusions in contested cases requires specialized methods and institutions. Thus, courts and lawyers play a predominant role, and the most important part of that role consists in a mode of reasoning that generates specific conclusions of entitlement.

Rights are individualistic; they protect autonomy. They have in general the quality that Reich ascribed specifically to property:

> Property draws a circle around the activities of each individual or organization. Within that circle the individual has a greater degree of freedom than without. Outside he must justify or explain his activities and show his authority. Within he is master, and the state must explain or justify any interference. There must be sanctuaries of enclaves where no majorities can reach.[12]

There is no consensus within Legal Liberalism on the exact content of the category of rights. But the rights idea has an affinity with individual interests in privacy and physical autonomy, with claims

[12] Reich, cited in note , at 787.

against state interference with individual action, and with the protection of established entitlements.[13]

The idea of "enclaves where no majorities can reach" also connotes the categorical quality of rights. Rights differ from other norms in being less susceptible to trade-offs and balancing. For some, rights are "trumps" that compel recognition and conclude discussion.[14] For others, rights have a vaguer priority; they yield only to exceptionally weighty non-rights values. In any case, to designate something is a right is to imply that has presumptive priority over some competing set of values.

Further, a right strongly implies, if it does not entail, judicial definition and enforcement. The remission of rights enforcement to even a relatively benign administrative structure — say, the Veterans' Administration in its dealings with veterans — is deeply suspect. Even more so is their remission to private institutions — for example, through the easy enforcement of contractual arbitration clauses. The central judicial role implies an exemption from the general Populist suspicion of institutions for judges as well as juries. Legal liberalism is rife with idealized portrayals of the judicial role and sentimental homages to particular judges. (The role of the judicial clerkship as a paternalistic initiation ritual for elite academics contributes to this tendency.) In a less romantic vein, the judiciary is simply the "least dangerous branch"; the one whose institutional constraints limit its capacity for corruption and dispose it to rights enforcement.

Finally, rights with monetary remedies are typically grounded in corrective justice – the rectification of past wrongs at the expense of those deemed responsible for them. Legal Liberalism tends to presume that injurious wrongdoing ought to give rise to claims for redress against the wrongdoer. We see this in the attachment to the tort system as opposed to no-fault compensation systems. We see it as well in the position that currently disadvantaged people whose position is due to injustice they or their ancestors suffered under prior legal regimes

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[13] In "The New Property", Reich used several images suggesting the physical autonomy interpretation, such as the New York case that denied welfare benefits to a man who insisted, against the instructions of welfare officers, on sleeping under a bridge. Id. at 758. When he came to formulate his conception of right explicitly, however, he emphasized protection for vested economic benefits. Id. at 785-86.

[14] Ronald Dworkin, Taking Rights Seriously 184-205 (1977).

receive "reparations" from surviving corporate and governmental institutions that bear responsibility.[15]

"Rights talk" has come in for a good deal of criticism lately, but one indication of its continued vitality is the emergence of international human rights litigation in the American trial courts. The international human rights movement is explicitly committed to a Victim Perspective, in this case, the victims of some of the most extreme cruelty and injustice on the part of governments. Until recently, however, human rights activism was thought of as a humanitarian activity. Lately, activists have pushed with notable success for its juridification.

One of the most interesting (though perhaps not most important) developments has been the opening of the American courts, with the encouragement of Congress, to lawsuits asserting individual claims against foreign states and their officials for human rights abuses abroad. There are now damage actions pending in the American courts against the Chinese premier Li Peng for injuries sustained at the Tiannamin Square massacre and against President Robert Mugabe of Zimbabwe for violence against political opponents, among others.[16]

Such suits represent a substantial departure from the traditional institutional approach to such claims. Traditionally, if we put aside the remote possibility of redress in the courts of the countries where the wrongs occurred, such claims were deemed matters of diplomacy, negotiations by one sovereign with another, or more recently, by international organizations like the United Nations. If American citizens or even residents were victims, the State Department might seek redress on their behalf. Otherwise, the interests of victims would likely be remitted to international organizations. In part, the move for juridification reflects disappointment with the records of these past efforts and, in particular, a Populist-like distrust of non-court institutions. The move to litigation also reflects an assertion of the priority of the liberal conception of rights in this area. An important part of what the activists rejected in the diplomatic approach was the idea that the interests of victims could be asserted as part of a large menu of interests in which they could be traded off for other interests. For the State

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[15] Robert Worth, "Companies Are Sued for Slave Reparations," New York Times (March 27, 2002), sec. B.

[16] William Glaberson, "U.S. Court Become Arbiters of Global Rights and Wrongs," New York Times (June 24, 2001), sec. A., p. 1, col. 3.

Department, such litigation is objectionable because such awards, if seriously enforced, would limit the discretion of American diplomats in sovereign-to-sovereign negotiations. The diplomats might have to trade off some other interests in order to induce compliance with the judicial decree or in order to placate an offended foreign state. But for human rights activists, the claims of victims should not be susceptible to trade-offs or balancing of this sort.[17]

B. Operating Premises

1. Procedural individuation and differentiation. The first basic practical premise of legal liberalism is that disputed facts on which a claim of right depends be determined in a distinctive manner. This manner is the adjudicatory hearing. Ideally, such a hearing involves personal appearance by the claimant, representation by a lawyer, oral evidence and cross-examination, and a law-trained professional decision-

[17] There is a key exception to the Legal Liberal attitude toward rights -- the labor law of collective bargaining. The labor law that came down from the New Deal is distinctive in the extent to which it restricts conventional individual rights in the interests of collective power. For example, it permits non-union members to be bound by union actions without their consent, and it deprives workers of individual enforcement rights with respect to many key interests, remitting them to rights within the union. The idea is that effective joint action requires a limitation of individual autonomy. For decades, liberals generally supported this regime as a half-acknowledged exception to their commitment to individual rights. The rights-based critiques of labor law tended to come from conservatives. (The phrase "right to work", meaning the right to be hired without having to pay dues to a union, has definite reactionary connotations.) The civil rights movement partially discredited the New Deal regime because of the unions' pervasive mistreatment of minority and women workers under that regime. It was easy to win liberal support for rights of minority and women workers to bring challenges to union discrimination directly to the courts. But outside of race and gender issues, full-scale liberal challenges to the collectivist premises of the New Deal regime were rare. Perhaps the clearest one – Staughton Lynd, "Government Without Rights: The Labor Law Vision of Archibald Cox," 4 Industrial Relations Law Journal 483 (1981) -- did not appear until 1981.

However, labor law and unions have ceased to play the central role they once did in the liberal thought. In law schools, this means that virtually the only course in which the individualist premises of the liberal commitment to rights are systematically put in question from a left perspective is one that most students, even most politically-engaged left students, don't take. (I say "virtually" because there is another exception – the law of Native American tribal relations – but that course has always been marginal.)

maker with substantial independence from both market and bureaucratic pressures.[18]

This relatively elaborate and expensive procedure is valued in part as the most effective means of enforcing claims of right. Rights enforcement is important in itself and because it has some deterrent effect that induces potential defendants to comply with legal requirements in their general course of conduct. However, the liberal commitment to adjudication is founded on more than accurate decisionmaking and deterrence. Adjudicatory participation has an intrinsic value. The opportunity to have one's "day in court" (or in a diluted administrative variation) is asserted to be an important satisfaction, even to those who are unsuccessful on the merits. Adjudication serves "dignitary" values. It expresses respect for the claimant.

Adjudication in this view is an individual procedure. The dignity in question is that of an individual participating alone or through a representative committed only to her in a proceeding concerning a right peculiar to her. At least, this is the paradigm. The forms of collective adjudication—aggregate settlements, consolidated trials, class actions—are innovations whose contours are substantially undefined and whose legitimacy is contested precisely because they depart from individual claim determination. To the extent that they permit conclusive determination of rights without opportunities for direct participation by claimants and without claimant control of lawyers, they generate a good deal of anxiety within Legal Liberalism.

A further feature of this perspective is that adjudication is strongly differentiated from administration. Dispute resolution processes have little resemblance to routine decisionmaking processes and are structurally separate from them. Adjudicatory processes are more elaborate and more individual. Routine decision-making is summary and wholesale. Legal regulation focuses largely on the dispute processes, and is relatively uninterested in routine decisionmaking until routine decisions become disputes.

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[18] Goldberg v. Kelley, 397 U.S. 254 (1970); In Re Gault, 387 U.S. 1 (1967); Jerry Mashaw, "The Supreme Court's Due Process Calculus in Mathews v. Eldredge: Three Factors in Search of a Theory of Value," 44 University of Chicago Law Review 28 (1976).

The separation of administration and adjudication is reinforced by the adjudicatory ideal of the decisionmaker. The adjudicator is supposed to be someone not involved in the original decision and not subject to supervision by anyone who is. Ideally, he is to have substantial independence from those who enact the norms that she is applying. And she is to have legal training, which will differentiate her background from those making administrative decisions. Thus, the paradigmatic adjudicatory institutions — the courts -- enjoy unique organizational autonomy. But even in the broad range of administrative adjudications that within public and private bureaucracies, the adjudicatory processes are typically strongly separated from the administrative ones.[19]

2. Rules and Standards. A pervasive dialectic of modern legal thought arises from the opposition of rules and standards.[20] A rule is a norm that strictly limits the range of factors that the decisionmaker can consider; it characteristically dictates a particular decision upon a finding of one or a few basic facts. A standard mandates that the decisionmaker vindicate a more general value by considering the full range of relevant facts in the context in which the dispute arises. "Do not drive over 65 miles per hour" is a rule; "do not drive unsafely" is a standard. Rules have an over- and under-inclusive quality. They sometimes require the decision-maker to decide in a way that is inconsistent with the ultimate purposes of the rule. Standards have an indeterminate quality. Since they enlarge the range of relevance, they tend to make for more expensive enforcement procedures, and there is often controversy about how they should be applied even to undisputed facts.

The dialectic of rules and standards is not unique to Legal Liberalism, but it has an especially strong resonance there. On the one hand, there is both a moral and a social cost to the under- and over-inclusiveness of rules. Under-inclusiveness means that there is no sanction for socially obnoxious conduct or no assistance for socially-recognized need that does not come within the terms of the rule. Over-

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[19] See Philippe Nonet, Administrative Justice: Advocacy and Change in a Government Agency 125-243 (1969) (chronicling the growth of procedural individuation and differentiation – "judicialism" and "administrative withdrawal" – in a worker's compensation program).

[20] See Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 Harvard Law Review 1685 (1975).

inclusiveness means that we penalize otherwise acceptable or desirable conduct or reward undeserving conduct just because it does come within the terms of the rule. Such results potentially involve a sacrifice of social welfare, justice, and soldarity. This intuition led the Warren Court to flirt with the "irrebutable presumption" doctrine. The court rejected a Food Stamp rule that denied eligibility to a household when any member had been declared as a dependent on the tax return of a non-member. The court viewed the rule as presuming irrebutably and unreasonably, first, that the putative dependent was being supported by the taxpayer and, second, that the remaining household members were being supported by him. It then went on to suggest that the Constitution might invalidate any such regulatory over-breadth to the extent that it deprived a poor person of a basic need. But on reflection, the court backed off.[21] The consequences of such a doctrine would have been too drastic. The legal system depends pervasively on rules. It requires them in order to reduce decisionmaking costs and to restrain the discretion of people we cannot trust to make complex judgments.

The response to this dilemma in Legal Liberalism consists of three tendencies. First, there is a preference for standards for decisionmakers who are presumed trustworthy; a preference for rules for decisionmakers who are presumed not trustworthy. The most salient trusted class is the judiciary. In general, legal liberalism has favored broad contextual decisionmaking power for judges under norms like due process, reasonableness, public convenience and necessity, and just cause. The most salient distrusted class is the police. Thus, we have the Miranda rule for them.

Second, rules are acceptable and even desirable when the costs of under- or over-inclusion are borne by non-disadvantaged people. The costs of the exclusionary rule in criminal cases are borne by the prosecution, rather than the class of criminal defendants favored by Legal Liberalism. The costs of strict liability in tort, a rule-like norm, are borne by defendant corporations, rather than the favored class of plaintiffs. A rule-like welfare system of child allowances or a negative income tax is preferred to a standards-like means-tested one on the

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[21] United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); Note, "The Irrebutable Presumption Doctrine in the Supreme Court," 87 Harvard Law Review 1534 (1974).

assumption that the costs of over-inclusion of the former are borne by the state.

Third, where the law gives institutions power over ordinary people, standards should be deployed to allow the latter to raise the full range of pertinent social values that weigh against the adverse exercise of such power in the circumstances of the particular case. This means broad defenses of fraud, duress, mistake, and unconscionability in contract. It means just cause standards for job dismissal and eviction. It means tort recovery for pain and suffering and emotional distress, as well as material loss.

3. Confidentiality and Bilateral Information Control. Liberal legal practice is characterized by strong confidentiality safeguards and an emphasis on the role of lawyers in the strategic control of information.

The most salient norms here are the strong attorney-client evidentiary privilege, the ethical duty of confidentiality, and the civil procedure norm that requires the disclosure of disadvantageous material information only when the opposing party is able to formulate a demand for it. The bar's confidentiality rule is an extreme one that requires the lawyer to withhold information in a broad range of situations where disclosure might remedy substantial injustice. The Civil Procedure rules sometimes deny important information merely because the opposing party is unable to formulate an adequate demand for it, most likely, because she lacks sufficient awareness of the nature of the information.[22]

More broadly, this approach gives the lawyer the role, once the possibility of dispute has arisen, of gatekeeper between client and the outside world. At least presumptively, the client is supposed to cease direct or unilateral communications with outsiders. In discovery and often in regulatory compliance, the lawyer takes charge of disclosure functions. The attorney-client privilege encourages firms to put lawyers in charge of investigations of possibly illegal conduct in order to minimize the possibility of involuntary disclosure of the findings. Parties and even nonparty witnesses are accompanied to depositions by lawyers, who tell them that they must not volunteer information. Lawyers instruct and rehearse clients extensively for trial. Once the very

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[22] ABA Model Rule of Professional Responsibility 1.6 (confidentiality duty); Wigmore on Evidence sec. (James Chadbourne rev. 1981) (evidentiary privilege); Federal Rule of Civil Procedure 26(a) (discovery rule requiring production without request only of narrow range of information).

prospect of litigation arises, the client is instructed not to communicate about the matter even in contexts unrelated to the litigation. Injury victims, prospective tort and criminal defendants, and even witnesses routinely tell journalists that their lawyers have told them not to talk about the case, and this is usually accepted as a satisfactory explanation for their silence.

We have grown accustomed to the sight of witnesses at Congressional hearings, even those who have little prospect of being joined in related litigation, appearing with and intermittently consulting lawyers. No one thought it at all remarkable, for example, that Anita Hill, herself a lawyer, appeared for her testimony in the Clarence Thomas confirmation hearing with a battery of lawyers, even though there was little prospect of ensuing litigation and her role, in theory, was just to give a straightforward lay account of events she had observed.

The gatekeeper function is supposed to play a role in protecting various privacy rights of the client. The most important of these is the privilege against self-incrimination. This rationale, however, has limited relevance. In many situations, there are no relevant privacy rights (aside from those that attach to the attorney-client relation itself). In these situations, the lawyer's information-control function is explained as serving social interests in accurate disclosure. We get more disclosure because clients, assured of their lawyers' loyalty, make more disclosure to their lawyers, and the lawyers persuade and assist clients to pass on the information to the extent the law requires this. (Whether the persuasion involves appeal to self-interest or to public duty is left ambiguous.) Moreover, we get more concise and accurate disclosure to the extent that the lawyer is able to shape it to remove redundancy and ambiguity.[23]

The idea of lawyer control of information is related to a litigation procedure dominated by a trial format characterized by orality, continuity, and concentration. Unlike procedure in civil law countries, the paradigmatic Anglo-American trial is a single, continuous event, rather than a series of discrete evidentiary proceedings. It typically takes place in a short period of time and nearly always occupies only a small fraction of the course of the entire litigation. It emphasizes oral testimony by witnesses present in court.

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[23] ABA Model Rule of Professional Responsibility 1.6, Comment, par. 3.

Of course, a trial is a rare thing in American litigation; most cases are settled. But a trial of this kind is the default procedure in the absence of settlement, and the prospect of trial is an overwhelming influence on settlement. Legal liberalism celebrates this kind of trial as a powerful safeguard of justice.

The Anglo-American trial reinforces the role of the lawyer as gatekeeper. A proceeding of this sort puts a high premium on extensive preparation and precise execution. A litigant has a single, intensely focused opportunity to make her case. Mistakes or bad impressions are relatively hard to correct. Because the trier has a limited opportunity to absorb the case, clarity and coherence of presentation are critical. The tradition of the adversary system mandates relative passivity on the part of the judge and constrains her ability to assist the litigants directly in presenting their cases. Under these circumstances, the dominance of professional advocates is inevitable.[24]

Moreover, this procedure encourages lawyer control prior to the trial. The compression of the trial means that a single piece of evidence can have a large impact. Nuance is often lost, and sophisticated explanations are not always possible. The Anglo-American trial is in some respects a battle of sound-bites. The procedure thus creates the risk that a prior statement, when offered in evidence, out-of-context and shorn of nuance, will create a misleadingly adverse impression at trial that was not anticipated at the time it was made. The impression may be hard to correct, and it may require the expenditure of scarce time and effort to do so. This kind of risk justifies the lawyer in advising the client to forego independent communication about the circumstances in issue.

Notice that partisan control at trial and partisan witness preparation reinforce each other. Partisan witness preparation leads to distrust of witnesses, which leads to giving opposing counsel great latitude in cross-examination. But anticipation of the distorting effects of hostile cross-examination intensifies the need for witness preparation.

II. A Liberal Critique of Legal Liberalism

[24] See John Langbein, "The German Advantage in Civil Procedure," 52 University of Chicago Law Review 823 (1985).

Legal Liberalism remains the dominant perspective of a broad segment of the bar, but there is less confidence and more unease about it than there once was. There are familiar critiques of it. One critique objects that a program that focuses on rights without devoting proportionate attention to corresponding duties undermines the moral and institutional basis for productive social cooperation.[25] Rights consciousness diverts attention from the kinds of altruistic effort and self-restraint that society has a right to expect from even its disadvantaged members. Although this point may seem smug when voiced from a position of upper class privilege, it has been voiced increasingly in recent years from among the disadvantaged themselves. If criminal defendants tend to be disadvantaged, so do the victims of crime, we are reminded. Some leaders of poor communities have expressed sympathy for the idea that an emphasis on rights to, for example, welfare may impede the development of initiative and self-discipline needed to attain economic self-sufficiency.[26]

Another critique asserts that the recognition and even enforcement of legal rights for the disadvantaged is unlikely to significantly improve their well-being in the absence of reforms fundamentally altering the distribution of wealth and power. Such an upheaval is not part of the legal liberal agenda, and its tools of rights-creation and enforcement would be inadequate to it. But in the absence of fundamental redistributive change, the effects of liberal rights expansion will be swamped by economic and political inequality. Sellers of goods or services will respond to consumer protection doctrines by raising their prices or ceasing to deal with poor consumers. Employers will respond to restraints on arbitrary or discriminatory discharges by hiring less. Middle class whites will respond to desegregation decrees by moving to the suburbs. Government agencies will respond to conditions on their administration of programs by shutting the programs down or by shifting resources from areas where

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[25] E.g., Richard Morgan, Disabling America: The Rights Industry in Our Time (1984).

[26] See, e.g., George Packer, "A Tale of Two Movements," The Nation (December 14, 1998), at 19.

they have discretion in order to comply with judicial commands in other areas.[27]

There have been persuasive replies to both types of critique from within Legal Liberalism,[28] but both remain important and, on some points, powerful. Here I want to consider some criticisms in a somewhat different spirit. These criticisms are more grounded in the basic commitments of political liberalism. They do not assert the futility of redistributive reform, and while they do invoke notions of duty and responsibility, they do not do so in the name of hierarchy or conformity, but in the interest of effective democratic collective action on the part of the disadvantaged.

A. The Anti-Policy Bias of Rights Talk[29]

It is difficult to criticize the rights theme in Legal Liberalism. For one thing, the notion of right has undeniable value as an expression of core values of individuality. For another, its meaning and effect are elusive. The indeterminacy of the rights idea means that it has the capacity to embrace almost any appealing normative consideration.

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[27] There are conservative and radical versions of this critique, depending on whether fundamental change is viewed as bad or good. Donald Horowitz, The Courts and Social Policy (1977) (conservative version); Karl Marx, "Critique of the Gotha Program," in The Marx-Engels Reader 382-98 (Robert Tucker ed.1972) (radical version). A critique more characteristic of recent radical writing argues that the liberal legal thought reinforces a culture of alienation that demobilizes and disorients the disadvantaged. E.g., Jay Feinman and Peter Gabel, "Contract Law as Ideology," in The Politics of Law 497-510 (David Kairys, ed.; 3d ed. 1999). The Legal Pragmatist critique is closer to this one, but focuses on institutional structures at least as much as rhetoric and consciousness.

[28] For a response to the virtue critique, see Gerald Lopez, "A Declaration of War by Other Means," 98 Harvard Law Review 1667 (1985) (reviewing Morgan, cited in note); for a response to one application of the ineffectuality critique, see Duncan Kennedy, "The Effect of the Warranty of Habitability Enforcement on Low-Income Housing: 'Milking' and Class Violence," 15 Florida State University Law Review 485 (1989). The Legal Pragmatist studies cited in note are full of counter-examples to the ineffectuality critique.

[29] For an explicitly Pragmatist critique of "international human rights" rhetoric on grounds similar to those pressed here, see David Kennedy, "The International Human Rights Movement: Part of the Problem?," 15 Harvard Human Rights Journal (2002).

Nevertheless, as conventionally used, right does not connote simply any important value. It works rhetorically to privilege a subset of values and to bias consideration of competing ones, in particular, against collective as opposed to individual values, against values that require public assistance as opposed to non-interference, against new as opposed to established benefits, and against consequences other than immediate benefit to the claimant. Thus, it is harder to make a rights claim for a neighborhood's opportunity to control land development within its borders than against a taking of an individual's property without compensation. It is harder to make a rights claim for police protection from private harassment than for freedom from police harassment. It is harder to make a rights claim for the provision of as-yet unenacted welfare benefits than against rescission of enacted Social Security benefits. To be sure, there is a tendency to try to expand the rights claim to embrace any interest deemed important by political liberalism.[30] But this course would dilute the rights idea to triviality. The central rhetorical thrust of the rights theme has always been to suggest that there is a sub-category of important interests that merit a special type of commitment from the legal system.

In operation, however, rights rhetoric does not seem to mark out a set of claims that could plausibly be regarded as more central to the basic liberal commitments of liberty and equality than the claims against which this rhetoric is invoked. To be sure, the rhetoric resonates with the long tradition of constitutionalist political theory that holds that certain protections of individual flourishing must be safeguarded against legislative majorities. To some extent then, rights talk implicates the debate within political liberalism between constitutionalism and legislative supremacy.[31] But often this rhetoric is deployed in a stale, dogmatic manner that reflects little more than a desire to protect longstanding visceral attachments against re-examination.

This impression is magnified by a series of intellectual rigidities that commonly accompany the rights theme. These include the following:

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[30] E.g., Lynd, cited in note , at 494-95 (arguing in response to the claim that the rights idea has been inimical to worker interests in collective organizational efficacy that such interests should also be deemed rights).

[31] See Frank Michelman, Brennan and Democracy (1999)

-- a formalist tendency to assume that legal texts have timeless and essential meanings that can be derived without reference to their contexts;

-- a "slippery slope" tendency to assume that the smallest reduction of an entitlement will cascade into an enormous loss,

-- a Utopian tendency to ignore the costs of the recognition of entitlements;

-- a paranoid tendency to portray competing values in terms of the interests of government and corporate power and wealth;

-- a sentimental tendency to defend general rules with broad social consequences in terms of dramatic, emotionally compelling, but not necessarily typical, stories of individual misfortune, and

-- a self-righteous tendency to see serious injuries as consequences of morally blameworthy misconduct.

Of course, these tendencies are not unique to Legal Liberalism. The claim here is simply that, within Legal Liberalism, they are strongly associated with the rights theme. Practitioners who wished to alleviate their pernicious influence would do well to be more circumspect about their deployment of rights rhetoric.

The only way to support this claim is through examples. Here are two:

1. Community Policing. In an article called "When Rights Are Wrong," Tracey Meares and Dan Kahan criticized Warren Court criminal procedure doctrine for impeding efforts by minority communities to organize to enhance neighborhood security.[32] They focused in particular on the "void-for-vagueness" doctrine used to strike down loitering ordinances and search-and-seizure doctrine. These doctrines were being used by the American Civil Liberties Union and other opponents against a series of measures adopted in some of the most crime-troubled minority neighborhoods in Chicago. One such measure was the "mass building search" for weapons or drugs in housing projects. Another was a loitering ordinance that gave police discretion to order people suspected of gang-related activity to disperse.

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[32] Tracey Meares and Dan Kahan, "When Rights Are Wrong," Boston Review (April-May 1999) ; reprinted as Urgent Times, cited in note ; A different version of the argument is Tracey Meares and Dan Kahan, "The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales," 1998 U.Chi. Legal Form 197.

Against the ACLU interpretation of the Warren Court precedents that such measures should be categorically invalid, Meares and Kahan argued that their validity should be assessed contextually in terms of three factors. The first factor is the extent of support for the measures in the local communities affected by them. Measures imposed by a remote and unrepresentative government ought to be suspect, but measures supported by local institutions deserved deference. Second, "burden sharing" – whether the costs of the measure unfairly accrued to some recognizable group within the community (other than groups defined primarily in terms a propensity for illegal activity). If the burdens were fairly distributed, then that should weigh in favor of acceptance. Third, "guided discretion" – the extent to which the measures are accompanied by processes that structure the discretion they confer and induce accountability for its exercise. Meares and Kahan pointed out in connection with the Chicago loitering ordinances that the police department permitted its enforcement only by designated officers working under specific guidelines and that enforcement was part of a "community policing" strategy in which police worked closely with neighborhood groups.

As they surely anticipated, the responses to Meares and Kahan's argument, all from card-carrying liberals, were largely and sometimes passionately negative. Some of the responses challenged the suggestion that their three criteria were satisfied in the Chicago case. In particular, they questioned whether there was broad and informed support in the affected minority communities for the measures and whether the police were exercising their discretion in a structured, accountable fashion. But several respondents challenged the criteria themselves and insisted that the measures in question should be invalid regardless of whether the three conditions were satisfied.

For example, Albert Alschuler and Stephen Schulhofer argued that the idea of an affected "community" was so indeterminate that it could not be properly defined for the purpose of measuring approval (a skepticism that would seem to preclude democratic legitimacy for any legislative act) and that "Our Constitution does not permit a majority to limit individual rights simply by offering to share the burden" (ignoring Meares and Kahan's point that the likelihood of disproportionate burden should determine whether there <u>is</u> a constitutional right). The "Framers", they conclude, "enacted a Constitution that guaranteed rights, not to

collectivities, but to individuals," (failing to note that the Framers would almost certainly have considered anti-loitering laws legitimate).[33]

Alschuler and Schulhofer at least implied that a unanimous waiver might be acceptable (though given their skepticism about legislative boundaries, it would have to be a global one). Carol Steiker would not go even this far. For her, the rights established by these 40 year-old Warren Court cases are timeless and inalienable. She framed the issue as a contest between "indispensable freedoms" (not to be subject to police discretion) and "expedient policy" (the interest in not being victimized by violent crime) and insisted that the former must "trump" the latter.[34]

The themes of these critiques – extreme skepticism about democracy and all forms of nonjudicial collective action, the selective invocation of tradition, the conclusory privileging of interests conventionally defined as individual – are echoed in Alan Dershowitz's contribution. Dershowitiz takes particular exception to Meares and Kahan's effort to promote the interest in neighborhood security to the level of a right by the term "group rights," dismissing the term as an "oxymoron," noting ominously that "groups have interests and agendas". "Our traditional conception of rights," he further insists, "is directed against governmental abuses." Interests that don't fit within this conception just have to yield because of a "fundamental lesson of history, that in the long run, abuses by the state are far more dangerous to liberty and democracy than individual criminal conduct."[35] Presumably this "fundamental lesson" does not mean we should have no state enforcement of the criminal law, but Dershowitz never explains why it dictates a scope that excludes the Chicago measures. Meares and Kahan had not ignored the danger of state abuse; they'd simply proposed different checks – community and departmental monitoring. But apparently for Dershowitz "history" speaks only through the Warren Court.

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[33] Albert Alschuler and Stephen Schulhofer, "Antiquated Procedures or Bedrock Rights: A Response to Professors Meares and Kahan," 1998 University of Chicago Law Forum 215, 239-42. See Lawrence M. Friedman, Crime and Punishment in American History 103-04 (1993) (indicating that harsh treatment of vagrancy was an accepted part of the Anglo-American legal tradition until recently).

[34] Carol Steiker, "More Wrong Than Rights," in Urgent Times, cited in note , at

[35] Alan Dershowtiz, "Rights and Interests," in id., at

Alschuler and Shulhofer, Steiker, and Dershowitz all invoke the "slippery slope" trope to suggest that, even if these Chicago communities had somehow plausibly and legitimately concluded that it was in their interests to adopt the measures, they should not be permitted to do so because their actions would have bad precedential effects elsewhere. The premise seems to be that other communities would be unable to discern the particular features that distinguished Chicago's situation from their own and thus be tempted to import the Chicago innovations to inappropriate environments. The critics don't explain why they think this difficulty with contextual thinking is so widespread. The suspicion arises that they are simply projecting the pathologies of their own rhetorical practices on the population at large.

2. Tort Reform. The American tort system has radical deficiencies that one would expect liberals to decry. The system provides no benefits at all to most injured people because, for example, they were injured without fault (or without discovering the fault), or their damages are too low to warrant the cost of bringing a claim, or the injurer is judgment-proof. The awards the system does make are staggeringly arbitrary, depending on the actual or anticipated judgments in thousands of dispersed venues of panels of lay decisionmakers assembled for a single case, operating under vague instructions, and without any knowledge of decisions in other cases. (These are exactly the conditions that liberal lawyers often mention as making fair decisionmaking about the death penalty impossible.) The system's effect in deterring bad conduct seems weak, and in some respects, perverse. Most importantly, the compensation it does provide is accomplished only at huge expense. Less than fifty percent of the total payments by defendants go to claimants, in some categories, much less. For example, in one series of studies, "close to two-thirds of insurance company expenditures in asbestos suits (including cases settled before trial) ended up in the pockets of lawyers and experts for both sides rather than in those of asbestos victims and their families."[36]

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[36] Robert Kagan, Adversarial Legalism: The American Way of Law 127 (2001). See also Lester Brickman, "The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative," 13 Cardozo Law Review 1819, 1834-37 n.61 (1992) (calculating that attorneys' fees on a large set of asbestos claims that did not involve substantial risk or call for exceptional skill averaged $5,000 an hour).

You might expect liberals to favor the replacement of this system with one that is more inclusive, involves stronger administrative and less partisan control, and restricts or eliminates juries, such as that proposed by Stephen Sugarman or the one actually operating in New Zealand. To some extent, they do, but many liberal lawyers seem to have a soft spot for the tort system. Their indulgence seems related to the fact that comprehensive reform challenges the basic commitments of Legal Liberalism to procedural individuation and partisan control, its populist suspicion of nonjudicial state actors, and a tendency to regard the benefits that the current system provides as rights.

Surely these premises play some role in the virtual disappearance of comprehensive tort reform from Liberal Legal discussion and political practice in recent years. Instead, both debate and practice have focused around a small set of incremental reforms, most proposed by conservatives or businesses, such as caps on non-economic damages or limits on attorneys' fees. Such ideas address important problems in the system, but most are poorly designed.[37] Thus, there are ample grounds for opposing them. Nevertheless, much of the Liberal Lawyers' discussion of them is striking for its absence of serious analysis or meaningful alternatives. Much of it, including virtually all the statements of Ralph Nader and the trial lawyers' associations, expresses a vehement categorical opposition to any serious alteration of the system. Rhetorically, this rigidity is strongly associated with rights talk.

Currently, doctors in several American states say there is a malpractice crisis. At least one insurance company has gone under, and several have cancelled coverage of especially risky practice areas, such as obstetrics. Rates have soared to the point that some doctors are abandoning their practices. (Even before the crisis malpractice insurance rates in the United States were 10 times the rates in Canada.) The doctors are asking state legislatures to intervene. Asked for his views on this situation, the president of the West Virginia trial lawyers'

My assertions about the tort system rely on Kagan's excellent analysis of the literature at 127-144; Stephen Sugarman, Doing Away With Tort Law: New Compensation Mechanisms for Victims, Consumers, and Business (1989); and Michelle Mello and Troyen Brennan, "Deterrence of Medical Errors: Theory and Evidence for Medical Malpractice Reform," 80 Texas Law Review 1595 (2002).

[37] For discussion and references, see Marc A. Franklin and Robert L. Rabin, Tort Law and Alternatives 690-97, 787-92 (7th ed. 2001).

association said, "The real crisis we face is the threat to our system of justice. They want to take away our fundamental right to seek and obtain compensation for a wrong."[38]

The idea that the pay-offs flowing from the lottery that our tort system has become represent "fundamental rights" has been taken to heart by several state Supreme Courts, who have struck down various reforms. The Supreme Court of Florida, for example, interpreted a provision of the state constitution providing no more than that "the courts shall be open to every person for redress of any injury" to effectively constitutionalize established tort law. It followed that a $450,000 cap on pain-and-suffering damages was invalid regardless of the policy justifications for it: "[W]e are dealing with a constitutional right that may not be restricted just because the legislature deems it reasonable to do so."[39] Courts in at least 18 states have held a variety of tort reforms to deny several constitutional rights, including rights to due process, equal protection, and jury trial.[40] The decisions have in common that they are based on formalistic deductions from vague constitutional language, they more or less explicitly refuse to consider policy arguments, and they afford a level of protection to tort plaintiff's rights considerably greater than the same courts typically give to private law interests.

Dogmatic conceptions of right played an important role in the 1998 defeat of a Congressional response to health claims against the tobacco companies that would have replaced expensive lawyer-dominated litigation with administrative tribunals and streamlined eligibility criteria and procedures. The proposed settlement would have also strengthened federal regulation over cigarettes and, at once, increased resources and re-directed them away from individual claim payment toward public health measures. After elaborate negotiations,

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[38] Francis X. Clines, "Insurance-Squeezed Doctors Fold Their Tents," New York Times, June 6, 2002, sec. A, p. 24. col. 2; see also Maria Newman, "In Mass Rally in Trenton, Doctors Protest Malpractice Insurance Costs," New York Times, June 14, 2002; sec. B, p. 5. col. 1 (quoting the president of the New Jersey trial lawyers association as saying "Taking away people's rights is not the answer….").

[39] Smith v. Department of Insurance, 507 South 2d 1080, 1089 (Fla. 1987).

[40] See Richard Turkington, "Constitutional Limits on Tort Reform: Have the States Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?," 32 Villanova Law Review 1299 (1987) and cases cited at n. 52. To be sure, many decisions have rejected such challenges. Id. at

the proposal was killed by coalitions of self-interested trial lawyers and sincere activists under the influence of Legal Liberalism. In a detailed account of the negotiations, Michael Pertshcuk concludes that the opposition was mistaken and reports that some of the opponents, including Ralph Nader, are having second thoughts.[41] No doubt the merits of the settlement were debatable, but it's troubling that so much of the argument against it took the form of unreflective rights rhetoric. Opponents denounced the bill's (quite modest) limitation of damage liability as a violation of individual rights, even though no one could say reliably what the magnitude of civil liability under existing law was or which claimants could expect to benefit.[42] They insisted on the importance of punishing the companies with massive liability, even though there was little reason to believe such liability would have any effect on the individual wrongdoers (who were likely to have retired or sold their stock) or on the practices of the companies (which would continue to operate after bankruptcy, now peddling their wares for the benefit of the plaintiffs).[43]

Rights rhetoric on tort reform is strongly reinforced by Populist themes. There is considerable public sympathy for injured people, and the typical voter is more likely to find herself in the position of a tort plaintiff than of a tort defendant. In simple majoritarian terms, one would expect legislatures to fairly protect plaintiffs' interests. It is thus

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[41] See Michael Pertshcuk, Smoke in their Eyes: Lessons in Movement Leadership from the Tobacco Wars (2001). To date, a similar coalition has thwarted analogous reforms regarding asbestos. See Lester Brickman, "Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation," 26 William & Mary Law Review 243, 246-48 n.13 (2001). (update)

[42] Pertschuk, cited in note , at . There had been no significant recoveries in private tobacco cases up to this point, and as the experience with asbestos cases suggests, smoker interests are poor candidates for elevation as rights even by Legal Liberal standards. Recovery requires doctrinal innovation on such matters as causation and assumption of the risk that could not have been anticipated at the time of the defendants' conduct. It requires factual findings regarding such matters as the plaintiff's exposure to asbestos or awareness of tobacco toxicity that are not susceptible to reliable determination in circumstances where the only evidence is often oral testimony likely to be distorted by self-interest. And it necessitates modifications of traditional court procedure to facilitate mass processing of claims that replicate the stereotypical disadvantages of state bureaucratization without the compensating advantages of unified, disinterested administration. See Brickman, cited in note .

[43] Perschuk, cited in note , at

an important part of the case against judicial deference to legislatures that they have been captured by corporate interests. Thus, Ralph Nader in a book with Wesley Smith calls tort reform "The Corporate Scheme to Wreck Our Justice System." After dismissing reform proposals as "a direct assault on victims" and "anti-individual rights," they describe at length the corporate contributors to various groups lobbying and advocating for changes and conclude, "Behind the various front groups agitating for tort deform [sic] in Washington and state capitals are the usual suspects: America's richest industrial and insurance companies and their power-lawyer lieutenants from [the] big firms…."[44] Nader and Smith do have some policy arguments against the reforms, but their main point seems to be that they are discredited simply by virtue of their association with the presumptively greedy striving of big business.

They take no account that one of the major lobbying and advocacy forces on these issues is the plaintiff's bar. You would never know from them that the vanguard of this bar has emerged in recent decades as a wealthy and highly organized political power. Nader and Smith include an appendix listing "The Top-Grossing Law Firms in the United States" and their annual gross revenues,[45] apparently intending to awe and disturb us with the large numbers, but do not mention that most of the highest-paid individual lawyers in the United States are tort plaintiff's lawyers.[46] The contributions of the trial lawyers to President Clinton's first electoral campaign were among the largest of any industry group, and when Clinton vetoed two liability reform bills in his first term, the vetoes were widely attributed to their influence.[47]

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[44] Ralph Nader and Wesley J. Smith, No Contest: Corporate Lawyers and the Perversion of Justice in America 256-59 (1996).

[45] Id. at 371-76.

[46] The 15 top earners in Forbes's survey of the highest-paid lawyers in 1994 (the year for which Nader and Smith reported firm incomes) were all plaintiffs' lawyers. On average, the highest paid plaintiff's lawyers earned several times the highest paid corporate lawyers. Brigid McMenamin, "The Best-Paid Lawyers," Forbes (Nov. 6, 1995), at 145-68.

Populism has a traditional tendency, at the same time that it rails against corporate wealth and power, to confer benefits on putatively "small" or "independent" business people, who often turn out to be extremely wealthy. Thus, Huey Long, and later his son Russell, demonized the national oil companies while allying himself with the likes of Jett Rink and J.R. Ewing. See T. Harry Williams, Huey Long (1977).

[47] Douglas Frantz, "Trial Lawyers, Their Money, and their Influence Become Issues in the Campaign," New York Times (Sept. 13, 1996), sec. 1, p. 18, col. 1.

B. The Inhibition of Civic Organization

The Priority of Rights and the commitments to confidentiality and procedural individuation suggest a view of law as the vindication of a series of discrete individual entitlements. This view does not rule out lawyering in connection with civic organization, but it sometimes turns out to be in significant tension with it.

1. Social Policy Design. The rights idea also has a bias in favor of certain styles of social policy that may impede civic organization. Rights can impede organization by providing a substitute for it. The decline of American unions, for example, has been accompanied by the growth of a panoply of worker protections in the form of individual rights (for example, unlawful discharge constraints, anti-discrimination, ERISA, health care regulation). There is no necessary causal relation between individual rights and union decline, but there is a potential one. When society channels benefits through unions, it raises individual incentives to join and thus helps unions overcome the "free rider" problem that leads many not to join even though they benefit from the union's activity. For this reason, some nations provide a role for unions in the administration of social insurance or training benefits. Giving unions responsibilities for general benefit programs generates economies of scope with other activities and brings them into routine contact with workers. Conversely, a state that makes many benefits available as individual rights may inhibit the union's organizing abilities. If the workers still need the union for some purposes but find it more difficult to organize, they could be worse off.[48] Moreover, effective union action may depend on the union's ability to compel dissidents to comply with majority decisions and police free-riding by people who get the benefits of collective action but are disinclined to contribute to them. Strong

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[48] Tamara Lothian calls the model in which the state delegates to the union the performance of various social welfare and education functions "corporatist" and argues that, in comparison with the American alternative, it makes organizing much easier. "The Political Consequences of Labor Law Regimes: The Corporatist and Contractualist Models Compared," 7 Cardozo Law Review 1001, 1010, 1017-27 (1986). For an exploration of the idea that organizational efficacy often requires collective coercion in order to overcome "free rider" problems, see Mancur Olson, The Logic of Collective Action (1965).

individual rights – for example, to refuse to abide by strike decisions or to contribute to union political activity – can impair collective efficacy.[49]

Just now in American housing and welfare policy there is a recurring competition between "mobility" policies, such as vouchers that create portable benefits that the individual recipient can take with her, and policies that provide benefits to community-based organizations to make improvements rooted in particular communities. One of the arguments for the latter is that they are more likely to induce civic participation that creates social capital that provides variety of collective benefits.[50] I cannot say that liberal lawyers have been hostile to the second approach, but their ideological premises make it difficult for them to explain its potential virtues.

2. Professional Responsibility and Legal Aid. If the idea of right implies a discrete entitlement that an individual holds "against the world", the corresponding idea of the lawyer-client relation is a "community of two" in which a professional champion protects the client from outsiders.[51] This image, as expressed in the professional responsibility norms derived from the premises of confidentiality and procedural individuation, sometimes creates tensions with efforts to connect lawyering with civic organization. The tensions are reinforced when this lawyering image is combined with the Victim Perspective. We can see this in the recurring anxiety about organizing and organizations in the movement to provide civil legal aid to the poor.

Lawyers' primary professional commitments are to clients. They may not make commitments to principles or collectivities that conflict with the interests of clients (other than the positive law and certain basic procedural norms). They may not take on clients when their own

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[49] See David Abraham, "Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikes in the New Economy," 63 New York University Law Review 1268 (1988).

[50] See William H. Simon, The Community Economic Development Movement: Law, Business, and the New Social Policy 49-58 (2001).

[51] Philip Rieff, The Triumph of the Therapeutic: Uses of Faith After Freud 52 (1966). This is Rieff's term for the patient-psychotherapist relation. I show that a similar conception of the lawyer-client relation pervades the law school clinical movement in William H. Simon, "Homo Psychologicus: Notes on a New Legal Formalism," 32 Stanford Law Review 487, 496-501 (1981).

commitments are likely to limit their pursuit of the client's interests.[52] They may not put themselves in positions where third parties can influence their actions on behalf of clients.[53]

The degree of constraint these principles impose depends on how they are interpreted. There was a time when they were interpreted to preclude lawyer participation in most efforts to combine organizing with individual claim assertion. Traditionally, where lawyers acquired overlapping responsibilities to both individual clients and organizations, the bar was quick to find ethics violations on the basis of even speculative conflicts of interest. The two most important examples are the NAACP's antidiscrimination campaign and the railroad unions' efforts to assist trainmen in asserting workers' compensation claims. Lawyers who took individual cases referred to them by the NAACP and the unions as part of these organizations' broader political strategies were disciplined on the ground that they had put themselves in a position that might require them to sacrifice client interests to those of the organizations. In neither case was there any evidence that the clients were not well-served, and in both cases the campaigns against the lawyers were promoted by the clients' adversaries. In both cases, the campaigns to stop lawyers from cooperating with these organizations were halted only by Supreme Court cases holding that the activities were protected by the First Amendment.[54]

The bar's efforts in these episodes are today considered transparently reactionary, and Legal Liberalism does not identify with them. But the anxiety they reflect about the conflict between client and organizational commitments still has an influence. The idea of the lawyer-client relation as a fortress for a single desperate individual seems to have played an important role in the reluctance of legal aid programs to organize small-case, neighborhood practices strategically. Gary Bellow, among others, argued for decades that they should do this.[55]

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[52] See, e.g., ABA Model Code of Professional Responsibility 5-105(a).

[53] See, e.g., ABA Model Rules of Professional Responsibility 5.4(c)

[54] United Transportation Union v. State Bar, 401 U.S. 576 (1971); NAACP v. Button, 371 U.S. 415 (1963); see generally George Bodle, "Group Legal Services: The Case for BRT," 12 UCLA Law Review 306 (1965).

[55] Gary Bellow, "Turning Solutions Into Problems – The Legal Aid Experience," 34 NLADA Briefcase 119 (1977). For a another version of the critique, with citations to the literature, see Marc Feldman, "Political Lessons: Legal Services for the Poor," 83 Georgetown Law Journal 1429 (1995).

The resources available for such work are sufficient to serve only a small fraction of the claims that might be asserted on behalf of the poor. In addition, many of the legal problems presented in these individual cases have a systemic quality; they involve practices of large institutions that affect broad numbers of people. It thus makes sense for legal services programs to set priorities and focus their efforts on these systemic problems. Bellow also suggested that aggregating and coordinating individual cases might be superior to appellate litigation for addressing many systemic problems. Appellate litigation is slow, and appellate rulings often have limited impact because there are insufficient resources to enforce them. Individual case work can take place at the grassroots level and may be more amenable to coordination with other forms of civic activism.

Some legal services offices take a strategic approach to service work, but more resist it. They tend to set very broad parameters and then take whatever cases within them people happen to bring into the office. Some of the pressure to practice this way comes from conservatives with influence in Washington, who are suspicious of any federally subsidized lawyering that looks political. But few legal services lawyers are themselves conservatives, and they have their own reasons for inclining toward a non-strategic style of service practice. They are uncomfortable turning clients away. Under any model, they will turn some people away, but under a focused, strategic model they will turn away more people and sooner. Moreover, they are uncomfortable setting priorities. Emotionally, they see their cases as discrete representations of individual people. Cognitively, they think of the job as the enforcement of individual rights.

These inhibitions can be mitigated by making an organization a client. Under the bar's norms, an organizational client is treated more or less like an individual. And if the organization is committed to principles the lawyer regards as valid, the potential for tension between collective commitments and client loyalty is minimized. There are at least two limitations to this approach, however,

First, some legal aid lawyers put such a strong value on representing individuals that they are reluctant to accept any organizational representation that might put them in opposition to a poor person. For example, lawyers in a legal services program I'm familiar with once opposed representing a community nonprofit developing

subsidized housing because representing the corporation might preclude them, under conflict-of-interest norms, from representing tenants in the housing after it was built, for example, if the corporation sought to evict the tenants. The corporation was a highly-regarded community-based organization. No one knew any reason to think it would mistreat its tenants. But these lawyers would have rather foregone the opportunity to represent an admired organization than lose the speculative possibility of representing individuals against it.

Second, disadvantaged groups are less formally organized than others. This means that if the legal aid lawyer wants to represent organizations, she will sometimes have to help form them. Efforts to help people organize will involve the lawyer in jointly representing individuals. While such representation is common, the bar's norms express discomfort with it. They mandate a hypersensitivity to conflict that can sometimes inhibit or preclude particular efforts to assist groups that are not formally organized.

The norms on joint representation caution against the danger that jointly represented individuals will disclose confidences to each other and then regret it. Or that one of the individuals may end up getting less in a joint representation than if she were separately represented. Under the previously dominant rules, lawyer could not undertake a joint representation unless it was "obvious" that the representation would work out well for everyone, a standard that if taken literally, would almost never be satisfied.[56] Even under the newer, more liberal standard, it is not enough that the representation appears to be the best course for everyone. If there is serious uncertainty, doubts are to be resolved against joint representation.[57]

If disputes develop, the lawyer may have to cease representation of any of the individuals. More than likely, she won't be permitted to remain with the majority, or with those whose positions she believes are most consistent with the original project. The concern is that she will have confidences from each of them that she should not be permitted to use to his or her disadvantage. Even without confidences, the doctrine sometimes suggests that a sense of continuing loyalty to each individual

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56 ABA Model Code of Professional Responsibility DR 5-105(C).

57 ABA Model Rules of Professional Responsibility 1.7.

precludes continued representation adverse to a former jointly represented client.[58]

To some extent, this solicitude for the individual client is not waivable, at least prospectively. Suppose ten tenants ask a lawyer to bring a lawsuit against their landlord for failure to maintain the premises. They think that by conducting their cases in concert, they will achieve both cost efficiencies and greater leverage against the landlord. They also think that the landlord will not be willing to settle with any of them unless he can settle all the cases. They thus agree that they will abide by majority rule with respect to strategy and settlement. If one of them defects from the agreement, may the lawyer follow enforce the agreement by following the instructions of the majority with respect to all the cases? If not, may he at least continue to represent the majority? Although the answers have lately become unclear, the traditional answer is no.[59] Loyalty to individual clients precludes the lawyer from vindicating this kind of collective commitment. But such loyalty deprives such individuals of opportunities for effective collective action.

C. Minimizing Lawyer Accountability to Clients

At the same time that it exalts the individual client and seeks to protect her from outside forces, Legal Liberalism leaves the client vulnerable to the lawyer. The principles of confidentiality and individuation reinforce this vulnerability.

Organized clients generally have the resources and sophistication to hold their lawyers accountable for their performance. But the individual client of whom Legal Liberalism is most solicitous does not. There is substantial indication that lawyers for individual clients commonly exploit them by overcharging or providing negligent or knowingly poor service.[60] The reason is not that they are more or less greedy than others, but that the mechanisms of accountability are so weak.

The professional responsibility norms that inhibit the lawyer from establishing relations with both individuals and organizations they are

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[58] See Brennan's Inc. v. Brennan's Restaurant's, Inc., 590 F.2d 168 (5th Cir. 1979).

[59] See Hayes v. Eagle-Pitcher Industries, Inc., 513 F.2d 892 (10th Cir. 1975).

[60] Douglas Rosenthal, Lawyer and Client: Who's in Charge (1974).

affiliated with preclude or constrain some of the more plausible monitoring relations. Unions and insurance companies are sometimes in a good position to monitor the quality of service given to their members or insureds, but the bar has successfully resisted such efforts on the ground that they would jeopardize confidentiality and independence of judgment on behalf of the client. Aside from enjoining confidentiality of client information, the bar's norms forbid allowing a third party who pays for legal services or refers the client to "interfere" or "direct" the lawyer's conduct.[61] Although such norms preclude opportunistic interference, they also preclude benign interference designed to insure quality of service.[62]

For decades the organized bar sought to prohibit group legal service or legal insurance plans in which lay people had any executive role or which limited beneficiary choice to a "closed panel" of lawyers who had a continuing relation with the group or insurer (and hence would be subject to at least indirect monitoring).[63] The ABA takes the position that, while boards of legal aid programs may review the work of staff lawyers, they may regulate decisions in ongoing cases only through general policies, not through ad hoc review.[64] Legal aid lawyers often resist any qualitative evaluation of their work on the ground that it would interfere with their independent judgment on behalf of the client.

Plaintiffs' lawyers commonly insist that the medical profession is unaccountable, aside from the malpractice system, for medical mistakes.[65] But the non-litigation monitoring of much of medical practice is quite rich compared to the monitoring of most of the practice of plaintiffs' lawyers. American hospitals at least have peer review

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61 ABA Model Rules of Professional Conduct 1.8f, 5.4c.

62 Another minor but revealing norm is the rule that forbids a lawyer from communicating with a represented adverse party without the advance consent of that party's lawyer. Model Rule of Professional Responsibility 4.2. The rule has an obvious legitimate function in protecting the adverse party against over-reaching. But the rule often functions to allow a lawyer to prevent his own client from learning about his own incompetence or misconduct from the other side. It is difficult to think of any legitimate reason for the bar's refusal to permit even written communication to the client with a copy to the lawyer.

63 See Charles Wolfram, Modern Legal Ethics 910-18 (1986)

64 ABA Standing Committee on Legal Ethics and Professional Responsibility, Formal Opinion 324 (1970).

65 See Nader and Smith, cited in note , at 290-95.

procedures that do not depend on patient complaints. There is no comparable monitoring procedure for lawyers. The disciplinary agencies of the medical licensing authorities may be lax, but surely no more than the comparable agencies of the bar. The recent Harvard study of medical mistakes, based on a review of randomly chosen treatment files at hospitals, would be inconceivable with respect to tort law practice.[66] No one could get access to enough files.

The class action for damages represents another highly unaccountable representative structure. Here the only plaintiffs likely to have direct contact with the lawyer commonly have no significant individual stake, and hence, incentive to monitor. Courts are supposed to watch out for the class, but they have limited information and have often shown remarkable disinclination to do so.[67]

Consider also that the Legal Liberal's inclination to turn dependent people, especially children and the mentally disabled, into rights holders has created more non-accountable representative structures. The old paternalistic practices of juvenile courts and mental health institutions functioned poorly, but they were potentially more transparent and, to that extent, accountable. The lawyer's insistence on the independence and confidentiality of his relation with client makes accountability difficult. In the famous Pennhurst case challenging a Pennsylvania institution for the retarded, the plaintiff's lawyer initially undertook to represent the mother of the named plaintiff, as guardian of her daughter. When the mother objected to his efforts to close, rather than improve, the institution, he indicated that he would take instruction only from the daughter (who by then was an adult but whose ability to make the relevant decisions was doubtful).[68]

Finally, the Liberal Legal idea of rights as something to be argued and derived analytically may encourage lawyers to limit client participation. When Derrick Bell questioned whether the NAACP's school desegregation strategy was responsive to the views of members of the client classes, NAACP's General Counsel Nathaniel Jones replied:

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[66] Paul C. Weiler et al., A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation (1993).

[67] See, e.g., John C. Coffee, Jr., "Class Wars: The Dilemma of the Mass Tort Class Action," 95 Columbia Law Review 1343 (1995).

[68] Robert Burt, "Pennhurst – A Parable," in In the Interests of Children: Advocacy, Law Reform, and Public Policy 265, 284-89 (Robert Mnookin ed. 1985).

> The responsibility I, as chief litigation officer of the NAACP have, is to insure that each plan the NAACP submits to a court … must square with the legal standards pronounced by the Supreme Court as necessary to effectively vindicate constitutional rights, and bring into being a unitary system.[69]

D. Diseconomies of Information

Observers find the American judicial system vastly more expensive than those of the nations to which we usually compare ourselves. Some concede that it has the advantage of accommodating certain large-scale challenges to corporate and government abuse that could not be brought in other systems. But at the same time, large-scale cases have a potential for waste and opportunism that would not be tolerated in the peer systems.[70]

If one turns to the medium and small-size cases that constitute the bulk of the courts' business, the comparisons seem almost entirely to the disadvantage of the American system. Our system is more costly, more unpleasant for litigants and witnesses, and more uncertain than others.

The conclusion that the American system functions poorly is reinforced by the tendency of parties in contractual relations to opt out of the court system by agreeing to private arbitration. To be sure, many of these contracts are adhesion contracts where the stronger party uses its contracting power to shunt the other into a process more favorable to it. But even in contracts between parties of comparable resources and sophistication, there is a tendency to agree to arbitration. Since these are the cases where the judicial system is least prone to problems of opportunism, the tendency to opt out seems quite damning.

The most salient explanation for the excessive cost, unpleasantness, and uncertainty of the judicial system emphasizes the extreme degree of partisan control, and perhaps also, its unique reliance on the jury in civil cases.

These points are quite harmful to Legal Liberalism, since the latter's commitment to confidentiality and information control gives it a strong affinity for partisan control and its Populism inclines it to embrace

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69 Bell, cited in note , at 491 n. 64.

70 See Kagan, cited in note , at

the jury. There are, however, two more specific problems that arise under Legal Liberalism's operating premises. Each involves inefficiency in the production and use of information, and hence, in the possibilities for learning.

1. Disincentives for producing information. First, the operating premises of Legal Liberalism create very large demands for information at the same time that they make it expensive to obtain. Procedural individuation and the commitment to standards when beneficial to the disadvantaged makes for a very broad range of relevance. The Legal Liberal ideal is the exploration of all the dimensions of the disputed situation, at least all those that a disadvantaged litigant thinks relevant. Respect and dignity are equated in part with the fullness and particularity of consideration.

But the system makes information hard to get. There are strong confidentiality norms, and there is a discovery process with limited disclosure duties controlled by partisans. Moreover, the nature of the American adversary trial – its combination of compression and adversary control – has unfortunate effects on the production of information. If people trust a trial system to produce just results, they have incentives to preserve evidence of their conduct so long as they are law-abiding. When someone destroys evidence without an apparent good reason (or fails to create it when it would do so in the normal course), a presumption that she is trying to hide something is warranted.[71] On the other hand, if the trial system cannot be trusted, then law-abiding people may rationally fear that evidence of their conduct will be misused to establish liability against them. If this fear is widely recognized, no presumption can be warranted. In a compressed, party-dominated trial proceeding, people may fear that evidence of legitimate conduct, when "taken out of context", will be used to support liability. If the dangers are widely recognized, people will cease to take failure to document or document destruction as a sign of wrong-doing, and this will remove a major disincentive to these practices.

In fact, growing distrust of the courts seems to have produced a marked tendency in recent decades to minimize documentation. Traditionally, the basic norm among law-abiding businesses was to retain documents as long as any dispute about the relevant event or

[71] Wigmore on Evidence, cited in note , at sec. 2524 (adverse presumption from spoliation of evidence).

transaction might arise, say, for the duration of the relevant statute of limitations. In recent years, however, there has been a tendency toward a much more restrictive norm – discard everything immediately unless it will clearly be supportive if a dispute should arise. In addition to advising such policies, attorneys have often counseled clients to refrain from taking notes or memorializing meetings and conversations. Presumably, they believe they can avoid adverse inferences from such practices because juries and officials will recognize that their fear of misuse of such information by the judicial system is reasonable, or at least, genuine.[72] At the same time, some businesses have channeled discussion of sensitive issues through privileged communications with lawyers.[73] Such practices, of course, reduce the availability of information, and increase uncertainty when disputes arise.

The Liberal Legal commitment to rights sometimes interacts with confidentiality norms in a perverse way. The categorical view of rights demands that claims be enforced uncompromisingly when made. But making claims requires information, and rights to information in Legal Liberalism tend to be weak, in part because of the commitment to confidentiality. This leads defendants to assert confidentiality norms to resist disclosure of information in ways that would be socially valuable but costly to them in terms of liability.

For example, recent studies suggest that medical mistakes occur in hospitals at a much greater rate than previously thought. Perhaps only one out of seven results in a medical malpractice case. It would be

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[72] Such advice was an issue in the prosecution of Arthur Andersen for Enron-related obstruction of justice. Andersen conceded that it had a general practice of destroying documents to prevent their use by plaintiffs' lawyers. The prosecution argued that this suggested consciousness of guilt. Andersen claimed it reflected a fear that they would be misused "out of context" to create false inferences. It appears that the verdict against Andersen was not based on its general destruction policy (but rather on the alteration of a retained document), so the jury may have accepted Andersen's rationale. Jonathan Weil and Alexei Barrionuevo, "Duncan Says Fear of Lawsuits Drove Shredding," Wall Street Journal (May 12, 2002), at sec. C, p. 1; Jonathan Weil, Alexei Barrionuevo, and Casell Bryan-Low, "Auditor's Ruling – Andersen Win Lifts Enron Case," Wall Street Journal (June 17, 2002), at sec. A, p. 1. In the aftermath of the Andersen case, there is currently no consensus on prudent documentation policy, and many corporate lawyers feel unable to advise on it.

[73] For an egregious example, see the account of the cigarette industry's efforts to conceal evidence of the toxicity of their product by putting lawyers in charge of research activities in Stanton Glantz et al., The Cigarette Papers 24-46 (1996).

highly desirable for hospitals to disclose data either publicly or to industry organizations to assist in self-correction and improvement, as well as regulation. But to do so would risk an explosion of malpractice claims. The hospitals insist plausibly that a disclosure regime should involve either assurance that disclosure could not be used for liability purposes or broad malpractice reform with a scaling down of awards. Recent efforts to negotiate such a regime have been scuttled, in substantial part because the trial lawyers vehemently opposed both conditions.[74]

The preoccupation with confidentiality reinforces the inhibition of civic organization by impeding non-judicial investigation and consideration of problems. Members of the lay commission appointed by the Catholic Church to make recommendations about problems of sexual abuse by priests recently complained that some bishops were refusing to provide them with needed information. They attributed this recalcitrance to the influence of lawyers preoccupied with the possibility that cooperation would make information more accessible to prosecutors and plaintiffs' lawyers. Following his resignation, the former chair, Frank Keating, asserted that the non-cooperating bishops "turned to their lawyers when they should have turned to their hearts." Another member complained that, while the larger Catholic community believes that "transparency" on the issues is critical, "[t]he lawyers for a diocese do not see it that way."[75]

2. Lack of Coordination of Dispute-resolution and Regulatory Effects. A good legal system functions both to resolve disputes and to regulate conduct generally. But the design of the American judicial system minimizes its regulatory value. Clearly, the prospect of liability has influence on conduct, but the influence is crude, imprecise, and occasionally perverse. Some dangerous products have been taken off the market as a result of lawsuits, and corporate executives are more careful to disclose business information for fear of liability. On the other hand,

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[74] Sarah Glaser, "Should Reports of Medical Mistakes Be Made Public," The CQ Researcher (Feb. 25, 2000), at 137-60

There some irony in the trial lawyers' position, given the parallel between the hospitals' argument for confidentiality of error reporting and the bar's argument for attorney-client privilege.

[75] Frank Keating, "Finding Hope in My Faith," New York Times (June 19, 2003), at A27; Laurie Goodstein, "The Lessons of a Year," New York Times, (June 18, 2003) A1, A18 (quoting board member Jane Chiles).

it is said that some useful products have been removed from the market for fear of mistaken imposition of liability and employers don't provide candid evaluations of former employees to prospective new employers for fear of having to defend themselves in defamation suits.[76] On balance, however, the striking failing of the system is the weakness of its regulatory effects.

Most cases are settled without any liability findings. A settlement has no formal precedential value, and its terms are not necessarily reported at all. Even if they are reported, the basis of the settlement will be unclear, and no liability will have been established. Thus, the settled cases have limited value either in clarifying the law or generating information that might be useful to either private actors or governments. Yet, cases have to be settled because it is so expensive to try them.

Moreover, even cases that are adjudicated often yield little or no useful information for regulatory purposes. The jury as fact-finder is notoriously a "black box"'; juries usually return only general verdicts, and they never explain their conclusions.

In the welfare system, the administrative adjudicatory system has been more or less consciously designed to have no impact on the parallel administrative system of initial claims determination and case maintenance. When Congress and later the courts pushed welfare programs to develop hearings systems with independent, preferably legally-trained, decisionmakers, opportunities for oral presentations, and written decisions with reasons based on the evidence, the programs responded. In most welfare programs, a claimant who files a grievance is likely to get a respectful, procedurally elaborate hearing, and in fact, claimants have tended to win these hearings with significant frequency.

The problem is that adjudicatory decisions have no influence on the cases that claimants do not appeal into the system. In the public assistance programs, the appeal rates were tiny. There has been ample reason to believe that significant numbers of these unappealed decisions would have been reversed if they had been appealed. Failure to appeal seems to have been often due to ignorance. In effect, these programs operate two parallel programs – a high-quality respectful process and a low-quality impersonal one. The two were quite consciously separated

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[76] See Peter Huber, Liability (198).

by bureaucratic walls, separate personnel, and specific instructions that administrative workers were to disregard adjudicatory decisions. The situation seems unsatisfactory on both equity and efficiency grounds. Similarly situated claimants are treated differently depending on whether they manage to escape the bureaucratic sphere. (At some times, for example, medical conditions routinely deemed by Social Security line administrators insufficient to establish disability have been commonly found disabling by the system's administrative law judges. And welfare hearing officials have applied an estoppel doctrine to excuse eligibility conditions, such as procurement of documentation within specified deadlines, where the administrators failed to provide necessary information or assistance, but no such relief was available to the great majority of denied claimants who do not make it into the hearing system.) And the relatively rich information generated in the adjudicatory sphere is not used to improve performance in the administrative one.[77]

To some extent, this may suggest a problem of misimplementation, rather than a basic defect of Legal Liberalism. Nevertheless, there may be a more fundamental problem. A response to such problems would need to involve some attenuation of the distinction between administration and adjudication. This would improve the quality of administrative decision, but it might require attenuating the principles of individuation and party control of information in the adjudicatory sphere. One suspects that some liberal lawyers may have preferred to sacrifice the administrative sphere in order to maintain the purity of their vision in the adjudicatory one.

E. Rule and Standard Pathologies

Rules and standards each have disadvantages. The rigidity of rules means that they sometimes compel decisions that are contrary to their underlying purposes. The need to restrict the discretion of the relevant actor requires that he sometimes be forced to make a decision

[77] See William H. Simon, "Legality, Bureaucracy, and Class in the Welfare System," 92 Yale Law Journal 1198, 1246-54 (1983). This article and the literature cited in it concerns Social Security and the main public assistance programs (AFDC, Medicaid, Food Stamps). For a comparable account of workers' compensation, see Nonet, cited in note .

that the legislator would not want a more trusted decisionmaker to make. But the same rigidity of rules can also expand the discretion of the decisionmaker. He can pursue goals that the legislator has tried to forbid if he can figure out a way to do so not anticipated in the specific terms of the rule. Disclosure rules in both the criminal and consumer contexts exemplify both disadvantages. Under the Miranda decision and the Truth-in-Lending Act, certain disclosures have to be made, and the failure to make them, even if harmless, can lead to substantial penalties. On the other hand, if the disclosures are made, compliance is established even if they have not been understood.

With respect to standards, a major problem is the tendency for decisions to become a series of ad hoc determinations with no discernible consistency or principled basis. The one area where liberals have emphasized this problem is the death penalty, where they have condemned decisions under such open-ended norms as "outrageously and wantonly vile" as inevitably arbitrary. But others plausibly complain that decisions under a variety of norms that liberals tend to favor – "just cause" for employment termination or eviction, "unreasonable" for malpractice or product safety, "informed consent" for medical treatment – have the same problem.

The problems of rules and standards are not unique to Legal Liberalism, but they are exacerbated by institutional assumptions that follow from its commitments to Populism and procedural individuation. These assumptions are distrust of the street-level public workforce on the hand and the exaltation of the jury on the other.

Distrust of the lower-tier public workforce inclines Legal Liberalism toward rules. But because the rule-maker never has enough time or information to anticipate every contingency (or to monitor compliance), the worker retains substantial discretion. Moreover, the rigidity of the rules and the distrust on which they are premised may alienate the worker and exacerbate her inclination either to slack or to find ways around the rules. A common response is to try to make the rules more specific. Here we have the danger of a vicious circle, in which each effort to tighten the rules merely worsens the actors' alienation and resistance, and hence the need for more specification. Such cycles have been played out quite explicitly in the less successful "public law litigation" efforts in which courts have used command-and-

control injunctive regulation to try to reform schools, mental health, institutions, and prisons.[78]

The contrasting pathology of standards reaches an extreme with the "black box" decision maker of the jury. Juries do not explain their decisions and are not aware of the decisions in analogous situations made by other juries. Thus, there is no way in which such decisions can be made consistent.

In both cases, mitigation of the problem requires a culture of collaborative learning. Rules can work when those subject to them have some disposition toward voluntary compliance and can be enlisted to provide information needed to update them. In the private sector, the modern manufacturing methods pioneered by the Japanese auto industry exemplify this possibility.[79]

Standards can be consistently applied when the decision-makers have a common understanding of their underlying purposes and an ability to take account of the decisions made by each other. Judicial decision-making is an example. In principle, at any given level, judicial decisions are coordinated in part by the common professional orientation of judges and their commitment to treat the decisions of their peers as persuasive authority. (Hierarchical supervision by superior courts plays a role, but it is too limited to do the job alone.) Something like this horizontal coordination may actually function with respect to appellate doctrine and even among the federal trial courts with respect to high profile legal issues. But most trial court decisions are not reported, and on most issues, trial judges have relatively limited knowledge of what peer courts decide. And appellate courts make little effort to review findings of fact in order to reconcile disparities. Nevertheless, some efforts to achieve consistency are made with trial court decision-making and more would be feasible. For example, tort reformers have proposed that guidelines based on past awards for various categories of cases be formulated and updated. The guidelines would be presented to the trier,

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[78] See, e.g., A. Wise, Legislated Learning: The Bureaucratization of the American Classroom (1979).

I don't suggest that top-down, rule-based regulation is always unsuccessful, merely that it has strong vulnerabilities. For a more sanguine view, see Malcolm Feeley and Edward Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons (1998).

[79] See Taiichi Ohno, The Toyota Production System (1991); see the discussion below at pp.

and if the trier made an award outside the guidelines, it would have to justify the departure with specific findings.[80]

Such efforts are not precluded by Legal Liberalism, but they are in some tension with its commitments to Populism and procedural individuation. Populist distrust of the lower-tier public workforce engenders skepticism about creating a culture of voluntary initiative among public workers. Populist infatuation with the jury discourages taking issues away from it. Some Legal Liberals might even oppose efforts to constrain jury discretion through guidelines as an undue limitation on their authority. And regardless of the decisionmaker, such guidelines would be opposed by some as a violation of the principle of procedural individuation.[81]

III. Legal Pragmatism

This section elaborates the premises of the body of convergent works I call Legal Pragmatism. At the risk of over-emphasizing the contrast, I have formulated and organized the premises so as to emphasize their differences with Legal Liberalism.

It is debatable whether the Legal Pragmatist perspective is best seen as a competitor to the Legal Liberalism that addresses the whole field of lawyering or rather as a complement that purports to be more appropriate to a range of situations but that concedes a significant range to the Legal Liberal approach. No doubt the attitudes and strategies of Legal Pragmatism are more plausible in some situations than others. On the other hand, the Pragmatists seem reluctant to specify limits to the applicability of their approach, and they tend to be ambitious. So, in the current state of the discussion, it seems necessary to defer the question of scope.

A. Background Premises

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[80] Blumstein, Bovbjerg, and Sloan, "Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury," 8 Yale Journal of Regulation 171 (1991).

[81] See Nonet, cited in note , at (development of "judicial ethos" in California Industrial Accident Commission impedes supervision of claims referees who insist they should decide cases "in accordance with our conscience").

The basic background premises of Legal Pragmatism are the Citizen Perspective, Associative Democracy, and the Priority of Solutions.

1. The Citizen Perspective. Pragmatism is oriented toward citizens. Victimhood connotes weakness, passivity, and self-absorption. Citizenship connotes interest in and capacity for active participation in decisionmaking and an at least moderate sensitivity to public values.

Much of the difference between the citizen perspective and the victim perspective of Legal Liberalism is rhetorical. To some extent, the objection to the victim perspective is that it lends itself to sentimentality and patronization. But the difference may go deeper than that. The category of people likely to benefit from the modes of intervention favored by Legal Pragmatism probably does not coincide with the category most likely to benefit from the interventions favored by Legal Liberalism. In particular, Pragmatist initiatives are likely to by-pass the most desperate and the most deviant. Pragmatism supposes a measure of mutual accountability and engagement that may not be attractive to or possible for everyone.

An intentionally provocative illustration of the difference in perspective is reported by Paul Grogan and Tony Proscio in a book on Pragmatist-style social programs that support local economic development. These programs emphasize an unsentimental approach to screening applicants for housing or credit assistance. They unhesitatingly reject people with criminal records or bad credit histories:

> "You mean you turn people away?" one foundation executive asked incredulously.
>
> "You bet we do," replied Ginny Brooks, the founder of the Mid-Bronx Desperadoes, which played so central a role in saving the South Bronx. "We're doing enough, turning this neighborhood around. Don't ask us to value people who don't contribute."
>
> The executive persisted, "But what happens to them?"
>
> Brooks's reply: "I don't care."[82]

[82] Paul S. Grogan and Tony Proscio, Comeback Cities: A Blueprint for Urban Neighborhood Survival 169 (2000)

No doubt most Pragmatists would dissociate themselves from the vehemence of this repudiation of the Victim Perspective. A more tactful response would have been, "There are other types of programs for them." The drug courts considered below are an example of a Pragmatist-style program oriented to a particularly desperate group. But even programs like these are more selective than many. Addicts charged with violent crimes are ineligible, for example. More importantly, the drug courts treat their subjects in a highly regimented manner. In return for the possibility of ultimately more lenient punishment, as well as treatment, they must submit at least in the short term to a regime of infantilizing control and pervasive surveillance. It seems likely that some would prefer the harsher but less intrusive punishment.[83]

Moreover, while the kind of participatory engagement that the Citizenship perspective connotes is fulfilling for many, it may be a burden for some. Beyond the requirements of time, the need to articulate your views to strangers and to do so in the form of publicly acceptable reasons may be oppressive and alienating.[84]

2. Associative Democracy. Associative Democracy is the idea that citizens should participate in the design and implementation of the policies that affect them.[85] This participation can take a variety of forms, but there is a special emphasis on participation through non-governmental organizations. Associative Democracy counts on the countervailing power of such organizations to protect against the abuses of governmental and corporate power emphasized by Populism, rather than relying primarily on spontaneous unorganized citizen action (as in traditional Populism) or a virtuous judiciary (as in Legal Liberalism).

Associative Democracy looks in part to the state to foster the conditions of widespread civic association. The state should provide

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83 See Below

84 This was the experience of some members of the self-governing workplace studied in Jane Mansbridge, Beyond Adversary Democracy (1984). For the suggestion that the more ambitious forms of participatory politics may be unappealing or disadvantageous to minorities, see Derrick Bell and Preeta Bonsal, "The Republican Revival and Racial Politics," 97 Yale Law Journal 1609 (1988).

85 See Joshua Cohen and Joel Rogers, "Secondary Associations and Democratic Governance," in Associations and Democracy 7-98 (Joshua Cohen and Joel Rogers ed.s 1995); Jody Freeman, "The Private Role in Public Governance," 75 New York University Law Review 543 (2000); Carmen Siriani and Lewis Friedland, Civic Innovation in America (2001).

support for associations, subject to conditions of openness and accountability, and should open up access in the policy formulation and implementation process for them. If the Populist asks why the state could be expected to support civic associations, rather than crush or co-opt them in the interests of its own power, the Pragmatist has two answers. The first is that state actors are less rapaciously selfish and more public-spirited than the Populist assumes. The second is that there are potential gains from such a practice for nearly everyone.

Associations can facilitate a more decentralized and flexible mode of policy-implementation. They can transmit better information about citizen preferences. They can better induce voluntary cooperation in implementation. In facilitating participation, they induce a type of education and acculturation that potentially creates support for the policies.

For example, standard setting in work safety and pollution control requires local knowledge of changing effects and preferences. Standard enforcement requires continuous monitoring of local practice. Associations seem well adapted to respond to both needs. Thus, work safety regulation in many European countries is considered more effective than in America in part because the European countries give a major role to unions in both standard-setting and enforcement.[86] And the Legal Pragmatists have shown that grassroots associational activity has played a major role in some of the most promising recent developments in American environmental policy, such as habitat conservation and toxics monitoring.[87]

In appealing to the idea of Associative Democracy, Legal Pragmatism resonates with a major turn in American public policy in recent decades. In a variety of programs at all levels of government, there has been a trend to incorporate citizen participation and to provide conditional support for interested voluntary associations. The opportunities for associational participation in regulatory rule-making have been codified and expanded through measures such as the Negotiated Rule-making Act. Associations play a more direct role in formulating industry standards for such matters as safety and product

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86 Steven Kelman, Regulating America, Regulating Sweden (198).

87 See Karkkainen, "Information as Environmental Regulation," cited in note , and Archon Fung, Bradley Karkkainen, and Charles Sabel, Beyond Backyard Environmentalism (2000); Bradley Karkkainen, HCPs

quality that acquire legal force through incorporation by legislatures, courts, or agencies. A growing range of public services, from health care to housing, are sub-contracted by government to private organizations, many of them nonprofits with participatory membership structures. Some of the space emptied by the contraction of traditional welfare programs has been filled by entrepreneurial community-based organizations developing housing, employment, or business opportunities for low-income people.[88]

Nevertheless, the Pragmatist literature suggests some caution about some of these efforts. Associations have the advantages, in comparison to government, of being closer to their members and more flexible in organization. They have the disadvantages that they are less inclusive and less broadly accountable. Thus, the Pragmatist view does not simply contemplate delegation or "devolution." It is not a vision of private voluntarism. Without government intervention, private associations will not necessarily focus on the issues of most pressing public importance, will not be accessible or accountable to many affected constituencies, and will not form at all or will be relatively weak in disadvantaged areas. Thus, Associative Democracy entails strong central government institutions that focus efforts on key issues, provide technical and financial support for associational efforts to deal with them, and assess and enforce organizational openness and accountability.

If associative democracy is not voluntarism, neither is it corporatism. Corporatism is a system in which government uses its support and regulation of private associations to dominate them as instruments of policy dictated by state officials.[89] The Pragmatist goal is to achieve support and accountability, while preserving associational independence.

3. The Priority of Solutions. Pragmatist practice is problem-solving. A legal claim is a suggestion of a problem that calls for a public solution.

From the Pragmatist point of view, the most important difference between solutions and rights is that solutions to public problems cannot

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[88] Jody Freeman, "The Private Role in Public Governance," 75 New York University Law Review 543, 551-56 and passim (2000); William H. Simon, The Community Economic Development Movement: Law, Business, and the New Social Policy 7-40 (2002).

[89] See Lothian, cited in note , at

be derived analytically. They are best derived deliberatively and experimentally. The Pragmatist objects to the Liberal idea of rights enforcement as the elaboration of a pre-existing moral consensus. She sides with the Legal Realist in insisting that whatever normative consensus exists in the society is too incomplete and ambiguous to play the role Legal Liberalism expects.

Whether the Fourth Amendment precludes sweeps of troubled housing projects, whether the right to property or equal treatment requires a fault-based tort system, whether the equal protection clause entails maximum feasible racial balancing – questions like these cannot be answered plausibly solely through textual interpretation or the abstract analysis of principle. Our best judgments about them depend on a range of knowledge that is not derived from the texts in question and does not take the form of principle. Moreover, these judgments are in substantial part instrumental and strategic; they depend on assumptions about the likely consequences of particular decisions. Thus, the judgments are most plausibly provisional, revisable in the light of later experience. To the extent that problem-solving connotes a joint exploration of uncertainty, the term encourages the parties to be candid about the limitations of their understanding.[90]

The rhetoric of problems and solutions suggests common interests, rather than the notion connoted by the idea of rights of individual interests competing with group ones. Problem-solving connotes the possibility of mutually beneficial outcomes. It treats issues as neither purely distributive nor involving categorical choices between mutually exclusive positions.

This perspective seems more potent in some situations than others. It seems more potent, for example, in connection with school desegregation and tort reform than rent control and abortion. But even with respect to intensely distributive issues such as rent control, some options in the range of possible interpretations and implementations often produce higher benefits or lowers costs to all parties than others. And even with respect to highly divisive issues like abortion, the competing positions are often indeterminate with respect to specific issues of elaboration or implementation – for example, if the mother has presumptive autonomy, how far into the pregnancy it extends; or if there

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[90] Dorf, NYU

is no presumptive autonomy, abortion should nevertheless be allowed to save the life of the mother.

The Pragmatist does not ignore conflicting interests or value dissensus. She merely assumes, first, that any given set of issues is likely to involve shared as well as conflicting interest and values, and second, that it is often a mistake to try to determine in advance of the dispute resolution process which type of values and interests predominate. If the process is properly designed, neither the individual nor the community can know what their interests are before entering it. Each party's conception of her own goals may change in the course of the process because each may learn things in the process about the possibilities for realizing them.

Thus, Pragmatism declines to single out a particular category of interests as categorical or trump-like. It doesn't deny that there are interests whose value is infinite or that certain types of rationales are inadmissible. But it suggests that these categories are smaller than Legal Liberalism tends to suppose and that the attempt to wall them off in advance of discussion will rarely be useful.

The distinction should not be exaggerated. Every discussion needs starting points. Every negotiation presupposes a set of endowments and assumptions about what will happen in the absence of agreement. The distinctive tendency of Pragmatism is to insist, as a descriptive matter, that these starting points are usually indeterminate, and as a normative one, that people should regard them as provisional.

The Pragmatist conception of problem-solving connotes a less bounded activity than rights enforcement. A right connotes a claim for an individual benefit, and rights enforcement connotes finality. Liberal lawyering is a series of discrete self-contained cases.[91] By contrast, in Pragmatism problems can ramify broadly, and problem-solving is a continuous activity. Every resolution is provisional and incorporates assumptions about its evolution and potential transformation.

Thus, a "problem" can have a range of dimensions. It could be a demand for compensation for a particular injury; it could be a challenge to an established processing for compensating such injuries. Pragmatism

[91] Many liberal lawyers do not, in fact, think of their work in this way. They think of their cases as having a cumulative significance in terms of over-arching projects. But this is just one of several ways in which their ideological premises are inconsistent with their more fundamental self-conception.

blurs the distinction between moves within a framework and challenges to frameworks. An ostensibly routine complaint is a possible source of information and initiative that may suggest broader revisions. The dimensions of the problem may change in the course of discussion.

The courts are less central in this view. In the first place, assumptions about what institutions are good for have to be tested by experience, not incanted as dogma from 18th century political theory. The American judiciary appears to be doing a very poor job of enforcing a broad range of rights. In the second place, problem-solving usually requires collaboration among different kinds of institutions.

Finally, Legal Pragmatism is inclined to focus on future collective benefit rather than compensation for past wrongdoing. It emphasizes the high cost of pursuing corrective justice through the legal system. Proving and punishing wrongdoing is costly both because it requires difficult factual inquiries about the connection between past conduct and current injury and because it polarizes the parties and encourages procedural conflict. Judicial decisions about rights are increasingly controversial and often fail to alleviate feelings of injustice, or may aggravate them. The distinction between people who suffer injuries from past wrongdoing and those who suffer from similar conditions but cannot trace them to specific wrongdoing seems arbitrary in many contexts.

As an example of the Legal Pragmatist emphasis on solutions, consider a proposal by Archon Fung, Dara O'Rourke, and Charles Sabel for the human rights problem of international labor standards.[92] They propose a system of auditing conducted by nongovernmental organizations in accordance with agreed performance measures. The results as well as the basis of the audit would be publicly reported. Firms with similar products could be compared within and across nations. The more successful firms could be rewarded in various ways – for example, procurement preferences by public and nongovernmental organizations, consumer goodwill, good public relations; the less successful would penalized through analogous mechanisms. For them, they key point is that standards could be expected to "ratchet" upward, as the frontrunner firms demonstrated possibilities of better performance.

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[92] Archon Fung, Dara O'Rourke, and Charles Sabel, Can Sweatshops Be Stopped? (2002).

They favor this approach over a more conventional one that would set universal minimum conditions and impose a single set of powerful sanctions against violators. They object that there is no way to derive such conditions analytically and that no institution could acquire enough information to formulate such criteria effectively. They argue that compliance should not be prescribed in general categorical terms. Different expectations should be applied to countries in different circumstances, and standards should be revised quickly as new learning becomes available. Their approach is only indirectly punitive; it tries to acknowledge and harness the common interests of firms and workers in technological advance that makes possible better working conditions and productivity.

B. Operating Premises

The core operating premises of Legal Pragmatism are stakeholder negotiation, transparency, and rolling rule regimes.

1. Stakeholder Negotiation[93] Ideally, problems are solved by negotiation among the people and groups interested in them. Effective negotiation involves a decentralized deliberative process supported and channeled by central public institutions.

a. Deliberation. Deliberation connotes openness and reason-giving. Openness means both a commitment to volunteer relevant information and willingness to consider opposing positions. Reason-giving means an effort to explain and discuss one's position in terms of general or public values. How limiting this condition is will depend on the circumstances. In many contexts – for example, small informal groups of people accustomed to speaking in this manner – it should not exclude first person narratives or discussions of feelings. What the reason-giving condition most commonly constrains is bargaining based on threats or claims about the relative power of the parties to inflict injury on each other. The main objection to such bargaining is that it impedes the search for mutually beneficial solutions.

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[93] See Archon Fung, "Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing," 29 Politics and Society (2001); Archon Fung and Eric Olin Wright, "Deepening Democracy: Innovations in Empowered Participatory Governance," 29 Politics and Society (2001).

The goal of negotiation is consensus – voluntary agreement by all stakeholders on the basis of a shared normative understanding.[94] It would, of course, be naïve to think that such a goal can be routinely or even often attained, and Pragmatists are usually ready to settle for much less. The consensus ideal plays an important heuristic role, however. Striving for consensus, even when unsuccessful, expresses respect for all stakeholders and puts pressure on the parties to try to understand each other and search for mutually beneficial solutions.

Of course, negotiation necessarily takes place against a background in which participants have selfish interests and assumptions about their distributive entitlements. The Pragmatist, however, relies on "bootstrapping" – the bracketing of self-interest and distributive claims in order to focus attention on common interests and values.[95] The bootstrapping idea is that, once participants start to search for mutually beneficial solutions, both their conceptions of the problems and the range of plausible responses is likely to change. As this happens, the boundaries of self-interest and the distinction between distributive claims and policy responses are likely to blur. As long as there is any possibility of significant, mutually beneficial exchange, people cannot be sure what their interests are, and if they cannot be sure what their interests are, they cannot be sure whether and to what extent it is in their interests to assert their rights. Once they start to do so, the more daring the solutions considered, the less clear it will be how they map onto the selfish interests of the parties. To the extent that this mapping is impeded, the parties find themselves forced into a kind of "original position" in which they have to decide on the basis of the common interests because they cannot figure out what their individual interests are.

Consider, for example, the positions of public defenders and treatment providers deliberating about a drug court regime.[96] The public defenders may fear that they will lose prominence once treatment

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[94] See Lawrence Susskind, "An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad Hoc Assemblies That Want to Operate by Consensus," in The Consensus Building Handbook (Lawrence Susskind, Sarah, McKennan and Jennifer Thomas-Larner ed.s 1999).

[95] See Charles Sabel, "Bootstrapping Reform: Rebuilding Firms, the Welfare State, and Unions," 23 Politics and Society 5 (Winter 1995).

[96] See Michael Dorf and Charles Sabel, "Drug Courts and Emerging Experimentalist Government," Vanderbilt Law Review (200).

becomes the focus of the process. The treatment providers may anticipate greater prominence. But the new regime subjects the treatment providers to new mechanisms of accountability that may reduce their autonomy and result in reduced rewards for the less effective ones. The new accountability procedures may create new roles for the lawyers. It is hard to be selfish when you cannot figure out what your position will be.

Bootstrapping is the Legal Pragmatist's substitute for, or complement to, Republican civic virtue. The Republican citizen is motivated to virtue by a strong sense of solidarity and honor. For the Pragmatist citizen, such dispositions are supplemented by social circumstances that present them with the possibility of generally valuable reforms in which they cannot clearly separate out individual from collective interests.

Note that the bootstrapping idea implies a different view of legal process from the one often associated with the common law that emphasizes the virtues of narrow controversies and case-by-case decision-making. In Cass Sunstein's recent version, by deciding "one case at a time" within narrow frameworks, we get the benefits of "incompletely theorized agreement."[97] We resolve conflicts more readily by looking for a confined space where differing views converge and bracketing broader issues on which it will be harder to reach agreement.

The Pragmatist approach has some kinship with this view. Part of the idea of "problem solving" is to focus attention on matters that are of practical importance to the participants and thus divert attention from merely abstract, moot, or academic disagreement. But defining issues in practical terms is not the same as defining them narrowly. In Pragmatist negotiation, problems have a tendency to expand. A discussion about police responses to street crime may implicate a landlord's tolerance of drug dealing or the housing code agency's failure to cite the landlord for code violations, or the park department's failure to light a neighboring public facility at night. A discussion of failing student performances might start out with a focus on the classroom practices of particular teachers but might move to the patters of collaboration and supervision of the school as a whole.

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[97] Cass Sunstein, One Case at a Time (1999).

Moreover, enlarging the problem has a tendency to increase the bootstrap effect. As the problem is defined more broadly and the spectrum of potential resolutions grows, the difficulty of mapping self-interest, and the consequent openness to possibilities of mutual benefit, intensifies. No doubt there are dangers of unconstrained expansion of issues, but the Pragmatist approach emphasizes advantages that the common law approach ignores.

b. Background institutions. Negotiation takes place in the shadow of a court or other governmental institution or set of institutions. These background institutions perform three roles.

First, they they induce affected parties to negotiate and insure their representation. Especially powerful stakeholders may see no need to negotiate. Some stakeholders may be excluded without intervention. A common criticism of negotiated settlements – "devolved colloboration" – in environmental regulation is that they are often concluded without adequate representation of key stakeholders. For example, the "Quincy Library Group" settlement between local logging and resident interests in the Plumas National Forest in California, which has been approved in a federal statute and promoted as a model for environmental regulatory negotiation, was concluded without the participation of the United States Forest Service or any national environmental groups.[98] Luke Cole, reporting on three negotiations by "local assessment committees" over toxic waste facility siting under a California statute, concludes that two were unsuccessful because poorer and Latino residents of affected communities were not effectively represented.[99]

Government can try to secure representation by directly prescribing the composition of institutions as a condition of support or as a condition of giving legal efficacy to negotiated arrangements. Local school councils, for example, in "new accountability" educational reforms typically must have designated numbers of representatives for

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[98] Timothy Duane, "Community Participation in Ecosystem Management," 24 Ecology Law Quarterly 771, 784-97 (1997); 16 U.S.C. 2104 (codifying the Herger-Feinstein Quincy Library Group Forest Recovery Act of 1998). See generally Sheila Foster, "Environmental Justice in an Era of Devolved Collaboration," 26 Harvard Environmental Law Review 459 (2002).

[99] Luke W. Cole, "The Theory and Reality of Community-Based Environmental Decision-Making: The Failure of California's Tanner Act and Its Implications for Environmental Justice," 25 Ecology Law Quarterly 733 (1999).

parents and teachers, elected by each constituency. Often negotiation and representation can be induced indirectly by the setting of defaults. Logging interests that were previously unwilling to negotiate about the Plumas forest were brought to the table by a federal regulation drastically reducing the amount of timber they could harvest without some kind of variance or waiver.[100] The Endangered Species Act has induced landowners to negotiate over eco-system governance by effectively making large-scale development of many sites impossible in the absence of local stakeholder agreement.[101] Representation of disadvantaged groups can be encouraged by giving them strong rights to block settlements negotiated in their absence. For example, in many cities, strong resident rights to challenge major real estate development encourage developers to negotiate with community groups.[102]

It is not important that these default conditions be precise, and indeed, it is often desirable that they be uncertain. The conditions might then perform as a kind of "penalty default"[103] – a result that no one wants, and thus gives everyone an incentive to search for alternatives.

Second, the background institutions provide support for the negotiations. One or more of the parties may require professional assistance in structuring and conducting the negotiation, for example, a mediator or facilitator. To the extent that understanding of the problem requires factual information or technical expertise, researchers and experts may be helpful.

Archon Fung's study of local participation in school decentralization and "community policing" reforms in Chicago gives examples. Fung finds that participation in both processes is as extensive in poor and minority neighborhoods as in others, and he finds evidence of efficacy in poor and minority neighborhoods. However, he also emphasizes the importance of support from the city. In one of the schools where the parents' council seems to have made a difference, the council was able to collaborate only after the school's poor performance triggered the arrival of an "intervention team" of professionals from the

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100 Duane, cited in note , at 786.

101 Karkkainen, at

102 William H. Simon, The Community Economic Development Movement: Law, Business, and the New Social Policy (2001).

103 Ian Ayres and Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 Yale Law Journal 87 (1989).

board of education. The team's report drew the council's attention to issues they hadn't considered before and helped them organize their discussions. Similarly, participation in setting policing priorities in a mixed-income beat was dominated by residents of its relatively affluent sector at the expense of poorer neighborhoods until a facilitator provided by the police department helped organize the meetings. The marginalization of the poorer residents was apparently not deliberate; it arose from an unstructured style of conducting meetings that favored more self-confident and articulate speakers. When the facilitator adopted a more systematic approach, new voices were heard, and the group developed consensus around different set of priorities.[104]

Third, the court or coordinate institutions give legal form or effect to the solution and assist in monitoring and enforcement.

The role of the state then is not impose or devine an outcome, but to induce and assist the parties to negotiate one and to assist in its implementation.

2. Rolling Rule Regimes. Just as every default rule is regarded as no more than a starting point to be readily discarded as better options are discovered, so every negotiated consensus is a starting point for a continuous effort of implementation. Legal Pragmatism resists the tendency in some versions of the Alternative Dispute Resolution movement to celebrate agreement as a definitive resolution of conflict. It makes no strong distinction between negotiation and implementation. Even if entirely in good faith, the parties will not be able to anticipate the contingencies that arise in implementation. These contingencies will generate new information and present both challenges and learning opportunities. Thus, a pragmatist solution incorporates procedures for self-revision.

Moreover, while Pragmatism does count as a virtue of deliberative negotiation its potential to induce good will among participants, it does not rely more than marginally on altruism. The implementation regime is thus a regime of accountability designed to hold participants to their commitments in a precise way.

"Rolling rule regime" expresses this notion of implementation as a process of both learning and accountability. A rolling rule regime includes process norms and performance norms. The process norms

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[104] Archon Fung, "Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing," 29 Politics and Society (2001).

specify how operations are conducted – how teachers address a particular reading difficulty, how manufacturers handle a toxic chemical, how drug treatment providers respond to client relapse. The performance norms measure the results of such operations – the levels at which students read, the amount of use or discharge of a toxic, the degree of self-control of the addict. Commonly, though not invariably, actors are assessed primarily on the basis of performance norms. Specified process norms enable more precise measures of performance and mitigate the danger of arguments as to whether commitments have been met.

Although actors typically must adopt explicit process norms, they have discretion over which ones to adopt. In this approach, the process norms are not a direct basis for sanction or reward; the performance norms play this role. The process norms have two functions. First, they encourage systematic and self-conscious planning and self-appraisal within each institutional actor. Explicit norms make the practices easier to teach to those who were not part of the discussions that produced them. Even for the participants, the pressure to be explicit can enhance mutual understanding. Reliance on tacit understanding risks that the parties are making different assumptions without realizing it. And the duty to explicate one's assumptions can often clarify thought.

Second, they facilitate diagnosis and learning among institutions. When actors lag in performance, outside evaluators can more readily determine the problem when the practices are explicitly defined. When actors perform well, their peers can learn from their success by consulting their process norms. Thus, the process norms of the most successful actors become "best practices" available for incorporation by peer institutions.

For example, in "new accountability" education reform, districts and schools adopt improvement plans consisting of process norms. Often, teachers must have explicit lesson plans for each class and sometimes even explicit improvement plans for each student. The institutions and the teachers get support from central institutions, and struggling institutions and teachers will receive firm direction, but they will retain a range of discretion. They are then periodically assessed by outcome measures, such as standardized test scores, drop-out rates, attendance and truancy patterns, and completion of college course

requirements. Performance scores are publicly reported and trigger rewards, sanctions, and assistance.[105]

In the safety monitoring regime of the nuclear power industry, plants must have detailed protocols for such matters as maintenance and responses to operating irregularities. At the same time, they are periodically assessed on such measures as radiation emission levels, lost work time from any type of accident, and unplanned shutdowns. Performance rankings based on these measures (adjusted for plant size) are distributed throughout the industry and two regulators.[106]

Norms in this type of regime have four key characteristics. First, continuous revision. Both process and performance norms are always regarded as provisional. The process of implementation is simultaneously a process of revision. The process is driven first by the performance measures, as poor performance prompts review of the actor's process norms and a search for better practice models among more successful peers. But the performance norms themselves are reconsidered. The participants have to be open to the possibility that a poor score may indicate a defect in the measure, rather than in the performance. Or that, even if the score is high, the norm is having counter-productive effects. If the norm forces "teaching to the test" – focusing on a narrow range of instruction that has little benefit outside the test – then there should be discussion of changing or revising the test or supplementing it with alternative measures. Thus, the initial stakeholder negotiation is not a definitive settlement but the beginning of an on-going process.

The second characteristic of a rolling rule regime is local experimentation. The norms require the actors to submit to specified assessment of their performance, and attach consequences to that assessment, but they leave the actors broad discretion as to how the perform their roles. Actors must plan explicitly and collaboratively. Schools need improvement plans. Drug treatment centers must have treatment plans. Industries in Massachusetts must have "reduction plans" for toxic use. But they retain discretion over the contents of the plans. The best performers are unconstrained. The worst are more

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105 See Liebman and Sabel, cited in note

106 See Dorf and Sabel, cited in note , at ; Joseph Rees, Hostages to Each Other: The Transformation of Nuclear Power Safety Since Three Mile Island 67-121 (1994).

closely supervised but still retain discretion to tailor the plan to their own assessments of local conditions.

The third characteristic is scaling. Conventional regulations are binary. They specify fixed conditions of compliance; an actor is either in compliance or not. In contrast, a rolling performance measure often ranks the actor on a graded metric. The California prison medical care assessment system prescribes for the weighting over various performance measures to produce a single audit score for each institution. The Texas Public School Accountability System produces "report cards" for each school that shows how it ranks on various measures in comparison to institutions with similar socio-economic student bodies. The Toxics Release Inventory shows discharges of specified toxics from each reporting facility in terms of numbers of pounds. This approach gives more precise information than a binary compliance norm. It enables identification of the more serious failures among the lagging performers. It makes it possible to measure improvement over time in particular actor's performance. It also yields information about the frontier of possibility from the superior performers. The regimes often specify minimum performance scores and attach consequences to failure to meet them. But these minima are provisional. The expectation is that they will "ratchet up", as the leaders push back the frontiers. This might be the expectation in a conventional regime of binary norms as well, but unlike a rolling rule regime, the enforcement of binary regime does not itself generate the information needed for revision of the norms.[107]

Finally, rolling rule regimes require standardization to facilitate comparability. Comparative assessment is only possible when performance is measured in common terms. Thus, a key rule of central institutions in a rolling rule regime is to devise and propagate common metrics. Standardized tests perform this role in education. Some regimes provide an explicit structure designed to facilitate comparison. Thus, the Texas education regime constructs for each school a set of

[107] Not all regimes that invoke pragmatist themes and rhetoric have this scaled quality. For example, the fair labor practice norms of the Social Accountability 8000 standards are binary and lead to a single categorical judgment regarding certification. See Social Accoutability International, cited in note . From a Legal Pragmatist point of view, this is a serious failing. The standard would be more effective if it formulated scaled performance metrics and mandated disclosure of audit assessments.

socio-economically comparable peers against which it is compared on various dimensions. The Toxics Release Inventory is less structured. In simply mandates disclosure of discharges in terms of a simple metric – pounds – along with accompanying information about the nature of the facility. Users can combine the data in various ways, depending on their interests. For example, they can determine discharge in relation to facility size or density of surrounding population.[108]

From the point of view of system design, the key task is to devise measures that are uniform and that track the dimensions in which comparative measurement is most important. Some earlier school testing regimes produced scores that were valid only at the district level, rather than the school level. This is inadequate for a system that gives basic initiative to schools. A test system that reports only school averages risks overlooking the shortchanging of poor or minority students in mixed-race or –income schools. Thus, the new systems typically report separately for different racial and income groups.

Viewed in jurisprudential terms, the rolling rule regime represents an important contribution to the analysis of the choice between rules and standards. We saw that Legal Liberalism tends to opt for rules for people it does not trust and standards for people it trusts. Both moves prove disappointing because the rule-maker never has enough information to frame or enforce the rules properly, and standards-based decisionmaking tends to become inconsistent and unaccountable. We can try to mitigate these problems by developing better institutional infrastructure for the type of normative regime we choose (for example, better monitoring of rule appliers; more educational requirements for standards appliers).

But the Pragmatists found in contemporary industrial practice, as pioneered in the Japanese automobile industry, a type of normative approach that is not captured by the idea of either rule or standard as they appear in the legal literature.[109] In the Toyota manufacturing system, the practice of most workers is specified by minutely detailed written norms. Viewed statically, these norms are conventional rules, but viewing them statically ignores an important dimension. In practice, situations

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[108] See Karkkainen, cited in note , at

[109] The seminal Pragmatist work is Charles Sabel, "Learning by Monitoring: The Institutions of Economic Development," in Handbook of Economic Sociology 138-65 (Neil J. Smelser and Richard Swedberg, ed.s 1994).

frequently arise in which it is impossible or inappropriate to follow the rules. An approach to such a situation characteristic of other production systems is to build into the rules some standards-type exception for extraordinary situations, or simply to afford tacit discretion to disregard the rules when following them would be counter-productive. But the Toyota approach is different. Ad hoc adjustments to unforeseen circumstances are discouraged. The preferred response is to suspend operations in order to consider what is wrong with the norms, to revise them (in accordance with specified procedures that look somewhat like stakeholder negotiation), and then to re-commence in accordance with the re-stated norms.[110]

The process thus combines, in a manner not contemplated by rules/standards jurisprudence, the form of the rule with the continuous adjustment to unanticipated particularity associated with the standard. Of course, decisions vary in the extent to which they lend themselves to formalization. And there are different avenues to formalization; paradigmatic examples can be used instead of indicative commands. The basic idea is to capture as explicitly as is feasible a constantly changing practice.

Recent practice with respect of social policy appears to have been influenced by the kind of industrial practice exemplified by Toyta. In their study of school reform, Liebman and Sabel observe in some of the most notable developments, such as the much admired work of District 2 in Manhattan, a trend toward practices that combine formalization with continuous self-assessment and revision in ways analogous to the Toyota system and quite foreign to the rule-v.-standards analysis.[111] Traditional conception of professional practice is based on standards. Practice takes the form of partly tacit knowledge informally communicated among peers through observation of exemplary performances and case studies. But the new approaches in places like District 2 demand systematic articulation of and assessment of practices through detailed lesson and student improvement plans and standardized testing. New diagnostic techniques in reading encourage the detailed coding of student patterns for diagnostic purposes.

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[110] See Paul Adler, "Time and Motion Regained," Harvard Business Review (Jan.-Feb. 1993), 97, 103-05; Mathilde Bourrier, "Elements for Designing a Self-Correcting Organisation: Examples from Nuclear Power Plants," in

[111] Liebman and Sabel, cited in note , at

3. Transparency. The third operating premise is transparency, or open access to information. The premise applies at two levels. At the level of stakeholder negotiations, the parties must commit to volunteer material information. This is a pre-requisite for both trust and effective learning.

At a general level, transparency is essential to the kind of information pooling that facilitates peer comparisons and the learning they generate. Thus, we've seen that an important role of background institutions is both to develop metrics to facilitate the comparison of data across institutions and to create incentives for these institutions to make information available.

The Pragmatist view of transparency involves a significant challenge to the Legal Liberal's (and the bar's) values of confidentiality and lawyer information control. Pragmatism can probably accommodate a limited confidentiality for intimate matters and perhaps proprietary business information, but it is committed to oppose broad professional evidentiary privileges and confidentiality duties, weak discovery and disclosure systems, and compressed, histrionic, partisan-dominated trial proceedings. The Citizen Perspective and the Associative Democracy principle also suggest that, where direct participation in public decision-making is possible, it should not be strongly dependent on professional representatives.

The Pragmatist program thus rejects the bar's argument for confidentiality as a safe harbor in which people can make disclosures they would otherwise be afraid to make to lawyers who will channel them along law-abiding paths. Among many objections to this view, two are especially salient in Legal Pragmatism. First, at most, the bar's argument promises compliance with established requirements.[112] But in a regime of continuous revision, this is insufficient. For the latter purpose, any information that might disclose problems with or potential improvements to the rules is relevant. Disclosure may be important even where there is compliance with the rules in their current formulation.

Second, the lawyers' approach to confidentiality deals with a real need in a crude and heavy-handed way. The real need is to induce transparency. The lawyer's approach is a categorical safe harbor for disclosures, as long as they are made to lawyers. This approach is over-

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[112] Even in this context, the argument is unconvincing. See William H. Simon, The Practice of Justice: A Theory of Lawyers' Ethics 54-62 (1998).

inclusive, since it immunizes many disclosures that would be made anyway or that have little social value (because the lawyer's response does not lead to compliance). It is also under-inclusive because it is limited to lawyers.

Consider again the question of disclosure of medical errors. A regime of continuous improvement would require pooling of information by hospitals about both errors and efforts to correct them. However, if such disclosure would expose them to a massive increase in lawsuits and damage judgments, the hospitals would feel constrained to forego them. For their part, the trial lawyers invoke the Legal Liberal principle of confidentiality and lawyer information control to insist that the only confidential disclosures the hospitals can make are to their lawyers. Discussions with lawyers, of course, of little use for the purpose of systemic improvement.[113]

The commitment to transparency implies a corresponding disposition against harsh punitive sanctioning. Pragmatism tends to favor soft enforcement. Failure triggers supportive intervention first. When it does trigger coercive sanctions, they are often mild or indirect, such as the shaming associated with publicly disclosed poor performance. Sometimes severe but vague sanctions in the nature of "penalty defaults" to induce negotiations are threatened, but they are seldom applied. Of the characteristic sanctions in pragmatist regimes, the most severe involve not punishment, so much as loss of control. The prescribed ultimately sanction for failure in public institutions is receivership.

The Texas Public School Accountability System is an especially well-developed example. It forces broad public disclosure of a large amount of information pertinent to assessing school performance. But indicia of poor performance do not lead immediately to harsh performance. Indeed poor performers initially receive targeted resources to assist them in improvements. The main sanctions involve loss of autonomy -- increased supervision by central authorities and ultimately receivership -- but these are gradually phased in over time. More drastic sanctions are disfavored precisely because they encourage hiding or distorting information.[114]

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[113] See Institute of Medicine, To Err is Human: Building a Safer Health System 86-131 (2000).

[114] See Liebman and Sabel, cited in note , at

Pragmatism has three reservations about punitive enforcement. First, failure often arises from incapacity rather than deliberate action.[115] If this is the case, punishment may simply aggravate the situation. Thus, critics assert that some "high stakes testing" reforms that attach substantial financial rewards or penalties for teachers and principals to student performance on standardized tests are misguided. Some of these tests measure performance in ways that provide relatively little diagnostic information pertinent to teaching practices. Moreover, most poor performers require some assistance to identify and rectify the practices associated with their poor performances. The 1996 welfare reform legislation has also been criticized for combining arbitrarily strict outcome standards with counter-productively harsh sanctions. Such measures seem to invoke the rhetoric of decentralization and experimentation to cosmeticize recklessly draconian cutbacks. The regimes most consistent with the Pragmatist view downplay tangible sanctions and emphasize assistance for change.

Second, severe punishment requires a considerably higher level of information than softer or less hostile interventions. For any intervention, the regulator has to calculate both the compliance threshold that will trigger it and its proper magnitude. But severe punitive interventions may be less reversible than others and hence require more planning and information. If severe sanctions cause a school or a plant to close, it may not be easy to reconstitute it. Moreover, the prospect of severe sanctions triggers defensive responses on the part of those facing the sanctions and invokes expensive legal procedures. The evidentiary threshold the courts require to sustain a punitive regulation or its application in a particular case is often expensive and sometimes prohibitive. By contrast, softer interventions can be taken informally.

Finally, the prospect of severe punishment increases the costs of transparency to some participants and encourages them to distort or resist disclosure. At worst, it induces fraud. "High stakes" testing in education appears to have inspired a substantial amount of cheating and misreporting by teachers.[116] At best, it discourages voluntary disclosure and fuels claims for confidentiality or proprietary rights with respect to information of public importance. The recent increase in criminal

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[115] See Chayes and Chayes, cited in note , at 13-15 (emphasizing incapacity as a source of noncompliance with international legal regimes).

[116] Chicago newspaper cite

prosecutions for lying to federal investigators or Congressional committees may have had a bigger effect in discouraging people from volunteering information for fear they will inadvertently incur liability than in deterring deliberate lying.[117] The tendency we noted above of witnesses to refuse to speak in Congressional hearings without the presence of lawyers is sometimes explained in these terms.

Pragmatist programs tend to reserve the most severe sanctions for violation of disclosure duties. Examples of approaches in this spirit are "safe harbors" for accurate disclosure, ranging from the South African Truth Commission to the products liability provisions of the Restatement 3d of Torts that give manufacturers immunity from tort damages if they both comply with applicable administrative regulations and disclose to regulators any information they have suggesting that the regulations are inadequate.[118] Similarly, the enforcement activity most emphasized in these regimes is the independent auditing of reports of performance assessments. To an extent, these programs are premised on the idea that, if the integrity of the information is assured, proper conduct will follow without punishment.

The Pragmatists emphasize that, without formal state-imposed sanctions, transparency can trigger informal pressures for compliance.

Clearly, to the extent that noncompliance results from incapacity, and transparency succeeds in exposing both poor performance and the methods associated with adequate performance, it can be self-enforcing. Moreover, private producers sometimes discover that compliance with regimes designed to achieve social goals have unanticipated synergies with cost-cutting and product quality strategies that enhance profitability.[119]

It also seems clear that pride in good performance and shame at bad performance will create incentives of compliance in a regime of transparent performance ranking.[120]

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[117] Jeffrey Rosen, "The Perjury Trap," New Yorker

[118] Restatement 3d of Torts sec.s

[119] See Sally Goodman and Det Norske Veritas, "Is 14001 an Important Element for Business Survivial?", www.iso14000.com (visited October 22, 2002).

[120] Rees attributes substantial effects to forces of honor and shame associated with intra-industry disclosure of safety performance rankings in the nuclear power industry. Rees, cited in note , on 106-18.

For private producers, reputation potentially influenced by performance rankings can affect profitability through customer choices. A sufficiently large fraction of consumers of some products are influenced by concerns on such matters as a maker's labor or environmental practices for manufacturers to be intensely concerned about their public images with respect to these matters. Such concerns have prompted many garment manufacturers to sign up for various monitoring regimes. General Motors and Ford are among the companies who require all their suppliers to have their environmental practices certified under ISO 14001[121] -- the International Standard Organization's environmental management norms -- apparently in part out of concern for public relations.

No doubt the strength of the customer reputation effect varies with issue and product, but it can be large. As this is being written, a major decline in the value of Martha Stewart's media company is being attributed in substantial part to the effect on her image of the disclosure that she may have engaged in illegal trading in the stock of another company. The loss in value is in the range of 100s of millions of dollars; the potential formal sanction is trivial in comparison.

In the public sphere, transparent assessment regimes can interact with the electoral process. School reforms often accompany rolling rule regimes with the establishment or invigoration of elected school site councils, sometimes with powers to hire and fire principals. The "report card" sent parents by the Texas regime is designed in part to influence their votes for local school officials.

Local public officials may consider the performance rankings of industries in deciding how to exercise there discretion with respect to such matters as land use permissions, regulatory waivers, or the allocation of business subsidies. And industries may strive to avoid low ratings for fear that, even though no punitive sanctions are currently provided, they may prompt citizens to push for harsh sanctions in the future, or that courts may decide that they indicate that tort duties of care have been violated. Such vague background threats of liability may be far more effective than specific and explicit ones. They are more easily revisable, less likely to generate expensive legal challenges, and more likely to prompt productive discussion and negotiation.

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[121] "Companies Encouraging ISO14001 Registration," www.iso14000.com (visited October 22, 2001).

Some combination of these informal pressures apparently explains the success of the federal Toxics Release Inventory and the Massachusetts Toxics Use Reduction Act. The federal statute requires only public disclosure of toxic discharges. The Massachusetts act requires a plan for reducing toxic use, but does not mandate any quantity of reduction. The statutes impose no sanctions for anything except failure to disclose and, in the Massachusetts case, plan. Yet, both appear to have induced substantial reductions in toxic polluion.[122]

The transparency commitment implies a loss for lawyers of the comparative advantage that the attorney-client evidentiary privilege gives them over their competitors and a need for them to develop new practice models. Conventional litigation practice is unsuited to Pragmatist problem solving. So are the forms of transactional practice dominated by distributive bargaining. But lawyers have recently been experimenting with different practice styles in connection with Alternative Dispute Resolution. And in some business contexts, where client firms structure their relationships in collaborative, problem-solving terms, the lawyering styles presently involve many of the features of the Pragmatist approach.[123]

IV. Two Case Studies

Pragmatists are inclined to pursue their ideas in particular practical contexts. So much of the work of the Columbia School takes the form of case studies. We can best pursue the themes of Legal Pragmatism by looking at two of them – Michael Dorf and Charles Sabel's study of drug courts and Susan Sturm's study of "second generation" employment litigation.

In each case, I first summarize the authors' account of the operations in question, then consider how they implicate the background premises of Citizenship, Associational Democracy, and the Priority of Solutions.

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[122] Karkkainen, "Information as Environmental Regulation," cited in note , at 286-94.

[123] See Mark Suchman and Mia Cahill, "The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley," 21 Law and Social Inquiry 681 (1996).

A. Drug Courts[124]

The drug court idea emerged in the 1990s in response to the burden on courts and prisons of the explosion in drug prosecutions, as well as continuing doubts about the efficacy of traditional punishment practices for drug-related offenses. There are now more than 400 local drug courts around the country, encouraged by grants from the federal government and various foundations.

It has long been recognized that the traditional criminal justice paradigm fits poorly with many non-violent drug-related crimes. This paradigm treats each prosecution as a self-contained episode of wrongdoing, which it seeks to resolve by a discrete punishment. From the defense perspective of Legal Liberalism, a key role for the defense lawyer is to impede as much as possible the access of the prosecution and the court to inculpatory information. The defense lawyer will pressure the defendant not to volunteer information; will seek to exclude information that was improperly procured, and will attack incomplete or ambiguous features of the prosecution's case. Or more commonly, she will negotiate away the defendant's right to these manoeuvres in return for a reduced punishment.

An addiction-related criminal act is virtually always a continuing phenomenon. Without effective treatment, the defendant is highly likely to return to the system. To the extent that effective treatment is possible, the defendant shares an interest with the community in having it provided. Punishment is expensive, and the purely retributive concerns with crimes of this sort are small. Thus, courts have long been willing to trade punishment for treatment, say, as a condition of probation. What is new about the drug courts is the way treatment is made the central institutional focus (rather than, say, relegated to a peripheral probation department) and the way the court's processes are structured.

In the most common drug court model, if the defendant asks and the prosecutor consents, charges are filed in the drug court. The defendant concedes guilt, and treatment becomes the focus of the proceedings. The defendant, the staff of the court, and one or more treatment providers under contract with the court negotiate a treatment plan. The plan puts the defendant in one of several "treatment bands",

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[124] Dorf and Sabel, cited in note

which specify obligations on the part of the defendant and the service provider and sanctions for non-compliance. The 'band" determines the frequency of urine testing, program attendance, court appearances and case management meetrings. The defendant's duties are likely to include passing drug tests, court appearances, meetings with treatment professionals, refraining from illegal conduct, and other conditions. A schedule of sanctions is specified for different infractions. The program treats infractions as normal in the sense of likely, but it also emphasizes the importance of calibrated sanctions. Compliance is rewarded by progression through less and less restrictive "bands." At each stage, the defendant gets more autonomy.

The defendant appears periodically before the judge, accompanied by a report on his progress by the primary treatment provider. In the event of infraction, the judge decides from a menu of specified sanctions which to impose. The judge can also consider proposals for modification of the plan.

The treatment plan is individualized in two limited respects. The plan matches the defendant to the most appropriate of the several patterned "bands." There is also some discretion within each band to tailor the plan to specific needs of the defendant. And the bands themselves are revised in the light of experience in the program.

At the same time that the court is monitoring the defendant, it is monitoring its treatment providers, and the court itself is being monitored by a network of government and non-governmental organizations. Sub-contracting with multiple treatment providers allows the court to compare their performances, to encourage learning among them, and to sanction or terminate poor performers. The same data can be used to evaluate the court's own overall performance by the Office of Justice Programs of the Department of Justice or the Drug Court Standards Committee of the National Association of Drug Court Professionals. Data can be collected and compared on such indicators as program completion rates, recidivism rates, and program cost. These organizations provide technical assistance and facilitate exchange of information among programs.

Assessment requires transparency at all levels. The defendant must submit to extensive surveillance of his personal life. All the data on his course of treatment is available to the judge and team of professionals working with him. For their part, sub-contractors and the

court must make aggregate data on results and diagnostic information relevant to explaining success or failure.

Assessments comparing the performance of the drug courts to more traditional approaches are encouraging.

Now consider how these programs implicate the background principles of Citizenship, Associative Democracy, and Problem-Solving.

First, citizenship. These programs arise from a self-conscious rejection of the Victim Perspective as applied to drug addiction. The Victim Perspective tended to argue against punitive or coercive responses to addiction on the grounds, first, that addiction resulted from social conditions for which the victim should not be blamed, and second (somewhat contradictorily) that effective treatment could not be coercively imposed. Thus, the preferred remedy was decriminalization coupled with the expansion of voluntary services.

The drug court movement was influenced by recent research suggesting that, in fact, addicts are as likely to respond to coercive as to voluntary treatment, perhaps more likely. These studies suggest that repeated relapse is normal, even in successful cases, and that they are minimized by a schedule of certain but graded sanctions and rewards.

Although the orientation of these studies is medical rather than political, the approach they prescribe associates autonomy and responsibility in the manner of the Citizenship idea. Drug courts subject the defendant to a potentially infantilizing loss of autonomy. But this deprivation is premised on the conceded fact that through addiction he has lost at least some of the capacity for responsible action. The program involves the defendant in the planning for his own treatment. It responds to demonstrations of increased responsibility with reduced supervision. Moreover, at least in principle, the program makes itself accountable to the defendant for providing the services in the negotiated plan.

Second, associative democracy. The first of the current drug courts was established in Dade County, Florida, in response to local protests over the harshness and ineffectuality of conventional responses to drug cases. When the Department of Justice under Janet Reno, who had been Dade County District Attorney when the Florida experiment occurred, sought to encourage such programs, it stipulated as a condition of support that a local team of court personnel, prosecutors, and defense lawyer be constituted to plan and monitor the project. Many drug courts

are community courts with narrow, geographically-defined jurisdictions. Such courts encourage community participation through advisory boards, community mediation panels, victim-offender impact panels, and town hall meetings.[125] And many of the service providers who provide treatment and participate in revision and evaluation of the treatment providers are local nongovernmental organizations.

The Priority of Solutions operates at two levels. At the level of the individual, it broadens the view of what is at stake from an isolated episode of wrong-doing to that of a long-term condition and emphasizes the possibilities for mutual gain through treatment. At the same time, it treats the negotiated resolution as a starting point to be improved in the course of experience. At the systemic level, the Solutions principle appears in the view of the program, not as a mechanism for resolving discrete disputes or vindicating an established set of entitlements, but as a provisional, revisable approach to a social problem.

B. Second Generation Employment Discrimination[126]

"First Generation" employment discrimination claims tended to involve allegations of "disparate treatment"— more or less explicit policies or practices directly disadvantaging women or minority groups. The characteristic legal response was a lawsuit for damages for the identifiable victims or an injunction forbidding the discriminatory practices.

"Second generation" claims tend to involve allegations of "disparate impact" – practices that are not discriminatory on their face but seem to produce effects that consistently disadvantage women or minorities. Salient examples are claims based on subjective hiring and promotions practices and sexual harassment claims that allege a "hostile work environment." In both cases, the defendant employer responds that it has merely delegated authority to lower tier decision-makers, invariably with instructions not to discriminate. Most often, it will claim to have been unaware of any discriminatory acts, and sometimes there will have been no overt ones. The plaintiff's case consists mainly of a showing that women are disproportionately passed over in hiring and

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[125] See Greg Berman and John Feinblatt, "Problem-Solving Courts: A Brief Primer," 23 Law & Policy 125, 127 (2001).

[126] Sturm, "Second Generation Employment Discrimination," cited in note .

promotion or that they are not comfortable in, or tend to leave, the allegedly hostile environment. The courts have indicated that plaintiffs can establish liability with disparate impact evidence. However, the first generation remedies seem unsatisfactory in this context. The wrongs are not susceptible to redress by specific negative injunctions, and damage awards do not directly change the workplace or give the defendant notice about what it must do to avoid further liability.

Sturm has studied a range of responses to this situation. Some have been negotiated in the course of litigation or in anticipation of litigation. Some have been undertaken voluntarily by firms concerned about employee morale and retention. Regardless of how they originate, they share characteristics of pragmatist practice.

The structures in question are typically instituted after extensive consultation with rank-and-file employees and are designed to facilitate continued consultation. Management might be able to impose a regime of its own devising; so might the employees if they prevailed in litigation. But both sides concede that they lack the understanding to devise an effective remedy without the other. If the remedy arises from a lawsuit, then it is negotiated with employees' counsel, and perhaps with direct participation by some employees. If there is a union (although this apparently is only rarely true), the union will be involved. Sometimes informal employee identity groups participate. The employer can form a task force with employee representation. Instead or in addition, it can invite or solicit employee views through systematic interviewing, telephone hot lines, or grievance procedures.

Managers are required to state as explicitly as feasible criteria for hiring and promotion, and when they deviate from the articulated criteria, to explicitly justify the deviation. The structures involve continuous monitoring based on benchmarks, goals, and indicators of various kinds. Most basically, data on hiring and promotions by race of gender are kept. Often there are goals specified, and progress toward the goals is measured and compared with performances of comparable units. As analysis identifies more specific problems, diagnostic indicators are established. Where lack of training is an obstacle to female or minority promotion, the provision of training can be monitored in relation to the relevant category. And promotional data can be assessed by gender and race relative to a given amount of training. In an accounting firm that discovered that one barrier to women advancing was their

disproportionate failure to get the assignments that led to the most valuable training and contacts, assignments were monitored by gender. Where lengthy out-of-town assignments were identified as a problem for women in balancing work and family, the number and length of such assignments was monitored. Ad hoc grievances can be examined for patterns, and the indicators revised as new patterns are discovered. One company assesses the efficacy of its internal grievance process by comparing complaints made through this process with outside complaints, including lawsuits and complaints to public agencies.

Transparency is important to these regimes in various ways. Data on benchmarks and indicators is available to managers. If there is a consent decree, it is likely to be available as well to representatives of the employee class. Even without litigation, it may be shared with employee representatives. Some companies share such data with each other. An important part of some regimes is the provision of information on training and promotion opportunities to employees. At Home Depot, for example, a computer tracks employee interests and training, notifies both employees and managers when a relevant job opens up, and send notices to monitors when ostensibly qualified workers are repeatedly rejected.[127]

Note how the second generation approach resonates with the background premises of Legal Pragmatism.

The new remedial regime implicates a shift in the understanding of discrimination that parallels the distinction between the Citizen and Victim perspectives. The old paradigm implied that the plaintiff was a victim because it treated the defendant as a villain; discrimination was seen as conscious and malicious wrongdoing. Research, however, increasingly portrays important forms of discrimination as consequence of practices that are as likely perpetuated by indifference or ignorance as by intention. And it also appears that discrimination often arises from basic cognitive practices of categorization and generalization that do not involve malice.[128] There are thus opportunities for learning through

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[127] Sturm notes that the transparency on which Pragmatist approaches depend is in some tension current doctrine because tracking such data may make it easier for plaintiff's to establish liability. Id. at 476. This counter-productive disincentive could be avoided either by giving some limited or temporary immunity to employers for inculpatory data they generate themselves, or alternatively, by imposing a duty on all employers to collect such data.

[128] See, e.g., Linda Krieger, "The Content of Our Categories," Stanford Law Review

mutual engagement. To the extent that the Victim Perspective excessively moralizes the issues and engenders self-righteousness on the part of the plaintiffs or defensiveness on the part of the defendants, it can be counter-productive.

The second generation regimes always involve at least gestures toward employee participation, ranging at the least ambitious, to procedures for individual grievances, to at the more ambitious, incorporation of employee groups into negotiation and monitoring. Without independent unions, initiatives toward Associative Democracy in the workplace are subject to suspicion about employer domination. In litigation, the class action decrees can institutionalize countervailing power.

The Problem-Solving perspective appears from two dimensions. One dimension is the recognition of an interest shared by firm and employees in fair treatment, as illustrated by the fact that some of these regimes have been initiated voluntarily in response to management-perceived recruitment and retention problems. The other dimension is the broadening of the frame for a series of episodic conflicts with discrete static solutions to search from improved structures that contain procedures for learning and self-revision.

IV. Ambiguities and Limitations

So far, Legal Pragmatism consists of a set of theoretical intuitions and a series of case studies. The intuitions are explicitly tentative and incomplete, and the case studies are necessarily ambiguous. Most of them involve nascent experiments. Even if we treat them as success stories, the question remains whether the success is attributable to a limited set of problems or social circumstances, rather than the capacity Pragmatist method to respond to a broad range of problems.

It is to the credit of this kind of theory that it makes its limitations so explicit by eschewing axiomatic formalism and interpreting its findings modestly and tentatively. Yet both the plausibility of Legal Pragmatism as a general orientation and the capacity to apply it to particular problems is constrained by a series of critical ambiguities.

In particular, there are four especially important concerns about the practical approach suggested by the operating premises of stakeholder negotiation, rolling rule regimes, and transparency. If I

focus on the operating premises, it is not because I regard the background premises as less debatable. It is because the operating premises seem the most original but least developed aspect of the Pragmatist contribution.

A. Vagueness About Domain

Legal Pragmatism is sometimes ambiguous as to whether its approach is a complement to Legal Liberalism that is better adapted to some contexts, or rather a global competitor that could occupy the entire field. Deliberative negotiation would seem to have pre-conditions. The parties have to have some uncertainty about how the matter should be or will be resolved, and they have to believe that mutual gain is possible. The parties have to be capable of deliberation, which means treating each other with respect and remaining open to learning. Clearly, these conditions are not invariably satisfied.

The issue of the productivity of deliberation can arise from two perspectives. First, the weaker party contemplating whether to enter a negotiation has to consider whether she will be worse off than if she takes a more aggressive course.[129] She has to worry that she will signal weakness to the opposing party. Or that the negotiations will weaken her coalition by slowing things down, or raising internally divisive issues, or depriving them of the possibility of a clear symbolic victory. She has to worry that, because she lacks skills and information, she may be manoeuvred into a worse deal than she could get by fighting. For example, some unions are reluctant to participate in labor standards monitoring regimes of the sort the Pragmatists recommend for fear that their involvement will be construed as an endorsement of high-scoring firms. Apparently, they are reluctant to give endorsements because they fear they will make mistakes and because they think they can mobilize workers best with a clear message of militance.

Second, the legislator or policy-maker contemplating whether to encourage and support negotiation has to consider whether negotiation will lead to a worse outcome from a public point-of-view than alternative

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[129] See Joan E. Lancourt, Confront or Concede: The Alinsky Citizen-Action Organizations (1979).

interventions.[130] One alternative course to direct support for negotiation would be a revision or re-assignment of rights. We could enhance the rights of the weaker party and then leave it to her to decide whether to negotiate in her strengthened position. For example, if the problem is employment discrimination, we could ease the plaintiff's burden of proof or make punitive damages automatic. The plaintiff's default position – the net value of her claim discounted for time and the risk of losing – would increase, and so would her bargaining power in any negotiation she decided to enter into. If the problem is non-violent addiction-related crime, we could reduce the penalties for it.

Another alternative intervention would to directly strengthen the weaker party, say, by transferring resources or organizing assistance. We could deal with discrimination by making it easier to organize unions or respond to the drug addiction problem by increasing the funding for public defenders.

The Pragmatist tends to respond to both the strategic actor and the policy-maker by emphasizing the indeterminacy of the situation. There are risks to the strategic actor of negotiating, but there are also potential benefits, and more often then not, it is impossible to reliably assess their relative magnitude in advance of entering into the negotiation. But of course, indeterminacy cuts both ways. It is as much a reason to hold back as to leap forward. The Pragmatist's presumption in favor of going forward seems to be based on a predisposition to optimism and a belief that the strongest cultural influences on many strategic actors (Legal Liberalism, for example) are most likely to bias them against negotiation.

The response to the policy-maker seems to be that all three types of interventions – direct support for negotiation, re-assignment of rights, and strengthening weaker parties -- should be considered and that the the latter two will often complement, and rarely pre-empt, pragmatist negotiation. A basic pre-condition of stakeholder negotiation is that none of the stakeholders has the power to proceed unilaterally. Where that condition does not obtain, the policy-maker can open up deliberative possibilities by re-adjusting the balance of power through changes in

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[130] See, for example, the critical appraisal of the sort of stakeholder negotiations encouraged by the Negotiated Rulemaking Act, 5 U.S.C. 561-70, in Mark Seidenfeld, "Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation," 41 William & Mary Law Review 411 (2000).

default endowments or direct assistance. Once that condition has been obtained, the indeterminacy point arises. It is unlikely that the policy-maker can insure anything like optimal outcome solely by adjusting the balance of power. The policy-maker has no way of knowing what the optimal outcome is without stakeholder negotiations. Thus, the policy-maker needs to induce negotiation, and for that purpose direct encouragement and support for negotiation will sometimes be more effective than power re-adjustment.

This may seem plausible as far as it goes, but the vagueness about the range within which deliberation is productive seems a weakness.

B. Incomplete Sublimation of Distributive Issues

The Pragmatist approach requires the transcending of distributive bargaining. In distributive bargaining, people argue about their current entitlements and the position they would be in absent agreement. They argue about what these entitlements and positions are and about the proper division of the savings in the costs of disputing that settlement would accomplish.

This kind of bargaining is inimical to Legal Pragmatism. It is quite risky. It can fail because people mis-estimate their default positions, or because they lock themselves into aggressive strategic postures, or because they want a symbolic or emotional vindication that settlement would not provide. Moreover distributive bargaining diverts energy and resources from the search for mutually beneficial solutions.[131]

Yet, distributive bargaining would seem hard to avoid. People will not enter into negotiations unless they think they can do better by doing so, and they won't agree to solutions unless they think the solutions are better than their default positions. The process depends on each participant having some sense of her default position. Moreover, it will often be in the interests of parties to persuade others that their

[131] On the dynamics of distributive bargaining, see Robert Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 Yale Law Journal 950 (1979); for the constrast between distributive and deliberative negotiation, see Susskind, cited in note .

default positions are worse than they think or purport to think they are. Thus, distributive bargaining seems inevitable, as well as inimical.

We saw that the Pragmatists look to "bootstrapping" to mitigate this problem. If the parties can be induced to bracket distributive concerns and focus on common interests, then the creative exploration of alternative responses may loosen their understanding of how their selfish interests fit in the larger structure. But this implies a further pre-requisite and limitation: The situation must be one in which most stakeholders see the possibility of major collective improvements in which they might share but in which there is major uncertainty about the relation between their selfish interests and the general interest. This rules out situations in which some major stakeholders are doing as well as they can imagine doing. It also rules out situations where all of the options are fairly familiar and well-understood.

The case studies suggest that situations with the right combination of possibility for gain and uncertainty arise with some frequency. But they do not establish that most social disputes or problems involve such situations. And where the pre-requisite is not satisfied spontaneously, the very uncertainty that bootstrapping seeks to exploit will limit the ability of policy-makers to generate it.

C. The Problem of Interest Representation

Legal Pragmatism has little to say about who has standing to participate in stakeholder negotiations and how the views of different participants are to be weighed in decisionmaking. We could limit standing to people with interests of a minimum size, and we could weigh the views of participants in proportion to some measure of the interests of the people they represent. It is, however, extremely difficult to measure or weigh interests. Nor can the participants' claims as to whom they speak for be readily assessed.[132]

The Pragmatists believe that these difficulties are less troubling for their approach than for others. The function of negotiation for them is not to identify and aggregate interests; it is a search for the common good. The hope is that such a process will produce decisions that non-participants will recognize as good. Failing that, legitimacy depends on

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[132] See Richard Stewart, "The Reformation of American Administrative Law," 88 Harvard Law Review 1667, 1723-47 (1975).

showing nonparticipants, not that they were represented in any agency sense, but that their views were considered.[133] For these purposes, weighing interests is neither necessary nor desirable. What is important is that the full range of views in the society are expressed and considered. They should be considered, moreover, not on the basis of the magnitude of the interests the speaker represents, but in terms of the persuasiveness in terms of shared interests and values. Thus, we can dispense with complex standing rules in favor of a presumption of inclusion, and with weighing rules, in favor of a consensus standard for decision.

These responses are not entirely satisfactory. There needs to be some limits on inclusion, and consensus will often be impossible. More importantly, even where consensus is reached after good faith, high-quality deliberation, the negotiations and the decision will be affected by the pre-existing organization of interests. The best organized and financed groups and interests will tend to be better represented and have more chance of influencing the deliberation. (Even if we assume they are thoroughly principled deliberators, they will be more articulate, more skilled at negotiation procedure, and better able to document their claims.)

Pragmatists recognize this problem and prescribe that the state or NGO sector assist under-organized groups and interests.[134] The problem is that that task would seem to require something like the weighing of interests that Legal Pragmatism sought to avoid through deliberation. How can we decide which under-organized groups and interests should be given support and how much support they should be given without some weighing of interests?

D. The Reversion Danger

In the Legal Liberal perspective, people are most often arguing about what they are entitled to because of what happened in the past. They back up their assertions by interpretations of legal authority and

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[133] See Michelman, cited in note , at 60 (proposing as pre-requisite constitutional legitimacy "arrangements for exposing the basic-law interpreters to the full blast of sundry opinions and interest-articulations in society").

[134] See Archon Fung, "Collaboration and Countervailing Power: Making Participatory Governance Work," (Unpub. 2002).

evidence of past conduct. The Legal Pragmatist perspective tries to by-pass such issues by focusing on solutions. Deliberating about solutions involves predictions about the future, and the principal way parties back up these assertions is by agreeing to submit to accountability regimes involving performance measurement and rewards and sanctions.

We've seen that a critical role in the initial deliberation is played by uncertainty about how selfish interests will fit in a reformed regime. But at best this uncertainty operates only ex ante. Once the regime is up and running, people's roles will become more defined and their sense of self-interest will be clearer. Of course, Pragmatist regimes aspire to revise themselves continuously, so there is always an element of uncertainty and open possibility about the future. But after the initial round, the accountability mechanisms have to be applied, and this entails some assessment of past performance. Parties will have definite selfish interests with respect to this assessment.

Both the initial round and every subsequent round anticipate the problem of differing interests in assessment by specifying performance measures as much as possible. But these standards have to be provisional. Thus, every occasion for the assessment of performance is also an occasion for the assessment of the standards. Every measurement of performance is at once potentially an indication of good or bad performance or an indication that something is wrong with the measures. Thus, there is the risk that distributive conflict will break out every time the accountability mechanisms are applied.

Cooperation under the new regime may develop a solidarity that inhibits opportunism. But to the extent that Legal Pragmatism depends on solidarity, that represents a further limiting condition that will not be present in many circumstances.

V. Conclusion [to come]