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This essay, written for a volume surveying "contemporary legal thought", provides an overview of Democratic Experimentalism, a perspective that draws on both pragmatist social theory and recent practical innovations in private and public organization. Normatively, Democratic Experimentalism aligns with process theories that emphasize the role of courts in vindicating entitlements through inducing, collaborating with, and policing institutions, rather than vindicating them directly through interpretive or policy-engineering techniques. It departs from some such theories, however, in emphasizing that practice must often take the form of continuous investigation and revision, rather than the adoption of definitive solutions already known to at least some social actors. Descriptively, Democratic Experimentalism purports to give a better account than other perspectives of important recent developments in private, public, and international law that aspire to enhance decentralization and accountability simultaneously.

Democratic Experimentalism is an orientation in contemporary legal thought that draws on both the critical impulses of modernist theory and the constructive practice of post-bureaucratic organization.

Some of the core ideas of Democratic Experimentalism were formulated long ago, notably by pragmatists in the John Dewey mold, but they have been elaborated in response to social developments of recent decades. A recurring challenge presented by these developments is uncertainty, by which we mean the inability to anticipate, much less to assign a probability to, future states of the world. The constellation of changes that make contemporary economies more innovative produces uncertainty: As innovations cascade, breakthroughs in one domain become relevant in other, distant ones. Deep knowledge of what has gone before

becomes a poor guide of what is to come. On occasion, innovation results in catastrophe when unforeseen consequences concatenate in the short term, as in the financial crisis of 2008, or in the long term, as with climate change. More often, innovation produces social destabilization, dislocating branches and even sectors of activity.

At the same time, both the perception of social diversity and the capacity to respond to it have increased. Immigration has produced greater cultural diversity. Social and cultural movements demand more recognition and accommodation of cultural and physical diversity in employment and social services. Research in both medicine and the social sciences has detected significant variation in populations previously treated as homogeneous and has sought to make interventions more sensitive to such variation.

Increased change and diversity undermine traditional forms of public intervention premised on stability and uniformity. Both public and private actors have responded to these demands by creating new forms of organization—neither markets nor hierarchies—that compensate for the limits of ex ante knowledge by rapid, deliberate learning from parallel and collaborative exploration of new risks and possibilities. Simultaneously, they seek to accommodate diverse circumstances and characteristics both within and across groups.

Democratic Experimentalism aims to understand the common features in these responses and to show both that they seek a kind of accountability we associate with law and that dominant understandings of law should be revised to make the most of their potential.

I. General Themes

The underpinnings of Democratic Experimentalism lie in American pragmatist theory, and in mid-twentieth century innovations in organization.

A. *Pragmatism*.

The term pragmatism is widely used in contemporary legal discourse, but it most often connotes merely an eclectic, if not contemptuous, attitude toward theory. The term as applied to the orientation discussed here connotes a coherent and germinal body of thought best set out in the work of John Dewey.

The pragmatist themes that most influenced twentieth century American law were instrumentalism and contextualism. Instrumentalism prescribed a forward-looking approach to legal legitimacy emphasizing consequences rather than a backward-looking approach emphasizing first principles or historical continuity. Contextualism insisted that legal norms be understood in the circumstances in which they were used. It thus rejected formalism in interpretation and rigid bureaucracy in regulation. This rejection was long ago absorbed as a standard position in mainstream legal thought, though never an uncontested one.

Two further points associated with Dewey's pragmatism, which did not become part of the mainstream legal thought, were empiricism and sociability. These premises are central to Democratic Experimentalism.

The empiricist point was rooted in Deweyan psychology. Both individually and collectively, people form habits and formulate rules that capture their experience and enable them to deal effectively with their environment. The process can become dysfunctional, however, when habit congeals into "routine." Then, people continue to operate on assumptions that respond to past experience without taking account of changed or new circumstances. When routine encounters dissonant phenomena, people experience what Dewey called an "irritation." Such encounters could be inducements to re-examine taken-for-granted norms that had congealed into routine. The pragmatists favored processes that would productively exploit such encounters. Applied to social policy, this precept led to an emphasis on provisionality and experiment. As Dewey said, "[P]olicies and proposals for social action [should] be treated as working hypotheses, not as programs to be rigidly adhered to and executed. They will be experimental in the sense that they will be entertained subject to constant and well-equipped observation of the consequences they entail when acted upon, and subject to ready and flexible revision in the light of observed consequences."

The closest Dewey had to a large-scale model for political organization was science. He repeatedly suggested that politics should emulate key features of the institutions of science – the commitment to testing belief against experience, freedom to criticize established views, transparency and free access to information, and a sense of collaboration among peers. In science, as Dewey saw it, anyone is free to challenge

accepted beliefs. People respond to such changes, not by attempting to resolve them abstractly, but by agreeing on procedures for testing the relative merits of competing propositions. A test typically involves controlled variation to compare the effects of different interventions on a common material or of a common intervention on different materials. We measure the results in terms of agreed criteria. And then we assess the significance of the results for the challenged belief. The resulting conclusion is not established by bureaucratic fiat or majority vote, but by an informal consensus among members of a loosely defined community of practitioners.

The final premise of Dewey's view was a distinctive conception of sociability. Dewey held that the individual and the group were mutually constitutive: neither was intelligible without the other any more than an alphabet and its letters have meaning except in relation to each other. He thought that American culture tended to underestimate the personal satisfactions of collaboration and the extent to which the development of individual capacities and interests depended on social engagement. His was not a *family* conception of sociability, attributing solidarity to shared background and culture, but a *lifeboat* conception that associates solidarity with the possibility and experience of effective collaboration. In a lifeboat, people collaborate because their welfare depends on it. Diverse values and perspectives need not be disabling obstacles; they are often beneficial because they give the group access to a wider range of knowledge.

The empiricist and sociability premises underwrote a distinctive argument for democracy. Democracy, Dewey argued, was the politics best suited for effective problem-solving. Democracy, with its commitment to free-speech and official accountability, was least tolerant of the kind of ossification of belief that the pragmatists saw as the most basic problem of social order. In addition, by maximizing participation in public-decisionmaking, democracy was able to bring to bear a larger range of perspectives and information.

Dewey favored democratic institutions that emphasized provisionality, deliberation, and decentralization. Norms should be provisional so that they can be re-examined in the light of experience. Re-examination should take the form of deliberation in which diverse perspectives are brought to bear. Decentralization is important because the most productive forms of social engagement occur in "face-to-face

relationships by means of direct give-and-take."

B. *Post-Bureaucratic Organization*

Dewey's prominence has fluctuated over the years, but even during the periods of his greatest influence as a philosopher, his distinctive political ideas have had surprisingly little currency. One problem is that their institutional implications have seemed elusive, even mysterious. For example: How can norms be open to continuous re-assessment and yet provide the stability needed for effective social order? And how do we empower diverse local groups while maintaining the ability to coordinate across and beyond a large nation?

No doubt many found the institutional implications of Dewey's work confused or Utopian because they contradicted the basic assumption widely held throughout much of the twentieth century that there are only two key types of organization – markets and bureaucracies. Markets operate through individual contracting and price signals. Bureaucracies operate through centrally promulgated stable and hierarchical rules.

This assumption was dominant from the Progressive era through the 1970s, and it is still influential in the legal academy. But elsewhere it has been recognized that it excludes at least one important category of organization. This category might be called post-bureaucratic. It includes a range of organizations that were first observed in the industrial sector in the mid-twentieth century and have since emerged in many areas of both public and private spheres. Its distinctive features have been most salient in "lean production" manufacturing firms, which must adapt to short product cycles and demand for specialized features, and "high reliability" organizations such as aviation or nuclear power, where breakdown threatens catastrophe. Especially influential examples have been the Toyota Production System and the U.S. Navy's nuclear submarine program. A vast literature on the resulting "learning organizations" has emerged.

Post-bureaucratic organization is constituted by four features. None is a defining feature of markets or bureaucracies. All can be seen as responding to uncertainty.

First, rolling rule regimes. In such a regime, rules govern comprehensively, but agents are instructed to depart from them when

compliance would be inconsistent with the rules' underlying purposes. However, agents must signal their departures in ways that trigger review of their actions, and when the departures are sustained, the rules get re-written to reflect the new understanding gained from the review. By contrast, conventional bureaucracies do not authorize rule departures by subordinate agents, and when departures occur, they tend to respond either by sanctioning them or, where consistent enforcement is impractical, ignoring them.

Second, root cause analysis of unexpected adverse events. "Significant operating events" that signal dysfunction, like unexpected deaths in a hospital or "near misses" in aviation are analyzed diagnostically to determine their systemic causes and practices are revised to prevent them in the future. The triggers of these reviews are neither prices of the sort that drive markets nor rule departures of the sort that mobilize corrective intervention in bureaucracies. The assumption is that the proximate cause of the problem is unlikely to be the root or underlying cause, and that the underlying cause—unknowable ex ante—could be associated with a flaw in the design of the overall system. Root-cause analysis is thus directed, not at detecting breakdowns in systems that function well when operating as planned, but rather at uncovering the limits of plans.

Third, peer review. Proactive audit processes trigger examination of specific instances of frontline processes through collegial dialogue. Typically, the agent explains what she did, and the reviewers respond to the explanation and conclude with some evaluation of the actions. In traditional bureaucracy. superiors are presumed to have more encompassing and reliable knowledge of circumstances and adequate responses to them than subordinates, and are therefore best placed to make rules and review their application. In post-bureaucracy, lower level agents are presumed to have access to information about problems and solutions unavailable elsewhere, and therefore to have an important formal role in revising rules (not just devising local work-arounds) even if this undermines hierarchy.

Fourth, performance measurement. The regimes specify indicators that measure aggregate performance. The measurements track both the extent of compliance with the regime's norms and the extent to which the

underlying goals are being achieved. (While the use of indicators has long been conventional in organizations, they do not appear at all in canonical accounts of the classic model of bureaucracy, where rules do all the work. In practice, they appear to be more central in post-bureaucratic organization.) The measures are used to guide discussion about how practice can be improved. Discussion begins by considering the efficacy of the organization's practices in furthering its goals, but it may reach reconsideration of whether prior understanding of goals needs revision in the light of experience. In addition, measures may have to be reconsidered and revised because they failed to capture the factors originally intended, or because of unanticipated collateral factors, or because people have adapted to them manipulatively and counter-productively (for example, "teaching to the test").

Each of these four practices is designed to institutionalize the kind of confrontation between the inherited stock of operating rules and the "irritations" of dissonant experience that Dewey saw as central to social life. Each attenuates the distinction between enactment and implementation. Each diffuses the practice of deliberative re-assessment throughout the organization as a continuous practice. In conventional bureaucracies, such deliberation occurs only at the top and episodically. In markets, it has no place at all.

The four practices are part of the conventional wisdom of modern management reform, and they arrive in many variations, not all of which vindicate pragmatist aspirations. Where the forms are adopted without a sincere aspiration to alter practice, they may simply generate unproductive paperwork and meetings. In some variants, they are designed less to foster learning from frontline experience and more to tighten and expand hierarchical control and induce greater fidelity to rigidly stipulated goals and metrics. In these systems, goals and metrics tend to be promulgated at the top without frontline input, and information from monitoring tends to be used more punitively to induce greater effort than diagnostically to enable greater efficacy. These systems resonate more with Foucauldian critique than with Deweyan prescription; their administrative practices are experienced as oppressive regimentation and surveillance more than as opportunity for creativity and collaboration.

Even at their best, however, these systems may not appeal to all participants. Some who have accommodated themselves to rule-governed

bureaucracy may not welcome the call for initiative and creativity. They may prefer predictable routine or the opportunities to pursue their idiosyncratic projects within the interstices of formal rules. Moreover, many nominally bureaucratic organizations in fact accord a good deal of minimally supervised discretion to frontline workers, such as teachers or police officers. For these workers, reform will increase demands that they become more articulate about their practices. Some will resent the loss of informality, spontaneity, and privacy.

No doubt many workers performed well under these informal regimes, and many systems performed well as a whole. But even at their best, these systems have limitations that have become increasingly important. First, it is more difficult to learn and transmit learning in informal systems. Where knowledge remains tacit, new recruits have to be inducted through acculturation, which may be relatively expensive. Moreover, tacit premises are harder to test, and efficacy cannot be rigorously assessed across sites unless they are fully articulated. Finally, it is more difficult to achieve accountability without explicit practices and measures of performance. In the public realm, this is a problem of democracy as well as efficiency.

C. *Experimentalist Architecture*

The organizational model that vindicates pragmatist aspirations combines the four elements of post-bureaucratic organization with a more general architecture. The most basic constituents of this architecture are a "center" and a set of "local units". In practice, the center is sometimes the national government, and the local units, its federated states or municipalities. Or the center could be a government agency, and the local units the private actors it regulates or the public and private service providers with which it contracts. Or the center might be a single public or private organization with the local units its (territorial) subdivisions: a state department of child welfare services and its regional districts, as one example, or a school district and its individual schools, as another.

These relations are often nested, with an entity such as a school district at once the local unit of a broader (state) jurisdiction and the center of a territorial unit of its own; but the relation between continguous "higher" and "lower" units is the similar, regardless of where they are located within the system. Together, the center and the local units set and revise goals, and the means of pursuing them in an iterative process.

Governing norms – for example "adequate education" or "good water status" – are formulated in general terms, and provisional measures for gauging their achievement are specified, whether by legislation, administrative action, or court order, through consultation among the center and local units and relevant outside stakeholders. Local units are explicitly given broad discretion to pursue these ends as they see fit. But as a condition of this autonomy, the local units must report regularly on their performance and submit to monitoring in which their results are compared to other units employing alternative means to the same end. The local units must explain their efforts to peers and superiors; show that they have considered alternatives, and demonstrate that they are making progress or are making plausible adjustments if not. The center provides services and inducements that facilitate this disciplined comparison of local performances and mutual learning among local units. Finally, the framework goals, performance measures, and decision-making procedures themselves are periodically revised on the basis of alternatives reported and evaluated. And the cycle continues.

Neither "botton up" nor "decentralization" is an accurate term for this architecture. It is not like a market (the conventional paradigm of decentralized organization) because it has a center. But the center does not correspond to the conventional notion of hierarchy because it is facilitative and supportive, not directive. The key ambition is to combine, in a manner responsive to Dewey's aspirations, local initiative with accountability.

II. Relation to Other Currents in Contemporary Legal Thought

Pragmatists are skeptical of the claims of other theories to fundamental or comprehensive status, but they consider that many of them may have useful tools for particular types of problems. So Democratic Experimentalism does not so much dismiss the dominant theoretical orientations as question their usefulness for many important questions, especially those in the growing domain characterized by uncertainty.

Legal academics have tended to focus their theories on the position of the judge confronting a hard case, one in which there are reasonable arguments on both sides of a contested legal issue. The pre-eminent responses have emphasized either interpretation or policy engineering.

Interpretivists offer techniques by which the ambiguities of pertinent authority can be resolved analytically. Policy engineers suggest that the judge use her discretion to impose the most efficient resolution and offer techniques, mostly derived from economics, for determining what it is.

Democratic Experimentalists, while conceding the power of these approaches in some contexts, emphasize that they are not adequate for many of the hard cases that pre-occupy the legal culture. Part of the problem is the indeterminacy of governing authority. In hard cases, legal authority often cannot be made, through analytical means, to yield determinate answers. Rapid change in circumstances, and its correlate, increased heterogeneity, exacerbate this indeterminacy. Efficiency norms are also sometimes too ambiguous to yield specific resolutions. They are most applicable in static comparisons, as in evaluating the allocative effects of a change in a single rule, all else equal. Determining the efficient solution when institutions and technologies are changing rapidly, and when the decision itself could affect those changes, is incomparably more difficult. In these situations, judges will lack the information necessary to calculate reliably the effects of alternative rulings.

Both the interpretive and policy engineering perspectives are based on Principal-Agent premises. The principal is presumed to have a conception of a policy or plan detailed enough to induce agents — by contract in a market; by promotion or penalty in a hierarchy —to undertake particular tasks and to judge performance reliably enough to reward success and punish failure. The judge is the agent; the legislature or the broader polity is the principal. By contrast, experimentalists suggest that many hard cases are hard precisely because the relevant principal (however we conceive it) does not know what it intends or desires. This is because intent or desire depends on facts and circumstances that are not yet known. Thus, intervention must be designed in part as a form of investigation, and it must be reconsidered in the light of experience.

In such situations, experimentalists suggest, the solution to a hard case is less likely to be substantive than procedural or institutional. The legal decision-maker adopts the normative output of various stakeholder processes, or alternatively induces their formation or their reform. The key criteria of legitimacy are openness to affected citizens and responsible operation of the core features of post-bureaucratic organization.

Perhaps the most important antecedent of Democratic

Experimentalism is the Legal Process school founded by Henry Hart and Albert Sacks. A key theme of their perspective was that courts should often resolve disputes by deferring to other institutions – agencies, trade associations, standard-setting organizations. Deference was partly a function of expertise, partly of procedural integrity. The court was expected to condition deference on the procedural openness and responsibility of the institution.

In urging this deference, the Legal Process school assumed implicitly, however, that the chief problem confronting courts and administration was official ignorance of facts known to private actors. In economic regulation, for example, it assumed that both problems and potential solutions were well understood by firms, even if conflicts-of-interest and collective action problems inhibited implementation. Thus, their remedy was public-private coordination between agencies and organizations like trade associations and unions. Courts could assess the adequacy of an agency's efforts to acquire information and engage private actors, but where those efforts seemed adequate, they should refrain from deciding substantive matters independently. This procedural approach reflected the institutional premises of the New Deal: a trusting view of expertise and of regulatory agencies and a very limited sense of democratic participation beyond elections or membership in quasi-corporatist institutions like industrial associations and labor unions. They were thus vulnerable to the critique of expertise and agency capture that emerged from both the Left and Right in the 1960s and after; they were equally unprepared for the rise of the civil rights, feminist, and other social movements reflecting emergent interests with no place in the corporatist scheme of the 1930s.

Democratic Experimentalism has a broader conception of knowledge and politics. It focuses less on the problem of official ignorance and more on the problem of uncertainty that limits the capacity of both public and private actors to define problems and solutions in advance of intervention. Uncertainty at once limits the value of expertise and revalues diffuse, situational knowledge. It thus gives new force to Dewey's argument that ordinary citizens have information experts lack and that relatively direct participation by affected people in public problem-solving is a constitutive aspect of democracy. "Only the man

who wears the shoe knows where it pinches," he wrote.

Democratic Experimentalism has some overlap with legal theories that have responded to the civil rights revolution by reinterpreting American public law in democratic terms. One important development in this line is Bruce Ackerman's recent proposal to anchor constitutional adjudication in the norm-generating capacity of spheres of social life, such as schools or the workplace. Another is the "democratic constitutionalism" of Robert Post and Reva Siegel, which emphasizes the interaction of the courts with the other branches and especially with social movements.

But while Ackerman takes constitutional values to be inherent in the activity of various social spheres, experimentalism assumes that these values arise in mutually transformative dialogue between individuals and institutions in their immediate contexts and courts articulating the framing values of the society as a whole. While democratic constitutionalism is preoccupied with contestation over and construction of broad constitutional principle in its most inchoate stages--when the identity of the actors and their institutional configuration is most open--Democratic Experimentalism is focused on the way broad norms are given meaning in more local deliberations once identities and structures are becoming manifest.

Finally, there is some affinity between Democratic Experimentalism and the academic movement to study and promote "Alternative Dispute Resolution". In contrast to most legal academic endeavor, this work is focused on deliberation rather than analysis or argument. And in principle at least, it is interested in problem-solving, which it occasionally understands in institutional as well as psychological terms. However, in much of this work, the core values are harmony and stability. Deliberation is an ad hoc response to disruption, and its key purpose is to re-establish equilibrium. Dewey's emphasis on the dangers that consensus will ossify and on the need for institutionalized diversity as a spur to re-assessment and discovery are absent.

III. Experimentalist Observations

In one sense, Dewey was ahead of his time. He had trouble elaborating the specific practical implications of his ideas because when he wrote there were few functioning organizations that embodied the more

original features of his prescriptions. But such organizations have emerged in recent decades in response to basic social changes in communication, transportation, and information technology. Recent scholarship has sought to interpret these developments in the light of Deweyan experimentalism. Repeatedly, it turns out that legal regimes conventionally thought of as consisting of general substantive rules involve generalist law makers inducing or policing "contextualizing regimes" in which stakeholders, facing increasing uncertainty, engage and revise norms continuously.

A. *Private Law*

In the classical view that is still the starting point of the law curriculum, contract is the paradigmatic form of private law, and contract defines a process by which individuals (or organizations who can be treated for this purpose as individuals) make binding exchanges. The picture emphasizes judges and legislatures making general substantive rules and actors transacting within them.

Within this view, interpretivist views compete with policy-engineering ones, and formalist interpretivist views compete with contextualist interpretivist views. But a longstanding and recently re-invigorated strand of contracts scholarship has suggested that these debates are irrelevant or peripheral to the practical stakes in most disputes. It argues descriptively and normatively for a more procedural approach.

One category of contract that escapes the classical contexts was explored by Hart and Sacks and allied scholars. These are contracts between businesses based on standard terms and often enforced through specialized arbitration procedures. The standard terms are not negotiated in individual contracts. They are incorporated wholesale by reference or in the form of boilerplate, or they may be drawn on by enforcers to resolve ambiguities in language. Trade associations often coordinate stakeholder participation to administer and revise the terms and processes. When trade associations act by themselves in these capacities, the arrangements are referred to as private legal systems. But often, as in the cases that drew the attention of Hart and Sacks, problems such as externalities or imbalances of power call for public bodies to participate in defining terms, enforcement, or dispute resolution, or all three.

A different and important category involves situations where uncertainty is high and there are few potential parties to any particular agreement. In these arrangements, the goal is not to regulate the exchange

of a determinate class of goods or services, but to establish a collaborative regime for the development of some new product or technique that neither party can specify ex ante. Here principal-agent relations break down in their paradigmatic setting. Neither party can form the idea of a project and its feasibility without the help of the other, and innovation becomes explicitly social in the way Dewey imagined. As research-and-development activities are disaggregated across firms, we see more "contracts for innovation". Instead of defining incentives to perform particular tasks, such contracts establish processes of consultation and information exchange — regular meetings with information-forcing decision rules — that allow each party to determine the probity and capacity of the other, and both to determine the feasibility of a project while protecting themselves against the vulnerabilities that collaboration creates. Once collaboration begins to work, high switching costs —the expense of finding a partner as trustworthy and capable of learning as the current one — provide the assurance necessary for both parties to make project-specific investments even in the absence of formal agreement. Such contracts are designed to be self-enforcing in most situations. They give each party numerous opportunities to detect opportunism or incapacity in the other and the rights at various stages to terminate the relation when it is not satisfied. Thus, the contracts do not often reach the courts. When they do and a court finds fault, the appropriate remedy will usually be reliance damages (compensating the plaintiff for expenses incurred in the fruitless collaboration) rather than expectation damages (reproducing the state in which the contract would have been executed) because these contracts presuppose that the parties cannot know what to expect from their collaboration.

A third category includes standardized mass contracts for the purchase of consumer goods. Neither the private law system nor the legal process solutions are applicable since consumers have no opportunities to bargain and are not effectively represented in industry associations. But it seems unlikely that courts have the specialized knowledge or the capacity for rapid adaptation needed to police evolving seller practices (although advocates of contextualizing interpretivism in contract have long maintained, on scant evidence, that they do). Public regulation of fair and unfair contract terms is required; but such regulation has to be able to

respond to the highly innovative — and often devious — efforts by sellers to game existing rules. Promising administrative regimes are being constructed in the European Union and in the US (by the Consumer Financial Protection Agency), and we take up their general features below.

B. *Public Law: Regulation and Social Welfare*

The conception of the administrative state dominant in legal thought for most of the 20th century saw administration as a balance of bureaucracy and discretion. Bureaucracy meant hierarchically promulgated rules. Discretion was grounded in expert knowledge at the top or street-level intuition at the frontline, but in either case it was never fully articulable and often presumed ineffable. Administration was checked for individual entitlements by adjudicatory processes. But administrative adjudication of individual claims was considered a separate and self-contained process insulated from line administration.

Both the rule of law and democratic control were identified with bureaucracy. A major pre-occupation of administrative law was the promulgation of rules and assessment of their compatibility with statutes. But most people recognized that because rules were inflexible and could not address small contingencies and unforeseeable circumstances, some residuum of discretion was needed. On both the right and the left, unhappiness with administrative practice tended to produce demands for more and tighter rules and less discretion. At times, there was a tendency to treat discretion as unreviewable by outsiders, including courts. An alternative approach subjected discretion to "reasaonableness review," which was usually portrayed as minimal and relatively formless duty to provide an intelligible explanation.

From about the 1970s, the nature of the social problems and the public interventions that produced this conception of administration changed. The paradigmatic New Deal regulatory programs were sectoral entry-and-price regimes, such as those in communications, transportation, and energy. In conjunction with macro-economic regulation, they were designed to produce relative stability and calculability. The paradigmatic social welfare initiatives were social insurance programs – Social Security and Unemployment Insurance. These were explicitly based on actuarial premises. Uncertainty undermined the calculability of outcomes on which both the regulation and welfare programs depended, and social change produced new problems for which the New Deal models were ill-adapted.

Entry-and-price sectoral regulation came undone for three reasons. The first was capture of the regulatory authorities by private interests: Incumbent firms often used regulatory decisions to protect themselves against challengers. Second, new developments blurred the boundaries among sectors, so that the defense of stability increasingly seemed to obstruct innovation. Third, new economy-wide regulatory challenges had become prominent, such as health-and-safety and environmental and consumer protection, that cut across industrial sectors and thus demanded different institutional configurations.

Social policy also became pre-occupied with problems for which its New Deal antecedents had not prepared it. Education is a leading example. The shift towards a high-skill economy, and the corresponding loss of stable, well paid unskilled and semi-skilled work, made attainment of levels of literacy and numeracy far above historical norms a precondition for successful participation in labor markets. Schools must therefore be re-organized to meet the needs of the large, but diverse groups of students whose family background has not prepared them to come to class ready to learn on their own. As learning problems are often associated with psychological problems or family stress, moreover, the burden of providing new forms of pedagogy is increased by the need for coordination with providers other social services as well. At the same time, government has assumed increasing responsibility for health care. While some health care provision has long been organized on the model of insurance, that model has been strained, for example, by the problems associated with adverse selection, by defective incentives for motivating preventive care (because private insurers worry that turnover will prevent them from capturing long term gains), and by insurer opportunism (finding excuses to deny coverage when insureds become seriously ill).

One response to these circumstances has been to give up on complex organization and to attempt to achieve administrative ends through simulation of markets. By pricing rights or duties and making them tradeable, such regimes hope to assign them to the most efficient producers and spur technological innovation. The best-known examples are tradeable emissions permits and school vouchers. Although market simulation approaches have been much discussed in the legal academy, their practical effects have been minor. This disappointment is partly due to political opposition from emitters of greenhouse gases and teachers' unions. But it may also be due to limitations of the basic conception.

Markets are attractive because they promise to limit information demands on all participants. But the design of simulated markets can create extraordinary information burdens, for example, with respect to the setting of prices or quantities. Moreover, simulated markets require elaborate regulatory efforts to constrain undesired consequences of the very self-regarding behavior the markets are meant to encourage. Ingenious efforts must be made, for example, to restrain the tendency of pollution emitters to cluster in "hot spots" under a tradeable permit regime or schools to attract and select students who need the least help under a voucher regime.

The alternative tendency, which has been for more salient in practice, is the move toward experimentalist architecture. Whether through legislative design or administrative initiative, programs have sought to structure a relation between a center and local units that combines decentralized initiative with learning and accountability.

In the regulatory sphere, a key development is meta-regulation. Rather than presuming to write uniform rules based on the expertise available to it, the meta-regulator aims to induce heterogeneous ground-level actors—firms— to actively investigate the particular risks they face and how best to mitigate them. Elements is this approach were pioneered in the nuclear power safety program administered by the Nuclear Regulatory Commission and the Institute of Nuclear Power Operators and by the Hazard Analysis and Critical Control Point (HAACP) food safety regime developed initially in the US in the private sector. A comprehensive system of meta-regulation has been recently mandated by the Food Safety Modernization Act. Each firm must make its own plan to achieve regulatory goals within uniform parameters, and must measure its own performance under its plan in terms of stipulated metrics. The firms must report unexpected adverse events, such as "near misses", and respond to such reports by considering ways to mitigate the dangers they reveal. The regulator verifies the adequacy of the initial plan, including the monitoring regime, and reviews responses to reports of adverse events.

As more successful plans are identified, some of their features may be codified as mandatory. Typically, however, actors have substantial discretion to substitute alternative measures to the extent they can demonstrate that they are equally effective. The regulator enforces basic substantive parameters, but a major part of its activity involves management of the experimentalist process that include root cause

analysis of significant operating events, peer review, and continuous assessment of performance metrics.

Similar developments can be observed in social services. Health care has long been ambitiously experimentalist. Rigorous empiricism in the form of the randomized control trials have been central here, and the key features of experimentalist organization – rolling rules, root-cause analysis, peer review, and performance measurement – have been developed with great sophistication. As government has assumed increasing responsibility for health care costs, these features have been adopted into the relevant public law.

The same trends can be found, albeit at less elaborated stages, in child protective services, disability, and poverty relief. Regimes in these fields were typically preoccupied with balancing bureaucracy (rules) and frontline professionalism (low-visibility discretion). Initiatives of recent decades impose experimentalist disciplines.

Education illustrates this evolution. Among several developments that have challenged traditional administration in education, we can mention two. First, there is the growing awareness of the poor performance of U.S. schooling in international comparisons, the class- and race-based variation in attainment within the US, and the recurrent finding that educational success correlates only weakly with financial resources. Second, there is the growing sense that, for many struggling students, effective teaching requires tailored interventions that take account of individual needs.

The first set of developments has led to a move toward "evidence-based" practice in which educators both within and across schools continuously assess interventions both informally at the school and classroom level and more formally across schools. The second set has led toward more emphasis on individual diagnosis and tailoring. The initial step here was the adoption of "special education" programs for students with medically diagnosed "learning disabilities". But at the margin it proved hard both in principle and in practice to distinguish students lagging because of disabilities from those lagging for other reasons.

In consequence of these developments, there has been a transformation in the architecture of schooling. The most salient manifestation of these developments are the No Child Left Behind Act of

2002 and the Obama administration's modification of the statutory scheme with its waiver and Race to the Top grant programs. The most discussed feature of this regime is its initially very crude accountability measures, mandating high-stakes performance assessment with severe penalties for schools that do not hit aggregate testing targets. But this feature, which has been much refined since the statute's enactment, is related to two others. First, the emphasis on performance assessment is in practice related to a general tendency to give more autonomy to local school systems and individual schools. Schools have been released from a range of rigid rules that dictated resource-use and instructional practice. The emphasis on performance measures is an effort to achieve accountability without rigidifying practice. Moreover, the initial emphasis on high-stakes rewards and sanctions has given way to a more diagnostic and remedial approach. Tests and other forms of review are designed to uncover specific deficits at student and school level and to indicate specific remedial interventions. Race to the Top emphasizes "instructional improvement systems" that scan practice at other schools for interventions that have proven successful for specific problems.

Second, there is a tendency toward greater individuation of instruction. The type of tailored assessment associated with "special needs" students has been gradually generalized. No Child Left Behind specifically declares that "all children" have a right to an education that enables them to attain at least basic proficiency, and it requires that all failing schools provide their students with supplemental resources. These efforts require interventions that are more tailored and provisional than bureaucratic administration provides. At the same time, they differ from traditional professionalism in demanding explicit and articulate planning and assessment, rather than deference to ineffable expertise.

C. Civil Rights

The Civil Rights revolution of the Warren and Burger Court eras was centrally pre-occupied with explicitly invidious or egregiously reckless official behavior. De jure racial segregation is the paradigm example of the first; police use of deadly force against non-violent people suspected of minor crimes is a salient example of the second. Courts were able to derive plausible substantive rules to control such behavior.

But the success of the revolution changed the issues. Explictly

invidious discrimination virtually disappeared from public life. Discrimination became inarticulate and even unconscious. Moreover, much official behavior that was not egregiously reckless nevertheless burdened civil rights values in ways widely perceived as unfair. Thus, "second generation" civil rights cases tended to challenge behavior that was not openly intended to harm civil rights values and that had some legitimate purposes.

In effect, second generation claims seek to move the standard from intent to negligence and to frame the issue in terms of a duty to reasonably consider and weigh civil rights values against others. Doctrine sometimes resists such a duty and clings to intent-focused norms. The result is either the dismissal of all second-generation claims or a willingness to infer intent from the "disparate impact" of an official action on a protected group or value. Since intent is highly elusive both conceptually and factually, outcomes under the latter approach often turn on assignment of the burden of proof. If the defendant bears the burden of rebutting the inference, the plaintiff has a good chance of winning; otherwise not.

Another approach to second-generation problems comes closer to recognizing a duty of reasonable consideration. This can be seen in Americans with Disabilities Act duty of "reasonable accommodation". It is also implicit in the stronger forms of "disparate impact" doctrine that hold that an inference of discrimination is not rebutted where the defendant has failed to adopt an alternative practice that serves its legitimate purposes but is less burdensome to civil rights values.

Once we get to this point, however, we encounter the familiar problem of elusive and asymmetric knowledge. Defendants have much more information about the legitimate costs and benefits of controversial practices than plaintiffs and judges, and traditional litigation is a very expensive and cumbersome way to induce them to disgorge it.

There is thus good reason to frame second-generation civil rights enforcement in terms of an obligation to engage in experimentalist collaboration in specifying and solving problems. In fact, we do see promising examples of such framing. The provisions of the Juvenile Justice and Delinquency Prevention Act on discrimination in pretrial detention and the Prison Rape Elimination Act adopt experimentalist architecture. Each declares general goals and then mandates that agencies, within uniform parameters, develop plans to advance the goals within their

facilities. The plans must be periodically assessed. Performance measures are used to identify superior performers and to target laggards for remedial intervention. Adverse incidents must be subjected to root cause analysis. Central institutions collect information on effective practice and make it generally available.

The core norm in this model is a (partly implicit) duty of reasonable consideration that is elaborated through a series of contextualizing regimes. Courts and other generalist enforcers would enforce procedural requirements for planning, monitoring, and re-assessment. They would also enforce basic substantive requirements where there was adequate information and understanding to declare such requirements. The operation of the regimes would themselves generate information and understanding that might make it possible to recognize new practice as mandatory. In effect, the courts would set substantive requirements on the basis of observed performance among the regulated units.

D. International Law

International law was traditionally identified with treaties and with customary principles. However, as with domestic private law, international regimes have increasingly confronted problems that are not adequately addressed either by negotiated rules or ineffable principle. They call for organizations capable of adaptation.

The encompassing, post-war international organizations do not seem viable for these new tasks. The United Nations and its specialized agencies together with the International Monetary Fund, the World Bank, and the General Agreement on Tariffs and Trade (now transformed into the World Trade Organization) integrated large numbers of countries into regimes governing broad ranges of issues. Such regimes depended crucially on the global dominance of the United States, which could pressure other countries to cooperate. With the emergence of a series of countries able to resist US pressure, regimes must now accommodate a greater degree of diversity of preferences. Thus, the newer regimes tend to be more specialized in scope and less encompassing in membership than those of the earlier epoch. In many domains there are two or more regimes--"regime complexes"-- with partially overlapping, partially competing aims, and their capacities for regimentation are correspondingly limited.

All these trends favor experimentalist architecture. Thus, we see the emergence of specialized international regimes that address specific

problems in ways designed to accommodate volatility and diversity. A notably successful example is the Montreal Protocol on Ozone Depleting Substances. Established by international agreement in 1989, the regime consists of a cluster of central administrative bodies that coordinate national efforts to reduce harm to the atmospheric ozone layer. The regime sets schedules for reducing, and ultimately banning, the use of ozone-depleting substances subject to exceptions where technical committees find no substitutes are available. Member states report to the center on practices and outcomes and submit to monitoring by the center. The center administers a fund to subsidize the costs of transition for developing countries. It also supports and publicizes research on new technologies and provides technical assistance. The regime has achieved remarkable results and large changes in behavior. The main mechanisms appear to have been collaborative learning induced or at least buttressed against the risks of defection by the threat of trade sanctions as the penalty for violations, particularly the failure to report accurately on performance.

The European Union (EU) is another, perhaps more striking, instance of Democratic Experimentalism beyond the state. The EU is not a nation-state, since it joins independently self-governed polities, nor is it an international organization, since it intrudes in unprecedented degree into its members' domestic affairs. It does, however, fit the specifications of experimentalist polyarchy, linking heterogeneous but interdependent units in an epoch of increasing uncertainty. And in fact key features of this architecture have been observed in regulation of networked industries, notably communications and energy, as well as in the regulation of health and safety, the environment, pharmaceuticals, food safety, and commercial aviation. The model has been more recently extended tentatively in other areas, including financial services and human rights.

These areas are governed by "framework directives" that specify general goals but contemplate variation in implementation among member states. Rules take a rolling or presumptive form. "Comply or explain" is the norm. A state must follow the rule or explain why its departure as served the underlying purposes as well or better. Many regimes have significant event reporting systems that demand diagnostic follow-up. Peer reviews processes in which member state performance in a given area is assessed and critiqued by teams of experts from other member states, are common. Demanding reporting requirements and performance

indicators are also frequent.

IV. Recurring Issues

A. Domain

Dewey spoke of Democratic Experimentalism as a general model of political organization. Contemporary experimentalists often take this tone as well, but they also speak of experimentalism as a response to specific social conditions of fluidity and diversity. The experimentalist literature suggests that current social and economic change favors the expansion of experimentalism. But assuming this is so, the question remains whether the traditional legal regimes that emphasize general and stable rules enforced substantively by generalist officials will continue to play an important role. A pragmatist has no resources for excluding this possibility categorically. For now we observe only that in domain after domain the frontier of law is experimentalist.

B. Soft v. Hard Law

The Democratic Experimentalist architecture emphasizes collaboration and deliberation. To some, this emphasis implies voluntary participation and is thus incompatible with coercion. Thus, Experimentalism is said to have an affinity with "soft law" – law that operates by carrots rather than sticks, or by sticks that take only the intangible form of shaming or reputational harm.

As a descriptive matter, it is not correct to conflate Experimentalism with "soft law". Some regimes have quite conventional coercive sanctions and even unconventional sanctions often involve tangible harm. Experimentalism is dominantly procedural. Sanctions for failing to comply with procedural duties can be conventional and harsh. Failure to supply required information, falsification of reports, or persistent failure to correct norm infractions under these regimes can lead to exclusion from valuable markets or criminal sentences, for example. The characteristic tangible sanctions in these regimes tend to take the form of a "penalty defaults". As originally defined in the contracts context, a penalty default is a provisional resolution imposed in situations where the decision-maker does not know as well as the parties what the best resolution is. It is designed, not to approximate the best resolution, but to induce the parties to negotiate a better one. A favorite example is a rule

under the Endangered Species Act that precludes development that would impair the habitat of a listed endangered species. The statute provides an exception where the administrator commits to implement an adequate "Habitat Conservation Plan" to mitigate harm from the development. A key criterion of adequacy is the approval of the plan by stakeholders. Here, the penalty default is a prohibition of development. This is a tangible and harsh mandate. However, it is designed to induce the developer to engage stakeholders and to produce a plan that is likely to be better than one that the regulators could devise on their own.

C. Distributive Issues

People sometimes worry that experimentalism is insensitive to distributive issues and that the move to experimentalist regimes will exacerbate the situation of disadvantaged stakeholders. They are, of course, clearly right to emphasize that the outcome of a collaborative process will be affected by the relative resources of the participants. Even if a group's consent is required to go forward, that consent may be inflected by the group's disadvantage. Experimentalist regime design does try to take account of these factors in three ways.

First, procedural design can try to mitigate inequality. A neutral can be charged with moderating discussions to insure everyone is heard. Some or all participants can be given funds to use for assistance in researching or articulating their positions.

Second, if design can reach background default rules, than it can enhance equality by shaping the rule that will govern in the absence of stakeholder agreement. The Endangered Species Act penalty default is a good example. Before the Act, the default rule permitted the developer to go ahead without taking account of stakeholder views. The penalty default changes the balance of power in ways that make it more likely both that there will be engagement and that any agreement will be fair.

Third, certain possible outcomes can be ruled out as substantively unacceptable. An outcome that involves explicit racial or gender discrimination or the expropriation of a non-participant's property, for example, can be excluded at the outset.

But even after such constraints are adopted, anxiety about equality may persist. The problem is that it will rarely be possible to fully specify in advance the effects of inequality and hence to identify the extent to which the outcome has been affected by it.

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