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MINIMALISM AND EXPERIMENTALISM IN THE ADMINISTRATIVE STATE

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MINIMALISM AND EXPERIMENTALISM IN THE ADMINISTRATIVE STATE

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Minimalism is our name for the dominant liberal perspective on public policy implementation in contemporary legal scholarship. Minimalism emphasizes public interventions that incorporate market concepts and practices and that centralize and minimize administrative discretion. This essay appraises Minimalism in relation to a competing liberal view of the administrative state. Experimentalism emphasizes interventions in which central government affords broad discretion to local administrative units but measures and assesses their performance in ways designed to induce continuous learning and revision of standards. We fault Minimalist scholarship for ignoring an important reorientation in public policy along Experimentalist lines in the U.S. and elsewhere since the 1990s. We also argue that, in practice, Minimalism is excessively preoccupied with static efficiency norms and price signals and insufficiently attentive to learning and to “weak signals” of risk and opportunity. Experimentalist intervention is a more promising approach in the growing realm of policy areas characterized by uncertainty about both the definition of the relevant problem and its solution.

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Introduction

The dominant liberal perspective in legal scholarship on public policy in recent decades might be called Minimalist. This perspective seeks to ground policy design in economic concepts and market practices and to minimize frontline administrative discretion and popular participation in administration. Its key normative reference points are efficiency and administrative consistency. It favors cost-benefit analysis for elite bureaucrats and restrictive rules for lower-tier ones. Instead of directive regulations, it prescribes regimes of marketable duties, such as emissions permits, or marketable rights, such as welfare vouchers. Where people are prone to make bad choices, it urges “nudges” -- providing information or making provisional choices from which the beneficiary can opt out – rather than mandatory rules.

In this essay, we compare Minimalism to an alternative liberal perspective – Experimentalism -- that has emerged more recently in legal scholarship. Experimentalism has been strongly influenced by both management theory and democratic ideals, especially as the two converge in John Dewey’s idea of “democratic experimentalism” (Dewey 1927; Dorf and Sabel 1998). Its governing norm in institutional design is reliability – the capacity for learning and adaptation. In Experimentalist regimes, central institutions give autonomy to local ones to pursue generally declared goals. The center then monitors local performance, pools information in disciplined comparisons, and creates pressures and opportunities for continuous improvement at all levels. The regimes’ distinctive mechanisms of achieving both learning and coordination emphasize deliberative engagement among officials and stakeholders.

Minimalism and Experimentalism both accept an ambitious role for the state in regulation, social welfare, and human rights, and both arise from disenchantment with New Deal-style “command-and-control” regulation. Whether the two perspectives should be viewed as complementary or competitive is debatable. On the one hand, Cary Coglianese and David Lazar suggest that policy tools we associate with Minimalism and others we associate with Experimentalism are each potentially productive responses to different types of problems (Coglianese and Lazar 2003). On the other hand, a recent critique of Experimentalism by David Super suggests that distrust of frontline discretion and popular participation may preclude Minimalists from accepting Experimentalist responses even in the situations where they seem most promising (Super 2008).

We take issue with Super by arguing that recent Experimentalist innovations suggest that administrative decentralization can be both effective and accountable. We follow Coglianese and Lazar in seeing Minimalist and Experimentalist regimes as complements (although our conception of the regimes is broader than theirs), and in suggesting that Experimentalist regimes are especially well suited for circumstances in which effective public intervention requires adaptation to changing circumstances and local variation (although we see these circumstances as more pervasive than they). The central characteristic of these circumstances is “uncertainty” in Frank Knight’s sense – contingency that cannot be known or calculated actuarially or with formal rigor but can only be estimated impressionistically (Knight 1921). In the realm of uncertainty, policy aims cannot be extensively defined in advance of implementation; they have to be discovered in the course of problem-solving. Yet, the characteristic Minimalist interventions presuppose a strong distinction between the enactment or elaboration of public goals and their administrative implementation.

Our analysis highlights and explains a fundamental re-orientation of public policy along Experimentalist lines in the U.S., the EU, and elsewhere since the 1990s. Minimalism has been influential in legal scholarship and popular policy discourse on such matters as pollution control and health care reform, but its impact on actual policy design has been surprisingly limited. By contrast, Experimentalism has had a lower profile in legal scholarship and popular policy discourse, but its premises are pervasively (if often imperfectly) manifest in operating regulatory and social welfare regimes. The reason for this practical influence, we suggest, is that public policy is increasingly pre-occupied with problems characterized by Knightian uncertainty.

In Part I, we defend our notion of Minimalism as a heuristic that usefully identifies influential premises of liberal public law scholarship and we elaborate its limitations as a guide to regulatory and welfare policy implementation. In Part II, we elaborate the Experimentalist alternative and argue for its comparative advantages in key policy spheres. We offer a conclusion in Part III.

II. Minimalism and Its Limits

We begin by describing the convergent themes of Minimalism and then proceed to analyze the limitations of its treatment of, first, regulation, and then, social welfare policy.

A. General Themes

The term “Minimalist” is associated with Cass Sunstein (Kuttner 2009), but it usefully connotes the understanding of administration, especially lower-tier official discretion and popular participation, in a broad range of legal scholarship, including especially the influential work of Bruce Ackerman and Jerry Mashaw.¹

The Minimalists are liberals who favor an expansive set of regulatory and welfare programs designed to canalize economic activity along socially beneficial lines, to achieve distributional fairness, and to insure basic human rights. They approve the underlying aims of the major New Deal regulatory and social welfare legislation, Warren Court-era civil rights precedents and statutes, and the “new social” environmental and safety regulation of the 1970s and after.

However, Minimalism reflects disillusionment with the New Deal practice of vast and vague delegation of authority to expert bureaucratic agencies. The Minimalists join the broad post-War consensus that professionalism and technical expertise are insufficient constraints on bureaucratic discretion: Given pervasive discretion, bureaucracies will pursue self-aggrandizement, or the safety of self-protective routine, or their own democratically unwarranted ideals of justice.

At the top, the problem is that, because legislative specification generates excessively rigid instructions and invites rent seeking by special interests, statutes must afford discretion to administrators. At the bottom, the problem is the limited capacity of senior officials to monitor and control the “street level bureaucrats” – welfare case workers, police officers on the beat, classroom teachers -- who make on-the-spot, face-to-face decisions that often determine the life chances of citizens (Ackerman and Hassler 1981; Mashaw 1985).

Minimalism also reflects disillusionment with the more ambitious claims for participatory democracy among liberals in the 1960s. Ackerman emphasizes that people have limited time and energy for politics except in times of crisis.² Moreover, Sunstein adds, popular

¹ We focus on the parallels among Sunstein, Ackerman, and Mashaw in their treatment of administrative policy implementation. In the sphere of constitutional adjudication, Ackerman rejects Sunstein’s Minimalism (see Ackerman 2007). The parallels between Mashaw and the other two are clearer in Mashaw’s earlier work we cite below than in his more ambivalent recent work (see, e.g., Mashaw 2006).

² Ackerman (2007) makes an exception for “constitutional moments” of heightened popular mobilization and deliberation. However, he uses the idea to more to explain the authority of past events than to inspire mobilization over current issues.

deliberation is not all it's cracked up to be by Utopian democrats. Serious disadvantages arise from tendencies, on the one hand, toward unreflective conformity ("groupthink") and on the other, toward unreflective tendentiousness ("group polarization"). Both phenomena are mitigated in decision making processes that, instead of striving for deliberative agreement, impersonally aggregate individual views (Sunstein 2005). The Minimalists believe in the possibility of meaningful public-regarding deliberation by officials and citizens, but democracy for them is mostly indirect. It takes place through electoral representation rather than popular participation.

The Minimalists have been strongly influenced by economics in responding to this situation. Economics provides a set of concepts that can structure decision-making by top level policy makers. And it defines a set of market-based practices that can be used to implement decisions without lower-tier discretion or popular participation.

The core economic norm is efficiency or optimality, which prescribes that resources be invested so that at the margin their return is equal and that duties be assigned to those who can perform them most cheaply. Basic economics suggests that standard markets will achieve both tasks in the presence of certain pre-conditions.

The Minimalists insist that there is nothing inherently conservative about such ideas so long as they are not permitted to displace distributive and dignitary values. The basic Coasean idea that transaction costs are the main obstacle to private solutions to externality problems suggests that liberal analysis should seek to identify and analyze such obstacles in deciding when and how the government should intervene (Ackerman 1983). Moreover, the more recent literature of behavioral economics shows that a key precondition of basic economic analysis – rational decisionmaking – often does not obtain. People tend to process some kinds of information incorrectly in generally predictable ways. Sunstein has shown how this body of work can help identify problems and structure interventions (Sunstein and Thaler 2009).

So the Minimalists urge that policymakers engage in the most rigorous feasible efficiency analysis in devising regulatory standards. They support the presidential orders that have required agencies to engage in cost-benefit analysis before promulgating rules (though they

Ackerman is open to the idea of occasional referenda on specific issues, and he likes the idea of quadrennial "deliberation days" in which citizens can discuss and make recommendations on key issues to elected leaders (see Ackerman and Fishkin, 2004; Ackerman 2000). However, such deliberative experiences are rare and engage issues only selectively or at a high level of abstraction.

deplore the tendentious mis-use of such analysis in the service of political goals). They have drawn on and contributed to a large literature that tries to give structure to such analysis, in particular, by showing how regulatory benefits such as greater health, longer life, and lower mortality, can be taken into account consistently and systematically (Sunstein 2002; Revesz and Livermore 2009).

In welfare programs, they propose a “social cost accounting” that balances the benefits of individualized treatment and adjudicatory process against its costs. The availability of trial-type hearings should be weighed against the magnitude of the cost of wrongful deprivation of the benefit in question. In setting substantive standards, administrators should choose between rigid rules and contextual standards so as to maximize the social benefits of “transparency”, “accessibility” (ease of application), and “congruence” (with underlying purposes), (Mashaw 1981; Diver 1983).

At the level of implementation, the Minimalists have a preference, where feasible, that regulatory programs take a form that complements or induces markets. The core examples are tradeable emissions permits and school or housing vouchers. Reforms of this kind promise two benefits. First, they incorporate the optimizing tendencies of markets. Second, they reduce the number and complexity of the program’s norms, thus cabining discretion.

Cap-and-trade” regimes respond to defects in the more “command-and-control” approach of the Clean Air Act. Under the Act, polluters have been obligated to reduce emissions to the level of the “best available” mitigation technology. Such abatement is inefficient, however, because it imposes uniform duties that disregard large variations in the compliance costs of emitters. Moreover, determining the “best available” mitigation technology for myriad highly technical functions is just the sort of task to which bureaucracies are unsuited, especially since the information needed for sound decisions is held by private firms with many incentives to withhold it from regulators.

Instead of attempting to define feasible technical solutions, the Minimalists propose that the regulator issue permits authorizing emissions of specified pollutants in socially acceptable aggregate amounts and then compel emitters to buy such permits in a market where they can be freely traded. Firms that can abate emissions cheaply do so, and those with high costs buy the permits. The market thus allocates the burden of a prescribed degree of abatement to the cheapest cost avoiders with a precision that no bureaucracy could achieve directly (Ackerman and Stewart 1985).

In social welfare, the Minimalists support school and housing vouchers in which beneficiaries choose for themselves from among a range of providers certified as meeting basic general standards. The beneficiary receives a voucher that she can exchange for housing or schooling, and the chosen provider, on surrendering the voucher, receives a specified payment from the government. As emissions permits contribute to optimization on the cost side by allocating duties to the cheapest cost avoider, vouchers do so on the benefit side by providing the beneficiary with the housing or schooling she deems most valuable. Moreover, in principle, vouchers put pressure on providers that make them more accountable to beneficiaries. If the beneficiaries are not satisfied, they go elsewhere and the providers lose the payments (Lui 2006).

At their most ambitious, Minimalists would replace much of the existing welfare state with what Ackerman and Anne Alstott call a “stakeholder” regime where each citizen, on turning eighteen, receives a substantial one-time endowment that can be used in whatever ways she decides -- “to start a business or pay for more education, to buy a house or raise a family or save for the future.” The goal of this universal voucher is to provide “a fair starting point for all” while protecting individuals from bureaucratic interference and eliminating the work disincentive effects of means-testing. “Stakeholders are free to make their own decisions... [but their] triumphs and blunders are their own” (Ackerman and Alstott 1999, 5).³

Where markets already exist and the problem is people’s limited capacity for effective choice, Sunstein has urged that interventions should often be limited to “nudges” designed narrowly to compensate for the relevant cognitive impairments. These micro-interventions involve altering a default rule or attending to “choice architecture” by providing information to consumers. So, for example, if people appear to be saving too little (as indicated by post-retirement poverty or expressions of regret), the solution is not to mandate savings, but to change the default rule for tax-subsidized employer-run savings plans. The current default rule provides that the employer direct a portion of compensation to savings if the employee requests; the new rule would require the employer to contribute to savings unless the employee requests otherwise. By influencing without pre-empting choice, “nudges” protect

³ See also Graetz and Mashaw (1999, 151): Proposing national programs of “cash income replacements or supplements, mandated individual savings, and certain forms of stop-loss insurance” that avoid “highly individualized discretion and decision making”.

impaired choosers from their mistakes, while maximizing autonomy and avoiding errors costs by leaving a significant range for choice (Sunstein and Thaler 2009).

Where administrative judgments are unavoidable, the Minimalists prefer to limit discretion with clear and easily monitored rules. A key example here is the “vocational” determination in the Social Security Disability programs. Eligibility requires a finding that the applicant is incapable of performing any jobs that exist in significant numbers. For decades, the decisions were made on the basis of all-things-considered judgments. But “one disability examiner's ‘broken down manual laborer’ is another's ‘malingerer’” (Mashaw 1981). The system of appeals to administrative law judges simply reproduced the problem at a second level. The Minimalist solution is a grid that dictates a conclusion on the basis of a series of straightforward findings about age, education, physical capacity, and work experience.

Summarizing Mashaw’s view, A.I. Ogus writes:

Bureaucratic rationality involves accurate and cost-effective implementation of centrally determined goals; it avoids direct confrontations with the claimant, concentrating instead on the application of detailed rules and guidelines with internal systems of management and control to insure consistency (Mashaw 1987).

The problem of “street level bureaucracy” is avoided by keeping the bureaucrats off the streets.

B. Limitations: Regulation

We turn now to our reservations about Minimalism, beginning with the Minimalist treatment of regulation.

1. The Optimization Perspective. The main preoccupation of Minimalist regulatory scholarship is optimization. Yet, optimality is not the only and often not the most important regulatory value. Management theorists often espouse a different value, which they suggest is sometimes in tension with optimization. “Reliability” is one name for this norm. (Landau and Chisholm 1995) It connotes a capacity for learning and innovation, or more specifically, for prompt recognition of and adaptation to changing threats and opportunities.

We do not doubt that the Minimalists would acknowledge the importance of reliability or that reliability could be subsumed under a thick definition of optimality. Nevertheless, in practice, the Minimalists seem to deploy a static conception of optimality that risks slighting reliability concerns.

Reliability entails responsiveness, not just to strong signals like prices, but to “weak signals”, such as small anomalies or deviances. Consider an incident at the Davis-Besse nuclear power plant near Toledo in the early 2000s. Maintenance personnel found rust particles “mysteriously clogging” the air conditioning and water filters. They had to replace the filters every two days. The industry standard for replacing such filters was two months, although the workers involved did not know this. After every-other-day replacement went on for two years, other personnel discovered that a metal liner built to contain radioactive material had corroded from its original 6 ½” thickness to about a half inch. The corrosion had been generating the rust particles. Karl Weick and Kathleen Sutcliffe assert:

The rust accumulation was a weak signal of plantwide problems that would have been detected sooner had information about industry wide experience been disseminated more thoroughly, had local personnel compared this experience with filter replacement in other parts of the facility, had the purchasing department questioned the large orders for filter replacements, or simply if people had started asking around whether replacement every forty-eight hours seemed out of line (Weick and Sutcliffe 2007).

Weak signals may not be visible in market prices. They differ from prices and other strong signals in being more numerous and diverse, and in requiring deliberative consideration and complex judgment (Simon 2010).

The best known examples of organizations focused on detecting and assessing “weak signals” are “high reliability” organizations in areas such as aviation or energy, where operational breakdown threatens catastrophe, and “lean production” manufacturing firms, where competitive pressures arising from short product cycles and customer demand for specialized features calls for the kind of discipline that the threat of catastrophe imposes on “high reliability” organizations. Perhaps the most influential examples have been the U.S. Navy’s nuclear submarine program and the product development and manufacturing model associated with Toyota. (Spear 2009; Sabel 2006)

The Navy’s Nuclear Propulsion program developed an ethos and a set of practices that treated even minor unexpected observations as symptoms of potential systemic malfunction calling for inquiry and possibly reform. The Toyota Production System deliberately stresses its processes (for example, by “just in time” parts delivery that eliminates buffer inventory stocks) so that errors will surface quickly. It eliminates end-of-the-line re-work departments in favor of practices that stop the

line when defects are discovered and require that the “root cause” of the problem be diagnosed and remedied before production resumes.

While there is no tension in principle between optimization and reliability, many have observed that optimization rhetoric has a tendency in practice to inhibit the pursuit of reliability.

First, optimization is associated with a preference for simple and few norms and hence crude categories. Such preferences encourage a tendency to “normalize the unexpected,” to re-frame deviant observations in ways that assimilate them to previous understanding, rather than to treat them as opportunities to revise such understanding. Burn marks on the Challenger space shuttle and the rust particles at the Davis-Besse nuclear plant were initially perceived as anomalies, but in the absence of pressure to focus on them, were reconceived as normal. Arguing against “simplification”, Weick and Sutcliffe assert, “the diagnostic value of weak signals is lost when details are lumped into crude general categories.” They continue, “Categories may improve coordination [i.e., static optimization], but they harm detection of events not seen before” (Weick and Sutcliffe 2007; Vaughn 1996).

Second, the optimization view is associated with a preoccupation with short-term cost minimization. The pursuit of reliability requires incurring immediate and measurable cost in the hope of speculative future benefits. Those who have been taught to optimize sometimes find this hard to do. Reporting on the transformation of nuclear power safety in the 1990s, Joseph Rees writes that, under the old regime, “maximizing the output of electricity meant fixing the reactor after it breaks.” Conventionally trained managers resisted supporting “operations review” engineers who sought to prevent all breakdowns because the benefits of their work could not be measured. The managers were uncomfortable with committing resources to “solve problems that haven’t even occurred yet” (Rees 1984). Books on Toyota-style organization assert incessantly that, while optimization and reliability ultimately go together, managers need to defer or sublimate optimization concerns and focus on reliability to achieve success.⁴

Neoclassical economics encourages the hope that, if the administrator gets the prices right, the regulated firms will develop

⁴ “Japanese managers have found that seeking improvement for improvement’s sake is the surest way to strengthen the company’s overall competitiveness. If you take care of quality, the profits will take care of themselves.” Imai 1986, 49-50.

“[T]he manufacturing world learned [from firms like Toyota that] [i]f one focused on improving quality, then cost competitiveness would follow.” Suri 1998, 55.

whatever skills are necessary to succeed in the re-optimized market. But other economic learning shows that we cannot assume that this will happen. Key actors may be able to externalize the costs imposed by the regulator. Notably, corporate agents can shift costs to shareholders, and shareholders, with limited liability, can shift them back to the public. Moreover, as we will illustrate shortly, the learning that occurs through the analysis of weak signals has a public good quality. It is valuable to others, but it is usually not feasible for the discoverer to charge for it. (Information comes in small pieces of initially uncertain value, and it becomes obsolete quickly.) Under the circumstances, there is a substantial probability that, without further public intervention, private investment in the capacity to detect and interpret weak signals will be sub-optimal.

Where markets fail, it is sometimes more important for regulation to strive to induce reliability than optimality (in the static cost-minimization sense that the term most often connotes). The regulators need to develop capacities for learning and adaptation in their own systems, and they need to encourage the firms they oversee to cultivate such capacities in a manner that gives appropriate weight to relevant public values.

Some key aspects of the regulatory failures involved in the financial crisis illustrate the dangers of excessive preoccupation with optimization at the expense of reliability. The regulators were overly focused on the optimization rationales for financial innovation (lower transaction costs, better diversification) and relatively insensitive to less measurable and immediate systemic risks. They put a great emphasis on price signals (looking to asset and stock prices as indicators of bank solvency and risk-taking) and ignored a panoply of weak signals of systemic vulnerability (for example, the departure from the historical relation between incomes and home prices).⁵

When goals are framed in terms of catastrophe-avoidance (as with “high reliability” organizations), the need for reliability is obvious, but reliability concerns are potentially relevant where the relevant harms are more diffuse and frequent. Consider criminal justice. The static

⁵ See Greenspan 1998 (arguing that regulatory capital requirements were “demonstrably too stringent” for “optimal capital regulation” because they were higher than creditors in unregulated industries required for comparable exposures); (see Greenspan 1998); Financial Services Authority 2009, 41 (faulting economic thought for insufficiently appreciating that “allocative efficiency benefits of further liquidity and market completion may be relatively slight, and therefore easily outweighed by additional instability risks which additional liquidity and complexity may create”). See generally Simon 2010.

optimization perspective directs attention here to “getting prices right” by calibrating penalties and resources for detection and apprehension (so that penalties approximate the value of the harm adjusted to reflect the probability of apprehension and conviction). A competing perspective argues for relatively more attention and resources for prevention, and here the key focus is not on prices/penalties, but on the sharing and collaborative analysis of “weak signals” of danger between and among different agencies, localities, and community groups. This reliability perspective became more prominent in the 1990s in connection with “community policing” regimes instituted in many cities, but not as prominent in routine crime control as the punishment-focused view. 9/11 made the reliability perspective more salient. Because it involved catastrophic harm, it shifted attention to prevention, and because the critical performance failures involved sharing and analysis of ambiguous information, it emphasized the importance of reliability (Richman 2005; Stuntz 2006).

2. Minimalist Intervention. Both the Minimalist’s favorite regulatory tools – cost benefit analysis and tradeable emissions permits – reflect a preoccupation with static optimization. Both tools are valuable but not as valuable as the Minimalists suggest, and their efforts may have obscured or distracted attention from some important issues.

a. Cost-benefit analysis. Any sensible regulatory proposal should consider costs. And it is often a valuable heuristic exercise to compare the costs with the benefits of a particular proposal or the relative return on public expenditures for different proposals even if the exercise requires controversial and speculative estimations. It is useful to know that the cost-per-life-saved of the EPA’s Trihalomethane drinking water standard is \$200,000, while the cost per life saved of its 1,2-Dichloropropane standard is \$653 million. The comparison, even if plausibly calculated, does not establish that either standard is mistaken, but it gives a reason to revisit both.

Nevertheless, the potential value of cost-benefit analysis is limited by its focus, at least in practice, on static factors, not the capacity for learning and adaptation. More specifically:

First, the proponents have been preoccupied with methodological issues concerning the estimation of benefits (for example, the value of a life or of different kinds of lives or the right discount rate for future lives), whereas, in practice, conclusions will often be dominated by estimates of future costs that will necessarily be highly speculative. Richard Revesz and Michael Livermore note a persistent tendency to under-estimate cost-saving innovation and overestimate costs (Revesz

and Livermore 1998). They give examples of estimates that proved to be wrong by factors as high as 10. Methodological rigor makes only a slight contribution when the inputs are so soft. More importantly, in many situations where innovation is highly likely but indeterminate, the more important task is not to estimate the effects of innovation but to induce them. If cost-benefit analysis can make a contribution to interventions focused on inducing innovation, there is no indication of it in the Minimalist literature.

Second, the proponents tend to defend cost-benefit analysis in the abstract without much attention to how it might be institutionalized. The value of cost-benefit analysis as intellectual discipline does not imply any particular conclusions about institutional structure. To the extent that analysis involves comparison of costs and benefits across different regulations and agencies, it suggests a central role in collecting and disseminating data, but this central role could be a subordinate one performed without any loss of authority to the agencies. Or it could involve a coordination and oversight role played with varying degrees of strictness.

In practice, however, the principal effect of cost-benefit analysis in the federal government in recent years seems to have been to rationalize a shift in authority from the agencies to the White House. This shift has at least occasionally involved heavy-handed ad hoc central intervention, sometimes rationalized by tendentious and ideologically-driven estimations of costs and benefits. It also appears to have involved significant diminution in the transparency of the regulatory process, since the White House regulatory offices are less transparent than the agencies (Strauss 2007; Heinzerling 1998). No doubt the Minimalists regret both these developments, which are not entailed by cost-benefit analysis in principle. But the developments show the limitations of a literature preoccupied with analytical methodology rather than institutionalization.

b. Cap-and-trade. The most developed regulatory proposal in the minimalist literature is the cap-and-trade emissions permit system, which epitomizes the Minimalists virtues of static efficiency (allocating burdens to the cheapest cost avoider) and minimizing discretion (Ackerman and Stewart 1985). Although experience to date is mixed, the emissions trading idea seems likely to prove an important contribution. But its range and its value are more limited than the Minimalists suggest. In particular, four limitations should be noted:

First, the cap-and-trade approach only works with harms that can be effectively measured (Coglianese and Lazer 2001). Although the

environmental harms of air pollution cannot be directly measured, they correlate sufficiently with the amount of emissions of specific pollutants, and for some sources and pollutants, we can measure that. However, for most regulatory goals, we have no comparably powerful proxies. Regulatory regimes are usually prophylactic; they are designed to minimize risk. But with, for example, food safety, occupational health and safety, or financial institution soundness there is no single powerful indicator of risk. In such situations, we are forced to rely on “weak signals” – a multifarious range of indicators that require interpretation and complex judgment and do not lend themselves to pricing.⁶

Second, even where adequate proxies are available, the information demands of cap-and-trade remain large and sometimes disqualifying. The regulator still has to set an aggregate quantity limit (or in the tax alternative, a price) for each pollutant. Since the efficacy of the regime depends on this single number, the stakes are extremely high. Yet both methodology and data for this determination are likely to be incomplete and disputed. The regulator needs to estimate, not only the immediate effects of abatement of the target pollutant, but collateral costs and benefits of behavior induced by the abatement incentives. Costs, for example, of unregulated but still harmful pollutants that might be substituted for the regulated ones; benefits, for example, of unregulated but harmful pollutants that might be abated by the same efforts required to abate the regulated ones.

Moreover, while the market regime obviates determinations of relative abatement costs among emitters, it requires knowledge of aggregate costs. It often does not make sense to reduce a pollutant to the level at which there is no probability it is imposing any harm; a plausible limit will involve some weighing of abatement benefits with the costs of achieving them (as required by cost-benefit analysis). Yet, determining such costs even assuming current technological constraints is notoriously difficult.

⁶ Of course, measurement needs to be economically as well as technically feasible. Moreover, trading requires an infrastructure (for example, to identify owners and record trades) and entails transaction costs. These pre-requisites will limit the application of the model to actors of more than minimal size or abatements of more than minimal social value. The thresholds are met with respect to the kind of large power-generating and manufacturing facilities covered by current regimes. However, to the extent that the relevant problems involve smaller, more diffuse activities, they may not be. For example, the model seems unpromising for the increasingly salient problems of emissions from “non-point sources,” such as farm water pesticide run-off. (See Karkkainen 2006).

It is no surprise then that the few examples to date of operating cap-and-trade systems include some spectacular examples of getting quantities, and hence prices, wrong. In 2000, quantities proved too low to accommodate an unanticipated surge in demand in the South Coast Air Quality Management District trading regime in California. Prices for nitrous oxide emissions soared from \$4,300 per ton to \$45,000 per ton (Lejano and Hirose 2005). The District had to suspend trading and issue new permits to prevent exacerbation of a statewide energy crisis. Another crisis emerged with the inauguration of the European Union's greenhouse gas emissions trading regime. Permit prices collapsed in 2006, when it became apparent that the regulators had over-estimated current "business as usual" emissions, and thus set an aggregate target that was too high, resulting in the distribution of too many permits (Timmons 2006).

It is true that market-simulating reforms like cap-and-trade will often require less information and complex judgment than comparable command-and-control regimes. However, this advantage comes at a cost. There is a risk that market simulation will involve a sacrifice in flexibility, in particular, the capacity to revise in response to new information. Part of the market-simulation idea is to induce private investment by creating marketable entitlements. Investors will claim that they need and deserve some measure of stability with respect to the key parameter of price or quantity. Thus, permits may be good for several years – for example, five in the EU – and can sometimes be "banked" for use beyond that period. The regimes typically place limits on the ability of regulators to dilute the value of the permits by new issuances before the end of a period. Regulatory tightening is apt to trigger protest under any regime, but by encouraging emitters to view the current limits as an entitlement for a fixed period, cap-and-trade may exacerbate the problem.

The third limitation on market-simulating regimes is that, while they are sensitive to variations in abatement cost among emitters, they are insensitive to variations in abatement benefits across the localities where emissions occur. At least in the paradigmatic model, there is a single price for emissions throughout the system. Yet, the harm emissions involve usually varies locally with such contingencies as population density, aggregate emissions levels, and land use patterns. The marginal harm in a heavily polluted urban area is often much higher than in a sparsely populated area with low aggregate emission levels. Moreover, market regimes may encourage the creation of "hot spots." These occur where polluters minimize compliance costs by clustering in

low cost areas (areas with low land costs and limited local taxes and regulation). When this happens, pollution burdens concentrate in particular localities. It is possible that these localities will disproportionately include low income and otherwise disadvantaged people. The “hot spot” problem does not apply to greenhouse gases because their effect operates at the global level, and emissions from any point contribute equally. However, for most pollutants, location matters.⁷

Trading regimes can address the localization problem by subdividing markets. Thus, in the South Coast Air Quality Management District, permits sell at different prices in coastal and inland districts. Yet, such sub-division multiplies the number of judgments and the amount of information required.⁸

⁷ While the global nature of greenhouse gas effects on temperatures exempts it from the “hot spot” problem, it creates a “tragedy of the commons” problem. Only global efforts, or at least efforts including all major emitting nations, are likely to be strongly effective. Yet, it has proven difficult to induce major emitters, especially India and China, to participate substantially. Two responses show the limits of the market approach:

1. The Kyoto Protocol and other regimes allow emitters within the regime to earn credits by subsidizing projects in non-participating countries that reduce emissions (or increase gas absorption) beyond what would have happened in the absence of the project. A major fraction of the reductions credited to Kyoto have involved such efforts.

2. Some observers propose a focus on negotiated deals for large infrastructure projects in which rich countries trade economic benefits for developing country commitments that favor low-emission energy production (natural gas and nuclear power rather than coal and oil).

A key point about both approaches is that they cannot operate primarily through self-adjusting price signals and self-interested trading. They require complex administrative capacity. Failure to appreciate this point accounts for the early disappointments of the Kyoto Clean Development Mechanism. It appears that a large fraction of the credits certified under the regime involve abatements that would have occurred without the regime or could have been induced at a much lower cost than the regime paid. A core problem is that the regime has encouraged private institutional development that has outpaced the development of public institutional capacity to restrain abuses. See Wara 2007 and, more generally Ruhl and Salzman 2000..

⁸ In their early proposal, Ackerman and Stewart proposed extensive sub-division (1985). Richard Revesz and Jonathan Nash speculated on the possibility of a massive computer program aggregating information about local climate affects that would continuously generate local prices for emissions of controlled pollutants (2001). It seems ironic that a discussion that started out with the goal of minimizing the information demands on regulators should lead to a proposal that resembles nothing so much as Soviet central planning.

Fourth, it is not clear how powerful the incentives for the production and dissemination of innovative technology created by trading systems will be. To the extent that innovations take the form of major capital goods, especially with patentable features, they will be marketed and adopted where likely to be profitable. But many innovations take the form of incremental improvements or involve adaptation of technologies to particular local conditions. Without public efforts, small incremental improvements may not be disseminated because of transaction costs. Moreover, technology may not be usable without significant customization, and small and medium-size producers may lack access to necessary technical assistance.⁹ It is possible that trade associations or business consultants can fill this gap, but it is not inevitable. The example of the U.S. Agricultural Extension Service shows that publicly-subsidized technical assistance to small and medium producers may be needed to induce adoption of socially desirable practices and to protect them from the competitive disadvantage that they might suffer vis-à-vis larger producers from regulations that require technologically complex responses.¹⁰

C. Limitations: Social Welfare

The Minimalist welfare program of nudges (manipulation of default rules and choice architecture), norm simplification, and vouchers is likely to prove helpful with respect to some problems. But the approach seems implausible or question-begging with respect to many of the most important problems. It is unresponsive to some salient trends in welfare policy, and the most promising recent innovations have taken a much different approach.

1. The Changing Policy Context.

Minimalism remains heavily grounded in the premises of New Deal social welfare policy. The New Deal welfare system was focused on cash transfers under categorical rules. Its central programs were modeled on private insurance, and they reflected an actuarial conception of risk. The basic reference point was a typical worker: a male

⁹ See Von Hippel 2008) (explaining that the costs of transferring even “fully developed” process technology to new settings can be high).

¹⁰ On the extension service, see note below.

Atul Gawande (2007, 242-43) has argued that in health care, “[n]ew laboratory science is not the key to saving lives. The infant science of improving performance – of implementing our existing know-how – is.” A new drug with a fraction of the effectiveness his simple but counter-intuitive surgery protocol would have attracted a vast amount of private capital, but developing and demonstrating the “checklist” required public support. (2010).

breadwinner working for 40 years, after an initial period of searching, in the same job or a succession of similar jobs in the same industry. His career would be interrupted by spells of unemployment, but these spells would correlate with systematically calculable phases of the business cycle. The Social Security Act created programs of wage-related benefits for this worker and his dependents during bouts of unemployment, after retirement, in case of disability, and for his surviving dependents after his death. A parallel program of means-tested public assistance benefits for people who could not work and lacked sufficient employment history to qualify for social insurance was expected to wither away as the economy recovered from the depression and breadwinners built up their social insurance entitlements.

Of course, the public assistance programs did not wither away. The problems that they addressed persisted and grew even in periods that approached full employment. This basic development has required extensive rethinking of these programs and their relation to the social insurance ones. An important body of Minimalist scholarship has struggled with this task. As we've noted, this scholarship has sought to preserve the New Deal emphasis on standardized rule-defined cash benefits while broadening the scope of both the social insurance and public assistance programs.

These efforts, however, have not taken full account of changes in the social context that underlay the New Deal commitment to standardized rule-defined benefits, and they have largely ignored the most distinctive policy responses to them. The key social changes concern increased diversity and volatility. The distinction between labor market participants and nonparticipants has eroded. People whom the New Deal model considered normally outside the labor market – the elderly, disabled, housewives, single mothers – are now thought to have a right and/or a duty to participate effectively. Long-term careers in the same job or industry are less common; the skills that jobs demand vary more widely and change more rapidly than before. Long-term marriage and two-parent child rearing, which the New Deal took as normal, have diminished, and family structures have become more diverse. The social backgrounds and linguistic capacities of citizens vary increasingly. Some social problems, including many involving mental health and substance abuse, that were not prominent in the New Deal welfare program are highly salient today. And the system has gradually assumed responsibility for health care under circumstances where both relevant technology and needs are changing rapidly.

The most distinctive policy innovations induced by these developments focus on capacitation rather than maintenance or compensation. Where actuarial risk-pooling breaks down in an uncertain world, the welfare state strives to equip people with skills to deal with the disruptions they face, whether in the market or the family. The services of the new programs are typically customized and bundled across disciplines and problems. For example, employment-related services may be combined with family support services, or family support services may combine education, mental health, and medical services.

At the same time, persistent and labile problems call for continuing and adaptive intervention. Responding to unemployment will often require, not just temporary income support, but reskilling to respond to changing configurations of job opportunities. Chronic educational and psychological problems – for example, substance abuse, family dysfunction, and learning disabilities – require recurring intervention that takes account of the likelihood relapse.

The design of services reflects changes that have occurred in professional disciplines. One is the greater capacity to diagnose and respond to idiosyncrasy. For example, in medicine, genetic indicators permit the customization of drugs to particular patients. More mundanely but at the moment more importantly, effective treatment for many behavior-dependent diseases such as diabetes is now understood to include the construction and monitoring of an individualized plan that covers medication, diet, and activity (Christensen et al. 2008). Or to take another example: educators have recently come to understand that the debate between “phonics” and “whole language” approaches to reading was misconceived. Each approach has techniques that are effective with some students. The teacher should not choose wholesale between them but should assess each student to determine the combination of interventions most helpful to him or her (Schemo 2007).

Reforms in most key areas of social welfare, including education, child welfare, disability rights, and mental health, have reflected these trends in professional practice. They typically require individual assessment and customization of services, complex, heavily diagnostic judgment, and ongoing re-assessment and adaptation.¹¹ The Minimalists have not taken account of these developments.

¹¹ Statutes requiring either individual service plans or “reasonable accommodation” include: Education for All Handicapped Children Act of 1975 (“individualized education plan”); Individuals with Disabilities Education Act of 1990 (“individualized education plan”); Adoption Assistance and Child Welfare Act of 1980,

2. Minimalist Intervention. We can assess the limitations of welfare Minimalism in terms of the two most characteristic Minimalist projects in this area: norm simplification and vouchers or stakeholder funds.

a. Norm simplification. There is a plausible role for programs based on simple norms that obviate pervasive complex judgment. In his Minimalist critique of Experimentalism, David Super mentions as models of the kinds of programs he favors Food Stamps and Supplemental Security Income (SSI), (Super 2008). These programs provide easily defined benefits (food vouchers or cash) to broadly defined categories of indigent people -- “households” (virtually any person or group that lives outside an institution and prepares its own meals) for Food Stamps, aged and disabled people for SSI. If we put aside the complicated issues associated with disability determination in SSI, they are based on relatively straightforward rules, and as far as they go, they are successful.

The problem is that these programs do not go very far. They can get by with uniform benefits and simple rules because each addresses only a single and simple need – food or money – and they avoid making judgments at the margin by under-satisfying the need. The programs provide benefits only to the most disadvantaged, and the benefits they provide are meager. Relative to the broader purposes of poverty relief, the programs are spectacularly under-inclusive. If Food Stamps and SSI constituted the whole of America’s response to poverty and social need, they would be reviled as abominations. They can only be considered successful as a component of a broader array of programs that provide benefits related to health, education, job training, housing, and other matters. These benefits typically take the form of services, and their providers increasingly aspire to the complex customization that we noted above.

The simplification project in the welfare area to which scholars have devoted the most attention is the vocational “grid” regulation in the Social Security Disability programs. These programs condition

P.L. 96-272, sec. 101(a)(1), 42 U.S.C. 675(1) (“case plan” for children in state custody); Developmental Disabilities Act of 1984, P.L. 98-527, sec. 123(a) (“individualized habilitation plan”) [since removed]; Personal Responsibility and Work Opportunity Act of 1996, P.L. 104-193 (“individualized responsibility plan” for public assistance recipients); Americans with Disabilities Act of 1990 (“reasonable accommodation” for disabled workers); Fair Housing Act Amendments of 1988, Pub.L. 100-430, sec 6(a). 42 U.S.C. 3604(f)(3)(B) (“reasonable accommodation” of handicapped residential housing purchasers).

See also Noonan, Sabel, and Simon 2009.

eligibility on “permanent and total disability”, which entails a finding that there is no substantial number of jobs that a person in the applicant’s medical condition could perform. For decades this “vocational assessment” was made through an all-things-considered judgment, first, by a vocational expert, and second if there was an appeal, by an administrative law judge. The process was costly, and the resulting judgments were wildly inconsistent. The response was to replace expert judgment in a broad range of cases with a “grid” consisting of a set of rules that dictated eligibility conclusions on the basis of a small number of easily determinable facts about age, physical capacity, education, and work experience.

Minimalists have supported the grid as an efficient trade-off of “congruence” (fit with substantive purposes) for “accessibility” (less expensive process and more formal consistency). The main objection to the grid is that its simplicity makes for under-inclusion. There are some cases that would be deemed eligible under an all-things-considered judgment for which the grid denies eligibility. The Minimalists respond that perfect justice is impossible and that the quest for it must yield to resource constraints. Moreover, they suggest that the costs of under- and over-inclusion will be relatively small if, as appears, the relevant cases are borderline or marginal. To the extent that incorrectly denied cases resemble correctly denied ones and incorrectly accepted claims resemble correctly accepted ones, the social costs of error are likely to be relatively low (Mashaw 1980; Diver 1983).

Two limitations of the line of analysis are becoming salient.

First, the grid approach is out of touch with changes in the social understanding of disability. When disability programs were added to the Social Security regime in 1950, it was generally assumed that severely incapacitated people were necessarily and appropriately excluded from the workforce. Moreover, the idea of “permanent and total disability” was considered an observable self-defining category. But these notions have been discredited as both normative and empirical matters. Normatively, the inclusion of disabled people in the broadest feasible range of social activities has become a central goal, one that is sometimes given precedence over compensation. Empirically, we have discovered that a combination of rehabilitation services and “reasonable accommodation” at the workplace can enable a large fraction of those once considered incapable of significant work to perform a broad range of jobs. Thus, a variety of programs for disabled people provide or mandate customized services or workplace accommodation (Institute of Medicine 2002).

It is thus no surprise that, as Jerry Mashaw reports, many urge that the Social Security programs move away from its compensation focus and its categorical norms toward “a community-based and multidisciplinary approach that would deploy financial assistance, medical care, rehabilitation, and transportation services, among other things, to promote the overall well-being and highest possible functioning of disability beneficiaries.” This revised approach, Mashaw emphasizes, “would demand highly discretionary judgments” (Mashaw 1980).

Second, the most commonly asserted arguments for the grid are static cost-benefit arguments. By contrast, modern management theory emphasizes that detection and correction of individual errors involves opportunities for systemic improvement (Womack and Jones 2003). Errors can be corrected in a specialized department that addresses only the particular defective product. Alternatively, they can be addressed diagnostically; the causes of a particular defect can be mapped, and the systemic flaws can be remedied along with the individual problem. As a purely logical matter, either approach might be efficient, but a full assessment has to consider, not only accuracy and decision costs, but also the opportunity costs and benefits of learning and systemic improvement. Companies that feel pressures and opportunities to innovate often decide that they do better to sacrifice static optimization in order to strive for continuous improvement. When they do so, they tend to adopt explicitly super-optimal norms such as “total quality” or “zero defects”, refusing to consider (at least rhetorically) that any level of error could be optimal.

In Social Security disability, the fact that cases under- and over-included by the “grid” regulation tend to be borderline has different implications from static and dynamic perspectives. In a static sense, the proponents are right to suggest that the social cost of incongruence is relatively low. But from a dynamic perspective, the opportunity costs of formal rules in these cases may be relatively high because these may be the cases in which the potential for learning and systemic gain from contextual examination may be highest. Even in the current system, which is largely preoccupied with sorting people into categories of disabled or non-disabled, contextual examination in marginal cases might have exceptional diagnostic value if the characteristics ignored or over-emphasized by the rules are shared by relatively large numbers of applicants. Moreover, if we imagine a program reconfigured along the lines of recent criticisms to combine income support with rehabilitation, the learning potential from contextual inquiry may be highest in these

cases because these may turn out to be the cases in which rehabilitation has most promise.

b. Vouchers and Choice Architecture. Housing and school vouchers are a natural extension of Minimalist logic. Super expresses particular enthusiasm for housing vouchers. Aside from SSI and Food Stamps, he points to the Section 8 housing voucher program as a model (Super 2008). Under this program, eligible recipients get certificates they can use to induce landlords to rent to them. The tenant pays a percentage of her income, and the government pays the difference between that amount and the officially determined “fair rental value” of the apartment. The idea is to give the tenant a broader range of choice and more leverage than traditional public housing, where there are few choices and, once a tenant moves in, she usually loses her subsidy if she moves.

The evidence on housing and school vouchers remains limited, and we are open-minded on the subject. However, we note some basic limitations to the model. Some of these limitations resemble those observed with emissions permits. Foremost among these are information demands. Perhaps it is easier to design a voucher than to run a school or housing project directly, but voucher programs require administrators to set a price. If the housing voucher price is too low, landlords will refuse to participate. If the price is too high, they get a windfall. The Section 8 program Super admires has suffered from both problems. During some periods, a large fraction of certificates awarded to applicants were returned unused because the holders could not find a suitable apartment for which the landlord would accept the certificate. At the same time, it has been asserted that in some localities, the certificates gave landlords more than the market value of their apartments (Curham 1996).¹²

There are further problems with vouchers in the welfare context. Beneficiaries may lack either adequate information or adequate analytical capacity to make good choices with their vouchers (as some Minimalists themselves emphasize). In addition, providers have strong incentives to “cream”: instead or in addition to competing in the voucher market by trying to provide better services, they can compete by better identifying and attracting applicants who can be served more easily. Landlords will look for the most stable families; schools for students with the most promising pre-existing ability and behavioral traits; and medical facilities for the healthiest people.

¹² The danger of setting the price too low could be avoided by giving the voucher a flat base value and allowing the tenant to add any amount she wants to it. However, some worry that this approach, if widely used, might contribute to rent inflation.

Moreover, the effectiveness of schools and housing is widely thought to be influenced by the social mix of the local population. Average achievement may be higher when classrooms have a mix of ability levels than when they are segregated by ability. Disadvantaged people may do better in racially and economically integrated neighborhoods. Integration may require a complex balance, for example, achieving a “critical mass” needed for minority group members to feel comfortable on the one hand and avoiding the “tipping point” that triggers the flight of the privileged on the other. If integration or social balance is a goal, then it seems unlikely that it can be achieved through unaided individual choice. Aside from discrimination by providers and local governments, there is a coordination problem. (Liebman 1991).

Some combination of information and coordination problems seems to account for the finding that “if given vouchers, poor people choose ... segregated areas similar to the ones they left.” (Rosenbaum and DeLuca 2009, 5) The most admired effort to achieve housing integration with vouchers – the Gautreaux program in Chicago – depends heavily on professional services to match applicants with apartments and counsel them about adjusting to life in their new neighborhoods

Health care cost control is the major social welfare challenge of the day. We doubt that the Minimalists’ approach can play more than a secondary role in effective reform, and we worry that it will discourage critical reforms that depend on the kind of administrative capacity they are skeptical of.

The central American public health care programs, and even private insurance, already have voucher-like characteristics. The main difference between Medicare or Medicaid entitlement and a housing or school voucher is that there is no cap on the amount of benefits that the beneficiary of the health programs can demand. The system thus gives providers an incentive to overtreat and to use relatively expensive treatment that may not even serve the medical interests of the patient, much less social efficiency.

The economists’ favored approach to the problem involves making consumers more selective by tightening their budget constraints (for example, by cutting back tax subsidies and encouraging healthcare savings accounts and employer self-insurance), (Hubbard, Cogan, Kessler 2005). A competing managerialist response involves reforms along the lines we have observed in other social welfare areas – monitoring that induces and assesses complex individualized decisionmaking and that generates and disseminates information in a

way that promotes continuous learning and improvement (Christensen 2008).

The Minimalists are unlikely to be comfortable with either perspective. The economic vision relies on individual choice to an extent the Minimalists know is implausible. The managerialist perspective calls for exactly the kind of complex administrative capacity that the Minimalists despair of creating.

The difficulties for Minimalism in this area can be seen in the chapter on health insurance in Sunstein and Richard Thaler's Nudge (Sunstein Thaler 2009). It focuses on the Medicare Part D prescription drug plan inaugurated in 2003. The program requires most beneficiaries to choose among a variety of private plans. Sunstein and Thaler summarize evidence that shows two crippling problems. First, left to themselves, many people will not choose at all, and if the default is no coverage, they will lose coverage. Second, most people do not seem to choose the plan that is most beneficial to them. We know this because researchers can get an idea of what people's drug needs are from the records of their plans and then compare the coverage they got (deductible, co-payments, ceilings) with the coverage they could have gotten under alternative plans.

Sunstein and Thaler propose a classic Minimalist response: manipulation of default rules and "choice architecture." Instead of no coverage, the default for non-choosers should be a plan chosen by the government. And the government should make these default choices, not randomly (as is now done for some beneficiaries) but by "intelligent matching." The government can use available data to calculate which plan is most likely to be the best for non-choosers and assign them to it provisionally. For choosers, the key is to present the data at the time of decision in a way that helps the beneficiary choose effectively. For example, the choice document can contain a list of the beneficiary's drug use in the past year and the net cost to the patient of such drugs under alternative plans.

Note that, for their only discussion of health insurance, the authors choose a relatively small and manageable portion of the picture. Even if we saw the kind of assisted choice they propose as effective here, it would be harder to see it working with respect to the more complicated choices involved in, say, choosing a doctor or a hospital or a comprehensive insurance plan.

And most strikingly, even in this relatively simple case, choice ends up doing very little work. Sunstein and Thaler argue convincingly that, by using sophisticated data aggregation and analysis, the

government, can make plausible decisions about the interests of the large fraction of people disinclined to choose. They suggest further that the government can use the same tools to present data to choosers in a way that will make their choices effective. It seems quite likely that, for many choosers, the presentation of the data will more or less determine the choice. To the extent that the government can accurately determine the best choice and can present the data that underlies that determination clearly, choosers will simply ratify the government's decision. To the extent that choosers depart from the government prediction, it could mean that they understand their situation better than the government, or it could mean that they are confused. In the former case, choice would serve as a valuable check on the government's analytical apparatus (which presumably could be continuously improved as the government investigates the reasons for the discrepancies). In the latter case, choice is just noise and nuisance. But in either case, the key intervention involves much more than a "nudge"; it is a kind of complex administration that Minimalism tends to acknowledge only as an afterthought.¹³

II. Experimentalism

Experimentalism takes its name from John Dewey's political philosophy, which aims precisely to accommodate the continuous change and variation that we see as the most pervasive challenge of current public problems. "Policies [should 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," he wrote (Dewey 1927, 203). At the same time he

¹³ You would never know from Sunstein and Thaler's breezy discussion of the potential contribution of Minimalism that Medicare Part D involves a public policy fiasco on a scale of the SO₂ scrubber legislation that Ackerman and William Hassler famously denounced in Clean Coal/Dirty Air (1981). In larding unnecessary subsidies on the drug industry and precluding government price negotiation or foreign imports, the bill, like the scrubber legislation, represents the victory of special interest rent-seeking and regulatory dogmatism over sensible public policy. See, e.g. Slaughter 2006. There is one difference: the relevant dogmatism in the case of the scrubber legislation was New Deal command-and-control. With Part D, it is market fetishism. To be sure, the Minimalists are not to blame for the bad faith and unreflective uses of their ideas, but the fact that Sunstein and Thaler can discuss their market-mimicking reform without any indication of how dependent it might be on a deeply dysfunctional infrastructure suggests that even well-considered discussion can have distorting effects.

rejected standardized bureaucratic solutions and urged responses that combined respect for local context with centralized structure and discipline. Aside from education, where he was an active reformer, Dewey offered little by way of concrete illustrations of his proposals, but postwar developments in business management and recent reforms in many public policy areas connect fruitfully with Dewey's theories.

In the United States, some Experimentalist institutions have emerged in sectors, such as nuclear power or food safety, where technological and economic change has outstripped the capacities of established market and bureaucratic safeguards to protect key public interests. Others have emerged in settings, such as public education or child protective services, where decades of apparently fruitless and interminable debate have created strategic uncertainty among the contending parties and opened them to interventions aimed at learning from promising local experience.

In the European Union and in many international regimes, Experimentalist institutions have arisen from the realization that mutual evaluation and learning from diverse national practices is sometimes the only feasible way of coordination in the absence of a conventional national sovereign with presumptive authority to fix common goals.

Not all these regimes have complete or well-configured architectures, but we consider them Experimentalist to the extent that they are designed to achieve local adaptation and aggregate learning by combining discretion with duties to report and explain and by pooling information. We do not suggest that any of these regimes has proven its efficacy over alternative approaches to the problems it addresses. But each has functional and jurisprudential properties that make it a distinctively promising response to the dimension of uncertainty in these problems. Our optimism about Experimentalism is based most generally on this fit between structures and problems.

A. Basic Architecture

We start with a relatively abstract model of Experimentalism in which the basic constituents 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 or private service providers with which it contracts. Or the center might be a single public or private organization, with the local units its (territorial) sub-divisions: a state department of child welfare

services and its regional districts, for one example, or a school district and its individual schools for another.

In practice 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 contiguous “higher” and “lower” units is the same, regardless of where they are located in the overall system. Together the center and local units set and revise goals, and the means of pursuing them, in an iterative process with four basic elements.

First, framework goals (such as an “adequate education” or “good water status”) and provisional measures for gauging their achievement are established by legislation, administrative action, or court order through consultation among the center and local units and relevant outside stakeholders. Second, local units are explicitly given broad discretion to pursue these ends as they see fit.

But, third, as a condition of this autonomy, the local units must report regularly on their performance and participate in a peer review in which their results are compared with those employing other means to the same general ends. These reviews require the local units to describe and explain their efforts to peers and superiors; to show that they have considered alternatives; and to show that they are making progress by some jointly acknowledged measure of success, 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 in peer reviews, and the cycle repeats.

Experimentalism thus combines decentralization of operative control with central coordination of the evaluation of results. John Braithwaite’s observation on the most successful private mine safety efforts exemplifies this feature of the experimentalist architecture:

[W]hile all these companies have decentralized control over safety, they also have centralized assessment of the safety performance of line managers. All carefully monitor each mine and each district to ascertain whether their accident and fatality rates are improving or worsening in relation to performance of previous years and to the performance of other mines and districts. [For

all the local managers,] the sense that the head office is watching their safety performance is pervasive. (Braithwaite 1985)

Experimentalism has been influenced by 20th century innovations in economic organization. In particular, it reflects the development of practices of “learning by monitoring” and “continuous improvement” exemplified by the Toyota Production System (Simon 2006). This system breaks strongly with organizational premises that Minimalism shares with Wilsonian/Weberian public administration, Lockean constitutionalism, and Fordist industrial organization. Toyota-style organization rejects the strong distinction these views make between making rules on the one hand and applying them on the other. It contemplates that rules be continuously revised in the course of application. It treats rule departures diagnostically as symptoms of systemic problems and opportunities for systemic improvement. Sometimes, instead of seeking to minimize or isolate them, it tends to induce and expand them (for example, by eliminating “buffer inventory stocks” and imposing super-optimal standards like “zero defects”) in order to make the system’s weaknesses transparent.

Moreover, it denies the desirability or inevitability of realms of non-accountable discretion, what Locke called “prerogative”. It seeks to develop modes of accountability that can be applied pervasively. In particular, it extends the role of collaborative explanation and deliberation -- confined in the Weberian, Lockean, and Fordist views to elite administrators -- through all levels of administration.

In both their private and governmental incarnations, Experimentalist structures are typically not free-standing. They are most often embedded in broader structures that involve more specifically directive or conventionally coercive norms. Some norms will prohibit and sanction conduct that can be readily defined and agreed upon as intolerable. Tort and criminal sanctions against physical intimidation or fraud will play a fundamental, if usually taken-for-granted, role.

Other norms are designed to induce relatively strong parties to deal respectfully with relatively weaker ones. These rules often take the form of default rules – the rules that specify what will happen in the absence of an alternative agreement among stakeholders. When the legislature sets a “penalty default,” instead of designing the default to reflect its judgment of the most desirable outcome, it designs it to induce bargaining. For example, a penalty default might preclude a developer from improving land where there are endangered species unless the

developer concludes a Habitat Conservation Plan with local stakeholders (Karkkainen [2006](#)).

Still other norms will attempt to secure fair access to the deliberative process. For example, antitrust law may be used to sanction manipulative practices in private standard-setting organizations (Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988)) Or the benefits of public subsidies and tax exemptions may be conditioned on norms of fair access (Simon 2006). A key set of norms will typically require disclosure of practices and their effects to public authorities and, usually, the general public.

Just as Experimentalist institutions confound the distinction between centralization and decentralization of authority, so they straddle the line that conventionally distinguishes “soft” law that plays on pride and shame to motivate compliance from “hard law” that depends on sharp-eyed calculation of pains and prizes. In the EU and international regimes, resort to “soft law” is encouraged by the limited capacities for conventional coercive enforcement (Trubek, Cottrell, and Nance 2006). Even where harsh sanctioning is feasible, Experimentalists suggest that it is often counter-productive because it encourages defensiveness and concealment. The prospect of harsh penalties leads actors to hide problems and even to hide improved ways of mitigating them (for fear that disclosure of improvements will lead to heightened requirements that the actor may not be able to meet routinely in the future). Harsh penalties usually require expensive fact-finding and clear well-established rules. Experimentalism, however, makes use of tentative and provisional norms, and it is more interested in adapting them in the light of new knowledge than in defending their validity at points in the past when they were arguably violated. Thus, Experimentalist regimes try to induce voluntary compliance and to enlist informal social pressure, in particular, reputational pressure, for compliance (Braithwaite 1985).

However, these regimes are rarely voluntary in any strong sense, and they can involve harsh sanctions. We’ve noted that key experimentalist processes of deliberative inquiry are set in a context of more conventionally specified and coercively enforced norms that safeguard procedural fairness and access to information, and mandate minimum performance. Moreover, at least one extremely harsh sanction is exceptionally prominent in Experimentalist regimes -- loss of privilege to continue the regulated or subsidized activity, for example, shut down of an unsafe plant or a chronically failing school.

B. Regulation

A variety of regulatory regimes in the United States and abroad are best understood in Experimentalist terms.

One is “management-based regulation” in which the regulator requires each regulated actor to develop a plan to mitigate specified harms; assesses the adequacy of the plans; monitors their implementation, and through a combination of tangible penalties, technical assistance, and public shaming, induces the laggards to comply with minimum standards and the front runners to improve continuously. Examples discussed in recent scholarship include the Hazard Analysis and Critical Control Point program for meat and poultry production of the Department of Agriculture, the Massachusetts Toxics Use Reduction Act, the power plant safety program of the Nuclear Regulatory Agency, and the mining safety programs of Queensland and New South Wales, Australia (Coglianese and Lazar 2003; Karkkainen 2001; Rees 1984; Gunningham 2007).

Another structure involves public-private contracting in which an agency enters into a series of bilateral contracts with large regulated actors. The contracts commit the actor to observable performance on one or more regulatory dimensions, and the regulator may in return agree to waive otherwise applicable requirements or to use less frequent or costly monitoring. The EPA’s Project Excel and OSHA’s Voluntary Protection and Strategic Partnership Programs are examples (Lobel 2006; 2001).¹⁴ Or in another variation, the government oversees and/or ratifies negotiations between regulated actors, NGOs, and local stakeholders, as occurs in the Habitat Conservation Plan program under the Department of the Interior (Karkkainen 2006).

A third structure involves “multi-level governance” in which regulatory authority is decentralized to lower-tier governments in ways designed to permit adaptation to local conditions and/or regulatory competition. Both the air and water pollution statutes and OSHA give states the option of assuming important regulatory responsibilities, subject to meeting minimum national standards. Some international trade regimes are pushing participating nations in Experimentalist directions. Principles of mutual recognition or “equivalence” found in many trade treaties require importing countries to accept products produced in compliance with the regulatory regimes of the exporting countries where these regimes provide protection substantially equivalent to the importing country’s regime (Nicolaidis and Shaffer 2005). Such provisions require trading partners to engage in a kind of

¹⁴ Environmental regimes have generated the largest body of self-consciously Experimentalist legal scholarship. For discussion and references see Holley 2010.

peer review of each other's regimes. International organizations within and outside the World Trade Organization promote information exchange and discussion of regulatory standards among member states (Scott 2008).

The specific configuration of Experimentalist regulation depends in part on whether the risks it addresses take the form more of concentrated large-scale catastrophe, such as a nuclear reactor meltdown, or of more diffuse danger, such as tainted food. Regimes focused on catastrophe-avoidance emphasize event notification – the duty and capacity of regulated actors to identify and report “weak signals” of systemic problems and to respond to such reports. In U.S. nuclear power safety, for instance, plants must initially satisfy a demanding set of structural requirements and then must report all potentially dangerous “significant operating events,” ranging from breakdowns in control to unexpected deterioration of equipment, to the Nuclear Regulatory Commission.

The NRC evaluates the report and notifies all operators of possible hazards. Thus the failure of a non-critical valve in one facility can lead to a notice alerting all the others to inspect similar valves, some of which may indeed be performing critical functions. Peer reviews are conducted frequently to evaluate the facility's responses to such notices. In addition, plants are ranked annually on their overall performance with regard to operating safety. These rankings, along with other safety information, are provided directly to the highest level managers and the operator's board of directors to ensure that criticism is not dulled by passage through a managerial hierarchy. (Rees 1984)

By contrast, in food processing, where the range of acceptably safe arrangements is much wider than in nuclear power generation and the risk of catastrophe less, responsibility for identifying and mitigating hazards rests more with the operators. In the Hazard Analysis and Critical Control Points (HACCP) programs that have become central in food safety regulation world-wide, processors specify the points in the production process where precise control is necessary to prevent contamination by pathogens, develop a hazard mitigation plan describing how that control should be exercised, and design a testing regime to confirm the efficacy of the measures they propose. The regulator reviews and approves the plan, validates the efficacy of its measures, and monitors the firm's compliance with its plan. Finally, plans increasingly include provisions for tracing products as they are processed, so that when failures occur it is possible to identify the entity and the

procedures that failed. (Committee on the Review of the Use of Scientific Standards for Safe Food 2008)

In practice, the distinctions between the two approaches blur, as systems based on risk-mitigation planning increasingly focus on event notification and vice versa. Thus, in food safety, the Centers for Disease Control and Prevention coordinate a network that continuously analyzes data from healthcare providers about food borne illness that federal and state regulators use to target their efforts (Arkin 2007). At the same time, the ability to respond effectively to the information disseminated by event-notification systems of the type familiar from the nuclear power-generating industry is seen as depending on the kind of careful and continuing review of facility operations associated with the implementation of HACCP plans.

Drug regulation, where technological change has created strong pressure to reconfigure structures in Experimentalist directions, further exemplifies the convergence of event notification and risk mitigation planning.

The system of drug regulation that has evolved since the New Deal requires “approval” by the Food and Drug Administration (FDA) prior to “marketing.” Approval typically involves an expensive and rigorous testing process focused around clinical trials. The FDA then makes a decision whether to permit marketing on the basis of a general assessment as to whether likely benefits to people within the prescription criteria outweigh likely costs (inefficacy, side effects). This framework initially had little to say about what happened post-approval, and post-approval duties of both the manufacturers and the FDA remain more limited and ambiguous than pre-approval ones (Christensen 2008; Government Accountability Office 2006).

For decades, this system has been subject to two salient criticisms. First, critics assert that the approval process is too long and expensive, and in particular, that it unnecessarily delays access to potentially beneficial drugs. Second, they decry the scantiness of post-approval regulation, pointing to a series of scandals in which approved drugs continued to be marketed despite evidence that they were doing unanticipated harm.

Pressure on this structure is now intensifying from two sorts of developments. The first involves greater individuation of treatment. Advances in genetics make it possible to customize medicine in accordance with the particular genetic make-up of the patient. In addition, practitioners have recognized that that drug efficacy often

depends on patient behavior that can be influenced by advice, instruction, and monitoring.

The second set of developments involves the aggregate analysis of individual medical treatment data. A major current health policy priority is to develop information systems for standardized recording and transmission of individual treatment data (while protecting the patient's privacy). Aside from facilitating coherent patient care by making past history transparent to current caregivers, such systems could contribute to the continuous assessment of treatment, including drug, efficacy. Drug efficacy has been studied in a controlled environment because that has been the only way to get sufficiently precise data on the baseline condition of the patient and the nature and effect of the intervention. But with sufficiently precise and standardized routine treatment reporting, the line between clinical trials and routine treatment would blur.

If current trends continue, the key judgment for drug regulators will cease to be a binary call about whether or not to permit general marketing of a drug. The key task will be to assure that the drugs are properly customized to the patient and properly integrated with other medical and behavioral interventions. Moreover, as the line between research and treatment erodes, a one-time global cost-benefit judgment would be far less important than an ongoing capacity to monitor data for signals of problems and opportunities.

One might expect regulatory regimes to partly reconfigure along the lines of different medical conditions or treatment categories. An example is the system set up by the FDA, a pharmaceutical company, and the American Academy of Dermatology originally known as the System to Manage Accutane-Related Teratogenicity and later renamed "iPledge". Accutane is a highly effective acne cream that poses a strong risk of birth defects when taken by pregnant women. After encountering strong opposition to banning the cream, the FDA settled on a system under which the drug can be prescribed to women of child-bearing age only by doctors certified under a protocol that provides for periodic pregnancy monitoring of the patient. An advisory committee monitors reports of problems related to the drug and considers revisions to the protocol.

Drug regulation has long been experimental in the sense that it has based key judgments on disciplined empirical assessment. But as long as experimentation was confined to a specialized realm and associated with one-time binary judgments, it lacked the features associated with Experimentalism. As it moves to emphasize and integrate event notification with contextual risk-planning (continuously

revised protocols) it increasingly resembles Experimentalist regimes such as nuclear power and HAACP (Jesitis 2009; Christensen 2008).

It is not easy to account for such regimes in Minimalist terms. Static notions of optimization capture very little of the central thrust of the system, which is to facilitate learning and continuous revision. Moreover, by blurring the line between rule-making and implementation, the system precludes the kind of accountability that binds local actors to centrally-promulgated rules.

In comparison to the Minimalist approach, the Experimentalist approach to regulation promises the following advantages:

First, these regimes create pressures to respond to “weak signals” with self-diagnosis and corrective action. Moreover, they have the potential to induce continuous improvement by all actors, not just those who are below the minimum standards. They can provide a range of incentives, including rewards and subsidies, reputational effects, and conventional penalties.

Second, Experimentalist regulation reduces the information burden on the regulator in determining initial levels of acceptable performance. To the extent that performance standards are based on questions of technical or economic feasibility, they can be set from observed experience across the full population of regulated actors. The regulator can require that plants that fail to perform at some fraction of average industry performance be subject to remedial and/or punitive consequences. Under the HAACP regime for meat and poultry safety in the US, only the poorest performing two percent of plants — those whose products most frequently test positive for conveniently measured proxies of pathogens — are at risk of closure. But as laggards improve or exit the industry, the average performance rises and the minimum standards could “ratchet up” without the need for special investigations or proceedings of the kind necessary, for example, to adjust permit allocations in a cap-and-trade regime (9 C.F.R. 310.25).¹⁵

Third, Experimentalist regimes accommodate diversity by leaving extensive discretion to local actors while making their activities mutually transparent. The key mechanisms involve metrics that measure performance. Experimentalism co-opts the paradox of standardization: By imposing uniformity along a few dimensions, we permit more variations on others.¹⁶ Microbiological testing for both serious toxins

¹⁵ Unfortunately, as implemented, the U.S. HAACP regime lacks this “ratcheting up” feature.

¹⁶ “Uniformity and standardization may provide an underlying basis for differentiation and liberation of individual potentialities.” Dewey 1923, 213.

and specified proxy organisms permits us to compare food processing plants and identify the leaders and laggards, while leaving them substantial discretion over their operations. Minimalist market simulation regimes aspire to achieve the same goal, but their logic focuses effort around a single indicator – price. A regulatory mistake in setting prices may undermine the whole regime. Moreover, price signals often have no diagnostic value. They tell us who the high cost producers are, but they do not tell us what, if anything, they are doing wrong. By contrast, because Experimentalist regimes rely on a range of indicators, they are less vulnerable to the failure of one. And their indicators typically have diagnostic weight.¹⁷

Fourth, an Experimentalist regime readily propagates relevant technical and organizational advances that may not circulate freely under bureaucratic or Minimalist regulation. Event notification and risk planning tends to make technical knowledge accessible both to regulators and peers. The agency can provide technical assistance to firms in developing risk-management plans or can disseminate quick fixes to problems registered in event-notification systems. It can mandate publication of risk management plans and can encourage or mandate information exchange through peer review. It can subsidize demonstration projects in which progressive firms get assistance in customizing new technology to local conditions so that its potential can be publicized to the firm's peers (Von Hippel 2008; Carpenter 2001; Gawande 2009; Sabel 2009).

C. Social Welfare

In the welfare area, promising programs with key Experimentalist traits can be found in at least two broad areas.

The first includes programs that provide individualized services. These include child protective services, health care, both “special” and general education, job training, mental health services, and disability capacitation. They typically require highly individualized planning, pervasive performance measurement, and efforts to aggregate and disseminate information about effective practices (Noonan, Sabel, Simon 2009).

¹⁷ Kaplan and Norton (1996, 150) propose use of a “balanced scorecard” consisting of parallel sets of “outcome and “performance” measures: “Outcome measures without performance [measures] do not communicate how the outcomes are achieved.... Performance [measures may] fail to reveal whether operational improvements have been translated into ... enhanced financial performance.”

The second area involves public participation in the design of local public goods. Notable examples are community policing and community economic development. In community policing, police consult with neighborhood groups in order to set priorities in local law enforcement objectives, to obtain local knowledge to configure strategies, and to coordinate with private activities in implementing enforcement plans. Success is monitored in terms of various indicators of safety. In community economic development, government agencies and private charities make financial and technical assistance available to community-based organizations to implement locally-produced plans for housing, job, and business development. Again, projects are evaluated in terms of an array of criteria, and the more successful organizations receive priority in later rounds of funding (Simon 2006; Fung 2004).

These programs redefine the conventional relation between center and frontline. The center's role is no longer merely to monitor frontline compliance with promulgated standards. It is responsible for providing the infrastructure and services that support frontline efforts. Thus the role of the principal in the Experimentalist school is not just to verify that the teacher's class is studiously at work, but also to organize the specialized services and framework conditions -- remedial reading, testing to diagnose learning difficulties, coaching in team building -- on which the teacher's team must rely in formulating and implementing individual learning plans.

In child welfare, caseworkers rely on a center that trains and otherwise qualifies foster parents, facilitates contracting with outside specialists, and marshals resources that respond to the unexpected needs of particular families or sudden community-wide problems (for example, a tornado or an epidemic of methamphetamine abuse). In community policing, the precinct and its subunits count on a department that provides timely information about the migration of crime and criminals from one neighborhood to another (perhaps in response to local success in policing), helps orchestrate cooperation with community groups that work with youth recently released from detention and at risk of re-incarceration, or provides mediation and consultation services in the aftermath of racial incidents.

The key influence in the move toward Experimentalism is the view that services need to be tailored to the needs of beneficiaries. Such tailoring requires the active participation of beneficiaries because effective intervention depends on their cooperation or because they have information essential to diagnosis and planning. As Dewey wrote, "[t]he man who wears the shoe knows best where it pinches" (1927).

Tailoring also requires the understanding of local context. A child welfare worker putting together a plan for an obese child may be able to include a bicycle in the plan if she knows that the family's church can be persuaded to come up with one if credibly assured that it will fill an important need. Police dealing with a high crime neighborhood can be more effective if they learn from local residents that a poorly maintained house from which drugs are sold is a magnet for non-resident deviants.

The solitary "street level bureaucrat", who was discovered in the organizational literature of the 1970s and has since haunted the Minimalists, does not appear in the emerging Experimentalist regimes. The street level bureaucrat exercised tacit discretion under the radar of her superiors in the broad interstices of poorly enforced rules. Experimentalist design departs from the organizational features that gave rise to the street level bureaucrat in four important ways.

First, difficult frontline issues are more likely to be decided by a team than by a single worker. The social professions increasingly see individual problems as functions of multiple and diverse causes that call for interdisciplinary diagnosis and intervention. In the most highly regarded child protective service programs, the case worker's chief responsibility is to form and periodically convene a team that typically includes key family members, a health professional, lawyers for the child and the state, a therapist, and perhaps a teacher (Noonan, Sabel, Simon 2009).

In schools, analogous interdisciplinary teams — the classroom teacher, the reading specialist, the behavioral therapist — formulate plans for students with learning difficulties. In community policing, the precinct officers meet regularly with community members and their representatives, school officials, landlord and tenant associations, among others, to determine which crimes are currently most disruptive and threatening, and to explore ways of reconfiguring public services to reduce them — perhaps rerouting a bus line to pre-empt encounters between rival gangs or demolishing an abandoned house that has become a magnet for drug dealers.

Group decision-making promotes accountability in two ways. Team members act under the gazes of a shifting array of peers. Thus, the informal pressures of pride and shame are triggered. Furthermore, collaborative decision requires articulation, and the fact that the team members are diverse in background means that matters that might be taken for granted in a more homogeneous setting have to be explained and subject to examination.

The second feature of experimentalist service provision that distinguishes it from street-level and other bureaucracies is a distinctive form of monitoring. Like event notification practices in Experimentalist risk regulation, social services monitoring engages in intensive scrutiny of individual cases to reveal systemic problems.

But where event notification is triggered by unexpected disruptions, core monitoring in Experimentalist service provision is part of the organizational routine. A particularly well developed example is the Quality Service Review (QSR) used in child welfare programs in Utah and several other states. The QSR begins with selection of a stratified random sample of cases. A two-person team, including an agency official and an outside reviewer, examines the case over two days, beginning with a file review and proceeding to interviews with the child, family members, non-family caregivers, professional team members, and others with pertinent information.

The reviewers then score the case numerically in terms of two sets of indicators, the first concerning "child and family status" — the well-being of the child and his or her family -- and the second concerning "system performance" — the capacity to build teams, make assessments, formulate and update plans, and execute the plans. The initial scoring is then refined in meetings among the reviewers as a group, and then between reviewing teams and the caseworkers and supervisors whose decisions they have reviewed. Following these clarifications, there is a second meeting to draw general conclusions and a final meeting between reviewers and personnel from the region to discuss the systemic significance of their findings. The final report sets out the aggregate scoring, identifies recurring problems, and illustrates these from specific cases.

The QSR is as much a process of norm elaboration as of compliance enforcement. Agency goals like child safety and family stability ("permanence") are in the abstract, indeterminate. The QSR helps establish paradigmatic instances of what the goals mean and how the processes should be carried out. Participation by officials from the child welfare department's central administration promotes consistency across regions. The integration of outsiders from other states or consultants with national practices promotes consistency across states. Similarly, QSR data functions as a measure of performance and as diagnostic tool of systemic reform. The scores can be compared over time and (in principle though not as yet in practice) across states, giving

rough but serviceable indications of where attention and remedial effort should be focused (Noonan, Sabel, Simon 2009).¹⁸

Third, rules have a different relation to accountability in Experimentalist administration than in conventional legal thought, including Minimalism. Rules serve accountability, not by constraining discretion, but by making the system transparent – and hence open to democratic appraisal and intervention. (Discretion is constrained by the qualitative peer evaluation in processes like the QSR.) The goal of Experimentalist regimes is for the system’s articulated norms to mirror its practice as fully as possible. But the regimes accomplish this goal, not by forcing practice to comply mechanically with the rules in situations the rules did not anticipate, but by re-writing the rules prospectively to reflect new understanding encountered in practice.

Workers are taught that, when they encounter a discrepancy between rule and purpose, purpose should govern. In Utah, workers make “documented exceptions”, just as in the European Union some norms call for a response by member states of “Comply or Explain”. The worker’s discretion to depart from the rule, however, is limited by the requirement that she do so transparently in a manner that triggers review and, if her judgment is sustained, prompt re-writing of the rule to reflect the new understanding.

Fourth, another important accountability mechanism in many Experimentalist regimes is co-investment among different government and private actors. Child welfare case planning in Utah-type regimes includes an assessment of available “private supports”. Private supports may come from relatives, friends, churches, employers connected to the child’s family. They may come from institutions in the community with charitable missions. Community-based housing development grants are structured so that projects typically require the support of multiple governmental and private institutions. Job training programs aspire to enlist private employers in supporting and designing their curricula. From one perspective, the co-investment practice is an extension of the team concept, further marshaling diverse perspectives and expertise. At the same time, it serves as a check on agency discretion. The willingness of independent institutions to invest in the plans and projects provides some reassurance of their soundness.

¹⁸ John and Valerie Braithwaite (1995) find that monitoring judgments in standards-based nursing home regulation in Australia are more consistent than judgments in rule-based regulation in the U.S. in part because Australian monitoring is more deliberative, while the U.S. relies more on tacit individual judgments by monitors).

Co-investment can also occur between the programs and their beneficiaries, and this kind of co-investment potentially responds to concerns about beneficiary responsibility. Given his skepticism about complex ongoing administrative judgments, Ackerman favors a scheme – stakeholder grants – that is generous upfront in a standardized way – but necessarily stingy at the back end for individuals whose choices do not work out. But Experimentalism makes possible an approach that responds to need throughout a person’s life. The moral hazard problems are muted because the key benefits are services that a public provider had determined, in collaboration with the beneficiary, are useful, and because the individual co-invests her efforts and perhaps also resources. The Utah child welfare model, where parents co-invest in service plans, is an example. A more large-scale example is the Nordic “flexicurity” model that provides intensive job training and placement services, as well as generous income support, to workers at whatever stage of their careers they need it. The model is controversial, but is widely credited with neutralizing the employment disincentive effects of high benefits (Anderson and Svarer 2007).

III. Conclusion

Much current public law scholarship seems to reflect the Minimalist preoccupations with static optimization and administrative simplification at the expense of Experimentalist concerns with reliability and learning. At the very least, this bias amounts to a major failure of description. The number of major recent policy initiatives that reflect distinctive Minimalist concerns is small compared to the number that employ unmistakably Experimentalist rhetoric and architecture. And the Experimentalist initiatives have been central in a broad array of the most pressing policy areas, including pollution, occupational safety, food safety, policing, and nearly every major sphere of social service.

A common feature of these problems is that they arise in circumstances of fluidity and diversity and they call for interventions that are capable of adaptation and contextualization. Interventions of the sort that Minimalism tends to favor – “nudges,” market simulation, rule simplification – have scant capacity for adaptation and contextualization. By contrast, Experimentalist regimes have developed forms of non-bureaucratic administration that try to combine accountability with local initiative in ways that facilitate learning and individuation. They strive for accountability less through simple rules than through peer review of

local discretion. The aspiration is that pooled learning will discipline local autonomy while generalizing its successes. Perhaps Minimalism could accept such regimes as appropriate to categories of problems other than those on which it has focused, but in order to do so, it would have to soften its resistance to frontline discretion.

REFERENCES

- Ackerman, Bruce. 2007. The Living Constitution. *Harvard Law Review* 120: 1737, 1805-06.
- . 2000. The New Separation of Powers. *Harvard Law Review* 113: 633, 666-68.
- . 1983. Law in the Activist State. *Yale Law Journal* 92: 1083.
- Ackerman, Bruce and Anne Alstott. 1999. *The Stakeholder Society*.
- Ackerman, Bruce and James Fishkin. 2004. *Deliberation Day*.
- Ackerman, Bruce and William Hassler. 1981. *Clean Coal/Dirty Air*.
- Ackerman, Bruce and Richard Stewart. 1985. Reforming Environmental Law. *Stanford Law Review* 37: 1333.
- Andersen, Turben M. and Michael Svarer. 2007. Flexicurity – Labour Performance in Denmark. *CESifo Economic Studies* 53: 389.
- Arkin, Richard L. 2007. PulseNet, FoodNet, NARMS: Tools to Fight Disease, Protect Public Health. *FDA Veterinarian Newsletter* 22
www.fda.gov/AnimalVeterinary/NewsEvents/FDA/VeterinarianNewsletter/um110048.htm.
- Braithwaite, John and Valerie Braithwaite. 1995. The Politics of Legalism: Rules versus Standards in Nursing Home Regulation. *Social and Legal Studies* 4: 307
- Carpenter, Daniel. 2001. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies* 238-54.
- Committee on the Review of the Use of Scientific Standards for Safe Food. 2003. Scientific Criteria to Ensure Safe Food.
- Christensen, Clayton. et al., 2008. *The Innovator's Prescription: A Disruptive Solution for Health Care*, 56-61.
- Cogan, John F., Glenn Hubbard, and Daniel Kessler, 2005. *Healthy, Wealthy, and Wise: Five Steps to a Better Health Care System*.
- Coglianesse, Cary and David Lazar, 2003. Management-Based Regulation. *Law & Society Review* 37: 691.
- Committee on the Review of the Use of Scientific Standards for Safe Food. 2003. *Scientific Criteria to Ensure Safe Food* 133-174.

- Cottrell, Patrick, David M. Trubek, and Mark Nance. Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity. in *Law and New Governance in the EU and the US*, eds. Grainne de Burca and Joanne Scott.
- Curhan, Jennifer J. 1996. The HUD Reinvention: A Critical Analysis. *Boston University Public Interest Journal* 5: 239, 243-45, 250-51.
- DeLuca, Stefanie and James E. Rosenbaum. Does Changing Neighborhoods Change Lives? The Chicago Gautreaux Housing Program and Recent Mobility Programs. *Institute for Policy Research, Northwestern University, Working Paper Series (WP-09-01)*, .
- Dewey, John. 1927. *The Public and Its Problems*.
- Diver, Colin. 1983. The Optimal Precision of Administrative Rules. *Yale Law Journal* 93: 65, 90-92.
- Dorf, Michael. and Charles Sabel. 1998. A Constitution of Democratic Experimentalism. *Columbia Law Review* 98: 267.
- Financial Services Authority (UK). 2009. The Turner Review: A Regulatory Response to the Global Banking Crisis.
- Fung, Archon. 2004. *Empowered Participation: Reinventing Urban Democracy*.
- Gawande, Atul. 2007. *Better* 242-43.
- 2010. *The Checklist Manifesto* .
- . 2009. Testing, Testing. *The New Yorker*.
- Government Accountability Office. 2006. *Improvement Needed in FDA's Postmarket Decisionmaking and Oversight Process* (GAO-06-402).
- Graetz, Michael J. and Jerry L. Mashaw. 1999. *True Security*, 149-51
- Greenspan, Alan. 1998. The Role of Capital in Optimal Banking Supervision. *FRBNY Economic Policy Review*: 163, 167.
- 2009. U.K. Financial Services Authority, *The Turner Review: A Regulatory Response to the Global Banking Crisis*, 41.
- Gunningham, Neil. 2007. *Mine Safety: Law Regulation Policy*.
- Heinzerling, Lisa. 1998. Regulatory Costs of Mythic Proportions. *Yale Law Journal* 107: 1981.
- Hirose, Rei and Raul Lejano. 2005. Testing the Assumptions Behind Emissions Trading in Non-Market Goods: The RECLAIM Program in Southern California. *Environmental Science and Policy* 8: 367.

- Holley, Cameron. 2010. Facilitating Monitoring, Subverting Self-Interest, and Limiting Discretion: Learning From the 'New' Forms of Accountability in Practice. *Columbia Journal of Environmental Law* 35: 127, 139-49.
- Imai, Masaaki. 1986. *Kaizen: The Key to Japan's Competitive Success*, 49-50.
- Institute of Medicine. 2002. The Dynamics of Disability: Measuring and Monitoring Disability for Social Security Programs.
- Jesitis, John. 2009. iPLEDGE Update: Program Has Improved Reporting of Pregnancy Exposures. *Modern Medicine*, 261-309.
- Kaplan, Robert S. and David P. Norton. 1996. *The Balanced Scorecard*.
- Karkkainen, Bradley. 2006. Information-Forcing Regulation and Environmental Governance," in *Law and New Governance in the EU and the US* , eds. Grainne de Burca and Joanne Scott.
- 2001. Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm? *Georgetown Law Journal* 89: 257
- 2006. Managing Transboundary Aquatic Ecosystems: Lessons from the Great Lakes. *Pacific McGeorge Global Business and Development Law Journal* 19: 209.
- Knight, Frank. 1921. *Risk, Uncertainty, and Profit*.
- Kuttner, Robert. 2009. The Radical Minimalist. *The American Prospect*.
- Landau Martin and Donald Chisholm (1995). The Arrogance of Optimism: Notes on Failure-avoidance Management. *Journal of Contingencies and Crisis Management* 3, 67
- Liebman, James S. 1991. Voice, Not Choice. *Yale Law Journal* 101: 259.
- Liu, Goodwin. 2006. Education, Equality, and National Citizenship. *Yale Law Journal* 116: 330, 403.
- Mashaw, Jerry. 2006. Accountability and Institutional Design: Some Thoughts on the Grammar of Governance," in *Public Accountability: Designs, Dilemmas, Experiences*, ed. Michael Dowdle.
- 1981. Administrative Due Process as Social Cost. Accounting. *Hofstra L. Rev.* 9: 1423, 1436.
- 1985. *Bureaucratic Justice: Managing Social Security Disability Claims*.

- . 1980. How Much of What Quality?: A Comment on Conscientious Procedural Design. *55 Cornell L. Rev.* 55: 823, 824-28.
- Nash, Jonathan and Richard Revesz. 2001. Markets and Geography: Designing Marketable Permit Schemes of Control Local and Regional Pollutants. *Ecology Law Quarterly* 28: 569.
- Nicolaidis, Kalypso and Gregory Shaffer. 2005. Transnational Mutual Recognition Regimes: Governance without Global Government. *Law and Contemp. Probs.* 68: 251.
- Noonan, Kathleen, Charles F. Sabel, and William H. Simon. 2009. Legal Accountability in the Service Based Welfare System. *Law and Social Inquiry* 34: 523.
- Olgus, A.I. 1987. *Oxford Journal of Legal Studies* 7: 389.
- Orly Lobel. 2001. *Environmental Governance: Comparative Approaches to Regulatory Innovation in the United States and Europe* . eds. Eric Orts and Kurt Deketelaere.
- . 2006. Governing Occupational Safety in the US,” in *Law and New Governance in the EU and the US* , eds. Grainne de Burca and Joanne Scott.
- Rees, Joseph. 1984. *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island*.
- Revesz, Richard and Michael A. Livermore. 2009. *Rethinking Rationality*, 131-43.
- Richman, Daniel. Winter 2004. “The Right Fight,” *Boston Review*.
- Ruhl, J.B. and James Salzman. 2000. Currencies and the Commodification of Environmental Law. *Stanford Law Review*. 53: 607.
- Sabel, Charles F. 2006. A Real Time Revolution in Routines. In *The Firm as a Collaborative Community*, ed. Paul Adler and Charles Heckscher.
- Sabel, Charles F. 2009 (unpublished). Self-Discovery as a Coordination Problem: Lessons from a Study of New Exports in Latin America.
- Schemo, Diane. 2007. Federal-Local Clash Over Teaching of Reading. *New York Times* (March 9, 2007).
- Scott, Joanne. 2008. *The SPS Agreement*. Nuclear Regulatory Commission. 2009. Part 21 Report: Potential Failure of Bonnet Valve. http://www.nrc.gov/readingrm/doc_collections/eventstatus/event/2009/20091109en.html.
- Simon, William H. 2010 (forthcoming). Optimality and Its Discontents in Regulatory Design: The Example of Bank Regulation. *Regulation and Governance*.

- . 2006. Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes," in *Law and New Governance in the EU and the US* , eds. Grainne de Burca and Joanne Scott.
- Slaughter, Louise M. 2006. "Medicare Part D: The Product of a Broken Process. *New England Journal of Medicine* 354: 2314.
- Spear, Steven J. 2009. *Chasing the Rabbit: How Market Leaders Outdistance the Competition and How Great Companies Can Catch Up and Win*.
- . 2007. Overseer, or 'The Decider': The President in Administrative Law. *George Washington University Law Review* 75: 696, 732-38.
- Sunstein, Cass. 2005. Group Judgments: Statistical Means, Deliberation, and Information Markets. *New York University Law Review* 80: 962.
- . 1999. *Once Case at a Time: Judicial Minimalism in the Supreme Court*.
- . 2002. *Risk and Reason: Safety, Law, and the Environment*.
- Sunstein, Cass and Richard Thaler. 2009. *Nudge: Improving Decisions About Health, Welfare, and Happiness*.
- Super, David. 2008. Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law. *University of Pennsylvania Law Review* 157: 541, 609.
- Suri, Rajan. 1998. Quick Response Manufacturing, 55.
- Sutcliffe, Kathleen and Karl Weick. 2007. *Managing the Unexpected: Resilient Performance in an Age of Uncertainty*.
- Stuntz, William. 2006. The Political Constitution of Criminal Justice. *Harvard Law Review* 119: 780, 807 14.
- Timmons, Heather. 2006. Data Leaks Shake Up Carbon Prices. *New York Times* (May 16, 2006).
- Vaughn, Diane. 1996. The Challenger Launch Decision.
- von Hippel, Eric. 2008. *Democratizing Innovation* 67.
- Wara, Michael. 2007. "Is the Global Carbon Market Working? *Nature* 445: 595.

CASES CITED

Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988)

STATUTES CITED

Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, sec. 101(a)(1), 42 U.S.C. 675(1)

Developmental Disabilities Act of 1984, P.L. 98-527, sec. 123(a) [since removed]

Personal Responsibility and Work Opportunity Act of 1996, P.L. 104-193 (“individualized responsibility plan” for public assistance recipients); Americans with Disabilities Act of 1990

Fair Housing Act Amendments of 1988, Pub.L. 100-430, sec 6(a). 42 U.S.C. 3604(f)(3)(B)