CONTEXTUALIZING REGIMES: INSTITUTIONALIZATION AS A RESPONSE TO THE LIMITS OF INTERPRETATION AND POLICY ENGINEERING

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When legal language and the effects of public intervention are indeterminate, generalist lawmakers (legislatures, courts, top-level administrators) often rely on the normative output of contextualizing regimes—institutions that structure deliberative engagement by stakeholders and articulate the resulting understanding. Examples include the familiar practices of delegation and deference to administrative agencies in public law and to trade associations in private law. We argue that resorting to contextualizing regimes is becoming increasingly common across a broad range of issues and that the structure of emerging regimes is evolving away from the well-studied agency and trade association examples. The newer regimes mix public and private participation in novel ways. Their structures are less hierarchical than those of traditional administrative agencies and less clearly bounded than those of traditional trade associations. While the traditional regimes function to make solutions developed in more specialized realms available to generalist lawmakers, the newer ones function to organize collaborative inquiry where neither specialists nor generalists have well-developed understandings of problems or solutions. We explore the structure of such regimes and their relation to generalist lawmakers through three examples—a health and safety regime that straddles private and public law (the California Leafy Greens Products Handler Marketing Agreement), a civil rights regime (the Juvenile Detention Alternatives Initiative), and an international environmental regime (the Dolphin Conservation Program of the Inter-American Tropical Tuna Commission).

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INTRODUCTION

As portrayed in legal scholarship and the law school curriculum, legal decisionmaking is fundamentally a matter of interpretation or policy engineering. In either approach, a disinterested official (or a lawyer trying to anticipate her decision) reasons analytically from given premises or goals to a specific solution. Lawyers differ about how interpretation and policy engineering should be conducted and about when one or the other is appropriate, but their views converge in seeing law as elaborated primarily through these two ways of making decisions.

This Article explores another approach to legal decisionmaking—contextualizing regimes. In this approach, instead of making the decision directly, the officials charged with decisionmaking adopt the normative output of one or more specialized bodies of stakeholders. The stakeholder regime may form independently of official intervention or it may be induced, facilitated, or influenced by it. Either way, this approach to decisionmaking differs from interpretation and policy engineering in two respects. First, key decisions of the officials with primary responsibility tend to be indirect or procedural; they focus on the adequacy of the contextualizing regime rather than the substantive merits of the controversy. Second, decisionmaking within the contextualizing regime does not take the form only or even primarily of interpretive elaboration or instrumental effectuation of given premises or goals. It involves dialogic reconciliation of diverse views among stakeholders about premises or goals on the one hand and conclusions or means on the other, and in the particular kind of contextualizing regime that most interests us, decisionmaking is preoccupied with discovery and experiment.

We argue that the importance of contextualizing regimes has grown rapidly in recent years and that the phenomenon deserves a more prominent place than it has in legal theory and scholarship. Contextualizing regimes are a response to ignorance or uncertainty: the decisionmakers with primary authority defer to contextualizing regimes rather than make the decision directly because of one or more of three disadvantages. They do not know what the correct specific norm is. They believe that the correct specific norm is likely to change between the time they promulgate a decision and the time they will be able to revise it. Or they believe that what the correct specific norm is will vary across a broad range of local contexts about which they have little information. The increased pace of technological and economic

change, globalization, and the intensification of demands to accommodate diversity both within and across nations all generate such conditions, and such conditions generate contextualizing regimes.

Our analysis builds on and generalizes from some familiar reference points. It is a commonplace observation that legislatures delegate and courts defer to administrative agencies.[1] Moreover, a rich body of private law scholarship describes the role of trade associations in elaborating and enforcing industry-specific commercial norms.[2] We emphasize the parallel roles of such public agencies and private associations in the elaboration of indeterminate legal norms. However, our central aim is to document and argue for the importance of a different regime structure than those portrayed in most discussions of agencies and trade associations.

The emergent contextualizing regimes of recent years are typically a mixture of public and private actors and institutions. They engage a diverse variety of participants, and their boundaries are often porous and ambiguous. These regimes do not have the top-down, command-and-control structure associated with New Deal regulation and sometimes presupposed in modern administrative law doctrine. Neither do they arise spontaneously through independent private initiative, like the institutions portrayed in the trade association literature. Moreover, the process of norm elaboration in contextualizing regimes is not adequately described as the derivation of rules from an established body of scientific knowledge (the conventional view of agencies) or the application of customary understanding (the conventional trade association view).

In the New Deal agency vision and the contemporary trade association vision, generalist lawmakers (legislatures, courts, top-level administrators) defer to experts or private associations because the generalists have a limited understanding of how to solve the problems at hand. However, these visions assume that, within the relevant discipline or industry, the problems can be solved through the application or elaboration of established understanding or practices. By contrast, the regimes on which we focus arise from problems that cannot be solved by applying established knowledge. The official decisionmakers' disadvantage is not ignorance of some solution known to insiders of a more specialized institution, but an uncertainty shared by both generalists and insiders about what the solution might be.[3]

Participants in regimes that respond to uncertainty, in this sense, are more likely to see their efforts as the joint exploration of possibilities and reinterpretation of premises and goals in the light of what is discovered than as the elaboration of established knowledge. This newer-style contextualizing regime has been described in recent scholarship on "public law

1. *E.g.*, Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

2. *E.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001).

3. On the distinction between ignorance and uncertainty, see, e.g., FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 19–20, 224–32 (1921).

litigation" and "new governance" regulation, and it is perhaps most familiar in the literature on international organizations.[4] Our account generalizes across these studies and argues that the phenomenon of contextualizing regimes is more pervasive than they often suggest.

The argument proceeds as follows. In Part I, we illustrate the predictably unfortunate results when generalist lawmakers insist on interpretive or policy-engineering strategies in situations that call for contextualizing regimes. Part II elaborates on the idea of a contextualizing regime in three widely varied policy contexts. In commercial law, we illustrate the contrast between the trade association regimes emphasized in recent scholarship and the newer type by considering, first, the Perishable Agricultural Commodities Act reparations process and, second, the California Leafy Greens Products Handler Marketing Agreement. We then examine a regime established in a civil rights context—the Juvenile Detention Alternatives Initiative associated with the Juvenile Justice and Delinquency Prevention Act. Lastly, we consider a regime that has emerged in international environmental protection—the Dolphin Conservation Program of the Inter-American Tropical Tuna Commission. In Part III, we discuss the common structural features of the newer type of contextualizing regime.

I. The Need for Contextualizing Regimes

Contextualizing regimes arise when uncertainty about the practical application of legal language or the effects of public intervention blocks conventional legal analysis. However, lawyers and judges wedded to traditional notions of legality sometimes find it hard to acknowledge when they are blocked. Here is an example:

In *Melendez-Diaz v. Massachusetts*, the Supreme Court considered the constitutionality of the practice of admitting at a criminal trial, without accompanying oral testimony, a chemical analyst's written report certifying that a substance found in the defendant's possession was an illegal drug (in this case, cocaine).[5] The petitioner argued that the practice violated the Confrontation Clause of the Sixth Amendment. Three liberal justices joined Justices Scalia and Thomas to hold that the right of confrontation meant that the prosecution had to present the analyst as a live witness, even when the defendant had made no effort to pursue discovery about the evidence or to subpoena the analyst.

The majority opinion emphasized interpretation. The Sixth Amendment says that criminal defendants "shall enjoy the right . . . to be confronted with

4. *E.g.*, Abram Chayes & Antonia H. Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995); Law and New Governance in the EU and the US (Grainne de Burca & Joanne Scott eds., 2006); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Proceeds*, 117 Harv. L. Rev. 1015 (2004).

5. 129 S. Ct. 2527 (2009); *accord* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2713 (2011) (affirming and elaborating *Melendez-Diaz*).

the witnesses against them."[6] Viewed in abstraction, the text provides scant guidance. The author of a document offered into evidence is not necessarily a "witness." As Justice Scalia acknowledged in an earlier case, "One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial . . . , those whose statements are offered at trial . . . , or something in between . . . ."[7] Moreover, even if the Sixth Amendment created a right of confrontation with respect to the author of the document, nothing in the text suggests that this right could not be satisfied by an opportunity to subpoena the witness.

The majority looked to history to resolve the ambiguity. An obvious difficulty with this tack is that it has long been assumed that the Confrontation Clause is compatible with traditional hearsay exceptions for business and public records. The question thus arises whether the analyst's certification is more like a percipient witness's report of the defendant's conduct, where there is a confrontation right, or a business or public record, where there is no such right. The majority argued that the certification is more like a report of conduct because it is "testimonial"—that is, the declarant expects her statement to be used at trial to adjudicate guilt.[8] The dissent concluded that the chemical report is more like a business or public record because it reports about a routine technical process, rather than the defendant's conduct.[9]

The alternative policy-engineering approach to these issues would discern the general goals of the Confrontation Clause and assess whether the Massachusetts statute was likely to frustrate these goals. For some years, the Court took such an approach in Confrontation Clause cases. In *Ohio v. Roberts*, the Court suggested that hard cases should be resolved by an inquiry into whether the evidence was accompanied by adequate "particularized guarantees of trustworthiness"[10] or, as the Court later put it, adequate "indicia of reliability."[11] However, in 2004, *Crawford v. Washington* purported to repudiate this approach. Writing for a unanimous court, Justice Scalia explained, "Reliability is an amorphous, if not entirely subjective, concept."[12] *Crawford* insisted that the scope of the Confrontation Clause be settled on interpretive grounds.

No one in *Melendez-Diaz* disputed directly *Crawford*'s rejection of the instrumental perspective. On the other hand, both sides asserted instrumental concerns emphatically. Justice Scalia argued that there was a significant propensity to commit errors in scientific evidence and cited recent high-profile scandals involving large-scale incompetence or fraud in forensic laboratories. The dissenters argued that forcing the prosecution routinely to

6. U.S. CONST. amend. VI.

7. Crawford v. Washington, 541 U.S. 36, 42–43 (2004) (citations omitted).

8. *Melendez-Diaz*, 129 S. Ct. at 2531–34.

9. *Id.* at 2550–51 (Kennedy, J., dissenting).

10. 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36.

11. *Crawford*, 541 U.S. at 42.

12. *Id.* at 63. The tortuous doctrinal background of these cases is critically reviewed in David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 39–44.

present a live witness to testify to the analysis would be of little value in checking such problems. They also insisted that the holding would be highly disruptive to the trial process, in part because it might take many witnesses to describe the analytical process without resorting to testimonial hearsay. Justice Scalia dismissed these concerns, noting that few criminal cases reach trial and speculating that, in many of those that do, defendants would waive their right to confront the analysts.

Melendez-Diaz exemplifies the limits of interpretation or at least the narrowly interpretive strategy of textualism. The principal virtue claimed for textualism—determinacy—comes at the cost of arbitrariness in terms of the practical vindication of relevant values. If interpretation indicates that the Confrontation Clause entails some practice that does not serve any plausible public goal, the fact that it does so clearly is at best a limited advantage. In fact, there does not seem to be any determinacy payoff at all to textualism in *Melendez-Diaz*. There is at least as much disagreement about the semantics and history of the Confrontation Clause as there is about the practical effects of alternative rulings.

But the problems of the policy or "reliability" approach are also undeniably severe. The judges could not even agree on the likely impact of their decision on judicial resources, much less on the reliability of scientific evidence under the Massachusetts practice. From the point of view of "guarantees of trustworthiness,"[13] scientific evidence is fundamentally different from traditional percipient-witness testimony. Scientific evidence is generated by a process in which many people participate. With respect to drug identification, the process begins with the collection, packaging, and transportation of a substance. It continues through the decisions as to what portions of the substance to test (if there are large quantities, sampling will have to be used), what drug identities to test for, and—because there are multiple tests for most kinds of drugs—what tests to use. It then involves the preparation of the substance for testing and the application of mechanical and/or chemical processes. These processes typically produce results that require interpretation. For example, a machine may produce a graph of the composition of the tested sample that is compared to standard representations of drugs. Finally, a document reports the conclusion of this process.[14]

Examination or cross-examination of the veracity, perception, and expertise of any one participant in this process may not yield significant insight into the reliability of the conclusion. The conclusion depends on all of them. Moreover, it depends not only on their individual veracity, percep-

13. *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

14. Erin Murphy argues that "second generation" scientific evidence, such as DNA identification, is even more removed from traditional percipient witness testimony than "first generation" scientific evidence, such as fingerprint identification. First-generation evidence often focuses around a complex judgment made by a single analyst, whereas the responsibility for second-generation evidence is more diffused and more dependent on centrally developed protocols, software, and databases. Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721, 726–30 (2007).

tion, and expertise, but also on the rules by which they collaborate. It further depends on the quality of the rules and information embodied in the machines, software, and databases on which they rely.

Given these circumstances, both the majority and the dissent in *Melendez-Diaz* are partly right about the decision's likely practical effect. As the dissent suggested, cross-examination at trial often could make a serious contribution to protecting against misleading evidence only if it involved extensive disruption, forcing agents at various stages of the process to testify.[15] But Justice Scalia may be right to have suggested that the decision will have little impact of any kind. States will find an acceptable procedure that induces defendants to waive these rights, as they have with other procedural rights the Court has given defendants.[16]

For these judges then, the Constitution has little or nothing to say about what they all acknowledge is a critical problem of reliability with scientific evidence. The majority felt compelled by (its tendentious interpretation of) language and history to adopt the anachronistic and ineffective remedy of requiring routine oral testimony at trial. The dissent, recognizing that this remedy will be ineffective and perhaps unable to imagine a better one, preferred to leave the problem alone.

Outside the courts, the most salient response to the problem of forensic evidence is an accreditation regime. In such a regime, a central organization sets provisional general standards, demands that local units implement them with contextualized plans, audits the local units, facilitates the exchange of information among the local units and the continuous updating of standards, and publicizes information in a way that stigmatizes bad performance.

At least part of such a structure was in place for the kind of forensic evidence involved in *Melendez-Diaz*. The federal government sponsors a Scientific Working Group for the Analysis of Seized Drugs and parallel groups for analysis of gunshot, hair and fiber, fingerprint, and DNA evidence. Each group promulgates and regularly updates protocols and standards. The federally supported American Society of Crime Laboratory Directors ("ASCLD") has organized an independent Accreditation Board. The Board's standards adapt to the forensic field the International Organization for Standardization's *General Requirements for the Competence of Testing and Calibration Laboratories*, which are widely used in the private

15. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2547–55 (2009) (Kennedy, J., dissenting).

16. In *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2718 (2011), the majority suggested that a "notice-and-demand" procedure would satisfy the Constitution. Under such a procedure, if the prosecution gives notice of intent to offer a forensic report, the defendant must make an affirmative demand for live testimony of an analyst or the right is waived. The court noted that "analysts testify in only a very small percentage of cases . . . for it is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." *Id.* at 2718–19 (citations omitted) (internal quotation marks omitted). *But see id.* at 2728 (Kennedy, J., dissenting) ("There is in the ordinary case . . . no good reason for defense counsel to waive the right of confrontation as the Court now interprets it.").

sector. Seventy-eight percent of publicly funded crime laboratories are accredited by the ASCLD Board.[17]

The accreditation process involves extensive self-reporting and selective audit verification of the reports and "proficiency" testing in which individuals and groups must identify test samples. Laboratories are supposed to have their own Quality Assurance processes, and accreditation reviewers assess the adequacy of these internal processes. The standards recommend initial certification and periodic recertification of laboratories on the basis of classes and tests of various kinds.

A recent National Research Council report views the ASCLD process favorably, but suggests that it is too fragmented and underfunded. The Council's strongest criticism is that laboratory accreditation and analyst certification are voluntary.[18] Another plausible critique of this structure is that it is too dominated by forensic professionals and thus vulnerable to the impulses of mutual self-protection often found in self-regulated organizations. Transparency that facilitates public criticism and judicial assessment might be responsive to this concern. But an important role could also be played by the defense bar. As Erin Murphy has pointed out, if defense lawyers are to play a role in ensuring the reliability of forensic evidence, they will need extensive and ongoing training.[19] Moreover, given the limitations of challenges at trial as a check on systemic malfunctions, it would make sense to incorporate defense lawyers into the processes of ongoing systemic review, such as accreditation.

The possibility of an improved contextualizing regime suggests that there was an alternative in *Melendez-Diaz* to the tendentious semanticizing of the majority on the one hand and "a mere judicial determination of reliability" (Scalia's characterization of *Ohio v. Roberts*) on the other.[20] The Court could have insisted on guarantees of reliability as a condition of admission of forensic evidence without undertaking to define those guarantees itself. A documentary report should be admissible if it is certified by a laboratory in good standing in a minimally adequate contextualizing regime, if the report itself meets the reporting standards of the regime, and if the report asserts that the test results were derived in accordance with the regime's processing standards.

17. NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 199–200 (2009). On accreditation in general, see *id.* at 193–215.

18. *See id.* at 195–200, 215.

19. Murphy, *supra* note 14, at 776. Research confirms this point. Garrett and Neufeld reviewed 137 transcripts of convicted defendants who were later exonerated and found that "invalid" forensic evidence played a role in eighty-two of the wrongful convictions. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 12–14 (2009). The problem, however, was not hearsay. All the cases involved live forensic testimony. *Id.* at 13. Yet "[d]efense counsel rarely cross-examined analysts concerning invalid testimony and rarely obtained experts on their own." *Id.* at 2.

20. Crawford v. Washington, 541 U.S. 36, 62 (2004).

Of course, this approach requires the Court to give some meaning to the notion of a "minimally adequate contextualizing regime." There is no reason to think this task beyond the Court.

First, the Court does not need to define an adequate regime all at once, or indeed, ever. It can simply give examples, as it encounters them in cases, of patently inadequate regimes. The Massachusetts regime in *Melendez-Diaz* seems patently inadequate in two respects. The state laboratory involved was not accredited "by an[y] external certification body for purposes of forensic testing."[21] Moreover, the "certificates of analysis" offered in evidence disclosed nothing other than that seized bags had "been examined with the following results: The substance was found to contain: Cocaine."[22] Lack of uniform reporting standards is a major deficiency of the present regime, but it seems unlikely that there would be much dispute that this report was inadequate. There appears to be consensus that "laboratory reports . . . should describe, at a minimum, methods and materials, procedures, results, and conclusions, and they should identify, as appropriate, the sources of uncertainty in the procedures and conclusions along with estimates of their scale (to indicate the level of confidence in the results)."[23]

Second, judicial judgments about the adequacy of a contextualizing regime would be a lot like the judgments that the Supreme Court has already committed the federal judiciary to make with respect to scientific testimony under the *Daubert* interpretation of the Federal Rules of Evidence.[24] *Daubert* requires, as a condition of admissibility, a judicial determination that scientific evidence is "reliable."[25] This reliability determination is supposed to include considerations of whether the theory and techniques on which the testimony is based have been validated, subjected to peer review and publication, governed by generally accepted standards, have an established error rate, and are widely accepted in the scientific community.[26] Clearly, this inquiry extensively overlaps with the assessment of the contextualizing regime for forensic laboratories.

Indeed, in the federal courts, proposals for policing the adequacy of forensic evidence might be developed subconstitutionally through *Daubert* and the rules of evidence. But while interpretation of the Confrontation Clause cannot yield a specific set of practice standards, it does suggest that the reliability of scientific evidence is a matter of constitutional concern and that the federal courts have a role in holding the states accountable. The

21. Brief for Petitioner at 6, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (No. 07-591) (alternation in original) (quoting a Massachusetts Department of Health official) (internal quotation marks omitted).

22. *Melendez-Diaz*, 129 S. Ct. at 2531.

23. NAT'L RESEARCH COUNCIL, *supra* note 17, at 186.

24. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588–95 (1993).

25. *Id.* at 589.

26. *Id.* at 593–94.

most plausible way for the Court to vindicate this concern is through encouraging and policing a contextualizing regime.[27]

II. The Emergence of Contextualizing Regimes

The minimum structure of a contextualizing regime involves a set of local units, united by relations to a set of products, services, and associated problems, and a center. The local units are related horizontally by virtue of similar functions or outputs, or vertically by virtue of different positions in a supply chain or production process for a particular output. The center performs key coordination and governance functions, including the facilitation of mutual learning and the contextualized elaboration of norms. Our main claim is that contextualizing regimes arise in substantial part as a response to the inadequacy of interpretation and policy engineering in situations of uncertainty.

A. *Background: Hart and Sacks's Case of the Spoiled Cantaloupes*

Although particular contextualizing regimes are well-known, there have been few recent efforts to analyze the general phenomenon. Indeed, the most useful starting point for a general account remains Henry Hart and Albert Sacks's 1958 work *The Legal Process*.[28]

The first and longest of the case studies featured in the book was "The Case of the Spoiled Cantaloupes." In 1943, through a series of telegrams, a Chicago broker sold a railroad carload of cantaloupes en route from Yuma, Arizona, to a Springfield, Massachusetts, wholesaler specifying "rolling acceptance final." When the cantaloupes arrived in Springfield, they were extensively spoiled and did not satisfy the contractual specification of "U.S. No. 1 cantaloupes." The spoilage resulted from Cladosporium Rot, a disease "of field origin" that was latent but perhaps not observable at the time of shipment.[29] The wholesaler sent a notice of rejection and abandoned the cantaloupes at the loading dock in Springfield, from where the railroad

27. The idea that constitutional criminal defense rights might be elaborated incrementally and experimentally is not novel. For example, Henry Monaghan pointed out some time ago that the Court's explanation of the exclusionary rule shifted after *Mapp v. Ohio* from the claim that exclusion was entailed interpretively by the Fourth and Fifth Amendments to an instrumental claim that it was necessary to deter violations of the values underlying these Amendments. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 4–9 (1975). He then argued that, from an instrumental rationale, the Court could not plausibly assume that exclusion would always and invariably be necessary. *See id.* at 9. It follows from the instrumental view that the states should be free to try alternatives, and the Court should respect their efforts as long as they appear "minimally satisfactory." *See id.* For a comprehensive critique and set of proposals along such lines, see William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780 (2006).

28. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process (William N. Eskridge & Philip P. Frickey eds., Found. Press tent. ed. 1958).

29. *Id.* at 10–11.

eventually disposed of them for salvage value. The broker sued for the contract price.[30]

Hart and Sacks entitle this chapter "The Significance of an Institutional System." Their most general and basic point is that the case cannot be effectively resolved by doctrine as taught in law schools and elaborated in treatises, but requires a set of institutions configured to the industry. This lesson rests on a series of more specific ones.

First, there is the realist lesson of the *indeterminacy* of doctrine. Hart and Sacks show that the general law of sales is ambiguous as to whether, in this situation, the seller's shipment of nonconforming goods permits the buyer to reject the goods, instead of accepting and claiming damages for their reduced value. They proceed to point out that, if we had concluded that there was a right to reject, there would remain the question of whether a rejecting buyer has a duty to assist the seller by disposing of the spoiled goods. And after those questions are answered, a court might still have to answer the further question of whether the buyer's failure to salvage or his wrongful rejection leads to offsetting damages or a complete forfeiture of his defense.[31] The resources of general contract law are inadequate to resolve these questions.

A second lesson is the importance of *context*. The cantaloupes dispute is not simply a contract case; it is a case about the interstate exchange of perishable agricultural products. Assessment must take account of "[t]he practices, attitudes, and expectations . . . of members of the industry."[32] In particular, it must pay attention to "the rejection evil." When prices fall, buyers may seek to escape their commitments by seizing minor nonconformities as excuses to reject. Small shippers may have limited ability to dispose of rejected goods or to pursue litigation in distant locales. What is needed in this context is "a better means of preventing abuses from occurring, and of discouraging unscrupulous dealers from taking advantage of reluctance to litigate."[33] Such considerations encourage us to consider whether interpretations that give broad latitude to reject or that do not penalize failure to salvage may exacerbate the rejection problem.

The third lesson Hart and Sacks draw is the need to *adapt* to new circumstances.[34] This case was eventually resolved in favor of the seller. Hart and Sacks approve of that decision, but they conclude by noting later cases in which courts plausibly decided not to apply the forfeiture result. In these later cases, it appeared that the seller misrepresented the condition of the goods or unilaterally altered the terms of the sale after the goods had shipped. Hart and Sacks portray these decisions sympathetically, suggesting that to apply the forfeiture rule where there was evidence of opportunism on

30. *Id.* at 45–46.

31. *See id.* at 11.

32. *Id.* at 9.

33. *Id.* at 40.

34. *Id.* at 64–66.

the seller's part would shift the balance of vulnerability too far toward the buyer.

These lessons lead to a final one—the importance of *institutional structure*.[35] The courts and other actors with responsibility for resolving the dispute need to understand that they and the dispute are embedded in structures of roles and responsibilities. A regime has developed in response to the distinctive problems of interstate trade in perishable fruits and vegetables. The preeminent player is the United States Department of Agriculture, and the normative keystone is the Perishable Agricultural Commodities Act ("PACA"), which makes it a violation of federal law for "any dealer to reject or fail to deliver . . . without reasonable cause any perishable agricultural commodity" in an interstate transaction.[36] Congress enacted the statute in 1930 in part as a response to "the rejection evil."[37] The Act instructs the Secretary of Agriculture to operate an arbitration process that reduces the cost of adjudicating claims and to administer a licensing scheme designed to screen irresponsible buyers and sellers from the industry.[38]

Another important element of the regime is a set of regulations promulgated by the Department to guide the interpretation of undefined contract terms like "U.S. No. 1 cantaloupes" and "rolling acceptance final." ("U.S. No. 1 cantaloupes" requires, among other things, that not more than one percent of the shipment be "affected by soft rot," while "rolling acceptance final" entails, among other things, that the buyer "has no right of rejection on arrival.")[39] In addition, the Department operates an inspection service at major shipping terminals that makes it feasible to prove the condition of goods at pertinent times.[40]

Although extensive, the Department's activities are part of a still larger structure. State commercial law continues to play a background role, filling the interstices of federal authority. Private industry associations facilitate enforcement of the Secretary's orders by publicizing noncompliance and mobilizing informal industry pressures against repeat offenders. Moreover, industry groups play an important role in the Department's formulation of its regulations on default contract terms. The Department actively consults trade associations and, in some cases, it incorporates norms they have previously enacted for their members.[41]

Hart and Sacks are centrally concerned with the relation of courts to contextualizing regimes, and especially to agencies. The cantaloupes case came to the courts in an action for review of a decision by a Department of

35. *See* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003) (discussing and applying Hart and Sacks's institutionalism to questions of public law indeterminacy). Our ideas have been strongly influenced by discussions with Dorf.

36. HART & SACKS, *supra* note 28, at 33–34.

37. *Id.* at 40.

38. *Id.* at 33–34.

39. *Id.* at 18 n.10 (discussing several since-repealed provisions of 7 C.F.R.).

40. *Id.* at 11.

41. *Id.* at 41–42, 44.

Agriculture hearing officer in a PACA arbitration.[42] Treating the case in terms of the general law of sales, the district court held that the buyer could offset the reduction in value caused by the cantaloupes' nonconformity against the seller's claim for the purchase price. However, this decision was ultimately reversed by the appellate court on the ground that the buyer had forfeited his defense by failing to salvage.

Hart and Sacks defend the forfeiture resolution as the response developed for this situation by the Department of Agriculture, who they deem and think the courts should defer to as, the institutional actor best qualified to address it. Yet, they suggest deference should be conditioned on the agency providing a clear, minimally plausible explanation of its decision. Moreover, they point to cases where the courts could properly take the lead role instead of deferring to the Secretary. They approve of decisions in which the courts overrule the Secretary in order to protect buyers from seller fraud or sharp practice, suggesting (debatably) that the courts' expertise is superior in matters involving basic fairness.[43]

The PACA regime differs from the ones described in the contemporary literature on trade associations in that it is not a predominantly private regime. Hart and Sacks argue that public intervention was necessary because the industry had not been able to produce a regime on its own to solve "the rejection evil" and related problems.[44] As it develops, the PACA regime combines "private decisions and official decisions" in ways that exhibit "elements of a chicken-and-egg relationship" that "def[ies] any facile description."[45]

On the other hand, the PACA structure does resemble the trade-association-focused regimes in its preoccupation with dispute resolution. Like the trade association regimes, PACA is focused on providing default terms for contracts and arbitration of claims. It is primarily designed to facilitate bilateral exchange. The norms it generates are stable and customary.

The newer regimes to which we turn now resemble Hart and Sacks's account in their complex mingling of public and private. But they depart from both PACA and the traditional trade association regimes in two central ways. First, their concerns are broader than dispute resolution and the governance of intra-industry exchange. They embrace core aspects of the industry's production processes. Second, their norms are not customary. Norms are revised more or less continuously in response to new perceptions of risk and opportunity in unstable environments. Private actors engage in joint exploration of uncertainty, and public officials are less likely to

42. *Id.* at 47–53.

43. *Id.* at 63–64.

44. Hart and Sacks seem to have discounted the possibility that private initiative can sometimes be sufficient, though the trade association scholarship shows that it can. *See, e.g.*, Bernstein, *supra* note 2, at 1724–25 (discussing the cotton gin industry). The key determinants of the need for public intervention appear to be the number and heterogeneity of the stakeholders. *See* ELINOR OSTROM, GOVERNING THE COMMONS 15–21, 182–85 (1990).

45. HART & SACKS, *supra* note 28, at 8–9.

passively adopt their solutions than to encourage, shape, and collaborate with their efforts.

B. *The California Leafy Greens Products Handler Marketing Agreement*

The commercial law concerns Hart and Sacks emphasize converge with public safety concerns. A system parallel to PACA regulates food products to prevent adverse effects on health. At the federal level, there are two major safety regimes—one administered by the Department of Agriculture for meat and poultry, and one administered by the Food and Drug Administration ("FDA") for other foods. Statutes have long prohibited the sale of food that is "injurious to health"[46] or "unsound, unhealthful, unwholesome, or otherwise unfit."[47] The Food Safety Modernization Act of 2010 gives the FDA the authority to shut down facilities producing food that "has a reasonable probability of causing health problems."[48]

The difficulties of administrators and courts in elaborating such terms are analogous to the ones they face in elaborating contract terms such as those in the cantaloupe case. The response has also been analogous—the construction of contextualizing regimes.

For more than a century, the most elaborate food safety programs have been those for meat and poultry run by the Department of Agriculture. Until recently, most unsafe meat and chicken could be detected by visual and olfactory inspection. Regulators practiced "poke and sniff" examination of each carcass.[49] Because this kind of inspection was imperfect, they also regulated the equipment, structure, and practices of processing plants prophylactically in highly directive regulations. For example, regulations required that driveways leading to plants be paved, that poultry plants have thirty candles of light intensity on all working surfaces, and that water used to clean cutting equipment be at least 180 degrees Fahrenheit.[50]

In the past two decades, this system has changed in response to two sorts of pressures. Increasingly, hazards have taken the form not of directly observable contamination but of micropathogens detectable only through chemical testing.[51] Moreover, the processes that produce clean products are

46. 21 U.S.C. §§ 342(a)(1), 601(m)(4) (2006).

47. *Id.* §§ 601(m)(3), 606(a) (defining "adulterated" and prohibiting adulterated meat respectively).

48. Food Safety Modernization Act, Pub. L. No. 111-353, § 102(b)(1), 124 Stat. 3885, 3887 (2011) (amending 21 U.S.C. § 350d(b)(1) (2006)).

49. *See, e.g.*, Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC'Y REV. 691, 696–98 (2003).

50. Sanitation Requirements for Official Meat and Poultry Establishments, 62 Fed. Reg. 45,045, 45,047–48 (Aug. 25, 1997) (to be codified at 9 C.F.R. pts. 303, 308, 381, 416) (describing and repealing various highly directive regulations).

51. Hart and Sacks note as a potential problem that the Cladosporium Rot was not visible in its early stage. The problem was not intractable in the cantaloupes case because, since the disease was "of field origin," its presence at the time of shipment—the relevant time

not well understood, uniform, or stable. In consequence, food safety regulation has been shifting over the past two decades away from "command-and-control"-style regulation toward "management-based regulation."[52]

In 1996, the Department of Agriculture rescinded much of the command-and-control structure for meat and poultry processing and inaugurated a management-based approach known as Hazard Analysis and Critical Control Points ("HACCP"). The regulations now require the processors themselves to identify the risks of contamination and the "critical control points" where intervention can reduce these risks. They must then produce plans for minimizing the risks. The plans must provide for monitoring and corrective action in the event of failure, and they must also be updated in light of experience. In addition, the operator must be able to point to evidence of the adequacy of the plan from research performed by the operator himself or by others. The regulators monitor plan adequacy and implementation. Performance is assessed by sample testing of indicator organisms. The indicator organisms—salmonella and generic E. coli (not the more toxic forms of E. coli such as O157: H7)—are relatively mild toxins likely to be destroyed by cooking and which would normally not themselves render the product unmarketable. They serve as indicators of the effectiveness of the process control. Facilities are ranked based on industry surveys. They must meet minimum thresholds to avoid regulatory intervention and, in principle, these thresholds increase as industry practice improves. The agency, trade associations, and consultants collect and disseminate information throughout the industry so that firms can learn from each other's experiences.[53]

Until the recent Food Safety Modernization Act,[54] no comparable federal requirements covered most other foods. However, some producers did not wait for the statute. The California Leafy Greens Products Handler Marketing Agreement is an especially interesting instance.[55] Raw fruits and vegetables became an acutely salient concern after some highly publicized disease outbreaks from tainted spinach and lettuce in 2006.[56] Because fruits and vegetables are often eaten raw, they are subject to special concern. Heat kills most micropathogens on cooked foods. Food poisoning outbreaks have

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under applicable contract law—could be inferred from its discovery on arrival. HART & SACKS, *supra* note 28, at 11.

52. *See* Coglianese & Lazer, *supra* note 49, at 689 (describing "management-based" regulation).

53. In practice, implementation has been erratic. *See* COMM. ON THE REVIEW OF THE USE OF SCIENTIFIC CRITERIA & PERFORMANCE STANDARDS FOR SAFE FOOD, NAT'L RESEARCH COUNCIL, SCIENTIFIC CRITERIA TO ENSURE SAFE FOOD 140–41 (2003).

54. Pub. L. No. 111-353, 124 Stat. 3885 (2011).

55. STATE OF CAL. DEP'T OF FOOD & AGRIC., CALIFORNIA LEAFY GREEN PRODUCTS HANDLER MARKETING AGREEMENT (effective as amended from Mar. 5, 2008) [hereinafter CALIFORNIA MARKETING AGREEMENT], *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/CA%20Leafy%20Green%20Products%20Handler%20Agreement.pdf

56. *See generally* Julie Schmit, *All Bacteria May Not Come Out in the Wash*, USA TODAY.COM, Oct. 5, 2006, http://www.usatoday.com/money/industries/food/2006-10-04-spinach-wash-usat_x.htm (discussing the 2006 outbreak and the special concerns with eating raw spinach).

been especially frequent with spinach and other leafy greens. These vegetables are produced in larger-scale operations than in the past and in new forms, like "salad mix," that involve mingling pieces picked in different locations. By multiplying the number of "contact points," these new conditions increase the likelihood that contamination will spread widely. Federal food regulation has focused traditionally on post-farm industrial processing. But for raw fruits and vegetables, most of the "critical control points" are on the farm. Further, the large number of farms and the way farm production, as compared to industrial processing, is spread over time and space present additional challenges for traditional regulatory approaches.

In 2007, the FDA announced that it would not promulgate mandatory rules for processing of fruits and vegetables because there was too much uncertainty about the proper standards.[57] Instead, it has encouraged and assisted state and private efforts. Acting through a trade association, California producers petitioned the California Department of Food and Agriculture in 2007 under a statute that authorizes the Department to enter marketing agreements to establish the California Leafy Greens Product Handler Marketing Agreement ("LGMA").[58] LGMA membership consists of intermediaries who handle 18 specified leafy green vegetables. There are currently about 120 members, accounting for about 99 percent of California leafy green production (which in turn accounts for about 75 percent of national production).[59]

LGMA is governed by a thirteen-member board. Board members are chosen by the state Secretary of Agriculture from nominations by the membership.[60] Twelve must be representatives of the handler-members of the organization; the thirteenth is supposed to represent "the public." The board designates safety standards or "best practices" for the farms from which the handlers buy. The handler-members commit to deal only with farms that comply with the standards. Inspectors from the California Department of Food and Agriculture monitor compliance. The LGMA board sanctions noncompliance by suspending or withdrawing a recalcitrant member's right to use the LGMA service mark. The entire process is funded by assessments on LGMA members. The key benefit of membership in good standing is the right to use the LGMA service mark on the product and on bills of lading and other shipping documents. The mark seems to have some value to consumers, but its most important function is as a certification to business

57. Marian Burros, *Government Offers Guidelines to Fresh-Food Industry*, N.Y. TIMES, Mar. 13, 2007, at A17. The agency also pointed to insufficient enforcement resources. *Id.*

58. *See About Us*, CAL. LEAFY GREEN PRODS. HANDLER MKTG. BD., www.caleafygreens.ca.gov/about-us (last visited Jan. 21, 2012); CAL. FOOD & AGRIC. CODE § 58745 (West 2012).

59. *See* Western Growers Ass'n, *Justification for Proposed National Marketing Agreement for Leafy Green Vegetables*, *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5077207. *See generally* Variun Shekhur, *Produce Exceptionalism: Examining the Leafy Greens Marketing Agreement and Its Ability to Improve Food Safety*, 6 J. FOOD L. & POL'Y 267 (2010).

60. CALIFORNIA MARKETING AGREEMENT, *supra* note 55, art. III.

buyers of compliance with the standards. Many dealers bargain for LGMA-compliant leafy greens, and Canada and Mexico forbid import of non-LGMA-compliant California greens.[61]

An important set of LGMA requirements concerns "trace-back."[62] Each handler must maintain records that permit identification of the farm and field from which the products it sells come in the event that contamination is discovered downstream in the supply chain. The rest of the requirements concern growing practices and product quality. For the most part, these "best practices" are taken from recommended guidelines developed by 4 major trade associations under the auspices of the FDA. Like the other most prominent certification regimes, LGMA is based on HACCP principles. It has some specific directive rules. For example, planted areas should be at least 400 feet from any concentrated animal-feeding operations.[63] But most of the standards prescribe planning, monitoring, and testing. Each grower must develop plans with respect to field configuration, water, soil amendments, worker sanitation, and equipment cleanliness. A plan for equipment, for example, must provide for routine cleaning, periodic inspection, and intervention when inspection detects problems. Some testing requirements are specific. Water must be tested in accordance with specified protocols for generic E. coli at least once every 60 days, and the water must meet specified tolerances for contaminants. If it fails, then water use has to be suspended or modified while the cause is diagnosed and remedied, and a wider, more frequent testing regime kicks in.

This regime develops the tendencies Hart and Sacks note in the cantaloupes case. First, there is the problem of *indeterminacy*. The difficulty of defining hazards to health increases as those hazards multiply. When difficulties of detection lead to prophylactic regulation of the production process, they increase still further. For decades, the regulators used policy analysis to prescribe the requirements of safe production. But as both

61. *Import Requirements for Leafy Green Vegetables from U.S. and California*, CAN. FOOD INSPECTION AGENCY (issued May 4, 2007, amended May 31, 2007), http://www.inspection.gc.ca/english/fssa/frefra/safsal/califore.shtml; *Mexico Opens Border to State Spinach*, CAL. FARMER (Dec. 21, 2007), http://farmprogress.com/california-farmer/story.aspx?s=14911&c=9.

There are many certification regimes for other products, and there is even another major regime that includes leafy greens. This is the Safe Quality Food program sponsored by some major retailers, including Wal-Mart and McDonald's. Codex Alimentarius Comm'n, 32d Session, Jun. 29–Jul. 4, 2009, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, ALINORM 09/32/9D-Part II 4–5 (May 2009) (by Spencer Hensen & John Humphrey).

62. CALIFORNIA MARKETING AGREEMENT, *supra* note 55, art. V. *See generally*, CAL. LEAFY GREEN PRODS. HANDLER MKTG. BD., COMMODITY SPECIFIC FOOD SAFETY GUIDELINES FOR THE PRODUCTION AND HARVEST OF LETTUCE AND LEAFY GREENS (Jul. 22, 2011) [*hereinafter* FOOD SAFETY GUIDELINES], *available at* http://www.caleafygreens.ca.gov/sites/default/files/LGMA%20Accepted%20Food%20Safety%20Practices%207.22.11.pdf (containing various provisions that impose record-keeping requirements on signatory handlers for purposes of traceability).

63. FOOD SAFETY GUIDELINES, *supra* note 62, at 49. 400 feet is a minimum. Distance should reflect a series of "risk/mitigation" factors, such as the slope of the terrain.

technology and risks changed, they found themselves unable to keep up. Even in the face of public demand for regulation following the 2006 outbreaks, the FDA felt compelled to decline to promulgate mandatory standards because of insufficient understanding of what the requirements of safety were.[64] The move to "management-based regulation" here and elsewhere is an acknowledgement of the limits of policy engineering.

Second, as in the cantaloupes case, we see the importance of *context*. Most certification regime standards are based on "guidance" norms published by the FDA. The initial 1998 "guidance" consisted of recommendations for fruits and vegetables in general;[65] in 2004, the FDA called for "commodity-specific and practice-specific" guidelines.[66] "Commodity-specific" standards, such as those of LGMA, are now pervasive. HAACP-style regulation represents a more radical step toward contextualization, tailoring safety precautions to the circumstances of individual farms or even fields.

Some of the most prominent criticisms of LGMA and other major regimes call for further contextualization, especially to accommodate small farmers. Critics argue that small farms often involve lower contamination risks than larger ones and that a regime more sensitive to variation in risk would impose less costly burdens on them. For example, one complaint is that the required barriers between planted areas and areas that might attract animals represent a major cost for many small farmers and are unnecessary where there are no "high-risk" animals (for example, cattle as opposed to deer).[67]

Another dimension of contextualization involves the place of local production in the broader supply chain. It is not always clear at what point in the supply chain contamination is introduced or at what point it can be most effectively mitigated. Thus, upstream and downstream producers may need to collaborate with and monitor each other. The emphasis on "trace-back" reflects this reality. In leafy greens, for example, regulations focus on the

64. Burros, *supra* note 57.

65. U.S. Food & Drug Admin., Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables (1998), *available at* http://www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf.

66. *Produce Safety from Production to Consumption: 2004 Action Plan to Minimize Foodborne Illness Associated with Fresh Product Consumption*, U.S. Food & Drug Admin. (Oct. 2004), http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/FruitsVegetablesJuices/FDAProduceSafetyActivities/ProduceSafetyActionPlan/UCM129487.htm.

67. *See* Testimony of Chris Blanchard, Owner, Rock Spring Farm (Iowa), to the U.S. Dep't of Agric., Public Hearing in the Matter of Leafy Green Vegetables Handled in the United States 2337–56 (Oct. 6, 2009), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5080524 (stating that low levels of E. coli have been detected in deer feces). However, the LGMA guidelines do take account of some such factors. The guideline for land with "grazing domestic livestock" (as opposed to confined commercial livestock) is thirty feet (as opposed to 400 feet). Cal. Leafy Greens Mktg. Bd., *Audit Checklist* 2 (July 23, 2010), *available at* http://www.caleafygreens.ca.gov/sites/default/files/Audit%20Checklist%20California%207-23-10.pdf.

growers, but the "handlers" are the locus of regulatory organization. While the growers can most efficiently mitigate the risk, the handlers, less numerous and closer to the ultimate customer, can more credibly certify.[68]

Third, as in the cantaloupes case, we see the need for ready *adaptability*. Contemporary food safety regimes are self-consciously experimental. They draw on the American tradition of government-supported agricultural science that takes the form both of scientific research and of an "Extension Service" designed to make the practical applications of research widely available.[69] In addition, they link to a more recent system of food-illness incident reporting that emphasizes prompt diagnosis and intervention. LGMA guidelines get reassessed at least annually, and whenever either new technical knowledge or incident reporting suggests problems or opportunities.[70]

International trade norms intensify the need for adaptation. Treaties typically require that health and safety regulations with trade-restrictive effects be no stricter than necessary to accomplish their purposes, and they require nations, for trade purposes, to treat as sufficient compliance with comparably effective regulations of exporting states. Such norms require that regulators continuously engage with their counterparts in trade-partner nations.[71]

Finally, the tendency of exchange relations to embed themselves in the kind of multilevel, multifarious *institutional structure* that Hart and Sacks have observed is strikingly confirmed in contemporary food safety efforts.

Again, we see a collaboration of federal and state and public and private. Standards are produced at the national level primarily by trade associations but with some oversight by the FDA, which then publishes them as recommendations. They are incorporated with modifications at the state level by a producer organization with some oversight by the state agency. They are enforced through monitoring by the state agency, pursuant to an agreement with the producer organization, and through sanctions applied by the producer organization.[72]

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68. *See* Christophe Charlier & Egizio Valceschini, *Coordination for Traceability in the Food Chain: A Critical Appraisal of European Regulation*, 25 EUR. L. J. ECON. 1, 13–14 (2008) (analyzing the coordination barriers to effective private trace-back monitoring and arguing that downstream actors are more likely to play the necessary leadership role in organizing effective initiatives).

69. On publicly supported agricultural research and extension, see DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 179–254 (2001).

70. Telephone Interview with Scott Horsfall, Chief Exec. Officer, Cal. Leafy Greens Prods. Handler Mktg. Agreement (June 25, 2010).

71. Kalypso Nicolaides & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 LAW & CONTEMP. PROBS., 263, 293–94 (Summer 2005).

72. Public agency participation at both federal and state levels involves agriculture, public health, and environmental officials. Many food safety standards draw on or interact with environmental standards. For example, LGMA water standards incorporate standards promulgated by the Environmental Protection Agency under the Clean Water Act. Cal. Leafy Green Prods. Handler Mktg. Agreement, *Appendix B: Technical Basis Document for*

State contract and tort law play a background role. Contracts at all stages of the supply chain may require LGMA-compliant product. And LGMA standards will likely be treated as relevant in defining the standard of care in tort suits by injured consumers.

There is also an international dimension. We have noted that trade treaties require regulators to engage with peers in trade-partner nations over the trade-restrictive effects of regulation. The key treaty covering food safety regulation—the Sanitary Phytosanitary ("SPS") Agreement of the World Trade Organization ("WTO")—requires that signing nations base their regulations on international standards unless the standards are inadequate to national regulatory purposes.[73] The United Nations-sponsored Codex Alimentarius Commission is the most important of several intergovernmental organizations that set food safety standards. Among the private international standard-setting and certification regimes is GlobalGAP (for "good agricultural practices"), an organization formed by major European retailers. Another private international organization, the Global Food Safety Initiative, assesses certification regimes in accordance with a set of metastandards. Once a certification regime has itself been certified at this level, buyers who have previously decided to accept any of the other approved certifications should be willing to accept it.[74]

The Food Safety Modernization Act passed at the end of 2010 affirms and strengthens the tendencies reflected in HAACP and LGMA.[75] It mandates registration of food processing facilities by the FDA in a "management-based" approach. Facilities must develop, implement, monitor, validate, and update HACCP plans (now called "Hazard Analysis and Preventive Control"). The FDA inspects and suspends registration on the basis of risk assessments. Among the specified risk factors are the adequacy of a facility's plan and its implementation and whether the facility has been certified by a private auditor that is in good standing under an accreditation regime. With respect to imports, the Act encourages private international certification regimes by allowing importers to rely on certification in discharging their duties to verify safety and by expediting the import process for certified goods. The FDA is charged with operating a meta-accreditation process for third-party accreditors.

The Act provides for the FDA to set standards for fruits and vegetables. It seems clear that such standards will be developed in a way that relies on

Commodity Specific Food Safety Guidelines for the Lettuce and Leafy Greens Supply Chain 2nd Edition 2-4 (Apr. 18, 2007), http://www.caleafygreens.ca.gov/sites/default/files/appendix_b_technical_basis.pdf. Some LGMA standards create tensions with environmental ones that require negotiation. For example, settling ponds that filter sediment improve water quality but attract animals that might contaminate nearby crops.

73. WTO Agreement on the Application of Sanitary and Phytosanitary Measures art. 15, Apr. 15, 1994, 1867 U.N.T.S. 493. *See generally* JOANNE SCOTT, THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES 41–75 (2007).

74. *See generally* Codex Alimentarius Comm'n, *supra* note 61.

75. Food Safety Modernization Act, Pub. L. No. 111-353, §§ 102–05, 201–05, 301–07, 124 Stat. 3885–905, 3923–39, 3953–66 (2011).

organizations like LGMA. In anticipation of the Act, the FDA and the Department of Agriculture jointly announced in the fall of 2010 a Produce Safety Alliance based at Cornell University that will include federal and state agencies, universities, and trade associations. The Alliance will develop standards based in substantial part on existing "voluntary and contractual produce safety standards" and will facilitate information exchange among members.[76]

C. *Racial Discrimination in Juvenile Justice*

Debate about discrimination tends to oscillate between two interpretations of the meaning of impermissible discrimination—disparate treatment and disparate impact. At the extremes, the first interprets discrimination to mean only decisions that consciously aim to disadvantage members of a protected group; the second interprets it to include all decisions that have foreseeably disproportionate and adverse effects on such a group.

The first is too narrow. It involves severe difficulties of proof when defendants take care to hide their prejudices, it ignores the demonstrated fact of unconscious bias, and it is unresponsive to the continuing effects of past, conscious discrimination. The second is too broad. Because membership in disadvantaged groups correlates with other factors that are legitimate bases for decisionmaking, it would often be unfair and impractical to prohibit all decisions with foreseeable disparate impacts.

The disparate treatment approach has been favored by the courts in constitutional equal protection cases.[77] However, an approach that is more demanding than simple disparate treatment but less demanding than simple disparate impact has emerged under Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal grants (which include most state and local government agencies and private universities and hospitals) and Title VII of the same statute, which prohibits discrimination by employers. Under this approach, a disparate impact on a protected group creates a rebuttable inference of discrimination. Rebuttal requires a demonstration of a nondiscriminatory purpose. In the more demanding formulations, the decisionmaker must show that there is no reasonably available alternative path to the nondiscriminatory goals that would be less burdensome on the disadvantaged group.[78] In this more demanding formulation, disparate impact analysis converges with the "reasonable accommodation" standard introduced in nondiscrimination law concerning

76. Press Release, U.S. Food & Drug Admin., FDA, USDA, Cornell University Announce Alliance for Produce Safety (Nov. 4, 2010), *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm232503.htm.

77. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 273–74 (1979); Washington v. Davis, 426 U.S. 229, 242 (1976).

78. *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 390–402 (2007). Our analysis relies extensively on Johnson's article.

the disabled.[79] Thus, we see suggestions that antidiscrimination norms sometimes can be understood not as defining specific prohibited conduct but as requiring that "racial impact [be viewed] as a warning sign that should trigger scrutiny of the rationality or fit between means and objectives" of the relevant practice.[80]

This approach leads discussion away from personal motivation and toward institutional practicalities. And the inquiry into reasonableness and alternatives tends to become intensely local. The rights and duties these antidiscrimination norms create can only be defined through a form of investigation that will depend on technical and local knowledge. An interesting example is the response to race discrimination in juvenile corrections established by 1992 and 2002 amendments to the federal Juvenile Justice and Delinquency Prevention Act ("JJDPA").[81]

Many practices in the criminal justice system have marked disparate impacts on minority youth. While 15 percent of all youth are African-American, 40 percent of youth in confinement are African-American.[82] On a disparate impact theory, this disparity raises an inference of discrimination. On the other hand, there are potential nondiscriminatory explanations that might rebut the inference. Race correlates with income, education, employment, family structure, and other nondiscriminatory factors that may in turn correlate with criminal activity. Some studies find substantial disparate impacts after purporting to control for these other factors, but they are controversial. Thus, the scope of disparate impact liability is ambiguous, and claims tend to be hard to establish.[83]

However, Congress took a more proactive approach in the JJDPA. As a condition of receiving federal grants, states must make and annually revise a plan to "reduce . . . the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system."[84] Each state must submit annual performance reports on its compliance with

79. *See* 42 U.S.C. § 12112(b)(5)(A) (2006); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 38–41 (1996) (suggesting that "reasonable accommodation" is implicit in discrimination doctrine outside the disabilities area).

80. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 258 (2011); *see also* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY 11–14 (2002); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

81. 21st Century Department of Justice Appropriations Authorization Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758 (codified as amended at 42 U.S.C. § 5633(a)(22) (2006)); Act of Nov. 4, 1992, Pub. L. No. 102-586, 106 Stat. 4982 (1992) (codified at 42 U.S.C. § 5633 (2006)).

82. Johnson, *supra* note 78, at 402–03.

83. *See generally* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006).

84. 42 U.S.C. § 5633(a)(22) (2006).

its own plan and its progress toward the goal of reducing this disparate impact.[85]

The JJDPA plans must identify what in food safety regimes are called the "critical control points" in the process that lead to incarceration. As with food safety, an important source of uncertainty in juvenile justice is the difficulty of pinpointing where in the "supply chain" of separate actors sub-optimal practices occur.

> A given juvenile justice case will involve multiple decision points: the initial delinquency referral from police or other sources; the decision on whether to detain (which can be made by intake staff, law enforcement officials, and the state's attorneys); referral to prosecution for delinquency or for transfer to adult court; and a judicial disposition which may involve returning a child to a community (for community service, informal, or formal probation), commitment to a residential facility, or transfer to adult court.[86]

At each point, JJDPA requires that racial disparities be measured, their causes assessed, and mitigating interventions considered.[87] As successful interventions are identified, information about them is made available, and lagging jurisdictions are pressured to consider and try them.

The Office of Juvenile Justice and Delinquency Prevention of the Department of Justice monitors compliance with the program, provides technical assistance, and funds demonstration projects. The federal statute encourages the formation of state advisory groups, and these groups have formed the Coalition for Juvenile Justice to exchange information. A variety of foundations, led by the Annie E. Casey Foundation, support peer exchanges and experimentation, and advocacy groups, such as the Youth Law Center, provide advocacy around disproportionate minority contact ("DMC") issues.[88]

Measured by aggregate racial disparity figures, the JJDPA regime in juvenile justice has not been a success, but many continue to regard it as the most promising framework for reform in this area. The program, Olatunde Johnson writes, has "resulted in the development of promising programs and

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85. *Id.* § 5633(a).

86. Johnson, *supra* note 78, at 403. Congress took note of this supply chain in 2002, when it replaced the focus of the original statute on "disproportionate minority confinement" with a focus on "disproportionate minority contacts" within the juvenile justice system. *See* 42 U.S.C. § 5633(a)(22).

87. 28 C.F.R. 31.303(j) (2011). The Office of Juvenile Justice and Delinquency Prevention ("OJJDP") does not normally publish jurisdiction-specific data, but the Heywood W. Burns Institute for Juvenile Justice Fairness and Equity has obtained some of this data from the OJJDP and published that data on its website. *State Map*, THE HEYWOOD W. BURNS INSTITUTE FOR JUVENILE JUSTICE FAIRNESS AND EQUITY, http://www.burnsinstitute.org/state_map.php (last visited Jan. 21, 2012).

88. *See generally Cases*, YOUTH LAW CENTER, http://www.ylc.org/ylcInAction.php (last visited Jan. 21, 2012); *Juvenile Detention Alternatives Initiative*, THE ANNIE E. CASEY FOUNDATION, http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx (last visited Jan. 21, 2012).

initiatives some of which have reduced racial disparities in particular states, and provided a focal point for advocacy for system improvements by private providers and outside advocacy organizations."[89]

An especially promising development is the Juvenile Detention Alternatives Initiative ("JDAI") organized and supported for the past 20 years by the Casey Foundation. The JDAI includes 110 participating local jurisdictions and 27 state jurisdictions. It has developed a model of planning, self-assessment, and experimentation for juvenile detention generally similar in principle to (but more developed than) that required for minority disparities by the JJDPA. Most participants appear to have achieved large reductions in detention without any adverse impact on public safety.[90] The extent to which aggregate reductions are specifically attributable to JDAI interventions remains to be determined. Juvenile detention decreased in most states during the period of JDAI efforts, as did juvenile crime rates.[91] However, the JDAI architecture seems exceptionally well configured to the problems it addresses. Monitoring for racial disparities is an integral part of the JDAI process. While there has been no aggregate reduction in the disparities, the JDAI reports some notable local successes. For example, both aggregate detention and racial disparities dropped significantly in Santa Cruz, California.[92] Moreover, there have been important benefits to minori-

89. Johnson, *supra* note 78, at 410 (citations omitted).

90. Specifically:

> [The 73 sites reporting] had a total average detention population of 5,451 in the year prior to each site joining JDAI and 3,967 in 2007—representing a 27 percent cumulative reduction in average daily population as of 2007. Thirty-six of the reporting sites (49 percent) had total population reductions of 25 percent or more, and those high performing sites had a median population reduction of 39 percent.

THE ANNIE E. CASEY FOUND., TWO DECADES OF JDAI: FROM DEMONSTRATION PROJECT TO NATIONAL STANDARD 14 (2009) [hereinafter THE ANNIE E. CASEY FOUND., TWO DECADES]; *see also id.* at 19 ("[T]here is no evidence that JDAI has led to any increases in offending in the short-term while youth who might otherwise be detained are supervised in the community."). *See generally* ELEANOR HINSON HOYTT ET AL., THE ANNIE E. CASEY FOUND., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION: 8 PATHWAYS TO JUVENILE DETENTION REFORM (2001), *available at* http://www.aecf.org/upload/publicationfiles/reducing%20racial%20disparities.pdf. For more information, see http://www.jdaihelpdesk.org.

91. JEFFREY A. BUTTS & DOUGLAS N. EVANS, JOHN JAY COLL. OF CRIMINAL JUSTICE, RESOLUTION, REINVESTMENT, AND REALIGNMENT: THREE STRATEGIES FOR CHANGING JUVENILE JUSTICE 1–2 (2011), *available at* http://johnjayresearch.org/wp-content/uploads/2011/09/rec20111.pdf. A study by the National Council on Crime and Delinquency of the period 1994–1998 found that, while juvenile detention decreased in JDAI sites, it increased in fourteen comparison sites. Nat'l Council on Crime & Delinquency, NCCD Evaluation of JDAI (Feb. 2002) (unpublished draft) (on file with authors). There has been no independent assessment of JDAI since then, but one by the Chief Justice Earl Warren Institute on Law and Social Policy at the UC Berkeley School of Law is underway. *See Impact Evaluation of the Juvenile Detention Alternatives Initiative (JDAI)*, CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY, http://www.law.berkeley.edu/11130.htm (last visited Jan. 21, 2011).

92. Scott MacDonald & Todd Foglesong, The Role of Probation in Reducing Minority Youth Confinement: Detention Reform and Justice Development in Santa Cruz County, 1990–2008 (Oct. 2009) (unpublished manuscript) (on file with authors).

ties in other jurisdictions that are not captured by racial disparity figures. In jurisdictions such as Chicago, where minority youth constitute more than 90 percent of the youth in the criminal justice system, aggregate detention reduction largely benefits minority youth, and a focus on racial disparities seems futile.[93]

JDAI intervention begins with the development of Risk Assessment Instruments to govern detention decisions. Such instruments are designed to give structure and consistency to judgments previously left to inarticulate discretion.[94] The JDAI protocol for the development of Risk Assessment Instruments calls for assembling "stakeholder" representatives, including judges, police, probation officers, prosecutors, defense lawyers, schools, public health agencies, and community service providers. The process strives to neutralize bias of many kinds by forcing precise articulation of standards and rigorous evaluation in light of experience. Factors that have disparate racial impacts are intensively reviewed, and alternatives are considered. Some sites have lowered racial disparities without harm to public safety by replacing "good family structure" as a counterindication to detention and instead asking whether there is an adult willing to be responsible for the youth's appearance in court. They have replaced "school attendance" with "productive activity" (thereby including employment).[95] Portland, Oregon, eliminated consideration of the severity of the offense giving rise to the arrest after it found that this consideration had no predictive value.[96] Once formulated, the Instrument is supposed to be validated by research and reassessed periodically.

The need for detention depends substantially on the availability of less restrictive forms of monitoring. A jurisdiction that fails to develop alternatives will feel forced to detain in situations where a more proactive jurisdiction would not. Moreover, the way diversion programs are configured and sited may have an influence on racial disparities. "Much of the progress in Santa Cruz[, California,] has been due to a new community-based detention alternatives program—an evening reporting center—which is located in a formerly underserved neighborhood and supervises many Latino youth who would have previously been assigned to secure detention."[97] Home detention monitored by daily visits or electronic devices is another commonly used alternative.

Where particular practices are associated with disproportionate minority impact, they should be investigated and reconsidered. In some jurisdictions,

93. HOYTT ET AL., *supra* note 90, at 38, 50–51, 59–60.

94. DAVID STEINHART, THE ANNIE E. CASEY FOUND., JUVENILE DETENTION RISK ASSESSMENT: A PRACTICE GUIDE TO JUVENILE DETENTION REFORM 19 (2006), *available at* http://www.jdaihelpdesk.org/Docs/Documents/Objective%20Admissions%20Criteria%20and%20Instruments/Juvenile%20Detention%20Risk%20Assessment/Practice%20Guide%20to%20Juvenile%20Detention%20Risk%20Assessment.pdf.

95. HOYTT ET AL., *supra* note 90, at 57.

96. Interview with Richard Jensen, Nat'l. Model Site Adm'r., Multnomah Cnty. Juvenile Detention Reform Initiative (Aug. 12, 2011).

97. THE ANNIE E. CASEY FOUND., TWO DECADES, *supra* note 90, at 23.

disproportionate minority detention has been associated with "failure to appear" charges when juveniles miss court appointments. Some have responded with "notification" programs. Agency personnel telephone or, if necessary, visit the offenders and their caregivers to remind them of their scheduled appearances, and may also assist them in preparing for the appearance and arranging transportation. A notification program in Pierce County, Washington, is credited with raising the appearance rate of minority youth from 52 to 91 percent.

At their most ambitious, reforms are designed to integrate risk assessment and monitoring with coordinated provision of social services. Referrals to the juvenile justice system often involve problems that are susceptible to professional intervention—for example, drug treatment, behavioral therapy such as anger management, or special education. Where cross-cultural communication and understanding is difficult, intermediaries with experience and credibility in the child's community may be needed. In some localities, a Community Assessment and Referral Center ("CARC") provides these services at the point of entry into the juvenile justice system. An example is the Huckleberry CARC in San Francisco, which describes itself as "a forum in which staff from juvenile probation, the sheriff's department, and community based organizations, work together in the same space to form an interdisciplinary team that assess[es] and case manage[s] youth who are arrested for a variety of nonviolent offenses."[98]

Assessments of the broader DMC regime are mixed. A salient complaint is that federal sanctions are insufficient. Private enforcement is precluded, and the Department of Justice, which has enforcement responsibility, prefers to use the carrots of technical assistance and demonstration grants to the stick of withdrawing federal funds. The Department appears to withhold funds only when noncompliance is extreme and obvious.[99] Yet, even with such limited enforcement, the achievements of the regime—as augmented by the efforts of the Casey Foundation—seem substantial, and it seems plausible that the most effective approach to the problem of disproportionate minority contact would involve a strengthening of the framework rather than an alternative to it.

The regime manifests the key jurisprudential traits we found in the agricultural regimes. Disparate impact doctrine is fundamentally *indeterminate*. At the most abstract level, it is indeterminate because there is no generally accepted answer to the question of what nondiscrimination entails in situations where nonracially motivated action has foreseeably disparate racial

98. HUCKLEBERRY COMMUNITY ASSESSMENT & REFERRAL CENTER, ANNUAL REPORT JULY 1, 2008–JUNE 30, 2009, at 1, http://www.sfgov3.org/ftp/uploadedfiles/juvprobation/meetings/Full_Commission/supporting/2010/03-10-10_Huckleberry_CARC_Update_handout.pdf. Sustained community involvement is promoted and facilitated in some areas by the Haywood Burns Institute for Juvenile Justice Fairness and Equity. JAMES BELL ET AL., W. HAYWOOD BURNS INST., THE KEEPER AND THE KEPT: REFLECTIONS ON LOCAL OBSTACLES TO DISPARITIES REDUCTION IN JUVENILE JUSTICE SYSTEMS AND A PATH TO CHANGE (2009), *available at* www.burnsinstitute.org/downloads/BI%20Keeper%20Kept.pdf.

99. *See* Johnson, *supra* note 78, at 415.

impacts. Analysis becomes somewhat more focused if we accept the suggestion that nondiscrimination requires monitoring of racial disparities and the adoption of reasonably available means to mitigate them. Yet, this precept also is indeterminate because it makes duty a function of practical feasibility, and we know little about practical feasibility. Thus, as with leafy greens, a key response to indeterminacy is the establishment of a regime in which meaning can be elaborated through collaborative investigation.

Such assessment requires the kinds of *contextualization* observed in food safety. Local units should be encouraged to experiment with reforms adapted to their own circumstances and to compare their experiences for lessons that can be transported from other sites to theirs. At the same time, there needs to be coordination across a series of actors in a linked production process (schools, police, courts, corrections) in order to identify the points at which mitigation is likely to be effective.

Again as in food safety, there is an emphasis on continuous reassessment and *adaptation* of norms. The JDAI protocol for Risk Assessment Instruments, for example, calls for continuous reassessment as experience suggests problems and wholesale reconsideration at least every four years.[100] More broadly, the JDAI experience suggests how collaborative deliberation can lead to reconceptualization of problems, as well as new solutions. Discrimination that was initially perceived as a problem of either conscious or implicit bias in individual detention decisions has come in some of the more successful jurisdictions to mean failure to configure services and facilities to the circumstances of low-risk minority youth in ways that obviate detention.

The regime also involves a multifarious *institutional structure*. It started as an effort by the federal government to induce self-assessment and self-correction by the states. However, it acquired an additional institutional dimension when a nongovernmental organization ("NGO")—the Casey Foundation—dissatisfied with the federal government's performance, took advantage of the reporting and planning process required by the statute to encourage more efforts through technical assistance.

The DMC regime is an effort to elaborate the legal safeguard of "equal protection" and the prohibition of "discrimination on the basis of race." In Pierce County, Washington, this elaboration has led to the practice of home visits to remind juveniles of all races of their court appointments. This is not a conclusion that could have been reached analytically; nor could it have been derived technocratically without the process of local experimentation that led to it. Once evidence of a practice's efficacy is available, it becomes plausible to say that nondiscrimination requires a comparably situated jurisdiction to either adopt the reform or provide a good reason for not doing so. Before we have the evidence, the best interpretation of nondiscrimination is as a duty to participate in the process of self-assessment and collaborative inquiry constituted by the contextualizing regime.

100. STEINHART, *supra* note 94, at 68–69.

D. *The Inter-American Tropical Tuna Commission and the Dolphin Conservation Program*

Tuna commonly school beneath swimming dolphins in the eastern tropical Pacific Ocean. Because these schools are relatively large and because the dolphins are readily spotted on the surface, "dolphin sets" are an effective way to catch tuna. Fishing boats use dolphin sightings to identify the schools and then encircle the schools with nets. The dolphins have no commercial value, but without special effort, fishers kill large numbers of them in the process.[101]

Harm to dolphins from tuna fishing first became a public issue in the late 1960s, and in 1972, Congress passed the Marine Mammal Protection Act. The statute mandated that marine mammal populations be managed to maintain an "optimum sustainable population" and banned the taking of mammals from "depleted" stocks.[102] It further declared an "immediate goal" to reduce dolphin mortality and serious injury from tuna fishing to "insignificant levels approaching a zero . . . rate."[103]

The term "optimum sustainable population" has no definition either in the statute or in science,[104] and the duty to reduce mortality from tuna fishing to "insignificant levels" is also ambiguous in several respects: What is "insignificant"? How quickly does the reduction have to occur? How should cost or technical feasibility be considered? Moreover, at the time the statute was enacted, there was little data on dolphin population size or mortality rates from tuna fishing.

The ambiguity in the statutory terms remains, and the data deficiency has been rectified only partially. Yet Richard Parker, on whose account we rely here, calls the regime that eventually emerged from this effort "one of the most innovative and effective environmental regimes in the world."[105] It reduced dolphin mortality from tuna fishing by over 99 percent.[106] On Parker's account, the success of the regime is due to the discovery of surprisingly inexpensive ways to reduce dolphin harm coupled with indirect but potent pressure on fishers to adopt them. No technocratic analysis could have mandated this result directly because the relevant facts were unknown prior to the intervention. Both discovery and implementation of the harm-reducing practices depended on the creation of a contextualizing regime.

Soon after its enactment, the National Marine Fisheries Service implemented the statute by imposing technology-based "gear and practice"

101. *See generally* Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1, 11–17 (1999).

102. 16 U.S.C. §§ 1361(2), 1362(1)(A), 1371(a)(3)(B) (2006). *See generally* Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423h (2006).

103. 16 U.S.C. § 1371(a)(2).

104. Tim Gerrodette & Douglas P. DeMaster, *Quantitative Determination of Optimum Sustainable Population*, 6 MARINE MAMMAL SCI. 1, 1–2 (1990).

105. Parker, *supra* note 101, at 6.

106. *Id.*

standards on U.S. boats and requiring them to accept monitors on board. Dolphin mortality from U.S. tuna fishing fell dramatically from an estimated 300,000 dolphins per year to 15,000.[107] But the decline partly reflected the shrinking of the U.S. fleet in the eastern tropical Pacific under consumer pressures for "dolphin-safe" tuna, which has been defined as tuna caught without any encirclement of dolphins. When U.S. processors demanded tuna they could label "dolphin-safe," U.S. boats dispersed to other areas where tuna can be caught more easily without setting on dolphins.

As U.S. boats left, they were replaced by foreign ones, and both NGOs and the remaining U.S. fishers concerned about dolphins focused attention on foreign boats.[108] Prior to 1984, U.S. efforts to induce foreign conservation were ineffectual. In that year, Congress amended the statute to require the Secretaries of State and Commerce to seek an international agreement and to embargo imports of tuna from the eastern tropical Pacific from any country that lacked a regulatory program and a fleet mortality rate "comparable" to those of the U.S.[109]

By this time, the Inter-American Tropical Tuna Commission ("IATTC") had begun to address the problem.[110] IATTC is an intergovernmental organization of coastal and fishing countries established to manage the eastern Pacific tuna fishery, and in particular, to guard against depletion through overfishing. The commissioners are appointed by each member state, and they make decisions by consensus. IATTC had begun a dolphin conservation initiative that included placing observers on boats to document mortality and study fishing techniques, a research program on gear and practices to mitigate harm, and an outreach program to disseminate information. Participation was voluntary, but the 1984 U.S. statute gave non-U.S. members incentive to cooperate because cooperation demonstrated that their efforts were "comparable" to those of the United States.

The IATTC program very soon produced some "startling" information.[111] First, dolphin mortality was considerably higher than the industry had ever acknowledged. But second, mortality was highly correlated with specific practices—for example, misaligned gear, fishing after sundown, failure to adequately deploy crew to assist dolphins out of the net—that could be avoided with fairly modest training and effort. The observers documented wide variance in the performance of different boats. IATTC staff "estimated that total mortality could be reduced by 80% simply by getting the mortality rates of the worst captains down to the level of the best."[112] The organization set up "a fleet-wide clearinghouse of information on

107. *Id.* at 19.

108. *Id.* at 29.

109. Commercial Fishing Industry Vessel Act, Pub. L. No. 98-364, 98 Stat. 440 (1984) (codified as amended at 16 U.S.C. § 1371(a)(2) (2006)).

110. *See generally* Parker, *supra* note 101, at 21–25 (describing the creation and functioning of the IATTC).

111. *Id.* at 24.

112. *Id.* at 31.

dolphin mortality reduction gear, techniques, and experience."[113] Mortality rates dropped dramatically.[114] And industry opposition to mandatory limits softened as fishers saw that the costs of mitigating the problem were far lower than they had assumed.[115]

Although participation in the IATTC program could establish that a flag state had a protective regime "comparable" to the United States, foreign boats, despite dramatic progress, lagged behind U.S. ones and thus could not establish the "comparable" mortality rates also required by statute. In 1991, the United States embargoed tuna from most of the foreign-flag states.[116] At about the same time, consumer boycotts succeeded in inducing some major processors to commit to buy only "dolphin-safe" tuna.

"Dolphin-safe" initially meant caught without any deliberate encirclement of dolphins (and for many, it still does). But during the embargo and the boycott, information emerged that suggested a trade-off among ecological goals. The techniques for catching tuna that do not deliberately encircle dolphins pose a much greater threat to the sustainability of tuna because they trap many more immature tuna. They also kill a significantly larger number of other species, including sea turtles and sharks.[117] Some environmentalists joined IATTC in arguing that a focus on reducing injuries from dolphin sets was preferable to an outright ban on these sets.

In 1992 and 1995, the United States entered into dolphin conservation agreements with other flag states.[118] The agreements committed the parties to "progressively reduce dolphin mortality [to] levels approaching zero," while at the same time limiting the bycatch of juvenile tuna and nontarget species.[119] The parties agreed to establish, through IATTC, annual fleet-wide mortality limits no higher than 19,500 in 1993 and declining to below 5,000 by 1999. (In addition, fleet-wide morality could not exceed 0.2 percent of the dolphin population as estimated by the National Marine Fisheries Service; after 2000, this limit was to decline to 0.1 percent.) This fleet-wide limit would be apportioned into per-vessel limits among boats licensed by the member states under IATTC-approved procedures. IATTC would provide required training for captains and continue research on mitigation techniques. Every boat would require an observer, and at least half of the

113. *Id.* at 29.

114. *Id.* at 52 n.235.

115. *Id.* at 27–29.

116. *Id.* at 33–34.

117. Betsy Carpenter, *What Price Dolphin?*, U.S. NEWS & WORLD REP., June 13, 1994, at 71. Apparently, the differential effect on immature tuna and other species is due to the facts that dolphin sets induce the tuna to move faster prior to netting and the junior tuna and other species don't keep up with the adult tuna. *Id.* A World Trade Organization panel found that harm to dolphins may also occur in sets that do not involve deliberate encirclement. Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.531, WT/DS381/R (Sept. 15, 2011), at 248 [hereinafter WTO Panel Report].

118. Parker, *supra* note 101, at 47–53.

119. *Id.* at 47–48, 53–54.

observers would have to be agents of IATTC. A "tracking system" would allow the tracing of particular tuna to particular vessels and sets. To monitor implementation, the agreements provided for an Implementation Review Panel within IATTC consisting of five delegates of signatory governments, two industry representatives, and two NGO representatives.[120]

Congress implemented the agreements in 1997 amendments to the Marine Mammal Protection Act. The amendments permit imports of tuna from nations that participate in the IATTC dolphin conservation program, comply with program norms, and in particular, meet relevant mortality limits.[121] Regulations for U.S. vessels, in addition to specifically incorporating standards developed by IATTC (for example, no sets after sundown, no use of explosives), require the vessels to accept observers from IATTC or other recognized organizations and to apply to IATTC and abide by vessel-specific mortality limits.[122]

Some environmental groups continue to protest any pursuit of dolphins and insist that the label "dolphin-safe" be restricted to tuna caught without deliberate encirclement. Others would prefer a labeling regime less focused on a single species. Although its import rules support the IATTC regime, U.S. labeling requirements make the no-encirclement position a condition of the "dolphin-safe" label, thus imposing a significant market penalty on tuna from the eastern Pacific.[123] Most tuna caught under the IATTC regime is thus marketed outside the United States. A recent decision by the World Trade Organization Dispute Settlement Body held that the U.S. refusal to allow use of a "dolphin-safe" label for IATTC-compliant tuna violated the

120. *See generally id.* at 47–58.

121. International Dolphin Conservation Program Act, Pub. L. No. 105–42, 111 Stat. 1122, 1123–24 (1997) (codified as amended at 16 U.S.C. § 1371(a)(2) (2006)).

122. 50 C.F.R. § 216.24 (2011).

123. *Id.* § 216.91(a)(2)(i). IATTC favors a definition of "dolphin-safe" as tuna caught in sets where there were no observed dolphin deaths, and its tracking system is designed to identify such tuna reliably. Congress had adopted the "no-encirclement" definition in 1990. *See* Bower v. Evans, 257 F.3d 1058 (9th Cir. 2001) (describing the enactment of the Dolphin Protection Consumer Information Act of 1990, 16 U.S.C. § 1385 (2006)). Pursuant to one of the international dolphin conservation agreements, Congress in 1997 directed the Secretary of Commerce to change to the "no observed mortality" definition if he found, after researching the matter, that encirclement did not have a "significant adverse effect on any depleted dolphin stock." *See id.* at 1061–62. The evidence turned out to be inconclusive. Despite lower mortality, dolphin stocks did not recover in the years immediately following the conservation program. It was a matter of controversy whether failure was due to nonfatal harm from tuna fishing or some undetected ecological change. *See id.* at 1062–63. Despite this uncertainty, the Secretary sought to move to the "no observed mortality" definition, but the courts reversed his decision in litigation brought by environmental groups. *See id.* at 1071; Taking of Marine Mammals Incidental to Commercial Fishing Operations: Tuna Purse Seine Vessels in the Eastern Tropical Pacific (ETP), 69 Fed. Reg. 55288–89 (Sept. 13, 2004); Paul R. Wade et al., *Depletion of Spotted and Spinner Dolphins in the Eastern Tropical Pacific: Modeling Hypotheses for their Lack of Recovery*, 343 MARINE ECOLOGY PROGRESS SERIES, Aug. 7, 2007, at 1, 12. More recent data suggest that stocks may be recovering. TIM GERRODETTE ET AL., NAT'L OCEAN & ATMOSPHERIC ADMIN., ESTIMATES OF 2006 DOLPHIN ABUNDANCE IN THE EASTERN TROPICAL PACIFIC (2008) (technical memorandum).

Agreement on Technical Barriers to Trade.[124] If upheld on appeal, the ruling would require the United States to change its labeling policy or suffer trade sanctions.[125]

As with our other cases, the problem of dolphin protection arises along a production chain, and interventions at multiple points are potentially effective. However, here two U.S. interventions—trade rules that incorporate IATTC norms for fishers and labeling rules for processers—are in some tension, and the regime is not as well articulated as it could be. Nevertheless, although the U.S. labeling rule currently reduces incentives to comply with the IATTC norms, the regime has remained stable so far.

Given its declared goals, the IATTC-based conservation program appears to have been successful. Reported dolphin mortality in 2008 was 1,168—well below the 5,000 maximum of the agreement. The rate of mortality per set, which varied between 6 and 13 in the mid-1980s and was 1.5 in 1992 and 0.45 in 1995, was 0.13 in 2008.[126] "[T]he salient facts," Parker concludes, "are that the Program established ambitious, verifiable, and environmentally defensible goals for environmental performance—goals, in fact, that had eluded the *best* performing national program in previous years—and achieved those goals."[127]

The jurisprudential traits that we have noted in earlier regimes recur in Tuna–Dolphin. Here again is a case in which *indeterminate* legal terms, such as "optimum sustainable population," are resolved through deliberation and experimentation rather than interpretation or policy engineering.

We also see important *contextualization*. Here is a regulatory regime tailored for a problem associated with a specific industry, a specific species, and a specific body of water.

Adaptation is again an important theme. While he suggests that congressional pressure was critical to the construction of the regime, Parker finds that highly directive legislative intervention proved counterproductive because it failed to anticipate important contingencies.[128] For example, the legislative demand that foreign fleets match U.S. mortality rates in the early 1990s proved arbitrary and unworkable. After most of the U.S. fleet had left the region, U.S. rates were set by the performances of very few boats, which were likely to fluctuate widely over time. And the "no-encirclement" policy of the NGOs and the government encouraged practices with the surprising and, to some, unacceptable consequence of harming tuna sustainability.

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124. *See* WTO Panel Report, *supra* note 117, at 206–63.

125. The WTO panel held the labeling policy to violate article 2.2 of the Agreement, which prohibits technical regulations that are "more trade-restrictive than necessary to fulfill a legitimate objective." *Id.* at 206.

126. Inter-Am. Tropical Tuna Comm'n, Executive Report on the Functioning of the AIDCP in 2008, at 1, *available at* http://www.iattc.org/PDFFiles2/ExecutiveReports/2008-AIDCP-Executive-Report.pdf; *see also* Parker, *supra* note 101, at 52 n.235. Parker finds that the IATTC reports are credible. *See* Parker, *supra* note 101, at 48–49 n.218.

127. Parker, *supra* note 101, at 56 n.256.

128. *See id.* at 39–40.

The case also shows that the need to adapt extends to reassessment of ends as well as means. The discovery of a trade-off between the goals of dolphin conservation and tuna sustainability required some stakeholders to reconsider their goals. Most of them had initially understood their goal as minimizing harm to dolphins, and the "no-encirclement" policy had reflected this understanding. But when the trade-off was discovered, some NGOs decided that they should be concerned with the sustainability of tuna as well, and five major environmental groups embraced the IATTC program as a reasonable compromise within what they saw as a more complicated set of goals.[129]

Finally, we again find a multifarious *institutional structure*, this time complicated by international dimensions. The key actor—the IATTC—is formally an intergovernmental organization, but it reflects strong industry influence. It interacts with national regulatory authorities, especially the U.S. National Marine Fisheries Service. At the same time, although NGOs have only a small formal role within the IATTC (with two representatives on the Implementation Review Panel and a few representatives at Commission meetings acting as "observers"), they have had great practical influence through legislative lobbying and consumer-oriented publicity.

From the U.S. regulatory perspective, the tuna–dolphin story is an effort to implement the statutory norm of maintaining "optimum sustainable population[s]"[130] of dolphins and achieving "insignificant levels" of mortality.[131] These terms could not have been elaborated very far analytically, and any effort to implement them technocratically in a command-and-control fashion would have been impeded by limited understanding, not only of the causes of the problem, but also of how the problem should be defined.

III. The Structure of Contextualizing Regimes

The Leafy Green Marketing Agreement started through private initiative, the Juvenile Detention Alternatives Initiative was built on a federal statute, and the Dolphin Conservation Program was undertaken by a treaty-based international organization. These examples do not exhaust the possible origins of contextualizing regimes. They sometimes arise through judicial or agency initiative. For example, in areas such as education and child protective services, courts have responded to allegations of systemic misconduct by officials by inducing and overseeing the formation of regimes designed to make their agencies more effective, transparent, and accountable to stakeholders.[132] Kenneth Bamberger and Deirdre Mulligan recently recounted the critical role of the Federal Trade Commission in promoting a

129. *See id.* at 44–46.

130. 16 U.S.C. § 1361(2) (2006).

131. *Id.* § 1371(a)(3)(B).

132. *E.g.*, Kathleen Noonan, Charles F. Sabel, & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 Law & Soc. Inquiry 523 (2009).

stakeholder regime that has developed a very skimpy and ambiguous set of statutory texts about data privacy into a nuanced body of learning and practice.[133]

Institutional origin does not appear to be a strong determinant of ultimate structure. Regardless of its origins, each of the regimes just mentioned has common structural features. We begin by contrasting the open and amorphous structure of these newer regimes with those portrayed in the trade association literature. We then discuss some basic internal-process norms common to most contextualizing regimes. Finally, we take account of the means available to generalist lawmakers to induce and influence contextualizing regimes.

A. *From Closed to Open Structure*

Our key examples—the Leafy Greens Marketing Handlers Agreement, the Juvenile Detention Alternatives Initiative, and the Tuna–Dolphin Conservation Program—are distinguished by their vague boundaries and shifting and heterogeneous memberships. In these qualities they are typical of regimes that address uncertainty through ongoing collaborative inquiry and deliberation. We call such regimes "experimentalist."

Such regimes differ from the trade associations that have been prominent in recent scholarship and which are primarily concerned with codifying established practices and values.[134] The main goal of such codification regimes is to facilitate bilateral exchange, most often of commodities on spot markets. They proceed through promulgating standardized definitions of contract terms and maintaining arbitration processes. At least in the best-known American versions, they rely on formally promulgated rules, rather than tacit understanding. However, these rules are closely configured to customary practice and tend to be stable. Noncompliance is typically a matter of either inattention or opportunism, and optimal sanctions tend to be a combination of moderate monetary penalties and informal social pressures mobilized through publicizing noncompliance. The central institutions are usually mutual-benefit nonprofit corporations with clearly defined memberships limited to industry participants.

The PACA regime described by Hart and Sacks in the cantaloupes case differs from these trade association regimes in that it arose from and depends on public intervention. But in other respects, it is more of a codification regime than an experimentalist one. It is concerned with bilateral exchange in commodity markets, operates through promulgating standard terms and maintaining arbitration services, sanctions with a combination of moderate penalties and informal shaming, and it has a well-bounded institutional structure. The cantaloupes case illustrates that private initiative is not always sufficient to create such regimes, but it also shows

133. *See* Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247 (2011).

134. *E.g.*, Bernstein, *supra* note 2.

that public intervention need not alter the basic function and structure of this type of regime.

Our three newer regimes are quite different. They are not focused on bilateral exchange. And they deal in products—safe food, nondiscriminatory public services, and "dolphin-safe" tuna—where compliance cannot be verified by inspection at the point of delivery. Rather, compliance depends on activities at various points in a multiactor supply chain. Specifications thus embrace not just the product but also the extended production process. (The only reliable way to ensure that leafy greens are safe or that tuna was caught without harm to dolphins is to assess the production process; the only reliable way to ensure that racial disparities in juvenile detention are nondiscriminatory is to look at the process that leads to detention.) Moreover, since both the understanding of the problems and the means of mitigating them are changing, compliance assessment is typically coupled with investigation and experiment. Norms tend to be more provisional and fluid than they are in codification regimes. And the structure of sanctions tends to be different. While noncompliance in codification regimes is associated with inattention or opportunism, noncompliance in experimentalist regimes often seems as likely to result from ignorance or incapacity.[135] Thus, initial responses to deviance are likely to take the form of technical assistance, required planning and training, and increased monitoring. Sanctions are harsher for persistent violators, but the harshest sanctions often take the form not of monetary penalties but of expulsion from membership or denial of certification, as in LGMA and IATTC.

Institutional structures tend to be more complex and amorphous. LGMA is closest to the traditional trade association organizational structure, and perhaps even closer to PACA, since its rules are promulgated by public regulators and enforced by government inspectors. But it has a close relation to university-based agricultural research that is expected to generate rapidly evolving standards. Moreover, its own success has been a factor influencing the creation of a national regulatory regime in the Food Safety Modernization Act of 2010, and it will in all probability soon be playing an important role in the emerging public system.

The regime that has developed around discrimination in juvenile justice has been similarly polymorphous. As conceived by Congress, the Department of Justice was expected to play the strongest facilitative and monitoring role. Anticipating that the Department's efforts would be insufficient, the Annie E. Casey Foundation brought many states and localities together to form a parallel network. And when some thought the Casey Foundation was insufficiently focused on racial disparities (as opposed to excessive detention in general), the Heywood Burns Foundation established yet another network that both complements and competes with the Department of Justice and the Casey Foundation. And as we noted above, a full description of the regime would have to include many local NGOs that

135. *See* CHAYES & CHAYES, *supra* note 4, at 13–15.

develop detention alternatives and configure social services in ways designed to obviate detention.

In the international sphere, organizational forms are still more complex and ambiguously bounded. IATTC is formally an intergovernmental organization with a well-defined membership of nation-states. But the key 1992 international agreement that established vessel-specific mortality limits was negotiated by NGOs.[136] Moreover, IATTC is strongly responsive to industry representatives, and it has lately acknowledged the influence of NGOs by admitting them as observers. And the international organization is in continual interaction with national domestic agencies that implement import and labeling rules.

B. *Internal Process Norms for Contextual Regimes*

The forms contextualizing regimes take are diverse, and so are their relations to public authority. But all of them are subject to legally enforceable duties of procedural fairness, and all of them typically have strong incentives to respect some norms of procedural fairness regardless of their formal enforceability.

Formally, we can distinguish three categories of regime. In the first—exemplified by the trade association regimes—the central actors are membership organizations that formulate standards that purport to bind only their own members. Here the standards acquire force by virtue of the members' contractual commitments, with expulsion from the organization as the most severe sanction. Internal procedural norms are in the first instance a matter of contract, though background common-law norms may insist on some basic due process.[137]

In the second model, the organization promulgates standards intended to apply to nonmembers as well as members. Absent contractual assent, these standards can acquire legal force against nonmembers only if adopted by a public authority.[138] Here the key enforceable process constraints will be constitutional and statutory norms that apply to the public process of adoption.

Then, there is a large intermediate category in which the distinctions between member and nonmember and public and private are blurred. Standards may not be formally binding on nonmembers but may acquire economic compulsion, for example, by becoming the de facto standard in a market with network externalities. Or membership, while nominally voluntary, may become a de facto requirement for participation in some markets. Alternatively, the public process by which private standards get incorporated may be so perfunctory and automatic that the most important practical opportunities for deliberation occur in the nominally private process. In this

136. Parker, *supra* note 101, at 28, 47.

137. *See* HART & SACKS, *supra* note 28, at 331–39.

138. The nondelegation doctrine operates to preclude prospective delegation of lawmaking authority to private organizations. *See, e.g.*, Cospito v. Heckler, 742 F.2d 72, 86–89 (3d Cir. 1984).

intermediate realm, antitrust laws will frequently impose process requirements.[139]

In our examples, the Casey Foundation's Juvenile Detention Alternatives Initiative looks like the first category, where voluntary contract is doing most of the formal legal work. IATTC is formally an intergovernmental organization, but it has some resemblance to the second category, since its dolphin conservation standards acquire force by virtue of incorporation by national governments as conditions of trade privileges. LGMA is still harder to classify. Within the United States it enforces norms only against its members (even though state agents play a major role in enforcement), but Canada and Mexico incorporate LGMA standards as conditions of trade privileges, and within the United States, it may have the kind of de facto market dominance that characterizes the third category.

Regardless of formal legal requirements, most regimes feel strong pressure to demonstrate commitment to procedural fairness. Even organizations that only regulate their own members are often concerned about convincing the public of the adequacy of their self-regulatory efforts in order to forestall more costly public interventions. While the norms are not as specified as is customary in trade associations and governmental agencies, they tend to reflect a fairly consistent set of themes.

The main themes are these:

1. *Transparency*. Virtually all contextualizing regimes recognize transparency requirements greater than those that would apply to purely private proprietary organizations. Standards must generally be publicly accessible if they are to have binding legal force against people who have not agreed to abide by them. Fair process requires notice of standards before punitive enforcement, and standards that are not publicly accessible cannot be used as evidence of negligence or due care (except sometimes against someone who has adopted them).[140] Incorporation of standards in law limits the ability of the developer to claim intellectual property rights in them (though how much is a matter of dispute.)[141]

139. *See, e.g.*, Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); Silver v. N.Y. Stock Exch., 373 U.S. 341 (1963).

140. *See, e.g.*, 5 U.S.C. § 552(a)(1)–(2) (2006) (requiring that agency norms be published in the *Federal Register* before a person can "in any manner be required to resort to, or be adversely affected by" them); Grayned v. City of Rockford, 408 U.S. 104, 112 (1972) (holding that constitutional due process requires "fair notice" of obligations as prerequisite to criminal sanction); Braden v. Workman, 380 N.W.2d 84, 87 (Mich. Ct. App. 1985) (holding private standards admissible as evidence of tort standard of care only if "notorious"); AM. NAT'L STANDARDS INST., ANSI ESSENTIAL REQUIREMENTS: DUE PROCESS REQUIREMENTS FOR AMERICAN NATIONAL STANDARDS § 4.5 (2010) (requiring, as condition of approval as an "American national standard," that the standard be published).

141. *See* Lawrence Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291 (2005). While standard-setters generally publicize summaries of their output, they sometimes limit distribution of the full versions so that they can earn money by charging for it. Cunningham criticizes this practice. *Id.* at 324.

A separate set of issues has to do with disclosure of performance or compliance data.[142] Public disclosure of such data facilitates rewarding of frontrunners and shaming of laggards. But it also raises the stakes in assessment and creates incentives for those who fear they might lag to withdraw (if participation is optional) or to hide or manipulate data. Different regimes trade off these considerations in different ways.

Federal regulators disclose individual performance ratings for nursing homes and hospitals.[143] However, the federal Office of Juvenile Justice and Delinquency Prevention discloses only aggregate data on DMC performance.[144] Another approach found in nuclear power regulation is to publicly disclose aggregate industry data and detailed information on serious harm, but to limit disclosure of routine individual performance data to members of the regime.[145] The LGMA and IATTC take this route. The premise is that intra-industry disclosure will generate soft reputational pressures to improve and facilitate the discovery of best practices by making clear who the frontrunners are. Wider disclosure is resisted on the ground that public reaction may be arbitrary and discourage candid reporting.

2. *Inclusion*. Contextualizing regimes tend to espouse principles of inclusiveness. An important expression of the principle is the "Essential Requirements" of the American National Standards Institute ("ANSI"). ANSI and its international affiliate, the International Organization for Standardization ("ISO"), certify standards as "consensus standards." Certification confers no direct legal force, but it is a credential that many potential public adopters find persuasive. The ANSI Essential Requirements proclaim that "[p]articipation shall be open to all persons who are directly and materially affected by the activity in question."[146] ANSI requires a notice-and-comment procedure through which anyone can submit views that the standard-setters are obliged to consider. It also requires some "balance" in the standard-setting body. For product standards, balance requires representation of both producers and users of the product, and may require representatives of labor, professional societies, or government agencies. Presumptively, no single "interest category" should constitute more than one-half (or in the case of safety standards, one-third) of the decisionmaking body.[147]

142. *See generally* MARY GRAHAM, DEMOCRACY BY DISCLOSURE (2002).

143. *See Nursing Home Compare*, MEDICARE.GOV, http://www.medicare.gov/nhcompare (last visited Jan. 21, 2012).

144. *See National Disproportionate Minority Contact Databook*, OFFICE OF JUVENILE JUSTICE & DELIQUENCY PREVENTION, http://ojjdp.gov/ojstatbb/dmcdb/index.html.

145. JOSEPH REES, HOSTAGES OF EACH OTHER 94–96, 104–05, 118–20 (1996).

146. AM. NAT'L STANDARDS INST., *supra* note 140, § 1.1.

147. *Id.* §§ 1.1–1.3, 2.1–2.3. The one-half or one-third standard is described as a "historical" benchmark used as a "normative policy." *Id.* §§ 2.1, 2.0. A related principle at the international level is the trade law doctrine that holds that a nation sometimes may not enforce a regulation with strong trade-restrictive effects unless it has first engaged exporting nations in an effort to find a mutually acceptable arrangement. *See* Robert Howse, *The Appellate Body*

As a practical matter, most standard-setting tends to be dominated by industry, professional groups, or government officials (though there is often significant diversity of views within and among these categories).[148] Formally, LGMA is an industry body, and IATTC is constituted by government representatives, although the LGMA board has one "public" member, and IATTC admits environmental NGO representatives as "observers" to its meetings. On the other hand, since the effectiveness of the standards produced by each depends on approval or incorporation in public lawmaking process, each has incentives to respond to diverse concerns. The JDAI regime we have described is an interesting alternative. Formally, the Department of Justice is the dominant player, but the Annie E. Casey Foundation, a private NGO concerned with social policy toward children, has constructed a parallel network with itself at the center that has proven quite effective, and may ultimately prompt the Department of Justice to raise its mandatory requirements.

3. *Fair decisionmaking process*. Contextualizing regimes tend to describe their decisionmaking in self-consciously vague and aspirational terms, such as "consensus." Consensus implies agreement reached through good faith, principled discussion. This aspiration is supplemented by three types of norms that can often be enforced by appeal both within and outside the organization.

The first type is the notice-and-comment procedure we have just mentioned. The second involves voting rules. The ideal form of consensus is unanimity, and a unanimous vote is sometimes required, especially in international organizations. IATTC requires unanimity.[149] However, unanimity often cannot be achieved (and even when it can, it may involve tacit coercion or compromise). LGMA provides for decision at the board level by majority vote. When "neither scientific studies nor authoritative bodies ha[ve] allowed for suitable metrics," LGMA tries to adopt norms supported by "consensus among industry representatives and/or other stakeholders."[150] The most common voting rule for standard-setting organizations is probably a supermajority one. Organizations who want to convince outsiders that their standards are "consensus" or "generally accepted" will feel pressure to show supermajority support for them.[151]

The third type of fair-process rule is designed to prohibit opportunism. For example, standards regulate such matters as the distribution and form of ballots, quorums, and record-keeping. They require disclosure of important conflicts of interest. And there are general residual prohibitions of

Rulings in the Shrimp/Turtle *Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 504–11 (2002).

148. ROSS E. CHEIT, SETTING SAFETY STANDARDS 176–79 (1990).

149. INTER-AM. TROPICAL TUNA COMM'N, RULES OF PROCEDURE, r. IV; *available at* www.IATTC.org/PDFFiles/Rules%20of%20ProceduresENG.pdf (last updated Aug. 22, 2011).

150. FOOD SAFETY GUIDELINES, *supra* note 62, at 9.

151. ANSI requires a vote that provides "evidence of consensus" and suggests that a two-thirds vote (with a quorum of at least half of the membership) is an "example" of such evidence. AM. NAT'L STANDARDS INST., *supra* note 140, § 2.7.

opportunistic manipulation. An important example of the latter is the role of the Sherman Act in policing standard-setting organizations with monopoly power. A landmark case is *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, which involved a proposed revision of a National Fire Protection Association standard that would have permitted plastic, as well as metal, conduit.[152] A maker of metal conduit sought to thwart the revision by packing the Association meeting with new members it had recruited for this purpose. The Supreme Court held that such conduct could incur antitrust liability.[153]

4. *Continuous Self-Assessment*. Hart and Sacks saw that custom played a vital "filling-in function" with respect to legal indeterminacy, but they were troubled by it, in part because of the tendency of custom to lag behind technological and economic change. They suggested that courts should be prepared to overrule custom where the judge could determine that its norms were obsolete or inefficient.[154] A key difference between the norms of experimentalist regimes and the kind of customary norms Hart and Sacks ambivalently appealed to is that the norms of contextualizing regimes are explicit and subject to frequent reassessment.

ANSI requires, as a condition of accreditation, that standard-setting organizations engage in "[c]ontinuous maintenance" of their standards, which it defines as "consideration of recommended changes . . . according to a documented schedule."[155] Our three exemplary regimes set more demanding conditions for themselves. They mandate not only response to proposed changes but also detailed monitoring and recording of experience and proactive reconsideration of norms in light of this experience.[156]

C. *Mechanisms by Which Generalist Lawmakers Induce, Facilitate, and Monitor Contextualizing Regimes*

The jurisprudence of contextualizing regimes includes a distinctive set of interventions by which generalist public authorities induce and influence such regimes. These interventions tend to take one of four general forms:

152. 486 U.S. 492 (1988).

153. *Allied Tube*, 486 U.S. at 509–10; *see also* Dell Computers, Inc., 121 F.T.C. 616 (1996) (adopting the same posture in an FTC proceeding).

154. Thus, in "The Case of the Unworthy Tugs," they approve of the court's refusal to enforce an industry custom where it reliably determined that "a calling . . . [had] unduly lagged in the adoption of new and available devices." HART & SACKS, *supra* note 28, at 403–15 (internal quotation marks omitted). In "The Case of the Bankers Accustomed to Doing What They Pleased," they approve of the court's disregard of an industry custom where it determined that the defendant had invoked the custom opportunistically to frustrate the plaintiff's reasonable expectations. *Id.* at 415–34.

155. AM. NAT'L STANDARDS INST., *supra* note 140, § 4.7.2.

156. Courts have occasionally treated duties to monitor and reassess implementation as implicit in substantive statutory norms. *See, e.g.*, R.C. *ex rel.* The Ala. Disabilities Advocacy Program v. Walley, 475 F. Supp. 2d 1118 (M.D. Ala. 2007) (terminating an injunction against child welfare officials after concluding that monitoring and reassessment procedures were adequate). This case is also discussed in Noonan et al., *supra* note 132, at 549–51.

encouragement and subsidization, immunity, incorporation and enforcement, and direct regulation.

1. *Encouragement and Subsidization*. The optimal level of organization around a public problem will not routinely occur spontaneously, but sometimes a small amount of public initiative or support can produce big gains. The Federal Bureau of Investigation ("FBI") induced the creation of the American Society of Crime Laboratory Directors by organizing and funding meetings. The Food and Drug Administration encourages agricultural trade associations to produce production guidelines by bringing them together and publicizing the results of their deliberations. The Department of Justice funds meetings and specific experiments under the "disproportionate minority contacts" program under the Juvenile Justice and Delinquency Prevention Act. An incrementally more coercive form of encouragement is the conditioning of some independent benefit on the development of participation in a contextualizing regime. For example, the FBI gave a boost to the accreditation regime of the ASCLD by limiting access to its DNA database to accredited labs.[157]

2. *Immunity*. Contextualizing regimes in markets for private goods and services have a complex relationship with competition. Ideally, they suppress undesirable competition—"races to the bottom"—where there are externalities or where consumers do not make reliable choices (notably, with respect to health and safety). And they can also enhance competition by generating standards that facilitate comparison of products ("U.S. No. 1 cantaloupes") or that facilitate interoperability among products. However, even when standardization promotes competition, it does so only along some dimensions by taking others out of competition. We have a very competitive market in electrical appliances in part because standardization has eliminated competition in building outlet configuration.

Because contextualizing regimes can limit desirable as well as undesirable competition, they raise antitrust concerns, and their activities often come within the language of the basic antitrust prohibition of "combinations in restraint of trade." Thus, antitrust immunity is an enabling condition of some regimes. A variety of statutes confer immunity on specific regimes, and the courts have construed the Sherman Act to impliedly exempt a range of beneficial collaborative standard-setting and information-sharing activities.[158] The California Marketing Act under which the state's Leafy Green Marketing Agreement is organized,[159] and its federal analog, under which the national regime has been proposed,[160] are examples of specific exemptions.

3. *Incorporation.* Public authorities can influence contextualizing regimes by giving legal effect to their normative output. We have emphasized

157. NAT'L RESEARCH COUNCIL, *supra* note 17, at 197.

158. *See* Christopher L. Sagers, *Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction*, 25 CARDOZO L. REV. 1393 (2004).

159. California Marketing Act, CAL. FOOD & AGRIC. CODE §§ 58601–59293 (West, Westlaw through Ch. 745 of 2011 Reg. Sess. and all 2011–12 1st Ex. Sess.).

160. 7 U.S.C. §§ 1621–1638d (2006).

that public authorities look to standards developed by these regimes to resolve indeterminacies in publicly enacted or declared law. The prospect of such adoption or incorporation can influence stakeholder conduct within the regimes in a variety of ways.

The norms of contextualizing regimes can be incorporated in private agreements and enforced by courts and agencies as contracts. This happens with the Leafy Green standards. They can also be incorporated into common law tort duties or into regulations. "Generally accepted" industry standards have long been given weight in determining duties in tort. Since 1998, an Office of Management and Budget Circular has required federal agencies to "use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical."[161] Statutes and regulations give at least presumptive force to standards, such as those of the Financial Accounting Standards Board.[162] Eligibility conditions of government programs incorporate standards of contextualizing regimes. For example, to receive payments under Medicaid and other healthcare programs, hospitals must comply with the standards of the Joint Commission on the Accreditation of Healthcare Standards.[163]

International trade privileges are often linked to the norms of contextualizing regimes. We saw that Canada and Mexico will admit fruits and vegetables from California only if certified under the Leafy Green Marketing Agreement. The Tuna–Dolphin regime evolved in response to trade pressures, and participation in the IATTC conservation regime is a condition for export to the United States.[164]

The WTO Sanitary Phytosanitary Agreement, which applies to food safety regulations among others, requires that national regulations that have trade-restrictive effects be "based on" international standards unless available standards are demonstrably inadequate for the regulatory purpose.[165]

4. *Direct regulation*. Subsidy, immunity, and incorporation influence regime design by conditioning benefits on compliance with procedural norms. For example, a standard developed in a process that blatantly excluded important stakeholder views could not qualify as a "consensus standard" under the OMB Circular that regulators incorporate such norms where feasible. Lawmakers can also enforce such norms directly. They can do so by taking charge of such regimes. For example, in "negotiated rulemaking," the gov-

161. Office of Mgmt. & Budget, Circular A-119 Revised (1998), *available at* http://www.whitehouse.gov/omb/circulars_a119.

162. Fin. Accounting Standards Bd., Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards, Accounting Series Release No. 150 (Dec. 20, 1973), *available at* 1973 WL 149263.

163. *See, e.g.*, 42 U.S.C. § 1395x(f) (2006).

164. *See* 16 U.S.C. § 1371(a)(2)(B)(iii) (2006).

165. WTO Agreement on the Application of Sanitary and Phytosanitary Measures art. 3, Apr. 15, 1994, 1867 U.N.T.S. 493.

ernment convenes an inclusive stakeholder group and orchestrates its deliberations in accordance with specified procedures.[166]

The government can also direct the processes of private regimes, and it commonly does so with respect to regimes that acquire monopoly power over important economic interests and activities. As it acquires economic power, a private regime acquires public duties under the antitrust laws. Members who suffer economic injury from arbitrary exclusion may obtain damages or injunctive relief. So may competitors sometimes sue for harm from standards adopted through manipulation of the regime's processes for the benefit of parochial interests.[167]

When public or private regimes manifestly and persistently fail to meet applicable standards—either their own or others that can plausibly be applied to them—courts or agencies often intervene to force restructuring. Three categories of such intervention are especially important. First, insolvency and bankruptcy law. When business enterprises become insolvent, courts create a process for liquidation or reorganization of the enterprise in the interests of and under the supervision of often diverse creditor constituencies. Second, deferred prosecution agreements. When corporations are caught in systemic or large-scale unlawful activity, they may be able to avoid the potentially catastrophic consequences of corporate criminal conviction by agreeing to a restructuring. The restructuring is designed to safeguard against the recurrence of unlawful activity. It typically involves prolonged supervision by an outside monitor and periodic reports to the prosecutor.[168] Third, "public law litigation"—civil rights cases in which courts, on finding continuing systemic failure to meet basic obligations, oversee the restructuring of the organization's processes.[169] In each of these three categories, the tendency of intervention is to increase transparency and broaden participation of affected constituencies.

Judicial practice in these restructuring cases illustrates the basic Hart and Sacks insight that indeterminacy arises from discontinuity of right and remedy. The court is able to determine that the regime or organization is in violation of its obligations, but it is unable to specify substantively what remedy follows from that determination. It is thus led to induce or reconfigure a regime to bring about more effective deliberative elaboration of the relevant standards.

166. Negotiated Rulemaking Act, 5 U.S.C. §§ 561–70a (2006).

167. *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Silver v. N.Y. Stock Exch., 373 U.S. 341 (1963). *See generally* Amy A. Marasco, *Standards Development: Are You at Risk?*, AM. NAT'L STANDARDS INST., http://www.ansi.org/news_publications/other_documents/risk.aspx?menuid=7 (last visited Jan. 21, 2012).

168. *See, e.g.*, Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757, 784–85 (2005).

169. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

CONCLUSION

Contextualizing regimes start out with very general norms coupled with specific requirements or implicit inducements for stakeholders to collaboratively deliberate and investigate how they apply in specific circumstances. They are then elaborated in the course of this deliberation and investigation. The range of problems that the legal system addresses through contextualizing regimes is growing, and the structure of the regimes that address some of the most important problems is changing. This new structure is more multifarious and less clearly bounded than the structures associated with regimes dominated by trade associations or administrative agencies.