

## EPILOGUE: ACCOUNTABILITY WITHOUT SOVEREIGNTY

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There is substantial agreement among contributors to this volume that the body of rights and rules that goes generally by the name of law is changing. Municipal law is becoming more responsive to changes in the supranational setting. Think, for example, of the influence of international human rights law and environmental conventions, or the effect of EU law on member states of the Union. It is also becoming more sensitive to the particularities of local contexts within nation states. At the same time this body of rules and rights is reaching into new realms and striving to take account of the effects of intervention in one realm on the others. Think of the regulation of social responses to disability or the requirement to regulation of water quality. There is further agreement that the effort to make rights and rules more responsive while increasing their reach and integration increasingly takes the form of frameworks subject to revision in the light of the experience of implementing initial conceptions.

Doubts emerge, however, as to whether law can be made an instrument of these changes and still be law in the sense of holding officials accountable for their acts and assuring that citizens are otherwise secure in the enjoyment of their rights. In their introduction to this volume Grainne De Burca and Joanne Scott formulate these doubts as a chain of successively less forbidding theses regarding the (in)compatibility of the ensemble of innovations just invoked, or “new governance,” with traditional law.

According to the “gap thesis”, the most daunting of all, there may be a fundamental incompatibility between law and new governance. According to some versions of the “hybridity thesis”, new governance can be a (complementary) part of law, but only by relying on and leaving unaltered elements, substantive as well as procedural, of tradition. According to the transformation thesis, new governance can combine with traditional law so as to transform the latter. But even in this last case, there is a concern that the transformational law may need to rely on the elements of a traditional, separation of powers constitution.

In their separate contributions to this volume De Burca and Scott have furnished rich case studies of traditional law/new governance hybrids in, respectively, ecological regulation and rights against discrimination, with special attention to the institutional innovations that, in linking revision of the legal framework to the experience of implementation in civil society, create what is arguably a hybrid form. Many other chapters are in this same spirit, reporting carefully on messy facts, and drawing conclusions from this close observation that avoid at one extreme the claim of an unbridgeable gap or fundamental contradiction between traditional law and new governance, and at the other, the claim that new governance is not just a part of law, but its bright future.

In this brief epilogue, we try to explain why we are drawn to the latter, transformation thesis. Our reluctance to see traditional legal institutions as either a basic foundation that must be protected from erosion by new governance or as a constituent of a stable partnership with it does not arise from confidence in the superiority and ultimate triumph of new governance, and still less on a belief that its innovations are never used for bad ends. Rather, it springs from two other sources.

First, both the gap and the hybridity theses treat traditional legality as more coherent and more potent than it is. Modern jurisprudence casts an enormous shadow of doubt over the stronger claims of traditional legality, and history gives no reason to think that traditional legal institutions could perform the tasks of insuring accountability and protecting rights in a world of rapid technological and organizational change, and cross-border transactions, migration, and externalities.

New governance may or may not be an answer to the dilemmas of this situation, but distinctions between working traditions and fanciful innovations are not. Indeed the suggestion at the core of much new governance discussion that societies can and should innovate at the margin without profoundly perturbing the arrangements that enable the innovations ignores the enduring insight of 19<sup>th</sup> century social theory that great innovations only arise in conditions that undermine their antecedents. The hope of innovation that only augments but otherwise does not alter our existing capacities is certainly a more harmless fable of social engineering than the idea of a deliberate and all encompassing revolution, but it is no less a fable, and no less informed than its revolutionary cousin by the idea of a knowing social apex or center.

The second source of our inclination toward the transformation view is empirical. The accounts of new governance in this volume present just the kind of evidence we have in mind: The more detailed they are, the

more they suggest, not the co-existence of old and new, but their mutual transformation — the creation of institutions whose very function or role has no precise analogue in prior legal regimes, and whose operation therefore forces us to reconsider familiar terms such as “accountability,” “penalty,” and “compliance.”

### 1. Gaps: Tonic and Toxic

The "gap" concern comes in two forms: tonic and toxic. In the tonic form the worry is that new governance innovations are in tension with current law, perhaps in a mutually disruptive way, because the law lags the innovative practice. It is easy to find suggestive evidence for this concern in the awkward evasiveness with which the EU Constitutional draft treated new governance, as discussed by Claire Kilpatrick, and in U.S. court decisions that obstruct new governance initiatives in, for example, occupational health and safety, as discussed by Orley Lobel.

But it is hard to know just how serious a worry this is. Social development in general and jurisgenerative social development in particular are seldom synchronized with the development of law. There are a few justly celebrated instances where the law is far in advance of any consolidated and deliberate social practice. The American Constitution comes to mind. There are cases where the courts side vigorously with the what Whig history liked to call the forces of progress. Recall the 19<sup>th</sup> century U.S. cases in which common law judges took the side of improving land users in their disputes with neighbors who claimed protection under traditional common law property rights against any disruption in the flow of their stream water or the view from their windows.<sup>1</sup>

But on balance the intuition (standing in here for the summary evidence we might want but don't have) is that law and courts lag development, often egregiously so. The most notorious cases have to do, fittingly enough, with judicial foot dragging in the recognition of the traditional administrative state, as for example Supreme Court resistance to the New Deal — the paradigmatic new governance institution of its day. And even when courts have accommodated such large changes as the advent of a new administrative regime, they have frequently lagged, or deliberately resisted ongoing adjustments to changing circumstance within that new regime. For US administrative lawyers a persistent

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<sup>1</sup> See Morton J. Horwitz, *The Transformation of American Law: 1780-1860* 31-62 (Cambridge, Mass.: Harvard University Press, 1977).

instance of this is the opposition of the Supreme Court to innovations in rule-making procedures prompted by new requirements for information gathering and assessment, but not authorized by the Administrative Procedure Act.<sup>2</sup>

A benefit of this judicial “obstruction” is presumably to weed out or retard the diffusion of innovations that are in fact best uprooted or contained. But even assuming that the costs of persistent legal tardiness in the recognition of worthy social innovations exceed the benefits, no one, to our knowledge, has argued that the judicially-contrived delays have fundamentally changed the course of development in the past; and there is no strong evidence for the view that belated legal recognition of new governance institutions would have more than transitory effect.

In the toxic version of the gap concern, however, the tension between law and new governance becomes a contradiction, and the choice is either-or: either new governance, with its capacity to contextualize and update rules, or the rule of law by means of stable and constraining rules. The deep worry here is that the explicit provisionality of new governance framework laws obligates those who “follow” the legal rules to re-write them in the act of applying them; that this revision is at the discretion of those who do the revising; and that this inevitable exercise of discretion is incompatible with the kinds of accountability on which citizens of a democracy rightly insist in the elaboration of administrative rules and constitutional rights. We entrench rights in constitutions to make them difficult to revise by legislatures, administrators, or judges. We declare administrative agencies to be the agents of the sovereign, democratic principal, embodied in the legislature, to make manifest, and subject to judicial review, the administrators’ obligation to act within the limits established and for the purposes set by the democratic principal.

The ideal of accountability is compelling, but the model of accountability that the toxic gap thesis invokes is not realistic. In essence, the critics have in mind an idea of law as hierarchical and the associated idea of principal-agent accountability -- fidelity of law applying agents down in the legal hierarchy to law-making sovereigns at its apex. The sovereign is a democratically elected government; its enactments are legitimate because of its representative status. The law-applying judgments of the government's unelected agents are legitimate only to the extent they can be traced to the enactments of the legislative principal. Accountability is thus a matter of pedigree. Ideally, pedigree

is tested by an independent judiciary in proceedings that can be initiated by individual citizens. Accountability in this view is upward- and backward-looking; the court looks upward toward the sovereign and backward toward some prior authorization.

From this point of view, new governance seems radically unsettling because of its flagrant disrespect for the distinction between enactment (or law-making) and enforcement (or law-application) on which principal-agent accountability depends. In new governance, agents are expected to revise their mandates in the course of implementing them. Sovereigns set frameworks that describe vague goals and invite elaboration. They do not purport to confine discretion within narrow channels. Because many of the traditional connotations of the "rule of law" are linked to principal-agent views of accountability, the renunciation of the latter seems threatening.

Yet long recognized problems with the principal-agent version of the rule-of-law, amply illustrated in these essays, indicate that it is implausible.

First, for the sovereign to perform the role ascribed to it in principal-agent accountability, it must know what it wants, and it must know this at a level of detail that meaningfully circumscribes its agents' discretion. New governance institutions arise from the recognition that rule-makers do not have sufficient knowledge to do this. This is not a novel situation, but it has been intensified by rapid technological and institutional change, and by the need to coordinate activities among increasingly diverse constituencies. Rule-makers know that today's solutions may not be optimal by the time they have embodied them in specific decrees. And they know that effective solutions must accommodate the interests of an expanding range of constituencies that they do not have detailed knowledge of. It often appears that solutions to problems can only be identified as they are pursued; that actors have to learn what problem they are solving through the very process of problem-solving. It is this condition of severely bounded knowledge that drives the legislators to abandon the idea of prescribing solutions and instead to establish the kind of frameworks described in this book that induce and facilitate problem-solving by diffuse constituencies.

Second, even an omniscient sovereign could not embody its intentions in instructions sufficiently detailed to obviate discretion. Given the limited time it would have to formulate them and the limited time the agents would have to absorb them, she would have to simplify and generalize. Simplification and generalization, however, involve

ambiguity or rigidity or both. Either the agent must be held strictly to the text of the instruction, or she must be urged to seek out its underlying intent. The first strategy restricts discretion only at the cost of introducing arbitrariness (since text, strictly interpreted, will diverge from intent). The second increases ambiguity and opens up a space for competing interpretations of intent. Given these limits on cognition, it is no surprise that the insistent lesson of modern jurisprudence is the inevitability of ambiguity and contestation in law application.

New governance acknowledges these problems more directly than traditional legality. It seeks to respond to them through explicitly provisional and incomplete legislative frameworks that set the terms for diffuse groups of stakeholders to elaborate in particular applications, which will then be reviewed at the center with an eye toward revision of the frameworks. New governance thus officializes and subjects to public discipline this process of resolution of ambiguity, rather than, as traditional judicial practice tends to do, treating it as an insider's secret.

Third, the argument for principal-agent accountability in the U.S. and the E.U. rests on the assumption that the relevant sovereigns are democratically representative of the people affected by the agents' law-applying activity. Yet, it is increasingly the case that people are affected by the actions of many sovereigns, while generally only one, or at most a few, are democratically accountable to them. People move around more. They engage in more cross-border transactions and activities. They engage in local activities with cross-border effects. In this situation, they constantly find themselves affected by activities regulated, facilitated, or authorized by states of which they are not citizens. The accountability of agents to democratic sovereigns would not legitimate the effects of the agents' conduct as to these people. Concerns about the extra-territorial effects of state conduct were key to the founding of both the U.S. and the E.U, and at least in the E.U. have remained so. New governance is in part an effort to create accountability with respect to cross-border effects without creating an encompassing sovereign that would tightly constrict member state autonomy.

Finally, it's worth recalling how limited the range has been in which courts historically have even purported to hold state agents accountable to the mandates of their sovereign principal. Vast spheres of government activity have been exempt from traditional rule-of-law principles. Sovereign immunity has precluded judicial review of both routine activity and major discretionary decisions. Decisions that do not directly infringe traditional private rights have historically been exempt from

challenge. No doubt the proper scope of such immunity is debatable, but most people would concede that full-scale judicial review would not work for many such decisions, whether because they cannot be objectively substantiated, judges lack the requisite expertise, review would be too costly, or necessary confidentiality would be compromised. Yet, many of the new governance approaches discussed in this book do reach such decisions. Claire Kilpatrick makes this point with respect to the European Employment Strategy, which reaches into areas such as macro-economic policy that traditional legality has not purported to regulate. Thus, the flexibility of new governance modes has made it possible to extend forms of discipline into areas that would otherwise be unregulated.

It is correct, then, that new governance repudiates the rule-of-law in its principal-agent variation, mostly fundamentally by disrespecting the distinction between enforcement and enactment. On the other hand, it suggests an alternative discipline that could be seen as a reinterpretation of the basic rule-of-law ideal of accountability. The alternative, instead of looking backward to a prior enactment and upward toward a central sovereign, looks forward and sideways. Forward to the ongoing efforts at implementation. Sideways to the efforts and views of peer institutions.

Peer review is the answer of new governance to the inadequacies of principal-agent accountability. Peer review imposes on implementing “agents” the obligation to justify the exercise of discretion they have been granted by framework-making “principals” in the light of pooled comparable experience. In peer review, the actors at all levels learn from and correct each other, thus undermining the hierarchical distinction between principals and agents and creating a form of dynamic accountability — accountability that anticipates the transformation of rules in use. Dynamic accountability becomes the means of controlling discretion when that control cannot be hard wired into the rules of hierarchy.

To see how intuitively compelling the logic of peer review is to thoughtful administrative lawyers confronted with the dilemma of an ex-ante unknowable world, consider the work of Phedon Nicolaides on policy implementation in the EU. His explicit aim is not to transcend the tested and true principal-agent framework, but on the contrary to apply that framework to what appears to be, from the standpoint of traditional notions of accountability, the ramshackle structure of the EU. Even after heroically assuming that the European Parliament and Council of Ministers together amount to something approximating a unified

principal, Nicholaides must take two oddities into account. The first is that this unified principal, the E.U., has multiple agents: the national administrative authorities who implement E.U. law in their respective jurisdictions. Agents being what they are in principal-agent theory, each of these national administrations can be expected to interpret the E.U.'s instructions—a directive, say—in a self serving way; and the principle will of course be determined to minimize the “drift” away from its original intentions produced by these multiple agents. The second is that (in the EU) the principal is realistically presumed to have only a vague or provisional idea of its own goals. Sometimes self-interested drifting by national administrative agencies will therefore be only that; while other times it may reveal possibilities that the principal has overlooked, and prefers more than any of the options entertained *ex ante*. In other words, the principal can sometimes learn from the agents. Since accountability cannot under these circumstances be established by comparing rule to performance, how can it be achieved? The device is simple:

Accountability is strengthened not when the actions of the agent are constrained but when the agent is required to explain and justify his actions to those who have the necessary knowledge to understand and evaluate those actions. We conclude, therefore, that effective delegation must confer decision-making discretion to the agent, while effective accountability mechanisms must remove arbitrariness from the agent's actions by requiring him to (a) show how he has taken into account the impact of his decisions on others, (b) explain sufficiently his decisions and (c) be liable to judicial challenge and, preferably, to some kind of periodic peer review. The latter is very important because only peers have the same knowledge to evaluate the agent's explanations.<sup>3</sup>

Notice that in the case of both principal-agent accountability and peer review the mechanism for evaluating the exercise of discretion is distinct from the mechanism for rewarding the acceptable use of discretion or sanctioning its abuse. Moreover the results of peer reviews are in principle and practice no harder or easier to enforce than the judgments of agents by principals, a point we touch on below and develop more fully in the next section.

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3 Phedon Nicolaides, *Improving Policy Implementation in an Enlarged European Union: The Case of National Regulatory Authorities* 46 (Maastricht: European Institute of Public Administration ,2003).

These qualities are strikingly manifested in the E.U. variant of peer-review accountability: Initial framework goals (such as full employment, social inclusion, a unified energy grid) and measures for gauging their achievement are established by joint action of the Member States and E.U. institutions; lower-level units (such as national ministries or regulatory authorities and the actors with whom they collaborate) are given the freedom to advance these ends as they see fit; but they must report regularly on their performance, especially as measured by the agreed indicators, and participate in a review process with other member states in which their results are compared with those pursuing other means to the same general ends. Framework goals, metrics, and procedures themselves are periodically revised by the same combination of actors that initially established them.

Under the name of fora, networked agencies, councils of regulators, open methods of coordination, or more generally, processes, this peer review, with its reliance on recursive, disentrenching deliberation, has become all but ubiquitous in EU governance: for instance in the regulation of telecommunications, energy, pharmaceutical licensing, environmental protection, occupational health and safety, food safety, maritime safety, rail interoperability and safety, financial services, employment promotion, social inclusion, and pension reform. Similar arrangements are incipient in other key areas such as health care and anti-discrimination policy; and the basic architecture of framework making and revision is now routinely used to address new problems such as GMO regulation and the fight against terrorism, and to renovate solutions to familiar ones such as competition policy, state aid, and fiscal coordination.

A body of “EU administrative law” requires that decision making at key steps in these iterative process be transparent, accessible to relevant parties in civil society as well as affected administrations, and deliberate in the sense of providing reasons for decisions.<sup>4</sup> This law notwithstanding, the degree to which peer review is binding on national participants and cumulatively influential in the revision of frameworks varies from domain to domain. But this variation only underscores that peer review is a defining feature of (E.U.) governance in an ex-ante unknowable world, while the degree to which the norms produced by that innovative governance are “transposed” to practice is, as legal

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4 See Mario P. Chiti, "Forms of European Administrative Action," 68 *Law & Contemporary Problems* 37 (2004).

anthropology and law and society have taught us to expect of norms in general, a matter of context.

The democratic legitimacy of these peer review processes cannot depend on the conformity of their results to prior legislative decision. Rather, democracy will have to be established within the review processes themselves. Legitimacy will depend on their transparency and more ambitiously, on their openness to directly-deliberative participation by affected stakeholders. Deliberative because preferences, even ideas of the possible, change in the course of decision making (otherwise we could count on principals to define solutions in advance); directly so because new preferences and possibilities arise through hands-on problem solving by those in urgent need of an answer, not dispassionate reflection of first principles by a magisterial elite secure against life's pressures.

A range of questions remain to be answered. Who, in view of any particular problem, is to be included in the process of directly deliberative problem solving? Who decides on the criteria of inclusion? What is the relation of these particular problem-solving "publics", as John Dewey called them, to each other? To a public sphere that includes them all? To the self rule of the polity? To pose these questions is to conclude that new governance, precisely because of its successes in displacing the old, will in the end require us to rethink the very ideas of democracy on which our inveterate ideas of accountability are founded.

These are critical problems, but progress need not await theoretical solutions to them. Just as law and jurisgenerative social development are seldom synchronized, so the theory and practice of democracy are frequently, perhaps normally, disjoint. (Lawyers, especially administrative lawyers, make a profession of this condition; at least they can live with it, resembling in this the unlikely creatures who prosper in the crevices of Antarctic glaciers or the boiling spume of deep-ocean volcanoes that seem utterly inimical to life. The traditional administrative state did not shut down upon discovery that the delegation doctrine was an unworkable fiction, and therefore often ignored by the high courts that promulgated it—see for the U.S. the endless discussion of Chevron, for the E.U. Meroni.)

Many of the great crises of the development of democracy—the New Deal first and foremost—result from the clash between sub-national advances in governance and the existing frame of national democracy. The crises are resolved, when they are, by some adjustment of the frame

and the advance that permits a synthesis of the two. To go by this crude rule of thumb, the relevant worry for our time is likely to be that the “local” successes of new governance—made possible partly by the availability of institutions that check discretion without directly renewing democracy—provoke broad crises of legitimacy, not that the absence of a new account of legitimacy checks the spread of new governance. An explosion, not a logjam, is likely to be the signal that discussion of the democratic legitimacy of new governance can no longer be deferred. This is not a reason to be insouciant about the problems of democratic legitimacy waiting beyond the horizon of accountability issues addressed by peer review. But it is a reason to expect that new governance innovations of questionable legitimacy will proceed because they promise results when more legitimate methods no longer do, and perhaps a reason as well to search in the interaction between traditional law and new governance for clues to the solution to large questions of democratic justification that the progress of the later are already provoking. The hybridity thesis, discussed in the next section focuses attention on this interplay; the constitutionalism question, with which we conclude, asks us to draw first conclusions from what we find.

## 2. Law and New Governance Hybrids: Conservative or Transformative?

The hybridity thesis takes for granted the compatibility of some variant of law and some variant of new governance—no co-existence or joiner of old and new, no hybrid to speak of—and invites us to reflect on the precise conditions of the relation.

The conservative form of the hybridity thesis asserts that old and new are complementary but inert, in that old stays old and new is new. De Burca and Scott's "baseline hybridity" belongs in this category. From this perspective, new governance institutions can supplement traditional ones, increasing the reach of law without jeopardizing the core protections it affords.

In its radical variants the hybridity thesis implies reciprocal change: old and new react upon each other, creating institutions with no close analogue in either of the original classes. Its appeal is that transformative combination produces novel ways of securing traditional protections while extending those protections in ways traditional norms would have precluded. We class in this perspective De Burca and Scott's

"developmental" and "default" hybridity, as well as their "transformation thesis".

As a practical matter, to agree that old and new governance form a hybrid at all is to agree that profound changes of a certain general kind are underway — agreement enough certainly to frame a research program, as the current volume illustrates, and beyond that debate about institutional and political reform. But a virtue of the hybridity and transformation ideas is to press for further conceptual and empirical clarification against the backdrop of the common orientation they afford. In this spirit we use the cases of discrimination directives and the emergence of penalty defaults in US environmental law — both presented in this volume at least as much as instances of conservative as transformative hybridity — to argue that the hybridization in progress is transformative: changing our concepts of law and right by refashioning the institutions that give expression to both. Discussion of the anti-discrimination directives returns us to the relation between new governance and fidelity to the foundational values of the polity: the counterpart in the domain of fundamental rights to the problem of administrative accountability. Discussion of penalty defaults puts on the table questions about the enforcement of peer review accountability deferred until now and suggests that the notion of enforcement too is being transformed by its suffusion with new governance.

As De Burca recounts, in 2000 the EU adopted two anti-discrimination framework directives and an “action program” to combat discrimination. The Race Discrimination Directive addresses ethnic and racial discrimination in a wide range of social and economic settings; the Directive on Equal Treatment in Employment and Occupation addresses workplace discrimination on a wide range of grounds, including sexual orientation, age, disability, ethnicity, and religious belief. The action program to combat discrimination aims to increase the capacity of national administrations, E.U. bodies, and networks of experts and NGOs at the national and E.U. levels to assess and propose reforms of the rapidly evolving law and practice of ending discrimination. These measures are in turn part of a continuing effort to include fundamental rights in an eventual E.U. constitution, and to monitor their application, for example through the creation of an E.U. Fundamental Rights Agency for this purpose.

From the standpoint of conservative hybridity -- the portrayal of old and new as complementary but not mutually transformative -- the directives and program fall naturally and attractively into two parts. The

first is a categorical prohibition on discrimination, understood as a practice or decision that disadvantages an individual or group relative to others solely on grounds of ethnicity, faith, age, disability or other attribute judged irrelevant to relations among equal citizens. This is the “traditional” right, similar in kind to human and civil rights; its effectiveness, like theirs (on the traditional understanding) derives largely from unequivocal textual requirements easily intelligible to courts.

The second, novel part of the hybrid is contained in provisions establishing equality of treatment of potentially disadvantaged groups as an open-ended goal. Consider, for instance, the case of persons with disabilities. A rule permitting employers to consider in hiring decisions only those attributes of job applicants directly relevant to their prospective employment prohibits many kinds of discrimination, yet does not protect persons with disabilities which could affect performance. Anticipating this difficulty the Employment Directive obligates employers to provide “reasonable accommodation” to persons with disabilities, where “reasonable” depends on the accommodations actually afforded in the practice of various national administrations.

These parts of the Directives put us in the province of the framework regulation characteristic of new governance in general and E.U. governance in particular. Certainly courts acting in isolation from other institutions have a poor record of giving corrigible meaning to requirements of this kind. But peer review of implementation efforts by relevant authorities and civil society actors, and subject to judicial scrutiny, has, at least in some circumstances, proved able to make effective sense of such open-ended goals. This is arguably the premise of the action program for augmenting the evaluative capacities of key actors: Linked together in forms that are already familiar from the regulatory realm of E.U. governance, these newly capacitated actors could, as De Burca suggests, extend the system of peer review from regulation to rights, creating along the way a conservative hybrid of traditional anti-discrimination law and new-governance law of equality.

The limit to this interpretation is that the very distinction between a traditionally justiciable, textually unambiguous prohibition on discrimination and an open-ended requirement of equality (vindicated through new governance) proves in practice untenable, even in what might seem its natural habitat of anti-discrimination rules. The distinction breaks down because the core meaning of the prohibition against discrimination often depends on new-governance mechanisms in just the way the conservative hybridity thesis disallows.

The ambiguities that come to light in addressing discrimination against pregnant women is a familiar illustration. Gender-blind rules or practices that penalize the career disruptions associated with child bearing discriminate against pregnant women even if they nowhere announce or even intend this. So a bright-line rule requiring gender-blind interpretations is obviously useless in these circumstances. Indeed the only general way to address, rather than aggravate, this and many other kinds of discrimination is to convert them into questions of accommodation: to require, for instance, that differences in physiology between the sexes be accommodated so that men and women have equal chances to advance precisely because these differences are openly acknowledged, not ignored. By this route the prohibitions of discrimination come to resemble the requirement of reasonable accommodations needed to secure equality, and to raise with the latter the problem of defining a standard or comparison group—a comparator—with reference to which the reasonableness of any particular accommodation can be judged. Bright-line rules of doctrine give way to investigation of open-ended, rapidly evolving social possibility.

The creation of an EU Fundamental Rights Agency in 2003 formalizes and generalizes this synthesis. In response to the populist electoral successes of Jörg Haider in Austria in the late 90s, and the fears of widespread xenophobia that they aroused, the Treaty of Nice granted the EU Council, in Article 7 of the Union Treaty, the authority to sanction member states for persistently offending the common values on which the Union is founded, including human rights.<sup>5</sup> But just as the determination of a “reasonable” accommodation depends in part on the accommodations actually afforded, so the non-arbitrary determination of persistent breaches of rights depends on a (continually corrected) baseline of practices in member states of identifying and sanctioning rights abuses. As two leading protagonists in the construction of the new institutions put it:

In order to ensure that such a mechanism [of sanctions] is used in a non-selective manner, it should proceed on the basis of a systematic monitoring by independent experts, providing

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5 See Philip Alston and Olivier De Schutter, “Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency”, and Olivier De Schutter, “Mainstreaming Human Rights in the European Union”, in *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* 1-21, 37-72 (Philip Alston and Olivier de Schutter, ed.s., Portland, Oregon: Hart Publishing, 2005)..

comparable data and objective assessments on the situation of fundamental rights in all the Member States of the Union.<sup>6</sup>

To this end a network of independent experts in fundamental rights was created to “detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty,” and to “help in finding solutions to remedy confirmed anomalies or to prevent potential breaches.”<sup>7</sup> If, as seems likely, this network does become the core of the Fundamental Rights Agency, then peer review of fundamental rights will have been in some important measure officialized in the E.U.

From this it does not follow, as proponents of the conservative hybridity thesis might fear, that the protection of new rights to equality comes at the price of the evisceration of the old protection against naked discrimination. To say that rights are open ended, and that their determination is dependent on a (disciplined and accountable) evaluation of social possibilities is not to say that they are hostage to shifting social preferences, or at the mercy of just the kinds of utilitarian calculations that the commitment of values to rights is meant to forestall. Certainly the history of institutions such as the E.U. Fundamental Rights Agency does not suggest that their purpose is to allow civil society to subvert or degrade onerous rights, new or old, if it finds this useful.

On the contrary: as we just saw, the Agency was originally created precisely to police and when necessary to sanction politically motivated rights violations in accord with, if not directly animated by at least some important currents of popular sentiment. Its mandate is to detect and where possible identify means of preventing breaches of right, not to register what citizens aggrieved by the protections accorded others prefer to do with those protections. From this perspective the intent of the Agency, and of other such benchmarking institutions is to establish a kind of non-court-centric judicial review, “horizontalizing” determination of fundamental values by engaging elements of civil society in their interpretation (via the regular surveys of changing practice), and so extending the range of justiciable claims to protection in ways that courts can not.

Of course, founding intentions do not directly and reliably determine on-going practices and outcomes. Institutions can fail, betraying the

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6 Ibid, p. 7

7 Ibid,

intentions that animated them. The judiciary, for example, has been notoriously derelict in protecting vulnerable citizens against violation of their rights by state authorities in times of national crisis, even in countries such as the U.S, with well entrenched traditions of judicial review of actions by other branches of government. The consensus, at least in the U.S., is that such failures are corrigible lapses, not proofs of the fundamental inadequacy of judicial review as a means of vindicating rights. The new-governance forms of rights determination will periodically fail too—inevitably, given the novelty of the task and the institutions addressing it. If we credit the consensus view of the failures of judicial review, then we ought to treat the inevitable breakdowns of non-court-centric or benchmarking judicial review as corrigible institutional problems as well, at least until we have evidence of their persistent incorrigibility.

As a second instance of the transformative character of experimentalist new governance consider the penalty default as elaborated by Brad Karkkainen and the changes it works on our understanding of law as an instrument of inducing compliance with authorized social ends. As first introduced by Ian Ayres and Robert Gertner,<sup>8</sup> the idea draws attention to deficiencies in the standard, contract-law understanding of a default rule (the rule courts apply when the agreement lacks a relevant provision) as rule the majority of contracting parties would have agreed on had they bargained over the issue. They pointed out that such rules will be unjust or inefficient in a significant range of cases where there are asymmetries of information. Default rules that would not be chosen by a majority of parties may nevertheless be desirable, if they can be cheaply contracted out of by those who don't want them, because they will induce the disclosure of information that would otherwise be withheld. A default rule that says that sellers are liable only for foreseeable consequences of a breach is better than one that provides liability for all harm incurred by the buyer, even if most sellers would ultimately agree to the unlimited damage rule. The foreseeability rule is better because it gives the buyer an incentive to inform the seller of any unusual risks non-performance presents, and such disclosure in turn encourages the parties to bargain in an informed fashion to their own rule. In formulating a penalty default, the rule-maker does not try to approximate the optimum outcome. Rather, it tries

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

to create incentives for the parties to produce a rule that approximates the optimum outcome.

Karkkainen's innovation is to extend the idea of a penalty default from one-shot transactions to on-going regimes where sequences of rules have to be written in circumstances where information is not only asymmetrically distributed and inaccessible to outsiders, but also so incomplete and rapidly changing as to be highly unreliable for even the party best informed at any moment. These are, you will have noticed, the very circumstances in which principal-agent accountability breaks down because there is no actor with reliable knowledge of what to do. Examples range from the identification and mitigation of environmental harms to the reform of whole school systems found to be in violation of constitutional or statutory obligations. Under these conditions a court or administrative agency imposes, in new governance, a penalty on the actors if they do not establish a system for warranting to one another the information they disclose, and then acting on what they currently know.

Thus, the U.S. Endangered Species Act precludes development of certain lands entirely unless relevant stakeholders develop and implement a conservation plan for endangered species. California's Proposition 65 creates vague but potentially large liability in connection with sometimes onerous warning requirements about toxic substances and then creates an exemption for businesses that disclose pertinent information to an agency and comply with minimum tolerance levels announced by the agency. Note that there is nothing intrinsically "soft" about such regimes. If anything, the new penalty default is more overwhelmingly coercive than conventional legal penalties. New governance defaults are often potentially Draconian. Severe criminal penalties can apply for failure to comply with environmental and workplace safety reporting rules; non-performing schools under the U.S. No Child Left Behind Act can be dissolved. Enforcers often hold back from imposing such harsh penalties, but the prospect of leniency comes only at the cost of uncertainty. In contract, penalties for breaches are costs, and parties prefer (efficient) breach to compliance with the agreement when the penalty is less expensive than performance. In new governance penalty defaults, the parties sometimes must choose between performance—creating the requisite information warranting regime—and a future so incalculable as to be chaos.

The new penalty default is not transformative because it can be draconian. Rather the new penalty transforms the character of law by shifting the obligations of compliance, and the coercion directed to

enforce those obligations, from rules to frameworks for creating rules. This shift is of course of a piece with, and helps establish the background conditions for, the shift from accountability as rule following to accountability as the justifiable exercise of discretion subject to peer review: The penalty default motivates the actors to provide the information on the basis of which the peer reviewers can determine whether discretionary choices under uncertainty are warranted.

### 3. Constitutionalism

Supposing then that new governance is law, and transformative law at that, what is the relation between such law and conventional constitutionalism? At its broadest, this question asks for a specification of the relation between new governance and constitutional democracy. It is a very broad question indeed—much too expansive for discussion here. A narrower version, better suited to present purposes, asks only for clarification of the minimum conditions of compatibility between experimentalist law and its enabling constitution — what the latter must and must not provide if it is to accommodate the former. But note that even a response to this limited question is necessarily speculative. As we suggested a moment ago, changes in –constitutional—frameworks lag changes in law, just as changes in law lag changes in social organization. So while we have tried to build the case for new governance as transformative law on the innovative practice of courts and administrative bodies, with regard to the constitutional dimension of new governance, assuming there can be one, we are anticipating, not reporting developments.

We can begin with features that a constitution must *not* contain if it is to be compatible with experimentalist governance. The crucial preclusion here is a strict specification of the separation of powers, at least as understood in the conventional sense of a delineation of the roles the legislative, executive, and judicial branches of government. This separation of powers has come to map onto the democratic pedigree view of law and the principal-agent model of accountability, with (in the simplest version) the legislature charged with setting goals, the executive and administration charged with realizing them, and the courts charged with ensuring that the other branches meet their obligations while respecting the rights of the citizens. Since experimentalist law blurs the distinction between conception and execution—between legislative enactment and administrative implementation—a constitution that insists

on separating them is inimical to new governance. Any constitution, or constitutional interpretation, that established judicial sovereignty — assigning a court exclusive authority to police this separation of powers by deciding itself how to resolve conflicting claims to authority among the branches of government — would by the same token be inimical to any broad expansion of experimentalist governance.

Yet, this rejection raises fears that the courts will not be able to perform their role in protecting the individual rights. So in addition to saying what an experimentalist constitution must not do, we must indicate how it might provide a form of constitutional self-restraint and accountability other than by the separation of powers. In the language of the earlier discussion the question is whether there is a constitutional analogue to peer review. In fact we have already encountered a candidate example: the Fundamental Rights Agency of the E.U. and the emergent system of monitoring, interpreting and enforcing rights of which it is a part. Recall that in this system the varying national practices of rights enforcement—each the outcome of particular interactions between the domestic courts and administrations — create the benchmarks or precedents against which the others are judged and the frontier of just enforcement. Member states of the EU are held to constitutional account; but the standards of accountability are set by their peers, on the basis of a comprehensive evaluation of practice, not by a court trying to determine whether each organ of government acted within the bounds legitimately set for it. This method is already being applied to ensure respect for the core — common — values of the E.U.; and there is nothing in principle to prevent its generalization to many other domains as well.

In American constitutional discussion the view that the branches of government jointly resolve conflicting interpretations of their authority under the constitution by creating competing precedents and debating or evaluating their significance is called departmentalism. For leading historians of the US constitution departmentalism was taken for granted in the early period of the Republic, at least through the first quarter of the 19<sup>th</sup> century. Encounters between and (temporary) co-habitation of first people and colonizers in Canada and elsewhere in the late 18<sup>th</sup> century produced similarly fluid “dialogues” on the meanings of constitutional forms.<sup>9</sup> Judicial sovereignty is a late development in all these settings, the result of the ossification of the legal profession and popular democracy generally. But for our purposes the historical fact of

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<sup>9</sup> James Tully, *Strange multiplicity: Constitutionalism in an age of diversity*. (Cambridge: Cambridge University Press, 1995).

departmentalism is less significant than the periodic re-discovery of the need for some form of dialogue among the branches — an elementary form of peer review—when some authority (typically the Supreme Court in the U.S.) tries, in the spirit of a separation of powers view of the constitution, to rectify definitively the division of labor between, congress, administrative agencies, and the executive, or between any combination of these and the court itself.<sup>10</sup> The protests are typically founded on the demonstration of the impossibility of an *ex ante* determination of an optimal division of responsibility; and the appeals to dialogue are motivated by the consequent need for mutual learning among the branches: just the conditions, again, that render principal-agent accountability unfeasible and peer review effective.

But despite the recurrence of these episodes—itsself an indication of a persistent and perhaps increasingly burdensome limit to the constitutionalism of a fixed separation of powers—contemporary versions of departmentalism have been more often invoked to criticize the defects of current practices, such as judicial sovereignty, than to construct alternatives to them. Part of the explanation for this programmatic hesitation is surely the presumed absence of institutional mechanisms for realizing the constitutional dialogue and disciplining—holding accountable—the participants. In the absence of such mechanisms departmentalism seems to depend on the disposition of the actors: some joint, civic commitment to the common good, or an intercultural sensitivity to the way of being of those, other than ourselves, with whom we are unavoidably living. The difficulty is that constitutions that can count on such conciliatory dispositions may seem superfluous when the dispositions prevail, and unworkable when they do not. But just as experimentalist law is providing institutions that allow for rule-making that is flexible but not unaccountable, and for the vindication of open-ended rights to equality that is not arbitrary, so too it may provide the matrix for creating institutions that permit the branches of government to resolve their different understandings of their roles as peers, not as supplicants before judges acting as the exegetes of an eternal, and unworkable plan. Such an innovation would not yet be a revolution in democracy. But it would bring a transformation of

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<sup>10</sup> See Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford and New York: Oxford University Press, 2004), and Robert A. Burt, *The Constitution in Conflict*. (Cambridge, MA: Belknap Press of Harvard University Press, 1992).

constitutionalism as surely as experimentalist governance is bringing a transformation of law.