Litigation, Bargaining, and Regulation

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IN THE UNITED STATES, the link between the regulatory system and the adversary process is a close one, reflecting not only their common legal parentage but the ethos of contentiousness so deeply embedded in our social processes and institutions. That ethos, that chronic fractiousness, characterizes our journalism, our dissenting religious tradition, our arts and literature, our political institutions, and our competitive economic system. So ubiquitous is it that Lionel Trilling defined ours as the "adversary culture."

Indeed, our adversary processes are far more highly developed than those of societies built on similar legal foundations. In England, for example, the number of lawyers per capita is but a fraction of what it is here, mirroring (and perhaps contributing to) the dearth of litigation and of public law in the English system. Such a difference strongly suggests that adversary processes serve important functions in our society. First, they recognize and give active voice to our extraordinary diversity of political, economic, social and other interests. Second, they provide each participant with a strong incentive to adduce facts, assert values, controvert the facts and values of others, and advance his or her own view of the public interest. Because those affected are most likely to know what information and values are relevant to the decision in question, the adversary process sharpens and gives added content to the issues requiring decision, while stimulating innovative approaches and solutions. Third, adversary processes, by providing a systematic channel for dissent and criticism, serve as solvents for encrustations of state power, privilege, and ideological orthodoxy. Finally, they invite participation in the decision-making process by those who are affected—participation that is valuable in a democratic society quite apart from its potential contribution to the quality of the decisions. It is not surprising, then, that adversary processes enjoy considerable constitutional, statutory, and judicial protection; in a liberal society in which there is no received or even widely shared notion of truth, they are simply indispensable for resolving sharply conflicting interests.

The adversary process manifests itself in many forms. Professor Lon Fuller described a spectrum of forms ranging from pure adjudication by a formal and independent tribunal to pure bargaining between opposed interests. Each form of the adversary process can be located on this spectrum according to the extent to which it employs a logical-rational process. Pure adjudication possesses this attribute to the fullest degree (at least in theory) by virtue of the norms that govern it—such as a commitment to precedent, logical deduction from general principles, decision by an objective decision-maker on the basis of a well-defined record, and the like. Pure bargaining between in-

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terests, however, is not a rational process at all except in the narrow sense that it reflects the calculated interests of its participants. Moving along the spectrum from adjudication to bargaining, one can identify numerous mixed forms: arbitration, arbitration in which the parties select some of the arbitrators, informal rulemaking under the Administrative Procedure Act (APA) in which reasoned arguments are presented to an independent decision-maker bound by only the most minimal constraints (such as the obligation to state reasons for the decision), bargaining structured by legal requirements (as under the Wagner Act), mediation, and other hybrids.

My argument may be simply stated. While both the adjudicatory and the bargaining forms of adversary process possess distinct advantages and disadvantages, I believe that our regulatory system has come to rely excessively upon the adjudicatory form to the relative neglect of direct bargaining between interests. Most efforts to reform the administrative process have amounted to tinkering with what remain essentially adjudicatory modes, and have in some cases actually magnified, rather than reduced, the inherent limitations of those forms. While direct bargaining between affected interests will, for a variety of reasons, play only a limited role in the regulatory process, that role might be expanded to a modest degree without abandoning the considerable advantages of more formal procedures.

Regulation and the Litigation Model

While many procedural innovations—broadened public rights of participation, governmental subsidy for participants, judicial insistence upon open and reviewable regulatory activities—have been designed to enhance the *scope* of the adversary process in regulatory proceedings, there has been relatively little experimentation with new adversary *forms*. Virtually all regulatory processes—policy development, standard-setting, licensing, application of general rules to particular situations, and enforcement—are conducted through procedures that cluster near the adjudicatory end of the spectrum, and most innovations in administrative procedure have been drawn with magnetic force toward that same pole. Even "informal rulemaking," originally intended as a flexible, discretionary, legislative-type process, has been relentlessly judicialized, formalized, and rationalized into something quite different.

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This development can be seen in the spate of "hybrid" rulemaking procedures—requiring public hearings before impartial decision-makers, oral testimony, cross-examination of witnesses, judicial review on the basis of a well-defined record, reasoned and articulated decisions, and the like—that Congress has written into an increasing number of regulatory statutes. It can also be seen in the less visible, more incremental, but equally dramatic transformation of informal rulemaking through judicial interpretation, a trend that had proceeded so far that the Supreme Court felt compelled last year (in the *Vermont Yankee* case) to employ unusually strident language to repudiate it. Yet the impulse on the part of the lower courts to "judicialize" informal proceedings appears to remain irresistible; indeed, as Antonin Scalia has argued, the most important of those courts (the District of Columbia Circuit) blithely continues on this path even now, undeterred by the Supreme Court's caustic admonitions. Perhaps the clearest indication of the strength of this impulse and of its political support is that the Carter administration's regulatory reform proposals would take only a few modest steps away from the adjudicatory pole (for example, by expanding the existing discretion of hearing officers to dispense with cross-examination), while at the same time taking a few other steps back toward it (for example, by importing separation-of-function principles into rulemaking). In sum they would not appreciably disturb this trend towards the judicialization of regulatory procedures.

The regulatory agencies, then, have relied heavily upon what we shall call the litigation model, in which adverse interests present their arguments to an independent tribunal for decision—to the exclusion of what we shall call

the bargaining model, in which they advance their arguments directly (or through an intermediary) to each other. (Much bargaining already occurs in the regulatory process, of course, but it is largely negotiation between the decision-maker and a party or parties, rather than between the parties themselves). The appeal of the litigation model is easy to understand, given its formidable strengths. These strengths—moral legitimacy, social acceptability, and reliance upon precedent—derive from a formal rationality dictating that decisions be deduced from general principles free of "irrational" decision criteria extraneous to those principles and that judgment be rendered in favor of one party and against the other.

Yet just as surely, the litigation model has important shortcomings. For example, the decision-maker is presented with a choice—but usually only between two outcomes, each of which pushes against the extreme limits of what each party thinks the decision-maker might be persuaded to adopt. Thus, very few of the many possible outcomes lying somewhere in between are systematically considered. To be sure, the parties are always free—and may even be encouraged—to negotiate a settlement falling somewhere within that vast field of possibilities. Yet the prospect of complete victory is alluring and tends to discourage settlement until the final stages of litigation. Moreover, the law's preoccupation with assigning fault, liability, guilt, or rights to one party or the other —but not both—further entrenches obstacles to negotiated settlement. Finally, the decision will divide the adverse parties into a "winner" and a "loser." The latter will tend to have little commitment to the "rightness" of that decision, and will often seek exoneration through judicial review or will obstruct or delay implementation of the decision.

In addition, the nature of the litigative process—the procedures, the rules of evidence, the criteria of relevance, and so on—and the substance of the ultimate decision itself are controlled by someone other than the parties affected. While this reinforces certain fundamental values that legitimize the litigation model (such as the objectivity of the tribunal, the exclusion of extraneous influences, and the paramount importance of rationality in the decision process), it sacrifices certain other values. Thus, the procedural and evidentiary "rules of the game" tend to grow more complex and technical over time. As they almost become ends in themselves, the game itself tends to grow ever more expensive, protracted, and preoccupied with form, technique, and tactics.

More important, the formality of the process limits its suitability for pragmatic approaches to problem-solving. Rather than speaking to one another, the parties speak to the decision-maker. Rather than seeking common ground, they try to induce the decision-maker to allocate blame. Rather than seeking new formulations around which a compromise might be shaped, they wrap themselves in established precedents with which the decision-maker will be more familiar and comfortable. Rather than adducing whatever facts or values they deem relevant to the issues that divide them, they confine themselves to those that the decision-maker is thought to deem relevant in some technical sense. Rather than maximizing the flow of information that would bear upon potential compromise solutions, they screen it out, greatly simplify it, or otherwise distort it in order to conform its contours to the Procrustean bed of litigation formalities.

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In this way, the decision-maker remains remote from the ambiguities and subtleties of the problem at issue; while the parties possess a "feel" for the problem that could contribute to its solution, they cannot easily communicate that "feel" to the decision-maker, who knows the problem only through a highly stylized evidentiary presentation or, worse, a "cold" written record. In addition, the decision-maker is constrained to treat facts as unequivocally true and legal rules as unequivocally applicable when these are actually contingent or uncertain, just as he or she is ordinarily constrained to find for one party or the other even when the fault or loss ought properly to be shared.

Finally, the litigation model's emphasis on reasoned argumentation and logical deductions

from first principles makes it inappropriate for resolving certain kinds of regulatory issues. Even judges do not simply decide by logical deduction from well-defined premises but inevitably engage in a process containing many elements of subjective choice. This is not necessarily regrettable, but it does tend to dilute some of litigation's advantages over less "rational" decision modes. Many regulatory problems are what Fuller characterized as polycentric. Polycentric problems can be solved only by taking account of numerous interdependent and highly variable factors which oblige the decision-maker to manage a kind of cybernetic process involving tentative probe, feedback, adjustment, and reconciliation. (A common example is the allocation of limited supplies of natural gas among a number of different but economically interdependent end uses.) Such problems ordinarily involve multiple criteria, and can be solved only by applying a number of standards whose relative weightings and orderings are sufficiently indeterminate as to imply no particular solution. Such a problem (for example, the selection of a water quality standard) requires the exercise of substantial discretion rather than the application of preexisting decision rules, and its solution will often require interaction between the decision-maker and others—interaction that would be inconsistent with traditional norms of litigation. A vast number of regulatory proceedings —and certainly the most important—focus on polycentric problems and require the application of multiple criteria, even though such problems do commonly generate some questions suitable for adjudication—whether all relevant factors were considered, whether prescribed procedures were observed, and the like.

Adjustments to the Litigation Model

Congress, the agencies, and the courts have fashioned a number of innovations in an effort to overcome the inherent limitations of the litigation model. Each, however, has fallen short. The most important of these, the informal rulemaking process, suffers from some (though not all) of the same defects that afflict formal adjudication—chiefly the fact that parties play formalized roles, tend to adopt fixed (and extreme) positions, and communicate with the decision-maker rather than each other. (The fact that the decision-maker—the agency—is often a party in interest may distort communications even further.) As we have noted, informal rulemaking has become progressively judicialized by Congress and the courts; indeed, recent controversy over presidential intervention in such proceedings threatens to strengthen that trend.

More recently, the courts have elaborated another important variant on the litigation model—what Professor Abram Chayes has described as public law litigation—but far from surmounting litigation's shortcomings, this variant exacerbates some of them. Much public law litigation is directed at the conduct of states in directly administering institutions, such as hospitals, schools, and prisons. But much of it—perhaps an increasing proportion —is directed at federal and state agencies in their exercise of regulatory authority over complex state and private sector activities. Examples of such litigation include a suit to compel the Department of Health, Education, and Welfare to bring about desegregation of higher education in the southern and border states by withholding funds, and a suit to compel the Department of Labor to use its authority to reform the activities of state employment services.

Obviously, public law litigation has much in common with traditional litigation; some scholars even contend that the new variant is novel only in the substantive rights it adjudicates. Nevertheless, it does attempt to broaden the range of interests represented in the case, employ innovative fact-finding processes, fashion remedies directed at institutional reforms for the future rather than merely resolving past disputes, and legitimize a more intrusive judicial role in the dispute.

Despite the creative transmutation of the litigation model to embrace the forms and functions of public law litigation, however, the model's capacities for reshaping litigation without altering its essential qualities may well be approaching its outer boundaries. First, the number of polycentric problems for which society demands a governmental solution appears to be increasing rapidly. Even judicial adjustments, such as class action procedures and court orders mandating institutional changes, cannot keep pace indefinitely with the growth in the demands being placed upon the courts to resolve such issues. Heightened efforts to

satisfy these demands through litigation must *at some point* undermine the pretense that it is adjudication that the courts are engaged in, and must inevitably produce more simplistic decisions.

Second, such adaptations, far-reaching as they are, fail to rectify some of the fundamental limitations of the traditional model. Thus, despite its best efforts, public law litigation may fail to include important interests. In litigation against state mental hospital administrators, for example, the interests of taxpayers and of recipients of other tax-supported services (like health care for the elderly) may not be represented. Some of the regulatory problems with which public law litigation attempts to deal—the location of public housing, the structure of the oil industry, the relationship between traditionally white and traditionally black colleges in the southern and border states—magnify the shortcomings of the litigative fact-finding process, even as (or perhaps especially as) it is augmented by a more active court involvement and a more promiscuous use of social science theory and data. The kinds of issues involved in such litigation possess an ideological dimension that strengthens the tendency for litigation to polarize and harden positions. Moreover, such issues are often so specialized (for example, higher education curriculum or mental health administration) that the decisionmaker can only deal with them in a simplistic fashion. In addition, the absence in these cases of any single standard or criterion by which to resolve the problems (except by doing violence to their complexity) renders adjudication increasingly an exercise in administrative discretion and subjective judgment. This undermines the adjudicator's distinctive advantage—the claim to be administering rational justice.

Third, public law litigation vastly complicates the problem of implementing court decrees. Not only are the issues involved in such litigation often polycentric; they are also problems for which no satisfactory solutions may be at hand. Above a minimal threshold, for example, no one really knows how to rehabilitate criminal offenders, or what constitutes a "proper" or "effective" course of treatment for the institutionalized mentally ill, or how to ensure that deinstitutionalization of such persons will not entail serious risks to their well-being. Even if such knowledge existed, factors over which adjudicators have little or no control inevitably constrain and distort execution of the decree.

Finally, public law litigation greatly compounds a problem that conventional litigation, because of its more modest ambitions, largely avoids: the limitations of substantive legal rules as instruments for easing complex social conflicts and interactions. As these conflicts and interactions grow in number and intensity, legal rules and formal centralized decision processes lose their capacity to accommodate them effectively, while generating new and less manageable conflicts. In such cases, public law litigation may well simply reinforce the natural inclination of legislators to pass the buck to the courts. Even legislators truly desiring higher standards in mental hospitals, schools, and prisons may find it considerably easier to support increased appropriations demanded by a court order than to assume the political responsibility for initiating the necessary tax increases (or reductions in other more popular programs).

The litigation model, then, shows significant and systematic limitations as a way of resolving regulatory issues—limitations that are only partially overcome (and are in some respects exacerbated) by the informal rulemaking and public law litigation variants. These limitations argue strongly for consideration of procedural devices less prone to those deficiencies.

Regulation and the Bargaining Model

The processes of mutual accommodation—bargaining, reciprocity, mediation, contract, log-rolling, deference, voluntary cooperation—are unquestionably the predominant modes of human interaction and dispute resolution in our (or perhaps any) society. However described, these particular orderings of adversary relationships have one characteristic feature: they all entail a voluntary exchange between two or more persons which each believes will render him better off than he was before (or would be in the absence of) the exchange.

Every liberal society must protect the integrity of bargaining processes. Indeed, unless it is prepared to invest enormous resources to administer centralized social controls, society must nurture and extend those processes. The reasons are not hard to find. The bargaining

model exemplifies the virtues of all adversary processes: it encourages diversity, stimulates the parties to develop relevant information about facts and values, provides a counterweight to concentrations of power, and advances participation by those the decisions affect. Moreover, it secures these advantages without incurring the shortcomings of the litigation model. Thus, good faith bargaining often unearths solutions lying between those extreme positions that would be asserted by the parties in litigation. Bargaining tends to expose the true intensities of the participants' preferences, while litigation tends to exaggerate those intensities. Bargaining stimulates the flow of information *between* parties (information relevant to their preferences, even if not to the applicable legal rules), while litigation constricts inter-party communication (and takes a narrow view of relevance). For these reasons, bargaining can help participants to develop a better appreciation of the perspectives of their adversaries than litigation can, an appreciation that may reduce hostility, soften positions previously taken, and suggest solutions that had escaped notice. In addition, because bargaining is a process controlled by the parties themselves, any solution is likely to reflect a more sensitive "feel" for the problem that engendered it; litigation exhibits the opposite tendency. And because a bargained solution is essentially voluntary and emerges from a process that helps build consensus, it is more likely to generate support by both parties for its implementation; litigation—particularly the public law variety—can pose awesome problems of implementation, in part from the continuing intransigence of a losing party.

Finally, a bargained solution depends for its legitimacy not upon its objective rationality, inherent justice, or the moral capital of the institution that fashioned it, but upon the simple fact that it was reached by consent of the parties affected. The importance of that criterion is rooted in the fact that the problems around which many (and perhaps the most important) social conflicts turn have no "right" or "wrong" answer in any moral or even technical sense. Such conflicts are best resolved through a mechanism based not upon principle but upon pragmatic accommodation and adjustment. In contrast, the litigation model assumes that the problems with which it deals have "right" and "wrong" solutions that ordinarily correspond to the positions of the prevailing and losing parties; indeed, its essential nature and strength depend upon this premise.

These formidable advantages of bargaining over adjudicatory-type processes are, of course, not without their own costs. As the number of parties increases, the difficulties in reaching a bargained solution also increase. Since the bargained solution tends to reflect the initial bargaining power of the parties, it may be unacceptable from a moral or social standpoint. Bargaining can only succeed if the parties perceive that they have a stake in achieving a negotiated solution. A party can easily subvert the process by delay (or otherwise) if it has an incentive to do so and if no sanctions exist to dissuade it. If a bargained solution is to command respect and legitimacy, all those with a significant stake in the outcome must be represented, yet diffuse interests may not be well-organized enough to participate. Finally, the bargaining process cannot generally be conducted efficiently in public view, yet secrecy in the resolution of public issues offends widely held democratic beliefs.

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These limitations, however, need not be fatal to a broader use of bargaining in the regulatory process. First, the considerable disadvantages of litigative processes justify serious consideration not only of perfect alternatives with widespread applicability, but also of imperfect alternatives with limited applicability. Even marginal improvements simply cannot be sneered at. Second, some of the bargaining model's shortcomings are at least equally characteristic of the litigation model. Thus, the complexity introduced by having more than two parties in interest is a disadvantage that an adjudicator avoids only by pretending that there are only two. Parties to litigation often have considerable incentives (and opportunities) to delay and perhaps moot a decision. And it is highly unlikely that all relevant in-

terests will be represented in litigation. Third, some of these shortcomings constitute a greater problem for certain regulatory activities (say, standard-setting) than for others (say, policy development or the application of general rules to specific situations). Finally, as noted below, it may be possible to devise hybrid forms that combine the advantages of both the litigation and bargaining models, while minimizing their defects.

Some Applications of Bargaining in the Regulatory Process

Regulators, of course, already engage in much negotiation with regulated (and other affected) interests. The inescapably political environment of regulation and the costs and limitation of adjudicatory and near-adjudicatory procedures ensure that this kind of bargaining will continue. But it is typically conducted between the agency and another party to the proceeding rather than between the parties other than the agency. This reduces bargaining's characteristic virtue—the advantage of face-to-face exchanges between the parties primarily at interest. Improvement over the status quo may be found in stimulating more fruitful dialogues between those parties, rather than in reinforcing the litigative nature of existing regulatory processes.

The usefulness of bargaining in the regulatory process depends to a considerable extent on the nature of the regulatory activity in question. Let us consider potential uses of bargaining in four activities—policy development, standard-setting, enforcement, and the application of general rules to specific cases.

Policy Development. The experience of the National Coal Policy Project suggests that even in extremely controversial and politically charged policy areas, dispute over policy alternatives can be considerably narrowed and important consensus achieved through negotiation. The project brought together industrialists and environmental activists in an effort to address important coal-related environmental and energy policy issues. Its task forces, composed of members nominated by the environmental and industrial caucuses, engaged in extended discussions to clarify positions and reach such agreement as might be possible. The discussions culminated in a striking degree of consensus on the policy-relevant facts and in a series of more than 200 recommendations organized around questions of mining, transportation, air pollution, fuel utilization and conservation, energy pricing, and emission charges. While some of the recommendations were general and highly qualified, others (for example, support for full marginal cost pricing of energy, opposition to cross-subsidization, and location of major coal-burning power plants in areas where the energy is to be distributed rather than in remote areas) were quite specific and potentially far-reaching. Participants on both sides are now engaged in efforts to persuade decision-makers to implement the recommendations, devise new approaches to those issues upon which agreement could not be reached, and extend the discussions to other interests (such as labor unions and consumer groups) whose failure to participate appears to constitute the project's chief limitation.

Standard-setting. At first blush, the development of specific regulatory standards would appear to be particularly ill-suited to the use of bargaining, given the multiplicity of interests involved and the obligation of agencies to ensure that regulation meets statutory requirements, rather than simply reflecting a consensus.

Nevertheless, there may well be an appropriate (if modest) place for bargaining in standard-setting, though it will require that the regulatory agency itself play a new and delicate role in the process. The agency would have to preside over what might be called "structured bargaining," in which it would prescribe certain policy parameters within which the bargaining would be conducted and attempt to ensure that all legitimate interests had an opportunity to participate. It would be careful not to intrude into the dynamics of the bargaining process itself (at least not in the first instance), attempting only to facilitate a bargained consensus among the interests within the parameters previously set. But it would not be bound by that consensus, remaining free (consistent with its governing statute) to impose a different solution. In this way, it might realize the main advantages of both the litigation model and the bargaining model, while minimizing the major disadvantages of both.

The phenomenon of collective bargaining conducted under the Wagner Act and the watchful eye of the National Labor Relations Board is an alluring—but inapt—model for such structured bargaining. In the case of collective bargaining, Congress has taken the view that, except in unusual circumstances, the clash of management and labor suffices to protect the public interest. With most regulatory programs, however, Congress has clearly proceeded from a contrary premise, giving the agency responsibility for the formulation of substantive regulatory policy. A more useful analogy is the "offeror" procedure under the Consumer Product Safety Act. The act authorizes the Consumer Product Safety Commission (CPSC) to contract with an outside organization (the "offeror") to develop a product safety standard that the CPSC may wish to adopt as a mandatory standard. The offeror manages the development process and must systematically involve a variety of interested groups, including consumers, small business, retailers, and so on; indeed, the CPSC has sometimes subsidized the participation by such interests where they cannot afford it themselves. The CPSC may accept, reject, or modify the standard developed by the offeror.

Such a regulatory procedure, at least in theory, encourages informal, face-to-face, problem-solving negotiation between the affected interests, under the auspices of a public body that retains final decision-making authority. The offeror program has been much criticized, and the CPSC has begun to move away from relying on it—a movement accelerated by Congress's recent expansion of the commission's authority to develop standards in-house. To some extent, this experience reflects the fact that the commission had played a passive role in the process, providing little guidance, direction, or assistance of either a technical or a policy nature to the offeror. Recently, however, it decided to play a more active role—providing more "front-end" information and analysis, narrowing the number and scope of the hazards to be addressed, suggesting some alternative solutions, and involving its staff more in the process—with far better results. (It must be admitted, however, that the standard in question—for Christmas tree lights—may not have been typical.) Moreover, as the commission begins to encounter problems in developing standards in-house, the imperfections of the offeror process may loom somewhat smaller by comparison. Indeed, such reasoning underlies a soon-to-be-issued Office of Management and Budget circular that will call upon government agencies to rely more upon privately negotiated ("consensus") standards and to participate more in their development.

Enforcement. Clearly, a great deal of bargaining occurs between regulatory agencies and those upon whom they intend to impose sanctions; such bargaining is ordinarily designed to encourage voluntary compliance and reduce the need for formal procedures. Rarely, if ever, does the agency employ its authority to convoke direct negotiations between the parties primarily at interest—the "violator" and the "victim"—in an effort to resolve the dispute to the mutual satisfaction of all. Given the ambiguity of many regulatory requirements, the consequent ease with which good faith misunderstandings may arise between regulated interests and the public, and the often marginal policy importance of such disputes, it would appear that mediation—that is, bargaining through the medium of a neutral third party—might prove useful in resolving such cases.

Regulation under the civil rights laws seems an apt candidate for expanding the use of negotiation as an adjunct to the enforcement process, since good faith disputes over the meaning of those laws are legion, and negotiation could lead to satisfactory resolutions.

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In fact, efforts to conciliate civil rights complaints arising under the jurisdiction of the Equal Employment Opportunity Commission are already under way; the procedure is flawed, however, by the fact that EEOC staff members, who may not be disinterested, performed the mediation. Under the Age Discrimination Act, on the other hand, mediation will be performed by an independent body, the Federal Mediation and Conciliation Service. The complainant, of

course, retains the right to seek enforcement in the event that mediation fails.

Applying General Rules to Specific Cases. Long before any concrete issue of enforcement arises, there will often be questions of the extent to which a regulation applies to a particular activity. A dispute may exist, for example, as to whether the proposed siting of an electric utility violates environmental laws, whether a proposed housing development complies with civil rights restrictions against racial concentration, or whether a bank's past lending practices offend laws prohibiting "redlining" of neighborhoods. In each of these cases (and especially where the controversial action has not been taken), there may well be incentives on all sides to resolve the issue without resorting to the regulatory process. Such incentives may include a desire to avoid alienating the community, the financial costs of a building project's becoming bogged down in litigation and wrangling, uncertainties if decisions are to be made by regulatory and judicial forums, and the like.

Perhaps as a consequence, there has been considerable experimenting with mediation of community disputes, especially in the environmental area. Indeed, environmental mediation has acquired the hallmarks of an idea whose time is coming—a growing body of case studies of successful mediations, foundation support for some pilot efforts (for example, Environmental Mediation International), a newsletter, an academic base (at the University of Washington), and even its own government agencies (the Office of Dispute Settlement in the New Jersey Department of the Public Advocate, for example). In practice, mediation of community disputes entails a number of separate activities: "conflict anticipation" (before mistrust has developed and significant costs have been incurred), "data mediation" (to develop consensus on the basic factual issues underlying the dispute), "conflict assessment" (the development by the mediator of recommendations for breaking a deadlock), and other but more traditional mediation processes.

In November 1978, the Council on Environmental Quality adopted new regulations requiring that the preparation of an environmental impact statement be preceded by a "scoping" process in which the agency responsible for the statement convenes interested parties to determine, through negotiation, the scope of the issues to be addressed. One can imagine this new procedure evolving into structured bargaining between these interests on disputed substantive issues—of course, under the aegis and prodding of the agency.

Conclusion

A variety of factors—growing public suspicion of the private sector, risk aversion on the part of health and safety regulators, the widespread conviction that the public interest can be protected only by government decision, and a recognition of the shortcomings of bargaining between interests—ensures that direct bargaining between interests will probably never play a major role in the development of regulatory policy and regulatory decisions. Nevertheless, an increased role may be desirable. Innovation in this area is not confined to a choice between the litigation and the bargaining models. Hybrids such as structured bargaining can be fashioned to conform to the needs of particular regimes and to draw upon the strengths (and minimize the weaknesses) of each model. Most important, to the extent that Congress delegates polycentric, multiple criteria problems to regulatory agencies (and, for better or for worse, such delegations are likely to continue), some form of structured bargaining appears to comprise an essential element of any problem-solving mechanism. Such problems are at root neither technical nor legal but political—that is to say, they are problems of social choice in a world of ever more limited resources. In such a world, bargaining may do for us what litigation and law increasingly cannot: it may nourish those impulses toward integration, accommodation, reconciliation, and mutuality of interests which an adversary society tends to stifle, but without which no society can effectively discharge its business. ■

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