



ANXIETIES  
OF DEMOCRACY



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You're now going to hear from a bunch of lawyers and so the tenor I suspect will be somewhat different. Let me, before I turn over the panel, just say a word of introduction about lawyers and legal methods and how we come to many of these problems. Law tends to prioritize the private. What we call "private ordering" is the normal state of affairs. We believe that mutually beneficial exchanges between people should take place and that they should be enforced. That's our law of contract.

Environmental issues pose a challenge because they raise the question that was raised in the last panel, of externalities, so we have to move to a world in which private ordering, private, mutually advantageous gain cannot control. So this is a domain where, because there are externalities, because we're dealing with public goods in many instances, the legal approach is to regulate. Regulation takes two forms. Regulation takes the form that lay people tend to associate with legal regulation. That is, you have a government agency, you prescribe a number of commands that have to be followed on an ex-ante basis. That is, the legislature and administrative agencies put together a menu of conducts that are expected from those that fall under the sway of the regulation.

Lawyers tend to focus as much on... not on the ex-ante side of regulation, but on the ex-post. In particular, in the United States, we are a highly litigious society, which means that we conduct a good deal of our regulation through after-the-fact litigation in a way that's supposed to incentivize and internalize socially optimal conduct. But we have a menu across all three domains of private conduct: private ordering, best practices: community norms that operate powerfully in some settings; ex-ante regulation, usually done by government directive that operate well in some settings; and the ex-post accountability that is supposed to be a supplement to the other two.

Let me give a concrete example that is germane to the topic today: the Volkswagen emissions scandal. Volkswagen is a company with a strong internal culture. It has internal norms. It has internal gatekeepers in the forms of lawyers and executives and boards of directors—two boards of directors in the German context—and it is supposed to have certain forms of compliance with socially desirable conduct and requirements. Volkswagen is also subject to ex-ante regulation. It was told if you are to sell diesel engines, they must have a certain measure of environmental compliance or they may not be marketed—not just in the United States, but in Europe and increasingly in other parts

of the world as well. Third, they face litigation risk in some places (and realistically, the only place they face litigation risk is in the United States).

So, I had a colleague, the dean of the Zaragoza law school from Spain come spend some time at NYU [New York University]. The Spanish Bar Association gave him money to study collective redress and what can be done in the environmental context. He came away saying that Volkswagen is in itself a perfect example of legal regulatory systems that work and don't work. In the United States Volkswagen spent \$20 billion on remediation. It had to get dirty cars off the road. It had to pay for all the people who had purchased these diesel cars to at least have the option—and over 90% took it—of buying a new car. In Europe, where the bulk of these cars are concentrated, there has been no legal redress whatsoever. There is hand-wringing. There is a proposal in Germany that if you join a consumer alliance it can stand in for you—it can perhaps sue—but it cannot collect damages, it cannot get an injunction. It can just get a declaration that this was done badly, which is a little like kicking in an open door at this particular point.

In Brazil, Volkswagen was a disaster because São Paulo was on the verge of changing its entire system of municipal fleet—garbage trucks, ambulances, buses, cabs. And Volkswagen persuaded them that the clean diesel was the fuel of tomorrow, not natural gas (which Buenos Aires went to). I'm Argentine—Antonio [Benjamin] has the misfortune of being Brazilian.

And so, they locked in Brazil for a generation because São Paulo can't just replace its entire fleet. So it's an entire generation of destruction, and we have these questions about how do you get the norms, how do you get regulations that are compliant to the best, the socially desirable objectives, and you get what's the stick at the back of this. Katie [Kuh] is going to start more on the norms side. Justice Benjamin, who was a crusading prosecutor in his day, is now a semi-retired into being a justice of the high court of Brazil—he's going to talk about the judicial side of this, and that's where we're going to go.

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