The Foundation for Law, Justice and Society

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Courts and the Making of Public Policy

The Capacity of Courts to Handle Complexity

REPORT AND ANALYSIS OF A WORKSHOP HELD AT
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Keynote lecture by **Professor Sheila Jasanoff**, *Pforzheimer Professor of Science and Technology Studies*, Harvard University
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Professor Jasanoff argued in her keynote lecture that law, no less than science, defines our understandings of nature and the natural. Such a conclusion is a controversial one, since it cuts against conventional wisdom on the subject. There is a common perception that science settles the fact of the matter, whereas law serves only to sew doubt. The idea behind the claim that 'science speaks truth to power' is that scientific understanding helps guide our judgements as to how the world should be by removing uncertainty. This, in turn, informs us how we should make law, and indicates what law we should make. This belief in what science can do to and for the law is a cornerstone of how many people in Western societies, as children of the Enlightenment, think. Jasanoff's purpose in her lecture was to problematize this belief.

Concerns regarding the implications for the power of meritocracies saw expression in the fear that scientists in white coats might take over from judges in black robes

American law's reliance on nature goes back to the foundations of its institutions. When the Founding Fathers declared independence, they turned to the laws of nature to justify the radical measures they implemented in relation to human-made law. Natural law underlay their assumptions concerning inalienable rights, and the need for accountability between governors and the governed. This form of certainty and authority is now associated with science, in a process of entanglement between law and science that has increased dramatically over the last two hundred years. It has become commonplace to incorporate presumed facts about nature into the law's rulings. Science serves as an indispensable resource for the law across an ever-widening spectrum of controversies including many that involve complex litigation, examples including product liability, medical malpractice, environmental controversies, criminal prosecutions, intellectual property, antitrust, and race and gender discrimination.

As the law becomes increasingly dependent upon science for its own authority, there has been growing scepticism as to the law's capacity to use science well and wisely. Earlier years saw concerns regarding the implications for the power of meritocracies in allowing scientists into the courtroom, and in the 1960s, this saw expression in the fear that scientists in white coats might take over from judges in black robes. But as time has passed, concern is now more usually phrased in terms of how law misuses science, with critics of the courts pointing to the inadequacy of legal fact-finding and the technical illiteracy of judges, as well as the law's willingness to buy into claims that would not pass muster in an informed scientific context. Jasanoff drew attention to four powerful narratives of institutional weakness which have emerged from these concerns: 'law lag', 'culture clash', 'crisis', and 'deferment'. Such narratives can actually serve the law's interests, since, paradoxically, in ceding authority to science, the law enhances its own authority in subtle ways, a phenomenon referred to as 'co-production', whereby our ideas of *what is* and what *should* be are entwined and complementary of each other.

One may first look at the idea of the 'law lag', reflected in the claim that interconnected social institutions, such as science and the law, develop at different paces, so that the slower institution is constantly lagging behind the other. This means that there is a constant need for adjustment in the law, as it lags behind scientific progress. Such an idea has been challenged, by questioning, for example, the extent to which the social science evidence produced in *Brown v. Board of Education of Topeka* led the Court, as opposed to merely helping to consolidate an already formed moral consensus. Nonetheless, the idea that law lags behind science is commonly held: the law is seen as conservative, easily outdated, and as producing a drag on technological innovation. Less deterministic than the idea of the law lag is that of the 'culture clash', which also casts law and science as antithetical, putting the law in the weaker position in terms of knowledge making. This is often articulated in binary terms, such as when it is claimed that science is committed to progress, whilst the law is committed to process.

A third narrative is that of 'crisis', when a highly reductive version of the culture clash narrative posits a pathological conflict between law and science that fails to produce beneficial outcomes. Thus, for example, litigious society is blamed for the spiralling costs of medical insurance due to the prevalence of malpractice suits and runaway jury verdicts against physicians. This belief that a 'litigation explosion' has caused increases in insurance costs has persisted despite years of countervailing quantitative research. For some, the crisis narrative centres less on the economic costs of litigation than on the costs to science itself. Law, on this view, encourages the development of 'junk science', which is not scientifically credible, privileging legal victory over scientific truth, but which passes muster with judges and juries. This has proved politically persuasive, and paved the way for the fourth narrative: that of deference by courts to science and scientists.

The 1993 ruling in *Daubert v. Merrell Dow Pharmaceuticals* announced that judges should act as gatekeepers in relation to science, ensuring that only science that meets certain scientific standards is admitted to the courtroom, according to the criteria of testability, peer review, error rate, and general acceptance. Whether *Daubert* was good law depends on our view of the underlying narrative of 'junk science', which rests on a series of unstated and untested claims about the relationship between scientific and legal knowledge. We may identify four such presumptions:

1) the facts needed to resolve legal disputes are available on the shelves of science at the time that legal disputes come into being;
2) science produces legally relevant facts in a context of impartiality, which is not available in a legal context where an adversarial approach prevails;
3) cross-examination is not as effective as peer review at separating good science from bad science; and
4) finding scientific truth is necessary to rendering justice in cases where the facts are disputed.

These presumptions have repeatedly been shown to rest on weak grounds. Legal controversies often arise because the facts that gave rise to them are unique, contingent, and hard to pin down. Legal disputes are situated in specific, unrepeatable contexts that would not be anticipated by science. In many cases, it is the legal setting which opens up an enquiry into the facts. Law created the niche for new science. In such cases, it is hard to claim that science has ready-made answers to legal questions. It is the partnership of law and science that produces legally relevant facts in such cases. Insisting on getting the science right only addresses part of this partnership.

Why does this matter? What's wrong with pretending that science provides truth-telling function, if it helps to resolve legal controversies? Jasanoff argued that the law's reliance on an external, truth-telling science is not an innocent fiction. It not only ignores important epistemological concerns about science's

facticity, but also puts to one side precisely those normative concerns that should be the core preoccupations of law. Jasanoff illustrated this point with a series of examples, involving patents on life, environmental law, the death penalty, and the emerging alliance of law and neuroscience. The example of whether laboratory-bred mice can be patented, for instance, shows the way in which understandings of what is natural and what is invented have changed over time. A consideration of 'clean air' policy raises the question of the extent to which the air we breathe is natural, or is a product of human creation. So, for example, there has been disagreement based on an ontological debate as to the meaning of 'air' that has significance consequences for whether climate change can be combated within the terms of clean air legislation.

In the case of the death penalty, Mitt Romney has recently proposed using scientific evidence to impose the death penalty in cases where there is, scientifically speaking, 'no doubt' as to whether a perpetrator of a crime is guilty. Such an understanding of perfect science is deeply flawed, given both the possibility of human error, and the pressure on crime labs to put people behind bars. Finally, we may look at advances in neuroscience, which seek to use brain imaging to cast light on the nature of moral reasoning. Both these last two examples prompt a deeper set of questions around law and science. Are there risks involved when we seek to base law in an account of science that is divorced from society's normative concerns? Jasanoff ended her lecture with a plea against linearity. Rather than bowing down to graven images of science, we should instead adopt a view of science which is bound to an account of the kind of world we want to live in and the sorts of people we think we ought to be.

This greatly complicates any prospect for science to serve as an unproblematic recourse for solutions to legal dilemmas. The solution lies in accepting the doubt and uncertainty in both science and the law. What made science reliable is not the invocation of nature's law, but the act of giving reasons; not because we've reached certainty, but because we remain doubtful and uncertain, and so have to provide arguments in defence of our positions. In law, as in science, strength comes not from getting the facts right, but from giving and receiving reasons. It is not certainty but doubt, both cognitive and normative, that permeates lives, and it is our attempt to cope with doubt using our limited powers of reason that keeps us enlightened and, ultimately, also human.

The Capacity of Courts to Handle Complex Cases

Dr Daniel Butt, *Fellow and Tutor in Politics*,
Oriel College, Oxford University

In his presentation, Dr Butt sought to introduce the workshop by looking at ways that the courts affect public policy, whilst also considering some other aspects of court behaviour, such as the capacity of judges and jurors to understand complex evidence in criminal trials. He drew attention to two trends of the last fifty years or so, which are frequently commented upon by political scientists.

The first of these relates to the increasing complexity of modern-day policymaking. The business of government has become more and more difficult and complicated, for a wide range of reasons: the expanded role of the state following the welfare reforms of the twentieth century, whereby the state accepted responsibility for providing some minimal level of welfare in many democratic polities; the complicated nature of the international economy; the development of scientific understanding in a range of areas, from healthcare to the environment, and so on. The second trend relates to a rise in judicial power, whereby judges are both playing an expanded role in the policymaking process and, on some accounts, seeking to effect positive social transformation following what Charles Epp has called the 'rights revolution'. This rests, in Epp's view, not so much on judicial activism, whereby judges seek to wrest power from other political actors, but on the democratization of access to the courts. This increase in judicial power is a global phenomenon; while the United States was, for many years, the poster child for judicial policymaking in such policy areas as civil rights, desegregation, and reproductive rights, more recent years have seen a focus on socio-economic and cultural rights in other non-Western jurisdictions, such as in central and Eastern Europe following the fall of Communism, in India, and in South Africa, as well as at an international level.

These twin developments raise a range of issues. Some of the most obvious relate to the democratic legitimacy of courts' actions, in comparison with other political actors, but a particular line of concern has emerged relating to the competency of the courts. This reflects the idea that there is a tension between the increasing complexity of the contemporary policy environment, and the growing role of the judiciary. This begs the question of whether the courts have the capacity effectively to play the role that they have assumed in the policy process. We may identify two senses in which it is felt that the courts suffer from a lack of capacity in relation to complexity: the complexity of the subject matter under consideration, and the complexity of the political system within which they are operating. Consequently, a body of work has emerged within the political science literature, with a particular focus on the United States, which may be characterized as broadly sceptical as to the extent to which courts possess sufficient capacity to deal with complexity. One may think here of the work of Donald Horowtiz, Shep Melnick, and Gerald Rosenburg, amongst others.

There is a tension between the increasing complexity of the contemporary policy environment, and the growing role of the judiciary

The first concern relates to the complexity of the material that comes before the courts. In a nutshell, the worry is that those who make the decisions in courts, be they judges or jurors, are not experts in particular policy fields. This being the case, do we have good reason to be sceptical as to their abilities properly to understand information that is presented to them, and so come to the best judgments? As Cass Sunstein has said of judges, 'while some

of them are undoubtedly superb deliberators about rights, or expert in particular areas of law, they are not trained in philosophy, political theory, or empirical analysis' (Sunstein 1996: 177). This line of critique looks at the way in which courts both obtain and process evidence from expert sources, and compares it to the resources and working practices of other political actors. So one might compare parliamentary hearings with the cross examination of witnesses and the submission of amicus curiae briefs, for example. The working assumption of many political scientists is that courts do badly in these kind of comparisons, often with legislative bodies, and in particular, with bureaucratic bodies who incorporate experts on their staff. One suggestion is that courts are generalist in nature, whereas there is greater scope for specialization in both legislative bodies, where elected representatives may, for example, serve on specialist committees for long periods of time, and in executive bodies, typically staffed by specialists.

Jasanoff's lecture made reference to this kind of scepticism as to the capacity of the law properly to understand scientific evidence, in discussing the idea that judges may operate on the basis of junk science, rather than a proper understanding of what is being presented to them. As a result, some have argued in favour of moving away from the regular courts to specialist tribunals in relation to cases which require a particular kind of expertise. Such concerns about complexity are not limited to those elements of judicial activity which affect public policy. A major controversy in British politics in recent years involved the government's plans, which were defeated in the Lords, to abolish juries in complex fraud cases, replacing the twelve-strong jury with a single judge aided by expert advisors.

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This line of critique opens up a number of questions. The first is empirical: is it indeed the case that judges and juries do lack expertise, and is it true that lacking this expertise, they make mistakes in their interpretation of complex material? If we look at the question in a comparative perspective, is it right to say that judges, for example, are generalist in nature, and lack expertise in relation to particular policy areas? One case, examined in a previous FLJS workshop on Adjudicating Socio-Economic Rights, involved the 'Homeless Families with Children' litigation in New York, whereby a single judge had been presiding over a single ongoing case in relation to housing provision for over twenty years, and it was widely accepted that she was the expert in the relevant policy field (Clary 2008). Clearly this is a particular case, but it is not the only instance in which participants of previous workshops have expressed doubts as to whether we should see courts as inferior in their capacity to gather and process information, in particular when they are compared to legislatures.

In order to conduct a meaningful comparison of the relative abilities of the judiciary and the legislature in this matter, one must look at the different resources available to both – not just the formal institutional resources, but the resources of all the parties involved, including major law firms – and at the differing amounts of time that are given to litigation and to legislation. Is it clear that legislative scrutiny of complicated material is superior to that of the judiciary? An interesting double-edged example is the Supreme Court decision in *Gonzalez v. Carhart* in 2007 on the Partial Birth Abortions Act. The dissent to this opinion damns the majority opinion for accepting Congressional scientific findings at face value following a one-sided investigation, whereas trial courts had heard weeks of evidence from medical experts (Resnik 2008).

One question, then, is what do the courts do in practice: are they good at processing complex material? The question can be phrased in a relative fashion, to ascertain whether they are better than other bodies, be they legislatures, specialist bureaucratic bodies, or alternative judicial bodies, which might replace them in the policymaking process. We should also ask whether failings of

courts in these areas are inevitable, or whether there are institutional reforms we can carry out to help judges and/or juries to process information. Evidently, the comparative perspective here is helpful, both between different policy areas, and between different jurisdictions.

The second critique looks not so much at the complexity of the subject matter before the courts, as at the complexity of the policy context in which they operate. This feeds into an often stated scepticism as to the ability of courts to effect social reform, based on the belief that, even when they know themselves what they want to do, they may fail to achieve their own stated aims. As Sunstein argues:

> *An important reason for judicial incapacity is that courts must decide on the legitimacy of rules that are aspects of complex systems. In invalidating or changing a single rule, courts may not do what they seek to do. They may produce unfortunate systemic effects, with unanticipated bad consequences that are not visible to them at the time of decision, and that may be impossible for them to correct after. Legislatures are in a much better position on this score.* (Sunstein 1996: 45)

Sunstein uses the example of judicial attempts to reform landlord–tenant law. In some cases, moves to improve the quality of housing may result in higher rents, to the detriment of poor tenants. He notes that the context of litigation means that judges see only small parts of complex wholes. Although a particular rights claim that comes before them may, on its own, seem compelling, they are unlikely to be able to comprehend the systemic effects or collateral consequences of changes that they make to existing policies. Again, it may well be argued that legislatures or bureaucracies are better placed to anticipate the effects of their decisions. The conclusion is that courts should be cautious and modest in their interventions in the policy arena, and seek to embody the virtues of incrementalism in their decision making. Drawing on such thoughts, we might categorize mild, moderate, and major scepticism as to the courts' capacity:

- *Mild skepticism:* courts should not compete for power with other political actors who are better placed to make policy, but may be the best/only available option in the face of legislative and/or executive withdrawal.
- *Moderate scepticism:* courts are unlikely to be able to effect policy change since they lack implementation powers.
- *Major scepticism:* courts should refrain from engagement with policymaking, since their actions are likely to have negative effects.

So moderate sceptics might doubt that courts will do any good (see, for example, Rosenburg's claim that a decade after *Brown*, less than 2 per cent of black children in the South were attending desegregated schools), whereas major sceptics might argue that judicial intervention can suppress activism and undermine the legitimacy of the courts (as has been argued, for example, in relation to *Roe v. Wade*). Drawing these sorts of conclusions from complexity is more straightforwardly controversial. Again, aspects of this can be challenged in similar fashion to the earlier critique: is it in fact the case that judges are worse at anticipating the effects of their actions on complex systems than other political actors? Are they indeed limited in terms of the extent to which they can engage in programmatic social reform, or does the Sunstein perspective understate their efficacy, with regards to their ability to determine which cases to grant certiorari to, to signal to litigants, and so on? Do their actions in fact have the kind of systemic effects that critics allege? Is it better to have policy being led from the centre, or might there be something to be said for the decentralized, multi-faceted character of social change by litigation, whereby multiple law suits work their work up the court system?

One interesting argument that a number of writers have made in recent years is that the system of what is sometimes referred to as 'adversarial legalism' in the United States, where the courts play a major role in policy implementation and dispute resolution through adversarial legal conflict, and which has been criticized by writers such as Robert

Kagan, is analogous to a market, and so brings with it the kind of 'invisible hand' benefits that markets can provide. Such an approach was defended recently by Frank Cross, in his article, 'America the Adversarial'. Comparing the United States to Europe, Cross defends adversarial legalism as a 'populist libertarian' approach to the law, which allows inefficient or obsolete legal rules to be reversed as a result of litigants' market incentives. He argues that the use of juries:

> *allows the law to track changes in society with an efficiency that cannot be achieved by asking legislatures to rewrite laws every few months, or even by judges, who are inclined to give more deference to the legislatures than perhaps they always should.* (Cross 2003: 231)

Evidently such an approach is controversial, but it does at least suggest that there might be advantages to judicial policymaking which are not clear when we focus on particular cases, but only emerge if we adopt a system-wide perspective.

Incrementalism and Complexity

Jeff King, *Fellow and Tutor in Law*, Balliol College, Oxford University

In his paper, Jeff King examined the use of judicial incrementalism as a response to complexity, with particular relation to the development of legally enforceable social rights. King's discussion concerned the role of the courts in relation to a particular kind of social complexity. He drew upon Lon Fuller's concept of polycentricity, derived from the libertarian thinker Michael Polanyi, which describes the complexity of modern-day societies in terms of 'many-centred' contexts characterized by networks of interlocking related interests. For Fuller, polycentricity should be managed by careful adjudication, since in polycentric contexts, where it is unclear how a decision will affect other related parties, courts reach the outer levels of their expertise. Ultimately, this is a matter of degree. The more polycentric a case, the more caution should be deployed in passing judgment.

The problems posed by polycentricism are acknowledged in administrative theory. Herbert Simon's work showed that administrators operate under 'bounded rationality', whereby they 'satisfice' rather than 'optimize' and stop searching for alternative policies once they reach a particular goal. In a 1959 article, 'The Science of Muddling Through', Charles Lindblom contrasted two models of decision making. The first is the 'rational comprehensive' model, whereby there is a legislative process of the clarification of values and goals, and a bureaucratic process of selecting the means to achieve these goals. In the 'successive limited comparison' model, these two processes are not separated but closely intertwined, with the result that means-end analysis is limited, as one may have to alter one's values in the light of empirical reality. Decision making may therefore take place by means of 'disjointed incrementalism', based on a series of trial and error. Even if one favours the latter approach, one need not always argue in favour of incremental decision making depending on the particular context in question; for instance, the best way to get people off a ship will rather depend on whether or not the ship is sinking. But there are good reasons to think that incrementalism in policymaking represents the most appropriate response to the problems of complexity raised by polycentrism.

There are good reasons to think that incrementalism in policymaking represents the most appropriate response to the problems of complexity

How, then, should we view incrementalism in a judicial context? King argued that legal incrementalism is different from political incrementalism, as it arises in different contexts. Rather than being a question of whether an official acts or not, judges typically restrain the decisions of other actors. The courts are one institution among others responsible for the protection and provision of social rights. Courts operate in inter-institutional collaboration with others, and should view their role in the provision of social rights as one of partnership, which would undercut the question of whether the courts or the legislature are the more appropriate actor in the provision of social rights. King referred here to Leslie Green's remarks on the 'gin *and* tonic fallacy', which shows that whilst gin may taste better than tonic, this does not mean that it tastes better than gin and tonic. Judicial decisions in relation to social economic rights should be justifiable with reference to democratic legitimacy, polycentricity, expertise, and flexibility.

One may look here at Cass Sunstein's injunction that courts should rule in a 'narrow and shallow' fashion, in order to avoid decision costs and error costs.

King outlined a number of different techniques of incrementalism that courts may employ when making decisions. The first is particularization, whereby courts reduce complexity by particularizing on the specific cases they are considering. They may employ analogical reasoning, focus on procedural rights, and utilize vague legal standards, as reflected in terms such as 'reasonableness', 'all deliberate speed', 'due diligence', and 'good faith'. Courts can and should be open to revisiting previous issues, and may be said to have both a right and a duty to do so. Finally, they should typically prefer both non-constitutional and non-intrusive remedies. Applying such techniques in welfare cases will tend to prevent the creation of macro-level distortions.

This is not to say that incrementalism is always the right approach to take. It is primarily intended for when judges have to deal with uncertainty, and so not, for example, for circumstances where a statute or constitutional right has clearly been violated. But rulings which depart from the incremental approach should be narrow in character. Incrementalism does not tell judges how to weigh complex evidence in individual cases, and is not a complete theory of welfare rights adjudication. But it does provide a reliable basic methodology for dealing with social rights, and so is a good default rule. It follows, however, that it will not always be the right approach. As such, the incremental agenda is revisable, and so if it fails, it can be discarded.

Civil Juries and Commercial Complexity

Tim Cameron, *Partner*, Cravath, Swaine & Moore LLP

Tim Cameron's presentation examined a particular response to the problem of complexity, by looking at the capacity and competence of civil juries to deal with commercial litigation in the United States. The central question was whether civil juries in US federal courts were capable of deciding increasingly complex legal claims, in relation to, for example, anti-trust cases, and increasingly complex technological issues, in relation to issues such as patent protection and product liability claims. Despite scepticism as to the extent to which laypeople would be able properly to comprehend complex legal issues, civil juries have not been as deficient as might have been thought. Such cases typically involve the production of millions of pages of documents, thousands of trial exhibits, and numerous witnesses, in person or on tape, many of whom give evidence in foreign languages. Jurors may be confronted with six months of factual evidence, and often do not receive instruction until after closing statements. Nonetheless, the bar for jury membership is set low, so that what results is a genuine cross section of the community.

The case against the use of civil juries is relatively straightforward. It is sometimes suggested that jurors are too easily influenced by experts, or too readily accept statistical evidence as fact. It has been claimed that jurors do not understand technical evidence and jargon, that they lack knowledge of sophisticated principles of economics and modern causation theory. The 1978 antitrust case *ILC Peripherals Leasing Corporation v. IBM* is often cited in this regard: the jury deliberated to deadlock after a five-month trial, with the jury foreman commenting, 'If you can find a jury that's both a computer technician, a lawyer, and an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that' (Kassin and Wrightsman 1988: 125).

It has been suggested that multiparty claims are confusing to juries. Concerns have been raised regarding the length of trials, which may have a bearing on jurors' abilities to recall evidence, as well as causing resentment at the length of proceedings, which may make it difficult to keep the original jury in place. It has been claimed that jurors are more likely to give excessive weight to morality and emotion and so, for example, award higher damages than are strictly appropriate in order to send a certain signal. It has also been suggested that laypersons adopt a different attitude to risk than experts, in that they are much more risk-averse.

Jurors are more likely to give excessive weight to morality and emotion and so award higher damages than are strictly appropriate

In defence of civil juries, we may observe that they are fundamentally consistent with democratic principles, since the US system of justice reflects societal interests, and stands against special interests. Jurors take their role seriously in deliberating and adjudicating, and whilst they may bring perspectives from their own lives, many of these perspectives are balanced out during deliberation, so that more extreme views are either taken off the table or influenced by the moderates seeking unanimity. There is not much empirical evidence on the general competence of juries. Research from the University of Chicago Law School Jury Product found, however, that disagreement between judges and jurors occurred independently of the judge's judgment as to the difficulty of the evidence before the court. Other research seems to indicate that jurors in lengthy trials typically feel that they can understand the evidence which has been presented to them.

What alternatives are there to civil juries? One would be adjudication by judges alone, another would see the development of professional juries for certain types of cases, a third would raise the educational level necessary to qualify for jury service. Cameron sought to draw a tension between the claim that those responsible for deciding an issue should be knowledgeable in relation to its subject matter, and the essentially democratic nature of the jury. Lay jurors may look beyond the legalese of a case, and draw on their personal experience, and it is quite possible that this approach is better suited to reaching good decisions. In considering the use of civil juries, it is necessary to examine not only the abilities of jury members to understand, but also the ability of advocates and members of the law to present in a way which facilitates comprehension. A number of concrete proposals which could be considered to assist juries were discussed, ranging from the use of pre-trial conferences to the facilitation of note-taking by jurors as they are presented with evidence.

Comparative Risk Regulation and the Courts

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Dr Fisher's paper was concerned with the role of the courts in relation to technological risk. The role of the courts in relation to the regulation of environmental and health risks arising from human activity, through, for example, standard setting and licensing decisions in environmental protection, food safety, worker safety, and so on, raises a number of problems. The contexts in which the courts operate are controversial, uncertain, polycentric, and ongoing, and so raise issues relating to judicial capacity. The issues in question are primarily administrative in nature. Thus, insofar as the role of the courts is controversial, the issue in question relates to the quality of their decision making, rather than to its democratic character.

The courts have become involved in reviewing administrative decision making through two mechanisms. The first is the familiar form of judicial review, whereby courts review the legality of decision making in order to determine whether a decision maker has exceeded the terms of its delegated power. In addition, in some jurisdictions courts have been empowered to carry out full merits review of particular decisions, with the power to remake the decision if it holds the original decision to be deficient, 'standing in the shoes' of the primary decision maker.

The role of the courts in this area has been deeply controversial, and there is significant variation amongst different legal cultures in dealing with such matters. When particular technological risks are uncertain and controversial, and when there is disagreement as to the proper role of public administration, the question of what constitutes 'reasonable action' becomes contested. A range of different bodies, including ordinary and specialized courts and tribunals have tackled such issues in different jurisdictions, but all face a common criticism concerning their capacity. It is commonly presumed that capacity is a fixed and functional concept. Since the courts are supposedly concerned with law rather than science or politics, it has been argued that specialist bodies should instead be trusted with oversight of particular technical areas. However, the regulation of technological risk is not solely a scientific manner.

Fisher argued that there is a need to deconstruct the idea of 'capacity', and see it as a malleable concept which varies between legal cultures and which is profoundly influenced by discourses over institutional and constitutional competence. The Oxford English Dictionary defines capacity as 'mental or intellectual receiving power; ability to grasp or take in impressions, ideas, knowledge... the quality or condition of admitting or being open to action or treatment; capability, possibility'. If this definition is applied to the courts, two particular senses of capacity become apparent, namely institutional capacity and constitutional capacity.

In some jurisdictions courts have been empowered to carry out full merits review of particular decisions, 'standing in the shoes' of the primary decision maker.

The first of these, institutional capacity, relates to the ability of the courts. It is often suggested that courts lack expertise in relation to complicated scientific policy matters. Expertise can be viewed in two different ways, which may be described as contributory expertise and interactional expertise. Courts clearly do possess a particular type of expertise in relation to legal issues, and, as

legal institutions themselves, contribute to the development of law. They are not expected to be experts in this contributory sense in relation to science; rather, the issue is whether they are properly able to consider the evidence presented to them by engaging with other disciplines, without contributing to the discipline themselves. So interactional expertise is necessary if courts are to have contributory capacity in developing the law. Thus, for example, specialist environmental courts operate within legislative frameworks that regulate both contributory and interactional expertise so courts have the institutional capacity to review and remake decisions. Their interactional capacity is enhanced by the expertise of specialist judges and/or by their particular hearing and evidentiary procedures, and this allows them to contribute to the development of environmental law.

Constitutional expertise is linked to the power, rather than the ability, of the courts. It concerns the legal context within which the court operates, and the nature of the powers which are afforded to it within the constitutional order. The power of a court will thus vary according to different jurisdiction's particular constitutional provisions, which are themselves often subject to challenge and interpretation. Furthermore, a court's constitutional capacity is directly linked to the constitutional capacity of the particular body which it is overseeing. Both institutional and constitutional capacity, therefore, are malleable, in that they vary with legal and constitutional culture.

Fisher illustrated this malleability by describing the rather different understandings of the role and nature of public administration evinced by two judges of the District of Columbia Circuit of the US Federal Court of Appeals, Judges Leventhal and Bazelon, in the 1970s. Both judges believed that the role of the courts in judicial review was to ensure that those engaged in technological risk standard-setting took a 'hard look' at the issue before them, but each understood 'hard look' rather differently. Leventhal saw technological risk regulators as expert fact finders and argued that the court's role was to ensure that there was a firm factual basis for decision making, and that decision makers pursued a rigorous methodology. Bazelon understood the court's role in terms of an ongoing deliberative process, and so saw the purpose of judicial review as the ventilation of relevant issues, in order to resolve complex issues through a confrontation between opposing scientific and technological viewpoints. Thus, for Leventhal the interactional expertise of the court hung upon its understanding of methodology and quantification, and placed a heavy emphasis on evidence; whereas Bazelon understood risk regulatory problems as messy and complex, and placed less emphasis on the presentation of evidence.

In conclusion, the capacity of courts in relation to reviewing technological risk standard-making is more complex than much of the current debate tends to assume, and is not susceptible to easy solutions. Questions of capacity involve institutional capacity (both contributory and interactional expertise) and constitutional capacity, underlining the importance of administrative constitutionalism. We therefore need to be mindful to specify the particular type of capacity with which we are concerned when we look at judicial capacity in such contexts, and understand that a given institution's capacity will depend upon its context, both in terms of institutional and constitutional capacities, and the particular legal context in which it is situated.

Courts, Complexity, and Health Care

Professor Johnathan Montgomery, *Professor of Health Care Law,* University of Southampton

Professor Montgomery's presentation was concerned with the way in which courts handle complexity in relation to health care. He began by noting the existence of three main types of complexity: technical, political, and moral. All three of these overlap. Cases relating to health care often involve competing narratives, which may draw upon one or more particular type of complexity. Different explanations of what a particular case is concerned with are sometimes given by different judicial bodies. An example of this was the 1995 case of Jaymee Bowen, which gained significant media attention in a context of medical rationing. In the High Court, the case was presented as turning on the proper interpretation of the right to life in a context of scarce resources. In the Court of Appeals, however, the case was explained in terms of whose responsibility it was to make decisions relating to experimental treatment. Outcomes are thus largely determined by which narrative is adopted.

Courts have utilized a number of avoidance strategies when faced with complexity. One technique is that of 'incorporation', whereby courts draw in normative standards from elsewhere. So, for example, in the 1993 case of Hillsborough victim Tony Bland, the court drew upon a consensus within the medical profession on how to treat people in permanent vegetative states. Montgomery used the concept of 'anti-nomianism' to describe the judicial avoidance strategy of abdicating responsibility by accepting peer review standard evidence from doctors, in so doing, requiring that professionals air their reasoning, but then not challenging the reasoning itself. This is not a strategy of denying the presence of complexity or of denying the importance of the matters under consideration, but rather represents a claim of confidence in the quality of the medical profession. Judges have a deferential and confident belief in the professionalism of doctors, and so believe their stance is justified by epistemological and evaluative conceptions of professionalism. They feel not only that they may not *understand* technical evidence, but are deferential in terms of how they *interpret* technical evidence.

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Two further avoidance strategies are concerned with determinacy, in that they involve issues on which it is not possible to say that there is a single right answer for the courts to find. One approach is to appeal to 'proceduralism', whereby courts specify a process that should be followed, but do not say what the outcome should be, as has been seen in cases relating to the sterilization of women who are not able to decide the issue for themselves. Finally, we may look at the courts' application of 'legalism', whereby judges seek to constrain their decision making strictly within the letter of the law. English courts, for example, have been very reluctant to develop sets of rules on informed consent, relying on National Health Service guidance as to what should happen. It was suggested that this was a sensible position for English courts, as they can plausibly point to where soft law can be found. The conclusion which should be drawn from these strategies is not entirely clear. Are we saying that doctors have an adjudicative role? Are we saying they have a discretionary role, but that we care how they exercise their discretion? Or are we effectively saying that we do not mind how they fulfill their function? The overall conclusion was that courts try extremely hard to leave complexity to others rather than resolving issues themselves.

Education and the Courts

David Sciarra, *Executive Director,* Education Law Center

David Sciarra's remarks concerned the role of the courts in advancing socio-economic rights for children, and especially poor children, in relation to systemic problems in the delivery of public education. The central issue under consideration is the existence of serious inequities in access to education. In the United States, this has led to challenges to state laws for funding schools. *The Abbott v. Burke* decisions in New Jersey led to numerous decisions by the Supreme Court in terms of directing, upholding, and enforcing judicial remedies in relation to public education. Disparities in the quality of public education available in the United States have led in some areas to the development of two school systems. Demographic patterns in relation to residential housing lead to a two-tier provision of very high-quality schools alongside those which are less desirable. Such educational inequalities are strongly correlated to poverty and race. The issue manifests itself in a variety of ways, such that, whereas it is largely an urban phenomenon in some states, it is more of a rural problem in the South and Midwest.

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There is no right to education in the US Constitution, although such a right does exist in Israel and South Africa. This point was challenged in the 1973 case *San Antonio Independent School District v. Rodriguez*, which brought a challenge to deep inequalities in the Texan system of funding schools under the equal protection clause, but which was rejected by the Supreme Court in a 5–4 ruling. Although the courts have been involved in racial desegregation in the past, the federal courts are now largely out of the business of dealing with *de jure* desegregation. The disengagement approach can also be seen by the Court's willingness to uphold voucher systems which provide public money for religious and private schools, as in *Zelman v. Simmons-Harris* (2002).

The right to education is included in all fifty state constitutions. The general standard relates to a 'thorough and efficient' system of education that states are responsible for funding, generally by means of property taxes. As a result, post-Second World War housing patterns mean that some communities struggle to fund their schools. The system ensures that schools with the greatest need get the least resources, with predictable consequences for educational outcomes. The result is a political problem. It is very hard to get the legislative and executive branches to respond, and in the face of legislative retreat, the courts enter the picture.

The last forty years have seen litigation in most states, presenting challenges to state funding systems. The plaintiffs in such cases have been successful in two-thirds of the cases they have brought. This has not been restricted to 'blue' states – there has, for example, been litigation in Alaska and South Carolina – and litigation has been popular in the West, where it has tapped into a populist tradition willing to stand up to the other branches. Such cases involve a good deal of complexity, in relation, for instance, to how schools are funded and resources distributed. Generally, it appears that courts have handled complexity well, showing a willingness to define the right to education in terms of modern educational needs, rather than adopting a literalist approach. The courts in New Jersey, for example, have defined an adequate education in terms of an ability to compete with others. States are now beginning to set curriculum standards

and assessment systems to determine if states are living up to the standards which they have set.

The courts have had no problem either in declaring state funding laws unconstitutional or in directing other branches to devise remedies. The usual response is for the legislature to put more money into the system, usually from state tax revenues. Although this has created a degree of more equity, it has not led to a fundamental overhaul of the system.

Once the courts have made such a declaration, they are well advised to revisit the issue, and in a series of cases, courts have stayed engaged by scrutinizing the remedy in question, devising an interesting series of creative mechanisms to keep other branches in check, such as retaining jurisdiction, and appointing special judges to examine the nature of a given state's response. Some, indeed, have accused courts of overstepping their bounds, going so far as to order schools to be closed until legislatures come up with appropriate funding schemes. A minority view in some states holds that the courts have no business intervening in policy areas such as education, which are best left to the other branches. The key variable here is the legal culture of the particular state in question, which in turn is closely related to the issue of whether judges are elected or appointed. Sciarra concluded by observing that litigation cannot fully resolve education policy on its own. Judgments always go back to the elected branches, and so they have to be seen within the context of a broader political movement in opposition to certain kinds of educational deficiencies.

Discussion and Criticism

The arguments presented during the course of the workshop showcased a range of different responses to the issue of complexity. There was extensive discussion of both the complex subject matter of much contemporary judicial reasoning in a number of rather different policy areas, and of the complexity of the modern-day social contexts within which courts act, as evidenced by Jeff King's discussion of polycentricity, a theme that was addressed by a number of participants.

Are there reasons based in democratic accountability for ensuring a lay presence, rather than handing over scrutiny of a given policy area exclusively to a select group of experts?

The most obvious lesson to be drawn from the discussion is that generalizing about judicial capacity across either different policy areas or across different jurisdictions is very difficult and is unlikely to provide much insight into judicial functioning. Liz Fisher's paper makes clear the extent to which the capacities of different judicial bodies will depend critically upon the particular institutional and cultural context within which they operate. This is an important conclusion, since it means that one cannot take a given instance of either apparent judicial success (or failure) and conclude that it constitutes good evidence of how judicial bodies are able (or unable) to deal with complexity in general. Sheila Jasanoff suggested that the term, 'complexity' may have been called on in the discussion to do too much work. In medical cases, for example, there is a 'high signal-to-noise ratio' type of complexity, which makes trying to discover individualized causation in a particular case extremely difficult. Such factors simply need not be present to the same degree in other policy contexts. To look at the financial, environmental, and medical worlds together, then, is to miss something of the fact–value distinction that judges have to make in particularized contexts.

Complexity, then, is complex. First, it should be noted that it is inappropriate to focus too closely on a narrow definition of 'courts'. When it comes to thinking about how judicial bodies deal with complexity, we are confronted with a wide range of different decision-making bodies, including regulatory bodies, ombudsmen, and various types of tribunals. Much of the literature on courts and the public policy process assumes a particular, characteristically American image of a regular court, but there are a range of options available to those who would seek to assign functions and powers to judicial bodies.

This is not necessarily to say that there is a need to move away from ordinarily constituted courts to specialized bodies. Tim Cameron, for example, presented an optimistic view of the ability of lay juries in particular cases, and the views of Frank Cross cited in Daniel Butt's paper argued that lay juries collectively may reach better outcomes than specialized bodies, as are more usually found in some European countries.

Two primary questions arise when we try to decide on a form of judicial institution. The first concerns the quality of judicial outputs: which type of bodies are likely to reach better decisions? The second concerns the legitimacy of different institutions: are there reasons based in democratic accountability for ensuring a lay presence, rather than handing over scrutiny of a given policy area exclusively to a select group of experts? These questions evidently overlap, particularly in cases where it is not clear that there are right and wrong answers, and where the quality of the judgment will depend at least in part on the extent to which it is accepted by the public in general. In such cases, a range of different jury-like

procedures, including citizen conferences, citizen juries, and public consultations, may best serve the ends of democratization.

Again, there is no reason to think that the same type of institutions will be appropriate in different policy areas, given potentially diverse cultural attitudes amongst the public, or in different jurisdictions. Epistemic cultures, for example, differ in terms of their willingness to attribute trustworthiness to the observations of experts. Thus while the courts in the United Kingdom are generally trusting of such observations, German judicial actors display more of a tilt towards faith in collective rationality. However, it was also claimed that the United Kingdom is increasingly seeing a divergence between the established culture of trusting experts through credentialism and popular distrust of experts. In such a situation, it is not clear that courts can retain their existing level of faith in the decision making of others without losing popular legitimacy. There seems little choice but to examine a particular policy area in its individualized context and draw up principles and institutions accordingly.

A number of participants endorsed, to a greater or lesser extent, the incremental approach to judicial decision making argued for by Jeff King. It was even suggested that the position may not be as controversial as at first thought, if we accept that incrementalism is in fact the default mode by which courts operate, given the role of precedent in their operations, even though this is not commonly recognized. Others, however, contended that the position is best seen in opposition to the type of judicial activism which, it might be thought, is endorsed to some extent by writers such as Ronald Dworkin. The incremental approach in relation to judiciaries mirrors arguments which have been made in other areas of public administration as to how political actors should seek to bring about change in political systems. The difficulty with any essentially gradualist approach, of course, is that of identifying when urgent and dramatic change is, in fact, needed. Theoretical accounts of incrementalism accept that such change might be required in some circumstances, and accept that incrementalism should sometimes be abandoned, but how are we to know when we face such an instance? This reflects a familiar charge that is analogically made against conservatives in a more general political context: how can a political ideology that is ideologically opposed to sudden change cope with the fact that we believe that some societies in the past have made terrible mistakes about questions of right and wrong, and should have acted in a thoroughly non-incremental way to halt serious injustice? One might cite here the striking thoughts of American conservative Ross Douthat, who recently accepted that conservatism, and by association incrementalism, generated the wrong response to the phenomenon of segregation in the United States in the 1950s:

> *I think there's something to be said for simply conceding that support for segregation – as deep-rooted and 'conservative' an institution as has ever existed in America, in a sense – simply was the conservative position in the 1950s, and that the liberals were right that the injustice of the practice required a deeply un-conservative response, as they have been right (and will be right again) on other points as well.* (Douthat 2008)

Of course, as King argues, there are good reasons to think that incrementalism is appropriate for judiciaries in particular, and this need not commit one to a conservative perspective on other political institutions, such as legislatures. So the question becomes one of knowing when courts specifically should be prepared to act in a non-incremental fashion. Is it sufficient, for example, for there to be a grave injustice to be addressed (if, for example, particular individuals' vital interests are in some way threatened), or might it be that even in these circumstances there are good reasons to behave in an incremental fashion? A useful test case here might be provided by the Supreme Court's decision in the 1955 follow-up ruling to the Brown judgment, *Brown v. Board of Education of Topeka (II)*, in which it ruled that district courts should carry out desegregation, 'with all deliberate speed'. This has long been seen as a controversial judgment by many

of those who supported the Court's ruling in the first *Brown* judgment. For some, it represented lamentable backsliding by the Court; for others, it was a sensible rationalization of the Court's lack of powers of enforcement. Incrementalists seemingly must be prepared either to defend the *Brown II* ruling, or to explain how the resources of incrementalism would have led to a more radical policy at the time. Nonetheless, it does seem as if, in most jurisdictions, incrementalism appears to be the norm rather than the exception. We might ask how common the maximizing, as opposed to the satisficing, strategy really is in practice; one participant observed that, from an American perspective, social rights litigators would be delighted to get incrementalism from the courts, but they often fall short even of this.

Finally, we might ask whether the wealth of experience of different jurisdictions on display during the workshop could lead to any proposals for institutional reform in order better to equip the courts to deal with complexity. It was suggested, for example, that those who advocated an incremental approach to judicial decision making might favour the idea that principles of interpretation could be written into the Constitution so as positively to promote incrementalism. There was also some discussion of ways in which, for example, rules of evidence limit the expertise that comes before the court, by affecting the flow of information. Judicial actors face the question not just of what is presented in court, but also the way in which it is presented. It was also suggested that there was a need for more research on practical tools that courts can use in their deliberations, as well as a need for the courts to be better informed regarding the devices available to them to help them to engage in incrementalism.

Both Jasanoff's lecture and the subsequent workshop were extremely stimulating occasions, which have contributed significantly to the work of the FLJS programme on 'Courts and the Making of Public Policy'. The Foundation is deeply grateful to all those who helped to make the workshop a truly memorable experience.

References

Clary, R. (2008) 'The "Homeless Families with Children Litigation"', FLJS Policy Brief, available at: ‹http://www.fljs.org/uploads/documents/Clary.pdf›.

Cross, F. (2003) 'America the Adversarial', *Virginia Law Review*, 89.

Douthat, R. (2008) 'Notes Toward a Definition of Conservatism', *The Atlantic*, 11 June 2008. Available at: ‹http://rossdouthat.theatlantic.com/archives/2008/06/notes_toward_a_definition_of_c.php›. Last accessed 18 March 2009.

Kassin, S. M. and Wrightsman, L. S. (1988) *The American Jury on Trial*. Oxford: Taylor & Francis.

Resnik, J. (2008) 'Courts and Democracy: The Production and Reproduction of Constitutional Conflict', FLJS Policy Brief, available at: ‹http://www.fljs.org/uploads/documents/Resnik.pdf›.

Sunstein, C. R. (1996) *Legal Reasoning and Political Conflict*. New York: Oxford University Press.

Cases cited

Abbott v. Burke, 153 N.J. 480 (1998)

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

Brown v. Board of Education of Topeka (II), 349 U.S. 294 (1955)

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)

Gonzales v. Carhart, 127 S. Ct. 1610 (2007)

ILC Peripherals Leasing Corp. *v. IBM*, 458 F. Supp. 423 (ND Cal. 1978)

Roe v. Wade, 410 U.S. 113 (1973)

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)

Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

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