Pragmatic Tools for Pragmatic Lawyers: Assessing Stakeholder Salience for Deliberative Problem-Solving

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Legal scholarship advancing deliberative tactics to solve problems in public interest law frequently recommend engagement with stakeholders to affect outcomes. However, “stakeholder” is a slippery term, with little clear guidance for a practicing lawyer to assess who might be a stakeholder, or which ones matter. This note proposes that public interest lawyers adopt frameworks developed in the corporate social responsibility movement to assess and prioritize stakeholders relevant to their practices.
Who are the constituents with which a public interest lawyer need be concerned, how are they to be assessed and prioritized? Legal scholars acknowledge the tensions attorneys face in responding to multiple interests, with particular concern for the potential for conflict between represented litigants and financial contributors supporting the effort.  

1 The ABA Model Rules of Professional Conduct sorts this conflict in favor of the client, but leaves some discretion to the attorney to determine how best to pursue the client’s objectives. This tenuous compromise addresses situations commonly found in traditional public interest litigation, what Simon refers to as “Legal Liberalism.” However,

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2 The ABA Model Rules asserts the primacy of the client in the attorney-client relationship:

Subject to [certain restrictions], a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.


3 The comment to ABA Rule 1.2 states:

Paragraph (a) [of Rule 1.2] confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. …[¶]…On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved.


4 Simon describes Legal Liberalism as follows:

There is no canonical definition of Legal Liberalism, but we know it when we see it. Its tacit indicia include predispositions in favor of plaintiffs in tort and civil rights cases, defendants in criminal cases, consumers in commercial cases, and workers in employment cases. Its explicit elements include the positions and ideas conventionally associated with the Warren Court, the ACLU, the NAACP Legal Defense Fund, Ralph
how does the Model Rule hold up in situations with multiple constituencies?

Simon suggests a model of “Legal Pragmatism” as an alternative to Legal Liberalism, where lawyers act as problem-solvers. Simon’s pragmatic lawyer is not only concerned with their own clients interests, but also the interests of others involved in the controversy. A pragmatist lawyer “does not ignore conflicting interests or value dissensus” but rather approaches situations with a belief that they are “likely to involve shared as well as conflicting interests and values,” and that “it is often a mistake to try to determine \textit{in advance} of the dispute resolution process which types of values and interests predominate.”

Simon assumes some “core operating premises” as central to Legal Pragmatist problem solving, including negotiation amongst stakeholders, use of flexible processes dubbed “rolling rule regimes,” and the open sharing of information, transparency. Of these premises, that of stakeholder negotiation leaves some room for question about what Simon means exactly. Simon defines the effectiveness of stakeholder negotiation as requiring “central public institutions supporting and channeling a decentralized deliberative process;” and divides discussion between “Deliberations” which analyzes the actual mechanics of negotiations, and “Background Institutions” which asserts the need for an institutional framework within which negotiations can take place.

The concept of deliberation described by Simon is positive and uplifting: the word “connotes openness and reason giving” and posits that “[t]he goal of negotiation is consensus, or voluntary agreement by all stakeholders on the basis of a shared normative understanding.” This view of stakeholder negotiation seems a bit Pollyanna-ish, and Simon acknowledges that it is naïve to presume that such a goal is often realized. Instead, he suggests that the “consensus ideal … plays an important heuristic role,” that it is through the “[s]triving for consensus” that creates an atmosphere of mutual respect and challenges parties to find win-win solutions.

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Nader, and the legal aid and public defender movements.”


5 \textit{Id.} at 177.

6 \textit{Id.} at 179 (emphasis in original).

7 \textit{Id.} at 181.

8 \textit{Id.}

9 \textit{Id.} at 181-4.

10 \textit{Id.} at 184-6.

11 \textit{Id.} at 181.

12 \textit{Id.} at 182 (emphasis in original).
Well, maybe. But still the problem of constituent definition remains – nowhere does Simon define who exactly is a stakeholder, or how stakeholders’ differing concerns may affect this ideal of collective striving for consensus. For a pragmatic lawyer to have much hope for success in navigating the deliberative process, she would be well advised to anticipate where fellow stakeholders’ values and interests diverge from the deliberative ideal envisaged by Simon. To do so, first the pragmatic lawyer would need to consider what a stakeholder is. While the term “stakeholder” occurs frequently in academic legal scholarship, scholars rarely define the term and its meaning often appears to be taken for granted.13

Several definitions exist to interpret who or what a stakeholder may be. Legally, a stakeholder is the party to an interpleader action who is holding the item in dispute, or the “stake.”14 Black’s Law Dictionary corroborates this definition in two of its three listings for “stakeholder,” but also refers to a stakeholder as a “person who has an interest or concern in a business or enterprise, though not necessarily as an owner.”15 Common definitions of the term “stakeholder” may also help in understanding its use;16 Webster’s Dictionary likewise first defines a stakeholder as “one who holds money bet by others and pays it to the winner,” but also offers the interpretation of “a person or group having a stake, or interest, in the success of an enterprise, business, movement, etc.”17 The second definition has most traction when considering Simon’s use of the term.

13 The author of this note conducted several Westlaw “Journals and Law Reviews” (JLR) database searches in support of this premise. A simple search on the term “stakeholder” resulted in over 10,000 results, refined to include wildcard variations of “define” in the same paragraph narrowed the results to 1,450, further refined to the same sentence narrowed results to 629. A cursory review of highlighted search terms within results suggests that fewer than 15% define “stakeholder” itself in any way, less than half of those define the term outside of the particular context of the article. This is admittedly a rough estimation for the purpose of this paper; further empirical sampling may be useful for future work in this area.


16 Relying on common dictionary definitions is consistent with textualist approaches increasingly favored by several sitting Supreme Court justices. The use of the term “stakeholder” here does not rely on legislative or statutory use of the term, however, to the extent that statutory language may use the term without definition this analysis may be a propos. See Ellen P. Aprill, The Law of the Word: Dictionary Shopping on the Supreme Court, 30 ARIZ. ST. L.J. 275; see also Lawrence M. Solan, The New Textualists’ New Text, 38 LOY. L.A. L. REV. 2027, 2053, Dec. 2005 (announcing another pragmatic standard: “[w]here courts should look for word meaning depends upon what they are looking for”).

This notion of a stakeholder as relating to a business or enterprise has roots in management research in the 1960s, which considered that corporations may need to be responsive to groups besides stockholders “without whose support the organization would cease to exist.”

Interest in this stakeholder theory of the firm flourished and developed into a burgeoning field of scholarship within the management disciplines, including corporate planning, systems theory, corporate social responsibility (CSR), and organizational theory. The concept is not without debate - critics have suggested that a firm’s fiduciary responsibility to shareholders is its paramount obligation (subject to open competition, legal compliance, and avoidance of fraudulent behavior), and that it is up to shareholders to support social causes as they deem just. Nevertheless, the idea of stakeholder theory took hold in management strategy, largely due to changes in external conditions that rendered traditional corporate management models anachronistic. Examples of external change include the expansion of the regulatory state, increases in foreign competition, the 1960s consumer movement stimulated by Kennedy’s ‘Consumer Bill of Rights,’ the growth of environmentalism following Rachel Carson’s publication of Silent Spring, and increasing media attention to corporate activities.

In 1984, R. Edward Freeman published the seminal work that documented the development of stakeholder theory as its own discipline. Freeman states that a “stakeholder is (by definition) any group or individual who can affect or is affected by the achievement of the organization’s objectives,” and illustrates this by diagramming multiple stakeholder classifications revolving around the firm (but cautions that this is ‘enormously simplified’)

Legal scholarship has embraced Freeman’s conception of stakeholder theory within the context of corporate and securities law, but has been slow to import the model to the public interest situations that Simon contemplates.

18 Infra, note 23 at 31.
19 Id. at 31-33.
22 Id.
24 Id. at 46.
25 Id. at 55.
26 A search of the Westlaw JLR database for articles relying on Freeman’s contribution (search terms: “stakeholder” & “Edward Freeman” /3 “Strategic Management”) resulted in 33 articles, of which only three apply stakeholder theory to public interest situations (specifically:
This stakeholder theory framework evolved in the management disciplines may be helpful for pragmatic lawyers engaged in problem-solving and deliberations. As a first step, pragmatists can apply the same sort of social mapping exercise demonstrated by Freeman to identify and situate stakeholders as a means of assuring that the relevant interests are at the negotiating table. This approach helps to address one criticism Simon concedes in his assessment of the deliberative process, that of the potential lack of representativeness of negotiated agreements and whether there exists enough buy-in to achieve a meaningful resolution. While Simon relies on the involvement of background institutions such as state actors to assure an inclusive process, having devolved assessment tools at their disposal allows pragmatic lawyers to verify appropriate inclusion and provides a vital safeguard against the potential failure or capture of these

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27 Simon, supra note 4 at 879
institutions.

Just identifying who the stakeholders are, however, is insufficient to assist the legal pragmatist in “striving for consensus.”28 For complex negotiations, there may not be enough resources to support all interested parties. Pragmatic lawyers need a way to effectively evaluate and discriminate between potential parties to refine this to a manageable number. Moreover, Simon relies on the baseline good-faith reasonableness of parties to engage in constructive dialogue, and does not address cases where stakeholders may be so polarized as to not be amenable to consensus-building approaches.29 Inasmuch as different groups’ values and interests may completely oppose each other’s, a legal pragmatist faces with a dilemma of which relevant stakeholder to favor in order to pursue partial consensus and to avoid holdup.30 A means by which to track the evolution of stakeholders’ positions as negotiations progress would also assist the pragmatic lawyer in crafting potential solutions. The stakeholder approach has evolved from Freeman’s work, however, as additional contributors have added tools that managers apply to situations where the same sort of tough choices need to be made – selection of relevant stakeholders and prioritizing between them.31 These tools may be helpful for the legal pragmatist.

Freeman notes two components in his definition of a stakeholder: a) a claim, and b) the ability to affect (or be affected) by the firm.32 The first component – the claim – narrows the scope of who might be a stakeholder based on the legitimacy of the party’s interest in the situation.33 The second component – the ability to affect (or be affected) – is a broader assessment based on more pragmatic grounds and recognizes the influence the party the party wields relative to the firm.34 Between these two components lies a spectrum of potential stakeholders – claimants can be legitimate, or powerful, or some combination of the two. Managers are wise to avoid normative judgments of which end of the spectrum is preferable, whether stakeholders are justified on idealistic (legitimacy) or cynical (power) grounds is immaterial – what matters is the effect on the desired outcome of negotiations. This is a characteristic in common with pragmatic lawyers in their focus on problem-solving and mutually beneficial solution-seeking. This spectrum, however, still leaves something to be desired in

28 Supra note 12.
29 Simon, supra note 4 at 182.
31 See generally FRIEDMAN & MILES, supra note 21 at 83-117.
32 Freeman, supra note 23.
33 Id. at 45 (“‘Stakeholder’ connotes ‘legitimacy’”)
34 Id. at 46.
assessing a potential conflict, as it is difficult to determine which end of the spectrum is more relevant in a given situation.

Freeman has referred to this heuristic approach as “the principle of who or what really counts.” Building on this, Mitchell, Agle and Wood (1997) dissect his principle into a normative component (who is a stakeholder?) and a descriptive component (what counts to managers?) dubbed “salience.” While commending the normative spectrum between power and legitimacy, the authors add another dimension – “urgency” – that takes into account the immediacy and criticality of the potential stakeholder’s interest. Under this refined model, stakeholders are assessed not just on a linear spectrum between power and legitimacy, but on three axes of power, legitimacy and urgency, that more fully map the interaction of various interests. The combination of attributes systematizes the development of a typology of interests (see figure 2).

Mitchell et al advance the core proposition that “stakeholder salience will be positively related to the cumulative number of stakeholder attributes – power, legitimacy, and urgency – perceived by managers to be present.” The framework classifies interests by the presence of attributes; if only one characteristic is present, they are latent stakeholders (including “discretionary,” “dormant,” and “demanding” stakeholders), if they possess two attributes they are expectant stakeholders (including “dominant,” “dependent,” and “dangerous” stakeholders), if all three are present they are “definitive stakeholders,” and if no attributes are present, they are classified as nonstakeholders.


37 *Id.* at 854.

38 *Id.* at 872.

39 *Id.* at 874.

40 *Id.* at 873.

41 *Id.* at 872.
The authors generalize several sub-propositions in support of the typology. First, they observe, “stakeholder salience will be low where only one of the stakeholder attributes … is perceived by managers to be present.”42 Second, they offer that “salience will be moderate where two … attributes … are perceived by managers to be present.”43 Third, the authors propose “salience will be high where all three … attributes … are perceived by managers to be present.”44 This relationship lends itself to a hierarchical view, assisting managers to visualize the perceived relative priorities of stakeholder classes and their relation to one another (see figure 3).45

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42 Id. at 874.
43 Id. at 876.
44 Id. at 878.
The descriptive labels assigned by the authors signify relative positioning of groups within the categories. Managers typically dismiss nonstakeholders and latent stakeholders, allocating resources to higher priorities.46 “Dormant stakeholders” hold power, but neither exercise it nor hold any compelling claim on the firm.47 “Discretionary stakeholders” have a legitimate claim, but no influence to satisfy it and no pressing need for it to be fulfilled.48 “Demanding stakeholders,” having neither power nor legitimacy, the authors characterize as “the mosquitoes buzzing in the ears of managers: irksome but not dangerous, bothersome but not warranting more than passing management attention.”49

Expectant stakeholders, with two attributes rather than just one, command more attention from managers. Ostensibly, according to the authors, this is

46 Mitchell et al, supra note 36 at 874.
47 Id.
48 Id. at 875.
49 Id. (internal quotations omitted).
because “the combination of two attributes leads the stakeholder to an active versus a passive stance.”\textsuperscript{50} Stakeholders with urgent and legitimate claims the authors characterize as dependent stakeholders because without power they are reliant on other stakeholder or the firm for their authority.\textsuperscript{51} Those stakeholders who hold no legitimate claims but wield influence and demand attention the authors classify as “dangerous stakeholders,” cautioning that “coercive power often accompanies illegitimate status;”\textsuperscript{52} in short, dangerous stakeholders are bullies.

“Dominant stakeholders” combine power and legitimacy, the classic coalition that matters to managers.\textsuperscript{53} Without insistency, however, this group still lacks the ultimate attention from managers. When a dominant stakeholder’s claim is urgent, however, “managers have a clear and immediate mandate to attend to and give priority to that stakeholder’s claim” and the stakeholder becomes what the authors call a “definitive stakeholder.”\textsuperscript{54}

An important caveat on the use of this model is that it constructs a snapshot, stakeholder relations vis-à-vis the firm as perceived by managers change with time and circumstance.\textsuperscript{55} The implications of this change is that any stakeholder group may become more salient by acquiring the attribute(s) they lack, either through their own efforts or by forming coalitions with other organizations. By this token, managers are cautious not to disregard low priority stakeholders that may be in a position to alter their standing dramatically. Conversely, stakeholder groups may lose their salience with decisionmakers through the loss of one of these attributes, either through some misfortune or through negotiated settlement between the firm and the group. The ability for stakeholders to move up or down the salience hierarchy in this way explains the vertical connectors in the diagram in figure 3. Another caveat is that opinions of relative weightings of the three attributes are notoriously subjective, however, the framework is an investigatory tool to aid managers in arriving at more objective evaluations than otherwise. The ability to map these possibilities assists managers to think through strategies for interactions with stakeholder groups, in such a way as to not only respond to the current dynamic, but also to anticipate potential opportunities and threats brought about by changing relations.

A pragmatic lawyer can use this framework in several ways: first, the

\textsuperscript{50} \textit{Id.} at 876.
\textsuperscript{51} \textit{Id.} at 877.
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.} at 876.
\textsuperscript{54} \textit{Id.} at 878.
\textsuperscript{55} \textit{Id.} at 879.
attorney can use the model for its descriptive feature. The typology creates a useful lexicon with which to discuss the nature of various parties to deliberative negotiations. Even in the absence of any efforts to prioritize between different interests involved, having a taxonomy of behavioral types to draw upon in describing the interaction of parties to a controversy eases the task of explaining the deliberative process with the lawyer’s client.

Second, the pragmatic lawyer can use the model strategically as a way of mapping the various interests involved in a complex deliberative process in order to weigh the priorities of interest groups involved in the negotiation. To the extent that critics assail the deliberative processes as not being representative, decisions that arise out of the deliberative process would be more defensible provided the stakeholder groups with higher salience are engaged and satisfied with the dominant consensus. The assessment of three attributes of potential relevance offers more assurance than the two-pronged assessment model espoused by Freeman for this purpose.

Third, the pragmatic lawyer can use this framework for assessing her client’s own place in the typology and determining relative strength prior to engaging in deliberations. This can be for either proactive efforts at improving the client’s position or as a defensive tactical measure. Seeing where the client may be deficient in one of the attributes can stimulate exploration of strategic partnerships or alliances to correct the deficiency and increase the client’s bargaining strength in deliberations. Recognizing where other opposing groups might conspire to diminish the client’s claim to one of the attributes can help the attorney to act preemptively to prevent that loss of salience. The framework provides a vital tool for a pragmatic lawyer to prepare for deliberations that may proceed less equanimously than Simon contemplates.

The tool may be less useful, however, for the lawyer to use in balancing competing interests among clients and financial supporters. The ABA Rules anticipate the client as the quintessential definitive stakeholder – the attorney would not take the case unless there was a legitimate claim, the attorney-client

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56 Supra note 27.

57 The ABA Model Rules prohibits attorneys from engaging in advocacy on behalf of clients with illegitimate claims:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

relationship imputes the attorney’s power to the client,\textsuperscript{58} and it is the client’s own sense of urgency that causes the client to seek representation in the first place. Funding agencies that support the attorney retain their own urgent, powerful, and legitimate claim on the attorney. To the extent that clients’ and financial supporters’ claims are dissimilar enough to prioritize, the model provides a way of assessing and talking about these different stakeholder interests; however, it assumes that relative priorities can be determined and provides no guidance as to what to do when faced with equally salient definitive stakeholders. As such, while the framework for stakeholder identification and salience determination offers a means to assess constituents other than the client, it remains a tool for the attorney’s use in seeking to accomplish the objectives of the client. Use of this tool is entirely consistent with the discretion afforded the attorney by the ABA Model Rules, but falls short of offering a means of managing conflicts between two masters.

\textsuperscript{58} \textit{Model Rules of Prof’l Conduct} R. 1.2(a), \textit{supra}, note 3.