

This text is the basis for an informal talk,
and not intended as a finalized research paper.

How Adversarial Legalism Affects Behavior

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Law and lawsuits are *supposed* to affect behavior. They are supposed to constrain my liberty when I might exercise it ways that could harm you – so that you can exercise your liberty more freely. A problem arises when laws and legal processes *unduly* restrict my liberty. My argument in this paper is that American legal and regulatory processes generate high levels of legal uncertainty, so that its difficult for those subject to regulation and liability to be sure of the boundary between justifiable and unjustifiable use of their liberty. And that has socially costly, negative effects.

One way to demonstrate that is to look at American legal processes in comparative perspective. I collect comparative socio-legal studies, which provide perspective on what is distinctive about the American way of law, and on what alternative ways of law seem to be feasible. By socio-legal studies I mean systematic, often ethnographic, empirical studies of legal and regulatory processes as they actually operate. In the past 15 years, there has been a wealth of such studies, each comparing how the US and another rich democracy deal with a specific legal or policy challenge, such as adjudicating civil lawsuits, compensating individuals injured in motor vehicle accidents or sick from asbestos exposure, regulating workplace safety or nursing homes, or cleaning up old hazardous waste sites. These studies have resulted in two recurrent findings.

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I. American Legal Distinctiveness: Adversarial Legalism

One recurrent finding concerns the substantive similarity of laws in wealthy democracies. For example, the basic national norms for many areas of regulation – environmental protection, product safety, workplace safety & health, civil rights, consumer protection -- tend to be surprisingly similar. That is, in the U.S. and other economically advanced democracies basically regulate the same air and water pollutants, establishing similar maximum emission levels, or similar “best available control technologies. Product liability standards in the EU resemble those established by American courts. National rules and reserve requirements concerning bank safety and soundness are similar.

The second recurrent finding, however, is that in terms of the forms of law and modes of implementation and adjudication, the United States employs a unique *legal or regulatory style*. Repeatedly, comparative studies find that the relevant *American* legal or regulatory process, compared to foreign counterpart, has eight distinctive features:

- (1) more complex and detailed bodies of rules;
- (2) more frequent recourse to formal legal methods of implementing policy and resolving disputes;
- (3) more adversarial and expensive forms of legal contestation;
- (4) more punitive legal sanctions (including larger civil damage awards);
- (5) more frequent judicial review, revision, and delay of administrative decision-making;
and
- (6) more legal uncertainty, malleability, and unpredictability.
- (7) more political controversy about legal rules and institutions and processes

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(8) More legal uncertainty and instability

Adversarial legalism is my term that I have used to summarize those features of the American legal and regulatory style.

II. The “Regulatory Encounters” Project: Greater Legal Uncertainty in the U.S

In latter half of 1990s, I organized my own comparative study, entailing ten case studies, each of which examined a specific multinational corporation that conducts parallel business operation in the United States and in at least one other rich democracy and was subject to similar legal or regulatory regime in each country. One case study, for example, focused on a large e.g. motor vehicle manufacturer, and its application for an air pollution permit when it sought to expand two plants in the U.S. and two Germany. Another examined a chemical company’s experience in seeking and defending a patent for the same new process in the U.S., Japan and the EU. Third concerned a large pharmaceutical company’s legal obligations in assessing environmental damage and cleaning up similarly-contaminated industrial sites in the US, Great Britain, and The Netherlands. Put another way, in this project, which resulted in the book *Regulatory Encounters*, my fellow researchers and I used each multinational corporation as an observation post for viewing the legal characteristics of the different national regimes. The findings can be summarized as follows:

1. Compared to legal and regulatory regimes in Germany, Japan, Netherland, and Great Britain, American legal and regulatory rules and processes usually were not experienced as significantly more stringent.
2. But the American legal rules were experienced as *more prescriptive and detailed*; yet
3. American legal and regulatory regimes were experienced as *more legally unpredictable, confusing*. That is, they generated more legal uncertainty for the

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enterprises subject to those regimes. The reasons arose from the following two findings.

4. The American legal and regulatory regimes generally were experienced to be more organizationally complex, more inconsistent, , and changeable. Enterprises had to deal with different bodies of legal and regulatory rules from state and federal governments, which often had different partisan-political leanings, and which often amended rules and policies following elections that resulted in partisan change. In addition, enterprises confronted often- unclear legal risks embodied in liability law, which also was experienced as more complex and changeable than laws it had to deal with in other countries.
5. American regulatory officials were experienced as more defensive and legalistic than their counterparts in other countries, more reluctant to work things out informally, more reluctant to make judgments without demanding more information, more tests, more certifications.
6. Regulatory and legal enforcement in the United States usually were experienced as *more legalistic and punitive*. Civil case damages and regulatory penalties both are much larger in the U.S. than elsewhere, and more readily invoked. The combination of greater legal uncertainty and much more severe legal penalties made American legal and regulatory regimes more threatening.
7. The regulatory and legal regimes in the United States generally were *much more costly* to comply with. (I will elaborate on this point below).
8. *Similar outcomes*. Despite the greater detail and punitiveness of American law, the multinational corporations in our case studies generally did not provide demonstrably higher levels of protection for customers, workers, or neighbors than they did in their operations in other rich democracies, where regulators employed less legalistic and adversarial methods.

III. The Costs of American Legal Uncertainty for Multinational Corporations

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Let me elaborate on the "extra" costs attributable to American adversarial legalism that emerged from the comparisons with the companies' experience in other wealthy democracies. These extra costs were of three kinds: (a) much larger direct expenditures on **lawyers and legal processes**; (b) much larger "**accountability costs**," by which I mean the costs of determining one's legal obligations and proving that one has complied with them (including expenditures on consultants, studies, reporting, paperwork); and (c) greater **opportunity costs, stemming from longer** legal and regulatory delays.

a. Legal Services. Officials in multinational enterprises often mentioned that their company spends far more money on legal services in its American operations than in its parallel operations in other countries, put together. American subsidiaries consult lawyers more often and longer on a wider range of matters, ranging from selecting pollution control equipment to managing problem personnel and conducting sales transactions. They do so, project researchers repeatedly were told, because (1) American law is generally more complex, changeable, and difficult to master, and (2) the legal sanctions for being wrong are generally much higher.

For example, one case study involved a multinational pharmaceutical company that sought to implement identical personnel policies in all its branches and subsidiaries. Yet when it decided to terminate individual employees in the U.S., it consulted its attorneys earlier, more frequently, and in more depth than when terminating employees in Canada. That is because in one recent year in which the company's experience was studied in depth, almost 23 percent of "forced separations" of employees in the United States resulted in a lawsuit against the company, compared to 7 percent of forced separations in Canada - even though Canadian substantive law protecting employees against arbitrary dismissal is more comprehensive than is American law.

A company we called "Credit Corp" is a multinational bank, with credit card divisions in the U.S. and Germany. But in contrast to Credit Corp's American operations, the German division does not have to maintain separate in-house counsel's offices to deal

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with litigation management, consumer bankruptcy, and debtors' counterclaims. And unlike its U.S. counterpart, the German division does not feel obliged to provide ongoing, intensive legal training for collection agents. The reason lies in the greater complexity of American debtor protection laws and the much greater complexity and delay associated with pursuing debt collection cases in American courts, as compared to German courts.

A corporate general counsel in the U.S. office of a multinational chemical firm told us that in the company's U.S. subsidiary -- in contrast to its European corporate parent -- a wide variety of documents are routinely reviewed by the legal department. One stimulus to this procedure was a lawsuit for breach of contract in which a drawing made by a company sales representative was held, much to the company's surprise, to have been evidence of a contract. The suit cost the company roughly \$500,000 in damages and \$500,000 in disputing and lawyering costs. Now, the lawyer said, "Half of our salesmen are scared to death to do anything without consulting a lawyer." The U.S. subsidiary employs six specially-trained nonlawyers who spend at least half their time fielding legal questions that salespeople routinely ask about sales contracts. To further avoid legal problems, the corporate attorney added, "When European people [from the parent firm] come over here, we have to forbid them from talking or writing letters to anyone."

Most shockingly, Welles and Engel found that Waste Corp (Chapter 5) spent a staggering \$15 million on legal services in the course of its efforts to obtain approval for a municipal solid waste landfill in California; for over ten years, the company had approximately seven lawyers on retainer, busy addressing, inter alia, two major administrative appeals and three extended lawsuits. In England, by contrast, the company retained two lawyers, part-time, for an eight year process that also included at least one administrative appeal; its legal costs there were about \$137,000. And in The Netherlands, despite having undergone two administrative appeals, the company didn't have to retain lawyers at all (since lawyers are not required in administrative appeals) and spent "less than \$50,000" on legal services.

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b. Accountability Costs. The cross-national differences in accountability costs are symbolized most strikingly by the huge volume of *supporting evidence* companies must supply to regulators in the U.S. in order to demonstrate that the firm has met legal standards. Consider the experience of “D Corp” when it notified regulatory authorities in the U.S., England, and The Netherlands that it had discovered solvents which had leaked from deteriorating underground tanks and pipes. In each jurisdiction, D Corp embarked on discussions with regulators concerning further soil and groundwater testing and remediation. The American regulators, however, demanded far more comprehensive analysis, more voluminous documentation, and more costly reports.

D Corp corporate regulatory compliance group officials said that documents submitted to American regulators for such contaminated sites typically fill a four-drawer filing cabinet, compared to a foot of depth in a single file drawer to the other countries. And behind each additional 10 pages of documentation, they emphasized, lie scores of hours which company officers must devote to research, testing, measurement, analysis, and preparation and checking of draft reports. All in all, D Corp officials estimated that “extra” studies, submissions and negotiations with U.S. regulators added \$8 to \$10 million to the costs of designing the cleanup plan for the two sites in the U.S. (out of total costs per site of an estimated \$22 million), whereas the “extra” regulatory accountability costs for comparable site investigations and cleanup planning in the U.K. and The Netherlands were negligible.

As of the time of our study, remediation efforts in England and The Netherlands were well under way. But in the American sites, action remained on hold while the firm waited to learn if officials considered the company's analysis sufficient. In this case, therefore, the additional demands of the U.S. regulatory regime confirmed the maxim that when pushed too far, *accountability* (proving one has done the right thing) can displace *responsibility* (doing the right thing).

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c. Opportunity Costs. According to an environmental consultant with a great deal of cross-national experience, because the regulatory permitting process for an industrial project in the U.S. entails a great deal more legal formality, organizational complexity, and documentation than in Western Europe, "It takes less time overseas. The cost for initial studies is less. We are not required to accumulate as much information. In Europe [the time from application to permit averages] one third less."

Consider, for example, the study in *Regulatory Encounters* of the U.S. and the German permit system for ensuring that changes in motor vehicle factory production and painting processes do not result in increased air pollution or obnoxious odors. Regulatory officials in both countries required Ford Motor Corporation to install similar pollution control technologies and to build higher exhaust stacks to diffuse odors. But for two factories in Western Germany, the time from permit application to approval took 5 months and 17 months, respectively; for Ford's plants in Minnesota and New Jersey alike, it took over four years.

IV. Legal Uncertainty and the American Tort System

In direct regulation by government agencies in the U.S. , the primary risk to liberty arises from the characteristic overinclusiveness of prescriptive, prophylactic regulatory rules – that is, rules that require specific precautionary actions by all regulated entities, even if the risk of harm in a particular case is remote.

Tort law *seems* to differ in that it is invoked only when harm has actually occurred. But tort law doesn't prescribe specific precautionary measures. It simply says, "be careful?" Or "be *really* careful, or else!". But that, at least in the U.S., poses a risk to liberty because of (a) the *uncertainty* of what behavior will result in liability, (b) the fear that being wrong will result in a very expensive litigation process and potentially enormous money damages. Legal uncertainty + fearsomeness = defensive medicine in many kinds of activities.

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This becomes even more clear when one looks at the American tort system in comparative perspective. For example, here's a passage from my book *Adversarial Legalism* (pp. 126-28) that summarizes a comparative study by sociolegal researchers from the Netherlands:

In the 1970s and 1980s, the rate of asbestos-related diseases among Dutch workers was five to ten times as high as in the United States. Dutch law authorizes tort claims against employers. [But] as of 1991, [when] ... 200,000 asbestos-based tort cases had been filed in the U.S (and Johns Mansville had already been driven to bankruptcy), fewer than *ten* suits had been filed in The Netherlands. The primary reason ... [is that under Dutch social insurance programs] disabled Dutch workers are entitled to all needed medical care and lifelong benefits equal to 70 or 80 percent of their lost earnings, *without having to prove an employer or product manufacturer did anything wrong.*

So as in most other countries, there is much less incentive in the Netherlands to bring tort cases, and much more legal certainty for both for injured persons and defendants. Tort damages are much lower, first of all, because the Dutch tort victim, who gets medical care and earnings replacement from social insurance, basically can sue only for non-economic damages.

Secondly, the Netherlands, like most other democracies, deal with *non-economic damages* (what we call damages for "pain and suffering" and the like) very differently. Those damages are decided by a judge, according to specific rules, and they are more moderate than damages in US tort law – sort of like American worker compensation systems. As a result, the outcomes are so predictable that injured people often don't need to hire (and share their recovery with) a lawyer.

Contrast that with American tort law, where the calculation of non-economic damages is left to the discretion of a jury, which doesn't know about comparable decisions in other cases, and doesn't have to articulate and defend the reasons for its verdict, and whose decisions are by and large unreviewable. So noneconomic damages in

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the U.S. tend to be several times higher than actual out of pocket damages. And that creates much greater incentives to sue. [So while the substantive norms of product liability and medical malpractice are similar in the US and Europe, the rates of such litigation are enormously greater in America.

Because of the vagueness of the American law of damages and use of juries, damage awards for similar cases in the American tort law system are quite variable and harder to predict. Because the lawyer-driven, jury-trial oriented American litigation process is so much more expensive, and threatening than civil litigation in Western Europe, over 90 percent of cases are settled before verdict – which makes it even harder to predict what outcomes will be. Research shows that lawyers' estimates are often wrong. And research shows that businessmen, physicians, and other potential defendants vastly overestimate the likelihood of being sued, the likelihood of losing, and the severity of average jury verdicts.

Sociolegal research also indicates that American adversarial legalism is a truly terrible method for compensating victims of personal injuries or illnesses and their families. Its very inefficient, incomplete, erratic, and often unjust, as compared to systems that rely more on social insurance or well-run court systems organized in accordance with bureaucratic legalism.

What About Deterrence? Would substituting social insurance for tort liability make our society more dangerous? The other thing tort law is supposed to be good for, despite its weaknesses as a system for compensating injuries, is deterrence. The threat of liability presumably has regulatory effects – some defensive medicine is good. The threat of tort liability presumably makes corporations more careful in testing and designing products, and in maintaining machinery and sanitary standards, and in warning consumers about risks.

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On June 14, a Wall St Journal article spelled how American anesthesiologists, in response to rising malpractice premiums, have adopted and disseminated innovative precautions that have resulted in a huge decline in patient deaths due to anesthesia.²

Political scientist Charles Epp interviewed a sample of city managers in the Midwest about tort liability. They complained about the resources their municipal governments had to devote to defense of civil lawsuits, but they acknowledged that to ward off liability, their cities engaged in more systematic checks of road conditions and playground equipment, instituted more training for police and other employees who deal with the public, and acted more rapidly to weed out "problem officers." One of them said:

The biggest changes for the better in this city have come as a result of lawsuits or threatened lawsuits, not as a result of political changes in the council or anything else. The courts have done a far better job than politics of improving our policies.

Another said:

The rights of citizens and employees are far better protected as a result--and only as result of litigation, not other changes. And the safety of our citizens is better protected. Remember all that training and inspection I mentioned? It makes a difference. Our roads and streets are safer, our playgrounds are safer, our whole operation is safer.

² Over the past two decades, patient deaths due to anesthesia have declined to one death per 200,000 to 300,000 cases from one for every 5,000 cases, according to studies compiled by the Institute of Medicine, an arm of the National Academies, a leading scientific advisory body.

Malpractice payments involving the nation's 30,000 anesthesiologists are down, too, and anesthesiologists typically pay some of the smallest malpractice premiums around

Joseph T. Hallinan, *Heal Thyself: Once Seen as Risky, One Group of Doctors Changes Its Ways*
Anesthesiologists Now Offer Model of How to Improve Safety, Lower Premiums
Surgeons Are Following Suit. THE WALL STREET JOURNAL June 21, 2005; Page A1

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On the other hand, the evidence on how pervasive these positive regulatory effects are is extremely incomplete. There are lots of ways in which the deterrence effects in practice are muted – especially by liability insurance and the uncertainty and delayed effect of tort liability. And we don't know how much the threat of tort liability adds to the pressures for responsible behavior that come from direct governmental regulation and market forces and professional ethics.

It surely is not clear that the level of negligence or heedlessness in providing goods and services is greater in Canada and Western Europe, where the threat of tort liability is vastly lower, than it is in the US. The issue (AL p.144) is whether tort law's positive effects on safety are too mixed, uncertain, and scattered to justify retention of an adversarial system that fails to provide just and reliable compensation, generates large economic costs, alienates people from the legal system, spends huge amounts on lawyers, and in some sectors of society, as Philip Howard's paper will show, inhibits socially useful activity.