Scenes from a Sociolegal Career: An Informal Memoir

Robert A. Kagan

Professor Emeritus of Political Science and Law
University of California, Berkeley
rak@berkeley.edu

PREFACE

This memoir describes the forty-year unfolding, project by project, of my sociolegal field research on legal and regulatory processes. It provides brief accounts of my interactions and interviews with regulatory officials and with businesspeople responsible for regulatory compliance. It also describes my ventures into the cross-national comparison of legal and regulatory institutions and of the political systems that shape and support them.

As I drafted this memoir, I thought of it as a time-capsule that someday might be opened by my grandchildren or other family members, giving them a sense of the kind of work I had done. It describes my research and writing in an informal, non-technical way, framed as a succession of "scenes" -- word-pictures of the places and processes to which my field research projects led me. Some scenes also provide glimpses of how my research life interacted with my family life and my teaching responsibilities. And to make the field research scenes intellectually comprehensible, I inserted short summaries of my motivation for each project and of the conclusions I drew from it.

Subsequently, I was persuaded that a very different audience – graduate students interested in law, or social science, or both – might find this memoir helpful, since it illustrates how a research career at the intersection of those fields can be conducted. Not *should* be conducted, since there are many ways of proceeding, but it might be interesting to see how one person proceeded. The evolution of a research career, my memoir suggests, need not reflect a coherent, long-term plan, formulated early in a scholar's career. To me, the course of my research felt unplanned, like a series of spontaneous jumps, first into one research project and then into another. Each project was motivated partly by what I had learned during its predecessor, but many were motivated just as much by a chance observation, encounter, invitation, or teaching experience. Nevertheless, the memoir as a whole shows how a sequence of separate projects can gradually accumulate bits of knowledge and moments of insight that all relate to each other. What felt to me at the time like a jagged line appears in retrospect more like a straight one.

The memoir might also call graduate students' attention to the substantive subjects I addressed and the research methods I employed. Most of my research subjects --the inner workings of bureaucracies that implement regulatory laws, and of corporate "regulatory compliance" departments – are closer to gritty than to glamorous. That may explain why those subjects have not been high on the research agendas of the two academic disciplines I have been most closely associated with, political science and law. Academics in those fields who are interested in regulation tend to focus on the making of regulatory policies and on the ideas or political forces that shape those policies. My research, however, has been influenced most strongly by the sociolegal tradition, which suggests that scholars should also attend to the work of officials at the front lines of law enforcement and to the responses of individuals and organizations whom the laws seek to control. So this I hope that this memoir will show that it can be both fascinating and important to study variation in the enforcement of and compliance with regulatory laws, along with the factors that influence that variation, since those variables shape the extent to which the regulations actually provide the essential protections that they promise.

With respect to my other major research subject – the structures and operation of American legal institutions, viewed in comparative and political perspective -- I think that many readers will find the memoir's analyses not only significant but surprising, because that subject too has received relatively little attention from political scientists, legal scholars, and the news media.

My qualitative field research methods may seem unfamiliar to graduate students being trained in an era that has come to favor quantitative data and statistical proofs. But qualitative exploratory research often is a necessary first stage of a scientific process, for it helps inform us about what quantitative data is worth gathering, and what precisely should be measured. The research methods I describe in the memoir's first two scenes – "ride-arounds" with regulatory inspectors, and a "participant observation" study in a regulatory bureaucracy -- reflect an ethnographic tradition pioneered a century ago by anthropologists, urban sociologists, and criminologists. To me, those methods seemed well-suited for my essentially exploratory research on "street level" legal processes and on front line decision-making in administrative agencies which had not been studied before. A similar focus on gathering detailed, site-level data characterized several subsequent projects. Reading about these projects, I imagine, may reveal some new possibilities for contemporary graduate students.

Finally, this memoir can be read to suggest another idea for graduate students to ponder: it may be both feasible and valuable to follow one's scholarly interests or passions rather than following scholarly pathways dictated by one's advisors or by current academic trends. In my decades on the political science and law faculties at the University of California, Berkeley, I advised many PhD students from many departments. Researching and writing a dissertation, I often pointed out, is a long, difficult process, punctuated by emotional ups and downs. The odds of completing it and completing it well, therefore, are highest if one is researching and writing about issues one cares about deeply and enjoys learning about. That advice, writing this memoir made me realize, affected my PhD research and my subsequent projects as well. I hope my passion and enjoyment show through the words on following pages.

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Scene 1: A New Beginning. In September 1969, at age 31, my adult life seemed to be starting all over again. My wife Betsy and I had recently moved to New Haven. I was a PhD student at Yale, enrolled in four sociology classes, including sociological theory, research design and research methods. Our rent was paid with a fellowship from a program of the Russell Sage Foundation that fostered sociolegal studies. I rode to campus and back to our apartment on Betsy's high-school-era bicycle -- rusty, rediscovered, and reclaimed. Walking among Yale's neo-Gothic buildings, I again felt like a college freshman, a new intellectual world unfolding around me. I didn't mind being a beginner again, low down on the learning curve, where each reading, each class, was a revelation.

Yet I was not a *total* beginner. I had spent three-and-a-half years practicing law and three subsequent years in the manufacturing world. I had negotiated contracts, argued issues in court, worked in sales and labor relations, walked through tens of factories. I had knocked on all kinds of doors and dealt with a wide range of people. So I had a trove of knowledge and experience to draw on when I read an academic article and evaluated its propositions. And I had a rough sense of why I was there, what I was interested in studying.

I graduated from law school in 1962. In 1963, I joined a Newark, New Jersey law firm with a litigation-oriented practice. In time, I learned I was not temperamentally suited for repeated conflict over pretrial interrogatories and other kinds of procedural jousting. In 1966,

I went to work for a family business that specialized in fabricating brass and aluminum wire products, sold to a variety of industries. That work, it seemed to me, was more socially and economically constructive than litigation. The company made useful products and gave working people decent jobs. In 1968, however, the company was purchased by a much larger corporation, and I did not fancy working for them. I planned to leave in 1969. What then? I thought about re-engaging with the law or becoming a teacher. But exactly what, and how?

All around me, in the second half of the 1960s, the political and legal environment had been in turbulent change. During each workday, I was reading articles in *American Metal Markets,* a trade paper, and coordinating customers' needs with my company's production planners. But after work, I was watching television news that overflowed with the moral passions and street demonstrations of the civil rights movement, the anti-Vietnam War movement, and the environmental movement. New public interest groups were lobbying courts and governments, demanding new laws to expand legal rights and regulatory protections for women, for minorities, for poor children, and consumers, mine workers, and people with disabilities. The US Supreme Court's "due process revolution" was establishing procedural rights for criminal suspects hauled into local police stations and courts, along with rights to free defense lawyers and access to federal courts to enforce those rights. Congress had begun enacting a wave of sweeping regulatory statutes that included the Civil Rights Act, the National Environmental Policy Act, the Clean Air and Clean Water Acts, the Mine Safety Act, the Occupational Safety and Health Act, the Consumer Product Safety Act, and the National Highway Traffic Safety Act.

I approved of those new legal rights and regulatory laws. My experience in county courthouses and in the business world, however, had taught me that the law in action did not always reflect the laws on the books. How, I wondered, would all those laws be implemented? To what extent would they actually result in compliance, in the hoped-for changes in power relationships, in shifts in the normative beliefs and behaviors of government officials, police officers, and business managers. And finally, was there a place for me in that evolving legal drama?

An answer arrived in my mailbox one day in 1968. My uncle Herb McClosky, a political scientist, had sent me Volume 1, Issue 1 of the *Law & Society Review*, a new academic journal. I skimmed the articles in it with growing excitement. They were about the relationships between social norms and social change, between the law on the books and the law in action. There was one that examined how compared standards of proof in prosecutions for witchcraft in early modern Europe affected the subsequent evolution of evidence law in Europe as compared with the United States. Doing the kind of research and writing in those pages, I realized, was what I wanted to do with my life. The fellowship I received a year later from the Russell Sage Foundation enabled me to start in that direction.

I. STUDYING REGULATORY ENFORCEMENT AND DECISION-MAKING

At Yale, another Russell Sage Fellow, Donald Black, told me about a "participant-observation" study of housing code enforcement he was beginning in New Haven. I expressed interest, and when he then asked me if I wanted to help with the field research, I leapt at the chance.

Scene 2. Shadowing Housing Code Inspectors. New Haven's housing code, like those of other cities, contained a set of "habitability" rules. Landlords of rental properties were required to keep them adequately equipped with functioning electrical outlets, bathrooms and kitchens; to maintain them properly; to provide adequate heat and door locks; to respond to reasonable tenants' requests. The city's inspectors were obliged to respond to tenants' telephoned complaints that their landlord was violating those obligations. The code authorized the enforcement office to impose fines for violations and to order landlords to bring their facilities into compliance. Starting in late October 1969, I spent one or two days a week with a City of New Haven inspector as he drove from site to site, conducted inspections, talked with tenants, wrote up violations, and pushed landlords to take remedial action more rapidly. I rotated among three or four inspectors, and I got to know others when my inspector-of-the-day met his colleagues at a diner for lunch or a coffee break.

Most of the many apartments I co-visited were in ageing three or four-unit buildings, once occupied by middle class families, but now, in a city with a shriveling manufacturing base, occupied predominantly by poor families, many subsisting on welfare. Most landlords were not rich; they owned just one or perhaps two or three buildings. Many did repairs themselves, sometimes not very well. Inspectors often were dispatched to apartments in which relations between tenant and landlord had broken down. A tenant had grown impatient with the landlord's delays, excuses, or unresponsiveness. Or a landlord had grown impatient with the tenant because she was asking him for a second or third time to repair damage to windows or walls or plumbing that had been caused by her rambunctious children. I was disturbed by visits to ill-kempt apartments in which children sat watching television, their mother ostensibly struggling with addiction, an open-doored oven blasting extra heat into the kitchen. These neighborhoods, I realized, had deep social and economic problems that the housing code and its enforcers couldn't solve. At best, they could keep one symptom from getting worse, prodding moderate-income landlords to keep disadvantaged families' meager housing reasonably safe and habitable.

Observing the code enforcement process, I began to comprehend a core challenge of all governmental regulatory programs. They seek to achieve challenging public goals – the protection of workers, tenants, consumers, or the environment – by requiring private enterprises to do those jobs. Blending legal threat and moral suasion, regulators must motivate entrepreneurs and corporate managers and their employees (a) to comprehend and apply a raft of abstractly-worded regulations to the particular features of their enterprise; (b) to finance and install the protections required; (c) to keep checking that those protections keep working, month after month; and (d) to absorb (at least initially) the costs of compliance. For the New Haven housing code inspectors, deciding whether a landlord was in violation of the housing code was only a threshold question. The real issue was what to do about a violation. Legal coercion was one option: an inspector *could* ask his supervisor to issue a repair order or impose a fine. But it was more important, inspectors usually felt, to get the violation fixed as soon as possible. That's what tenants wanted and needed. Steps toward legal coercion could lead to time-consuming legal conflict. So inspectors usually used the implicit (or explicit) *threat* of legal coercion to negotiate with the landlord a prompt remedial plan and a time-table for its

completion. Inspectors prided themselves in their ability to establish rapport with a landlord, to advise him about remedial strategies, and to get his agreement to fix the more serious violations quickly in return for a little extra time for others.

That usually worked. But not always. Sometimes inspectors, or their superiors, lost patience, and the agency imposed a monetary fine. For repeat offenses, for untruthful excuses, they sought a heavier fine. Over time, I learned that inspectors' initial choice—seeking cooperation or turning quickly to legal coercion -- depended on their assessment of each particular landlord's reliability and historical level of effort to maintain the building adequately. Bad landlords developed a bad reputation with the inspectors. About ten percent of the landlords, inspectors told me, were repeatedly unreliable or flatly uncooperative: "That 10 percent cause 80 percent of my problems." In subsequent years, I heard the same "10 percent" aphorism from enforcement officers in other regulatory programs. Chester Bowles, head of the U.S, Office of Price Administration during World War II, was asked how he could enforce price control regulations that applied to every business firm throughout the country. Bowles said he figured that "20 percent of the population would comply with any regulation out of patriotism, 5 percent would evade the law, and the remaining 75 percent would comply as long as the 5 percent were caught and punished." [1]

My experience with the housing code enforcers helped me decide what kind of social scientist I wanted to – and did -- become. Some sociologists, I was learning, formulated their research projects by focusing on theoretical generalizations in books and articles; then they looked for or developed data that would further test the generalization's validity. Others found their projects by focusing on phenomena they encountered in the world – phenomena they found disturbing or hard to explain; then they would investigate those phenomena systematically, discover how they varied, and tried to explain that variation. Think of Charles Darwin, as he observed that the finches on different Galapagos Islands, although probably descended from a single mainland species, had different beaks -- and then asked. "How come?" I was attracted to that approach, perhaps because of my years of practical experience,

[1] Robert A. Kagan, Neil Gunningham, and Dorothy Thornton, " Fear, Duty and Regulatory Compliance: Lessons from Three Research Projects" in Christine Parker & Vibeke Nielsen, eds, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2012) p.47,

perhaps because there was relatively little published theory about the subject that I had begun to focus on – regulatory decision-making, enforcement, and compliance.

The housing code experience also confirmed my attraction to research methods that would draw me out of the library. I wanted to study legal processes by talking directly with legal officials and with people affected by those processes. A great deal of my subsequent research took this form. I leaned in that direction, I guess, because I had always enjoyed tasks that propelled me into little-known corners and basements of our complex society – places where I would learn about occupations, kinds of businesses, and governmental functions I hadn't known even existed, where I would glimpse some of the sinews and arteries, pumps and motors, that make our social, economic, political and legal systems function.

The housing code experience had one further consequence: it confirmed my inclination to study regulatory agencies and processes. A lot of sociolegal research, I was learning, focused on criminal law enforcement and punishment. But my prior work experience made me more interested in the legal control of the powerful, in examining the impact of laws designed to forbid or change business practices that adversely affect people's lives or the natural environment. Besides, I believed that the growth of the activist administrative state had been the most transformative development in twentieth century legal systems. Regulation enabled poor New Haven tenants to enforce their legal rights without having to find and pay a lawyer and endure the costs and delays of litigation. They only had to dial a telephone number, an inspector came (sooner or later), and the government absorbed the costs of enforcement. This pattern recurred in scores of regulatory programs, federal, state and local. Yet regulatory enforcement and compliance, it seemed to me, had mostly been neglected by socio-legal scholars. In terms of empirical research, it was scholarly *terra incognita,* ripe for exploration.

Scene 3. Inside a Regulatory Bureaucracy: Applying Legal Rules. Two years later, in 1971, I began my PhD dissertation research. It was a study of the implementation of a ninety-day nationwide freeze of wages, prices, and rents – the first phase of an inflation control program created by President Nixon executive order. When I saw Nixon announce the freeze

on television, followed by interviews with his aides (who couldn't answer most journalists' questions about how it actually would work), I realized a big, new regulatory system had to be created – and that it would interesting to observe its birth, development and operational practices. A few days later, I flew to Washington, DC, and, after several unsuccessful ventures, found my way to the Office of Emergency Preparedness (OEP), an agency ordered to enforce more detailed "freeze regulations" that would be promulgated by the Cost of Living Council (CLC), a new agency created by the President's executive order. OEP also had to respond to the public's questions, petitions, and complaints about the restrictions. The agency's General Counsel, I was delighted to discover, was a lawyer whom I had met when I had been practicing law. I offered to work for him for free – if he would allow me to use what I learned for my projected dissertation about how a government agency went about implementing a new regulatory program. Short-handed, he accepted my offer, and I spent the next three months working at OEP.

Each day, working side by side with lawyers and bureaucrats recruited from other agencies, I pored through the growing set of CLC's specific regulations, deciding how to answer questions and petitions from businesses, labor unions, and landlords. Most of them argued that they ought to be able to increase a price, salary, or rent because a freeze would cause hardship or disruption. I discussed the correct legal response with other attorneys and bureaucrats, and when we couldn't agree, with the General Counsel or Assistant General Counsel. At night, in an attic room in the Washington home of my wife Betsy's cousin, I typed up my field notes, analyzing the most interesting of the day's legal discussions. I would ask myself why I or others had taken a particular position, what factors might have impelled me or the others to respond the way we each had done.[2]

Through that process, I realized that the office was developing unspoken norms – an unarticulated "culture of rule-application" – that told officials what to do when the regulations didn't provide a clear answer, or when the answer seemed clear but would produce a blatantly unfair or counterproductive result in the particular case. When I thought I had gained an

[2] I provided a detailed account of my research method in the Appendix to Kagan, *Regulatory Justice: Implementing a Wage-Price Freeze* (1978) and in "Robert Kagan and *Regulatory Justice*," in Simon Halliday & Patrick Schmidt, eds, *Conducting Law and Society Research: Reflections on Methods and Practices.* Cambridge Univ. Press (2009), pp.26-38

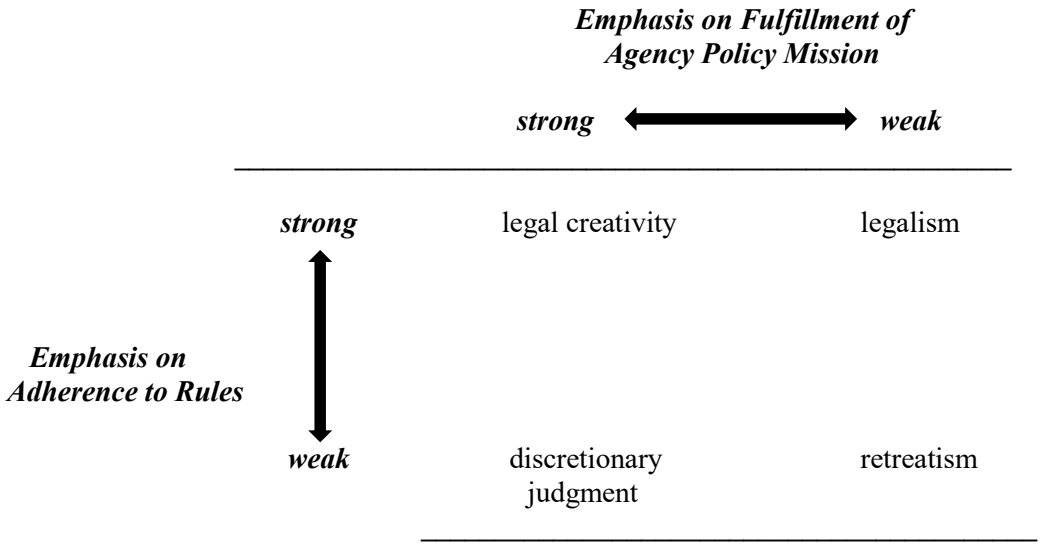
insight while writing my field notes, I'd test it the next day in conversations with office colleagues. I also took on extra tasks that required me to leave the General Counsel's Office periodically and interact with bureaucrats in other offices in the agency. As I came to be regarded as knowledgeable and competent, the General Counsel sometimes sent me to assist top agency officials when they met with representatives of businesses and organizations who were seeking a favorable interpretation. The General Counsel also asked me to fly to New Orleans to advise a U.S. Attorney bringing an enforcement case against a violator. (Remember Chester Bowles's aphorism about catching and punishing the uncooperative five percent?)

During the initial ninety-day freeze, an agency called the Price Commission was established to regulate price increases in a somewhat more flexible manner, along with a Pay Board, established to slow increases in wages and salaries increases. As the freeze near its end, the General Counsel asked me to serve as Special Assistant to the incoming Chair of the Price Commission. I was eager to get back to New Haven to resume my life with Betsy and to write my dissertation. But the Assistant to the Chairman position, I thought, would give me a front-row seat, and sometimes a seat at the table, at another aspect of regulation – the policymaking and regulation-drafting process. I took the job, and it did give me more insight into the regulatory process, together with some enlightening experiences at the heart of regulatory politics in the conservative, often paranoid, political culture of the Nixon Administration. After two more months in Washington, however, it was clear to me that my most desired future was in academia, not in national politics and administration, and I returned to New Haven, my wife, and my PhD program.

Drawing on my field research, I wrote a PhD dissertation that analyzed how government bureaucracies, often pressured to be both consistent ["adhere to the regulations"] and responsive ["do what makes sense in the particular case"], respond by constructing internal cultures or styles of rule-application. Those cultures and styles can vary, even among offices in the same agency. Some office cultures, as my research showed, emphasize legalistic consistency. In others, officials are more focused on their agency's policy mission; in some cases, they bend or even ignore the legal rules to avoid harsh, disruptive consequences, since that, their leaders teach them, would undermine the agency's legitimacy or policy purposes. Still other office cultures strive to blend legal consistency and responsiveness through

continuous reinterpretation and amendment of rules. And in underfunded, inadequately resourced offices, a dispirited "retreatist" office culture tends to evolve; officials resort to delay or ritualistic routine-following. Here is a typology I devised to summarize how bureaucratic offices can react to the tension between rule-following and discretionary judgment:

MODES OF RULE-APPLICATION IN ADMINISTRATIVE BUREAUCRACIES[3]



In my dissertation, filed in 1974, I tried to explain how those variations in legal decision-making cultures are influenced by (a) the way cases are presented to the bureaucrats (e.g,, in person or on paper), (b) the organizational pressures the bureaucrats experience (e.g., for very rapid decision-making, or not), and (c) the dominant political pressures on agency leaders (e.g, for consistency versus responsiveness, for "toughness" or for fairness).

A few years later, in early 1978, the scene has shifted. Now I am an assistant professor of political science at the University of California, Berkeley. I'm sitting at the dining room table in our house in the Berkeley hills. On the table is a typewriter, on which I'm trying to weave my analysis of administrative rule-application into a book manuscript. And there also is an infant-seat holding our 3-month-old daughter Elsie. I alternate between typing and

[3] This is the version of the typology, which evolved a little bit over the course of my career, that I used in recent publications. Kagan, "Varieties of Bureaucratic Justice: Building on Mashaw's Typology, in Nicholas Parrillo, ed, *Administrative Law from the Inside Out: Themes in the Work of Jerry L. Mashaw* (Cambridge University Press, 2017). See also Kagan, "The Organization of Administrative Justice Systems: The Role of Political Mistrust," in Michael Adler, ed, *Administrative Justice in Context* (Hart Publishing, 2010).

tickling (or reinserting a pacifier in her mouth). A few months later, I was still at that table, but instead of the baby-seat, Elsie was in a "Swing-a-Matic." I would wind a handle to start the swing, type intensely during the three minutes before the swinging ran down, then turn the crank to re-start it, lulling Elsie into another three minutes of blissful calm. As the three-minutes of typing piled up, the book, *Regulatory Justice*, was completed.

Scene 4. Getting Deeper into Regulatory Enforcement. Soon after *Regulatory Justice* was published, I embarked on another field research project, this time with a superb academic partner – Eugene Bardach, a professor of public policy at UC Berkeley (and a dear friend ever since). A grant enabled us to extend our reach by hiring research assistants, but I too did much of the field research, which unfolded in many different places. In July 1979, for example, I was in a huge aluminum smelter near New Orleans. Outside it was 99°F. and 99% humidity. It was hotter still walking along the steamy "potline" in the smelter,[4] accompanied by the facility's director of workplace safety and health. Among many other things, I asked him "How many people work here?" "About half of them," was his answer. I was exploring what impact the Occupational Safety & Health Act, the OSHA regulations, and OSHA's inspection system had on safety in manufacturing facilities. Gene Bardach and I had agreed that to study regulatory enforcement, we should spend a lot of time with "the regulated" as well as with "the regulators."

The smelter's safety official told me that OSHA had strengthened his authority and effectiveness. It enabled him to tell management they had to pay for the safety measures he told them were desirable, or if they were resistant, to tell them that the measures were necessary to stay out of trouble with the enforcement officials. This dynamic, Gene and I learned, is perhaps the most important contribution of all the regulatory programs we studied: they induce corporations to create specialized internal "shadow" regulatory units that continuously gather data about the firm's regulatory performance and pressure management to invest in both current and anticipated compliance-enhancing equipment.

[4] The "pots" were very large vats, in which huge currents of electricity are used to turn a steaming bath containing alumina powder, obtained from bauxite, into molten aluminum.

On the other hand, the company safety director complained, specific OSHA rules, were enforced too legalistically, too mechanically. He showed me costly changes that the inspectors had forced the company to make despite the fact the changes didn't reduce risk or add to safety in any significant way, due to the configuration of that site's particular facilities or due to its alternative risk-controlling measures. I often heard the same thing in other factories. Like the traffic codes we're all familiar with, governmental regulations tend to be overinclusive: they state rules that make a great deal of sense in the general run of situations, but are unreasonable as applied strictly to some specific situations or actions.[5] The world, it seems, is too varied and dynamic to be rigidly-controlled by the generalizations that underlie "one rule fits all" regulations.

The next day, I met with OSHA's local office director in New Orleans and then with an enforcement official at Louisiana's state environmental protection agency (EPA). They provided their perspective on the aluminum smelter's level of diligence in regulatory compliance. I also concluded that Louisiana regulators were less demanding than their counterparts in California.

Then I was off to Carrollton, a town in northwest Georgia, for a process-by-process tour of a large factory that melted aluminum ingots, then cast the hot metal into aluminum rod two inches in diameter and coiled it onto huge reels. Powerful machines then pulled the rod through dies to make it into wire. Eight reels of the wire at a time were attached to a large wheel that spun as the wire was pulled almost simultaneously from each reel and braided into aluminum cable, which was then sold for use in electrical transmission lines. I interviewed the factory's officials responsible for the safety of employees who worked amidst these furnaces, hot metal, and whirring machines. I also met with engineers responsible for the facility's compliance with environmental regulation, exploring their experience with the rules and the regulators. From there, I drove to Atlanta to interview the regulators: OSHA officials and Georgia EPA officials responsible for monitoring that company (and of course many others).

[5] When promulgated after a disastrous action or accident, regulatory rules often are very overinclusive. Think of the elaborate searches that thousands of airline passengers are compelled to comply with in order to detect or deter a possible terrorist. Some regulations designed to prevent chemical explosions, oil spills from tankers or trains or offshore wells, and outbreaks of food poisoning from meats and vegetables, necessarily have this very overinclusive character. For those and many other hazards, that overinclusiveness of regulatory rules seems unavoidable—but it also is annoying, which helps account for regulation's unpopularity with regulated entities.

Some months later, repeating the same research method, I met with corporate workplace safety officials – and separately, with labor union safety stewards -- in two huge automobile assembly plants in California, exploring their experience with OSHA regulations, the agency's enforcement style, and the impact of both on worker safety and health. Because the plants had been engineered and re-engineered to protect the workers at each station, the official showing me through the plant told me that we were more likely to be hurt than a worker would be. I was inclined to believe him after he several times pushed or pulled me out of the path of a forklift truck because, engrossed in conversation, I had veered off the pathway marked on the factory floor.

By studying regulatory enforcement and compliance in several regulatory programs in several industries, Gene Bardach and I were able to observe regulatory commonalities as well as program-based differences. In addition to the field work, we organized a conference attended by fifteen enforcement officials from federal and state regulatory agencies with a range of missions. Officials steeped in the implementation of environmental laws compared notes with officials who regulated workplace safety, with nursing home regulators, with officials who regulated railroad chemical car safety, and with regulators who policed quality control in factories that make pharmaceuticals and genetically engineered blood products.[6]

One important insight we gained was that beginning in the late 1970s, regulatory enforcement officials had come to feel that *they* were over-regulated. Regulatory laws had changed. Legislators, responding both to the business community's dislike of arbitrary regulation and to pro-regulation advocacy groups' fears that regulators would be too lax, had been enacting much more detailed and prescriptive regulatory statutes amendments. Those laws sharply constrained regulatory enforcement officials' discretionary judgment. Officials also had been compelled to demonstrate their diligence by reporting statistics concerning enforcement citations issued and fines imposed. These accountability pressures on regulators, in turn, generated complaints from regulated entities, who complained about rigid enforcement and regulatory unreasonableness. Confronted with ever-more voluminous bodies

[6] Gene and I also drove to San Jose, CA to attend a conference of a professional association of quality control experts, some embedded in manufacturing companies, some in consulting firms, some in academia. For us, this opened a window into a fascinating world of sophisticated expertise we hadn't known about, much of it essential to keeping all of us safe.

of detailed regulations, companies that were inclined to be cooperative – those in Chester Bowles's 75 percent of reasonably good apples -- felt that they were being treated like bad apples, that is, like Bowles's recalcitrant 5 or 10 percent.

Gene Bardach and I wrote about this in *Going by the Book: The Problem of Regulatory Unreasonableness*.[7] Detailed prescriptive rules combined with inflexible, legalistic enforcement, we observed, generated resistance from business groups, undermining the cooperation that regulation requires. Legalistic regulation also stimulated political opposition to regulation in general. But there was an antidote. Through conversations with regulatory officials and with insightful managers in regulated enterprises, we learned their ideal was "flexible enforcement." We recounted many examples. When "the good inspector," as we labeled him,[8] encountered recalcitrant bad apples in the population of regulated firms, he would apply regulations strictly, readily employing legal penalties and mandatory remedial orders. Conversely, when encountering "generally good apples," the good inspector (like most of the building code inspectors in New Haven) would teach, persuade, and prod the company to fix violations and improve systems for preventing them. Some agencies had institutionalized an office culture that encouraged this flexible mode of rule-application.

Institutionalizing flexible enforcement, however, is challenging and costly. Repeatedly, we were told it requires investments in recruitment and training, in increasing enforcement officials' technical competence and professionalism, in improving their capacity to distinguish serious from less serious violations, and teaching them to distinguish bad apple firms from good and reasonably good apples. Not all regulatory agencies do that – sometimes because of the restrictive, discretion-limiting statutes that guide them, often because of budgetary restrictions, or because of political oversight pressures that induce agencies to

[7] Temple University Press, 1982, second printing with new introduction, Transaction Publishers, 2002.

[8] Interestingly, we did not meet any female inspectors in our research, which was conducted in the late 1970 and early '80s. That is explainable, at least in part, by the prevailing practice of recruiting regulatory inspectors who had backgrounds in law enforcement or who had been technically trained in the business operations that were the subject of regulation.

demonstrate their "toughness" by reporting higher numbers of violations cited and penalties imposed.[9]

In many other economically advanced democracies, however, a flexible enforcement style is common practice. Managers in multinational corporations find American regulation more prescriptive, punitive, and frustrating than parallel regulatory programs in other rich democracies, and considerably more expensive to comply with. [10] Nevertheless, as my later field work on compliance suggested, most regulated businesses in America accept the necessity of most regulation and comply with most regulations. And in that research, as Chester Bowles speculated, I found that managers in regulated firms in the US applaud when the bad apples are caught and punished.[11]

II. COMPARING LEGAL SYSTEMS

Scene 5. Asking "Compared to What? " At UC Berkeley, the Political Science Department expected me to teach an undergraduate course in American Constitutional Law, but I was not completely comfortable with that assignment. In graduate school, I hadn't studied the mountain of political science scholarship about the political influences on judicial decision making. Nor had I studied the even higher mountain of scholarship on constitutional law by law school professors. And I had no desire to pile my own scholarship on either mountain. I had taken a Con Law course in law school, but that was in 1960, fourteen years before I started teaching at Berkeley. But I agreed to teach the course. UC Berkeley's law school started fall semester classes two weeks before Poli Sci classes began, so for two weeks I sat in on two different law professors' Con Law classes. That gave me the confidence to

[9] For many reasons, developing precise, parsimonious explanations of variation in regulatory enforcement styles, I had to admit, is an elusive goal. Robert A. Kagan, "Regulatory Enforcement," in David Rosenbloom and Richard D. Schwartz, eds. *Handbook of Administrative Law and Regulation* (1994) and Kagan, "Regulators and Regulatory Processes" in *The Blackwell Companion to Law and Society*. Austin Sarat, ed. (Blackwell, 2004)

[10] Kagan & Axelrad, *Regulatory Encounters*: *Multinational Corporations and Adversarial Legalism* (2000); Kagan, "Comparing National Styles of Regulation in Japan and the United States." *Law & Policy* 22:225-44 (2000)

[11] Kagan et al, " Fear, Duty and Regulatory Complianee." fn 1 above

start my course and develop my own style. I taught Con Law that year and for years thereafter. I enjoyed discussing morally and politically compelling court cases with the students. And it also impelled me to engage with political scientists' questions about the reciprocal relationships between law, courts, and politics.[12]

The Political Science Department's catalogue also listed an undergraduate course labeled "The American Legal System." I taught that almost every year too. At first, I groped for the right content, pouring different wine into the same bottle for several years. Gradually, however, I shaped the course around some fundamental questions: "What *is* a 'legal system? "What is the American *version* of such a thing?" Compared to what other kind of legal system? How can we explain variation in legal systems and legal institutions? Are they shaped primarily by particular traditions of legal thought, such as Anglo-American common law versus European "civil law? Or as political scientists' work inclined me to think, are legal systems and institutions more powerfully shaped by the features of the political systems in which they are embedded and by specific political movements?" Those questions also filtered into the graduate seminar on "Legal Institutions" I taught every year and into my own scholarly agenda.

American legal scholarship in the 1970s (and all previous decades) was determinedly parochial. There were few empirical studies in English of adjudication, product safety litigation, land use regulation, criminal prosecution or any other legal process in other economically advanced democracies, and fewer still that compared them to their American counterparts. So I began a years-long search for comparative sociolegal studies. Over time, however, I found excellent ones, such as a comparison of worker safety regulation in Sweden

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[12] To my own surprise, I even ended up writing and publishing a few articles on the US Supreme Court and constitutional adjudication: "What If Abe Fortas Had Been More Discreet?" in Nelson Polsby, ed., *What If? Explorations in Social Science Fiction* (Lewis Publishing, 1983); "Constitutional Litigation in the United States." in Ralf Ragowski and Thoman Gawron, eds., *Constitutional Courts in Comparison*. Berghahn Books, 2002); "*Marshall v. Barlow's, Inc.:* Legitimating Regulatory Enforcement" (with Rachel VanSickle-Ward), in Peter Strauss, Ed., *Administrative Law Stories* (Foundation Press, 2006); "A Consequential Court: The U.S. Supreme Court in the 20th Century," in D. Kapiszewski, G. Silverstein, & R.A. Kagan, eds, *Consequential Courts: Judicial Roles in Global Perspective.*Cambridge University Press (2013) pp.199-232;

and the US; of how civil and criminal court processes differ in Germany and the US; of how criminal prosecutors are trained and coordinated in the US as compared with France and Japan; and of how the Japanese tort law system, compared to the American system, handles claims arising from motor vehicle accidents.[13] I also began to wonder how I could contribute to that body of scholarship.

Scene 6. Order in the Port. Living in Berkeley, I often crossed San Francisco Bay on the lengthy Bay Bridge. Passing the Port of Oakland docks, I marveled at the huge containerships and beside them, the massive gantry cranes, which looked to me like the offspring of dinosaurs that had mated with Star Wars creatures.

In 1985 or '86, I managed to get a tour of the Port and then to interview the operators of a dockside marine terminal. From a large, windowed room on the terminal's second floor, I looked out at a docked containership and watched a crane in action. Perched in cabin some seventy feet above the dock, the operator, a modern-day longshoreman, repeatedly plucked a forty-foot-long shipping container off the ship and lowered it onto a dockside truck trailer.

[13] For a list of these and other comparative sociolegal comparative studies, see Table 2, in Kagan, *Adversarial Legalism: The American Way of Law* (2nd Ed, 2019)

Trucks then pulled away, taking some containers to warehouses, others to be loaded on cross-country trains, others onto a highway, headed for the loading docks of factories or stores.

Further along the dock, an enormous, mobile, wheeled "straddle crane" roamed the "container yard." This one looked to me like a giant spider, its long "legs" completely straddling a row of containers, stacked like Brobdingnagian books in a Brobdingnagian library. The spider came to a halt, reached its claws down, grabbed and lifted a container from the stack, and then deposited it on the trailer of a truck that had just rolled between its legs. The truck then drove the container to the dock, where another gantry crane lifted it, swung it above the huge ship, and lowered it into a prescribed slot between two other stacks of containers. The prescribing was done by longshore clerks, sitting at desktop computers in the terminal that overlooked these operations.[14] Their job was to keep track of each container and its contents, weight, and destination. Shipping company experts had already devised instructions for which containers should be off-loaded and which onloaded. I was told they used the weight of each container to pick its slot on the ship, striving to balance the overall weight on ship's port and starboard sides.

A few weeks later, in the nearby waterfront city of Alameda, I met with a genial, gravel-voiced lawyer. He represented a dredging company that was enmeshed in a lengthy, litigation-laden controversy that included the Port of Oakland, several environmental agencies, several environmental advocacy groups, and the Pacific Coast Fishermen's' Association. They had been battling about where to deposit immense volumes of contaminated sands dredged from the harbor floor – and to do so in a place and manner that would be both economically efficient and safe for the aquatic environment. The dredging was needed to deepen the channel for the next generation of still larger containerships.

[14] Before containerization in the 1970s, the clerks' predecessors stood at dockside with clipboards. As a result of containerization, pilfering and theft of cargo has been drastically curtailed. I later wrote, "One gang of dockworkers, about fifteen men …[now] unload as much cargo in ten hours as three gangs did in a week in the precontainer era." Robert A. Kagan, "How Much Does Law Matter? Labor Law, Competition, and Waterfront Labor Relations in Rotterdam and U.S. Ports, " *Law & Society Review* 24: 36-69 (1990). The containerships, I was told, nowadays are in port such a short time that their crew often doesn't get to leave the ship. So no longer is there a dockside neighborhood full of bars, restaurants, brothels, and sailors from many nations. No longer is there a surplus workforce of longshoremen hanging out, hoping for work on the next ship. No more Elia Kazan's *On the Waterfront*'s world with its corrupt labor leader Johnny Friendly (Lee J. Cobb) or dockworkers like Terry Malloy (Marlon Brando). Now, I thought, there is order in the port.

Not long after that, I met with a former merchant seaman who was writing a book about Bay Area port labor, famous for its history of radicalism. He introduced me to officials of the West Coast longshoremen's' union, which in the early 1970s had agreed to accept containerization – and hence a reduction in the number of dockworkers – in return for a share of the startling productivity gains brought about by the containerization revolution. The resulting labor contracts awarded the remaining union members job security and very high pay. Shippers were willing to pay in order to keep the ports humming, since ports were now key junctions in a moving inventory of innumerable parts and products, tightly scheduled to arrive "just in time." [15]

Commercial seaports interested me because they are basically the same in all major trading nations; they host the same shipping companies, use the same kinds of container-moving equipment, have similar labor issues, and face similar environmental problems when they need to expand. Consequently, seaports and their users in all those nations deal with the same kinds of legal and regulatory regimes – environmental regulation, labor law, commercial law, customs regulations, and property law. If I wanted to compare American law and regulation with the legal/regulatory systems of other countries, one step forward would be to compare how domestic legal systems affected American and foreign seaport operations, the shipping companies and other enterprises that used them, dockside workers, and the ports' environmental impacts. An opportunity to do that soon arose.

Scene 7. Wassenaar, The Netherlands, 1987. My wife Betsy, our daughter Elsie (age nine), Miles (our ageing golden retriever), and I had a third-floor apartment in this small Dutch city, just north of The Hague. When Betsy had been six and seven, she lived and went to school in The Hague, and now was happy to be back in The Netherlands for a semester. Every weekday morning, I would take Miles on a walk while Betsy and Elsie rode their bikes to the Dutch school that Elsie was bravely attending, struggling to learn the language. I'd then pedal my bike along a road that crossed wintry fields where rows of tulip bulbs were

[15] American longshoremens' unions also benefit greatly from the fact that in contrast with manufacturing, seaport operations in the United States can't be "contracted out" to distant low wage countries.

hibernating, then through a wooded residential area to a large house occupied by The Netherlands Institute for Advanced Study (NIAS). There, with a semester off from teaching, I organized and edited a journal issue of articles on law and regulation in Great Britain and The Netherlands.[16] I also wrote a review of political scientist David Vogel's illuminating comparison of environmental regulation in the UK and the US – a task that got me thinking about how regulation in the US was shaped by distinctive features of American politics.[17] Yet what I looked forward to most at NIAS was the company at lunchtime.

I had been invited to NIAS to join a cluster of European sociolegal scholars interested in comparative legal systems. I usually ate and talked with Dutch scholars Albert Klijn and Kees Schoenendyk, and with Erhard Blankenburg, a cosmopolitan German sociologist of law who then lived and taught in Amsterdam. Week by week, exchanging questions and ideas with them, I gained a feel for how the legal cultures and the actual practices of continental "civil law" systems differed from American legal culture and processes. With another Dutch scholar, Gjalt Huppes, I co-wrote an article on water pollution regulation in The Netherlands.[18] My dialogues with Gjalt confirmed my sense that US environmental regulation made less use of economic incentives than Dutch regulation, and also was more legalistic, inflexible, and adversarial. The legalism and adversarialism of regulation in the U.S., I was becoming convinced, stemmed from mistrust of government both by the American business community, which believed, as Vogel's book showed, that regulators too often were incompetent and anti-business, and by American pro-regulation advocacy groups, who feared that government regulators would be too influenced by the regulated businesses.

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[16] I recently looked at my Introduction," Understanding Regulatory Enforcement," *Law & Policy* 11: 89-119 (1989). I had totally forgotten its opening epigraph:

"Murphy's Law: If something can go wrong, it will."

"Kagan's Corollary: Regulation grows."

[17] Robert A. Kagan, "(1988) "What Makes Uncle Sammy Sue? A review of David Vogel, National Styles of Regulation," Cornell University Press, 1986," in *Law & Society Rev.* 21: 718 (1988). David was colleague of mine on the UC Berkeley faculty; he was my good friend then and ever since.

[18] Gjalt Huppes & Robert A. Kagan, "Market-Oriented Regulation of Environmental Problems in The Netherlands " 11 *Law & Policy* 215-239 (1989)

Scene 8. Rotterdam. At least once a week, I rode my bike not to NIAS but to a rail station, where I would catch a yellow, inter-city train to the port city of Rotterdam. One week, I interviewed there an official of the Dutch dockworkers' union. He was college-educated and had, for me, a surprisingly sophisticated way of talking about public policy. His focus was on what was good for the national economy and all its workers rather than on the economic welfare of dockworkers alone. He helped me understand the Dutch labor law regime, why it encourages such a broad perspective, and why it generates what I had become convinced is a seaport labor system that is more cooperative and more economically efficient than the system that American labor law helps encourage in American seaports.[19]

Another week, I met with Kenneth Hanf, a high school classmate of mine whom I had been surprised to find in Rotterdam. Ken had married a Dutch woman and was on the political science faculty at Erasmus University. He explained to me how the Port of Rotterdam had negotiated and implemented an environmentally safe disposal plan for contaminated sands dredged from the harbor, with no litigation of the kind that protracted the Port of Oakland's struggle to get a dredging permit -- another fine lesson on how and why the American legal system is distinctive. [20]

A week later, I met in a Rotterdam office building with representatives of two marine insurance companies. There is an international treaty that makes the law governing financial responsibility for damage to cargo the same, whether the damage is discovered in a Dutch port and litigated in a Dutch court or is discovered in an American port and is litigated there. So I

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[19] Here's the reason, in brief: Dutch labor unions are tightly linked into sectoral federations and ultimately into a national one. Dutch labor contracts are negotiated at the national level, cover all firms (not just ones that are "unionized"), and seek to equalize pay and benefits across all occupations. For a variety of reasons, American labor law, whose foundation is individual workplace-level election (or rejection) of unions, has made it much harder for organized labor to achieve industry-wide, much less cross-sectoral nationwide labor agreements. Moreover, Dutch labor law guarantees much more generous minimum wages, unemployment benefits, and job security than US labor law. In America, therefore, each local labor union has incentives to be narrowly focused on winning contractual benefits and job security for just its own members in those workplaces in which it has labor agreements. In the US, dockworkers, who have exceptionally high bargaining power, have much higher pay than the truckdrivers who serve the ports. Not so in The Netherlands. Kagan, "How Much Does Law Matter? Labor Law, Competition and Waterfront Labor Relations in Rotterdam and U.S. Ports," 24 *Law & Society Review* 35-69 (1990)

[20] "The deadlock in Oakland, the Rotterdam experience suggests … stemmed from a particular institutional structure, characterized by fragmented authority, complex and constrictive legal rules, wide access to litigation, and unpredictable risks of judicial reversal." Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (2d Ed, 2019) p. 35

asked the insurance men, "Does it matter if a contested cargo damage case ends up in a Dutch court rather than a court in New York"? "Oh, yes," they answered, "You have to pay a lot more in lawyers' fees if the cargo is in New York." In addition, they said, "The negotiation process is different." In the U.S., they explained, the lawyers, compared to Dutch lawyers, are less likely to work out a reasonable agreement "based on the facts and the law." Instead, they are likely "to see what they can get away with." Those differences, I was coming to understand, were the consequences of specific differences in two countries' court systems and behind that, in the countries' political systems.

American lawyers cost much more because they *do* much more. In seriously contested disputes, they assemble the facts, interview witnesses, conduct pretrial discovery, and do legal research related to the case. In the Netherlands (and in other continental European countries), all those time-consuming tasks are performed by *judges* – hence they're paid for by the government – not by lawyers hired and paid by the disputing parties. Moreover, in the Netherlands, contested cargo damage claims, if not settled, are decided by a specialized commercial court, which helps make the judicial decisions (and hence settlement negotiations) considerably more predictable than they are in the US. In addition, the judges in the two countries are different. In marked contrast with the Dutch system, American judges are selected through elections or via appointment by elected politicians. Despite an oft-quoted statement by current US Supreme Court Chief Justice Roberts, there are indeed Republican judges and Democratic judges, and in controversial cases, they often act on their own political beliefs.[21] Moreover, when first elected or appointed, American judges – again, unlike Dutch judges -- get no apprenticeship, no special training, no annual review by superiors.

Consequently, American judges are less homogenous and less predictable than judges in The Netherlands (or in other European countries). European judges are career civil servants,

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[21] The literature on this is enormous. See, e.g., Daniel Pinello "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis." *Justice System J.* 20: 219 (1999); .John Gottschall, "Reagan's Appointments to the U.S. Courts of Appeals." *Judicature* (June/July), pp. 49–54 (1986) ; C. K. Rowland and Robert A. Carp, "The Relative Effects of Maturation, Period, and Appointing President on District Judges' Policy Choice: A Cohort Analysis." *Political Behavior* 5: 109 (1983) ; Stephen Burbank and Sean Farhang, *Rights and Retrenchment: The Counterrevolution Against Federal Litigation* (2017). Most American judges were politically active in a political party before election or appointment. Kagan, *Adversarial Legalism*, 2nd Ed (2019) p. 306, n.16
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selected via non-political examinations, trained via apprenticeships, supervised and evaluated by a powerful nationwide judicial bureaucracy dedicated to regular performance reviews. In the U.S., the lower level of legal predictability makes the disputants less sure of the legal outcome, and the costs of trial are much, much higher. Those two factors give the disputants' lawyers an incentive to "see what they can get away with," hoping that their adversaries, fearful of the uncertainty and high costs of going to trial, will concede.[22]

Scene 9. Climbing Onto the Shoulders of Giants. This is more like a slideshow, a set of almost identical pictures of myself, my eyes focused on a book or academic journal, sitting in my office on the Berkeley campus or in my makeshift study on the enclosed second floor porch of our house. Fieldwork had given me data and insights. It took reading, however, to settle on the ideas, the theoretical concepts or hypotheses, with which to organize my empirical findings and turn them into new concepts or hypotheses or generalizations. I needed scholarly giants upon whose shoulders I could see my path forward. I revisited some of their books and articles every year because I put them on the reading list for my graduate seminar on Legal Institutions. They shaped my efforts, after returning to Berkeley in the summer of 1987, to articulate what I had learned.[23]

Scene 10. In the Stanford Hills: Developing the Concept of "Adversarial Legalism." Like the other "fellows" at the Center for Advanced Study in Behavioral and Social Science (CASBS), I had a desk in a "cabin" – a study, tucked in a row of attached

[22] Another factor, I later learned, is that lawyers' ethics in the US much more strongly endorse "zealous advocacy" on behalf of clients than do the professional codes of their British and Continental European counterparts, who are trained to value correct legal outcomes and broader social interests as well. Mark Oseil, "Lawyers as Monopolists and Entrepreneurs," 103 *Harvard L. Rev*, 2009, 2019 (1990)

[23] Foremost among these works were Mirjan Damaska, "Structures of Authority and Comparative Criminal Procedure, "*Yale Law Journal* (1975); Damaska, *Faces of Justice and State Authority* (1986); Jerry Mashaw, *Bureaucratic Justice* (1983); Philippe Nonet and Philip Selznick, *Law and Society in Transition* (1978, 2nd printing 2002, with an introduction that I was honored to write, at Phil Selznick's invitation). I also profited greatly from P. S. Atiyah & Robert Summers, *Form and Substance in Anglo-American Law* (1987) (on US-UK differences in adjudication, statutory drafting, and legal education). My penchant for making conceptual four-fold tables had come from my graduate school reading of Max Weber and his idea of constructing "ideal types" to map variation.

studies, surrounded by California oaks. The Center was the model for the founders of NIAS in Wassenaar. I felt both fortunate and honored to have been invited there for the 1989-90 academic year. It gave me time, free from teaching, to complete my comparative seaport study. On Monday mornings, I drove the fifty miles from Berkeley to Stanford, stayed overnight in a one-room rented apartment, drove back to Berkeley late Tuesday afternoon, and repeated the same pattern on Thursday-Friday. [24] That gave me four days a week at CASBS, four lunches and midday walks with interesting scholars from around the country, and valuable time to write.

Late in my first semester at CASBS, my friend Marty Levin, a political scientist, invited me to an April 1990 conference at Brandeis University. The conference topic was "The Politics of Public Policy in the United States." That felt like a stretch. I didn't know the political science literature on the politics of public policy. But I did get an idea. I was working on my "seaport" book, finishing a chapter on the litigation-plagued battle about the dredging of Oakland Harbor. That struggle, I had written, stemmed from the interaction of three features of American governance: (1) its unusually fragmented *governmental structure* (multiple agencies, federal and state and local, and multiple court systems); (2) a *political culture* that mistrusts concentrated governmental power, and hence imposes complex legal controls on administrative decision-making; (3) a *legal system* that facilitates easy access to courts, whose judges can issue powerful remedial orders. That explanation, I thought, could be expanded into a more general analysis of why courts and litigation play a distinctively large role in governance in the US – and with what consequences. And that analysis might be seen as a contribution to the scholarship on "the politics of public policy."

[24] The fifty-minute Berkeley-Stanford drive became longer after a destructive earthquake in early October 1989. The quake broke a segment of the Bay Bridge, sending a car and driver plunging down into the water. Many more were killed as elevated highways collapsed. The earthquake struck as I was in my cabin at CASBS. Books flew off the shelves. The whole structure shook violently. I rushed out of my cabin, as did the other CASBs Fellows. The ground on which we stood rippled and rocked as if caught between rapid incoming waves and outgoing riptides -- and most frighteningly, it continued for five full minutes or more. But no buildings at CASBS had fallen. I tried to rush back to Berkeley, but the drive took hours. Betsy and Elsie were shaken but fine, as was our house, which was further from the epicenter than was Stanford, which sustained considerable damage to its older buildings.

Setting aside the seaport book, I wrote a paper for the Brandeis conference that I called "Adversarial Legalism and American Government."[25] To summarize and simplify what I had concluded was distinctive about American law and governance, I devised a typology of "modes of policy implementation and dispute resolution." It based on two variables: (1) how decision-making is organized -- ranging from hierarchical (or "top-down") to participatory (a strong role for disputing parties and their lawyers); (2) the extent to which decision-making is dictated or constrained by binding legal rules -- ranging from formal (rule-dense) to informal (more room for discretionary judgment). Crossing those two variables yield four "pure," of ideal-typical, modes, as shown in this table:

Modes of policy implementation and dispute resolution

Organization of decision-making authority	**Decision-making style**	
	INFORMAL ⟷	FORMAL
HIERARCHICAL	Expert or political judgment	Bureaucratic legalism
PARTICIPATORY	Negotiation/mediation	Adversarial legalism

Most modern governments, I pointed out, use a mix of all four modes. But "adversarial legalism" – which is characterized by dense legal rules, a large role for lawyers, and frequent recourse to courts -- is much more prevalent in the US. Most parliamentary democracies, in contrast, prioritize "bureaucratic legalism" and "professional/political judgment," which restrict the role of lawyers in dispute resolution and limit judges' ability to overturn administrative or legislative decisions. Of course, institutions often do not conform to the pure version of an ideal-typical mode; they occupy intermediate points on the formal-informal

[25] My conference paper was later published -- 10 *J. of Public Policy Analysis and Management* 369-406 (1991), revised version in Marc Landy & Martin Levin, eds., *The New Politics of American Public Policy* (Johns Hopkins Press, 1995)

dimension, on the hierarchical-participatory dimension, or onboth. The ideal types provide a conceptual landscape on which such hybrid modes can be located.

In the United States, my paper noted, adversarial legalism yields such a costly, unpredictable mode of litigation that most court cases, criminal and civil, shift into the negotiation quadrant of the typology and are settled there. But the structures of adversarial legalism, rooted in law, shape what is distinctive not only about adjudication in the U.S. – particularly in contrast with the more hierarchical or bureaucratic European style – but also about governance in the U.S., where courts play a uniquely prominent role in policy implementation, in policy-making, and in partisan political conflict. My paper went on to explain how that American legal distinctiveness has been shaped by the country's political history.

I had been in a political science department for fifteen years, but trained as a sociologist of law, I always had the sense that I dwelt at the margins of the political science field. Few other political scientists did research on the topics I studied most: regulatory enforcement and compliance, the legal profession, comparative litigation. My "Adversarial Legalism and American Government" paper finally made me think of myself as a political scientist too. A year later, after that paper had been published, I was encouraged to expand it into a book, and that became my main scholarly agenda for the next decade.[26] In those years, I researched and wrote articles that elaborated my account of "the political construction" of adversarial legalism in the United States,[27] as well as a few more articles contrasting law and

[26] What about my comparative seaport book? Although I completed it before I left CASBS in the summer of 1991, but I never submitted it to a university press. I "published it" only as typescript photocopied report by UC Berkeley's Institute for Transportation Studies, which had provided me some support. Robert A. Kagan, *Patterns of Port Development*: *Government, Intermodal Transportation, and Innovation in the United States, Hong Kong, and the People's Republic of China*. (Berkeley: Institute of Transportation Studies, 1990). I left the project at that stage because the "adversarial legalism" line of scholarship had become much more compelling for me. Some material from *Patterns of Port Development,* however, found its way into separate journal articles and into my *Adversarial Legalism: The American Way of Law.*

[27] "Do Lawyers Cause Adversarial Legalism?" 19 *Law & Social Inquiry* 1-62 (1994); "The Political Construction of American Adversarial Legalism," in Austin Ranney, ed. *Courts and the Political Process* (Inst. of Governmental Studies Press, 1996) pp. 19-39; Trying to Have it Both Ways: Local Discretion, Central Control, and Adversarial Legalism in American Environmental Legislation," 25 *Ecology Law Quarterly* 718-32 (1999).

regulation in the US with other countries.[28] The ultimate result was my *Adversarial Legalism: The American Way of Law*, published in 2001.[29] Before completing it, however, I had another field research project to do: a more extensive project to confirm the persistence of American legal distinctiveness across more fields of law and regulation and to assess the consequences of American adversarial legalism.

Scene 11. Regulatory Encounters. One day in 1997 or '98, I visited a sprawling computer chip manufacturing facility in California's Central Valley. I drove there with Kazumasu Aoki, a political science graduate student from Japan (and now a professor there). "Kaz" was one of fourteen faculty members and PhD students I had recruited to help me implement an ambitious, foundation-funded research project. Building on the strategy of my comparative seaport study, the project used ten multinational corporations as research sites. Each of the corporations had parallel operations in the United States and in at least one other economically advanced democracy, and therefore faced similar legal or regulatory issues in each country. The factory Kaz and I visited, for example, was owned and operated by Q Corp (a pseudonym), a multinational whose home office was in Japan. Q Corp also made computer chips in Japan, where its production processes were much like those in their California plant. In the factories of both Q-USA and Q-Japan, as we labelled them, water was used to cool the production equipment and clean the product. Before treatment, the wastewater they discharged contained environmentally harmful chemicals. Both Japan and the US, accordingly, had imposed demanding environmental regulations on the Q Corp factories.

We wanted to compare Q-USA and Q-Japan plant managers' experience with their respective legal and regulatory systems. Had the Japanese and California regulators demanded identical or different pollution controls? Did compliance costs differ? Did company officials experience the American system as more adversarial and legalistic, as I had hypothesized?

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[28] "The Politics of Smoking Regulation: The United States, Canada, and France" (with David Vogel) in Robert Rabin & Stephen Sugarman, eds*., Smoking Policy: Law, Policy, and Politics*. Oxford University Press (1993). "Should Europe Worry About Adversarial Legalism?" 17 *Oxford Journal of Legal Studies* 165-183 1997); "Comparing National Styles of Regulation in Japan and the United States." *Law & Policy* 22:225-44 (2000).

[29] My revised and expanded second edition, taking into account post-2000 developments, was published in 2019.

And if so, what difference did that make? If American regulation was more adversarial and threatening than Japan's regulatory style, did it thereby make American regulation more effective in reducing pollution? Or less so? The other nine case studies in the research project asked the same kind of questions as applied to other kinds of business operations and their regulatory environments.[30] Each case study, by focusing on a specific process as carried out in different nations, obtained highly-detailed data and insights into each national's system's legal or regulatory style and its consequences. *Regulatory Encounters* was the name I gave to the resulting book of studies.

At Q-USA, for example, Kaz and I interviewed the official in charge of environmental compliance. Behind his desk was a bookcase packed with three-ring binders and folders. In them, he showed us, were the ever-changing body of regulations, state and federal, that he had to keep up with. And there was still another, even more detailed level of regulatory requirements: the permits issued to the facility by municipal, state and federal environmental agencies. Each permit contained more-specific rules, plus data gathering and reporting requirements, all tailored to Q-USA's production system and environmental setting. The Q-USA official showed us key parts of the permits as well as charts showing the measured levels of contaminants in the plant's effluent. Kaz later was able to get similar information from Q-Japan. The Q-USA official also linked us to the attorney he often contacted for legal advice.[31]

All of Q-USA's folders of regulations and permit conditions (which were far more detailed and extensive than those that Q-Japan had to deal with) and all of Q-USA's conversations with lawyers (which Q-Japan very rarely had) did not give Q-USA a sense of

[30] Here are some examples: One other study involved a large corporation that had sited and constructed municipal waste disposal facilities in the US, the UK, and the Netherlands, where it faced similar land use and environmental regulations. A second study concerned a pharmaceutical maker with operations in both the US and Canada, enabling us to ask how labor law in the two countries affected the corporation's experience when it planned to dismiss or lay off employees. A third concerned a multinational motor vehicle manufacturer's experience when it sought to expand production at two assembly plants in the US and two in Germany, encountering in both countries controls on the air pollution generated by its expanded painting operations. A fourth concerned a multinational bank that had credit card operations in the US and in Germany and had to cope in both countries with laws and court systems that regulated the bank's debt collection practices. A fifth multinational had obtained and defended patents on an innovative chemical process and resultant products in the US, Japan, and the EU, so we asked, "how did the patenting and patent defending processes differ, and how did those differences matter?"

[31] Kaz and Lee Axelrad (an environmental lawyer and chief administrator for the research project) later interviewed that attorney, as well as officials from state and local regulatory agencies and a US-based environmental consultant with experience in the US and Japan.

legal certainty. Its officials experienced the governing law as complex, changeable, difficult to keep up with and comprehend. Q Japan officials, we learned, did not. For Q Japan managers, the legal rules and potential sanctions were not salient concerns. They saw compliance mostly as an engineering and management challenge. So did Q-USA managers, but for them it was a legal challenge too. Q-USA had a generally good record of compliance, but compared to Q-Japan, its officials were more concerned about the threat of monetary fines and civil liability claims for inadvertent regulatory violations, and they had more legalistic and skeptical attitudes toward regulatory rules. Nor did the greater specificity and salience of legal requirements in the US result in higher levels of environmental protection. The water quality in the post-treatment effluent from the American and Japanese plants was about equal.

All but one of the ten case studies produced similar findings. Across nine different fields of regulation or law, the American law was more detailed, prescriptive, and complex. It required much more detailed reporting and costly paperwork. It imposed much longer delays in getting permits for new projects and plant expansions. It generated more litigation or the threat of it, which resulted in much larger expenditures on legal services. Yet with a few exceptions, American adversarial legalism did not produce more protection for the American public. Indeed, in some cases, the defensiveness it generated among regulated firm managers sometimes made the outcomes a bit worse. [32]

And that, you may recall, is what Gene Bardach and I had found about American regulatory enforcement and had written about in *Going by the Book*, published almost 20 years earlier. The legalistic "medicine" that may be appropriately prescribed for the bad apples often upsets the stomachs of the good and reasonably good apples, which reduces the cooperative spirit that makes regulation truly effective. And *Regulatory Encounters'* lesson about the excesses of adversarial legalism was also a major theme in my *Adversarial Legalism* book, published a year later. Adversarial Legalism was much broader, however, including similar findings not only in its chapter on the American regulatory state but also in its discussion of adversarial legalism's effects on American criminal justice, civil justice, tort law system, and welfare state.

[32] Robert A. Kagan & Lee Axelrad, eds, *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (Univ of California Press, 2000)

III. STUDYING REGULATORY COMPLIANCE

There are lots of regulatory enforcement officials in modern societies – a white collar police force that inspects factories and farms, restaurants and railroad tracks, drilling rigs and diesel truck emissions, nursing homes and mines and banks. But there never are enough enforcement agents. They can't be everywhere all the time. When inspectors are visiting Businesses A through G, it might be one of the Businesses H through Z that is violating a regulation. Some violations have serious ill effects: outbreaks of food poisoning, eco-catastrophic petroleum spills, neglectful operations of dangerous machines and vehicles, deliberate law evasion schemes. But how come, I often asked myself in my years studying regulation, it isn't even worse? Order is far more prominent than chaos. Doesn't that mean compliance is much more common than noncompliance? If so, another question arises: why would profit-seeking business firms comply with risk-reduction regulations, especially those that are costly to implement?

The standard economic theory is that rational business firms would comply with regulations when (and only when) the anticipated costs of punishment for noncompliance exceed the costs of compliance. If the probability of detection and actual punishment for a violation is low, as is common, the firm's incentives to evade the law or skimp on compliance measures increase proportionately. I viewed this theory with considerable skepticism. First of all, my experience indicated that regulatory compliance in the US and other advanced democracies is far higher than the economic theory would predict. Second, sociolegal theories of legal compliance among individuals had long concluded that people comply not only because of fear of official punishment. They comply also because of peer pressure and because of the normative beliefs that most individuals are brought up to internalize.[33] Business firm managers are people. Aren't they subject to those social and normative pressures too? A prior research project had inclined me to think so.

[33] Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (1975)

Scene 12. Studying Anti-smoking Law: Compliance without Enforcement. One summer afternoon, I left my seat at an Oakland A's baseball game in the sun-drenched stadium, walked up to the level where the hot dog stand and the men's room were located, and asked a uniformed security guard for directions to the "smoking room" for that section of the stadium. That's where I went, not to smoke but to see if anyone was smoking there. Sure enough, there were five or six baseball fans there, smoking cigarettes while they looked down on the action through a wide glass window, nicely located between home plate and first base. As you will have guessed, I was doing some field research concerning regulatory compliance.

In 1990, my Berkeley Law School colleague Steve Sugarman had drawn me into an interdisciplinary faculty seminar on strategies for reducing harm from tobacco products. I started reading about a recent wave of municipal regulations designed to restrict where cigarette smokers could smoke. The idea was both to reduce risks smokers imposed on others forced to inhale "second-hand smoke" and to discourage the smokers themselves from smoking. Anti-tobacco activists had realized that they could more readily win support for anti-smoking regulations from city and town governments than they could at the federal or state levels of government, where the money-based influence of "big tobacco" often was difficult to overcome. That first wave of municipal regulations banned smoking completely in certain public places and required restaurants and businesses to create no-smoking sections or rooms. Some cities went further, enacting complete smoking bans in stores, schools, health facilities, and workplaces. By 1991, there were about 450 municipal anti-smoking laws.

I wondered, however, were smokers – people addicted to tobacco -- complying? How about the employers, restaurant owners, and storekeepers who were supposed to put up "no smoking" signs and enforce those rules? Noncompliance with Prohibition in the 1920s left us with images of bootleggers and speakeasies, gangsters and bathtub gin. The "War on Drugs" in recent decades hadn't come close to squelching the sale or use of illegal narcotics. Would bans on smoking have the same fate? And if not, why?

Together with my colleague Jerry Skolnick, known for his studies of police vice squads and the regulation of gambling, I decided to address that subject. In three Northern California cities that had enacted partial smoking bans, a research assistant and I interviewed police departments, non-smokers' advocacy organizations, high school administrators, and

representatives of the Chamber of Commerce. In other cities, we interviewed site managers in two restaurant chains that were obligated to establish no smoking zones. With Hollywood movie images of smoke-filled newspaper city rooms on my mind, I called several newspapers in cities with complete bans on smoking in workplaces. In their experience, we asked all these respondents, had businesses established the required the no-smoking areas? Did smokers comply or resist? Were the police called to eject noncomplying smokers, or stop fights between smokers and complaining nonsmokers? Had businesses or employers declined to enforce the rules against resistant customers or employees?

With the exception of high schools, where administrators acknowledged some students still smoked in far corners of the school yard during lunch-hour, the answers were remarkably similar. Very high rates of compliance. Virtually no resistance when smokers were asked or told to stop. No fights. Almost no fines or prosecutions. Police very rarely were called to deal with a dispute. The same was true even at the baseball stadium, a huge outdoor venue where smoking also had been prohibited except in the few smoking rooms. Those findings, we discovered, were echoed by newspaper stories and other academic studies concerning responses to local smoking bans throughout the US. Jerry Skolnick and I subtitled the article we wrote "Compliance Without Enforcement."[34] The article also discussed *why* compliance with regulations restricting the smoking of cigarettes (a legal product) was so high and non-conflictual, as compared with efforts to regulate narcotics use and drunk driving. And what does the smoking ban story teach us about the factors that enhance (and detract from) legal compliance in general?

One major factor in the smoking ban story, as in other studies of compliance, was the relative *visibility of violations*[35] – in this case, the visibility of forbidden smoking to citizens and co-workers who were motivated to complain about the secondhand smoke. By 1990, surveys indicated, most Americans knew that tobacco smoke was not merely unpleasant but

[34] "Banning Smoking: Compliance Without Coercion" (with Jerome Skolnick), in Robert Rabin & Stephen Sugarman, eds., *Smoking Policy: Law, Policy, and Politics*. Oxford University Press (1993

[35] Robert A. Kagan, "Visibility of Violations and Income Tax Law Noncompliance", in Jeffrey Roth & John Scholz, eds, *Taxpayer Compliance. Volume 2: Social Science Perspectives.* Univ.of Pennsylvania Press (1989)

dangerous. And the nonsmokers now had the law on their side. Once "no smoking" signs were posted—as the municipal ordinances required of business firms -- nonsmokers felt much more emboldened to complain, directly to violators or to managers of the facility that had posted the sign. They felt so emboldened because law crystallizes social norms and vests them with authority.

Second, compliance motivations are always affected by the relative *cost of compliance.* In this case those costs were not so high as to provoke much resistance. The laws didn't ban smoking entirely, but merely zoned it out of certain places. Smokers did not have to quit. They only had to wait a bit, or to step into a permitted smoking area or step outside.

Third, there was *no supportive deviant subculture* among smokers that contested the legal constraints and encouraged resistance. For cigarette smokers, there was no equivalent to the National Rifle Association, which organized opposition to restrictions on firearm ownership. Attempts by "big tobacco" to stimulate such a grassroots organization had fallen flat. That was because by 1990s, even most smokers acknowledged that smoking posed serious health risks. A majority of adult smokers, surveys showed, wanted to quit.

This underscores the importance of a fourth influence on compliance or noncompliance -- the *normative beliefs of regulatory targets.* In this case, what mattered most was that according to polling data, smokers generally accepted the norms underlying the smoking control regulations. That finding supported my skepticism about the economists' theory of regulatory compliance and noncompliance. And that finding about normative beliefs would play a role in a subsequent set of studies of large corporations, which faced much higher regulatory compliance costs than did smokers.

Scene 13. A New Partnership. In 1988 I received a joint appointment to the law schoo1 faculty at UC Berkeley and from 1993 to 2002 I served as director of the Center for the Study of Law and Society, a prominent interdisciplinary research institute founded in 1961. In 1997 or so Neil Gunningham of Australian National University spent a semester as a visiting scholar at the Center. Neil was a fellow member of the tribe of sociolegal scholars who study regulatory enforcement and compliance. Neil told me he was thinking about why

regulatory compliance varies, and particularly why some businesses in an industry are "leaders" in complying with environmental, health and safety regulations while others are 'laggards." He saw the possibilities of combining that question with my research method in the *Regulatory Encounters* project: comparing regulation across countries and doing so via detailed case studies of a small sample of businesses in the same industry, from whom one could get detailed compliance-related data.[36] Over the next decade we did three consecutive regulatory compliance studies together, beginning with a study of environmental regulation and environmental performance in a sample of 14 pulp and paper mills.

We also recruited a third partner. Dorothy Thornton, a PhD student in UC Berkeley's School of Public Health who had recently taken (and starred in) my graduate seminar on Legal Institutions. Dorothy was interested in environmental regulation's potential for improving public health. I suggested to her that Neil's and my planned pulp and paper mill study would provide data for her PhD dissertation-- such as the pollution reports each paper mill had to keep for regulatory purposes. Dorothy agreed. She quickly became an equal partner on the pulp mill study and continued to work with us on our two subsequent projects. We enjoyed each other and profited from each other's different backgrounds. Dorothy was from Capetown, South Africa. Neil was an English-born Aussie. I was from New Jersey. Neil was a gifted interviewer, full of mental and physical energy, always pushing each project forward. Dorothy was adept in analyzing mathematical data and also in learning about the corporate production processes and pollution control technologies we studied. Dorothy and Neil took the lead in conducting the field research. I played a larger role in framing each study, applying for funding, and trying to write up our findings and conclusions in an accessible, theoretically meaningful manner. In describing the three studies, I think it would be best to start not with the pulp mill study but with the second one.

Scene 14. Looking for General Deterrence. "General Deterrence" isn't a comic book hero. It is a concept used in the study of law enforcement and compliance. "Special

[36] Both Neil and I had realized long before that the compliance/violation data assembled by regulatory agencies usually were not adequate for our research purposes, due to gaps and missing information and lack of specificity about variables that are important for our analyses.

deterrence" is generated when *you* are punished for violating the law; it makes you wary of violating that law again. "General deterrence" occurs when you learn that *someone else* has been punished for violating a law, and that makes *you* more wary of violating that law. Politicians and enforcement officials rely on general deterrence when they publicize the punishment of a particular company and say they want to "send a message" to all the other companies subject to the same law. I wondered, however, "Does the 'general deterrence signal' sent by that news story really increase compliance by similar companies, as the economic theory of compliance would predict? Or does that signal simply get lost in the cacophony of communications and news stories that those companies' managers encounter? Or does signal get heard but is quickly pushed out of mind by the many crises and day-to-day pressures that managers have to cope with?" Neil, Dorothy, and I decided to try to find out. The U.S. Environmental Protection Agency (EPA) had a research grant program that was willing to help us.

The first phase of our research entailed a telephone survey, rather than in-person, on-site observation and interviews. In the summer of 2001, we gathered 112 press releases that had been issued by the EPA in the previous eighteen months. Each described an enforcement action in which EPA officials, responding to a serious regulatory violation, had won a court ruling or a settlement entailing a severe penalty -- a jail sentence for the responsible company manager or very large money damages. Each press release was intended to send a "general deterrence" message. From those we selected eight "signal cases," one each from eight different states. We then drew a sample of 221 firms, each of which was in the same state and industry as a defendant company or executive in one of the signal cases. [37] In telephone calls to each firm, we spoke with the official primarily responsible for compliance with environmental laws. We described the facts of the infraction and punishment in the signal case and asked if the respondent had heard of it. Only 42 percent said "yes." That supported my hunch that the general deterrence signal often gets lost in the noise of other communications and concerns.

[37] To generate our sample of firms, we had identified all businesses facilities in the same industry and state as the defendant in a signal case. From those we picked a random sample, and then repeated the procedure for another signal case. The resulting sample yielded mostly facilities with fewer than 100 employees, although a significant number had more than 1000. The response rate in our telephone survey was 80 percent, outstandingly high for survey research of this kind.

But not totally lost! Most of the respondents (89 percent) remembered at least one instance of *some* company, somewhere, that had been penalized for an environmental violation in the last year or two. And those less-specific signals mattered: after hearing about such a case, 63 percent of the respondents said they had taken some additional environmental protection action. We also asked the respondents, "Suppose your firm committed a violation like [the violation in the signal case]. What is the likelihood, in your estimation, that the violation would be detected and your company punished?" In the responses, the median perception of the probability of punishment was 0.7 (that is. seven times out of ten). Altogether, those responses suggested that general deterrence does work, but via a *cumulation* of deterrence signals, not usually via any particular signal.

Moreover, while the cumulative general deterrence signals had an effect, it was not quite what the economists' theory predicted. For the vast majority of our respondents, the signals they attended to did not scare them *into compliance*. All of the respondents we interviewed believed their firm was basically compliant, but they recognized that slip-ups could and sometimes did occur. So while almost two-thirds had taken "additional environmental compliance measures," the most common such measure, the respondents told us, was simply to check that their firm really was in compliance, that its compliance-related systems were working properly. Their actions were like those of a driver on the highway who spots a car pulled over by a highway patrol officer and then checks his own speedometer. Neil, Dorothy and I called this general deterrence's *reminder effect*.

We also learned that almost all the respondents thought the penalty imposed on the violator in the signal case was reasonable. Some of them *applauded* the enforcement officials' harsh action. They were like a driver on a highway, having been passed by car moving at a reckless speed, who inwardly cheers when she eventually sees that speeder stopped on the side of the road, getting a ticket from a highway patrol officer. Learning about regulatory enforcement against other firms, those responses suggested, also has a *reassurance function* for firms that have made normative and financial commitments to be law-abiding. I thought

of Chester Bowles's belief that the majority of businesses would comply with a regulation if they thought the regulators were catching and punishing the "bad apples." [38]

Overall, our research and that of other sociolegal scholars indicated that business firm managers are motivated to comply with regulations by three factors: (1) fear that violations can result in legal punishment; (2) fear that violations would harm their reputation among consumers, employees, investors, friends, and family members; and (3) managers' normative beliefs, including the importance of the rule of law and belief in the legitimacy of particular regulations.[39] Of course, those three factors vary in intensity. And those factors interact. Respondents at large chemical companies told Neil Gunningham that legal penalties mattered not because they feared the costs of paying them, but because they generated adverse publicity, negatively affecting the companies' reputation.[40] Another example of interaction: fear of penalties affected the beliefs of regulated companies' managers: drawing on his longer interviews with smaller chemical companies and electro-platers, Neil wrote:

> "We were struck by how many of our respondents in small and medium-sized companies did not calculate the likelihood of detection or the severity of [legal] punishment in the ways predicted by deterrence theorists. Instead, they appeared to use a general rule of thumb: if you violate the regulations, you eventually will be caught, the penalty could put you out of business, and resistance is futile. Sustained inspection and enforcement activity seems to have inculcated a 'culture of compliance.' …. Rather than simply providing a threat, regulations and

[38] See footnote 1, p. 4.

[39] Robert A. Kagan, Neil Gunningham & Dorothy Thornton, "Fear, Duty, and Regulatory Compliance: Lessons from Three Research Projects," in Christine Parker & Vibeke Nielson, eds., *Explaining Compliance; Business Responses to Regulation* (2012). With respect to normative beliefs, in the second phase of our general deterrence study, Neil Gunningham conducted longer interviews with officials in 35 chemical and electro-plating companies. Neil noted "None criticized the need for regulation," and quite a few said regulation was desirable. Neil Gunningham, Dorothy Thornton & Robert A. Kagan, " "Motivating Management: Corporate Compliance in Environmental Protection" *Law & Policy 2*2:289*,* 303,

[40] One chemical company official said, "I don't believe fines are a driving force. They are typically minimal, the publicity is the driving force. It leads the general public to believe you're doing things you're not supposed to do. It opens the door for watchdog groups – you've flagged yourself." Gunningham et al, " Motivating Management," p. 305

inspections acted as a reminder or guide to enterprises as to what was required of them."[41]

Scene 15. Pulp Mills: Comparing Leaders and Laggards. On a bright day in 1998, Dorothy, Neil and I took a flight from San Francisco to Vancouver, British Columbia. There we rented a car, drove to the waterfront, and boarded a large auto-ferry. It headed north and eventually turned into Howe Sound, a fjord-like inlet fed by streams that tumbled down from steep mountains. We had arranged to spend two days each at three different pulp and paper mills, spaced miles apart on the banks of the sound. Like many such mills, they were ugly things in beautiful places. Hungry for water to use in the manufacturing process, most pulp and paper mills are located on rivers or estuaries. Here's picture of one:

[41] Motivating Management p, 312

Pulp mills use massive doses of chemicals to break down wood chips into cellulose fibers, from which paper is made. Historically, the chemical-filled wastewater that they discharged devastated aquatic life in the river or estuary, and the air around them was horribly odorous. So in the 1970s, when rich democracies finally got around to regulating air and water pollution seriously, paper mills were prime regulatory targets. By 1998 and 1999, when we studied 14 mills --in Canada, Australia, New Zealand, and two US states (Georgia and Washington) -- environmentally harmful chemicals in pulp mills' effluent had been reduced by a striking 90 percent. The remaining 10 percent, however, is still environmentally harmful. And there is an ongoing risk of accidental spills of harmful chemicals or leaks from imperfectly maintained pollution-reduction systems. The mills we visited also still smelled bad — although older employees and residents in nearby towns told us that the odor was minimal compared to two decades earlier. ("You should have been here *then*!" "No thanks.").

The pulp mills were gigantic. Heaps of wood chips (the waste from lumber mills) were fed into giant cylindrical "digesters," four stories tall, where they were bathed in heated chemicals. The resultant fiber-filled chemical "liquor" then was fed into a series of huge, heated vats in which the two main fibers in wood, lignin and cellulose, were separated, and the increasingly pure cellulose was repeatedly washed. Then – because most consumers demand white, not tan, toilet paper, paper towels, and copy paper – the pulp is fed through a multistage bleaching process. The primary bleaching agent in 1998-99 was chlorine, and the chlorine-filled wastes, if released into the nearby waters, also are environmentally hazardous.

Consequently, all the pulp mills in our sample, after being compelled by regulation to install and operate very expensive effluent treatment systems in the 1970s and early '80s, had been compelled in the 1990s to install costly secondary treatment systems as well -- and to find ways to reduce chlorine pollution, an even more costly process. Moreover, the mills had devised ways to recycle many of their wastes. For example, they used separated lignin fibers, together with wood chips that were too large to send to the digester, to fuel the furnaces that heated the digester and the other vats of chemicals. Sludge from the bottom of those vessels was dried and recycled too.

Notwithstanding all these investments, the pulp mills remained targets for regulators, who pushed them to reduce accidental chemical spills, reduce or eliminate elementary

chlorine use entirely, reduce dust, and reduce odors. By 1998, we learned, the legal rules and the mill-specific regulatory permits in British Columbia, New Zealand, Australia, Washington and Georgia were about equally stringent. Regulatory officials in each jurisdiction knew what the others were doing. They knew what technologies and techniques the most efficient and well-managed pulp mills were using to reduce the input and the environmental discharge of chemicals, and they knew what technologies were likely to be used in the coming decade. The regulators used the best practices and future plans of the environmental leaders among pulp and paper companies as guides for regulations that would compel the industry's laggards to emulate the leaders. As a result of many years of close regulatory attention, many pulp mill managers spontaneously told us that compliance, indeed "overcompliance," with environmental regulations was part of their "license to operate." And that " license" included not only a legal/regulatory strand but also a "social license," enforced by the local community and by environmental activists, both of whom could generate reputation-harming publicity about the mill's environmental failings.

At each pulp mill, Dorothy, Neil and I met with the plant manager, the chief environmental compliance officers, and operators of the effluent-treatment facilities. In the nearby towns, we met with representatives of environmental activist organizations. We asked mill managers for -- and were given -- mill-specific effluent data (which they were required to measure and report to British Columbia regulators). We could then compare that data to the limits set by the facility's official regulatory permits. With that information, plus the data the mills were obliged to report concerning breakdowns and chemical spills, we eventually could compare each mill's environmental performance with the other 13 mills in our sample. In addition, Dorothy's prior research on best industry practices enabled us to evaluate critically mill managers' answers to our questions about their recent improvements and future plans. Through our conversations with managers, we could also discern differences among the mills in how they interacted with regulators, environmental activists, employees, and the local community. These interviews enabled us to characterize each mill's "environmental management style" – a characterization we could test (and sometimes adjust) in our

subsequent interviews with the regulators, with local environmental activists, and with some folks in the nearby community.[42]

Comparing notes on the different mills, we classified each mill's environmental management style on a five-point scale that ranged from "environmental laggards" and "reluctant compliers" to "committed compliers" (the most common type in our sample) and a few forward-looking "environmental strategists" and "true believers." Mill managers in the latter two categories, expecting regulation to grow increasingly stringent over time, saw environmental leadership as a sensible corporate strategy and marketing identity.[43] All of the mills in our sample "overcomplied" with regulation to some degree; they had reduced pollution in their effluent to levels below their permit limits, giving them a margin of error. But the most environmentally committed managements had reduced effluent pollution quite a bit further.[44] They also had invested in odor reduction measures not required by law or regulation. They devoted more energy to training personnel, to searching for new, innovative environmental methods or technologies, and they generally experienced fewer accidents and spills. They were more open and cooperative with environmental advocacy groups, nearby communities, and regulators.

Why did the environmental leaders overcomply? Not because they had a tighter "regulatory license" (more pressure from regulatory officials) than the other mills, or a less restrictive "economic license" (which we measured via the size and profitability of the corporation that owned the mill). Rather, the environmental strategists and true believers felt keener pressures from the "social license" strand in their overall license to operate. That led

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[42] We followed the same research protocol when we left Howe Sound and visited a pulp mill on Vancouver Island, and then two mills in the state of Washington. I stayed behind in Berkeley when Neil and Dorothy visited the mills in Georgia, and Neil alone visited the New Zealand and Australian mills.

[43] The "true believers" differed from the "environmental strategists" in terms of their evident strong beliefs in environmental values and their proactive "beyond compliance" activities. The "strategists" merely thought that it was wise from a business perspective to be "ahead of the curve" and to cultivate a "green' reputation with regulators and local governments. See Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Shades of Green: Business, Regulation and Environment*. Stanford University Press, 2003; Kagan, Gunningham, & Thorton, "Explaining Corporate Environmental Performance: How Does Regulation Matter?" *Law & Society Rev*. 37:51-90 (2003)

[44] Neil, Dorothy and I assessed a mill's environmental management style without reference to the degree to which their effluent "overcomplied" with their permit limits and were gratified when we later saw that there was a strong correlation.

us to two related questions: What determined variation in the 'tightness' of mills' perceived social licenses? What determined variation in how their social licenses were enforced?

Location mattered, for that affected the visibility of violations to people who were likely to complain. The "reluctant compliers" were in or near small towns in which they had been the major employer for a long time; social license pressures, therefore, were weak. The true believers and environmental strategists were in locations that had become more urban or were visible from highways traversed by urbanites; greater visibility made those mills more likely to get complaints about odors or about discolored waters. In addition, the environmental strategists were part of larger, vertically integrated corporations whose forestry operations were monitored by environmental groups and whose paper products had a widely recognized brand name – factors that made them more of a target for environmental activists and made them more concerned about preserving their company's "reputational capital."[45]

At the same time, the mills' "economic licenses" – enforced by pressures for profitability from corporate headquarters and from investors – imposed limits on how far beyond compliance even environmental strategists and true believers could go. None of the mills had leapt *far* ahead of its competitors and regulatory requirements, for example, by creating a totally chlorine-free bleaching process or abandoning pulp bleaching entirely. That would be extremely costly, and customers, some mills had learned to their regret, would not pay much of a price premium for "greener" pulp or paper. Indeed, all the most important environmental changes in the mills, such as installation of primary and secondary effluent treatment facilities, were immensely costly; they had been installed only because the law and the regulators had insisted on them.

In sum, social license pressures had made some mills work harder at making marginal (although not insignificant) environmental improvements. But it had taken legally binding regulations, implemented by regulatory agencies, to bring about the vital major improvements. As we later wrote, "Only specific regulatory requirements and the threat of enforcement could trump [the mills'] tight economic constraints by making a credible implicit promise to each

[45] The better performing mills also experienced social license pressures from local political jurisdictions, whose cooperation in granting and renewing land use permits was something mill managers had to bear in mind.

pulp mill: 'You have to make a huge investment in environmental technology, but believe me, your competitors will have to do it too."[46]

Scene 16. Further Explorations of Compliance: Diesel Trucks. Soon after dawn, one morning in 2005, I drove to an intersection near the Port of Oakland where the California Air Resources Board (CARB) had set up a roadblock. An enforcement team was stopping trailer trucks and checking their engines and exhausts. Heavy duty diesel-fueled trucks are the moving links in the supply chains of our modern economies. There are millions of them. Their diesel engines, if well-maintained, can last for a million miles. But the exhaust from those engines contains nitrogen oxide (NOx) and invisible small particulates. Both are very hazardous to human health, particularly in high truck-traffic areas – like those near seaports. To meet CARB's regulatory standards, diesel engines had to have been well-maintained and, if more than 10 years old, modified in a specified, emission-reducing way. The trucking business, after its deregulation in 1980, had become hyper-competitive, and many small trucking companies found the retrofits hard to afford. That morning, I saw a few trucks fail the CARB test, which the inspectors administered quickly with a device they hooked up to the engine. That technology was making invisible violations visible to CARB agents.[47]

For about 45 minutes, I watched how the tests were done, chatted with CARB officers about their task, and spoke with several waiting truckers. The morning fog hadn't burned off yet and a cold wind was coming in from the Bay. "Maybe," I was thinking, "I'm getting old, losing my enthusiasm for fieldwork." I walked back to my car and drove home, thinking about a hot cup of coffee. At bottom, however, I was glad to have had another new kind of regulatory encounter, observing another node in the modern world's astoundingly complex network of specialized processes.

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[46] See references in fn 43.

[47] At that time, California, the first U.S. state to regulate motor vehicle admissions, was still the nation's -- and probably the world's -- leader in that regard. No other state was then doing that kind of proactive roadside enforcement of regulatory controls on diesel-powered trucks. Thornton, Kagan, & Gunningham, "Compliance Costs, Regulation, and Environmental Performance: Controlling Truck Emissions in the US" *Regulation & Governance* 2: 1-18 2008

In our pulp and paper mill study, Neil, Dorothy, and I had observed social license pressures playing an essential role in ensuring regulatory compliance. Pulp mills, however, are large facilities. They operate under the gaze of regulators, environmental activists, and nearby communities. For two decades, they had been subject to "technology-forcing" regulatory rules that pushed them to reduce emissions. Most are owned by large corporations capable of financing the steep costs of new technologies. Not so for trucking companies. They are mostly small, not in the public eye. They are subject to many safety regulations, and some environmental regulations, such as those designed to prevent oil contamination around the yards where the trucks are serviced and refueled. But except for California's novel enforcement program, the toxic NOx and particulates emitted by their trucks were not closely regulated.

Beginning in the early1990s, Federal statutes and regulations had required manufacturers of diesel-powered heavy-duty truck engines to reduce emissions in new models and reduce them further every five years. Petroleum companies had been required to develop and sell the cleaner-burning diesel required for the newest model year engines. But just as no one is obligated to buy the newest model low-emission car, federal regulations did not require trucking companies to *use* the new model trucks or engines. Relatively few companies could handle the $150,000 cost of new model trucks. Shrinking from the economic and political consequences of driving many small companies out of business, by 2005 no state government (except for California's limited restrictions) had enacted laws or regulations forbidding the use of older, dirtier diesel engines.[48] So by studying diesel-engine trucking companies, Dorothy, Neil, and I had concluded, we could examine regulatory compliance and environmental performance when regulatory scrutiny and social license pressures are not so intense. The EPA had again agreed to fund our research.

Social, political, and normative pressures, we learned, were having some impact. They had induced some large trucking companies – particularly those whose brand names are

[48]Dorothy Thornton, Robert A. Kagan, & Neil Gunningham, "When Social Norms and Pressures Are Not Enough: Environmental Performance in the Trucking Industry," *Law & Society Review* 43:405-34 (2009)

emblazoned on their frequently-seen trucks (UPS, Federal Express and Walmart) – to switch to newer, less-polluting vehicles. But what about smaller, less visible trucking companies? With several measures of truckers' environmental performance in mind,[49] we visited and interviewed a sample of medium-sized and small trucking companies, eight in California, eight in Texas – two large states with busy container ports but with politically different regulatory regimes. For these smaller truckers, the story was very different. In the absence of legal requirements to buy the newest, greenest engines, few of those companies had been pushed to do so by social pressures or normative beliefs. The few who had bought new model trucks had done so for "economic license" reasons alone; they operated in particular market niches that demanded the higher reliability that newer trucks provide, so the resulting environmental benefits were a side-effect, not a motivation. Similarly, some of the small truckers we studied had made special efforts to reduce fuel consumption (and, as a byproduct, lower emissions), but had done so in order to reduce high diesel fuel costs, not because of a commitment to reduce harmful pollution.

The small trucking firms we studied were not oblivious to their legal obligations. They took pains to comply with the extensive safety regulations applicable to trucking operations. They obeyed environmental regulations concerning disposal of used motor oil and run-off from maintenance yards. But reducing pollution by scrapping or retrofitting old model diesel engines had not been legally required, so few of them had done so. A lesson of our diesel trucking study, therefore, was that among small, low-visibility business firms in highly competitive markets, social and environmental concerns are not likely to play a major role in improving their environmental performance –*unless*, like the small electro-platers mentioned earlier, those smaller firms "are subject to regulatory regimes that induce significant fear of punishment for noncompliance," which assures each firm that not only it but its competitors will be compelled to invest in environmental improvements. [50]

[49] Because newer diesel engines were less polluting than those in made in early periods, if we ascertained the model year of each company's trucks and averaged their age, we could do a rough but useful calculation of each company's relative level of NOx and particulate emissions. Trucking companies' emissions also are affected by how well they maintain their vehicles' engines, their restrictions on drivers' speed limits, their restrictions on idling with engines on, their total miles driven, etc.

[50] Thornton et al, 2009:431.

Summing up, our three studies, taken together, confirmed that regulatory compliance does get a large boost from most business managers' desire to build and preserve their firm's reputation for being a good corporate citizen and their own personal reputation as a good citizen. Compliance also gets a boost from many (but not all) managers' and in-house professionals' internalized sense of duty to obey the law and to avoid doing harm. But absent the legal standards and threat of enforcement provided by specific regulatory requirements, social and normative pressures on most medium sized and small firms are likely to be weak. Governmental regulations, particularly the normative standards they establish, provide the foundation on which social license pressures are built. While some large, visible companies had purchased new model, low-polluting trucks, they did so only after government regulation had measured and publicized the harmful effects of heavy-duty diesel engine emissions and required engine manufacturers to develop the low-emission vehicles. In that industry and many others, regulation crystallizes the norms and provides the benchmarks that enable social activists to criticize prominent firms and pressure them to adopt the less-polluting "best available technology."

While I felt good about my three projects on regulatory compliance with Neil and Dorothy, I had to recognize that there is much I still *didn't* know. I didn't know, for example, what *level* of enforcement it takes to create a culture of compliance, or why or how fast that culture can erode. I was unsure quite how confidently I could generalize beyond the particular industries and regulatory rules we had been studying. How do fear of legal sanctions, social license pressures, and managers' normative beliefs interact in other contexts, other markets, other regulatory programs, other political contexts? Finding answers would require a great many labor-intensive case studies of different regulatory programs and regulated markets. And there are so many regulatory programs, so varied in purpose and in nature, operating with varying degrees of political, budgetary, and public support. Within each regulatory program, there are so many regulatory rules -- rules that vary in cost of compliance and degree of resistance, rules whose violations are visible to regulators and citizen watchdogs and rules that are not. And of course, regulated businesses vary greatly-- from good apples to bad apples, from rich to barely getting by, from truckers in a market niche that gives them incentives to buy greener trucks to those in market niches that do not.

Not for the first time, therefore, I had to recognize the limits of my type of scholarship. Sociolegal research reflects the conceptual forms and ideals of science. But the phenomena we study – legal norms and processes – are so varied, so changeable, and molded by so many hard-to-measure factors, that elegant causal models are perpetually elusive, and scientifically unassailable generalizations often are out of reach. For many questions, the best sociolegal scholars can aspire to is to formulate meaningful insights, to make some informed judgments. Nevertheless, I had valued the quest, the feeling of moving a bit further up the learning curve, experiencing moments of insight into how law affects the society I live in, and discerning how social and political processes affect legal outcomes. As is often said, life's satisfactions are to be found not in the destination but in the journey.

IV. DENOUEMENT

As I approached retirement and reflected on my academic career, I thought with much satisfaction about my relationships with Ph.D students. Those relationships began when graduate students took my Legal Institutions seminar, continued when I worked with them in preparation for their field exam in "law and politics," and when I helped them formulate their Ph.D research project, and when I commented on drafts of their dissertations. Many worked closely with me as teaching assistants in my undergraduate courses. As they moved on into faculty positions around the country (and some abroad), I felt a kind of parental pride as well as satisfaction that some of what I had learned and taught was now being taught to their students. One of the most treasured shelves in my study today contains a row of books my PhD students have written based on their PhD dissertations – and some books on their subsequent research.

Reflecting on "teaching and mentoring" awards and the "lifetime scholarship" awards I had received from the Law & Society Association and from the Law-Courts Section of the American Political Science Association, I asked myself, "Which do I feel most proud of ?" It took me some thought, but my answer was "teaching and mentoring." It was the human connectivity of teaching and mentoring that pleased me most. If I had to choose, I concluded,

I'd most like to be remembered for having been a supportive guide, a mentor who was both a constructive critic and a cheerleader, and ultimately an empathetic friend.

I also had received much satisfaction from two institutional commitments: to the Center for the Study of Law and Society and to Regulation & Governance. The Center provided me with a congenial and stimulating intellectual home, and during my decade as Director I enjoyed being able to host (and constantly learn from) seminar-type presentations by legal scholars and social scientists from UC Berkeley and other universities, in the US and abroad, and to build connections among them. For three years, I served as co-editor of *Regulation & Governance*, a new journal that (at last!) provided a specialized forum for empirical studies of regulation. The journal's peer review process enabled me to provide advice and (usually) encouragement to innovative scholars from many countries, whose work in turn broadened my own knowledge. And it was very gratifying to see that in the trickle of studies of regulatory agencies and processes that I could find in the 1970s had become in the pages of *Regulation & Governance* a bubbling stream. That made me feel that I had been on the right , that doing regulatory studies was a meaningful enterprise, and that governmental regulation, with its mix of successes, shortcomings, and annoyances, is indeed an essential mechanism for keeping dynamic capitalist economies responsive to democratic values.

I retired from teaching undergraduate courses at UC Berkeley in June 2011 and from teaching my graduate seminar in June 2014. And by then at age 76, I figured I wouldn't do any further field research.

Scene 17. RegNet, Canberra. In October 2012, groggy from traveling halfway around the world, I checked into a little apartment in Canberra, near the campus of Australian National University (ANU). Neil Gunningham had wangled me an invitation to come to ANU for a week-long residency at RegNet, a renowned center for the study of regulation. Over the next three days I gave two lectures at RegNet and a talk in a graduate seminar. In an email exchange, I had asked Neil, "What should I lecture on?" He responded, "Adversarial Legalism." I thought, "I can't just talk about a book that was published in 2001, more than 10 years ago." After thinking a bit more, I wrote him, " How about 'Adversarial Legalism in the Early 21st Century?' " He wrote back, "Fine!"

For fifteen years, adversarial legalism in the US had been under assault by what political scientists had come to call the "conservative legal movement." It was the brainchild of wealthy libertarians whose money and lobbying had pushed the Republican Party toward a rigidly partisan, anti-government stance. The conservative legal movement fostered the development and propagation of conservative legal thought, and it created networks of Republican government lawyers and politicians that promoted the election or appointment of conservative judges committed to those ideas. Republican electoral successes at both the federal and state elections led to significant increases in the number of judges who are antagonistic toward Warren Court constitutional doctrines, to the regulatory-welfare state, and to the procedural rules that undergird adversarial legalism, particularly the kinds of litigation favored by political liberals. That gave me questions to address: Had the conservative legal movement significantly restricted or diminished the role of adversarial legalism in American governance? In my 2001 book, I had written that adversarial legalism was here to stay, entrenched by American political culture and both parties' political incentives. But now, in 2012, was adversarial legalism still "the American way of law," as my book's subtitle had claimed?

Working on my lecture, I wondered if it could serve as an "Afterward" in a second printing of my book. In fact, I ended up re-writing virtually every page of the book and, seven years later, publishing a second edition.[51] My RegNet lecture, however, contained what would become the revised book's main new ideas and research findings. The lecture also presaged a change in emphasis. In the first edition of *Adversarial Legalism*, I had noted adversarial legalism's distinctive virtues: "It enables lawyers, litigation and courts to serve as powerful (even if not always complete) checks against official intolerance, corruption, and arbitrariness, as protectors of essential individual rights, and as deterrents to corporate heedlessness…. Adversarial legalism [also] provides a channel for addressing social problems or injustices that legislatures neglect or are too politically deadlocked to resolve. "[52] But I also had written, "If we are to retain the system's virtues, it is important to understand and hence to tame its vices." The book's first edition, therefore, devoted a lot of attention to those vices.

[51] Updating all the chapters took a lot of time and research, so it was not until early 2018 that I finished a draft, got feedback on it, and revised it further for publication. Robert A. Kagan, *Adversarial Legalism: The American Way of Law, 2nd Edition*, Harvard University Press, 2019.
[52] Adversarial Legalism, 2nd Ed, p. 4l

Adversarial legalism, it showed, had made the American legal system more complex, costly, inefficient, and unpredictable than the legal systems of other rich democracies. Those characteristics of American adversarial legalism, I wrote, "often deter the assertion of meritorious legal claims and compel the compromise of meritorious defenses." And they often "clog the processes of governance, business, and other spheres of activity."

The conservative legal movement, however, did not appear to be interested in preserving adversarial legalism's virtues. It seemed more interested in crippling it. The legal changes wrought by Republican political leaders and judges in the early 21st Century seemed designed primarily to shield governments and corporations from even valid legal claims and even reasonable regulatory restrictions. In numerous, precedent-changing decisions, the conservative majority on the US Supreme Court impeded powerless peoples' legal challenges to violations of their civil rights and their due process rights.[53] Because of the conservative legal movement's indifference to the virtues of adversarial legalism, in my second edition (and my RegNet lecture) I was much more inclined to highlight those virtues.

What had been the conservative legal movement's overall impact on adversarial legalism as a prominent mode of governance in the United States? On balance, I argued in my 2012 lecture (and in my 2019 revised book), adversarial legalism was still the American way of law. Most forms of litigation had not declined or declined significantly. Significant new genres of litigation had sprung up. Intensified political polarization had made political conservatives as well as liberals eager to employ the legal machinery of adversarial legalism to advance their values. The same Supreme Court conservatives who impeded adversarial legalism in cases filed to advance liberal values had created new rights that encouraged litigation for conservative causes, such as gun owners' and religious employers' complaints about government regulations. Conservative state attorneys general enthusiastically used adversarial legalism to attack government regulations and presidential executive orders issued during the Democratic Obama administration, just as liberal state attorney generals had done

[53] This pattern continued, of course, in later years, particularly as more federal judges committed to the principles of the conservative legal movement were appointed to the US Supreme Court (and to the lower federal courts) during the Trump Administration.

during Republican presidencies –especially, and with considerable success, during the Trump administration.[54]

So overall, I concluded, adversarial legalism's fenders had been dented by the conservative legal movement, but its motors were still humming. Its basic legal structures and rules remain in place. Attempts to dismantle them face strong resistance from an American political and legal culture in which both liberals and conservatives value the rule of law and the right to use the courts to demand justice and to combat governmental and corporate arbitrariness.

My other lecture at RegNet was about both regulatory compliance and regulatory politics. I began by summarizing the conclusions of the research projects I did with Neil and Dorothy Thornton. I then used those conclusions as lenses through which one could view some important aspects of the disastrous 2008 financial meltdown that had been triggered by the collapsing subprime mortgage finance bubble. If business corporations, our publications had argued, generally were impelled by social license pressures and normative beliefs to comply with government regulations, what went wrong? Why did the leaders of major financial institutions, whom we used to think of as prudent, risk-aversive bankers, act so recklessly, plowing billions into risky mortgages and novel financial instruments, hurtling like giant lemmings toward and then over a financial cliff? And why did regulation fail to stop them?

I had given myself a crash course on the causes of meltdown, relying especially on an impressive 2011 report by a National Commission on the Financial Crisis. Most of the risky financial practices that led to disaster, I reported in my lecture, did not violate any specific regulatory rules! Regulatory policymakers had simply not kept up with the rapid proliferation of new risky, financial practices.[55] Once again, "visibility of violations" – this

[54] A NYU Law School institute kept count of lawsuits by state attorneys general and liberal advocacy groups challenging the legality or constitutionality of formal regulations, executive orders and related policy initiatives by the Trump Administration. Of 110 lawsuits in their survey, they found that the Trump Administration was successful in 12 and unsuccessful in 98. *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY (2020), policyintegrity.org/trumpcourt-roundup [https://perma.cc/BQG8-6DN9

[55] There were no governmental regulations that restricted new lending institutions' from issuing risky subprime loans to seriously underfinanced homebuyers. (Subprime loans didn't meet the underwriting standards of two government-created mortgage insurance companies, nicknamed Fannie Mae and Freddie Mac, and weren't insured

time of risky financial practices, not tobacco smoke – was a crucial variable. No regulation of the explosively-growing, multi-trillion-dollar international trade in mortgage-backed "derivatives" meant the participants in those markets did not have to report the amount and nature of their holdings. The true dimensions of the huge liabilities created were not visible on the financial statements of financial institutions – invisible to regulators, to financial analysts, even to the financial institutions themselves, even as that trade in derivatives kept pouring billions of dollars into the American home loan market, stoking the housing price bubble. And because mandatory reserve requirements had not been extended to cover giant financial institutions' off-balance-sheet holdings of mortgage-based instruments and derivatives, those institutions were vulnerable to the "runs on the bank" by investors that triggered the 2008 systemic meltdown.

That financial collapse, of course, doomed many millions of ordinary people to loss of their jobs, their homes, their savings, and to a deep, long-lasting economic recession. And it reinforced, I pointed out, the lesson of the studies I had done with Neil and Dorothy: without specific regulatory requirements – and the mandatory data reporting, the normative benchmarks, and the threat of enforcement they provide – social and normative pressures on firms to avoid actions that might harm others are not likely to be strong enough to prevent those harms.

Why were there such dramatic regulatory gaps? The two most important causes, I argued in my RegNet lecture, were (a) intense lobbying by increasingly wealthy, Wall Street firms, which consistently fought against the imposition of regulations on innovative financial practices; and (b) the "free-market," anti-regulatory ideology of important governmental

by them). No regulations prohibited Fannie Mae and Freddie Mac, previously stabilizers in the home loan market, from relaxing *their* underwriting standards in 2005. No regulations limited huge Wall St financial institutions' bundling of hundreds of home loans into complex bonds that purported to limit the risks of default by mixing safer loans with risky ones. No regulations were violated by the major private credit-rating agencies which gave those mortgage-backed bonds unwarranted Triple-A credit ratings. There were no regulatory rules governing the large financial institutions' creation and sale of mortgage-backed derivatives –contracts that purported to hedge the risks inherent in the mortgage-backed bonds; thus no regulations prohibited an explosively-growing, multi-trillion dollar international trade in derivatives among giant financial institutions and hedge funds. Regulations were not adjusted to impose mandatory reserve requirements to anchor large financial institutions' massive holdings of mortgage-backed securities or their huge short-term borrowings to finance their trade in mortgage-backed financial instruments.

officials, particularly Alan Greenspan, chair of the Federal Reserve Bank. Together, those two elements led to the repeal of some regulations that would have made a difference, and most importantly, to the rejection of proposals for new regulations to deal with the rapidly growing new risks.

After the fact, Congress enacted the 2010 Dodd-Frank Act, which was intended to plug some of those regulatory gaps. I didn't talk about that in my RegNet lecture, but I saw it as completing a recurrent cycle in the political history of regulation in the US. In a dynamic economy, new technologies, new business practices, and new kinds of businesses repeatedly develop. Some of them, by design or by chance, operate outside the scope of existing government regulations. Because they are not subject to regulatory data-gathering and reporting requirements, the hazards that some of those new technologies, practices, and businesses create are invisible to those they endanger. Sooner or later, someone -- or many -- engaged in those new practices are careless or deliberately heedless. Horrid disasters ensue: fatal plane crashes, eco-catastrophes like the Exxon Valdez and the Deepwater Horizon petroleum spills, a financial system collapse, a lethal epidemic of deceptively-marketed opioids, hurricanes and forest fires accelerated by inadequately regulated CO2 and methane emissions. Only then does the political system respond to cries of "never again!" and "there oughta be a law." Studies are undertaken. New laws and regulations are promulgated. New agencies are created, or old ones strengthened. As I had written in 1989:

Murphy's Law: *If it can go wrong, it will.*

Kagan's Corollary: *Regulation grows.*

Although now, in early 2024, as I grow increasingly concerned about an anti-administrative-state bloc of justices on the U.S. Supreme Court and the threat of an anti-administrative-state Trump presidency, I need to add a qualification to Kagan's Corollary: regulation will grow in response to disasters *in a liberal democracy*—a governmental system in which elections are fair, the rule of law prevails, and public opinion, science, and evidence-based journalism continue to matter.