WHAT MAKES UNCLE SAMMY SUE?

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David Vogel. *National Styles of Regulation: Environmental Policy in Great Britain and the United States.* (Ithaca, NY: Cornell University Press, Cornell Studies in Political Economy, 1986). 325 pp. Notes, index. $39.95, $12.95 (paper).

I recently had a conversation with a Dutch representative of a cross-Atlantic shipping line. When the merchandise in shipping containers arrives damaged, disputes sometimes arise about who is at fault and who's insurer should pay—the shipper, the ocean carrier, the stevedoring company in Rotterdam or in the Port of New York. Lawyers are often consulted and legal action sometimes commenced, but disputes are usually settled before trial. The relevant law in the Netherlands and the United States is virtually the same, reflecting an international convention on cargo losses. But do the settlements or the negotiations differ, I asked, if the dispute and the possible lawsuit is in New York rather than Rotterdam? "Yes," I was told. "You have to pay a great deal more in lawyers' bills if the cargo is in the U.S." And the negotiation process in Holland is "more logical. It's more human, more fair." In New York, they are more likely "to see what they can get away with" or to take an uncompromising stand based on a strict reading of the bill of lading. The few Dutch lawyers and insurance executives I have spoken to agree.

One often hears such tales when knowledgeable practitioners are asked about cross-national experiences. Even when the substantive law does not differ much, nations often seem to have different legal styles—ways of making, crafting, and implementing laws; resolving disputes about legal obligations; and dealing with violations.

Sociolegal scholars often try to identify various aspects of legal style, describing intranational as well as cross-national differences. Are disputes resolved, they ask, via formal adjudication or by informal mediation and negotiation? Does the legal system attempt to control official discretion through hierarchical supervision and review or by fragmenting power and encouraging responsiveness to local values (Damaska, 1975)? Are legal rules interpreted in a

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legalistic or in a purposive, result-oriented manner (Nonet and Selznick, 1978; Kagan, 1978)? Are official policies and legal obligations typically stated as broadly worded language or as precisely specified rights, duties, and exceptions? Do violations evoke prescribed legal sanctions or restorative, rehabilitative measures?

The next question is why such differences exist. Sometimes, contrasting legal styles are attributed to legal culture—what legal elites and ordinary citizens in a society think about law, how it should be framed and implemented, and how one should respond to the law and its agents (Bayley, 1976; Wagatsuma and Rosett, 1986). From this perspective, cargo damage claims may be resolved differently in New York because American lawyers, judges, and business executives think differently than their Dutch counterparts about legal obligations and processes.

Legal sociologists and economists, typically skeptical about cultural explanations, are more inclined to trace legal styles to social relationships, institutions, and incentive systems. The form and use of law is assumed to reflect the "social distance" among disputants (Black, 1976) or the costs of formal legal action as compared to alternative conflict-management institutions (Kagan, 1984; Verwoerd and Blankenburg, 1985). From this perspective, both New York and Rotterdam cargo damage disputants are presumably responding to the way commercial relationships are organized in their nation and to the differential availability of nonlegal sanctions against "unreasonable" claims or defenses.

Thirdly, legal style can reflect differences in political organization and structures. Legal institutions, one could assume, are shaped by the struggle for political influence or autonomy among social groups with conflicting interests and ideologies. These groups press for the kinds of legal rules and practices that will further their interests; their ability to succeed reflects their capacity for political organization, as compared with that of competing interests and as mediated by political structures (for example, constitutional arrangements and the organization of political parties) that regulate the pursuit of power. From this viewpoint, if cargo claims in New York and Rotterdam are handled differently, it is probably because certain powerful groups benefit from these practices.

Vogel's *National Styles of Regulation* is a valuable contribution to the study of legal styles and their cultural, social, and political origins. As in much of his other work, Vogel's primary focus is the politics of business-government relations, concentrating here on how it shapes environmental regulation in Great Britain and the United States, producing different "regulatory styles." Factually and intellectually rich, lucidly written, *National Styles of Regulation* joins Kelman's *Regulating America, Regulating Sweden* (1981) in illuminating the regulatory process by presenting it in the light of comparative political analysis. Because Vogel's book

also raises broader questions, I would like to discuss, in a rather speculative way, what *National Styles of Regulation* teaches about national styles of law.

I. ENVIRONMENTAL REGULATION IN THE UNITED STATES AND GREAT BRITAIN

In the last two decades, Vogel reminds us, environmental issues have been prominent in Great Britain as well as in the United States. The disastrous 1966 wreck of the oil tanker Torrey Canyon paralleled the oil spills off Santa Barbara in focusing attention on water pollution. More recently, both Britain and the United States have been vigorously urged to do more about stopping acid rain (pp. 19–20). Each nation has enacted a far-reaching set of pollution control statutes.

Comparing the effects of environmental protection laws is not easy. Priorities, Vogel notes, have been somewhat different: American law has concentrated more on curbing motor vehicle emissions, Great Britain on conserving green belts. But after canvassing a good deal of the technical literature, Vogel (p. 153) concludes that "both nations have made measurable though uneven progress in reducing pollution levels, safeguarding public health, and preserving amenity values." Fish have returned to both the Thames River and Lake Erie. Both Americans and Britons breathe air with sharply reduced levels of particulates and sulfur dioxide. Overall, Vogel (ibid.) feels there is no clear evidence that "either nation's environmental policies have been significantly more or less effective than the other's."

In certain important respects, however, regulation has differed drastically: in the form of the laws, in the ways in which they have been made and enforced, and in the level of contentiousness that has pervaded policy making and implementation. The United States, says Vogel, has displayed a far more legalistic and adversarial "regulatory style." This conclusion is based on a detailed review of a large number of case studies, which I will try to summarize.

A. The Form of the Laws

Although the United States, compared to Great Britain, is a huge, environmentally varied, and politically decentralized country, American regulatory law has made far more use of nationwide, detailed rules governing emission levels and abatement technologies. Vogel cites the usual statistics on the scores of pages in the Clean Air Act Amendments (42 U.S.C. § 7401 et seq. (1970)) and the hundreds in the *Federal Register* (see also Bardach and Kagan, 1982: 36, 47). The British, in contrast, have enacted short,

broadly worded environmental statutes and comparatively few formal regulations; those issued often establish no more than "presumptive limits" (p. 77). Instead, Great Britain has relied on regional and local administrators to develop and enforce controls on a source-by-source basis. Whereas the detailed American statutes and regulations, combined with frequent legislative oversight hearings and judicial review, seek to narrow administrative discretion, British law fosters decentralized, discretionary implementation (see also Asimov, 1983; Smith, 1986).

B. Rule Making

In the United States, the process for making regulations to implement major federal environmental statutes is far more formal, open, judicialized, and adversarial than in Great Britain. American statutes and court decisions insist on publication of draft regulations and often require open hearings in which environmental groups, businesses, and labor unions may present their critiques and demands. Administrative law compels regulators to spell out the scientific, technological, and economic evidence they think will justify the standard chosen. Regulations are often challenged in the courts, which carefully scrutinize the fairness of an agency's procedures, its interpretation of relevant statutory language, and the quality of its response to industry and environmentalist arguments. In Great Britain, on the other hand, the policy-making process is much more secretive. The Alkali Inspectorate, the chief air pollution control agency, typically makes its decision on "presumptive limits" and recommended control technologies after private discussions among staff members and selected technical representatives of affected companies or trade associations. Discussions with "responsible" environmental groups do occur (more effectively, it seems, in land use regulatory agencies), but often, Vogel's account suggests, they do not. Judicial review of agency decisions is infrequent.

All this reflects different procedures for including economic considerations in environmental decision making. In Great Britain, business participation in making and implementing policy "is both assumed and assured," according to Vogel; balancing of economic and environmental values is built into the legal process (p. 172). In the United States, however, participation by business "must constantly be asserted" and "the importance given to economic considerations is in large measure dependent on the lobbying and litigation skills of business" (ibid.). Economic concerns are typically addressed through formalized cost-benefit analyses, whose inevitable methodological flaws become the focus of sharp contention (see also Coppock, 1985). Not surprisingly, in the United States, lawyers are involved at every stage of the regula-

tory process (p. 173). However, they are seldom seen in British regulation, where formal cost-benefit analyses are rare but intuitive ones are common at both the rule-making and enforcement level.

C. *Enforcement*

Major American environmental laws, Vogel argues, reflect a vision of regulation via strict rule enforcement and deterrence. Businesses are assumed to be "amoral calculators" that will not comply unless coerced. (see Kagan and Scholz, 1984). Federal clean air and water acts, for example, stipulate fixed compliance deadlines backed by the threat of large penalties (up to $25,000 for each day of excessive emissions). Prosecution for failure to meet deadlines or report emissions accurately is far from automatic, but it is frequently threatened (see Downing and Kimball, 1983) and initiated far more often, Vogel says, than in any other industrialized democracy (p. 21). In contrast, British enforcement policy is based on an expectation of cooperative problem solving between regulators and regulated entities. Enforcement officials rely on a mix of persuasion, exchange of technical information, and general invocation of legal authority (Hawkins, 1984). Prosecution and imposition of legal penalties is almost unknown (pp. 87–89).

D. *Contentiousness*

In Great Britain, where formal rule making and enforcement are rare, legalistic resistance to environmental controls is uncommon. Sometimes regulatory policy, particularly concerning land use issues such as the building of a third London airport or disposing of toxic wastes, spills over into the media and the political arena (pp. 53–60). But as an American, Vogel seems almost amazed by British industry's failure to mount a political struggle over the details of legislation or control of the agencies that administer it. In fact, he (p. 21) writes, "in no nation has environmental policy been the focus of so much political conflict as it has in the United States." Confronted with stringent, industry-wide, technology-forcing standards and strict deadlines, American businesses more often find regulatory demands unreasonable as applied to their particular case. Consequently, they more often dig in their heels; they ask their lawyers to win them some relief, or at least some delay, by appealing to the courts, or ask their Washington lobbyists to slip exemptions into congressional bills or to push for the appointment of more sympathetic administrators. Requests for such delays, revisions, or changes in administration are in turn met by counter-lawsuits and counter-lobbying by environmental groups or by congressional subcommittee investigations of allegedly lax administration.

E. Consequences

Due to its adversarial quality, Vogel argues, American environmental regulation has more often been based on politically exaggerated estimates of hazards, and hence has been subject to more belated corrections and sudden policy shifts than the quietly negotiated, more incremental British approach. Another consequence—and here Vogel echoes Mendeloff's (1987) analysis of OSHA's rule making for dangerous work-place emissions—is that inflexible overregulation causes underregulation (p. 192). That is, by promulgating the most stringent possible standard for one salient hazardous substance, the agency provokes fiercely litigated appeals. As the battle of legal briefs and the reanalyses of rushed scientific and economic studies drag on, agency officials are distracted from promulgating any regulations at all for other hazardous substances.

Another consequence is what Vogel calls the "enforcement gap." Despite the stringency of United States pollution standards, he argues, in the end "the balance struck between economic and amenity values" may not be very different from the results achieved in Great Britain (p. 169). EPA and state environmental protection agencies have simply found it impossible to enforce ambitious rules that are insensitive to site-level technical variations and economic difficulties (see also Slawson, 1986: 724–728). "There are limits," Vogel observes, "to the amount of economic disruption the citizens of any democratic nation will tolerate: the law ends precisely when the costs of compliance become excessive" (p. 166). Enforcement officials have often bowed to this constraint, issuing extensions of time and substantive variances (p. 168). Sometimes they have not given in, however, and the consequences have included business apprehension about regulatory unreasonableness (Bardach and Kagan, 1982), prosecutions that have led judges to read exceptions into the law (Melnick, 1983), and political campaigns that induced Congress to grant special relief to certain hard-pressed industries (such as copper smelters, steel mills, and automobile manufacturers). In contrast, Vogel (p. 21) states,

> in scores of interviews that I conducted with corporate executives in Great Britain, including several with the subsidiaries of American-based multi-nationals, not one could cite an occasion when his firm had been required to do anything it regarded as unreasonable.

Reading this, Americans are likely to think that British regulators have not asked enough. Vogel insists, however, that the British have by and large done as well as American regulators in getting industry to reduce pollution. They do so, he says, because their demands are more moderate, consensually developed, and better tailored to particular local conditions, and hence are "perceived as reasonable" (p. 23).

F. Other Regulatory Programs

Is the contrast between British and American regulatory style as depicted by Vogel peculiar to environmental controls? Pollution reduction, after all, is an especially hard case. Costs of compliance are far higher than for most other forms of regulation and also vary a great deal across competing firms, threatening "high cost abaters" with significant disadvantages (Leone, 1986). Moreover, unlike airline safety regulations, to take an example at the other end of the regulatory spectrum, pollution abatement regulations are not backed by powerful economic incentives to protect the public, by strong employee pressure for compliance, or by the threat of massive tort actions. Thus strictly worded rules and a deterrence-oriented enforcement style may be especially suited to pollution control (although the British experience suggests it is not invariably necessary).

In *National Styles of Regulation*, Vogel presents an impressive review of cross-national case studies in other spheres of regulation, including occupational safety (Kelman, 1981), worker exposure to vinyl chloride fumes (Badaracco, 1985), carcinogenic chemical products (Brickman *et al.*, 1985), premarketing testing of pharmaceuticals, and regulation of securities sales and banking. Vogel (p. 267) concludes that

> the American system of regulation is distinctive in the degree of oversight exercised by the judiciary and the national legislature, in the formality of its rulemaking and enforcement process, in its reliance on prosecution, in the amount of information made available to the public, and in the extent of the opportunities provided for participation by nonindustry constituencies.

At the same time, "in no other nation have the relations between the regulated and the regulators been so consistently . . . strained" (p. 267) or resulted in so much open legal and political contestation.

Further support for Vogel's conclusion might be drawn from Braithwaite's (1985) book on coal mine safety regulation. In Great Britain and France, Braithwaite (ibid., p. 4) notes, there has been a trend "away from prosecution and toward persuasion as the best way of achieving mine safety." But in the United States, regulation has become more legalistic and punitive (ibid., p. 84). The federal Coal Mine Health and Safety Act (30 U.S.C. § 801 (1969)) instructs MSHA officials to inspect each mine at least four times a year, to keep the precise day of inspection secret, and to write up and fine every violation detected. In 1980, MSHA imposed 140,000 fines (ibid., p. 3). This approach has successfully improved the safety record, Braithwaite reports, and with less reduction in productivity than some studies have indicated. But it has not been noticeably more successful than the British or French method, and it has produced a huge amount of legal contestation: "The civil pen-

alties program keeps 13 MSHA attorneys fully occupied . . . and keeps 13 administrative law judges and their staffs occupied with . . . administrative hearings involving civil penalties" (ibid., p. 111). The risk thus created by a legalistic approach, says Braithwaite (who, generally speaking, is a supporter of aggressive regulation and strong legal sanctions), is "an inspectorate that spends more time in court than in mines, and an [alienated] industry . . . resisting any improvement not achieved by legal compulsion" (ibid., p. 114).

G. Explanations

Why is the American regulatory style, as described by Vogel and Braithwaite, so distinctive? Vogel's explanation of the United States–Great Britain divergence is multifaceted, referring to both cultural and political-structural factors, and to simplify it for purposes of presentation here risks distortion. But the core of his argument is a variant of the traditional "no feudalism, no socialism" explanation of "American exceptionalism." Rather than stressing the absence of strong class distinctions and ideological conflict in America, however, Vogel focuses on the culture of the business community in the two nations and the resulting pattern of public attitudes toward business and government-business relations.

British regulation is based on an ethic of cooperation, while American regulation has become increasingly adversarial and legalistic, Vogel (p. 242) argues, because Great Britain has had "a highly respected civil service, a business community that was prepared to cooperate with government officials, and a public that was not particularly mistrustful of large corporations." These features are rooted, he continues, in the fact that Great Britain has not been, or has not remained, a "business civilization" like the United States, that is, a society in which successful businessmen have seen themselves as constituting the most important national elite, and in which government intervention into the privately owned and managed economy is widely regarded as suspect, or at least as potentially contrary to the public interest. Relying on Weiner's (1981) historical account, Vogel suggests that British businessmen were subdued by the intellectual backlash against the ugliness and social injustice of nineteenth-century industrial society. Their acquisitive and competitive impulses were diverted toward a search for stability and social acceptability (p. 243). As Barnett (1987) writes, British upper classes were "seduced by visions of pre-industrial gentility." Consequently, from the start of the era of environmental regulation, British industrialists have been inclined to defer to the polite requests of Oxford- and Cambridge-educated civil servants. Vogel writes that "Accepting 'reasonable' constraints on profit maximization was an important way of demonstrating that one had successfully transcended one's bourgeois origins and had

become a gentleman" (p. 243). Not coincidentally, in marked contrast to populist and Progressive reformers in America, "fears of . . . the corrupting influence of industrialists on public policy are strikingly absent from the writings of Victorian social reformers" (ibid.).

> In contrast, Vogel (p. 245) argues that in America
> the pursuit of wealth through economic activity remained the dominant interest of the nation's upper class. As a result, civil servants in America never acquired the status that they did in Great Britain. . . . American business executives continued to regard them as their social and intellectual inferiors.

The public in turn never developed confidence in the business community's responsiveness to pleas for social responsibility, or in governmental officials' ability to withstand business efforts to deceive or corrupt them. These attitudes shaped the two nations' approaches to environmental regulation, Vogel contends.

When public concern about environmental degradation and its effects on human health intensified in the 1960s, the British tended to view these threats as an inevitable "component of production and consumption in a highly developed and affluent society" (p. 254). Pollution posed problems for the collectivity: finding the appropriate technology and an appropriate amount of scarce capital to spend on it. American environmentalists and their political allies, on the other hand, assumed that "the main obstacle to adequate compliance was political rather than economic or technological" (ibid.). They blamed pollution on the greed and insensitivity of "big business" and its "capture" of state regulatory agencies. One logical remedy was legal coercion: technology-forcing rules, strict deadlines, and harsh penalties. Another remedy was close legal regulation of the new federal regulators—with environmental groups as watchdogs—to prevent business and their political allies in the executive branch from influencing agency officials. A conflictual approach was thus deliberately written into the regulatory system: "While in Britain a resort to prosecution is viewed as reflecting a failure on the part of enforcement officials, in America it became an important index of their integrity" (p. 255).

Nor has the Reagan administration's antiregulatory stance changed the essential character of American regulation, Vogel thinks. Instead, regulatory policy "remains highly politicized." The administration has been unable to soften the key regulatory statutes, and the popular perception is that its administrators have simply sat on their hands, widening the enforcement gap (p. 261). EPA Administrator Ann Gorsuch was driven from office in 1983 when a congressional investigation indignantly revealed that EPA officials had permitted Dow Chemical to suggest language revisions in a draft agency report on the company's responsibility for

dioxin contamination in waters near one of its plants, and had given formaldehyde manufacturers the opportunity to comment privately on technical studies concerning the hazardousness of their product. What Americans took as evidence of corruption, says Vogel, the British would regard as appropriate consultation. "Indeed, were Gorsuch a British civil servant, failure to consult with industry before issuing a study or regulation would have made her subject to criticism from Parliament" (p. 262). In America, he concludes, "the ground between capture and coercion remains narrow."

II. LEGAL STYLE AND LEGAL CULTURE

As an explanation for American regulatory contentiousness, Vogel's "outlaw business culture" thesis, while intrinsically plausible, seems in one sense too narrow: Why are American legal methods often uniquely legalistic and adversarial in policy areas far removed from the regulation of big business? One might wonder, therefore, if the regulatory style Vogel describes reflects a broader American legal style, and whether it stems from an adversarial, contentious legal culture that transcends the business regulation context.

At the same time, Vogel's "business culture" thesis seems too broad: Why do some American regulatory programs resemble the conciliatory British style, or shift from legalistic confrontation to conciliation? Perhaps cultural explanations do not adequately account for either regulatory style or broader national styles of law. I will return to these issues in subsequent sections.

A. Adversarial Legalism in Other Contexts

The United States does not necessarily have "more law" or regulate behavior more closely than other democratic nations. For example, the Dutch regulate land use more intensively, Sweden has tighter rules concerning dismissal of employees, and many governments have laws controlling prices, wages, apartment rentals, entry into business, and other decisions that the United States leaves to market and contract. But where the United States does use law, the "regulatory style" Vogel discerns in American environmental regulation often reappears. In many policy areas, the United States, compared to other nations, resorts to exceptionally detailed legal rules, deterrence-oriented enforcement practices, intensely adversarial procedures, and frequent judicial review and reversal of administrative policies. And, as in business regulation, the United States ends up with a uniquely costly and politically contentious legal process.

Every civilized democracy, for example, regulates police interrogation and search methods. Usually, the rules are made by ministries of justice or high police officials and enforced by supervi-

sory review. The United States, however, is unusual in making and enforcing those rules via adversarial litigation between prosecutors and defense counsel (or between private tort claimants and police departments). The United States is unusual, too, in producing, through its judiciary, a body of rules as formalized, voluminous, and detailed as those concerning *Miranda* warnings and their waiver, the appropriate scope of automobile searches, or the evidence that will support a search warrant. And in few democracies are rules governing police interrogation and search so much a subject of appellate litigation and political controversy.

Similarly, most nations have liability law systems to compel compensation for negligently inflicted personal injuries. Injured Americans seem more inclined to make tort claims than the British (compare Miller and Sarat, 1981, with Harris *et al.*, 1984), although the actual litigation rate in the United States may be lower than that of some other nations (Galanter, 1983; Verwoerd and Blankenburg, 1985). The truly striking features of the American tort system, in comparative perspective, are: (1) its heavy, deterrence-oriented sanctions, as manifested in the enormous sums awarded in the largest 10 percent of jury verdicts and settlements (Shanley and Peterson, 1983); (2) the contentiousness and costliness of its adversarial process (see Alschuler, 1986; Langbein, 1985), in consequence of which liability insurance companies pay out more to their lawyers and plaintiffs' attorneys than they do to injured persons (Sugarman, 1985); and (3) the amount of political controversy the system engenders, as legislators are besieged by competing lobbyists from the trial lawyers' and the hospital administrators' associations, and voters (at least in California) enact ballot initiatives changing courtmade rules about joint and several liability.

Many countries make rules governing which children are assigned to which public schools, student discipline, and allocation of funds to particular schools and programs. Mostly, these rules are made by educational administrators. Political controversy sometimes erupts, frequently about whether schools should institute policies designed to reduce class-based or inter-ethnic-group disparities in access to higher education and good jobs. Few nations compare with the United States, however, in the extent to which legal contention pervades such controversies (see Kirp and Jensen, 1986). In many policy areas—such as the reduction of racial disparities, school finance, the role of religion in schools, the control of student violence, drug use, and offensive speech—judicial decisions have overturned school board policies, often producing ongoing litigation over compliance and the appropriate reach of judicially created rights and obligations. Tyack and Benavot (1985) estimate that in recent decades, federal and state appellate courts averaged over one thousand opinions per year concerning schools, suggesting a much larger volume of actual or threatened litigation

in the lower courts. Implementation of the federal Education for All Handicapped Children Act (20 U.S.C. § 1401 et seq.), designed to prevent schools from indiscriminately dumping hard-to-handle children in separate, low-expectation classrooms, has spawned as much adversarial litigation as the federal statutes designed to prevent the indiscriminate dumping of factory wastes. School administrators, no less than business executives, have complained about excessive regulation and reporting obligations, and of distrustful treatment by officials monitoring compliance with the complex federal laws that require special programs for linguistic minorities and economically disadvantaged students (Kagan, 1986). These efforts to make schools more responsive to the disadvantaged undoubtedly reflect real needs. My point is only that in the United States the regulation of schools, like the regulation of business, has been accomplished through a uniquely adversarial and legalistic process.

The same could be said about American regulation of prison conditions, commitment and care of the mentally ill, employers' obligations to recognize and bargain with labor unions (Bok, 1971), and even industrial structure (via antitrust and takeover-related litigation). It cannot only be public distrust of an autonomy-minded business community that brings about this hard-edged "regulatory style." The distrust—if such a cultural factor is in fact the main cause—seems to run more broadly and deeply throughout American society.

B. Two Visions of Law

One can hardly read Vogel's contrast between British and American ideas about regulation without sensing two different perspectives on the nature of law in general and how it should be framed and implemented. This difference in legal culture can be highlighted by outlining two sharply dichotomized, ideal-typical visions of law.

1. Law as Authoritative Ideal. Picture a society in which law is generally viewed as an authoritative expression of widely held ideals or societal imperatives. In such a society, particular rules of positive law would ordinarily be taken to be just or necessary. Consequently, citizens, organizations, and government officials are assumed to be, on balance, responsive to legal rules and orders; sanctions or remedies for violations would accordingly be mild or rehabilitative in purpose. The rules themselves can be stated in rather general terms, for judges and administrators are trusted to exercise discretion in applying broad norms or policies to particular situations. Negotiated regulatory rules and informal case-level dispositions would be favored, for they would presumably be based on legitimate normative considerations.

2. Law as Political Instrument. Now envision a society in which law is viewed primarily as an instrument and manifestation of the struggle among groups and classes for political and economic advantage. Since political and economic power balances tend to shift, producing related shifts in the political allegiances and ideologies of lawmakers, judges, and administrators, the law on the books is viewed as manipulable and malleable, its correspondence to social ideals and needs always questionable, disputed, and changing. In such a legal culture, compliance with the law by citizens or legal officers could not be taken for granted, for they might challenge or evade orders that they consider unfair. Sanctions and remedies must therefore be designed to have a powerful deterrent effect. Political and economic groups seek rules spelling out their rights in unambiguous terms, so that they may be used as swords against the resistant or as shields against unjustified intrusions on one's freedom.

In such a regime, legal system officials, one would fear, might be manipulated by one's adversaries or inclined to favor the political groups that put them in office. The law would accordingly attempt to constrain official discretion. To that end, procedural rules would give affected citizens and their advocates strong rights to participate in fact finding and decision making in order to expose official bias or attempts to deceive the tribunal. For the same reason, regulatory decisions would have to be based on "objective" scientific studies.

Finally, negotiated dispositions would be suspect, viewed not as norm-guided searches for fair dispositions (Eisenberg, 1976) but as products of Machiavellian bargaining wherein legal rules are used cynically, along with economic resources, as weapons for extorting submission. In such a society, it would not only be acceptable but also almost obligatory to seek legal remedies for social or individual problems or to mount legal resistance against unfair governmental or private demands. One should fight for one's rights, whether those rights are explicit or inchoate.

C. The American Vision

Americans, whether legal elites, business executives, environmentalists, or ordinary citizens, surely do not uniformly adhere to the "law as political instrument" vision. Nor do their opposite numbers in Great Britain invariably picture law as an authoritative ideal. I know of no relevant opinion poll data, but, absent empirical evidence, it might be argued that Americans' views, on balance, lie closer to the law-as-sword-and-shield end of the continuum than do those of the citizens and legal elites in other industrialized democracies.

Scattered bits of evidence do lie about. Beginning in the 1930s, American legal education was strongly influenced, if not domi-

nated, by the legal realist tradition, with its profound skepticism about the idea that abstract legal rules actually control legal decisions (Ackerman, 1984). Law students have been taught to discern, criticize, and challenge the unstated values and political alliances that lie behind legal rules and decisions. Law reviews bristle with arguments for new laws and judicially created rights. Appellate court judges seem to view the law as malleable. In the 1984 term, only 32 percent of United States Supreme Court opinions were unanimous; in six of ten cases, dissenting justices explained at length why the majority was dead wrong, trying to lay the groundwork for change in doctrine should the ideological composition of the Court shift a bit. See also Friedman *et al.*, 1981:790 on dissent rates in state supreme courts.) In the 1940–70 period, more than 30 percent of the California Supreme Court's cases involved challenges to the constitutionality of laws and procedures; in 30 percent of those cases, the judges upheld the challenge (Kagan *et al.*, 1978: 989, 994). Trial court judges often restrict the application of statutory rules they think unwise (Ross and Foley, 1987). As observed by Sarat and Felstiner (1986), divorce lawyers describe the judicial system to their clients as unpredictable, personalistic, and manipulable, producing outcomes that have little to do with justice.

Echoes of this vision commonly heard are among lay people. Interviews of business executives, as found in DiMento's (1986) insightful study of the compliance problem in environmental regulation, suggest a deep skepticism about the lawmaking process and its output. Consider Di Mento's (pp. 118–119) report of an auto manufacturer's experience with Congress when it was setting standards for hydrocarbon emissions:

> You'll never tell me . . . this process of running around the hall in and out of a conference committee at 11 o'clock at night deciding whether it should be .41 of this or that . . . is a rational process. The people bartering on what the emission levels should be on automobiles wouldn't know a hydrocarbon if they tripped over it. . . . But there they are, [saying] "I'll give you this, if you give me that." It's almost like you're out in Nevada. . . . (pp. 118–119)

In comparing the experience of police officers in Japan with those in the United States, Bayley (1976: 150) offers this summary:

> An American accused by a policeman is very likely to respond, "Why me?" A Japanese more often says "I'm sorry." The American shows anger . . . [and] contests the accusation and tries to humble the policeman; a Japanese accepts the accusation and tries to kindle benevolence. In response, the American policeman is implacable and impersonal; the Japanese policeman is sympathetic . . . .

Even if this is an overgeneralization, it captures an often-observed American tendency—a readiness in individual cases to evaluate and challenge the legitimacy of the law and its agents.

Against this scattered evidence of a distinctively contentious and politicized American legal culture, however, one must array the enormous variation in contentiousness found across the country, along with the outspoken hostility to that mode of thought and legal action. Many state and local protective regulation regimes, historically and even today, have preferred a British-style mediational enforcement process to the legalistic approach described by Vogel (Bardach and Kagan, 1982; Silbey, 1981). As shown by Shover *et al.* (1984), while federal officials enforcing strip-mine restoration laws in the Appalachians employed a legalistic, deterrence-oriented style, their colleagues in the same agency who were policing strip mines on the Western plains clearly did not, issuing far fewer citations and cessation-of-work orders. A California work-place safety agency whose legalistic style resulted in thousands of fines and hundreds of appeals each year also pioneered cooperative labor-management safety programs at selected large construction sites (Rees, 1986). Even during the Carter administration, the Department of Agriculture instituted nonlegalistic ways of enforcing pure food laws at qualified meat-packing plants (Grumbly, 1982), and the EPA's "bubble policy" substituted site-level choice for uniform emission abatement rules (Levin, 1982). The Consumer Product Safety Commission also developed mechanisms for negotiating rather than litigating about the content of certain new safety regulations (Schuck, 1979).

Civil litigation varies, too. Business executives rarely bring suit against breaches of long-term supply contracts (Macaulay, 1963), even if they are legalistic in other contexts. As described by Engel (1984), most residents of a rural Illinois county were deeply critical of "litigious behavior" such as tort actions based on personal injury (see also Ellickson, 1986; Baumgartner, 1985; Greenhouse, 1982). Insurance claims agents I interviewed in 1983 in California and Texas spoke of sharp differences across their states in "claims consciousness" or readiness to sue the insurer. Consumers often do not assert their legal rights (Whitford, 1979), and lawyers sometimes discourage them from doing so (Macaulay, 1979). Judges, law professors, and newspaper editorialists regularly criticize manifestations of what they see as "excessive" jury awards, litigation costs, legalistic regulation, and judicial "imperialism," while endorsing governmentally funded "alternative dispute resolution" to foster informal, cheaper settlement methods.

In sum, American legal style and behavior are not uniformly adversarial and legalistic. One can find plenty of informalism, acceptance of discretionary judgment, and official forgiveness of violations in some regulatory programs and in many other quarters. While there may still be more examples of the adversarial, legalistic, contentious style in the United States than elsewhere, as well as support for that style in some strains of American legal culture, the internal variation suggests that the instances of legal conten-

tiousness are not the product of a cultural consensus about the nature of law and how one should use or respond to it. When such a vision prevails, its prevalence requires some other explanation.

III. LEGAL STYLE AND SOCIAL ORGANIZATION

Variation in legal style *within* the United States invites explanations that focus on particular social relationships and economic incentives. Indeed, in some passages, Vogel (p. 350) invokes social-organizational explanations: "The relative formalism of the American regulatory system reflects the inadequacy of informal mechanisms of social control." He notes in this regard that the United States, unlike "corporatist" political systems, lacks strong trade associations that can make commitments for and discipline member firms, thereby serving as vehicles for industrial self-regulation and reliable agreements between the business community and government.

Research on regulatory style within particular nations typically emphasizes social-organizational factors. Why are Western enforcers of federal strip-mining laws more conciliatory than their colleagues in the Appalachians? According to Shover *et al.* (1986), the reason is that they regulate a small number of large corporations that they visit regularly, which implies that the firms "can't hide" and that the inspectors quickly learn about each company's problems and trustworthiness (Scholz, 1984). In addition, the Western enforcement officials, Shover *et al.* point out, have intra-corporate allies—environmental specialists hired to keep their nationally visible employers out of trouble with the law. Appalachian regulators, conversely, confront a large number of small, economically marginal, entrepreneurial firms for which the costs of compliance per ton appear to be much higher than for their competitors on the Great Plains. Similarly, Grabowsky and Braithwaite (1986), in a multivariate analysis of ninety-one Australian regulatory agencies, find that those most likely to resort to criminal prosecution (1) regulate many types of companies, rather than a single type; (2) have infrequent rather than frequent contact with most of the enterprises they regulate; and (3) regulate smaller rather than larger companies.

From this perspective, legalistic business regulation in the United States was encouraged by the *federal* assumption of responsibility for major *multi-industry* programs (e.g., air and water pollution control, occupational safety) in the early 1970s. The shift to Washington, it would seem, greatly increased the information costs of ascertaining and comparing the compliance efforts of individual firms and of custom-tailoring regulations to local conditions. Even more importantly, the shift to nationwide regulation intensified sensitivity to what Leone (1986) calls the "iron law of regulation": For every rule, some regulated businesses can comply more

cheaply than their competitors. Since regulation inevitably creates advantages and disadvantages, businesses inevitably want to reshape the rules (or resist their reshaping) to obtain a comparative advantage, and regulators face the impossible problem of demonstrating that they are not favoring anyone. When the geographical scale of regulation is increased, this analysis implies, regulators may feel compelled to demonstrate their even-handedness by the strict enforcement of uniform rules. Thus, Vogel observes that Great Britain's nonlegalistic style of environmental regulation is threatened by its membership in the European Community, which calls for uniform, Europe-wide rules and enforcement methods that assure each country that officials in other nations will not favor their own industries.

Differences in civil litigation also reflect social organizational patterns. Despite the surging incidence of nonpayment in the debt-ridden American economy and the proliferation of new debtors' rights, high court cases concerning debtor-creditor issues have declined, and there has been little or no increase in the rate of contested debt litigation in lower courts. As a result of new social mechanisms for loss-spreading (e.g., deposit insurance, health and unemployment insurance, crop insurance, bankruptcy proceedings, and liquid markets for credit instruments), litigation against delinquent debtors has often become more costly than renegotiation or simply giving up (Kagan, 1984). The frequency of medical malpractice suits in the United States as compared to Great Britain, according to one recent analysis (Quam *et al.*, in press), reflects social arrangements that make it more attractive to sue in America: with contingency fees, the American litigant's lawyer will pay the expenses of investigating and assembling proof (not so in England); an American who loses does not pay the winning defendant's litigation expenses (not so in England); in a market system, doctors willing to serve as expert witnesses (for a fee) are readily available (not so in England); and in the absence of a national health system, Americans cannot count as surely as the British on being able to obtain future medical care. Eight times as many cases contesting worker dismissals are filed before West German industrial tribunals than before British tribunals. Blankenburg and Rogowski (1986) attribute this largely to the extensive elaboration of labor-management shop floor grievance procedures in Great Britain (see also Verwoerd and Blankenburg, 1985). From this perspective, if there is more contentious, sanction-oriented, and costly legal activity in the United States, it is because Americans, who are more mobile and less enmeshed in cohesive subcommunities than Europeans, have fewer informal conflict-management systems, weaker social insurance systems, and fewer disincentives to sue or prosecute (see also Rosch, 1987).

The underlying premise of this analysis is that people act ra-

tionally, choosing the regulatory or legal style—formal or informal, adversarial or conciliatory—that is best suited to their social situation. Thus, Vogel says (p. 259),

> In a sense, each nation's business community has experienced the kind of regulation it deserves. The British approach is viable precisely because British business does not have a confrontational attitude toward public authority. It can be trusted to negotiate in good faith. The American approach . . . is uniquely suited to a business community that is extremely competitive, jealous of its prerogatives, and contemptuous of government officials.

The causal model runs from business behavior (resistance) to regulatory style (legalistic, deterrence-minded).

In the very same paragraph, however, Vogel (ibid.) suggests a different explanatory model:

> Government officials in both societies get the response . . . they deserve. British industrialists are relatively cooperative because the demands imposed on them are reasonable; American executives are frequently antagonistic to government officials precisely because many of the demands imposed on them are not.

Here the causal arrow runs from legalistic regulation to business resistance. The implication, as many have argued, is that more flexible or selectively strict regulation would induce greater cooperation and effectiveness.

The contradiction can be resolved by recognizing that strict, deterrence-oriented regulation is indeed needed for resistant enterprises, like the small, Appalachian stripminers. But resistance is not uniformly present in the American or any other business community. Some firms, like the low-compliance-cost strip-mining corporations in Wyoming, will have good economic reasons to comply with regulatory requirements that strike a reasonable balance between compliance costs and social benefits. These "good apples," however, can be provoked into resistance if subjected to cost-insensitive rules or adversarial treatment more appropriate for the "bad apples."

The larger point is that mismatches between legal style and social conditions often occur. Legalistic, economically inefficient controls are often employed even where more flexible ones would be socially optimal. Conversely, one can easily find weak, informal regulation where tighter rules and formal prosecution are needed. Worthy claims often are not asserted either in court *or* informal forums because the political system has simply been unresponsive to the claimant or the entire social group. In short, formal, legalistic systems do not automatically develop whenever and only whenever informal ones are inadequate. The process by which legal styles are institutionalized, I would argue, is also a matter of politics.

IV. LEGAL STYLE AND POLITICAL STRUCTURE

The adversarial, legalistic regulatory style Vogel discerns in the United States has emerged, for the most part, only in the last twenty years, primarily in certain federal programs and in some larger, politically liberal states. For the preceding eighty years, Americans may have been, as Vogel suggests, more distrustful of big business and government than were the British, but environmental, public health, land use, and occupational safety regulation as conducted by state and local governments was essentially cooperative in style. It remained so, moreover, even as problems in some areas, such as occupational health, air and water pollution, grew worse. The most plausible explanation, in my view, is a political one: Industry was content, agencies often had inadequate staffs and enforcement powers, industrialized states worried that more stringent regulation would push manufacturing toward low-wage states, and there were no politically strong organizations that lobbied persistently for tougher measures.

Legalistic, deterrence-minded regulation stemmed from a strong political movement and pronounced changes in political organization. The story cannot be told in detail here, but its basic components are familiar: (1) the advent in the late 1960s of adequately funded, highly visible environmental and consumer advocacy groups, mirroring the civil rights movement in making strongly worded federal laws and judicial rulings, enforceable through "public interest" litigation, a principal goal of political action; and (2) the rise of media-oriented entrepreneurial politics, as political party control of legislative agendas declined and public advocacy of the rights of consumers, minorities, the poor, and the natural environment became an important route to political success (Wilson, 1980).

Successful proponents of tougher regulation perhaps did have a distinctive "legal culture." Many of them may have viewed the law as a malleable political instrument, mistrusted regulators' capacity to withstand "capture" by regulated enterprises, believed in strong legal penalties, and insisted on open, adversarial procedures. McCann (1986), after interviewing leaders of public interest law firms and advocacy groups around 1980, suggested that they had implicitly adopted a "judicial model of the state." On the other hand, these views have been very controversial. They spawned academic critiques of legalistic modes of regulation and rule making, and encouraged Ronald Reagan to campaign for the presidency by denouncing "excessive regulation." Political conservatives and even many liberals argued for flexible, negotiated methods of regulating. Reagan appointees to some regulatory agencies sought to switch to a less contentious legal style. Yet their deregulatory "legal counterculture" has not prevailed either, as Vogel notes, largely because Republicans fell short of control-

ling the legislature. Congress has refused to "soften" the Clean Air and the Occupational Safety and Health Act (29 U.S.C. § 651 (1970)), the "Superfund" law Water Pollution Control Acts (42 U.S.C. § 7401 (1970); 33 U.S.C. § 1251 et seq. (1972)), (42 U.S.C. § 9601 (1980)) for clean-up of toxic waste dumps, or the affirmative action interpretations of the Civil Rights Act (42 U.S.C. § 2000e (1964)). Consequently, proregulation advocacy groups have regularly challenged in court administrative-level changes by Reagan appointees, arguing, often successfully, that they violate statutory intent (see Reagan, 1987: 109).

In sum, there has been a political struggle over not only the substance but also the legal style of regulatory institutions. Centralization versus decentralization, detailed versus general rules, and punitiveness versus leniency toward violators, have been explicit topics of political contention. Regulatory style has moved toward the legalistic pole only when advocates of legalistic regulation have had the political muscle to insist on it, and vice versa. From this perspective, regulatory style, and indeed legal style in any policy area, depends on the rise and fall of political movements, as mediated by changes in political organization, public support, and coalition-building possibilities. If there is more legalistic regulation in the United States than in Great Britain, it may not be because Americans by and large think differently about the nature of law or because the social organization of business is so different, but because American environmentalists, confronting a more permeable political structure, have been better able to attract the support of legislators interested in backing that brand of regulation and capable of writing it into the statute books.

A graphic demonstration of the importance of political variables is provided by Scholz and Feng (1986), who studied job safety law enforcement by fifty state-level agencies, some run by federal officials. Why did some offices, they asked, issue more citations, especially those designated as "serious," and impose heavier fines? What Scholz and Feng call "task factors" had some influence: To a moderate but statistically significant extent, serious citations and fines were issued more often in states with higher accident rates, that is, where tougher regulation was presumably needed most. They found much stronger regression coefficients, however, when enforcement measures were related to "political factors": There was a decline in serious citations and fines when the presidency shifted from Carter to Reagan, when the state had a Republican governor, and when the state's legislature or congressional delegation was dominated by Republican representatives (to whom regulated employers could presumably complain about legalistic treatment). The most powerful relationship of all, however, concerned the strength of organized labor in the state, as indicated by the rate at which safety-related complaints were called in to the enforcement agency. When a politically organized constituency put

pressure on the agency for tougher enforcement, regulators adopted a more confrontational, legalistic style. When that constituency was less active, it appears, the agency's style was less confrontational.

This line of analysis suggests that if the United States, taking internal variation into account, employs a legalistic, adversarial style of social control and dispute resolution more often than other industrialized democracies, it is because American political structure encourages and enables politically organized groups to pursue their aims through legalistically cast programs and processes. The United States has a more open and fragmented power structure than most European democracies. The American Constitution separates and counterposes executive and legislative powers, rather than fostering rule by a majority party or parliamentary coalition that controls both the executive and the legislative branch for a period of years. American political parties do not exert strict discipline over individual legislators or aspirants to legislative power. Nor does the United States have "peak associations" of business firms or labor unions, formally incorporated in the governmental process. With power thus fragmented, the United States offers many more points of meaningful access to a broad variety of interest groups. In contrast to most parliamentary systems, legislation is often proposed not only by the chief executive or party leaders but also by individual legislators responding to locally important industries, unions, or advocacy groups. Sponsors of particular policies, including chief executives and majority party leaders, must piece together a new supportive coalition each time a bill is introduced, bargaining for support from dissident party members and affected interest groups. It should not be surprising, then, if statutes emerging from American legislatures so often look like detailed treaties negotiated by mutually suspicious nations, replete with carefully specified rights, exceptions, protections, and procedures.

The traditional independence and power of American courts also play a role, inviting losers in the legislature or the administrative agency to keep fighting, claiming a denial of due process that the judges must remedy or recasting their policy goals as judicially cognizable rights. This encourages winners in the legislature to articulate their victories in specific, "judge-proof" language, and to protect substantive policies by stipulating that implementation should satisfy the tenets of procedural fairness (even if that in turn invites adversarial contestation). All this happens because the American judiciary is singularly accessible to diverse political interests and claims. Unlike European nations, where judiciaries are closed bureaucracies or selected from a narrow group of barristers, American courts are staffed in considerable measure by self-confident former political activists (Kagan *et al.*, 1984), sometimes responsive to populist demands for new rights and remedies that

conservative legislatures have not seen fit to grant, sometimes responsive to conservative demands for restrictions on populist-inspired rights, and frequently unpredictable enough to invite litigation by politically determined interests. Large, well organized segments of the bar, moreover, have been able to support an active judiciary by blocking measures that some other nations have used to restrict the role of courts in social policy, such as forbidding contingency fees, eliminating civil juries, or requiring mandatory conciliation (see, e.g., Haley, 1982).

Another structural feature of the American polity, as Vogel observes, is the weakness of its central bureaucracy, at least as compared to the top civil service in most parliamentary democracies. Perhaps, as some have suggested, this is because mass democracy preceded the development of large governmental units in the United States, which means that administrative staffing has been more subject to political party patronage and influence than in nations where a powerful centralized bureaucracy preceded the advent of mass political parties. Perhaps it is partly because a conservative Supreme Court, through constitutional interpretation, for many crucial years restricted the expansion of the federal government, thus delaying the development of a respected national civil service. In any case, recurrent fears that law enforcement bodies might operate out of political bias relates to a history of unprofessionalism (principally in state and local agencies) that is rooted in political structure, not merely in cultural attitudes about big business and big government, as Vogel seems to suggest. And it is precisely this distrust that encourages both political victors and losers to constrain law enforcers by explicit legal rules and to empower citizens to invoke these rules in court in order to hold law enforcers in line.

The relative weakness of the central bureaucracy in the federated American political structure also means that controversial federal laws often are administered by state and local officials who may not implement them wholeheartedly. For backers of those federal laws, a logical remedy is to empower individuals to sue state officials in court; thus "bills of rights" and provisions for counsel fees are attached to the federal legislation, or courts are persuaded to find an implied individual right of action in the law. A similar strategy underlies the Supreme Court's extension of the Bill of Rights to control state prosecutors and police. Without a national ministry of justice to take care of implementation, proponents of suspects' rights relied on a litigational implementation strategy, persuading the Court to establish a constitutional right to free defense counsel. The result is an effective but unusually adversarial way of regulating local criminal justice officers.

I have obviously been painting with a broad brush, but my point is a broad one: The United States does seem to have a particularly legalistic, adversarial legal style (not uniformly, but more

pervasively than comparable countries). Its roots can probably best be found in its fragmented, pluralistic, and permeable political structure, which creates possibilities and inducements for legalistically formulated and administered policies. This political structure, moreover, would seem to encourage a particular kind of legal culture, providing hope and support for those political activists and legal elites (lawyers, judges, and law professors) who view the law as a manipulable political instrument, who value strongly worded rights and protections, and who accept the propriety of legal contestation. But because the political structure is permeable, it is also open to those who feel their interests (or the national interest) would be advanced by legal institutions designed to soften rigidly defined rights and obligations, reduce adversarial contestation, and moderate penalties. Neither the national regulatory style described by Vogel nor the national legal style that it suggests is likely to be entirely stable or uniform in its coverage.

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