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# DO LAWYERS CAUSE ADVERSARIAL LEGALISM? A PRELIMINARY INQUIRY<sup>1</sup>

Robert A. Kagan<sup>2</sup>

Cross-national empirical studies repeatedly come to a similar conclusion: compared to other economically advanced democracies, American methods of policy implementation are more adversarial and legalistic, shaped by costly court action or the prospect of it (Kagan, 1991). This paper addresses the role of American lawyers in creating and perpetuating this mode of governance. To state the question in a simplistic way, which is closer to the truth?

1. Americans get governmental policies, institutions, and bodies of law that induce or consciously encourage adversarial legalism because lawyers play a large role in formulating and implementing those policies (through litigation and otherwise).
2. Lawyers, insofar as they play a direct role in shaping institutions, policies and laws, are merely agents -- obediently carrying out the preferences of clients, political interest groups, and segments of public opinion; those client, interest group and popular preferences are what produce adversarial legalism.

These propositions are too broad, and the available data too limited, to warrant any definitive answer. But in view of the political controversies that currently swarm around the American way of law, it seems worthwhile to discuss the issue. This paper argues that while adversarial legalism stems *primarily* from enduring features of American political culture and governmental structure, the legal profession plays a significant *independent* role in promoting and perpetuating legal constestation as a prominent feature of governance.

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2. Drinko-Baker & Hostetler Distinguished Visiting Professor, College of Law, Ohio State University, and Professor of Political Science and Law, University of California, Berkeley. The author is grateful to the College of Law and the Socio-Legal Center, Ohio State University, for their generous support. Thanks also to Ann Palcmaki and Jill Rice for research assistance.

## I. THE DEPENDENT VARIABLE: ADVERSARIAL LEGALISM

The United States has a unique "legal style." That is the message of an accumulating body of case studies that compare governmental responses to social problems. Whatever the policy area or social function studied -- compensating injured people, regulating pollution, equalizing educational opportunity, deterring malpractice by policemen, physicians, or product manufacturers -- the relevant American legal process tends to be characterized by (1) more complex bodies of legal rules; (2) more formal, adversarial procedures for resolving political and scientific disputes; (3) more costly forms of legal contestation; (4) more punitive legal sanctions; (5) more frequent judicial intervention into administrative decision-making; and (6) more political controversy about (and more frequent change of) legal rules and institutions.<sup>3</sup>

Searching for a summary term for these legal propensities, I have dubbed them "*adversarial legalism*" (Kagan, 1991a) -- a method of policy-making and dispute-resolution characterized by comparatively high degrees of:

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<sup>3</sup>. For some illustrative comparative studies, see Badaracco (1985) on occupational health regulation in German, France, England, Japan and the U.S.; Bayley (1976) on regulation of police in Japan and the U.S.; Braithwaite (1985) on regulation of coal mine safety in several countries; Day & Klein (1987) on nursing home regulation in Great Britain and U.S.; Brickman et al (1985) and Jasanoff (1986) on regulation of carcinogens in several countries; Kelman (1981) on occupational safety regulation in Sweden and the U.S.; Kirp (1979) on racial desegregation in British and American schools; Kirp (1982) on regulation of education for handicapped children, U.K. and U.S.; Langbein (1985) on civil litigation methods in West Germany and the U.S.; Lundqvist (1980) on air pollution regulation in Sweden and the U.S.; Quam et al (1987) on medical malpractice litigation in Great Britain and the U.S.; Schwartz (1991) on products liability and medical malpractice law in the U.S. and Western Europe; Tanase (1990) on compensation for motor vehicle accidents in Japan and the U.S.; Vogel (1986) on environmental regulation in Great Britain and the U.S.; Bok (1971) and Flanagan (1987) on selection of labor union representatives; Glendon (1987) on abortion policy-making and dispute-resolution related to divorce and child support; Reich (1985) on bank regulation and labor law affecting governmental bailouts of large corporations in Germany, Japan, Great Britain and the U.S.

- (a) *formal legal contestation* -- disputants and competing interests invoke legal rights, duties, and procedural requirements, backed by the threat of recourse to judicial review or enforcement;<sup>4</sup>
- (b) *litigant activism* -- the gathering and submission of evidence and the articulation of claims, is dominated or profoundly influenced by disputing parties or interests, acting primarily through lawyers;
- (c) *substantive uncertainty* -- official decisions are variable, unpredictable, and reversible; hence adversarial advocacy can have a substantial impact.

As suggested by Table 1, adversarial legalism, in its reliance on formal legal contestation, differs from *informal* processes, which can range from mediation of individual disputes to political negotiation of conflicts among groups →

TABLE 1. MODES OF POLICY-MAKING AND DISPUTE RESOLUTION

	INFORMAL	to	FORMAL
HIERARCHICAL	expert or political judgment		bureaucratic rationality
to			
PARTY-INFLUENCED	negotiation/ mediation		adversarial legalism

<sup>4</sup> This does not mean, of course, that Americans always define their problems in legal terms and always seek legal redress. Clearly, they don't (Metzloff, 1988; Saks, 1992; Kagan, 1984). And there is enormous variation in rates of recourse to legal action across American subcultures, regulatory programs, and types of grievance. Miller and Sarat, 1981; Engel, 1984; Caplovitz, 1974; Kagan, 1989). The point is that in comparative, cross-national terms, adversarial legalism is more prevalent in the U.S.

and organizations. In its reliance on litigant activism, adversarial legalism also differs from more *hierarchical* policy-making and dispute resolution methods, in which an authoritative official controls the process and the standards for decision. Thus in Western European courts, judges -- not attorneys for the parties -- dominate the fact-gathering process (Langbein, 1985). Similarly, reliance in the U.S. on tort law for compensating victims of highway, medical, and product-related accidents is more legalistic and adversarial than European methods of responding to accident victims, which operate primarily through hierarchically-organized health care and social benefit payment bureaucracies.

Even when compared to the British "adversarial system" from which it descended, American methods of adjudication, as Atiyah & Summers (1987) demonstrate in many ways, are far more party-influenced, less hierarchical, and consequently less predictable. American judges are more diverse, more political, more autonomous than British judges, and their decisions are less uniform. Law is treated as more malleable, open to parties' novel legal and policy arguments. In civil cases, lay jurors still play a large and normatively important role in the U.S., magnifying the importance of skillful advocacy by the parties and reducing legal certainty.<sup>5</sup>

Similarly, when compared to European democracies, *regulatory* decision-making in the U.S. entails many more complex legal formalities, most of which are designed to enhance interest group participation and review by courts -- public notice and comment, open hearings, restrictions on *ex parte* and other informal contacts, high evidentiary and scientific standards, mandatory official "findings" and responses to interest group arguments. Concomitantly, hierarchical authority in American agencies is weaker than in European regulatory bodies, where

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<sup>5</sup>. Several surveys and experiments have shown that attorneys and insurance claims managers assign widely different settlement values to civil cases (Galanter, 1988; Williams (1983:6; Rosenthal, 1974: 202-207; Saks, 1992:1215, 1223)



lawyers rarely participate, and appeals to the courts are even rarer (Badaracco, 1985; Brickman et al, 1985; Vogel, 1986).<sup>6</sup>

Adversarial legalism, of course, is not uniformly distributed throughout the American legal order. Some policy arenas and administrative systems are rather free of litigation and the threat of it. Some communities, subcultures, and industries eschew legal contestation (Greenhouse, 1986; Ellickson, 1986; Macaulay, 1963).<sup>7</sup> Many kinds of problems and losses are dealt with by private or public insurance, not by litigation (Kagan, 1984). Even in social arenas in which the processes of adversarial legalism often are invoked, *full-scale* legal contestation usually does not occur. The costs and delays associated with adversarial legalism impel most disputants to negotiate an informal plea bargain or settlement, even if it means forgoing valid claims or defenses (Feeley, 1979; Macaulay, 1979).

It should be emphasized, however, that the costs and fearsomeness of adversarial legalism also can promote *justice*. Some actions *should* be deterred, by legal intimidation if necessary. Some defensive medicine prevents malpractice. Adversarial legalism, to paraphrase Dr. Johnson's comment on the law in general, "supplies the weak with adventitious strength."<sup>8</sup> It empowers ordinary citizens to challenge the plans and assumptions of an arrogant, biased, or incompetent highway department, regulatory rule-maker, or school board. Adversarial legalism can make

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<sup>6</sup>. In the U.S., in contrast, agency decisions often are met with formal legal challenges and judicial appeals by dissatisfied parties, advocacy organizations, local governmental bodies, and even by other administrative agencies (Kagan, 1992b; Lester, 1990; Mashaw & Harfst, 1987; Mendeloff, 1987; Melnick, 1983. Lawyers, scientists and economists hired by contending industry and advocacy groups play a large role in presenting evidence and arguments.

<sup>7</sup>. See also references in note <sup>4</sup> above.

<sup>8</sup>. Boswell, *Life of Johnson* (London: Oxford university Press, 1953), as cited in Muir, 1973: 112.

the insurance company, the prosecutor, the welfare office attend more carefully to the evidence and the equities of individual cases. It can shine the spotlight of accountability into the prison and mental hospital, and pry open the files of corporate product designers and of the Forest Service. By virtue of its openness and its resistance to hierarchical control, adversarial legalism, when functioning at its best, fosters rationality and sensitivity to the interests of others.

The purpose of this paper, however, is not to assess and compare the costs and the benefits of adversarial legalism, but to discuss what role the American legal profession plays in promoting and perpetuating this uniquely American mode of governance.

## II. TWO COMPETING HYPOTHESES

### A. Thesis: Lawyers as Cause of Adversarial Legalism.

When I told my 85 year old father that I was interested in why the U.S. had more adversarial legalism than other countries, he said, "Its simple. Because we have so many lawyers!" A stranger sitting beside me on an airplane recently offered a similar explanation: "Because there's so much money in it!" Sophisticated socio-legal scholars, had they been present, probably would have scoffed at this "supply-side" notion. To the contrary, they would suggest that the salience of lawyers and lawyering in the U.S. is a consequence rather than a cause of adversarial legalism. Nevertheless, a plausible "supply side" argument can be constructed.

After all, it seems clear that lawyers and legally-trained politicians outnumber representatives of all other occupations and professions at the commanding heights of American governance -- chief executives,<sup>9</sup> legislatures,<sup>10</sup> legislative staffs, administrative agencies,<sup>11</sup> the judiciary, law reform commissions. Professions, we are often told, typically seek to create and preserve economic advantages and influence for their members (Abel, 1984). Hence if lawyers make the laws, promulgate the regulations, and decide the court cases, one would expect them to perpetuate legal forms and values -- including ready access to courts, due process norms, strong rights to legal representation, and a significant policy-making and oversight role for the judiciary -- that preserve lawyers' influence on legal reform and implementation.

Their reason for doing so is not necessarily venal. Lawyers' ideals and well as lawyers' interests may incline them to preserve and extend adversarial legalism. Lawyers, one would imagine, have a tendency to advocate methods of governance and dispute resolution with which they are professionally familiar.<sup>12</sup> Typically, one suspects, they believe

<sup>9</sup>. In the 1980s, more than half of all state governors were lawyers, and more than half of all U.S. Presidents have been lawyers (Miller, 1992:2).

<sup>10</sup>. In the 1980s, slightly more than 60% of U.S. Senators and 44% of U.S. House members were lawyers (somewhat fewer than in 1953, 1965, and 1975 (Miller, 1992:6).

<sup>11</sup>. A majority of the heads of departments in President Clinton's cabinet are lawyers. More than two-thirds of presidential appointees to head the EPA and to serve on the EEOC, FCC, FTC, NLRB, and SEC in recent decades have been lawyers (Miller, 1992:3).

<sup>12</sup>. Polsby 1990:114 observes: "The occupational culture of Congress is dominated by lawyers' ways and lawyers' jargon. Committees are organized

that the adversarial legal methods they were trained to value in law school actually further the public interest. They participate in a legal culture, reproduced in courtrooms, law reviews, and law school classrooms, that views law as a malleable, political instrument and pictures litigation as an invaluable weapon against arbitrary power (Atiyah & Summers, 1987). It might be predicted, therefore, that the prevalence of lawyers in high places -- in lobbying firms, legislatures, commissions, legislative and administrative staffs -- generates steady pressures to expand the realm of legal rights, due process protections, and opportunities for challenging the legal basis for governmental action.

**B. Antithesis: Lawyers as Consequence of Adversarial Legalism.**

Despite the plausibility of the lawyers-as-cause argument, there are reasons to think that the contrasting hypothesis -- that the salience of lawyers and lawyering in America is a *consequence* rather than a *cause* of adversarial legalism -- comes closer to the truth. Compared to other democracies, one might argue, the United States has more "adversarial legalism" not because its lawyers cause it but because of fundamental features of American political culture, governmental structure, and economic organization.

In an earlier article that sought to explain American adversarial legalism (Kagan, 1991a), I emphasized the growth in this century of

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to elicit information by 'holding hearings' in which 'witnesses' 'testify' and are examined 'on the record' by questions from members and staff. At least one high ranking staff member, and usually more than one, is a lawyer and is known as 'counsel' to the committee."

widespread popular demands for governmentally-guaranteed income replacement programs, health care, and protection from discrimination, physical harm, and environmental damage -- what Lawrence Friedman (1985) has called the expectation of "total justice." In the United States, in contrast with Western European welfare states, these demands have been filtered through a political culture that is mistrustful of "big government" and high taxes, and through governmental structures designed to fragment governmental authority . America's constitutional scheme and political heritage have impeded the development of strong *national* law enforcement, regulatory, medical care and welfare bureaucracies. Instead, satisfaction of demands for "total justice" has been left to state and local judges and governmental agencies, even for the implementation of federally-enacted programs and policies. Lacking centralized, "top-down" controls over local police officers, administrators, school districts, and businesses, legislators and high courts have granted ordinary citizens and advocacy groups the right to haul errant officials and corporations into court. Lawyers and adversarial legalism thus substitute for hierarchical bureaucratic and political accountability mechanisms.

Similarly, the extraordinary fragmentation of power in U.S. government -- between the executive and legislative branches, within subcommittee-dominated legislatures, and within U.S. political parties - - weakens hierarchical control, making American government especially permeable to the demands of local, ideological, and economic interest groups. Interest groups, seeking to reduce political uncertainty, push for laws that enable their constituents to challenge unsympathetic



administrators in court (Moe, 1989). Lawyers and adversarial legalism thus are called into being by political interests as tools for maintaining influence over government policy.

Structural features of American courts and legislatures, Atiyah & Summers (1987) demonstrate, American law is more *uncertain and malleable* than law in Great Britain (and most European countries). The U.S. is almost unique in committing civil cases to lay jurors and in staffing its courts with politically-selected, relatively untrained judges -- which in turn encourages the free play of judges' personal attitudes, prejudices, and visions of justice. In the sphere of statutory law, Atiyah & Summers emphasize, weak political party control over members invites substantively incoherent, vague, and inconsistent statutory compromises and amendments. When legislation is unclear and court decisions unpredictable or malleable, then disputants and dissenters, less sure of where they stand legally, have more incentive to hire lawyers and seek to reshape the law to their own ends.

Finally, the social organization of the American business, financial, and labor systems is far looser and decentralized than their European counterparts (Roe, 1991 ; Rogers ). Economic disputes, difficulties and power struggles can less easily be dealt with by strong industry associations, labor federations, bank holding companies, or governmental ministries. In the more competitive U.S. economy, more driven by short term market relationships, lawyers, lengthy contracts, detailed and punitive government regulation, and litigation fill the need for governance.

In sum, structural features of the American political and economic system create a demand for lawyering. The demand arises independently of, regardless of, the interests and views of the legal profession. Deeply-rooted economic and political attitudes and structures are the locomotive of adversarial legalism; lawyers seem to have their hand on the throttle, but they are basically just along for the ride -- "mouthpieces" and "hired guns" serving the interests of others. From this perspective, if all American lawyers were suddenly incapacitated by a disease that struck only the legally trained (lawpox? legal lockjaw? weasels?), new lawyers, or nonlawyers who did just about the same things, would soon be called into action by politicians, lobbyists, judges, and clients of all kinds, and there would be little change in the incidence or intensity of adversarial legalism.

### III. SYNTHESIS: LAWYERS AS SECONDARY CAUSE OF ADVERSARIAL LEGALISM.

How can we assess the relative power of the lawyers-as-cause versus the lawyers-as-consequence hypothesis? Some research suggests that American lawyers, as such, do not play a major *independent* role in shaping policy. Lawyers for the powerful do their clients bidding, share their clients' political attitudes, and exercise relatively little independent influence on corporate clients' goals (Heinz, 1983; Nelson, 1989; Kagan & Rosen, 1985). As Washington lobbyists, lawyers are primarily "conduits" for the interests of corporations or trade associations, working primarily in established legal forums, not as *policy-formulators* (Nelson & Heinz, 1988). This suggests that if lawyers initiate litigation or advocate legal rules that in turn encourage adversarial

legalism, the lawyers do so not in response to their own interests or values, but as agents for others.

In explaining the behavior of legislators, political scientists generally refer to variables such as political party loyalty, constituency characteristics, subcommittee assignments, and the like; they do not seem to find legislators' legal training or experience, or lack of it, to be an important factor. I have not encountered any empirical evidence that law-trained legislators, staffers or agency officials --- whose very numbers suggest internal political diversity -- differ systematically from non-lawyer colleagues. Similarly, the diversity of interests among judges and private lawyers means that some are at the forefront in pushing for reforms that *reduce* adversarial legalism (Nader, 1988).

Nevertheless, the available empirical evidence is skimpy and only indirectly relevant to the question at hand. Little if any research has systematically sought to examine or catalogue lawyers' roles in extending the forms of governance that encourage adversarial legalism. This paper's first conclusion, therefore, is that social scientists really don't know much about the issue.

A second important point is that the two hypotheses set forth above are by no means mutually exclusive. Even if, as the lawyers-as-consequence thesis quite plausibly holds, structural features of American government and broader dispositions to mistrust government are the *primary* causes of adversarial legalism, that does not mean that the

legal profession and the legal culture it continuously recreates play no causal role.

Consider, for example, the relation between federalism and adversarial legalism. The federal structure of American government means that top officials in Washington, D.C. lack direct supervisory powers over local governmental officials who violate national norms and policies; they can neither fire them nor offer them promotions for future good behavior. That is one reason why proponents of nationwide pollution control norms lobbied for federal laws that give advocacy groups the right to bring lawsuits against state and local officials responsible for implementing federal regulations. That is why proponents of nationwide controls on police behavior sought Supreme Court rulings requiring local judges to suppress evidence obtained in violation of federally-elaborated Constitutional norms and why the Court insisted that states provide indigent criminal defendants lawyers. That is why lawsuits by U.S. attorneys became a prominent method for attacking corrupt local officials (Maass, 1987).

The causal arrow, in this analysis, runs directly from *governmental structure* (federalism, which precludes centralized bureaucratic accountability) to *adversarial legalism*, which inheres in a collaterally-activated, lawyer-operated system that seeks accountability through private lawsuits.

But there is nothing *automatic* about the creation of the legal rights to challenge local officials in court. To ensure that local officials follow national rules, federal lawmakers and officials do have

other options. The feds can insist on detailed reporting by local officials. They can send in federal auditors. They can suspend or cut-off federal funding in the event of non-compliance. They can bypass local government by entrusting implementation of federal laws to new decentralized federal administrative offices.

It took lawyers' arguments about the special virtues of adversarial legalism to persuade the Supreme Court to extend most Bill of Rights provisions to the states; to read the 6th Amendment's right to counsel to require affirmative governmental provision of free defense lawyers; to imply (that is, create) private rights of action to bring tort suits for damages against state and local officials under federal civil rights law<sup>13</sup>; to imply a Fourth Amendment right to sue state and local law enforcement officials for illegal searches and seizures<sup>14</sup>; to empower advocacy groups to obtain injunctions against government agencies for not withholding funds from local agencies alleged to have violated federal civil rights laws (Rabkin, 1989).

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<sup>13</sup>. See, e.g., *Maine v Thiboutout*, 448 U.S. 1 (1980) (authorizing private tort claims against state officials under 42 U.S.C. Sec. 1983 for violation of federal statutory rights); *Monell v Department of Social Services*, 436 U.S. 658 (1978) (authorizing suits against cities and counties for Section 1983 violations).

<sup>14</sup> *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See also *Carlson v Green*, 446 U.S. 14 (1980) (authorizing tort claims against federal officials for violations of the 8th Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (implied right of action for damages for 5th Amendment violations); *Butz v Economou*, 438 U.S. 478 (1978) (same for 1st Amendment). In 1980-81, based on docket studies in three federal court districts, an estimated 5500 "constitutional tort" cases were filed in the federal courts, accounting for about 12% of all federal tort actions (Schwab & Eisenberg, 1988:725).



I am not suggesting that these decisions were undesirable. I mean only that they do not flow automatically from the fact that federalism restricts direct national governmental control over errant local officials. It is hard to imagine British or German courts dealing with such a structural problem by creating new, textually- unfounded rights to sue local officials. Those decisions were the product of a lawyer-created legal culture that values adversarial legalism as a means of accountability and endorses judicial creativity to "do justice" when other branches of government seem to be failing. Put otherwise, lawyers' legal culture <sup>15</sup> operated as an "intervening variable" between the underlying political structure and the ultimate emphasis on adversarial and legalistic control mechanisms.

Consider also Neal & Kirp's (1986) analysis of the landmark federal Education for All Handicapped Children Act (P.L. 94-142). In 1974, reformers won Congressional enactment of a mandate, binding on all local school districts, to provide all children, regardless of handicap, an "appropriate public education." How was compliance to be assured in thousands of school districts, controlled by locally elected boards? The solution chosen -- in marked contrast to the method adopted by British special education reformers (Kirp, 1982) -- was to subject local decision-making to detailed due process procedures. Parents of handicapped children were given legal rights to participate in a prescribed meeting with educational officials to agree upon a formalized educational plan for their child, and to appeal, first ~~administratively~~, then to court, from educational plans with which they disagreed. In

<sup>15</sup>. Distinguish from Friedman's popular legal culture

consequence, decisions often led to adversarial, legalistic hearings,<sup>16</sup> and federal courts became the principal forums for defining "appropriate public education" (Melnick, 1993).

Again, Congress's decision to rely on lawyer-assisted private legal challenge, rather than top-down bureaucratic review, to protect the interests of handicapped children *seems* to flow directly from the limitations imposed by American political structure, in this case a politically decentralized educational system. But that decision was not inevitable. Early versions of PL 94-142 called for oversight of school-level compliance by either federal or state administrative entities. However, according to Neal & Kirp (1986:350), two public interest law firms -- the Children's Defense Fund and the California Rural Legal Assistance Foundation -- "played a key role ... as advisors to the congressional conferees .... Their experience [in civil rights and poverty litigation] produced a belief in the efficacy of rights, courts and court-like procedures, and profound mistrust of bureaucratic accountability."

Here, too, a legal culture particularly dedicated to due process and accountability via judicially reviewable rights, seems to have

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<sup>16</sup>. Neal & Kirp (1986:355), after surveying numerous studies, report: "Adversariness and legalism seem to characterize the conduct of hearings. Rather than adopting an informal negotiating format, the due process hearings tend to provide a forum for culmination of long-term bad relations between the school and the parents involved. Involving lawyers aggravates the situation, rendering proceedings more legalistic. Emphasis on compliance with procedural matters such as notices, signatures, and time deadlines offers an easy substitute for harder substantive questions ...."

operated as an intervening variable, translating a federal government's propensity to rely on locally-exerted collateral legal pressures into actuality. And in the PL 94-142 case, the influence of lawyer lobbyists in shaping the implementation method was palpable.

Consequently, it seems appropriate to propose a third hypothesis, that the norms and actions of American lawyers act not as a primary cause but as a significant secondary cause of adversarial legalism. Lawyers (not all, but some) do so, I also suggest, through three streams of activity :

1. Promoting legal ideas and rules that *legitimate* *adv leg* and *extend* the realm of issues, governmental and economic functions that are subject to that mode of governance and dispute resolution.
2. Aggressive case by case advocacy, in which they choose to exploit or magnify (rather than temper) the characteristics of adversarial legalism.
3. Mounting organized resistance to reforms that would tend to reduce adversarial legalism.

The sections that follow provide a preliminary sketch of each of these three streams of activity.

#### IV. LAWYERS AND THE CULTURE OF ADVERSARIAL LEGALISM

Many American lawyers try to *reduce* adversarial legalism. In their everyday practice, corporate lawyers attempt to minimize the likelihood of litigation; they draft contractual formulae for resolving conflict in case business earnings decline or debts go unpaid (Gilson, 1984; Kagan, 1984), and stipulate that controversies must be referred to binding arbitration. Corporate general counsel have insisted on using private mediation firms, rather than litigation, to resolve entire categories of disputes; the leading mediation firms are run and staffed by lawyers and ex-judges (Pollock, 1993). Law professors have been at the forefront in recommending no-fault insurance schemes to replace costly tort litigation (Keeton & O'Connell, 1955; Sugarman, 1989). In recent years,

government lawyers persuaded conservative judges to restrict grounds for appeal to federal courts from state criminal convictions and from federal administrative rule-making proceedings.

Those litigation-reducing reform efforts, however, can best be understood as a counter-reaction to legal rules and institutions, supported by the more dominant strains in American legal culture, that have expanded the scope and intensity of adversarial legalism. By and large, the American legal profession has been more fully engaged in extending adversarial legalism than in constraining it. And as discussed in Section VI below, organized segments of the profession have been intensely involved in blocking proposed reforms designed to reduce adversarial legalism.

When lawyers lobby for government programs and legal doctrines that extend the reach and intensity of adversarial legalism, they usually do so on behalf of clients or political constituencies whose interests they are paid to advance. How, then, can we properly view the lawyers, rather than the clients and interest groups, as the "causes" of adversarial legalism?

Independent causal weight can be imputed to lawyers, firstly, as principal actors in propagating a legal culture that legitimates adversarial legalism as a desirable mode of government. Secondly, lawyers often act on their own account in advocating new legal rules that expand adversarial legalism. Abundant evidence exists of both activities in three arenas of activity -- legal education and scholarship; lobbying in judicial and legislative institutions; and formulating rules of legal ethics that encourage adversarial legalism.

#### **A. American Legal Culture and American Law Schools**

1. Law as Politics By Other Means. Recently, an Alabama trial court judge wrote a 125 page opinion declaring that the state's entire public school system violated the state constitution's mandate to "maintain a liberal system of education throughout the state." The system was unconstitutional not because of discrimination but because,

Judge Eugene Reese said, it doesn't give Alabama students an adequate education. The academic performance of many students, the judge found, fell short of basic standards, and many school buildings were badly maintained. Judge Reese's opinion specified that the schools, inter alia, must provide students with an opportunity to attain sufficient skills to compete with other students throughout the world and "sufficient understanding of the arts to enable each student to appreciate his or her cultural heritage and the cultural heritages of others" (*Alabama Coalition for Equity v. Hunt*, 1993).

This decision, while remarkable for its ambition and creativity in interpreting the constitutional text, nevertheless exemplifies a vision of the law and the courts' role that is common, if not predominant, in American legal culture. The law as laid down, in this view, is not a fixed set of authoritative norms. Law is a set of tools, evolving guides to the realization of broader ends, primary among which are individual and social justice. That instrumentalist, social engineering view of law and of the proper role of judges contrasts sharply with the legal culture of the civil law countries of Western Europe and even of Great Britain, America's common law ancestor. In other democracies, law is regarded as a set of relatively stable, binding rules. Changing policy to attain social ideals is regarded as a job for democratically elected parliamentary governments (Atiyah & Summers, 1987; Kagan, 1988:728-30).

The instrumental view of law and of the judicial role, of course, is by no means uncontested in the United States. Its predominance ebbs and flows with political eras, issues, and movements. But it has long been a major stream in American legal culture (Horwitz, 1977). To the extent the American legal profession -- the social grouping in which legal culture is most consciously and continuously articulated, debated, shaped, and reshaped -- endorses and promotes an instrumentalist vision of law and legal change, then it seems fair to infer that lawyers do play a significant role in extending adversarial legalism .

**2. Law Professors and the Culture of Adversarial legalism.** Asked about the aforementioned Alabama judge's decision, Eric Neisser, a



professor of law at Rutgers University, was quoted as follows (Felsenthal, 1993) :

"I think [courts] would like to get out of the business [of defining standards schools must uphold], but unless someone takes control of the problem, the courts feel that they have to respond to the constitutional mandate."

Neisser apparently endorses that view, i.e., if the other branches of government are not doing the job adequately, the courts, however reluctantly, are *obliged* to see that basic justice is done. If that is what American law professors teach their students -- who will become the advocates, judges, legislative staffers, and politicians who nominate judges -- then the legal culture they absorb and draw upon in making laws and legal arguments will tend to expand adversarial legalism.

Are Professor Neisser's views typical of the American law professoriat? Many American law professors, surely, would dissent. They might object that whether the other branches of government are failing to "do the job" or "take control of the problem" depends on a complex set of educational, economic and political judgments that the courts are not well suited to evaluate. The critics might object that the courts are not likely to be able to solve the problem if they take it on, or that the courts have no warrant to try without clear legal justification in the text of existing constitutions, laws and precedents.

Nevertheless, Professor Neisser surely is not alone. I know of no study that attempts to measure support for his instrumentalist philosophy among the law school professoriat.<sup>17</sup> But when I ask law

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<sup>17</sup>. There are some surveys that address different but somewhat related issues. Kelso (1972) surveyed law professors' views of legal education. He found that teachers at larger "high resource schools" (primarily university law schools) thought that law schools should teach a more theoretical (and presumably more critical) approach to law, while those at "low resource" (usually proprietary) school tended to think they should teach in a more positivist, law-applying manner. A Carnegie Commission on Higher Education survey (in 1969 and 1974) found that at least two-thirds of professors in the twenty top-ranked law schools agreed with the proposition that their institutions "should be actively involved in solving social problems" (Auerbach, 1984:62). More than half of American law professors, and higher proportions in the top twenty law schools, identified themselves as politically "left or liberal," and

professors what they think their colleagues think, most say that the instrumentalist view, if not predominant, is quite prominent.

Comparative observers have little doubt. When contrasted with legal education in England and Western Europe, American law schools promote a remarkably activist, instrumentalist image of law and the lawyer's role. Atiyah & Summers (1987:406-07) note that while English legal academics defer to the barristers and the judges in shaping legal culture, American law professors actively seek to shape legal culture, and through it, society, and have had a significant degree of success:

"American law schools have been the source of the dominant general theory of law in America ... '*instrumentalism*'... [which] conceives of law essentially as a pragmatic instrument of social improvement" (Id at 404) (emphasis added).

Instrumentalism is embraced by many politically conservative as well as liberal professors, most prominently by adherents of the influential "law and economics" movement, who seek law reforms designed to enhance economic efficiency.

Whereas British law students are expected to learn the rules of rules as laid down in rather dogmatic textbooks (Atiyah & Summers, 1987: 394-95), and Continental students are expected to learn and accept the theoretical underpinnings of their legal systems, American law students are taught to challenge or at least to question their country's law. They spend more time studying the most disputed cases than basic black letter doctrine. They are urged to analyze the merits of legal doctrines and judicial opinions in terms of the fairness, economic efficiency, or effectiveness of their social consequences.<sup>18</sup> They are prodded to formulate legal arguments that would support their gut feelings about

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only small percentages as "moderately or strongly conservative," which put them far to the left of most other academic and professional faculties (Auerbach, 1988:1248-49).

<sup>18</sup>. Atiyah & Summers (1987:391): "the primary aim *is* to teach the student a methodology -- how to construct, analyse, compare, evaluate, and criticise arguments and decisions (including rules) and to 'project' lines of judicial decisions and legislation. In this way the instructor implicitly inculcates faith in the power of substantive reasoning, in policy arguments, rather than in the mere arbitrium of formal rules."

what the results *should* be. The law reviews they edit are full of articles calling for new legal rights and changes in old ones, along with essays stressing the indeterminacy of legal rules.

American law students are taught by their professors that judges often are incompetent, or as apt to be influenced by their political attitudes and allegiances as by the letter of the law.<sup>19</sup> The legal system, many American law professors implicitly suggest, is a field of political struggle, shaped by the play of creative lawyering and argumentation (at best) and by raw economic and political power (at worst). So the lawyers' job is to pick her way through that uncertain minefield, striving for justice as best she can when she sees an opening, whether as lawyer or judge. Not surprisingly, that is the view of the system that American lawyers convey to their clients (Sarat & Felstiner, 1986).

**3. Law Schools and Distrust of Governmental Power.** If judicial authority, viewed through the lens of American legal education, is not entirely reliable and rational, law schools suggest that the rest of government is even more likely to be arbitrary. In law school, American political culture's vague distrust of governmental competence is honed to a fine edge. "The best insurance against autocracy," says an introduction to the law (Moll, 1990: 10), "is to diffuse power as much as possible throughout society. This is exactly what lawyers in America do!" If this country's biggest worry is defined as the threat of "autocracy" -- rather than government too fragmented and mistrusted to achieve collective goals -- it is no wonder that lawyers-to-be are taught, first and foremost, to question the bureaucrat's or the police officer's word, to favor strict (or at least "heightened") judicial scrutiny of legislative enactments for signs of bias or "rent-seeking", and to view due process procedures and lawyer-assisted access to the courts as the best way to structure governmental processes.

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<sup>19</sup>. Reviewing the last decade's debates among the leading schools of legal thought, one professor concluded, "Now all sides agree that 'in some ultimate sense law ... is unavoidably political.'" (Wells, 1991: 636) (quoting Posner, 1987:766)

When American lawyers or policy-makers call for the extension of legal rights, enforceable through litigation, they draw upon a well-developed and familiar rationale. "Legalization," say Neal and Kirp (1986:357), who are by no means unalloyed enthusiasts of that mode of governance,

is a vehicle by which individual citizens may redress the balance between themselves and the state or other powerful opposing interests. It provides access to individuals unable to summon the political resources needed to obtain a legislative majority in modern politics. It offers principled decision-making in an impartial, procedurally-balanced forum. It emphasizes accountability, administrative regularity and the reduction of arbitrariness.

But for those who are skeptical about adversarial legalism's virtues, American legal culture offers no countervailing set of ideals. Opponents often argue that further legalization would be costly, or would overburden the courts, or would unduly curtail official discretion, or (perhaps most effectively) would be "a full-employment program for lawyers." But those are crimped, negative arguments, devoid of the high-sounding values that permeate the arguments for rights and for adversarial legalism. A countervailing ideal would favor collective goals over individual rights, legal stability rather than legal responsiveness, the notion that professional governmental officials are better guarantors of the public interest and equity than are judges and juries. Those are ideals discussed in European legal scholarship (Damaska, 1986) But that is not what one generally encounters in American legal scholarship and classroom talk (Glendon, 1991). In the legal culture developed in American law schools, therefore, the proponents of adversarial legalism, therefore, tend to occupy the moral high ground .

4. **Law Professors as Lobbyists.** The generally pro-adversarial legalism views of the American law professoriat are channeled directly to the judiciary. Some legal scholars often are called on to write briefs in controversial Supreme Court cases. Writing about NYU law professor Anthony Amsterdam, a leading expert in capital punishment issues, a legal reporter asserts, "his consultant services are virtually

mandatory in death penalty challenges" (Couric, 1985). Student law review editors move directly to the chambers of high court judges, bringing the latest scholarship to the pages of judicial opinions. Influential law professors, rush their articles into print in time to be quoted in briefs in controversial cases. Atiyah & Summers (1987:401-402) write:

"A striking and far from isolated illustration of the extraordinary impact which academic ideas have on the daily administration of law can be found in the way in which in the 1970s and 1980s American state courts across the country accepted the arguments of a junior law professor ... for allowing punitive damages more generously in products liability cases.<sup>20</sup> ... Indeed, almost the whole of the modern law of strict products liability in tort has originated in academic writings."<sup>21</sup>

Law professors also serve as reporters and chief drafters of the American Law Institutes influential "model statutes" and "Restatements" of various branches of the common law -- documents which tend to advocate expansion of legal rights and easier access to courts. Law professors serve on the judicially-appointed commissions that draft rules of civil procedure; the highly influential Federal Rules, drafted by Yale law professor Charles Clark, generally sought to remove formal obstacles to the filing of lawsuits and to pre-trial discovery.

The most important influence of the law schools, however, has been indirect. They shape a legal culture that is invoked, day in and day out, by practicing lawyers and legally-trained governmental officials (including judges) when they make arguments based on instrumentalist vision of law; that validate judicial policy-making under many circumstances; and that call for judicially-enforceable legal rights as a way of implementing public policy.

#### **B. Extending Adversarial Legalism in Courts and Legislatures.**

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<sup>20</sup>. Citing Owen (1956) "an article said to have been cited within a few years in at least 20 jurisdictions" (Atiyah & Summers, 1987:401-02).

<sup>21</sup>. See Priest (1985)



Connecticut attorney Robert Farr seems to have learned his lessons well. As a state legislator, he tried and failed to push through legislation banning smoking in restaurants. When Congress passed the 1990 Americans with Disabilities Act, designed primarily to bar workplace discrimination against disabled people, Farr saw another opportunity. The American Lung Association, an anti-smoking organization, put him in touch with a three mothers of children with asthma. On their behalf, Farr brought suit against Wendy's, McDonalds, and Burger King, arguing that by failing to bar smoking entirely -- their current practice is to restrict smoking to some sections -- the restaurants discriminate against people with respiratory ailments, forcing them to eat elsewhere (Felsenthal, 1993).

Farr may or may not win his case. It is highly unlikely that Congress, in enacting the Disabilities Act, intended it to bar smoking in all stores, restaurants, and workplaces. But the language of the Act is both sweeping and undefined, so Farr has at least a chance of winning. Many ADA suits have been filed, for example, on behalf of injured workers as a way to circumvent workers compensation laws and obtain larger damages -- although again, that probably was not Congress's intent (Felsenthal, 1993). Like Farr, many American lawyers feel no compunction about using litigation to persuade the courts to extend statutory rights in previously uncomtemplated ways (Atiyah & Summers. 1987: 3381-82); their legal culture, which values legal creativity in the pursuit of justice, validates their behavior. In day-to-day advocacy, therefore, lawyers pound away at the frontiers of adversarial legalism. They lose many cases, of course. But in the aggregate they extend the universe of litigatable claims a bit further, and thereby also reinforce the culture of adversarial legalism.

1. Creative Judging. Innovative lawyering aimed at extending the boundaries of adversarial legalism would be fruitless, of course, if judges were not responsive. Consider again, therefore, the Alabama trial judge who declared the state school system inadequate and hence unconstitutional. If his decision is upheld, the threat of appeal to court will become a pervasive feature of decision-making in Alabama

public schools. The Alabama judge's decision was not "compelled" by law or by political pressure. It was the decision of a law-trained judge, secured in his position by the traditions of judicial independence, responding to high-minded legal and policy arguments advanced by public interest lawyers. To the extent this phenomenon is common -- that is, judges, acting without great political pressure, in response to novel lawyers' arguments, make litigation-encouraging policy decisions -- then it seems fair to regard the legal profession as a significant cause of adversarial legalism. It is common. Hence lawyers do cause adversarial legalism.

In the last 30 years, American judges, acting without political or legal compulsion, have been either the sole or the primary authors of adversarial legalism-inducing change in a wide range of policy areas. The most salient examples come from fields traditionally dominated by judge-made law, such as Constitutional law and torts, as in this incomplete and selective list:

- \* Judicial abolition of the defense of contributory negligence in tort, in favor of a claim-encouraging contributory negligence standard.
- \* Judicial abandonment of the litigation-restricting "locality" rule for determining the standard of care in medical malpractice cases, giving rise to a lively field of litigation.
- \* Judicial creation of liability for "toxic torts" (Huber, 1988).
- \* Judicial creation of causes of action for dismissal of employees without "just cause" (Dertouzos et al, 1992).
- \* Judicial creation of implied warranties of habitability for rental housing, which has introduced a larger measure of adversarial legalism into eviction procedures.
- \* Judicial extension to all criminal courts of the "exclusionary rule" for illegally obtained evidence -- giving rise to a new field of pre-trial motion process and appellate litigation.
- \* Judicial creation of a Constitutional right, for indigent criminal defendants, to free legal counsel (initially in felony cases and appeals, later in most misdemeanor cases), and then to "adequate representation" (raising many new grounds for appeal).
- \* Judicial creation of a Constitutional right of privacy, which made litigation a pervasive part of policy-making concerning abortion policy.



- \* Judicial creation of Constitutional rights to decent treatment in prisons and mental institutions, which brought litigation, lawyering, and judicial supervision into the policy-making and funding process in scores of state prison systems, jails, and treatment facilities .
- \* Judicial creation of new due process rights for welfare recipients , persons subject to involuntary commitment to mental hospitals, and school children threatened with disciplinary suspensions -- giving rise to new, institutionalized forms of adversarial legalism.

Most of these decisions have been socially desirable, on balance. The judges who issued them probably were responding to deep social concerns, widely expressed in the media or by prominent politicians. Indeed, many of these decisions have been acquiesced in or even extended by legislatures. Lawyers and judges, therefore, did not act alone, without encouragement from the wider society.

Nevertheless, the decisions mentioned and the strategy of legal change they reflected were triggered and shaped primarily by lawyers. They were justified and defended by lawyer-dominated legal discourse.<sup>22</sup> That discourse endorsed social problem-solving via judicial action and advocated ongoing litigation as a primary tool for realizing the ambitious goals and values articulated in the reform-oriented judicial decisions. For example, the judicial rulings extending liability law were explicitly justified in social engineering terms. The advocates' briefs and judges' opinions argued that enhanced liability would force businesses, hospitals, and municipalities to internalize harmful externalities, reducing aggregate social costs. The Constitutional decisions mentioned above reflected the view implicit in Professor Neisser's comments on the Alabama school case: if other political bodies are not dealing adequately with the social problem dramatized by the case at hand, then judges, however, reluctantly, are duty bound to forge a responsive legal right and a judicially-enforceable remedy. And each creative judicial decision, covered widely in the press and given prominence in law school casebooks, served to validate and deepen the

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22. For an illustrative account of how lawyers help build acceptance for controversial decisions, see Muir, 1973 (school board lawyer and the Supreme Court's school prayer decision).

legal culture's endorsement of adversarial legalism as an essential mechanism of government.

Policy-oriented judges also have extended statutes in ways not contemplated by the original legislators. Earlier, reference was made to judicially-implied private rights to sue governmental officials for insufficiently aggressive enforcement of civil rights and regulatory statutes. Civil rights lawyers and sympathetic judges reshaped the 1965 Voting Rights Act, which guaranteed equal rights to vote, into a vehicle for legally challenging electoral rules that made it more difficult for minority candidates to win elections (Thernstrom, 1987); in consequence, few electoral redistricting statutes now take effect without a lawsuit. Similarly, creative judicial decisions read the National Environmental Protection Act to give environmental groups the right to sue agencies for inadequate environmental impact statements -- which helped make adversarial legalism a recurrent feature of governmental efforts to build highways and license power plants, implement forestry plans, dredge harbors, construct waste disposal facilities, and issue off-shore oil exploration leases.

**2. Organized Lawyering for Legal Change.** Many of the innovative judicial rulings mentioned above, and many others as well, culminated systematic campaigns of legal advocacy . In no other nation's legal system are there such a large number of, or such effective, politically-motivated advocacy groups. The prototypes were the American Civil Liberties Union and the NAACP Legal Defense Fund. Through systematic litigation, often aided by law review articles written by allied legal scholars, dedicated ACLU, NAACP, and "Inc Fund" lawyers were instrumental in persuading courts to expand the legal rights of criminal suspects, persons charged with capital crimes, opponents of school prayer, victims of racial discrimination, and proponents of busing to achieve racial balance in schools -- and to institutionalize adversarial legalism as a means for protecting those rights.

The ACLU and the NAACP Legal Defense Fund were the models for an expanding army of specialized public interest law firms. In the past twenty years, lawyer-dominated advocacy organizations have filed

innumerable lawsuits, appeals, and amicus briefs to extend welfare rights, tenants rights, childrens' rights, womens' rights, consumers rights, disabled and mentally handicapped persons' rights, and the rights of criminal suspects and prisoners. They were often successful.<sup>23</sup> More recently, politically conservative public interest law firms have been established, and have had some limited success in persuading courts to expand the constitutional rights of property owners vis-a-vis regulatory restrictions and exactions.

Loose networks of plaintiffs lawyers regularly are formed on an ad hoc basis to lobby the courts for legal rights to recover for damages caused by particular hazards, such as asbestos, tobacco products, or pharmaceutical products. Trial Lawyers for Public Justice, a public interest law firm modelled on the ACLU, pursues novel damage claims and appellate legal rulings that will broaden (or preserve) the reach of liability law (Blum, 1992).

It is not only "private attorneys general" who lobby the courts for new legal rights and procedural guarantees. Ambitious public prosecutors -- not a majority of them, but enough to make a difference -- seek to enhance their reputations by "making law." In the 1960s and 1970s, according to Suzanne Weaver's (1980) study of the Antitrust Division of the Justice Department, lawyers competed to devise innovative legal theories that would support path-breaking prosecutions; winning spectacular victories and extending the reach of antitrust law -- rather than any considered analysis of whether the effects would be good for the economy -- seemed to be their overriding concern. Similarly, in the wake of Watergate, U.S. Attorneys crafted legal arguments that transformed the federal Mail Fraud Act, the Hobbs Act, the Travel Act, and the RICO (Racketeer Influenced and Corrupt Organizations) statutes, none of whose "statutory language nor ... legislative histories ...

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<sup>23</sup>. For selected accounts of activist public-interest lawyering that extended adversarial legalism into new areas of welfare, educational, regulatory, mental health, and penal policy, see Curtis, 1986; Mnookin, 1985; Rabkin, 1989; DiIulio (1990).

authorize their application to local political corruption," into vehicles for prosecuting state and local officials (Maass,1987:114).

Persistent advocacy by claimants' lawyers gradually transformed California's workers' compensation program, originally designed to provide insured benefits to injured workers without costly legal conflict, into an intensely adversarial and legalistic system (Nonet, 1969). J. Anthony Kline, legal affairs secretary to Governor Brown between 1975 and 1980, says, "The lawyers began to take over, The more lawyer involvement you get, the more procedural rules you get. The labor union movement gradually became dependent on the lawyers." (Walters, 1983:41). In 1990, more than a third of workers compensation claims resulted in litigation; litigation costs amounted to two-thirds the average award.<sup>24</sup> In the 1980s, claimants' attorneys persuaded the courts to extend coverage to disabilities, physical or emotional, caused by workplace-generated "stress." Stress claims are both costly and difficult to disprove; along with back injury claims, they generate a disproportionate amount of litigation (Economist, 1992; CWCI Research Notes, 1991).<sup>25</sup>

During the late 1960s and 1970s, public interest law firms also lobbied hard and successfully, in legislatures as well as courts, to make adversarial legalism the primary mode of accountability in the expanding regulatory-welfare state. In his detailed analysis of the

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<sup>24</sup>.In 1990, California's statutory benefit levels for workers compensation -- which tends to reflect the lobbying strength of organized labor -- were comparatively low, ranking 34th among the 50 states. But in terms of average cost per worker (47 cents for every dollar of payroll), California ranks about third (Economist, 1992). A major reason is a high rate of litigation, reaching nearly 36 percent of claims (CWCI Research Notes, 1991). Direct litigation costs -- fees for both sides' attorneys, forensic physicians averaged over \$7000 per case in 1990; the average award for successful applicants was \$11,879.

<sup>25</sup>. In one case cited by reform groups, the claimant was a Sacramento workers' compensation judge who smoked and drank heavily, suffered a stroke, and was then awarded a \$45,000 settlement under the compensation law after he claimed that his stroke was caused by job stress (Frammolino, 1988).

public interest movement, Michael McCann (1986: 114 ) points to "the judicial model of democracy" as one of the reformers' principal ideals. Public interest lawyers wanted to expand governmental power to regulate, tax, and redistribute, but they also were profoundly mistrustful of politicians and administrators , whom they viewed as corruptible by business . The reformers' solution was to create an administrative process that would mimic the adversarial, formal, participatory procedures of courts -- the one governmental institution they felt they could either trust or influence. The adversarial judicial model "defined for the new activists," McCann observes, "something like what the agora was for the Greeks, the tribunal was for the Romans, and the town meeting was for colonial New England citizen politics" (McCann, 1986: 114).

To a remarkable degree, the public interest lawyers persuaded Congress to build the ideal of adversarial legalism into the landmark regulatory statutes enacted in the 1960s and 1970s. Decision-making in federal regulatory agencies, the reformers successfully argued, should be constrained by procedural rules that (a) guarantee participation by advocacy groups who might counter the arguments of regulated entities (thereby replicating in administrative agencies the court-house adversary model), and (b) compel administrative decision-makers to provide rational, formal justifications for their actions (thereby replicating the judicial opinion as a method of accountability) (Id at 112-113; Shapiro, 1988) . To ensure compliance with these new administrative legal procedures, the public interest lawyers persuaded Congress to broaden standing-to-sue standards, enabling advocacy groups to challenge administrative decisions in the courts. They won enactment of strict statutory deadlines for the achievement of regulatory objectives; deadlines empowered advocacy groups to sue administrators who did not meet advocacy groups' enforcement priorities (Melnick, 1992). The reform lawyers also won many statutory enactments requiring governments and regulated entities to pay the counsel fees of advocacy



groups that brought successful civil rights and regulatory suits (O'Connor & Epstein, ; Greve, 1987).<sup>26</sup>

How can we be sure these changes were "caused" by reform-oriented lawyers and their legal culture -- rather than by political pressure from popular environmental, civil rights, and consumer groups, or from influential business groups who calculated that the institutions of adversarial legalism would best protect *their* interests from zealous regulators? The reforms sought by the public interest lawyers, in sum, might also be explained in terms of interest group politics (Moe, 1989). Without detailed evidence of the evolution of particular bills and the inputs of legal staffers and lobbyists, at varying stages of the drafting process -- and I have found few studies that focus on this issue<sup>27</sup> -- the precise role played by adversarial legalism beliefs and lawyer-staffers or lobbyists remains unclear. It seems likely, however, that ideals and lobbying efforts of "public interest movement" legal activists were a significant "causal" factor in "judicializing" policy-making and implementation in the new regulatory-welfare state -- and in ensuring an ongoing, governmental role for public interest lawyers.

26. According to the Council on Competitiveness established by the Reagan Administration, Congress had enacted more than 150 one-way fee-shifting statutes, under which plaintiffs who prevail can recover lawyers' fees from losing defendants, while victorious defendants get no such recovery.

27. A noteworthy exception is Rubin (1991), who provides a detailed account of the formulation and drafting of the federal Truth-in-Lending Act. The Act provided debtors a right of action against lenders who did not comply with the complex federal disclosure regulations, adding that prevailing plaintiffs would receive a \$100 minimum award, regardless of actual losses, plus their attorneys' fees. That was enough to enable many defaulting debtors, simply by hiring a lawyer and raising a Truth-in-Lending defense, to repel collection suits. And the \$100 remedy, "when combined with the procedural mechanism of class actions, raised the specter of enormous damages suits for minor violations of the statute" (Id at 237). According to Rubin's account, the private right of action enforcement mechanism arose not primarily from pressure by lawyer-lobbyists, but from Senator Douglas's hope of gaining political support for the bill by promising it would not require "spawning another federal bureaucracy" (Id at 246). But where did the idea of private enforcement, attorney-fee shifting, and minimum damage awards come from?

Consider, for example, the 1980 federal Superfund statute.<sup>28</sup> The Act's goal is to clean up hazardous waste disposal sites. But it reads as if it were designed by a plaintiff's personal injury lawyer. Its primary tool is the civil lawsuit.<sup>29</sup> The Superfund Act casts EPA enforcement officials in the role of tort lawyers, trying to maximize dollar recovery by suing a few large corporate waste disposers, who then are compelled to sue other "potentially responsible parties" (PRPs). As Landy & Hague (199 :70) describe the result:

"The potentially enormous costs confronting a firm caught within Superfund's liability net provide a powerful incentive to use every conceivable delaying tactic, either in the hope of finding some legal tool for wriggling free or for the purpose of dragging PRPs not identified by EPA into settlements.<sup>30</sup> ... Because of these dynamics, the shovels often remain in the tool shed while the EPA pursues PRPS along the slow and tortuous path of litigation."<sup>31</sup>

Most estimates are that litigation and related transaction costs, governmental and private, add up to as much as 44 percent of the funds actually expended on clean-up (Menell,1991:108). Superfund was supported by EPA, the hazardous waste treatment industry, and Congress members who could take a strong symbolic stand in favor of cleaning up sites in their districts without having to appropriate a lot of general funds revenues (Landy & Hague, 1992). It wasn't all lawyers' doing. But Superfund also reflects -- indeed it is almost the apotheosis -- of a

28. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

29. CERCLA imposes absolute, joint and several, and retroactive liability for clean-up costs on any enterprise whose wastes found their way into the disposal site -- regardless of the disposer's share of the wastes, regardless of whether it acted perfectly lawfully under the legal rules and containment practices prevailing at the time of disposal, regardless of any demonstrated current harm to human health.

30. Landy & Hague (1992:70) elaborate: "In an effort to clean up a site near Utica, New York, the EPA sued two companies -- a cosmetics producer and a manufacturer of metal components -- who, in turn, sued over 600, mostly small, businesses and 41 towns and school districts"

31. As noted in Church & Nakamura (1993) in their detailed study of Superfund implementation, "By mid-1990, .. after 10 years of program operation, only sixty-three of the more than twelve hundred National Priorities List sites had been cleaned up."



legal culture that espouses adversarial legalism as mode of governance, and (although direct evidence is lacking) it has the fingerprints of legally-trained legislators and staff members all over it.

### C. Constructing Lawyers' Ethics

In constructing rules of ethics for practitioners, a legal profession has a range of choices. It can stress the lawyer's duty to her client alone, zealously protecting and advocating the client's interests regardless of the costs or injustices to the rest of the world. Or legal ethics can enjoin attorneys to temper pursuit of clients' interests with concern for legitimate interests of third parties and society at large. The American legal profession has stressed the ethic of zealous advocacy, in contrast to the legal professions of England and Western European nations, where "the ethical rules of conduct set greater limits on the lawyer's duty to protect client loyalty and confidentiality in deference to larger societal and third party interests" (Osiel, 1990:2019).

Thus American lawyers have fought for rules of evidence that provide a broader and more absolute lawyer-client privilege than exists in most other countries (Osiel, 1990:2018). In contrast to most other legal professions, the American bar has endorsed contingency fees, justifying them on grounds that they facilitate litigation by the non-wealthy. American legal ethics endorse lawyers' practice of pre-trial coaching of witnesses; German legal ethics strongly discourage it (Langbein, 1985:833-34).<sup>32</sup>

The American legal profession's endorsement of the lawyer's duty of zealous advocacy -- as opposed to her duty to serve as "officer of the court" -- encourages a more entrepreneurial form of legal practice than prevails in Europe. It authorizes lawyers to advance novel legal

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32. Langbein (1985:833): "If we had deliberately set out to find a means of impairing the reliability of witness testimony, we could not have done much better than the existing system of having partisans prepare witnesses in advance of trial and examine and cross-examine them at trial."

claims and arguments, challenging or stretching existing doctrine, asserting that it is the court's job, not the lawyer's, to separate the wheat from the chaff. <sup>33</sup>

The adversarial ethic disseminated by the profession also has validated American trial lawyers' competition to develop ever more aggressive and costly techniques of litigation -- dramatic "day-in-the-life" videos to illustrate the adverse effects of accidents; exhaustive and burdensome pre-trial discovery; clearing-houses and computer networks to spread information facilitating product liability and other kinds of lawsuits. Finally, the ethic of zealous advocacy encourages an aggressive style of lawyering that intensifies the practice of adversarial legalism within the bounds of existing legal rules and institutions -- as elaborated more fully in the next section.

#### V. CASE-BY-CASE LAWYERING AND ADVERSARIAL LEGALISM

Most American lawyers do not devote their lives to lobbying for new law that extends adversarial legalism. But acting within a legal culture that supports zealous advocacy and ready recourse to litigation, many lawyers, simply by day to day advocacy, add to the *practice* of adversarial legalism.

Again, it is important to focus on what is properly attributable to lawyers. From one standpoint, whenever lawyers litigate or threaten to litigate they could be considered to be "engaging in" adversarial legalism. Even ordinary legal contestation incrementally increases the level of adversarial legalism in the system. It adds to the delay other litigants encounter, and thereby increases pressure on them to

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<sup>33</sup>. Mark Oseil (1990:2060) argues: "The stringency of their ethical guidelines on matters of client loyalty impelled American lawyers toward the imaginative discovery of doctrinal ambiguity where such ambiguity would otherwise have remained merely latent. In particular, the view of legal expertise as the skillful exploitation of doctrinal uncertainty would not have become so central to the self-understanding of American attorneys had their ethical guidelines encouraged them to view themselves, like many lawyers elsewhere in the West, primarily as 'officers' of society."

compromise legitimate claims and defenses. However, when lawyers litigate on behalf of clients' just (or arguably just) claims and defenses, it seems inappropriate to view lawyers themselves as "causes" of adversarial legalism, any more than jockeys are "causes" of fast, highly competitive horse racing and high-stakes gambling.

Most litigation, we can safely assume, is stimulated not by lawyers but by clients or complainants. But we can also assume that is not always the case. Suppose 10 percent or even 15 percent of legal contestation is the lawyer's idea. Lawyers sometimes bring lawsuits or threaten them to bring them in order to advance their own pecuniary interests or to vindicate ideals they hold dear. To the extent that occurs, then lawyers themselves might be considered a cause -- even if not a predominant cause -- of adversarial legalism. Ten or fifteen percent more or less legal contestation surely is not an insignificant matter.

Well, how much legal constestation is lawyer-induced (as opposed to client-induced)? Ten percent? Fifteen? Twenty? Two? We don't know. Legal and socio-legal scholars have had little to say on the subject, perhaps for fear of providing support to conservative lawyer-bashers. But a great deal of anecdotal evidence, and limited systematic evidence, suggests that there is a significant amount of superaggressive lawyering -- even though quantitative measures are elusive. This section offers a selective laundry list of spheres of practice in which it seems to occur.

#### A. "Normal" v "Superaggressive" Lawyering

Lawyers are not wholly passive agents. They can (and do) serve as peace-makers rather than encouraging clients to litigate. Normally, socio-legal studies indicate, attorneys serve as stolid gatekeepers for the courts. They often decline to advance claims or defenses that seem

unjustified or far-fetched in law or equity, thereby *diminishing* adversarial legalism.<sup>34</sup>

Other lawyers push clients to avoid litigation not for reasons of fairness or morality but for economic reasons, emphasizing the costliness of the adversarial process. Divorce lawyers often push clients intent on moral vindication to accept financial compromise (Sarat & Felstiner, 1986 ) Lawyers for business, Macaulay (1979:153-55) concludes, most often take serve the function of *dampening* outrage, defensiveness, and vindictiveness on the part of corporate managers and engineers involved in disputes with consumers, convincing them it would be more prudent to compromise than to fight.<sup>35</sup>

Some lawyers, however, are "superaggressive" adversarial litigators. They *add* to the volume of adversarial legalism in situations in which most lawyers would not. Let me suggest three variants:

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<sup>34</sup>. Reporting on his interviews of Wisconsin attorneys in connection with their handling of consumer claims, Macaulay (1979:140) says:

"A number of attorneys suggested that a lawyer has an obligation to judge the true merits of a client's case and to use only reasonable means to solve problems....For example, several attorneys were very critical of other members of the bar who had used the Wisconsin Consumer Protection Act so taht a lender who had violated what they saw as a 'technical' requirement of the statute would not be paid for a car which the consumer would keep. While this might be the letter of the law, apparently a responsible alywer would negotiate a settlement whereby the consumer would pay for the car but would pay less as a result of the lender's error."

<sup>35</sup>. Macaulay also describes how lawyers for consumers use the threat of costly litigation to pressure merchants to offer a settlement, and then refer to those same costs to pressure their client to accept it -- *without ever arguing the legal merits of the claim* (Macaulay 1979:126-128). These lawyers use the more disturbing features of adversarial legalism to resolve disputes. In ignoring the merits, they perpetuate the tendency of costly adversarial legalism to deter the assertion of legally valid claims and defenses. But they do not increase adversarial legalism.

**Ambulance Chasers and Knights Errant.** Some superaggressive attorneys operate as bounty hunters or knights errant, looking for lawsuits to bring, for mercenary or ideological reasons, and search for clients to serve their own ends.

**Legal Extortionists.** Lawyers of this ilk file suits in support of claims they know to be legally weak, or mount diversionary legal defenses against strong claims, calculating that the costs and delays of litigation will induce the other side to abandon or compromise just claims, defenses, or projects.

**Warrior Litigators.** While most attorneys, when pushed by clients to litigate, do so in a more or less "gentlemanly" style, the superaggressive litigator engages in legal warfare. He deliberately uses the tools of discovery, motion practice, and other procedural devices to impose extortionate pressures on the other side.

It is difficult to say how many specimens of these subspecies dwell in the ever-burgeoning legal rainforest (although it seems unlikely that any are on the endangered list), or how much they contribute to adversarial legalism. It may be worthwhile, however, to provide a few examples of each, necessarily leaving out many others, and to refer to whatever evidence on prevalence that I have encountered.

#### **B. Ambulance Chasers and Knights Errant.**

1. **Ambulance Chasers.** Big Yank Corporation's sales of work clothing fell from \$110 million in 1991 to \$65 million in 1992. After the company told the 225 workers in its Wewoka, Oklahoma factory that the money-losing plant would be closed, a representative of a workers' compensation law firm met with employees, according to company officials, distributed forms, and told them how to file claims. Two days before the plant closing, 247 claims for work-related injuries were filed -- compared to 6 for that factory in the previous year. Much litigation ensued, both between Big Yank's insurer and workers whose claims it disputed, and between the insurer and Big Yank, which claimed the insurance mounted too few legal challenges to fraudulent claims (Kerr, 1993).

In the United States severance pay and unemployment benefits are quite limited when compared to Western European welfare states.



American workers' motivation to use injury claims to help alleviate economic hardship therefore is understandable. Again, an underlying cause of adversarial legalism is structural -- the political weakness of American organized labor and the weakness of protective labor legislation. But workers' vulnerability does not automatically generate legal injury claims. As in Wewoka, the evidence suggests that sudden surges in claims, many of them legally questionable, occur quite regularly when factories close, indicating that in those situations workers' compensation lawyers, or some of them, play a causal role.

Some lawyers, of course, almost literally chase ambulances. They send runners to hospitals and union halls to give the personal injury attorney's cards to injured people. They send representatives to the scene of highly-publicized train wrecks and explosions. Some may justify it on grounds that insurance companies dispatch representatives to disaster scenes in order to make quick payments to victims, asking for releases in return. Some people in ambulances, that suggests, have valid legal claims. Nevertheless, ambulance chasers actively turn injury into legal claim, intensifying the wider culture's acceptance of litigation as an appropriate social response.

We don't know how often this occurs. Surveys indicate most injured persons never hire an attorney (Hensler et al, 1991; Miller & Sarat, 1980-81). And it seems unlikely that more than a small proportion of those who do hire a lawyer were first encouraged to do so by the lawyer or his agents. Nevertheless, anecdotes about such behavior can easily be uncovered, suggesting that it is not rare. Moreover, marked regional differences in litigation for similar injuries often seem linked in the minds of experienced claims agents to subcultures in which especially aggressive lawyers play a prominent role.<sup>36</sup> Some systematic research on the topic seems long overdue.

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<sup>36</sup>. I have interviewed a number of claims officials who work for West Coast shipping lines and handle claims under the federal Longshore and Harbor Workers Compensation Act. I am invariably told me that claims rates are far higher in the Ports of Los Angeles and Long Beach than for essentially identical stevedoring operations in the Ports of Oakland and San Francisco. The employers contest a far larger proportion of claims in

2. **Advertising.** A televised ad shown in Florida portrays a boy squirming in a barber's chair. "If you don't stop moving, Jonathan, I'll cut your ear off," said the barber. The boy spins his chair and replies, "Yeah, and if you do, I'll call attorney David Singer." Singer then appears on screen to intone, "No client is too small to benefit from our legal protection" (Geyelin, 1992).<sup>37</sup> Annual TV advertising expenditures by lawyers, the Television Bureau of Advertising reports, grew from about \$17 million in 1983 to over \$100 million in 1991 (Geyelin, 1992). To be sure, much lawyer advertising is not tasteless and conveys useful information about access to justice to individuals with valid legal claims. Perhaps most people who respond to an ad would have eventually

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the Los Angeles ports as unfounded or inflated. Asked why, they refer to the entrepreneurial behavior of claimants attorneys whose offices abut the port area on San Pedro Bay and who station representatives in union halls.

One suspects aggressive attorney behavior is involved when research reveals that in Southern California, workers compensation insurers' or employer's first notice of injury claims came from the claimants attorney in almost 55% of 1991 claims, up from 44 % in 1985, while attorneys were initially engaged in only 29% of 1991 Northern California claims, a *decline* from 34 percent in 1985. Similarly, workers' comp litigation rates (an indicator of how often insurers find claims unfounded or exaggerated) rose from 10% of Southern California claims (1985) to 17.5% (1991), while litigation occurred in only 8.2% of Northern California 1991 claims. (CWCI, 1991)

New York City's municipal liability payments for slip-and-fall accidents in 1991, calculated on a per capita basis, were double those in Detroit and more than 50% higher than Chicago's. The City's aggregate liability claim payments grew by almost 50% in the preceding three years, until they exceed what the city pays to operate all its parks and libraries. The City's attorneys, according to a *New York Times* reporter, "attribute their rising expenses to increasingly litigious citizens, zealous (and sometimes fraudulent) trial lawyers, and juries often ruled more by emotions than facts." They claim that lawyers whose clients are injured in car accidents or sidewalk stumbles scrutinize the pavement for defects that can drag the city into the case. Even if the jury finds that the city is just 5 percent at fault, in the absence of other wealthy defendants, the city can be held responsible for ... damages." (Myerson, 1992).

37. Another Florida TV ad featured a man who said that after his third arrest for drunk driving, "They wanted to put me in jail for a year and take away my drivers license for 10 years. That's when I called the lawyers at the Ticket Clinic. They got my case thrown out of court. No jail. No suspension. Nothing." (Geyelin, 1992)



found a lawyer in other ways. Nevertheless, lawyers who advertize probably can be thought of as "causes" of adversarial legalism, helping, by the power of suggestion, to turn some grievances that might have been dealt with otherwise into lawsuits.

**3. Entrepreneurial Class Actions.** In 1990, a New York law firm filed a state court class action in against seven major brokerage houses on behalf of all investors -- a class of about 1 million -- who held margin accounts between 1984 and 1990. The suit claimed that the brokerage houses illegally charged compound interest -- on the credit they extended *and* on accumulated unpaid interest. According to a newspaper account:

The brokers countered that the interest rate charges on margin accounts, which are applied in a similar manner to those of credit cares, are part of a long-standing policy well understood by their customers. In addition, they said it was completely lawful.

Thousands of hours of legal work later, the lawyers for both sides agreed to settle the suit without any resolution of the legal issues involved. (In fact, the New York Legislature recently clarified state law to make it clear that compounding interest on margin accounts is legal.) The defendants agreed to notify customers about the compound interest rates ... and to pay legal fees to the plaintiffs' attorneys.

A spokesman for defendant Merrill Lynch & Co. said the company has long included a notice to margin customers about interest charges agreed but that it agreed to pay a portion of plaintiffs' legal fees, which totaled \$1 million, in order to avoid further litigation expenses (Moses, 1992).

After learning of a government investigation of alleged price fixing by major airlines, attorneys filed 21 cases on behalf of 12 million passengers. After three years, the consolidated cases were settled for \$458 million in cash and discount coupons, and \$14.4 million in fees for the plaintiffs' lawyers -- even though, according to a Wall Street Journal account (1993), the presiding judge said he "would assess the chances of the plaintiffs recovering as not good" and that "I think the case would have a hard time surviving a motion for summary judgment." But it made sense for the defendants to settle once they hit on the idea of paying the actual plaintiffs in discount coupons (worth 10 percent off purchased tickets for off-peak travel). Again, the

plaintiffs' attorneys got a big payoff while providing their "clients" - those who bother to go to the trouble of proving they fall within the affected class and collect the coupons -- with minimal benefits.

In these cases opportunistic lawyers themselves initiated litigation and used the club of costly adversarial legalism to extract settlements that primarily benefitted the lawyers themselves. Are these isolated stories, or are they commonplace? Apparently the latter.

In a remarkable study, Janet Cooper Alexander (1991) found that in 1983, a handful of entrepreneurial California law firms routinely filed a class action suit against every computer company, nine in all, whose stock declined substantially in the half-year following its initial stock offering.<sup>38</sup> Regardless of the apparent strength (or weakness) of the claim, defendants felt compelled to settle the case on the eve of trial for about 25% of the potential damages.<sup>39</sup> Why? Because the potential damages claimed were "astronomically high"; "insurance and indemnification rules that make substantial sums of money ... available for negotiated settlements but not for judgments after trial"; and the rules for paying plaintiff lawyers' counsel fees made it very advantageous for them -- if not for the class of investors they putatively represent -- to settle before trial (but after conducting a vigorous round of pre-trial discovery) (Id at 499). The plaintiffs lawyers ended up with fees of \$2-\$3 million (averaging 27% of the recovery), defendants' lawyers with even more, and most of the "damages"

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<sup>38</sup>. The suits were filed whenever a stock sustained a market loss of \$20 million or more, skipping some smaller issues in which some larger percentage losses occurred, since that amount seems to have been necessary to make the contingency fee litigation profitable (i.e. a potential fee of \$1.25 million, or 25% of a 25% percent settlement)(Alexander, 1991:513). The plaintiffs' lawyers clearly filed suit merely on the basis of the stock decline, without any prior evidence of fraud or other securities laws violations, and then sought detailed pretrial discovery that probed for evidence that management had in some way exaggerated the company's product quality or sales prospects.

<sup>39</sup>. Alexander's method of demonstrating that the settlements were unrelated to the legal strength of the suit is exhaustive and convincing, but too complicated to restate here.

(averaging \$9 million) did not go to small investors but served to "insure a relatively small number of institutional investors against market losses from a speculative investment ..." (Id at 575). Moreover, the resulting "non-merits-based settlement regime also encourages the filing of more and weaker suits" (Id at 501).

Roberta Romano , in an equally brilliant study of a broader population (n=139) of shareholder suits,<sup>40</sup> also found that the settlement pattern is consistent with the proposition "that a significant proportion of shareholder suits are without merit" (Romano, 1991:61); that the litigation did not produce significant structural changes in board composition<sup>41</sup> or other changes in corporate governance; and "that the principal beneficiaries of cash payouts in shareholder suits are attorneys" (Id at 65).<sup>42</sup>

Similarly, large pretrial settlements (and lawyers' fees) have been paid in many "toxic tort" class actions, even in the absence of proof of harm to human health stemming from the chemical exposures in question (Schuck, 1986; Huber, 1988:135-39). A study of federal class actions in the Northern District of California, 1979-1984 -- as I read the account (Garth, 1993) -- found that in most cases, plaintiffs' substantive justice claims -- if there were any real plaintiffs not recruited by the law firm that brought the class action -- were transformed into narrow procedural issues about notice and rights to be heard, providing few significant results for anyone except the lawyers.<sup>43</sup>

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40. Romano (1987) studied all shareholder suits from the late 1960s through 1987 against a random sample of publicly traded corporations.

41. "A likely explanation for cosmetic structural settlements is the need to paper a record to justify an award of attorneys' fees to courts." (Romano, 1991:63)

42. Of the 83 resolved cases in Romano's sample, only half involved a monetary recovery for stockholders, while plaintiffs' attorneys were paid in 90% (75 cases), and in 7 cases the only relief was attorneys' fees. Of the 32 adjudicated cases, plaintiffs won only one (or perhaps two). (Romano 1991:60-61).

43. "Turning to the benefits provided to the class, the facts do not add up to a strong picture of litigation that makes lasting improvements in

Undoubtedly some class actions are socially useful, punishing and hence deterring unlawful corporate behavior. A rash of consumer class actions against banks that charged allegedly illegal interest on certain transactions may fall in that category. But even in these cases, the alleged violations often seem technical, the alleged damages are so high that defendants often settle, and most of the recoveries seem to end in the hands of lawyers (Hudson, 1993). And quite often, it seems, the lawyers who claim to serve as "private attorneys' general" really only "pile on" after the government has imposed criminal sanctions.<sup>44</sup> A study of private class actions based on insider trading offenses found that virtually all piggybacked on investigations or charges first brought by the Securities and Exchange Commission (Hetherington, 1979: 228). In the anti-trust context, Coffee (1981:435) observes:

"The private plaintiff is typically a 'free rider' who files his civil action in the wake of an indictment brought by the Antitrust Division. It is not uncommon today for the private enforcer to attend the criminal trial and to take copious notes so that evidence uncovered by the government will yield a treble damage recovery for him.... In such cases, the actual litigation undertaken by the private enforcers is chiefly internecine: they skirmish among themselves over such procedural issues as the appointment of lead counsel, the size of the settlement, and the allocation of attorney's fees."

4. **Ideological Litigators.** If many class actions seem primarily to enrich lawyers, other lawyers promote adversarial legalism as a matter of political belief. The *raison etre* of many public interest law firms is explicitly to use litigation or the threat of litigation to protect particular public values or group interests. They chase not ambulances but perceived instances of governmental and corporate misconduct. They are legal knights errant, looking for the dragon of authority to sue, whether or not called into action by any particular damsel in distress.

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the lives of class members" (Garth, 1993:257). "...[T]he cases do not add up to a very convincing argument for the class action as a significant tool of empowerment or social change" (Id at 259).

<sup>44</sup>. For a discussion of the problems raised by adding large civil damage claims to criminal prosecutions of regulatory offenses (especially since the promulgation of the new federal corporate sentencing guidelines), see Yellen & Meyer, 1992.

The American Civil Liberties Union monitors governmental processes for perceived violations of free speech, freedom of religion, due process and other values, whether or not the organization's help has been sought by a client; the lawsuit and the appeal are its primary methods of exerting leverage. Natural Resources Defense Council lawyers scour the compliance reports that permit holders must file with the EPA pursuant to the Clean Water Act; from these reports, they target self-reported violators whom they then sue for damages. <sup>45</sup>

Public interest law firms undoubtedly perform a valuable social and legal function. They add deterrent punch to public law, defend individuals and values that otherwise would lack representation, and intensify accountability of governmental bodies. Their tool, however, is adversarial legalism. They are run by lawyers who, precisely because they use superaggressive advocacy as a political strategy, are admired by many law students, held up as model citizens. They surely contribute significantly, not as mouthpieces and scribes but as autonomous legal and political actors, to the volume of adversarial legalism in the U.S. To know precisely how much would require research yet to be done.

### C. Legal Extortionists.

As the story is told by journalist James B. Stewart (1983:146), George Kern, Jr., a senior partner in Sullivan & Cromwell, "wasn't entirely satisfied with his defensive legal efforts" to prevent a hostile takeover of his client, the giant Kennecott Copper corporation, by T. Roland Berner, a lawyer who was chairman of Curtiss-Wright Corporation. Kern "began hatching a plan which would put Kennecott on the offensive -- and silence Berner as a threat forever." The plan included a lawsuit designed to block Curtiss-Wright's tender offer, on far-fetched anti-trust grounds, as well as Kennecott's own hostile-

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<sup>45</sup>. A 1984 study showed that 349 notices of intent to sue were filed under federal pollution control laws in the 1978-April 1984 period, 214 of which were filed under the Clean Water Act after 1982, most by environmental groups. Greve's article, published in 1989, found that more than 800 additional notices of intent to sue were filed after April 1984, two-thirds by environmental organizations (Greve, 1989:18).



takeover of Curtiss-Wright -- which Curtiss-Wright's lawyers attempted to block by a separate series of lawsuits. There followed a furious round of additional legal actions, requests for ex parte injunctions, countersuits, motions, and appeals, scattered through several jurisdictions. None of the legal claims or arguments concerned a fundamental issue -- such as whether a Curtiss-Wright takeover over Kennecott (or vice-versa) would be good or bad for Kennecott shareholders, or for the copper industry, or for the national economy. All the litigation was designed simply to slow down or derail the other corporation's tender offers.<sup>46</sup> Finally, the two companies, exhausted by

<sup>46</sup>. Here, for readers unfamiliar with the scope of contemporary legal warfare in financial markets, is a synopsis of the battle: Sullivan & Cromwell lawyers filed in federal court an anti-trust suit (based on an alleged overlap between Curtiss-Wright and a Kennecott subsidiary that would "reduce competition"), and obtained an ex parte order to show cause designed to block Berner from voting his Kennecott stock until the suit was resolved (Stewart, 1983: 254). Curtiss-Wright responded with a motion to disqualify Sullivan & Cromwell as Kennecott's lawyers on conflict of interest grounds. Curtiss-Wright lost the disqualification motion. Kennecott's won an initial victory on the antitrust claim, but it was unanimously reversed by the Second Circuit Court of Appeals. Then Kern, according to Stewart's account (Id at 258), suggested a hostile takeover of Curtiss-Wright by Kennecott. Sullivan & Cromwell anticipated that Curtiss-Wright lawyers would seek to derail or deally Kennecott's move by filing lawsuits challenging the takeover on anti-trust grounds, or for defects in Kennecott's SEC disclosure statement, or for failure to comply with the takeover statutes in New Jersey and Delaware (where Curtiss-Wright had its headquarters and was incorporated). So Sullivan & Cromwell filed a preemptive strike suit in U.S. District Court in Newark, New Jersey, seeking an injunction against enforcement of New Jersey's anti-takeover law pending hearing of Kennecott's claim that the waiting period for offers in New Jersey law it conflicted with the shorter waiting period demanded by SEC regulations. The federal judge in Newark denied the request. Curtiss-Wright's lawyers filed suit in New Jersey state court, petitioned the N.J. Attorney General, and filed a lawsuit in federal court in New York, in each case demanding an order against Kennecott's takeover efforts. Sullivan & Cromwell appealed the New Jersey federal court's rejection of its injunction request, taking the case to the Third Circuit. Both sides filed suits in Delaware. The N.J. Attorney General issued a cease and desist order. Sullivan & Cromwell immediately obtained a stay of that order in a New Jersey court, but a few days later that court lifted the stay, restricting Kennecott's sollicitation of Curtiss-Wright stockholders. The Third Circuit reversed the decision of U.S. District Court in Newark, ruling that enforcement of the N.J. takeover law should be enjoined. Curtiss-Wright's lawyers sought to bar that by filing a counterclaim in the Newark federal court. The U.S. District Court in New York, after an

the legal struggle, agreed to settle without either taking over the other. Kennecott had expended \$1.5 million in legal fees. "In the end," Stewart concludes, "little was accomplished" (Id at 282).

In this struggle, top attorneys deployed groups of younger lawyers like *panzer* divisions. The purpose of the litigation was to create obstacles and impose costs, not to vindicate their clients' deeply-felt legal rights. To paraphrase Mae West, justice had nothin' to do with it. Although Stewart's account, based on interviews with lawyers, may downplay the role of the clients, it is plausible to believe that in these legal maneuverings, the lawyers devised the strategies. They deliberately searched the law and its procedures for any available charge or defense, manipulating the techniques of adversarial legalism for ends not contemplated by the lawmakers.

How often does manipulative use of the legal system occur? It almost certainly does not characterize most commercial and financial litigation. But it is also hard to believe that the Kennecott/Curtiss-Wright type of battle is uncommon. Moreover, examples of extortative, obstructionist, and intimidative litigation can be found in many spheres of practice. Consider the cases described by Canan and Pring (1988) as SLAPP suits -- "strategic lawsuits against public participation." Their search of legal libraries and trial court records, along with a mail questionnaire to public interest organizations, turned up 100 damage suits (mostly for defamation), filed against citizen protestors and critical advocacy groups, by lawyers for real estate developers, city government officials, public utilities, police officers, and alleged polluters. Parents were sued by a board of education for complaining about allegedly unsafe school buses. Homeowners who sponsored a referendum petition to block a proposed project were sued by the real estate developer. Police officers sued those who complained of official misbehavior. Canan & Pring conclude from the fact that most of these suits seek high money damages, rather than injunctive relief, that the

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intense trial, rejected Curtiss-Wright's claims that Kennecott's tender offer violated federal securities laws.



goal was primarily to impose high litigation costs and hence silence critics. And their finding that final legal judgments favored the citizen-defendants in 80 percent of the SLAPP suits that reached a legal disposition suggests that lawyers for the SLAPPers not only were ineffective gatekeepers for the courts but willingly participated in the use of legal processes for purposes of intimidation.

Opponents of development, too, not infrequently use lawsuits as obstructive or extortative tactics in a struggle to attain other ends. Some advocacy groups and their lawyers are inclined to oppose highway construction, logging, waste incinerators, or offshore oil development on principle. The lawsuits they bring, however, often are cast far more narrowly, as challenges to the completeness of environmental impact statements. The best legally-obtainable result, in many cases, would be not to stop the project but to compel additional analysis and a rewriting of the EIS (see Taylor, 1984:240-48). The purpose of the litigation is the hope, often not unfounded, that the delays and costs imposed by the lawsuit, along with related opportunity costs, will compel the developers or public agencies to abandon the project altogether (see O'Hare & Bacow, 1983; Kagan, 1991b; Lester, 1990). The lawyers who file these suits and appeals are willing to bring legal claims on grounds only tangentially related to their clients' goals simply to put pressure on the other side. It does not seem inappropriate, therefore, to label the lawyers themselves, however idealistic their purposes, as "causes" of adversarial legalism.

Similarly, attorneys opposed in principle to the death penalty deliberately exploit every possible opportunity to file multiple state and federal appeals and habeas corpus petitions, often on legal grounds highly unlikely to succeed, in hopes that the extraordinary delays, the build-up of prison death row populations, or the publicity attending frantic last minute appeals, will increase political pressures for clemency or for legal change. To many who oppose capital punishment, the defense lawyers' actions are morally justifiable and even commendable. But it is hard to deny that many death penalty appeals, typically

stretching out for years, represent a manipulative form of adversarial legalism, devised and extended by lawyers.

**Unwarranted Claims and Defenses.** In a publication of the national association of law school job placement officials, an Atlanta attorney (Jones, 1993) wrote:

As a litigator, I see lots of cases filed now that no self-respecting lawyer would have taken 15 years ago. The plaintiff's attorney has the high costs of litigation as leverage and can reasonably hope for a nuisance or moderate settlement from the defendant who doesn't want to pay his or her lawyers an arm and a leg to defend the action.... And if you think that a manufacturer against whom an absolutely baseless products suit is brought will surely escape on summary judgement ...and maybe even recover expenses and attorneys' fees because of the frivolous nature of the suit, you are naive."

Is there any systematic evidence to back this up? The Administrative Office of the U.S. Courts estimates that more than one in three (35 %) civil cases are disposed of by motion to dismiss or motion for summary judgment (Resnick, 1986 : 511-12). The Wisconsin Civil Litigation Project found that 22.5% of civil suits were dismissed or adjudicated on the merits without trial (Trubek et al, 1983:89). Those figures suggest that plaintiffs' attorneys, in the aggregate, do a rather poor gatekeeping job.

Results of civil case trials indicate that in some categories of cases, plaintiffs' lawyers are poor gatekeepers. Competent plaintiffs' counsel presumably would not initiate or would settle claims in which the prospect of winning at trial was significantly lower than 50 percent (Priest & Klein, 1984). Thus Eisenberg (1990), using records from Federal District Courts, 1978-85, found that plaintiffs in most kinds of contract cases (in which damages are generally limited to out-of-pocket losses) won at trial more than 60% of the time (n = > 10,000). They also won 60% of motor vehicle accident personal injury trials (n=3261) and 46% of "other personal injury" trials. But plaintiffs won only 33% of trials in motor vehicle *product liability* cases (n=392), only 25% of other *product liability* trials (n=3255), and 38% of personal injury cases based on *medical malpractice* (n=697). This suggests that in

contingency fee cases with potentially large money damages, many plaintiffs' lawyers are willing to push defendants to trial in cases in which liability is questionable; the chance of a big payoff makes it worthwhile for them to try some "long shots." For the legal system, it adds to the volume of adversarial legalism.

Parallel deficiencies in gatekeeping occur on the defense side. In a study of litigation in the the Southern District of New York, Nelson (1990) found that contract cases tripled between the 1960s and the 1973-79 period, and that the percentage of cases in which a party was represented by a major corporate law firm increased by 40 percent. Nelson argues that the increase in inter-corporate litigation stemmed primarily from structural changes in the economy, in regulatory regimes, and in corporate management, all of which affected corporate executives' incentives. But he also asserts:

"Litigation was also promoted during the 1970s by the willingness of lawyers to provide managers with opinion letters or other advice that nonperformance of a contract followed by litigation was a legally appropriate course" (Nelson, 1990: 436).

Corporate lawyers, Nelson suggests, were willing to suggest to managers (or endorse the latter's suggestions) that even in the absence of a strong legal argument for contractual nonperformance, it might be both economically advantageous and morally acceptable to wait and be sued -- since in a clogged, costly court system, the plaintiff might settle for far less than its legal due. [Arthur Leff (1970) noted that in a costly, slow, adversarial court system, in which creditors who are forced to sue must pay their own lawyers' bills, it is economically irrational for debtors to pay their debts in full]. Nelson provides little supportive evidence of this alleged shift in the legal ethics of corporate law firms. But neither is it implausible, especially in an era in which large law firms had to compete ever more fiercely to maintain their large litigation departments and the growth in billings on which they had become dependent (see Galanter & Palay, 1991).

#### **D. Warrior Litigators: Taking Adversariness to Extremes.**

Second Circuit Court of Appeals Federal Judge Ralph K. Winter (1992: 263-64), who also served as member of the federal courts' Advisory Committee on Civil Rules, wrote:

In private conversations with lawyers and judges, I find precious few ready to argue that pretrial discovery involves less than considerable to enormous waste....[The Advisory Committee found] a no-stone-left-untuned ... philosophy of discovery governs much litigation and imposes costs, usually without corresponding benefits....Second, discovery is sometimes used as a club against the other party ... solely to increase the adversary's expenses."

Of course, this doesn't occur in every case, or even in the average one, where the monetary stakes are not very large (Trubek et al 1983).<sup>47</sup> But it clearly happens a great deal in high stakes cases. To many litigators, like legendary Coach Vince Lombardi, winning is the only thing, and discovery demands and other pretrial maneuverings become a technique for grinding down the opposition. Thus Professor Robert Rabin, a judicious moderate on tort reform and reporter to an ABA commission on the liability system, concluded:

The ... most troublesome aspect of the spiralling costs of the system is not excessive litigation *per se* but too much lawyering - more concretely, the tendency to abuse the torts process through strategic resort to delay and imposition of burdensome costs of trial preparation. The many forms of this abuse include spurious motions practice, excessive deposition taking, unnecessary continuances, frivolous claims, and multiple lawyering" (Rabin, 1988: 42).

Chicago lawyers who frequently are involved in large-stakes litigation admitted to a researcher (Brazil, 1980) that they often (that is, in 40 percent of their cases or more) had used discovery tools simply to impose work burdens or economic pressure on their adversaries. The lawyers also said they often made discovery demands or delayed responses

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47. In a careful study of litigation in both state and federal courts in 1978, researchers associated with the Wisconsin Civil Litigation Project found that most civil cases -- only some 12% of which involved claims of \$50,000 or more -- settled relatively quickly and hence in over half the case files there was no record of any pretrial discovery. And "rarely did the records reveal more than five separate discovery events" (Trubek et al, 1983).

to discovery in order to slow down an action; bombarded the other side with huge amounts of information as a way of obscuring crucial information; and tutored witnesses to give evasive answers in depositions .<sup>48</sup>

Trial practice is not much better. According to one student of the process, trial attorneys routinely endeavor to prevent the introduction of unfavorable facts, attack the credibility of adverse witnesses by exaggerating small inconsistencies, and engage a variety of obstructionist tactics (Luban, 1981: 13-14). Many lawyers transform a system of pre-trial pleadings designed to foster non-technical, non-adversarial behavior into patterns of obfuscation and costly motion practice (Kaufman, 1988).<sup>49</sup> If the reader's response is "Of course!" that only shows the extent to which lawyers have propagated a legal culture that supports the perpetuation of unnecessary adversarial legalism.

Intensely adversarial, even obstructive litigation tactics are very common in criminal defense, and indeed are encouraged by the conventional interpretations of the defense attorney's proper role. Criminal lawyers routinely tell suspects never, never to say anything to investigators. They treat the *right* to silence an *obligation*, thereby encouraging offenders to adopt an adversarial rather than a cooperative or repentant stance -- at least until the attorney is able to use that silence to try to extort a reduced sentence. Once the possibility of a *criminal* investigation arises, corporate defense lawyers routinely try

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<sup>48</sup>. For all the admitted waste in the discovery process, it is often ineffective. Large-case litigators estimated that 50 percent of their are closed out with at least one party believing it knows something of significance that opposing parties do not know (Brazil, 1980:234).

<sup>49</sup>. Kaufman (1988:204) notes that whereas Rule 9(b) of the Federal Rules is designed to avoid unnecessary contentiousness by requiring plaintiffs in claims of fraud "with particularity," "One would be hard-pressed to envision a lawsuit with common law fraud, securities fraud or RICO claims that did not get bogged down in a Rule 9(b) dispute' because the plaintiff's lawyer, unwilling to help the defendant prepare, "typically resists the nonadversarial spirit of Rule 9(b) by alleding fraud in a general notice-pleading manner."



to prevent corporate officers and employees from speaking with regulatory officials (Penner, 1992; Mann, 1985). Many criminal defense lawyers as a matter of course bring unwinnable motions to suppress evidence<sup>50</sup> (Nardulli, 1987)' deliberately imposing unnecessary delays or costs on the prosecution.

Politically ambitious or competitive public prosecutors, too, frequently seem to put winning high visibility cases ahead of the pursuit of justice. Brill (1989) describes two cases in which prosecuting attorneys in the offices of the U.S. Attorney for the Southern District of New York and for the Securities and Exchange Commission, respectively, manipulated legal rules, and probably misrepresented key facts, in order to steer two closely watched prosecutions -- one against the Teamsters, one against Drexel Burnham -- onto the dockets of federal judges who were well-known to be biased in favor of government prosecutors. U.S. Attorney Rudolph Guliani initiated numerous highly-publicized insider trading cases that resulted in acquittals, or reversals, or were never brought to trial. And what are we to make of the actions of Special Prosecutor Lawrence Walsh and his top assistants, who despite an apparent win-at-all-costs style (Tooby), spent millions of dollars prosecuting governmental officials in connection with the Iran-Contra scandal only to have most of the prominent cases thrown out on legal grounds that had been asserted by defendants from the outset?

Most prosecutors presumably are not overzealous. It is difficult to make any estimate what (undoubtedly small) proportion are, or act that way in at least in some of their cases. There are signs that it occurs with some frequency in the area of environmental law, where prosecutors face temptations to reap the publicity rewards (and obtain

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<sup>50</sup>. Nardulli (1987, 1984), in a study of several criminal courts, found that only 17 percent of motions to suppress physical evidence were granted, and only 5% of motions to suppress confessions. In Chicago, while motions to suppress were more often granted at pretrial hearing, those made before the trial court were granted only 12% of the time.



some of the large criminal and civil penalties now legally available)<sup>51</sup> by treating regulatory violations as environmental crimes. In any event, there are a lot of prosecutors; like bad drivers, even a relatively small number can have a disproportionately large effect on the system.

Moreover, the ethic of zealous advocacy endorsed by the profession can draw even socially responsible enforcement attorneys into an adversarial posture that invites litigation rather than compromise. Church & Nakamura (1993) observed that some EPA regional offices took a much more prosecutorial stance than others in seeking remediation of hazardous waste disposal sites under the Superfund statute. In the "prosecutorial" offices, they note (p. )

"The informal language of government lawyers is often tough and uncompromising ... [Potentially responsible parties] become 'slam dunk' PRPs or 'deep pockets'.... Such views are an outgrowth of the professional training of lawyers, of the ... arguments taht they make, and of their interactions with the PRPs themselves."

The upshot, however, is to close doors to cooperative cleanup. "The adversary process," Church & Nakamura further observe, "with its assumptions about self-seeking behavior, discourages unilateral candor and openness" on the part of the prosecutors. And the result is legal resistance and slower environmental remediation. (Id at ).

## VI. LOBBYING TO PRESERVE ADVERSARIAL LEGALISM

Many lawyer-dominated organizations, from the federal Judicial Council to the ABA, often work for legal reforms that would curtail adversarial legalism. On the other hand, highly-organized subgroups of lawyers have been prominent and successful in *resisting* such reforms,

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<sup>51</sup>. Many state and county prosecutors' offices retain some or all of the large fines that can be obtained through successful prosecution of environmental crimes (Fellner, 1989) or from civil suits seeking "natural resource damages." Thus one can find accounts of district attorneys striving to "build up" damage claims in the style of a plaintiff's personal injury attorney (Privitera (1992)). For a study indicating the increasingly large money penalties assessed on regulatory violators through criminal prosecution and collateral civil penalties see Cohen, 1991).

especially those that would make a large dent in the scope and intensity of adversarial legalism. Sometimes they do so for reasons of economic self-interest. Sometimes they do so for idealistic reasons, arguing that those rules and institutions are bulwarks of justice; those arguments have some merit. The point, in terms of the subject of this paper, is that lawyers, operating as political actors, and operating on their own account, have successfully opposed adversarial legalism-reducing reforms that serious students of the law believe would be socially desirable.

#### A. Battling Civil Justice System Reform.

In April 1993, the Governor of New York proposed legislation creating a large fund, supported by a fee on hospital births, to be used to provide compensation for expenses incurred by families whose babies were injured in the course of birth -- without the need to bring a lawsuit and prove negligence on the part of the doctor or hospital.<sup>52</sup> "The bill," cautioned the *New York Times*, "faces steep opposition from trial lawyers" and "has an uncertain outlook in the Legislature" (Lyall, 1993). The trial lawyers' opposition to adversarial legalism-reducing reform is not unusual. Indeed, they have been persistent in fighting in the legislative arena to preserve the civil case jury system and to maintain the primacy of the tort law system for compensating accident victims.

The jury system, with its unexplained verdicts, loosely-structured and subjective law of damages (Blumstein et al, 1990), and cumbersome methods of decision-making (Langbein, 1985), is a major source of legal

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52. Under the tort law system, governmental officials said, few suits on behalf of infants are successful and those who win in court have to wait a decade or more to see any money. Under the proposed system, they argued, "instead of a small number of individuals getting very large awards," a much larger number of families would receive moderate compensation. Determinations about eligibility and benefits would be made by a panel made up of two doctors, a lawyer, a parent of an injured infant, and an expert in developmental disabilities (Lyall, 1993).

unpredictability<sup>53</sup> and adversarial legalism. In England, in order to achieve greater predictability and consistency of results (and hence less adversarial legalism) the civil jury has been phased out and the law of damages has been refined by judges. But in the U.S., the legal profession has battled to preserve the jury system even in selected areas of litigation, thereby managing to keep wholesale abolition off the political agenda entirely.

Tort litigation is an extraordinarily costly and inconsistent method for compensating victims of negligence. Early in this century, American states recognized this fact and passed laws that would ensure injured workers certain but modest compensation for injury. Employers were made absolutely liable for work-related injuries -- without any proof of "fault" on their part, without any defense based on contributory negligence -- and employers were required to carry workers compensation insurance. Disputes about the extent of accident-related disability were diverted from costly jury trials to less expensive administrative tribunals, and workers compensation was made an exclusive remedy in most cases.

In most European democracies, this "social insurance" model for compensating accident victims and their families has gradually been extended beyond the workplace. When it appears that certain technologies -- highway accidents, pharmaceutical products, medical care -- result in a large number of injuries, governments have responded by enacting specially-targetted compensation and mandatory insurance programs, designed to eliminate costly disputes about fault and to provide victims modest but certain compensation for out-of-pocket losses. Tort law damages are limited to economic losses not covered by such social insurance programs, and to moderate, legally-specified non-economic damages.<sup>54</sup>

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<sup>53</sup>. See studies cited n. above, and Bovberg et al (1989) Hammett et al (1985); Bovberg et al (1990); Chin & Peterson (1985). See also O'Connell, 1979.

<sup>54</sup>. In Germany, mandatory worker compensation (industrial accident) insurance coverage was extended to cover students and to travel to and

In the U.S., however, the no fault/mandatory insurance model has not been extended, with the exception of the 1986 Childhood Vaccine Injury Act and a federal law covering lung damage to coal miners. Workers compensation is still restricted to on-the-job accidents. Indeed, by judicial ruling or legislative enactment, injured workers have been authorized in a widening array of circumstances to *circumvent* workers' compensation programs' exclusive remedy provision and to bring potentially more remunerative tort cases against employers, contractors, and manufacturers of products used in the workplace. Tort claims have driven auto insurance rates so high that many drivers go uninsured. Driven by rising damage awards, American medical malpractice and product liability insurance costs rose to levels 5 to 10 times as high as insurance rates abroad,<sup>55</sup> driving not a few obstetricians and most small airplane manufacturers (Priest, 1992) out of business -- even though most victims of medical malpractice or product injuries recover nothing (Saks, 1992).

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from work and school, and thus covers at least one-third, possibly half, of all traffic accident injuries (Nutter & Bateman, 1989:46). Switzerland extended workers compensation insurance coverage to injuries at home and at play (Duffy & Landis, ). In 1961, Germany enacted an "enterprise liability" law for compensating persons harmed by vaccines, and added a similar law in 1978 for injuries caused by all pharmaceuticals (Nutter & Bateman, 1989:44). Sweden, in addition to making social insurance and medical care the primary recourse for tort victims, established special no-fault insurance regimes for motor vehicle injuries, injuries to patients caused by medical procedures, and pharmaceuticals (Oldherz, 1986; Hellner, 1986).

55. Research on comparative liability insurance costs is sparse and remains anecdotal, but it all points in the same direction. Dow Chemical, whose sales abroad equal those in the U.S., said its 1986 legal and insurance expenses in America were five times its overseas costs for comparable coverage (Nutter & Bateman, 1989:20). Summarizing a 1987 business round table discussion at the Fletcher School at Tufts, Nutter & Bateman (1989:20) say "It has been estimated that German producers pay insurance premiums for goods exported to the United States that are four to six times higher than the premiums on exports to other countries." In Canada, physicians in 1986 paid medical malpractice protection fees ranging from \$288 to \$3500 a year depending on their specialties; in the same year, St. Paul Insurance Co., a leading malpractice underwriter, said its typical premiums ranged from \$1365 annually for an Arkansas general practitioner to \$106,000 for a Miami neurosurgeon (Berkowitz, 1986).

In the mid-1980s, insurance, medical, and business groups, with substantial support from some legal academics and from municipal governments, mounted a major political campaign to curtail or reform tort litigation. It has been estimated that 800 civil justice reform bills were introduced in state legislatures in 1986, 1000 in 1987, and 1400 in 1988 (Nutter & Bateman, 1989:16). They sought to modify rules on joint and several liability (so that "deep pockets" only partly responsible for injuries would not be stuck with the whole bill), shorten statutes of limitations, put caps on "pain and suffering" and punitive damage awards, change the collateral source rule (under which tort victims can claim damages even for losses covered by their own insurance), penalize refusals to accept reasonable settlement offers, limit contingency fees, and require arbitration or mediation as a prerequisite to (or in some cases an exclusive substitute for) a jury trial.

These civil justice reform proposals were fiercely opposed by the organized bar, most prominently by the Association of Trial Lawyers of America (ATLA) and its state-level affiliates, along with consumer advocacy groups associated with Ralph Nader, whose organization is widely believed to receive substantial funding from plaintiffs lawyers. ATLA and its allies (both inside and outside the legislatures) did not always win. Scores of reform laws were enacted, and they did tend to reduce litigation and award levels (Danzon ). But ATLA often did win, or succeeded in significantly weakening the reform bills. In at least 17 states, the plaintiffs bar successfully pursued the battle in the courts, persuading judges to hold tort reform statutes, particularly those imposing caps on damages, unconstitutional under state law (Nutter & Bateman, 1989:16-18).

Throughout the 1980s and early 1990s, ATLA also was a notably well-heeled and formidable lobbying force at the federal level. Political reporters gave ATLA credit for lobbying the Senate to reject an international treaty limiting plaintiffs' damages in air crash cases -- even though the American Bar Association favored ratification (Nelson, 1983). "They [ATLA] have a lot more raw political power than



the ABA," a former Senate staff member was quoted as saying (Ibid). ATLA's lobbying approach, another staffer said, "is characterized by pure political power as much as it is by policy arguments."<sup>56</sup> Using such techniques, ATLA and its 100 person Washington staff have played a crucial role in blocking enactment of a federal product liability reform statute that was designed to constrain adversarial legalism (and limit damages) in that sphere of litigation.

#### B. ATLA v. No-Fault.

The most well-documented example of ATLA's anti-reform activism has been its campaign to block no-fault insurance plans for motor vehicle accident victims. For more than twenty years, research has shown that the tort system only erratically compensates the victims of traffic accidents. Many plaintiffs, especially the most seriously injured, are undercompensated. On the other hand, many are overcompensated. More money is spent on litigation costs than on payments that end up in injured plaintiffs' pockets (Rabin, 1988:24,34). But serious no-fault laws, under which accident victims would obtain compensation from their own insurers or from a government fund (with an exception, perhaps, for catastrophic negligently-inflicted injuries), would eliminate a very lucrative sphere of legal practice.

During the 1965-1975 period, no fault bills were introduced in many state legislatures. But they were fiercely opposed by ATLA, whose charter declares its dedication to the adversary system and trial by jury. Often, the bills died in key lawyer-dominated legislative committees. The no-fault bills that did pass, with few exceptions, were watered down by inclusion of low "thresholds" that preserved the right to bring third party suits for most injuries (DOT, 1985; Foppert, 1992).

When a federal no-fault bill was introduced in the Senate in 1971, it was supported by broadly representative labor and consumer

<sup>56</sup>. "Several hill staffers who had worked on the federal no-fault legislation said they had been told by Congressmen and Senators that ATLA implicitly had threatened to support an upcoming election opponent if the member did not vote against the legislation" (Nelson, 1983).



groups,<sup>57</sup> as well as by large stock insurance companies (Heymann & Liebman, 1988:317). It was vigorously attacked, however, by ATLA. ATLA raised its dues, hired lobbyists and public relations firms, created a political action committee that used its funds to reward Congressional foes and target supporters of no-fault, and mobilized its members to bombard Members with anti-no-fault telegrams. Throughout the 1970s, in session after session of Congress, the Senate Commerce Committee voted to support the Bill, but ATLA lobbyists managed to prevent it from being brought to a vote, often succeeding in getting it referred to the lawyer-dominated Judiciary Committee (Id at 325-330).

In 1988 the California trial lawyers association spent millions of dollars campaigning against an insurance-company sponsored ballot initiative that called for a no-fault system, and in favor of a competing initiative that retained the tort system while mandating a roll-back and refund of liability insurance premiums (Sugarman, 1990). The trial lawyers, aided by slickly-produced TV ads and support from Ralph Nader, helped defeat the heavily advertized no-fault initiative. They not only preserved adversarial legalism but inadvertently expanded it, since the rollback measure triggered a large and continuing wave of litigation by insurance companies concerning the unconstitutionality of arbitrarily-decreed refunds (*New York Times*, 1993; Sugarman, 1990).

### C. Voir Dire in Civil Cases.

In many jurisdictions, the questioning of prospective jurors on *voir dire* has burgeoned into a proceeding that takes longer than trials did 20 years ago. In New York, a criminal lawyer (Spitzer, 1993) recently wrote, *voir dire* "has been distorted by trial lawyers" to the extent that the average time taken to select a jury is more than twice the time it takes in jurisdictions in which the *judge* questions

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57. The Hart-Magnusen Bill was supported by the Consumer Federation of America, the Teamsters, the United Auto Workers, the AFL-CIO, and the American Association of Retired Persons. One prominent consumer advocate who did not support the Bill was Ralph Nader, who is widely assumed to receive a good deal of financial support from ATLA (Heymann & Liebman, 1988:309).

potential jurors for bias."<sup>58</sup> [S]electing a jury for a trial of even the lowest grade misdemeanor, he observes, often takes two days" -- further increasing the pressure on prosecutors to avoid trial by offering concessions in return for a plea.

The state legislature has failed to act on a proposal calling for judge-controlled *voir dire*, Spitzer asserts, because of opposition by trial lawyers. Indeed, "The American Bar Association and the Trial Lawyers of America not only oppose judge-led *voir dire* but also are pushing legislation [passed by the Senate in the last term of Congress] to bring to the Federal courts the jury selection process that has produced the quagmire in New York" (Spitzer, 1993). There may well be significant arguments in favor of lawyer-dominated *voir dire*, just as there may be some good arguments against no-fault handling of highway accidents. The point here is not to assert they are wrong, but to note that ATLA and its affiliates seem to be effective lobbyists against reforms that would reduce ad leg.

#### D. The Loser Pays Rule for Counsel Fees.

In 1991, the White House Council on Competitiveness, chaired by Vice-President Dan Quayle, released a report of a panel headed by Solicitor General Kenneth Starr that called for a variety of civil justice reforms. Most significantly, it suggested limited changes in the "American rule" pursuant to which each party in civil cases, win or lose, is responsible for paying her own counsel fees. Under this rule, as compared to a rule whereby the loser pays the winner's counsel fees -- as in England and in most European countries -- it is less risky for plaintiffs to file and pursue "long shot" cases, and tempting for defendants to discourage just claims mounting costly, time-consuming legal defenses.

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<sup>58</sup>. Spitzer (1993) says, "Judges focus only on questions designed to produce a fair jury, and avoid the long lectures, only thinly disguised as questions, that lawyers use to preview their essential arguments...Because in New York each lawyer has the opportunity to ask questions, at least two lawyers, -- and more in cases involving many defendants -- are involved."

The Vice President (possessor of a law degree but also of a less than distinguished intellectual image) presented these ideas at an American Bar Association meeting. There are reasonable arguments to be made on both sides of the counsel fee issue, but any prospect of reasoned consideration of the proposals quickly was squelched by impassioned opposition by the organized bar.<sup>59</sup> A leading securities class action lawyer convened a thousand-dollar-a-plate dinner for Democratic Senators (many of them lawyers) who were thought to oppose the idea (Crovitz, 1991). ATLA reportedly was a major contributor to the Clinton campaign. Now, any federal governmental proposal to adopt the "loser pays" rule seems to be highly unlikely.

Some analysts (including many British lawyers) feel the loser pays rule discourages too many legitimate lawsuits by risk-averse victims of injustice. Others think that on balance it would increase justice. What seems clear is that intense, political opposition by organized American lawyers' groups helped perpetuate the rule that tends to encourage, not reduce, adversarial legalism.

Similarly, in 1984 the California state bar supported a bill that would authorize courts to force parties who reject a settlement offer and then do worse at trial to pay the other side's attorneys' fees. The California Trial Lawyers Association opposed the bill, and for two years in a row it died in the ATLA-friendly Senate judiciary committee (Pollard, 1984).

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<sup>59</sup>. Following Quayle's address, ABA President Curtin responded as if the Vice President had proposed eliminating all lawyers (which he hadn't) and had blamed litigation costs on lawyers (as opposed to the laws and procedural rules addressed in the report). Curtin protested: "Anyone who believes a better day dawns when lawyers are eliminated bears the burden of explaining ... who will protect the poor, the injured, the victims of negligence, the victims of racial discrimination, and the victims of racial violence." Delegates cheered (Pollock, 1991).

### **E. Asbestos**

Even in the view of professors favorable to product liability litigation, "Asbestos litigation ... has come close to crippling the entire litigation capabilities of the American judiciary" (Henderson & Twerski, 1991: 1336). The volume of cases is enormous. The potential damages are far larger than the net worth of the asbestos industry. The cases are complex, for they entail difficult-to-resolve issues, including which employers and insurance companies are responsible for occupational exposures that occurred decades earlier, as well as disputes about whether the claimant's lung cancer is properly attributable to asbestos exposure rather than to smoking. RAND Institute of Civil Justice studies have indicated that close to 75% of insurance company expenditures in asbestos cases have ended up in the pockets of lawyers and experts, as opposed to asbestos victims and their families. Johns Mansville, unable to predict its liability exposure, declared bankruptcy. It is hard to imagine a more costly and inequitable way of dealing with tragedy.

As the dimensions of the asbestos problem became apparent, proposals were made to create a federally-administered fund to compensate victims, analogous to that created for coal miners suffering from black lung disease, without the need for costly civil litigation. It never was enacted. ATLA opposed the ideas -- although it is not clear whether the failure to enact such a plan is more attributable to ATLA's opposition or to the lack of cohesion among proponents, unable to agree on plans for funding it.

### **F. Workers' Compensation**

In most European worker injury compensation plans, disputes about degree of permanent disability are resolved by panels of government physicians and other experts. In U.S., it is common for each side to hire their own doctors, selected for propensity to favor either employer

or employee respectively. <sup>60</sup> Dissatisfaction with workers' compensation is rife, not only among employers but among injured employees and claimants attorneys. Yet claimants attorneys' associations routinely have lobbied against legislative reform proposals that would replace "dueling doctors" with government-appointed doctors to determine the extent of disability,<sup>61</sup> as well as against other litigation-inhibiting reforms. <sup>62</sup>

## VII. CONCLUSION

Lawyers clearly are not the only or even the primary source of American adversarial legalism. Far more important are preferences of their clients and the political interest groups that seek to shape public policy. Adversarial legalism is also the product of a populist political culture, more inclined to trust courts than "big business" and "big government," and reluctant to pay the taxes that would finance European-style social welfare programs. Adversarial legalism is also stimulated by a Constitutional tradition that has limited central

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<sup>60</sup>. One study of permanent disability claims indicated that in Maryland, New Jersey and some categories of cases in Wisconsin, "dueling adversary experts" were employed in 63%, 79%, and 63% of cases, respectively, and "friction costs" added up to 38%, 46%, and 42% of the total disability payments awarded (WCRI, 1988).

<sup>61</sup>. Another demonstrated method for drastically reducing adversarial legalism is the "final-offer adjudication" rule adopted for some categories of cases in Wisconsin. The adjudicator is pledged not to "split the difference" but to adopt the percentage of disability found by either the employee's or the employer's physician; in consequence, extremely divergent assessments are uncommon. Together with a more aggressive staff role in making initial determinations, this Wisconsin plan has resulted in enormous reductions in attorney use and "friction costs" (WCRI, 1988). One has to wonder to what extent claimants' attorneys have played in preventing diffusion of this reform.

<sup>62</sup>. A 1989 California statute requires an injured worker to first file a notice of claim with the employer. But implementing regulations, calling for the screening of such notices by the Compensation Appeals Board to determine the existence of a bona fide litigatable controversy were stayed pending resolution of legal action by the California Applicants Attorneys Association.

bureaucratic government and encouraged litigation as a mode of checking governmental arbitrariness.

But as our lengthy but necessary selective *tour d'horizon* of the legal system indicated, there is abundant evidence that the American lawyers, or at least significant segments of the profession, play a substantial contributory causal role. Lawyers, law professors, and judges generate a legal culture that supports adversarial legalism as an essential aspect of governance. Organized groups of lawyers systematically lobby courts and legislatures to extend the realm of adversarial legalism and to block reforms that would reduce it. Lawyers have created and defended an ethic of zealous advocacy that in the hand of some -- but not merely a few -- practitioners legitimates supereaggressive adversarial legal contestation.

How important in the whole scheme of things, however, are the lawyers' own ideas and aggressive practices? What if all the lawyers -- or at least those who consciously work to extend and preserve adversarial legalism, or engage in supereaggressive litigation -- were suddenly banished to a reservation in central Nevada?<sup>63</sup> It is hard to believe that the resulting change in the legal order would be truly massive. The social divisions, economic conflicts, political fragmentation, and popular beliefs that generate adversarial legalism would not disappear. If what lawyers and judges now do were very unpopular, democratic processes presumably would change them.

On the other hand, one could imagine a legal profession that reconfigured legal ethics to discourage supereaggressive litigation, argued that social insurance was preferable to tort law for compensating injury, insisted that judges should urge legislatures to reform the laws rather than doing it themselves, lobbied for the creation of cheaper, less adversarial dispute-resolution forums, and for improving rather than subverting administrative authority. After all, that is not so different from the stance taken by the legal profession in other rich democracies. And if they did, it is hard to believe that would not have

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<sup>63</sup>, Would the route they took be called the Trail of Cheers?



some effect on the level of adversarial legalism. For what lawyers think and say, the legal culture they generate and the behaviors they exhibit, almost surely have a significant effect on what clients, interest groups, legislators, journalists, and the general public think appropriate to demand of the legal order.

Such fantasy scenarios aside, the relative causal importance of lawyers practices and legal culture is difficult to determine because in fact they reinforce and strengthen the pro-adversarial legalism tendencies that stem from the broader political and economic order. There have been generations of *interaction* between lawyers' legal culture and other American belief systems and institutions. Lawyers' legal culture reflects and is influenced by a surrounding political culture that also mistrusts authority, that values individual liberty and the right to challenge government in court, that treasures the jury system and politically-responsive rather than a professionalized, bureaucratic judiciary. Conversely, lawyers' distillations of those broader sentiments into a more focussed ideology of adversarial legalism have worked themselves into the warp and woof of legislative hearings, the drafting of laws, administrative and business procedures, the newsmedia, and the dramas shown on television and in movie theaters.

The Jewish comedian Lenny Bruce used to say that in New York City, even the Gentiles were Jewish. In the law-saturated United States today, even the laymen are lawyers. Or at least every politician, governmental official, and corporate executive, law-trained or not, thinks like a lawyer to a considerable extent. So if American lawyers are not the only cause of adversarial legalism, it may be because they have trained everybody else to do it too.

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