
Review Essay

American Adversarialism

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Adversarial Legalism: The American Way of Law. By Robert A. Kagan.
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Introduction

The idea that the United States stands apart from other countries and other cultures is deeply rooted in the American psyche. Americans seemingly take pride in being different, but so do people in many other countries: the French and the Japanese come immediately to mind. As discussed in books such as Seymour Martin Lipset's *American Exceptionalism: A Double-Edged Sword* (1996), there are many ways that the United States stands out as different from other countries. One dimension of American exceptionalism focuses on law. America is, in Lipset's words, "a society profoundly rooted in law" (1996:270). The argument that law looms large in the collective American self-image is not news. The rhetoric of law is deeply rooted in American consciousness, and has been so embedded since the founding of the country, as

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captured by John Adams's oft-quoted description of the American polity as a "government of law, not of men."¹

Critical writing about America's love affair with law and courts is very common. In recent years we have seen such books as Mary Ann Glendon's *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (1994) and Philip Howard's *The Death of Common Sense: How Law Is Suffocating America* (1994), as well as the most recent polemic from Walter Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (2003). One of the most prominent voices among law and society scholars in this ongoing discussion is Robert Kagan, who has published a series of articles over the years about what he has labeled *adversarial legalism* (Kagan 1988, 1990, 1991, 1994, 1996). Kagan uses this term to refer to the particular style of "policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation" (2002:3) that is prevalent in the United States. In *Adversarial Legalism: The American Way of Law* (2002), Kagan presents the most detailed explication of what he sees as the causes and consequences of this phenomenon.

Kagan describes adversarial legalism as having two salient features: formal legal contestation and litigant activism. Formal legal contestation refers to "competing interests and disputants readily invoc[ing] legal rights, duties, and procedural requirements, backed by recourse to formal law enforcement, strong legal penalties, litigation, and/or judicial review" (p. 9). Litigant activism consists of "a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers" (p. 9). He contrasts adversarial legalism to other forms of policy implementation and dispute resolution along two key dimensions: the organization of decisionmaking authority ranging from a hierarchical organization to a participatory organization, *and* the style of decisionmaking ranging from informal to formal. Adversarial legalism combines formal decisionmaking style with participatory decisionmaking authority. While Kagan acknowledges the extant evidence that "Americans often refrain from and disparage adversarial legalism," that "ordinary people often do not demand tougher laws, prosecutions, and lawsuits for every kind of offense," and that "judges and

¹ This quote first appeared in an essay in the *Boston Gazette* in 1774 and was incorporated by Adams into the Massachusetts constitution of 1780. Adams himself attributed the quote to the seventeenth-century English political theorist James Harrington, although Harrington's actual words referred to an "empire of laws not of men" (see <http://www.bartleby.com/66/24/2824.html>, accessed January 28, 2003).

legislatures periodically issue rulings and enact statutes that are designed to *discourage* [emphasis in original] lawsuits and appeals,” he argues that in comparative perspective, the United States is “especially inclined to authorize and encourage the use of adversarial litigation to implement public policies and resolve disputes” (p. 13).

Kagan recognizes that “American adversarial legalism has both positive and negative effects” (p. 3; see also pp. 19–25), and frequently reminds the reader that adversarial legalism is not all bad. Nonetheless, his bottom line is that adversarial legalism is, on balance, more of a negative than a positive. The negative consequences of adversarial legalism lie in its costliness and in the legal uncertainty it produces (p. 9).

I find the idea of adversarial legalism intriguing. I believe that it does, overall, describe a particular style of legal and political contestation, a style that is deeply embedded in American legal and political processes. Nonetheless, several central questions arise for me after reading Kagan’s extended discussion of this phenomenon

- What are the underlying sources of adversarial legalism?
- Did adversarial legalism increase significantly in the last half of the twentieth century?
- What are the manifestations of adversarial legalism?
- What are the consequences of adversarial legalism?

In this essay, I consider each of these questions, dealing with the latter two in the context of the four general examples that constitute much of the book. My overall conclusion is that Kagan does not successfully make the case that adversarial legalism has changed markedly over the last fifty years or that the consequences of adversarial legalism are on balance more negative than positive. I conclude with a brief discussion of issues that arise in Kagan’s assessment of the possible impact of changes that he believes would mitigate the negatives of adversarial legalism.

Sources of Adversarial Legalism

In Kagan’s view, the sources of adversarial legalism are complex. At the surface level, he sees it as reflecting the norms and expectations that guide legal elites, which he labels “American legal culture” (p. 15). Specifically, American legal elites often see law as “the malleable (and fallible) output of an ongoing political battle to make the law responsive to particular interests and values” (p. 14).² This stands in contrast to the view of law by elites in other

² Kagan does not assert that all elites have this view; he acknowledges strains in the elite culture but sees this as the dominant view.

cultures, where it is “viewed as a set of authoritative rules and principles, carefully worked out over time” (p. 15).

Kagan argues that the roots of adversarial legalism in fact run much deeper, deriving from “broader American political traditions, attitudes, structural arrangements, and interest group pressures” (p. 15). These include a strong tradition of mistrust of government, a long-standing emphasis on rights, and a fragmented and weak governmental structure involving “crosscutting institutional checks and judicially enforceable individual rights” that leaves the state “especially open to popular and interest groups demands” (p. 15). Thus, Kagan sees adversarial legalism as helping to resolve the fundamental tension between

a political culture (or set of popular attitudes) that expects and demands comprehensive government protections from serious harm, injustice, and environmental dangers—and hence a powerful, activist government—[and] a set of governmental structures that reflect mistrust of concentrated power, and hence that limit and fragment political and governmental authority. (p. 15)

In other words, where given a government (i.e., legislature, executive, and bureaucracy) that is too weak to deal with the demands of a modern society, adversarial legalism through the courts provides an alternate route for obtaining justice from the government and for implementing ambitious public policies.³

As the discussion develops, Kagan refines his explanation, describing the roots of adversarial legalism as the “political traditions and legal arrangements that provide incentives to resort to adversarial legal weapons,” and more specifically “from the relative absence of institutions that effectively channel contending parties and groups into less expensive and more efficient ways of resolving disputes” (p. 34). Political culture is important—not because it explicitly focuses citizens toward adversarial legalism, but because it denies citizens other avenues of redress or policy implementation; American political culture “demands comprehensive government protections . . . [while at the same time] mistrust[ing] government power [resulting in] fragment[ed] political authority [that must be held] accountable through lawsuits and judicial review” (p. 35).

Starting around the middle of the twentieth century, perhaps as late as 1960, Kagan sees a sharp increase in Americans’ demands for what Lawrence Friedman (1985) termed *total justice*. Some of this reflected increased rights consciousness; some reflected a

³ Kagan’s former student Thomas Burke develops these themes in his own recent book, *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society* (2002).

growing expectation that people would be taken care of through insurance mechanisms, both private and public. Yes, misfortune occurred, but it was no longer simply to be borne by the victim; steps should be taken to aid the victim and to reduce the likelihood of there being future victims. The government should engage in social engineering to deal with the problems that were social in their basis, and the courts should use the common law to provide redress for problems arising through private action or neglect. While similar developments were common throughout the developed world, Kagan argues that the United States was unique in its reliance on courts and lawyers rather than on governmental bureaucracy, regulation, and the welfare state (p. 40). The reason for the difference between the United States and other countries was to be found, according to Kagan, in the American political system, which is marked by an absence of cohesive, policy-oriented political parties, a weak national bureaucracy, and no tradition of social insurance.

More generally, in the United States, there is no center of power that can provide direction for dealing with issues of social and individual justice. Congress is dominated by local interests. States enjoy substantial sovereignty. Interest groups can apply influence at multiple “veto points” in the policy process. Political parties are more interested in local patronage than in national policy. Deep-seated hostility to big government (and taxes) makes Congress reluctant to create the bureaucratic structures needed to respond to the demands of the fickle citizenry.⁴ These structures constitute a mismatch between American political tradition and the demand of the modern administrative state. The result is a highly fragmented governmental system, which when combined with an expectation of “total justice,” leads to adversarial legalism, or so argues Kagan (pp. 44–48).

Presumably it is the particular combination of factors in the United States that results in our uniquely adversarial, legalistic approach. Certainly there are other countries where power is fragmented through a federalist system (e.g., Canada, Germany). Certainly there are other countries where trust of government is low; for example, the 2002 Eurobarometer found trust in government ranging from a low of 30% in France to as high as 70% in Luxembourg (European Opinion Research Group 2002:9).⁵ Americans are by no means unique in expecting to be

⁴ How do you defeat proposals for national health care insurance, something that in 1993 60 to 70% of the population saw as desirable (these figures are from several polls I found in the RPOLL file on Lexis)? You link the Clinton proposals to creating a national bureaucracy, something that is anathema to the American public.

⁵ Six countries produced figures in the thirties, five in the forties, three in the fifties, one in the sixties, and one right at seventy.

taken care of in the event of misfortune; if anything, Americans may be more sanguine about misfortune than people in countries with extensive social welfare systems (compare Harris et al. 1984; Hensler et al. 1991).

In the end, I find Kagan's discussion of the sources of adversarial legalism unsatisfying. What are the *necessary* conditions for adversarial legalism to develop? Are there any *sufficient* conditions that would inevitably lead to adversarial legalism? The United States is unique neither in its relatively fragmented, federalist system, nor in its citizenry's current faith in government. What may set the United States apart is the relative faith that Americans place in law and legal institutions, and the broad scope that is assigned to them, a faith that is probably traceable to the country's founding. A central question, one that Kagan does not address, nor is clear how one might address, is whether such deep historical routes constitute a *sufficient* condition for adversarial legalism. If so, then the various structural elements Kagan identifies as part of the causal mechanism would matter very little, and the possibilities of significant change are very limited. However, if deep historical roots are simply a necessary condition, then the potential for change is much greater.

Has Adversarial Legalism Increased?

As noted above, Kagan argues that adversarial legalism, at least as we know it today, is a development of the last third of the twentieth century. It is reflected in institutional litigation (such as the attacks on prison conditions—see Feeley & Rubin 1998), massive class actions (see Hensler et al. 1999), and threats of suits against public officials for abuse and other failings (the police, in particular; see Epp 2000). “In 1960 the threat of litigation was not an omnipresent consideration, as it is today in corporate finance, electoral redistricting, seaport planning, and the practice of medicine” (p. 36). I have no doubt that Kagan is right that the *scale* of litigational activities has increased markedly in the latter part of the twentieth century, but so has the scale of government, the scale of corporations, the scale of medicine, and the scale of economic activities generally. But has litigation, broadly defined, increased out of proportion with the other changes in American society?

As a child growing up in the 1950s, I have memories of a *Reader's Digest*-like periodical my mother received; this magazine was called *Coronet*, and one of its regular features was entitled “I'll

be suing you.” It seems that Kagan forgets the attacks on economic regulation and government power more generally that were a common part of American legal activity up until the 1930s (Gillman 1993). Is the change in the extent and intensity of adversarial legalism really all that out of line with the broader change of scale of economic and government activity? Kagan makes a variety of assertions and observations that purport to show how adversarial legalism has increased. For example, he asserts that the average civil and criminal trial was far shorter in 1960 than is true today. Is it? What was the length of the median trial in 1960 compared to 2001? According to statistics published by the Administrative Office of the United States Courts, the median federal trial lasted two days in 2000, compared to one day in 1960; in 1960, 87% of trials lasted three or fewer days, compared to 75% in 2000; in 1960, 0.4% of trials lasted 20 or more days, compared to 0.7% in 2000. Even the longest cases have not appreciably increased in length; the mean length of cases lasting 20 days or longer in 1960 was 28.7 days, compared to 32.7 days in 2000 (Administrative Office of the United States Courts 1961, 2000: Tables C8, C9).⁶ Trials are longer today, but not “far” longer. It may well be the case that the average *state criminal* trial is substantially longer, at least in those states that in 1960 did not provide counsel to indigent defendants but today do provide such counsel; does this represent a growth in adversarial legalism?

He observes that the number of lawyers has sharply increased in the United States; true, but the number of lawyers has sharply increased in a number of countries, often at a rate equal to or greater than in the United States (see Abel & Lewis 1988, 1989).⁷ While I believe that Kagan is right (p. 55) that the culture of the American legal profession produces a greater emphasis on adversarialism than is true of legal professions in other countries (Luban 1984), there is no systematic evidence that the adversarialness of American lawyers has increased over the last 50 or 100 years (p. 55), despite the laments of authors such as Glendon

⁶ To the degree that the length of trials has increased, that may reflect changes in which cases are going to trial rather than changes in adversarialness (see Seabury, Pace, & Reville 2004). On the civil side, it is probably the case that changes have occurred in what is and is not tried (Vidmar 1994:1213–16); it is also likely that there have been changes on the criminal side as well.

⁷ A striking comparison is to India. In 1948, at the time of independence, the legal profession in India comprised less than 50,000 practitioners; by 1983 this figure had grown to approximately 250,000 (Gandhi 1988:374), and by 2002 the number of advocates, as they have been called since 1961, was approximately 1 million, even though only about one-third of law graduates entered practice (JURIST 2003). During this period, the population of India has approximately tripled. <http://search.123india.com/cgi-bin/query/results1.cgi?url=http://www.cs.colostate.edu/~malaiya/india.html&word=directory>. Thus, over a 50-year period, India went from a population-to-lawyer ratio of approximately 7,500/1 to 1,000/1.

(1994), Kronman (1993), and Howard (1994).⁸ Zealous advocacy has long been deeply ingrained in the American legal profession; in fact, until 20 years ago courses on negotiation, mediation, and other forms of alternative dispute resolution were essentially unheard of in American law schools.

Similarly, Kagan suggests that American legal scholars and European legal scholars view law differently. For the European, law is “a logically coherent set of authoritative principles and rules,” while for the American, law is “a manifestation of the ongoing struggle among groups and classes for political and economic advantage, or . . . a manipulable set of tools for achieving better government” (p. 56). He suggests that one result of this is that law graduates have learned from their teachers that “good policy solutions involve judicially enforceable individual rights, harsh penalties for violation, and tight legal controls on official discretion” (p. 56), views that they take along as they enter legislative staff positions, governmental policy positions, and the judiciary. Kagan cites a study that found American judges to be the most freewheeling and creative in their style of judicial interpretation (p. 57, citing Summers & Taruffo 1991). Again, has there been a fundamental change in how American law teachers view law? Was it not the case that the central players in designing the New Deal came from America’s elite law schools?

I do not want to suggest that there has been no change in litigation in the United States. Clearly there has been some change. The Warren Court certainly ushered in an era of increased litigation over civil liberties; as observed by Lucas Powe in his recent book on the history of the Warren Court, “all nine justices [of the Warren Court in 1963] found a new First Amendment right to pursue redress by means of litigation” (Powe 2000:218). However, at the same time that the Supreme Court’s docket of civil liberties cases was growing, the number of economics cases being decided was declining (Pacelle 1991, 1995) and, in more recent years, the overall number of cases the Court has decided has sharply decreased. Regarding the growing civil liberties agenda before the Court, this is by no means a phenomenon unique to the United States (see Epp 1998).

Similarly, the volume of litigation during the 1960s certainly increased, but did this growth constitute a sharp break with American history? Various historical studies (Daniels 1984; McIntosh 1980–81; Stookey 1990) suggest that the volume of litigation has risen and fallen throughout American history, and that the volume reached in the 1960s and 1970s was not out of line

⁸ On the more general issue of lawyers’ longing for a lost glorious past, see Galanter (1996).

with levels seen in earlier periods. It is not clear whether the growth into the 1980s constituted a deviation, and since the 1980s the volume of litigation has been relatively stable or, in some areas, has declined sharply (see Galanter 2001; National Court Statistics Project 1982:16, 26–32).⁹ Moreover, there is some evidence that the incidence of trials, perhaps the archetypical event of adversarial legalism, has been declining; data recently assembled by Marc Galanter (2003) show a sharp decline in trials at the federal level. In 1962, there were a total of 5,802 federal civil trials, constituting 11.5% of dispositions of 50,302 cases. Not surprisingly, trials as a percentage of dispositions have declined as the number of dispositions has risen to 250,000 or more; in 2001, only 1.8% of civil dispositions were through trials. However, while the absolute number of trials grew to 11,280 (6.1% of dispositions) in 1982 and dropped only to 8,029 (3.5% of dispositions) in 1992, by 2002, the number of trials was down to 4,569 (Galanter 2003: Table 1).¹⁰

Kagan correctly points out (p. 36) the unprecedented growth in appellate cases. At the federal level, the number of cases taken to the U.S. Court of Appeals grew from 3,899 in 1960 to 27,946 in 1982 to 57,464 in 2001.¹¹ There was a period of significant growth in appeals at the state level (but not as rapid as at the federal level) from the 1950s through the 1980s—a growth rate of about 7% per year, which doubled the number of appeals approximately every ten years (Bureau of Justice Statistics 1985). However, growth during the 1990s was at a much lower rate, about 1.5% per year, for an increase of only about 15% over the decade (Ostrom, Kauder, & LaFountain 2001:76).

While there are a number of excellent analyses of the changing nature of cases in the (federal) appeals courts (Baum, Goldman, & Sarat 1981–82; Songer, Sheehan, & Haire 2000) and in state supreme courts (Kagan et al. 1977), little systematic analysis of the

⁹ Importantly, all evidence of the frequency of litigation focuses on population figures for establishing a base for computing a rate. For many types of litigation, population is probably a poor base. For example, the increase in medical malpractice claims may be a function less of litigiousness than of the increased use of sophisticated medical procedures and medications, combined with the survivability of disastrous medical outcomes. Some of the most expensive medical malpractice cases involve newborn babies who suffer injuries during labor and delivery. The high value of these cases reflects the huge cost of lifelong care that may be incurred. Twenty or thirty years ago, such injuries were not survivable, and hence the potential liability was much less (and in many cases there may not have been any significant damages available).

¹⁰ This decline occurred while the number of federal trial judges has increased from about 250 to 685, not counting the approximately 500 (as of the late 1990s) magistrate judges who are authorized to conduct trials in certain situations.

¹¹ These statistics are from various reports prepared by the Administrative Office of the United States Courts; the most recent of these reports can be accessed online at <http://www.uscourts.gov/judbus2001/front/2001artext.pdf> (Administrative Office of the United States Courts 2001).

growth in appellate dockets is available. One study does examine the growth of federal appeals between 1977 and 1993 (Krafka, Cecil, & Lombard 1995), a period during which the number of appeals grew from 10,000 to about 33,000 per year. This study found that much of the growth reflected growth in the district court caseloads. Only for a small number of areas did the rate of appeals as measured against the number of terminations in the district court increase over the study period. Substantial increases in appeal rates were found for prisoner cases; the only other areas showing (modest) increases were Social Security cases, benefits repayment cases, and nonprisoner civil rights cases. It is also worth noting that the characteristics of the prison population surely changed during this period, given that the number of persons imprisoned grew from 285,000 to 932,000 (Bureau of Justice Statistics 2002:494). Within the federal courts, the number of persons sentenced to prison grew from 17,540 to 35,001 over this same period; in 2001, federal judges sentenced 67,731 to terms of imprisonment (2002:420).¹²

Fundamentally, I am not sure the evidence to sustain this core part of Kagan's argument exists. Is there a marked increase in adversarialism, particularly when one controls for factors such as broader increases in economic and government activity? For example, while there are certainly more securities lawsuits today compared to during the 1950s, might not this reflect the vastly increased level of economic activity? In 1958, the average daily volume on the New York Stock Exchange was just under 3 million shares traded each day; by 2002, the average was 1.4 *billion* shares traded each day (New York Stock Exchange 2003). Does an increase in securities litigation indicate an increase in the tendency toward adversarialism, or is an increase in the incidence of adversarialism consistent with the increase in the incidence of opportunities for disputes to arise?

Examples: Manifestations and Consequences

The core of *Adversarial Legalism* consists of discussions of four areas where Kagan describes its manifestations and implications:

¹² In 1973, roughly equal numbers of defendants convicted in the federal courts received sentences of imprisonment and sentences not involving imprisonment. By 2001, the number sentenced to prison was almost six times the number receiving sentences not involving imprisonment; in 1993, the ratio was approximately 2.5 to 1 (Bureau of Justice Statistics 2002:494). I could not find comparable data on sentencing patterns in state courts. Through the 1990s, the percentage of convicted felons sentenced to prison by state courts remained relatively constant at around 45%, with another 25% sentenced to jail terms; during this period, the number of felony convictions increased by about 12% (Durose, Levin, & Langan 2001:10-11).

criminal justice, civil justice generally with a detailed discussion of tort law, the welfare state, and government regulation generally with a detailed discussion of environmental regulation. As I read these chapters, I frequently found myself wanting to argue with Kagan, not necessarily because he was wrong but because of what seemed to me to be left out of the discussion or because of a lack of evidence for the generalizations he seeks to draw. In the following discussion, I consider each of these areas, in the order in which I find Kagan's discussions increasingly problematic.

Regulatory Style

In two chapters, Kagan discusses the American approach to regulation, which he sees, correctly I believe, as greatly influenced by adversarial legalism. That is, government regulation in the United States is conducted in a more adversarial style than in other countries, both within the agencies and in cases that get into court. Kagan identifies four reasons for this (p. 187)

- “American regulatory law almost invariably is more legalistic—that is, more detailed, prescriptive, and complex.”
- American regulatory regimes are more oriented toward the use of sanctions when they encounter violations and tend to levy more several penalties for those violations.
- Contestation of regulatory rules and decisions is more common resulting in adversarial relationships between the regulators and those they regulate.
- Regulation is more enmeshed in political controversy in the United States, with interest groups battling over both the laws and who the regulators will be.

I think Kagan is probably right in these comparisons, and Kagan's own comparative research on regulation provides a solid empirical basis for these conclusions. Regulation in other countries is almost certainly more cooperative (p. 204). The American style of regulation does impose significant costs or can be used for purposes other than what it was intended for to produce undesirable consequences (pp. 207–28).

Kagan describes the experience of PREMCO, a manufacturer of precision metal parts that operates in both the United States and Japan (and other countries as well). In the United States, PREMCO had to deal with very detailed regulations and with the orientation of U.S. enforcement agencies to use sanctions as a primary method for dealing with infractions. This differed sharply from PREMCO's experience in Japan, where the focus was more on cooperative efforts to achieve end results. Given PREMCO's operation in multiple countries, one wonders whether Kagan's focus on the

United States and Japan serves to maximize the contrast. Does PREMCO operate in Canada, and if so, how does the regulatory regime operate there? Kagan does not discuss the experience of PREMCO in Canada, but he does describe Canada as not having experienced “high levels of adversarial legalism” (p. 220); Kagan ascribes the differences to a combination of political culture and political structure. Interestingly, the Canadian scholar William Bogart has described environmental regulation in Canada as *evolving* over time so that by the 1990s it had an increasing focus on cooperative problem-solving (Bogart 2002:225). Bogart also discusses the significant conservative opposition to environmental regulation during the Reagan-Bush I administrations in the United States, raising the question of whether the failure of U.S. environmental regulation to move toward cooperative problem-solving may result largely from continued, and successful, political opposition to environmental regulation in any form, rather than either political culture or political structure (2002:227).

While Kagan’s description of the style of regulation in the United States largely rings true, American regulation is not *always* adversarial, even when it is guided by detailed, specific rules. May’s (2004) recent article on building inspection finds that many inspectors adopt a facilitative style and try to work cooperatively with contractors to deal with issues that come up in the course of inspections. In fact, a recent personal experience shows how this more cooperative approach can be used to avoid issues. A prepurchase inspection done when I purchased a house revealed that some 80-year-old support beams needed some attention. We arranged for a contractor to do the work; before he started, he decided to have the building inspector come in and check to see if what he proposed to do raised any issues. The inspector did in fact identify some unrelated issues and proposed a solution that would deal with both the support beams and the other issues, a solution that involved a bit more in materials costs but the same amount of labor.¹³

¹³ I do not want to imply that there are not at times problems with regulating construction through building inspection; May distinguishes between inspectors who take a facilitative approach and those who are more formalistic and rulebook-oriented (2004). Another personal anecdote is a good illustration of an inspector who was too focused on “rules” rather than looking, at least initially, at the entire situation. In doing a major remodel on another home, we had to have an electrical inspection completed. The inspector “red-tagged” the electrical work. As the inspector was leaving, I asked the general contractor, who was in the house, what the issue was. He said that the inspector wanted plates installed behind some places so that no one would inadvertently strike the wiring when driving a nail through from the outside of the house. I pointed out to the contractor that this was absurd because the exterior of the house was brick. He ran outside where the inspector was sitting in his car writing up the inspection, and pointed to the house; the inspector rescinded the red-tag and approved the electrical work. If I had not been home at the time, almost certainly the electrical contractor would have had to come back and do the additional, unneeded, work.

The example of building inspection raises the issue of *variation* in regulatory style. Why is regulation in this area often fairly cooperative? Is it because it is so thoroughly routinized? Is it because it has such a long history, and the regulators and the regulatees have adapted to and come to accept the system? Clearly, it is possible in the American context to have regulation that is not sufficed with adversarial legalism. It would be helpful to have an understanding of when this is and is not likely to happen.

Kagan's own examples, and much of the work on regulation, tend to focus on large corporations. While regulatory agencies such as the Occupational Safety and Health Administration and the U.S. Environmental Protection Agency often deal with many small business entities, much of their work centers on business entities that are accustomed to relying heavily on legalistic structures. The American expectation about how law (and regulation) should work may well be in terms of very specific rules that must be followed, and corporations may insist on the need for specific rules so that they know what they have to do. The perceived emphasis on penalties rather than on "working together to achieve a goal" may reflect concerns about agency capture and the frequently identified pattern whereby regulatory agencies serve more as protectors than as regulators. Overall, it may be that the American style of regulation described by Kagan reflects the culture of the American business corporation, as it is accustomed to working in both the political arena and the regulatory arena.

Let me deal briefly with one last question regarding adversarial legalism in the regulatory context: why is there such an emphasis on sanctions? Law in the American psyche is closely tied to detailed rules, and the primary approach to policy is not focused on how to get to a desired outcome but rather on establishing a set of rules to govern behavior with the a priori hope that it will lead to a desired outcome. How then should one deal with rule violations? The core American response to rule/law violation, whether regulatory or criminal, is punishment (see Bogart 2002:164–69). In part, this may reflect an unwillingness to delegate discretion to government officials to work out solutions because of a deep-seated distrust of government and bureaucracy.¹⁴ Certainly it is the case that when a regulatory failure occurs, most recently evidenced in the corporate accounting debacles of Enron, Worldcom, and other mega-corporations, the first response focuses on punishment: finding

¹⁴ Kagan suggests that the adversarial relationship between regulator and business may also reflect the public's distrust of both government and powerful corporations: "[a]dversarial legalism helps legitimate the regulatory process because it emphasizes legal accountability, transparency, and rights of public participation" (p. 206).

someone to punish and increasing sanctions for violations to deter recurrences of the supposed problem.

Social Welfare Policy

In his brief chapter on social welfare policy, Kagan correctly observes that the American welfare state is stingy compared to that of other developed countries. Part of the reason for this is that many of the programs are means-tested (p. 163). A major effect of means-testing welfare programs is to create many avenues for producing disputes, which end up being resolved through adversarial procedures. There is much truth to this analysis. The Supreme Court ruled in *Goldberg v. Kelly* (397 U.S. 254 [1970]) that a person denied welfare benefits, or who has welfare benefits reduced or terminated, is entitled to due process protections, through a system of evidentiary “fair hearings.” In line with other aspects of American legal procedure, these hearings are often structured along adversarial lines.

Underlying much of Kagan’s discussion of welfare policy is the view that a significant amount of adversarialism could be eliminated if the United States had generous welfare systems modeled on those of other countries. Certainly if there were a system of child allowances that went to all parents with children regardless of income (with redistributive issues dealt with through tax policy), there would not be disputes over entitlements as there frequently were under Aid to Families with Dependent Children (AFDC). Still, I wonder whether Kagan underestimates the level of disputing that occurs in other systems. For example, any system that provides benefits on other than an absolutely uniform scale will produce disputes over whether the benefit being paid is correct. Likewise, any system that provides special allowances for disability, whether through private insurance such as the American workers’ compensation model or through public systems such as Social Security Disability, will have to deal with disputes over whether an individual’s medical condition meets the definition of disability. Similarly, a system of nationalized health insurance programs leads to disputes over whether a particular medical treatment is necessary for a patient, or whether a patient meets the criteria for a particular medical treatment. In a system of generous governmental support for housing, as in England, there are going to be disputes over rent, maintenance, and behavior of tenants. Finally, highly regulated systems of labor relations lead to the need for dispute resolution systems; in Germany, this is accomplished through a separate group of labor courts (see Blankenburg & Rogowski 1986).¹⁵

¹⁵ The German statistical yearbook shows almost 600,000 cases filed in the labor courts in 2000 (Statistisches Bundesamt 2002:345).

Overall, a critical reading of this chapter leaves one with a sense of pervasive overstatement. Perhaps this tendency toward overstatement is best represented in a somewhat tangential comment about abortion policy: “The United States is unique in the extent to which liberalization of abortion laws came through litigation, and unique in establishing an untrammelled judicially established right to first trimester abortion” (p. 174). While Kagan may be almost correct in terms of the results achieved through the courts regarding abortion policy, courts in other countries have played just as significant a role in developing policies in this area as has the U.S. Supreme Court. Canada has effectively legalized abortion throughout the country through action of its Supreme Court (*Morgentaler v. the Queen*, 20 CCC 2nd 449 [1975]). In Germany, the reverse has been the situation: the German Constitutional Court has essentially disallowed legalized abortion (see Jonas & Gorby 1976 for a translation of the decision). There were also abortion-related decisions by constitutional courts, either upholding liberalization or providing for some liberalization, during 1974–75 in France, Austria, and Italy (see Gorby 1976:559–60).

It is interesting that the two primary counterexamples mentioned in the preceding paragraph are federal systems. Perhaps the issue here is the problem of harmonizing policy in a federal system to avoid major disjunctures across the geographic subunits. Recent developments in the European Union, and the growing role of the European Court of Justice, may point to the conclusion that judicial processes tend to play a greater role in federal systems generally (Alter 1996; Alter & Meunier-Aitsahalia 1992; Dehousse 1998; Kenney 1998; Shapiro 1992; Slaughter, Stone Sweet, & Weiler 1998; Starr-Deelen & Deelen 1996; Stone Sweet & Brunell 1998; Volcansek 1992; Weiler 1999).

Criminal Justice

Kagan views the American criminal justice system as showing the mixed results of adversarial legalism. Federalism, local control, and decentralization mean that there is a lot of inconsistency in the application of criminal law in the United States. The constitutionalization of criminal procedure (and the conditions of imprisonment) has mitigated some of the worst and most problematic of these inconsistencies. However, the cost of accomplishing this through the courts has been to make American criminal procedures distinctively cumbersome, inconsistent, and confusing. This conclusion seems to imply that prior to the constitutionalization of criminal process, criminal procedures in the United States were not cumbersome, not inconsistent, and not confusing. Even before the

key criminal justice decisions of the 1960s, death penalty cases frequently involved years of appeals. If anything, inconsistency of criminal procedures was much greater. And how does one judge cumbersomeness? Is the American guilty plea process, through which well over 90% of criminal cases are resolved, more cumbersome than the multihearing process of the civil law systems?

In a chapter entitled “Deciding Criminal Cases,” Kagan opens with the observation that in the 1700s English juries sitting in the Old Bailey tried between twelve and twenty felony cases a day. He then contrasts this to felony trials in Los Angeles, which, he reports, spread over an average of 7.2 days in 1968. This comparison is intended to shock the reader, but what shocks the knowledgeable reader is the idea that this comparison tells us anything at all. Guilty pleas were strongly discouraged (if not forbidden) in eighteenth-century England (Alschuler 1979:214–19); juries heard multiple cases, one after another, probably in a process that was not entirely dissimilar from what today has been called “slow pleas” (Levin 1977:42; Mather 1973:195; White 1971:441–42).¹⁶ The defendants in these “trials” were largely without counsel—in fact, they may not have been permitted legal counsel (Cooper 1972:432)—and most were probably illiterate. Kagan asserts that the “expansion of the criminal trial springs from the intensification of adversarial legalism” (p. 82), but what expansion is he referring to? It is likely that jury trials in criminal cases are longer today than in the eighteenth century, but at that time many trials were marginal affairs at best, and with few defendants represented by counsel. Once one controls for representation, has the length of criminal jury trials significantly increased over the last 50 years? A good way to look at this is to examine federal cases over the last 50 years, because the right of counsel in federal criminal cases has been constant through that period, as has been one of the more controversial criminal procedure rules, the exclusionary rule.¹⁷ In fact, the length of federal criminal jury trials has increased over the last 50 years or so. In 1950, the median federal criminal jury trial lasted one day or less; by 2002, the median was three days; in 1950, only 16% of federal criminal jury trials lasted more than two days,

¹⁶ Malcolm Feeley, who has done research (unpublished) on the development of the guilty plea process that includes looking at seventeenth-century England, described to me the process as follows, “Trials could be as short as just a few minutes. The same jury might sit all day, hear a number of cases before lunch and then deliberate on all, and then reconvene for another batch in the afternoon. A trial could be as short as three or four minutes if the defendant confessed or did not contest” (Feeley 2003).

¹⁷ The exclusionary rule as applied to federal criminal cases dates to *Weeks v. United States*, 232 U.S. 383 (1914). The right to counsel, paid for by the government if the defendant could not afford to hire counsel, dates to *Johnson v. Zerbst*, 304 U.S. 458 (1938).

compared to 63% in 2002.¹⁸ We do not know how much of the increase is due to changing roles of lawyers (i.e., an increase in adversarial legalism), changing nature of cases, or increases in the potential penalties faced by convicted defendants.

As suggested by his comparison to the absence of guilty pleas in eighteenth-century England, Kagan sees a linkage between plea bargaining and adversarial legalism. While acknowledging that plea bargaining is by no means unique to the United States and that many guilty pleas reflect “straightforward confessions by defendants caught dead to rights” (p. 84), he insists that “many guilty pleas do reflect the extraordinary complexity and stressfulness of adversary trials” (p. 84), which he links to adversarial legalism. He notes that defendants in Japan are encouraged to confess and apologize, while lawyers for American defendants encourage even clearly guilty defendants to maintain their silence, which Kagan asserts aids the lawyers in playing what might be termed the adversarial legalism game. Kagan seems to ignore the fact that defendants in the United States have a constitutional right to maintain silence, or that American criminal justice starts with a presumption of innocence, unlike many systems, including in Japan, where there is no such presumption. Moreover, these rights in the American system are not new; even though the application of the Bill of Rights to the states is a relatively recent phenomenon, state constitutions incorporated many of the same rights. Our criminal justice system is *supposed* to be adversarial, and that has been the case throughout the existence of the United States.

Kagan devotes substantial attention to a comparison of criminal justice in the United States and in England, which he perceives as having much less of a problem with adversarial legalism.¹⁹ He is generally correct that advocates in the Crown Court approach their work differently than do lawyers in American felony courts; there is a somewhat less adversarial approach reflecting the stronger duty

¹⁸ The figures for 1950 are from the 1950 Annual Report of the Director of the United States Courts (Table C8, p. 164); the figures for 2002 were provided to the author by the Administrative Office of the United States Courts (1950, 2002).

¹⁹ Kagan also compares the “get tough on crime” politics of the United States and England and concludes that the “measures enacted by Tory governments in Great Britain during the 1980s and 1990s did not come close to matching the large increases in punitiveness and incarceration in the United States during those years” (p. 69). True, in terms of punitiveness, but England saw changes such as limiting the right to silence (Kagan does note this; see p. 92) and eliminating peremptory challenges for the defense (while retaining the “stand aside” procedure for the prosecution, which functions effectively as a peremptory challenge). The Home Secretary has proposed substantial limitations in the right to a jury trial, something that is already effectively limited in a large number of cases by the “either way” rules, which allow defendants to insist on a jury trial only by risking the more serious sanctions that can be imposed by the Crown Court rather than allowing a Magistrates’ Court to decide their fate. In 1993, the Royal Commission on Criminal Justice made essentially the same recommendation (Cownie & Bradney 2000:300).

to the Court felt by the elite barristers who handle these cases,²⁰ and possibly the greater role played by judges who present their own view of the evidence to the jury in their “summing up” of the case before deliberation begins. Kagan asserts that acquittal rates in England’s Crown Courts are higher than those in American jury trials (p. 92); while this does appear to be true (Kagan provides neither data nor citation),²¹ it may reflect the threat of much harsher punishment that defendants may face than can be meted out by the Magistrates’ Court by insisting on jury trials in what are called “either way” offenses—offenses that can be disposed of either by Magistrates’ Courts (which are strictly limited in the sanctions they can impose) or by the Crown Court. Thus, defendants in England may be willing to accept the mild sanctions (fines or short periods of incarceration) handed out by the magistrates rather than risk the harsher sanctions a Crown Court can impose. If this is true, than one would expect acquittal rates to be high in the Crown Court, because the institutional structure would discourage defendants who knew they were guilty from risking a trial in the Crown Court (Kritzer 1996:111).²²

Kagan praises the German system as an example of a system that avoids the problems of adversarial legalism. In Germany, a “professional judge writes an opinion explaining and justifying the . . . decision (including the sentence), which makes the decision reviewable by an appellate court” (p. 73). He contrasts this with the decisions of American juries, which are relatively unreviewable.²³ Not surprisingly, there is a higher incidence of criminal appeals in Germany than in the United States. The National Center for State Courts reports that in 2000, approximately 14 million criminal cases were filed in the United States in state courts (Ostrom,

²⁰ In addition to barristers, there are today a small number of solicitor advocates who have rights of audience in the Crown Court.

²¹ The Lord Chancellor’s Department reports that in 2001, 37% of defendants who had jury trials were acquitted on all counts, 11% were acquitted on some counts and convicted on some counts, and 52% were convicted on all counts (Lord Chancellor’s Department 2002:69–70). Acquittal in the United States is much less likely, only 14% in U.S. district courts in fiscal year 1998 (Administrative Office of the United States Courts 1998:228) and only 28% for felony defendants in large urban counties in 1998 (Reaves 2001:26). Ironically, the lower acquittal rate in the federal courts may be a function of sentencing guidelines designed to increase uniformity in sentencing (i.e., end the kind of inconsistency Kagan decries), which gives defendants little to lose by insisting on trial if they think there is the slightest chance of acquittal.

²² Even if a defendant pleads guilty before the magistrates, they have the option of committing the defendant to Crown Court for sentencing if they believe that the defendant merits harsher punishment than they can impose (Cownie & Bradney 2000:299).

²³ It is not clear on what basis Kagan makes the assertion that decisions of juries are unreviewable. On the civil side, there is clear evidence that courts regularly review pro-plaintiff jury decisions, both with regard to liability and damages (Clermont & Eisenberg 2000, 2001; Shanley 1991; Shanley & Peterson 1987).

Kauder, & LaFountain 2001:56). Approximately 300,000 cases were filed in state appellate courts, slightly less than half of which were criminal appeals (Ostrom, Kauder, & LaFountain 2001:78); putting these two figures together, approximately 1% of state criminal trial filings in 2000 led to an appeal. In Germany in 2000, there were about 850,000 criminal proceedings in courts of first instance, and approximately 65,000 criminal proceedings in courts of appellate instance (Statistisches Bundesamt 2002:344); putting these figures together, something between 7 and 8% of criminal filings in courts of first instance led to appeals, a rate many times higher than in the United States.

One can debate whether five times more appeals indicates a system that works better or a system that works worse. While Kagan appears to believe that this is a positive indicator, many would probably argue the reverse to be the case. More generally, there is a long-standing debate over whether the adversarial approach to procedure is better or worse than the investigatory (traditionally labeled “inquisitorial”) approach of civil law countries such as Germany. An important part of this question is what we mean by “better,” and the evidence on the relative advantage of one method versus another shows that there is no definitive answer (Fennell et al. 1995; Goldstein & Marcus 1977; Hatchard, Huber, & Vogler 1996; Langbein 1977; Langbein & Weinreb 1978).²⁴

It appears that to Kagan a significant part of the problem with American criminal justice is that advocates take seriously their obligations to vigorously defend their clients when those clients are clearly guilty. Ironically, he also seems concerned that many poor defendants fail to get a rigorous defense; that is, it seems that for the poor defendant, the system is *insufficiently* adversarial. Adversarial legalism also fails in many jury trials, according to Kagan, because lawyers are not equal in their skill and experience. Does this mean that adversarial legalism works better in a system such as England’s, where only accomplished advocates appear in jury trials?

Another major piece of the problem in Kagan’s view is that criminal justice is a state rather than a federal responsibility. Undoubtedly it is quicker and easier to impose uniform national policy in a nonfederal system, but short of a constitutional amendment nationalizing criminal justice—something that is difficult to imagine happening in the foreseeable future—inconsistency seems inherent. Efforts of the federal government to

²⁴ In recent years, the relative merits of adversarial versus inquisitorial/investigatory procedures have been debated most often in the context of civil justice (see Allen et al. 1988; Djankov et al. 2002; Langbein 1985; Zuckerman 1999).

impose a measure of national consistency can meet with fierce opposition. One need only think about the recent controversies over the Bush administration's efforts to block state decisions to allow the use of marijuana for medical purposes and Attorney General Ashcroft's insistence that U.S. attorneys seek the death penalty more frequently in states where there are few death penalty prosecutions or the state itself does not have a death penalty (Novak 2002). In fact, a common argument is that the American federal system effectively allows for *more* innovation because the states constitute laboratories where new policies can be tried on a small-scale basis. Whether it is empirically a fact that government in the United States is more innovative, either because of federalism or for other reasons, is certainly a matter for debate.

Civil Justice

The American civil justice system has been under sustained attack for many years (Bok 1983; Huber 1988, 1991; O'Connell 1979; Olson 1991, 2003; Quayle 1992). Kagan's discussion of civil justice echoes the litany of ills cited in much of this writing: high costs, unwarranted delays, and unpredictability. He argues that many of the problems are linked to adversarial legalism, whereby actors use procedural strategies to drive up opponents' costs and multiple appeals to create delay and increase uncertainty; in line with his thesis that adversarial legalism is a growing problem, he believes that these problems have worsened in substantial ways in the latter half of the twentieth century. To support his core proposition linking the system's ills to adversarial legalism, Kagan presents a combination of statistical and anecdotal evidence. The major problem with his argument is that he selects and uses the evidence as if he were writing a legal brief rather than assessing a body of social science evidence.

According to Kagan, the potential for cost and delay created by our adversarial system, combined with the parties' relative resources, has increasingly pushed parties toward settlement: Adjudication has become less frequent in the American legal system. Kagan approvingly quotes Alschuler:

The American trial has been bludgeoned by lengthy delays, high attorneys' fees, discovery wars, satellite hearings, judicial settlement conferences, and the world's most extensive collection of cumbersome procedures. Few litigants can afford the cost of either the pretrial journey or the trial itself. (p. 109, citing Alschuler 1990:4)

Is there any evidence that a significant portion of civil cases in the United States has ever been resolved by trial?²⁵ Are procedures in the United States really the *most* cumbersome in the world? Has Kagan forgotten about Charles Dickens? Would Kagan accept Alschuler's assertion if he had looked at civil procedure as practiced in the justice system of India (Bearak 2000; Chodesh et al. 1997–98; Debroy 2002; Galanter & Krishnan 2003; Nagpaul 1994:68–71)? Should we expect trial to be the dominant mode of resolution, given that economic theory tells us that any system of dispute resolution that is not free of transaction costs will create incentives for settlement (Coase 1960; Friedman 1969; Gould 1973; Posner 1973)?

In support of the assertion about the costs of the American civil justice system, Kagan references studies of the costs of litigation that show that in injury *lawsuits* the costs absorbed by the parties can reach 40 to 50% of the total amounts expended to resolve claims (pp. 104–05). He then contrasts these costs to the transaction costs of injury compensation systems in Western Europe and Japan. This is an apples and oranges contrast: lawsuits represent only a part of the American injury compensation system. Miller and Sarat (1980–81:544) found that only 4% of tort claims over \$1,000 (including personal injury and/or property damage) result in court filings; if one limits the claims to those that did not result in an immediate, nonconflictual resolution, only 19% lead to court filings;²⁶ a study of compensation for accidental injury in the United States conducted by the RAND Corporation found that only 20% of those taking some action to obtain compensation through a tort claim ended up filing lawsuits (Hensler et al. 1991:122). A recent study of bodily injury claims arising from auto accidents found that in only four states (of 39 that relied on a traditional tort-based liability system) was the proportion of claims leading to lawsuits as high as 20% (Insurance Research Council 1999:72–73).²⁷

Kagan cites statistical patterns that he would have the reader understand as indicative of the malaise created by adversarial legalism. For example, pursuing the issue of infrequent adjudica-

²⁵ One might make the argument that the role of adjudication has actually increased in the American civil justice system with the development of procedures such as summary judgment. In fact, looking only at trials grossly underrepresents the importance of adjudication (see Kritzer 1986).

²⁶ Replications of this study in Australia and Ontario found rates of filing suit that were virtually identical: 18% in the case of Australia (FitzGerald 1983:35), or substantially lower, 11% in the case of Ontario (Bogart & Vidmar 1988:18).

²⁷ Transaction costs are partly driven by the use of a percentage fee by claimants; in other countries, lawyers may be paid through a system of insurance, fee shifting, or legal aid, which may reduce the amount of the fees.

tion, he notes that 95% of civil lawsuits do not go to trial (p. 108). He relates this to our system of discovery,²⁸ neglecting the fact that the original idea of discovery was precisely to reduce the need for trial, or that a significant fraction of cases are resolved by adjudication short of trial (Kritzer 1986). Ironically, it is probably the case that discovery does *not* account for our low trial rate, because other adversarial systems that have much more limited pretrial discovery, such as England, have similar trial rates.²⁹

What about the problem of delay? Undoubtedly there are courts in the United States that have significant problems of delay in getting civil cases to trial (see Selvin & Ebener 1984). Kagan notes that according to one study, the median time from filing to trial is two years. Does this indicate that there is *excessive* delay? To suggest that it does, Kagan compares the *time to trial* in the United States to *disposition times* in Germany. What we do not know from the information provided by Kagan is whether *case filing* has the same meaning in Germany as in the United States, or whether it is affected by things such as statutes of limitations,³⁰ or whether the German figures include what would be small claims cases in the United States (which are not typically included in studies of the pace of litigation in the United States), or whether the disposition times in Germany include or exclude the time consumed by appeals, which are much more common in civil cases in Germany.³¹ That is, what Kagan presents as a simple comparison supporting his point raises many more questions than it answers.

Kagan seems to use comparative research in a highly selective fashion, apparently overlooking such research when it might contradict his argument. For example, he notes that many countries have administrative tribunals for dealing with a wide range of personal plight cases, in which lawyers are not needed (there are, in fact, many such tribunals in the United States as well) (p. 237). It is true that the rhetoric of such tribunals is that no

²⁸ Kagan decries the costliness and wastefulness of pretrial discovery. Discovery has been a frequent target of attack, although research has failed to show that discovery is excessive or abusive in anything but a very small proportion of cases (see Chapper & Hanson 1983; Mullenix 1994a, 1994b).

²⁹ According to the recent statistics published by the Lord Chancellor's Department (2002:29–31), 21,613 cases were filed in the High Court in 2001, 460 were disposed after trial, and 870 were disposed during trial, which indicates a trial rate of 6%. In personal injury cases, the trial rate is probably lower (see Harris et al. 1984:112; Lord Abbeydale et al. 1978:154–55).

³⁰ For cases involving serious injuries in the United States, it is frequently necessary to file a lawsuit to avoid statute of limitations problems well before the injury victim has reached a stage of recovery when damages can be assessed. Such cases may be “delayed” for substantial periods of time while recovery continues.

³¹ In Germany, 8 to 9% of civil terminations in courts of first instance are appealed (see Statistisches Bundesamt 2002:342–43).

lawyer is necessary, but extant research indicates that representation (usually in the form of a lawyer) does make a significant difference (see Genn & Genn 1989).³² At least one of Kagan's comparative assertions is simply wrong: organizations such as the "American Trial Lawyers Association [actually, Association of Trial Lawyers of America] (ATLA) and its state level affiliates ... are unique to the United States" (p. 151). In England there is an organization, founded around 1990, named the Association of Personal Injury Lawyers (APIL), which has been very active in recent debates over modifications to litigation funding in England. There are also organizations of plaintiffs' lawyers in several Canadian provinces and in Australia.³³

Even when Kagan makes assertions that are probably correct, his evidentiary base is at times weak. "Legal uncertainty" is one such example: "In all countries the cases that reach adjudication involve a relatively large amount of legal uncertainty. Yet it appears that legal unpredictability in the civil justice systems of the United States ... is greater than in many other economically advanced democracies" (p. 112). If I am going to be persuaded of this point, I want to see some systematic comparisons between the United States and "other economically advanced democracies." Kagan provides no such comparisons. It is not sufficient to simply state:

In European civil justice systems, where judges dominate the fact-gathering processes, settlement negotiations occur under the nose of a third party who is deeply familiar with the case. In both kinds of legal system, pretrial settlements occur "in the shadow of the law." But the greater predictability of European adjudication means that the boundary of the shadow is far clearer. (p. 117)

Where is the evidence that European adjudication has "greater predictability"?

One piece of evidence that Kagan provides to support his proposition about the high level of uncertainty in the United States is the case of *Texaco v. Pennzoil*, in which Texaco was accused of interfering with the purchase of Getty Oil by Pennzoil, and which Texaco lost in a spectacular way (pp. 110–11). At the time, the jury verdict against Texaco, \$10.5 billion, was the largest in American history. Implicit in Kagan's discussion is that this case was an indication of the high level of legal uncertainty *typical* in the American civil justice system that arises in part from the use of citizen-jurors to resolve civil cases. What Kagan fails to mention is

³² Moreover, research on such tribunals in the United States shows that representation matters even in the most informal of tribunals (see Kritzer 1998; Lempert & Monsma 1988; Popkin 1977).

³³ Links to the Web sites of these organizations can be found at <http://www.otala.com/content.phtml?page=links>, accessed February 2, 2003.

that the large verdict almost certainly reflected that failure of Texaco to mount any case with regard to damages, leaving the jury with only figures advanced by Pennzoil's counsel. In fact, one could readily argue that the jury did exactly what it should have done under the circumstances; more generally, research on juries in complex cases suggests that they do a good job *given the case presented to them* (Lempert 1981; Vidmar 1995).

Still, Kagan is probably correct: there is substantially more uncertainty in an American civil trial, particularly on the question of what damages should be (or will be) awarded in personal injury cases (pp. 115–16). Kagan attributes this to the use of lay juries. However, the available evidence suggests that American trial *judges* also are quite variable in the damages they award in such cases (Clermont & Eisenberg 1992; DeFrances & Litras 1999). The issue may be less a procedural one than a legal one: under American law, damages, particularly those for pain and suffering, are generally set entirely at the discretion of the decision maker, rather than being governed by precedential cases as is true in other systems (regarding England, see Kritzer 1996; regarding Ontario, see Ontario Law Reform Commission 1987:82–88, 99–107).³⁴

Kagan is also correct that there *are* inconsistencies in findings of liability from trial to trial. Some of this reflects the vagaries of jury decisionmaking, but some of it also reflects the process of lawyers learning how to present and defend particular kinds of cases and over time, the lawyers have more evidence to work with in those types of cases (see Galanter 1990). Moreover, it is by no means clear that professional judges would be more consistent than juries in their decisions on liability or more able to “weigh properly the quality of experts or the scientific findings” (p. 115). This is particularly true in a case involving scientific evidence that is only becoming available as the case is being litigated.

While there are undoubtedly ways that the American civil justice system could be improved, the evidence Kagan presents fails to sustain his argument that the problems the system faces are largely a function of adversarial legalism. The system's problems more likely reflect a combination of the law governing civil liability, the incentives inherent in the system, and the unwillingness of the taxpayer to fund either court services or legal services (or alternative compensation systems) adequately, if at all.

³⁴ This would certainly explain the inability of experts to predict jury verdicts with a high level of accuracy (a point discussed by Kagan on p. 116). While I have not done a detailed analysis, I expect that one would find that judges in England and Canada are much less variable than are judges in the United States, even though neither country has a career judiciary of the type favored by Kagan; rather, as noted above, England and Canada have a set of precedential cases governing the setting of damages.

Solutions

If one does accept Kagan's argument that adversarial legalism is on balance more a negative than a positive, what can be done to tame this problem tiger? This is the topic of the final chapter of *Adversarial Legalism*, and Kagan's answer is that he is not optimistic that major change will occur (p. 230). He does review a laundry list of possible changes in American governmental structure and political culture that could lead to significant movement away from adversarial legalism. Such changes could include some of the following

- Centralize judiciaries and prosecutorial organizations, by subjecting these to at least state-level control rather than the current system of local control.
- Move significant numbers of criminal cases to more summary procedures where juries are not used.
- Substantially reduce criminal sanctions to improve cooperation with defense counsel.
- Eliminate the criminal defendant's right to remain silent and the right not to testify at trial (while ensuring that every defendant has "a competent defense lawyer [who] is present to object to misleading or bullying questions" [p. 234]).
- Extend compensation through social insurance to eliminate the need for a substantial amount of tort litigation.
- Reduce the incentives to seek compensation by not allowing compensation for costs covered by health insurance, whether publicly or privately provided.
- Enact no-fault systems for auto accident compensation.
- Abolish or limit the civil jury.
- Increase the use of "informal" tribunals.³⁵
- Adopt the "loser pays" rule in litigation.³⁶
- Increase the discretion of officials in regulatory agencies.
- Increase the degree of finality for decisions by regulatory officials.
- Increase the professionalism of regulatory officials.

³⁵ Kagan assumes that tribunals are informal in how they operate; he specifically refers to the "informal industrial tribunal" in England (p. 236). However, industrial tribunals are far from informal, not infrequently involving barristers appearing as advocates for one or both sides (Genn & Genn 1989:44–48, 198–203). Nor does Kagan consider the fact that in the United States similar tribunals have long been widely used in many of the same areas for which they are used in European countries (social welfare benefits, unemployment compensation, workers' compensation, etc.).

³⁶ It is far from clear whether the "loser pays" rule will reduce adversarialism; both the theoretical and empirical literature show very mixed results from such rules (see Kritzer 2002:1946–60).

- Create structures (essentially corporatist in nature) to integrate interested parties into the process of regulatory development.
- Move away from a sanctions-oriented style of regulatory enforcement.

While Kagan sees these changes as positive, he recognizes and discusses the many obstacles that make such changes unlikely (pp. 242–52). Those obstacles include the adversarial nature of the culture to which American legal elites are socialized (what he calls legal culture), the intense nature of interest group politics in the United States, and the mistrust of government deeply ingrained in American political culture.

Still, what if Kagan had a magic wand and could bring about some of the changes he describes? He is probably somewhat simplistic in his expectations of the effects that the changes would have. A good example of this can be found in his faith in alternative methods of dispute resolution. He sees informal tribunals and a “more ‘proactive’ method of adjudication” as representing positive changes (p. 237).

As evidence, Kagan references a 1988 study of workers’ compensation claims in Wisconsin (Boden 1988). That study compared two different methods of assessing disability, one focusing on “loss of earning capacity” and one focusing on “functional impairment.” He asserts that the study found that Wisconsin significantly “cut adversarial costs” by moving many cases to the functional impairment method. These savings were supposedly achieved by setting minimum impairment levels, placing a heavy emphasis on the assessment of the treating physician, and relying on a form of “final offer adjudication” to resolve disputes over the level of disability. Kagan argues that this study shows how various changes could be used to reduce transaction costs.

Thus, Kagan’s core argument is that changes in a system can reduce costs. The problem with his argument is that there is no evidence that any changes were actually made to the Wisconsin workers’ compensation system. The study Kagan references, by the Workers Compensation Research Institute (WCRI; Boden 1988), did not look at change; rather, it contrasted two systems that have existed side by side in Wisconsin for some time. Moreover, the study itself failed to get behind the key differences in the cases that are handled in the two systems, and the conclusion that it is the procedural system that accounts for differences in transaction costs is flawed. In fact, it is not the system but the differences in the cases handled under each system, combined with the legal presumptions made about those cases, that account for the differences in transaction costs.

The functional impairment system *presumes* a level of *permanent* disability given objective circumstances, regardless of whether there is any observable disability or any permanent loss of income. For example, if I suffered a back injury lifting boxes of blue books that necessitated back surgery (a spinal fusion, L5-S1) that allowed me to return to all my previous activities (including lifting boxes of blue books, hopefully more carefully), I would be deemed to have a minimum permanent partial disability of 10%. I could receive workers' compensation payments based on this presumptive level of disability more or less automatically.³⁷ Under these circumstances (i.e., a full recovery), it is hard to see how a treating physician, or any physician, could assign a disability rating greater than the presumptive minimum.³⁸ If the treating physician assigned the minimum rating, there would be nothing at all to dispute about the level of disability.³⁹ The situation would be very different in the absence of a full recovery; if my back injury prevented me from standing or sitting in front of a class for 50 minutes at a stretch, I would be unable to continue my teaching career, and I might have a very significant loss of earning capacity.

As one might expect, someone who has a full recovery and suffers no permanent loss of earnings would be less likely to hire a lawyer. Moreover, there is little or nothing a lawyer could do to increase the workers' compensation payment, and given Wisconsin law regarding payment of lawyers in workers' compensation cases, lawyers would be reluctant to take on such a case. The difference in the kinds of cases handled under one or the other methods of assessing disability is evidenced in the study's finding that payments under functional impairment average only about 50% of the payment under loss of earning capacity.

The core problem this example illustrates is that Kagan's desire to identify alternatives that reduce the problems he sees with adversarial legalism may have led him to view the alternatives through rose-colored glasses. Rather than looking critically at alternatives, he accepts at face value their claimed advantages. Supposed alternatives are deeply embedded in the systems they serve. They reflect core assumptions, core processes, and the belief systems of the actors who make the system operate. Extracting alternatives without carefully examining all of the elements that make them work as they do will lead to failure and disappointment.

³⁷ The only possible dispute would be whether the injury resulted from lifting the boxes of blue books, as opposed to lifting some heavy object at home.

³⁸ The WCRI report does not provide data on the percentage of treating physician ratings that falls at the presumptive minimum; I expect that it is very high.

³⁹ There could be a dispute over whether the injury was work-related. The WCRI does not discuss what issues were in dispute in cases that went to adjudication.

Conclusion

In the end, while I find Kagan's concept of adversarial legalism useful, in this book he does not succeed in convincing me that adversarial legalism has increased sharply in the last 40 or 50 years, nor does he succeed in mounting a case that on balance adversarial legalism is more of a negative than a positive. Certainly there are other ways to structure contested decisionmaking, and there are other ways to implement policy. Certainly there are negatives that arise from too much adversarialness. Certainly Americans are inclined to be legalistic in how they approach the role of government. However, in assessing the impacts of the American adversarial style and advocating for change, Kagan picks and chooses evidence without getting behind the examples in a way that fully illuminates their implications. Even while acknowledging that there are examples in which other countries have chosen more litigational approaches to specific problems (e.g., employment security and housing tenancy, which in some countries are provided much greater legal protection than in the United States, and which lead to significant litigation), Kagan provides no detailed analyses of such examples or their implications. In the end, *Adversarial Legalism* reads more as a legal brief than as a critical analysis of the issues the concept of adversarial legalism could illuminate.

Even with these shortcomings, Kagan's concept of adversarial legalism is a useful vehicle for thinking about the nature of American exceptionalism as it relates to law. In Kagan's view, this exceptionalism turns on the *style* of activity in the public arena. Specifically, American politics and policy reflect an emphasis on legality and legalism. Law is the primary medium for expressing public policy and the primary vehicle for implementing policy preferences. Congress makes policy choices by passing laws. It is not surprising that American students' first exposure to understanding Congress is not typically focused on how Congress debates and arrives at the policy choices it makes, but rather on "how a bill becomes a law." I once heard this approach to policy described in the following way: "Americans' view of how to deal with a public issue is to pass a law, either for it or against it."⁴⁰ Is it then surprising that lawyers seem to be privileged participants in the political process, if the focus of that process is "making law" rather than "making policy"?

However, Kagan argues that we Americans not only approach things legalistically, but that our style of legalism is adversarial.

⁴⁰ While I remember hearing this, perhaps from one of my college or graduate school instructors, I have never been able to find a source of a quote along these lines.

That is, contestation over issues mimics the adversarial style associated with the American courtroom. Congressional hearings look very much like court proceedings.⁴¹ The emphasis on developing policies or explicating policy choices is couched in adversarial terms and undertaken in an adversarial style, with opposing interests proposing and attacking policies much as they might advance and attack arguments presented in a courtroom. While occasionally expert commissions are appointed to investigate policy issues and propose policy solutions, the reports of those commissions go largely ignored when policies are actually made. Where experts are employed outside of a commission setting, those experts tend to be chosen to reflect one policy preference or another, in much the same way that experts are used in adversarial court proceedings.

Many other countries approach policymaking and policy change in a different way. First, while there is debate and contestation over policy choices, that conflict is not styled as an *adversarial* process. Where the American legislative process tends to mimic the adversarial style of the courtroom, legislative process in many other countries mimics a debating hall. Moreover, there is a much greater reliance on substantive experts, and those experts are not viewed as partisans, representing one side or another. Ad hoc and standing independent commissions (e.g., law reform commissions) produce reports that are taken seriously and frequently acted upon.

In summary, even while questioning his contention that American adversarial legalism represents a pathological blot on American law and politics, I believe that Kagan has accurately described a general pattern that reflects the ways in which American policy processes differ from those in other countries.

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⁴¹ This may be somewhat overstated. Certainly those congressional committees dominated by lawyers evidence a very court-like style (Miller 1995:139–48); however, whether committees *not* dominated by lawyers are *more* legalistic in their operation than are legislative committees in other countries is not clear.

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