Law & Social Inquiry
Volume 45, Issue 4, 1170–1184, November 2020

Law& Social Inquiry

The Same Only Different: Reflections on Robert Kagan's *Adversarial Legalism*

Lawrence M. Friedman

KAGAN, ROBERT A. *Adversarial Legalism: The American Way of Law (Second Edition)*. Cambridge, MA: Harvard University Press, 2019.

Robert A. Kagan's influential book, first published at the beginning of the twenty-first century, is now brought up to date with a second edition. "Adversarial legalism," in Kagan's view, distinguishes law in the United States from the law of other developed countries in many ways, for example, heavy use of policymaking through litigation and punitive regulation, as opposed to bureaucratic and conciliatory techniques. He suggests that this situation is likely to continue. This essay, however, looks at the same phenomena from the standpoint of similarities rather than differences. It suggests that powerful economic and cultural forces, common to the modern world of developed countries, tend to push the legal systems of these countries in parallel directions. Convergence, rather than divergence, is therefore the trend in the legal systems of the Western world; and this trend is likely to continue in the future.

In *Adversarial Legalism* (2001), Robert A. Kagan explored in detail the "American way of law," a distinctive cluster of traits that he called "adversarial legalism." This "American way" stands in sharp contrast to the law-ways of other developed countries. Now a second edition (2019) brings the story up to date and adds references to new developments. Like the first edition, it is a brilliant and thoughtful account of the way the legal system of the United States works, based on a rich and varied storehouse of research. Some is Kagan's own research; some is research that his students carried out or that was inspired by Kagan's work, mostly (but not entirely) on the subject of business regulation.

Kagan defines "adversarial legalism" as "policymaking, policy implementation, and dispute resolution by means of party-and-lawyer-dominated legal contestation." In other developed countries, there is a system of "bureaucratic administration, discretionary judgment by experts or political authorities, information negotiation or mediation and the judge-dominated style of litigation." To be sure, the United States uses all of these other ways of making and enforcing policy, but they operate "in the shadow of the legal structures of adversarial legalism" (ibid., 3).

Lawrence M. Friedman is the Marion Rice Kirkwood Professor of Law at the Stanford University School of Law, with a courtesy appointment as well in the Department of History. He can be reached at the Stanford Law School, Crown Quadrangle, Stanford University, Stanford, CA 94305. His phone number is 650-862-8194. Email: lmf@stanford.edu.

I want to acknowledge the enormous help I enjoyed from the Stanford Law Library staff.

© 2020 American Bar Foundation.

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

The key phrase may be "legal contestation." More than other countries, policy in the United States, to an astonishing degree, flows out of lawsuits. To be sure, Congress, the executive, and state and local governments make policy, and administrative agencies enforce and implement these policies. But Americans do make striking use of lawyers and lawsuits, in a way that other systems do not—systems in the rich European countries, Japan, South Korea, and the rest of the developed world. In addition, law in practice in the United States is drenched with an adversarial ethos. Business regulation is more rule-bound, more punitive, less willing to cooperate with businesses, less inclined to work with them, to mediate, and conciliate. Also, government in the United States is extremely fragmented. The legal system hardly seems like a system at all; rather, it is like the old Holy Roman Empire, a cluster of tiny and not-so-tiny little statelets, run by kings, dukes, bishops, and electors.

These then are three traits of law in the United States, traits that seem out of step with the rest of the developed world: first, the bloated role of litigation; second, the adversarial style of regulation; and third, the fragmentation of government. The result is a system that can be or can seem to be unusually slow, messy, and inefficient—though arguably at times more democratic than the systems in other countries.

A few words about these three traits. The first seems undeniable: the United States legal system makes striking use of lawyers, lawyering, and lawsuits, beyond what is typical in modern societies. At times, lawsuits can reach the depths of Dickens's *Bleak House*. Litigation seems both ubiquitous and iniquitous; a shiny tool that interest groups of all sorts gleefully and obsessively indulge in. Civil rights suits. Death penalty cases. Complaints against business regulation. Objections to government decisions of all sorts. Any plan to build a highway, an airport, or a pipeline, or to dredge a harbor or drill for oil, any scheme that impinges or might impinge on some national park or forest, is bound to attract lawsuits. Groups, individuals, nongovernmental organizations, municipal authorities—in fact just about anybody with a gripe or complaint might go to court. This does not mean that the litigation *rate* in the United States is higher than in other countries, or that there is a "litigation explosion" in the United States. That may or may not be the case. Litigation "rates" are hard to measure, and the figures can be misleading. It is the *type* of litigation that matters, more so than the actual number of cases.

As Sean Farhang has pointed out, in the United States, the regulatory state itself, to a great degree, "takes the form of radically decentralized intervention by an army of litigants and lawyers" (Farhang 2010, 214). This habit goes far back. The Sherman Act (1890) made monopolies and contracts in restraint of trade criminal offenses; at the same time, the act gave private citizens and companies the right to bring their own lawsuits against companies that acted in violation of the law.

Law in the United States also indulges in an unusual amount of judicial review. "Formal legal contestation" and "litigant activism" is rampant (ibid., 10). Judicial review, as is well known, goes all the way back to the early nineteenth century; every law student is aware of *Marbury v. Madison* (1806, see also Nelson 2000). The rest of the world has done a great deal of catching up, in the period since World War II; but it is still the case that in the United States (whatever the situation elsewhere), any major piece of legislation has to run the gamut of judicial review. And, of course, there is not just a federal constitution, there are fifty state constitutions to reckon with as well.

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

The second trait is the adversarial nature of regulation. Take, for example, one striking instance, which Kagan cites in detail, the regulation of industrial waste management. In *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism*, a book of essays edited by Kagan and Lee Axelrad, one chapter is a detailed study by Kazumasu Aoki and John Cioffi: "Poles Apart: Industrial Waste Management Regulation and Enforcement in the United States and Japan" (Aoki and Cioffi 2000, 33). Aoki and Cioffi exploit a kind of natural experiment. A "multinational corporation specializing in the manufacture of precision metal parts," which the authors call PREMCO, has plants both in Japan and the United States, and in both countries, there are regulations that apply to hazardous waste products. But the contrast between the two systems is stark. The Japanese mode of regulation is "cooperative and nonadversarial." The American mode is legalistic, and leans heavily toward sanctions; it is "punitive" in nature. After a fine was imposed on the American firm, there were six months of negotiations "as the opposing attorneys, hobbled by mutual mistrust and antagonism, haggled over changes in language," language that, apparently, did not make much real difference. This was costly, of course. In Japan, by way of contrast, it is rare to resort to "formal enforcement mechanisms," and sanctions have never been actually imposed. The Japanese system is informal—but also quite effective. Japanese managers "welcome regulators into the plant" (do they really?), while the American plant "resents and dreads the arrival of anonymous and legalistic regulators."

The third trait, the fragmentation of government, is fairly obvious. To begin with, there is the federal system. Within each state, there are counties, municipalities, school boards, sewer districts; cities are surrounded by independent suburbs; everywhere one looks, there are little fiefdoms that can frustrate or delay any attempt to centralize control. In many ways and in many areas, there is no real central authority anywhere. The president may have his finger on the nuclear button, but there is no button to give him, or anybody else in Washington, power to control the school board of Wichita, Kansas, or to reform the building code of Fresno, California. There are other federal systems (Germany, Canada, Australia, and Switzerland come to mind), but perhaps none quite so fragmented. In the sad experience of the United States, the battle against the coronavirus—of course there are other factors involved—shows what a muddle fragmentation makes when the country is faced with a crisis.

In this essay, I want to examine Kagan's thesis, not so much by way of critique (I think he is basically right), but rather to look at it, and the underlying facts, from a slightly different standpoint. I admit the reality of adversarial legalism, and that it does seem to set America apart from other countries. But in general, Kagan's work is about *differences*: between the United States, its government, its laws, its legal culture; and the government, laws, and legal culture of other developed democratic countries. Differences in welfare services, in business regulation, in tort law, in criminal law, and in other rooms in the house of law. Kagan and his students have studied business regulation and other topics in the Netherlands, Japan, Germany, and other countries. In these comparative studies, the United States usually (though not always) comes out looking worse. The work then, explicitly or implicitly, is critical of adversarial legalism. The system is inefficient, disruptive, and sometimes maddeningly slow. Yet, as I said, it is arguably at times more democratic than systems in other countries.

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

My aim is not to argue with the central point. Kagan has explored American legalism sharply, even ruthlessly. Adversarial legalism is deeply entrenched, "woven into the fabric of American life and politics" (2019, 43). Almost two centuries ago, de Tocqueville famously observed that political issues in the United States tended to turn into legal issues. This is, if anything, even truer today.

But I want to ask two basic questions. The first asks, what if we looked for similarities, rather than differences? What if we asked, in what ways are systems in modern, developed countries alike? What do the "law ways" of all these countries have in common; and how important are these commonalities? The second question asks: how permanent is this gulf between the United States and the rest of what we used to call the civilized world (it seems much less civilized these days)? Is the gap likely to last? Is it growing, standing still, or declining? As a popular saying (attributed to various people) has it, it's tough to make predictions, especially about the future. Tough indeed; but it is tempting to try.

ON COMMON GROUND

Legal systems are conventionally grouped into "families" of legal systems. Members of particular legal families are said to be closely related to each other, and only distantly related or not related at all to members of other families. The common law family consists of England, its former colonies (including the United States), along with former mandates and colonies of colonies. The huge civil law family includes most of the European legal systems, along with those of Latin America, plus a number of countries that have simply adopted the system, very notably Japan, Korea, and Turkey.

Legal families, on the surface, seem comparable to language families. French and Italian are Romance languages. They have a lot in common; their roots are in the Latin language, but they have grown far enough apart so that they are no longer mutually intelligible. But despite their differences, if you compare them to (say) Turkish or Chinese or Samoan, what jumps out at you are similarities, not differences. English, Swedish, and German are Germanic languages, with a common ancestor; but of course these languages too are no longer mutually intelligible. You can apply this analogy to legal systems—US law, the law of Jamaica, and the law of New Zealand, common law systems, have a common ancestor: English law. French law, and the law of Paraguay or Haiti are civil law systems, which go back in many ways to Roman law.

But the analogy between languages and legal systems is misleading in one significant way. The Romance languages have grown further and further apart over the years; but modern legal systems are doing the opposite. In the middle ages, the legal systems of, say, England, Japan, and France were more distant than they are now. Contemporary legal systems, one could argue, have gotten close enough to form a kind of global meta-language. Adversarial legalism, arguably, is a legal dialect of this meta-language. And the various dialects are getting closer to each other, rather than growing more different.

Suppose we go back to the study by Aoki and Cioffi, on an industry with branches in Japan and the United States. Japan comes off much better than the United States.

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

(I can't help feeling that the Japanese side of the story might be a bit romanticized, but we will let this pass.) The very fact of the comparison is significant—the vivid account of *differences* depends on a massive, even overwhelming degree of *similarity*. Here are two countries, which could hardly be more different, in history and (apparently) in culture. At least that was true in the past. Some of the cultural differences—and economic and structural differences—seem to be fading. A plant in Japan, and a plant in the United States: they are in the same business, they make the same product, they respond to the same consumer demands. Management styles and practices can be compared—and they show differences. But Aoki and Cioffi could not tell their story, could not report on their natural experiment, without the baseline similarities. Their title "Poles Apart," then, is perhaps a bit misleading. There is, indeed, something here that is "poles apart," but a lot more that is not apart at all. The story of waste management regulation is a story of convergences as well as a story of differences.

Kagan, of course, is aware of this, and so are many of the scholars who study regulation of business. They are careful not to overstate the case. There is a good deal of "adversarial legalism" in other legal systems. And, by the same token, you can find European or Japanese styles of regulation in our system—elements of mediation, and informality, for example. Lots of it, in fact (ibid., 15). Regulation of business in the United States is not always chaotic and adversarial. It can be rational and efficient; it can be scrupulously bureaucratic; it can be cooperative and friendly; it can be all of these things. Still, comparatively speaking, the United States is to adversarial legalism as Saudi Arabia is to oil; and the *prospect* of adversarial legalism looms like a dark shadow over the system, even though, for the most part, disputes are settled in some other way (by negotiation, for example).

"Adversarial legalism" is an aspect of legal culture that appeared relatively early, and became strong, in the United States. Today other countries may be following along. The proliferation of lawyers, the activism of judges, the wide use of litigation as a policy tool: these go back quite far in the history of the United States. This country was, perhaps, the first country in which the broad middle class owned a bit of land, a house; white male heads of household voted and took part in government. That was already true in the nineteenth century. There was an explosion of rights, rules, laws, and strategic litigation in the second half of the twentieth century. Government rules regulating business proliferated. So did sensitivity to the environment, to issues of air and water pollution, to endangered species. This was also the period of the civil rights movement, the feminist movement, and movements on behalf of prisoners, immigrants, illegitimate children, ethnic minorities, religious and sexual minorities, handicapped people, and others. This was the period of the "due process revolution." This was a period in which the "American version of the contemporary activist state" flowered to an unprecedented degree; and adversarial legalism became a "crucial component" of the state (ibid., 19).

But this, as we all know, is not just an American story. Similar "winds of change" roared through Western Europe (ibid., 48), responding to similar "pressures." The sheer size of the legal profession grew in country after country (Galanter 2011, 68). Of course, Japan responded to "winds of change" in its own way; its response was not the US response, or France's. The concept of adversarial legalism captures a part of the difference. But the winds of change blew globally. Every country in the modern world has something of a feminist movement, even Saudi Arabia. Of course, Sweden and Saudi

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

Arabia are still truly "poles apart." Whether Sweden and the United States are "poles apart" is a different question. A similar point can be made about business regulation. Japan, Sweden, and the United States, and all other modern developed countries, have set about to do what the United States also was doing: regulating business, controlling the environment, seeking clean air and water, stimulating economic development, controlling monopoly, safeguarding intellectual property—the list could go on. Again, the details and the methods may not be the same. But are they "poles apart"?

CRIME AND PUNISHMENT

Adversarial legalism flourishes in America's criminal justice system, and Kagan pays a good deal of attention to this branch of law and practice. The US system certainly looks bad by comparison with other developed countries, on big and small issues. Hardly any aspect of law in the United States is more of a mess, more of a jumble; big city courtrooms can be filthy and confused; police brutality and racism are major problems; and the system is infected with adversarial legalism, like a giant computer infested with malware. On paper, the system looks good: the right to trial by jury is enshrined in the Constitution. Defendants enjoy (at least in theory) many due process rights. No doubt some of these are effective, in various places and at various times, and criminal procedures can be fair and just. But not always. And the complexities increase costs and delays (2019, 106). Trials, when they occur, are expensive and time-consuming. They can turn into nasty battles between lawyers on the two sides, sometimes trying to use dirty tricks to score points. In some countries—countries we like to compare ourselves to—the system seems cleaner, saner, more rational. Professionals and professional standards are in firm control.

Moreover, criminal justice in the United States is also exceedingly harsh, in comparison to (say) France or Germany or even the United Kingdom (though perhaps not so harsh, compared to earlier times or to countries like Honduras). Sentences in the United States are very long. Prison conditions are worse, less humane, than abroad. America's history of racism may of course be part of the explanation. In Europe, a certain elite quality of justice may modulate the severity of the system. Patterns of deference persist in Europe that have disappeared in our country, or were never there in the first place. Perhaps memories of old autocracies and dictatorships, memories of cruelties and oppression, or outright genocide play a part: European countries may be reacting against the heritage of Nazis, fascists, and communists.

Then there is capital punishment. The countries of the European Union have abolished it completely. Indeed, getting rid of the death penalty is a condition for getting into this club. It is gone in most other developed countries (Japan is an exception). The United States appears to be a major exception, too, to the disgust of many foreigners.

Yet even here if you focus on similarities instead of differences, you get a somewhat different picture. Criminal justice in the United States is mostly a matter of state law; there is no national penal code. About twenty states—most recently New Hampshire in 2019—have gotten rid of the death penalty (or, like Michigan and Wisconsin, never had it). Some states where it survives on the books hardly use it. It is significant at all

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

only in some southern and border states—Texas very notably. Even in those states, the road to the fatal injection is slow and tortuous. And extremely legalistic: rules upon rules upon rules. Here is adversarial legalism at its most extreme. In *Valle v. Florida* (2011),[1] a US Supreme Court case, Justice Breyer pointed out that Manuel Valle, the defendant in the case, had been sentenced to death more than thirty-three years earlier. Spending that long on death row was, in Breyer's opinion, in itself a form of cruel and unusual punishment, forbidden by the Eighth Amendment of the US Constitution. Valle's situation was admittedly unusual, but hardly unique. Delays of ten years and more are completely normal in death penalty cases. Twenty years on death row is not at all rare. Gary Alvord died on May 19, 2019, at the age of 66, in a Florida prison, after forty years on death row. Somebody is bound to break this record.

Arguably, adversarial legalism is at the root of these incredible delays. In any event, the "American way of law" lets this happen; it allows a blizzard of writs, motions, appeals, habeas corpus petitions, endless state and federal actions, objections to procedure, claims of violation of basic rights, big points and small points and in-between points. The system seems completely unable to carry out the death penalty quickly. Politicians fulminate, legislatures pass laws demanding swift action, but nothing seems to change. In the background is genuine social conflict about the death penalty—real controversy, real hesitation, real dispute. But adversarial legalism is the vehicle, the structure, the institutional basis for the delays, the confusion, the endless wrangling.

Does this mean that something is badly wrong with the system? Yes and no. To be sure, Breyer has a point: stuffing more and more people into death rows cells is both cruel and expensive. In California, where nobody has been executed in the last fourteen years, more than seven hundred men and women live year after year in the shadow of the lethal injection chamber, hovering between life and death. But there is good news too. For some inmates, justice gets done. Justice delayed may be justice denied, but delayed justice is better than no justice at all. Many death row inmates get new trials. Some even get exonerated. According to the Death Penalty Information Center, more than 165 death row inmates have been released since 1973. These were defendants who should not have been convicted in the first place. They were victims of wrong or misleading testimony, perjured witnesses, sloppy lawyering, and rogue behavior by prosecutors. Some of them made false, perhaps coerced, confessions. Appellate courts reverse and remand with astonishing frequency. Many death sentences get overturned. Occasionally, the prosecution simply gives up. Douglas Stankewitz was sentenced to death in California in 1978. From then on, Stankewitz and his lawyers were constantly in and out of courts. The California Supreme Court ordered a new trial. The issue was whether Stankewitz was competent or not. The trial court had not dealt with this question. Another trial, another conviction, another death sentence. This time the California Supreme Court affirmed. Next came a series of *federal* cases. Finally, in 2009, a federal district judge threw out the death sentence (but not the conviction for murder). In 2012, a federal appeals court affirmed. And in 2019, prosecutors (in Fresno County) gave up on the death sentence. Stankewitz would spend the rest of his life in prison, but not on death row. This was forty-one years after the original

1. Valle was put to death in September 2011.

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

conviction. This was an extreme, and spectacular, case. Justice (of a sort) was grotesquely delayed. Delayed—by adversarial legalism. But it saved a man's life.

Thus the system can work, can prevent rank injustice at times; still, nobody could call the system smooth and efficient. Or even particularly just. And it is certainly different from the way the system works in other countries. After all, they have abolished the death penalty altogether. Nevertheless, here too we can see convergence going on. The death penalty has been losing ground steadily. Japan, another holdout, uses it very sparingly. In 2011, there were no executions at all. 2018, with fifteen executions, was exceptionally bloody. In death row states in the United States, fewer and fewer people have been put to death. There were twenty-five executions in 2018, compared to almost one hundred in 1998. California, with more than seven hundred men and women on death row, has not executed anybody since 2006, as we mentioned. The current governor of California, Gavin Newsom, signed an executive order in March 2019 suspending the death penalty, for at least as long as he is in office.[2] Many of the men on death row will die of old age. The death penalty is wobbling even in Texas, the state most enthusiastic about executions. Everywhere, courts impose fewer and fewer death sentences and fewer and fewer executions take place. The federal government has recently started executing federal prisoners again, but still, in general, the death penalty is struggling to survive in the United States. The country seems to be heading toward convergence with other developed countries, though in a stumbling and halting way.

The Welfare State

Another big contrast between European democracies and the United States is in welfare and health law. European democracies are highly developed welfare states. Each has a system that provides universal medical insurance or medical services. The English Parliament created the National Health Service (NHS) in 1948. Fundamentally, this system, funded by taxation, gives everybody free care, free hospitalization, and free doctor services. Other democracies followed the lead with their own plans. The Canada Health Act of 1984 set up a single-payer (government) system. The Spanish National Healthcare System, established in 1986, is another scheme of universal coverage and free health care. In France and Germany there are compulsory insurance schemes, largely financed by government. Details vary from country to country, in large and small ways: Is dentistry covered? What about prescription drugs? Eyeglasses? Hearing aids? What role does private insurance play? But the basic principle, the core, is fairly similar everywhere.

The United States *seems* quite different. Millions of people lack health insurance. There is still no general health plan, no scheme of general insurance. But there are bits and pieces of a system. The workers' compensation system dates from the early twentieth century. By 1948, some version of this system had been adopted in all of the states, and it is mandatory for employers.[3] Workers' compensation covers injuries at work, and

2. There is also a moratorium in Pennsylvania—a state that has executed exactly three men since 1976, the last of these in 1999, or a bit more than twenty years ago.

3. In Texas, employers can opt out of the compensation system, but this is exceptional. On the origins and development of workers' compensation, see Friedman and Ladinsky (1967).

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

provides some compensation for loss of wages, along with medical expenses. The system has expanded over the years. Workers' compensation was a response to the problem of the industrial accident, with "accident" taken quite literally. It was a reaction to the many deaths and injuries that came out of dangerous jobs in coal mines, factories, and railroad yards. Nobody was thinking about white collar workers who slipped and fell at work, or about occupational diseases, or about heart attacks at work. Nobody had in mind twenty-four hour coverage for traveling salespeople, or coverage for a worker who slid into third base at a company picnic, or people who claimed that conditions at work brought on psychological trauma.

More to the point, there are particular programs for veterans, and for children, and for particular diseases—kidney dialysis, for example. Medicare covers hospital expenses for people over sixty-five. Supplemental programs deal with prescription drugs and doctor bills. For the poor, there is Medicaid. Both of these programs date from the 1960s. The Affordable Care Act ("Obamacare") was another step toward full coverage. ACA is a complicated scheme, but the core idea was to provide insurance for millions who had gone without. ACA also called for expansion of Medicaid, with federal money. ACA wanted to make this mandatory; the Supreme Court demurred.[4] Most states, however, accepted the expansion. Some states with Republican governors refused. Indeed, the Republican Party strongly opposed ACA and vowed to get rid of it. From 2016 to 2018, Republicans controlled the White House and both houses of Congress, but they failed (narrowly) to end Obamacare. As of this writing (2020) it survives, battered but alive. Meanwhile, millions of people enjoy health insurance at work; it is one of their "benefits." If you put all these bits and pieces together, they make up a sizeable system of health insurance. Not a complete system, by any means; nothing like England's NHS. Copayments and deductibles are a heavy burden even for those with health insurance. Nonetheless, the country has traveled a good distance along the road to full coverage. The trend is striking and all in one direction.

And "Obamacare," whatever its politics, came out of a kind of national debate over health care. This debate is decades old. More and more people seem to feel some sort of health plan is or should be a *right*, as it is in England and Canada, or like free public school in the United States. Will there be "Medicare for all," or at least a government option for those without other health insurance? For a long time, the odds were against any such program. Now, however, the Democratic Party seems committed to some form of national insurance for all. The great pandemic of 2020 cost millions of people their jobs; health insurance evaporated along with the jobs themselves. Nobody can predict the future, of course, but pressure for universal health care, or universal insurance, seems to be increasing.

Another area of law closely allied to welfare issues is labor law. Here too the United States supposedly stands nearly alone. Laura Beth Nielsen analyzed the differences between Canada and the United States in this area. She found what seems to be a gulf between the two countries, but on closer look the contrast seems a little less stark (Nielsen 2000). One question is: under what conditions can a company fire a worker? In

4. The case upholding the ACA, but not the mandatory expansion of Medicaid, was *National Federation of Independent Business v. Sebelius* (2012). Both branches of the decision were decided narrowly (5 to 4); Chief Justice Roberts provided the fifth vote in both cases.

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

Canada, an employee can be terminated only for just cause. In the United States, most employment is supposed to be "at will"; the boss, in other words, can fire a worker at any time for any reason or no reason at all. But American law is not quite what it seems on the surface. Some U.S. courts now allow lawsuits for "wrongful discharge." Under the Civil Rights Act of 1964, no worker can be fired on the basis of race or sex discrimination. The Age Discrimination in Employment Act protects older workers; the Americans with Disabilities Act (1990) protects the handicapped. Aggrieved workers can take their claims to the Equal Employment Opportunity Commission (EEOC). None of this amounts to full job protection; it is not the same as a "just cause" rule. But it is hardly nineteenth century laissez-faire.

Nielsen studied job terminations in a pharmaceutical company, which had facilities both in Canada and the United States. In the United States, as one might predict, she found more lawyering, more legal uncertainty, more litigation; the legal environment was "more threatening" than in Canada. This was standard adversarial legalism. Claims "from a multitude of statutory and common law theories" confronted the American branch, but not the Canadian branch (ibid., 245). Terminated workers in Canada got a more generous severance package than American workers. They rarely brought lawsuits. The American side was awash with lawsuits; and these, in turn, create new doctrines, rules, and exceptions to rules; the governing law ends up unclear, ambiguous, and full of pitfalls. But despite the cost, and the delays, and the turmoil, the trend is unmistakable: movement toward the Canadian norm, though awkwardly, slowly, and in a messy, jerry-built way.

Coming Together

In the last pages, I have advanced an argument about convergence. The system in the United States, which, on first glance, seems uniquely different from the systems in (say) Western Europe, on closer inspection does not look *quite* so different; and seems, on the whole, to be moving, however haltingly, toward the norms in other developed countries. There is reason to expect the yawning gap between the United States and other democracies to become less yawning. The most important reason, I think, is *cultural* convergence: the lifestyles and life-ways of rich, developed countries are growing closer. They are not identical, and probably never will be. But they are getting more and more alike. We live in a world in which images, ideas, and concepts travel from place to place with the speed of light. People also physically travel around the globe. Business people, but also millions of tourists. They have an impact on the countries they visit, and the countries have an impact on them. The world has become a global village.

Convergence is a reality. Business life and business customs, for international businesses in particular, show many similar traits all over the world. Private life as well: dress codes are similar; food habits a bit less so; family structure also somewhat less (though rapidly converging); and native language habits least of all. A traveler from Baltimore, Maryland, on tour to Tokyo and Kyoto, coming home, will tell everybody how exotic things were in Japan, how different life seemed. This is because the differences are striking. The similarities are not. Our traveler takes for granted airports, cars, buses, drugstores, department stores, computers, elevators in high-rise buildings, and a thousand

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

other things that Tokyo and Baltimore share. Kids in Kyoto listen to rock-and-roll music. The Tokyo Symphony plays Beethoven. Nobody on the street is wearing a kimono. Department stores have elevators and escalators. Most of the goods in the stores are familiar, mostly the same as in Harrod's in London, or any department store or shopping mall all over the globe.

Similarly, an American visitor to Australia notices the unusual accent, and the (small) cluster of words that only Australians use. But the Australians, after all, speak English and the similarities overwhelm the differences. The Japanese speak Japanese, of course—languages do not converge—but the dominant position of English, the international language of trade and science, *is* a form of convergence. Japan of course does have a distinctive culture (though less distinctive than it was before). They also have a distinctive cuisine. But you can have sushi in Boston or Mexico City or London as well as in Tokyo. Conversely, you can eat Italian, French, or Hungarian food in Tokyo.

But if cultures converge, this implies legal convergence as well. Convergence does not mean complete identity. No two systems of law are identical or even close to identical. The law of North Dakota is not the same as the law of South Dakota; and, obviously, the law of, say, Estonia, is foreign to both of them. Japanese law and French law and Australian law and American law remain distinct. Still, on matters of *substance* there is striking convergence, even though structures and procedures remain distinctive. All countries face a daunting menu of problems that must be dealt with. They have to regulate stock exchanges, provide for patent and copyright law, and land-use planning, deal with air traffic control, hazardous waste management, air and water purity, conservation, climate change, to mention only a few of the issues that bombard modern society. Governmental structures have also converged: parliamentary or presidential systems, regular elections, and administrative systems. Country after country now has a written constitution, with a bill of rights. They either have a constitutional court, or (on the U.S. model) a high court with the power of judicial review. Even the exceptional cases—New Zealand, Canada, Israel, the United Kingdom—have functional substitutes of one sort of another. The details differ, of course, both as to form and substance. The German constitutional court is an activist court, the Japanese Supreme Court much less so. But everywhere in the world of modern democracies courts have gained much more power. Their actions feed the impulse to bring lawsuits on basic constitutional and political issues. In this regard, one of the hallmarks of adversarial legalism seeps into the heart of legal systems in country after country.

Constitutionalism, and judicial review, can be traced, historically, to countries of the West. But they are not particularly "Western." Nor is judicial review specifically "American." It goes back further in time in the United States than in (say) Spain. But a good deal of what is labeled "Western" or "American" is simply modern. The computer and the automobile are not "Western"; nor are they more exotic in Japan or Singapore than in France or the United States.

Judicial review is legal convergence at a fairly high level. But there is convergence at all levels of the legal system. Consider, for example, the spread of class actions. Kagan refers to the class action as a "distinctively American invention," which embodies both the virtues and the vices of adversarial legalism. The class action has been an "important mechanism" for counteracting abuses by big companies. It can be used to advance claims of "racial or gender discrimination in employment." On the other hand, it is

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

a powerful weapon, easily "misused" to "extract a large settlement" in cases that are, in fact, legally quite flimsy (2019, 138–39).

Industry (no surprise) hates class actions, and has not been shy about fighting back. Conservative legislatures and courts have helped out with rules and restrictions. The road to a class action suit has become much bumpier in the United States. The Supreme Court, in particular, has "steadily closed the courthouse doors to class actions," though never entirely.[5] But while this has been going on at home, the class action has invaded other systems. The key concept that underlies the class action is the use of "private litigation to supplement legal enforcement by government agencies." This was, historically, very foreign to the civil law—even "anathema" to these jurisdictions. Despite this, the class action idea has spread widely in recent years, almost like some sort of legal pandemic. Deborah Hensler recently listed over thirty countries that have either adopted the class action, or something like it, though sometimes in a rather restrictive form (Hensler 2017). This may be simply because the idea is extremely useful. Situations where masses of people share a particular type of claim is as common in Europe as it is in the United States.

Scholars in the civil law world have typically considered common law procedure (especially procedure in the United States) less rational, less systematic than civil law procedure. But a number of countries have reformed aspects of procedure in recent years, in ways that seem influenced by common law procedural habits. A few countries have experimented with juries (usually unsuccessfully). "Orality," however, has had a good run. "Orality" is the focus on the spoken word, which is characteristic of common law trials: the lawyers argue, they cross-examine, and the judge gives oral instructions to the jury. Civil law systems, on the other hand, historically focused on documentary evidence; the "trial" consisted of judges sifting through documentary evidence and coming to a decision. Today, "orality" is on the rise. In Chile, for example, a new system, based on "orality," has replaced the traditional system in criminal cases, family cases, and labor cases; there have been similar developments in other Latin American countries; some have gone even further.[6]

Decline and Fall

I now turn to the second question: is adversarial legalism here to stay? And will it continue to mark off the law of the United States from the law in other countries? In the "afterword" to the second edition, Kagan himself asks this question. On the whole, his answer is yes, adversarial legalism is here to stay; and yes, it will continue to set the U. S. system apart (Kagan 2007). Adversarial legalism is tough. It is deeply rooted in the culture and institutions of the United States. So too of the European systems: they too are distinctive, hard to change, and unlikely to change. True, "litigation and judicial decisions" have become "more prominent features of governance, regulation, policy development and dispute resolution" in Europe, but strong "national traditions" of

5. On the hostility of the Supreme Court to class actions, see, for example, *Epic Systems Corp. v. Lewis* (2018).

6. I am indebted here to the work of Claudio Fuentes, a J.S.D. candidate at Stanford Law School, and his dissertation on the transformation of the Chilean judicial system.

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

"bureaucratic legalism" do not mean that "American-style adversarial legalism" is going to prevail across the Atlantic (Kagan 2008).

To a certain extent, my mild disagreement is no disagreement at all; one of us sees the glass as half full, one as half empty. In general, my answer to the second question is implied in my focus on convergence, especially convergence as a double process. Law in the United States is moving *away* from adversarial legalism, at least to a degree, and European systems are moving *toward* adversarial legalism, for their part, at least to a degree.

As to the movement in the United States: Kagan has pointed out the influence of the "conservative legal movement," which has gotten stronger over the years. It has pushed back, especially against the liability explosion, the heavy use of class actions, and other legal institutions that hurt the interests of big business, or that simply seem like bad policy, or too much government. Conservatives have "successfully chipped away" at excesses, in their never-ending battle against regulation of business. The appointment of sympathetic judges is part of their program—and, particularly in the Trump era, they have had a good deal of success. One should add here, too, the spread of arbitration and mediation (2019, 263). Forms of alternative dispute resolution (ADR) are flourishing. Arbitrators do not use juries, and some arbitration proceedings "look a bit like European civil adjudication" (ibid., 143). Businesses love arbitration as a way to choke off litigation. The courts have allowed, and even encouraged, the use of arbitration. Meanwhile, in criminal cases (and not only in criminal cases), trial by jury is in radical decline. Plea bargaining is the norm in criminal cases, and has been for generations. Cases mostly settle out of court. We live in the age of the "vanishing trial" (Galanter 2004).

David Vogel has examined in detail the "politics of precaution"—regulation of health, safety, and environmental risks—in Europe and the United States. This is a complicated story, full of zigs and zags and legal differences. Vogel, however, finds "increased transatlantic convergence" in several policy areas. To take one example, the "drug lag" has vanished. At the level of the Food and Drug Administration, "a new drug is now as likely to be first approved for use in the United States as in the EU" (Vogel 2012).[7] This despite adversarial legalism, and the tortuous pace of approval of new drugs. Plea bargaining itself was once specifically considered a phenomenon of the United States. It was forbidden in the United Kingdom—on paper (Baldwin and McConville 1979). In fact, it was rampant in England, and has now appeared (in one form or another) in other countries. This fact, along with many other changes in substance and procedure, has led some scholars to talk about the "Americanization" of foreign legal systems (Langer 2004). It would go too far to claim that adversarial legalism is catching on globally, invading other systems like some sort of imported beetle or fungus. But an article in *The Economist* cited what it called the "compo culture" of Ireland. This is (according to the article) an "epidemic of dubious compensation claims, extravagant awards and soaring insurance premiums" in tort cases. The "compo culture," arguably, is "blighting small business and stifling public activities, including local festivals" (*Economist*, 2019). These are critiques much more common in descriptions of law in the United States.

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

Inside the Crystal Ball

Nineteenth century travelers to the United States, like tourists today *from* the United States, tended to be struck by differences, and to ignore similarities. That most insightful of visitors, Alexis de Tocqueville, in *Democracy in America*, was no exception. He found America's (pioneer) democracy distinctive and remarkable (despite slavery and other things that strike us today as profoundly undemocratic). De Tocqueville was comparing the United States with France and other European countries; he had no way of course to look into the future. Much of what impressed de Tocqueville as special would not be particularly special today. Democracy in America is more democratic than it was in de Tocqueville's day but perhaps less democratic than Denmark or New Zealand—or perhaps France. A modern de Tocqueville might want to choose a different model.

Perhaps a skillful and insightful political scientist might, a hundred years from now, no longer see adversarial legalism as something specifically American. Not that adversarial legalism is likely to disappear. Some sort of trial by jury is guaranteed by the Constitution. But, as I said, we use the jury less and less. Nor is a full-blown jury system likely to pop up in Finland or Switzerland. The most powerful examples of adversarial legalism come from work on business regulation. Wholesale change is unlikely to come in either direction. In the near future at least, the Netherlands is not likely to fumble and stumble the task of dredging harbors, or smother a proposal about dikes and levees with a barrage of lawsuits. Nor is the next dredging crisis in Oakland, California likely to go as smoothly as butter, without lawsuits or public protests. Nonetheless, it is possible both countries will edge closer together.

The future is always dark. To assume that this or that trend will simply continue is likely to be wrong. One can expect the unexpected. A virus allegedly leaps from bats to people in a market in Wuhan, China. The virus, perhaps, could have been stopped early on, but this did not happen. It spread all over the world. A worldwide pandemic followed. Every country has dealt with the crisis in its own way. Yet never in isolation. And there are similarities as well as differences. Climate change is a rolling, ongoing crisis. Here too reactions differ, but again not entirely.

Right-wing governments come to power. They demand regulatory pushback. In the United States, the right-wing program includes measures to curb some causes and effects of adversarial legalism: tort reform, privatization, measures against class action, or the rights of death row inmates, among other things. None of this is easy to accomplish. Regulation of health and safety, for example, is sticky and resistant. Pro-business administrations can bluster and haggle; they make marginal changes. Even Trump, surrounded by a clique of lobbyists and climate deniers, has not gone very far in rolling back past regulations. Adversarial legalism is part of his problem. How all this will work out, what changes will flow from the pandemic, what lies ahead for climate change: none of this is or can be clear.

The one safe prediction is the prediction of change. Change is the fundamental law of social life. Sometimes dramatic change. Adversarial legalism may survive, but it is bound to change. Its European counterparts will also change. My own guess is that both sides will continue to move toward each other, in fact, as if some giant magnet was

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press

attracting them. I will place my own bet on more and more convergence. But of course one cannot be sure.

REFERENCES

Aoki, Kazumasu, and John Cioffi. "Poles Apart: Industrial Waste Management Regulation and Enforcement in the United States and Japan." In *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism*. Edited by Robert A. Kagan and Lee Axelrad, 33–63. Berkeley, CA: University of California Press, 2000.

Baldwin, John, and Michael McConville. "Plea Bargaining and Plea Negotiation in England." *Law & Society Review* 13, no. 2 (1979): 287–307.

Farhang, Sean. *The Litigation State: Public Regulation and Private Lawsuits in the United States*. Princeton, NJ: Princeton University Press, 2010.

Friedman, Lawrence M., and Jack Ladinsky. "Social Change and the Law of Industrial Accidents." *Columbia Law Review* 67, no. 1 (1967): 50–82.

Galanter, Marc. "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts." *Journal of Empirical Legal Studies* 1, no. 3 (2004): 459–570.

————. "More Lawyers Than People." In *The Paradox of Professionalism; Lawyers and the Possibility of Justice*. Edited by Scott L. Cummings, 68–89. New York, NY: Cambridge University Press, 2011.

Hensler, Deborah R. "From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally." *Kansas Law Review* 65 (2017): 965–88.

Kagan, Robert A. "The 'Non-Americanisation' of European Law." *European Political Science* 7 (2008): 21–31.

————. "Globalization and Legal Change: The 'Americanization' of European Law?" *Regulation and Governance* 1 (2007): 99–120.

Langer, Maximo. "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure." *Harvard International Law Journal* 45, no. 1 (2004): 1–64.

Nelson, William. Marbury v. Madison*: The Origins and Legacy of Judicial Review*. Lawrence, KS: University Press of Kansas, 2000.

Nielsen, Laura Beth. "Employee Termination Practices in the United States and Canada." In *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism*. Edited by Robert A. Kagan and Lee Axelrad, 225–54. Berkeley, CA: University of California Press, 2000.

Vogel, David. *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States*. Princeton, NJ: Princeton University Press, 2012.

Whitman, James Q. *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe*. New York: Oxford University Press, 2005.

CASES

Epic Systems Corp. v. Lewis, 128 S. Ct. 1612 (2018).

Marbury v. Madison, 1 Cranch (5 U.S.) 113 (1803).

National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

Valle v. Florida, 564 U.S. 1067 (2011).

https://doi.org/10.1017/lsi.2020.32 Published online by Cambridge University Press