The Judge over Your Shoulder:[1] Is Adversarial Legalism Exceptionally American?

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ROBERT A. KAGAN. *Adversarial Legalism: The American Way of Law*. Cambridge, Mass.: Harvard University Press, 2001. Pp. xii + 339. $49.95 cloth.

Robert Kagan's new book explores one of the fundamental issues in modern democracies: how to organize the policy process so as to best balance the fundamentally competing values of accountability, efficiency, and individual fairness. In essence, he argues that the American solution, with its emphasis on procedural protections, *seems* at first glance to emphasize individual fairness at some cost to accountability and efficiency, but *actually* ill serves not only accountability and efficiency but also individual fairness. He likens American-style legal and administrative justice to a major league baseball star who hits smashing home runs but bungles routine plays, and whose salary is so high that most ordinary people can't afford to get into the ballpark (p. 32). Similarly, American law, Kagan argues, produces compelling morality tales of (occasional) triumph by underdogs over corporate and bureaucratic intransigence, but is so costly, cumbersome, and inefficient that in routine matters it denies justice—and thus is unfair—to most ordinary Americans. Kagan favors a more bureaucratically centered process, one

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1. "The Judge Over Your Shoulder" is the title of an influential British government publication (Cabinet Office 1988) that encourages government officials and administrators to act carefully in light of increasingly aggressive judicial oversight of administrative policies and actions.

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that grants greater discretion to bureaucratic experts and that minimizes, in particular, the extent of judicial checks on expert bureaucratic discretion. Such a process, he argues, is widely used in many other economically advanced democracies, notably those of western Europe and Japan. And such a process favorably balances accountability, efficiency, and individual fairness, achieving vastly more of each—and in the process better serving the ordinary individual—than does the American approach.

I am a fan of the book: It is the sort of broad, provocative, consistently insightful analysis that encourages one to think deeply about fundamentals. But I also disagree with key aspects of Kagan's analysis. I want to use my contribution here both to hail Kagan's unique and important insights and to suggest where I depart from his conclusions. And there is much to hail. *Adversarial Legalism* provides the best existing comparative analysis of the characteristic American reliance on adversarial processes in both judicial and bureaucratic administration, the best comparative analysis of the key role played by administrative discretion in the policy process, and an impressive study of comparative public policy processes in general. For these and many other reasons, I suspect that few scholars will fail to respect Robert Kagan's considerable achievement.

But, I think, there also is much to doubt in Kagan's analysis and conclusions. My doubts, which I shall discuss following a review of Kagan's contributions, fall into two broad categories. One covers conceptual ambiguities in Kagan's thesis and analysis that, in my view, cloud any empirical assessment of the thesis. Nonetheless, the adversarial legalism thesis is a fertile source of empirical claims that beg for further assessment. The second category of concern involves several such empirical issues, particularly whether the United States is as exceptionally adversarial as Kagan claims, and whether adversarial legal reforms perform as poorly in comparison to their bureaucratic alternatives as Kagan claims. Kagan suggests that the United States is fundamentally exceptional; I believe that comparative research on law suggests that there is a significant degree of convergence, or, at least, shared change in response to shared problems. Much of my subsequent discussion draws comparisons with the British legal system, although I provide examples from other systems as well. Britain provides a very useful comparison case. It shares with the United States a common law legal system, yet Britain's social and criminal justice policies are much more bureaucratic, more hierarchical, and more free of judicial interference than is the U.S. policy process. Kagan, too, repeatedly turns to British examples to make his points. Indeed, if largely bureaucratic reforms might work in the United States, Britain provides a partial "trial run" or test case. The British experience does not, in my view, support Kagan's sanguine characterization of insulated bureaucratic policy processes—nor his claim that the United States remains fundamentally exceptional in its turn toward adversarial le-

galism. But before I turn to my misgivings, I want to say why I believe this is an important book.

THE SIGNAL CONTRIBUTIONS OF *ADVERSARIAL LEGALISM*

There is much to be said for *Adversarial Legalism*. The book's central questions—whether American legal and bureaucratic policy processes are excessively adversarial, if so why, and what are the benefits and costs of this attribute—are compelling and have burned increasingly brightly in American policy and academic debate over the last generation. These questions are broadly significant for a host of audiences, among them participants in political debates over legal liability and tort reform, policy analysts, scholars of the U.S. legal system and bureaucracy, and comparative legal scholars. Kagan's questions thus could hardly be more timely or theoretically significant to a broad range of scholarly literatures.

The book's answers to those questions take the form of a bold, comprehensive—even global—thesis that Kagan applies broadly to the U.S. legal and policy administration systems. In simple form, Kagan argues that the United States is exceptional in comparison to other economically advanced democracies in three related respects. First, as a matter of *description,* Kagan argues that the United States is exceptionally subject to adversarial legalism, or what he calls a "legal style" that features legally framed, complex, party-driven adversarial contestation in the policy and judicial processes (pp. 3, 7, 9). Second, as a matter of *evaluation,* Kagan argues that although adversarial legal processes have produced some notable policy reforms, those approaches are often more costly and inefficient than comparable bureaucratically administered policies, provide disproportionate benefits to those who have the resources necessary to mobilize the legal process, and offer fewer benefits for ordinary people (pp. 9, 25–33, 67, 84–86, 93–96, 104–11, 117–25, 135–44, 170–80, 198–206, 224–28). Third, as a matter of *explanation,* he argues that adversarial legalism is the result primarily of the American state's exceptional incapacity to respond programmatically and bureaucratically to the public's rising demand for policy reform and to reformers' tendency to resort to judicially centered reforms (pp. 40–51).

Kagan applies his argument to a remarkably broad range of phenomena, among them the notorious Texaco-Pennzoil lawsuit, negotiated settlements in civil suits, the guilty plea process in criminal court, environmental regulatory enforcement, public interest litigation aimed at welfare-law reform, and litigious challenges to major public works projects as well as ordinary property development disputes. Kagan's analysis of many of these policy areas is remarkably illuminating, even compelling, in a number of ways. One is his

astute recognition that key policy decisions in any governing system are made at the lowest levels of the administrative and judicial processes—and thus that studying how these processes work in practice is crucially important. Kagan's analysis is compelling as well in his clear commitment to exposing the persistent injustices and inequalities that result from the work of courts and litigation in many aspects of American life and his equally clear commitment to providing a vision of a better world.

Although Kagan's thesis is clearly a critique of the American legal style, he admirably balances that critique with frank praise and celebration of aspects of the American approach, particularly its openness to new or excluded interests and its capacity for exposing governmental and corporate abuses. Thus, unlike politically conservative critics of "judicial activism," Kagan praises the partial successes of court-ordered reforms of prisons, policing, and racial desegregation. And unlike politically conservative tort reformers, Kagan calls not only for curbing judicial power but also for increasing public budgets and bureaucratic authority, something that will be distinctly unwelcome, I suspect, to most tort reformers and court-curbers. In all of these ways, Kagan's analysis is refreshingly large, bold, broad-minded, and frankly normative. Although scholars may disagree with aspects of Kagan's thesis, by the start of the twenty-first century even his most likely critics, the "litigation-explosion" skeptics—and I am one—are unlikely to doubt Kagan's central claim that, in comparative perspective, American policy processes are notably subject to legal contestation or the perceived threat of it. Yet in a book of this scope and ambition, it would be remarkable if readers were to agree with the analysis on all points. I turn now to my reservations.

THE *ADVERSARIAL LEGALISM* THESIS AND ITS AMBIGUITIES

Kagan's central thesis is, upon careful examination, somewhat complex and ambiguous, and thus is deserving of a relatively extended discussion. Regarding the *descriptive* aspect of Kagan's thesis—the idea that the U.S. policy process is exceptionally subject to adversarial contestation—Kagan makes two very different observations that are at least partly in tension with one another. One observation, as noted, is that the U.S. policy process, in contrast to those of other economically advanced democracies, is exceptionally subject to complex adversarial legal contestation. But Kagan makes a second very different observation, which is that the United States, as many studies have shown, is *not* fundamentally exceptional in its rate of litigation, that there has been no dramatic "litigation explosion" in the United States, that most civil disputes are settled without trial, that most criminal prosecutions are resolved through guilty pleas, and the like (see, e.g., pp. 13, 83–86,

96, 109, 117–18, 119–21, 123–25, 226). Therefore, his descriptive thesis, contrary to the book's title and central concept, is *not* that U.S. policy processes are always *or even usually* subject to adversarial legal contestation. Instead, Kagan's descriptive thesis boils down to the observation that policy and administrative processes in the United States are widely *perceived* to be subject to the *possibility* (thus, the *threat*) of full-blown legal contestation and judicial oversight—and that in the relatively small proportion of disputes in which full-blown legal contestation does occur, it is more complex, adversarial, and lawyer driven than in other countries. Thus, in the criminal justice process and civil disputes alike, the threat of (rare) full-dress trial looms; in regulatory matters, the possibility of (rare) full-scale investigations and enforcement actions is ever present.

A crucial aspect of Kagan's descriptive thesis is that perceptions of the threat of full-blown adversarial processes drive disputants in the United States toward either abandoning their claims or pursuing less formal means of dispute resolution, sometimes called "bargaining in the shadow of the law" (pp. 82–86, 109, 117–18; Mnookin and Kornhauser 1979). The United States thus has, as it were, a two-tier justice system, encompassing an extraordinary tier in which the disputants mobilize the full panoply of procedural devices, and a routine tier in which disputes are processed more informally (see, e.g., pp. 82–83). Kagan acknowledges that most other countries have a similar bifurcation in their legal-bureaucratic procedures (pp. 83–84). For instance, in Britain, most criminal cases are processed in magistrates' courts, where legal procedures are more relaxed than in the Crown Court, where a broader range of procedural guarantees may be mobilized (pp. 89–93). Both in the United States and elsewhere, the extraordinary tier is used relatively rarely, while the routine tier is used in the vast majority of cases. Nonetheless, according to Kagan, the bifurcated system of the United States differs from that of other countries in a crucial way: in other economically advanced democracies, the routine tier of justice is programmatic and is bureaucratically administered, consisting of social welfare policies, social insurance for injuries or disabilities, professional bureaucratic enforcement of environmental law, professional police and prosecutorial investigations, and the like. And, while in the United States the option for pursuing full-blown adversarial contestation is limited by *resources*, in other countries, the options for doing end runs around the routine system and into extraordinary legal appeals are limited by *law*. In other countries, then, disputants gain fewer extraordinary advantages by pursuing their claims in the extraordinary tier, the wealthy are not disproportionately advantaged by their greater capacity to mobilize legal protections, and the quality of justice for the middle class and poor is actually quite good in the routine tier (pp. 128–30). (The evidence in support of this favorable view of the virtues of unchecked bureaucracy is, in my view, rather mixed, as I discuss below.)

The observation that most disputes, even in the United States, are processed in ways other than judicial decision is clearly valid—but its place as a key part of Kagan's adversarial legalism thesis raises questions about the core meaning of that thesis, particularly how it might be assessed empirically. If scholars find that litigation is very, even extremely, rare in the local property development process (Brisbin, Hunter, and Leyden 2002), is this further evidence of the widespread inhibitory effect of adversarial legalism's costs or, to the contrary, that adversarial legalism is not pervasive throughout U.S. policy processes? This problem of theoretical clarity and empirical assessment runs through significant parts of Kagan's analysis. For instance, is the increasing rate of guilty pleas over the twentieth century best attributed to the inhibitory effect of adversarial legalism's costs or, to the contrary, to the growing professionalization of police and prosecutors who, for all their faults, have gotten better at screening out factually innocent defendants (Friedman 1979; see also Heumann 1981)? Is the low rate of trials in civil cases best attributed to adversarial legalism or, to the contrary, to other factors, among them the various pressures—social as well as managerial efforts by judges—on disputants to reach a negotiated settlement? In sum, is the American legal style predominantly one of negotiation in the shadow of the law or adversarial legal contestation? Clearly, both are present, and Kagan acknowledges that the former is indeed more prevalent, but then argues that the latter defines the U.S. legal style.

Kagan's *evaluative* thesis similarly is clear on its face but increasingly complex and ambiguous upon deeper consideration. Stated simply, that thesis is that adversarial legalism is more costly, unpredictable, and obstructionist than comparable bureaucratic policies (pp. 29–32). Perhaps just as significant, the intended impact of adversarial legal reform is limited (particularly for ordinary people), Kagan argues, in comparison to bureaucratic approaches. Other countries, Kagan argues, rely on professionally staffed, well-funded bureaucracies to implement programmatic social policies, an approach that extends the impact of public policies, minimizes inconsistencies in their application, and generally improves the efficiency of the administration of justice. By contrast, adversarial legal policies have a limited "reach" (p. 79), which seems to be a metaphor for the more common term *impact,* due to a variety of factors. One is the ambiguity of court decisions. Thus, tort law, due to its ambiguity and unpredictability, has no appreciable effect in improving product safety (pp. 142–44). Similarly, judicial reforms of criminal justice are often communicated very imperfectly down through the system to law enforcement officers on the street (p. 80). Adversarial legalism's reach is limited as well by economic inequality: legal protections are mobilized mainly through self-help, and thus both civil disputants and criminal defendants who lack resources and knowledge or whose attorneys are lazy or overburdened are served very poorly (pp. 93–96, 121–24). The American solution's reach is also limited largely to matters of procedural

fairness; in criminal justice, adversarial legalism has failed miserably in addressing the development of extreme and excessive penalties (p. 79). Ironically, however, if the *intended* consequences of adversarial legalism are limited, the *unintended* consequences, according to Kagan, are massive. For instance, adversarial legal reforms of the criminal justice process have resulted in a very unfortunate politicization of the criminal justice process (p. 80): reform-oriented judicial decisions have provoked a firestorm of controversy and a conservative political backlash aimed at placing the courts under conservative political control. For another example, tort liability overdeters, not by improving product safety but by encouraging unneeded "defensive medicine," by forcing manufacturers to drop production of such socially valuable products as small aircraft and the like (pp. 142–44).

Yet, if Kagan's evaluative thesis seems clearly to favor European bureaucratic approaches over the American adversarial legal style, Kagan *also* seems hesitant to be drawn into extended debates over the relative merits of European and American approaches. He disavows any intent to provide an overall calculation of the costs versus the benefits of adversarial legalism (p. 32). More significantly, he acknowledges that "there is more to be learned about the weaknesses of Western European models" (p. 233). Indeed, his descriptions of European and Japanese alternatives exclusively highlight their bright sides and avoid even brief references to the literatures on their weaknesses. This, frankly, is puzzling, and comes off as a comparison of adversarial legalism's costs to insulated bureaucracy's benefits. For instance, Kagan correctly observes that "adversarial legalism has not been capable of eliminating the substantial differences in outcomes for African-American youth" in the criminal justice process (p. 79). This, of course, is absolutely true and represents a great and continuing American tragedy. Yet he does not examine whether European bureaucratic approaches perform better on this issue (or on many others). For Britain, at least, the evidence, as I show below, is very clear: they do not.

Kagan's *explanatory* thesis also is clear at first glance and increasingly ambiguous upon deeper analysis. In simple terms, it is that adversarial legalism reflects a tension between rising popular expectations for "total justice" (Friedman 1985) and the weak political party system and limited, fragmented bureaucratic and resource capacities of the American state: When confronted by American bureaucratic handicaps, American reformers have turned to judicially led reform (pp. 40–51). Kagan captures this structural thesis in a simple, clear formula: "Total Justice + Fragmented Government = Adversarial Legalism" (p. 44). Similarly, he argues that "adversarial legalism is not a *cause* of the grudging and incomplete character of the American welfare system. It can more properly be viewed as a *consequence*" (p. 175).

But Kagan also attributes adversarial legalism to a set of *elite attitudes* that have hindered the bureaucratic development of the American state. Due to cultural blinders, Kagan suggests, American reformers all too quickly

turn to legal remedies when they might more aggressively pursue bureaucratically centered reforms (pp. 55–57). Early in the book, Kagan seems to characterize this failure of imagination as a secondary "contributing cause" of adversarial legalism by distinguishing it from the "basic causes" (fragmented government and rising expectations), which "remain unchanged and perhaps unchangeable" (p. 57). But in the book's conclusion, cultural blinders seem to take pride of place as a cause of adversarial legalism and, especially, as the key hurdle to adopting bureaucratically centered reforms. Thus, Kagan there argues that a primary barrier to effective reform in the United States is the "legal parochialism" of American elites: they are fixated on adversarial legal checks on governmental authority and are remarkably unaware of the bureaucratic alternatives used in other countries (p. 250).

Although both attitudes and broader structural factors undoubtedly each have some degree of independent influence, and each surely influences the other, the priority given to one or the other arguably shapes visions of how social change may best be pursued. And it is in Kagan's vision of change that the tension in his causal analysis is most acute. Thus, in presenting a number of "scenarios" of "radical change" that would ameliorate the worst aspects of adversarial legalism, Kagan declares that his purpose is to "help illuminate the *attitudes* that entrench adversarial legalism" (p. 233, emphasis added). Yet, in light of Kagan's prior structural analysis, his scenarios for change (p. 232–42) are surprisingly *non*radical in that they largely eschew visions of governmental centralization, political party consolidation and reform of legislatures, or moderation of popular expectations—precisely the structural factors that earlier were identified as the sources of adversarial legalism. Instead, Kagan's scenarios for change describe, in general terms, increases in the coordination and funding of government programs (pp. 233, 243) and increases in health insurance and government-provided social insurance generally (p. 235), but focus especially on placing limitations on judicial authority and on rights to popular mobilization of the legal process. For instance, those scenarios include abolishing the privilege against self-incrimination in the criminal process (p. 234); abolishing the jury in civil disputes (p. 236); and adoption of a "loser pays" rule for attorneys fees in civil disputes (p. 239). These scenarios seem to target what earlier were called the "effects" of fragmented government. If earlier in the book adversarial legalism is characterized as the result of fragmented government, by the book's conclusion, it seems to be more the result of cultural attitudes that celebrate adversarial legal checks on authority and that serve to maintain governmental fragmentation.

In sum, *Adversarial Legalism's* thesis is far-reaching but, in crucial respects, ambiguous. It is a description and explanation both of an ostensibly extraordinary degree of adversarial contestation in *some* disputes in the United States but also of an ostensibly extraordinary degree of informality and denial of justice in the *vast majority* of disputes. And, moreover, the

latter is taken to be an explanation of the former, but the former also is used to explain the latter: on the one hand, the fragmented, bureaucratically weak American state leads reformers to pursue adversarial legal reforms, while, on the other, adversarial legal blinders keep American reformers from pursuing centralized bureaucratic reforms.

I should hasten to add that the ambiguities in Kagan's thesis partly reflect the unusually balanced nature of his analysis. Thus, unlike tort reformers, Kagan acknowledges, even emphasizes, the surprising pervasiveness of nonlitigiousness in the United States. Unlike most tort reformers, he clearly favors stronger social programs and social insurance. And unlike opponents of tort reform, he points out the remarkably high costs of tort law as a system of compensation for injuries.

ASSESSING KAGAN'S HYPOTHESES

As I have suggested, Kagan makes three general sorts of empirical claims in his study—that the United States, in comparison to other economically advanced democracies, is exceptionally subject to adversarial legalism; that adversarial legal processes, in comparison to bureaucratic processes in Europe, are relatively inefficient, ineffective, and ill serve ordinary Americans; and that adversarial legalism reflects a tension between bureaucratic incapacity and rising public demands for reform. On each of these hypotheses, the evidence from research on the United States and other countries is, in my view, more mixed than is acknowledged in *Adversarial Legalism*—indeed, substantial bodies of research seem to contradict the book's main theses.

I should emphasize at the outset that there are very few truly comparative studies of the "law in action" and that most scholars working in this area—myself included—therefore must rely on studies that are less than ideal. But this general point is true as well of the studies on which *Adversarial Legalism* is based. I am somewhat less certain than is Professor Kagan that some of the key studies on which he relies, even some listed as primary sources in table 1 (p. 8) provide solid empirical support for the adversarial legalism thesis. In some policy areas, particularly regulation, the evidence strikes me as rather strong, largely because in those areas Kagan and his colleagues have developed clearly focused studies aimed at developing and testing the adversarial legalism thesis. And the contrast between Japan and the United States is especially stark (Johnson 1998).[2]

But in other areas Professor Kagan was forced to rely on studies developed by others, some of which, frankly, do not rise to the level of quality in Kagan's own empirical research. This is especially true of comparisons

2. For qualifications, see Feldman (2000) and Johnson (2003).

with European criminal justice systems. In that area, the studies listed in table 1 are not empirical studies of the law in action; they merely provide able summaries of the alternative *ideologies* of different legal systems. For instance, Pizzi (1999), one of Kagan's key authorities on comparative criminal justice, provides a lengthy, empirically informed critique of the U.S. system, juxtaposed against very brief, idealized summaries of the formal structure of the criminal justice system in four European countries.[3] Langbein (1979), Kagan's key authority on German criminal procedure, has been challenged by Dubber (1997), who, after conducting empirical work on the German criminal justice system, characterized Langbein's view of Germany as "idealized" (1997, 549). Kagan (p. 86) notes Dubber's criticism of Langbein but underplays the full force of that criticism and of Dubber's alternative portrayal of German criminal law in action.[4]

Undoubtedly formal structures influence the "law in action"; but, in the end, what we really want are careful empirical studies *of* the law in action, for, as we know from research on the United States, the formal structure of the legal system and the law in action have a very contingent relationship. As I suggest below, focusing especially on criminal justice in Britain, empirical research on the law in action departs rather significantly from the view presented in *Adversarial Legalism*.

1. Is the United States exceptionally subject to adversarial legalism?

In comparison to other economically advanced democracies, the United States, Kagan argues, is exceptionally subject to adversarial legalism. The attributes of this characteristic, as noted above, are remarkably diverse: an extraordinary range of creative procedural devices and legal remedies,

3. Pizzi's (1999) discussion of each of the four countries is contained in one brief chapter that provides merely a summary of the formal structure of each criminal justice system; thus, the discussion of the Netherlands is less than four pages; Germany, a little over three pages; Norway, about three and half pages; and England about seven pages. The entire comparative chapter on European criminal justice has a total of only seven footnoted sources, only three of which might conceivably be characterized as empirical research on "the law in action," and one of these (Walker and Starmer 1993) is overwhelmingly critical of the quality of British criminal justice in practice.

4. Dubber shows rather persuasively, for instance, that, contrary to Langbein's (and Kagan's) characterization of German criminal procedure: (1) German criminal procedure is regarded as notoriously *inefficient* by German commentators, particularly because there exist innumerable procedural loopholes and devices that may be used by criminal defendants (1997, 570–78); (2) beginning in the 1990s, German defense attorneys increasingly have been aggressively exploiting these procedural devices, with the result that a significant number of trials now take very long (even years) to complete (1997, 567–70, 580–81); (3) plea bargaining has become quite common and is often explained as the result of German procedural inefficiency (1997, 550, 558–61, 567); (4) "defendants regularly face substantial pressure to plead guilty in exchange for leniency" (1997, 560); and (5) to the extent that there is efficiency in the German system, it results (as Kagan argues) from the domination of the proceedings by the prosecutor and judge, with the result that trial procedures in routine cases may be accelerated. But (contrary to Kagan's characterization) "this acceleration, however, may come at the price of turning the public oral proceedings into a farce, thereby deepening the sense of partiality that already pervades the inquisitorial German process" (1997, 578).

a large and entrepreneurial lawyer population—and yet also a widespread tendency to avoid full-blown trial procedures. Thus, I suggested above that Kagan's descriptive thesis boils down to a claim that Americans are exceptionally fearful of the *possibility* of litigation (and therefore go to great lengths to avoid it) and that when litigation does occur, it is highly complex and unpredictable. Thus, throughout *Adversarial Legalism*, Kagan seems to use a key summary measure of the extent of adversarial legalism, which is something like this: *adversarial legalism is measured by the extent to which the implicit or explicit threat of legal contestation encourages evasive, defensive, or preventive action.*

Such a measure may be able to encompass much of the evidence in *Adversarial Legalism* as well as much else that is known about the U.S. legal system. In particular, it is now well established that resort to litigation, even in the United States, is a rare thing, and it has not gotten much less rare over time. There has been no "litigation explosion," except in certain very limited categories of law. Even in policy areas that Kagan suggests are especially subject to adversarial legal threat, particularly property development and planning, the actual litigation rate is very, very low (Brisbin, Hunter, and Leyden 2002) and even in major property development controversies is not appreciably higher than in several European countries (Sellers 1995). Moreover, in the area of personal injuries, although Americans are more likely to make *claims* than Canadians, they are significantly less likely to use *lawyers* than Canadians (Kritzer, Bogart, and Vidmar 1991). Nonetheless, as *Adversarial Legalism* shows so well, there is a fair amount of evidence that, even though nonlitigiousness is routine, the implicit or explicit threat of full legal contestation encourages evasive, defensive, or preventive action. The threat is, as Kagan writes in his response here, "dormant" (2003, 846), but—and here is the key point—it nonetheless has palpable effects that sweep much more broadly than the rare experience of full adversarial conflict. Thus, *Adversarial Legalism* suggests that the threat of adversarial legalism in the public policy process leads to defensive policymaking aimed at minimizing exposure to legal liability.

In the United States, what are these effects, how widespread are they, how intrusive, and are they, in comparison to other countries, *exceptional*? We do not presently have a full answer. For some time, a key indicator proposed by many scholars has been expenditures on legal services, because people and organizations turn to lawyers for advice on how to evade, prevent, or defend against adversarial legal threats. Kagan (p. 36) appropriately notes the observation by Sander and Williams (1989) that expenditures on legal services in the United States almost tripled as a proportion of GNP between 1960 and 1987. But we are far from fully understanding the source of that growth or whether there are significant variations in it among sectors of the economy. For instance, we don't even know whether the growth in legal services expenditures is comparable in the public and private sectors—

and thus how much of the growth is attributable to business disputes and how much to challenges against government agencies or public policies. But, as Kagan's thesis focuses heavily on the costs of adversarial legalism for public agencies and programs, the latter question seems to be highly significant. One study (Epp 2000) has addressed that question by examining legal services expenditures by cities from 1960 through 1995; it finds, controlling for overall city expenditures, no common pattern of substantial growth in city government legal expenditures. Similarly, the costs to government agencies of constitutional tort litigation, according to Eisenberg and Schwab (1987), are wildly exaggerated by most media and even scholarly reports. Nonetheless, there is a growing body of evidence that organizations in the United States respond defensively to the perceived threat of liability (see, e.g., Edelman 1990, 1992; Epp 2002; as well as Kagan's book).

Turning to other countries, there is growing evidence that the key attributes of adversarial legalism have developed elsewhere (see, e.g., Galanter 1992) *in ways that increasingly produce precisely the sorts of defensive responses found in the United States*.[5] One of the striking developments of the last two decades in many economically advanced democracies is the emergence of the adversarial legal option, often by deliberate design aimed at encouraging adversarial legal policy reform. An indicator is the law of standing, which regulates access to court. Traditional standing doctrine worked to exclude from court most advocacy groups wishing to challenge government policies or corporate practices. In the last two decades, however, standing doctrine has been greatly liberalized in a number of countries, sometimes significantly more so than in the United States. Standing doctrine is significantly more liberal, for instance, in India (Cassels 1989), Italy (Parker 1995), and Canada (Bogart 1988), and in each case the liberalization was introduced in order to grant interest groups greater influence over various policy processes. Similarly, in a range of countries, lawyers increasingly have taken adversarial, activist approaches to policy change. Getting at lawyers' mode of action is, admittedly a tricky matter, and so only impressionistic measures are at present available. But the impressions given by these measures, in my view, are quite different than those Kagan has drawn. There is a relatively new (and growing) literature on "cause lawyers"—those pursuing entrepreneurial policy activism—in various countries, and the evidence clearly shows that the phenomenon is indeed growing significantly elsewhere (see, e.g., Sarat and Scheingold 1998, 2001). Moreover, associations of plaintiffs' lawyers have been formed in other places in recent years and appear to be increasingly active[6]—England's version is the Association of Personal Injury Law-

5. Although Kagan examined some evidence of the growth of adversarial legalism in Europe in an earlier article (1997), much of that evidence is downplayed in this book.

6. This is contrary to Kagan's claim that such associations are "unique" to the United States (p. 151).

yers, Australia's is the Australian Plaintiff Lawyers Association, and several of the Canadian provinces (Alberta, British Columbia, Ontario, Saskatchewan, and the Atlantic provinces jointly) have similar associations.

Similarly, case filings, or at least the perceived threat of lawsuits, seem to be increasing in other countries, and the litigation rate for some types of suits is similar to that in the United States. In Canada, constitutional litigation under the Charter of Rights and Freedoms has grown dramatically in the last two decades, and litigation over public policy in general is on the rise as well (Epp 1998; Morton and Knopff 2000). In Britain, applications for judicial review (a legal means for testing the validity of administrative action) have increased substantially in the last two decades (Sunkin, Bridges, and Meszaros 1996). In Germany, the tort litigation rate is about the same as it is in the United States, even though Germany has a well-developed social insurance scheme that compensates for personal injuries (a fact, by the way, that seems to call into question Kagan's explanation for the rise of adversarial legalism in the United States) (Markesinis 1990).

Additionally, it is by now widely known that courts elsewhere increasingly have intervened, and intervened increasingly aggressively, in the policy process, particularly in matters related to civil rights and liberties. The scholarly literature on the expanding judicial role elsewhere is truly large and growing, and any list of references is bound to be incomplete (see, e.g., Ahdieh 1997; Bridges 1987; Cassels 1989; Conant 2002; Dotan 1999a, 1999b; Epp 1998; Holland 1991; Morton and Knopff 2000; Stone 1992; Sunkin 1994; Tate and Vallinder 1995).

Perceptions of the threat of litigation also have risen elsewhere (see, e.g., Furedi 1999). The evidence from Britain in recent years is especially clear. A search of British newspaper websites using the term *compensation culture* (a term that roughly equates with what Americans call a *litigation explosion*) turns up dozens upon dozens of news articles and commentaries. Americans reading the growing British genre of "compensation culture" commentary will find much that is familiar. There are the complaints about an explosion of new judicially created rights: one commentator, for instance, opined that "Employment lawyers are on a roll. Every month—every day almost—brings the announcement of new employment rights" (Emmott 2001). There are the complaints that rely on extreme and distorted examples: an unsigned editorial, for instance, complains, "Along with much of our popular culture, we are importing American litigiousness where minor grievances, like burns from scalding coffee, can attract ludicrous awards" (The Price of Pain 2001). There are the complaints about ambulance-chasing lawyers: a commentator thus observes, "Turn on your TV during the day and you'll be bombarded with advertising for 'no win, no fee' personal injury litigation services" (Insley 2001). There is the litany of apparently absurd legal claims or court judgments, among them policemen suing the government for having been witnesses to a disaster, soldiers suing for psycho-

logical damage during wartime, a doctor suing her government employer for pricking herself with a needle and consequently developing a phobia about needles . . . and the list goes on (Toynbee 1999). There is the seemingly inflated but widely repeated estimate of the total societal cost of the compensation culture, put at £6.2 billion by British sociologist Frank Furedi (1999). And finally, there is the doomsday-like warning of a litigation explosion: "Schools face explosion of litigation" reads a recent headline in the *Times* (Carter 2002).

To what extent do these attributes of adversarial legalism encourage, as in the United States, evasive, preventive, or defensive responses? The evidence, it seems to me, is very limited, but much of it suggests that precisely these sorts of effects are appearing in other countries. Observers report that the potential organizational targets of litigation increasingly are taking defensive actions. For instance, a recent survey of British schools found that many have banned common children's playground games for fear of injuries and lawsuits (Kirkman 2000; Thomson 2000). Similarly, according to Dr. David Pickersgill, chairman of the British Medical Association Statutes and Regulations subcommittee, general practitioners are "increasingly litigation conscious," and therefore "are much more likely to refer people for investigations and refer people to specialists earlier in their illness" (Huge Rise 1999). Tellingly, the British government some time ago published a pamphlet aimed at educating its administrators about developments in the law of judicial review; it was titled "The Judge over Your Shoulder" (Cabinet Office 1988). Undoubtedly the overwrought media portrayal of an explosive growth in a compensation culture reflects biases in media coverage of lawsuits and claims, particularly a focus on extreme cases (Bailis and MacCoun 1996; McCann, Haltom, and Bloom 2001; see also Dingwall and Fenn 1994). Yet if the perception of exposure to legal liability and, in response, evasive, preventive, or defensive actions are key attributes of adversarial legalism, then adversarial legalism seems to be on the rise not only in the United States but elsewhere, too.

In the end, is all of this evidence of *convergence?* If by that we mean "becoming precisely the same," I doubt it. But, as Kagan suggests in his response to this symposium, even relatively low levels of adversarial legalism may provoke substantial policy responses. I am struck by the growing evidence that, as the attributes of adversarial legalism spread to other countries, there, as in the United States, relatively low levels of adversarial legal conflict seem capable of producing relatively substantial, cascading secondary effects.

2. Is adversarial legalism exceptionally more costly and less beneficial than alternative bureaucratic approaches?

I also have reservations about Kagan's second broad empirical claim, which is that court-led reforms perform significantly less well than the bureaucratic policies used in other countries. I again focus on a comparison

between the United States and Britain and mainly on criminal justice. Kagan observes that Britain, like the United States, has faced rising crime rates (which, for some crimes, now outstrip rates in the United States)[7] but that Britain, like European countries generally, responded bureaucratically, largely avoiding the exceptional politicization, punitiveness, and adversarial nature of American criminal law—and thereby avoiding the American system's "potential for inconsistency and unequal treatment" (p. 61). Kagan's summary of the failings of the American criminal justice process is compelling, but his brief snapshots of European alternatives seem to me overly truncated and, because any discussion of the characteristic problems found in European countries is left out, overly sanguine.

Kagan applies his thesis with particular sharpness to the American criminal justice system. Beginning in the early 1960s, Americans relied especially heavily on court-centered reform of the criminal justice system in order to impose some degree of rule-of-law consistency and fairness on a process that had been notoriously arbitrary, abusive, and politicized, and which was fragmented by a multitude of different jurisdictions and staffed by relatively nonprofessional officials. Because defense lawyers are, in Kagan's felicitous characterization, the "enzymes" that catalyze a cascading process of mutual checks between judges, prosecutors, and police (p. 74), American reformers focused on defendants' legal rights to counsel and on procedural protections. According to Kagan, although such procedural reforms produced some salutary improvements in the criminal justice system, on the whole they have a very limited reach in comparison to other countries' bureaucratic policies. For instance, adversarial legal reforms do not address persistent racial inequalities and variations in the system by locale, they are ambiguous and thus leave wide room for police abuses, they encourage psychological trickery by police during interrogations, their complexity drives most defendants to plead guilty—and they have provoked a conservative backlash that greatly increased the punitiveness of American criminal sanctions (pp. 77–81, 83–86, 91–96).

By contrast, Kagan claims, European criminal justice systems look quite good on all of these dimensions. Their greater bureaucratic centralization and professionalization minimize variations in treatment among regions of each country (p. 72), and among defendants, regardless of their resources (p. 93), and such systems have largely avoided the American-style politicization of criminal law and increasing punitiveness of the criminal sanction (pp. 72, 93–94). In illustrating his argument, Kagan provides a very telling anecdote regarding British magistrates' courts, which are part of that country's routine tier of justice and which process the vast majority of its criminal

7. Surprisingly, rates of assault, burglary and motor vehicle theft in Britain in the 1990s were significantly higher than in the United States (Langan and Farrington 1998; see also Maguire 1997, 157–69).

cases. He reports (pp. 90–91) that the magistrates' courts have an atmosphere of "benevolent paternalism" and—surprisingly—polite respect for the defendants and their procedural rights. The contrast with the sausage-grinder ambience of American criminal courts is, of course, dramatic.

The reality of British criminal justice, in my view, is dramatically different than Kagan's characterization of it—*and surprisingly similar to U.S. patterns*. At the most general level, Britain has experienced a serious crisis of confidence in its criminal justice system in the last generation. Regarding the police in particular, Robert Reiner, the leading British scholar of the police, has characterized the period since 1969 as a "repeated cycle of scandal and reform" and a "permanent crisis" (2000, 62, 202). Indeed, one has only to read the titles of books by prominent British scholars of criminal justice to get this message. Mike McConville and Lee Bridges edited a volume titled simply *Criminal Justice in Crisis* (1994); Philip Scraton's book on the British police is titled *The State of the Police: Is Law and Order out of Control?* (1985); Ellis Cashmore and Eugene McLaughlin edited a book titled *Out of Order? Policing Black People* (1991); Clive Walker and Keir Starmer's edited volume is titled *Justice in Error* (1993). The list could go on. But the persistent and common theme of much recent scholarship on British criminal justice is that the system is under significant strain and is not performing well.

A key source of the crisis is a growing awareness that race and class discrimination, and police abuse in general, is pervasive in the criminal justice system (Bowling 1999; Choongh 1997; Hood and Cordovil 1992; Reiner 2000). Police in Britain, like their counterparts in the United States, appear to target members of racial minorities and the lower class for more harsh and punitive treatment than members of the white middle and upper classes, particularly through use of their powers to stop and search on the street and to detain for questioning (Bowling 1999; Choongh 1997; Sanders 1997, 1056–59). The police routinely use their powers of detention as a form of leverage in interrogations, and there is much evidence that detention is used disproportionately against members of racial minority groups and the lower class (Sanders 1997, 1060–61). More broadly, the Institute of Race Relations, an advocacy group, has documented (1987) myriad cases of abuse of members of racial minorities by British police officers, which include, among other things, numerous cases of discriminatory street stops and searches of individuals, mass street sweep operations that target whole neighborhoods, excessive use of force during and after arrests, coerced confessions, fabrication of evidence, and deaths in custody due to police violence or failure to provide appropriate medical attention. There are also persistent complaints about racial and class discrimination at the level of police *policy*, that is, above the level of individual officer discretion on the street. As in the United States, the street protests and riots by members of racial minorities in Britain often appear to be provoked by perceptions of discriminatory actions by the police. Thus, the Scarman Report (1981) attributed the Brixton

riots to discriminatory actions by the police and particularly to broad-scale stop-and-search tactics that antagonized many in the Brixton population. That report also sharply criticized the heavy-handed police response to the Brixton riots (Reiner 2000, 204–5). There also have been numerous well-documented cases of "miscarriage of justice"—planting of evidence, the use of duress or torture to extract confessions, fabrication of evidence, failure to report exculpatory evidence, and the like—in antiterrorist investigations (Walker and Starmer 1993).

Moreover, plea bargaining, "adversarial legalism's ugly child" (p. 83), far from being rare in Britain, is as prevalent there as it is in the United States. Nationally, about 85% of criminal cases in Britain are resolved by guilty pleas, and this rate rises to about 90% in the more informal magistrates' courts (Ashworth 1994; Baldwin and McConville 1979, 287). As Baldwin and McConville observed in their study of a crown court, "not only did we find that informal plea negotiation was common but it was also clear that virtually all defendants were exposed to a variety of pressures calculated to induce them to plead guilty" (1979, 292).

Rising crime rates and increasing complaints about the police and criminal justice processes have provoked a continuing attempt to reform British criminal justice policies. On the one hand, contrary to Kagan's characterization, British criminal justice policy has become increasingly politicized and increasingly punitive. Beginning with the 1979 election, in the wake of a major surge in crime rates, the politics of "law and order" became one of the central terms of dispute between the Labour and Conservative parties, with the Conservatives calling Labour soft on crime (Downes and Morgan 1997; Kritzer 1996, 120). Kagan only briefly mentions these developments (p. 69) and does not acknowledge their full extent and very real effects. For instance, the Conservative Party, like the Republican Party in the United States, called for harsher criminal penalties, relaxation of legal checks on police investigations and arrests, and the construction of new prisons. The Conservative Party's anticrime program in the 1990s deliberately relied on imprisonment as a crime-fighting tactic and thus incorporated the famous—or infamous—claim that "prison works" (Home Office 1996) (see, e.g., Ashworth 1997; Morgan 1997). The Conservatives, aided by tabloid newspaper support, presided over a major prison-building boom and a dramatic growth in the British prison population during the decade of the 1990s. In the Crime (Sentences) Act 1997, the Conservatives also introduced mandatory minimum sentences—in particular, a mandatory life sentence for the *second* conviction (a step up—or down—from the American "three strikes and you're out" approach) for a serious sexual assault or other violent act. Although sentences for most major categories of crime are typically substantially longer in the United States than Britain, as Kagan observes, in *both* the United States and Britain the actual sentence time served for several major crimes has increased significantly—and comparably—since 1981 (Langan

and Farrington 1998, 36). As a result, the British prison population grew by more than 40% in the 1990s (*Prison Statistics, England and Wales*, various years).[8] Finally and crucially, with regard to racial disparities, the British imprisonment boom is comparable to the miserable U.S. standard: In both societies, the rate of incarceration of blacks is about six times the rate of incarceration of whites (Langan and Farrington 1998, 49).

If some policy changes in Britain have increased the punitiveness of criminal law, others have increased the degree of centralized, bureaucratized control over the police and prosecutors. Thus, Kagan's comparative thesis is surely correct in noting a bureaucratizing tendency in European criminal justice reforms (p. 79). Under pressure from public critique, various British governments have subjected British policing to a series of analyses, reports, and attempts at legislative reform (Reiner 1991; 2000, 204).[9] The most sweeping of these reforms undoubtedly is the creation, by the Police and Criminal Evidence Act (PACE) of 1984, of a comprehensive legal code governing police conduct, which is comparable to (although less protective of defendants' rights than) American court-led reforms symbolized by *Mapp, Gideon, Miranda*,[10] and their progeny. The British statute imposed a national legal framework on the police, outlining in clear language the powers of the police and the limits on their powers in such matters as criminal investigations, arrests, interrogations, and the like. Similarly, the PACE statute created the Police Complaints Authority, a centralized professional agency external to the police bureaucracy, with a mandate to supervise investigations into abuses of legality by individual police officers (Maguire and Corbett 1991).[11] Additionally, in 1985 the government created the Crown Prosecution Service (CPS), an agency authorized to impose centralized, professionalized prosecutorial authority over police investigations and prosecu-

8. Nonetheless, Kagan is clearly correct that the prison population in Britain remains dramatically lower than that in the United States as a proportion of the total population (in 2000, prisoners numbered 124 per 100,000 total population in Britain compared to the U.S. prison population of 702 per 100,000).

9. Although the British police bureaucracy is, technically, decentralized, it is also increasingly constrained by centralized bureaucratic management. The basic structure for contemporary police administration was created by the Police Act 1964, which introduced a "tripartite" structure, dividing the authority over policing between chief constables (similar to police chiefs in the U.S.), local police authorities (consisting of elected members and judges) with nominal authority over the chief constables for their locale, and the Home Office, a central government ministry. In practice, Reiner persuasively argues, the balance of power lies with the Home Office, because it is the arbiter of conflicts between chief constables and their local police authorities, because it has final authority over appointments to the position of chief constable, and because it has authority to "promote the efficiency of the police," which it exercises through the circulation of centrally coordinated policies (Reiner 1991, 22–24). Reiner has characterized the reforms as increasing even further the degree of centralized, hierarchical control over British police forces.

10. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

11. The PCA is statutorily precluded from investigating complaints about police policies above the level of the individual officer.

tions, with the aim of bringing a consistent rule of law to the prosecution process by checking police decisions to prosecute.

Although Kagan does not mention these statutory reforms, they seem clearly to fit his model of centralized, bureaucratized policy reform. One might fairly ask, then, whether the statutory reforms in Britain have succeeded where the American adversarial legal approach has failed. Kagan rightly criticizes the American solution for its ambiguity, its lack of centralized enforcement mechanisms, and, perhaps as a consequence, its inconsistent application and limited impact. By contrast, the relatively unambiguous British PACE statute, the availability of managerial control over the police in the form of the Home Office, the Police Complaints Authority, and the Crown Prosecution Service might appear to provide a far more effective solution. Nonetheless, the evidence is surprisingly clear and consistent—and largely runs contrary to Kagan's thesis.

With regard to the statutory controls regarding suspects' rights and the process of interrogation, the findings of research on the British police, ironically, closely mirror what we know of the effects of *Mapp, Gideon,* and *Miranda* (see, e.g., Leo 1996a, 1996b; Simon and Skolnick 1988). On the positive side (see Reiner 2000, 180–82), virtually all suspects in Britain are now informed of their rights (when required, during initial processing at the police station); the proportion of suspects requesting and receiving legal advice has increased, so that now about a third receive such advice; and the use by interrogators of legally questionable tactics to extract information has declined. On the negative side, "the information to suspects about their rights is often given in a ritualistic and meaningless way," which may explain why "the overwhelming majority" of suspects don't invoke their rights (Reiner 2000, 181); required procedures are often avoided by gaining the consent of suspects; and, although legally questionable tactics during interrogations declined upon adoption of PACE, interrogators recently seem to be developing what Kagan called, in the American context, "psychological trickery" in order to obtain confessions (p. 92; see Reiner 2000, 182). Finally, PACE's requirement of audio taping of interrogations appears to be widely implemented—but discretion has simply shifted to other areas: police now commonly interrogate suspects on the street or in police vehicles, a practice that is euphemistically known as taking the "scenic route" to the police station (Sanders 1997, 1063–64).

The Crown Prosecution Service (CPS) similarly appears to have failed in its goal of bringing greater professionalism and uniformity to the prosecution process. The CPS was intended to exercise a check on the police by deciding which criminal charges should be carried through. Yet research by McConville and his colleagues (McConville et al. 1994) found that the CPS very rarely drops charges due to weak evidence. The researchers found that the CPS supports the original police charges in such cases for several reasons that are likely to be familiar to American readers: in order to main-

tain support for the police, in the high likelihood of gaining a guilty plea, and in the expectation that even without a guilty plea, a conviction can be gained in spite of weak evidence. McConville et al. thus concluded that the CPS has come to function mainly as an extension of the police rather than as an independent, professional check on them. Partly as a consequence, the variations in patterns of police charges by location and the prosecution of charges remain as extreme after the 1980s-era reforms as before (Sanders 1997, 1071). Moreover, McConville et al. (1994) found that, after passage of PACE (as before its passage), police decisions regarding whom to charge and with what crimes bore little relation to legal rules of evidence and the like, and instead related more directly to police "working rules" regarding the use of the charge as leverage in conducting investigations.

Similarly, the leading research on the Police Complaints Authority (PCA) suggests that there is widespread dissatisfaction with its performance. In prominent cases, the centralized supervision of investigations into complaints against the police "can be vigorous and active" (Reiner 2000, 180). But for average persons—those whom Kagan claims are better served by the European bureaucratic approach—the record is not as satisfactory. For one thing, the PCA has not achieved its goal of bringing uniformity and centralization to the police complaints system. Maguire and Corbett observe that even after institution of the PCA reform, "the complaints system in England and Wales is subject to a confusing array of legal requirements, regulations, instructions to chief officers, and local force orders. It is further complicated by local traditions, which produce considerable variations in practice and in ways of interpreting the regulations" (1991, 19). Moreover, satisfaction with the complaints process is very low. Maguire and Corbett conducted a survey of complainants in three local police forces and found that 90% of them were "dissatisfied" or "very dissatisfied" with the outcome of the investigation and processing of their complaint (fully 68% were "very dissatisfied") (1991, 59). More than half of the respondents complained of efforts by investigators to persuade them to withdraw the complaint (1991, 91). The vast majority of respondents said they would have preferred a truly independent, external investigation of their complaint, and many said they would prefer that the investigators have legal qualifications (1991, 63).

Although, as noted earlier, Kagan (pp. 90–91) suggests that British magistrates' courts—which process the vast majority of criminal cases and do so in a relatively informal manner—provide dignified, fair treatment of defendants, research by McConville and his colleagues (McConville et al. 1994) offers a more gloomy characterization of that institution. Foremost, about 90% of defendants in those courts plead guilty (Ashworth 1994; Baldwin and McConville 1979), and of those who proceed to trial, the acquittal rate (22.7%) is dramatically lower than in the Crown Court (50.2%) where trials are more formal (McConville et al. 1994, 212). McConville and his

colleagues devote considerable effort to interpreting why this gap is so large. In the end, they attribute the lower acquittal rates in magistrates' courts to one basic factor: a heavy reliance by the magistrates on testimony and evidence provided by the police, which leads magistrates to be more conviction-prone than their Crown Court counterparts (McConville et al. 1994, 213–38). If the testimony and evidence provided by police were uniformly reliable, of course, this would not be a problem. But McConville and his colleagues provide considerable evidence of unreliability and duplicity in police testimony in such courts (McConville et al. 1994, 225–37). Thus, they note that their research bears out the widespread perception of magistrates' courts as "police courts" (1994, 226), and they approvingly quote Ashworth's (1994, 62) conclusion that the available evidence "hardly demonstrates faith in magistrates as triers of fact and appliers of law" (1994, 226).[12]

In sum, the British criminal justice process generates persistent and widespread complaints about police brutality, abuse of power by the police, racial and class discrimination, and wide variation in charges against defendants in different locations, all in spite of aggressive attempts to address these problems through centralized bureaucratic reforms. As Philip Scraton has argued (1994, 102) in summarizing the observations of numerous official reports and social scientific studies, "the police habitually break the rules, commit unlawful acts before, during, and after questioning, and fabricate evidence." Sanders has observed that the police treatment of suspects who are poor, members of racial minorities, and young, "*is frequently humiliating—and deliberately so*" (1997, 1068, emphasis added). And Reiner observed that after the 1980s reforms "*the socially discriminatory pattern of use of police powers remains as marked as before*" (2000, 182, emphasis added).

Consequently, British scholars and policy analysts increasingly have called for enhancing the extent of adversarial legal checks throughout the criminal justice process. Philip Scraton approvingly quotes the Legal Action Group's view that "the system is failing because it is insufficiently adversarial" (1994, 101). Reformers have called for provision of better legal counsel for defendants and at earlier stages of the police investigation process. For instance, Bridges and McConville have argued that "potentially the most significant 'safeguard' for suspects is the right of access to free legal advice while in police custody" (1994, 19). Additionally, reformers have called for a more frequent and regular reliance on lawsuit-centered sanctions against police officers and departments (see, e.g., Harrison and Cragg 1991). Moreover—shades of adversarial legalism—some scholars have observed that the extent of litigation against the police is increasing significantly (Dixon and Smith 1998; Reiner 2000).

12. This conclusion is consistent with that of McBarnet (1981), who observed that outside of urban areas many magistrates are laypersons.

Finally, if European bureaucratic reforms of criminal justice are not notably more successful than American adversarial legal reforms, then there is some merit in asking whether the American state is as weak as Kagan assumes. Kagan's view is consistent with a long line of distinguished scholarship. But some scholars are beginning to challenge the conventional wisdom (see, e.g., Carpenter 2001; Dobbin and Sutton 1998). Thus, Dobbin and Sutton (1998) argue that, although the American state is administratively weak, it is "normatively strong": In a wide range of policy areas, national policies have diffused remarkably broadly through a mixture of statutory exhortation and statutory authorization of litigation as a mechanism of regulatory enforcement. In the absence of true administrative centralization, which is very unlikely in the United States, statutory authorization of litigation as a means of regulatory development and enforcement is, arguably, a reasonably effective policy. Thus, I have great difficulty imagining a federal bureaucratic reform of state and local police procedures, but some significant reforms of those matters were achieved through litigation and judicial oversight (Leo 1996a, 1996b; Simon and Skolnick 1988; Walker and Fridell 1993). I have a similar difficulty imagining a federal bureaucratic takeover and reform of state prisons and local jails, but some significant reforms of those institutions were achieved through judicial oversight (Feeley and Rubin 1998). I have difficulty imagining a federal bureaucratic takeover and reform of state school-financing schemes, but some significant reforms of those systems have been achieved through judicial oversight (Bosworth 2001; Reed 2001). And, perhaps ironically, in each of these areas, judicially led reforms have included remarkable accommodations to, or encouragements of, bureaucratic professionalism (see, e.g., Feeley and Rubin 1998). Undoubtedly adversarial legal reforms remain limited in important respects. But I am not confident that cutting off the possibility of such limited reforms would lead to more comprehensive ones. Indeed, I greatly doubt it.

In sum, whether bureaucratic reforms of British policing have a longer reach and avoid the well-known limitations of American-style adversarial legal reforms is highly debatable. The two countries seems to be struggling with a shared set of social problems, and the solutions adopted by each seem at present less than fully satisfactory. At the least, I think it is premature to conclude that court-centered reforms are notably less successful than bureaucratic reforms. Indeed, British reformers increasingly seem to think their country would benefit from a stronger dose of adversarial legalism—and that sort of sentiment may be a key explanation for the indisputable growth of adversarial legalism outside of the United States.

3. Is adversarial legalism the result of a tension between rising expectations and fragmented government?

Kagan's explanatory hypothesis, that adversarial legalism reflects a tension between rising expectations for total justice and the American state's limited bureaucratic capacity, is a big topic and I can only make a few sugges-

tive comments. In general, I largely agree with this aspect of Kagan's thesis, although I believe that factors other than state fragmentation and rising expectations have contributed to adversarial legalism. One factor, as I have written elsewhere (Epp 1998), is the growing availability of resources for the legal mobilization of rights claims. Another is the tension between rising expectations of justice and bureaucracy per se—or, more particularly, the well-known tendency of bureaucratic organizations toward unresponsiveness to individual complaints. In response, bureaucratic organizations for some years have turned to mechanisms of internal oversight and adjudication. Yet even these mechanisms commonly remain subject to complaint. Thus in recent years pressure has grown for mechanisms of *external* oversight (see, e.g., Goldsmith 1991). In many countries, perhaps due in part to the American example, courts have emerged as popular mechanisms for external oversight of bureaucracies. Intriguingly, just as pressures for external oversight in other countries have increased, American organizations increasingly have attempted to further internalize and control complaints by individuals (Edelman and Suchman 1999).

Finally, surely the robust international exchange of ideas about rights, courts, and judicial policymaking has contributed to the spread of certain aspects of adversarial legalism. Thus, Anthony Lester, a distinguished English barrister, has written of the "overseas trade in the American Bill of Rights" (1988, 537). Kagan (1997) is quite right in claiming that the American influence overseas in things legal is somewhat greater in the area of *norms* than in the area of *processes* and *remedies*. Yet the extent to which other countries have been turning toward not only rights-based norms but also adversarial legal processes and remedies is striking. Britain's law against sex discrimination is based directly on the American Civil Rights Act of 1964 and authorizes enforcement of its terms both by a government agency and by individual complaints and lawsuits (Hepple 1983; Meehan 1985). Similarly, Austrian law on sexual harassment is based directly on U.S. law, both in its substantive terms and in its authorization of both agency enforcement and individual litigation (Cahill 2001). In sum, although fragmented government surely contributes to adversarial legalism, fragmentation to the degree found in the United States does not seem to be a necessary condition for its development, and other factors seem to contribute much as well.

CONCLUSION

Adversarial Legalism is an elegant and challenging book. Robert Kagan's analysis of the differences between the United States and other countries in legal processes and legal style is illuminating, and his normative commitment is compelling. I hope and expect that the book will encourage further careful comparative research, particularly on the relationship among courts,

bureaucracy, and the policy process. And I hope that subsequent research will be as alive to normative issues, particularly the issue of fairness and equity in legal systems. At the same time, I urge researchers building on *Adversarial Legalism* to take into greater account the considerable degree of shared change among countries. I believe that much of the comparative legal research of the last generation demonstrates that the United States is not, as Kagan argues, exceptional in many of the attributes of adversarial legalism, nor is the limited reach of adversarial legal reforms exceptional.

The similar trajectories among economically advanced democracies (and even among others as well), as I have suggested here, reflect similar conditions and similar policy responses to those conditions. Populations in many countries expect more from their states, and many of the social problems found in the United States are now found elsewhere as well. Modern states also have developed a mix of bureaucratic and judicially centered policy responses to these expectations and problems. Moreover, in recent decades there has been a growing convergence among countries toward similar policy responses. Significantly, in those countries where bureaucratic approaches once dominated—and Kagan is surely correct that these approaches predominated outside of the United States—judicial checks on bureaucracy are increasingly appearing. And in countries where judicial approaches once dominated—and clearly the United States is, as Kagan argues, the paradigmatic example—bureaucratic approaches have gained ground.

Kagan's book is part of a long line of arguments in favor of bringing more of European policy to American shores (see, e.g., Rodgers 1998). Yet the trade in ideas clearly now goes both ways across the Atlantic. Perhaps adversarial legalism and its cousin bureaucracy increasingly are global phenomena.

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