Annual Review of Law and Social Science

Untangling the Concept of Adversarial Legalism

Jeb Barnes[1] and Thomas F. Burke[2]

[1]Department of Political Science, University of Southern California, Los Angeles, California 90089, USA; email: barnesj@usc.edu

[2]Department of Political Science, Wellesley College, Wellesley, Massachusetts 02481, USA; email: tburke@wellesley.edu

Annu. Rev. Law Soc. Sci. 2020. 16:473–87

First published as a Review in Advance on July 6, 2020

The *Annual Review of Law and Social Science* is online at lawsocsci.annualreviews.org

https://doi.org/10.1146/annurev-lawsocsci-041620-083410

Keywords

adversarial legalism, judicialization, legalization, juridification, comparative law, Robert A. Kagan

Abstract

The concept of adversarial legalism has been widely used by scholars of law, public administration, public policy, political science, sociology, and Law and Society, but the varying ways in which the concept has been employed raise concerns that it has become stretched to the point of incoherence. We argue that adversarial legalism entails both a style, an everyday practice of dispute resolution and policy making with distinct attributes, and a structure of governance that can be compared to other structures of authority. Untangling these aspects of adversarial legalism allows us to make sense of its different uses and identify future avenues of inquiry. Despite its wide application, adversarial legalism is in fact underutilized, especially in studies aimed at understanding consequences of judicialization, legalization, and juridification in the United States and abroad.

INTRODUCTION

Kagan's (2001, 2019) *Adversarial Legalism: The American Way of Law* has been enormously influential, contributing to debates in law, public administration, public policy, political science, sociology, and his native field of Law and Society. The book, first published in 2001 and updated in 2019, is ambitious and wide-ranging. Although *Adversarial Legalism* focuses on the legal system in the United States, making a core argument about how Americans have governed themselves over time and across criminal, civil, constitutional, and administrative law, it is also inherently comparative. Kagan repeatedly contrasts American law with that of other affluent nations, making the book much more global than its title portends.

Part of what makes the book so useful—as we write it has more than 1,400 Google citations and counting—is the resonance of its core concept. Critics of American litigiousness use "adversarial legalism" to summarize all they think is wrong with American law and policy making (Derthick 2002, Fukuyama 2014). For them, adversarial legalism is a term of opprobrium, a label that captures what makes litigation such an ungainly, expensive, and ultimately inadequate mechanism for solving policy problems and rectifying injustices. On the flip side, some highlight the heroic side of adversarial legalism and litigation in vindicating individual rights, holding powerful interests accountable, and providing remedies when other levels and branches of government refuse to act (Barnes 2009, Bogus 2001, Crohley 2008, Mather 1998, McCann & Haltom 2018). Others use adversarial legalism descriptively and abstractly, as a way of delineating types of legal systems and placing developments in a broader framework, as in debates over "Eurolegalism" (Bignami 2011, Bignami & Kelemen 2018, Kelemen 2011) or efforts to describe emerging legal regimes, like the system for coping with auto accidents in Russia (Hendley 2018). Adversarial legalism is also used as a kind of marker to analyze struggles within the United States over litigation and regulation, as in Melnick's (2018a) recent book on Title IX, Witt's (2007) analysis of auto accident litigation, Feeley & Swearingen's (2018) study of California's responses to prison litigation, Nolette's (2015) examination of the increasing role of state attorneys general in American politics, and several studies of the rise of the litigation state and its retrenchment (Burbank & Farhang 2017, Dodd 2015, Farhang 2010, Staszak 2015).

At first glance, this literature seems like a hopeless tangle. Yet we argue that it is more like a braid of several strands, each reflecting aspects of Kagan's dual conception of adversarial legalism. This conception defines adversarial legalism as a style of dispute resolution and policy making, a set of everyday practices with a series of characteristic attributes, and a structure of governmental authority, a way of organizing power that profoundly influences society. Kagan's distinct approach to empirical research reflects this duality by combining richly detailed case studies with sweeping comparative institutional analysis (Burke & Barnes 2018).

Although adversarial legalism's double-sidedness ensures wide applicability, its pliability may lead scholars to dismiss it as too amorphous. As Sartori (1970) warned long ago, the drive of scholars to apply concepts across diverse contexts can lead to concept stretching, wherein concepts are warped beyond coherence. The challenge is to conceptualize adversarial legalism in a way that allows it to travel across settings and policy areas, a productive enterprise, without becoming distorted in the process (Collier & Mahon 1993). To meet that challenge, we untangle the two sides of adversarial legalism and illustrate their distinctive analytic domains and avenues of inquiry. We believe adversarial legalism is best used not as a shorthand for litigation or a cluster of attributes associated with lawsuits but instead as a tool for comparison. Kagan's typology of legal style and of different structures of governmental authority helps capture variation in a world that is becoming increasingly "legalized" and "judicialized." This framework allows sociolegal scholars to address fundamental questions: What is this a case of? Compared to what? Answering these questions is essential for understanding a world that, in Kagan's (1995) words, has too much law to study.

To develop this argument, we discuss each aspect of adversarial legalism in turn, offering examples of recent work that illustrates them and considering possible paths moving forward within them. We end with some thoughts on the power of adversarial legalism to raise new questions and so reframe scholarly debates. We believe that despite its wide usage, adversarial legalism has in fact been underutilized, especially in exploring the consequences of growing legalization, judicialization, and juridification across the globe.

ADVERSARIAL LEGALISM AS EVERYDAY PRACTICE

Adversarial legalism is often used as a negative label for an American style of governance that allegedly relies too much on litigation. Fukuyama's (2014) *Political Order and Political Decay* provides a particularly vivid example. Fukuyama treats adversarial legalism as one of several symptoms of the decay of American government. Growing adversarial legalism marks decline, Fukuyama contends, because it reflects a misalignment: Functions that should be handled by executive branches and legislatures have instead been invested in the judiciary (see also Derthick 2002, Fuller 1978, Horowitz 1977, Schuck 1986). Fukuyama (2014, p. 474) notes, for example, that in nations with stronger bureaucracies, such as Sweden and Japan, political conflicts are handled "by quiet consultations among interested parties." Regulations established through these consultations can then be subject to scrutiny and debate through the legislative process. In the United States, by contrast, "policy is made piecemeal in a highly specialized and therefore nontransparent process by judges" who never face election (p. 474). The result, Fukuyama (2014, p. 474) says, is "[u]ncertainty, procedural complexity, redundancy, lack of finality, high transaction costs."[1]

Fukuyama's description of adversarial legalism is rooted in a list provided by Kagan. Fukuyama's collection of negative attributes has rhetorical appeal, allowing him to use adversarial legalism as a shorthand for what ails American policy making. Yet Fukuyama truncates Kagan's list, which is not nearly as one-sided as Fukuyama implies. Specifically, Kagan (2019, p. 8) defines adversarial legalism as a style of policy making and dispute resolution with the following characteristics:

> (1) more complex bodies of legal rules; (2) more formal, adversarial procedures for resolving political and scientific disputes; (3) a much larger role for private lawsuits in enforcing antidiscrimination, consumer protection, and regulatory law; (4) more adversarial and costly forms of legal contestation; (5) stronger, more punitive legal sanctions; (6) more frequent judicial review of and intervention into administrative decisions and processes; (7) more political controversy about legal rules and institutions; (8) more politically fragmented, less closely coordinated decision-making systems; and (9) more legal uncertainty and instability.[2]

Some of these attributes, such as costliness and uncertainty, seem unequivocally negative at first glance, but even these attributes may have hidden benefits if the threat of expensive and unpredictable lawsuits deters organizations from misconduct or provides activists leverage in ongoing reform efforts (Epp 2009, McCann 1994). Other attributes seem neutral in their effects. How one judges frequent judicial review, or more formality in resolving disputes, depends on how one feels about judicial review and legal formality. A third group of attributes are framed negatively but could easily be interpreted more positively. Is adversarial legalism "uncertain and unstable" or potentially "flexible and creative," open to innovative legal arguments and policies? Is adversarial legalism "fragmented" and "uncoordinated," or "more accessible" and "less hierarchical" than

[1]In the text, Fukuyama (2014, p. 474) attributes this list to Farhang (2010), but in a footnote (p. 595, footnote 6), he cites an unpublished paper by R. Shep Melnick as the source.
[2]Note this is a slightly different (and longer) list than the one in the first edition (Kagan 2001, p. 7).

bureaucratic forms of policy implementation and dispute resolution, and thus more responsive to novel claims?

Fukuyama's negative spin is perhaps understandable given Kagan's emphasis on the costs of adversarial legalism. Kagan (2001, pp. 32–33) gives two reasons for stressing the negative. The first is that "pathological cases have diagnostic value, revealing fundamental system mechanisms. If we understand the reasons for the adverse effects of legal institutions and practices, they perhaps can be altered for the better" (p. 32). The second is that these costs matter, producing wasteful "defensive medicine," chilling the assertion of just claims, undermining faith in the legal system, inviting political backlash, and distorting and delaying administrative processes. Moreover, the cost and complexity of adversarial legalism can disproportionately favor repeat players, who can game the system to bend the rules in their favor over time while harming one-shotters, who lack the resources and strategic advantages to play the game at all (Galanter 1974, Kritzer & Silbey 2003, Talesh 2015). In practice, adversarial legalism can fail both organizations and individuals, as it is often too costly for ordinary claimants to use and too unpredictable for organizations to plan for (Kagan 2019).

Despite the negative cast of his analysis, Kagan's normative assessment of adversarial legalism is far more nuanced than Fukuyama's. Throughout his work, Kagan explicitly acknowledges "The Two Faces of Adversarial Legalism," as chapter two of his book is titled, and repeatedly offers cases that embody its virtues. Indeed, the latest version of *Adversarial Legalism* (Kagan 2019) seems to place greater emphasis on its benefits in contemporary American politics, particularly given the difficulty of creating meaningful alternatives in the current polarized politics inside the Beltway.

The fact that adversarial legalism is part blessing, part curse invites some kind of overall reckoning—is it a net negative or a net positive? But Kagan (2001, p. 32) declaims such an accounting, explaining that "gathering the data, coding the outcomes, and comparing incommensurable consequences (better prison conditions versus the toll on economic well-being due to legal imposed opportunity costs) all present unfathomable problems." We agree. Consider an admittedly mundane example from our own research on laws designed to give people who use wheelchairs access to public facilities (Barnes & Burke 2006, 2012). As part of this study, we looked at a small restaurant chain that had been hit by a disability access lawsuit. Management was scornful of the litigation, which it deemed frivolous, a shakedown commenced for a quick buck, and in fact one of the plaintiffs was later found to be a "vexatious litigant." But the lawsuit resulted in tangible changes to the chain's facilities that made them considerably more accessible to people with wheelchairs than similar restaurants. How should we weigh the burdens of the process, with its typically high transaction costs, against the outcome, changes in line with the goals of disability access law?

Epp's (2009) *Making Rights Real* raises similar issues in its systematic analysis of litigation aimed at local governments. In the book's introduction, Epp (2009, p. 9) identifies Kagan as a potential foil, citing him as a leading critic of legalization and proponent of the idea that excessive litigation encourages "practicing professionals to adopt law-modelled policies that serve no sensible purpose other than to satisfy the courts." In making his argument, Epp zeroes in on many of the same aspects of adversarial legalism that Fukuyama derides, including its use of private lawsuits to address complex social and policy issues and its costs and uncertainty. But for Epp, these attributes are productive because they result in the "fertile fear of litigation," fertile because it leads organizations to make socially beneficial changes in their operations.

Using a combination of survey analysis, comparative case studies, and historical process tracing, Epp finds that the credible threat of litigation significantly corresponds with the extent local governments invest in "legalized accountability." Epp defines legalized accountability

as an administrative model that states its commitment to legal norms, provides training and communication systems to convey the importance of these norms, and uses internal oversight to assess progress in changing existing practices while adjudicating violations. When juxtaposed with Fukuyama's account, Epp's argument dramatically underscores the double-sided nature of adversarial legalism as a style of legal practice, as even its ostensibly negative attributes of costliness and unpredictability can have positive radiating effects.

An additional challenge for assessing the costs and benefits of adversarial legalism is identifying a baseline for assessment (McCann & Haltom 2018). Kagan's implicit (and Fukuyama's explicit) comparison is between adversarial legalism and well-run bureaucratic schemes that are predictable and cost effective. In theory, a proficient government agency would level the playing field by socializing costs of adjudication and enforcing policy more efficiently than judges and private litigants through a series of uncoordinated lawsuits. But in the United States, as elsewhere, the choice is often litigation or nothing at all. And even when there are feasible alternatives, they are typically systems that fall well short of a fully rational Weberian bureaucracy free from "capture" by powerful interests (Rubin & Feeley 2003). From this perspective, inefficient, expensive, and unpredictable lawsuits may be the only viable option, or the best among imperfect alternatives. Asbestos litigation, for example, has undoubtedly come to represent many of the worst excesses of adversarial legalism. It has been costly, slow, erratic, and, at times, riddled with unscrupulous and even fraudulent claiming practices. Yet litigation ramped up only after it became clear that workers' compensation programs were providing asbestos workers woefully inadequate compensation and Congress had already refused to act. Moreover, courts did not jealously guard their turf as the stereotypical bureaucratic agency might. As the limitations of asbestos litigation came into focus, judges repeatedly begged Congress to intervene, but Congress failed to do so. Under these circumstances, legislative paralysis seems more central to the ultimate policy failures in asbestos injury compensation than the limits of adversarial legalism (Barnes 2011).

Given the challenges of measuring, weighting, and assessing the costs and benefits of the American style of litigation, how should scholars interested in saying something about them proceed? Although aggregate accounts seem to us, as to Kagan, unpersuasive and even pointless, simply stating that adversarial legalism involves trade-offs seems anodyne at best and, at worst, glosses over its shortcomings.

We see two paths forward. One is attempting to develop limited generalizations—or what Merton (1968) once called "theories of the middle range"—about the substantive realms or stages in the policy-making process where adversarial legalism's characteristic strengths are more relevant than its weaknesses. So, in our work on injury compensation policy (Barnes & Burke 2015), we found adversarial legalism helped uncover the problems of asbestos and vaccine injuries. As the policy challenge shifted from getting victims' claims recognized to providing them fair and predictable compensation, though, the uncertainty and high costs of the tort system became more and more problematic.

This finding dovetails with Witt's concept of "mature torts," fields in which the law and the procedure for compensating victims of some injury are well-developed, classically auto accidents. Witt observes that the tort system under these circumstances shifts over time, losing some of its adversarial legal character. In Kagan's terms, "uncertainty and instability" are reduced, and so the system becomes bureaucratized, but in a funny way: It is bureaucratization by insurance companies and a network of plaintiff lawyers. Unfortunately, the system retains one very negative feature of adversarial legalism: high transaction costs (Issacharoff & Witt 2004, Witt 2007).

Beyond tort, we see some instances of adversarial legalism challenging entrenched practices and disrupting unjust status quos (Epp 2009, Sabel & Simon 2004). Classic examples are the use of litigation to confront segregated schools (Francis 2014) and prison conditions (Feeley & Rubin

1998). Others include uncovering the behavior of predatory priests in the Catholic Church (Lytton 2008) and corporate misconduct in the opioid crisis (Gluck et al. 2018). In some cases, adversarial legalism offers a means of addressing policies that the elected branches seem unwilling to take on, such as acid rain, climate change, and distortions in drug pricing (Nolette 2015). Taken together, these cases suggest that adversarial legalism's openness and fluidity can be especially valuable at the early stages of a policy cycle, when problem definition, information gathering, agenda setting, and mobilization are crucial. These strengths seem less relevant in the later stages of the policy cycle, where concerns about efficiency and consistency predominate. A similar type of analysis might be used to identify issue areas in which the strengths of adversarial legalism are most significant and others in which its weaknesses loom large.

Another potential path forward is to rethink Kagan's definitional list of attributes, which reflect findings of a large body of comparative public policy research. In Kagan's telling, these attributes tend to hang together in the American context. That said, it is possible to imagine styles that have some of these attributes but not others: highly punitive legal sanctions, for example, but greater legal certainty and stability. Indeed, we see no particular reason to believe that all of Kagan's attributes coincide, especially outside of the United States, a point that emerges in a recent colloquy on adversarial legalism in Europe between Bignami & Kelemen (2018). Accordingly, we might think of Kagan's list as an inventory of individual variables as opposed to a fixed set of closely related characteristics. We can then explore what happens when specific attributes of legal practice vary over time and across policy areas. Although these types of studies would not settle debates about adversarial legalism's net costs and benefits, which may be intractable anyway, they would yield useful insights into the consequences of how law is practiced, which is central to Kagan's research agenda.

To illustrate, we might recast Gash's (2015) study of the varied ways in which lesbian and gay activists have used litigation in their quest for equality. Gash compares the high-profile litigation campaign for marriage equality, including landmark cases such as *Windsor v. United States* (2013), with the concurrent yet much more obscure efforts in family courts to gain adoption rights. Gash asks, To what extent do the visibility and political contentiousness of a litigation campaign affect its propensity to trigger a political backlash? Gash is contrasting two litigation campaigns that have many attributes of adversarial legalism but differ on one of its stylistic hallmarks: political controversy about legal rules and institutions. She finds that the quiet, below-the-radar campaign for adoption rights evoked much less backlash than the prominent campaign for marriage, even though for social conservatives the issues of same-sex marriage and family adoption are equally fraught.

Gash's finding points to the utility of decomposing generalizations about the practice of litigation and adversarial legalism. It is not the case that all, or even most, litigation campaigns generate political controversy, and it may be possible that the effectiveness of strategies varies across policy areas and groups. So, whereas the attributes Kagan lumps together as an aggregate style do seem to offer a useful contrast to the styles of legalism of other affluent countries, more fine-grained studies like Gash's can illuminate how variations in these attributes within countries and across policy domains can affect our understandings of adversarial legalism as a legal practice—and contribute to the broader project of theorizing about how, when, and for whom different styles of advocacy advance social and political goals.

ADVERSARIAL LEGALISM AS A MODE OF GOVERNANCE

Kagan defines adversarial legalism as a style through a list of attributes. His structural definition is quite different. Drawing on typologies developed by Mashaw (1985) and Damaska (1986), Kagan

employs a 2 × 2 table that distinguishes adversarial legalism from other forms of governance. In the table, each cell represents an ideal type of regime for dispute resolution and policy making.

The horizontal axis is the level of formality in defining and determining the underlying claim, meaning the degree to which decision makers use preexisting rules and procedures in making and implementing policy. Formal policy making features all the machinery of legal decision making: rules, records, documents, and written procedures. Informal processes, by contrast, rely on case-by-case decision making that rests on professional or political judgments. The vertical axis refers to the degree of centralization of decision-making authority, ranging from hierarchical structures that are controlled by a governmental official from the top down to participatory structures that are driven by contending interests from the bottom up.

Adversarial legalism is formal and participatory, meaning that the parties (and their representatives) resolve disputes and make policy by arguing over the meaning of substantive standards and procedural rules, the application of these standards and rules to the decision at hand, and the intrinsic fairness of both the standards and procedures. There are official decision makers, but they serve as referees and do not predominate. American civil law, in which parties bring actions under general legal principles, is a paradigmatic case. The parties and their lawyers have the primary responsibility to initiate the process, frame the dispute, collect and present the evidence, and argue over the procedural rules and the application of the law to the facts.

Bureaucratic legalism is formal and hierarchical. It connotes an ideal Weberian bureaucracy in which civil servants implement policy according to rules, as, for example, in social insurance programs in which compensation is based on detailed payment schedules. Whereas adversarial legalism places a premium on particularized justice—treating each case according to its individual merits—bureaucratic legalism emphasizes uniform justice, treating like cases alike.

Informal modes of policy making do not use preexisting rules to resolve disputes. Expert or political judgment is the hierarchical version, and its ad hoc decision making may rest primarily on scientific expertise, as when the National Transportation Safety Board investigates an airplane crash, or a mix of scientific knowledge and political judgment, as when the Environmental Protection Agency decides to regulate a pollutant. Negotiation/mediation is informal and participatory. It covers any situation in which decisions must be made among roughly equal parties. Depending on the details, QUANGOs—quasi-autonomous nongovernmental organizations—might fall into this box, as stakeholder representatives are appointed to official forums to bargain over important policy issues. Legislatures, to the extent they are nonhierarchical, would fall into this box as well (**Table 1**).

This framework is versatile. In his writings, Kagan examines both the causes and consequences of adversarial legalism, treating it both as an outcome to be explained and as an explanatory factor. He attributes the growth of adversarial legalism in the United States primarily to the conjunction of two forces, a demand for "total justice" that gained momentum in the 1960s and 1970s, combined with a governmental structure and political culture that resisted the creation of a European-style welfare state. The result, Kagan contends, is a less centralized, more chaotic government response in which courts and litigation take on more authority (Kagan 2019, pp. 41–70; see also

Table 1 Four modes of policy making (Kagan 2001)

Organization of decision-making authority	Decision-making style	
Hierarchical to Participatory	**Informal to Formal**	
	Professional or political expertise	Bureaucratic legalism
	Negotiation/mediation	Adversarial legalism

Melnick 2018b). But much of Kagan's work uses adversarial legalism as an explanation for various aspects of American public policy. For example, he contrasts the criminal and civil justice systems in the United States and Germany, arguing that American adversarial legalism results in more inefficiency and unpredictability than the German bureaucratic model (Kagan 2019, pp. 84–96, 134–46).

Hamlin's (2014) *Let Me Be a Refugee* nicely builds on the use of Kagan's typology as an explanation for policy outcomes. Her study looks at how three nations, Canada, Australia, and the United States, handle applications for asylum. Scholars have typically framed such comparative research as a tension between international pressures for convergence and domestic sources of divergence from global norms. Their studies treat the nation as a unitary actor often pushing back against international pressure to accommodate refugees. Hamlin shows the limitations of this framework through a careful comparison of the refugee status determination processes within each country. Hamlin uses Kagan's framework of systems of authority—adversarial legalism versus the other modes of governance—to explain outcomes that might otherwise seem anomalous.

Canada, she shows, has empowered an agency, the Refugee Protection Division, that Canadian courts generally defer to, very much in line with Kagan's professional treatment model. Australia, Hamlin (2014, pp. 101–17) concludes, has a much weaker immigration authority. The Australian system in Hamlin's portrayal is a "bouncing ball" between courts and the Parliament, with restrictionist political sentiments predominating. The United States, by contrast, embodies adversarial legalism, with many "different points of access to the process, different sites and forms of decision making" combined with "low levels of insulation from political tinkering" (p. 82). In the United States, federal courts frequently overturn the decisions made in the executive branch, and because the courts themselves are divided on key issues, the result is "turf battles, inconsistency, and unpredictability" across cases (p. 82). The structure for deciding refugee cases, then, is both formal, based on legal principles and legal argument, and participatory, with parties able to bring novel claims across many venues, approximating the ideal type of adversarial legalism.

The very different refugee status processes within each country profoundly shape how each nation deals with similar asylum issues. Hamlin (2014, p. 188) argues that "domestic struggles over asylum policy are only partially about how generous to be to immigrants." In Hamlin's account, they are just as much about turf battles among courts, legislatures, and bureaucracies, struggles that Kagan's framework helps to illuminate. The insulation of the Canadian immigration system from parliamentary politics in favor of a professional treatment regime has enabled a more generous policy toward refugees; the frequent incursions of the Australian parliament have generally created a more restrictionist policy; and the adversarial legal structure of refugee determination in the United States has produced a more fluid, unpredictable system, generous in some cases and restrictionist in others.

Hamlin's finding jibes with our own conclusions about the effects of adversarial legalism in *How Policy Shapes Politics* (Barnes & Burke 2015), which compares bureaucratic and adversarial approaches to personal injury compensation policies within the United States. As in Hamlin's account, adversarial legalism resulted in more uneven outcomes, with some victims receiving great sums and others receiving none at all. Bureaucratic legalism, by contrast, tended to produce more even compensation. This difference in policy, we found, also tended to result in a different kind of politics. Adversarial legalism's uneven allocation of costs and risks pitted a complex patchwork of winners and losers against one another, creating a pluralistic, chaotic politics; bureaucratic legalism's tendency to smooth out cost and politics created a more technocratic politics. This pattern was augmented by the tendency of adversarial legal policies to privatize fault for injury and assign blame to specific actors, as opposed to the tendency of bureaucratic legal policies to frame the problem in more social, collectivized terms. Further exploring the political fallout from reliance

on adversarial legalism and its counterparts would build on Kagan's work, which focuses on its administrative consequences in the form of greater costs, delays, and unpredictability.

Before we turn to the ways in which we think adversarial legalism has been underutilized, a few caveats are in order about the structural definition of adversarial legalism. First, whether it is used as an outcome or an explanation, Kagan's 2 × 2 table connotes ideal types that do not correspond exactly to any empirical example. It is easy to overlook this and reduce adversarial legalism to "courts and litigation" and bureaucratic legalism to "bureaucracies and administration." In fact, even in the United States, courts vary quite radically in the key variable that separates adversarial legalism from bureaucratic legalism, the degree of centralization of the decision-making process. The researcher must consider the extent to which aspects of the decision-making process are dictated from above rather than argued over by two rival parties. For example, administrative courts in the Social Security Administration (SSA) operate with relatively well-defined rules and procedures, making SSA appeals relatively unparticipatory: The applicant who is appealing does not have much room to make procedural or substantive objections. The researcher must also consider the relative power of parties versus judges. Courts both in the United States and elsewhere vary in the degree to which the judge controls the proceedings; the more dependent the process is on parties, the more participatory and thus closer to the adversarial legal ideal. On the flip side, even bureaucratic agencies can have participatory elements. A regulatory agency that responds to complaints is more participatory, and thus slightly less hierarchical, than an agency that decides for itself in which cases to investigate and enforce the law, which is more in line with the bureaucratic legal ideal.

Almost all real-world examples, then, fall between the ideal types in **Table 1**; courts are more or less adversarial legal in type, and bureaucracies are more or less hierarchically legal. This can create measurement issues as we try to locate different regimes on these continua. But, as developed more fully in the next section, this variation can be useful for researchers. Instead of treating adversarial and bureaucratic legalism dichotomously, researchers should think of them as creating a spectrum and locate cases along this spectrum. In our work on injury compensation policies, for example, we found that as the policies shifted in structure, moving along the spectrum from the adversarial legal pole to the bureaucratic legal pole, there were corresponding shifts in the nature of the politics associated with these policies. This variation provides some leverage in assessing the extent to which changes in structure, as opposed to other factors, explain changes in outcome, an assessment that is always tricky from a methodological perspective.[3]

A second caveat is that there is no necessary relation between adversarial legalism as a structure and adversarial legalism in practice. The criminal justice system in the United States is adversarial legal in structure, providing extensive opportunities for litigants to challenge both criminal laws and the procedures used to enforce them. Yet in practice, very few defendants use these opportunities. As a result, although the structure of American criminal law is highly participatory, in Kagan's terms, in practice it is dominated by plea bargaining under the auspices of prosecutors, making it arguably distinctively unparticipatory. This pattern goes well beyond criminal law. As decades of sociolegal scholarship have demonstrated, contrary to their image as sue-happy litigants, Americans typically forgo opportunities to press claims, settling quickly or "lumping" their potential grievances (Abel 1988, Miller & Sarat 1980, Sandefur 2014). Adversarial legalism as a structure seems to invite participation, but for individuals and organizations the costs of participation may in practice prove too steep.

[3] In experimental terms, we can think of observing a "dose effect" among cases involving adversarial legalism, hybrid regimes, and bureaucratic legalism (see Barnes & Hevron 2018).

A closely related caveat is that adversarial legalism does not create equal opportunities for all groups seeking to use it. In the popular imagination, adversarial legalism is often seen as a tool of the have-nots, and of progressive groups seeking to change society on their behalf. So, civil rights groups have used the structures of adversarial legalism to challenge segregation, biased election practices, and discriminatory employment practices. Environmental groups have used litigation to spur the cleanup of toxic waste sites, force the state and developers to consider environmental impacts, and protect critical habitats of endangered species. But adversarial legalism can also be used by the haves. Indeed, it is the repeat players, typically savvy, affluent organizations, who are best positioned to capitalize on the opportunities created by an adversarial legal structure (Galanter 1974, Kritzer & Silbey 2003, Talesh 2015). Business interests, to take one example, regularly use adversarial legalism to their advantage, employing it, for instance, to undermine the mobilization of antidiscrimination statutes, tort law, and consumer protections (Berrey et al. 2017, Daniels & Martin 2015, Edelman 2016, Edelman et al. 2011, Nielsen et al. 2010, Talesh 2009). Business interests also have access to sophisticated lawyers, who have created strategies that, for example, use class actions and bankruptcy to limit liability, rewrite union contracts, and discharge debts (Coffee 1995). The state, in many ways the ultimate repeat player, has used the criminal justice system for mass incarceration and the prosecution of a punitive war on drugs. Moreover, as Murakawa (2014) argues in *The First Civil Right*, it is important to remember that building the carceral state has been a bipartisan project, as both liberals and conservatives invested in the structures of adversarial legalism—more rules, more legal contestation—in reforming the criminal justice system following the Second World War, first in the name of reducing arbitrary policing and then under the guise of restoring law and order. Adversarial legalism as a structure, then, may be politically appealing to a wide range of political interests (Burke 2001, Farhang 2010) and used for ideologically liberal and conservative ends (Keck 2014). But however it is used, it is inherently complex, and this complexity requires resources, representation, experience, and time, which are beyond the reach of many ordinary individuals (Galanter 1974, Kritzer & Silbey 2003, Talesh 2015).

USING ADVERSARIAL LEGALISM TO ASK NEW QUESTIONS: EUROLEGALISM AND BEYOND

The concept of adversarial legalism leads us to see legal systems in new ways and ask new questions about them. Perhaps the most obvious example concerns Kagan's pathbreaking work on whether adversarial legalism—or some variant of it—is taking root in other countries (Bignami & Kelemen 2018). After publishing his first essays on adversarial legalism in the American context, Kagan began to consider whether the American way of law was truly distinct or emerging abroad, especially in Europe, where the rise of the European Union created a governmental overlay on nation states that had shown signs of encouraging litigation.

In a widely cited article, Kagan (1997) argued that although the European Union created new opportunities for litigation, many entrenched features of European legal culture and legal institutions would dampen the spread of adversarial legalism. Europe, Kagan pointed out, did not have contingency fees, massive damage awards, and other rules that fostered litigation. Moreover, European elites had learned about the pathologies of American-style adversarial legalism and so would guard against them. Cioffi (2009) largely agreed, finding claims of spreading adversarial legalism in corporate governance law in the United States and Germany to be greatly exaggerated, as the United States placed limits on shareholder suits and Germany resisted private litigation during a round of reforms following the 1990s.

Scholars like Kelemen (2011) have disagreed, contending that the European Union has encouraged the rise of "Eurolegalism," a close cousin of adversarial legalism. The gist of Kelemen's

argument is that policy makers in Brussels believed that national systems of regulation centered on closed networks of elites impeded integration. In response, they sought to create freer markets through deregulation, which led to more rules and greater reliance on private enforcement through the courts (see also Vogel 1996). Meanwhile, the fragmented nature of the European Union and its relatively limited administrative capacities reinforced these trends. As in the United States, fragmentation of political authority created principal-agent problems that engendered distrust within and across levels of government, leading to more participatory, less centralized policies that rely on judicial enforcement and encourage private actors to turn to the courts (see also Bignami & Kelemen 2018).

Bignami (2011) provides an alternative account. She maintains that "a cooperative legalism" is rising within Europe, which is more formal and legalistic than traditional forms of European regulation but reflects the more cooperative and corporatist forms of governance already in place. The empirical debate surrounding European legalism continues, but the use of Kagan's framework has enriched it by offering a common set of concepts to organize competing characterizations of institutional developments and focus disagreements (Bignami & Kelemen 2018). Despite their substantive disagreements with Kagan's analysis, Bignami & Kelemen (2018, p. 95) acknowledged his core contributions: "By posing a trenchant question others had not thought to ask—'Should Europe worry about adversarial legalism?'—Kagan triggered a vibrant debate and inspired a wealth of research that continues to transform our understanding of European regulatory styles and the impact of the EU on national regulation."

We think adversarial legalism can contribute to other debates along similar lines, especially to studies related to the general phenomenon of "judicialization," "legalization," or "juridification," which Hirschl (2008) has described as one of the most important institutional developments in governance in the post–World War II era. Kagan's framework seems useful in this area for the simple reason that it provides a language for comparison. The idea that studying judicialization would benefit from comparison may seem obvious, but it is often glossed over in research on the politics of rights, courts, and litigation (Barnes & Burke 2015, Burke & Barnes 2009, Hevron 2018). To say anything meaningful about how and why growing judicialization matters, we must compare the social and political consequences of the alternative forms of authority—expert, legislative, executive—that judicialized structures displace (or, more likely, are layered on top of). These types of comparisons remain shadowy in the existing literature because it often lumps together forms of legalism under general terms and treats all nonjudicial forms of authority as equivalent. The result is ironic, as sociolegal scholars who typically criticize the law/politics dichotomy seem to have adopted an approach in which all forms of legalism get lumped together as law, whereas all alternative forms of authority are treated, implicitly or explicitly, as politics (Burke & Barnes 2009).

We see two ways in which Kagan's structural framework can help. The first is by providing a richer language for describing judicialization. In *Courting Social Justice*, for instance, Gauri & Brinks (2008) and their collaborators grapple with core questions related to the social impact of judicial enforcement of social and economic rights in the developing world. Like Kagan, they eschew simplistic distinctions between legislative and judicial processes and call for a comparative analysis of the effects of legalization. They recognize that legalization is a continuum and covers various institutional arrangements. Their framework allows them to aggregate insights from case studies of legalization in diverse settings, including South Africa, Brazil, India, Nigeria, and Indonesia, and hypothesize about some of the conditions under which formal rights matter.

Gauri & Brinks's insightful collection of essays significantly advances our understanding of legalization in the developing world. At the same time, Kagan's approach might have enhanced their analysis by distinguishing among different modes of policy making and dispute resolution,

including distinct types of formal systems. For example, in their discussion of South Africa, Gauri & Brinks note that despite relatively strong constitutional language, the South African courts have been largely deferential toward the government and the cases have been defensive or narrow, focusing on particular disputes as opposed to setting broad policy. Instead of thinking of this case as ineffective judicialization, it might be better to treat it as a form of bureaucratic legalism, where the policy making is centered in the other organs of government and the courts play a secondary role. The broader point is that good description is essential to any research agenda (Gerring 2012). As in debates on Eurolegalism, Kagan's typology offers a set of common terms for capturing differences among distinct types of legalism—some more court centered and others more centered in administrative agencies—which, in turn, should provide a basis for better framing comparisons than trying to reduce legalization, judicialization, or juridification to a single dimension.

Once we replace umbrella terms like judicialization, legalization, and juridification with Kagan's typology, new avenues of inquiry reveal themselves. For example, growing patterns of judicialization naturally raise questions about their social, economic, and political consequences—the "so what?" question. Assessing whether judicialization is prone to certain risks requires us to compare the effects of judicialized and nonjudicialized policies (Barnes & Burke 2015, Hevron 2018). This comparison is deeply problematic because judicialization takes so many forms and reaches into so many corners of modern administrative states. Using Kagan's typology allows us to get out of this box. Instead of trying to find cases of judicialization and nonjudicialization, we can instead focus on identifying different policy making and dispute resolution regimes, some more reliant on adversarial legalism, some less so, and policy areas in which regimes switch abruptly. This approach allows us to ask a better-specified question: What are the effects of relying on different types of policy-making systems—adversarial legalism, bureaucratic legalism, expert judgment, and negotiation/mediation—in Kagan's typology?

We can employ the standard tool kit of comparative institutional analysis to answer this question. If our goal is to make strong causal claims, researchers can seek cases with sharp discontinuities or where the underlying selection mechanism—the historical processes that channel an issue into adversarial legalism versus other forums—creates natural experiments (see Dunning 2012, Hevron 2018). Using these strategies, we can argue that our cases provide a plausible basis for causal inference, even if they fall far short of the ideal of a randomized experiment in a laboratory setting (Barnes & Hevron 2018).

Of course, not every study seeks to make causal claims within a positivist tradition patterned on experimental research design. Researchers interested in tracing the implications of relying on different types of regimes can use qualitative, quantitative, or mixed-method approaches to make within- and across-case comparisons. Using Kagan's typology to design comparative studies—whether strictly causal or more focused on process tracing and interpretative methodologies—seems a particularly promising avenue of inquiry, one that invites diverse scholars into a conversation about the consequences of relying on different structures of policy making, which is one of the questions that lies at the heart of *Adversarial Legalism*.

CONCLUSION

It is the dream of many social scientists to mint a concept that becomes widely used and lives beyond the scholarly life of the researcher. We feel safe in assuming that adversarial legalism will live on for many years in research on law, politics, and society. But we are concerned about the myriad, seemingly contradictory uses to which adversarial legalism has been put. Does this reflect a mushiness in the concept itself? Or is there a problem in the ways scholars have used the concept? Is this a case of concept traveling or concept stretching?

In this article, we argue that adversarial legalism has traveled without being unduly stretched, as scholars have taken different aspects of his definition and advanced research agendas related to both legal practice and institutions. These different legacies ultimately reflect the dual nature of Kagan's conceptualization of adversarial legalism as both a style of everyday practice and a structure of governance. As long as we keep these different strands of adversarial legalism clear in our minds, we think adversarial legalism could travel further and be put to new uses, especially in research grappling with the social, economic, and political implications of different styles of legal advocacy and growing judicialization in all of its many guises. The key is that Kagan's definitions of adversarial legalism point to sharper questions centered on comparative analysis. This ability to prompt new questions is, of course, one of the most valuable ways that concepts contribute to research. It helps explain the appeal of adversarial legalism to scholars trying to make sense of an increasingly law-filled world.

DISCLOSURE STATEMENT

The authors are not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

LITERATURE CITED

Abel R. 1988. The crisis is injuries, not liability. *Proc. Acad. Political Sci.* 37(1):31–41

Barnes J. 2009. In defense of asbestos tort litigation: rethinking legal process analysis in a world of uncertainty, second bests, and shared policy-making responsibility. *Law Soc. Inq.* 34(1):5–29

Barnes J. 2011. *Dust-Up: Asbestos Litigation and the Failure of Commonsense Policy Reform*. Washington, DC: Georgetown Univ. Press

Barnes J, Burke TF. 2006. The diffusion of rights: from law on the books to organizational rights practices. *Law Soc. Rev.* 40(3):493–524

Barnes J, Burke TF. 2012. Making way: legal mobilization, organizational response, and wheelchair access. *Law Soc. Rev.* 46(1):167–98

Barnes J, Burke TF. 2015. *How Policy Shapes Politics: Rights, Courts, Litigation, and the Struggle over Injury Compensation*. New York: Oxford Univ. Press

Barnes J, Hevron H. 2018. Framed? Judicialization and the risk of negative episodic media coverage. *Law Soc. Inq.* 43(3):1059–91

Berrey E, Nelson RL, Nielsen LB. 2017. *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality*. Chicago: Univ. Chicago Press

Bignami F. 2011. Cooperative legalism and the non-Americanization of European regulatory styles: the case of data privacy. *Am. J. Comp. Law* 59:411–61

Bignami F, Kelemen RD. 2018. Kagan's Atlantic crossing: adversarial legalism, Eurolegalism, and cooperative legalism in European regulatory style. See Burke & Barnes 2018, pp. 81–97

Bogus C. 2001. *Why Lawsuits Are Good for America: Disciplined Democracy, Big Business, and Common Law*. New York: N.Y. Univ. Press

Burbank SB, Farhang S. 2017. *Rights and Retrenchment: The Counterrevolution against Federal Litigation*. New York: Cambridge Univ. Press

Burke TF. 2001. *Lawyers, Lawsuits and Legal Rights: The Battle over Litigation in American Society*. Berkeley: Univ. Calif. Press

Burke TF, Barnes J. 2009. Is there an empirical literature on rights? *Stud. Law Politics Soc.* 48:69–91

Burke TF, Barnes J, eds. 2018. *Varieties of Legal Order: The Politics of Adversarial and Bureaucratic Legalism*. New York: Routledge

Cioffi J. 2009. Adversarialism and legalism: juridification and litigation in corporate governance. *Regul. Gov.* 3(3):235–57

Coffee J. 1995. Class wars: the dilemma of mass tort class action. *Columbia Law Rev*. 95:1343–465
Collier D, Mahon JE. 1993. Conceptual "stretching" revisited: adapting categories in comparative analysis. *Am. Political Sci. Rev*. 87(4):845–55
Crohley S. 2008. *Regulation and Public Interest: The Possibility of Good Regulatory Government*. Princeton, NJ: Princeton Univ. Press
Damaska M. 1986. *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven, CT: Yale Univ. Press
Daniels S, Martin J. 2015. *Tort Reform, Plaintiffs' Lawyers and Access to Justice*. Lawrence: Univ. Press Kans.
Derthick M. 2002. *Up in Smoke: From Legislation to Litigation in Tobacco Politics*. Washington, DC: CQ. 1st ed.
Dodd LG. 2015. The rights revolution in the age of Obama and Ferguson: policing, the rule of law, and the elusive quest for accountability. *Perspect. Politics* 13(3):657–79
Dunning T. 2012. *Natural Experiments in the Social Sciences: A Design-Based Approach*. New York: Cambridge Univ. Press
Edelman LB. 2016. *Working Law: Courts, Corporations, and Symbolic Civil Rights*. Chicago: Univ. Chicago Press
Edelman LB, Krieger LH, Eliason SR, Albiston CR, Mellema V. 2011. When organizations rule: judicial deference to institutionalized employment structures. *Am. J. Sociol.* 117(3):888–954
Epp CR. 2009. *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*. Chicago: Univ. Chicago Press
Farhang S. 2010. *The Litigation State: Public Regulation and Private Lawsuits in the U.S*. Princeton, NJ: Princeton Univ. Press
Feeley MM, Rubin EL. 1998. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. New York: Cambridge Univ. Press
Feeley MM, Swearingen V. 2018. Devolving standards: California's structural failures in response to prison litigation. See Burke & Barnes 2018, pp. 155–77
Francis MM. 2014. *Civil Rights and the Making of the Modern American State*. New York: Cambridge Univ. Press
Fukuyama F. 2014. *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy*. New York: Farrar, Straus & Giraux
Fuller L. 1978. The forms and limits of adjudication. *Harvard Law Rev*. 92:353–409
Galanter M. 1974. Why the "haves" come out ahead: speculations on the limits of legal change. *Law Soc. Rev*. 9(1):95–151
Gash AL. 2015. *Below the Radar: How Silence Can Save Civil Rights*. New York: Oxford Univ. Press
Gauri V, Brinks DM, eds. 2008. *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*. New York: Cambridge Univ. Press
Gerring J. 2012. Mere description. *Br. J. Political Sci.* 42(4):721–46
Gluck AR, Hall A, Curfman G. 2018. Civil litigation and the opioid epidemic: the role of courts in a national health crisis. *J. Law Med. Ethics* 46:351–66
Hamlin R. 2014. *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia*. New York: Oxford Univ. Press
Hendley K. 2018. Coping with auto accidents in Russia. See Burke & Barnes 2018, pp. 98–130
Hevron P. 2018. Judicialization and its effects: experiments as a way forward. *Laws* 7(2):20–41
Hirschl R. 2008. The judicialization of politics. In *The Oxford Handbook of Law and Politics*, ed. K Whittington, D Keleman, G Caldieria, pp. 119–41. New York: Oxford Univ. Press
Horowitz D. 1977. *The Courts and Social Policy*. Washington, DC: Brookings Inst.
Issacharoff S, Witt JF. 2004. The inevitability of aggregate settlement: an institutional account of American tort law. *Vanderbilt Law Rev*. 57(5):1571–636
Kagan RA. 1995. What socio-legal scholars should do when there is too much law to study. *Socio-Legal Stud*. 22(1):140–48
Kagan RA. 1997. Should Europe worry about adversarial legalism? *Oxford J. Leg. Stud.* 17(2):165–84
Kagan RA. 2001. *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard Univ. Press. 1st ed.
Kagan RA. 2019. *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard Univ. Press. 2nd ed.
Keck TM. 2014. *Judicialized Politics in Polarized Times*. Chicago: Univ. Chicago Press

Kelemen RD. 2011. *Eurolegalism: The Transformation of Law and Regulation in the European Union*. Cambridge, MA: Harvard Univ. Press
Kritzer HM, Silbey SS. 2003. *In Litigation: Do the Haves Still Come Out Ahead?* Palo Alto, CA: Stanford Univ. Press
Lytton TD. 2008. *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse*. Cambridge, MA: Harvard Univ. Press
Mashaw JL. 1985. *Bureaucratic Justice: Managing Social Security Disability Claims*. New Haven, CT: Yale Univ. Press
Mather L. 1998. Theorizing about trial courts: lawyers, policymaking, and tobacco litigation. *Law Soc. Inq.* 23(4):897–936
McCann M. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: Univ. Chicago Press.
McCann M, Haltom W. 2018. Seeing through the smoke: adversarial legalism and U.S. tobacco politics. See Burke & Barnes 2018, pp. 57–80
Melnick RS. 2018a. *The Transformation of Title IX: Regulating Gender Equality in Education*. Washington, DC: Brookings Inst. Press
Melnick RS. 2018b. Adversarial legalism, civil rights, and the exceptional American state. See Burke & Barnes 2018, pp. 20–56
Merton R. 1968. *Social Theory and Social Structures*. New York: Free
Miller RE, Sarat A. 1980. Grievances, claims, and disputes: assessing the adversary culture. *Law Soc. Rev.* 15(3–4):525–66
Murakawa N. 2014. *The First Civil Right: How Liberals Built Prison America*. New York: Oxford Univ. Press
Nielsen LB, Nelson RL, Lancaster R. 2010. Individual justice or collective legal mobilization? Employment discrimination litigation in the post-civil rights United States. *J. Empir. Leg. Stud.* 7(2):175–201
Nolette P. 2015. *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America*. Lawrence: Univ. Press Kans.
Rubin E, Feeley MM. 2003. Judicial policy-making and litigation against the government. *Univ. Pa. J. Const. Law* 5:617–63
Sabel CF, Simon W. 2004. Destabilization rights: how public law succeeds. *Harvard Law Rev*. 117:1016–101
Sandefur RL. 2014. *Accessing justice in the contemporary USA: findings from the community needs and services study*. Work. Pap., Am. Bar Found., Chicago, IL. **http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf**
Sartori G. 1970. Concept misformation in comparative politics. *Am. Political Sci. Rev.* 64(4):1033–53
Schuck P. 1986. *Agent Orange on Trial*. Cambridge, MA: Belknap Press Harvard Univ.
Staszak SL. 2015. *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment*. New York: Oxford Univ. Press
Talesh S. 2009. The privatization of public rights: how manufacturers construct the meaning of consumer law. *Law Soc. Rev.* 43(3):527–62
Talesh S. 2015. Rule-intermediaries in action: how state and business stakeholders influence the meaning of consumer rights in regulatory governance arrangements. *Law Policy* 37:1–31
Vogel SK. 1996. *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries*. Ithaca, NY: Cornell Univ. Press
Windsor v. United States, 570 U.S. 744 (2013)
Witt JF. 2007. Bureaucratic legalism, American style: private bureaucratic legalism and the governance of the tort system. *DePaul Law Rev*. 5(2):261–92

Annual Review of Law and Social Science

Volume 16, 2020

Contents

Indexes

Errata

An online log of corrections to *Annual Review of Law and Social Science* articles may be found at http://www.annualreviews.org/errata/lawsocsci