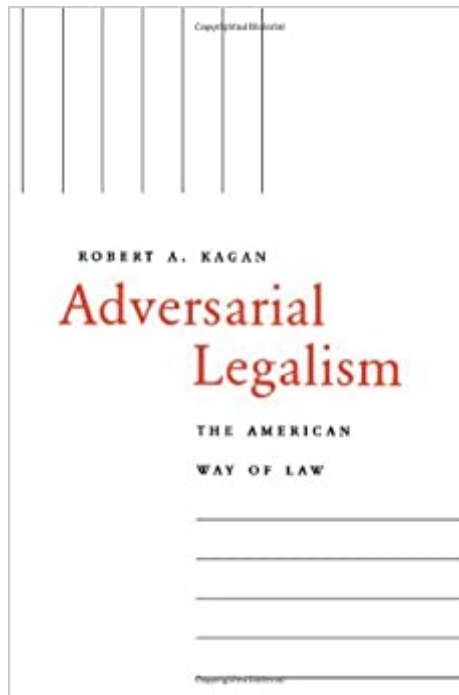


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# Adversarial Legalism: The American Way Of Law



## Synopsis

American methods of policy implementation and dispute resolution are more adversarial and legalistic when compared with the systems of other economically advanced countries. Americans more often rely on legal threats and lawsuits. American laws are generally more complicated and prescriptive, adjudication more costly, and penalties more severe. In a thoughtful and cogently argued book, Robert Kagan examines the origins and consequences of this system of "adversarial legalism." Kagan describes the roots of adversarial legalism and the deep connections it has with American political institutions and values. He investigates its social costs as well as the extent to which lawyers perpetuate it. Ranging widely across many legal fields, including criminal law, environmental regulations, tort law, and social insurance programs, he provides comparisons with the legal and regulatory systems of western Europe, Canada, and Japan that point to possible alternatives to the American methods. Kagan notes that while adversarial legalism has many virtues, its costs and unpredictability often alienate citizens from the law and frustrate the quest for justice. This insightful study deepens our understanding of law and its relationship to politics in America and raises valuable questions about the future of the American legal system.

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## Customer Reviews

This is a wonderful piece of work, richly detailed and beautifully written. It is the best, sanest, and most comprehensive evaluation and critique of the American way of law that I have seen. Every serious scholar concerned with justice and efficiency, and every policymaker who is serious about improving the American legal order should read this trenchant and exciting book. (Lawrence

Friedman, Stanford University)Kagan offers an important and insightful study of American legal culture. Its chief thesis is that the American way of law is best described as "adversarial legalism," or the process by which policy making, implementation, and dispute resolution are dominated by lawyers and litigation. Although the thesis in this form is hardly original, Kagan's treatment of it, ranging across a wide variety of scholarly disciplines, is both comprehensive and critical. A significant advantage of Kagan's treatment is his commitment to a genuinely comparative analysis of American legalism, though one might argue that his assessment of American legal exceptionalism is overstated. Whatever the merits of Kagan's assessment, however, it is made possible by his careful attention to comparative materials and thus shows the promise of an authentic comparative legal methodology. In sum, this is an important, indeed an elegant, book. Highly recommended. (J. E. Finn Choice 2002-03-01)[This] book is a tour de force. It is an elegantly written, consistently insightful analysis and critique of the American emphasis on litigation and punitive sanctions in the policy and administrative process...Adversarial Legalism is in many ways a breath of fresh air. Political elites, scholars, and college students alike may find much that is new and surprising in this book--and it is Kagan's key purpose to surprise and stimulate fresh thinking about the range of possibilities for addressing policy problems. His argument is equally critical of the Republican party's sympathy for underdog plaintiffs, and he is virtually unique among prominent legal voices in calling for more government, more bureaucratic discretion, and, at the same time, less opportunity for legal challenge to government and corporate policy. Kagan is also appropriately realistic in recognizing that his critique and reform proposals are greatly out of step with reigning cultural patterns of populist distrust of governmental and corporate power and faith in self-help legal activism, and thus that his proposals are unlikely to succeed in the near future. (Charles R. Epp Law and Society Review)

This is a wonderful piece of work, richly detailed and beautifully written. It is the best, sanest, and most comprehensive evaluation and critique of the American way of law that I have seen. Every serious scholar concerned with justice and efficiency, and every policymaker who is serious about improving the American legal order should read this trenchant and exciting book. (Lawrence Friedman, Stanford University) --This text refers to an out of print or unavailable edition of this title.

This book presents a really profound rethinking of legal processes in the United States, as compared with other countries. Now that I have read the book, every day I have a better understanding of events in the news that previously seemed almost incomprehensibly complicated.

I now understand how much of the intellectual energy of the United States is consumed in legalistic maneuvering, and in my view it is deplorable. The patterns of adversarial legalism pervade legislatures, lawyers' offices, courtrooms, and even the minds of people who are experiencing a crime or maltreatment, whether as perpetrator or victim.

Kagan is a political scientist and a lawyer who has no illusions about the shortcomings of the U.S. legal system. Unlike the "tort reform" crowd, he shares many of the political ideals of activist lawyers, but he does not share their delusions about the costs and benefits of the strategies they pursue. The American culture of adversarial legalism may fuel rights consciousness that encourages citizens to stand up for themselves, but also all too often under or over compensates victims, missing the target of consistent and fair compensation. The rhetoric of activist lawyers obscures the degree to which litigation impairs the basic functions of American government, obstructing the pursuit of social justice through government rather than the courts. NB, the author is not the "Of Paradise and Power" conservative Robert Kagan. This Kagan spent his career conducting comparative studies of the effectiveness of different regulatory strategies in increasing workplace safety, protecting the environment, etc. His frustration with the tendency of American litigation to obstruct social progress is based on his knowledge of what other some countries have achieved in the absence of adversarial legalism.

This book was excellent to write on for my law school seminar in law and society in global perspective. It gave me many opportunities to select a focus from the many things that Kagan writes. I highly recommend the book.

The book is a brilliant description about why similar problems abound in many different areas of law (criminal, civil, regulatory, social welfare). Adversarial legalism has its roots in fundamental mistrust of government in USA. This leads to multiple overlapping jurisdictions and the need to turn to the courts to achieve policy gains. Agency officials are hamstrung by so many requirements that they cannot apply their expertise. Instead we have a lawyer/judge centered system. Our system is less elite focused than in Europe/Japan but is also in many ways leads to less egalitarian outcomes and a decisionmaking process that takes years often without a corresponding benefit to justify the delays. In sector after sector, Kagan demonstrates how the fracturing of authority between branches, agencies, and levels of government leads to policies that no one would describe as "first best" or even "second best" but rather ugly compromises between competing interests. The fear of litigation

permeates policy-making and the power to wield litigation empowers those who can afford the time and money to retain talented lawyers. And yet the same people who often bemoan the legalistic culture in the United States would be reluctant to embrace a more bureaucratic centered hierarchical solution found in Europe. It is in the last chapter, where Kagan discusses solutions, that I found my only real criticism of the text. Kagan recommends steps, both large and small to move toward a European system. However, while diligently listing the political/legal/cultural barriers to doing so, he seems to be overly optimistic that these can be overcome. The book was written in 2003. I wonder if after a decade in which Washington has become even more paralyzed and laws have been enacted that are even more complex and detailed whether Kagan's optimism has been tempered. The forces that he so perceptively describes as leading to adversarial legalism are deeply embedded in our culture. And they don't seem to be going away.

Purchased this book for a legal class. I marked up the first two pages and gave up. My professor decided to take the book off the reading list because she agreed it is not well written. She admires the author but not the way it is written. So of course now I have a book that I only marked on two pages, but can not return. What a waste of money.

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