

## American and European Ways of Law: Six Entrenched Differences<sup>◇</sup>

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Are European and American legal systems moving toward convergence? There surely are many pressures in that direction. A growing array of international treaties demand cross-national harmonization of domestic substantive laws on numerous subjects -- pollution control, protection of human rights, public health measures, bank safety rules, the elimination of laws that operate as non-tariff trade barriers, and many more. This is to be expected, according to political scientist Beth Simmons (2004), because in an increasingly interdependent world, when powerful polities such as the U.S. and the European Union (or important constituencies within them) suffer significant costs or disadvantages from divergent national legal or regulatory standards, they are likely to use international or supra-national institutions, as well as their own economic and political leverage, to push for legal convergence. Some legal convergence also stems from what might be called “spontaneous simultaneous adaptation.” Global competition and communications confront all industrially advanced democracies with similar social, economic, and environmental problems and similar political demands. Regulatory officials, scientists, legal scholars, and policy advocates fly across borders, in person and electronically, sharing knowledge about problems, risks and claimed legal remedies.<sup>1</sup>

But for every political action (and theory), there is a counter-reaction (and counter-theory). Pressures toward legal convergence meet resistance from political factions, interest groups, and legal elites who think they would be disadvantaged by adopting foreign legal ways, or simply oppose them on philosophic grounds. Or they

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<sup>1</sup> Thus two recent cross-national studies indicated that multinational corporations in OECD countries face basically similar environmental laws and employ basically similar environmental control measures (Kagan & Axelrad, 2000; Gunningham, Thornton & Kagan, 2003). .

accept legal transplants, but transform them to conform with domestic legal traditions or with domestic professional, political and economic interests. Convergence-skeptics, therefore, argue that continued legal divergence is likely to continue in many areas of law and legal process.

One special concern has been the alleged "Americanization" of European law. The idea is that globalization, or the European Union, or the aggressiveness of American economists, business executives, investment funds, and law firms are compelling or inducing European nations to emulate American laws and legal practices (Garth & Dezalay, 1995; Kelemen & Sibbett, 2004; Kelemen, 2006), rapidly eroding the "European Way of Law." It is important, in this regard, to be clear about what one means by "Americanization." I would be reluctant to use that term to describe the adoption of a law or judicial doctrine that simply resembles an American law or doctrine, for there has long been a great deal of substantive convergence, including the adoption in the U.S. of legal norms first adopted in Europe. Nor would I use the term "Americanization" for a simple increase in the number of laws, lawyers, and judicial decisions, for that seems to be a function of modernity. The interesting question is whether aspects of law, legal processes, and legal institutional arrangements that seem *distinctively American*, *significantly different* from their European counterparts, are now being adopted in Europe.

In 1995, in a lecture at Oxford University (Kagan, 1997), I speculated that economic and political changes were indeed pushing European legal systems toward the distinctively adversarial and legalistic American way of crafting and implementing laws. But I concluded that there were so many fundamental differences between Europe and the U.S. in terms of the organization of governmental authority and in conceptions of law, that substantial legal convergence would remain unlikely. This article, written ten years after that lecture, revisits those questions. Notwithstanding the increasing volume and power of the law of the European Union and the decisions of the European Court of Justice, my focus will be on developments in the legal systems of member states, for that

is what most shapes the legal experience of individuals and business firms in Europe, and in that sense, most clearly functions as the “European way of law.”

Part I introduces the concept of “adversarial legalism” to distinguish the American way of law from that of the national legal systems of Western Europe (notwithstanding the many differences among them). Part II discusses some of the economic, social and political dynamics that have led to increases in adversarial legalism in the U.S. Part III suggests that those same basic dynamics are at work in Europe, creating incentives for – and some signs of – adversarial legalism in European legal systems. In Part IV, however, sets forth “six entrenched differences” between the European and American ways of law that I believe are extremely unlikely to disappear -- and seeks to explain discuss why.

I should add that I know much more about the American way of law than I do about law and legal processes in Europe. With respect to the latter, I know enough to recognize that one cannot assume a similar “way of law” in countries with distinctive and varied national legal traditions. But I am foolish enough to lump them together for the purposes of suggesting that certain features of the American way of law are too exotic to be transplanted successfully into European legal soil.

### **I. Adversarial Legalism**

In the 1980s and early 1990s, sociolegal scholars conducted a number of studies that compared a particular legal process in the U.S. with parallel processes in other economically advanced democracies. They repeatedly found that the American “legal style” entailed (1) more complex bodies of legal rules; (2) more formal, adversarial procedures for resolving political and scientific disputes; (3) more costly forms of legal contestation; (4) stronger, more punitive legal sanctions; (5) more frequent judicial review of and intervention into administrative decisions and processes; (6) more political controversy about legal rules and institutions; (7) more politically fragmented, less

closely-coordinated decision-making systems; and (8) more legal uncertainty and instability (Bogart, 2001; Kagan, 2001: 7-8).

My summary term for these legal propensities is “adversarial legalism.” One key feature of adversarial legalism is litigant activism: it is a style of legal contestation and decision-making in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence is dominated not by judges or governmental officials but by disputing parties or interests, acting primarily through lawyers. Organizationally, adversarial legalism typically is associated with decision-making institutions in which authority is fragmented and in which hierarchical control is relatively weak.

Adversarial legalism thus can be contrasted, first of all, with “bureaucratic legalism” -- a style of policy-making and dispute resolution in which legal authority and decisionmaking is hierarchically organized and disputants and their lawyers play a more restrained role. As Damaska (1986) so powerfully argued, it is that bureaucratic ideal that has traditionally animated Western European parliamentary regimes and legal systems. Yet even compared to the British "adversarial system" from which it descended, American adjudication is more party-influenced, less hierarchically-controlled. (Hughes, 1984), and more open to novel legal and policy arguments put forth by parties and their lawyers (Atiyah & Summers, 1987).

Adversarial legalism also can be distinguished from modes of policy-making and dispute resolution that are hierarchically organized but not legalistic, since they vest authority in the informed discretionary judgment of professionals, political officials, or administrators, or in corporatist bodies that represent different segments of society. For example, in many Western European countries, decisions concerning eligibility and the amount of disability benefits for injured workers are made by a panel of government-appointed physicians (or a mixed panel of physicians and social workers). In Sweden and Germany, according to an observational study by Christopher Jewell (2003), social welfare officials who process applications for governmental financial assistance have

considerably more discretion than their counterparts in California to make discretionary judgments to supplement standardized benefits to meet particular needs.

The distinction between adversarial legalism and bureaucratic legalism/discretionary judgment illuminates what is distinctive about the entire American approach to governance, in which courts deal with a wider range of issues. For example, in the U.S., regulatory policymaking is structured by detailed statutes, regulations, analytic criteria, and legal procedures -- which make legal contestation and judicial review very common. In European regulatory bodies, in contrast, policy decisions are more likely to be worked out informally by technical experts and politicians; lawyers rarely participate, and agencies' policy decisions much less often are reviewed and reversed by courts (Badaracco, 1985; Brickman et al, 1985; Vogel, 1986).

Adversarial legalism does not pervade the American legal order uniformly or completely. Indeed, adversarial legalism is so cumbersome and costly that it induces disputants to resolve most litigated disputes -- civil, criminal and administrative -- by informal negotiation. But adversarial legalism has been far more common in the United States than in Europe, and it more fully characterizes its legal structure. The next question is whether the economic and political forces that have driven the intensification of adversarial legalism in the United States also are likely to result in increases in adversarial legalism in Europe.

## **II. The Roots of Adversarial Legalism in the United States**

To understand why adversarial legalism might be expected to increase in the national legal systems of Europe, the first analytical step is to examine why adversarial legalism is so central to the American way of law ( Kagan, 1997). The answer, I believe, lies in distinctive features of American politics, which reflects a political tradition pervaded by mistrust of both concentrated governmental power and concentrated economic power. In the words of political sociologist Seymour Martin Lipset (1996: 21), "America began and continues as the most antistatist, legalistic, and rights-oriented

nation." American government, accordingly, is designed to fragment and limit power. Both the federal and the state constitutions subject governmental power to cross-cutting institutional checks and judicially enforceable individual rights. Compared to most other economically advanced democracies, the national government in the United States shares more power with states and municipalities. At every level of government, chief executives share more power with legislatures, legislative party leaders with subcommittee chairs and back-benchers. Administrative agencies share more power with judges, judges with lawyers and juries (Kagan, 2001).

With a tradition of limited, decentralized government, the United States developed what some students of comparative politics have called a "weak state," highly responsive to popular opinion and organized private interests--as opposed to a "strong state," capable of dominating and transforming civil society through powerful bureaucratic structures (Krasner, 1978: 55-70). In contrast to Western European nations, where strong royal bureaucracies preceded the development of democracy, nineteenth century American government was dominated not by legislatures and bureaucrats but by decentralized political parties and courts; judges were selected by local political processes (Skowronek, 1982; Shefter, 1994). Separation of powers, bicameral legislatures, and fragmented political parties created a large number of "veto points" at which special interests could strive to block governmental action that displeased them – and which gave common law judges more leeway to make and remake the law. Professional governmental bureaucracies were slower to develop in the United States than in Europe, and hence more faith was placed in courts as protectors of individual rights, checks on government, and, through the common law process, makers of law.

In the economic realm, American anti-trust and banking laws fostered the development of a system of corporate ownership and finance that, viewed comparatively, is particularly disaggregated and competitive (Roe, 1991). Thus in contrast to many Western European countries and Japan, the U.S. never developed hierarchical instruments of economic governance -- such as powerful central banks and finance ministries, strong business associations, cartels, strong labor union federations, closely-linked families of interlocked corporations -- which give central governments informal,

non-legalistic ways of restraining corporate misbehavior and influencing industrial structure. The American business community, David Vogel (1986) has argued, is less deferential to government than its counterparts in England and Western Europe and is far more inclined to battle government regulation in the courts. Markets and contracts, structured by lawyers and judges and enforced through litigation, have always played a more prominent role in economic governance in the United States than in other capitalist systems.

Business-labor relations in the U. S. also occur in a fragmented, decentralized organizational context. In many Western European countries, collective bargaining occurs at the national level, among peak associations of labor and industry. Agreements cover most workers and employers, whether they are union members or not. Key benefits (holidays, vacations, severance pay, retirement pensions) are guaranteed by nationwide laws. In the U. S., in contrast, the National Labor Relations Act (1935) encouraged union-management bargaining at the individual work-site level (Rogers, 1990). Government-legislated benefits, in comparison with European governments, are sparse. Industry-specific unions fight for their own advantage, regardless of effects on workers in other unions. (Rogers, 1990; Kagan, 1990). And the result is a great deal of adversarial legal conflict, as both union and employers fight legal battles over local elections (Flanagan, 1987). Far more than in other countries, dismissed workers in the U.S. sue employers in courts of general jurisdiction, seeking damages for unjust dismissal or discrimination (Nielsen & Axelrad, 2000).

Because American pension, workplace-injury insurance, and health care systems are left far more fully to the private sector than in Europe, and because providers of these benefits are more fragmented and competitive, providers in the U.S. have stronger incentives to take a hard line on claims and to qualify their obligations in contractual fine print. In consequence, although hard evidence is lacking, litigation in court over benefits and coverage almost certainly is far more common in the U.S. Similarly, governmental regulation of the privatized, employer-dominated American system for employee pension funding and pension rights is legalistic, complex, and frequently litigated.

Finally, American adversarial legalism has become more extensive and intensive in the last 40 years. Beginning in the 1960s, political movements and advocacy groups have demanded increasingly comprehensive governmental protections from a variety of harms -- racial discrimination, gender inequality, environmental degradation, hazardous products and technologies, sudden economic loss, arbitrary treatment by police and other governmental bodies, and so on. Meeting these political demands requires a more powerful, more activist government -- which runs counter to the political tradition of more limited, decentralized government. Adversarial legalism provides a way of reconciling, however roughly, these inconsistent political desires. Politicians enact statutes that grant administrators more power, but constrain agencies' discretion with detailed legal rules and procedural requirements, empowering both regulated entities, NGOs, and ordinary citizens to challenge administrators' decisions (or the actions of regulated businesses) in court. In sum, in responding to political demands for more active government, American politicians have substituted lawsuits, formal procedures, rights, legal penalties, lawyers, and courts -- the building blocks of adversarial legalism -- for the powerful bureaucracies, corporatist bodies, central banks, and social insurance programs that dominate the regulatory-welfare state in Western Europe.

### **III. Why Adversarial Legalism Might Grow in Europe**

If I am right about the underlying political and economic factors that stimulate adversarial legalism in the U.S., then the more European governments and economies experience the same political and economic pressures as the U.S, and the more they come to resemble the American political-economy, the more one should expect adversarial legalism to increase in European legal systems (Kagan, 1997). That dynamic can be examined by looking first at the drivers of adversarial legalism in the private sector, and then in the public sector.

In economic sector, European integration and the intensification of international economic competition have led to greater reliance on markets, less reliance on

hierarchical structures. More markets and less hierarchy, in turn, invite more legalistic forms of regulation and more litigation. In the public sector, continuing political demands for active government – combined with a fragmented governmental structure at the EU level and growing distrust of governmental expertise -- invite more reliance on litigation and courts to enhance governmental accountability and implement norms of social justice. Both trends, therefore, seem to invite increasing adversarial legalism in European legal systems.

### **A. Global Competition, Privatization, and Adversarial Legalism in Economic Life**

In the 1970s and 1980s, lawsuits between business firms had become the most rapidly growing category of litigation in federal courts in the U.S. (Galanter, 1998; Nelson, 1990). Large law offices serving corporate clients swelled to enormous proportions, expanding far more rapidly than GDP. Corporations had to take out insurance policies to protect their officers and directors from personal legal liability; the rates they had to pay for such insurance skyrocketed.<sup>2</sup>

The primary source of this newfound business litigiousness, I believe, was intensified international economic competition and integration. In the wake of falling trade barriers and the increased mobility of data, goods and capital, American businesses in the late 1970s and 1980s embarked on intensive efforts to cut costs. Increasingly, they “contracted out” various manufacturing and service functions to new business partners. With more alternative trading partners came reduced stakes in ongoing business relationships, and enterprises became less reluctant to sue for damages when things went wrong (Kagan, 1997).<sup>3</sup>

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<sup>2</sup> According to one survey, average damage claims in shareholders' lawsuits against officers and directors increased from \$550,000 in 1976 to \$4.27 million in 1992. The median amount in legal defense costs in cases that were settled in 1992 was \$250,000.

<sup>3</sup> A basic theorem in socio-legal studies is Donald Black's (1976) proposition that resort to law increases in accordance with the social distance between parties, while such resort is suppressed when parties are enmeshed in continuing relationships.

Similarly, global changes in corporate finance stimulated adversarial legalism in the U.S. Mergers and battles for corporate control led to rapid shifts in corporate management and more high-stakes, risky transactions. Financing arrangements became more complicated, engaging larger numbers of players. The risks of opportunistic behavior increased. American legislatures and courts formulated new regulations and private rights of action to punish financial deception, insider trading, bankruptcy abuse, risky forms of trading, and unjust employee dismissals. This led to more lawsuits against corporate managers, more lawsuits between debtors and creditors, more strategic use of litigation to intimidate and extort (Cooper, 1991). Corporations invested in more detailed, costly legal documents, designed to fend off those legal risks.

It seems logical to expect intensified global competition to affect European corporations in the same way. Despite a history in which corporate finance has been dominated by large banks and interlocking corporate groups, the trend has been toward liberalization of financial markets and toward more fluid, public, and international modes of corporate finance.(Coffee, 1991). European corporate managers now more often are strangers to their creditors and stockholders, and vice versa. Thus in the 1990s we began to see more European legal techniques that mimic methods pioneered in the U.S. -- legalistic financial regulation (Pitt & Hardison, ), aggressive lawyering in commercial litigation and arbitration (Garth & Dezelay, 1995), and detailed, defensively-written contracts (Shapiro: 1993:41). Wolfgang Wiegand (1996:139) observed, "In the seventies a merger of two Swiss firms with more than 1 billion dollars turn-over per year was effected through a contract of less than ten pages. Nowadays I am sure the contract would run to 100 pages or more."

To deal with their legally aggressive American adversaries, European lawyers began forging partnerships with American firms and hiring associates who have had American training (Kelemen & Sibbett, 2004:114-115). In consequence, Wiegand (1996:139) asserted, "the style of legal argument, and modes of handling litigation, are increasingly influenced by American models," nudging domestic European litigation in a more adversarial direction. After years of reluctance to follow the U.S. in authorizing

shareholder and consumer class actions against corporations, Great Britain and Sweden have done so in recent years, and political leaders in Germany and France have proposed doing the same (Tait & Sherwood, 2005).<sup>4</sup>

Intensified economic pressures for greater efficiency also have fueled a worldwide trend toward privatization. In the United States, as noted earlier, private enterprises discharge many social functions that in Europe traditionally have been conducted by governmental entities -- for example, in broadcasting, telecommunications, rail and air transportation, hospital care, health insurance, retirement funds. The "privatized," fragmented American economy has meant more social control by means of contract, private litigation, and legalistic forms of governmental regulation.<sup>5</sup> As many European nations have substituted competition for governmental monopolies, therefore, one should expect more legalistic forms of regulation, and more litigation. Stephen Vogel's (1996) comparative analysis of privatization and deregulation in financial services, telecommunications, public utilities, and transportation, is entitled *Freer Markets, More Rules*, for he finds that along with marketization, control by law replaces informal controls by governmental ministries and banks.<sup>6</sup> Similarly, Kelemen & Sibbett (2004: 109) argue that intensified economic competition in Europe has (a) increased the number and diversity of products/service markets and of competing firms, and hence (b) undermined informal systems of regulation based on insider networks and trust, and hence (c) inducing EU and member-state regulatory systems to become more legalistic and adversarial.

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<sup>4</sup> In June, 2005, British courts are scheduled to hear a "group litigation" on behalf of 55,000 former shareholders in Railtrack claiming managerial misfeasance, and in Germany, a draft class action law was proposed after 15,000 individual investors sued Deutsche Telekom for approximately 100 million euros, alleging overvaluation of assets before a share offering in 2000 (Tait & Sherwood, 2005)

<sup>5</sup> Sociolegal studies repeatedly indicate that the more fragmented and competitive the regulated industry, the more legalistic regulation and enforcement tends to be (Kagan, 1994).

<sup>6</sup> In the United Kingdom, for example, privatization of water and electric supply bodies led to a new, more legalistic regulatory regime, and this has made Britain "susceptible to the American disease: more lawyers and ever more complex and detailed rules." Vogel, 1996: 120

Intensifying economic competition also has increased political pressures for budgetary austerity in European welfare states, resulting in some countries in the partial privatization of retirement pension programs and health services – precisely the kind of arrangements that have spurred litigation about benefits in the U.S. In the U.K., the cost of government-funded legal services for lower-income citizens became so fiscally burdensome that claimants with monetary claims were relegated to a new “no win, no pay” format of hiring private lawyers (vaguely resembling American ‘contingency fees’); the change seems to have been associated with significant increases in tort claims in the U.K.

### **B. Fragmented Government, Government Distrust, and Adversarial Legalism in Public Law**

Adversarial legalism in the U.S, as suggested earlier, has increased because of the tension between (a) strong political demands for governmental action and (b) a structurally fragmented governmental system and distrust of the competence and fairness of government. In a decentralized system, in which a central government has limited capacity to deploy its own bureaucrats to enforce its regulatory norms, it is tempting for it to respond to political demands by issuing detailed laws and empowering citizens to deploy lawyers and lawsuits to help enforce them.

Similarly, when authority in a central government is fragmented, it often cannot respond quickly and coherently to political demands; the resulting deadlock invites litigation and judicial activism. Thus in the U.S. in the 1950s and ‘60s, regional divisions and constitutionally entrenched limits on federal authority limited Washington’s capacity to deal effectively with racism in local Southern schools, courts, and police departments, even as that racism became more intolerable to national political elites. The U.S. Supreme Court responded by re-interpreting the U.S. Constitution to ban segregation and to impose detailed “due process” and “search and seizure” rules on state criminal justice systems, enforceable by a Court-mandated cadre of publicly-funded defense lawyers (Kagan, 2001:44-46).

The government of the European Union, too, has faced political demands to promulgate Community-wide norms, not only to foster economic integration but also to enhance environmental protection and social justice. But the political authority in the EU is fragmented, both between the Commission, Council and Parliament and within those bodies. The EU government does not have its own local-level enforcement bureaucracy or courts. Logically, then, one would expect proponents of Europe-wide norms, like American reformers in the 1960s and '70s, to seek legal rules that empower private businesses and advocacy organizations to bring lawsuits against member-state governments which are not administering EU directives enthusiastically. Thus in a series of cases establishing and extending the "direct effect" doctrine, the European Court of Justice encouraged private claims, in member-state courts, for violations of EU Directives and some EU regulations (Stone Sweet, 2000: 161-65). Similarly, the fragmentation of EU authority, according to Kelemen and Sibbet (2004: 110) explains why the EU Commission (like the American Congress in the 1960s and '70s) has promulgated "detailed laws with strict goals, deadlines and procedural requirements, and has encouraged an adversarial, judicialized approach to enforcement."<sup>7</sup> In consequence, Kelemen (2003 ) asserts, "The legal services industry across Europe is experiencing a transformation that will strengthen the legal infrastructure for adversarial legalism."

Further, because the fragmented and complex decisionmaking structure of the EU often has resulted in deadlock or delay in responding to political demands for policy initiatives, it should not be surprising that, like the U.S. Supreme Court in the examples noted above, the European Court of Justice in the 1960s and '70s became the most dynamic policy making institution in the European Community (Shapiro, 1993; Weiler, 1991). The ECJ read the Treaty of Rome expansively to pave the way for community-wide environmental regulation (Vandermeersch, 1987) and to forge the ground-rules for reconciling national product regulations with free trade (Vogel, 1995).<sup>8</sup> Similarly, the

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<sup>7</sup> Kelemen points out that a decade ago, Majone (1993) made a similar point, arguing that the EU, eager to appeal to citizens by expanding the "social dimension" of the EU -- but lacking the resources necessary to pursue social policies that rely on fiscal transfers -- focused on establishing social regulations that create rights for individuals.

<sup>8</sup> According to a study by Stone Sweet and Brunell (2002: 286-87), even in the 1990s, the ECJ regularly interpreted EU directives on social issues so as to "ratchet [member state] obligations upwards in a pro-

European Court of Human Rights developed "Community human rights principles" against which individual litigants could force member-state judiciaries to test domestic law (Levitsky, 1994). And some observers contend that a judicial philosophy expressed by some American courts and legal scholars -- that judges must act when the legislature has failed to address a pressing problem -- is gaining ground in Europe (Rasmussen, 1986:62-64; Capelletti, 1987:3-5; Levitsky, 1994: 380).

If political mistrust of the expanding power of a distant federal government supported the expansion of adversarial legalism in the U.S., Shapiro ( 1993: 46) saw a parallel in Europe:

The strengthening of the European Community has increasingly centralized and distanced government regulatory power in Brussels, and as a result there is increasing European interest in increasing the transparency of, and public participation in, the decisions of the new Eurocrats.

Legal rules and procedures are the logical tools for promising transparency, equal participation, and fairness. Not surprisingly, therefore, European Union regulations generally are described as more legalistic than member-state regulations. And, as Shapiro ( 1993:57) observed, "both as providers of legal services and as lobbyists, lawyers are already playing a larger role in Community regulatory affairs than they traditionally have played in the national regulations undertaken by the member states."

European member state governments, like governments in the United States, have not been immune to declines in trust in government – and hence to increases in demands for citizen-activated legal protections and remedies. Mad cow disease, the contamination of HIV-contaminated blood in France, and fears of genetically modified foods – along with the social changes associated with expanded immigration – have decreased trust in

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integration direction," overriding "lowest common denominator" compromises the Council of Ministers had adopted to deal with political deadlocks, and even "legislate[d], by judicial fiat, provisions vetoed in the Council of Ministers." And Rachel Cichowski (1998: 400-401) describes how the ECJ encouraged private litigation to enforce environmental norms in decisions such as *Handelskwekerij GJ Bier v Mines de Potasse d'Alsace*, which allowed victims of transboundary pollution to bring tort claims in the country in which the damage suffered as well as in the country in which the act of pollution occurred.

bureaucratic expertise and in government in general. One result has been a tendency, in a number of European countries, to adopt environmental and consumer protection regulations that are more stringent than those in U.S., at least with respect to issues such as genetically modified crops and foods, sale of beef and milk from hormone-fed cattle, carbon emissions, and product recycling (Vogel, 2004).

Just as in the U.S., there are signs that distrust of government results in more policy-oriented litigation in European member states. Jeffery Sellers (1995) found that in the 1980s, governmental land use decisions were challenged in court (usually on environmental grounds) almost as often and as just as successfully in Montpellier, France and in Freiburg, Germany as in New Haven, Connecticut. In the last two decades, British courts have substantially increased the incidence of review of validity of governmental administrative action (Sunstein, 1994; Sterett, 1999). Distrust of government and professional expertise may lie behind judicial liability-expanding rulings, such as a much-discussed French case establishing medical liability for birth defects.

Most fundamentally, the growing power of high courts in European countries – both through national constitutional courts applying national constitutions and as enforcers and elaborators of rights articulated by the EU Commission, the ECJ and the European Court of Human Rights – has fragmented authority in EU member states, undermining unquestioned parliamentary (and hence national bureaucratic) sovereignty (Stone Sweet, 2004). Hence as in the United States, those who fail to get their way in legislative debates or via political pressure on administrative policymakers can more often frame their objections in terms of constitutional rights, EU law, or treaty-based human rights -- and pursue them through litigation.<sup>9</sup>

#### **IV. Why European Legal Systems Will Not Be “Americanized”: Six Entrenched Differences**

Pressures for change typically encounter counterpressures engendered by what political scientists have come to call “path dependency” – the resistance to change that

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<sup>9</sup> I am grateful to Alec Stone Sweet for emphasizing this point to me.

generally surrounds long-established institutional arrangements (Pierson, 2004). There are always powerful interests who would lose influence or income from proposed legal changes. Lawyers, judges, and legal scholars are usually quick to point out how proposed legal transplants would clash with long established laws, legal principles, and institutional practices, or would have unpredictable and probably unwelcome consequences. Even if adopting a legal transplant seems necessary on political or economic grounds, those committed to current ways of law, for either material or idealistic reasons, are likely to work assiduously to prune the transplant to fit their own values and to mesh with existing arrangements. Thus the factors that have increased adversarial legalism in the United States, even if now operating in Europe, encounter there a very different set of cultural and institutional traditions. Those traditions, and their influential adherents, impede and redirect the slide toward Americanization of European law, and are likely to do so in the foreseeable future.

One of those impediments is *the tenacity of European national legal cultures* (Kagan, 1997). Adversarial legalism is animated by skepticism concerning governmental and legal authority. That skepticism also pervades American legal education and the “legal culture” of lawyers and judges. The attitudes that support adversarial legalism in the U.S. valorize responsiveness to conflicting parties and legal advocates rather than hierarchical legal authority and consistency. Those attitudes are antithetical to most European lawyers’, judges’ and legal scholars’ assumptions about law, legal ordering, and adjudication (Damaska, 1986). Equally foreign to the legal cultures of European states are (a) the politically partisan way in which American judges are appointed, (b) the outcome-oriented “instrumentalism” of American judicial thinking (Atiyah & Summers, 1987: 404), (c) the higher levels of legal unpredictability and political use of litigation that characterize the American way of law, (d) the much more severe and threatening criminal, civil and regulatory legal sanctions that prevail in the U.S., (e) trial by jury in both criminal and civil cases, (f) lawyer-dominated (rather than judge-dominated) fact gathering (including wide-ranging, potent pre-trial discovery), (g) subjection of administrative policymaking to formal, adversarial procedures, and (h) highly entrepreneurial and aggressive modes of legal practice.

For all these reasons, virtually every adversarially-tinged proposed legal reform in a European nation must deal with the warning, "Be careful or we will end up like the United States!"<sup>10</sup> Consequently, although European countries may well continue to experience higher levels of *litigation*, they are not likely to adopt methods of litigation that resemble American *adversarial* legalism.

The second major impediment to the spread of American style adversarial legalism is *the tenacity of the political structures of European member states*. The route from EU directives to the processing of everyday disputes still runs through the member-state governments and their courts. Member states craft their own legal means of implementing EU directives. And member state politicians and bureaucrats are more likely to prefer accustomed, more predictable methods of policy-making, policy-implementation, and dispute resolution rather than the difficult-to-control and unpredictable methods of adversarial legalism. For example, adversarial legalism threatens to disrupt parliamentary supremacy and bureaucratic rationality and consistency. Thus even when rights to challenge governmental administrators are strengthened, they are likely to be implemented through administrative tribunals, part of the executive branch, not by means of costly, adversarially-structured litigation in courts of general jurisdiction, as is the case in the United States.<sup>11</sup>

Consider also how lawmaking in European national parliaments differs from American legislatures. In the United States, adversarial legalism flourishes because governmental power is fragmented. The Presidency and Congress often are controlled by different (and increasingly polarized) political parties, and political parties themselves exercise only intermittent control over legislators, who are often more loyal to local constituencies or supportive interest groups than to party leaders. Legislation, accordingly, is the product of negotiation and logrolling; it often is incoherent, leaving

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<sup>10</sup> Concern about American adversarial legalism's effects can be based on myths as well as on reality. French feminists, in pressing for a sexual harassment law, were quick to define the offense in ways that would distinguish it from U.S. law, where, according a prevalent stereotype, sexuality had been totally expunged from the workplace for fear of provoking litigation. (Saguy,2001).

<sup>11</sup> For a vivid illustration of the difference, see Welles & Engel, 2000.

crucial policy choices to be worked out by the courts in subsequent litigation .<sup>12</sup> Politically-unified European parliamentary majorities, in contrast, are relatively immune to these political sources of adversarial legalism. Generally speaking, because they draft laws with less concern for interest group money and individual legislators' electoral ambitions -- and with more attention to bureaucratic experts, corporatist councils, and justice ministries – their legislation tends to be more legally coherent, less inviting of litigation. Without a politically potent trial lawyer's bar to worry about, European legislatures, in contrast to their American counterparts,<sup>13</sup> are free to meet public demands for justice not by encouraging litigation but, as in the Netherlands, by elaborating a variety of informal dispute-resolution forums.

To elaborate, in this section I would like to point to six salient features of the American way of law that are so antithetical to ways of governance in European countries that they are and almost surely will remain quite unattractive to national political and legal elites in Europe. In the somewhat random order discussed below these six “entrenched differences” are:

- (1) The political nature and remedial powers of American judiciaries;
- (2) High levels of adversarial legalism in the American regulatory process;
- (3) The laws and institutional practices that make American tort law uniquely threatening;
- (4) The limited rights to social provision and employee protections that prevail in American law ;
- (5) The less demanding obligations of American tax law;

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<sup>12</sup> For an illuminating comparison of statutory lawmaking in Great Britain's parliamentary system and the U. S system of separation of powers and more fragmented political parties, see Atiyah & Summers (1987: ch. 11)

<sup>13</sup> In the U.S., tort reform by means of diversion of claims into administrative tribunals is inhibited by a well-funded, free-spending plaintiffs' lawyers' lobby, as well as by the threat that lawyers, citing state and federal constitutional rights to trial by jury, will file lawsuits challenging statutes that shift claims to administrative tribunals.

- (6) America's more punitive criminal sanctions, more permissive gun laws, and greater reliance on adversarial legalism in criminal adjudication and police accountability.

### **1. Litigation (and Judging) as Politics.**

In the weeks following the U.S. presidential election in 2000, as election officials in several county governments in Florida re-examined disputed ballots, lawyers for the Democratic and Republican parties filed fourteen separate lawsuits challenging the legality of election and counting procedures. The U.S. Supreme Court, in an opinion in which the most politically conservative judges outvoted the Court's political moderates, ended up deciding the American election in George W. Bush's favor. The decision not only seemed to defy prior judicial precedents, but had practical political consequences for virtually the whole world. The case of *Bush v Gore* was only the most dramatic example of two recurrent and unique features of the American legal system: (1) the institutionalization of litigation and judicial decisionmaking as a mode of political action, policy implementation, and governmental accountability, and (2) the power and political nature of the American judiciaries.

In many countries, and of course in the European Union, constitutional courts have made it possible for interests who fail to get their way via the traditional mechanisms of democratic politics to challenge the constitutionality of the policies and laws they dislike. Alec Stone Sweet (2002) has shown how the threat to appeal to the Conseil d'Etat has deeply affected the legislative process in France. In recent decades, Germany's constitutional court has declared more laws unconstitutional than the U.S. Supreme Court. The Irish Supreme Court has precluded the government from seeking to influence voters in the course of a referendum campaigns on a proposed constitutional amendment concerning divorce laws<sup>14</sup> As noted earlier, through the "direct effect" doctrine the European Court of Justice has enlisted the court-systems of member states as fora in which citizens and organizations can enforce rights established by or through

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<sup>14</sup> McKenna v An Taoiseach (no. 2) [1995] 2 I.R. 10, 42

EU Commission directives and ECJ decisions. Yet it seems to me that the range and intensity of the political use of litigation is institutionalized in the United States in ways that make it qualitatively different, as well as quantitatively much more frequent and varied, than in Europe.

First, the U.S. central government, unlike the EU, has its own network of lower federal courts throughout the states, ready to hear cases arguing that state and local (as well as federal) governmental bodies have failed to comply with federal statutes or the loosely-worded provisions of the U.S. Constitution (such as the ‘commerce clause,’ the “due process clause,” and the “equal protection clause”).

Second, the lower courts in the United States are powerful. In contrast to the Kelsenian model of constitutional courts in Europe, even American lower court judges can hold governmental laws, regulations, orders and actions unconstitutional. They act on an extraordinarily wide array of policy issues. Drawing on their equity powers, U.S. District Court judges in the U.S. often have issued orders compelling state governments, local school districts, jails and prison systems, police departments, highway construction agencies, and forestry agencies, among others, to undertake specific (and often costly) long-term reforms, under continuing judicial supervision (Melnick, 2004; Sandler & Schoenbrod, 2003). In the early 1990s, the municipal government of Washington, D.C. was operating under at least seven judicially-supervised decrees, each stemming from a separate lawsuit, requiring city officials to provide better services to beneficiaries of food subsidy programs, prisoners in crowded jails, recipients of public mental health services, households waiting for public housing, detainees in institutions for the mentally ill, youths in juvenile detention facilities, and public school children (Plotz, 1994). I have not encountered accounts that indicate this kind of judicial management of institutional reform is (or is likely to become) as common in Western European countries.

Third, the political character of American state and federal judiciaries invites policy-oriented litigation. Judges in the United States are recruited on the basis of their prior partisan political commitments, rather than through European-style meritocratic

examination systems and apprenticeships. Their approach to judging and statutory interpretation, comparative legal scholars have noted, is more instrumental or policy-oriented than the approach of more formally trained Western European judges (Summers & Taruffo, 1991; Atiyah & Summers, 1987). In cases that evoke political passions or policy disagreements, Democratic judges in the U.S. often decide differently than Republican judges.<sup>15</sup> When Congress, faced with conflicting judicial interpretations of a statute, passes an “override” law to clarify its intentions, federal courts often conflict about the interpretation of the “override” law (Barnes 2004: 90-91).<sup>16</sup> Not surprisingly, therefore, political activists who are rebuffed by a court at Time 1 in District A or Circuit B sometimes can later get a favorable ruling by tweaking their argument and bringing a new case to a court in another district or circuit.<sup>17</sup> One consequence is that the United States has by far the world's largest body of politically-motivated "cause lawyers", organized to influence public policy, public administration and corporate behavior through litigation. Another consequence is that in the United States, in contrast to European states, political interest groups of both the left and right publicly and well as privately pressure the president to appoint politically-sympathetic federal judges and pressure the Senate to block the appointment of nominees whom they dislike.<sup>18</sup>

Although political considerations may increase somewhat in selection of judges for the ECJ and some powerful member-state constitutional courts, it does seem very

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<sup>15</sup> Politically-based judicial dissensus does not occur in most cases. A study of published decisions by three judge panels of the U.S. Circuit Courts of Appeals, for example, found that approximately 80 percent of cases were decided unanimously. But in the remaining 20%, in which dissenting opinions were filed, judges appointed by Republican presidents very often decided differently from judges appointed by Democratic presidents (Gottschall, 1986:49-54). See also Sisk et al 1998.

<sup>16</sup> Barnes (2004: 90-91) found that judicial dissensus persisted about half the time in decisions that followed a Congressional override statute, and in third of the cases in which the override statute was relatively prescriptive.

<sup>17</sup> For an example, see Brendan Swedlow's (2003) detailed account of an environmental advocacy group's ultimately successful campaign to restrict logging throughout the Pacific Northwest by means of litigation based on logging's (contested) threat to the habitat of the spotted owl. See also my account of the repeated litigation concerning the deepening of a harbor in California (Kagan, 2001: 25-31, 212-220)

<sup>18</sup> In June, 2005, conservative political groups held a press conference in Washington, D.C. announcing that to counter politically liberal advocacy groups who are expected to denounce President Bush's next nominee to fill a U.S. Supreme Court vacancy, the conservative groups were prepared to spend more than \$20 million on advertising and lobbying in support of Bush's nominee. "The liberal group People for the American way," the article continued, "countered with the threat of its 45-computer war room on M Street and a coalition of 70 other groups to fight back."

likely that Western European countries will abandon their professional modes of judicial selection and training for an American-style, overtly political appointment process. The establishment of an EU system of trial courts with remedial, institutional reform powers as broad as those of U.S. District Court judges, seems equally unlikely. And hence compared to the United States, politics and public administration in European states is not likely to become as deeply pervaded by litigation and judicial decisionmaking as a mode of seeking political change and demanding governmental accountability.

## **2. Adversarial Legalism in the Regulatory Process**

In his account of the increasing stringency of EU regulatory policy, Vogel (2004:41) notes that just as the United States “judicialized” regulatory rule-making in the 1960s and 1970s in order to reduce the risk of “capture” by regulated industries, the EU and member states have been using formal rules to make the regulatory process more transparent, and courts are playing a larger role in reviewing the regulations of both the EU and member states. Yet I doubt that increases in legal accountability in any European regime approach the frequency and intensity of court scrutiny of regulation in the U.S. During the 1980s, virtually every U.S. Forest Service plan for a particular forest was held up by legal challenge and appellate review, either in administrative forums or in the courts or both (The Economist, 1990). In the late 1980s and early 1990s, more than half of all new major regulations promulgated by the U.S. Environmental Protection Agency were appealed to court, either by environmental or business groups (Coglianese, 1997). By critically assessing (and sometimes reversing) the scientific basis or policy reasoning of regulations made by the EPA (Dwyer, 1990), the Occupational Safety and Health Administration (Mendeloff, 1987), and the National Highway Traffic Safety Administration (Mashaw & Harfst, 1991), U.S. Courts of Appeals have profoundly reshaped the character and pace of policymaking by those agencies (Kagan, 2004: 18).

Moreover, large differences remain in regulatory implementation style. In the late 1990s, I initiated 10 case studies of multinational corporations that conduct similar

operations in the U.S. and in other economically advanced democracies and therefore encounter parallel regulatory and legal regimes (Kagan & Axelrad, 2000). We found little cross-national difference in the specific regulatory precautions (air pollution control standards and devices, pre-market testing of new chemicals, pollution-prevention at municipal waste disposal sites, etc.) that a company was compelled to install at its facilities in the U.S. compared with its facilities in the other countries studied. But multinational corporate officials experienced American regulatory regimes as more prescriptive, complex, confusing, punitive towards violations, and costly to comply with. Several multinationals said they spent as much money on lawyers in their American operations as in all other countries put together. And they found American regulatory processes less cooperative and more legalistic, requiring much more time-consuming and costly testing and documentation related to compliance (Kagan, 2000).

The differences in regulatory enforcement style reflect fundamental differences in the structure of government-business relationships and in attitudes toward regulatory officials. Traditionally, European member-state regulation of business has been less legalistic and adversarial than in the U.S. because of the close linkages between industry associations and government and the greater willingness of the European political party leaders, business communities, NGOs, and the public to view regulatory enforcement agencies as politically neutral and professional. As Braithwaite (1993) has emphasized, the American regulatory enforcement process, with its insistence on strict adherence to highly detailed legal rules and permit conditions and its tough penalties for noncompliance, is the legal embodiment of political distrust. There have been some steps away from that posture in American regulation and some steps toward it in European regulation. But the research reported above (Kagan, 2000) indicates that the starting points were so far apart that the distance between the American and European ways of regulatory implementation remain very substantial.

Moreover, European nations have moved only hesitantly toward the American emphasis on private litigation to enforce regulatory norms. In scores of laws, the U.S. Congress has authorized a broad range of affected interests to act as “private attorney

generals” to challenge in court the decisions of federal, state and local administrative bodies which have arguably failed to comply with the letter or spirit of Congressional legislation. The practice is rooted in the fragmentation of governmental power in the United States – particularly separation of powers and federalism -- which frequently result in a principal-agent problem for Congressional lawmakers. Politically liberal interest groups and Democratic legislators, for example, worry that federal agencies, state governments, municipalities, or local school boards which are dominated by political conservatives will undermine liberal policy goals. Conservative members of Congress worry about the opposite. Thus Congressional environmental legislation contains detailed procedural and analytic requirements and deadlines, all designed to give liberal or conservative political allies – and courts -- plausible legal grounds to reverse or amend local governmental regulatory decisions (Kagan, 2001: 212-224).

Federal civil rights legislation, for example, gives rise each year to thousands of civil lawsuits against local police departments, local jails, and state prisons for violating individual constitutional rights. Citing the desire to give lawyers more incentives to bring lawsuits, Congress in 1991 enhanced monetary penalties attached to violations of anti-discrimination regulations by employers (Farhang, 2005). The Americans with Disabilities Act (1990), by providing disabled people rights to gain access to governmental services free of architectural barriers, stimulated scores of lawsuits and judicial orders requiring city after city to install costly curb ramps on streetcorner (Sandler & Schoenbrod, 36-37). Thus in the U.S., rights and lawyers thus serve as the functional equivalent to the national bureaucracies that implement public policies in Western European countries.

European moves in that direction are muted by the path dependent dynamics mentioned earlier. For example, in a study of comparative corporate governance law, John Cioffi (2002) describes how Germany substantially appropriated the American model of securities regulation, creating a regulatory agency that resembles the powerful U.S. Securities and Exchange Commission. But Germany did not create legal rights or incentives for lawyer-driven shareholder class actions to enforce regulatory norms,

although such actions account for the bulk of enforcement actions in the U.S. The reason, Cioffi explains, is that an emphasis on legal actions by shareholders tends to make the enhancement of stock value the primary legal responsibility of management (which is the emphasis in American company law). Movement in that direction in German company law, however, was foreclosed by the political strength of the German labor movement and by the German political and economic elite's continuing commitment to co-determination on German corporate boards of directors. Thus in this policy sphere, as in many other fields of law and regulation, the "path dependence" of existing legal, political and social arrangements, supported by the constituencies that profit from them, prevents really significant convergence on the very different American models of governance.

Similarly, in 2000, the EU issued the Equal Treatment in Employment and Occupation Directive, the so-called 'Horizontal Directive,' which requires member states to enact legally enforceable rights against discrimination based on gender, age, religion, sexual orientation and disability, as well as a directive against racial discrimination, which requires member states to provide strong legal sanctions for violations.<sup>19</sup> Yet according Tom Burke (2004:159, 170), author of a comparative analysis of disability rights:

It seems unlikely ... that the Horizontal Directive ... will lead Europe to American-style disability rights litigation. That is because most European nations thus far lack the legal machinery required to vigorously implement litigious policies. Contingency fees, large verdicts, a corps of aggressive plaintiff lawyers – are in short supply in Europe. Until they appear, disability rights implementation seems poised to take a different direction ... among European nations.

.... Some nations, such as Britain and The Netherlands, have pre-existing administrative institutions designed to handle discrimination complaints .... Others will ... build a combination of administrative and litigation mechanisms....Although individual Swedes have the right to bring lawsuits,

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<sup>19</sup> The race directive states that "The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive." (Council Directive 2000/43/EC).

implementation of the discrimination law is mainly through trade unions and through a specialized government mediator .... Moreover, Swedish law provides comparatively small winnings for a successful plaintiff [by U.S. standards].

Even Daniel Kelemen, one of the most theoretically interesting proponents of the “spread of adversarial legalism” thesis, acknowledges “There is little financial or institutional support for individual litigants to pursue EU rights claims (Kelemen, 2003: 230)” and that “The reluctance of ... a high percentage of interest associations to employ litigation may constitute one of the most significant deterrents to the development of an EU rights revolution (Id at 232).

### **3. The Tort Law System**

The United States remains unique in both the severity and unpredictability of the money damages allowed as remedies in tort cases. This, together with the widespread use of contingency fees and aggregation of similar cases in large class actions, makes the practice of tort law more lucrative for plaintiffs’ attorneys and much more fearsome for business firms, medical providers, and governmental bodies who are potential defendants.

Underlying the trans-Atlantic differences in this regard are the large differences in welfare state legal entitlements. Because European countries’ social insurance plans take care of accident victims’ current and future medical expenses, victims generally cannot recover those expenses by means of a tort claim against the party who injured them. In the United States, with its much more limited statutory rights to health care coverage, tort law does enable victims to recover full damages from their injurers, along with current and future lost earnings, disregarding any amounts the plaintiff has received from private insurance coverage.<sup>20</sup> For this reason alone, tort damages are much higher in the U.S., and incentives to file tort suits are correspondingly greater.

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<sup>20</sup> In recent years, seven American states have enacted laws stipulating that “collateral source payments” (such as payments for medical expenses and lost earnings from public programs or private insurance policies) must be subtracted from plaintiff’s jury award in tort cases, with narrow exceptions. Another seven states provided for such offsets, but with much broader exceptions. And yet another seven states enacted statutes providing that grant the trial judge discretion to impose offsets, or providing that evidence

With respect to the measure of damages, there are two central legal differences between the United States and European legal systems. One is procedural. In most European legal systems, non-economic damages (primarily what Americans we call damages for “pain and suffering”) are decided by judges. In the United States, that decision is entrusted to a lay jury. The second difference is substantive. In Europe, the calculation of non-economic damages is guided by detailed legal rules. In the United States, in contrast, the calculation of non-economic damages is left almost entirely to the discretion of the jury, which doesn’t know about comparable decisions in other cases, and doesn’t have to articulate and defend the reasons for its verdict, and whose decisions in most cases are unreviewable.<sup>21</sup> Hence tort victims in the U.S. obtain, on average, much larger awards for pain and suffering than similarly injured tort victims in Western Europe (Sugarman, 2005).<sup>22</sup> In addition, plaintiffs’ recoveries in the U.S. are much less predictable than in Europe,<sup>23</sup> which also stimulates litigation.

Returning to my earlier reference to “class actions,” the United States is also distinctive in the relative ease with which entrepreneurial lawyers can aggregate tort

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of offsets can be admitted into evidence, thus giving the jury discretion to take that into account (ATLA, 2004).

<sup>21</sup> The trial judge typically tells the jurors that they may award plaintiff compensation for past and future physical pain stemming from the defendant's wrongdoing, but "There are no objective guidelines by which you can measure the money equivalent of this element of injury; the only real measuring stick, if it can so be described, is your collective enlightened conscience." (Douthwaite, 1988: 274).

<sup>22</sup> Stephen Sugarman compared “pain and suffering” damages awarded in a sample of US cases with European legal experts’ assessments of the amount of such damages that would be awarded for similar injuries in Western European countries. He found that the sums awarded in the U.S. cases were enormously greater (20 to 35 times higher for very serious injuries) than the median predicted awards in Europe, and higher than the highest predicted awards in Europe. Loss of a finger in the US generated 2.5 times the median European nation pain and suffering award for loss of an arm. The largest amounts attainable in the most generous other democracies were comparable to the caps stipulated in the new state legislation in the US – although in some of those states, seriously injured American plaintiffs would get less, on net, because they would have to share a substantial share of their award with their attorney. (Sugarman, 2005)

<sup>23</sup> Studies indicate that plaintiffs with similarly painful and debilitating injuries often obtain significantly different amounts of damages (Geistfeld, 1995: 784; Leebron, 1989: 310). Injury severity explains only about 40 percent of the variation in pain-and-suffering awards (Sloan & Hsieh, (1990:1025) and Bovberg et al (1989: 923-24). And American attorneys, shown the same case file, often differ widely in estimating the monetary damages that were awarded at trial or in a pretrial settlement (Galanter, 1993: 81-86; Rosenthal, 1974).

claims by persons injured by the same product, accident, or technology into a single case, demanding millions or (in the case of tobacco companies) billions of dollars in damages. The prospect of huge contingency fees from such cases has generated a thriving “tort industry” in the U.S. that has no counterpart in Europe. Asbestos disease gave rise in the 1970s to the first major American “mass tort” litigation campaigns. It is still going on: by 2005, lawyers have bundled more than 700,000 claimants into multi-million dollar class actions, and more than 70 defendant corporations, from several industries, have sought bankruptcy protection (Carroll et al 2000). The techniques polished in those cases have been applied in massive class actions against manufacturers of silicone breast implants, motor vehicles with certain defects, birth control devices, diet pills, and most spectacularly, tobacco manufacturers. Plaintiffs lawyers enriched by such cases are very prominent contributors to Democratic Party candidates for office, who in turn have resisted serious (as opposed to superficial) tort reform legislation. Political election campaigns for state supreme court judges have often become expensive battlegrounds between interest groups that favor restrictions on tort litigation and those who oppose changes.

There is little likelihood that any European legal systems will adopt such the American ways of tort law. In a recent article, Blankenburg (200X:21-22) writes:

[E]ven if there is much discussion about a few extraordinary liability claims also being launched in Europe, most empirical studies show that the volume of cases is much lower than in the U.S.A. Personal injury damages in Europe are largely covered by insurance systems, and most jurisdictions rely on standard tables for tort damages....In general, awards are lower than in America ...”

On first appearance, the U.K. might appear to be an exception. Recently it was asserted that medical error tort cases against the National Health system had risen from £1 million in 1974 to £477 million in 2003; that £200 million in claims had been filed against British schools; and that a “culture of fear” of tort suits had led to restitution in access to playgrounds and school outings (BBC 2004a). But due to a variety of entrenched legal differences, British tort law remains far less lucrative for plaintiffs’

lawyers,<sup>24</sup> and far more unpredictable and financially threatening for defendants, than American tort law. The U.K. has instituted a much more limited version of contingency fees than the U.S. Judges, not juries, decide liability and damages issues, and award much lower levels of non-economic damages. Britain's new "group actions" (Andrews, 2001) are far more limited and less threatening than American class actions. British insurance companies are complaining not about the large number of multi-million dollar verdicts, as their American counterparts do, but about excessive numbers of claims involving less than £1000 or £5000 (BBC, 2004b). Nor do British lawyers function, as American plaintiffs' lawyers do, as a powerful political obstacle to legislation or court decisions that seek to moderate tort claims or divert them into administrative forums.

#### 4. Social provision

Western European citizens have long enjoyed a wider array of legally-guaranteed rights to social welfare, health care, and employment benefits and protections than is provided by American law (Wilensky, 2002).<sup>25</sup> The American welfare state also has a distinctive political and organizational structure, which affects its legal character. Viewed comparatively, in the United States, social benefits and services tend to be administered or delivered in a more politically decentralized fashion. Public education is governed and largely funded by state and municipal governments. So are many other aspects of social welfare policy. Compared to Europeans, moreover, American citizens rely much more heavily on private insurance companies, employers, and nonprofit

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<sup>24</sup> Two leading "no win, no pay" British plaintiffs' law firms collapsed in 2004 (BBC, 2004b)

<sup>25</sup> Among economically advanced democracies, the U.S. stands out in declining to guarantee universal health care, limiting legally prescribed benefits to the elderly (Medicare), the very poor (Medicaid), and military veterans. American minimum wage laws are set much lower. Unskilled male workers in the United States earn less and enjoy fewer legally-mandated benefits than their counterparts in Western Europe (Freeman, 1994). Compared to Western Europe, legally mandated unemployment benefits in the U.S. are available for a much shorter period and replace a smaller percentage of the laid-off employee's wages (McFate, 1995: 636). Labor law in Western European countries and Canada provide workers with rights to severance payments in the event of layoffs or dismissals; American labor law does not (Freeman & Katz, 1994; Abraham & Houseman, 1993). Except for Italy, the U.S. spends far less than other rich countries, as a percentage of GDP, on public-employment services and job training for unemployed workers (Id. at 641, 644). In a study of 14 economically advanced democracies, the U.S. ranked a distant last in terms of legislation mandating maternity leave benefits and job protection for employed mothers-to-be (Gornick et al, 1997: 138; *The Economist* 1998: 110).

organizations (rather than on government agencies) for health care coverage, compensation for workplace injuries, treatment of the mentally ill and the elderly, and retirement pensions. Because benefit provision is entrusted to far-flung (and sometimes financially hard-pressed) county governments, private insurance companies, school districts, private nursing homes, and employers, the United States, in contrast with European welfare states, typically employs detailed, judicially enforceable legal regulations and procedures to ensure that those benefits are made available uniformly and fairly.

The result is a great deal of litigation in the U.S. concerning eligibility for welfare benefits, insurance coverage of specialized health care services, services for physically or mentally disabled school children, and more (Kagan, 2001: 162-63). In Western Europe, litigation plays some role, perhaps an increasing one, in policing the fairness of decisions by welfare state bureaucracies, but the litigation has a different character. Germany diverts complaints by patients who are denied special medical services into free "social courts," where they are decided by panels staffed by a professional judge who specializes in such cases, a lay judge who represents the patient, and another lay judge who represents the employer or doctor, (Jost, 1998).<sup>26</sup> Great Britain provides a system of relatively informal administrative tribunals in which citizens can dispute bureaucrats' decisions concerning entitlements. But neither these tribunals or regular courts, Herbert Kritzer (1996: 135, 147, 174) observes, "exercise the kind of direct control over other governmental institutions that courts in the U.S. have done repeatedly over the past several decades." And that helps explain why comparative analyses of welfare administration (Jewell, 2003) find much more inflexible, legalistic decisionmaking in American agencies.

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<sup>26</sup> Similarly, when U.S. officials suspect American physicians, hospitals, or HMOs of seeking excessive reimbursement, they often bring civil or criminal actions in general courts. In Germany, those disputes are decided by special arbitration committees, staffed by representatives of the health care plans and the doctor's union, and its decisions are appealable to the social courts. (Jost, 1998) In the U.S., legislatures and judges (rather than specialists as in Germany) end up trying to draw fine distinctions between justifiable and nonjustifiable medical services and between fraud and excusable error by providers, and then embed those distinctions in penal laws. Should politically active plaintiffs' lawyers and their political allies succeed in establishing patient rights to sue health maintenance organizations for malpractice, as they did in California in 1999, then courts and juries will end up making even more of those distinctions.

In a detailed analysis of public versus private provision of social benefits, Jacob Hacker (2002), relying on a rigorous OECD study, showed that in 1995, public social welfare expenditures<sup>27</sup> in the U.S. were only 17.1 percent of GDP (as compared to 35-37% in Scandinavian countries, and 25-30% in Germany, The Netherlands, Italy and the U.K.). On the other hand, government-mandated or subsidized private expenditures<sup>28</sup> for the same purposes were much higher in the U.S., amounting to 8.3 % of GNP. Thus once one takes those private expenditures into account, the U.S.-EU differences in total social provision narrow sharply. But it also illustrates the distinctively different legal structure of the American welfare state, referred to above.

But have these differences between the U.S. and most Western European countries noticeably narrowed in the last decade? Are they likely to narrow significantly in the near future? Pushed along by global competitive pressures, the shift to service-oriented economies, and demographic changes, Western European countries have faced intense political demands to cut back worker protections and social welfare provision (particularly pensions, health care expenditures, and disability payments). There has been much talk of the passing of the “golden age” of the welfare state and the arrival of the “age of austerity.” Yet most academic analyses have characterized the resulting legal changes in most countries as efficiency-enhancing reforms, rather than as massive retrenchment or movement toward the neoliberal ideal or the privatized American version of the welfare state ( Pierson, ed. 2001).<sup>29</sup> Most explanations point to the “path dependence” of existing arrangements and the strength in most countries of the broad

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<sup>27</sup> Social welfare expenditures (Adema, 1999) were defined as “cash benefits for .. disability, old age, death of a spouse, occupational injuries, disease, sickness, childbirth, unemployment, poverty” as well as government spending on housing, health care, services for the elderly and disabled, and similar benefits. Government spending on education was excluded.

<sup>28</sup> Private social welfare expenditures include special tax breaks that are tantamount to direct cash benefits (e.g. tax credits) or that subsidize private social benefits (such as exemptions of employer-paid health and pension benefits from the employee’s taxable income).

<sup>29</sup> In a study of labor market regimes in several Western European countries, Stewart Wood (2001) concludes that despite pressures for more flexible labor markets and some legal changes in workers’ rights, there has been no convergence on a “liberal, market-oriented model” and that labor law regimes in the three models of European welfare state approaches - Scandinavian, Christian-Democratic, and liberal (Esping-Anderson, 1990) -- “remain distinct in ways that demonstrate profound continuities with their ‘golden age’ incarnations (p. 369). The same conclusions emerge from comparative studies of health care expenditures (Giamo, 2001) and pension reform (Myles & Pierson, 2001).

political constituencies that support existing protections. As political scientists Myles and Pierson, 2001: 322) put it, “no government wants to pass legislation than will lead to its demise.”<sup>30</sup>

Indeed, the most significant welfare state change in the last decade probably has been the shrinkage of the protections afforded by the American welfare state. Confronted with pressures for austerity, the United States’s privatized and more voluntary mode of provision failed to generate the broad politically-organized constituencies and the path dependencies that have limited retrenchment in Europe. In the U.S. for example, federal welfare reform legislation in 1996 sharply limited welfare benefits for poor families. Business firms, faced with escalating health care costs, have sharply contracted employer-paid health insurance for workers (Hacker, 2002) and reduced the certainty of voluntary, employer-provided pension guarantees (Ibid). If anything, therefore, the gulf between Western Europe and the U.S. in legally-guaranteed health and welfare benefits has widened in the last 10 years.<sup>31</sup>

## 5. Tax Law

The other side of the welfare-state coin is the body of tax law that governments use to fund legally-entrenched social benefit programs. Among the rich democracies, the U.S. has long been near the bottom of the list in tax revenue as a proportion of gross national product (Steinmo, 1993). In a magisterial analysis of 19 rich democracies,

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<sup>30</sup> Among OECD countries, average gross public social expenditure declined from a peak of 23% of GDP in 1993 to about 21.5% of GDP in 2001, with all the decline accounted for by non-health expenditures. (OECD Factbook 2005). Social insurance spending related to work incapacity (disability, sickness and occupational injury benefits) has declined in as many countries, particularly in Belgium, the Netherlands and Portugal.(Ibid).

<sup>31</sup> An OECD (2003a) analysis showed that in most Western European countries, 70-90 percent of health care expenditures came from public sources, compared to 44% in the much more privatized United States.<sup>31</sup> According to 2001 figures compiled by OECD, public spending on and services to families (social assistance, child care, etc) remains far lower in the US as a share of GNP (about 0.3%) than the OECD average (about 1.9%), although in some Western European countries (Switzerland, Portugal, the Netherlands, Italy) the figure was closer to 1% and in Spain it was about 4.5%) (Adema, 2005:10). In 1999, OECD countries guaranteed an average of 26 weeks paid benefits to workers who take leave to care for infants and ill family members; in the United States, the law offers no such rights. (Jaumotte, 2003).

Harold Wilensky (2002) explains why. Higher national tax revenues are associated with a series of political and governmental structures – the presence of a consistently strong, left-of-center political party or a strong Catholic party, and the presence of corporatist bargaining structures, and strong support for solidarity-enhancing social security programs. The United States, along with Japan, Ireland, and Switzerland ranks low on these factors.

The style of American tax law, reflecting the politically fragmented nature of the American state and its political parties, is even more distinctive. Comparing American, British, and Swedish taxation systems, political scientist Sven Steinmo (1993: 38) observed:

The American tax system is by far the most complex system in the world. There are myriad special exemptions, deductions, credits, adjustments, allowances, rate schedules, special tariffs, minimum and maximum taxes designed to affect certain classes, groups, regions, industries, professions, states, cities, companies, families, and individuals. No other tax system in the industrialized world comes anywhere close to the degree of specificity found in the U.S. Federal Revenue Code.

Steinmo (1993: 141) also noted that British and Swedish politicians, like their American counterparts, are under constant pressure to make tax adjustments in the name of equity or efficiency or special need. But Great Britain and Sweden, with their unified political parties and strong parliamentary governments, are better at containing interest-group pressures. The mind-boggling complexity of American tax law, says Steinmo, directly reflects the fragmentation of power in Congress and in American political parties, which "made an already overly open process even more open and made an already porous system even more loophole-ridden." Compared to other democracies, not surprisingly, the implementation of tax law in United States is far more burdened by expenditures on tax lawyers and consultants, and far more prone to adversarial legalism in the implementation of tax laws.

Tax laws, needless to say, penetrate and influence social and economic life perhaps more than any other body of law. Americans pay much lower gasoline taxes than

Europeans, and in consequence they drive bigger, less fuel-efficient vehicles, generate more air pollution, contribute more to global warming, and live with worse urban sprawl -- although the latter is also, and more importantly, due to a taxation system that relies much more on local property taxes for urban services (and hence generates very strong incentives for businesses and home-owners to flee high-tax cities for ever-more-distant low-tax suburbs). Indeed, the suburbanization of the American electorate, attributable in significant measure to the national emphasis on local property taxes, also helps explain why American voters resist higher national and state taxes and social spending on the poor left behind in inner cities.

The last decade has seen strong political pressures for tax relief in Europe as well as in the U.S. Since 2000, according to the OECD (2003b), 15 OECD countries reduced their top rates for personal income taxes, and 12 lowered them for corporations. Have the U.S.- European differences narrowed significantly in this regard? Not really, perhaps because since 2001, a conservative American president and Congress have aggressively cut federal income tax rates further. According to 2002 figures, national tax revenues still remained substantially greater in almost all Western European countries than in the U.S.; American tax revenues, including compulsory social security contributions, equaled about 29% of GDP. By contrast, in Sweden, Denmark, Finland, Denmark, The Netherlands, Belgium, France, and Italy, tax revenues were 40% of GDP or more, and only Ireland was at the US level.<sup>32</sup>

The strength of anti-tax politics in the U.S. is an important contributor to the prevalence of adversarial legalism. It increases incentives for politicians to deal with social problems not through social programs but by legislating legal obligations and rights to sue those who fail to meet them. As long as European nations continue to face

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<sup>32</sup> The tax burden on individual households is more varied, and the US in that regard, is less of a low-tax outlier. The OECD calculated taxes (income tax plus employee contributions less cash benefits) as a percentage of gross earnings of the average production worker. That tax burden was greater than 20% of income for a one-earner family with two children in Belgium, Denmark, Finland and Sweden; between 15% and 20% in France, Germany, Greece and the Netherlands; 10-15 percent in Italy, Spain, U.K. and the U.S.; and less than 10% in Austria, Ireland, Portugal and Switzerland. (The tax burden in the Netherlands was distorted, OECD noted, because in 2002 employee and employer health taxes were replaced by premium payments to private insurers, which do not count as tax).

powerful political constituencies for strong social welfare programs, and hence for higher taxes than one finds in the U.S., the less likely they will to move very far toward American levels of adversarial legalism.

## 6. Criminal Penalties, Gun Laws, and Criminal Procedure

In my 2001 book *Adversarial Legalism*, drawing on research mostly from the 1980s and early 1990s, I wrote (65-66):

While a minority of American states do not employ the death penalty, and in states that do, only a relatively small minority of "death eligible" murderers actually are sentenced to die, the United States stands alone among economically advanced democracies in employing capital punishment (Zimring & Hawkins, 1997: 33-39). Even aside from the death penalty, penal policy in the United States is distinctively harsh. In 1995, its incarceration rate -- 565 per 100,000 people -- was more than five times as high as in other rich democracies (Economist, 1997: 46; Economist, 1995:25). The disparity is due not so much to differences in the crime rate but to the much longer prison terms doled out by American courts for felonies (Frase: 1990: 658; Selke, 1991), including the sale of psychoactive drugs, and to their greater propensity to impose jail sentences for "victimless" public-order infractions such as disorderly conduct, prostitution, and public drunkenness (Frase & Wiegend, 1995: 320-21)<sup>33</sup>. American police are more likely than their French or German counterparts to arrest and lock up crime suspects, rather than simply issuing a summons, and American defendants are more likely to be held in jail until both their first court appearance and the final decision (Frase & Wiegend, 1995:329; Frase, 1990:599-601).

In one respect, American criminal law is less harsh and restrictive .... The liberality (or laxness) of U.S. gun control laws, viewed in comparative perspective, helps explain why the U.S. suffers much higher levels of lethal crime than other economically advanced democracies with high crime rates (Zimring and Hawkins, 1997: 33-39). American robbers (as well as people involved in fights and acts of revenge) are much more likely to use guns.<sup>34</sup> At

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<sup>33</sup> In 1980, 6 percent of all criminal charges in France involved "victimless" or "consensual" crimes; in the United States, "comparable offenses accounted for over 30% of all arrests, notifications, or citations for nontraffic violations" (Frase:1990:569-70).

<sup>34</sup> A comparative study found that approximately 40 percent of robberies reported to the police in the U.S. involve firearms, compared to 12 percent in Germany and 9 percent in England. (Lynch, 1988: 196-97; Zimring & Hawkins, 1997: 115). As Zimring and Hawkins 1997b:59 wrote:

What sets the United States apart from other developed countries is not our high crime rates. What sets the United States apart is our distinctively high rates of lethal violence. Our cities

the same time, weak restrictions on gun ownership and possession mean that American police officers face potentially armed citizens much more often than their counterparts abroad -- which gives them greater incentives to approach suspects defensively and to engage in aggressive searches for possible weapons, which increases the incidence of legal conflict over alleged police malpractice.

Have any of these differences narrowed in the last decade? Are they likely to in the foreseeable future?

Stimulated by the continuing social disruptions stemming from immigration, competitive economic change, and de-industrialization, crime rates have increased in many European countries in the last ten years, while they have declined in the U.S. In Europe, fear of crime and popular investment in security measures, from burglar alarms to surveillance cameras, have grown (Downes, 2001: 60). Crime has become much more salient as a political issue in many European countries. In all those senses, too, Europe has become more like the United States. Garland (2001) has written eloquently of a similar, harshly penal "culture of control" dominating criminal justice policy in the United Kingdom, as well as in the United States, during the last 15 years. Imprisonment rates in the U.K. and the Netherlands have increased significantly (Greenberg, 2001:74).

Still, the U.S. remains in a league of its own in terms of the severity of penal policy. Exposures of erroneous convictions in capital cases, often abetted by DNA testing, led to a moratorium on executions in Illinois and some softening of support for the death penalty in 2005 public opinion polls. But the death penalty remains legal in a majority of American states, and executions remain common in a number of southern states (Zimring, 2003). In view of Europeans' ever-increasing criticism of the U.S. for retaining capital punishment, it is less likely than ever that Europe legal systems will become "Americanized" in that regard.

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have no more property crime than major cities abroad. Even the rates of assault reported in other industrial nations are quite close to the assault rate in the United States. But the rate of violent death from assault in the United States is from 4 to 18 times as high as in other G7 nations; and this is largely a consequence of the widespread use of handguns in assaults and robberies. Firearms are only involved in about 4 percent of all American crimes, but are used in 70 percent of all fatal assaults.

Similarly, movement in the U.K. and the Netherlands toward tougher sentencing are only baby steps toward the severity of American criminal sentences, particularly (but not only) for non-violent crimes and drug offenses (Downes, 2001: 65-66). Thus although American crime rates in the US have fallen and are generally lower (according to a 1999 UN household victimization study) than in many European countries,<sup>35</sup> in 2000 the U.S. imprisoned 468 adults per 100,000 in population. The rate in Norway, The Netherlands, Denmark, Switzerland, Finland and Italy remained less than 50 per 100,000, and at the high end for Western Europe, the rate for Spain was about 108, England about 93 and Portugal (OECD, 2005). And political support for harsh criminal penalties in the U.S. is greater: although burglary rates, according to the 1999 victimization studies, were higher in several Western European countries (England, Denmark, and Belgium) than in the U.S. (with the Netherlands about the same), American respondents were most likely to recommend imprisonment rather than community service for a hypothetical 21 year old recidivist burglar, and they recommended significantly longer prison terms than respondents from other Western European countries.<sup>36</sup>

Nor has there been any significant change in the vast differences between Europe and the U.S. in terms of the laxness of legal controls on private gun ownership, especially for handguns. Indeed, the differences may have widened. In recent years, pressured by the American gun-owners lobby, Congress allowed a federal law prohibiting sale of assault rifles to expire, some states and municipalities enacted laws expanding the right to carry concealed weapons, and other states (and Congress) enacted laws prohibiting tort

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<sup>35</sup> According to the UN victimization study, households in England, Denmark, and Belgium experienced higher rates of burglaries than in the U.S., whose rate was similar to the Netherlands. Other Western European countries in the survey had lower rates than the U.S. And with respect to selected contact crimes (robbery, sexual assault, and assault with force) Americans reported lower victimization rates than respondents from most Western European countries studied -- England, Scotland, Finland, Northern Ireland, Denmark, Sweden, France, Switzerland and the Netherlands. Only Belgium, Catalonia, and Portugal reported lower contact crime rates. Moreover, asked about whether they had concern about being out alone and at home after dark, Americans (along with Swedes) were least likely to express fear of crime in that sense.

<sup>36</sup> Respondents from Northern Ireland, Scotland and England (where, in contrast to the US, crime rates had risen sharply in the 1990s), were almost as likely (over 50% of respondents) to recommend imprisonment, and they recommended sentences of 21-24 months -- compared to the American average of 31 months, and the 7-19 months recommended by respondents from Denmark (at the low end), Finland, Sweden, France, Belgium and the Netherlands (at the high end).

claims against gun manufacturers for lax controls on distribution channels or failure to include safety devices. In recent years, when an American community is traumatized by the kind of deranged shooting massacres that in the United Kingdom and Tasmania in the 1990s led to new legal restrictions on sale of semi-automatic weapons and restrictions on gun sales and ownership, the principal response by American political leaders has been to offer condolences to the families of the victims. Criminal penalties for violation of regulations concerning the sale of guns have been light.

Finally, it is hard to imagine that European nations, even those that have taken some steps toward greater adversarialism or authorization of plea bargaining, will adopt modes of prosecution, adjudication, and adversarial modes of supervising police tactics that resemble the American model. In American criminal adjudication, the introduction of evidence and invocation of legal rules is dominated not by the judge (as in Europe) but by contending parties' lawyers. In contrast to bureaucratic legalism's emphasis on legal correctness, the crucial decision concerning the defendant's guilt or innocence is made not by a professional judge but by lay jurors, whose decisions are not explained in terms of law or legally reviewable. Lawyers for the prosecution and defense play a prominent role in choosing the jurors, in recruiting and coaching their own expert witnesses, and in influencing the jury's decision. In contrast to hierarchically-organized and supervised prosecutorial systems in Europe, the heads of prosecutors' offices in the U.S. are selected politically, and individual assistant prosecutors usually make their own judgments in formulating the charge and deciding when or how to reduce the charge in return for a guilty plea (Johnson, 1998). And the costs and cumbersomeness of the highly adversarial American jury trial has made it unworkable as an everyday mode of adjudication (Alschuler, 1986). Trials occur in fewer than 10 percent of prosecutions; a large proportion of cases are resolved by the prosecutor's agreement to reduce the charge, and hence the punishment, in return for a plea of guilty.

Even in comparison with the British "adversarial system," hierarchical, authoritative imposition of legal rules is relatively weak in the United States (Atiyah & Summers, 1987). In an excellent comparative analysis, Graham Hughes (1984) observed,

"England may be the cradle of the adversary system, but the child it reared never grew to the giant proportions of the sibling who crossed the Atlantic."<sup>37</sup>

Just as importantly, the American and British criminal justice systems differ sharply in the extent to which adversarial litigation and courts affect the rules of criminal procedure and controls on law enforcement processes. In the U.K., as in most countries, these rules are made primarily by legislatures and police bureaucracies. In the U.S., the rules are made in significant degree by courts, through judicial interpretation of the federal and state constitutions. Court-made rules of criminal procedure, elaborating defendants' constitutional rights, often override those made by legislatures and police departments, and adversarial litigation on such constitutional issues is an everyday phenomenon in both trial and appellate courts. Compared to European countries, including Great Britain, American courts have instituted a much stricter version of the "exclusionary rule" (illegally obtained evidence, however probative of guilt, cannot be used in court), as a way of empowering defense lawyers to enhance judicial scrutiny of police evidence-gathering and interrogation practices. And broad judicial interpretations of the U.S. Constitution's privilege against self-incrimination encourage defense lawyers to squelch cooperation by defendants, except in return for a reduction in charges and penalties, so that American defendants are much less likely than European defendants to testify on their own behalf at trial – which in turn increases incentives for police to trick criminal suspects into station-house confessions.

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<sup>37</sup> Hughes (1984) provides numerous examples of the "muted adversariness" of British compared to American criminal defense lawyers, due to differences in legal rules and institutions. In the United States, defendants' rights to purge racial and other forms of bias from jury selection have become routinized into a "prolonged jury selection process. In Los Angeles criminal trials in 1984, jury selection averaged five hours. In England, criminal juries usually are impaneled in a matter of minutes. In the United States, defense lawyers' legal objections often generate lengthy in-court wrangles over evidentiary issues. In English criminal trials, Hughes notes, lawyers rarely tie up proceedings with objections and disputes about the admission of evidence. In contrast to American judges, British judges in jury trials summarize and comment on the evidence. In American trials, he adds, that task is left entirely to the competing lawyers, who may resort to obfuscation and appeals to general values rather than close analysis of the evidence. American prosecutors and defense lawyers engage in "frequently repetitive (as well as pointless and degrading) cross-examination," punctuated with objections and arguments from opposing counsel about the cross-examiner's questioning style. This rarely occurs in English criminal trials, says Hughes, where "judges are forthright and dominating" and opposing counsel are "correspondingly restrained."

Crime increases in Europe have placed great pressures on traditional European methods of criminal law enforcement, police supervision, and adjudication, and there have been arguments for introducing more adversariness into the continental criminal process. But adversariness can be increased without mimicking American adversarial legalism. I imagine that virtually all of the American methods of adjudication and police accountability mentioned above are deeply unattractive most European criminal law experts and policymakers, and that they will resist emulating them. Thus Maximo Langer (2004) undertook a study of the introduction of plea bargaining in Germany, Italy, and France (as well as Argentina). His findings echo many of the observations and explanations offered in this paper:

The influence of American plea bargaining in all four of these jurisdictions is undeniable. Despite this influence, however, the importation of plea bargaining ... is not likely to reproduce an American model of criminal procedure. Each of these jurisdictions has adopted a form of plea bargaining that contains differences – even substantial differences – from the American model.

One reason, Langer suggests, is that the “structural differences between the American adversarial conception of criminal procedure and the continental European and Latin American inquisitorial conception of criminal procedure are so deep.” Another is that:

In each of these civil law jurisdictions, some legal actors have distrusted or resisted the adoption of plea bargaining ... either because reforms have threatened their traditional powers ... or because of their differing legal culture.

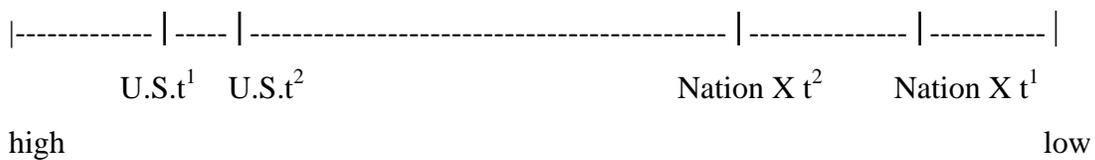
## **V. Conclusion**

Traditional European legal folkways are far from unchangeable. In the last few decades, litigation and judicial decisions have become more prominent features of governance, regulation, policy development, and dispute resolution in the legal systems of Western European countries. Global economic competition, migration, fiscal

pressures, and the challenges of coordinating law and policy throughout the EU will ensure that those trends will continue. Law and legal practice in Europe probably will increasingly reflect American styles of contracting, corporate financial regulation, and controls on private pension funds -- partly because they are well-adapted to a highly competitive, privatized economy. European NGOs, plugged into the Internet and American TV news, will continue to lobby for some of the individual legal rights that American adversarial legalism is so prolific at inventing -- such as rights against spousal abuse, sexual harassment, and more -- although European legal systems are more likely to mirror American norms than adversarial American enforcement methods.

Yet due to national traditions of “bureaucratic legalism”, increases in law, litigation and judicialization in Europe do not imply comparable increases in American-style adversarial legalism. And even some movement toward American-style adversarial legalism does not mean convergence on or with the American way of law. Imagine adversarial legalism varying, on a national basis, between “high” and “low”, as in Figure 1:

Figure 1  
Hypothesized National Rates of Adversarial Legalism



At Time 1 (e.g. 1970-1980), the Figure suggests, the U.S. had high levels of adversarial legalism, and Nation X (England, Germany, Italy, etc.), ranked low in that respect. Even if adversarial legalism were to increase in Nation X between t<sup>1</sup> and t<sup>2</sup>, as indicated in Figure 1, and even if the incidence of adversarial legalism decreased in the U.S. from t<sup>1</sup> to t<sup>2</sup>, there would still be a very substantial gap between the two countries. In reality, we have no aggregate measures of where countries as a whole stand on this dimension. But

my sense is that the gaps between  $t^1$  and  $t^2$  displayed on Figure 1 roughly capture both the trend over the last decade and the relative position of the U.S. and Western Europe.

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I have also argued in this paper that European member state legal cultures and political structures (parliamentary government, strong national bureaucracies) will operate to resist American-style styles of lawmaking, policy-implementation, law enforcement and adjudication. And I have listed six aspects of American in law and legal process that I imagine will remain so unattractive to European political and legal cultures that they are prime candidates for fierce resistance: (1) the political nature and extraordinary powers of the American judiciary; (2) high levels of adversarial legalism in regulatory processes; (3) a tort system shaped by contingency fees, trial by jury, high noneconomic damages, and entrepreneurial class action litigation; (4) more limited legal rights to social provision and employee protections; (5) lower tax obligations; and (6) punitive criminal sanctions, permissive gun laws, and reliance on adversarial legalism to regulate police behavior.

Conceivably, my time horizon has been too limited. When De Tocqueville visited the United States in the late 1820s, he noted the prominence of courts and lawyers in the governmental process, but neither he nor his American contemporaries could have envisaged the range and scope of adversarial legalism that pervades American governance and social life in 2005. In the 1820s, federal law and federal government did not play a very significant role in everyday governance or most areas of law and public policy. Looking back, however, we can see that some of the attitudes, governmental structures, and legal institutions that existed in Tocqueville's day still play an important role American law, and help explain why adversarial legalism has become so prominent.

Similarly, one might wonder whether the developments in European law and practice mentioned in Section III of this paper, even if they have moved European ways of law only to point  $t^2$  in Figure 1, are still in their infancy. The new legal structures are in

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<sup>38</sup> The overall thrust of articles by Dan Kelemen (2004, 2006) is that Nation X  $t^2$  should now, or in the future, be shifted a centimeter or so to the left.

place. They generate incentives for expansion in the direction of adversarial legalism. And external factors – continuing economic and social pressures and political pressures for legal harmonization and individual rights -- could well continue to fuel those incentives. So it might be argued that in 50 years, or 75 – only a blink of an eye in the history of European law – real convergence on some new Euro-American way of law might occur.

I would be foolish to assert that definitely will not happen, and indeed it probably will happen for some areas of law and governance. But American states -- in Tocqueville's time and in 1960 (at the brink of the real explosion of American adversarial legalism) -- had very different governmental structures and legal cultures than European countries have today. Adversarial legalism fits comfortably with those structures and cultures. It does not fit comfortably with the governmental structures and legal cultures of contemporary European states. So my bet is that adversarial legalism will remain primarily an American phenomenon for many decades to come.

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