LIFETIME ACHIEVEMENT AWARD 2012:
BOB KAGAN

Editor’s Note: Robert A. Kagan is the 2012 recipient of the Lifetime Achievement Award of the Law and Courts Section of the American Political Science Association, recognizing his four decade career as professor of political science and law at the University of California-Berkeley. The award cites Kagan’s “elegant blend of legal, sociolegal, political, historical, and comparative analysis” that “redefined the boundaries of the law and courts field.” We asked scholars in the law and courts field to introduce readers to some of the major themes of Kagan’s work and explain its significance for the study of law and public policy both in the United States and abroad.

Kagan The Explorer
by THOMAS F. BURKE
and JEB BARNES

Like a botanist in the tropics, intrigued but overwhelmed by a profusion of flora, what Robert Kagan saw when he looked at law and society in the late 20th and early 21st Century was law growing everywhere, law pouring out of every institution, law seeping into the nooks and crannies of everyday life, law growing both in its reach and density. Kagan attributed this profusion of law to “the relentless pressures of technological change, geographic mobility, global economic competition, and environmental pollution,” which generate new inequalities, new injustices, new risks, and new cultural challenges to old norms. But what is the scholar to do when, as Kagan put it in one article, “there is too much law to study?”

What Kagan does, mostly, is to study law not in books or in courtrooms, but in the everyday world where it lives. Perhaps because of his pre-Ph.D. background as a business lawyer, Kagan often studies law in the world of commerce. From his dissertation, for which he was employed as a regulator implementing Richard Nixon’s wage and price freeze, to his latest work on pulp mills, diesel buses, and trucks, Kagan is truly a law in society scholar, investigating the life of the law in ordinary, sometimes banal places—fast food restaurants that enforce smoking rules, shipping ports that struggle with labor and environmental rules, and factories that must contend with OSHA inspections.

The settings and subjects of Kagan’s research are diverse, but each is part of a quest to understand legal authority and how it works in the world. In this quest Kagan is closely connected to Max Weber, the founder of sociolegal studies. Weber observed that systems of authority were changing: Rule by religious leaders, or by charismatic individuals, was being replaced by “rational-legal” authority. But what would legal authority look like in practice? Weber’s answer, for the most part, was that law would be bureaucratic, centralized and hierarchical. Weber was the prophet of bureaucratic rationalization, the movement of society towards predictable, calculable rules. The legal system’s job in such a society was merely to implement and apply commands created elsewhere, in the political system. But of course much of American law does not look that way. It does much more than apply rules, and it is much more decentralized, more fluid, more unpredictable than Weber’s ideal type. This is the step from...

which Kagan’s work on “adversarial legalism” begins.4 What gives American law its open-ended character, Kagan observes, is that it is typically “party-centered” rather than hierarchical, meaning that instead of some legal authority, it is the parties to a dispute that drive American law. The parties can argue not just about how a rule of law applies to the facts of their case, but also over the purpose and justness of the rules themselves, as well as the justice of the process used to resolve the dispute. In adversarial legalism, then, everything is up for grabs.

American law and legal institutions, Kagan argued, were suffused with adversarial legalism, with powerfully mixed consequences. Adversarial legalism’s open-endedness makes it capable of great heroism, as when it used to reform barbarous prisons, stop police from torturing suspects, or recognize the ways in which sexual harassment abuses women. Litigant activism can be a powerful force, prying out the secrets of institutions that inflict asbestos, tobacco and pedophilic priests on society. Adversarial legalism made it possible for law to be, in the sociologists Philip Selznick and Philippe Nonet’s terms, “responsive,” that is, flexible and open to change in order to rectify social injustice.5 Further, Kagan argues that adversarial legalism is particularly attractive to American policymakers because, in a nation whose political institutions were designed to frustrate governmental activism, it gives them an alternative mechanism for addressing social problems. In an age of divided government and tight fiscal constraints, adversarial legalism appears to be government on the cheap, a way of building state capacity to resolve social problems without seeming to building the state. But Kagan was more struck by the flip side of adversarial legalism’s virtues: its costs, complexity, and unpredictability, features that result from its bottom up structure and endless opportunities for rule contestation. These downsides often create a system that works poorly both for would-be plaintiffs, who cannot afford to use it, and organizations, which struggle to manage uncertain legal threats.

Kagan came to his concept of adversarial legalism just as a cultural and political debate over “litigiousness” was ramping up. Did the U.S. have “too much” litigation? This is mostly a left-right debate, with conservatives taking the side of tort reform and curbs on many forms of litigation favored by liberals (civil rights and liberties, due process, environmental). Kagan’s position in this debate doesn’t correspond neatly to either side. He is with conservatives in worrying about the consequences for business of adversarial legalism, but his worries extend as well to the plaintiffs and their concerns—he is not anti-regulatory. Kagan’s comparative approach, and his evident appreciation for the social democracies of northern Europe, estranges him from today’s myopic and polarized policy debates over litigation and regulation.

Kagan’s focus has always been on good governance rather than academic theory building, and his engagement with public policy debates counts as one of his virtues as a social scientist. Sometimes though, the “pull of the policy audience” 6 works against him, and we think this has been true with the concept of adversarial legalism. We worry that the term will be used, as Kagan himself sometimes seems to use it, simply as a kind of a short-hand for law’s pathologies, a disease with malign symptoms, rather than in the more Weberian sense, as a structure of authority with all kinds of political consequences, empowering some actors and disempowering others. Using the term this way helps us to better understand the causes and consequences of differences in legal style both across and within nations—to explain, for example, why Kagan is skeptical that European law will become “Americanized” or that affluent nations will converge in their legal styles.7

Kagan is unusual among academicians that he works at both the macro and micro level, comfortable with making the big generalizations necessary for productive cross-national comparisons, but also with the more nuanced observations required for studies of the regulation of sites like ports and factories. Perhaps as a result, there is a tension in Kagan’s work between structure and process, or between the apparent tilt of the structures of authority and their actual consequences, as Kagan often discovered when he studied law in action. American criminal law gives defendants, in theory, all kinds of ways in which to contest their prosecution, yet an overwhelming percentage of defendants forgo their rights and take a deal instead. Tort and civil rights law in theory promise all kinds of opportunities for injured plaintiffs, but most of those aggrieved “lump it”. Adversarial legalism in theory offers too much law; in practice it often delivers too little. Where the pathological view of adversarial legalism says “too much,” the facts on the ground suggest a more complicated picture.

This is also true in the larger part of Kagan’s work, on regulation. Regulation, even in the United States, in structure looks more like Weber’s ideal type of “bureaucratic legalism,” with a hierarchical authority (OSHA, EPA, FDA) imposing rules and using the threat of punishment to elicit compliance. Kagan is part of a group of sociolegal scholars who have shown just how complicated the politics of regulation really are, and how little they correspond with this ideal type. Bureaucrats sometimes act like, well, like stereotypical bureaucrats, “going by the book,”

4. Kagan’s concept of adversarial legalism built on the work of Mirjan Damaska, whose connection to Weber is also quite clear. Mirjan Damaska, The Faces of Justice and State Authority, New Haven, Yale University, 1986
as Kagan and Eugene Bardach found in their study of federal regulatory agencies, and the regulated sometimes respond as rational actors who worry only about the costs of punishment, but these are far from the only possibilities.8

The limits of the rational actor model are apparent when, as Kagan often demonstrates in his research, organizations facing roughly the same threat of punishment react quite differently to a new law. A key variable in explaining regulatory response, Kagan and his co-authors argue, is the perceived costs of responding, not all organizations enjoy the same “economic license” to follow new legal mandates. But the response to law is more than just a matter of weighing costs versus benefits. An organization’s “management style” can also have a significant impact on its response to regulations, with some organizations acting as laggards who ignore the law, while others act as true believers who go well beyond compliance.9 Kagan highlights the slew of actors and institutions that figure into response to law. It matters, for example, whether the officers within an organization who are charged with responding to regulations have internalized the norms of new laws, and this means that part of the politics of regulation is within the professions, where new norms are absorbed, translated, rejected and diffused. Communities surrounding organizations also play an important role. They can grant or deny what Kagan and his co-authors have called the “social license” of the company, its legitimacy, based on community beliefs about regulations and their associated norms. A company unmove by the threat of punishment may still worry about the damage to its reputation when it is seen to violate norms about safety, the environment, and civil rights.

Political debates over “too much” or “too little” regulation, from this perspective, seem almost beside the point. For one thing, they center the action in government regulations. What Kagan and his colleagues have shown is that there is a much more complicated politics of norms in realms such as the environment, consumer protection, civil rights, and many others. Regulation is a field in which legal authority plays only a part. The corollary is that effective regulatory schemes have to go far beyond simply inducing compliance through fear of punishment. Policymakers must consider the wider, more complex politics of regulation Kagan and his comrades have illustrated.

As law continues to expand its reach both in the United States and abroad, we believe that more scholars will be drawn to the questions Kagan has posed and the concepts he has developed in his research. Kagan’s distinctions between forms of legal authority give us a lens to view structural differences across countries and policies areas, organizing the unwieldy landscape of modern law. And his insistence that structures are just the beginning of the story, that the “rule of law” is much more flexible and more circulatory than Weber’s ideal type would suggest, pushes us to look beyond the abstract, and account for how law actually happens in the world. The result is a deeper understanding of the consequences, both heartening and disturbing, of the relentless march of law in contemporary society, and what we might want to do about it. *

Kagan the Comparativist
by R. DANIEL KELEMEN

Einstein once said, “The formulation of a problem is often more essential than its solution, which may be merely a matter of mathematical or experimental skill. To raise new questions, new problems, to regard old problems from a new angle, requires creative imagination and marks real advances in science.”1 Asking the right questions is as important in social science as in physics, and far too much work in contemporary political science and socio-legal studies fails on this fundamental score. Over the course of his career, Robert Kagan has demonstrated again and again an extraordinary ability to ask the right questions. Kagan’s work on American law and regulation, from works like Going by the Book2 to Adversarial Legalism,3 poses fundamental questions about the nature of regulation in the United States. And fortunately for us, his work has not just asked the right questions, it has gone a long way toward answering them. In formulating and answering these

questions, three elements of Kagan's approach stand out: his knack for formulating new concepts, his facility for combining macroscopic and microscopic analysis and his emphasis on viewing American law and politics from a comparative perspective. As Sartori and others have taught us, concept formation is a critical element of social science research. Many scholars of law and politics fail to ask the right questions because they lack the conceptual tools necessary to comprehend the phenomena of interest to them. Many scholars before Kagan recognized that there were distinctive features of the American legal and regulatory style, but Kagan surpassed others in his ability to formulate a concept that could capture these distinctive elements. Kagan’s concept of adversarial legalism captures the distinctive features of the U.S. approach to policymaking, and dispute resolution. It is a multi-dimensional, ‘thick’ concept, which can be described in terms of two primary features (formal legal contestation and litigant activism) or further unpacked to reveal a number of interrelated characteristics including 1) complex rules, 2) adversarial dispute resolution, 3) costly legal contestation, 4) strong sanctions, 5) frequent judicial review of administrative actions, 6) political controversy over legal rules, 7) politically fragmented decision-making systems, and 8) legal uncertainty and instability. Equipped with the concept of adversarial legalism, one could see better the common themes that link seemingly disparate areas of law and policy. And prospectively, Kagan’s concept of adversarial legalism has provided a tool and a common vocabulary for a host other scholars of American and comparative law and politics.

But Kagan is not just a theorist, he is an empiricist who can “soak and poke” with the best of them. The signal strength of Kagan’s empirical work is the way it so effectively combines macroscopic and microscopic analysis. Kagan looks for the big picture and the fine grain. His work on adversarial legalism combines empirical analysis of broad trends affecting the structure of American government and the American economy, political and legal culture and the legal profession with analysis of highly detailed developments in policy areas ranging from criminal justice, to civil procedure, to tort law to social and environmental regulation. In doing so, he shows how phenomena ranging from punitive damage awards in personal injury cases, to class actions in anti-trust cases, to plea bargaining in criminal cases, to litigation over environmental impact assessments are connected to deeply entrenched structures of the American political and economic system, and aspects of American legal culture and the legal profession.

In his work on American exceptionalism, Seymour Martin Lipset famously said that he who knows only one country, knows no country. Unfortunately, parochialism dominates much of the study of American public policy. In analyzing fundamental questions about the nature of law and regulation in the United States, Kagan has shown himself to be that rare sort of Americanist—one with an instinct and a vocation for comparative politics. Like a handful of the great scholars of American politics—including the likes of Lipset, Robert Dahl and John Kingdon—Kagan understands that the distinctive features of the American polity can only be understood against a comparative background. In short, the fields of American politics or public law are best understood as subfields of comparative politics. While a number of Americanists acknowledge this, few actually let it inform their work. Kagan’s work, by contrast, is deeply comparative. This perspective has not only enriched Kagan’s work on the U.S., it has also allowed him to make major contributions to the study of law and regulation in politics outside the U.S.—inspiring specialists on law and regulation across Europe and Asia to wrestle with Kagan’s ideas.

I am one such specialist. My research on regulation in the European Union has been deeply influenced by Kagan’s work. Indeed, a 1997 paper written on the question, “Should Europe worry about adversarial legalism?”, more than any other single work, has inspired much of my research agenda over the past decade. Kagan asked a simple, yet highly prescient question: should European countries worry that adversarial legalism—with the pathologies that accompany it—might take root across the Atlantic?

Kagan and I have not agreed completely on the answer to this question. He has maintained that a variety of entrenched national legal cultures and institutions across Europe will forestall the development of adversarial legalism there. By contrast, I have argued that political and economic changes fostered by the process of European integration are indeed encouraging the rise of a European variant of adversarial legalism—“Eurolegalism.” In my 2011 book, Eurolegalism, and in a series of articles, I argue that the economic liberalization and political fragmentation associated with the process of European integration have generated functional pressures and political incentives encouraging European Union (EU) policy-makers to rely on adversarial legalism as a mode of governance. I acknowledge that the legal cultures and institutions highlighted by Kagan will
Robert A. Kagan: Man of Style
by CARY COGLIANESE

In recognizing Robert A. Kagan with its Lifetime Achievement Award, the American Political Science Association’s Section on Law and Courts has honored not merely a scholar of great distinction in the study of law—but also a man of style.

In referring to Kagan as a man of style, I am making no commentary on his choice of attire or office décor—both of which have always seemed perfectly fine to me but neither of which I could ever properly judge. Nor do I wish to be taken to suggest that Kagan has merely followed fashionable scholarly trends, something for which no scholar who started studying the intricacies of regulatory behavior more than perhaps a decade ago, if even today, could be mistaken of doing. I also do not refer to Kagan’s exceptionally graceful and generous style of mentoring students and younger scholars, something which I have long admired and appreciated. ¹

Rather, in characterizing Kagan as a man of style I mean to call attention to a vital contribution his scholarship makes to our understanding of regulation. In study after study, Kagan has shown us how social phenomena and human behavior can cluster together, forming meaningful and recognizable patterns—or styles. He has contributed greatly to our understanding of legal styles, how they vary, and what difference they make, opening up for scholars of regulation—and law more generally—significant new paths for further inquiry.

Even a breezy walk through Kagan’s canon shows his uncanny eye for style. His earliest book, Regulatory Justice: Implementing a Wage-Price Freeze, comprised a study of the federal government’s implementation of a temporary wage freeze. ² It remains one of the best ethnographic studies of regulatory implementation ever written, offering an insightful account of how regulators go about securing compliance with their rules. Here, Kagan introduced the concept of legalism—a style of implementation characterized by the formal, mechanistic adherence to rules—that he found shaped the effectiveness of the government’s implementation of the wage freeze.

His subsequent book, written with Eugene Bardach, Going by the Book: The Problem of Regulatory Unreasonableness, brought legalism even more squarely into focus, documenting the formal, by-the-book enforcement tendencies of many health, safety, and environmental regulatory agencies throughout the United States. ³ One of Bardach and Kagan’s central conclusions was that the style of regulatory enforcement can make a difference in how regulated entities respond. Inspectors and other enforcement officials can interact cooperatively with the managers of regulated firms, or they can “go by the book” and penalize firms for each and every formal violation, regardless of importance. Such a legalistic enforcement style may seem necessary, especially today in light of disasters such as the financial crisis or Gulf Coast oil spill, but Bardach and Kagan suggested it also can counterproductively engender resistance as firms’ managers view government behavior as downright unreasonable. In the years since Going by the Book, researchers have


doggedly studied the comparative effectiveness of cooperative and legalistic regulatory enforcement styles, sometimes with varying results but always with recognition of the ideas Kagan has developed.

Kagan moved beyond just the behavior of regulatory inspectors in his magnificent and provocative book, *Adversarial Legalism: The American Way of Law*, in which he sought to understand the overall style of the American legal system. In Kagan's writing, "adversarial legalism" became a shorthand for "the rambunctious, peculiarly American style of law and legal decisionmaking." He drew inspiration for this characterization of American legal style from a monumental case study of seaport administration in Oakland, California he had published a decade earlier in the *Journal of Policy Analysis and Management*—an article that has become one of the journal's most frequently cited works. In his book, *Adversarial Legalism*, Kagan vastly extended his research to show that, in realm after realm, American policy-making exhibited a frequent reliance on detailed rules and courts to manage and settle its large number of conflicts. Although observers of the American system since at least de Tocqueville had acknowledged the important role of the court system, Kagan argued that "the adversarial legalism that has pervaded the United States in the last few decades is both more extensive and more intense" than ever before.

Appearing in print a year before *Adversarial Legalism*, Kagan's co-edited volume, *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism*, offered further evidence of America's distinctive regulatory style. Built around a cleverly designed set of comparative case studies of different fields of business regulation, each of the book's chapters focused on a different multinational corporation's encounters with regulators in different developed countries. Collectively, the chapters reinforced the conclusion that American regulation is more legalistic and adversarial than cooperative. Managers of U.S. operations generally reported filling out longer forms and being governed by more detailed and extensive permits. They required permission from a more diverse and fragmented set of governmental bodies at the local, state, and federal levels. They encountered the threat of greater resistance to their operations from members of the public who have greater opportunities for participation in governmental decision making. The combination of these factors resulted in both greater uncertainty and longer delays for the companies in overcoming regulatory hurdles in the United States. Reflecting on the findings from this series of case studies, Kagan observed that the fragmented and legalistic U.S. regulatory style can help check governmental abuses and offer other benefits to society; however, he questioned whether these benefits fully justified the costly burdens and inefficiencies created by the American regulatory style.

More recently, Kagan shifted his attention from regulators' style to the management style of regulated firms. His monumental, co-authored book, *Shades of Green: Business, Regulation, and Environment*, set out to explain the pollution control behavior of fourteen pulp and paper mills across four developed economies: the U.S., Canada, Australia, and New Zealand. Some mills did a vastly better job at reducing pollution than did others. Some even did better than they were required to do by law. Kagan and his co-authors showed how the variation in pollution control could be explained by variation in each mill's license to operate, a metaphor for the combined effect of the external regulatory, economic, and social pressures that bear down on a business organization. Yet Kagan and his co-authors also emphasized the role of each firm's internal "management style" in explaining its environmental performance. Drawing on extensive interviews with mill managers, they sought to identify management style based on each mill's responsiveness to external forces, its environmental "ethos," its willingness to search for advantageous opportunities to reduce pollution, and its commitment to faithful implementation of internal environmental policies. Kagan and his collaborators classified each mill’s management style into one of five ideal-types, ranging from the least committed "environmental laggards" to the highest performing "true believers." By peering inside the black box of the firm to identify internal organizational characteristics that made up "management style," *Shades of Green* blazed a new path for regulatory scholarship as well as regulatory policy reform. After all, if management style helps explain firms' compliance behavior and social performance, then we need to study style more closely and seek to understand what might influence firms' styles.

Throughout his body of law and social science scholarship, Kagan has time and again found meaningful patterns worthy of his characteristically careful empirical scrutiny, and in so doing he has defined the contours of much research by other scholars. He has truly captured style—the style of regulatory inspectors, entire legal systems, and regulated businesses—and he has taught us why and how style matters. It matters because how someone acts can be as meaningful to others as what actions they take. It matters because the combination of discrete actions can sometimes amount to a whole that is qualitatively distinct from the sum of each of the parts. It matters, we might say, because often people

5. Id. at ix.
think it matters.

I remember a presentation Kagan once gave at a workshop I organized in Washington, D.C. The workshop brought together both academic researchers and government regulators, and Kagan presented a paper on management style as part of the opening panel. For the rest of the day, I felt sorry for the other presenters who had to follow. Kagan’s typology of management styles resonated with the government regulators so much that his was just about the only paper they wanted to talk about for the remainder of the workshop.11 If the virtues of social science generalizations lie in their robustness, replicability, insight, and verisimilitude, Kagan’s work exhibits them all—but it sets the gold standard for verisimilitude. The legal, enforcement, and management styles Kagan has articulated are not his idiosyncratic ways of fashioning together complex legal and behavioral phenomena. They are patterns that resonate with the individuals who inhabit the regulatory world he has studied and that line up with how many of us scholars view the world too, even if we never articulated these patterns as distinct “styles.”

Of course, an emphasis on style does have its own limitations and challenges, a point that Kagan has forthrightly and repeatedly acknowledged. If style is like the proverbial elephant, how it “looks” can depend on which part of it one examines. “It is risky,” Kagan reminded us in Regulatory Encounters, “to make sweeping generalizations about entire national legal systems, with all their internal complexity and variation.”12

In some of my own early research, I uncovered how seriously wrong scholars were about adversarial contestation over environmental regulations in the United States. Instead of the prevailing wisdom holding that interest groups challenge eighty percent of all U.S. Environmental Protection Agency regulations, for example, a simple inspection of court records revealed that closer to eighty percent of these regulations escaped litigation altogether.13 Of course, no single datum defines a national legal style, but if so many people can be wrong about such a basic fact about regulatory conflict in their own country, it is not unreasonable to raise at least a small flag of caution about judgments made about broader styles across countries, especially if those judgments are not fixed by intersubjectively valid metrics.

Furthermore, if styles are at least partly perceptual, they may be vulnerable to the myriad of cognitive biases that psychologists and behavioral economics have documented.14 Researchers may “see” more conflict, for example, only because our brains are hard-wired to be more receptive to it. Undoubtedly it is harder to see potential conflicts that never erupt.

Styles can also change. Over the years, scholars have suggested a growing convergence in the American style of regulation and the styles found in other developed countries.15 To my mind, this more recent work does not undermine Kagan’s earlier comparative analysis, although it does suggest the possibility that the differences in legal styles he observed are neither permanent nor based on rigid, structural differences. Kagan always accepted that such a possibility might exist; however, in recent work he has forcefully resisted the idea that countries in Europe will soon, if ever, become fully Americanized in their legal styles.16 Whatever side one takes in this debate, the point remains that styles can and do change, even if slowly, and social scientists must be ever on their guard for such changes. Indeed, dynamism in styles can itself be a worthy subject for empirical research, as Kagan’s work has itself taught us.

A final caution about styles arises when social scientists seek to use them as explanatory variables. Consider what would happen if social scientists coded a firm’s environmental management style based even partly on observations about the investments the firm has made in pollution control technology or other actions the firm has taken that might be indicative of an environmental ethos. If actions form the basis of judgments about style, it becomes circular to try to use style to explain why some firms perform better or act more responsibly than other firms. Style, in short, cannot explain everything.

Kagan has always proceeded with these cautions in mind. He has never sugar-coated the hazards—nor shirked from working his way around them as best as feasibly can be done. He richly deserves the recognition recently bestowed upon him by the APSA Law and Courts Section. His body of work, magisterial in its scope and insight, has proved a model of intellectual achievement. And, yes, of style too.*

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14. For an overview of cognitive heuristics, see Daniel Kahneman, Thinking Fast and Slow (2011).