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The Organization of Administrative Justice Systems: The Role of Political Mistrust

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In *Total Justice* (1985), legal historian Lawrence M. Friedman outlines a dramatic shift in the legal culture of economically advanced democracies over the last century and a quarter. He argues that in tandem with unparalleled increases in societal wealth, technological sophistication, and governmental capacity, citizens have become less fatalistic about the hazards and injustices of life. They have developed a generalized expectation that modern societies now have the ability to reduce the risks and impact of impoverishment, disease, injury, environmental degradation, crime, discrimination, and economic instability. If these things *can* be done, people come to believe, governments should make they *are* done. In competitive democracies, political leaders respond to such expectations. So decade after decade, governments conduct studies, hold hearings, enact more laws, create more rights, regulate more risks, extend legal liability to more sources of harm, and spend more money on social benefit programs.

One consequence has been the proliferation of specialized government agencies charged with implementing the policies of the administrative-regulatory state. Today, the bulk of official legal decisions are made not by judges but by "eligibility workers" processing files in welfare and unemployment insurance offices, by regulatory inspectors and tax auditors, by licensing officials, immigration officers, and assorted other bureaucrats. At the same time, however, the agencies created to fulfill demands for total justice come under criticism for failing to do so, or for acting arbitrarily and unjustly themselves. Administrative officials are squeezed between public expectations for "total justice" and, on the other side, by never-fully-adequate funding and the inevitable pathologies of bureaucracy. Hence administrative agencies repeatedly are investigated, studied, reorganized, expanded, downsized, reviewed by courts, and subjected to new legal mandates.

Many scholars of law and administration, not surprisingly, have turned their attention to issues of "administrative justice." A great deal of administrative law scholarship focuses on the legal procedures and standards that reviewing courts have imposed on administrative agencies. Other scholars have addressed the way administrative agencies organize their own internal decision processes. One strand of this intra-agency research has been normative: the effort to specify "the principles that can be used to evaluate the justice inherent in administrative decision-making" (Adler, 1993: 323-24) and to determine how administrative decision-making should best be organized.

A related strand of intra-agency scholarship, to which this paper seeks to contribute, entails the *empirical study* of administrative decision-making. Scholars in this tradition assume that issues of optimal institutional design can better be addressed if we had more systematic knowledge of how agencies actually conduct case-by-case decision-making, why agencies differ in that regard, and what difference that makes. To conceptualize variation among the many species in the administrative rainforest, some empirically-oriented scholars have offered analytic typologies of administrative justice systems (Mashaw (1983; Adler (2003). This paper seeks to contribute to that conceptual agenda, as well as to offer some thoughts about the role of trust, or mistrust, in shaping the way administrative decision systems are organized and behave.[1]

Part I of the paper will suggest a typology of ways of *organizing* administrative decision-making authority, encompassing both (a) case-by-case decision-making by "front-line" officials – the "street-level bureaucrats" (Lipsky, 1980) who interact directly with members of the public, and make decisions that directly affect their fates, and (b) modes of structuring appeals from, or review of, front-line decisions. Part II of the paper deals with *why* a political system adopts one or another way of organizing administrative decision-systems, discussing especially the role of political mistrust in that regard. Part

[1] I will present several typologies that I have found useful in my own efforts to describe and compare administrative decision-making systems. These typologies do not conflict with the conceptual schemes proposed by Adler and Mashaw, but seem to lie athwart them. My hope is that scholars in the field will find it illuminating to compare and discern the relationships among these related typologies.

III addresses the *decision-making behavior* of administrative officials in individual cases, presenting a typology of styles of administrative rule-application. Part IV returns the challenge of explanation, identifying some of the factors that shape the style of rule-application adopted by administrative bureaucracies, again paying special attention to the nature and intensity of political mistrust. Throughout, most of the illustrative examples I provide will be drawn from the empirical and legal literature on administrative agencies in the United States, partly because that is what I am most familiar with, partly because, especially when contrasted with accounts of administrative governance in Great Britain, Japan and Western Europe, it nicely highlights the significance of political mistrust. The paper's concluding section considers the factors that militate both towards and against the spread of American-style adversarial legalism to administrative decisionmaking in Western Europe.

I. Institutional Design for Administrative Decision-making

In contemporary democracies, administrative agencies are creatures of law. They are charged with the implementation of public policies embodied in legislation. Statutes (and implementing regulations) establish and delimit administrative authority, define the agency's mission, establish (with widely-varying degrees of specificity) the principal norms and standards that govern officials' decisions, prescribe procedures they must follow, the benefits they may grant and the penalties they may impose, the rights (again, with varying degrees of specificity) of the citizens and organizations they affect, and remedies those citizens and organizations can pursue when they feel their rights have been violated.

At the same time, the very act of entrusting the implementation of governmental policies to an administrative agency suggests the importance of a different, less-legalistic set of values. As Philip Selznick (1969:14-16) put it, one of social functions of administration, perhaps its primary function, is not to determine "the legal coordinates of a situation" in light of pre-established legal rules, but "to get the work of society done," to refashion "human or other resources so that a particular outcome will be achieved."

Administration, from that perspective, requires specialization, the accumulation of experience, and the application of expertise to complex and changing social contexts – precisely because those contexts vary too much to be boxed in by the generalizations embedded in fixed legal rules, prescribed in advance. Administrative decisionmaking, in this view, requires *judgment.* Administrative officials who exercise power over the agency's clients or regulated parties need discretion to adapt agency action to the individual case and the particular circumstance. And the administrators' specialized training and knowledge guides, limits, and legitimates their exercise of discretion.

But in societies dedicated to the rule of law, the exercise of discretion by the many different administrative decision-makers in large agencies raises the specter of inconsistency. Similar cases may be treated differently because some individual officials may be biased or lazy. With respect to benefit-providing agencies, political conservatives worry that front-line officials, moved by sympathy for applicants, will reward the undeserving and may pay out more than the state and its taxpayers can afford. Activists on the political left, conversely, worry that agency bureaucrats will be moralistic, judgmental and too stingy. With respect to regulatory administration, pro-regulation activists fear that regulatory inspectors, if granted discretion, may be swayed toward undue leniency by the blandishments of regulated businesses. Regulated businesses, conversely, fear the unchecked discretion of officials who may be indifferent or hostile to the legitimate arguments of business firms. From these concerns, based on wide-spectrum distrust of administrative discretion, stem demands for more formal legal controls on decisionmakers, both substantive and procedural.

There are many ways of dealing with this "dilemma of rule and discretion." In his seminal work *Bureaucratic Justice* (1983), Jerry Mashaw identifies three. Demands for accuracy, efficiency, and consistency, he notes, suggest organizing decision-making systems around principles of *bureaucratic rationality*, which emphasizes uniform application of detailed legal rules. Demands that administrators should above all be responsive to the particular needs and circumstances of agency clients, however, suggests granting officials discretion to decide on the basis of their expertise or *professional*

judgment. Still other administrative constituencies demand the right to challenge both bureaucratic rigidities and the fixed assumptions of agency professionals on *legal or moral* grounds -- which implies the right to adversarial procedures and judicial review.[2] The typology that I have found useful – see Figure 1 below – builds upon the work of Mashaw and others by conceiving of the organization of policy-implementing processes as varying along two distinct dimensions – (1) legal formality/informality, and (2) hierarchical vs. participatory.

With respect to the first dimension, administrative policy-implementation varies in the extent to which substantive decisions and decisionmaking procedures are structured by, and expected to conform to, written legal rules. The more detailed and specific those legal rules, the more "*formal*" or "*legalistic*" the decisionmaking system is. In contrast, in "*informal*" processes, administrative decisionmakers are granted more discretion; authorizing and guiding legal rules are more general, less constraining, both substantively and procedurally. Decision-making processes can in principle be located at various points along this formal-informal dimension. For example, an agency's decision-making procedures can quite formal and legalistic, while the rules constraining officials' substantive decisions are more general, leaving more room for judgment; thus it would be classified as somewhat less formal than a decision-system whose procedural *and* substantive standards are prescribed by detailed legal rules.

With respect to the second dimension, in *hierarchically-organized* administrative systems, case-by-case decision-making procedures are dominated by a relatively insulated agency official – as opposed to *participatory* processes, in which the individuals and or organizations who are subject to the agency's decisions have considerable opportunity to argue with and actually influence agency officials. Again, real-world agency decision-processes can occupy various points along this dimension. Consequently many administrative decision systems to do not precisely resemble any of the "ideal types" shown in the four quadrants of Figure 1; rather, they combine some

[2] Michael Adler (2003) adds still other expectations that often shape systems of administrative decision-making, such as demands for greater efficiency.

elements of two or more types, or contain a sequence of decision-types, one for front-line decisions, another for appeals (see Mashaw, 1983). In principle, however, both front-line agency decision-making and second-phase (and subsequent) review or appeal processes can be characterized in terms of an approximate location within the spaces in Figure 1.[3]

Fig. 1

THE ORGANIZATION OF DECISIONMAKING AUTHORITY IN ADMINISTRATIVE AGENCIES

DECISION MAKING PROCEDURE	**DEGREE OF LEGAL CONTROL** INFORMAL ←→ FORMAL	
HIERARCHICAL	expert or political judgment	bureaucratic legalism
↑ ↓		
PARTICIPATORY	negotiation/ mediation	adversarial legalism

Expert/Political Judgment. As suggested by the upper left quadrant in Table 1, some administrative decision processes are *hierarchical*, in the sense that an official decision maker (as opposed to the individual or organization subject to agency action) controls the process and the standards for decision, yet *informal*, in the sense that the decision's authoritativeness rests on the professional or political judgment of individual officials, not conformity with detailed legal rules. For example, in many Western European countries, decisions concerning eligibility for certain disability and workplace injury benefits are made by a panel of government-appointed physicians (or a mixed

[3] The typology in Figure 1 reflects the distinction between hierarchical and party-influenced modes of legal decision-making and adjudication developed by Thibaut & Walker, 1978 and Damaska, 1975, as well as the typology of bureaucratic decision modes in Mashaw (1983), from which I derive the additional category "expert judgment" (which I expand to include "political judgment" as well). Figure 1 is adapted from the typology presented in Kagan, 2001:10.

panel of physicians and social workers), based on their professional judgment. Or picture a social worker who, in evaluating a client's request for supplementary benefits, is authorized to make discretionary judgments about need (and desert) under all the circumstances of the particular case. Or a land use planning agency which has discretion to grant or deny applications for "variances" from zoning regulations based on its general – essentially *political* – judgment about whether the project's likely benefit to the community outweighs its potentially adverse neighborhood impact. The more purely expertise-driven such a system is, then the more restricted is the role for legal representation, argument, and influence by affected citizens and organizations, and the less likely the officials' decisions are to be reversed by appeals to higher officials or to courts.

Bureaucratic Legalism. An administrative decision-making process characterized by a high degree of hierarchical authority and legal formality (the upper right quadrant of Figure 1) resembles the ideal-typical bureaucratic process as analyzed by Max Weber. Governance by means of bureaucratic legalism emphasizes uniform implementation of centrally devised rules, vertical accountability, and official responsibility for fact finding. Here, too, the more hierarchical the system, the more restricted the role for legal representation and influence by affected citizens or contending interests. In contemporary democracies, the pure case of bureaucratic legalism usually is softened in some respects, but it is an ideal systematically pursued, for example, by tax-collection agencies.

Adversarial Legalism. Figure 1's lower right quadrant refers to policy-implementing and decision processes that are closely-constrained by formal procedural rules, but in which hierarchy is weak -- private individuals and organizations have formal legal rights to present evidence and arguments, often with the aid of lawyers. The ideal-type is best exemplified by adjudication in American courts, where the introduction of evidence and invocation of legal rules is dominated not by the judge (as in Europe) but by

contending parties' lawyers.[4] But adversarial legalism also creeps into administrative decision-making. As described by Philippe Nonet (1969), California's workers' compensation administration was originally designed to provide insured benefits to injured workers without costly legal conflict. Persistent advocacy by claimants' lawyers, however, gradually transformed it into an intensely adversarial and legalistic system. Similarly, many American administrative agencies initially sought to entrust front-line decisions to expert judgment but entrust appeals to quasi-independent intra-agency "administrative law judges," who follow adversarial procedures, with active participation by conflicting lawyers, that in many ways mimic the procedures of American courts.[5] In many agencies, decisions on factory expansions, pollution control permits, and facility-siting must be preceded by formally-scheduled hearings in which neighbors and advocacy groups can make objections and requests.[6] In such programs, agency decisions commonly challenged in court by dissatisfied parties and reversed by judges, whose rulings lead to further procedural changes in administrative decision-making routines that tend to "judicialize" them.

Negotiation/Mediation. An administrative process in the lower left quadrant of Figure 1 allows the individuals or organizations subject to the agency's authority (or who seek to invoke that authority) considerable opportunity to present and argue their cases in an informal manner. In this modality, regulatory officials charged with implementing anti-discrimination or consumer protection law, for example, often mediate disputes between a complainant and an employer or a merchant, fostering a negotiated settlement (Silbey, 1980-81). The process is nonlegalistic, since neither procedures nor substantive dispositions are dictated by formal law.

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[4] Even in comparison with the British "adversarial system," hierarchical, authoritative imposition of legal rules is relatively weak in courts the United States, where judges defer more to lawyers in the conduct of trials and are more open to novel legal arguments by the parties' lawyers (Atiyah & Summers, 1987:109-134)..

[5] See. e.g. Mashaw (1983) for an analysis of the role of administrative law judges in deciding social security disability appeals.

[6] For accounts of such processes, see Dwyer et al, 2000; Welles & Engel, 2000; Gunningham, Kagan & Thornton, 2003)

Political and Legal Accountability and Sequential Decision-Systems. In establishing and reforming administrative agencies, political authorities generally insist on a variety of *accountability mechanisms*, not only to structure front-line decisionmaking but also to provide mechanisms of accountability or review, hoping thereby to legitimate administrative decisionmaking in the eyes of a variety of potential critics. One can identify four commonly-employed, institutionalized modes of review – (a) case-by-case appeal (by dissatisfied citizens or organizations) to higher officials in the agency; (b) appeals to administrative tribunals that are independent of the agency, in whole or in part; (c) appeals to courts; (d) appeals to political officials (who are either explicitly or implicitly authorized to reverse agency decisions);[7] and (e) systematic "top-down" review of front-line decisions via an administrative sampling or audit system, designed to measure and detect patterns and "outliers."

In many agencies, these forms are mixed and sequenced. Thus in the U.S. Social Security Disability program, front-line decisions are based the bureaucratic application of detailed rules to facts submitted in writing by applicants and their physicians. But they can be appealed to an intra-agency panel in which the applicant appears and speaks in person, often with the aid of legal counsel (Mashaw, 1983). Some agencies combine case-by-case appeals with managerial quality-control audits. In some systems, parties simultaneously appeal to higher administrative levels and present their complaints to legislative representatives, seeking their intervention or pressure.

II. Political Mistrust and the Organization of Administrative Justice.

What explains why administrative decisionmaking in some programs resembles the ideal-type of bureaucratic legalism, while another is characterized by expert

[7] Those dissatisfied with administrative case-by-case decisions sometimes appeal to their elected legislative representative, even though those officials have no legal or political *authority* to overrule agency; the hope is that the representative will nevertheless have informal political *influence.* In the United States, most agencies will grant expedited consideration to "inquiries" from elected legislative members on behalf of a dissatisfied in an expedited manner, even if agency officials they feel secure in ultimately rejecting the politician's "appeal." Whenever, in the U.S. or elsewhere, the agency feels considerable pressure to accede to the politician's views, one might classify that as approaching a system of appeals based on political judgment.

judgment, or a third by adversarial legalism? It seems premature to offer any full-blown explanatory theory. Reviewing the sociolegal literature on regulatory enforcement style, for example, I concluded that numerous causal factors are important, including features of the agency's legal mandate and powers, the agency's task environment, its political environment, and the attitudes of agency leaders (Kagan, 1993). As one step toward the development of an explanatory theory, however, this paper will offer some thoughts about the importance of the role of political mistrust of the agency as an overarching factor in shaping the political and legal accountability mechanisms for, and hence the structure of, administrative decision-making systems.

The creation of administrative programs typically involves at least some faith in administrative expertise as the basis for policy-elaboration and implementation. Due to the complexity of legislative goals and the complexity of the program's social context, the legislature usually cannot formulate its goals in the form of specific legal rules. Hence implementation is assigned to an agency whose officials will specialize in the policy area, gather and analyze relevant data, and employ accumulating expertise to make context-and-case-specific judgments about what decision will best fulfill the agency's principal purposes. If faith in expertise inclines legislators and agency leaders toward an "expert judgment" model of case-by-case decisionmaking, *declines* in that faith should lead them – from the start or after some negative experiences – to impose a more formal and legalistic decision-system on the agency. Whether political mistrust of expert judgment results in a shift toward bureaucratic legalism or toward adversarial legalism depends on the source and particular nature of that mistrust.

Resort to *bureaucratic legalism* sometimes reflects political leaders' mistrust of local administrative officials' fidelity to the central government's policy goals. Sometimes it reflects more widespread public mistrust of the even-handedness and probity of administrative officials. Political mistrust often reflects the views of particular constituencies. Regulated enterprises may be concerned that their competitors will get special treatment from administrative officials. Advocacy groups charge nursing home regulators with laxness in enforcing the regulations. Conservative politicians fear that

soft-hearted social workers in a social welfare agency are not sufficiently vigilant against welfare fraud. For politicians, therefore, ensuring that the administrative decision-system is structured by bureaucratic legalism helps satisfy such constituencies, while giving the politicians themselves a greater measure of control over policy outcomes. For the agency, bureaucratic legalism, with its display of decision according to pre-existing legal rules, provides the trappings (and often, the reality) of impersonality and neutrality that will help legitimize its day-to-day decisions to the individuals and regulated organizations to whom they must say "no.".

Adversarial legalism reflects political distrust of *bureaucratic legalism* as well as of expert judgment. In one scenario, adversarial legalism is institutionalized when political leaders, judges, interest groups, or advocacy organizations believe that an administrative bureaucracy is too legalistic, that its officials often apply rules mechanically, without sufficient regard to the equities of the particular case. The remedy is to expand avenues for citizens or regulated enterprises to participate in the decision-making process, to have to opportunity to impress on officials alternative ways of looking at the facts and merits of the case. The more political and legal elites mistrust an agency's *responsiveness* to such arguments, the more they are likely to mandate formal and more adversarial procedures, rights to representation by lawyers, and rights to appeal to courts.

The mistrust that is conducive to adversarial legalism is most prevalent when political authority is fragmented or uncertain, for example, in federal polities, or systems based on separation of powers, like the United States, where top administrative agency officials may be appointed by elected executives from one political party while the legislature is controlled by a different political party. Hence legislators worry that an agency, now or in the uncertain political future, will be headed by an official appointed by a president or governor who is hostile to the legislative majority's policy priorities and who will push front-line bureaucrats to subvert those policies in case-by-case decisions. The legislator's solution is to empower individuals, regulated entities, and advocacy groups to appeal wayward administrative decisions to court. Lawyers and the judiciary thus are enlisted as enforcement agents for the legislature's enacted preferences. The

prevalence of this scenario in the United States goes a long way toward explaining the relatively high levels of adversarial legalism that since the mid-1960s have been built into major federal social benefit and regulatory programs (Kagan, 2001: Ch.3; Melnick, 2004). This scenario is less likely, conversely, in the parliamentary governments of Western Europe, where, in contrast with the U.S., newly elected governments do not routinely replace the whole top level of agency officials with politically partisan appointees, and where the national bureaucracy is in general more highly respected than are governmental bureaucracies in the United States.

Front-line decision-making processes often are reshaped over time through interaction with appeal systems. The more often citizens and regulated entities mistrust and *contest* the exercise of authority by front-line decisionmakers, and the more often appeals result in reversals, the more one would expect front-line officials to add formal requirements to initially informal processes, hoping to reduce the incidence of appeal and reversal. For example, a 1974 Congressional statute obligates local school districts to provide "an appropriate public education" to students with physical and mental disabilities. The statute mandates, first of all, a negotiation-based decision process, in which parents meet annually with school officials and "special education" experts to work out a contractual plan for their child's placement and assistance. (Neal & Kirp, 1986). If no agreement is reached, the parents can appeal to a school district-level administrative review panel, and then, at least in some states, to a state-level review panel. Finally, a dissatisfied parent can appeal to a court. Each successive appeal is more formal, more adversarial. One consequence of this scheme is that courts have made many of the crucial interpretations of the statute (Melnick, 1993), thereby creating more formal substantive rules that constrain the initially informal negotiation process. Another consequence has been that, in anticipation of the more formal administrative and judicial review, the first-level negotiated meetings often have become more procedurally formal and legalistic. According to Neal & Kirp (1986:355):

> Adversariness and legalism seem to characterize the conduct of hearings. Rather than adopting an informal negotiating format, the due process hearings tend to provide a forum for culmination of long-term bad relations between the school

> and the parents involved. Involving lawyers aggravates the situation, rendering proceedings more legalistic. Emphasis on compliance with procedural matters such as notices, signatures, and time deadlines offers an easy substitute for harder substantive questions ....[8]

Similarly, American welfare agencies have evolved over time from bodies staffed by trained social workers, exercising a degree of professional judgment, to bodies staffed largely by non-professional bureaucrats who legalistically follow detailed regulations, forms, and checklists (Simon, 1983). This evolution was propelled in large part by the "welfare rights movement" of the 1960s, which regularly challenged discretionary local administrative judgments and policies in court, winning decisions which, among other things, required agencies to establish 'due process' hearing procedures to which welfare rights lawyers could appeal front-line decisions (Melnick, 1993) . Conservative politicians, seeing this as a threat to fiscal control, enacted more detailed rules and mandated administrative audits that were designed to constrain front-line officials' discretion and encourage more stringent decisions (Brodkin & Lipsky, 1983). The introduction of a review system based on adversarial legalism, in short, stimulated efforts to control front-line officials' judgment via tighter bureaucratic legalism. Social workers, with their capacity for expert judgment (and higher salaries), became unnecessary and were replaced by clerks.

III. Styles of Administrative Decisionmaking

Agencies vary not only in the density and specificity of legal rules that are meant to govern case by case decisions, but also in what one might call the agency's "culture of rule-application" (Kagan, 1978: 88-90). The key point of variability is how officials in a particular agency or office deal with the inevitable shortcomings of administrative rules and regulations – and the forms, checklists, and manuals that are used to get front-line officials to follow the rules .

[8] By way of contrast, the British administrative decision-system for "special education," at least as established in the same time period as the U.S. program, emphasized "professional judgment" rather than formalized negotiation and adversarial legalism (Kirp, 1982).

Rules are based on generalizations; they say that under circumstances a, b, and c, the appropriate decision is X, for X will best advance the agency's policy goals. The generalization is that X will *always* be appropriate. But the social world, diverse and always changing, is too complex for rule-makers to imagine. Hence many rules will be overinclusive in some situations. A particular case may involve not only circumstances a, b, and c, but also d and e (a combination not recognized in any existing rule). In such a case, decision X , a legally proper application of the rule, may produce a result that is not compelled by, and indeed may be contrary to, the agency *policy* that the rule was formulated to implement. Or decision X, while in some way advancing the agency's policy, will be perceived as extremely unfair or inhumane, or will have other adverse consequences. Agencies that mechanically apply rules in those kinds of cases can trigger a public or political backlash, or alienate regulated businesses whose cooperation is important to the fuller achievement of agency policy goals.[9]

This periodic mismatch between agency goals and the dictates of particular rules occurs not only with respect to substantive rules, but with respect to evidentiary rules, particularly those involving the proof of crucial facts. To use another stylized example, the regulations governing decisions in an agency that provides certain benefits (such as income maintenance grants for poor families, or border entry to would-be immigrants) might say, "the grant (or permit) shall not be granted unless the applicant presents convincing documentary proof of a, b, and c." What if the applicant's situation does entail a, b, and c, but she cannot provide documentary proof of one or more of those factual circumstances? Can the agency official rely on the applicant's oral statements if they seem convincing? The issue is whether the official is allowed to treat the regulation as a *presumptive* rule, rebuttable by other kinds of evidence, or is compelled to treat it as a hard-and-fast, *unbendable, absolute* rule.

[9] See Bardach & Kagan (2002:109-119) for an account of how legalistic enforcement of occupational safety and other regulatory programs in the late 1970s in the United States led to resistance by industry, to frequent litigation that diverted agency personnel from their primary tasks, and fueled presidential candidate Ronald Reagan's anti-regulation rhetoric.

In *The Nature of the Judicial Process*, New York Court of Appeals judge Benjamin Cardozo (1921:19-25) discussed one way in which common law judges deal with potential conflicts between existing rules and desired social consequences. Judicial decision-making, he wrote, ideally is a two-step process: the judge, while assessing the facts of the case, first "looks backwards" to pre-existing rules (precedents) to discern what they seem to require, but then "looks forward" to assess the consequences of following an ostensibly applicable rule. When the results of literal rule-application would be patently unjust or unwise, a judge "worthy of his office" must consider reinterpreting the rule, or if so authorized, to create a new rule for cases of the kind he is considering.

Some administrative agencies enable and encourage its officials, in deciding individual cases, to adopt Cardozo's model of judicial creativity. Some do not, fearing it would at best lead to too much inconsistency and at worst open the door to bias and corruption. The pattern of possible responses can be characterized in light of the ideal-types set forth in Figure 2.[10]

Fig. 2. **MODES OF RULE-APPLICATION IN ADMINISTRATIVE BUREAUCRACIES**

		Emphasis on Realization of Agency Policies/Social Values	
		strong	weak
Emphasis on Adherence to Rules	strong	legal creativity	legalism
	weak	discretionary judgment	retreatism

In some agencies, the reigning culture of rule-application pressures administrative officials to follow the dictates of the written regulations, even if they feel the rule-based decision would not "make sense" in the particular case; at the extreme, officials might be

[10] Figure 2 is adapted from Kagan, 1978:95).

socialized not to "look forward" at consequences at all. That is what I would call a *legalistic* decision-making style, represented by the upper-right quadrant in Figure 2. At the opposite extreme, labeled *discretionary judgment* in Figure 2, the agency's internal culture values achievement of policy goals and responsiveness to the variety of individual situations more than it values strict rule-following, at least in cases in which the two goals appear to conflict. Decision-makers are empowered to make *ad hoc* exceptions to the rule, either formally or informally – or, if they do so, they are rarely detected and/or punished.

The upper left quadrant (labeled *legal creativity*) refers to agencies whose culture strongly emphasizes both rule-based decision-making and responsiveness to broader agency purposes. When the rule-based decision seems to frustrate policy goals, agency officials are authorized, alone or in consultation with colleagues and supervisors, to *reinterpret* existing rules, that is, to adopt innovative readings or to articulate principled exceptions (new sub-rules) which support the preferred outcome. Observing this practice in an agency that administered a nationwide price and wage freeze in the early 1970s, I wrote (Kagan, 1978:91-92):

> That is not to say that a rule *must* be abandoned whenever the result in a single case seems unfair: the issue is whether a better, more specific *rule* can be devised, taking into the costs of … carving out an exception to the old one. The key to this difficult process is a continuing effort within …[the agency] to develop common conceptions of that institution's proper purposes …."[11]

Not all agencies, not all such officials, are so dedicated. The lower right-hand quadrant of Figure 2 uses the label *retreatism* to capture the response of agency officials who face hard cases – conflicts between rule and agency goals – and who seem to abandon both goals. This sometimes occurs when officials lack the time or resources or wit to cope with the problem. Sometimes it happens because officials are indifferent,

[11] In *Regulatory Justice* (Kagan, 1978:91-92), I labeled the upper-left-hand quadrant, here labeled "legal creativity", the "judicial mode" of rule-application , because it reflects Cardozo's account of judging and because it is commonly observed in American courts, which combine an 'instrumentalist' approach to judicial decision-making (Atiyah & Summers, 1987:404) with norms of legal craft that call for principled rather than ad hoc justifications for legal innovations (Wechsler, 1959). My emphasis on institutional purpose as the key to coherent legal creativity in agencies reflects Philip Selznick's writings on "responsive law" (Nonet & Selznick, 2002 [1978]

weakly committed to either rule-following or the achievement of agency policy goals. In an agency whose internal culture fails to discourage retreatism, officials deal with difficult choices by temporizing and accumulating backlogs of undecided cases, or by making endless demands for more information or proof, or by processing cases in a pro-forma, ritualistic fashion, with little attention to legal accuracy or consequences, or at the extreme, by deciding on the basis of bribes. Retreatism does not conform with any normative notion of administrative justice. But unfortunately, as Franz Kafka taught us decades ago, it captures many people's experience with administrative bureaucracy in many places in the world. Hence retreatism deserves a place, I think, in the empirical study of administrative decision-making, along with attention to the factors that engender and sustain it.

IV. Factors Influencing Styles of Administrative Decision making

Variations in styles of rule-application arise from the personality, role-conceptions, and political commitments of individual decisionmakers, which can vary even within a single office. Officials can also be pushed away from legalism and toward legal creativity by the skill and persistence with which particular parties or their legal advocates present their arguments – a factor that varies from case to case. (Kagan, 1978: 148, 154-57). Cases in which it is likely that the agency's decision will be reported in the newsmedia tend to elicit more careful and thoughtful modes of rule-application.[12]

Notwithstanding these idiosyncratic sources of variation, agencies (or different offices within the same agency) tend to develop distinctive *internal cultures of rule-application*, to which new recruits are socialized and which are enforced by peer pressure and performance reviews. What shapes an office's dominant style of rule-application and decision-making? The sociolegal literature provides some clues, indentifying a series of influential factors.

[12] By analogy, U.S. Court of Appeals judges are less likely to decide cases on the basis of their own political values when they serve on panels with judges from another political party, and hence are more likely to file a dissenting opinion, calling attention to the majority's legal reasoning (Cross &Tiller, 1998).

Organizational Variables. A retreatist style is more likely in an agency that is so starved both for resources, manpower, and power that demoralization sets in and persists. A legalistic style is encouraged by burdensome case-load, combined with organizational and external pressures for rapid decision-making. Discretionary judgment and "legal creativity' do not flourish under such conditions. They take time and mental effort, close attention to the facts of the particular case and the likely consequences of routine rule-application, and enough emotional engagement to empathize with the situation of the individual or organization at hand. In a U.S. wage-price-control agency that processed a flood of "inquiries" (requests to raise prices or wages), officials in some offices were under severe pressures for rapid decision. While working in those offices, I saw that "officials tended to read inquiries more and more rapidly, through a set of lenses which picked out only the key words that enabled the official to place the case into a routine category, screening out information about the inquirer's financial situation and what it would mean for him [if his request were refused]." (Kagan, 1978:147-48).

Legalistic decisionmaking also is more likely when decisionmaking is based on paper dossiers or occurs in highly formal settings. Conversely, administrative officials are more likely to bend the rules when the organization of decision-making places them in face-to-face interaction with individuals or regulated entities. (Kagan, 1978: 152).

Degree of Professionalism. Even in face-to-face settings, modes of decision-making can and do vary. Christopher Jewell's (2003) study of welfare case-workers in California, Sweden, and Germany showed that in a welfare office in Malmo, Sweden, professionally-trained case-workers were embedded in an office culture that emphasized mutual consultation; they had a nuanced decision-making style, responsive to the needs of particular clients. Their counterparts in the United States, conversely, had much less professional training and were embedded in an office culture that emphasized legalistic adherence to rules and regulations. A similar relationship between professionalism and more flexible rule-application has been found in studies of regulatory inspectors (Bardach & Kagan, 2002: 152-58). If the inspector has experience and knowledge, he or she can more confidently judge the merits of a regulated enterprise's arguments about the

"unreasonableness" of applying a regulation strictly in the particular case; without such knowledge, the inspector finds it "safer" simply to enforce the rule legalistically. In Germany, regulatory officials concerned with bank safety and soundness are career employees, subjected to much more extensive education and training than their counterparts at the U.S. Federal Reserve Board. The highly professional German officials, consequently, are trusted to make programmatically sensible judgments, whereas the American regulators are bound by an immensely voluminous, complex, and detailed body of legal rules, and are expected to apply them legalistically (Rubin, 1997).

The Agency's "Task Environment." The missions and social functions of administrative agencies vary widely, as do the nature of the "clienteles" officials deal with on a daily basis. Police officers in communities with high levels of violent drug-dealing, gun ownership, or hostility to the police face a markedly different "task environment' than officers who work in middle-class suburbs. Hence one might expect differences in the way they interpret and enforce departmental regulations, criminal laws, and the rules of criminal procedure..

Shover et al (1984) studied two offices of the U.S. Office of Surface Mining (OSM), which regulates the environmental impacts of strip mining. Both were responsible for enforcing detailed regulations which required them to issue citations and cessation orders whenever they detected violations. The OSM office in West Virginia, in the Appalachian Mountains, had to deal with many small, privately-owned, often-recalcitrant mining companies. Officials in that office applied the regulations more legalistically than their counterparts in the OSM office in the Western plains of Montana. The western OSM officials interacted with many fewer, but much larger corporations. Those mining operations were owned by major petroleum companies; they were well-funded, concerned about their corporate reputation, and environmentally sophisticated. With fewer sites to visit, the Western OSM officials came to know the regulated enterprises well, and the enterprises knew they would be subject to prompt repeat visits if the inspector found a violation. The Western OSM office, Shover et al found, emphasized

"discretionary judgment" in applying the rules. It issued few citations or cessation orders because the companies were generally cooperative in abating and preventing violations.[13]

One aspect of the difference in task environment between the Western and Eastern OSM offices, and hence in their decision-making style, was the extent to which officials felt they could *trust* the individuals they dealt with to be telling the truth when they offered arguments for a more flexible rule-interpretation. How genuine was their asserted commitment to follow the law, or work toward the social goals it embodied? Almost every agency official that decides individual cases faces a version of this trust issue. The frequency and difficulty of making that judgment, which varies across task environments, is likely to be an important influence on an agency's decision-making behavior.

What's more, there are risks for the administrative official, and hence for the agency, in being too untrusting (which we might call a Type II error) as well as too trusting (Type I error). Figures 3 and 4 outline the choices that officials in a benefit-granting and a regulatory agency face in determining the honesty and cooperativeness of an applicant for benefits or a regulated businessman who makes a plea for an exception to the usual rule.

Figure 3 **Error-Avoidance and Decision-Style in a Benefit-Granting Agency**

		Applicant is Really	
		eligible	ineligible
Agency stance/ decision-style	trusting/ discretionary	ok	type I error: "wasted" resources
	mistrustful/ legalistic	type II error: injustice, hardship	ok

[13] For a more complete account and analysis of studies showing the influence of task environment and political environment (among other variables) on regulatory agencies' enforcement style, see Kagan, 1993.

Figure 4. **Error-Avoidance and Decision-Style in a Regulatory Agency**

		Regulated Entity is Really	
		Honest/ cooperative	dishonest/ non-cooperative
Agency stance/ Decision-style	trusting/ discretionary	ok	type I error: risk to public
	Mistrustful/ Legalistic	type II error: alienated, less-cooperative entity	ok

The OSM inspectors in Montana had more tools to detect whether the entities they regulated were honest and cooperative (more frequent visits) than their colleagues in West Virginia. They also had more reason to expect that the firms they regulated had rational reasons to be cooperative (frequent inspector visits, plus concern for public image). Hence a discretionary decision-style generated less risk of error than would a legalistic style. But many task environments are more like the Eastern OSM inspectors, in which the risk of a Type I error (excessive leniency) is higher, and incentives to adopt a more legalistic style are correspondingly greater.

The Agency's "Political Environment." The agency's solution to the dilemmas posed in Figures 3 and 4 often is not solely a product of its rational analysis of the relative risks of Type I and Type II errors. Its solution often depends on which risk important actors in the agency's political environment – elected political leaders, interest groups, journalists, and voters – regard as the risk to be avoided most. If a conservative government-in-power pushes hard for eliminating "welfare cheating' and 'waste",

agencies are likely adopt more rules, more legalistically-applied, aimed at that goal, even if administrative officials think that the result will be too many Type II errors.

Similarly, regulatory agencies tend to enforce rules legalistically when they are especially subject to public criticism for perceived laxity (Bardach & Kagan, 1982). Conversely, they are more likely to adopt a retreatist style when potential advocates for strict enforcement remain silent or when violators enjoy the backing of political authorities (Gunningham,1987). Scholz & Wei (1986) found that state-level offices of the U.S. Occupational Safety and Health Administration (OSHA) enforced federal regulations more legalistically in states in with higher rates of labor union membership and higher frequencies of complaints about violations. In a separate study in New York state, Scholz et al (1991) found that OSHA officials enforced the same set of rules more legalistically in counties whose legislative representative were liberal Democrats than in counties with more conservative Republican voters.[14]

More subtly, administrative officials often are affected by the political attitudes of the communities in which they live and work. Mashaw (1971) found that social welfare officials in poorer, politically conservative rural counties in Virginia interpreted and applied eligibility rules very strictly, while officials in wealthier, urban counties did the opposite. Variations in local political culture produce different law-enforcement styles in municipal police departments (Wilson, 1968). Hedge et al (1988) found that inspectors employed by a West Virginia state agency had a less legalistic, more accommodative way of applying strip mine control regulations than inspectors in the West Virginia office of the federal government's regulatory agency for strip mines.

National Political Differences and Administrative Decision-Style. The nature of the political environment also bulks large in explaining why administrative agencies in the U.S. often are found to have a more legalistic decision-making style than agencies in other Western democracies. In the United States, as suggested earlier, a political tradition

[14] For a similar finding with respect to local political climate and environmental law enforcement in Great Britain, see Hutter, 1988

characterized by mistrust of concentrated governmental power and bureaucracy has produced a significant level of adversarial legalism in the organization of administrative decision-making systems. The same mistrust affects the *behavior*, or rule-application style, of front-line administrative decision-makers.

Christopher Jewell, mentioned earlier, conducted an observational and interview-based study of decision-making by front-line officials in welfare offices in Malmo, Sweden, Bremen, Germany, and several California counties. Summarizing his findings, Jewell[15] writes:

> One way to simplify how social assistance is administered is to offer set benefits based on the typical needs for a household of a given size. … U.S. welfare policy has followed this approach, reflecting a fundamental distrust of front-line workers ….The price of greater formal predictability, though, is less assurance that claimants receive sufficient support, as caseworkers lack the authority to tailor aid to individual circumstances. …
>
> But the U.S. path of standardizing benefits and reducing caseworkers to eligibility clerks is not the only one modern states have taken… In both Germany and Sweden …different policy choices have translated into welfare programs in which caseworkers have considerably more authority to tailor aid decisions….
>
> The German approach involves considerable articulation [of rules] and continual regulatory development to define the parameters of basic need. The administration of this complex set of rules is delegated to senior level careerist public officials with extensive training in regulatory interpretation, an expertise …I call "regulatory entitlement scholarship." By contrast, the Swedish approach is characterized by more limited regulatory codification. National regulations consist of a "frame law" of general principles while most program guidelines are developed by local government with comparatively limited operational details. This challenge of 'rule scarcity' is addressed through a reliance on the social pedagogical training of a staff with a well-developed consultation culture, a .. constitution of program authority I call a 'social work ethos.'

Behind these cross-national differences in administrative decision-making style, of course, lie significant differences in national political traditions and attitudes toward

[15] Jewell (2006). The as yet unpublished paper from which this quotation is drawn summarizes the full report in Jewell's Ph.D. dissertation (Jewell,2003)

social welfare, as explicated in the "three worlds of welfare" described by Esping-Anderson (1991) and in Harold Wilensky's magisterial *Rich Democracies* (2002).[16]

Similarly, comparative studies of enforcement decision-making by nursing home inspectors in Australia, Great Britain, and the U.S. (Braithwaite, 1993; Day & Klein, 1987) found that American regulations concerning quality of care are more detailed and prescriptive and are enforced more legalistically. Accompanying governmental inspectors on visits to American nursing homes, John Braithwaite was struck by "the culture of distrust" generated by the more mechanical, document-checking style of the American inspectors, as compared with the more interactive, discussion-based style of British and Australian inspectors. Similar patterns were reported in Steven Kelman's (1981) comparative study of workplace safety regulation in U.S. and Sweden and David Vogel's (1986) comparison of environmental regulatory enforcement in the U.S. and the U.K. Each of these studies locates the primary cause of these differences in national political structures and political cultures.

In the late 1990s, I led a team of researchers that conducted nine case studies of multinational corporations, each of which conducted similar operations in the U.S. and in another economically advanced democracy (e.g. the Netherlands, the U.K., Canada, Japan). Each study examined in detail the corporation's parallel encounters with administrative officials in each country, focusing on similar regulatory and other legal issues. In each case, the corporation's officials in the United States experienced administrative regulations and procedures there as more detailed, complex, legalistically-enforced, and costly to comply with. Compliance costs were significantly higher for the corporation's U.S. branch – even though substantive measures taken by the company's U.S. and non-U.S. operations were quite similar. Costs in the U.S. were higher because the corporate facilities in the U.S. routinely had to spend far more money on lawyers and on certifications, studies, tests, and reports needed to document its compliance with regulations (Kagan & Axelrad, 2000). Corporate officials attributed the higher accountability costs to the kind of "culture of mistrust" that Braithwaite mentioned.

Compared to their counterparts in other rich democracies, American administrative officials were perceived as more defensive, more afraid to use their own judgment, more afraid of criticism from their superiors or politicians. They acted more legalistically, in short, because the agency itself was the subject of mistrust by actors in its political environment – including pro-regulation advocacy groups and politicians ready to criticize the agency for leniency and ineffectiveness, *and* conservative politicians ready to criticize the agency for overzealousness.

In an atmosphere of mistrust of the agency's professionalism, adopting a legalistic style of rule-application provides bureaucratic officials a somewhat safe haven. A vicious circle ensues. In an atmosphere of mistrust of the agency's professionalism, legislatures are less likely to fund the agency adequately and more likely to constrain its decision-making with more detailed rules, empowering critics on both the left and the right to challenge agency decisions in court/ All this, of course, increases the likelihood that the agency officials will act legalistically rather than thoughtfully, which increases the likelihood that it will be viewed as unprofessional and untrustworthy.

V. Toward Convergence?

I have argued that adversarial legalism is more common in American administrative systems that in other economically advance factors primarily because of (1) the prevalence, in American political culture, of distrust of the competence and fairness of government, and (2) its structurally fragmented and decentralized system of government. When political parties, interest groups and distrust the competence, political neutrality, and fairness of bureaucrats, it is tempting to demand stricter control of administrative discretion through detailed rules, rights to participate in administrative decision-making processes, through more formal and adversarial legal procedures, and searching judicial review of administrative decisions. In a fragmented and decentralized government, where central government has limited capacity to deploy its own bureaucrats to enforce its policies, it is tempting for it to seek to control local administrative decisions

through more detailed laws and empowering citizens to deploy lawyers and lawsuits to help enforce them.

To some scholars and observers, governance in Europe is moving in a similar direction. With the rise of the European Union, new, more fragmented forms of governmental power have developed. Distrust of governmental expertise and authority seem to be on the rise. This raises the question of whether administrative justice systems in Europe are likely to evolve away from reliance on expert judgment and bureaucratic legalism toward higher levels of American-style adversarial legalism. It is important to note the causal logic that does generate pressures in that direction. I am not sufficiently familiar with current developments in Europe to comment on how strong those pressures have been and what changes in administrative decisionmaking they have yielded. But I would like to point to certain countervailing factors that I think are likely to prevent European administrative systems from converging on the American style of administrative justice, particularly with respect to the prevalence of adversarial legalism as a mode of administrative policy-implementation and dispute resolution.

Structural Sources of Pressures for Adversarial Legalism in Europe. The government of the European Union 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 as in the United States, political authority in the EU is fragmented among the Commission, Council, Parliament and the European Court of Justice. In contrast with member-state parliaments, where a single political party or coalition dominates policy-making between elections, policy-making authority is also fragmented *within* the Commission, Council and Parliament. The EU government does not have its own local-level enforcement bureaucracy or courts. And hence governing power is fragmented between the EU and its member states, all of which may have differing policy preferences.

It is precisely this kind of fragmentation of authority that has spurred the expansion of adversarial legalism in the United States (Kagan, 2001). And this

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."[17] EU directives, accordingly, often articulate new judicially enforceable rights. And decisions by the European Court of Justice and the European Court of Human Rights have empowered citizens to invoke EU law and ECHR precedents in member state courts to challenge decisions and practices by member state administrative agencies. In consequence, Kelemen (2003) asserts, "The legal services industry across Europe is experiencing a transformation that will strengthen the legal infrastructure for adversarial legalism."

Moreover, 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 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).

Political concerns about the inefficiencies inherent in government administration have spurred the restructuring and of many governmentally owned public services public services. 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

[17] 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.

replaces informal controls by governmental ministries.[18] 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) induced EU and member-state regulatory systems to become more legalistic and adversarial.

And just as in the U.S., there are signs that distrust of government results in more litigation against administrative decisions. 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 (Sunkin, 1994; Sterett, 1999).

Factors Limiting Convergence. Pressures for change typically encounter counterpressures engendered by what political scientists have come to call "path dependence" – the resistance to change that generally surrounds long-established institutional arrangements (Pierson, 2004). 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 administrative justice.

One of those impediments is *the tenacity of European national legal cultures* (Kagan, 1997). Adversarial legalism is animated by skepticism concerning governmental 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

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[18]. 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." S.Vogel, 1996: 120

responsiveness to conflicting parties and legal advocates rather than hierarchical legal authority and consistency. Those attitudes are antithetical to most European lawyers', administrators and scholars scholars' assumptions about legal ordering and public administration (Damaska, 1986). 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!" 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. [19]

In a study of comparative corporate governance law, for example, 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.

[19] For a vivid illustration of the difference, see Welles & Engel, 2000.

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. Yet according Tom Burke (2004:159, 170), author of a comparative analysis of the implementation 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, implementation of the discrimination law is mainly through trade unions and through a specialized government mediator ….

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).

To repeat, then, what I wrote a few pages earlier, 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 administrative justice.

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