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THE AMERICAN WAY OF LAW

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Preface

On the evening of December 12, 2000, Americans by the millions—and for all I know, millions of people around the world—watched their television sets for the announcement of a decision by the Supreme Court of the United States. After weeks of postelection litigation concerning the proper counting of ballots in the state of Florida, the Court's ruling could determine whether the Democratic Party's candidate for president, Vice President Albert Gore, or the Republican Party's candidate, Texas Governor George W. Bush, would be declared the victor. A few days earlier, on December 8, a decision by the Supreme Court of Florida left Bush ahead, or so it appeared, by fewer than 200 votes (out of some 4.8 million in the state). The Florida court, however, had ordered a manual review of thousands of ballots to determine whether votes for president had not been recorded by Florida's voting machines. The Bush campaign organization, fearing that the recount would propel Gore into the presidency, had appealed to the U.S. Supreme Court. On December 9, a bitterly divided Supreme Court accepted the case and ordered a temporary stop to the manual recount, dashing spirits in the Gore camp. On December 11, the Court heard oral arguments. But there was no consensus among legal experts about how the Court, which traditionally had deferred to state courts in the interpretation of state electoral law, would actually decide.

Finally, late in the evening of December 12, the Court's ruling was distributed to waiting journalists, who struggled to decode a cryptic per curiam opinion, four dissenting opinions, and one concurrence. The Court, it was clear, had vacated the Florida Supreme Court's ruling by a seven-to-two margin, employing an unprecedented "equal protection clause" argument. But it also held that the recount could proceed if the Florida courts would issue uniform statewide standards for counting disputed ballots. Then it gradually dawned on the television reporters, and hence on the waiting viewers, that by a five-to-four vote, the Supreme Court had interpreted Florida law to impose an inalterable December 12 deadline for the certification of Florida's elec-

toral votes. That deadline made the belatedly permitted recount impossible. The next day, Gore conceded. By a one-vote majority, the five most politically conservative justices had enabled Bush to gain the presidency.

To many foreign observers, it may have seemed simultaneously remarkable and typical that the political contest for the American presidency had triggered an explosion of litigation—fourteen separate lawsuits, numerous appeals, and two U.S. Supreme Court reviews, the second of which, by blocking the counting of the disputed ballots, had determined the winner. As an earlier foreign observer, Alexis de Tocqueville (1835: 290), had written, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Yet even de Tocqueville would have been astonished by the nature of the postelection litigation in 2000—so sprawling, so resistant to legal finality, so legally unpredictable, so combative in its intensity. A complex set of legal rules and institutions designed to contain the passions and opportunism of politics became a partisan battleground itself.

In the weeks following the November 7 election, with the Florida result still in doubt, both political parties unleashed the dogs of law. Squadrons of Democratic and Republican lawyers were deployed, speed-reading the details of Florida's election laws, performing prodigies of brief-writing, meeting legal losses in one forum with an appeal or a new lawsuit in another. As the statutory date for the Florida's selection of electors approached, Democratic lawyers frantically prodded election officials and judges to count disputed votes or ballots. Republican lawyers argued that there was no legal justification or no time to keep counting, successfully delaying manual counts several times. As often occurs in American litigation, the outcome was shaped more by the delays and opportunity costs of extended adversarial legal processes than by authoritative legal judgments about the just result.

To observers from other constitutional democracies, where judges generally are selected through professional, less overtly political mechanisms, it must also have been remarkable that the American judges seemed to be such creatures of politics. As the hydra-headed litigation moved from court to court, journalists pointed out the political party background and connections of particular judges, as if those, and not the law, were likely to shape the court's decision. Indeed, it turned out that the Florida Supreme Court, composed of appointees of a Democratic governor, made two crucial and controversial decisions that favored Gore. The U.S. Supreme Court, made up predominantly of judges appointed by Republican presidents, vacated those decisions, employing legal arguments that surprised (or dismayed) most constitutional scholars. Yet it was not certain ex ante that the judges' political backgrounds would entirely predict their decisions. Generally, American

judges are motivated not only by their political predispositions but also by the desire to maintain a reputation for legal craftsmanship and to protect the perceived legitimacy of the courts. Sometimes a judge's individual political views matter a great deal, but sometimes they don't. The Florida Supreme Court decided in Gore's favor in two appeals but against him in several others. A U.S. Court of Appeals, with a majority of Republican judges, rejected a Bush appeal that sought to block the handcounting of ballots—although the predominantly Republican U.S. Supreme Court, in a separate suit, effectively did just that (with two moderate Republican judges dissenting). It is this shifting balance of political and legal factors, combined with the staggering complexity of contemporary American law, that makes a high level of *unpredictability* such a distinctive feature of adjudication in the United States—not just in the election litigation but in general.

Nevertheless, in *this* set of cases, the judges' political leanings seemed to be the deciding factor. Legal scholars, like the public at large, ended up viewing the propriety of each Florida and U.S. Supreme Court decision through sharply divergent partisan lenses, just as the high court itself divided along moderate-conservative lines. Tossed about by these turbulent political waves, the very notion of legal objectivity, already weakened by years of "legal realism," "critical legal studies," and "postmodernism," seemed close to death. In a December 11, 2000, public opinion poll, a majority of respondents (53 percent) said they believed the Supreme Court's decision to stay the Florida manual recount was based on "politics" rather than "law" (34 percent).

The postelection legal battle thus exemplified and intensified America's ambivalence about law and litigation. On one hand, the litigation underscored the nation's fundamental respect for the rule of law and the authority of courts. Just as President Richard Nixon in the Watergate tapes case had bowed to a Supreme Court decision that he knew would doom his ability to remain in office, Vice President Gore, while stating he strongly disagreed with the Court's December 12 decision, was quick to add that he accepted its authority. Throughout the litigation Bush and Gore supporters mounted loud demonstrations outside the key courthouses, but there seemed to be a reservoir of faith and pride that somber legal argument and constitutional procedures, not mobs or raw political power, ultimately would settle the various disputes and produce a smooth transfer of power. On the other hand, many citizens expressed annoyance that dueling lawyers had taken over the selection of the president. Others (including, perhaps, a majority of U.S. Supreme Court justices) worried that the litigation and counterlitigation would spiral out of control, generating not legal finality but a constitutional crisis. The Bush campaign organization found it politically acceptable and even desirable to repeatedly denounce the Florida Supreme Court's attempt to rec-

oncile ostensibly conflicting statutory provisions as "changing the rules after the election was over." Not only the courts but the rule of law itself had become politically contested territory—and not for the first time in American history.

In many respects, therefore, the protracted courthouse struggle following the 2000 election, for all its uniqueness, did typify the American political system, which persistently venerates courts and the rule of law but just as persistently derides the rule of lawyers, judges, and legal excess. "Adversarial legalism," as I call the rambunctious, peculiarly American style of law and legal decisionmaking exhibited in late 2000, has become a common phenomenon in the life of the nation. It recurs in everyday American processes of criminal and civil litigation, and in American methods of regulating police and schools and businesses, of compensating accident victims, and of holding governmental officials accountable.

The elements that fostered adversarial legalism in the 2000 election endgame, this book argues, affect almost every sphere of governmental and economic activity. They include adjudicatory systems that give lawyers for the competing parties a very large and creative role in gathering evidence, formulating legal arguments, and influencing decisions—and hence foster an especially entrepreneurial and aggressive legal profession; a politically selected, somewhat unpredictable, and uniquely powerful judiciary; a fragmented governmental and court system (which often enables losers in one forum to seek a different decision in another); and a system of governmental administration that is more decentralized, more responsive to democratic political pressures, and more generally distrusted than the national bureaucracies and court systems of, say, Western European countries. Florida's election laws were so complex because the legislature periodically had promulgated new, more specific rules to regulate the state's politically selected county election boards. The electoral decisions of Florida's Secretary of State were legally subject to review by courts because she, like her predecessors, was a partisan political official (in this case, a co-chair of Bush's Florida campaign organization) rather than an apolitical, professional bureaucrat. Some U.S. Supreme Court justices voted to stop the manual recount because they indicated that they did not trust Florida election officials or trial judges to conduct the recount in a neutral, consistent, and professional manner. These distrustful attitudes toward a decentralized, politically permeable governmental structure do not affect elections alone. They permeate American politics and governance, making adversarial legalism a pervasive feature of American life.

The passions that trigger adversarial legalism, with its hopes for justice and fears of costly legal excess, usually are not national in scope and attention. Rather, they are local and familiar. They arise in the course of everyday crimi-

nal prosecutions, personal injury lawsuits, and disputes over land use. They emerge from environmental controversies, from conflicts between regulatory officials and businesses, between commercial enterprises, and between employees and employers. That is the terrain that this book traverses, exploring the ways in which American adversarial legalism differs from law and governance in other economically advanced democracies, examining why that is the case, and describing its consequences, both positive and negative.

As best I can piece it together, the idea for this book arose during a fellowship I was granted by the Netherlands Institute for Advanced Study in the Social and Behavioral Sciences (NIAS) in 1987. Month after month, I was immersed in discussions of the Dutch and other European legal processes with Erhard Blankenburg, Kees Groenendyk, Albert Klijn, and other sociolegal scholars—conversations in which I had to explore what was different about American legal culture, methods of regulation, and modes of adjudication and why those differences arose and persist.

I also used the NIAS fellowship to begin a comparative study of seaports and intermodal transportation. My goal was to compare Dutch and U.S. legal and regulatory processes in resolving cargo damage claims, promoting safety, managing labor relations, fostering technological innovation, and protecting the environment. In this book one can find traces of my interviews in and around the Port of Rotterdam with regulatory officials, labor unionists, port officials, lawyers, shipping line and terminal managers, marine insurance companies, and freight forwarders. Their day-to-day experiences underscored some distinctive aspects of American legal and regulatory processes, particularly their higher costs, heavier penalties, and greater levels of uncertainty.

In the years that followed, my teaching at the University of California, Berkeley, gave me the opportunity and the incentive to gather sociolegal studies that compare particular legal and regulatory processes in the United States with similar processes in other economically advanced democracies. Like my work on the ports, I found these focused studies far more illuminating than global statistics or generalizations about national legal systems. These studies, summarized in Table 1 in Chapter 1 and referred to throughout this volume, all seemed to tell the same story: American legal and regulatory regimes, compared to their counterparts in other countries, generally are characterized by more detailed and prescriptive legal rules, more litigation, more costly forms of legal contestation, more fearsome legal penalties, more political conflict, and higher levels of legal malleability and uncertainty.

My research on seaports also led to a detailed case study of the legal and regulatory struggles surrounding the efforts of the Port of Oakland, Califor-

nia, to dredge its harbors. To me, the Oakland Harbor story epitomized the way in which adversarial legal struggle has become an ever-present propensity of American governance, often with highly disruptive, inefficient, and unjust consequences. When Martin Levin of Brandeis University invited me to write a paper for a conference on American public policy, I sought to link the Oakland Harbor story (discussed in Chapters 2 and 10 of this book) to a broader account of American law and regulation. My work on that paper was supported by the Center for Advanced Study in the Social and Behavioral Sciences in Stanford, California. In the paper, subsequently published in the *Journal for Public Policy and Management* and in a volume edited by Levin and Marc Landy, I invoked the concept of "adversarial legalism" to distinguish American legal processes from the more hierarchical, less participatory methods of regulation and adjudication used in other countries. In writing that paper, I also came to see more clearly how American adversarial legalism springs from fundamental features of American politics, particularly the propensity to distrust and fragment governmental authority—even as government is asked to become more active in providing justice and reducing risk. At my urging, Kenneth Hanf of Erasmus University and Yoshinobu Kitamura of Yokohama University wrote conference papers comparing the Oakland experience with parallel regulatory processes in the ports of Rotterdam and Kobe, respectively, and their research further highlighted the uniqueness of American adversarial legalism.

I am grateful to Professor Herbert McClosky for urging me to turn my initial article into a book, to Aida Donald of Harvard University Press for additional encouragement, and to a year as visiting professor at the College of Law, Ohio State University, during which I was able to conduct additional research about the role of American lawyers, judges, and legal scholars in fostering adversarial legalism. In 1995–1998 I was given the opportunity to undertake a research project that used the cross-national experience of selected multinational corporations to compare legal and regulatory regimes in the United States with parallel regimes in other economically advanced democracies. The project produced ten detailed case studies, gathered in *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (University of California Press, 2000). I am grateful to the case study authors, Lee Axelrad, John Dwyer, Kirsten Engel, Holly Welles, Kazumasu Aoki, John Cioffi, Lori Johnson, Martine Kraus, Laura Beth Nielsen, Charles Ruhlin, Deepak Somaya, Tatsuya Fujie, Marius Aalders, Richard Brooks, and Alan Marco. Their efforts provided findings and analyses that filled important gaps in the comparative literature and that I rely on at several points in this book.

My work on the manuscript benefited greatly from the support of Berke-

ley's Center for the Study of Law and Society and its staff, particularly Rod Watanabe and Margo Rodriguez. I received superb research assistance from outstanding graduate students, including Todd Lochner, Lori Johnson, Linus Masuredis, Brendon Swedlow, Sara Rushing, and especially Jeb Barnes, who not only found facts and summarized literature but also constantly pushed me to sharpen my arguments. The experience of teaching hundreds of Berkeley students over the last decade has also been immensely valuable, forcing me to view the American legal system afresh each year and to focus on its many strengths as well as its disturbing qualities.

So many valued and able academic colleagues have read and commented on various draft chapters of *Adversarial Legalism* that I fear that I will fail to mention everyone who provided important corrections or encouragement or both. Among the most prominent in my mind today are Sandy Muir, Eugene Bardach, David Vogel, Malcolm Feeley, Tom Burke, Albert Klijn, Harry Scheiber, Lawrence M. Friedman, David Kirp, Margaret Weir, David Johnson, Peter Schuck, William Pizzi, Bud Bynack, and David Levine. There are many more scholars whose careful research and thoughtful analyses provided the bulk of the information in this book; their names are in the table of references at the end.

Most important to me have been those whose love and patience have sustained and strengthened me, even as I withdrew into my study on far too many evenings—Betsy, my caring, lovely, and ever-insightful wife, and my wonderful and amazing daughter Elsie.

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I

Adversarial Legalism: Contours, Consequences, Causes

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The Concept of Adversarial Legalism

In contemporary democracies law is inescapable. Even in an era of political liberalism and "deregulation," it constrains ever more aspects of social, economic, and governmental activity—usually, even if not always, for good reasons. The rule of law is a very good thing. Different nations, however, implement the rule of law in different ways. Compared to other economically advanced democracies, American civic life is more deeply pervaded by legal conflict and by controversy about legal processes. The United States more often relies on lawyers, legal threats, and legal contestation in implementing public policies, compensating accident victims, striving to hold governmental officials accountable, and resolving business disputes. American laws generally are more detailed, complicated, and prescriptive. Legal penalties in the United States are more severe. And American methods of litigating and adjudicating legal disputes are more costly and adversarial.

To encapsulate some of the distinctive qualities of governance and legal process in the United States, I use the shorthand term "adversarial legalism," by which I mean policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation. Adversarial legalism can be distinguished from other methods of governance and dispute resolution that rely instead on bureaucratic administration, or on discretionary judgment by experts or political authorities, or on the judge-dominated style of litigation common in most other countries. While the United States often employs these other methods too, it relies on adversarial legalism far more than other economically advanced democracies.

American adversarial legalism has both positive and negative effects. Viewed in cross-national comparison, the legal system of the United States is especially open to new kinds of justice claims and political movements. American judiciaries are particularly flexible and creative. American lawyers, litigation, and courts serve as powerful checks against official corruption and arbitrariness, as protectors of essential individual rights, and as deterrents to corporate heedlessness. In so doing, they also enhance the political legitimacy of capitalism and of the system of government as a whole.

At the same time, however, adversarial legalism is a markedly inefficient, complex, costly, punitive, and unpredictable method of governance and dispute resolution. In consequence, the American legal system often is unjust—not, by and large, in its rules and official decisions, but because the complexity, fearsomeness, and unpredictability of its processes often deter the assertion of meritorious legal claims and compel the compromise of meritorious defenses. Adversarial legalism inspires legal defensiveness and contentiousness, which often impede socially constructive cooperation, governmental action, and economic development, alienating many citizens from the law itself.

Do the negative aspects of American adversarial legalism "outweigh" its positive features? To pose the question in such global terms is not very useful. There is no way to count up and compare all the social costs and social benefits that a gigantic, multifaceted legal system send rippling through economic, political, and communal life. And even if one could make such a calculation, the question would remain, "Compared to what?" That is, would alternative ways of implementing public policy and resolving disputes yield higher aggregate benefits and lower social costs, or vice versa? That question too defies any easy answer, at least at that sweeping, system-wide level of analysis.

Other economically advanced democracies, particularly in Western Europe, structure legal and regulatory institutions and processes in ways that suggest plausible alternatives to American adversarial legalism. But the practice that works well in Amsterdam or London might not work so well in Seattle or Miami, and it may also entail a "downside" not revealed by current comparative studies. Moreover, adversarial legalism is deeply rooted in the political institutions and values of the United States. Americans are not likely to accept wholesale replacement of familiar legal rights and practices by legal institutions drawn from rather different political traditions. Some Western European legal and regulatory practices may achieve higher levels of legal certainty than American adversarial legalism, without nearly so much expenditure on lawyers and legal conflict, but those practices are nested in political systems that impose high taxes and expect deference to governmental bureaucracies—neither of which has much political appeal in the United States. For good and for ill, adversarial legalism is the American way of law, and it is likely to remain so.

The purpose of this book, therefore, is not to provide a definitive overall assessment of adversarial legalism, nor to call for its burial, nor particularly to praise it. Rather, my principal intent is descriptive and explanatory—to enhance social scientific understanding of American adversarial legalism's characteristic features; to show how and why it differs from the legal and regulatory systems of other economically advanced democracies; and to highlight ways in which, for all its strengths, it also frustrates the quest for justice.

Many lawyers and sociolegal scholars view complaints about law and litigation in the United States as exaggerated (Galanter, 1994) or, more pointedly, as the laments of conservatives who resent legal changes that help the disadvantaged (Engel, 1984; Daniels and Martin, 1995). But the sociolegal scholars' defense of the American legal system, I suspect, also reflects a political concern: to acknowledge the system's defects, they fear, may encourage politicians to enact reforms that would throw out the baby of justice along with the bathwater of legal excess. The concern is understandable, but refusal to recognize the unique and problematic features of the American legal system may ultimately endanger the baby even more. As Peter Schuck (2000: 421) has observed, "Law that arouses and then dashes peoples' hopes discredits [law's] melioristic impulses, leaving corrosive cynicism and mistrust in its wake." And that may trigger political assaults that also disable law's best capabilities.

With those concerns in mind, this book offers a critical analysis of the American legal system, based on a wide array of scholarly literature. The analysis employs a sociolegal, comparative, and political perspective. The sociolegal strand draws on empirical studies of the system as it actually operates—studies of the law in action, not simply the law on the books, so that our focus is on day-to-day realities, not merely on legal ideals or on famous court cases. The comparative strand draws on studies that contrast legal and regulatory processes in the United States with similar processes in other economically advanced democracies. The political strand traces the links between the distinctive characteristics of the American legal system and fundamental features of American political culture, political structure, and political processes.

The discussion bridges categories of American law and policy that typically are treated as separate and distinct—criminal justice, liability law, environmental regulation, social welfare law, and so on. By viewing these different legal spheres holistically, it becomes clear that the different streams of the American legal process share a common set of characteristics. That is what undergirds the claim that adversarial legalism is the American way of law. The very pervasiveness of American adversarial legalism, moreover, suggests that it is best viewed not merely as a method of solving legal disputes but as a mode of governance, embedded in the political culture and political structure of the United States. In an important sense, therefore, this book can be viewed as a study of the relationship between law and politics in America, examined in comparative perspective.

The goal of the comparative analysis is not to recommend specific reforms or transplants from other political and legal systems, for that job is best left to specialists in particular areas of law and policy. The appropriate analogy is not transplant surgery but psychotherapy. Like that practice, comparative analysis attempts to reveal roads not taken, unconsciously maintained patterns, and