

Michigan Law Review

Volume 81 | Issue 4

1983

A Comparative Perspective on Legal Evolution, Revolution, and Devolution

Laura Nader
University of California, Berkeley

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Comparative and Foreign Law Commons](#), [Courts Commons](#), and the [Legal History Commons](#)

Recommended Citation

Laura Nader, *A Comparative Perspective on Legal Evolution, Revolution, and Devolution*, 81 MICH. L. REV. 993 (1983).

Available at: <https://repository.law.umich.edu/mlr/vol81/iss4/34>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

A COMPARATIVE PERSPECTIVE ON LEGAL EVOLUTION, REVOLUTION, AND DEVOLUTION

Laura Nader*

COURTS — A COMPARATIVE AND POLITICAL ANALYSIS. By *Martin Shapiro*. Chicago: University of Chicago Press. 1981. Pp. ix, 245. \$20.

LAWSUITS AND LITIGANTS IN CASTILE, 1500-1700. By *Richard L. Kagan*. Chapel Hill: University of North Carolina Press. 1981. Pp. xvii, 274. \$23.

In *Courts — A Comparative and Political Analysis*, Professor Martin Shapiro develops a series of propositions about the different modes of decisionmaking that characterize courts in various political systems. Shapiro's book appears in the same year with another contribution to legal history — one concerned with the increased use of courts for purposes of dispute resolution. In *Lawsuits and Litigants in Castile, 1500-1700*, Professor Richard Kagan describes changing litigation patterns and proposes to explain the increasing use of courts in Castile from 1450-1600 and the decline which followed. Both books are examples of a growing interest in the social context of legal institutions and their use, and as such allow one to discern the major strengths and failings of the law and society movement as it has come to be known in the United States. My remarks in this review will revolve around three general themes: the uses and abuses of the comparative historical method; ethnography and the use and presentation of data; and the theoretical and policy implications of this law and society research.

I. POSING THE PROBLEM COMPARATIVELY

In the Preface to his book *Courts*, Professor Shapiro tells us that his book has two purposes: one of which is pedagogic — a teaching tool for students interested in judicial process and comparative legal systems — and the other, to test a number of propositions about courts. From Professor Shapiro's point of view, comparative legal scholarship "has been a somewhat disappointing field" (p. vii), consisting of "showing that a certain procedural or substantive law of one country is similar to or different from that of another" (p. vii). "Or," he says, "alternatively, comparison consists of presenting descriptions of a number of legal systems side by side, . . . with no particular end in view" (p. vii). What Professor Shapiro proposes, however, is to use the comparative method as a substitute for the experimental

* Professor of Anthropology, University of California, Berkeley. A.B. 1952, Wells College; Ph.D. 1961, Harvard University. — Ed.

method (which he says is "not a terribly satisfactory substitute but one pressed upon us by the impossibility of putting laws and nations in test tubes and bubble chambers" (p. vii)) to test his propositions about courts. As he states:

My own position toward each of the propositions is then tested against the "worst case," that is, against that body of known legal phenomena most likely to falsify my position. The accumulated scholarship of comparative law is used as a catalogue for searching out these worst cases. The purpose is to move toward a more general theory of the nature of judicial institutions. [P. vii.]

Using secondary sources only, Professor Shapiro then sets out to test four propositions that he says define the conventional prototype of courts: independence, adversariness, decision according to preexisting rules and winner-take-all decisions.

In each chapter Shapiro proceeds to carry out his purpose, taking care to look at the role of courts in relation to political organization. The challenge to the judicial independence theme of the conventional prototype of courts is placed in the context of English judicial experience because "the conventional wisdom proclaims that it is in England that judicial independence has most clearly developed and flourished" (p. viii). The proposition that "judges decided by the application of preexisting legal rules" is examined in the context of the "civil law system in which judges are supposed to be strictly bound by codes" (p. vii). His assertion that "mediation and litigation invariably intermingle rather than maintain themselves as distinct alternatives" (pp. viii-ix) is tested in the setting of the traditional Chinese legal system which he says "is often presented as having chosen the mediation and rejected the litigation alternative" (p. ix). And finally, he examines appeal in the context of traditional Islam, a legal system which he had earlier described as lacking the means for appeal (p. ix).

What Professor Shapiro finds as he examines the courts of England, Western Europe, imperial China, and Islam is hardly surprising, but worth briefly summarizing here. The English case teaches us that the "notion of judicial independence is so ambiguous and misleading that it cannot serve as a touchstone of 'courtiness'" (p. 125). We learn that European courts do not "mechanically apply a set of complete, self-explanatory, preexisting legal rules" (p. 154), and have achieved only a relative amount of judicial independence. The Chinese case illustrates that "judicial systems almost invariably employ a mixture of mediation and winner-take-all decisions based on preexisting rules" (p. 191). In the case of Islam, the absence of appeal is related to the absence of hierarchical organization in Islam, for "without hierarchical organization much of both the opportunity and incentive for appeal is absent" (p. 221). The Islamic courts were insulated from central political authority and supplemented by the institutional combination of dual legal systems. Shapiro concludes about midway with a principle that has been underlying most anthropological studies of law: "As a general principle it would appear wrong to seize upon the judicial institutions of any one nation, write them large, and then insist that the institutions of other nations are truly judicial only to the extent that they correspond to the model thus derived" (p. 125).

Let me explain why I began by saying that his findings are not surpris-

ing by returning to his earlier comments on the comparative method. Recall that when Shapiro criticizes the quality of work on comparative law, he is implicitly referring to studies by legal scholars that are not rigorously comparative or at least not comparative in any real sense. He also alludes to the scientific model and the use of the laboratory method of testing propositions. What he does in *Courts*, however, is exactly in the tradition of the comparative law scholarship that he criticizes. He concludes that judicial independence is not as independent as some have thought, that the Chinese adjudicate as well as mediate, that the Europeans are not as rule conscious as someone said, etc. Indeed, his chapters are descriptions of legal systems side by side. The comparative method as anthropologists (rather than legal scholars) have developed it needs to be *controlled* to have scientific validity. The method of controlled comparison that I refer to is the method of controlled variables.¹

A major problem common to comparative studies lies in the formulation of concepts or units which will permit comparative analysis without distortions. Just because Western scholars use the word "courts" to refer to a specified form of triadic assembly does not mean that everything labeled courts is functionally equivalent and comparable. A court is more than a third party; it is an institution. The question for the comparative method is, as Bohannan points out, "When are two things the same thing?"² Who said that courts can be said to have a prototype characterized by the four features mentioned by Shapiro? Controlled comparison is comparison with a standard, using controlled variables and not simply variables taken from a Western frame. Shapiro's prototype is ethnocentrically derived and leads to vague and unsubstantiated statements such as "We generally find . . . highly mediatory styles of judging in agrarian villages, with a strong tendency on the part of the villagers to avoid the more courtlike courts of the central regime" (p. 14).

If Professor Shapiro's comparison is not controlled, then what is it? Based on the anthropological standards of comparison set by Eggan and Bohannan,³ I would argue it is casual comparison of the type Bohannan calls "selected counter-illuminative information," selecting data to illuminate the case in hand. It is this approach that renders Professor Shapiro's work vulnerable to criticism. He states that conventional wisdom (no citations) argues that English courts are characterized by an independent judiciary and then proceeds to select the instances from English legal history which negate conventional wisdom, whatever that is. In point of fact he could have selected his cases to prove the correctness of conventional wisdom. In the chapter on English law, he selected his materials from only one part of it, the English common law, when in fact various kinds of law pre-

1. For a valuable delineation of social anthropology and the method of controlled comparison, see Eggan, *Social Anthropology and the Method of Controlled Comparison*, 56 AM. ANTHROPOLOGIST 743 (1954). See also Bohannan, *Ethnography and Comparison in Legal Anthropology*, in LAW AND CULTURE IN SOCIETY 401 (L. Nader ed. 1969). For examples of controlled comparison, see Nader, *Choices in Legal Procedure: Shiu Moslem and Mexican Zapotec*, 67 AM. ANTHROPOLOGIST 394 (1965); Nader & Metzger, *Conflict Resolution in Two Mexican Communities*, 65 AM. ANTHROPOLOGIST 584 (1963).

2. Bohannan, *supra* note 1; p. 40.

3. See Eggan, *supra* note 1; Bohannan, *supra* note 1.

vailed, namely the ecclesiastical courts, the English borough courts, or the independent urban courts.

The antiquated tone of Shapiro's book, which I associate with scholarship at the turn-of-the century — a time when there was no adequate field data, which necessitated using whatever there was — is clearest in his treatment of examples from non-Western village societies. In that context, his comparison may be considered both casual and false — casual in the sense that there is no control, and false in the sense that he is comparing data on living law in one culture with normative (selected normative) principles from another.⁴ The result of such a strategy is that Chapter I is punctuated with unreferenced statements and unsubstantiated generalizations of the sort that put off the anthropological reader and undermined the credibility of the whole endeavor.

The following are selected examples of generalizations which may apply to a particular society but not to a group of societies called village or tribal: "In tribal societies organized under strong chiefs, the chiefs judge with or without the assistance of the elders and the body of tribesmen" (p. 20). "In village societies the elders do much of their own judging" (p. 20). "Simple societies rarely distinguish private from criminal law" (p. 24); "Most societies cannot afford or do not choose to allocate sufficient resources to provide three men or three institutions to do the job of governing what can be done by one Separate courts are a very expensive commodity" (p. 30). "Few human societies have found probabilistic treatment of evidence morally satisfying" (p. 46). Or, "In the context of conflict resolution, the major virtue of a trial is that it provides a definitive point of termination to the conflict" (p. 45), a statement which he does not document and for which there is a good deal of evidence to the contrary. Or, "It is doubtful, however, that very many societies experienced much pure popular judging" (p. 56). Then, "In Chapter I we traced the substitutions of office and law for consent that characterizes at least a segment of most developed legal systems" (p. 65), coupled with the earlier statement, "Courts are clearly the least consensual and the most coercive of triadic conflict resolving institutions" (p. 8).⁵

Social scientists have made some progress in data collection since the nineteenth century. Anthropologists, in particular, have collected and analyzed ethnographic materials for dozens of societies that make the use of general and unspecified phrases such as "In most societies," or "in village societies," "in tribal societies," etc. inexcusable in 1981. It is not, for instance, true that there is a universal tendency of persons in a dispute to seek out the assistance of a third party.⁶ Again, selecting from the harvest of

4. See Van Velsen, *Procedural Informality, Reconciliation, and False Comparison*, in *IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW* (M. Gluckman ed. 1968).

5. Many of these quotes ignore the diversity in societies. Medical specialists, who need not be elders, may play a judge-like role because of their special form of knowledge. And what is a "village society," anyway? The diversity in social structure and culture is immense. As for simple societies rarely distinguishing private from criminal law, see Nader & Parnell, *Criminal Law and its Enforcement in Preliterary Societies*, in *ENCYCLOPAEDIA OF CRIME AND JUSTICE* (S. Kadish ed. forthcoming).

6. See A. BEST & A. ANDREASON, *TALKING BACK TO BUSINESS: VOICED AND UNVOICED CONSUMER COMPLAINTS* (1976); L. NADER, *NO ACCESS TO LAW* (1980). A major finding of

decades of anthropological research in such an unsystematic manner serves to build arguments, not science. Shapiro says that *Courts* is an inquiry into the conventional understanding of judicial institutions. What is this conventional wisdom that Shapiro speaks about, and to whom do such conventions belong? We are never told. The style of this study is unbecoming to a serious political theorist.

A closer examination of Shapiro's contributions leave me puzzled as to what he thinks he is demonstrating. It is no surprise to a practitioner or an anthropologist that what may be considered standard for American courts does not fit all courts,⁷ nor is it surprising that courts perform shadow work above and beyond applying preexisting norms governing adversary proceedings.⁸ It has been known for years that while the state may be associated with courts, courts are not always associated with the state. Nor is it new that courts devise new rules (make law) rather than simply applying preexisting rules.⁹ It is also not surprising to discover that courts mix mediation with adversary procedures, thereby producing compromise rather than winner-take-all decisions.¹⁰ Since a whole generation of social scientists have dealt with issues relating to the political process, Professor Shapiro's findings have revealed nothing that is new in this field of research.¹¹

Professor Shapiro's contribution may be in challenging the ideas of academics who may still hold onto ethnocentric notions that limit the growth of theory in the area of politics and the judicial system. But if Shapiro's intent was to infuse ethnocentric notions with counter-illumination from cross-cultural and transnational studies, he, himself, needs to be more convinced of the "prototypedness" of his own thinking. Then at least he could make explicit the structures of vertical and horizontal pluralism that have led us to realize early on that more than one legal system is operating within the borders of the state at any one time and that a society is not an undifferentiated whole. Pluralism may be caused by ethnic variation or by class variation (or stratification), or by structural differences. If Shapiro had applied the notion of multiplicity expounded by a number of nineteenth- and early twentieth-century scholars¹² — the notion that several legal systems may exist within a given society — the straw man in his chapter on China would have been analyzed as just that. Anthropologist Leopold Pospisil has written extensively on legal multiplicity. He states:

both of these works is that Americans seek out the assistance of a third party in rare cases. The predominant pattern is the dyad-negotiation.

7. See, e.g., Nader, *Styles in Court Procedure: To Make the Balance*, in *LAW IN CULTURE AND SOCIETY* 69 (L. Nader ed. 1969).

8. See L. MATHER, *PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL CASE DISPOSITION* (1979).

9. See K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* (1941); I. SCHAPERA, *TRIAL LEGISLATION AMONG THE TSWANA OF THE BECHUANALAND PROTECTORATE* (1943); I. SCHAPERA, *A HANDBOOK OF TSWANA LAW AND CUSTOM* (1938).

10. See, e.g., Nader, *supra* note 7.

11. See, e.g., I. SCHAPERA, *GOVERNMENT AND POLITICS IN TRIBAL SOCIETIES* (1956); I. SCHAPERA, *A HANDBOOK OF TSWANA LAW AND CUSTOM* (1938); G. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959).

12. See Nader & Nader, *A Wide Angle on Regulation*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* (R. Noll ed. 198 forthcoming).

Traditionally, law has been conceived as the property of a society as a whole. As a logical consequence, a given society was thought to have only one legal system that controlled the behavior of all its members. Without any investigation of the social controls that operate on the subsociety levels, subgroups (such as associations and residential and kinship groups) have been *a priori* excluded from the possibility of regulating their members' behavior by systems of rules applied in specific decisions by leaders of these groups — systems that in their essential characteristics very closely parallel the all-embracing law of the society. This attitude was undoubtedly caused by the tremendous influence the well-elaborated and unified law of the Roman Empire exerted upon the outlook of the European lawyer. Had classical Greece exercised such influence over the legal minds of our civilization, our traditional concept of law might have been much more flexible and, cross-culturally speaking, "realistic."¹³

If we utilize the idea of multiplicity of legal systems, there is evidence for arguing that in imperial China, state law protects state interests, that customary law protects the interests of the landowners, and that mediation (which Shapiro never does locate in Chinese society) is reserved for dealing with disagreements between status equals at all levels of that society.¹⁴

But Shapiro is thinking ethnocentrically, from the point of view of European legal categories, and so fails to recognize mediation as one of several distinct legal structures in Chinese society. Instead, he concludes that the system is a "mixture" of mediation and adjudication. Likewise, the question he addresses about appeal in Islamic law arises from thinking in terms of a hierarchy of courts, on the Western European model. But Islamic law is not concerned with procedure, but with fitting the facts to the proper legal principles. In discussing appeal comparatively, the functional equivalent of the Western notion of appeal should be set in the context of a multiple number of remedy agents, only one of which may be the Islamic Court where appeal, as we know it, is horizontal, not hierarchical.

It is true that the notion that law is monopolized by the state has had a strong impact on scholarly thinking about the relation of state law to the societal elements within the state. However, the idea of the multiplicity of legal systems has, significantly, been accepted by researchers working in countries where legal pluralism is a fact of life because of colonialism of one sort or another.¹⁵

The concept of multiplicity has also been applied by those trying to understand the legal center of power. As Pospisil has said, the dogma regarding the law of the state as the most powerful source of social control proves to be a myth in some instances in our Western civilization:

In the long perspective the center of power, of course, is not a static phenomenon. The relative amount of power at the various levels within a society . . . may diminish or increase, with the result that the center of power (defined by the relative amount of control power of the various soci-

13. L. POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 99 (1971).

14. In Nader & Shugart, *Old Solutions for Old Problems*, in *NO ACCESS TO LAW* 57, 75-86 (1980), we observed that when mediation or arbitration was used for settling disputes between people of unequal power, the person of lesser power usually loses. Our recommendation was that mediation be reserved for dealing with disagreements between status equals.

15. *See generally* *THE IMPOSITION OF LAW* (A. Burman & B. Harrell-Bond eds. 1979).

etal segments) may shift its position to another level.¹⁶ In 1942, Roscoe Pound elaborated upon the thesis that the state's role in social control increases as traditional social control, *e.g.*, kinship and religion, breaks down,¹⁷ and others before and since have analyzed the interrelations between law and social organization.¹⁸ What this idea encourages, then, is an *interactive model* which stems from an understanding of historical development and from the recognition that courts expand and contract often in direct consequence of the political intentions of the state and its citizens. I will deal with this particular topic in my discussion of Kagan's *Lawsuits and Litigants in Castile*.

I do not find any new understanding in *Courts*, yet when I forget Shapiro's stated purposes, I come away thinking that the work is significant as a catalyst, especially for those who have spent a long time immersed in comparative materials. Counter-illumination strategy has a function, although different from controlled comparison. The profiles of English, Continental European, Chinese, and Islamic law that he presents are valuable as brief summaries of the materials on adjudication in four grand legal systems of our world, and the book should encourage a new generation of comparative historical legal research — one that would move us beyond the contributions of Ehrlich and Pound.¹⁹

II. THE ETHNOGRAPHIC-HISTORICAL COMPARATIVE APPROACH

Professor Kagan's work *Lawsuits and Litigants in Castile* presents an interesting contrast to *Courts*; it is a contextual analysis of litigation in one society over approximately three hundred years. Kagan uses primary sources in order to examine Castilian litigation between 1500 and 1700. He explores the beginnings in this southwestern corner of Europe of what might be described as a period of "legal revolution," an age in which the formal adjudication of disputes was sharply and dramatically on the rise (p. xx). His book is divided into two parts. Part I is concerned with "the economic, social, legal and political changes in Castile that . . . precipitated a sharp increase in the overall volume of civil litigation, accompanied by a widespread interest in legal study, the development of a sophisticated legal profession, and the expansion of the royal judiciary" (p. xxii). Part II is his attempt to explain "why . . . Castile's 'legal revolution' ran out of steam, leading to an apparent decline in litigation, retrenchment in the law faculties, and stagnation of courts and tribunals that had flourished in an earlier, more litigious age" (p. xxii). His view of legal history illustrates a sophisticated understanding of the multiplicity of legal systems: "I approach litigation not from a legal perspective but from a social and political one, viewing it principally as one of several methods by which disputes and conflicts are eventually resolved" (p. xviii). Kagan describes his view of legal history as approximating that of Jerold S. Auerbach (and, incidentally,

16. L. POSPISIL, *supra* note 13, at 118.

17. R. POUND, *SOCIAL CONTROL THROUGH LAW* (1942).

18. *See, e.g.*, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (M. Rheinstein ed. 1954).

19. *See* E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1936).

Marx, Weber and Durkheim)²⁰ who observed that "legal history is a chapter of social history, not a self-contained entity."²¹

In Kagan's book we are again dealing with conventional wisdom. This time, in relation to litigation rates; the West is said to be more litigious than the East. China and Japan, we are told, are models of low levels of litigiousness, with relatively few lawyers. We have in Kagan's introduction a live example of the conventional wisdom to which Professor Shapiro was referring. Kagan tells us early on: "Nor did Eastern potentates develop complex institutions specializing in the administration of justice; instead, rulers relied principally upon military and other nonlegal institutions to enforce their power. Consequently, adjudication was never given an opportunity to become a routine method of resolving disputes" (p. xxiii). Having posed the comparison — which Professor Shapiro might well say is a "false comparison," in the sense that what he says about the East is true at one level but not at another level — Kagan has his problem: he has profiled the West as peculiarly litigious and dependent on lawsuits, the East as not, and he can now proceed to explain the difference. Litigiousness, he tells us, was "a function of a worldview that placed greater emphasis on individual rights than on individual responsibilities" (p. xix). The development of the market economies of the twelfth and thirteenth centuries expanded the demand for dispute resolution by creating new reasons for lawsuits. The centralized monarchies used the rule of law, implemented and defended by the central government, to sabotage the power of local authorities, particularly the landed aristocracy. Adjudication, according to Kagan was "a service provided to promote loyalty" (p. xix), and in the process became an integral strategy of the rulers' efforts to expand their authority. The result of this combination of economic expansion, increase in population, state-building, and law, was a Castilian society immersed in litigation. Conversely, in seventeenth-century Castile, economic and demographic decline resulted in diminished litigation and decentralized social control mechanisms, a situation where "the extreme litigiousness of the sixteenth century was a thing of the past as such other modes of dispute settlement as out-of-court arbitration with the help of lawyers came to the fore" (p. xxii).

This book, based on extensive research in Spanish archives, is a major contribution to our understanding of the evolution of litigation in Castile over three hundred years. The topic of litigation in Spain has barely been examined and, as Kagan tells us, is not a popular subject among historians despite the fact that litigation has been of political importance in our time.²² As promised, Kagan's study explores the routine, daily processes of litigation in the context of the needs, the stress, and the politics of economic life. We learn who uses the courts and for what reasons. Peasants, trades-

20. See E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1893); K. MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (1967); MAX WEBER ON *LAW IN ECONOMY AND SOCIETY* (M. Rheinstein ed. 1954).

21. P. xviii (quoting J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICAN* 77 (1977)).

22. Indeed, it has become commonplace in U.S. society for members of the bench (with the Chief Justice of the U.S. Supreme Court in the forefront) and the Bar to complain about the increase in litigation. The basis for their remarks is rarely made clear — increase according to population, need, length of case, demand, or what?

men (such as tanners, dyers and innkeepers), widows seeking to protect their dowries from husbands' creditors, as well as nobles, brought cases dealing with problems of inheritance, property, commercial transactions, debt collection, honor, libel and slander. We learn of the emergence of legal practitioners, the lawyers and advocates, and judges, all of whom had a personal interest in the "law business," and of their emerging legal culture.

The description is rich with the complex motivations of human beings caught up in a world of political and economic competition. For Kagan, the bargaining, the corruption, the advocacy, are part and parcel of a competition for power between landowners and peasants, lawyers and clients, between the judges who ran Castile's highest level courts and the Hapsburg rulers. To begin with, the legal practitioners used the legal system as a means for competing for royal favor. In later years, however, they sabotaged royal justice, forcing clients of this system to fend for themselves in the local judicial marketplace. The popular image of law and lawyers during much of this period was one of "corrupt greedy practitioners, interested only in money" (pp. 59-60), and "many pined for some idealized vision of justice that was swift, easy, and cheap. The same utopian vision of justice lies at the heart of criticism about lawyers being too expensive, courts too corrupt, and litigation too slow" (p. 77).

In spite of the criticism, Kagan informs us that there were some plusses, for the traditional small face-to-face arbitration procedures were unsuited to a growing economy. A lawsuit in one of the king's courts furnished people who did not know one another — merchants living in widely separated parts of the kingdom or even in other countries, widows lacking powerful supporters, individuals without strong family ties — with the means by which to settle their disputes. In other words, demographic growth, geographic mobility, primary group fragmentation, and growing disparities between the rich and poor were accompanied by an increase in the number and types of disputes which could not be adequately resolved by the informal mechanisms of conciliation and compromise. Litigation in one of the king's courts increasingly became an effective alternative for protecting one's interests. In short, Kagan states: "I am suggesting . . . that the changes set into motion by economic expansion and population growth were the fundamental cause of much of the increase in litigation recorded in Castile's courts . . . Peasants in England and France experienced similar tensions . . . and in these countries the evidence also suggests that litigation in the sixteenth century was on the rise" (p. 136). An interesting hypothesis.

Like Professor Shapiro's book, Kagan's work is catalytic in its effect on the reader. But unlike Shapiro, Kagan tests his hypothesis with controlled variables and the result is more congenial to disproof and disciplined argument. My admiration for Kagan's work, for the care he takes in describing the different types of courts and legal procedures in Castile over a three-hundred-year period does not, however, hinder me from taking issue with his central concept: litigiousness. Litigiousness, Kagan tells us, is "knowing how to exploit courts and legal procedures for one's own advantage" (p. 89). He also comments that "[t]he accepted definition of a litigious person is one who litigates frequently" (p. 89). The Webster's Dictionary defini-

tions also associate the words "litigate", "litigation", and "litigious" with "to make the subject of a lawsuit, to contest in law, to carry on a legal contest by judicial process," but Webster's also links "litigious" with the words, "contentious, belligerent, dispute, quarrel."²³ In the broadest sense, Kagan is concerned with patterns of court use, and he would have to admit that a society that had no court could still be litigious. The Chinese could be as litigious (in the sense of contentious) as members of another society, and yet not use courts. In other words, we should separate questions about levels of litigiousness from patterns of court use. In fact, all that Kagan can tell us from the records is something about the level of court use, and not about levels of litigiousness in Castile or more generally, in the West. As it is, Kagan speaks in terms of conventional wisdom when he refers to the "litigious spirit of Western society" (p. 126), associating the rise of the litigious spirit with the republics and city-states of northern Italy in the late Middle Ages, specifically, "the spread of Roman law and the rise of a large and sophisticated legal class" (p. 126). This may be so, but the next step after separating the general term "litigiousness" from "court use," or recognizing court use as but one form of litigiousness, is to compare court use patterns. In the United States, it has been observed that patterns of court use may vary from state to state and county to county and within a county during the same historical period.²⁴ Furthermore, in my own research, I have compared two agricultural societies, the Jalé of New Guinea where there are no courts, to the Zapotec, where there are courts, and I would conclude that the Jalé are more litigious than the Zapotec, despite the latter group's very high percentage of court use (an average of 50-60 cases per month, involving over 250 persons in a population of 2,000).²⁵

This brings me to my second observation on litigiousness as a useful concept. The concept may be treated quantitatively or qualitatively — both of which Kagan has done. He tells us that for all their apparent litigiousness, Castilians thought that litigation was bad and they viewed the law with suspicion, distaste and disapproval, some likening it to a disease. Indeed, lawsuits were considered sinful, a symbol of discord. He explains that "[l]itigiousness . . . was a function of a world view that placed greater emphasis on individual rights than on individual responsibilities" (p. xix). In fact, one could argue that litigiousness was a function of a world view that placed greater emphasis on individual rights than on *social* responsibility, for Kagan also reports that Castile was a "‘composite society,’ an amalgam of hundreds of small corporate groups and communities held together only loosely by common economic circumstances, legal privileges, and shared allegiances to the church and the Spanish crown" (p. 18).

By the time I finished this book, I had the sense that both the author and the Castilian observers he quotes thought that litigation was undesirable, and that probable observers, whether academics or administrators, more

23. WEBSTER'S NEW COLLEGIATE DICTIONARY 491-92 (6th ed. 1961).

24. See, e.g., Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC. REV. 267 (1976).

25. Koch, "Pigs and Politics in the New Guinea Highlands: Conflict Escalation Among the Jalé," in THE DISPUTING PROCESS 41 (L. Nader & H. Todd eds. 1978); L. Nader, *Law in Context: The Structure and Ideology of Control*, Tressoline Lecture, Lehigh University 1981.

generally think that litigation is bad. There are, however, other views — one from the claimant for whom litigation is an expression of a desire for justice, a means of testing one's rights rather than simply an expression of squabbling and quarreling. Supporters of the victims' bill of rights movement in California recently tried to communicate their concern about the justice motive in their attempt to reconstruct the position of the victim in American legal relations.²⁶ For the claimant who feels aggrieved and wronged, litigation is an expression of belief in justice and moral behavior.²⁷ It is not simply the result of competition, power grabbing, or power consolidation.

The most interesting aspect of Kagan's description of court users is the universal use pattern. The king and aristocracy were primary court users, but peasants, tradesmen and even widows also entered this arena. The legal institutions of the rulers were democratized in relation to access, one might say, in order to attract loyalty and followers to the rulers, but they *democratized in order to attract citizens*. The explanation for decline of litigation or court use then is not only demographic and economic "decline," but also the withdrawal of access to universalistic procedures — or at least, the evolution of a court system that began to cost too much, in a context distressingly similar to the United States in the 1980s.

The last part of *Lawsuits and Litigants* is an analysis of devolution in Castile. There is no doubt that the royal judiciary deteriorated in the seventeenth century, but Kagan places this phenomenon in a broader framework: "[T]he decay of royal justice was but a small part of a wider redistribution of economic and political power that affected all of Castile in the seventeenth century" (pp. 234-35). The movement of political power was from the center to the periphery. While it is true that the machinery of royal justice was not meeting the demand for legal services, its decline indicated a redistribution of power from the center to the regions, from the crown to the aristocracy and officeholding families in charge of the major urban areas. Kagan has presented a dynamic picture of the role of law over three centuries, combining both the top-down and the bottom-up perspective, the user model with the state and private power models of legal development. The result is a sophisticated use of much of the best research methodology available in the social sciences. He has presented us with a relatively controlled comparison that will be an invaluable resource. His explanations, however, are specific to this one case rather than relating to a body of theory on social stratification in the classic traditions of a Marx or a Weber. It will be up to others to build on his case and to test his more general assumptions about litigation and Western litigiousness.

III. THEORETICAL AND POLICY IMPLICATIONS

By now, the theoretical implications of this review should be plain. If Professor Shapiro takes the view that he is doing science (*i.e.*, using a model

26. See Mandel, *Crime Victim, Legal Victim, Turns Crusader*, San Francisco Chronicle, Jan. 16, 1983, for a description of the motives behind the desired reconstruction of the status and rank of victim.

27. See Lerner, *The Justice Motive in Social Behaviour* in ADAPTING TO TIMES OF SCARCITY AND CHANGE (M. Lerner & S. Lerner eds. 1981).

comparable to the laboratory method), he is not. His propositions are too broad to be tested, his data based on secondary sources which are too selective, the ethnocentricity of the prototype of courtness too arbitrary. The book is a good one to read if the reader has had considerable experience with cross-cultural materials on law, but it has not made a contribution to legal theory. This work, unfortunately, reflects the tradition of the lawyer for whom evidence is information that may be useful in winning a case. For the scientist, however, evidence is used to test a hypothesis or connection between collected facts; science is empirical rather than argumentative. Unfortunately, the method of testing propositions against the "worst case," that is, against the body of data most likely to falsify the proposition, is not an adequate tool if used too broadly, and not in the best social science tradition.

Professor Kagan, on the other hand, describes himself as doing historical work that I would view as basically scientific in approach. He is using ethnographic evidence (contextual data) to test a hypothesis and to illustrate the connection between collected facts. He presents us with some propositions which should predict legal variation in the mobilization or initiation of cases. Indeed, the book is an illustration of Pound's thesis (mentioned earlier) that the state's role in social control expands and contracts in relation to the growing or diminishing role of traditional social control. As Donald Black puts it, law increases as other social control decreases.²⁸ Furthermore, this study fits into that body of social theory that states that with everything else held constant, disputes between people of different classes are more likely to result in legal action than disputes between equals. Durkheim's work on legal evolution (1893) and Stevenson's on population and statehood in Africa (1968) support Kagan's hypothesis that law increases with increased population density.²⁹ The ethnographic data on American Indians illustrate the waxing and waning of law in rhythm with corresponding changes in social organization.³⁰

There are some parallels in these two different works. The authors of both books under review have failed to give us a concluding chapter — one chapter that either links their work to a wider body of legal or social theory, or helps us to assess the implications of their work for the contemporary period. Both authors are products of their time. The past twenty years in the United States have highlighted issues in these books that are at the heart of legal policy in this country. It is in relation to legal policy that I think Shapiro's book makes its most important contribution. Throughout the work, but particularly in the first chapter, Shapiro raises the questions of law and the legitimacy of law in relation to the state. The judicial process lends legitimacy to the political process. In this sense, the work of the courts is the centerpiece of the state apparatus,³¹ and one that depends on

28. D. BLACK, *THE BEHAVIOUR OF LAW* 6-7, 107-11 (1976).

29. See E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 289-90 (G. Simpson trans. 1933); R. STEVENSON, *POPULATION AND POLITICAL SYSTEMS IN TROPICAL AFRICA* (1968).

30. See, e.g., J. RICHARDSON, *LAW AND STATUS AMONG THE KIOWA INDIANS*, (1940); Lowie, *Some Aspects of Political Organization among the American Aborigines*, 78 *J. ROYAL ANTHROPOLOGICAL INST.* 11 (1948).

31. See M. WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 180-95 (H. Gerth & C. Mills eds. 1946).

mutual consent of the users of the courts as conflict resolvers. But courts are also social controllers and what Shapiro calls their social logic *is* undercut if they are embedded in the political machinery of their regime.

Kagan's contribution to legal policy is of another sort. His work on Castilian litigation serves to reinforce an American stereotype of courts and litigation as necessary evils rather than as institutions responding to the justice motive. A depiction of courts filled with greedy practitioners and litigants may strengthen the currently held view of some American justices, a view based more on feeling than fact, that Americans litigate too much and that they should be encouraged to stop litigating or, at least, to take their cases to extra-judicial forums. We might do well to note that high court litigation rates in Castile corresponded with a very prosperous, energetic and creative period of Spanish history.

Both books demonstrate that our theories and policies could be enormously enriched by scholarship that is both comparative and historical. Scholars using the comparative and historical approach, however, must guard against assessing the legal expression of other cultures on the basis of the political biases and concerns of our own society. Legitimacy, control, liberal ideology and system breakdown are fundamental questions of our times. The comparative/historical model can improve our theoretical insights on law only to the degree that we can step outside our own system and examine others in terms of their own history, social structure, and culture.
