

PolS404: The Judicial Process

Final Study Guide

I. Main Reading Points

- a. Fuller: wrote *The Case of the Speluncean Explorers* which is a hypothetical legal case where five spelunkers are trapped and will starve to death unless they eat one of their party; once they are rescued they're convicted of murder; the article examines the case from the perspective of five different legal principles examining whether they should be found guilty and executed
- b. Nonet & Selznick: "Law and Society in Transition: Toward Responsive Law" on repressive law, autonomous law and responsive law (see below)
- c. Kagan: argues that the U.S. makes more use of adversarial legalism in settling disputes; a lot more activity coming from judges; Kagan's Typology= how formal are the rules in the decision making process? (informal or formal?); what's the level of participation in the process? (hierarchical or participatory?); informal rules + hierarchy decision= expert judgment; informal rules + participatory decision=negotiation/mediation; formal rules + hierarchy decision= bureaucratic legalism; formal rules + participatory decision= adversarial legalism
- d. Atiyah & Summers: about legal politics in the U.S. and U.K., They ask: "Why does England rely on legislation so much more readily to resolve questions that in America are left to the courts?" → the short answer: UK has strong, centralized government; U.S. has weak, fragmented government
- e. Meador: "German appellate judges: career patterns and American-English comparisons"; how judiciary selection is different in Germany; study law at university: 3½ - 5 years, at the end of their formal education, students take their first state examination, if they pass, they become a Referendar and begin 2 years of practical education (a Referendar is considered a temporary civil servant and receives a government salary), a Referendar completes training in five areas: civil courts, criminal courts/prosecutor's office, administrative office, private law office, one from a list of approved areas of legal or governmental activity, at the end of her practical training, the Referendar takes a second state examination, if she passes, she becomes an assessor and can enter any branch of the legal profession; a judge (Richter) is one career path an assessor can take and any assessor is formally qualified to become a Richter; those who wish to become a judge apply to their local justice ministry and applications are considered by the ministry's personnel department (the second exam score is considered but not the only factor); the minister of justice (a lawyer and former judge and prosecutor) makes the final decision; judges on the lowest level of the judiciary often apply to fill vacancies on the next higher court; again, promotional decision are ultimately made by the justice minister
- f. Moss: *The Wallstreet Journal* "On Judging Judges"; Moss says, "Let us remember that to be a good judge one must have (1) enough intelligence to reach a rational decision based on law and evidence, (2) enough wisdom to determine if this decision is also just, and (3) enough courage to reject or modify that decision to meet the requirements of justice; distinction between law and justice; refers to judges selling justice for a price; resist the popular will; "if judges are no more courageous than those they judge, they should be in the prisoner's dock instead of on the bench"

- g. This American Life: “Very Tough Love”: A drug court program that we believe is run differently from every other drug court in the country, doing some things that are contrary to the very philosophy of drug court. The result? People with offenses that would get minimal or no sentences elsewhere sometimes end up in the system five to ten years; drug courts have become one of those non-partisan solutions that everyone from the Republican governor of Georgia to the Democratic President of the United States says they love, but as they expand into more places, and become more of a standard part of the criminal justice system, it's possible that they're changing. One of the leading researchers on drug courts, Steven Belenko told me there are no studies on this, but anecdotally, he's noticing drug courts are becoming more punitive, and more controlling. Belenko: “Over time what's happened, drug courts became routinized. So you have judges who are put into drug court who have no interest or knowledge about addiction and treatment. Not to criticize them at all. They're just not trained or invested in this model. So I think they take with them the more typical judicial responses of “if you violate this judicial order, you'll be punished.” According to the National Association of Drug Court Professionals, about 150 of the nation's drug courts do not apply the principles of the drug court model correctly, and are not having good outcomes as a result.
- h. Liptak: The New York Times: “Justices Tell Judges Not to Rule on Major Backers”; Supreme Court decision stating elected judges must disqualify themselves from cases involving people who spent exceptionally large sums to put them on the bench; policing the role of money in judicial elections, “there was a serious, objective risk of actual bias”; re: *Caperton v. A. T. Massey Coal Company*—in WV, A.T. Massey Coal Co. was being sued for fraudulently cancelling one of its contracts; meanwhile, Massey's CEO raised over \$3 million for Brent Benjamin's campaign for WV; Supreme Court Justice Benjamin beat the incumbent justice in the election → a few years later, Massey's contract dispute reaches the state supreme court (where Benjamin is now a justice) the plaintiffs ask Benjamin to recuse himself, Benjamin refuses and is the court's deciding vote in favor of the Coal Company; appealed to the US Supreme Court; majority said this kind of extreme conflict of interest violates the 14th Amendment's due process guarantee doesn't prohibit all conflicts of interest involving campaign donation, just extreme cases like this
- i. Bonneau & Hall: “Debunking Popular Myths of Judicial Reform”; *Myth #1*—citizens are not interested, or willing to participate, in state supreme court elections; *Myth #2*—expensive, aggressive campaigns alienate voters and decrease citizen participation in judicial elections; *Myth #3*—nonpartisan elections “depoliticize” campaigns and reduce the costs to candidates of seeking these seats; *Myth #4*—money buys elections; *Myth #5*—citizens are incapable of assessing judicial qualifications when casting ballots in elections to the state high court bench; *Myth #6*—The United States Supreme Court's decision in *Republican Party of Minnesota v. White* transformed judicial elections into bitter, increasingly contentious races; *Myth #7*—state supreme court justices universally are being targeted by challengers, who themselves are driven in part by single-interest groups and other financial high rollers; *Myth #8*—nonpartisan elections and the Missouri Plan improve the quality of the state court bench; *Myth #9*—appointment schemes take politics out of judicial selection and promote the rule of law; *lesson*: everything has been tried and there is no perfect system for selecting judges in American states and each system represents tradeoffs; in support of state judicial elections

- j. Epp: about the Rights Revolution; Epp discusses two competing explanations for the rights revolution: judge-centered: judicial leadership and attention to individual rights contributed to the rights revolution in the U.S., support-structure=growing support and organization for rights-advocacy organizations and lawyers was the driving force behind the rights revolution; Epp argues that, while judges did play a role in the rights revolution...; the U.S. is known for having political judges—couldn't that have created the rights revolution? → it could have, but the U.K. (and other countries) also experienced a rights revolution; political judges cannot explain this shift toward judicial attention to rights in the U.K.
- k. Peretti: "In Defense of a Political Court": *The Virtues of Political Motive in Constitutional Decision-making: A Constrained and Consensus-Seeking Court*; supports value-voting; consequences of policy motivation; emphasis on political checks—formal checks and informal checks, informal and formal (see below) → FORMAL: impeachment, altering size of the court, jurisdictional control, constitutional amendment, statutory reversals, control of judiciary salaries, budget and staff, the president; talks about politically motivated judicial decision-making; Supreme Court justices operate in political environment filled with many opportunities for policymaking power; political checks on the court are key to its legitimacy

II. Key Terms & Concepts

- a. Natural law: lawmakers not only following correct procedures but also on the inherent justice of that law; many laws require judgment as to what is right and wrong → leads to moral punishments; how far can society regulate conduct? By their human nature, most people can tell what is morally good and what is morally bad for themselves and others
- b. Legal positivism: the law is the law and it should be enacted through procedures by whoever has lawmaking authority in a particular political system; even if laws are unjust, they are laws and all citizens have to follow them
- c. Repressive law: law is not independent of the political system, law is used as a tool of the regime, politically powerful dictate what the legal decisions should be
- d. Autonomous law: independent of political process; follow rules/procedures and doesn't matter if you like the outcome or not; law separate from politics (Blackstone and Hamilton)
- e. Responsive law: (Nonet & Selznick's Typology) law is not independent of the political system; law is used as tool of regime; politically powerful dictate what the legal decisions should be; factor in what is "just" not just what the rules say; justice should be served no matter what; "responsive" to political outcomes (Cardozo and Holmes)
- f. Civil law: looking directly at set of laws, a legal system in which laws are codified and applied (not interpreted) by judges, practiced in most parts of the world, including continental Europe
- g. Common law: based on precedent, a legal system law is developed over time by the interpretation of judges, practiced by the UK and its former colonies (USA, Ireland, Canada, Australia, India, etc.)