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Review of *Vaccine Court: The Law and Politics of Injury* by Anna Kirkland

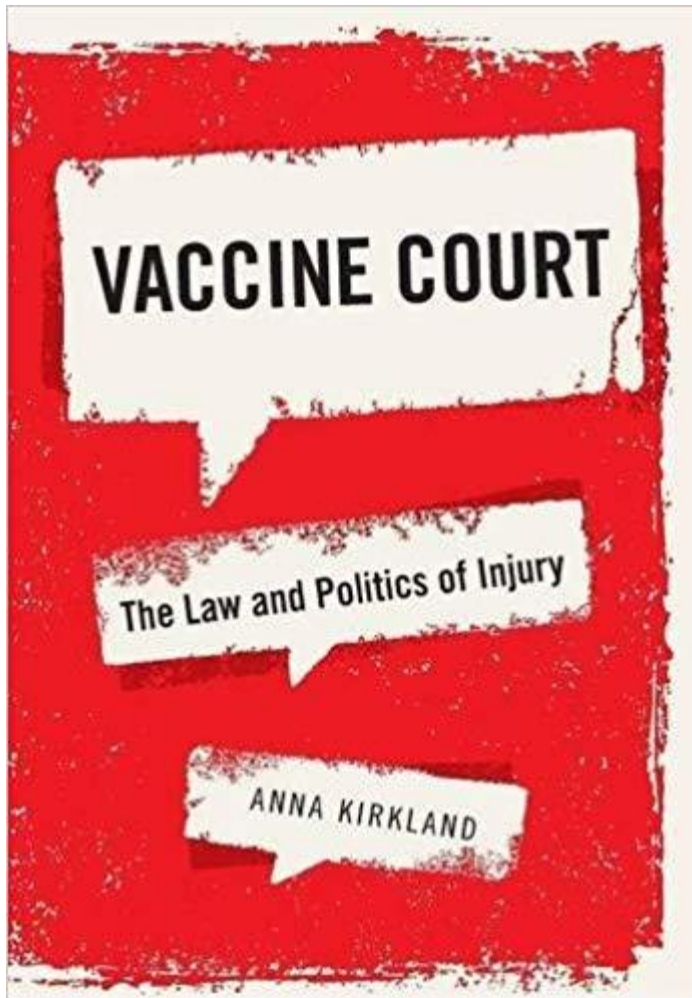
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VACCINE COURT: THE LAW AND POLITICS OF INJURY

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VACCINE COURT: THE LAW AND POLITICS OF INJURY, by Anna Kirkland. New York: New York University Press, 2016. 288pp. Cloth \$40.00. ISBN: 978-1-4798-7693-8.

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Anna Kirkland's new book examines a relatively little-known yet fascinating specialized court lodged within the United States Court of Federal Claims. The Office of Special Masters – most frequently referred to as the “vaccine court” – was established by the National Childhood Vaccine Injury Act of 1986. This act was a response to a flood of product liability lawsuits that threatened to drive drug companies out of vaccine manufacturing, thereby complicating mandatory vaccination programs across the country. As they have in other areas, such as with the September 11 Victim Compensation

Fund, Congress created a system to compensate those who had suffered certain specialized injuries. The vaccine court has served as the mandated first stop for those making vaccine-injury related claims, as the system funnels such cases away from the regular court system and towards this specialized court.

The central actor in Kirkland's study is itself a worthy object of attention as one of a growing number of specialized courts in the American judicial landscape (Baum 2011). In Kirkland's hands, however, the work is not simply a study of the operations of an obscure but nevertheless significant judicial body. It is also a study of how law and social movements interact in legal contests aiming to resolve competing claims drawn from scientific expertise and popular beliefs. Drawing from a wealth of public documents and debates related to the vaccine court, Kirkland illuminates the court's role in creating knowledge about vaccine injuries through the resolution of individualized cases. Her approach operates within the tradition of law and society, and builds off Martin Shapiro's classic insights about courts' role in upholding the social order (Shapiro 1981).

Throughout the book, Kirkland provides a thorough analysis of the workings of the vaccine court. As she describes in Chapter 2, the court operates differently than the typical tort process. For one, the court operates under its own procedural rules rather than the Federal Rules of Civil Procedure. Vaccine court cases are not subject to the stricter evidentiary standards that the Supreme Court required of federal civil lawsuits in *DAUBERT V. MERRELL DOW PHARMACEUTICALS* (1993); instead, special masters are tasked to consider “all relevant and reliable evidence governed by principles of fundamental fairness to both parties” (p. 121). The vaccine court is also unusual in that the attorneys for losing litigants routinely get their court costs paid, thereby providing additional incentives for attorneys to represent claimants.

The vaccine court also began by operating more bureaucratically, in contrast to the adversarial nature of tort litigation. The court initially resolved most cases with reference to a generous Vaccine Injury Table providing fast-tracked compensation for officially recognized injuries caused by vaccines. This system operated bureaucratically because claimants did not need to demonstrate that vaccines definitively caused their injuries but merely that their injuries might have been caused by vaccines. This sidestepped the central debate over vaccine harms, which Kirkland suggests was consonant with the lack of scientific consensus over vaccine injuries at the time of the court’s creation. However, when in the 1990s the scientific consensus shifted towards rejection of links between vaccines and injuries, the court shifted along with it. Fewer injuries were compensated through the fast-track Vaccine Injury Table and more claims became “off-table” claims contested in an adversarial manner.

[*138] A central claim of the book is that the vaccine court has served as a key institution in upholding what Kirkland terms the “immunization social order.” This social order “is the set of institutions, laws, pharmaceutical biotechnologies, and social practices that work together to produce high levels of vaccine coverage to prevent a wide range of diseases” (p. 2). Within the rights-focused American culture, this social order – especially laws and social norms requiring mandatory vaccination of children – is particularly vulnerable to various challenges. Kirkland highlights these challenges in chapter 3, which examines how vaccine-critical social movements have tried to destabilize the immunization social order by framing vaccines in a negative light.

As Kirkland details, some of this anti-vaccine activism is spurred by those on the political left, though most of it has been driven by libertarians located on the political right. The left-wing version, perhaps best exemplified by the “Green Our Vaccines” rally in 2008 led by celebrities Jenny McCarthy and Jim Carrey, tends to focus on alleged environmental harms caused by supposed unnatural “toxins” in vaccines. Libertarian vaccine critics instead focus on health freedom and opposition to mandated vaccination as part of a larger worldview about the proper role of government in individuals’ lives. Both sets of social movements tend to individualize vaccine harms by dramatizing the stories of the most sympathetic injured individuals: disabled children with rare injuries allegedly caused by vaccines. Vaccine critics are overwhelmingly white middle-class professionals, yet frequently describe themselves “as a vulnerable minority population in need of rights-based protections” (p. 114).

These social movements have sought attention for their anti-vaccine activism in various venues, with the vaccine court among them. The focus of chapters 5 and 6 is how these activists mobilized to try and use the court to achieve attention for their cause, with chapter 6 focusing on the campaign to link vaccines and autism. One strategy was to use the court to compel pharmaceutical

companies to turn over data related to vaccine studies that could be used as the basis for vaccine-critical research. While this strategy was largely unsuccessful, vaccine critics were able to introduce several studies and experts willing to re-evaluate aspects of the scientific consensus that, by the mid-2000s, had decisively turned against vaccine critics (particularly concerning any vaccine-autism link). Nevertheless, the vaccine court largely rejected the most explosive claims of vaccine critics, including the claim that vaccines cause autism. At the same time, the court did provide some measure of compensation for many sympathetic claimants, including families of injured or deceased children.

Kirkland's overall assessment of the vaccine court is positive. While acknowledging that it is not perfect (as no institution can be), she argues that the court's role in upholding the immunization social order has been largely successful. The court affirmed the consensus of vaccine safety while acknowledging some injuries, promoted accountability for vaccine claims, and produced knowledge about vaccine safety through adversarial processes. Intriguingly, Kirkland argues, the court also serves to channel "dissatisfaction with vaccines into compensation rather than social movement activity" (p. 8), thereby dampening the attacks on the immunization social order. It provided a venue for vaccine critics in a way that the federal court system (because of its stricter standards for evidence claims) would not, thereby giving vaccine critics a hearing but holding them accountable for their claims.

Despite these potential benefits, however, I find myself a bit more skeptical about the impact the court has on the immunization social order. Kirkland views the looser standards for the introduction of evidence as a positive, but this open door can serve to legitimize flawed research – at least among vaccine critics themselves. As Kirkland notes, many of the vaccine critics kept using flawed evidence, including Dr. Andrew Wakefield's infamous (and later retracted) 1998 study suggesting a link between autism and vaccines, well after they had been debunked. This is consistent with a variety of cognitive studies indicating that individuals tend to hold on to and even strengthen their [*139] pre-existing beliefs in the face of contradictory evidence (e.g. Gorman and Gorman 2016).

Additionally, the easier path for claimants to get compensation through the vaccine court can also contribute to misperceptions about the court's actual rulings. In one recent 2017 case, for example, a special master awarded compensation to the parents of a child who had died from sudden infant death syndrome (SIDS) (BOATMAN V. SECRETARY OF HEALTH AND HUMAN SERVICES). The special master concluded that under a preponderance of the evidence standard, the infant had died in part because of the administration of standard vaccines given shortly after birth. At the same time, however, the special master made explicit that he had not found any broader link between vaccines and SIDS, and indeed stated that the weight of the evidence failed to support any such link. Nevertheless, vaccine critics have pointed to this decision as confirmation that vaccines cause SIDS. The special master was likely seeking to provide an element of justice for a highly sympathetic claimant while simultaneously denying any scientific basis for a broader vaccine-SIDS link. Nevertheless, the grant of compensation in this individual case has allowed vaccine critics to reinterpret the dispensation of justice in an individual case as a false statement about what constitutes the leading edge of science.

In short, the vaccine court may provide certain benefits by serving as an unusual venue for negotiating the path between science, policy, and justice, but I wonder if the ultimate effect is to provide social movements seeking to disrupt the immunization social order simply more to latch on

to. In an era where there are few corrective mechanisms to prevent the flow of fake news and conspiracy theories in venues such as Twitter, Facebook, and Google News, the vaccine court's willingness to grant compensation even as it upholds the general scientific consensus about vaccines opens its rulings up to misinterpretation.

When asking whether the vaccine court is successful, it is also fair to ask: compared to what? Kirkland does briefly situate the vaccine court with systems elsewhere in the world set up to deal with alleged vaccine injuries, concluding that the court is unusual in its adoption of many features of adversarial legalism (Kagan 2001). While perhaps outside the scope of this study, it would be interesting to know whether the more bureaucratic systems elsewhere have succeeded along the criteria Kirkland uses to evaluate the vaccine court. I suspect, consistent with Robert Kagan's findings about America's adversarial legalism in other policy areas, that more bureaucratic systems prove more efficient, less susceptible to abuse, and provide more consistent compensation among different societal groups. Kirkland suggests that the infusion of adversarial legalism in America's immunization social order was a near inevitability, but I wonder if the unusual nature of vaccine injury – tied as it is to a system of widespread, mandatory vaccination – might have made a more bureaucratic solution to injury compensation politically possible in the United States. If so, the vaccine court seems more of a missed opportunity to secure a better system than a success story.

In any case, these are the sorts of questions and debates opened by Kirkland's excellent VACCINE COURT. This is a must-read book for health policy scholars and those with an interest in vaccine politics and law. Beyond those audiences, however, law and society scholars, those with an interest in specialized courts, and researchers focusing on the uses of litigation and law for political goals will all find Kirkland's study to be valuable.

Additionally, VACCINE COURT would be a solid addition to undergraduate or graduate courses on the American legal process. With its socio-legal approach, I can see it complementing in-depth studies of individual class-actions such as Peter Schuck's (1986) classic account of the Agent Orange litigation as well as works taking an American Political Development approach, including Jeb Barnes's (2011) study of the failure of asbestos policy reform. The American legal system's capacity to deal with widespread injury continues to be a fruitful area of study, and Kirkland's VACCINE COURT is a strong addition to this literature.

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