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All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law

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Abstract

This paper contains the introduction to the new book, *All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law* (Stanford University Press, 2010).

The book begins with the observation that Americans are divided in their beliefs about whether courts operate on the basis of unbiased legal principle or of political interest. This division in public opinion in turn breeds suspicion that judges do not actually mean what they say, that judicial professions of impartiality are just fig leaves used to hide the pursuit of partisan purposes.

Comparing law to the practice of common courtesy, the book explains how our courts not only survive under such suspicions of hypocrisy, but actually depend on them. Law, like courtesy, furnishes a means of getting along: it frames disputes in collectively acceptable ways, and it is a habitual practice, drummed into the minds of citizens by popular culture and formal institutions. The rule of law, understood as the rules of etiquette, is neither particularly fair nor free of paradoxical tensions, but it endures. Although pervasive public skepticism raises fears of judicial crisis and institutional collapse, such skepticism is also an expression of how our legal system ordinarily functions.

[*] This paper is an excerpt from ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW, by Keith J. Bybee,

In the winter of 2003, the *New York Times* announced the triumph of "legal realism," the theory that suggests judicial decisionmaking is essentially a matter of politics.[1] The announcement occurred in the course of reporting on Justice Thomas Spargo's energetic participation in the political process. When campaigning for a New York town judgeship in 1999, Spargo handed out free cider and doughnuts, distributed coupons for free gas at a convenience store, sent free pizzas to school teachers and government workers, and bought a round of drinks for everyone at a local watering hole.[2] Once elected town justice, Spargo kept up his political activities by speaking at partisan fundraisers and, more famously, by participating in obstreperous protests at the Miami-Dade County Board of Elections, with "the aim of disrupting the recount process" after the 2000 presidential election.[3] Spargo's political enthusiasm earned him a judicial promotion. In 2001, he was elected to the State Supreme Court in Albany County.

Spargo's politicking was less popular in other quarters. The New York State Commission on Judicial Conduct charged Spargo with violating the state rules governing judicial behavior. In response, Spargo filed suit claiming that the state code of judicial conduct was unconstitutional. The federal district court agreed. Applying the United States Supreme Court decision *Republican Party of Minnesota v. White*, the court ruled that Spargo was free to be as politically active as he had been.[4] Thus the *New York Times* was prompted to declare a conquest for legal realism, a victory for "the jurisprudential philosophy that calls for a frank acknowledgement of the role politics and other real-world factors play in judicial decisionmaking."[5]

Interestingly enough, Spargo himself was among the first to call legal realism's victory into question. Although he thought that the ruling was "absolutely good" because it freed judges

to be more involved in the political life of their communities, he otherwise believed that the decision pushed a political understanding of the courts too far. "When people think of Tom Spargo," Spargo said, "many would consider my reputation as a kind of partisan hack lawyer or Republican law expert. But when you get on the bench, then all that is behind you. . . . [F]rankly, I have not had a political thought in any of the work that I've done as a judge." It was one thing to acknowledge that politics played a part in judicial life, but it was altogether something else to argue that judicial decisionmaking was all politics. When it came to legal realism, Spargo seemed to suggest, it was best to accept a little bit, but not too much.[6]

Spargo's ambivalent reaction to his own exoneration seemed hard to believe. How could he consistently lay claim to the roles of both politician and judge? He had assiduously courted voters through frankly political electioneering. On the basis of his behavior, one could easily infer that Spargo was a judge who could be counted on to represent the interests of his political supporters. Yet, if this were true, then Spargo had misled litigants and the general public by claiming to be unbiased. By trying to have it both ways, simultaneously playing partisan politics and claiming judicial impartiality, Spargo risked looking like a hypocrite: his courtroom behavior appeared to be an act, an effort to affect a degree of neutrality and open-mindedness which he did not possess. He claimed to give litigants a serious hearing, but his behavior suggested that he was just giving them the pretense of being heard.[7]

In principle, Spargo easily could have avoided landing in such a bind. He could have stuck to a single role and thus eliminated the appearance of hypocrisy. For example, he could have responded to his courtroom victory by insisting that judicial decisionmaking is a thoroughly political enterprise. The goal, Spargo might have claimed, is not to pretend that judges operate on the basis of neutral legal principles but to recognize that judges are political actors with power

over controversial policy questions. As a result, Spargo could have argued that open judicial politicking is a welcome sight. Vigorous judicial elections contested by aggressively political candidates allow voters to select and control the officials responsible for making legal policy. Reasoning along such lines, Spargo might have sincerely defended his actions as a critical contribution to democratic politics.[8]

Alternatively, Spargo could have denounced the claims of legal realism from the outset. He could have argued that although elected politicians are necessarily obligated to represent the voters who placed them in office, judges are only required to "represent the Law."[9] The job of the judge, Spargo might have claimed, is to reason strictly on the basis of legal principle, to assimilate each dispute before the court into a coherent legal order, and to articulate a framework of rules capable of regulating subsequent judicial decisions. Spargo could have run a low-key, nonpartisan campaign and muted his political participation once on the bench. Indeed, he could have argued against the whole idea of judicial elections and insisted that a judge's loyalty to the law rightly renders him indifferent to popularity. Had Spargo sincerely cultivated a reputation for independence and impartiality, he would have eliminated the risk of being seen as a "partisan hack lawyer." He would have had no reason to contest charges leveled by the Commission on Judicial Conduct, since he would have never engaged in any judicially untoward actions in the first place.

And yet Spargo did not adopt either of these alternative strategies. Instead of choosing between the roles of active politician and impartial judge, he clung to both and defended his behavior by arguing that judges are political actors—except when they are not.

The legal realism that Spargo at once embraced and renounced has a venerable lineage. In 1897, Oliver Wendell Holmes, then a member of the Supreme Judicial Court of

Massachusetts, warned his Boston University School of Law audience against supposing that "the only force at work in the development of the law is logic." "This mode of thinking is entirely natural," Holmes admitted. "The training of lawyers is the training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And logical method and form flatter that longing for certainty and repose which is in every mind." The natural mode of thinking about the law clearly feels right, but Holmes argued that it is in fact wrong. Certainty, Holmes famously said, "is illusion and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth of and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[10] Lawyers and judges may talk of sound logic, impersonal principle, and impartial judgment, but the law is actually driven by politics.

In the decades following Holmes's address, a loose group of scholars that came to be known as legal realists took up Holmes's remarks and fashioned them into a way of thinking about the judicial process. The realists devoted themselves to exposing the role played by politics in judicial decisionmaking and, in doing so, they called into question conventional efforts to anchor judicial power on a fixed legal foundation. The realist rejection of objective judicial reasoning proved to be quite popular and has been widely adopted. Less than one hundred years after Holmes spoke, a prominent legal historian noted that the claim "we are all realists now" had been made so often in legal scholarship that it was a kind of truism.[11]

The remarkable fact about legal realism, however, is that in spite of its impressive provenance and current popularity, it occupies an uncertain position. When one considers the context in which American courts operate, the picture of legal realism that emerges is decidedly

mixed. On one hand, many Americans acknowledge that the judicial process is infused with politics; on the other hand, almost everyone seems to believe that judicial decisions are determined on nonpolitical, purely legal grounds. Spargo is far from being alone. In the public discourse about the courts, the claims of legal realism are simultaneously proclaimed from the rooftops and disavowed in the streets. The American judiciary is said to be squarely situated *in* politics, yet it is not, somehow, thought to be entirely *of* politics.

In Part I of this book, I examine the shape and significance of legal realism's ambivalent status. I find that the courts—at both the state and federal levels—are generally viewed as hybrid institutions, caught between general expectations of impartial judicial decisionmaking and widespread beliefs about politically motivated judicial rulings. Moreover, I find that the uncertain standing of legal realism provides fertile ground for public suspicion. The political nature attributed to the judicial process often appears to be at odds with claims of judicial impartiality, naturally leading many to wonder whether judicial appeals to law are anything more than ad hoc rationalizations deployed to obscure political purposes. One might argue that this state of affairs is not particularly significant. Conflicting public views and their attendant suspicions are, after all, matters of appearance and perception. Americans are reacting to the surface of the judicial process, and superficial assessments of how courts look may have little to do with how judges actually behave. Perhaps the public's opinion of the courts is less an inherently interesting phenomenon than a simple perceptual error in need of correction.

Although I agree that Americans are making judgments about appearances, I disagree that such judgments are either unimportant or simply mistaken. In part, my disagreement is motivated by the fact that the public's views are supported by scholarship: research suggests good reasons to believe that the modern judicial process really is an uneasy mix of legal and

political factors. Beyond the validation provided by scholars, the public's views merit attention in their own right. Judicial legitimacy has long been understood to derive from what judges do *and* from how they look doing it. Public confidence in the judiciary ultimately depends not only on the substance of court rulings but also on the ability of judges to convey the impression that their decisions are driven by the impersonal requirements of legal principle. Public suspicion of the courts is therefore worth paying attention to because it threatens judicial capacities. Litigants may not respect court orders when they suspect that a judge is advancing a political agenda. Indeed, citizens may be led to doubt the authority of government as a whole when they suspect a powerful institution is misrepresenting its manner of operation.[12]

But this is only part of the picture. As I will argue over the course of this book, the public's half-politics-half-law understanding of the courts not only chips away at judicial legitimacy but also forms an essential part of the current legal order. Public skepticism about whether judges actually mean what they say is potentially corrosive, but it also points to an enabling dynamic that makes possible the exercise of legal power. My overall goal is to illustrate and critique the means by which suspicions of judicial hypocrisy feed into the legal process, producing a rule of law that facilitates mutually beneficial accommodations among individual citizens and at the same time sustains hierarchies across different groups.[13] I take the first step toward my overall goal by describing how legal realism today is simultaneously accepted as conventional wisdom and decried as an inaccurate distortion.

Notes

1. Adam Liptak, "Judges Mix with Politics," *New York Times*, February 22, 2003, B1–B8. I am using a rough-and-ready definition of legal realism. The realists actually developed a complex range of related ideas and theories. For different accounts of legal realism's genesis and development in the United States, see Edward A. Purcell Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Press of Kentucky, 1973); Laura Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill: University of North Carolina Press, 1986); Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); John Henry Schelegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1995); Neil Duxbury, *Patterns of American Jurisprudence* (New York: Oxford University Press, 1995); and Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (New York: Oxford University Press, 2000).

2. *Spargo v. New York State Comm'n on Judicial Conduct*, 244 F.Supp.2d 72, 79 (N.D.N.Y., 2003).

3. *Ibid.*, 80.

4. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

5. Liptak, "Judges Mix with Politics," B1.

6. Al Baker, "Partisan Pit Bull, but Not on the Bench," *New York Times*, February 22, 2003, New York and Region section. Spargo's belief that the district court may have gone too far was ultimately vindicated. In December 2003, the Second Circuit Court of Appeals vacated the district court decision on the grounds that Spargo's constitutional claims had been improperly raised in federal court. *Spargo v. New York State Com'n on Judicial Conduct*, 351 F.3d 65, 85

(2d Cir. 2003). The disciplinary actions against Spargo subsequently resumed in New York with the additional charge that Spargo had solicited money for his legal defense from attorneys with cases pending in his court. In December of 2004, the state Supreme Court rejected Spargo's constitutional challenge to the state code of judicial conduct ("Decision of Interest: Restrictions on Judicial Speech in Conduct Rules Are Not Unconstitutionally Vague," *New York Law Journal*, December 16, 2004, 19). As Spargo's legal fortunes turned, he suggested that the courts were now swinging too far in the other direction and failing to respect judicial candidates' freedom of speech: "You know, in my experience, under our restrictive and rather obtuse rules, it is much harder to become a judge than to do a good job once you are actually on the bench. Perhaps more judicial freedom of speech will result in more good judges being elected to the bench." See Thomas J. Spargo, *A Peripatetic View of Judicial Free Speech*, 68 Alb. L. Rev. 629, 634 (2005). In March 2006, the New York State Commission on Judicial Conduct unanimously recommended that Spargo be removed from the bench. See John Caher, "Commission Calls for N.Y. Judge's Removal," *New York Law Journal*, April 3, 2006, http://www.law.com/jsp/article.jsp?id=1143812717567 (last accessed August 30, 2009). The Court of Appeals upheld the removal recommendation, thus ending Spargo's judicial career. In December 2008, Spargo was indicted by a federal grand jury for attempted extortion and soliciting a bribe. He was convicted on all counts in August 2009. In December 2009, Spargo was sentenced to twenty-seven months in federal prison.

7. In other words, Spargo appeared to lack what H.L.A. called an "internal" view of the law. See H.L.A. Hart, *The Concept of Law*, 2nd ed. (New York: Oxford University Press, 1994), 56–57, 89–91. For further discussion of Hart, see notes 116 and 121.

8. Compare the similar argument made by Justice Scalia. *Republican Party v. White*, 576 U.S. at 784. See also Judicial Elections White Paper Task Force, *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, 22 Tol. L. Rev 393, 393–409 (2002).

9. *White*, 536 U.S. at 803 (Justice Ginsburg dissenting, internal citations and quotation marks omitted). See also Terri Jennings Peretti, *In Defense of a Political Court* (Princeton, NJ: Princeton University Press, 1999), 11–35; and Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford, CA: Stanford University Press, 1961), 14–22.

10. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 465–466 (1897).

11. Kalman, *Legal Realism*, 229. See also William Twining, *Karl Llewellyn and the Realist Movement* (Norman, OK: University of Oklahoma Press, 1985), 382.

12. The spread of public suspicion presents a potential problem for judicial legitimacy, but it does not necessarily present a problem for legal realism as a theory of legal behavior. Several legal realists argued that judicial decisionmaking could not openly and exclusively be anchored in something other than the law and, at the same time, easily remain a legitimate "legal" process. For example, both Jerome Frank and Thurman Arnold believed that the open acknowledgement of the role of non-legal factors in judicial decisionmaking would ultimately require the broad psychological transformation of many individuals. Frank and Arnold understood that the judicial process could not be considered to be exclusively political—and nonetheless still be accepted as legally authoritative—unless we developed a new kind of person. Public doubt and uncertainty about judicial decisionmaking in the absence of such personal transformation would not have surprised either Frank or Arnold. See Thurman W. Arnold, *The Symbols of Government* (New Haven, CT: Yale University Press, 1935) and Jerome Frank, *Law and the Modern Mind* (Gloucester, MA: Peter Smith, 1970, reprint of the 1930 edition). As will become

clear over the course of the book, I agree with these realists that the tensions between law and politics in the judicial process are not going away. See also my discussion of Arnold in Keith J. Bybee, "The Rule of Law Is Dead! Long Live the Rule of Law!," March 2009, http://ssrn.com/abstract=1404600 (last accessed August 30, 2009).

13. I use the term *rule of law* in fashion similar to Robert A. Kagan's use of *way of law* in his book *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001). Although Kagan and I focus on different factors, our analyses are similar in the sense that we both ultimately direct our attention away from individual judicial decisions (and the specific legal principles at stake in those decisions) toward the political beliefs, habits of mind, and cultural practices that inform and sustain judicial decisionmaking. I argue that this cluster of beliefs, habits, and practices constitute the American rule of law.