

Players in the system: Judges

Recall:

understandings of law over time (natural law, positivist, realist)
looking within criminal and civil justice systems
now, turn to more detail look at "judging" stage of systems

The Internal Logic of Law

1. Sources of law (statutes, cases, constitutions)
 - (common law vs. civil law systems)
 - (criminal vs. civil law - prior hand out)
 - distributing costs of litigation (burden of costs; burden of proof)

2. A brief history of the common law
 - William the Conqueror 1066
 - Sheriffs (shire reeve)
 - Henry II 1100s
 - Bracton's treatises 1250

3. The morality of (common) law (Lon Fuller)
 - "law is an enterprise of subjecting human conduct to the governance of rules"*
 - morality not external (natural law) but internal to the legal process
 - justness inheres in how law is made and applied
 - it is law (rather than brute power or politics to the extent that adheres to internal rules of procedure)
 - 8 ways law can fail:
 - no rules, every issue decided on ad hoc basis
 - failure to make public or known to subjects of law what law expects
 - abuse of retrospective law undermines expectations/ prospective action
 - failure to make rules understandable
 - enactment of contradictory rules
 - require conduct beyond powers of subjects affected
 - too frequent changes so people can't organize and predict
 - failure to assure congruence between official acts and declared rules
 - (*'the gap'* between law on the books and law in action)

4. What is a case?
 - jurisdiction over cases and persons
 - informing the courts, complaints, indictments, discovery
 - settling on the issue (legal relevance, standing to sue)
 - trials vs. debates (burdens of proof, motions to dismiss, arraignments, indictments, show cause)
 - role of procedure (greasing the system; form of play cf. baseball; possibility of a jury of laymen)
 - appeals (manifest functions/ getting right vs. latent functions/ creating uniformity, delaying enforcement and costs, repeat players)

5. Legal reasoning

reasoning by example:

meaning of a rule defined by cases/examples

meaning of case defined by facts invoked

principle of justice implicit (like things treated the same)

3 step process of legal reasoning

(note spaces for invention; sources of constraint)

similarity is seen between two cases

rule of law in first case is identified

rule of the first case is applied to the second

Examples of legal reasoning (from Carter and Burke)