THE POLITICS OF RIGHTS

Lawyers, Public Policy, and Political Change

Second Edition

STUART A. SCHEINGOLD

With a Foreword by Malcolm M. Feeley

THE UNIVERSITY OF MICHIGAN PRESS

Ann Arbor

1. LEGAL RIGHTS AND POLITICAL ACTION

This is a book about the law. The law is real, but it is also a figment of our imaginations. Like all fundamental social institutions it casts a shadow of popular belief that may ultimately be more significant, albeit more difficult to comprehend, than the authorities, rules, and penalties that we ordinarily associate with law. What we believe reflects our values; it also colors our perceptions. What we believe about the law is related directly to the legitimacy of our political institutions.

Traditional views about the law in America see it as beneficent and tend to reinforce legitimacy and stabilize the polity. Surely these views have, at least until quite recently, dominated the literature on law and politics in the United States.[1] But now a radical interpretation which equates law with repression has begun to gain support.[2] Thus, myth and countermyth compete for our attention and acceptance.

The purpose of this study is not necessarily to choose

1. See, for example, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962); Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: Norton, 1969); and the works of J. Willard Hurst, such as *Law and the Condition of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956).

2. The Cornerstone of a radical analysis of American law is (or should be) Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Free Press, 1965). Two recent collections are Robert Lefcourt, ed., *Law Against the People* (New York: Vintage, 1971) and Jonathan Black, ed., *Radical Lawyers* (New York: Avon, 1971). See also Ralph Miliband, *The State in Capitalist Society* (New York: Basic Books, 1969).

between these competing visions, each of which seems to be flawed in significant ways. If, however, we can understand how the law lends itself to such dramatically contrasting interpretations, a more satisfactory appraisal of the relationship between law and change in America will surely be possible.

The specific aim of this book is to assess the part that lawyers and litigation can play in altering the course of public policy. While this problem has been considered in a number of previous studies, each of them has provided only a partial glimpse of the process. Their tendency has been to concentrate on a particular institution—most frequently the Supreme Court—or a single policy problem like civil rights. There has also been a pronounced inclination to separate theory (or jurisprudence) from empirical analysis.[3] The result has been a proliferation of data and theories but no efforts at general synthesis. At a time when serious questions are being raised about the role of law in the United States, a systematic look at the total picture is surely in order.

The most important distinguishing feature of this study is that it abandons the conventional legal perspective and replaces it with a political approach to the problem of law and change. In the United States we have long been accustomed to associating lawyers (albeit a small minority of the bar) with programs to alter the status quo. The lawyers'

3. There is a large body of literature and I cite only a few titles which illustrate the partial nature of these studies. Frederick M. Wirt, *The Politics of Southern Equality: Law and Social Change in a Mississippi County* (Chicago: Aldine, 1970); Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Knopf, 1970); Kenneth M. Dolbeare and Philip E. Hammond, *The School Prayer Decisions* (Chicago: University of Chicago Press, 1971); Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970). The relevant works of jurisprudence would include such titles as Judith N. Shklar, *Legalism: An Essay on Law, Morals and Politics* (Cambridge: Harvard University Press, 1964); H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961); and perhaps a recent collection, Robert Paul Wolff, ed., *The Rule of Law* (New York: Simon and Schuster, 1971).

basic tool has been litigation, and it has been used doggedly and inventively on behalf of goals like school desegregation, free speech, and the rights of defendants. The successes and failures of these efforts to influence public policy have provided the raw material for studies of law and change in the United States, and analysts have, for the most part, accepted the actors' legal frame of reference.

The Myth of Rights

Legal frames of reference tunnel the vision of both activists and analysts leading to an oversimplified approach to a complex social process—an approach that grossly exaggerates the role that lawyers and litigation can play in a strategy for change. The assumption is that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change. The *myth of rights* is, in other words, premised on a direct linking of litigation, rights, and remedies with social change.

There are a number of difficulties with this myth of rights approach to change. Judges cannot necessarily be counted upon to formulate a right to fit all worthwhile social goals. Even when a right exists, it can hardly be taken for granted that a remedy is close behind. Activist attorneys and those who chronicle their work are ordinarily unwilling to face up to these problems. They prefer to believe that persistence and legal ingenuity will ultimately be rewarded. The result is an ad hoc search for targets of opportunity rather than a careful sorting out of priorities as they relate to long-range goals.

But even rather sophisticated strategies of litigation have been flawed in a fundamental way by the confining legal perspective. Rights-and-remedies is primarily a test of wills and resources between the parties to suits, and it is not directly assimilable to a program of social action. Legal approaches and the rules under which courts operate tend to

reduce political conflicts to disputes between parties at a given time. While these encounters are often symptomatic of underlying social struggles and ordinarily reflect more general forces, success depends on establishing a personal entitlement and often turns on distinguishing one's cause from others with similiar claims. In thus driving a wedge between potential allies, litigative tactics can impose a heavy burden on the process of political organization. There are still other problems that flow from mistakenly identifying isolated courtroom victories with real progress. Confusion of the symbolic with the real diverts attention from the inertial forces which sustain the status quo. Lawyers are, moreover, reinforced in their natural inclinations to think of litigation apart from other political tactics rather than as part of a coordinated strategy.

The Politics of Rights

The simplicities and exaggerations of the myth of rights have led in the past to overrating the progressive capacities of the law. These days, it is fashionable to employ evidence and premises that are every bit as questionable to identify legal processes with reactionary forces in the society. Neither approach will do. So basic and pervasive a social institution as the law obviously merits careful and systematic scrutiny.

To this end, I propose a political approach to analyzing the utility of litigation. No framework is adequate if it fails to attach primary importance to the redistribution of power. If litigation can play a redistributive role, it can be useful as an agent of change. If not, its political utility must be heavily discounted. The political approach thus prompts us to approach rights as skeptics. Instead of thinking of judicially asserted rights as accomplished social facts or as moral imperatives, they must be thought of, on the one hand, as authoritatively articulated goals of public policy and, on the other, as political resources of unknown value in the hands of

those who want to alter the course of public policy. The direct linking of rights, remedies, and change that characterizes the *myth of rights* must, in sum, be exchanged for a more complex framework, the *politics of rights,* which takes into account the contingent character of rights in the American system.

To think about rights as officially articulated goals of public policy leads directly to a more politically sensitive perspective. It is immediately clear that the courts are only one of a number of authoritative agencies that articulate goals for the polity. Formal recognition by the courts may therefore improve the bargaining position of those upon whom the judges look with favor. Judicial acceptance does not, however, mean that the goal will be embraced more generally nor that the social changes implied will be effected. If there is opposition elsewhere in the system, the judicial decision is more likely to engender than to resolve political conflict. In that conflict, a right is best treated as a resource of uncertain worth, but essentially like other political resources: money, numbers, status, and so forth. The value of a right will therefore depend in all likelihood on the circumstances and on the manner in which it is employed, and for the social scientist this boils down to a matter for careful empirical analysis.[4]

If it is assumed that on important matters of public policy a political struggle will follow a judicial decision, then the task of the analyst is to determine how that struggle is affected by the articulation of rights, and in this way to develop a comprehensive understanding of the utility of litigation. The

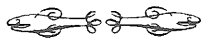
4. This political approach to rights departs from conventional legal and philosophic usage. My intention is to convey the idea that all official rules imply legal rights (as well as obligations) and to call attention to the contingent character of these official "promises." From this perspective, the distinctions made by lawyers and philosophers among categories of rights are less important than the opportunities and expectations that attach to all official enactments. For a compact presentation of conventional approaches to the analysis of rights, see Stanley I. Benn, "Rights," *The Encyclopedia of Philosophy* (1967), 7:195–99.

legal perspective encourages concentration on the implementation of judicial decrees alone. The courts are, however, only modestly endowed with coercive capabilities—adequate, perhaps, for dealing with recalcitrant individuals but probably insufficient for bringing large groups or powerful institutions into line. Moreover, the tendency of litigation to break political action down into a multiplicity of individual transactions stretches out the process of implementation to the point that it can become not only tedious but counterproductive—one step forward, two steps back. The politics of rights implies a much more comprehensive assessment which includes but transcends the simple straight-line projection from judicial decision to compliance.

The broader question is whether litigation can be useful for redistributing power and influence in the political arena. Such possibilities exist, and they deserve careful attention and investigation. Litigation can be useful for political mobilization and can in this way affect the balance of forces. Court decrees often articulate as a right that which has been traditionally withheld—like integrated schooling—or granted only as a favor—like an adequate income for welfare recipients. These judgments can therefore alter expectations and/or self conceptions and may be useful as well in creating a new sense of collective identity. Mobilization can surely not be taken for granted as the normal and necessary consequence of litigation. Nor should it be seen in isolation from other political tactics. Even the relationship between mobilization and more traditional compliance goals poses some interesting problems. The key point is, in any case, that there are implications of litigation suggesting that it may be useful in reshaping the political arena.

The politics of rights focuses on distinctive forms of political action which are closely associated with lawyers and litigation. Attention is directed to the articulation of public policy goals by courts and to the post-judgment political process. In investigating that process it is necessary to

examine both the symbolic and the coercive capabilities which attach to rights and to consider tactics that can maximize these capabilities. The utility of litigation may be expected to vary from one policy arena to another. What is useful at one stage in a process of change may be worthless or even counterproductive at another stage. In the final analysis, success may well turn on how skillfully litigation is employed and especially on how well it is coordinated with other tactics. In practice, this may all depend on the political sensitivity of lawyers and on how well they are able to work with other activists.



The organizational plan of the book flows directly from this introductory analysis. Part One, comprised of four chapters, provides a detailed analysis of the *myth of rights,* which is treated as a political ideology. The purpose of this section is to indicate how deeply and with what effect the roots of the myth of rights extend into the mainstream of American political thinking.

Part Two, also comprised of four chapters, sets the myth of rights into the political perspective that is required for an understanding of the *politics of rights.* Starting from the premise of the opening section—that the myth of rights is most sensibly treated as a political ideology—a frame of reference is developed for investigating the interplay between the ideology of rights and political action. The main message of this section is that litigation is more useful in fomenting change when used as an agent of political mobilization than when it is employed in the more conventional manner—that is, for asserting and realizing rights.

The activist lawyers who are ordinarily associated with programs of litigation are the subject of the next two chapters, which make up Part Three. The inquiry begins with an investigation of the impact of the myth of rights on legal education and professional standards. All American lawyers,

including activists, are subjected to these influences—albeit in varying degrees. The focus narrows in the following chapter to the programs and prospects of the activist lawyers and, more specifically, to the ways in which their approach to litigation is shaped by ideology and socialization. These *strategists of rights,* it turns out, tend to distrust politics in general and mobilization in particular.

The concluding Epilogue assesses the contribution that rights can reasonably be expected to make to a strategy for change. Once the analysis is broadened so that litigation, rights, and mobilization are put in the context of American politics more generally, it becomes immediately clear that it is not realistic to think in terms of a *strategy of rights* as such. Legal tactics which capitalize on rights can, however, make an important ancillary contribution. Beyond simple utilitarian calculations, the ethical costs and benefits of relying on legal tactics and on political mobilization must also be considered. What I am undertaking then is a comprehensive and value-sensitive balance sheet.

Part One

THE MYTH OF RIGHTS