THE POLITICS OF RIGHTS

Lawyers, Public Policy, and Political Change

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6. RIGHTS AS RESOURCES

The politics of rights is a term to describe the forms of political activity made possible by the presence of rights in American society. Only insofar as we understand the politics of rights is it possible to realistically assess the political significance of the myth of rights.

As a starting point we must accept the ideological character of the myth of rights. To acknowledge the myth of rights as an ideology is not to downgrade its importance to American politics nor to deny the political significance of rights. It is simply to shift the focus of inquiry to the myth of rights as a belief system which impinges on American politics in a subtle, complex, and altogether problematic fashion.

At the same time, the descriptive accuracy of the myth of rights is immediately called into question. Ideologies alter perceptions and therefore influence description. An examination of the available empirical research will provide a more balanced view of the political status of legal rights than can possibly be glimpsed through the focusing devices of the myth of rights.

With the myth of rights in political perspective, it becomes possible to look directly at the politics of rights as it focuses attention on three manifestations of rights in the American political system. The myth of rights provides political *ideals.* These ideals are reflected in the formal *rules* which structure American institutions. Finally, the ideals and rules influence the *behavior* of governmental officials and private citizens. The politics of rights is, in short, concerned with the interplay between ideology and action in American politics. In this complex process, the impact of the myth of rights will be

elusive and perhaps subliminal. While ideals are seldom if ever decisive, they are nevertheless among the most important determinants of political behavior.

A rethinking of the political relevance of litigation will be the third step in this introductory look at the politics of rights. If the status of rights is problematic, doubts are automatically raised about the political importance of judicial decisions. Surely judicial guarantees can no longer be thought of as politically conclusive. On the other hand, the politics of rights does suggest some far-reaching opportunities which stem from the connotations of legitimacy attaching to legal rights. The politics of rights, in other words, points towards a conception of rights as political resources. The further implication is that the value of rights resides less in the political power that backs them than in their close association with social justice in the minds of Americans. If so, doubt is cast upon the direct payoff of litigation but new possibilities are suggested—possibilities that can be realized by playing on the gap between existing patterns of politics and our cherished ideals.

This chapter will deal with these three introductory themes: (1) the political status of legal rights, (2) the interplay between political values and political behavior, and (3) the opportunities and limitations of litigation as a political tactic.

The Political Status of Legal Rights: The Myth Reconsidered

The myth of rights leads us to believe that American political institutions are regularly responsive to constitutional values. The political world is seen as a reasonable approximation of legal and constitutional ideals. The assumption is that our rights are reflected in, protected by, and consistent with the basic tendencies of American politics—allowing, of course, for some inevitable slippage between reality and aspiration. Litigation is, in this view, an effective tool because

it provides access to the substantial political power of the courts. Quite typically, Joseph L. Sax argues that litigation is preferable to "independent councils of experts, ombudsmen, negotiators, and so on," which "fail because they do not change the balance of *power*—precisely what the development of a scheme of enforceable legal rights, backed by judicial power can do." [1] Litigation is pictured as an effective way to redress the mistakes and deal with the shortcomings of American politics that result in denial of rights and neglect of constitutional values. Litigation, in short, is said to provide for more or less direct delivery of constitutional promises.

A sober assessment of the status of rights in American politics raises serious doubts about the capabilities of legal and constitutional processes for neutralizing power relationships. The authoritative declaration of a right is perhaps best viewed as the beginning of a political process in which power relationships loom large and immediate. Our rights are even at risk within the sheltered confines of governmental institutions, which are subjected to the rule of law and to a variety of control mechanisms designed to insure the integrity of legal processes. Let us consider briefly the inertial tendencies that underscore the primacy of power in the American political system.

There is no need to look any further than school desegregation problems to realize that the declaration of rights does not purge political conflict of its power dimensions. Neither irate parents nor intransigent southern congressmen have seen desegregation decisions as an invitation to employ reason and principle in search of truth.

> The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law. . . .

1. Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Knopf, 1971), p. 83. Italics in the original.

> We pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation.[2]

Both the tone of this Southern Manifesto and subsequent developments belie optimistic impressions about the persuasive capabilities of legal principles.

It is, moreover, not only on segregation issues that the influence of judicial decisions has proven to be problematic. The same tendencies are apparent in other matters such as school prayers, defendants' rights, and reapportionment.[3] Suffice it to say, then, that when legal rights run counter to prevailing power relationships, it surely cannot be taken for granted that these rights will be redeemed on demand. It is not even clear that they will serve as the base line for reasoned discourse.[4]

A convincing and continually growing body of evidence demonstrates further that constitutional values are hardly paramount within our governmental institutions. Innumerable studies of the criminal justice system, for example, indicate not only that neglect of rights is common, but that this neglect is rooted in demands that the system itself makes on policemen, prosecutors, judges, and even on defense counsel.[5] More broadly, the work of Ralph Nader and others

2. "The Southern Manifesto: Declaration of Constitutional Principles," reprinted in Hubert H. Humphrey, ed., *School Desegregation: Documents and Commentaries* (New York: Thomas Y. Crowell, 1964), pp. 32–35.

3. For general summaries of compliance problems, see Theodore L. Becker and Malcolm M. Feeley, eds., *The Impact of Supreme Court Decisions* (2nd ed. New York: Oxford University Press, 1973), and Stephen L. Wasby, *The Impact of the United States Supreme Court: Some Perspectives* (Homewood, Illinois: Dorsey, 1970).

4. For a more systematic consideration of the impact of judicial decisions and a more careful look at the compliance literature, see Chapter 8 *infra.*

5. I find three studies particularly useful for demonstrating just how deeply these abuses of authority are ingrained in our criminal law enforcement apparatus. Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: John Wiley, 1966); Abraham S. Blumberg, *Criminal Justice* (Chicago: Quadrangle, 1970); and Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), particularly pp. 149–246.

has sensitized us to the tendencies toward "lawlessness" in our governmental agencies and the inadequacy of the available machinery for maintaining legal accountability. The clear message is that institutional arrangements in this nation of ours are at least as likely to undermine rights as to nurture and sustain them.[6]

Nor are the courts immune from these insistent political pressures that tend to undermine legal rights. At each stage of the judicial process and at each level of the judicial system, the correspondences between political and legal forms are striking. Political rather than legal criteria ordinarily determine which of the more than 375,000 American lawyers are chosen and which are passed over in the process of judicial selection. While partially insulated once in office, lower court judges in particular remain linked to political processes. Career aspirations, for example, provide ample incentives for maintaining cordial relationships—both personal and professional—with influential politicos. Finally, research on judicial behavior indicates the unmistakable impact of personal policy preferences on judicial decisions. While this is no place to present a detailed analysis of judicial policy-making, some elaboration and documentation are clearly in order.

Judges are chosen for office in fundamentally the same fashion as other officials. Beneath superficial variations, recruitment patterns to public office are remarkably alike. Federal and state judges, elected and appointed judges, the Chief Justice of the United States and the lowly justice of the

6. For a first-rate and comprehensive analysis of the political pressures on legal procedures, see James Eisenstein, *Politics and the Legal Process* (New York: Harper and Row, 1973). Published after work on this chapter was completed, Eisenstein's study could be profitably consulted in connection with the following discussion. On "lawlessness," see Theodore L. Becker and Vernon G. Murray, eds., *Government Lawlessness in America* (New York: Oxford University Press, 1971), and Jethro K. Lieberman, *How the Government Breaks the Law* (New York: Stein and Day, 1972).

peace are all products of the political system. At the federal level, the American Bar Association's Standing Committee on the Federal Judiciary does perhaps exercise a certain degree of quality control, and there are roughly comparable mechanisms in some state jurisdictions.[7] Screening procedures may weaken the worst forms of cronyism and patronage but they do not substantially restrict the opportunities for appointing judges who belong to the right party, are committed to the "proper" values and policies, and (when deemed advisable) are drawn from a particular social background, race, or religion. Election of judges may make for a slightly more politicized recruitment process, but it is difficult to take the distinction between election and appointment too seriously. Because the public tends to be apathetic about judgeships, vote-getting pressures are normally reduced. Political leaders are, however, fully engaged, and they are at the core of both modes of selection. "Whether judges have arrived on the bench through merit or elective procedures, in the last analysis someone has to pick who runs, who is appointed, and ultimately who will be *ratified* by the voters." [8] In some places, it is apparently not at all unusual to simply purchase judicial positions. Rumor has it that federal judgeships in New York have gone for $80,000, with lesser local positions available at lower prices.[9] But whether purchased for money or for service, judicial appointments are made more in accordance with political than with legal criteria.

Once in office, just how do these political appointees

7. Joel B. Grossman, *Lawyers and Judges* (New York: John Wiley, 1965).

8. Martin and Susan Tolchin, *To the Victor: Political Patronage from the Clubhouse to the White House* (New York: Vintage, 1972), p. 179. Italics added.

9. Ibid., p. 146, taken from Wallace S. Sayre and Herbert Kaufman, *Governing New York City* (New York: Russell Sage Foundation, 1960), chap. 14. For a more balanced discussion of recruitment to the federal judiciary, see Richard J. Richardson and Kenneth N. Vines, *The Politics of the Federal Courts: Lower Courts in the United States* (Boston: Little, Brown, 1970), pp. 56–79.

behave? In the first place, they seem to emerge from the recruitment process with their personal values—if not necessarily their independence—very much intact. "It is beyond serious question today that the judges of the Supreme Court have their own conceptions of public policy and that their attitudes and values affect the thrust of decision making." [10] Labels like civil libertarian or economic conservative are probably no less misleading when applied to judicial behavior than when attached to other political actors. What is true of the Supreme Court is, in all likelihood, applicable elsewhere along the line although there is admittedly less information about other judicial bodies. A careful analysis of urban trial courts in the New York City area, for example, concludes on an altogether compatible note:

> All the evidence developed in this study points to individualized, value- and attitude-based decision-making by these trial judges—quite distinct for each judge, clearly value-based and preferential rather than "legal" only, but particular to the individual and unrelated to obvious party or ethno-religious "determinants." [11]

Beyond these individual idiosyncrasies, there are undoubtedly systemic pressures which shape judicial outcomes in a manner generally consistent with predominant political tendencies. Criminal court judges, for example, are apparently laced into a set of relationships with prosecutors, police, and defense attorneys. The resultant structures tend to be responsive to bureaucratic pressure for efficient processing of

10. Sheldon Goldman and Thomas P. Jahnige, *The Federal Courts as a Political System* (New York: Harper and Row, 1971), p. 157. The factors influencing judicial decision-making have been the focus of extensive scholarly research. Goldman and Jahnige provide a systematic review of this work, pp. 149–200. See also Walter F. Murphy and Joseph Tanenhaus, *The Study of Public Law* (New York: Random House, 1972), pp. 116–78.

11. Kenneth M. Dolbeare, *Trial Courts in Urban Politics: State Court Policy Impact and Functions in a Local Political System* (New York: John Wiley, 1967), p. 78.

cases—often at the expense of legal values—and the judge, as a participant in this ongoing social process is forced to "play ball." [12] Systematic analysis of the lower federal court system reveals comparable although perhaps less explicit linkages between judges and other agencies of the political order.[13] To draw the only possible conclusion as modestly as possible, such judges can hardly be counted upon to transcend issues of power and influence. They are, after all is said and done, men who have learned to get along and to stay in step with those in power.

The Politics of Rights

The descriptive shortcomings of the myth of rights in no way impugn its standing as a major American political ideology. What it contributes, in words borrowed from Judith Shklar, are "the standards of organization and the operative ideals" of American political life.[14] The principal impact of the myth of rights is on cognition and, more specifically, on perceptions of legitimacy. Its influence can also be found in the formal rules and accepted procedures of most American institutions. For our purposes, this institutional influence can be treated as a derivative concern. The formal rules are, in the final analysis, hostage to the political and cognitive pressures impinging on those responsible for their application and interpretation. But still it is necessary to determine just how, in which ways, and to what effect the standards and ideals of the myth of rights influence the course of politics in the United States.

Constitutional Values and Political Legitimacy

Once we begin to think about symbols and values, the myth of rights becomes altogether real. Political behavior is

12. Blumberg, *Criminal Justice*, chap. 6.
13. Richardson and Vines, *The Politics of the Federal Courts*.
14. Judith Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964), p. 1.

regularly cued and shaped by perception. Belief in the law, acceptance of constitutional values, respect for legal institutions—these all become political facts, albeit with contradictory implications.

The myth of rights may work in behalf of change, but its dominant tendency is surely to reinforce the status quo. As the Watergate experience has so graphically demonstrated, legal ideals furnish standards for evaluating the performance of officials and institutions and thus can lay a foundation for protest. "The awareness of the discrepancy between the actual and the possible . . . helps to make the adolescent a rebel. He is always comparing the possible and the actual and discovering that the actual is flagrantly wanting." [15] The energizing consequences of such discrepancies cannot be taken for granted. Dissatisfaction with the police may, for instance, lead to community-organized schemes for mutual protection or to armed reprisals against law enforcement officials. Conversely, it has also been shown that perceptions of unfairness in the way police deal with crime can lead to acquiescence—to a willingness to "ignore it or wait around." [16] Beyond acquiescence, the myth of rights can generate support for the political system by legitimating the existing order. That is to say, it reassures us that the institutions of American politics will respond to just claims and that any mistakes that occur are not only aberrational but subject to the self-correcting devices built into the constitutional system.[17]

15. D. Elkind, "Adolescent Cognitive Development," in J. F. Adams, ed., *Understanding Adolescence* (Boston: Allyn and Bacon, 1968) as quoted in Judith Gallatin and Joseph Adelson, "Legal Guarantees of Individual Freedom: A Cross-National Study of the Development of Political Thought," in *Journal of Social Issues* (No. 2, 1971), p. 104.
16. Harlan Hahn, "Ghetto Assessments of Police Protection and Authority" in *Law and Society Review* 6 (November 1971):191.
17. This is a theme developed most authoritatively by Murray Edelman in *The Symbolic Uses of Politics* (Urbana: University of Illinois Press, 1967).

Fundamental among the many factors that determine the behavioral consequences of standards of perfection is the tendency of normative expectations to alter empirical perceptions. Whether departures from legal standards are dismissed as aberrations or taken as a cause for concern depends to a significant degree on the extent to which one is caught up in and distracted by the web of beliefs that make up the myth of rights. Depending on perspective, performance which is generally consistent with ideals may satisfy expectations and result in quiescence or, by projecting the image of responsive institutions, may escalate expectations and action. Similarly, disaffection may energize or enervate depending on personality and circumstance, the availability of leadership, the opportunities for action, and so on. Finally, it is important to remain sensitive to the net effect of cognitive influences. Symbols which cue the hopes of some members of the polity may evoke the fears of others. Thus, for each action in support of change that may be sparked by the myth of rights, there could be a powerful reaction in support of the status quo. The impact of the myth of rights on political events is therefore difficult to assess but incontestable.

Constitutional Values and Political Institutions

Constitutional values are of course infused into the formal rules and organizational procedures of virtually all governmental institutions, but they are not, as the myth of rights would have us believe, the controlling feature of governmental institutions. The beneficence of these values, moreover, cannot be taken for granted as the myth of rights implies. The politics of rights suggests that the influence of constitutional values on political institutions is hard to gauge, sometimes perverse, and surely not to be taken at face value, but nonetheless too important to neglect.

The courts are most directly implicated in the network of attitudes, practices, and rituals associated with the myth of rights, and the judges are generally conceded to have primary

official responsibility for maintaining the constitutional integrity of the political system. For these reasons, this inquiry into the nature and extent of the impact of constitutional values on political institutions will be confined to the courts. Courts are nowhere near as well insulated from established configurations of power as the myth of rights leads us to believe, and there is little doubt that rules are bent and broken by judges who can be "corrupted" by personal preference as well as by more tangible inducements. On the other hand, judicial decisions do upon occasion run counter to the ostensible lines of political power. Moreover, only in the judicial system do professional training and role conceptions—rooted, of course, in the myth of rights—reinforce political independence.[18] The primary institutional influence of constitutional values is, therefore, heavily dependent on whatever tribute, beyond hypocrisy, judges are willing to pay to legal virtue.

But just how seriously do judges take constitutional values? This question can never be answered with great precision, because there is too much variation among judges and circumstances. Research suggests that constitutional values may have a residual influence on judicial decisions, but judges surely do not move inevitably toward constitutional values. Judicial decision-making studies tell us, at most, that some judges, some of the time, subordinate their personal preferences to what they sense as their obligations as judges.[19] More generally, as noted above, judicial decisions do not ordinarily run counter to the ostensible lines of power. On

18. In the other branches of government, the lines of responsibility to the electorate and hence to various manifestations of political power tend to compete in theory and overwhelm in practice adherence to constitutional principle—beyond, of course, certain accepted minimum rules of the game. For an effort to develop a theory of governance which meshes the interplay of pluralist forms of political power more closely and consistently with constitutional values, see Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: Norton, 1969), particularly Chapter 10, "Toward Juridical Democracy."

19. Murphy and Tanenhaus, *The Study of Public Law*, pp. 140–44.

those occasions when judges do take independent stands, constitutional values may serve as the inspiration and/or provide the rationale.

Let us briefly reconsider the nature of constitutional values. The myth of rights encourages us to associate these values with social justice and therefore to assume that there are satisfying constitutional solutions for all of society's problems. A more skeptical perspective suggested by the politics of rights leads toward a limited notion of constitutional values and to reservations about the adaptive claims of the myth of rights.

By way of illustration, consider the political struggles that had to be fought before the reform measures of contemporary welfare capitalism were deemed constitutionally acceptable. The Constitution was updated quite literally over the dead bodies of a goodly number of judges. It is all too common these days to dismiss this judicial intransigence as an effort by the court to overreach its legitimate area of authority. We ought to remember, however, that the new conceptions of private property and corporate responsibility that became the hallmark of the New Deal put significant pressure on traditional formulations of constitutional values. Whether as reason or rationale, these values provided an obvious line of resistance against novel and unwelcome changes. To put it another way, the changes brought on by welfare capitalism were unwelcome, at least in part, because they seemed to threaten cherished values.

An inquiry into the nature and limits of constitutional values will be the main task of the next chapter. My purpose at this point is to encourage a more critical perspective. To the extent that constitutional values are taken seriously, it must be understood that they imply constraints as well as opportunities. The more fundamental the changes sought, the more reasonable it is to think of constitutional values as problems that must be overcome rather than as solutions always at hand.

Litigation and Political Change

There is, these days, some ambivalence about litigation. The civil rights experience has made us all skeptics. Two decades after the *Brown* decision, we are still struggling inconclusively with school desegregation. Yet litigation is regularly used by, or on behalf of, a great diversity of groups seeking change: environmentalists, welfare mothers, prisoners, women, and so forth. The continued vitality of litigation may be read as a triumph of myth over reality—as a lesson in false consciousness. Or perhaps it is symptomatic of the willingness of middle class lawyers to settle for half a loaf—at least for their clients. Either way, litigation emerges as a strategy of desperation rather than hope.

The politics of rights, however, provides a more optimistic perspective on the persistence of litigative strategies for change. It suggests that the problem with litigative approaches may be less with the strategy than with the strategists. They are misled by the myth of rights toward a fundamental misunderstanding of the politics of change and, more specifically, toward exaggerated expectations about the political impact of judicial decisions. Ironically, this preoccupation with courts also leads strategists of litigation to ignore the opportunities that flow from the saturation of our culture with legal symbols. It is possible, therefore, to interpret the continuing interest in litigation as the product of an instinctive, if inchoate, understanding of the political importance of law in a society which associates legal values so closely with political legitimacy.

The next three chapters will assess the political utility of litigation from the perspective afforded by the politics of rights. This assessment will entail a reevaluation and reorganization of research findings that can be traced back to the first systematic efforts to understand "law as a political instrument" and to investigate "litigation as a form of pressure

group activity." [20] It will in addition be necessary to integrate some quite different kinds of research material which provide an understanding of the links among litigation, cognition, and political action. Chapter 7 sets the stage by considering how much policy innovation can realistically be expected from judges. Chapter 8 considers the direct impact of judicial decisions in the manner suggested by the myth of rights. Not surprisingly, it turns out that there are formidable obstacles to using courts for the implementation of public policy. And Chapter 9 shows that litigation can be used as a catalyst of political mobilization. Because the strategists of litigation, for reasons firmly anchored in the myth of rights, have consistently passed up opportunities to use their legal skills in behalf of political mobilization, such results as there are to report have come as the unintended and unwelcome consequences of more traditional plans of action. Nonetheless, the results have come, and they strongly suggest that litigation can make an important, if ancillary, contribution to political change.

20. See Victor G. Rosenblum, *Law as a Political Instrument*, Studies in Political Science, PS/16 (New York: Random House, 1955), and Clement E. Vose, "Litigation as a Form of Pressure Group Activity," in *The Annals of the American Academy of Political and Social Science*, vol. 319 (September 1958), as reprinted in the Bobbs-Merrill Reprint Series in the Social Sciences, PS-290 (1958). See also Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley: University of California Press, 1967), and Jack W. Peltason, *Federal Courts in the Political Process*, Studies in Political Science, PS/25 (New York: Random House, 1955).

7. CONSTITUTIONAL VALUES AND POLITICAL GOALS

A consideration of the relevance of constitutional values to political goals will be a two-pronged exercise—concerned on the one hand with the policy implications of constitutional values and on the other with the role of constitutional values in judicial decision-making. Both facets are highly speculative. The character of judicial decision-making varies enormously from judge to judge, court to court, and time to time, and the amorphous nature of constitutional values further complicates matters. Despite the ambiguity some inchoate patterns do emerge, providing a useful starting point for an investigation of the policy opportunities associated with the politics of rights.

Judges do not regularly take independent stands on matters having to do with goals for the polity, but they are from time to time to be found out on the end of public policy limbs. There is no reliable way to forecast the occasions of judicial independence, since there are such great variations among judges and according to circumstances. It is, however, fair to say that courts are unlikely to take the lead on behalf of goals that are not firmly rooted in constitutional values, although they may be fully prepared to discount or disregard these standards when they are swimming with the political tide. Lacking a persuasive constitutional rationale, however, the chances for coaxing most judges into the front lines would seem to be rather slim. Constitutional values, then, will usually define the boundaries of judicial independence—

Courts can, then, be of some use in implementing policies that apply principally to government agencies—particularly those policies relating to procedural matters turning on questions of due process. The deeper that it is necessary to penetrate into society, however, the more undependable courts become. These difficulties can be traced directly to judicial procedures and to the constitutional values in which they are rooted. Our government was set up so as to limit official intervention into society and, more specifically, into the lives of individual citizens. Active and effectual individuals were seen at once as a means to and as an end for the good society. It is therefore understandable and consistent that the judicial mechanisms for insuring rights were premised on individual initiative in defense of what were conceived of as individual freedoms. Be all that as it may, the consequence is to sharply restrict the effective range of courts in the implementation of public policy.

Within or beyond their effective range courts are further handicapped when the stakes of implementation are high. The obstacles to be overcome on important and controversial issues are so great, the coercive resources of the courts so meager, and the path of litigation so halting that reliance on judges would seem ill-advised. Acting alone, they are unable to force compliance and are therefore ordinarily unwilling to become integrally involved in the compliance process. Acting together with the dominant forces in society, their role becomes ancillary at best—nudging a few individuals into line. Without support of the real power holders, then, litigation is ineffectual and at times counterproductive. With that support, litigation is unnecessary. While this conclusion indicates that the *direct* impact of litigation on implementation is likely to be minimal, it does not exclude the possibility of *indirect* influence—in particular, the use of litigation as a means of altering the balance of power. It is this opportunity that will be considered next.

9. LEGAL RIGHTS AND POLITICAL MOBILIZATION

Regardless of the problems of implementation, rights can be useful political tools. It is possible to capitalize on the perceptions of entitlement associated with rights to initiate and to nurture political mobilization—a dual process of *activating* a quiescent citizenry and *organizing* groups into effective political units. Political mobilization can in this fashion build support for interests that have been excluded from existing allocations of values and thus promote a *realignment* of political forces. These three themes, activation, organization, and realignment, will structure this chapter.

It might seem odd, even paradoxical, to think of a legal strategy in connection with such a wide range of political activities. If courts cannot effectively insure the general application of acknowledged legal rights, what contribution can legal rights and legal institutions make to political mobilization—and in what manner?

Since rights carry with them connotations of entitlement, a declaration of rights tends to politicize needs by changing the way people think about their discontents. "One of the most successful elementary forms of mobilization of otherwise unacculturated sections on the periphery of society is the claim for the return of rights believed to have been illegally removed or denied."[1] The point is, of course, that the concept of rights evokes images of something "unjustly or

1. J. P. Nettl, *Political Mobilization: A Sociological Analysis of Methods and Concepts* (New York: Basic Books, 1967), p. 247. Nettl is writing of national integration of newly emerging nation states.

illegally taken away" and therefore of "a return to some previous *status quo.*" [2] What counts is not whether the court order actually leads to a redistribution of values, but rather the impact of the judicial decision on cognition. Insofar as court decisions can legitimate claims and cue expectations, litigation can contribute to both activation and organization; to the building of new coalitions; and, in the long run, to a realignment of forces within the political arena.

Political Activation

One of the primary obstacles to social change is the acquiescence of the oppressed. It is, at least at first glance, puzzling that people can learn to accept as normal that which the detached observer perceives as severe deprivation. The fact remains, however, that we learn to adapt—to endure the trials that life imposes on us and to harden ourselves to the burdens that others must bear. All this is the despair of reformers who can work much more effectively in an atmosphere of indignation at one's own deprivations and compassion for the deprivations of others.

If we tend to accept the existing order as inevitable, it is at least partly because it is the only reality that we know and therefore the only reality that we can fully comprehend. Our identity—that is to say, our expectations and our aspirations as well—is a "gift" of the society in which we live. John Stuart Mill pointed out more than a century ago that conceptions of self are shaped and perhaps determined by social forces.

> All women are brought up from the very earliest years in the belief that their ideal of character is the very opposite to that of men; not self-control, but submission, and yielding to the control of others. All the moralities tell them that it is the duty of women, and all the current sentimentalities that it is their nature to live for others; to make complete abnegation of themselves, and to have no life but in their affections.[3]

2. Ibid.

Similarly, it seems clear to at least some black people today that their oppression has its roots in the identity that society imposes upon them.

> They are oppressed initially in the subtle psychological confrontations of child and society. Living in a society where prominent authority figures are white, and where black men are featured as incompetent and foolish, black children at an early age become aware that theirs is an inferior social status and do not develop the level of self-esteem that other children do. Their feelings of worthlessness are frequently nurtured and reinforced in their dealings with others: (1) inhumane treatment by public school teachers with responses warped by their inability to cope with the transition from the relatively tranquil middle class universities to what they perceive as the violence and instability of urban slums; (2) brutal treatment by policemen with strange conceptions of the difference between order and disorder; and (3) cruelty by parents whose aggressive impulses toward a hostile world are often displaced on their offspring. Even as children many American blacks are not likely to hope for anything—achievement, wealth, happiness, or long life.
>
> Adolescent experiences build upon this childhood foundation, and the feelings of hopelessness and self-hatred are more firmly and elaborately woven into the fabric of personality.[4]

Murray Edelman puts the general proposition particularly well: "Perception of deprivation, then, like all perception, is a

3. John Stuart Mill, "The Subjection of Women," in *On Liberty, Representative Government, The Subjection of Women: Three Essays by John Stuart Mill* (London: Oxford University Press, 1971), p. 444.

4. William W. Ellis, *White Ethics and Black Power: The Emergence of the West Side Organization* (Chicago: Aldine, 1969), pp. 103–04.

function of social cues regarding what is to be expected and what exists; it does not correlate directly or simply with objective conditions or with any particular measure of them." [5] In any case, the status quo implication of these imposed political identities is clear: the patterns of subordination and superordination are accepted as natural by those on top and by those on the bottom as well.

Consider, for example, poverty in America. Is it a social problem? American values encourage us to accept poverty as a constant aspect of the human condition—even as a desirable stimulus to ambition.[6] If we are poor in a land of opportunity, society's signals tell us that we have only ourselves to blame. Less embarrassing, then, to suffer in silence than to call attention to our inadequacies. At the same time that this ideology of opportunity leads the disadvantaged to conceal their discontents, it also divides people from one another. Those who have not made it have failed and are not the responsibility of those who have succeeded. The simple truth is that whether discontents become political issues depends, at least in the first instance, on whether they are perceived as social problems—more a matter of cognition and values than of objective measures of deprivation, oppression, and injustice.

Lawyers are mediators between the individual and those with governmental and private power. They have ready access to important symbols of political legitimacy: the courts, the law, constitutional rights, and so forth. The attorney is therefore in a position to help cut through the

5. Murray Edelman, *Politics as Symbolic Action: Mass Arousal and Quiescence* (Chicago: Markham, 1971), p. 107. In an earlier volume Edelman made a similar point: "The very question of what man *is*, let alone what he wants, is in part a product of the political system, and in turn conditions the system." *The Symbolic Uses of Politics* (Urbana: University of Illinois Press, 1967), pp. 19–20. Italics in the original.

6. This argument is developed in detail in Dorothy B. James, *Poverty, Politics, and Change* (Englewood Cliffs, N.J.: Prentice-Hall, 1972). See, in particular, Chapter 2.

debilitating pall of acquiescence by transforming individual discontents into political demands. More specifically, adequate legal service can aid in altering self-conceptions by imparting to the client a sense of "legal competence"—confidence in his efficacy in dealings with others.[7] In addition, litigation undertaken on behalf of the client tends to bring him into direct and effectual contact with the courts, which are important organs of governmental authority. Like other governmental acts, court orders are, in the words of Murray Edelman, "powerful shapers of perceptions." [8] Note that neither of these steps in the direction of personal and political efficacy is dependent in any way on the modest store of coercive resources that is at the disposal of the judges nor upon any *unique* powers of legitimation attributed to courts by the myth of rights.

Let us first consider the attorney-client relationship. The contrast between the assertive attorney and the discontented but acquiescent citizen could hardly be sharper. Attorneys are taught to take rights seriously and to believe that their professional skills are useful for asserting rights, even against imposing aggregations of political and economic power. If some of the assertiveness of the typical attorney rubs off on his client—if the attorney can significantly increase the client's capacity for indignation—then access to legal services may ultimately serve the cause of social change in important ways.

> The competent subject will have a sense of himself as a *possessor of rights,* and in seeking to validate and implement these rights through law he will be concerned with holding *authorities accountable to law.* . . . We suggest that the legally competent subject does more than appeal to the

7. Jerome E. Carlin, Jan Howard, and Sheldon L. Messinger, "Civil Justice and the Poor: Issues for Sociological Research," in *Law and Society Review* 1 (November 1966): 60–62.

8. Edelman, *Politics as Symbolic Action,* p. 101.

considerateness of officials; he insists that official actions and decisions be consistent with authoritative rules.[9]

That changes in this general direction are possible is the conclusion of a study made of one Connecticut legal services project: "The most striking change which we have discerned is in the amount of legal knowledge acquired by clients in the program. . . . Post-service interviews show an increased willingness to use the services of lawyers and to differentiate those situations in which referral to the legal process would be of little value." [10] Whether or not people actually learn their rights from attorneys is less important than that they begin to believe that they have rights. What counts is that they cease sublimating their grievances and begin to seek redress.

Litigation can further advance the process of activation, since the courts share the symbols of legitimacy with other authoritative governmental agencies. At the very least, a judicial decision—even if it is unfavorable—indicates that the problem is no longer solely a private matter. Its existence has been officially acknowledged, thus implying that solutions are not solely a matter of individual responsibility. Secondly, judicial decisions create legal rights and carry with them connotations of entitlement. The judicial decision may not effectively redistribute any resources or influence but it will in all likelihood cue expectations of redistribution. The connotations of entitlement may also be reasonably seen as a contribution to self-esteem: deprivations that formerly might have been viewed as symptoms of personal inadequacy can henceforth be seen as unpaid governmental debts. Finally, the general character of legal enactments can lay the basis for a collective political identity, since the entitlements provide a

9. Carlin, Howard, and Messinger, "Civil Justice and the Poor," p. 70. Italics in the original.

10. George F. Cole, "Clients of a Legal Services Project," paper prepared for delivery at the 1971 Annual Meeting of the American Political Science Association, p. 15.

joint stake and the deprivations a mutual cause. In sum, litigation can politicize individual discontents and in so doing activate a constituency, thus lending initial impetus to a movement for change.

To be more concrete, consider the message conveyed by the Supreme Court's declaration in *Brown* v. *Board of Education* that "separate educational facilities are inherently unequal." Surely black people did not have to be told that their schools were inferior, nor for that matter was this news to most whites. Moreover, the judgment did not bear witness to that inequality in any particularly dramatic fashion—a matter on which the decision and the judges have been often criticized.[11] It was, nonetheless, read as a signal that changes were on the way, and surely it gave rise to anticipations which set the tone, established the direction, and influenced the outcome of a political controversy that continues to press upon us.

While blacks were, of course, conscious of the commonality of their grievances without the assistance of the Supreme Court, judicial intervention did lend political significance to those grievances—in the first instance, simply by *officially* acknowledging their existence. More specifically, the *Brown* decision can be seen as one of the earliest and most noteworthy of a long string of official enactments which made it clear as a matter of public policy that the deprived conditions of black people were a consequence of handicaps imposed both de jure and de facto by the established forces of the society. Surely hopes were kindled by these enactments. Is it not also reasonable to believe that a sense of a collective political destiny was extended and reinforced?

11. Moderate criticism on these grounds has come from the ranks of the law professors. See, for example, Louis H. Pollak, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler," *University of Pennsylvania Law Review* 108 (November 1959): 24–31. A more strident version of the same theme can be seen in Howard Moore, Jr., "The Court and Black Liberation," in Robert Lefcourt, ed., *Law Against the People* (New York: Vintage, 1971), p. 58.

If litigation has been useful in mobilizing blacks, it could be at least as useful—and perhaps more useful—for mobilizing other disadvantaged groups in the society. The courts could hardly convey anything to blacks about their blackness, but the judges were in a position to demonstrate the political relevance of being black. Much the same would hold true for the poor, for women, for prisoners, and for other self-conscious and reasonably cohesive groups. The stakes of litigation are higher in cases where intrinsic unity is less evident. Among consumers, environmentalists, debtors, and other inchoate interests both the collective identity and its political relevance must be demonstrated. Those interests which we all share to some degree, and which, therefore, do not distinguish us from one another, have traditionally been the most difficult to organize.[12] So long as these problems are perceived as our common lot, a pall of fatalistic acceptance makes for quiescence. To the extent that litigation can demonstrate that individuals are not isolated in their discontents and that these discontents have a status in the law, legal tactics can help to establish a collective political identity.

Political Organization

Activation and the establishment of a collective political identity are only the initial steps along the path toward

12. One study of public opinion on pollution tends to bear out this inclination to think of such problems as someone else's. In Durham, North Carolina, 83 percent of the respondents saw pollution as a serious national problem; 62 percent saw it as a serious problem in Durham; and 31 percent saw it as a neighborhood problem which was serious. Since air pollution in Durham is above the national average and since the neighborhood reaction was the same in all sections of the city, it would seem that most people in Durham have learned to live with pollution. Arvin W. Murch, "Public Concern for Environmental Pollution," *Public Opinion Quarterly*, 35 (Spring 1971): 101. Clearly, the problem of pollution tends to emerge so slowly, gradually and imperceptibly that adaptation precedes awareness: Are "those lazy, hazy, crazy days of summer" the cue for nostalgia and reverie or the smoggy harbinger of environmental decline?

effective action. Political demands do not automatically become political issues.[13] If they are to be taken seriously, political demands must be pressed by effective political organizations. Once again, lawyers and litigation can be useful although hardly decisive.

For political organizations to take root and become effective, members must take themselves seriously and must be taken seriously by others. These are significant obstacles to overcome in a society dominated by powerful and seemingly impervious bureaucratic structures. In order for a group to take itself seriously and begin attracting supporters, it must believe not only in its cause but also in its capabilities. In these difficult early stages, lawyers are in a position to lend organizing impetus to the group by enhancing its sense of efficacy. The same traits and skills that make lawyers helpful in the early stages can, however, make them unreliable strategists over the long haul.

What the lawyers provide at the outset are organizing skills and resources together with a credible strategy. Their technical skills can be useful in dealing with the details of establishment such as drafting a charter, working out the legal status of the organization for fund raising and tax purposes, and making contractual arrangements on administrative matters. More generally, the lawyer's presence at an organizational meeting can, in a society responsive to the myth of rights, lend an air of importance and legitimacy to what is often a meager group of citizens with very little political experience. Most important, lawyers have at their disposal litigation and its credible promise of tangible and proximate results in the form of courtroom victories and legal leverage to be used against stubborn and powerful opponents.

The growth of the National Welfare Rights Organization in the late 1960s indicates the kind of contribution that a legal

13. On the distinction between demands and issues, see David Easton, *A Systems Analysis of Political Life* (New York: John Wiley, 1965), pp. 140–49.

strategy can make to political organizing. Welfare agencies often fail to provide the full range of benefits to which the poor are entitled according to the law. The poor are ordinarily not aware of all of their entitlements, they are generally not very aggressive in making claims, and they are easily intimidated by agencies upon which they are heavily dependent. In short, the poor lack legal competence.[14] As Richard Cloward and Frances Piven pointed out in an influential article in *The Nation*, this situation created opportunities for an effective strategy of political organization.

> The strategy is based on the fact that a vast discrepancy exists between the benefits to which people are entitled under public welfare programs and the sums which they actually receive. . . .
>
> Movements that depend on involving masses of poor people have generally failed in America. Why would the proposed strategy to engage the poor succeed?
>
> First, this promises immediate economic benefits. . . .
>
> Second, for this strategy to succeed, one need not ask more of most of the poor than that they claim lawful benefits. . . .
>
> Third, the prospects for mass influence are enhanced because this plan provides a practical basis for coalition between poor whites and poor Negroes.[15]

It seems fair to say that these legal entitlements played an important part in the organizing efforts of welfare rights leaders,[16] and that the gap between what the law promises and what it delivers implies similar organizing opportunities in other issue areas.

14. Carlin, Howard, and Messinger, "Civil Justice and the Poor," pp. 42–52 and 69–84.

15. Richard A. Cloward and Frances Fox Piven, "The Weight of the Poor: A Strategy to End Poverty," *The Nation*, 202 (May 2, 1966): 510, 513–14.

16. Frances Fox Piven and Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Vintage, 1972), pp. 320–30.

Once the organization takes root legal tactics can continue to be useful, but lawyers may become unreliable tails unwilling to give up wagging the dog.[17] The lawyer can provide useful counsel on tactics at virtually all stages of organizational growth and development, since the organization must face up to the legal consequences of various tactics. If it decides to employ litigation, the attorney can counsel organizational leaders on how to behave so as to maximize chances of bringing a successful test case—that is, one in which the major issues are taken up by the courts. Similarly, the attorney can assess the likelihood and character of criminal and civil liability that is implied by various courses of action. When conflicts with the law do develop, the lawyer automatically becomes the vital defense arm of the organization—protecting leadership from the criminal justice system and other organization resources from the bailiff. On the other hand, lawyers are by training, socialization, and expertise inclined to exclusive use of litigation and negotiation. They tend to find politics somewhat distasteful and ordinarily try to steer away from militant confrontations.

At some point, the attorney's caution is likely to run counter to deeply felt needs of the membership or of constituency groups. For example, most civil rights organizations experienced strains of this sort during the 1960s as blacks grew increasingly militant. The role and attitude of

17. As Cloward and Piven point out, legal tactics are not the exclusive province of lawyers—at least, not where the entitlements are spelled out clearly and unequivocally as in welfare regulations. "Organizers will have to become advocates in order to deal effectively with improper rejections and terminations. . . . In some cases, it will be necessary to contest decisions by requesting a 'fair hearing' before the appropriate state supervisory agency; it may occasionally be necessary to sue for redress in courts. Hearings and court actions will require lawyers . . . However, most cases will not require expert knowledge of law, but only of welfare regulations; the rules can be learned by laymen, including welfare recipients themselves (who can help man 'information and advocacy' centers)." "Weight of the Poor," p. 512. While others can admittedly be trained to perform legal functions, lawyers, understandably, play pivotal roles when legal tactics are employed.

lawyers in a recent organizing effort of home owners in two ghetto areas of Chicago are also illustrative.[18] These people had been led either by desperation or misrepresentation to purchase homes on contracts under terms which were much less favorable than ordinary mortgage arrangements.

> The terms of the contracts . . . allow the purchaser to take immediate possession of the property, but give him no equity or title until the full contract price is paid. . . . Also, like the restrictive terms of a conditional sales contract, the seller has the right to reclaim the property and to keep all past payments if a single payment is missed. And while the buyer is obliged to pay for insurance, taxes, and all repairs on the property, the seller usually selects the insurance company and can collect all claims for damages to the property.[19]

In the beginning, the lawyers by initiating suits lent hope and purpose to the organization. Subsequently, when the members turned to direct action in the form of a payment-withholding strike, the lawyers objected strenuously—arguing in part that their litigation might be jeopardized. For the membership, however, the strike was a way of bringing economic pressure to bear on the sellers, of reinforcing organizational cohesiveness, and of using the mass evictions that were bound to follow as a way of creating a political issue. Without making any definitive assessment of the balance sheet, it seems clear that strike action did temporarily increase organizational enthusiasm and, moreover, brought Mayor Daley directly into the conflict. There were problems as well, but the point is that lawyers tend to resist a range of options that seems altogether reasonable in the context of grass roots or even pluralistic politics.

18. The following information is taken from James Alan McPherson, " 'In My Father's House There Are Many Mansions, and I'm Going to Get Me Some of Them Too!' The Story of the Contract Buyers' League," *The Atlantic* (April 1972), pp. 51–82.

19. Ibid., p. 53.

Political Realignment

Even successful efforts at activation and organization are threatened by countermobilization, but legal tactics do have some built-in capabilities for increasing *net* support. In working from rights established by law or derived from constitutional values, legal tactics evoke images of entitlements not only among the direct beneficiaries but within the ranks of all Americans who are responsive to the myth of rights. Of course it is unlikely that very many of those immediately and directly threatened will become supporters, but the mass of those who are not involved in the conflict could be either neutralized or persuaded by legal symbols. In short, a legal approach tends to be self-legitimating and thus increases the likelihood of a favorable political realignment.

The civil rights movement reveals the opportunities for altering the balance of political forces. The most immediate and decisive reaction to the *Brown* decision was the unequivocal and united opposition of the powerful southern bloc in Congress. Other Americans reacted more slowly—perhaps in part because that decision and subsequent litigation tended to confirm their faith in the progressive and beneficent character of the political system. By the mid-sixties, however, segregationists had been sufficiently isolated and discredited to permit the passage of increasingly strong civil rights legislation as well as more and more insistent implementation of desegregation policies by the executive branch.[20] In retrospect it seems fair to say that the withholding of officially acknowledged rights contributed significantly to the legitimacy of the civil rights movement and to the adoption of its program.[21]

20. See Harrell R. Rodgers and Charles S. Bullock, III, *Law and Social Change: Civil Rights Laws and Their Consequences* (New York: McGraw-Hill, 1972), for a comprehensive survey of the stages of implementation in a wide variety of civil rights matters.

21. For personal statements which bear witness to the tendency of support for the movement to build in reaction to denial of legal rights by southern officials, see William M. Kunstler, *Deep in My Heart* (New York: William

There are those who see the civil rights experience as confirmation of the theory of change associated with the myth of rights. Litigation is, in this perspective, viewed as a tool which prompted government agencies to rethink the goals of public policies while isolating the segregationist opposition. It is thus possible to view the civil rights era as a time of "colloquy" among judges, legislators, and administrators, a colloquy which was fruitful precisely in the measure that segregationist politics had been discredited by judicial initiative. The judge's function was, in other words, to call attention to the enduring principles of American politics—to what I have termed constitutional values—and in this way to demonstrate the dangers inherent in the expedient compromises that are the inevitable consequence of political bargaining.[22] Not surprisingly, the same theory has been applied to other matters. Joseph Sax advocates similar tactics as a way of "making democracy work" in behalf of the environment.

> Courts are not to be used as substitutes for the legislative process—to usurp policies made by elected representatives—but as a means of providing realistic access to legislatures so that the theoretical processes of democracy can be made to work more effectively in practice. Citizen initiatives in the courts can be used to bring important matters to legislative attention, to force them upon the agendas of reluctant and busy representatives.[23]

Morrow, 1966), and Howard Zinn, *SNCC: The New Abolitionists* (Boston: Beacon Press, 1968).

22. For an early and, I would say, definitive development of this position, see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), particularly Chapter 6 in which the general theory is applied to the politics of school desegregation. In a subsequent study devoted solely to school desegregation, the focus tends to shift from the workings of constitutional politics to a more conventional attack on judicial activism. Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970).

23. Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Knopf, 1970), p. xviii.

Note that making democracy work does not, for Sax, entail the travail of participatory politics any more than it did for the civil rights leadership of the 1960s. Participation is confined, at most, to "citizen initiative" in behalf of litigation—meaning that participation is filtered through lawyers who shape issues and, in effect, resolve them in concert with the duly constituted political authorities.

There is another way of viewing the civil rights era which calls into question the lawyers' vision of change without pain. Legal and constitutional values may have temporarily neutralized some of the opposition to desegregation and at least initially channeled political activity into institutional processes. In the long run, however, such changes as did occur were accompanied by more or less the full range of political conflict. Mobilization of blacks escalated well beyond the boundaries of constitutional values and processes. Moreover, mobilization led to countermobilization once the stakes of the conflict became clear. If there is a lesson to be learned from the 1960s, it is that the politics of rights is no different—and ultimately no less conflictive—than conventional politics. Its distinguishing trait is simply that it *may* work on behalf of groups ordinarily excluded from conventional politics.

Could it be any other way? The law can hardly transcend the conflicts of the political system in which it is embedded. In the first place, enough ambiguity attaches to legal and constitutional values so that ordinarily neither side has a corner on the symbols of legitimacy. The Southern Manifesto calling for massive resistance to the *Brown* decision was characteristically couched in terms altogether consistent with the myth of rights, for it pledged the use of "all lawful means to bring about a reversal of this decision which is contrary to the Constitution."[24] And, of course, the inertial tendencies built into the legal process made it a useful tool for the

24. In Hubert H. Humphrey, ed., *School Desegregation: Documents and Commentaries* (New York: Crowell, 1964), p. 34.

well-entrenched forces of segregation. Since the law could be used to slow the process of change to a snail's pace, it is understandable that newly mobilized blacks were easily disillusioned with judicial processes, and the pace of change seemed to quicken only when "busy and reluctant" Congressmen and executive officials were prodded—often by extralegal action. Once the impact of change became more concrete, opposition began to mount. Many of those who had been attracted to the civil rights movement or neutralized by its uncertain implications joined the opposition as the costs of change manifested themselves in affirmative action hiring, fair housing plans, school busing, civil disorder, and so forth. In short, the fallacy of consensual change quickly became clear.

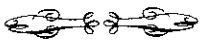
While consensual change may be an illusion, the impact of law on political attitudes, and therefore on the political arena, is not. William K. Muir's study of compliance with the Supreme Court's decision outlawing prayer in the public schools provides some insight into the variety of ways that changes in the law can be reflected in political attitudes.[25] At the extremes, changes in the law may convert some while being taken as a provocation by others. Changes in the law may also moderate attitudes; there were those in Muir's study whose favorable attitudes toward school house religion were softened but not transformed by the Supreme Court's decision.[26] Muir characterizes the range of responses as follows:

> Within any single discrete organization of individuals whose behavior lawmakers intend to affect, the reaction to the law is never monolithic within the group but varies from person to person. The responses do not move in the same direction, nor with the same intensity, nor with respect to the same objects. It was this varied range of response which was the most important result of my study, and explanation of these variabilities is my most important task.[27]

25. William K. Muir, *Prayer in the Public Schools: Law and Attitude Change* (Chicago: University of Chicago Press, 1967).

26. On these moderating tendencies see in particular ibid., pp. 100–08.

Among the more important cognitive factors identified by Muir are the effectiveness of political leaders and the cues of reference groups.[28] What stands out in this welter of ambiguous signals, however, is that all but a small minority of the respondents were ascertainably influenced by the judgment.[29] Legal norms may not induce acquiescence; they may not be self-authenticating; but they do seem capable of exercising an independent influence on political attitudes. A legal strategy may therefore contribute to the processes of political realignment but in a more unpredictable and inconclusive way than is implied by the myth of rights.



It follows from the preceding evidence that a legal strategy can contribute to political mobilization and in this way to political change. The mobilizing potential of the legal approach to change stems from the role of courts as articulators of public policy goals and from their demonstrated willingness to validate departures from existing practice. Given the responsiveness of most Americans to legal symbols, declarations of rights by courts tend to alter political perceptions.

27. Ibid., p. 81.

28. For a complete list of "concluding hypotheses," see Ibid., pp. 132–34. Robert L. Crain comes to complementary conclusions in his study of school desegregation, *The Politics of School Desegregation: Comparative Case Studies of Community Structure and Policy-Making* (Chicago: Aldine, 1968).

29. It should be noted, however, that Muir's study involved only officials who were in some way immediately affected by the decision. The effects on others were surely weaker and perhaps different in kind. Dolbeare and Hammond's work suggests that one cannot count on the law's influence even on the relevant actors. They were, however, more concerned with behavior than with cognition. *The School Prayer Decisions: From Court Policy to Local Practice* (Chicago: University of Chicago Press, 1971). Muir does, in any case, give us plausible hypotheses, based on psychological constructs, for further investigation.

Even less authoritative evocations of rights—as, for example, by attorneys or community leaders—can cue the hopes and expectations so important to successful mobilization.

To think of the law and of legal rights in this fashion entails a significant break with the myth of rights tradition. According to that tradition, rights are entitlements to be secured either by litigation which forces compliance with court orders or by consensual processes associated with constitutional politics. Rights are also viewed as ethical imperatives anchored in liberal democratic values and adding, as well, a note of continuity to the erratic world of politics. Our constitutional order is viewed as providing equitable, rational, progressive, and hence desirable procedures for resolving political conflict. By the same token, liberal democratic values are identified with a just society and are taken as adequate guides to public policy.

In contrast, I have argued that rights are most sensibly thought of as agents of political mobilization rather than as ends in themselves. This is an argument primarily based on pragmatic considerations. The evidence suggests that litigation may be useful for providing remedies for individuals but that its impact on social policy is open to question. The implementation of social policy by court orders is likely to be slow, costly, and perhaps self-defeating. The utility of constitutional politics is similarly suspect. There is very little reason to believe that legal and constitutional values are directly persuasive to the elites who are most immediately responsible for making decisions for the polity. These elites are, however, likely to respond to effectively organized interests, and legal symbols can be usefully employed in behalf of political mobilization. The politics of rights, therefore, involves the manipulation of rights rather than their realization. Rights are treated as contingent resources which impact on public policy indirectly—in the measure, that is, that they can aid in altering the balance of political forces.

Part Three

THE STRATEGISTS OF RIGHTS

10. LEGAL EDUCATION AND PROFESSIONAL SOCIALIZATION: THE MYTH OF RIGHTS REVISITED

The basic message of the politics of rights to lawyers interested in altering the status quo is simple. They are directed to turn their attention, at least in part, to the mobilizing potential of litigation. But lawyers are likely to resist the message of mobilization. Their legal training and professional experiences predispose them to think about litigation more conventionally, to internalize the myth of rights.

An investigation of the socializing experiences of American lawyers is therefore an essential precondition to understanding the policy roles that they will be inclined to play and the strategic counsel that they will provide to political organizations. These are important matters, since lawyers are bound to play a prominent role in any strategy of change that relies on legal tactics. Neither legal education nor professional experiences are likely to alter the politics of lawyers in the more obvious ways. Party preferences will not change, nor will radicals be changed into conservatives. The influence is more subtle. It is the influence of ideology on behavior.

Chapter 11 will focus directly on the priorities and preferences of the small "activist" minority of the American bar whose members serve as strategists of rights for groups interested in change. While a great many differences will emerge among these lawyers, none of them entirely transcend their educational and professional experiences. An examination of these background experiences will, therefore, help

explain the causes and character of resistance among lawyers to the politics of rights.

Three factors will be considered: (1) the basic skills learned in law school; (2) the world view imparted as those skills are learned; and (3) the role expectations thrust upon the lawyer by his profession. The first and third factors have a familiar ring. The second is more novel and requires an introduction.

My argument is that a distinctive approach to problem solving is imparted in law school, and that this approach influences the way lawyers think about societal issues more generally. A world view is implicit in legal analysis and tends to come along as a kind of silent partner in legal education. To oversimplify a point that will be developed in the third part of this chapter, the lawyer is encouraged to engage in what might be termed rule-mongering, and this preoccupation tends to narrow his vision.[1] Whatever may be the implications of rule-mongering for the ordinary practitioner, it has a disabling impact on activist lawyers who are rummaging around for causes and tactics.

The following discussion—an interpretive essay on legal education—will concentrate on only a few salient features, since available research on legal education does not deal directly with the problems that concern me. This is not at all surprising, since even the more zealous reformers are under the influence of the myth of rights and thus not prepared to ask any really fundamental questions about the political implications of law school training. Reform proposals are directed only at doing better or quicker what is already done—or at extending the unquestioned benefits of legal education to the broader university community.[2] My purpose

1. See, once again, Judith Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964) for the roots of this argument.

2. See, for example, the Carrington Report, reprinted in Herbert L. Packer and Thomas Ehrlich, with the assistance of Stephen Pepper, *New Directions in Legal Education* (New York: McGraw-Hill, 1972), pp. 95–162. For a more self-consciously political approach, which also neglects the issues raised here, see "The Rutgers Report: The White Law School and the Black Liberation Struggle," in Robert Lefcourt, ed., *Law Against the People: Essays to Demystify Law, Order, and the Courts* (New York: Vintage, 1971), pp. 232–52.

is, in any case, to make a point that has not previously been made rather than to provide a balanced critique of legal education.

Legal Analysis

Because most people understand instinctively what legal analysis is all about, legal symbols are useful in political discourse. People grasp particularly well the *limitations* of the legal perspective. How natural it is to accept the pejorative connotations of the adjective "legalistic," for example. Is there any mystery about what Attorney General Mitchell meant when he asserted: "We face in the United States a situation where the discovery of guilt or innocence is in danger of drowning in a sea of legalisms."[3] Even without further elaboration, did we not realize that Mr. Mitchell was rejecting "the hydra of excess proceduralism, archaic formalisms, pretrial motions, appeals, postponements, continuances, collateral attacks, which can have the effect of dragging justice to death and stealing the very life out of the law."[4] Well, perhaps we did not understand about the collateral attacks, continuances, and pretrial motions, but we knew as soon as we saw the word legalism that Mr. Mitchell was concerned with archaic formalisms. When we accuse someone of being legalistic, we suggest an excessive zeal for purely formal details which becloud rather than clarify the *real* issue. The legalist is someone who is lost among the trees and cannot *or will not* consider the overall shape of the forest. So it is a sense of willful closure together with an obsession for procedure and minutiae that we associate with the law game. An unfair caricature? Perhaps. On the other hand, like all good caricatures, it reveals some important features.

3. *The New York Times*, 17 July 1971, p. 1.

4. Ibid.

Consider the case method, which is the key to legal education in America. The case method focuses on the appellate opinion, and the student is taught to separate the opinion into its component parts—to parse a case. At one time, this meant teaching him to sift through the complex facts, competing claims, and judicial pronuncements in order to draw forth the controlling rule enunciated by the court and the reasons and doctrine linking the relevant facts to the rule. After three years of this it was assumed that the student now thought like a lawyer and could be certified with an LL.B. These days, we are assured, all this has changed—at least in the better law schools.

> Legal realism has infiltrated legal education through the same Langdell case method which had been the object of its attack. But where Langdell used the appellate opinion as a way of finding the "true" rule of law, we now assume that task can be learned quickly and easily, that particularly after the first year our students can parse a case and tell us what is holding, what is dictum. Under pressure from the weight and dynamism of an ever-increasing body of law, we have shifted our emphasis and have made "the case" the occasion for a much broader inquiry—one which will enable the lawyer to capture the dynamic of a given field, to cope with the changing legal scene and to call into question the old rules.[5]

Students are, in other words, encouraged to think about the way in which precedent is eroded and doctrine changes. An increasingly "realistic" faculty sensitizes the student to the "extraneous" factors that may determine whether a given judge will be receptive to a particular argument—prejudice, dyspepsia, political debts, and so forth. The student may even

5. Abraham S. Goldstein, "The Unfulfilled Promise of Legal Education," in Geoffrey C. Hazzard, Jr., ed., *Law in a Changing America* (Englewood Cliffs, N.J.: Prentice-Hall, 1968), p. 159.

be asked to reflect upon the societal implications of a given opinion for a body of law.

Everything has changed. Or has it? Dean Goldstein's statement indicates clearly that parsing is still at the very least the point of departure for effective legal training. As such, it would seem capable of exerting a considerable influence; it is after all the initial common experience and the necessary preparation for broader inquiry. There is, however, reason to believe that parsing remains as much a keystone as a preface. First, no real alternative seems to have been developed.

> But because we are not clear which concepts or course of training should be made central, we tend to treat the appellate decision as if it were an all-purpose hypothetical problem leading in any direction the teacher chooses to travel—sometimes to a search for behavioral presuppositions, sometimes to an assessment of impact, sometimes to discerning the lines along which doctrine is likely to develop.[6]

In the absence of agreement on the new dimensions of legal education, law schools tend to fall into the inertial patterns of the traditional consensus, and the broader inquiry turns out to be pretty much of a series of random variations on the original theme. There are no structural changes, only a few decorative modifications: a reflecting pool, an observation deck, and so forth. But if law schools continue in well-worn tracks, it is because the old methods have proven serviceable if not altogether satisfactory. Even critical and self-conscious law students recognize the worth of the skills imparted by a legal education and associate them with "attributes highly prized by successful lawyers."[7] Legal skills may not be enough—at least not at Yale, which must live with its avant

6. Ibid.

7. Duncan Kennedy, "How the Law School Fails: A Polemic," in *Yale Review of Law and Social Action*, 1 (Spring 1970): 77.

garde reputation and with restless students who learn to parse in the first year. But the old quest for legal logic and analytical rigor goes on, and not simply as a preliminary but as a mood which sets the tone and in the end probably determines the boundaries of innovation.

Typically, then, the law student spends the better part of three years learning legal analysis. The case method teaches how to determine the controlling rule in a legal dispute: the student learns that there is a rule and that the job is to find it. Finding no longer has the sense of pure discovery that it once did. It is not taken for granted any longer that the rule as such is there, waiting for the judge or the attorney. The law student is sensitized both to the case law and to the "open texture" in the patterns of American law.[8] Rules change; what is settled today may be altered tomorrow. The ingenious lawyer must learn to capitalize on open texture and turn change in favor of the client. The good craftsman learns to provide a respectable legal rationale for the judge. Judges may not be persuaded by legal skills, but they find it difficult to act without a legal rationale. The average American judge simply prefers to deliver a decision which is either consistent with precedent or which yields a rule that can be lived with for a while.

It is, then, the quest for continuity that characterizes legal analysis—not the ad hoc solution but the general guideline. What the student must learn are the secrets of harmony and consistency; these are the rules of the law game. Like the rules of chess, or of any game, the rules of the law are based on an *internal* logic. The rules that endure tend to be those that allow the game to proceed as smoothly as possible. The law game is itself a game of rules: "subjecting human conduct to the governance of rules."[9] If that is to be done smoothly,

8. Goldstein, "The Unfulfilled Promise," p. 162.

9. Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), p. 46.

there must be a reliable way of determining the applicable rule at all times and in all situations. Which institutions have jurisdiction? How can these institutions be activated? What are the accepted canons of interpretation? Are there guides for establishing precedence among relevant rules? Speaking more generally, even the lawyer as opportunist must come to understand or sense something of the logic and symmetry of a system of rules. To certain minds there is no doubt a fascination to this logic and symmetry. There is intellectual and even aesthetic satisfaction in coming to understand the internal logic of the system and real gratification in working out dependable doctrines which reconcile apparent contradictions among rules. But the law is not a parlor game, it is a social institution bound up with the most important dimensions of human freedom and oppression.[10] At the chess board, intellectual satisfaction may suffice. In the real world, however, the rule system is important primarily as it relates to societal goals; it is a means rather than an end. The preoccupation of legal education with the law game as such tends, therefore, to be confining:

> However much we talk the language of legal realism or of functionalism, we are doing so essentially from the inside view of the working lawyer, one which makes little effort to place law and legal institutions and legal decision-makers in a context which would enable us to learn what jobs can be done by law and what cannot.[11]

The student, in other words, learns not to raise the most troubling questions. For success in law school:

> The key element is control. . . . He accepts the "context," whatever it may be, and achieves above all a sort of "respectability." Getting directly to the point often means

10. Judith Shklar uses the same image to make a somewhat different point. See Shklar, *Legalism*, pp. 105–06.

11. Goldstein, "The Unfulfilled Promise," p. 161.

above all avoiding areas of ambiguity, "subjectivism," issues too large for him to understand or which may provoke fundamental disagreement.[12]

These habits may make the student into a serviceable and compliant tool of the client's interests but would also seem likely to provide a world view that narrows the lawyer's vision.

The Narrowing Vision

It may seem a long and perhaps indefensible leap from the professional skills imparted by a legal education to a general world view. After all, doctors, engineers, and architects are also prepared for their calling in university settings—indeed, in semi-autonomous professional schools. Are we to assume that they, too, come into the real world equipped not only with basic skills but with a special perspective on the problems of the world?

By asserting that there is a world view implicit in the paradigm that structures legal education, I mean that the student is provided with an approach which seems to both explain and justify the working of the American system. There is another way of making the same point. Legal education imparts a sense of efficacy which extends beyond the obvious skills learned in law school. Lawyers are efficacious not simply because they know how to activate institutions with injunctions, writs of habeas corpus, and the like. Mastery of the mechanics of public institutions may be, in fact, the most important skill that law students pick up, but they are encouraged to believe more broadly in their competence. Chances are that they were already aware upon entering law school of the disproportionate share of lawyers among our appointive and elective officials. It is even more likely that they knew of the traditional position of the

12. Kennedy, "How the Law School Fails," p. 77.

American lawyer as adviser to those in power in both business and government. Once in law school, students learn just why lawyers are so important; more specifically, they come to appreciate the general utility and analytic power of legal skills.

The image of the lawyer as the renaissance man of American public life is promoted and nurtured by a legal education in a number of ways which tend to distinguish law school from other professional educations. Most significantly, the law curriculum reflects virtually the full range of societal problems. As law students move through this curricular incarnation of American life, they become sensitive to the apparent efficacy of the legal process. Ironically, confidence as a lawyer may be advanced by degradation as a law student. Treated day after day to "the spectacle of the professor smiling quietly to himself as he prepares to lay your guts on the floor once again," [13] students no doubt come to see legal skills as synonymous with analytic power—the capacity to clarify complex problems and communicate to others the range of choice open to those in search of solutions. Moreover, students note that disputes are often effectively resolved by simply locating the controlling rule and determining who is obligated and who is entitled according to that rule. For each dispute there is either a rule or else a rule can be derived. The existing or potential rule becomes both the common denominator and the universal solvent of social conflict. The legal system takes on the trappings of a kind of overall regulator in that it assures us of a single authoritative rule for each dispute as well as an internally consistent system of rules. In sum, the students' professional concerns and training are indissolubly linked to the world around them, and the legal paradigm makes it possible to order and more generally to make sense out of what is to the uninitiated hopelessly amorphous.

13. Ibid., p. 80.

But even granting a world view, in what sense does it narrow the vision? Like all world views the legal paradigm is basically a focusing device. Rather like a complex of roads through the wilderness, it provides both guidance at a particular point along the way and a sense of confidence and understanding about the entire area. But like a road map the law game simplifies as it explains. The sense of mastery conveyed by the paradigm is at least partially an illusion, built as much on what is excluded from the analysis as upon the rigor and logic of the method. One could travel wilderness roads often enough to be able comfortably to dispense with a map and still not know the wilderness lying beyond the asphalt—the real wilderness, after all. Similarly, one could be thoroughly familiar with the overlay of rules which decorates the society and not be very wise in the ways of the world. It is important to recognize, for example, that in the world beyond the case book judicial decisions do not always resolve conflicts. Of course the focusing and simplification remain useful so long as rules and society—or asphalt and wilderness—are not confused. Unhappily, it is all too natural to mistake simplification for clarification and focusing for understanding. Legal education, for its part, seems likely to nurture the confusion.

There is a more fundamental aspect of the problem. The rules that the lawyer learns to read into social relations, it must be understood, are simply a point of view. Indeed, they are just *one* point of view and not a natural property of the world around us. There are many other points of view and each is arguably as persuasive as the law game. To Marxists, human behavior is of course economically determined. The positivist finds the crucial distinction between "is" and "ought." The legal view is no more narrowing than any other unidimensional explanation of the world, and legalists are not unlike other ideologues in their unwillingness to face up to the limitations of their paradigm. All ideologies tend to distort and narrow the vision.

What may make legalism a bit more deluding than some other world views is its covert character. Law professors and lawyers do not believe that they are either encumbered or enlightened by a special view of the world. They simply feel that their legal training has taught them to think logically. In a complex world, they have the intellectual tools to strip a problem, any problem, down to its essentials. They have picked up and are prepared to pass on to their students this instinct for the jugular. But covert or overt, it is a rare bird who shares Dean Goldstein's understanding that the case method simply makes "the lawyer especially skilled in showing the limits and inadequacies of what is proffered by others." [14] This is no mean feat, as generations of students who have had their guts spilled on the floor realize.[15] It is also useful, no doubt, in probing and testing matters of public and business policy. But what is actually nurtured in law school is the more imposing myth of a "lawyer-generalist": "a conceit which converts the accidental fact that the lawyer is an available social handyman, ready to take on a wide variety of complex assignments, into a basis for supposing he has a competence to deal with ever more complex phenomena." [16] Perceptive students can perhaps see through the facade and when they do their indictment is devastating. An instinct for the jugular is clearly evoked:

> But it is still shocking to hear professors dismiss all disciplines except the law as intellectually shoddy and

14. Goldstein, p. 160.

15. Sociologist David Riesman tells us that law professors do not just pick on students but can be every bit as tough on the visiting social scientist. "But, speaking for myself, I must say that the atmosphere of a law school is too abrasive, too cocky, to make an easy colleagueship on matters where the social scientist is apt to feel grave self-doubt—notably, at the frontiers of intellectual work." One cannot help but be reminded of Kennedy's remark about "control," by the remainder of the Riesman quote: ". . . if one is exploring rather new areas . . . then to meet constantly the really quite amiable needling of the skeptical lawman may be tiresome." David Riesman, "Law and Sociology: Recruitment, Training, and Colleagueship," in William M. Evan, ed., *Law and Sociology: Exploratory Essays* (New York: Free Press, 1962), pp. 25–26.

16. Goldstein, pp. 161, 163.

practitioners in other fields as a class of dolts. It is hard for the student not to wince at the air of magisterial self-satisfaction with which professors tend to approach questions *that they know little about.*[17]

The students may wince but apparently not even the discriminating few are immune from the call of the law, from its "great unifying threads—philosophic, moral, and intellectual —which draw apparently disparate areas together and give the law much of its fascination and much of its power." [18] It would seem that the believers still are able to convert the heathen to some measure of faith in the legal paradigm.

Professional Responsibility

Just as law school imparts habits of mind which tend to narrow the lawyer's political vision, the accepted standards of professional conduct encourage modes of behavior that narrow the tactical choices open to activist lawyers. The *Code of Professional Responsibility* diverts activist urges away from deliberate, direct, and coordinated political action and channels them instead into piecemeal legal responses to perceived injustices. It is difficult to determine the effective impact of the Code, and I do not mean to impute to it a controlling influence on behavior. There are, however, costs that attach to the violation of professional ethics. Activist lawyers are particularly vulnerable since they are likely to be out of step with the powers-that-be in the profession—that is, with those normally charged with the responsibility for disciplinary proceedings. Moreover, the Code reflects both the fundamental predispositions of the legal profession and myth of rights values as well. Practitioners, including activist lawyers, can be expected, therefore, to internalize its message in some measure. The relevant features of the Code for our purposes are: dedicated representation of clients, improving the level of professional skills, and protecting the market for legal services.[19]

Clearly, the lawyer's first and primary responsibility is to the client. The client's interests are to be represented to the best of the lawyer's ability, altogether irrespective of their social implications.[20] In this context, the prominent role of lawyers in the Watergate affair makes sense. As Richard Barnet, a Harvard Law School graduate himself, puts it: "Far from importing legal standards, lawyers who become national security managers are too ready to defer to their client, the state, and to ignore the law or make it up. A lawyer is paid to be a partisan." [21] The problem is compounded when the lawyers in question are without experience in the policy-making process and accustomed to functioning within the restraining influences exerted by the court system. It is not surprising that, to one inexperienced and working for the chief executor of the laws, zealous representation of a client might be difficult to distinguish from service to the law.[22]

17. Kennedy, "How the Law School Fails," p. 72, emphasis added. Again, Kennedy tends to come to conclusions very much like those of David Riesman, who noted, "a professional self-image of omnicompetence" which he attributed in part to the "lawyer's wish to maintain a pattern of practice and teaching in which he can play by ear." Riesman, "Law and Sociology," p. 24.

18. Kennedy, p. 76.

19. The discussion which follows draws heavily on the position developed by Raymond Marks et al., *The Lawyer, the Public, and Professional Responsibility* (Chicago: American Bar Foundation, 1972). It is not intended to be a comprehensive analysis or balanced critique of the *Code of Professional Responsibility* but a limited investigation of selected aspects which are germane to the activist bar.

20. "A lawyer should represent a client zealously within the bounds of the law." Canon 7, *Code of Professional Responsibility*, p. 1159. Effective 1 January 1972 (Seattle: Washington State Bar Association). The sole focus of four of the nine canons is responsibility to clients.

21. Richard J. Barnet, *Roots of War: The Men and Institutions Behind U.S. Foreign Policy* (Baltimore: Penguin Books, 1973), p. 56. Barnet was writing well before Watergate about the part played by lawyers in the national security bureaucracy.

22. As two of Egil Krogh's former teachers at the University of Washington Law School wrote of his involvement in the burglary of Daniel Ellsberg's

The difficulty is compounded by the way in which the ordinary lawyer's world tends to be broken down into a multiplicity of individual concerns. The overriding obligation is to serve any parties who come along, provided only that competent service can be rendered, that there is no conflict of interest or illegality, and that the client can afford the lawyer's services. The nature and limits of professional responsibility are nicely conveyed by the following exchange between Anthony Lewis of *The New York Times* and President Nixon's impeachment inquiry lawyer, James D. St. Clair:

> Does a lawyer have a duty to appraise the facts of a case, independent of his client's views? Mr. St. Clair indicates yes. He is an officer of the court, and for example he can never properly use false evidence. But Mr. St. Clair adds, "If you mean his becoming judge and jury himself, obviously no." [23]

Relationships between lawyer and client are, moreover, sealed in discrete compartments by the canon of confidentiality.[24] It is not the lawyer's role to work out the links between the client's difficulties and broader social problems and certainly not the lawyer's role to use a client's case as the

psychiatrist: "We neither condone nor excuse what Krogh has done. But we view his situation as a prime example of the tragic case, too frequently found in Mr. Nixon's administration, of an eager and innocent young man corrupted and unsupervised by his superiors." *The Seattle Times*, 14 December 1973, p. A 12.

23. The background of the interview further enhances its relevance to this study. Mr. Lewis begins his column by reminding us that James St. Clair was associated with Joseph N. Welch's dramatic repudiation of Senator Joseph McCarthy during the Army-McCarthy hearings in 1954. "Some people who lived through those days are bewildered at the role Mr. St. Clair is playing now, as President Nixon's lawyer. They wonder how a lawyer who helped repair the American conscience at another bad time can lend his skills to the defense of a man whom they see as today's symbol of political lawlessness." Anthony Lewis, *The New York Times*, 21 February 1974, p. 33.

24. "A lawyer should preserve the confidence and secrets of a client." Canon 4, *Code of Professional Responsibility*, p. 1146.

occasion for dealing with these problems. To do so would encourage the attorney to think of client needs as means rather than as ends. If this threat sounds academic and detached, ponder the common problem of a lawyer with the choice of getting a client off on a legal technicality or of fighting the case on an important but problematic point of principle—like the constitutionality of conspiracy laws or the limits of police discretion.

The tension between cause and client is a familiar one to activist lawyers, and they are directed by the Code to look first to the client's interest. Of course the waters are ordinarily a good deal muddier than this discussion might suggest. Activist lawyers can work for causes. The law even provides a mechanism, the class action suit, which permits an attorney to plead for a client and for all others in like circumstances. It remains true, nevertheless, that the Code casts a shadow of ambivalence over the work of the activist lawyer. The fact that the lawyer is directed toward the particular and away from the general inhibits fundamental social inquiry. The ideal of loyalty to clients may not preclude a concern with public responsibility or social policy, but it surely diverts attention and energies.

Quality control of legal services was a central concern and apparently the organizing animus for the bar: "In other words, early professional organization in the United States dealt with only one aspect of professionalism—the acquisition and improvement of the skill base." [25] What ultimately emerged are uniform minimum standards, which have developed during the shift from an apprentice system to legal education in accredited professional schools.[26] The case for quality control is obvious and there is no need to belabor the benefits that accrue to the public. Its inhibiting influence on

25. Marks, *The Lawyer, the Public, and Professional Responsibility*, p. 11.

26. For a succinct discussion, see Herbert Jacob, *Justice in America: Courts, Lawyers, and the Judicial Process* (2nd ed. Boston: Little, Brown, 1972), pp. 43–74.

the activist lawyer is more subtle and indirect but nonetheless unmistakable.

The "pursuit of professional excellence" impinges on activist law in two distinct but related ways. The attention of lawyers is directed away from the profession's conservative implications—its service of precedent on the one hand and the "interests of corporations" on the other. They are instead encouraged to think of the contribution that high quality representation makes to the adversary process and to the legal system more generally. The emphasis on quality control thus feeds into or at least articulates well with the myth of neutrality: "The assumption was, and, we feel, to a large extent is, that the craft of law is employed in a neutral fashion and that it is available to the clients of a firm for whatever legitimate use they might want to make of it." [27] A second implication of the emphasis on professional excellence is that lawyers are likely to think of their capacity for public service entirely in terms of legal skills. Their skills are, at once, a source of expertise and the boundary line of legitimate professional behavior. The activist lawyer who partakes of this ethos is likely to approach problems of public policy in a rather unidimensional fashion—either opposed or insensitive to the full range of political/legal tactics.

Finally, we come to the market concerns of the bar, which cast a kind of entrepreneurial pall over the entire profession. The market is cared for through a series of practices that limit the supply of legal services and maintain their price well above the level that would be established by the free play of competition. Supply is kept in check through control of entry into the profession by way of law school accreditation and bar examinations. In addition, the code is biased against paraprofessionals who might handle routine but remunerative work like the processing of divorces.[28] The reason that such

27. Marks, pp. 252–53.

28. "A lawyer should assist in preventing the unauthorized practice of law." Canon 3, *Code of Professional Responsibility*, p. 1143.

work is remunerative is the minimum fee schedule, which establishes rates for legal services and prohibits price cutting as an unfair competitive practice. Of course, all of these measures are presented as necessary to maintain quality control: "The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services." [29] Yet it remains true that many more *qualified* students are applying for law school these days than are being admitted and the minimum fee concept is the product of trade association thinking, pure and simple.

> As a start toward internal regulation, the legal profession will have to drop the minimum fee and the self-aggrandizement evident in its definitions of and approach to the unauthorized practice of law. As long as there are clients and interests in need of service and representation, the profession is ill-advised to talk of protecting the public against inadequate representation. The profession's excuses for minimum fee and vigilance against unauthorized practice are weak in any case. The profession should attend to those receiving little or no service.[30]

In this context, the opposition of the American Trial Lawyers to no-fault automobile insurance is simply the latest chapter in the continuing saga of *the bar as trade association.*

There are a number of ways in which the trade association tendencies of the bar create pressures against activist law. Most simply put, lawyers are led to think of their services as a product which is sold rather than as a vital public necessity. Attention is focused on those services that pay rather than on the societal job that has to be done. To reach out to those

29. Canon 3, Ethical Consideration 1, *Code of Professional Responsibility*, p. 1144.

30. Marks, p. 292. See also Lester Brickman, "Expansion of the Lawyering Process through a New Delivery System: The Emergence and State of Legal Paraprofessionalism," *Columbia Law Review* 71 (November 1971): 1177–81.

who might need the "product" by cutting rates or by educating potential clients as to their rights and the opportunities for litigation is deemed unprofessional.[31] Indeed, lawyers who foment litigation are in some jurisdictions liable under barratry laws that were used against NAACP lawyers in the early days of the civil rights movement. The preoccupation with fees reinforces the strong ties between the legal profession and business and monied interests.

It is now time to reflect on this brief glimpse of legal education and professional standards. Our concern is not with the browbeaten student or aggressive professional who plays the game in order to "make it," nor with the professor who has an obvious interest in perpetuating the lawyer-generalist myth, but with the more general appeal of the legal approach and its impact on activism within the profession.

A consideration of the full range of professional socialization reveals two sets of forces working in part at cross purposes. The school experience tends to make lawyers *action-oriented.* They have confidence in their legal skills as tools of analysis and persuasion. These skills enable lawyers to focus complex problems, to defend solutions in a rational and tough-minded fashion, and also to evoke important symbols of legitimacy. Finally, professional life is largely occupied with "doing"—and in particular with making public authorities responsive to the clients' needs. At the same time there is a current of quiescence running through the profession which does not so much prevent activist law as divert and inhibit activist responses. Lawyers are, on the one hand, encouraged to think of the normal pursuit of their calling as tantamount to public service and, on the other, led to believe

31. Lawyers who serve causes and seek clients whose plight both typifies that cause and permits it to be litigated are vulnerable to prohibitions in the Code against solicitation or advertising. See Canon 2, Disciplinary Rules 101–104, *Code of Professional Responsibility*, pp. 1124, 1132.

that many of their activist urges are inappropriate and professionally demeaning. Most members of the profession seem to succumb to these pressures or at least to rationalize their prosperous private practices in professional terms. The remarks of John G. Laylin, a senior partner in Covington and Burling (one of the most powerful of the Washington D.C. law firms) can probably be taken as typical: "Hell, I'm a lawyer, not a reformer. *We* are lawyers. We act as counsel. . . . You know, some of these younger people don't seem to understand the proper role of a lawyer. We're not here to save the world, or to force our own ideas on someone else, but to represent clients."[32] Many lawyers have resisted the profession's call for political quiescence reasonably well, and it is these activist lawyers who concern us. But resistance among activists to professional constraints tends to vary in important and revealing ways. After all, each step away from the professional path carries with it unethical connotations. In the following chapter, the thresholds of professional reluctance will constitute the organizing theme for understanding the objectives, methods, and potential political utility of the activist bar.

32. Quoted in Joseph C. Goulden, *The Superlawyers: The Small and Powerful World of the Great Washington Law Firms* (New York: Weybright and Talley, 1972), p. 52. Italics in the original.