LAW AND POLITICS *in the* UNITED STATES

Herbert Jacob

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Law and Politics
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To Lynn S. Carp

PREFACE

This book is intended to introduce readers to the American legal system, but the introduction is not conventional. I emphasize the legal system's inescapable links with the political arena; disputes are traced from their beginnings in their social contexts through many alternative dispute processes until they reach the courts—if they ever do. The book describes not only such familiar legal institutions as the bar and courts but also institutions that are often thought of only in terms of their governmental and political roles. Thus I discuss the ways in which administrative agencies and legislatures are integral parts of the American legal system, as central to law as are the courts.

All the readers of this book are users of the law and objects of legal actions, and many may become lawyers. It is my hope that those who do become lawyers will be more thoughtful about the power and limits of law as a consequence of reading this book.

As always, I have incurred many debts while writing this book. I am grateful to my students at the University of Wisconsin—Madison and the students of the summer institute on law and politics, sponsored by the American Judicature Society, who listened to lecture versions of this book as it was being written. My colleagues at Wisconsin and at Northwestern were as always supportive. I am particularly indebted to Jerry Goldman and Wes Skogan at Northwestern and Bert Kritzer and Joel Grossman at Wisconsin, who commented on segments of the manuscript. Malcolm Feeley and several anonymous readers critiqued it for my publisher; I did not always agree with their comments, but they always forced me to rethink what I had written and to improve it. The Glenn B. and Cleone O. Hawkins Chair in Political Science that I held at the University of Wisconsin made the task of writing this book easier. I am grateful to Rick Boyer for convincing me to write this book when he was Political Science editor at Little, Brown and Company and to Will Ethridge, Donald Palm, and John Covell for keeping me at the task. If there is any merit in the book, all of these people deserve part of the credit; all blame for the remaining errors of judgment or fact is mine.

Herbert Jacob
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PART I

Introduction

Law is often thought of as being the opposite of politics. Law seems dignified whereas politics seems seamy. Law appears predictable whereas politics seems typified by the unexpected. Law seems to search for justice while politics seems to seek the expedient.

Such perceptions, however conventional, are nevertheless misleading, for one cannot comprehend American law without understanding its roots in American politics. The first two chapters of this book provide guideposts to such an understanding. We first examine the several components of the American legal system and their many connections to the political arena. Then we closely examine the structure and conceptualization of law. This discussion will enable us to examine each segment of the American legal system in the chapters that follow.

CHAPTER 1

Law as Politics

Disaster struck a young couple in Long Island, New York, one day in October 1983.[1] Their joyful anticipation of the birth of a child turned into calamitous anxiety when they learned that their daughter suffered from multiple birth defects. We know the infant only as Baby Jane Doe, the name given her in the press and in court proceedings to protect her anonymity. She suffered not only from spina bifida, a defect in the vertebral column, but also from hydrocephaly and microcephaly, commonly known as water on the brain and an abnormally small skull and cranial capacity. The couple's consultation with their physician and other doctors indicated that the child would either die quickly or linger for two years if nothing were done to correct the defects. If immediate surgery were performed and if operations were repeated throughout her life, she might live for as long as twenty years. Even with such surgery, however, her life would be difficult at best. In all likelihood, she would be subject to epileptic seizures, paralyzed from the waist down, and bedridden. She would also be severly retarded.

What actions should parents take in the light of these options? Before medical science made intervention in serious illnesses possible, their situation would have been simpler: They would have had no choice but to wait until nature took its course and the child died. In 1983, however, dreadful choices faced them. They could authorize vigorous medical intervention in the hope of prolonging the life of their daughter, even though the quality of her life would probably always be minimal. Alternatively they could order only passive care with the knowledge that their child would die sooner rather than later.

Traditionally such painful decisions were the sole responsibility

1. This account of the Baby Doe case is based on reports that appeared in the *New York Times* from October 20, 1983 through October 1984. Key articles may be found in the issues for October 29, 1983 (I,30:3), November 13, 1983 (I,45:1), and January 12, 1984 (II,5:1). See also Jeff Lyon, *Playing God in the Nursery* (New York: W. W. Norton, 1985), pp. 45–55.

of parents. Others might offer advice and counsel but no one else could legally interfere with their choice. This, however, was not to be the case for the parents of Baby Jane Doe. They did consult clergy and doctors, and after considering the alternatives the couple decided against radical medical intervention, a decision that unwittingly pushed them into the midst of a legal maelstrom. Within days they and the hospital in which their child was being treated found themselves charged with child neglect and abuse. Lawrence Washburn, a New Hampshire private attorney who was active in the right-to-life movement, had somehow heard of the birth of this child and of her parents' decision. He sued in New York State courts to force the hospital to operate on the child.

From late October 1983 until mid-January 1984, the parents and the hospital were forced to defend themselves in both state and federal courts. The state trial court that heard the original case ruled for Washburn and ordered the operation, but after an immediate appeal a New York appeals court first suspended the trial court's decision and then reversed it. The federal government then entered the legal fight. President Reagan had embraced the pro-life position in his campaign and had even published a book supporting this stance.[2] Consistent with those views, the United States Department of Health and Human Services had issued administrative regulations that invited federal intervention in the care of infants such as Baby Jane Doe. Those regulations, however, had been challenged in court and ruled illegal because they had been issued without the required public hearings and public notice. In early 1984 the case of Baby Doe seemed to provide an ideal opportunity to promote the argument for federal intervention. The federal government consequently sued the hospital for access to its records on the treatment of the infant. That suit was also lost even though it was reported that the solicitor general of the United States had personally reviewed the appeal brief before it was submitted to the United States Court of Appeals.[3] At the same time the Department of Health and Human Services solicited public responses to new regulations that it had issued ten weeks after Baby Doe's birth. Those regulations provided for much less active

2. Ronald Reagan, *Abortion and the Conscience of the Nation* (Nashville, Tenn.: T. Nelson, 1984).

3. *New York Times*, November 20, 1983, p. I,42.

intervention by federal authorities, but they firmly established the federal government's interest in such incidents.

Congress also entered into the conflict. For several years opponents to abortion had been promoting legislation that would prohibit using public funds for abortions. With the prominence given to the Baby Doe case, Congress enacted a law in 1984[4] that expanded the definition of child abuse to include denial of care to newborns.[5] Because child abuse is not ordinarily a concern of the federal government, the law sought to force states to agree with the expanded definition by threatening them with the loss of federal grants if they did not establish procedures to prevent such abuse.

Finally, in April 1985 the Department of Health and Human Services promulgated new rules as authorized by the 1984 congressional act. Those rules require that full medical services be provided all infants unless they were "chronically and irretrievably comatose," or if treatment would only prolong an "inevitable death" or were so extreme "that it becomes inhumane to administer it."[6] In the meantime, Baby Jane Doe's parents consented to the operation which they originally refused. The child, although severely retarded, was still alive when the Department of Health and Human Services issued its regulations.

Few cases illustrate more dramatically the potential intervention of the law and politics into areas many people presume to be private. The litigation not only cost Baby Doe's parents thousands of dollars but also added to the anguish they already were suffering by observing their child's plight. Government officials and private citizens with no immediate interest in Baby Doe or her family were inserting themselves into the parents' decision-making process. Some, like Washburn, acted out of ideological concern; others, like the Reagan administration officials, were also motivated by the opportunity to promote their policy objectives. Some judges sided with Washburn and the federal officials; others — and they sat on the higher appeals courts — sided with the girl's parents and the hospital. Congress eventually sided with the Reagan administration's policies.

Baby Doe's case illustrates not only the vast possibilities for intervention by the law into affairs that have been traditionally considered private, but also the fundamental conflicts that are often visi-

4. Public Law 98-457.
5. *CQ Weekly*, September 22, 1984, p. 2305.
6. *New York Times*, April 16, 1985, p. 10.

ble in the legal and political arenas. Baby Doe's parents sought to protect their privacy and their parental right to take reasonable actions to care for their child without governmental interference. The right-to-lifers who sought to force medical treatment for Baby Doe advocated an absolute claim for the right to life for all persons as guaranteed under the Fifth and Fourteenth Amendments to the Constitution. Those advocates viewed the financial and emotional stresses imposed on parents as subordinate to the child's right to live. They also dismissed as irrelevant the claim that the quality of her life should be considered in the decision to provide medical care. As the Baby Doe case illustrates, the resolution of such conflicts is the function of both the legal system and the political process.

While the Baby Doe case was especially dramatic, it was not an unusual intervention of law into everyday life because law in the United States pervades every aspect of each person's life. It affects how people are hired, paid, retired, and fired. It governs the obligations of family and the conditions under which persons may break away from their family. It determines how much they must pay in taxes and their use of credit and the agreements they make to purchase goods and services. To an even greater degree, the law determines the shape of public institutions and their role in the political process. No sphere of life in the United States remains untouched by law.

It is therefore not surprising that law is at the center of all politics. Not only does the law affect how the political game is played, but it also is the goal of most political activity. People use politics to change or maintain a law, affect its administration, or influence its interpretation by the courts. They focus on the law because law is of paramount importance in our society. This book reflects the inextricable link between law and politics: it is as much about politics as about law.[7]

We first need to understand the meaning of "law," "legal system," "legal process," "politics," and "political process." I will use the term "law" to denote the body of legitimately authoritative statements

7. While hotly contested thirty years ago, this is now the conventional view of law and politics. It was first prominently expounded by Victor G. Rosenblum in 1955 in his *Law as a Political Instrument* (New York: Random House). It is also the assumption underlying Herbert Jacob, *Justice in America: Courts, Lawyers, and the Judicial Process*, 4th ed. (Boston: Little, Brown, 1984), the first edition of which appeared in 1962. For a contemporary view see Frances Kahn Zemans, "Legal Mobilization: The Neglected Role of the Law in the Political System," *American Political Science Review*, vol. 77 (September 1983), pp. 690–703.

that have the weight of governmental power behind them. By contrast, politics is the process by which a society makes authoritative allocations of values, to use David Easton's terms.[8] These definitions at once show the close relationship between law and politics. In modern societies in which customary law has mostly disappeared, almost all law is the product of political process. Law takes many forms, but in my meaning it is always connected with government.[9] Laws may emanate from legislatures, and we call such laws statutes. Many laws in modern societies emerge from the administrative process in the form of decrees and regulations such as the Baby Doe rules that regulate the treatment of children with severe birth defects, the standards that govern the disposal of toxic waste materials, or many of the rules that define income and its form of taxation. The judicial process also produces law in the form of judges' decisions interpreting statutes and regulations or extending customary or common law.[10] All of these institutions, which are sometimes referred to as the components of government, constitute the core of the legal system of the United States.[11] Just as political process refers to the activities surrounding the making, implementation, and interpretation of law, legal process denotes the various behaviors, both private and public, that result in the adoption, change, or maintenance of law.

There is considerable overlap between the political and legal processes. Both involve actions in Congress, administrative agencies, and courts. The statutes governing the payment of federal income taxes, for example, are part of the body of law as well as a product of

8. David Easton, *A Framework for Political Analysis* (Englewood Cliffs, N.J.: Prentice-Hall, 1965), p. 50.

9. This definition excludes law that is based purely on custom. Compare Roberto Magabeira Unger, *Law in Modern Society* (New York: Free Press, 1976), pp. 48–58. As Victor G. Rosenblum notes in *Law as a Political Instrument* (New York: Random House, 1955), p. 2, "the view of law asserted here is the traditional positivist view of men like Austin, Holland, and Kelsen. Law consists of general rules of external human action subject to enforcement by the coercive authority of the State or legal order." See also Donald Black, *The Behavior of Law* (New York: Academic Press, 1976), p. 2.

10. As Chapter 2 explains, not all laws have equal standing. Law embodied in a constitution is given more weight than statutory law, and statutory law is given more weight than administrative regulations. But this fact should not blind us to the fact that all three kinds of authoritative statements are a form of law.

11. My usage is somewhat different than that used by Lawrence M. Friedman in *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975), pp. 11–16, although the difference, I believe, is mostly one of terminology rather than substance. We both emphasize the reality of social practice rather than legal formalism.

the political process in Congress; the Internal Revenue Service is both part of the government and subject to political pressures and part of the legal institutions implementing the tax code.

There are, however, significant differences between the legal and political processes. In the debate over federal tax reform, for example, the political system responds mainly to elections and partisan pressures; the legal system, to specific disputes involving interpretation of the tax laws Congress has adopted. Whereas political parties and elections are central elements of the political process in the United States, they are more peripheral to the legal process. On the other hand, the activities of lawyers are central to the legal process but only marginal to the political process.

These terms — law, legal system, legal process, politics, and political process — will be constantly used in this book, for they define its core. To begin our analysis of law and politics in the United States, we need to explore the boundaries of these concepts.

Key Definitions

Law: Legitimately authoritative statements that have the weight of governmental power behind them

Legal System: The relationships between the institutions that produce, implement, and interpret law (legislatures, administrative agencies, and courts), the gatekeepers to those institutions, and those who wish to use the law

Legal Process: The activities and procedures that produce, implement, or interpret law

Politics: The process by which a society makes authoritative allocations of values

Political System: The relationships between the institutions of government (legislatures, administrative agencies, and courts), the gatekeepers to those institutions, and those who wish to benefit from the authoritative allocations of values

The Legal System

Legal system is a comprehensive term. It encompasses the entire array of governmental institutions, the social structures surrounding