CLIENTS AND LAWYERS

Securing the Rights of Disabled Persons

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To Kris, Pat, Kathryn
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Introduction

In 1977 a journalist declared in *Newsweek* magazine that the United States is in the midst of "one of the great unnoticed revolutions in U.S. history: the ever-increasing willingness, even eagerness, on the part of elected officials and private citizens to let the courts settle matters that once were settled by legislatures, executives, parents, teachers—or chance."[1] The article in which this comment occurred represents one of a small swell of complaints heard in the middle and late Seventies about a perceived increase in the "lawyerization" or "judicialization" of American life.

These popular complaints have two different emphases. Some focus on the role of lawyers and courts in facets of private life, such as divorce, personal injury, real estate transactions, and probate.[2] Complaints in this sphere tend to be that lawyers are greedy, high-handed, uncaring, or simply too expensive. Other popular excoriations focus on courts' actions in the public sphere on issues such as desegregation, abortion, and prison conditions.[3] In this, the popular press has a close counterpart in scholarly social science and legal literature.[4] Criticism of "judicial activism" has been heard for years from some scholars on the grounds that this takes away control over social policy from the majority and its duly elected representatives.

A possible common thread in the criticisms of lawyers and courts on the personal and policy levels is a sense of loss of control over important decisions in one's life. On the policy level court policy making is problematic because courts are not accountable to majority opinion as much as the other policy-making branches of government are. Indeed, they

are not supposed to be, but we do expect courts not to be too far ahead of or behind majority views on most subjects.

On the personal level individuals feel considerable ambivalence about their relationships with private lawyers. While we want our lawyer to prevent, cure, or at least shield us from our legal difficulties, we are often dissatisfied with the results. Twenty-eight percent of women responding to a survey about divorce lawyers reported that they were dissatisfied with their lawyers.[5] Complaints to lawyer-discipline agencies and malpractice suits "soared" in the late Seventies.[6] At the base of some of the unhappiness is uncertainty about the extent to which a lawyer is, in Hobbes' terms, an actor or an agent, that is, one who acts independently and takes initiative or one who acts only on the instructions of another.[7]

Confusion about the degree of autonomy of lawyers becomes politically significant when courts make policy at the behest of lawyers representing groups of people who are not formally part of the suit or who at least do not personally speak on their own behalf. The problem of knowing whom exactly the lawyers represent is greatest in public interest litigation, as evidenced by the endless debates over who determines the public interest.[8] The problem is almost as great in relation to populations who are presumed to need the protection of courts precisely because they are not certain to know their own interests, such as mentally disabled people and children.

With other types of clients, presumably, the lawyer's role is reduced from identifying the interests that need defending to merely applying his or her more sophisticated understanding of the legal and judicial system to obtain the interests identified by the client, but the line between these tasks is not clear. The survey on divorce lawyers found misunderstandings about whether the lawyer is expected only to respond to questions directly asked or is also expected to anticipate potential questions the client *should* ask.[9] That this problem exists even in personal litigation suggests the need to look closely at lawyer–client relations in social policy litigation. The extent to which lawyers or clients are directing the litigation may influence the substantive policy sought, the participants' attitudes toward the process, which may in turn influence their subsequent involvement with the judicial or political system, and the broader public's perception of the litigation.

This book describes the development of a style of social policy litigation which features greater participation by clients and goals and strategies different from the classic model of social reform litigation, as practiced by the NAACP. This new style is more integrated conceptually and practically with nonjudicial political strategies for achieving social change. Treating litigation more like other politics, it reduces the emphasis on the lawyer as expert. This new style arguably has the potential for achiev-

ing some kinds of results better than the NAACP model—fewer problems with a formal court victory going unimplemented, less client ignorance of and alienation from the judicial system, and more lasting involvement of people in political action.

To make this argument, this book brings together the concerns of two different sets of literature—that on interest group litigation, which tends to concern choices of strategy and conditions of success or failure with an emphasis on the lawyer's role, and that on mass political behavior in the form of political participation, community organization, and voluntary association and interest group membership. These two sets are used to inform and expand what little literature there is which expressly addresses questions of the client role in litigation.

The book does not claim that the new style of group litigation is a salvation for all the problems of all groups trying to use the courts for political relief or even that it is necessarily the "wave of the future" in group litigation. There is still a place for the familiar NAACP-style litigation; the new style requires certain conditions which may not always be present. Nevertheless, social reform litigation which involves the client more and achieves some success in obtaining the group's goals can happen and has happened.

The example presented is litigation occurring in the mid-Seventies over the provision of public transportation accessible to persons with physical disabilities. The disability rights movement produced groups which were able to initiate and pursue litigation at the grassroots level without its being taken over by lawyer-dominated national interest groups. Their use of the courts was highly politicized, in the sense of approaching litigation with many of the same assumptions with which they simultaneously pursued their goals in other political channels, and they achieved at least a moderate success. It is important that scholars of interest group litigation recognize this new style, exemplified by the accessible transit litigation, as a significant political use of the courts and a form of grassroots political participation.

The organizational plan of the book combines analytical issues concerning social reform litigation raised in other studies with evidence from the accessible transit cases and the disability rights movement. Chapter 1 presents the development of conditions in the larger political environment that have made possible the new style of litigation and introduces the characteristics of that style. Chapter 2 presents the argument that the extent of client participation is significant for the achievement of long-term success of litigation goals. Chapter 3 examines the political context of the accessible transit cases with a review of the development of the disability rights movement and accessibility laws. Chapter 4 introduces the five cases of accessible transit litigation studied in depth and the clients and lawyers bringing them. Chapter 5 uses

these cases to illustrate the characteristics of the new style of litigation. Chapter 6 specifically looks at how this new style helped to protect disabled litigants from some of the risks of litigation encountered by client groups in the past. Chapter 7 discusses the various determinants of client participation that can be gleaned from these case studies in combination with the literature on involvement in other political or quasi-political activities. Chapter 8 looks at factors other than client participation which influenced the success or failure of the transit access cases. Finally, chapter 9 draws some conclusions about the applicability of findings based on these lawsuits for social reform litigation generally, and for the women's movement in particular.

Notes

1. Jerrold K. Footlick, "Too Much Law?" *Newsweek*, January 10, 1977, p. 44.

2. E.g., Vivian Cadden, "The Case Against Divorce Lawyers," *McCall's*, November 1976, pp. 169+; Margaret Daly, "What Are Your Rights with a Lawyer?" *Better Homes and Gardens*, November 1975, pp. 40+; "Those #★%&!!! Lawyers," *Time*, April 10, 1978, pp. 56–59+; "Lawyers Giving Public a Raw Deal?" *U.S. News and World Report*, December 1, 1980, pp. 45–46; C. Salzberg, "Should You Trust Your Lawyer?" *Working Woman*, September 1980, pp. 30–31; Ted Gest, "Why Lawyers Are in the Doghouse," *U.S. News and World Report*, May 11, 1981, pp. 38–41.

3. E.g., William F. Buckley, "Curb the Courts?" *National Review*, May 26, 1972, pp. 606–7; Jerrold K. Footlick, "We've Got Too Much Law!" *Reader's Digest*, May 1977, pp. 96–100; F. Hunt, "Lawyers' War Against Democracy," *Commentary*, October 1979, pp. 45–51; John M. Ashbrook, "Are Judges Abusing Our Rights?" *Reader's Digest*, August 1981, pp. 77–80. See also, Jerold S. Auerbach, "A Plague of Lawyers," *Harper's*, October 1976, pp. 37–44.

4. To mention only a few examples from this vast literature, representing various points of view on judicial review: Charles L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* (New York: The Macmillan Co., 1960); Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: The Bobbs-Merrill Co., 1962) and *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970); Herbert Wechsler, *Principles, Politics and Fundamental Law* (Cambridge: Harvard University Press, 1961); Charles Hyneman, *The Supreme Court on Trial* (New York: Atherton Press, 1963); Howard E. Dean, *Judicial Review and Democracy* (New York: Random House, 1966); Louis Lusky, *By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution* (Charlottesville, Va.: The Michie Co., 1975); and Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977).

5. Cadden, "The Case Against Divorce Lawyers," p. 169.

6. Gest, "Why Lawyers Are in the Doghouse," p. 38.

7. Thomas Hobbes, *Leviathan*, ed. Michael Oakeshott (New York: Collier Books, 1962), chap. 16, pp. 125–26.

8. E.g., Frank J. Sorauf, "The Public Interest Reconsidered," *Journal of Politics*

19 (1957): 616–39; Glendon Schubert, *The Public Interest* (Glencoe, Ill.: The Free Press, 1960); Virginia Held, *The Public Interest and Individual Interests* (New York: Basic Books, 1970); Clarke E. Cochran, "Political Science and the 'Public Interest,' " *Journal of Politics* 36 (1974): 327–55; Barry M. Mitnick, "A Typology of Conceptions of the Public Interest," *Administration & Society* 8 (1976): 5–28.

9. Cadden, "The Case Against Divorce Lawyers," p. 169.

Contents

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Chapter 1

The Changing Environment of Social Reform Litigation

Pluralist theory emphasizes the importance of interest groups in the functioning of all institutions of the American political system, and courts are no exception.[1] Indeed, because the court's role has traditionally included the protection of minority rights, Clement Vose points out, "there is a special appropriateness for small, organized interests to work through litigation."[2] Other factors, such as the geographical decentralization of the federal courts, have made litigation a practical as well as appropriate means of influencing federal decision making.

As Vose has documented, minority interest groups have been using the courts at least since the turn of the century, but the strategy has become particularly widespread in the latter half of the century. The greater availability of low-cost legal assistance to more groups through federally-funded legal services and the public interest law movement as well as court decisions in the 1960s liberalizing doctrines about standing and attorney's fees contributed to the march to the courts.[3] Perhaps the greatest stimulus to the use of litigation as a political strategy, however, was the success of the National Association for the Advancement of Colored People (NAACP). By the time of *Brown v. Board of Education*[4] in 1954, the NAACP and its affiliated Legal Defense Fund (LDF) had won 34 of 38 cases before the Supreme Court.[5]

The desegregation litigation of the NAACP and the LDF was the first planned campaign of affirmative use of the courts for social change, and it has been the model for many other groups. The NAACP's approach is still the prototype of social reform litigation in the political science literature. American government textbooks and books on interest groups tend to use the NAACP as their example of group litigation. Social reform

litigation is much more varied than this one model, however. Litigation strategy reflects particular issues and historical circumstances.

The NAACP developed its strategy precisely because blacks were excluded from other channels of policy making. Facing statutes that were blatantly discriminatory, but duly enacted, the NAACP lawyers had to rely on constitutional arguments to challenge the unfavorable laws. The elements of the NAACP strategy, such as encouraging the publication of law review articles to provide scholarly support for their legal arguments, soliciting *amicus curiae* briefs, coordinating test cases in several geographic locations, and developing full trial records to facilitate appeal, were all aimed toward the establishment of constitutional precedent.

Such careful litigation planning was possible because the NAACP was the preeminent national organization working through the courts for black civil rights at the time. Through its volunteer National Legal Committee, the NAACP staff not only enjoyed the advice of prominent lawyers around the country interested in civil rights, but also enlisted their cooperation in pursuing the goals and methods of the national organization when they took charge of cases at the trial court level.[6] Furthermore, the other organizations for black advancement existing at the time were not using litigation as a strategy. The Urban League, for instance, concentrated more on economic issues, such as persuading employers to hire blacks.[7]

The NAACP clients did not challenge the lawyers for control of the litigation planning any more than did other organizations. Local groups and individuals were not eager to go into court at all, because at the time the litigation campaign began, blacks risked immediate reprisals for any attempt to challenge the status quo. The NAACP membership scattered around the country in local branches helped to identify willing plaintiffs and raise money, but had little autonomy.[8] In short, the NAACP lawyers were able to supervise and control desegregation litigation to an extent unmatched since by any other group litigating on any other issue.

A great deal has happened in the history of social reform movements in America since *Brown v. Board of Education*.[9] While the use of litigation is still popular, litigation style and strategy have changed, reflecting changes in the environment and the participants. Three developments in particular have influenced social reform group litigation. The first two are broad sociopolitical changes, while the third is a more narrow legal change.

(1) The growth of collective "rights consciousness" has produced more numerous, more assertive litigating groups. Furthermore, within those groups, challenges to professional expertise in the name of "citizen participation,"

"community control," or "consumer representation" have resulted in the lawyers having less complete control over the direction of litigation.

(2) The increase in statutory and regulatory responses to social problems has created multiple pressure points within government for achieving policy goals. Changes requiring less than a new constitutional interpretation can be sought through nonjudicial channels.

(3) Access to the judiciary has expanded through the use of legal mechanisms for articulating collective problems, especially organizational standing to litigate on behalf of group members. While this entry to the courts has already closed a little from its widest opening in the early Seventies, it has not returned to its original narrow confines.

The consequence of this multiplication of participants and opportunities to effect change is that social reform group litigation has become more decentralized with less agreement on or coordination of goals and strategies. The greater participation of nonlawyers in decision making and the greater realization by lawyers of the limitations of judicial pronouncements alone to induce change have resulted in a melding of political and legal strategies. Some litigation has become so integrated with political activity outside the courts that its goal is as much to increase bargaining leverage externally as to secure victory in court, as an examination of the interrelatedness of the three environmental changes and their ramifications for social reform litigation reveals.

Collective Rights Consciousness

The first of the three changes in the political environment of social reform litigation in the past thirty years is the growth of collective rights consciousness—the recognition that problems previously thought to be personal are instead collective and the rising sense of entitlement to relief from those problems. Although sometimes there is a strong self-help element as well, rights consciousness often results in a demand that the society or government take responsibility for and do something about the problems.

Group rights consciousness did not, of course, emerge suddenly in the mid-twentieth century. Its roots lie in the social dislocation created by industrialization and urbanization in the nineteenth century. Both social and economic relationships underwent what Mauro Cappelletti calls "massification."

> Because of the "massification" phenomena, human actions and relationships assume a collective, rather than a merely individual, character: they refer to groups, categories, and classes of people, rather than to one or a few individuals alone. Even basic rights and duties are no longer exclusively the individual rights and duties of the eighteenth or nineteenth century declarations of human rights

inspired by natural law concepts, but rather meta-individual, collective, "social" rights and duties of associations, communities, and classes.[10]

Rights consciousness seems to exist in ambiguous interrelationship with the government's assumption of responsibility for social problems. In some situations government action is a response to the demands of rights-conscious citizens, while in other situations it may be the conferral of rights by an authoritative source which stimulates the rights consciousness of the group. For example, political mobilization of people with disabilities really began only after several pieces of beneficial legislation were passed but then went largely unenforced.

Generally, there is a dialectical relationship of sorts between rights-conscious groups and government actions. Some commentators credit the NAACP litigation campaign, particularly its victory in *Brown v. Board of Education*[11] with stimulating the mass movement phase of the civil rights movement, usually dated from the Montgomery, Alabama, bus boycott which began less than six months after the Supreme Court's implementation decree in *Brown II*.[12] In the words of Richard Kluger: "It [*Brown*] meant that black rights had suddenly been redefined; black bodies had suddenly been reborn under a new law. Blacks' value as human beings had been changed overnight by the declaration of the nation's highest court."[13]

Participation in mass action tactics, such as boycotts, marches, and sit-ins, further heightened group rights consciousness and increased self-esteem.[14] This in turn led to greater demands for the recognition of rights such as an end to housing and employment discrimination.

This process was not confined to blacks. The rhetoric of President Kennedy's "New Frontier" and President Johnson's "Great Society" raised expectations that government could and would tackle all social problems. The blurring of expectations and rights led Daniel Bell to label the trend disparagingly, "the revolution of rising entitlements."[15] The Sixties saw the "rights revolution" spread to even more groups—senior citizens, environmentalists, native Americans, and consumers, to name only a few.

The federal government's largest effort, the War on Poverty, launched in 1964, drew its inspiration from what Samuel Krislov calls the "twin strands of the civil rights movement: the moral-ethical emphasis on analysis of problem areas and the quasi-existentialist emphasis on action and personality transformation through effective individual action."[16] Strategically, it combined the litigation approach of the NAACP and the emphasis on community organizations and indigenous leadership of Saul Alinsky, who had long before recognized the connection between direct participation and political consciousness.[17]

The activism of the Warren Court in addressing the problems of racial