LAW AND LIBERALISM IN THE 1980S

The Rubin Lectures at Columbia University

Edited by

VINCENT BLASI

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THE SAMUEL RUBIN PROGRAM FOR LIBERTY AND EQUALITY THROUGH LAW

The Samuel Rubin Program for Liberty and Equality Through Law was established at Columbia Law School in 1982. The program was made possible by a gift from the Reed Foundation of New York City. The program is named in honor of the late Samuel Rubin, a noted philanthropist and advocate of political tolerance and international understanding. Mr. Rubin was well known during his lifetime for his courageous opposition to Senator Joseph McCarthy and his generous gifts in support of medical services in poor communities, medical and legal education for members of minority groups, music education in Israel, and scholarships for Arab students in Israel. He endowed a chair in anthropology at Brandeis University and supported a variety of programs at the law schools of New York University and Columbia University.

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INTRODUCTION

Liberalism. Mere mention of the word seems to stimulate controversy—among voters, among philosophers, among proponents of clarity and precision in the use of the English language. Adam Smith was said to be a liberal. So were Thomas Jefferson, John Stuart Mill, William Gladstone, Oliver Wendell Holmes, Franklin D. Roosevelt, Huey Long, Felix Frankfurter, and William O. Douglas. Individualists and collectivists, traditionalists and revolutionaries, idealists, pragmatists, and fatalists—all have marched under the liberal banner at some time or another. For years the term "liberal" was problematic because almost everyone claimed to be one. Recently, the political cash value, and even the intellectual cachet, of the label "liberal" has plummeted. But through the vicissitudes and across a variety of settings, the concept of liberalism has figured prominently in the shaping of our political and legal cultures.

In the context of American law, the term "liberal" is most often associated with the high regard for individual rights displayed by the Warren Court, particularly individual rights that benefit the dispossessed and serve to check the depredations of the powerful. In addition, the legal structures introduced during the New Deal, such as welfare entitlements and regulatory agencies with expertise, real power, and political independence, are usually considered integral to the liberal vision of law. Theorists sometimes assert that this set of commitments is neither coherent nor stable, that rights work at cross purposes with egalitarian ideals, that expansive government never expands the freedom of its subjects, that one simply must choose between liberty and equality.

These difficulties, if such they be, were minimized during the years when the vigorous idealism of the Warren Court set the tone for the American legal culture. During the 1980s, however, the liberal view of law was the subject of unremitting challenge. Two schools of thought emerged as dom-

inant influences during this period, and both in different ways rejected many of the premises of liberalism. One school, critical legal studies, attacked liberalism from the left. Adherents to this school strongly reject the liberal claim that certain fundamental principles of fairness and humanity can be identified and enforced by the legal system. Critical legal scholars also believe that it is self-deception to view law as a promising instrument of social reform. These critics argue that the dominant mission of legal scholarship should be to expose the inherent class bias of law and to undercut the efforts of both liberals and conservatives to make law serve as a source of legitimation for existing political structures.

Liberalism as a legal idea was also challenged from the right by the law and economics movement. Although there are liberal lawyer-economists and there is nothing inherently conservative or reactionary in the use of economics in legal analysis, the fact is that conservative economists have exerted disproportionate influence in legal scholarship. The essential message of this group is that all legal doctrines should be viewed from the perspective of market efficiency, and should be interpreted wherever possible in a manner that serves the goals of efficiency and wealth maximization. What makes the right wing or "Chicago School" economists critical of liberalism is their conviction that there exist no consensual or transcendent values such as equality or fairness that cannot be subsumed under the individual preferences that persons assert in their market behavior. Any effort by judges or legislators to promote such values in opposition to market outcomes is, in the opinion of these economists, both shortsighted and unfair.

The critical legal studies movement and the law and economics movement won over numerous adherents among lawyers during the 1980s. There is a sense of intellectual excitement and vitality about both movements. In contrast, during the last decade liberals were placed on the defensive in legal debate. It is a common perception that legal liberalism is in decline, and that no new important ideas have enriched the liberal perspective on law in recent years.

This book is intended to serve as a partial response to that perception. Drawing from the Samuel Rubin Lecture Series at Columbia Law School, the book brings together essays by seven important liberal thinkers of the transatlantic legal community. The first five essays address particular issues of law that have been at the center of the debate between liberalism and its critics. The issues considered embrace the fields of election law, freedom of the press, international law, poverty law, and criminal law. The last two essays address more general themes. One deals with the question of the proper baseline assumptions of the Supreme Court in interpreting the Constitution. The other deals with the question whether constitutional doctrines in the United States can serve as a model for other countries. The

book is designed to illustrate the range and vigor of the liberal perspective on law.

No orthodoxy of liberal thought can be gleaned from these pages. The authors are too concerned about the problems and issues they address to permit their major premises to dwarf the analysis. But if no orthodoxy is discernible, certain common themes are. The essays in this book tie together in some interesting ways. A brief look at those connections may help readers to answer the oft-discussed question: What happened to the liberal view of law during the 1980s?

One belief that is shared by all the authors is that law has an important moral dimension, that legal claims cannot be resolved exclusively on the basis of linguistic analysis of authoritative texts or deference to existing political preferences and power relationships. Thus, Judge J. Skelly Wright criticizes the Supreme Court for its mechanical reading of the First Amendment in striking down limits on campaign expenditures. He argues that the gross disparities in wealth that differentiate political candidacies and ballot proposition campaigns should not be taken as simply given or natural in deciding the constitutional fate of electoral spending restrictions. Rather, the concept of representative democracy furnishes an ideal of fairness and balance in the conduct of elections, and that ideal can be incorporated in First Amendment analysis, he asserts.

Anthony Lewis also draws on the ideal of representative government in his trenchant critique of modern developments in the law of libel. He reads the Supreme Court's magisterial decision in *New York Times v. Sullivan* to embody the proposition that effective and vigorous criticism of government is the linchpin of representative democracy, so important that the protection and encouragement of such criticism must be considered one of the foremost priorities of the constitutional regime. Mr. Lewis claims that the practical dynamics of libel litigation pose a serious challenge to the *Sullivan* ideal. He recommends, accordingly, that the immunity against libel actions accorded critics of government be strengthened, even beyond the seemingly protective principles of the *Sullivan* decision itself.

Abram Chayes disputes the contention that international law, and particularly adjudication in the International Court of Justice, can play no role in the resolution of the conflict between the United States and Nicaragua. He believes there are principles of law, judicially discoverable and manageable, that govern the situation in which a foreign nation participates in efforts to undermine a domestic regime. Chayes sees in the rule of international law an egalitarian ideal: "[I]t is only in the Hague that Nicaragua can face the United States on equal terms. It is the only forum where the outcome is not preordained by the disparities of military and economic power between the parties."

In a similar spirit, Charles Black disputes the contention that constitutional law can play no role in alleviating the crushing burden of extreme poverty. He demonstrates that the Constitution is not silent on the subject of minimum standards of livelihood, and that there exists a rich tradition of judicial reasoning of the sort required to justify the recognition of a constitutional right to livelihood. Like the other authors in this book, Black objects to the view that law must defer to existing distributions of wealth and power: "The way I want to see thought reformed is by our ceasing to view the elimination of poverty as a sentimental matter, as a matter of compassion, and our starting to look on it as a matter of justice, of constitutional right."

Sanford Kadish emphasizes the moral underpinnings of the criminal law in examining the law of excuses, an area often said to be dominated by practical concerns regarding deterrence and the feasibility of proof. He finds a unifying moral principle that explains the criminal law's treatment of such factors as duress, ignorance of facts or law, addiction, and insanity. That principle, which derives from the liberal conception of moral agency, is that a person should not be held criminally responsible for an act that cannot be considered morally blameworthy in light of the capacities of the actor and the circumstances surrounding the act.

Cass Sunstein criticizes the Supreme Court for missing the moral point of the constitutional culture's emphatic rejection of the case of *Lochner v. New York*. That case, which held maximum hour legislation unconstitutional, has been considered for over fifty years the model of an improper interpretation of the Constitution. Sunstein claims that what makes *Lochner* wrong is not that the Court invalidated state legislation that served a rational purpose and violated no explicit constitutional guarantee, but rather that the Justices treated the existing distribution of bargaining power between employers and employees as presumptively ordained by the Constitution. He detects in some recent Supreme Court decisions a similar tendency to use as a baseline for constitutional interpretation the existing distribution of wealth and power as recognized, and in some respects created, by the common law. He argues that moral principles should have a larger role to play in constitutional analysis than common law doctrines and market outcomes. Like other authors in this collection, Sunstein believes that the existing distribution of wealth and power should not merely be reflected in legal doctrine, but rather should be subject to moral evaluation through the process of law.

Anthony Lester, an English barrister who has championed the cause of human rights in Europe, comments upon the moral force exerted abroad by the American Bill of Rights. He thinks that Americans underestimate the impact in other nations of the pathbreaking work of the United States Supreme Court in recognizing individual rights. He also thinks American courts have missed some opportunities to learn from the rights jurisprudence of

foreign courts, as in the case of the European Court of Human Rights, which in 1981 recognized the right of homosexual adults to engage in consensual sexual activity. Lester stresses the moral foundations of rights, a key to their exportability, and expresses the "hope that the United States judiciary will not retreat from the strong interpretation of the Bill of Rights into literalism, positivism, and historicism."

The belief, shared by the contributors to this book, that law must be informed by moral principles generates derivative themes that appear repeatedly in these pages. One is the notion of positive freedom, the idea that government has affirmative duties to its citizens to facilitate the meaningful exercise of freedom. Closely related to the idea of positive freedom is the view that law should play a role in shaping some of the basic structures of the society. Liberals are reluctant to view structural injustices as "given," or too basic to be amenable to legal redress. In their willingness to address fundamental questions, in their unwillingness to treat law as a problematic and very limited force for social ordering, these authors share a perspective that was not in the ascendancy during the 1980s.

Historically, liberalism seems to gain adherents in periods of optimism, when ideals are treated as worthy objects of aspiration rather than unrealistic, and therefore false, promises. In the Western world, the 1980s was not a decade of idealism. The rich grew more materialistic and less public spirited. The poor grew more impoverished, more dependent on drugs, and more prone to commit (and be victimized by) crime. At all levels of the socioeconomic scale, racial hostility became more intense and overt; expressions of racial prejudice that would have been utterly unacceptable a few years earlier became the standard fare of public debate and private conversation. The 1980s was a decade that invited cynicism, resignation, and despair.

A striking feature of the essays in this book is the refusal of the authors to be swept up in the pessimism, escapism, and passivity of their times. These authors are realists and pragmatists. They examine the reality of injustice and the practicality of legal reform. They offer no doctrinaire solutions. Nevertheless, what most unites the essays in this collection is the way the authors take ideals seriously. Each essay, in its own way, proceeds from the premise that it is the mission of law, and of legal scholarship, to give voice to principles of justice even when the environment is unfavorable. Charles Black captures the resilient spirit that each of these authors displays. Explaining the importance of developing the liberal perspective on law in an age dominated by illiberal attitudes, Black observes: "A period of no power is a period for the reformation of thought, to the end that when power returns it may be more skillfully, more fittingly, used."

Legal liberalism is not dead; it is in exile, hard at work and growing.

LAW AND LIBERALISM IN THE 1980s

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MONEY AND THE POLLUTION OF POLITICS: IS THE FIRST AMENDMENT AN OBSTACLE TO POLITICAL EQUALITY?

J. Skelly Wright

In the name of the very first amendment in our Bill of Rights, the present Supreme Court has put serious obstacles in the path of our society's advancement toward political equality through law. In two vitally important and, in my judgment, tragically misguided first amendment decisions, *Buckley v. Valeo*[1] and *First National Bank of Boston v. Bellotti,*[2] the Court has given protection to the polluting effect of money in election campaigns. As a result, our political system may not use some of its most powerful defenses against electoral inequalities. Concentrated wealth, often channeled through political action committees, threatens to distort political campaigns and referenda. The voices of individual citizens are being drowned out in election campaigns—the forum for the political deliberations of our people. If the ideal of equality is trampled there, the principle of "one person, one vote," the cornerstone of our democracy, becomes a hollow mockery.

Buckley and *Bellotti* create an artificial opposition between liberty and equality. The first amendment tradition of leading cases and scholarly writings shows that the ideals of political equality and individual participation are essential to a proper understanding of the first amendment. Campaign spending reform is imperative to serve the purposes of freedom of expression. Within the confines of *Buckley* and *Bellotti,* only limited reforms are permissible. More effective measures will be possible only if the Court reconsiders these unfortunate precedents.

MONEY AND THE POLLUTION OF POLITICS

The corrosive effect of money on the political process is not new to this country or to the modern era,[3] but the problem of money in politics has

taken on a new urgency in the American politics of the 1980s. The development of communications technology and campaign techniques has made the political impact of money even more potent and the political consequences of meager financial resources even more devastating. Financial inequalities pose a pervasive and growing threat to the principle of "one person, one vote," and undermine the political proposition to which this nation is dedicated—that all men are created equal.

The Legal Framework

In the early 1970s, the Watergate scandals gave impetus to popular demand for strong measures to purify the political process,[4] culminating in 1974 with the passage of the Federal Election Campaign Act.[5] The legislation adopted contribution limits,[6] comprehensive spending limits,[7] and public financing of presidential campaigns.[8] It created a new federal agency[9] to enforce these laws and to supervise campaign finance reporting and disclosure.[10] It did not, however, establish a system of public funding for House and Senate elections,[11] missing a golden opportunity, not since recaptured, to diminish the influence of money in congressional politics.

Because it did not reach congressional campaign financing, the 1974 act did not go far enough. But in the 1976 decision of *Buckley v. Valeo,*[12] upholding parts of the 1974 act but striking down other basic provisions, the Supreme Court decided that the legislation had gone too far. The Court accepted public financing of presidential elections[13] and held that Congress could constitutionally attach conditions—including spending limits—to the acceptance of those funds.[14] It also approved the reporting and disclosure requirements for all federal candidates and committees[15] and agreed that ceilings on campaign contributions were justified by the need to prevent corruption and the appearance of corruption.[16] The *Buckley* decision gutted vital portions of the legislation, however. Equating spending with speech,[17] the Court treated the first amendment as a near-absolute in the sphere of political debate.[18] It unequivocally struck down the act's limits on overall campaign spending by a candidate who does not receive public financing restrictions on independent expenditures in support of or against a candidate, and ceilings on candidate spending from personal or family funds.[19] The Court in *Buckley* insisted that "the concept that government may restrict the speech [i.e., spending] of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment."[20]

Justice White, who had practical experience in nationwide campaigning in 1960 as coordinator of John Kennedy's preconvention campaign in Colorado and then as head of National Citizens for Kennedy, was the sole mem-

ber of the Court to disagree with the Court's holding that expenditure limits violate the first amendment.[21] He rejected the Court's contention that money is speech. Writing with an apparent touch of sarcasm, he observed: "[A]s it should be unnecessary to point out, money is not always equivalent to or used for speech, even in the context of political campaigns."[22] In his view, expenditure ceilings reinforced the contribution limits and helped "eradicate the hazard of corruption."[23] He took judicial notice that

> [t]here are many illegal ways of spending money to influence elections. One would be blind to history to deny that unlimited money tempts people to spend it on *whatever* money can buy to influence an election. On the assumption that financing illegal activities is low on the campaign organization's priority list, the expenditure limits could play a substantial role in preventing unethical practices. There just would not be enough of "that kind of money" to go around.[24]

Like the congressmen and senators—who were presumably more knowledgeable than most about corruption in politics—who passed the 1974 act, and unlike the other Justices, Justice White recognized and understood the realities of political campaigns.

Two years after *Buckley,* the Court again repudiated the goal of political equality in *First National Bank of Boston v. Bellotti.*[25] Trying to prevent one-sided corporate messages from swamping referendum campaigns, Massachusetts had enacted a statute prohibiting corporate expenditures on statewide referendum issues not directly related to a corporation's business interests. The Supreme Court, however, struck down the statute, relying on *Buckley's* facile equation of spending and speech, and insisting that there was no possibility of corruption in a referendum campaign.[26] The Court thereby effectively declared open season for the influence of concentrated wealth upon initiative and referendum campaigns.[27]

In my view, these two decisions—though they quote the landmarks of our first amendment heritage—enunciated principles that are, to borrow the words of the *Buckley* Court, "wholly foreign to the First Amendment."[28] The two decisions have also had a direct, significant, and pernicious impact on political campaigning in America.[29]

The federal campaign reform provisions that survived *Buckley v. Valeo* have worked well. The disclosure and reporting requirements allow citizens and the press to discover the sources of a candidate's financial backing.[30] Public financing of presidential campaigns has relieved candidates of much of the draining, demeaning, and obligation-creating task of begging for funds from large contributors. At the same time, the limits on spending by candidates who accept financing are sufficiently high to allow ample discussion of the issues.[31]

A similar program for congressional campaigns would also pass judicial muster, but so far, despite strenuous efforts by reformers, Congress has been unwilling to extend public financing to House and Senate campaigns.[32] Money continues to infect House and Senate races, campaigns for state and local offices, and referendum and initiative voting. In these political contests, democracy is often shadowed by lopsided inequalities in campaign resources. The predominance of money comes at the expense of the ideals of liberty and equality that underlie our political system.

Political Action Committees

Political action committees (PACs), perhaps the fastest growing phenomenon in modern American politics, epitomize the contemporary threat to electoral integrity. The stark reality of PACs is that they bring the power of concentrated wealth to bear on officeholders and candidates—national, state, and local—on behalf of special interests. Although only a small fraction of these groups promotes particular ideologies or advocates single issues,[33] PACs generally represent the interests of organizations, such as corporations, labor unions, and trade associations, that are forbidden by law to contribute or spend directly in federal campaigns.[34]

In recent years, PACs—especially those connected with corporations and trade associations—have grown explosively in numbers and influence. Provisions in the 1974 act facilitated their formation and operation.[35] In 1974 there were 89 corporate PACs; now there are 1,327.[36] Between 1976 and 1980, PACs more than doubled the amounts of money they poured into House and Senate campaigns—$22.6 million in 1976, $35.2 million in 1978, and $55.3 million in 1980.[37] And PACs are taking on growing importance in the strategies of candidates and their fund raisers.[38] They are rapidly becoming the dominant force among categories of contributors. The PAC component of House candidates' campaign funds has risen steadily from 17 percent in 1974 to 26.4 percent in 1980.[39] And PACs have far outdistanced the federal campaign funding contributions of all national, state, and local political parties combined.[40]

While the overall figures are impressive, the patterns of PAC spending make them an even more formidable influence in congressional politics. PACs concentrate their giving upon strategic categories of candidates—those who are more likely to win and to have useful influence in Congress. PACs rarely contribute to candidates who lose in the primary,[41] and they donate much more heavily to incumbents than to challengers.[42] In addition, some PACs, especially those with ideological or single-issue orientations, spend large sums of money on highly effective campaigns against "hit-listed" candidates. Collectively, PACs devoted more than $14 million in 1980 to independent campaign activities for or against particular candidates.[43] Because *Buckley*