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TEST CASE LITIGATION AS A SOURCE OF SIGNIFICANT SOCIAL CHANGE

RICHARD A. DAYNARD*

Particularly since the "Warren Court" handed down its landmark decisions on school desegregation,[1] reapportionment,[2] and the rights of the accused,[3] many Americans have come to believe in test case litigation as an abundant source of significant social change in a politically "leftward" direction. One demonstration of this belief is the frequency of newspaper articles about attempts to have a single state trial court judge or a three-judge federal district court hold that some established procedure, whether judicial, administrative, or in the "private" market place, is contrary to constitution, statute, or common law rights. Another is the great increase in the number and proportion of law school applicants who express their career aspirations in terms of persuading courts to reshape social, economic, and political processes on behalf of poor, peace-loving, or other relatively powerless people.

Ascertaining the validity of this belief in the fruitfulness of test case litigation presents methodological problems. Any index based simply on judicial opinions in recent test cases would be deceptive. The fact that a test case has produced a favorable judicial decision does not mean that the social change which the plaintiff or his attorney hoped thereby to achieve has in fact ensued. The "right to treatment" of a patient committed to a mental hospital, announced by Judge Bazelon in *Rouse v. Cameron*,[4] may well be a right without a remedy due to the failure of

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1 Brown v. Board of Educ., 347 U S. 483 (1954).

2 *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

3 *E.g.*, United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

4 373 F.2d 451 (D.C. Cir. 1966).

Congress to fund the hospital adequately, the lack of sufficient trained personnel or training facilities to properly staff mental hospitals, and the general inadequacy of treatment techniques.[5] The attempt which culminated in *Shapiro v. Thompson*[6] to guarantee subsistence welfare payments to migrants by striking down state welfare residency requirements may unintentionally have resulted in a lowering of the percentage of need which the previously most generous states are willing to pay. There are equally strong reasons to doubt that the Warren Court's cases which on paper gave the accused a plethora of rights have in fact done much more than incite policemen to perjury and lower court judges to disingenuous decisions.[7] On the other hand, some cases, such as *Brown v. Board of Education*,[8] may, by focusing public opinion on a social problem of which the case at bar is only a partial reflection, and by providing some impetus towards the solution of this broader problem, make a contribution towards a social movement which cannot be measured by the specific changes ordered by the decision. Thus, any evaluation of how much change in social, economic, or political patterns has in fact resulted from even "successful" test case litigation would have to be based on a close empirical analysis, requiring extensive, imaginative, and costly data collection, not only of the extent to which the prescribed procedures have been implemented but also of other social changes, extrinsic to the prescribed procedures and to some extent unspecifiable in advance, which may dampen (or occasionally amplify) their effect.

Another problem, equally serious, in evaluating the usefulness to test case litigation by reference to recent cases is that these may not be either a fair sample of judicial behavior over a longer period or a good predictor of such behavior in the future. The Warren Court appeared willing to change the law for the purpose of counteracting the *de facto* disabilities suffered by those at the bottom of the socio-economic stratification system. Many of the lower courts followed suit, either because the tendency of the Supreme Court's decision was in accord with their social convictions and consciences, or for fear of reversal. The Burger Court has shown no disposition to continue this pro-equalization policy; indeed, it may well be embarked on a course of "correcting" what it takes to be the excesses of that policy.[9] It is now those lower court judges who had agreed with this policy who are con-

[5] The "remedy" of release, which is theoretically available in case of continuing failure to receive treatment, might be sufficient to coerce additional funding from Congress, but in many cases funding alone would not permit treatment.

[6] 394 U.S. 618 (1969).

[7] *See* Silverglate, Book Review, 84 HARV. L. REV. 1748 (1971).

[8] 347 U.S. 483 (1954).

[9] *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 217 (1971); Harris v. New York, 401 U.S. 222 (1971); Wyman v. James, 400 U.S. 309 (1971). *See also* Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). To bring a case in an effort to extend this policy in the present climate may be worse than futile, since an adverse precedent may legitimize an anti-equalizing program or policy, *see* Dandridge v. Williams, 397 U.S. 471 (1970), and would make it difficult for a later court with a different attitude to hold that program or policy illegal.

strained by fear of reversal. This is not to suggest that the social policies of the Burger Court will necessarily set the tone for judicial decision-making throughout the majority of the careers of present law students, though this is indeed possible. We cannot predict whether the policies of either the Warren or the Burger Court will set the pattern for Courts which follow. Hence, while data from the Warren era can provide some insight into the possibilities of test case litigation given a favorable judicial climate, there is no basis for extrapolating from such data to a prediction that the ratio, number, or importance of real successes achieved during this era can be duplicated in the future.

We may, however, be aided in estimating the probable fruitfulness of future test case litigation by examining certain structural factors, unlikely to change radically in the space of a single legal career, which impede significant judicially-initiated changes in the stratification system and its consequences, or in such other matters of concern to many liberal and radical law students as the place and influence of the military-industrial complex in American government and the general balance that has been struck between the interests of the state, the corporations, and the citizens. These structural factors relate to the role of the courts in the American legal system as well as in the broader social, economic, and political system, and to the background and training of judges.

Innumerable books and articles, both scholarly and popular, have been written criticizing—and occasionally defending—judicial, especially Supreme Court, decision-making on the basis of ethical notions ("role norms") as to the sorts of things courts should or should not do.[10] One widely supported judicial role norm is that judges are not free to fashion whatever rule or result they believe would best deal with the problem or case at bar, but must rather announce whatever rule and reach whatever result is dictated by the application of their technical skill in interpreting legal materials and applying them to the facts. This norm is typically justified by arguing that we have a democratic form of government, that judges do not—and are not expected to—respond directly to the popular will, and that it would therefore be anomalous for judges to make policy decisions, rather than merely carry out policy decisions made by the popularly-responsive organs of government. This norm frequently conflicts with the norm (equally subscribed to) that judges must decide every case properly before them. The result of this "role strain" has been the development of a set of canons of decision-making technique which permit courts to decide cases such as these without appearing to be making any policy choice on their own. Thus, a recent survey of prevailing opinions from three appellate courts revealed only four decision-making techniques in good currency: the Particularistic (court applies what it assumes to be settled legal rules to the facts at hand) (24%), the Authoritative (court invokes binding statutes, precedents, etc. as requiring the particular rule which it is applying to the facts) (54%), the Grand Style (court projects which it tries to show is a

[10] *See, e.g.*, Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971), and the sources cited therein.

trend in the development of the law—which perhaps tracks a trend in social conditions—to reach the particular rule which it is applying to facts) (18%), and the Social Policy canon (court asserts or proves that a particular set of values has been adopted by authoritative groups, other than courts, within the society, which values, under present social conditions, could best be served by the particular rule which it is applying to the facts) (4%).[11] None of these canons recognizes the right—much less the responsibility—of the judge to decide, on the basis of his own understanding of what is wrong with a particular social institution and of what the best possible alternatives are, what social policy should be chosen or devised and applied to the case at hand. Rather, the judge's effort is always to remove himself from the picture as an innovator, preferring the image of the able administrator carrying out the decisions reached in the real centers of power in the society. That these canons are not merely descriptive of present-day opinion-writing but have normative force as canons of craftsmanlike and decently self-restrained decision-making is shown by the extent to which scholarly criticism of the Warren Court attempts to show that the Court's decisions failed to satisfy any of these canons, and by the moral fervor of much of this criticism. While there is an equitable tradition of unabashed creativity in the formulation of remedies which has helped to justify the obvious judicial imagination embodied in Supreme Court cases implementing the right to a desegregated education, the right to an equally-weighted vote, and various criminal procedural rights, it has not protected the Court from the criticism that it has created these and other rights out of thin air. Although direct evidence of the responsiveness of judges, including Supreme Court Justices, to scholarly and media criticism is hard to come by, it is difficult to believe that this criticism has not had and will not continue to have some effect in tending to keep the judges' and justices' behavior in line with the role norms embodied in the criticism.

There are other reasons, apart from the constraints of the existing canons of decision-making technique, why even judges who favor structural social changes may be reluctant to make decisions implementing them. One is that legal categories of rights and the range of available judicial remedies may not be sufficient to deal effectively with the social problem at hand, and judges fear the loss of face which results from taking action which proves to be ineffective. Another is the limited judicial resources for systematically investigating social facts, in contrast to the legislative ability to conduct wide-ranging subcommittee hearings and staff investigations, and the executive (including the administrative agencies) ability to commission staff and independent surveys and social analyses.[12]

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[11] Daynard, *The Use of Social Policy in Judicial Decision-Making*, 56 CORNELL L. REV. 919, 924 (1971). The survey was of 300 randomly selected prevailing opinions delivered from 1967 through 1969 by the New York Court of Appeals and the United States Courts of Appeals for the District of Columbia and the Second Circuits. The Statutory and Precedential categories of the earlier article are here combined as the Authoritative canon, and the Social Policy Derived categories as the Social Policy canon.

[12] Courts are *best* adapted to resolving factual

Still another may be the relative inability of the higher judiciary to determine what social innovations will be accepted (if not necessarily desired) by those sectors of the public and of officialdom (sometimes including the lower judiciary!) which have the power to block *de facto* implementation of the reform in question.[13] Again, judges have little power, beyond what follows from the perceived authority of their offices, the persuasiveness of their reasoning, and the credibility (often low) of the threat of effective action by the sheriff or marshall, to obtain the acquiescence of these politically powerful individuals and groups; executive and legislative officials, on the other hand, can both lobby in public and private for the acceptance of their decisions and develop complicated deals whereby the acquiescence of the power-holders in decisions with which they are unhappy is bought with decisions favorable to them on other matters.

Reasons of background and training also make it unlikely that judges will favor leftward-tending social change. Judges, particularly in the federal courts and the state appellate courts, have typically gained much of their experience in private corporate practice or as prosecutors, careers which neither attract nor produce many radicals. These career patterns are unlikely to change very much until important changes in the stratification system have occurred. Influential representatives of business and professional interests, including newspapers and bar associations, demand and usually receive "high quality" appointments to important judicial offices, where major ingredients in the definition of "quality" include association with high-status clients and respect by other high-status attorneys. As long as more prestige is accorded those who involve themselves in business and the maintenance of public order than is given those who work to protect the quality of life against incursions by industry or who try to promote social justice, influential judgeships will continue to be filled predominantly from the ranks of corporate and prosecuting attorneys.

Finally, the training of lawyers, both at law school and in practice, makes them eye warily proposals for bold innovations. This training equips them to get what they want in a game in which the rules are relatively fixed, growth and development generally being limited to the interstices. The common law changes only by small steps; so does most statutory law, such as income tax and commercial law. Even the planning which lawyers do, in the form of wills, trusts, contracts, corporate charters, etc., is designed to stabilize situations in order to insure to the greatest extent possible that the client's present and anticipated desires and expectations will be fulfilled. To the extent that significant social changes upset settled expectations, proposals for such changes are seen as bearing a heavy burden of justification. An attitude like this, inculcated throughout a career, is not easily shed with a change in roles. Hence, when lawyers become judges they generally prefer to patch up an existing system, preserving settled expectations even

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and narrowly legal disputes between litigants; their resources for social investigation are limited to occasional "Brandeis briefs," amicus curiae briefs, and research by law clerks at general libraries.

[13] *See* text accompanying notes 4-7 *supra.*

at the cost of some social injustice, rather than to start afresh at the risk of unsettling and to some extent unpredictable consequences.

None of these factors, nor even the combination of all of them, precludes the possibility that significant social changes may result from future test case litigation. But they certainly raise serious questions about the belief of many liberals and radicals that the courts are likely to make important leftward-tending structural changes in social, economic, and political processes. These questions become particularly poignant in light of the many law students whose choice of a legal career seems to have been predicated on this belief.