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Legal Mobilization: The Neglected Role of the Law in the Political System

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This article argues that the role of the law in the political system has been construed much too narrowly. A review of the political science literature demonstrates an interest in the law that is largely confined to the making of new laws, social change, and social control. That view implies an acceptance of the legal profession's distinction between public and private law as a reasonable guide for political scientists in the study of law.

A more interactive view of the law is presented, characterizing legal mobilization (invoking legal norms) as a form of political activity by which the citizenry uses public authority on its own behalf. Further, the legal system, structured to consider cases and controversies on an individual basis, provides access to government authority unencumbered by the limits of collective action. This form of public power, although contingent, is widely dispersed.

Consideration of the factors that influence legal mobilization is important not only to understanding who uses the law, but also as predictors to the implementation of public policy; with very few exceptions, the enforcement of the laws depends upon individual citizens to initiate the legal process. By virtue of this dependence, an aggregation of individual citizens acting largely in their own interests strongly influences the form and extent of the implementation of public policy and thereby the allocation of power and authority.

Political Science Views the Legal System

Descriptions of American government traditionally include a discussion of the role of the judicial system, and its political importance is typically acknowledged by references to Tocqueville's observation that "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Yet the study of law and the legal system has been peripheral to the study of government, with special arguments deemed necessary to justify their consideration as political institutions. Thus, demonstrated interest has until recently been confined largely to the direct policymaking role of the courts in a common law system that has both a written constitution and a well-established tradition of judicial review. This virtually exclusive orientation toward law making as the sole political role of the courts worthy of study is clear from even a cursory review of the political science literature.

From doctrinal analysis of decisions (Cushman, 1960) to examination of judicial decision makers (Pritchett, 1948; Schmidhauser, 1979), the processes by which they are selected (Abraham, 1974; Chase, 1972; Grossman, 1965), and the relationship between their personal characteristics and decisions (Goldman, 1964; Nagel, 1962; Schubert, 1965), the focus of political science attention to the legal system has been on policymaking and case outcomes. Although interest in judicial behavior has waned substantially, the parallel interest in policymaking through the courts has not (Horowitz, 1977). Special attention has been given to the role, potential, and limits of the judicial branch in breaking new ground in public law and, more broadly, in promoting, if not generating, broad social change (Casper, 1976; Dahl, 1957; Scheingold, 1974).¹ Around this interest has grown an entire literature on the impact of court decisions (Becker & Feeley, 1973; Milner, 1971; Muir, 1967; Rodgers & Bullock, 1972; Wasby, 1970).

More recently political scientists have turned their attention to the criminal justice system

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¹There has also been a substantial normative literature on the policymaking role of the courts, most of it written by lawyers. For conflicting views of the appropriate role of the judiciary in the American governmental scheme, see Bickel (1970), Cox (1976), Greenberg (1974), Wechsler (1959), and Wright (1971).

(Casper, 1972; Eisenstein & Jacob, 1977; Feeley, 1979; Heumann, 1978; Wilson, 1975). Although this area of research may appear to be far afield from the law-making interest exhibited in earlier work, there is an underlying theoretical connection. First, criminal justice clearly falls on the public side of the traditional public-private law dichotomy; like public law generally, it is intimately concerned with the relationship between the citizen and the state. Further, whether the terminology is "social change" or "social control," the political science perspective on the law has remained the same—the action is unidirectional, emanating from state actors and imposed upon the citizenry.

Even critics of the public-private law distinction justify a broader consideration of the political role of the judicial branch in terms of rulemaking (Shapiro, 1972); i.e., it is appropriate for political scientists to study the legal system only to the extent that the legal system performs essentially the same role, although constrained by different structural apparatus, as the more clearly acknowledged political branches of government. The pervasiveness of this view is perhaps most evident outside the field of public law, where the most consistent references to the political role of the courts in the mainstream of political science are found in the interest-group literature (Key, 1958; Truman, 1951). But even there, the judicial branch is seen as a last resort in the effort to influence the making of public policy.³ Whatever else the law may do has been considered beyond the scope of inquiry by those interested in the political role of the legal system or in the political system more generally. The core work of the legal system, which deals with individual cases and controversies, is by and large left to the so-called private law arena, which is beyond the boundaries of political concern and therefore best left (with their concurrence) to the legal academy and profession.³

Political Behavior and the Public-Private Dichotomy

The study of individual participation in the polity (that is, action directed from citizen to the

state), has essentially ignored the legal system altogether. This fact reflects both the ancestry of the political participation literature (in voting studies) and the traditional distinction between law and politics. Participation research has been oriented to "public" policy and outcomes; it implicitly requires a political consciousness, an awareness of entry into the political arena and a desire for an effect beyond one's personal life space.

A definition of political activity which relies upon the public motivation of the actor may be attractive by virtue of its clarity and simplicity, but it would exclude much of what we traditionally think of as political activity. Attempts to use the political system to gain personal or group advantage may be criticized for failure to consider the general good, but these attempts are certainly not dismissed as private or apolitical and therefore beyond the legitimate concerns of those attempting to explain the authoritative distribution of social valuables. Indeed a central question in American political thought has been the maintenance of a public spirit (Arendt, 1959; Tocqueville, 1963). The dominant American ideology responds to this concern with an underlying faith that the public good will most likely be achieved through an aggregation of the assertion of narrower interests (Hirschman, 1979).

The very nature of the judicial process blurs the public-private distinction that pervades the political science literature. In a common law system in which the rules are said to emerge in large measure out of an aggregation of cases brought for consideration, the initiation of individual demands (and not merely outcomes) is central to the development of the law. In this common law system, with its commitment to *stare decisis*, each case has the potential to influence all subsequent similar cases. This process has been described as

one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them (Levi, 1948, pp. 3-4).

The point is that courts are essentially reactive institutions, so rules "change as they are applied" in response to claims made. Within the limits of jurisdictional rules that structure participation, individual litigants actually set the agenda of the judicial branch of government.⁴

⁴It is true that some appellate courts, particularly courts of final review, exercise substantial discretion in both the selection of cases to be heard and issues to be

³There has been some recognition of interest group activity to maximize or minimize the implementation of court decisions as another strategy of group influence (Peltason, 1955). This activity comes closest to the legal mobilization that is the topic of this article, but is limited by its exclusive focus on the conscious policy motivation of recognized political groups.

³An exception is Jacob's (1969) work on delinquent debtors.

In addition, of course, there are the more unusual cases that begin as private matters of personal interest to the claimant and that, by virtue of the court's response to them, are transformed into significant new policy. A prominent example is the case of Clarence Gideon, the ne'er-do-well Florida convict sentenced to prison without the benefit of counsel in his felony defense (*Gideon v. Wainwright*, 372 U.S. 335, 1963). Within a few short years of that decision, the extent of criminal defense and the role and financial burden of the state in providing it had been revolutionized.

The more general point is that individual choice and demands on public authority by invoking legal rights are closely interwoven with the making of public policy without any requisite involvement by a collectivity or any necessity for a public consciousness. However, even recognition of the importance of privately motivated individual cases to the development of the law ties their political role to a requisite contribution to rule making. A much broader conceptualization is necessary if the full magnitude of the political role of the law is to be appreciated.

The traditional public law-private law dichotomy, relying as it does upon the difference between the relationships controlled (i.e., state to individual and individual to individual, respectively) is, like the public motivational test of political participation, an easy but conceptually misleading distinction that does not well serve social science analysis of the legal system. As Durkheim long ago noted,

a law is private in the sense that it is always about individuals who are present and acting; but so, too, all law is public, in the sense that it is a social function and that all individuals are, whatever their varying titles, functionaries of society. (Durkheim, 1964, p. 68)

To take Durkheim's characterization one step further, the individual in reality becomes a functionary of the state, who is employing his legitimate authority by using the law; this includes the so-called private law, which is itself written to reflect public norms and achieve public goals. Ihering goes further and argues that the assertion of one's legal rights is not only an obligation to oneself, but a duty owed to society:

In defending legal rights [the individual] asserts and defends the whole body of law, within the

narrow space which his own legal rights occupy. . . . The general good which results therefrom is not only the ideal interest that the authority and majesty of the law are protected, but . . . that the established order of social relations is defended and assured (Ihering, 1879, pp. 68-69).

The unity of public and private law has been suggested more recently in an inquiry into administrative law that questions the validity of the distinction between private dispute-settling and administrative law. "To what extent," it is asked, "does private dispute settlement consist of anything other than the disposition of challenges to decisions about the use of state power?" (Vining, 1978, p. 179). Study of the use of state power is, of course, at the core of the political scientist's task; its direct use by the citizenry as in mobilization of the law, therefore, ought to be of particular concern in a democratic political system.

Legal Mobilization as Political Participation

Political participation is implied in the very notion of democracy. Whether characterized as serving the protection or maximization of interest, providing for self-rule, or as a means of self-realization of one's humanity, political participation has been and continues to be central to democratic theory (Arendt, 1959; Bachrach, 1967; Dahl, 1961; Fanon, 1965). Although these various roles are surely not mutually exclusive, neither are they necessarily mutually dependent. More important to the concerns expressed here, each of these goals is potentially available through legal activity and, it might be argued, more so than from traditionally acknowledged modes of political participation. For unlike other governmental structures, the legal system is structured precisely to promote individual rather than collective action. Although that surely limits the precipitousness of change that is likely to occur, it also means that the individual citizen does not require the imprimatur of an appointed group to have access to government authority. The legal system, limited as it is to real cases or controversies involving directly injured or interested parties, provides a uniquely democratic (as opposed to republican) mechanism for individual citizens to invoke public authority on their own and for their benefit. The bulk of this activity takes place among private citizens who, in the process of involving legal norms, employ the power of the state and so become state actors themselves.⁵

considered. To stress this proactive behavior of the courts, however, is to commit the common error of overemphasis upon upper courts, when in most cases it is courts of first instance that are the terminus of the legal process.

⁵The state is not dormant in this process. Individual participation in the legal system is highly structured by complex jurisdictional rules and the content of the substantive laws that benefit some at the expense of others.

In this way the legal system can be considered quintessentially democratic, although not necessarily egalitarian if the competence and the means to make use of this access to governmental authority is not equally distributed. Despite neglect by political science, the fact is that the share of the output of the political system that individuals receive is in part determined by the extent to which they mobilize the law on their own behalf. The reliance of some of the distribution of social valuables upon individual assertions of public authority is ultimately democratic, for it mitigates some of the problems inherent in representative government, including the limits of collective action and the difficulty of measuring intensity of subjective interest. If the dispersion of power provides protection from tyranny, then the potential for every individual to mobilize the law can play an important role in democratic governance.⁶

Without diminishing either the rule-making role of the courts or the importance of collective action in politics, scholarly neglect of the citizenry's mobilization of the law has contributed to a widespread failure to recognize the centrality of individual demands to the very implementation process that determines the benefits that citizens actually receive from their government.

As early as 1971 Pound noted that all law is limited by the necessity of appeal to individuals to set it in motion. Thus he concluded that

Last and most of all (law makers) must study how to insure that someone will have a motive for invoking the machinery of law to enforce his rule in the face of opposing interests of others in infringing it. (Pound, 1917, p. 167)

Despite this and other brief references in the literature to the obvious importance of the role of litigants in the legal process, neither they nor the factors that influence their legal activity have been accorded much serious scholarly attention. Black's (1973) work, "The Mobilization of Law," is an important exception. Black, however, defines law as the equivalent of "governmental social control," and its mobilization as "the proc-

ess by which a legal system acquires its cases." These definitions are at once too broad and too narrow. The first is too broad because it does not distinguish law from government power; thus it would, for example, include as an act of law the burglary of a psychiatrist's office to obtain Daniel Ellsberg's case file. Although that perspective may be highly recommended by virtue of its avoidance of many of the most complex questions that have historically plagued jurisprudential thought, it is a conceptualization that distorts the common understanding of law as a framework within which governmental actors can operate legitimately, setting limits on governmental power.⁷ The definition is too narrow because it is unidirectional and fails to recognize the interactive nature of the law. Finally, although Black has done more than anyone to call attention to legal mobilization as a meaningful area of study, he defines mobilization far too formalistically and so fails to encompass the breadth of its role in the distribution of governmental power among the citizenry.

Although defining mobilization as "the process by which a legal system acquires its cases" seems rather all-encompassing, Black goes on to make the direct involvement of public actors a prerequisite to the transformation of an incident or situation into a "case." In the criminal system this means involvement by the police, in the civil system the actual filing of a case in court. The attractiveness of this definition is its relative ease of operationalization. Yet an understanding of cases even so defined is itself necessarily dependent upon knowledge about those potential cases which do not enter the formal system and why they do not. Further, and more closely related to the role of the legal system as a mechanism for participatory democracy, an individual that invokes the law on his or her own behalf *without* direct assistance from the formal mechanism assumes the role of governmental actor. This form of mobilizing public authority is indeed worthy of inquiry. In addition, it can be argued that successful legal mobilization may be substantially more efficient than the interposition of police, prosecutors, and courts in the implementation of the law.

A more useful formulation of legal mobilization is provided by Lempert (1976) as "the process by which legal norms are invoked to regulate behavior" (p. 173). This definition includes the earliest stages of the mobilization process when,

These limitations imposed in the state's exercise of social control, however, do not diminish the independence of the individual to act alone.

⁶The existence of a legal structure that allows for individual mobilization of the law is surely not sufficient to define a democratic society. Yet the extent to which a citizen is entitled to employ the authority of government by mobilizing the law adds to the diffusion of power and thereby to the democratic nature of the political system.

⁷This is not to argue that the law plays no role in social control, but to offer a corrective to the dominant view that focuses exclusively on law as a mechanism of social control.

in Eastonian terms, desires or wants are transformed into demands, when the public authority inherent in legal norms is first asserted by the citizen in this participatory act. From this perspective legal mobilization is not dependent upon the use of particular formal structures. Most important, it does not exclude individual action and implicitly recognizes the central role that mere knowledge and assertion of legal norms have in the distribution of public policy. The individual citizen can be a true participant in the governmental scheme as an enforcer of the law without representative or professional intermediaries.

The model of political participation that underlies this conceptualization includes an active role for the citizenry in both the making and the implementation of public policy. In contrast, the more traditional perspective on citizen participation in governance has been oriented almost exclusively to policymaking. Verba and Nie (1972, p. 3) for example, are interested in democratic participation as "processes of influencing governmental policies, not carrying them out." Consistent with that view, the crucial question with respect to the relationship between the citizen and the state has been how the preferences of the citizens of a society are aggregated into a social choice. Further, according to Verba and Nie, it is "through participation [that] the goals of the society are set in a way that is assumed to maximize the allocation of benefits in a society to match the needs and desires of the populace" (p. 4). However, no such assumption is warranted. For although they claim that "the relevant consequence of participation for the individual citizen is what he gets from the government" (p. 9), along with other students of participation they fail to acknowledge that what one gets is not the same as allocation, for the latter is only the apportionment or designation of government benefits, and not their actual distribution. Although what one gets is most certainly *related* to governmental allocative decisions, to a substantial degree what citizens *receive* from the government is dependent upon the demands they make for their entitlements and upon participation in the policy-implementation as well as the policy-making process. In particular, what the populace actually receives from government is to a large extent dependent upon their willingness and ability to assert and use the law on their own behalf. Yet legal mobilization as political demand has been virtually ignored by the literature that purports to be concerned with who gets what.

Verba and Nie's definition of political participation ("activities by private citizens aimed at influencing actions of government personnel") does not necessarily exclude legal activity, and the mode of participation they denote as "citizen-

initiated contacts" would seem to incorporate legal contacts. Yet when it comes to their data analysis, they, like others, are particularly interested in attempts to influence governmental policy decisions and in collectively oriented outcomes. In reporting the correlations among campaign activity, communal activity, and voting they assert:

What may hold [these] modes of activity together is that all involve some political consciousness, some awareness of and concern about issues that transcend the individual's most narrow life space. But parochial participation can take place in the absence of such general concern with political matters (Verba & Nie, 1972, p. 71).

Although such a characterization might reasonably exclude the bulk of legal activity from the main arena of political participation, it is inappropriate on two different counts. First, it substantially narrows the purview of political participation as it has been variously conceptualized in the theoretical literature; second, it fails to take cognizance of the particular difficulty in characterizing public versus private issues in a legal system that is structured to generate rules out of an incremental aggregation of individual (largely "private") cases, and through which the implementation of public policy often proceeds. As a result it fails to acknowledge the importance of citizen-initiated demands to the actual distribution of social valuables.

Law as Potential—Rights as Contingent: The Citizen's Role in Enforcement

"Law," according to Samuel Johnson, "supplies the weak with adventitious strength" (Boswell, 1791, 1969, p. 498). In other words, law confers power.⁸ In Dahl's (1961) words, the "mantle of legality" conferred on private citizens provides them with power previously unavailable to them. Any new authoritative rule, whether statute, judge-made common law, or administrative regulation, merely provides opportunities. As an essentially reactive process, the legal system fits an entrepreneurial market mode;⁹ it is structured

⁸This is not to deny that the laws strongly reflect relative power positions in society, but here the focus is on law as a resource available to the citizenry.

⁹Recognition of the relevance of a market model as explanatory of the actual operation of the legal system does not constitute a normative endorsement of an idealized view that an invisible force operates to form individual judicial decisions into an optimal body of common law precedents (Engel & Steele, 1979, p. 333). All that is claimed is the central role in the distribution

so that by invoking the law private citizens play a critical role in its enforcement. Whatever rights are conferred are thus contingent upon the factors that promote or inhibit decisions to mobilize the law.

Ironically it has been sociologists rather than political scientists who have recognized that the legal process makes the individual a participant in governance rather than an object of government (Nonet, 1969; Selznick, 1969). Selznick's study of the law of employment and Nonet's study of the administration of the state workmen's compensation laws by the Industrial Accident Commission in California both document the legalization of the administrative process; i.e., enforcement agencies progressively become passive recipients of privately initiated claims with an increasing orientation to the settlement of disputes. Although on one hand that development may have the effect of diverting public policy goals inherent in the enabling legislation, it has the advantage of making legalized policy responsive to individual circumstances (Selznick, 1969).¹⁰

Nonet found that the social welfare model, in which government is actively to provide service and distribute benefits, is by itself unable to accomplish the intended ends; in the agency he examined, legalization actually facilitated the transformation of welfare policy into secure rights (Nonet, 1969, p. 263). In the process, private citizens become active agents of the growth of the law; instead of a passive object of the state, the citizen is the demander of rights and status. Nonet's conclusion that the law was liberating, freeing the injured employee from dependence upon agency and industry notions of his interests, sounds curiously like Fanon's arguments about the liberation and self-realization that come from participation in politics. In both cases citizens transform themselves from objects to willful participants.

Participation and the distribution of demands in any entrepreneurial scheme depend upon resources, skill, aggressiveness, and rights consciousness, none of which is evenly distributed in society. Because virtually all legal rights in the United States depend upon the citizen to initiate the legal process, the distribution of such resources and access to them are critical. It is here that organized groups play a central role in an otherwise individualized system, for as with other

forms of political participation, they can provide the resources to support the assertion of individual claims. For example, Nonet found that the union played this important role in facilitating the claims of their members for workmen's compensation (Nonet, p. 9), even though such a role lay outside the union contract. There is also evidence from other contexts that similar support for the assertion of individual claims is forthcoming from more informal networks. Friends, relatives, employers, co-workers, and neighbors all play a part in increasing awareness of the legal nature of problems and thus the availability of legal remedies (Jacob, 1969). In addition they provide guidance in the search for and selection of legal assistance (Curran, 1977).

Such citizen participation in the legal process is typically assumed to be central to private but not public law; however, that distinction is clearer in theory than in practice. Although it is true that the state is authorized to enforce public law on its own initiative, and that in private law that right is granted exclusively to private citizens (Black, 1973, p. 128), the evidence indicates that the state only rarely exercises that authority because in general the legal system is structured to respond to citizen-initiated complaints.¹¹ Both the growth of the criminal law and the creation of specialized administrative structures have an impact upon legal mobilization, but it is largely by virtue of the shifting of a substantial proportion of the costs to the polity. Although this has the effect of making it cheaper and less complicated for an individual to make a claim, the cases pursued by government still depend largely upon complaints from outside, that is, on active participation by the citizenry.

An illustration of just how important individual complainants are in the legal process can be found in a brief pamphlet written and circulated by PEER, the Project on Equal Education Rights, of the NOW Legal Defense and Education Fund (to "monitor enforcement progress under federal law forbidding sex discrimination in education"). The pamphlet is aptly titled "Anyone's Guide to Filing a Title IX Complaint." After first pointing out the dependence of HEW's civil rights office on individual complaints, the pamphlet goes on to

¹¹For evidence of the influence of private citizens at various stages in the criminal justice system (the most obviously "public" area of law), see Hagan (1982). Studies of antidiscrimination statutes, also virtually universally attest to the critical role of citizen complaints (Berger, 1967; Mayhew, 1968). In those exceptional areas in which government enforcement is very proactive, such as victimless crime and Internal Revenue Service regulations, there is substantial dependence on informers in lieu of complainants.

of legality played by individual decision makers asserting their rights under the law.

¹⁰Lowi (1979) similarly documents the central role of citizen-complainants in the development of administrative regulations at the federal level.

describe, step by step, the process involved, including a sample letter for filing a Title IX complaint and information about where to send it. It carefully argues that the costs to the complainant are minimal and informs the reader about available support groups to help prevent possible anticipated harassment. Further, it stresses the importance of persistence. "DON'T GIVE UP! HEW will get around to your case . . . [they] probably won't go ahead unless you say so." Finally, the directions stress the public policy import of an individual complaint:

HEW's estimation of the public demand for an end to sex discrimination in education is based in large part on the number of Title IX complaints filed. The more complaints HEW receives, the more likely it is that HEW will devote greater energy and resources to enforcing Title IX.

The same phenomenon is found, and often criticized, in the enforcement of housing codes (Mileski, 1971), the criminal law (Reiss and Bordua, 1967), and the work of the Federal Trade Commission (Cox et al., 1969). Yet there seems to be some reevaluation of its implications. Ten years after the Nader Report on the Federal Trade Commission attacked administrative agencies for acting only when people send letters of complaint, Nader himself seems to have changed his mind about the efficacy, and possibly the democracy, of reliance upon individual complainants. His proposal for the enactment of a Corporate Democracy Act (needed "to keep up with the economic and political evolution of giant corporations") places the burden of enforcement squarely and solely on individual citizens. "Rather than depending on a new bureaucracy to police its provisions, the ACT would be largely self-executing. So citizens injured by the non-performance of a standard could go to court, not Washington" (Nader & Green, 1979).¹²

Reliance upon citizen-initiated complaints undermines the ability of government agencies to set their own agendas as authorized by their enabling legislation. Although they can and do select among cases for particular attention, agencies are bound to respond to complaints. As a result, any enforcement agenda-setting attempted by a governmental agency depends upon the affected citizenry's demands for implementation. Agencies would often like to concentrate their efforts on exposing and pursuing serious and continuous offenders, being less concerned with individual

aberrations. However, a system that is dependent upon individual complainants cannot easily discriminate among these cases. Legal mobilization and the initiation of complaints with public authorities is thus dependent on complainant-related variables rather than offender-related variables. To the extent that the bulk of the complaints are individualized, the agency's work becomes substantially particularized.¹³

The importance of citizen mobilization of the law to its enforcement is further reflected in the continuing debate over Congressional and judicial authorization of private causes of action. A citizen's right to file a private lawsuit in the courts either to secure compliance directly or to seek damages for injuries suffered by virtue of non-compliance. Proponents of a strong enforcement effort often do not want to rely on suits by private citizens as the only mechanism to force compliance. Indeed it has been noted that "the very origins of administrative agencies lay in dissatisfaction with private litigation as an undemocratic mechanism for social choice and control" (Stewart & Sunstein, 1982, p. 1294). Despite the documented pervasive reliance of regulatory agencies on citizen-complainants (Kagan, 1978), the authorization to bring complaints (and suits if necessary) against violators constitutes a grant of substantial control to the agency, at least insofar as there is virtually unlimited discretion *not* to pursue a case. The option of a private cause of action thus limits an agency's enforcement monopoly. The continuing debate and the criticisms of private rights of action as usurpations of legislative authority that "may engender overenforcement of regulatory statutes" (Fein, 1981, p. 23) reflect how seriously mobilization of the law is taken as a tool of policy implementation.¹⁴

Understanding Legal Mobilization

Having argued the political relevance of legal mobilization to both the individual citizen and the

¹³Steele's study of the consumer fraud section of the Illinois attorney general's office suggests that little aggregation of cases occurs. In the office studied there was even a change in public posture from one of "riding the State of merchants who habitually employ fraud" to "righting the wrong and recovering the individual's money whenever possible" (Steele, 1975, p. 1180).

¹⁴In recent years the rights of citizens to bring legal action to force compliance with statutes that are subject to agency enforcement has been the subject of a substantial body of law. See Fein (1981) for a discussion of recent U.S. Supreme Court action; for a more theoretical discussion see Stewart and Sunstein (1982).

¹²Reliance upon complainants going to court to implement public policy makes jurisdictional rules extremely important. See, for example, Cannon v. University of Chicago, 441 U.S. 677.

larger society, it is now necessary to examine some of the factors that influence the invoking of legal norms. Although an in-depth evaluation of all the variables that influence legal mobilization is beyond the scope of this article, there are a number of factors that merit attention and will be considered in turn; generating legal demands, socioeconomic status, and the issue specificity of legal mobilization.

Generating Legal Demands

The relationship between the law as written and the nature of the claims made is not a simple one. The traditional view, most clearly articulated by Pound (1942), holds that conflicting interests (demands or desires) exist wherever a "plurality of human beings . . . come into contact" (p. 66), and that a legal system strives for order "by recognizing certain of these interests, by defining the limits within which those interests shall be recognized and given effect through legal precepts" (Pound, 1942, p. 65). Conceptualized this way, the law, much like the standard scheme of political participation, responds to and orders pre-existent interests, granting legal recognition to some and providing a mechanism through which they can be secured. Pound states quite emphatically that interests would exist irrespective of a legal order (Pound, 1942, p. 66). Although that conceptualization of law as an ordering of existing social interests accurately describes part of the relationship of law to the larger society, it is misleading because it presents as unidirectional what is a highly interactive process.

There is ample evidence that perceptions of desires, wants, and interests are themselves strongly influenced by the nature and content of legal norms and evolving social definitions of the circumstances in which the law is appropriately invoked. Indeed this is part of the educative role of the law (Andenaes, 1966). Thus, for example, the growth of consumer protection laws has generated demands on public authority by changing the public's view of the circumstances under which they can reasonably feel wronged and entitled to a legal remedy. Put another way, it changes the citizenry's perceptions of their interests.

In many instances legal mobilization is generated not by the writing of new laws, but by changing social perceptions of the nature of a problem and the appropriateness of the intervention of state authority. Assault and battery, for example, are violations of the criminal law in every state, but only recently has there been a substantial effort to enforce these laws in child abuse cases. Public and private organizations now promote the reporting of such cases, with doctors and teachers increasingly required to do so

(Grumet, 1970). These requirements are both a result and part of the growing recognition that child abuse is a social problem appropriate for intervention by the criminal law. Battered wives provide a similar example. Although long viewed as a private matter, with the police actively discouraged from involving themselves in intra-familial disputes, a new consciousness has changed both the reporting of offenses to the police and their response, in some cases as a direct result of court-endorsed consent agreements.

The complexity of the perception of interests and their transformation into legal demands is illustrated by the recent Chicago strip-search cases. Over a period of many years, the Illinois Division of the American Civil Liberties Union received complaints from women that they had been strip-searched, in some cases including body-cavity searches, after being arrested for minor offenses by the Chicago Police Department. With only infrequent complaints, it was assumed that the cases were aberrations, and they were handled as individual abuses. The investigative reporting unit of a local television station revealed numerous incidents, in some cases involving women stopped for minor traffic violations and taken to the police station because they had left driver's licenses at home. By prior arrangement, each of the reports broadcast the telephone number of the local ACLU office, which had agreed to set up a special hotline each evening to provide assistance to victims. Hundreds of complaints were received.

Eventually the Illinois legislature passed a strip-search bill that bars police from strip-searching persons arrested for misdemeanors or traffic violations unless the offense involves weapons or drugs. The lawsuit filed by the ACLU on behalf of the women resulted in an injunction against the Chicago Police Department and the payment of damages to many of the women plaintiffs (other cases are still pending). Although this case is also an example of individual incidents generating new law, in terms of legal mobilization it is most interesting as an illustration of some of the inhibitions upon the transformation of interests or wants to demands. The plaintiffs were not predominantly poor nor members of racial minorities whose failure to use the law may have been attributable to a status-related lack of legal competence (Carlin & Howard, 1965). One was the former wife of a judge. Shame, fear, assumptions that the police and the law are one and the same, failure to get any response from the internal investigative division of the Chicago Police Department, and the perception that the legal expense was not worth the possible gain—these factors, singly or in combination, kept the women from pursuing these cases. The revelation that such practices were not acceptable, that complaints would be

heard and pursued by a legitimate organization, generated a totally unexpected demand.

The foregoing examples provide an introduction to legal mobilization as an interactive process that is quite different from Pound's conceptualization of the relationship between interests and law. The view that law and changing social norms as well as individual circumstances are central to the critical step of perceiving and defining situations or incidents as legally actionable also contrasts sharply with much of the recent literature on legal services. As Brakel (1979, p. 883) noted in a recent review of a book representative of that genre, " 'Legal needs' of a population are talked about as if they were some objective, measurable, meetable entity." That view pervades the legal services literature and can be traced to the influence of Carlin and Howard (1965) and Carlin, Howard, and Messinger (1966). Without discounting its substantial merit, Carlin's work and much of the subsequent push for legal services for the poor imply that knowledge of the law and its protections, and the cost and distribution of legal counsel are sufficient to explain the observable pattern of legal mobilization. Although there is no doubt that the cost of legal advice is a critical factor in mobilizing the law, it is only one of many, and not always the most important.

Socioeconomic Status and Legal Mobilization

Both the political participation and the legal services literatures emphasize the importance of socioeconomic status as a predictor of citizens' activities in seeking influence upon or benefits from the state. Milbrath, for example, speaks of "persons whose energies are absorbed in personal problems as likely to place little value on participation in politics" (Milbrath, 1965, p. 70). Indeed most studies of political participation show that those with higher income, more education, and higher status occupations participate more (Verba & Nie, 1972, p. 12). Thus Verba and Nie conclude that "the relationship between socioeconomic status and overall participation is linear and fairly strong" (p. 130).

A disaggregation of the Verba-Nie data demonstrates that the relationship they find between socioeconomic status and political participation does not hold across all the modes of participation that emerged from their factor analysis of participatory behavior. "Particularized contact," a citizen-initiated contact (with a governmental official) taken for his or her own benefit does not correlate highly with socioeconomic status ($r = .07$; for other modes of participation r ranges from .27 to .33). As a noncollective action taken on behalf of the individual, this mode of participation is most closely analogous to legal

mobilization. Unlike campaign or communal activities, both of which may require a relatively large investment for a long-term, high risk gain, particularized contact (and legal mobilization) may be less costly in relation to potential gain. Furthermore, the benefits, if forthcoming, are more immediate. Thus Milbrath's conclusion that persons whose energies are absorbed in personal problems are less likely to value political participation may say little more than that everyone has only a given quantum of time, energy, and resources, and that rational actors must evaluate the potential benefits and burdens of action before committing their scarce resources. This is relevant to any citizen and not only those of lower socioeconomic status for whom priorities may be set, in part, by their economic situation. Indeed a review of available data indicates that there is substantial rationality to decisions to mobilize the law.

In contrast to the conclusion that there is a simple inverse relationship between socioeconomic status and use of the legal system (Carlin & Howard, 1965), data that are more issue specific show a substantially more complex pattern. For example, whereas a study of New York accident victims found that those with higher socioeconomic status were more likely to take action, socioeconomic status had the *opposite* effect on the likelihood of retaining a lawyer (Hunting & Neuwirth, 1962, p. 68). The reason for this apparent inconsistency is that accident victims of higher status were more likely to use self-help. That, of course, does not mean that legal mobilization did not occur, only that lawyers were not employed.

In another issue-specific study, of debtors in four Wisconsin cities, Jacob (1969) similarly found that socioeconomic status was not a very powerful predictor of legal mobilization. Although respondents with more education, higher income, and higher-status occupations were more likely to score highly on a judicial efficacy scale (Jacob, 1969, p. 121), when it actually came to using the law to their own advantage, these variables were not very predictive. Not surprisingly, although social characteristics helped to distinguish delinquent debtors from more responsible credit users, they did not distinguish users of court services (i.e., bankrupts) from abstainers (i.e., garnishees) (Jacob, 1969, p. 54). Since going to a lawyer was the best predictor of active (filing for bankruptcy) vs. passive (being the subject of a garnishment proceeding) behavior, these data raise questions about the validity of generalizing, across different issue areas, about the relationship between lawyer use (or access to the potential advantages offered by the law) and socioeconomic status.

The most fruitful data set for examining the importance of issue specificity to the determination of who mobilizes the law is reported in *The Legal Needs of the Public* (Curran, 1977). This national survey, covering twenty-nine problem areas (each with a potential for legal mobilization), found that lawyer use varies most by type of problem. Although the overall mean of lawyer use does not vary by income, when the data are analyzed by problem area, substantial differences emerge. For example, high income respondents are less likely than low income respondents to use lawyers in torts and juvenile matters (p. 153), yet high income adults are more likely to use lawyers in a number of other problem areas. Similarly, overall lawyer use does not vary with the education of the respondent, but when lawyer use is analyzed issue by issue, many differences are observed (p. 158). It is beyond the scope of this article to try to explain these differences. The central point of these data for an approach to legal mobilization as a form of political participation is that invoking the law may occur with a variety of goals in mind and that the individual citizen-actor's decision to mobilize the law is not dictated merely by demographic variables. Minimally it means that legal mobilization (and perhaps political participation more generally) needs to be evaluated with greater specificity than has heretofore occurred.

Issue Specificity of Legal Mobilization

The circumstances under which the law is mobilized and by whom are subject to limits imposed by the ability of the legal system to provide the desired result. There are at least two issue-related factors that weigh heavily on the decision-making process involved in legal mobilization. The first is the extent to which the goal sought *requires* the use of the state legal apparatus. The second, related factor, is the availability of specialized structures, legal and extralegal, to facilitate the pursuit of particular goals. Before considering these in detail, it is appropriate to note that this does not imply that legal mobilization is merely a mode of dispute resolution. Although disputes may provide the classic or ideal-typical work of the courts, legal mobilization, and much of the work of the public courts, often occurs without a clear dispute in the classic sense. Thus an examination of the political role of the law must necessarily include the entire range of issues over which citizens mobilize the power of the state on their own behalf and should not be limited to disputes *per se*.

As discussed previously, legal mobilization is also not limited to direct use of state legal structures; it is precisely that kind of narrowing of

focus that has substantially restricted understanding of the law as a form of political participation and of its role in the polity. Still, it must be recognized that issues vary in the extent to which it is likely or in some cases necessary that the public legal apparatus be employed.

Table 1 presents a typology of issues along a legal mobilization continuum, encompassing a wide variety of issues in which the law has a potential role to play. Movement from left to right on the continuum is increasingly into areas that are more generally conceptualized as legal issues and therefore more likely to be subject to legal mobilization.

Farthest to the right is the mandatory column, a select group of issues which by their very nature require not only the invoking of legal norms, but entry into the formal legal system and pursuit of a case to judicial disposition.¹⁵ In these examples, a citizen explicitly seeks the imprimatur of the state. To take a case in point, although marriages may dissolve experientially in a number of ways, partners often seek direct benefits from authoritatively ending a relationship in a divorce proceeding. These benefits come mostly in the form of state protection of post-marriage benefits, including, for example, welfare payments, the transfer of property, and the status necessary to obtain the imprimatur of the state in a new marriage, yet another legal relationship. As currently written, the law provides that this status can be accomplished only through judicial dissolution of the marital relationship. A similar point can be made with respect to all of the other items in the mandatory column in Table 1. Although each might be considered instrumental to obtaining some other goal (e.g., settling debts or seeking revenge), in every case it is the authoritative ruling by the court that is the immediate object.

The issues listed in the other columns in Table 1 are different; for these, the legal system is only one of a number of possible means of obtaining a desired end. Although the emergence of these interests and goals are themselves influenced by the law, the legal apparatus need not be employed in their pursuit; indeed, they usually are not unless other approaches fail to achieve the desired outcome. Yet the breadth of issues over which the law can be mobilized is a reflection of the extent to which modern American society has become legalized, with even the most intimate of social relationships having become subject to definition and influence by the state.¹⁶

¹⁵That many of these proceedings are highly routinized and therefore noncontentious does not in any way diminish the necessity to invoke the public law.

¹⁶See Abel (1979) for a discussion of the progressive legalization of numerous areas of social behavior.

Table 1. Frequency of Legal Mobilization: The Span of Issues

Never	Rarely	Sometimes	Frequently	Mandatory
Social snubs*	Intrafamily Juvenile Job discrimination	Consumer Contract disputes Landlord-tenant Small claims	Personal injury (Auto) Wills and estates Sale of house	Divorce Bankruptcy Garnishment Probate Make new law Adoption

*Social snubs may well be the motivation behind legal mobilization, but some other legally recognized right must be asserted.

Issues that are typically legal include those for which there is broad social understanding that the law plays a potential role and provides certain rights and duties. Included here too are issues for which specialized structures have developed which minimize the need for direct appeal to the court system. Personal injuries resulting from automobile accidents, for example, are now controlled largely by insurance companies and personal-injury lawyers. This does not mean that the law is not mobilized, because where specialized structures and professional personnel dominate, the law is known and plays a *sub rosa* part in negotiations and settlements (Mnookin & Kornhauser, 1979; Ross, 1980). Indeed it is for matters that fall into the "typically" and "mandatory" categories that lawyers are most likely to be used in this country (Curran, 1977), and in some cases abroad as well (Schuyt, Groenendijk, & Sloot, 1976; Users' Survey, 1979).

However, specialized structures and lawyers' specialization are not restricted to those particular areas; for example, a current study of consumer grievances and disputes in Milwaukee has identified no less than nine different forums for processing this kind of dispute (Ladinsky, Macauley, & Anderson, 1979), although not all forums are specialized exclusively to consumer issues. The emergence of these institutions as well as consumer affairs organizations and specialized legal expertise in this area is, like the law itself, both a result of and contributor to the demand for consumer rights. Such organizations also increase knowledge and use of legal rights, thereby facilitating legal mobilization. In other words, they increase this form of political participation in much the same way that more obviously political organizations have been characterized as generating and facilitating more traditional forms of political participation (Almond & Verba, 1965).

There are of course numerous other variables that are important, indeed central, to the mobilization of law. Judicial rules, for example, structure and thereby limit participation in the legal

system.¹⁷ Experience with the law, the interpersonal relationships among actors, and networks affecting access to legal advice are among other variables that would require consideration in the development of a model of legal mobilization. That task is, however, beyond the scope of this essay.¹⁸ Here we must settle for making the general case that legal mobilization is an important albeit unique form of citizen participation in the polity and that it is worthy of substantially more serious scholarly attention than it has been accorded.

Conclusion

Defining legal mobilization as the act of invoking legal norms to regulate behavior is purposively broad enough to include the earliest stage of legal activity; in the simplest case, a particular behavior is demanded by verbal appeal to the law. The law is thus mobilized when a desire or want is translated into a demand as an assertion of one's rights. At the same time that the legitimacy of one's claim is grounded in rules of law, the demand contains an implicit threat to use the power of the state on one's own behalf. This is most definitely not to argue that a legal mobilization framework provides a complete analytic scheme for understanding the law and its place in the polity; that would be both presumptuous and inaccurate, for surely it is not the case that the law affects actual behavior only via citizen demands. Much of the impact of the law results from voluntary compliance that stems from both an obligation to obey and a fear of sanction; i.e., a great

¹⁷In particular, jurisdictional rules controlling standing, class action rules, and the American rule regarding attorneys' fees (making each participant in a legal action responsible for his or her own legal fees) play a significant role in structuring legal mobilization.

¹⁸I have considered elsewhere (Zemans, 1982) the role of many of these factors in decisions to assert rights under law.

deal of citizen behavior is self-regulated, with law providing a backdrop of state-imposed parameters. By contrast, actual legal mobilization occurs only when there is an active demand based on legal norms. Although it must be preceded by a preceptual stage in which a given incident or situation is conceptualized first as calling for a response, and second as actionable in the law, it is not until the law is actually invoked that participation occurs.

This article has concentrated on the individual case in the so-called private law arena not because it is the only case for which this perspective is relevant (as documented, both prosecutors and regulatory agencies also depend heavily on complainants to initiate cases), but because that is where the argument needs to be made most strongly. In addition to the so-called private law being written to reflect public norms and to achieve public goals, it is in this arena where implementation of the law is most heavily dependent upon the active participation of the individual citizen, where the citizen is most likely to become effectively a functionary of the state by invoking the state's legal authority.

There is no question that better mechanisms for aggregating claims would increase the benefits received from the law. But to base analyses of the relationship between law and politics exclusively on the role of groups or group action would be to neglect the potential for the individual citizen to use the law to his or her own benefit without the intervention of a group or representative. It would also be to ignore the unique role of the law in the diffusion of public power among the populace.¹⁹

The bifurcation of research between policy-making and policy implementation has left unexplored the role of citizen participation as a linkage between them. Further, this approach has resulted in an insufficient understanding of the factors important to the implementation of public policy. Because of the contingent nature of public policies, who actually gets what from government is in significant part determined by the willingness and ability to invoke existing laws and to use the power of the state to demand compliance to benefit oneself.²⁰ Structured as it is to provide an individualized mechanism by which power may be diffused throughout the society, the legal system

has a peculiarly democratic nature. Its suitability to absorb the demands of numerous claimants of course limits its potential to promote centrally planned change.²¹ Moreover, at the same time that the legal structure minimizes the role of the official actor, it assumes and so encourages competence among the citizenry at large.

The selective focus here has been on the sorely neglected interactive nature of the law. More specifically, it has been argued that the governmental power inherent in the law is used by the citizen actively and individually to participate in the political system in order to receive part of the authoritative distribution of valuables. Law is of course not the panacea of the powerless, but by its very nature it does lend its legitimacy and the power of the state to whomever has the ability and willingness to use it (Thompson, 1975).

An interactive view of the law that acknowledges the universal availability of government power to the citizenry has important implications for socialization in a democratic society. Neglect of legal mobilization as a form of political participation is both a result and a part of the skew in political socialization toward the obligation of the citizen to obey the law. Such an orientation to the law is unidirectional (from state to citizen), and presents the law as merely a mechanism for social control. It does not in any way endorse an active, assertive participatory citizenry that is central to a democratic society. An interactive approach to the law dictates the promotion of a legally competent citizenry as essential if public aims are to be realized in a system in which the implementation of public policy is highly dependent upon mobilization of the law by individual citizens. It is time for researchers to broaden their scope and not to be bound by respondents' awareness of the "political" nature of their acts. To do otherwise causes us to remain victims of the traditional view that separates law and politics and leaves unexplored an important area of interaction between citizens and the state.

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¹⁹It matters little that elites may be more likely to use the law than the masses. What matters is that in mobilizing the law, as compared to other forms of political participation, the ordinary citizen, as an individual, has a greater potential to receive authoritative benefits.

²⁰This fact is recognized by interest groups that actively use the courts as a forum for the implementation of legal rules. See Gendlin (1980).

²¹This structural limit on planned changes in the legal system also accounts for a very different process of policy diffusion from that found in the legislative arena. See Canon and Baum (1981).

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