

BOOK REVIEWS

Coming to Terms with Terminology: Evaluating Law Reform

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SOCIAL MOVEMENTS AND THE LEGAL SYSTEM. By Joel F. Handler. New York: Academic Press. 1978. xiv + 252 pp. \$17.00.

The proliferation of "law reform" litigation over the last two decades confirms again Tocqueville's famous comment on our national character: There is scarcely a political issue that we neglect to turn into a question for the courts. The term "law reform" by itself suggests legislation, or perhaps even revolution, rather than adjudication. Faced with one regulation that trenches too deeply on religion or another that upholds too rigidly the more lupine practices of established wealth, other peoples might turn to the legislatures or to the streets. We, however, rustle together our lawbooks and our briefs, and head for the courthouse.

There is, of course, nothing new in using the courts to change the law. Litigation always "reforms" the law at least minutely; even the most routine personal injury or contract case raises some slight new bump on the corpus juris.¹ But law reform is a matter of degree. The sort of case we have come to identify with this movement is a kind of political drama: the big-issue litigation, wide-ranging, bold and exciting, affecting broad classes of persons and confronting huge government bureaucracies. Moreover, such cases purport to represent the unrepresented—the poor, the oppressed minorities or women, the aged and the children, the scattered nature-lovers—in short, those who through ignorance or despair, skepticism or poverty

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1. *See generally* E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

or inertia, would not be heard at all if not for the enterprise of the public interest lawyer.² Though law reform is more than melodrama, the basic elements are there: the downtrodden victim, the heroic defender, the giant villain, well-heeled and heedless to need and virtue; and of course, the courtroom as the stage. The drama is very much a part of law reform, and win or lose, the law reformers have used litigation to focus our attention on some of our most pressing national needs.

The law reform movement has been quieter of late, however, perhaps because the law reformers have already mined so thoroughly the most emotional themes of the '60s and '70s, notably civil rights and early environmental issues. The current pause invites reflection on law reform, and a reassessment of the reformers' implicit promise that litigation can pave the road to the new millennium.

Joel Handler's new book is a part of this reassessment. In it the author strives to place the law reform movement in the context of social reform movements generally. Within that context he turns to social science in order to set forth "a theoretical framework for evaluating the 25-year experience of social-reform groups and law-reform lawyers."³ This framework attempts to link the factors that cause any particular law reform effort to succeed or fail. The author first outlines five of these factors, or as he calls them "variables," drawing particularly on political science literature. Then he narrates a series of case studies of law reform efforts in the areas of environmental law, consumer protection, civil rights, and social welfare, analyzing all these cases according to his 5 success-predicting factors. In the final chapter, Handler reassesses the 5-factor analytic framework itself and arrives at some rather pessimistic conclusions about the prospects for law reform through litigation. Because the book is bound to be used as a starting point for future analyses, it is important to take account of its major assertions, and to note, too, some of its more troublesome aspects.

Handler's achievement is to draw together a great variety of vignettes from the annals of law reform activities, and give us some common categories by which to describe, explain, and evaluate those activities. This is no small accomplishment. "Law reform" encompasses a wide spectrum of subjects, and I have no doubt that future

2. See, e.g., Rabin, *Abandoning Our Illusions: An Evaluation of Alternative Approaches to Law Reform*, 27 STAN. L. REV. 191, 199-200 (1974) (reviewing S. LAZARUS, *THE GENTEEL POPULISTS* (1974)).

3. P. 2.

commentators will look to Handler's categories when they too attempt to make sense of the plethora of cases that have been described as "public interest litigation." Each category describes some factor that may contribute to the success or failure of a given law reform effort; hence the presence or absence of a given factor, says the author, may permit us to evaluate the probability that any particular effort will succeed.⁴ Since these factors are so central, a brief summary is in order.

The first factor is designated "characteristics of social reform groups," by which the author means chiefly the reform groups' ability to attract and hold supporters. Relying particularly on Mancur Olson's *Logic of Collective Action*,⁵ he postulates that the central problem for all social reform efforts is the "free rider": Since social reform may benefit many different people, the individuals who might benefit may see little connection between their individual efforts and the ultimate goal, and may simply decide to let others carry the burden. Handler argues that to overcome this problem a reform group may have to offer individual supporters or leaders what he terms "selective incentives"—that is, additional personal pay-offs such as money or prestige. The greater the group's ability to offer these "selective incentives," Handler argues, the greater its chances for success.⁶

The second success-predicting factor, the "distribution of benefits and costs," also refers to the degree to which individuals feel personally affected by the reform effort. If benefits are concentrated on a few persons, the author suggests, those persons may be more easily mobilized to support the movements; conversely, if the costs are concentrated on a few opponents, they will resist more strenuously. According to Handler, the costs of reform usually are concentrated on a few while the benefits are widely distributed—the least favorable constellation for mobilizing support and overcoming opposition.⁷

The third factor, which the author calls the "bureaucratic contingency," and the fourth factor, "judicial remedies," both focus on the difficulties a reform group faces when the remedy it seeks can only be achieved through numerous discretionary decisions of dispersed officials. If a law reform group must litigate an issue on a case-by-case basis against one official after another, the chances for success

4. The author refers to these factors as "independent variables," with "success" as the "dependent variable." See, e.g., p. 34.

5. M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965) [hereinafter cited to Schocken edition (1968)].

6. Pp. 5-14. This section draws especially on M. OLSON, *supra* note 5, at 47-52.

7. Pp. 14-18.

decline.⁸

Finally, in his discussion of the factor "characteristics of law reformers," the author examines law reform as a branch of social reform movements, and argues that the chances for success improve as the law reformers are more closely affiliated with a broadly based social reform group that generates publicity and political support.⁹

Useful though these factors may be for classifying the prospects and problems of law reformers, they present a difficulty that is, in effect, the mirror image of the book's major virtue. Handler's terminology itself sometimes obscures important distinctions. Take, for example, the "bureaucratic contingency," which denotes the difficulties a law reform effort faces when its objective requires numerous or complex decisions by government officials. Handler describes how law reform groups, when faced with issues of this sort, may exhaust their resources in fragmented litigation, problems of proof, and post hoc policing of recalcitrant officials. The author's illustrations and comments on this problem are one of the strongest features of the book, most particularly in his discussion of environmental litigation. But even granting that officials do not like to change their accustomed ways, why should we assume that, beyond mere inertia, they will systematically attempt to evade their legal duties? Such a calculated effort depends in part on the content of the law reform issue at stake, and on the officials' commitment to the older policy.¹⁰ Can we realistically lump official resistance to school integration, say, with official resistance to automobile air bags? There may also be a problem in treating several different types of officials under one label. Might not elected officials behave differently from appointees? Or appointees of some agencies or some administrations from appointees of others? The "bureaucratic contingency" includes a suspiciously wide spectrum of bureaucrats. Handler does not hide this problem. He remarks, for example, that the Carter administration's appointments of old Naderites may make a difference in the way consumer agencies perform.¹¹ But we get no account of those differences.

An equally pervasive problem is the perplexingly incomplete discussion of the social science theories underlying the book's analysis, particularly in the sections that present the author's psychosocial the-

8. Pp. 18-25.

9. Pp. 25-33.

10. See, e.g., Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 243-44 (1976).

11. Pp. 76-77, 79.

ory of reform movements. We learn, for example, that Mancur Olson thinks that the "free rider" problem is the chief impediment to successful organization of social movements with economic goals, but that he does not think the "free rider" analysis makes much sense with respect to philanthropic groups, where the group goal carries no ascertainable personal benefit for participants.¹² We learn also that William Gamson disagrees, and thinks that the "free rider" analysis does apply to such groups.¹³ Whom does Handler follow? Gamson. Why? We have very little idea, because the cursory discussion tells us almost nothing about the issues that divide the theorists.

This cryptic treatment of theory haunts the later portions of the book, where the "free rider" analysis becomes confusing. It seems to designate two quite separate groups: (1) persons who desire some reform goal but expend no effort to achieve it, because they think they can rely on the efforts of others; and (2) persons who expend no effort because they do not care about the goal at all.¹⁴ The former is easily comprehensible, but the latter is puzzling. How can people who do not share the goal be taking any sort of a "ride"? The unspoken presupposition is a concept of "benefit" that goes beyond the individual's desires, but this is a notion that carries a great deal of philosophical freight. Where is the discussion to support that conception? Apparently Handler's expanded use of the "free rider" language flows from Gamson, but the sparse discussion leaves us uncertain.

Similarly, in citing James Q. Wilson, Handler suggests that low income persons cannot readily be drawn into social movements unless they are offered some material incentive; appeals to mere altruism do not go far with them.¹⁵ This claim seems rather offensive on its face, and certainly warrants some supporting discussion. Handler, however, appears to accept the idea on Wilson's authority. The only bit of considered discussion of the point comes late in the book, where Handler concludes that Wilson's view is supported by the saga of the National Welfare Rights Organization.¹⁶

Again, still relying on Wilson, Handler suggests that individuals and groups are more likely to respond to the threat of loss than to the

12. P. 6; see M. OLSON, *supra* note 5, at 159-62.

13. Pp. 6-7.

14. A particularly striking example of this double meaning of "free rider" occurs in the author's discussion of school integration. See pp. 109-11.

15. P. 8; see pp. 110, 159. Wilson's statement of this thesis is related to a personal sense of efficacy and trust in others. See J. WILSON, *POLITICAL ORGANIZATIONS* 56-75 (1973).

16. P. 159. J. WILSON, *supra* note 15, at 64-68, also uses a welfare rights organization example to illustrate the point.

possibility of gain.¹⁷ But at least some of the law-and-economics writers assume that dollars lost weigh no more than dollars gained,¹⁸ and here too we would like to hear more about the bases for the argument. One could multiply examples of this peculiarly abrupt treatment of other authors' work, most notably in the concluding chapter's sweeping references to the natural ossification process of social movements—but enough is enough. No doubt time and space have limited Handler's discussion of his sources. But at times he simply names authority and then proceeds, and at critical points authority threatens to replace analysis.

The brevity of the theoretical discussion may indeed lie at the root of another of the book's dissatisfying features: the uncertainty of the theory of "incentives." Again citing Wilson, he speaks of three types of incentives. The supposedly strongest, "material," refers to things like money and jobs; the next, "solidarity," apparently refers to the enjoyment of being with one's bowling team or tennis club or some such group; the third and weakest is "purposive," which seems to encompass all the other reasons for which people support causes, although this term also doubles as a synonym for "altruism."¹⁹ A major difficulty is that Handler sometimes uses "incentive" as a kind of tautology, and as such the term loses its power to explain. Here is an example from the school integration case study:

There were other incentives operating among the black groups. Clearly selective incentives were important for recruiting leaders. The NAACP was not only challenged by SCLC, but SNCC and the Congress of Racial Equality [CORE] also rose to prominence. Moreover, within each organization, there were rivalries among local leaders and aspiring leaders. In addition, there were loners, such as James Meredith, and clergymen with their own churches. Again, there is a diversity of opinion as to whether the proliferation and competition among black social-reform groups was a benefit or a loss to the movement as a whole, but no one denies that selective incentives were powerful in motivating people who wanted to be leaders.²⁰

This passage tells us very little about incentives, "selective" or otherwise; nor does the language of "incentives" add anything to the discussion of leadership. That leaders were on the scene seems to prove that they had "incentives" to be there.

The vexations of the "incentives" analysis distract the reader

17. P. 14.

18. See, e.g., Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

19. Pp. 7-8; see J. WILSON, *supra* note 15, at 33-51.

20. P. 110.

from several extremely interesting questions that Handler touches but does not treat systematically. One is the question of the kind of "incentives" (if any) that can ensure that reform leadership will be dedicated, intelligent, and imaginative. In this respect, is it clear that "material incentives" are so strong and "purposive incentives" so weak? Certainly the Nader-related groups do not rest on this supposition. On the contrary, the Nader groups' low salaries and incredible workload seem precisely calculated to weed out those who lack dedication; starvation wages and all, morale was certainly high among the original Raiders. Why? Perhaps Nader's charisma explains it, or perhaps it was because the Raiders knew that they were smart, hard working, and creative, and that whenever some congressman showed the slightest interest, they could be right there with the goods.²¹ To his credit, Handler does not hide the problem of defining relevant incentives; indeed he tells us that public interest lawyers as a group are ready to sacrifice salary for their dedication to a cause.²²

Another serious gap in the incentive analysis concerns the place of foundation funding. Handler occasionally mentions that foundation funding has been crucial in some law reform efforts. Indeed, foundation funding seems to constitute an alternative to the whole baggage of mobilizing popular support—"selective incentives," "free riders," and all.²³ But we need to know how foundations get involved in law reform efforts. The author does discuss the closely related issue of law reform groups' "alliances" with outside organizations, particularly government agencies,²⁴ but he neglects to say when and why such alliances might be formed with foundations. While he suggests that law reformers must appeal to a foundation's "purposive incentives,"²⁵ he leaves unclear how the institutional "purposive incentives" of foundations compare to the "purposive in-

21. See, e.g., p. 93. Robert Fellmeth, one of the original Raiders, made some interesting observations on "incentives" in a recent interview: "I get upset about people always being advocates for their own group. Women proselytizing for women. Blacks organizing and making careers out of promoting blacks. I could never do that. If I were a minority, say a Polish Jewish handicapped person, the last group I would think to represent would be Polish Jewish handicapped persons. It doesn't seem right to me. I want to represent someone else." Jenkins, *Nader's Raiders Ten Years After*, STUDENT LAW., Nov. 1978, at 39.

22. Handler, Ginsberg & Snow, *The Public Interest Law Industry*, in PUBLIC INTEREST LAW 47 (B. Weisbrod ed. 1978).

23. Pp. 12-13, 27; see Handler, Ginsberg & Snow, *supra* note 22, at 53.

24. Some examples of such alliances appear in the case studies on consumer protection in Wisconsin, pp. 79-82, and on the implementation of the Voting Rights Act, pp. 118-29.

25. See, e.g., p. 128.

centives” of individual people. To be sure, foundation officers want to know how a particular project fits the foundation’s purposes. But what is the source of these foundation purposes, and what causes them to change over time? How influential is the notorious “old boy” network, and what is the role of sheer faddism or paper-pushing?²⁶ Just as important, how do foundation funding decisions influence the direction of law reform activities by recipient groups?²⁷ If foundations can substitute for popular support in law reform efforts, and particularly if foundation funding policies do significantly affect the content of law reform activities, then we need to know much more about the incentives that draw foundations into law reform.

Whether the focus is on individuals or on foundations, one wonders if it makes sense to discuss “mobilization” or “incentives” apart from the content of the cause at stake. Robert Rabin has suggested that certain issues, particularly discrimination and free speech, touch questions that many perceive as fundamental to our enterprise as a nation, and organizations focusing on issues of this sort may always be able to count on some response in our society.²⁸ If this is so, and I think it is, then the content of a reform group’s goal may be central in determining its ability to draw support, and a formal analysis, with no systematic reference to substantive goals, may only partially explain a group’s success or failure. Moreover, as we all know, different reform issues attract attention at different times. Why is this so? Though Handler gives no systematic explanation, he is certainly aware that reform enthusiasms shift over time, and at several points alludes to dramatic events or leadership that set off a particular reform wave.²⁹ To Handler’s credit, he never claims to set forth more than a partial explanation of the success or failure of law reform litigation, and his case studies make no attempt to conceal the elements that fall between the cracks of his formal analysis—the importance of the substantive purposes, the impact of a Martin Luther King or Ralph Nader, or the riveting shock of the civil rights murders. These matters have no niche in his formal analysis of the factors required for “success.”

The prediction of a law reform movement’s “success” is, of course, the ostensible purpose for which the author sets out his 5-

26. See, e.g., Kwitny, *Ford Foundation Mulls Crime Fight*, Wall St. J., Nov. 18, 1976, at 22, col. 4.

27. See Komesar & Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, in PUBLIC INTEREST LAW, *supra* note 22, at 96-97.

28. Rabin, *supra* note 10, at 221.

29. See, e.g., pp. 39, 73, 123.

factor analysis. Merely to define "success" in the law reform context is ambitious, and here too the author's performance is often provocative but somewhat mixed. Handler grapples with the amorphous concept of "success" by dividing it into three components: (1) success-as-tangibles—getting more goods and services for the target group; (2) success-as-indirect-results—attaining such benefits as bargaining leverage, publicity, and, most important, legitimation; and finally (3) success-as-pluralism—opening up the political process to new and ever-expanding numbers of previously underrepresented persons.³⁰

The fullest and most concrete discussion of "success," both in the case studies and in the final chapter's wrap-up, is on the first level. Litigation is sometimes a very inefficient method for improving the material or political well-being of an underrepresented group, and as Handler himself very ably illustrates, a litigating group may win lawsuits and still not materially benefit the underrepresented group, particularly when the practical difficulties of case-by-case litigation or enforcement are overwhelming.³¹ What he leaves unexplored, however, is the possibility that the very undertaking of litigation may actually harm the underrepresented group by diverting its energies from more productive endeavors. To some degree, litigation must operate within the context of existing laws; at times those laws contain no handles for litigators to grip. Take the "block grant" allocations under the Community Development Act.³² In this "New Federalism" program, federal funds are dispersed to cities on a formula basis, ostensibly for the primary benefit of low and moderate income residents. One of the most important sections of the Act is obviously the statutory allocation formula, since it determines the relative percentages of grants for deteriorating, older, central cities on the one hand, and robust suburbs on the other. The formula is crucial to low-income residents of older cities, yet this formula is virtually untouchable through litigation.³³

30. Pp. 36-39.

31. Pp. 192-208.

32. 42 U.S.C. §§ 5301-5317 (1976), *as amended by* Housing and Community Development Amendments of 1978, Pub. L. No. 95-557, 92 Stat. 2080.

33. Another serious difficulty is that the statute gives litigators almost no lever by which to require local officials to spend these funds on low income projects; the 1978 amendments to the Act have imperiled HUD's effort to ensure that at least 75% of local expenditures would be made for the benefit of low and moderate income persons. *See* Housing and Community Development Amendments of 1978, Pub. L. No. 95-557, 92 Stat. 2080 (amending 42 U.S.C. §§ 5301-5317 (1976)). The statute itself thus shunts litigation into such discouraging peripheral channels as the adequacy of the local Housing Assistance Plan or "citizen participation"

In an instance of this sort, where litigation may be useless to bring tangible results to an underrepresented group, the group really ought to be doing something other than litigating. Even where litigation is technically feasible, it may divert attention and resources from potentially more effective techniques of political organization. The courts, after all, are in form the most aristocratic of our political institutions, insulated as they are from the ordinary hurly-burly of politics.³⁴ Handler tells us that social reformers use the legal system because they are weak.³⁵ But a more sobering issue is whether law reform litigation may weaken even further an underrepresented group: If a reform organization becomes too mesmerized by the elaborate minuet of litigation, the membership may neglect to go pound on the door at city hall.

But this is old hat. Commentators as far back as Thayer have warned against the dangers of overmuch reliance on the courts in political affairs,³⁶ and Handler himself is certainly aware of the difficulty.³⁷ So are the most inventive of the law reformers, such as the Nader groups, who use litigation as only one among several devices by which to reform the law.

Another difficulty with the treatment of "success" appears when Handler distinguishes the first level "tangible success," which he equates with the law reform group's own goals,³⁸ from the second level of "success-as-indirect-results" (such as increased bargaining leverage, publicity, and legitimation): These supposedly "indirect" results are frequently in fact the law reformers' most important goals. Indeed, the traditional or tangible success of winning a lawsuit may be entirely secondary among the law reformers' desiderata.³⁹ From Handler's own case studies, for example in the environmental area,⁴⁰

measures. *See, e.g.*, *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1977); *Ulster County Community Action Comm., Inc. v. Koenig*, 402 F. Supp. 986 (S.D.N.Y. 1975). Handler would undoubtedly discuss this problem under the aegis of the "bureaucratic contingency": The statute vests too much discretion in local officials for successful litigation. My concern, however, is that litigation itself might cause the client group to lose tangible benefits if litigation diverts the group from more effective organizing projects.

34. *See, e.g.*, A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-28 (1962).

35. P. 232.

36. J. THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* (1893).

37. *See, e.g.*, p. 33.

38. This is stated explicitly at p. 191: "They sued because they wanted something. Did they get it?"

39. The author himself mentions the difficulty of separating direct and indirect results of litigation. *See* pp. 209-10.

40. *See, e.g.*, p. 63.

the reader cannot but sense that just this political use of litigation makes the law reformers' work so novel. Here are lawyers who may care less about winning a favorable judgment than about delaying some noxious project in order to insert themselves into the bargaining process and gain a platform for the views of an otherwise disregarded constituency. Handler himself points out that these nontraditional uses of litigation are among the most interesting and important aspects of the law reform movement.⁴¹ But the final chapter analyzes these nontraditional goals far too tentatively: Handler in effect abandons the discussion of "success" in *this* political sense because he thinks it so difficult to measure publicity or legitimation.⁴² My own view is that the pursuit of precisely these nontraditional goals lends to law reform an aspect of theater; and very serious theater at that. Perhaps it is just the political dramaturgy of law reform that eludes the author's obvious wish to apply scientific language and models. Indeed, it may be that a social science model of law reform is bound to be incomplete without the aesthetic leavening of linguistics or rhetoric.

In discussing the third level of success, "success-as-pluralism," the author is at his gloomiest, predicting that law reform will fall short of revitalizing pluralism. He argues that social reform organizations generally have a kind of natural evolution, resulting either in their gradual atrophy, or in their co-option by government or other "establishment" organizations. The reform organizations' use of law reform, he says, does nothing to alter this basic natural history; if anything, law reform accelerates the process of decay.⁴³

Interesting though this analysis may be, it has virtually no support in the case studies; it rather rests almost wholly on the author's extrapolations from the theories of yet another group of social science authorities. Thus, Handler's final pessimism about law reform seems strangely removed from the remainder of his study.

Because this lugubrious grand finale is unconvincing, one might conclude that the history of law reform to date gives us reasonable ground for cheer. Certainly there are some social reform movements—including those that have continually used litigation, such as the American Civil Liberties Union—that have not yet either collapsed altogether or merged with the "establishment." And what if they collapse or merge? Surely pluralism is not defunct simply be-

41. P. 210; *see* p. 221.

42. P. 222.

43. P. 230.

cause individual social reform movements go through a natural life-cycle. The important point is that new interests continue to emerge, not that any particular movement or organization lasts forever. Nor need co-optation be a fate worse than death for the social reform organization. We might speculate that co-optation comes precisely when the reformers gain access and become respectable to the political establishment. But again, co-optation of one group of social reformers need not prevent the emergence of new dissidents and new reformers.

The author is surely right that law reformers are unlikely to alter the basic life history of social reform movements, and certainly they are unlikely to toll the bells of social revolution. The significance—and indeed the excitement—of the law reform movement lies rather in its use of traditional institutions in nontraditional ways. The most imaginative and creative of the law reformers have sensed the theatrical possibilities in those very staid institutions, and have ushered in some hitherto unknown casts of characters to dramatize a set of concerns that have resounded only weakly in our other political institutions. Naturally, the particular play is sometimes a flop—often due to one or another of the difficulties included in Handler's 5-factor analysis. But the author's final pessimism aside, his case studies suggest that social reform will never be quite the same, and neither will the courts. Despite the author's personal melancholy about law reform, one concludes this ambitious study thinking that law reform litigation has after all helped to invigorate a number of social reform efforts, and that whether or not future social reformers turn to law reform, they cannot but think of the courts as a potential forum for unconventional political messages.