

## Social Change Litigation as Just Another Political Tool

By SAMUEL R. BAGENSTOS

Review of **HOW POLICY SHAPES POLITICS: Rights, Courts Litigation, and the Struggle Over Injury Compensation**, by Jeb Barnes and Thomas Burke

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Every fall, law school lecture halls fill with idealistic young students who dream of bringing lawsuits that change the world, in the mode of Thurgood Marshall or (pre-2000) Ralph Nader. When they take their seats, though, those students often hear that their idealism is misplaced. The notion that litigation can promote social change is at best a “Hollow Hope,” as the title to Gerald Rosenberg’s influential book tells us. At worst, litigation may be counterproductive and pernicious. Students hear, from left, center, and right, that efforts to achieve social change through litigation will provoke a backlash that will ultimately undermine those efforts; that litigation is undemocratic and privileges the elite voices of lawyers and judges; that litigation promotes a discourse of individualism that gives short shrift to the interests of the community and ultimately depoliticizes; and that the party-on-party nature of litigation is a poor fit for complex, “polycentric” social problems. One might regard it as a tribute to the indomitable human spirit that some new law school graduates, after three years of so much cold water thrown on their idealistic dreams, *still* plan on filing suits that make social change.

The critics of using litigation for social change make cogent points with substantial empirical support. But their arguments have, it seems to me, foundered on one key question: Compared to what? Major social changes, achieved through litigation, have provoked backlashes, but so too have major social changes achieved through legislation. The reaction to the Affordable Care Act stands as only the most recent, prominent example. Litigation privileges elite voices, but it's not like our legislative system is a model of openness and mass democracy. And legislation, just like litigation, can focus too narrowly on particularly salient dimensions of complex problems and therefore reach suboptimal outcomes. To decide whether achieving social change through litigation is pernicious, or at best a hollow hope, we must compare it to other modes of achieving social change.

In their smart new book, *How Policy Shapes Politics*, political scientists Jeb Barnes and Thomas Burke focus resolutely on that compared-to-what question. Through a series of case studies involving injury-compensation policy, they seek to identify whether policies driven by litigation (or, in their preferred term, “adversarial legalism”) have different effects on subsequent politics than policies implemented through a centralized bureaucracy (“bureaucratic legalism”). Although the case-study method limits our ability to draw systematic conclusions from their analysis, Barnes and Burke more than make up for that limitation by offering a rich account of the development of policy in the area of injury compensation.

They recognize that no American policy is an ideal type—litigation matters at least around the edges of even the most centralized, bureaucratic program, and even the most litigation-oriented policies involve some degree of expert or bureaucratic administration. But their three cases—compensation for work disability, asbestos injuries, and vaccine injuries—lie at identifiably distinct points on the spectrum between adversarial and bureaucratic legalism. We compensate work disability through the Social Security system, which is about as close to the ideal type of bureaucratic legalism as we get in the United States. Asbestos injuries have been compensated through the tort system—the paradigm of adversarial legalism. Although the important role played by bankruptcy courts in the asbestos area has added some degree of bureaucracy, Congress has rejected efforts to adopt a more centralized, bureaucratic compensation scheme. Vaccine-injury compensation started off, like asbestos, in adversarial tort suits against manufacturers. But Congress ultimately passed a law, the National Childhood Vaccine Injury Act of 1986, which largely moved these cases out of the tort system and into one administered by the federal government and funded by tax revenues.

Comparing these three approaches to injury-compensation policy, Barnes and Burke find unproven a number of the charges leveled against litigation as a tool to achieve social change. They reject the claim, articulated by Rosenberg and William Forbath among others, that litigation crowds out

other forms of political mobilization. Rather, they find that in their case studies “adversarial legalism seemed to fuel group mobilization, creating a more fragmented, pluralistic politics featuring more diverse interests with competing viewpoints” (p.17). Activists did not wholly commit to litigation *or* other forms of mobilization but instead “seemed adept at moving from one institution to another, looking for levers wherever they could find them” (p. 17). The shift in the vaccine area from tort law to a bureaucratic compensation system—a shift supported by many of those who had brought suits claiming vaccine injuries—is a prime example of the point (p. 162-167).

Barnes and Burke also reject the claim that the court system’s reliance on precedent makes litigation a poor tool for dealing with problems that change over time. There is a status quo bias in *both* adversarial *and* bureaucratic programs, which makes basically any program hard to change at the macro-level once it is implemented. But Barnes and Burke find that “bureaucratic programs and agencies often proved *less* flexible than legal doctrines and courts, failing to adjust existing rules to new policy circumstances and political demands, and forcing stakeholders to turn to the courts, which proved remarkably adept at adjusting administrative regulations and legal doctrines to new circumstances” (p. 20). Flexibility and responsiveness to change over time has long been understood as one of the benefits of the common-law method, and both the asbestos and vaccine cases offer a number of examples of this sort of judicial flexibility.

As for backlash, Barnes and Burke find that litigation *did* often lead to “counter-mobilization,” but that it “was far more complex and variegated than is implied by the backlash literature” (p. 21). Sometimes, as in the case of vaccine compensation, counter-mobilization can scramble the existing politics, creating opportunities for talented policy entrepreneurs (in this case Rep. Henry Waxman) to build unusual coalitions to make enduring change through legislation.

In all of these respects, Barnes and Burke find, litigation is not a way out of ordinary politics so much as it is a tool that individuals and groups seeking social change can employ in those politics. It is a tool that may have different costs and benefits—litigation may privilege the voices of lawyers, but it may also provide an entrée into pluralistic bargaining for previously excluded groups—but it is ultimately just one of many tools. Barnes and Burke’s conclusions thus resonate strongly with Stuart Scheingold’s argument, in his 1984 book *The Politics of Rights*, that legal rights are best understood as political resources that can be deployed by social movements. Although there are limits to the conclusions that can be drawn from three case studies in one broad area of policy, idealistic young law students should at least find some solace in Barnes and Burke’s discussion.

But Barnes and Burke conclude that their case studies vindicate one of the charges against litigation as a tool for social change — that it individualizes political interests, undermines social solidarity, and ultimately

creates “a fractious brand of politics” (p. 23). Asbestos and vaccine litigation, they find, made it harder to reach a political consensus because the litigation process “encouraged Congress and interest groups to see the problems in terms of individual fault — the problem of a particular company — as opposed to a more systemic policy issue” (p. 194). Moreover, litigation created a “complex pattern of winners and losers,” which led to “a fractious, chaotic politics” (pp. 194-195). By contrast, although Social Security Disability Insurance engendered contentious arguments at the moment of its creation, the politics of the program ultimately “settled down,” as opposition to the program became narrow and muted, while beneficiaries “remained united against proposed cuts” (pp. 194-195).

This is where I part ways with Barnes and Burke’s otherwise powerful analysis. Even leaving aside the limits of the case-study method, Barnes and Burke do not show that we should be concerned about the political effects of litigation-focused social change.

For one thing, their normative premise is doubtful. Why should we prefer a politics that has “settled down” over a politics that is “fractious” and “chaotic”? When people in fact have different interests, a settled-down politics is likely to be one in which some peoples’ interests have prevailed and others’ have been suppressed. Indeed, many of our most important movements for social change have sought to disrupt political settlements that excluded them. The movements to overturn Jim Crow, to promote equal

citizenship for women, and to end the oppression of gays and lesbians all sought to unsettle politics. By providing a voice to those who had previously been excluded, these movements undoubtedly increased the fractiousness and chaos of American politics, but that was very much a good thing.

Barnes and Burke themselves find that litigation seems to offer distinctive opportunities to open up pluralistic bargaining to once-excluded voices (p. 17). And “fractious” politics in this context at least sometimes means that litigation can divide the interests of those who would otherwise link arms to thwart important social change. That is precisely the dynamic Barnes and Burke describe in their vaccine-compensation case. Although vaccine manufacturers originally stood steadfast against any compensation system that they would have to finance, the rules of tort law gave different manufacturers different levels of legal exposure. By fracturing the interests of potential defendants from one another, tort litigation created an opening for Henry Waxman to craft a coalition that included both injured persons and some manufacturers to support a swifter, surer, more adequately funded vaccine compensation system (pp. 162-167). Sometimes the staid politics of the status quo need fracturing.

Although Barnes and Burke say that their findings support the claim, by many critical legal scholars, that litigation harmfully individualizes politics (pp. 22-23), the arguments are very different. Critical legal scholars contended that reliance on rights claims treats social problems as individual

ones and as a result alienates individual claimants from both their fellow claimants and the larger community — at the same time that judicial enforcement of rights places a veneer of justice on a fundamentally unjust system. But the fractious politics Barnes and Burke find is not at all the same. It's a politics in which different groups perceive themselves as having different interests and thus do not coalesce around particular solutions to social problems. Sometimes this politics can impede social change—and, indeed, for some matters *everyone* may prefer that the issue be settled even if it is not, in everyone's view, settled right. But the cases Barnes and Burke discuss do not follow this pattern. And, indeed, the chaotic politics they identify can sometimes, as in the vaccine case, fracture coalitions that would otherwise have prevented needed social change.

Even if we grant the normative premise, Barnes and Burke do not show that litigation uniquely causes a fractious politics. They argue that litigation-oriented policies “shape” subsequent politics through two mechanisms: (1) “distributional effects” (imposing “unequal, unpredictable, and unstable costs and benefits” that pit different stakeholders against each other); and (2) “blame assignment” (“focus[ing] blame on particular defendants” and thus “creat[ing] a barrier to reform”) (pp. 196-197). But the distributional effects are hardly unique to litigation, and blame assignment is likely to be as much the cause as the consequence of a focus on litigation.

Barnes and Burke are of course right that the implementation of a



particular policy can have distributive effects that affect the next stage of policy bargaining. Since at least Mancur Olson, we have known that programs with dispersed costs are unlikely to trigger much effective political opposition once in place. And the examples of bureaucratic legalism that Barnes and Burke explore—Social Security Disability Insurance and the Vaccine Injury Compensation Program—basically fit that pattern. It is therefore hardly a surprise that these programs, once enacted, led to a relatively quiet politics (despite occasional flares of controversy). But there is nothing inherent in bureaucratic approaches that makes their costs more broad-based than those of litigation-focused approaches to social change. Consider the Affordable Care Act, which Barnes and Burke would surely consider to be a policy of bureaucratic rather than adversarial legalism. The ACA imposes different costs on different segments of the health care industry—costs that are themselves uncertain and dependent on further decisions by a variety of individual, corporate, and political actors. Medical device makers, for example, face a new tax that other segments of the industry do not, and the financial health of some hospitals will depend on whether they are located in states that decide to take up the ACA's offer to expand Medicaid. The ACA's unequal, unpredictable, and unstable costs have clearly shaped the subsequent politics of health care. But that has nothing to do with the question of bureaucratic versus adversarial legalism.

As for blame assignment, Barnes and Burke likely have the causal

arrow reversed. They argue that the design of a policy shapes the public's assignment of blame: "organizing of claims into private lawsuits focused blame on particular defendants—vaccine and asbestos makers—and this created a barrier to reform; opponents argued that socializing the cost of injury let the defendants off the hook" (p. 197). Barnes and Burke are surely right that the law's assignment of responsibility can have *some* effect on the public's assessment of blameworthiness. But the reverse is at least as likely to be true: The public's assessment of blameworthiness often shapes the design of policies. In other words, maybe the reason why it didn't seem fair—to Congress or the public—to socialize the cost of asbestos injuries is *not* the accident of history that, before Congress acted, courts found manufacturers liable for those injuries. Maybe the evidence that manufacturers hid asbestos risks from the public (p. 124) is what made it seem unfair to let them "off the hook." Conversely, maybe the obvious public good in promoting vaccination, not to mention the fact that the government compels parents to vaccinate their children, made it seem appropriate for the public to bear the cost of inevitable vaccine-related injuries.

As the vaccine compensation example demonstrates, path dependency is not destiny in the world of blame assignment. That compensation for vaccine injuries first came through a litigation-driven policy did not prevent Congress from later adopting a more bureaucratic policy to address the problem. And the reverse is true as well. When a bureaucratic policy does

not track broad public understandings of responsibility and desert, it is the policy that is likely to change rather than the public's understandings. Consider, in this regard, the old Aid to Families with Dependent Children program, which was a bureaucratic policy but failed in large part because it became inconsistent with public views of who constitute the deserving poor. Or consider workers' compensation, a bureaucratic policy originally designed on a no-fault basis, but into which legislatures, administrative agencies and courts have increasingly smuggled fault-based understandings through the elaboration and interpretation of concepts of causation and compensable injury. Does the legal form control the public's understanding of fault, or is it the other way around?

*How Policy Shapes Politics* is an essential addition to the literature on the politics of social-change litigation. The book's rich case studies enable us to engage the compared-to-what question that work in this area too often elides. Barnes and Burke persuasively show that litigation is just another political tool that can be employed by those seeking social change. Litigation has costs, but so do the other tools on offer. And sometimes, litigation can have particular benefits, by shaking up staid politics, by incorporating once-excluded voices into pluralistic bargaining, and by providing space for a flexible, common-law approach to addressing new problems. If the book goes wrong, it is only by failing to pursue these core insights as far as they appear to lead. But Barnes and Burke do a great service in demythologizing social-

change litigation, and allowing us to see that it is simply a tool with costs and benefits like any other.

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