BOOK NOTE

ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE. By Aryeh Neier.[1] Middletown, Connecticut: Wesleyan University Press. 1982. Pp. ix, 265. $17.95.

Recent efforts in Congress to strip the federal courts of their jurisdiction over abortion, school busing, and other controversial matters[2] have intensified public debate over the role of courts as catalysts for social change. *Only Judgment* is a valuable, pragmatic contribution to this debate, which up to now has been notable more for ideological heat than for enlightened understanding of the underlying issues. Aryeh Neier, the author, is a former executive director of the ACLU. Despite his role as an advocate for social change, however, he presents a view of the courts that is balanced, insightful, and deeply concerned about the institutional propriety of judicial mediation of social and political conflict.

Neier chronicles the development of social change litigation in the United States during the two decades after *Brown v. Board of Education*[3] — a period that he calls the "golden era" of cause litigation (p. 235) — and the subsequent difficulties faced by such litigation during the Burger Court years. The book, however, is neither a jeremiad against conservative efforts to restrain the courts nor a mere survey of public interest litigation. Neier analyzes with remarkable objectivity the successes and failures of this movement. He provides the lay reader with an explanation of why the courts must play a major role in social change, and he provides public interest advocates with suggestions for doing their work more effectively.

Neier, who has been intimately involved in the struggles that he describes, organizes his account around nine areas of litigation activity undertaken by the ACLU and other public interest groups:[4] race discrimination, voting rights, sex dis-

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[1] Adjunct Professor of Law, New York University. Executive Director, NYCLU, 1965–1970; National Executive Director, ACLU, 1970–1978.

[2] *See* Sager, *The Supreme Court, 1980 Term — Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 18 n.3 (1981) (listing proposed legislation).

[3] 347 U.S. 483 (1954).

[4] Neier gives very little attention to the efforts of groups other than the ACLU, with one exception — the role of the NAACP Legal Defense Fund in challenging the death penalty (pp. 197–211). For descriptions of other approaches to litigation directed at social change, see RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS (J. Black ed. 1971); Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976).

crimination, welfare rights, the antiwar movement, government secrecy and spying, asylums and prisons, the death penalty, and the environment. In each area that Neier examines, the narrative reflects his curious combination of roles — the result-oriented advocate and the detached political observer. As advocate, Neier points out the ways in which a particular campaign could have been handled better. As observer, concerned with the legitimacy of the courts' mandating social change, he often concludes that the same campaign should not have been undertaken at all!

Neier's theory of the courts' proper institutional role in American society frames his discussion of each subject area and permeates his analysis. His theory is based on a questionable trichotomy of judicial goals into corrective, distributive, and political justice. The first of these goals, according to Neier, defines the courts' traditional and proper role: by enforcing "known principles," the courts "restore the order . . . that the rules of the society make clear should have prevailed before [the] injustice was committed" (p. 15). The other two forms of justice, which concern the allocation of wealth and political power, are generally less appropriate objects for judicial rather than legislative furtherance, because they often exceed the boundaries of known principles (pp. 16–19).

To the extent that this categorization of judicial roles is valid, it depends on a wholly pragmatic notion of legitimacy that would limit judicial authority to areas in which the public is willing to defer to the courts' decisions. Neier is certainly correct in his claim that public respect for the courts depends paradoxically on judicial self-restraint.[5] Thus, when he counsels successful colleagues in the environmental movement, for example, to curb their reliance on the judiciary (p. 224), he does so with the goal of conserving precious judicial legitimacy. It is his perception of the courts' legitimacy as the public interest litigator's greatest asset that integrates Neier's otherwise inconsistent roles as institutional observer and advocates' advocate.

As a matter of theory, however, Neier's analysis founders on its premise that the struggle over "known principles" is in some way distinguishable from the contest for shares of economic and political power. The differences, if there are any, may be apparent in extreme cases. For example, a post-*Brown* challenge to de jure school segregation would clearly invoke corrective justice and known principles. But most of the con-

[5] This now-familiar view was first developed fully in A. BICKEL, THE LEAST DANGEROUS BRANCH 127–33 (1962).

troversies described in Neier's book (for instance, the legality of the Vietnam war (pp. 141–53)) have been hotly contested for the very reason that they have defined the boundaries of evolving principles of law.

Neier's account is also disappointing in its curiously narrow focus. By concentrating almost exclusively on the courts, Neier fails to give his reader a sense of the whirlwind of social controversy and political struggle that characterized the era that is the focus of his book. Astonishingly, Neier tells the story of prison reform without mention of Attica, the story of the environmental movement without mention of Seabrook or Diablo Canyon. A reader unfamiliar with our recent past would not learn from this book that the inroads of public interest litigation were made against a backdrop of scattered but persistent civil disobedience, voter registration drives, pro-choice marches, and urban riots. One searches Neier's pages in vain for analysis of the effect that all that commotion had on life at the ACLU or in court.[6]

In focusing his broad survey of social change litigation on the constraints imposed by the political system, Neier omits discussion of several other limitations that are implicit in the nature of the relationship of the public interest litigator with the groups whose interests she advocates. First is the potential conflict of interest (described only in the context of two capital punishment cases (pp. 201, 204, 209)) between the interests of the individual client and those of others who have a stake in the controversy. Second is the isolation of the attorney, especially the appellate level attorney, from the client — a factor that is ultimately alienating for both. Third is the risk of cooptation and containment of the causes that the attorney seeks to further — that is, the risk that the reliance of some

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[6] In the case of American blacks, Neier does consider the opposite relationship — the pacifying effect that the Supreme Court's decisions had at a potentially volatile point in our history: "[W]ere it not for *Brown* or some comparable decision by the Supreme Court, American blacks would have engaged in violent struggle to end state-enforced segregation. The Supreme Court's assertion of authority to shape public policy in *Brown* may have had a large part in averting civil strife . . ." (p. 56).

Neier also considers the way in which foreign policy considerations affected the outcome of civil rights litigation. The Attorney General's filing an amicus brief in *Brown*, for example, was motivated at least in part by the exigencies of the Cold War and the Eisenhower Administration's perception that "'[t]he existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills'" (p. 34) (quoting Brief for the United States as Amicus Curiae at 6, *Brown* (No. 52-1)).

social change organizations on litigation may ultimately disempower them.[7]

Neier's analysis borders on a recognition of this last problem (p. 226), but instead of seeking a solution in reform of the advocacy process itself, the author focuses on the decision to pursue judicial as opposed to legislative remedies. Neier suggests, for example, that the attorneys for environmental groups might have done better to take their battles to legislative forums, where the struggle to obtain majoritarian support would have further consolidated their movements (p. 17). Blacks, on the other hand, clearly benefited from the decision to take their cause to court, as shown by the rising tide of political expectations following *Brown* (p. 57).

A more significant result of the choice of the judicial rather than the legislative forum for the groups represented by Neier and his colleagues is the disempowering effect of relying on lawyers and the legal process. Such a reliance grows out of familiar patterns of deference to the attorney's status and expertise. Yet skill in manipulating doctrine may not qualify the attorney for political leadership of those whose interests are dissimilar from her own. The efforts of the public interest advocate all too often obscure those of the client; Neier's book, for all its virtues, reflects this nearly exclusive concern with legal process. And if such a focus reinforces status and dependency relationships that are politically and psychologically disempowering, the solution may be to reinvigorate the process of public interest advocacy to instill in it more participatory values.

Such a reexamination of the attorney's role may not fit easily within the plan of Neier's book. Yet even for the result-oriented advocate, the enabling/disabling effects of litigation on the political consciousness of the participants must be taken into account as part of the outcome. Racial minorities, women, prisoners, and the poor — who, after all, instigate as well as benefit from social change — must in the end be the center of any public interest advocate's attention.

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[7] Public interest litigation frequently requires coordination with other aspects of a political struggle; one example is the shaping of public opinion (pp. 241–43). Cooptation and containment may occur when the goal of victory in the courtroom leads to strategies that displace the broad goals that the litigation was designed to advance in the first place.