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POLITICS AGAINST LAW

*Ernest van den Haag**

THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE. Edited by *David Kairys*. New York: Pantheon. 1982. Pp. ix, 321. Cloth, \$22.50; paper, \$9.95.

There are many things wrong with our legal system. The losing party in a civil suit does not have to pay the expenses of the winning party. This encourages litigiousness and makes it inviting for rich persons to harass poor ones and for poor persons to, in effect, blackmail corporations and the rich. Contingent fees contribute to this litigiousness and the resulting overload of the courts. The *voir dire* of prospective jurors delays trials and makes them costly with no discernible advantage to justice. The exclusionary rule has long been demonstrated to have no deterrent value in keeping law enforcement officers law abiding and to be of use only to guilty suspects or defendants. I could go on. But in the "Progressive Critique" under review matters of this kind are not discussed. Rather, we find chapters headed "Antonio Gramsci and 'Legal Hegemony,'" "Contract Law as Ideology," and "Perspectives on Women's Subordination and the Role of Law." The authors are more interested in attacking, or dismissing, our legal system for not being in accord with their ideological views, for supporting a social order which they oppose, than in improving or even criticizing the legal system in ways relevant to improvement. Perhaps there is nothing wrong with that. Nonetheless the performance is disappointing. The authors, with very few exceptions, discuss imaginary problems with great passion while ignoring real ones. Thus the whole effort seems irrelevant to any politics or to any law, although aimed at "The Politics of Law."

The keynote is struck in David Kairys' Introduction — although, to be fair, none of the other authors writes quite as badly. According to Mr. Kairys, judges
form values and prioritize [sic] conflicting considerations based on

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their experience, socialization, political perspectives, self-perceptions, hopes, fears, and a variety of other factors. The results are not, however, random; their particular backgrounds, socialization, and experiences — in which law schools and the practice of largely commercial forms of law play an important role — result in a patterning, a consistency, in the ways they categorize, approach, and resolve social and political conflicts. [P. 5].

Well, I should hope so. Although Mr. Kairys apparently objects he doesn't tell his reasons. Why shouldn't it be one purpose of the judiciary to decide conflicts in a consistent pattern? Would inconsistency be desirable? What patterns does Mr. Kairys prefer? There is a clincher: "[The law] . . . legitimizes dominant social and power relations . . . [and] confers a broader legitimacy on a social system and ideology that, despite their claims . . . are . . . characterized by domination by a very small, mainly corporatized [sic] elite" (p. 5). This statement (a complaint, I guess, but we are not told why) suggests the essence of the complaints of all the progressive authors of this volume: (1) The social system is bad. We are not told much about what makes it bad, except for the suggestion, here and there, that some people are poor, others wealthy, some are powerful, others are not and, most often, that power and wealth are held by a "small . . . elite." (2) Since the law's perceived legitimacy supports and legitimizes advanced capitalism the law as legislated, taught and practiced is bad too. Stripped of their evaluative content these two statements amount to saying that the law legitimizes and supports the existing social system. Now, this is quite true; it is also quite trivial. I don't know of anyone silly enough to deny it; how could it be otherwise? The law, anywhere, and in any social system is not meant to do less than articulate and support the social order. How could the law support a social system other than the one in which it is legislated and applied? The law in a socialist society cannot "legitimize" or support capitalism, nor, in a capitalist society, socialism.

I feel a little embarrassed to have to explain this to Mr. Kairys and his coauthors. Still I must. The law always consists of (1) some nearly universal rules (of various kinds) that are almost part of the definition of law, such as "*pacta sunt servanda*," "*de minimis non curat praetor*," or "*nulla poena sine lege*," and (2) specifically legislated statutes, customs, rules and *ad hoc* decisions which, indeed, articulate, legitimize and enforce the prevailing culture and ideology, and the existing social order and its rules. To be sure, ideology changes and so does the social order; these changes sometimes are reflected in the law and sometimes are helped along, or resisted, by legislation and by judicial pronouncements. Surely none of this can

come as a surprise to Mr. Kairys. Did he expect American law to support either Nazism or Communism? Or Communist or Nazi law to support democratic capitalism?

It would have been more interesting to investigate the large areas in which there is an overlap among the legal systems of all societies. In a socialist as well as a capitalist society the poor are more tempted to rob than the rich. In both societies the law tries to protect prospective victims by punishing robbers. Both social systems must deal with divorce and child support, with attacks against public authority, with murder and with theft. To me the case for the existence of an area of study called law, independent of specific political orders, seems much better than Mr. Kairys or his authors let on. In any society — “progressive,” socialist, capitalist, or whatever — there must be law which legitimizes the prevailing social order and also uses the universal rules mentioned above. Why this should, somehow, be a grievance against law beats me altogether. I cannot understand why Mr. Kairys writes with an air of discovery “[l]aw is simply politics by other means” (p. 17). It cannot be less. It may be more. It is the “other means” that are interesting to the lawyer, of course.

To be sure, legal institutions may enjoy different degrees of independence from incumbent power-holders. Accordingly, judges may or may not be able to apply impartially the accepted legal rules of a society to particular cases. Is it then the complaint of the authors of this volume that our legal establishment is less independent of power-holders than legal institutions elsewhere, or in the past? It is not made clear, but the major complaints seem to be “structural,” not against abuses but against the legal order as such. At any rate, our judiciary seems more independent from the government and from any specific power-holder than the judiciary is in Eastern Europe, or in South or Central America, Africa or Asia. We are not told in this volume of any instances of illegitimacy in the sense of intervention by nonjudicial power-holders in particular cases. The attack is against the legitimate practices of the law. They are depicted as, somehow, illegitimate because they support the existing society, which is bad, and fail to support something else which is nebulously adumbrated, but never described.

Although the authors do not explain why our society is bad, it seems fair to say, nonetheless, that they feel that our society is insufficiently egalitarian. Indeed, as far as I can make out that seems to be their main grievance. (A very un-Marxian one, incidentally, although some, but not all, of the authors are Marxists.) Yet in the distribution of power, income, and prestige, and with respect to ac-

cess to consumption, American society is more egalitarian than any socialist society I know of, and more egalitarian than any major capitalist society that I am familiar with. The authors seem to compare American society not to any other society, past or present, but simply to an implicit utopian construct. By definition, all actual societies are worse than wishful constructs.

About this implicit wishful construct the authors, so critical of the prevailing social order, do not ask, let alone answer, the most obvious questions: How much equality is desirable? How much does equality impinge on other desiderata, such as liberty? If it be desirable, how much equality is possible? Even with minimal liberty, as for instance in the Soviet Union, or in China, I can see no way of avoiding inequality: some people make much more money than others and some people gain much more power than others. Economic activity requires a management elite, cultural activity a cultural elite. Neither need be politically selected, as both currently are in socialist societies, and both may be open. But they are elites, however selected. The notion of government itself implies that a few — the government — at any time hold much more power than others — the governed. Further, if people are not rewarded according to their ability, skill and effort, they will not apply any of these and we will all be poor — though still unequally so since people spend at different rates. On the other hand, if effort, skill, and ability are to count for anything, inequality cannot be avoided since they are unequally distributed. Further, if these factors are not evaluated by an impersonal market, which distributes income accordingly, they have to be evaluated by a bureaucracy and by politicians. Would such a relocation of evaluations really lead to less arbitrary or morally better evaluations? It certainly would be less efficient than the market is.

Let me now turn to a few instances which seem typical of the *modus operandi* of these “progressive” critics of the law. (Incidentally, in the volume under review, progressive denotes whatever the authors approve of. Synonyms used are “radical,” “critical,” “left,” and “socialist.”)

In “The History of Mainstream Legal Thought,” Professor Elizabeth Mensch endorses Robert Hale, who “pointed out . . . [that] market exchanges are in fact a function of the legal order . . . so-called free bargains (and taken collectively the supposedly objective market price) are determined by the legally protected right to withhold what is owned” (p. 37). This is true, but trivial, if it means that market exchanges require a legal order including the legal concept of

property. However, that legal framework determines bargains, or prices, only in the sense in which the rules of a baseball game determine the outcome. If the rules really did determine outcomes, regardless of the input of the players, there would be no game. If "the legal order" really did, there would be no "free bargains." Actually the rules only determine the kind of game played: baseball, not tennis; capitalism, not central planning. The equivocation between the meanings of "function" and "determine" (between (1) limiting and regulating transactions and (2) ordaining their outcome) seems too silly to appear in a publication meant to be taken seriously.

Professor Duncan Kennedy ("Legal Education as Training for Hierarchy") contends that law schools provide "ideological training for willing service in the hierarchies of the corporate welfare state" (p. 40). He seems to think that providing this training is wrong, or bad, but he does not say why. Any society trains its young to serve in and to continue that society. A socialist society provides training for "willing service in the hierarchy" of a socialist society. I find nothing wrong with this, but Professor Kennedy does. Nor does it occur to him that his own teaching at Harvard Law School (not to speak of the behavior of Harvard law students) indicates that the practice he objects to, however interpreted, does seem to tolerate exceptions. He does contend, however, that what he (or is it only his colleagues?) does "teach along with basic skills is wrong, is nonsense" (p. 40). I won't argue about this. He knows best. But his other grievances should be mentioned.

Professor Kennedy complains about excessive deference for teachers, "a passivizing [sic] classroom experience" (p. 43) (I had not thought law school graduates to be a passive or deferential bunch), and about the law school being "culturally reactionary" (p. 42) since it affords "no purchase for left or even for committed liberal thinking" (p. 43). The liberal student is left "to undertake the Procrustean task of reinterpreting every judicial action as the expression of class interest" (p. 49). I agree that this would be a Procrustean task. Does Professor Kennedy? He believes that law is "an aspect of class struggle" (p. 50). If so, the task wouldn't be Procrustean. Did he confuse, as the context seems to indicate, Procrustes with Sisyphus? Anyway, Procrustean would seem an apt characterization of his essay. My task in reviewing it is Sisyphian.

Some of Professor Kennedy's complaints seem based on an altogether remarkable failure to understand what teaching *any* subject is all about. He feels aggrieved because "[grades are experienced as] unrelated to how much you worked, how much you liked the sub-

ject, how much you thought you understood going into the exam, and what you thought about the class and the teacher" (p. 50). Well, I should hope so. Shouldn't grades reflect demonstrated knowledge rather than what you thought about the class and the teacher, how much you thought you understood, how much you worked? Shouldn't students perceive as much? Professor Kennedy doesn't seem to think so. I hope that his practice is better than his theory.

If you think Professor Kennedy interesting, then Professor Richard Abel ("Torts") is downright intriguing. He seems to be a Marxist (circa 1930) of a kind I (wrongly) believed extinct. Here is a sampler: "In precapitalist society, injury . . . elicits care from intimates . . . motivated by concern" (p. 187) whereas, under capitalism, compensation is elicited. Abel's history seems shaky here, but worse is to come: "[T]he medical profession disables victims and intimates from caring for illness and injury . . . to protect . . . the monopoly of expertise of the . . . physician" (p. 188). How are victims and intimates disabled from "caring for illness and injury"? Does consulting physicians or being operated on in a hospital really "disable" anyone else from caring? At any rate, isn't it a helpful alternative? Or should your friends and relatives do the surgery and prescribe the medicines? Did medicine men, or precapitalist physicians, do better? Did they help their patients more and did they, unlike today's physicians and lawyers, share their expertise? Clio must be weeping.

All these nasty capitalist things are done because "capitalists have to maximize profits . . . they *must*[Abel's italics] sacrifice the health and safety of others . . ." (p. 188). Yet tort law may be effective. If so, I was naively tempted to think, it makes the preservation of other people's health, and protection from injury, part of maximizing profits. But that makes tort law worse according to Professor Abel: "By compensating owners for property damage it upholds the notion of private property" (we are not told why that notion is bad) and still worse "[b]y preserving the income streams of those who suffer physical injury . . . tort law affirms the legitimacy of the existing income distribution" (p. 194). Very nasty of tort law to do that. Would it be better not to compensate an injured person? Apparently tort law should be used for income redistribution independent of torts suffered. But tort law could do so only by ceasing to be tort law. Professor Abel does not tell us just why tort law is the right instrument for redistribution, nor how it should be used.

Tort law is even nastier than anyone dreamt. By giving monetary damages for suffering it simulates "a market in sadomasochism"

(p. 195). I have given serious thought to Professor Abel's "market for sadomasochism" but it leaves me confounded. I haven't been able to figure out what he means. Sadists enjoy hurting people. Masochists enjoy being hurt. However I know of no evidence indicating that persons whose behavior results in a tort suffered by others, enjoy the injury for which they are liable (sadism), or that those who suffer it enjoy their suffering (masochism) or that either enjoys asking for, or giving the compensation tort law grants. Nor do I know of persons enjoying the spectacle. Thus this "market" leaves me confounded. Wherein does the sadomasochism lie? Professor Abel does not tell. Nor does he bother to suggest evidence. I suspect that his "market for sadomasochism" has no meaning other than disapproval (of the tort remedy?) expressed in dramatic terms without precise meaning; indeed without any applicable meaning.

Professor Abel is less original, though more intelligible when he says "[d]amages commodify [sic] our unique experience by substituting the universal equivalent, money" (p. 195). This echoes Marx's well-known "fetishism of commodities. Tort law does compensate for a uniquely unpleasant experience through money. The author does not indicate how else to compensate for a lost limb. Nor does Professor Abel mention that, since time immemorial, money even compensated for lost life. It is the best that can be done by social regulation. Love undoubtedly would be better but cannot be produced by fiat. Just how tort law could exist without monetary damage payments is not explained, but, then, perhaps it shouldn't exist and Professor Abel is too cagey to tell us.

Enough of this. Nearly all (but not quite all) the essays in this volume are as silly as those I have quoted from. Some are abstruse and obscure (*e.g.*, Edward Greer on "Antonio Gramsci and 'Legal Hegemony'"). A few are mediocre summaries or quasi-analyses of legal cases. One, however, comes perilously near reasonableness, at least in comparative terms. Victor Rabinowitz ("The Radical Tradition in Law") persuasively defends the usefulness of law against "the IWW-Marcuse-Lefcourt position" (p. 312). But on the whole the merit of these writings does not warrant the effort required to read them.

I may be permitted a small digression. Victor Rabinowitz quotes (p. 312) as "a fair approximation of a view held by many Marxists," Florynce Kennedy, "a prominent militant lawyer" who writes: ". . . the legal profession, is a whorehouse The lawyer . . . is analogous to a prostitute. The difference . . . is simple. The prostitute is honest — the buck is her aim. The lawyer is dishonest — he claims

that justice, service to mankind, is his primary purpose.”¹ Now, I think, that claim is made primarily by “militant” or “progressive” lawyers. Other lawyers are quite content to say that they render legal services for a living, just as farmers farm for a living. Still they provide a “service to mankind” by providing food, just as lawyers provide a service to mankind by helping in the regulation of social life. At any rate, I don’t understand how Ms. Kennedy learned about the motives, honest or dishonest, of either lawyers or prostitutes. Perhaps some prostitutes feel that besides making a living they render as socially important a service as do lawyers. But let that go.

Mr. Rabinowitz does not endorse Ms. Kennedy’s view. Yet, in an excess of charity, he fails to remark on her odd logic. According to her, lawyers “are analogous” to prostitutes because they sell their services to those willing and able to pay for them, indeed (horrors) to “those best able to afford” them.² Well, don’t physicians? Is the medical profession a whorehouse, too, then? Are doctors also “analogous to prostitutes”? Taxi drivers, too, sell their services. Not only lawyers and doctors do so, but also cooks and coal miners, indeed, nearly anyone who does not have an income from capital. (Or do coal miners refuse to sell their services to the highest bidder because of their proletarian virtue? If so, I have not noticed.) Are coal miners prostitutes then, or prostitutes coal miners, or both something “analogous”? Ms. Kennedy simply discovered that where there is gainful employment, as distinguished from slavery, people sell their services, or their time, and are paid by other people according to the market value of their services.

A prostitute has that much in common with lawyers and doctors: they all sell their services for the highest prices they can get — although any of them may occasionally render services *pro bono publico*. Ms. Kennedy’s discovery is quite correct. And quite silly. Prostitutes differ from taxi drivers, coal miners, or lawyers and all these differ from one another, for, although they all sell their services, they each sell a different kind of service.³ What makes a prosti-

1. Kennedy, *The Whorehouse Theory of Law*, in *LAW AGAINST THE PEOPLE* 81 (R. Lefcourt ed. 1971).

2. *Id.*

3. Prostitutes are disapproved of because it is felt that the sexual services they sell should not be impersonally marketed. Sexual relations should be available only as part of personal relationships such as love or marriage. Some people feel that lawyers rent out their consciences as prostitutes do their bodies. An excessively adversarial system may indeed permit or even prompt such violations of ethics. Yet, the task of lawyers — to present the best possible case for their clients so as to enable courts to make decisions in the light of all pertinent facts and interpretations — is not only compatible with ethical behavior but required by it. Societies — socialist or capitalist — have always regarded this task as essential and morally required

tute a prostitute is not that she sells, but that she sells sexual services. What makes a lawyer a lawyer is not that he, or she, sells, but that he, or she, sells legal services. I am sure that Mr. Rabinowitz was too embarrassed to tell Florynce Kennedy these facts of life, but I think she is old enough to know. From now on she need not worry when she gets a fee. It does not make her a prostitute, if it is a fee for legal services.

while they have disapproved of the activities of prostitutes. The analogy between the lawyer selling his conscience as the prostitute does her body fails because the lawyer need not sell his conscience to be a lawyer whereas the prostitute needs to sell or rent her body to be a prostitute.