BOOK REVIEW

THE POLITICS OF LAW

Ed. David Kairys. New York:
Pantheon Books, 1982. Pp. ix, 321.

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At the end of this collection of essays critical of law, law schools, and legal ideology, Victor Rabinowitz reminds us of another such collection, Robert Lefcourt's *Law Against the People*,[1] published at the beginning of the last decade. Like this book, Lefcourt's was a landmark, not because the pieces in it were so excellent—many of them were ill-conceived and rough, as are some of the pieces in *The Politics of Law*—but because it summed up, as this book does, a set of attitudes about law that were increasingly widespread. Lefcourt and many of his contributors, reflecting that era of political show trials and resistance to the draft, embraced a version of what I call, in my mental shorthand, the "cat's paw" theory of the law: "that the law as an institution is an instrument of the bourgeoisie designed to deceive and oppress the mass of the people, and the lawyer is necessarily a part of this machinery."[2] While that theory is currently disfavored as being untenable in the long run, it at least had the virtue of apparent simplicity. The critique expressed or implied in much of Kairys's collection is more subtle and puzzling, even when the writers swing from the floor at the legal system.

The cat's paw theory was untenable because, in its simplest form, it allowed to the legal system no function at all. If you just once perceive that the true purpose of the legal system was to carry out the bidding of the ruling class, then the ideas of law become about as useful as the theory of epicycles after the Copernican Revolution; the ruling class might just as well direct the affairs of society without the expensive ceremonies. Yet everyone, the rich even more than the poor, clings to the ideal of fairness in the law, and dodges the radical claim that it is naked force dressed up in a black robe. Finally, then, no one maintains the cat's paw theory without in some way qualifying it, without saying, at least, that the law is a form of mystification necessary to govern peaceably.

When the cat's paw theory is so qualified, however, it immediately takes another form. Law is seen instead as part of an "ideology" which "legitimates" a system of government, affording it "hegemony." It ex-

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1. R. LEFCOURT, LAW AGAINST THE PEOPLE (1971).

2. Rabinowitz, *The Radical Tradition in the Law*, in THE POLITICS OF LAW 312 (D. Kairys, ed. 1982).

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plains social relations, affording them a rationality which they would not otherwise possess, so that they become acceptable to those subject to the laws. In this view, the law begins to take on some color of life again, some importance. There must be some values apart from naked personal or class interest to which the law appeals, and there must be some attempt, however sophistic, to be consistent in the application of law. Lawyers ought to have a job again, using the force of law to try to make the government stick to its announced ideals.

This is the place where the contributors to *The Politics of Law* find themselves. It is not an easy place; they are "critical" of law, in the sense that they seek to reveal its ideological core, and yet they know that systems of belief such as ideologies can be powerful instruments. David Kairys conveys their unease in the first piece, called "Legal Reasoning." He begins by telling us that the notion of *stare decisis,* under which courts purport to decide new cases according to old ones, in fact disguises "values and priorities [that] are the result of a composite of social, political, institutional, experiential and personal factors."[3] Yet the day is long past when an author like Kairys could entertain any direct instrumental view of the source of court decisions. *Stare decisis,* it turns out, is itself one of the "institutional" factors of which the courts must take account, as well as one of the "political" factors, because observers of the legal process expect the courts to adhere to precedent and the courts fear the wrath of their critics. Kairys's list of factors, then, roughly summarizes a dialectics for law, by which legal doctrine, even when it is seen to have its roots in political or economic needs, is partly governed by its own ideology.

Two poles emerge in the "critical" position, at one extreme the aspiration to even-handed justice implied by the notion of "law" itself, and at the other the all-encompassing criticism of every actual application of law in the American system. The two poles appear as clearly as anywhere in the two best pieces in the last section of the book by Rabinowitz and Robert Gordon. Rabinowitz harks back to the now-famous passage in *Whigs and Hunters*[4] where E.P. Thompson expresses his irreducible faith in the rule of law because, for all the shocking hypocrisy surrounding it, as Rabinowitz says, "the law sets up standards and rules by which the state agrees to exercise its power and which, by definition, set limits on that exercise."[5] Gordon, on the other hand is more concerned with the "cultural codes" of legal ideology, because ". . . a promising tactic . . . of trying to struggle against being demobilized [sic] by our conventional beliefs is to try to use the ordinary rational tools of intellectual inquiry to expose belief-structures that claim that things as they are must necessarily be the way they are."[6] He

3. Kairys, *Legal Reasoning,* in *id.* at 14.
4. E.P. THOMPSON, WHIGS AND HUNTERS (1975).
5. Rabinowitz, *supra* note 2, at 313.
6. Gordon, *New Developments in Legal Theory,* in THE POLITICS OF LAW 287, 289 (D. Kairys, ed. 1982).

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does not seem to hope for anything, as Rabinowitz does, from any ideal immanent in the present legal system.

Gordon's project, the revelation of belief-structures in the law as functions of capitalism, gets a great deal more space in *The Politics of Law* than the Rabinowitz project. In the first section, Duncan Kennedy's strong essay "Legal Education as Training for Hierarchy" claims that training in "legal reasoning" about "rights" does not prepare students to be critical of the belief-structures of law; the failure to give any real practical training, on the other hand, prepares them only to be molded to the profession by a law firm. I think Kennedy's criticism has a lot of truth in it; after years of listening to judges and lawyers complain that students do not learn anything "practical" in law school, and after some more years of teaching an elaborate practice program which seems to be of little interest to practitioners, I suspect that, whether consciously or not, many working lawyers are doubtful that they really want law students to be trained to practice by a bunch of professors in a law school. They want to "get 'em while they're young and bring 'em up the way they want 'em"—in accordance with whatever standards of ethics and litigation strategy prevail in the firm. Thus Kennedy has cut dismayingly close to the bone: much of the profession may be all too well-served by law students who have been shaped, not to the world of the practical, but to the docile and conventional elaboration of doctrine. They accept the relations of authority in school, in law firms and in the larger society, and they are, of course, that much less likely to be critical in the way that authors like Gordon would have them be.

The articles in the second section, drearily called "Selected Fields of Law and Substantive Issues," are concerned almost entirely with elucidating the ways that specialized areas of law reflect the assumptions and social relations of a market society; they are in search of the correspondences between the structures of law and the structures of the economy. Karl Klare argues that labor law functions to confine collective action as well as participation in workplace governance by workers, and to encourage the institutional separation of the union from the rank and file. He is doubtful of the ability of law to afford real reform because "law in itself is subject to the same process of alienation as is work in capitalist society."[7] In a somewhat similar vein, in discussing welfare law, Rand Rosenblatt argues that mere "legalization"—the attempt to institutionalize welfare reforms—is a hopeless strategy without an alliance broader than the welfare constituency alone. Richard Abel sees the values of bourgeois society symbolized by the law of torts in its description of liability, in its discrimination in damages depending on the earning power of the victim, and in its translation of all injuries into money damages. Alan Freeman tells us that an ideology of formal legal equality and equality of opportunity is preserved side by side

7. Klare, *Critical Theory and Labor Relations Law*, in *id.* at 82.

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with a continuing system of racial discrimination because the system of laws to rectify discrimination looks to the liability of "the perpetrator" rather than to the injury to "the victim."

The use of concepts of "liability" as symbols of social relations emerges as a theme in this section of the book, not only in the pieces on contracts, torts and antidiscrimination, but more directly in Morton Horwitz's historical sketch of the notion of "causation" in the law. Horwitz tells us that the limitation of liability through a simplified "proximate" cause was supported by many nineteenth century legal scholars on the openly political ground that to allocate responsibility through the mere "foreseeability" of consequences was tantamount to "practical communism." The notion of proximate cause served not only to strengthen the ideology of atomistic individualism but overtly to limit the financial risks of entrepreneurship in the law of torts, just as the notion of bargains freely entered into did in contract law, and as the search for a "perpetrator" does in the laws against discrimination.

It is not always clear what is "critical" about these essays, what it is that distinguishes the ideas expressed here from the more mundane view that the law, as society's instrument for settling disputes, is reflective of changes in the larger society. To some extent, this is a consequence of the brevity of the essays; the authors seem to have been unable to jam the full complexity of their views between the boards of the book. In one of the most penetrating essays, for example, Peter Gabel and Jay Feinman describe contract law as "an elaborate attempt to conceal what is going on in the world," which serves "to legitimate an oppressive economic reality by denying its oppressive character and representing it in imaginary terms."[8] In their account, however, contract law doctrines are shown to reflect a shift from competitive capitalism, with emphasis on an ideology of voluntary personal bargains, to monopoly capitalism, in which the ideology of competition is tempered by one of cooperation and regulation. It is hard to see how that shift in doctrine, familiar to traditional legal scholars, is an attempt to conceal reality instead of a response to it. It would seem instead that the present shift back to the myth of a free market, which Gabel and Feinman just mention at the beginning of their article, fits the description of an obfuscating ideology better than the contract doctrines characteristic of the welfare state. We are left at the close of the essay, then, without a finished picture, seeing contract doctrine as sometimes responsive to social change in an instrumental way, and sometimes as a mystifying cover.

Alan Freeman is able to provide a coherent critique of antidiscrimination law as ideology, perhaps because the history of that law is not nearly as long as that of contract law. He shows that by systematically ignoring the actual disparate treatment of minorities and concentrating on the eviden-

8. Gabel & Feinman, *Contract Law as Ideology*, in *id.* at 181, 183.

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tiary problems of proving the responsibility of some isolated person or company, the law maintains a formidable machinery of antidiscrimination law, without making much difference in the underlying social problem. Here is a case then, if Freeman's characterization is accurate, in which the law can be viewed as an elaborate liberal construct rather than a response to a problem.

The difficulty in seeing the critical edge of the essays sometimes seems to lie deeper than the limitations of space, in the authors' attempt to outline not only the structural but the dialectical relations between legal doctrine and social relations. Gordon gives us perhaps the clearest statement of the dialectical argument:

> If we start to look at the world . . . no longer as some determined set of "economic conditions" or "social forces" that are pushing us around but rather as in the process of continuous creation by human beings, who are constantly reproducing the world they know because they (falsely) believe they have no choice—we will obviously bring a very different approach to the debate over whether legal change can ever effect real ("social and economic") change, or whether law is wholly dependent on the real, "hard" world of production.[9]

In this view, legal doctrine may be taken as sometimes a mystification, yet one which is active, which can be put to use to try to bring society more nearly into harmony with the ideology.

The dialectic of change between the law and other forces brings us back to the question of what standards we can hope for in trying to decide what changes we want to push for. Most of the writers in *The Politics of Law* do not try to find those standards in the texture or traditions of the law itself. They reach outside the legal system to the economic justice of the socialist society they hope for, somewhat as the law and economics ideologues in justifying their arguments about law reach outside the legal system to a standard of "efficiency" in the allocation of goods among individuals. In only a few instances do the authors join Rabinowitz in trying to solve the puzzle of whether there is yet some vitality for them in the Rule of Law. Gabel and Feinman remark in passing, for example, that the notion of "free contract" carries some of the "utopian ideal" of personal freedom. They seem to suggest, without elaborating, that ideals underlying the legal system may have some critical power of their own.

There are, of course, ideals of fairness and equality in the law, and they are constantly used as tools in the reform of legal doctrine. It is hard to see how they can have much attraction for the critics in *The Politics of Law,* however, unless those ideals imply an immanent critique that reaches out, in

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9. Gordon, *supra* note 6, at 290.

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the Hegelian manner, beyond existing legal doctrine toward ideals that the critics share.

If writers like these radical critics find the ideals embodied in the Anglo-American legal system useful, it is because both capitalist and socialist ideas have common origins in the revolutions of the seventeenth and eighteenth centuries. Socialists have in fact been using the ambiguities in liberal principles as a critical tool for generations. The notion of a juridic person, to pick a simple example, not only generates concepts of contracts freely bargained, but is a great levelling principle, suggesting that the individual cannot really bargain freely unless she has the power to make independent decisions. Marx himself was a master at turning liberal notions to account against capitalism. He drew the idea that value is created by human labor from liberal economists who first conceived of labor as something sold by the individual; he drew the idea that politics and law reflect the system of production from English philosophers who rejected older historical views rooted in tradition.

The basic liberal legal ideals are similarly double-edged; they can be used to create the law of a free-market economy, and to criticize it as well, precisely because they were originally revolutionary ideals. They are, perhaps, in essence, of two kinds: one procedural, an ideal of evenhanded treatment of cases, and the other substantive, an ideal of personal fulfillment and liberation. The first of these is the principle by which the state "sets limits on the exercise of its power"; it can be used as a critical tool even when the substantive rules are otherwise inequitable, as they were in England when this became the ideal of the "rule of law." The second, still more revolutionary, appears constantly in Anglo-American law, not only in constitutional doctrine, but, as Gabel and Feinman remind us, in contract law as well. It has been used both to engender liberal legal doctrine, and to criticize it because of its failure to liberate the persons subject to the law.

These two can be the worst of ideological bromides; if we once imagine that the law really embodies them in any full sense, then they are just a source of quietism. They are powerful only if we remember that they are always frightening to the state and to concentrations of wealth; then they can be used for part of the critique for which writers in *The Politics of Law* are seeking.

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