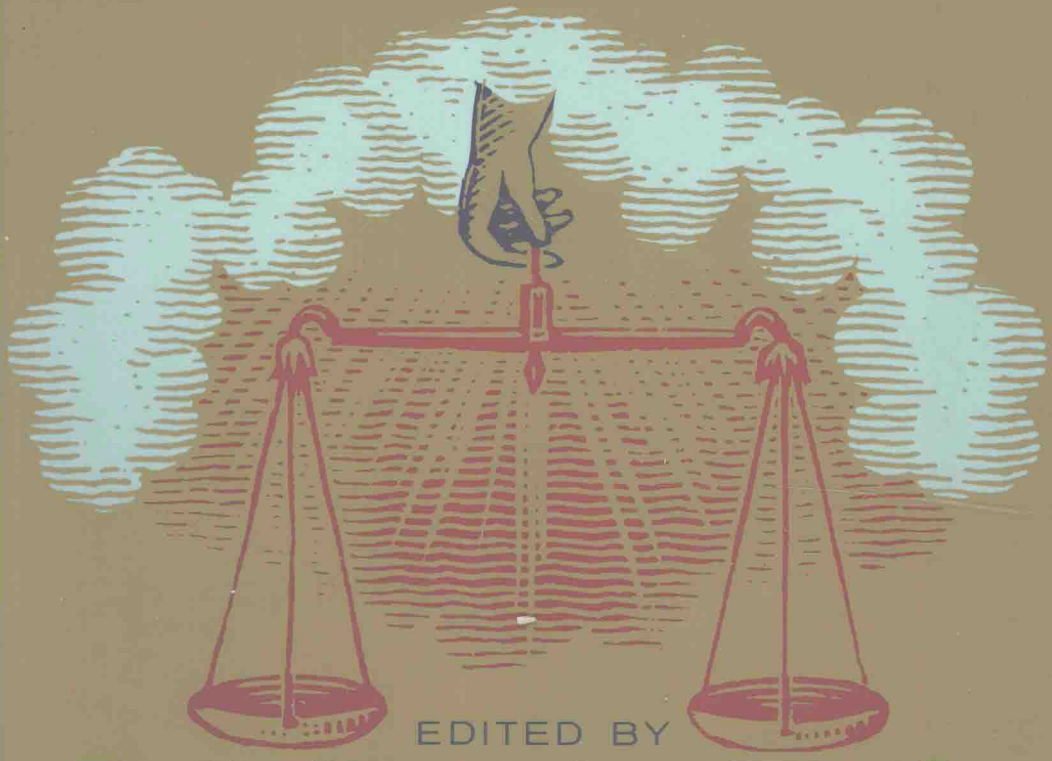
REVISED EDITION

THE POLITICS OF LAW

A PROGRESSIVE CRITIQUE



EDITED BY

DAVID KAIRYS

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EDITOR'S DEDICATION

To Antje Mattheus
and to our children,
Marah and Hannah

PREFACE TO THE REVISED EDITION

Since the first edition was published in 1982, law, and the politics of law, have seen a changing of the guard. Judicial appointments by President Reagan, screened for their conservative credentials, have come to constitute over half of the federal judges, and the Supreme Court is now dominated by a Reagan-Rehnquist majority. The results are already evident: in a decade characterized by public celebration of individual freedom and hostility to government, the courts have increasingly favored government, corporations, and those at the top of the social ladder over middle-class and poor people, minorities, women, and individual and organized working people. The government's power to constrain individuals has been enhanced, and business enjoys more freedom to do as it pleases—regardless of the effects on workers, the community, or the environment—than at any time over the last several decades.

At the same time, mainstream legal thought has been shaken by criticism from the left and right. Law schools and law reviews are bubbling these days about conservative trends like law and economics and libertarianism and progressive trends like critical legal studies. There is now a large and growing body of critical legal studies scholarship and responses from a variety of perspectives, and recent writings by minority and feminist scholars have raised new challenges and possibilities. There is in the legal profession, the law schools, and a variety of academic disciplines more questioning and interest regarding the social role and functioning of the law than in any other period over the last fifty years. As law and justice are increasingly distinct and in conflict and there is renewed interest in legal theory, we thought it a good time to reevaluate and expand as well as to update.

Half of the chapters are completely new, while the core of the first edition

has been maintained, with updating and revision throughout, by substantially increasing the total number of pages. We have broadened the legal fields and issues addressed, substantially expanded the range and depth of the presentations of alternative progressive approaches to law, and developed a new focus on the conservative shift in the law and society accomplished during the Reagan decade.

The new chapters cover a variety of topics, including corporations, constitutional law, foreign affairs and international law, crime, abuse of low-status workers, criminalization of gay sex, the legal and political marginalization of black women, and the major conservative approaches to law (libertarianism and law and economics). The book is still separated into three parts: Traditional Jurisprudence and Legal Education, Selected Fields of Law and Substantive Issues, and Progressive Approaches to the Law. However, with the additions, we now cover a sufficiently wide range of fields and issues to reorganize the substantive chapters into five broad categories: Class, Race, and Sex; The Constitution; Crime; Personal Injury; and Business.

The new authors include criminologist Elliott Currie; philosopher and social critic Cornel West; and law professors Regina Austin, Rhonda Copelon, Kimberle Crenshaw, Mark Kelman, Jules Lobel, Frances Olsen, William H. Simon, and Mark Tushnet. The core of authors from the first edition, who have updated and revised their chapters, include Richard Abel, W. Haywood Burns, Jay M. Feinman, Alan Freeman, Peter Gabel, Robert W. Gordon, Morton Horwitz, Duncan Kennedy, Karl Klare, Elizabeth Mensch, Victor Rabinowitz, Rand Rosenblatt, David Rudovsky, Elizabeth Schneider, and Nadine Taub.

David Kairys
Philadelphia
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DAVID KAIRYS

INTRODUCTION

WE Americans turn over more of our society's disputes, decisions, and concerns to courts and lawyers than does any other nation. Yet, in a society that places considerable value on democracy, courts would seem to have a peculiarly difficult problem justifying their power and maintaining their legitimacy. The judiciary is a nonmajoritarian institution, whose guiding lights are neither popularly chosen nor even expected to express or implement the will of the people. Rather, its legitimacy rests on notions of honesty and fairness and, most importantly, on popular perceptions of the judicial process.

Basic to the popular perception of the judicial process is the notion of government by law, not people. Law is depicted as separate from—and "above"—politics, economics, culture, and the values or preferences of judges. This separation is supposedly accomplished and ensured by a number of perceived attributes of the decision-making process, including judicial subservience to a Constitution, statutes, and precedent; the quasi-scientific, objective nature of legal analysis; and the technical expertise of judges and lawyers.

Together, these attributes constitute an idealized decision-making process in which (1) the law on a particular issue is preexisting, clear, predictable, and available to anyone with reasonable legal skill; (2) the facts relevant to disposition of a case are ascertained by objective hearing and evidentiary rules that reasonably ensure that the truth will emerge; (3) the result in a particular case is determined by a rather routine application of the law to the facts; and (4) except for the occasional bad judge, any reasonably competent and fair judge will reach the "correct" decision.

Of course, there are significant segments of the bar and trends in legal scholarship, as well as popularly held beliefs, that repudiate this idealized model. The school of jurisprudence known as legal realism long ago exposed its falsity; and later jurisprudential developments, such as theories resting the legitimacy of law on the existence of widely shared values, at least implicitly recognize the social and political content of law. Moreover, concepts like

public policy and social utility, while limited to certain notions of the public good, are generally acknowledged as appropriate considerations for judges, and it is commonly known that the particular judge assigned to a case has a significant bearing on the outcome.

But most of this thinking is either limited to law journals or compartmentalized, existing alongside and often presented as part of the idealized process. For example, "balancing tests," where judges decide which of two or more conflicting policies or interests will predominate, are presented and applied as if there were objective and neutral answers, as if it were possible to perform such a balance independent of political, social, and personal values that vary among our people and (to a lesser extent) among our judges.

Despite the various scholarly trends and the open consideration of social policy and utility, legal decisions are expressed and justified, and the courts as well as their decisions are depicted and discussed throughout society, in terms of the idealized process. The public perception—the crucial perception from the standpoint of legitimacy—is generally limited to the idealized model. One will often hear cynical views about the law, such as "the system is fixed" or "it's all politics," but even such observations are usually meant to describe departures from, rather than characteristics of, the legal process. While this perception is not monolithic or static (at various times substantial segments of society have come to question the idealized model), it has fairly consistently had more currency in the United States than in any other country.

Indeed, public debate over judicial decisions usually focuses on whether courts have deviated from the idealized model rather than on the substance of decisions or the nature and social significance of judicial power. Perceived deviations undermine the legitimacy and power of the courts, and are usually greeted with a variety of institutional and public challenges, including attacks by politicians and the press, proposals for statutory or constitutional change, and, occasionally, threats or attempts to impeach judges.

While there is presently considerable dissatisfaction with the courts and their decisions from a variety of political perspectives, it is usually expressed in terms of this notion of deviation from the idealized model. Thus, the conservative criticism that the courts have overstepped their bounds—going beyond or outside legal reasoning and the idealized process—is now commonplace, as is the accompanying plea for judicial restraint to allow our "democratic processes" to function.

The conservative critique of law, once thought to be outside the margins, has gained mainstream status over the last two decades. In the courts, as in society generally, social problems, such as the drug epidemic, homelessness, and AIDS, are regularly viewed as individual predicaments, the subjects of optional pity rather than social analysis or action; and the people suffering

the most are routinely blamed. In this view of society and jurisprudence, the government is the people; democracy and freedom are fully defined and realized by available government processes, no matter how impenetrable, skewed, or corrupt. There is little or no room for popular participation or scrutiny, and appeals to privacy or individual autonomy are often greeted with contempt. Powerful, largely corporate, interests; the patriarchal, authoritarian family; and government officials are generally not to be interfered with, by the courts or by the people. This has become the judicial philosophy and politics of a majority of the Supreme Court. It is the political hallmark of our time that this view of law and society has been implemented by a regime that rose to power largely based on appeals to its opposite: government was to be taken off the backs of the people (translated into tax cuts for the rich and removal of environmental, safety, and other limits on their ability to get richer); government was to be reduced (translated into cuts in social programs more than offset by a military buildup); courts were to be restrained (translated into a growing judicial activism to achieve conservative goals); and waste and corruption were to be eliminated (translated into unprecedented levels of both).

There is a conservative hegemony in the law as in other areas of public life that renders criticism of conservative views and assumptions naive, "soft," and the subject of mockery. Thus, while we have been extremely "tough" on crime for over fifteen years—to the extent that our prison population has tripled (to over one million) and we imprison a higher proportion of our population than any other country except the Soviet Union and South Africa (see chapter 13)—when in 1989 the Bush administration announced another "get tough" war on drugs, the only visible "critics" demanded a bigger and more costly war. We seem unable to deal with major crises that threaten our stability and cohesiveness as a nation with any degree of understanding or social analysis. There is afoot, as E. L. Doctorow has recently said, "a gangsterism of the spirit."[1]

In this context, it is time to talk about basics, which is what the authors of this book have attempted to do in both editions. The law should not escape the attention of anyone wishing to understand or change American society, and we believe it is best understood by focusing on a range of substantive, socially important areas of law rather than addressing the law only abstractly. The twenty-five essays in this second edition, while they present differing and sometimes conflicting views, suggest a progressive critique of law with four basic elements.

First, we reject the idealized model and the notion that a distinctly legal mode of reasoning or analysis determines legal results or characterizes the legal process. The problem is not that courts deviate from legal reasoning. There is no legal reasoning in the sense of a legal methodology or process

for reaching particular, correct results. There is a distinctly legal and quite elaborate system of discourse and body of knowledge, replete with its own language and conventions of argumentation, logic, and even manners. In some ways these aspects of the law are so distinct and all-embracing as to amount to a separate culture. For many lawyers the courthouse, the law firm, the language, the style, become a way of life, so much so that their behavior can be difficult for nonlawyer spouses and friends to understand or accept. But in terms of a method or process for decision making—for determining correct rules, facts, or results—the law provides only a wide and conflicting variety of stylized rationalizations from which courts pick and choose. Social and political judgments about the substance, parties, and context of a case guide such choices, even when they are not the explicit or conscious basis of decision.

This does not mean that the law lacks content or meaning or is unpredictable. To the contrary, some rules and results—though not legally required—seem more "sensible" and are relatively predictable in particular social contexts. This is not, however, based on any legal methodology or logic; rather, there is often in particular periods and contexts a prevalent set of social and political values and judgments regarding some issues or areas of law. For example, the courts will now generally protect a person handing out leaflets on a street corner from interference by local officials, but before the 1930s, although the same constitutional provisions were in effect, there was no such protection (see chapter 11).

Judges are the often unknowing objects, as well as among the staunchest supporters, of the myth of legal reasoning. Decisions are predicated upon a complex mixture of social, political, institutional, experiential, and personal factors; however, they are expressed and justified, and largely perceived by judges themselves, in terms of "facts" that have been objectively determined and "law" that has been objectively and rationally "found" and "applied." One result is a judicial schizophrenia that permeates decisions, arguments, and banter among lawyers.

Law students, trying to understand and master legal reasoning, are commonly puzzled by the array of majority and dissenting opinions and the pointed views of law professors regarding the cases presented to them. Differing judicial opinions each cite earlier cases and possess other apparent indicia of validity. The professor often has a theme and explanation for a string of decisions that is not found in any of the opinions. Everybody seems to have a claim to being right but the student, whose common reaction is laced with confusion, vulnerability, and insecurity. There is clear pressure to learn to "think like a lawyer," which often seems to involve abandonment of progressive values and the hope of social action (see chapter 2).

Second, we place fundamental importance on democracy, by which we

mean popular participation in the decisions that shape our society and affect our lives. While there is a very real sense of powerlessness that pervades contemporary society, to blame this solely or even principally on the courts misses the point.

Those democratic processes that the courts are supposedly invading in the conservative view consist essentially of the right to vote and freedom of speech and association. These democratic processes, while certainly important, do not provide meaningful choices or constitute meaningful mechanisms for popular control or input, which is, perhaps, why half our people do not vote. Moreover, our society allows no democracy outside this "public" sphere of our lives. For example, the economic decisions that most crucially shape our society and affect our lives, on basic social issues like the use of our resources, investment, the environment, and the work of our people, are regarded as "private" and are not made democratically or by the government officials elected in the public sphere. The public/private split ideologically legitimizes private—mainly corporate—dominance, masks the lack of real participation or democracy, and personalizes the powerlessness it breeds.

The law plays a crucial role in this: the idealized model, the notion of technical expertise, and the notion of the law as neutral, objective, and quasi-scientific lend legitimacy to the judicial process, which in turn lends a broader legitimacy to the social and power relations and ideology that are reflected, articulated, and enforced by the courts. The law serves to depoliticize—removing crucial issues from the public agenda—and to cast the structure and distribution of things as they are as somehow achieved without the need for any human agency. Decisions and social structures that have been made by people—and can be unmade or remade—are depicted as neutral, objective, preordained, or even God-given, providing a false legitimacy to existing social and power relations.

The current and seemingly endless debate over judicial restraint or activism also misses the point. There is no coherent framework or principled resolution of this debate within the legal system, just as and because legal reasoning does not yield required rules or results. Rather, with very few exceptions, the pleas for judicial restraint and activism, sometimes unintentionally or unconsciously, mask a political direction and are wholly dependent on the historical and social contexts. If one favored Social Security and restriction of child labor over maximization of profits during the New Deal, one was for judicial restraint; if one favored racial equality and justice over maintenance of white privilege and the historical oppression of black people in the 1960s, one was for judicial activism; if one favored prohibition of abortions by choice prior to 1973, one was for judicial restraint, but achievement of that same goal in the 1990s requires a judicial activism that would not hesitate to overrule the pro-choice *Roe* v. *Wade* decision.

Third, we reject the common characterization of the law and the state as neutral, value-free arbiters, independent of and unaffected by social and economic relations, political forces, and cultural phenomena. Traditional jurisprudence largely ignores social and historical reality, and masks the existence of social conflict and oppression with ideological myths about objectivity and neutrality. The dominant system of values has been declared value free; it then follows that all others suffer from bias and can be thoughtlessly dismissed.

Progressive thinking about the law and the state has long recognized this political content and lack of neutrality. However, there has been a tendency to oversimplify with analyses that often seem to seek an almost mystical, linear, causal chain that translates economics into law. For example, a common orthodox Marxist explanation is that law is a "superstructural" phenomena that is mysteriously governed and determined by an underlying "base" of economic relations and/or instrumentally controlled by the ruling elite or class. But the law is not simply an armed receptacle for values and priorities determined elsewhere; it is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped. Moreover, such analyses lose sight of the fact that the law consists of people-made decisions and doctrines, and the thought processes and modes of reconciling conflicting considerations of these people (judges) are not mystical, inevitable, or very different from the rest of ours. It is often difficult to resist dehumanization of one's opponents and a blanket rejection of all institutions and people that constitute and symbolize a system one deeply wishes to transform.

However, judges are not robots that are—or need to be—mysteriously or conspiratorily controlled. Rather, they, like the rest of us, form values and prioritize conflicting considerations based on 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 law play an important role—result in a patterning, a consistency, in the ways they categorize, approach, and resolve social and political conflicts. This is the great source of the law's power: it enforces, reflects, constitutes, and legitimizes dominant social and power relations without a need for or the appearance of control from outside and by means of social actors who largely believe in their own neutrality and the myth of nonpolitical, legally determined results.

This complex process whereby participants are encouraged to see their roles and express themselves as neutral and objective social agents also pervades the realm of law practice. Lawyers are trained to communicate as if they have no self-interests or values and are merely promoting what the law