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Book Review

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An Essay Review of Law's Promise, Law's Expression

Kenneth L. Karst, *LAW'S PROMISE, LAW'S EXPRESSION*, Yale University Press, New Haven, CT (1993).

Jerry S. Sloan*

Since most of what passes for legal scholarship is pompous, pedantic, paedomorphic poppycock, that is required reading only for hungry small bunches of "the best students" serving law reviews who may, after correcting the 400 footnotes that must be attached to every submission given to them before they go lousing up the text, so that the editors can obtain cushy jobs in Wall Street firms, or, is *de rigueur* for a few of my colleagues who must say they have read certain books, articles or reviews; and is required writing either for certain of one's colleagues who should have better things to do, or for one's self if he needs to placate his dean, I rarely write things now because I hate footnotes, disrelish most of my colleagues some of whom have never written a thing, and think that deans are merely following in the respected tradition of most silly deans when they urge, especially for older professors, more writing. Like the late Fred Rodell, I will not just write things even to entertain my colleagues or to placate those taking an

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administrative disrelish to me. Never the less, Fred's muse¹ has instructed me to tell you that it was a pleasure to read Professor Karst's new book and that it will be almost a pleasure to say something nice about it as well as if one is permitted to do so with fewer than six footnotes.²

Here I go. Damn it, this is a very good book. A significant book. It is the most comprehensive treatment of civil rights and its roots in empowerment, along with *The Law's Promise* that you and I could have read in many years.³

Karst's legal theme is equal protection. The focus of his rapier I think, is the new mobilized right wing that mistakenly calls itself Conservative. *Seriatim*, he exposes all their causes and Political Campaigns to be traceable Freudian-like, to the male superiority folk myth, and its subset myths of male physical superiority, male bonding, and male superior positions in every endeavor of the enterprise of citizenship in our republic. These myths he does not hesitate to label phoney, or as charades or at times, as having utterly no basis in reason.

This book is about America's social agenda, i.e., the counter revolution that began long before the move to the suburbs that began in the early 1950s and again, changed America. It is about majority over minority or, as he puts it, "us" and "them," explained in Chapter 1; about American Values, Status Politics and Political Image Making as defined in chapter 2; Our "Family Values" as refined in Chapter 3; about race, gender and religion as it is portrayed in chapters 4 through 6. Most importantly, it is about Order, as Karst calls it, with a deliberate capital O. Professor Karst skillfully relates Jim Crow Laws, sexism, gay/lesbian bashing, and all the issues framed on the right side of our politics since Dred Scott, The Slaughter House cases, the Willy Horton ads, back again

1. To be more precise, my muse instructed me to say something nice. However, to square grammar with reality because I have cited Professor Rodell, and to simultaneously explain the "almost" qualification, a second footnote is necessary because I need to give you the Rodell cite here and to explain the qualification in proper order. The Rodell one might read is the VIRGINIA LAW REVIEW article, *Goodbye to Little Reviews — Revisited*, reprinted in *RODELL REVISITED, SELECTED WRITINGS OF FRED RODELL*, Rothman and Co., 1994. Fred can be read with profit because he says somewhere, that the trouble with most legal writing is that writers can't say phony or stupid even if that is appropriate, they insist upon footnoting everything to death, and that withal, their writer's conventions present only problems of style and content.

2. Unfortunately, Professor Karst finds it necessary to give us no less than 786 footnotes in 211 pages plus four notes in his four page introduction, in his very good book.

3. Even Karst's footnotes, including the nearly interminable note 156 at page 103 and some four dozen citations of his own previous works, serve useful functions because his audience is not just law firms whose lawyers won't read the stuff anyhow until they can use an argument, but all of us. He is excused his footnotes because he uses them judiciously to make his points, and they are gorgeously done.

to the male mystique, fatherhood, Dan Quayle, Pat Robertson, the flag, the pledge of allegiance, the nuttiness that we see every election year about abortion or the proper place of women, diversity, welfare, crime in the streets, or the imagined need for local not federal control in the schools; then, onto university policies disciplining so-called hate speech, then back again gently to his own positions upon the First, Fourth and the Fourteenth Amendments; in a dazzling display of profound erudition which any educated layman, even some uneducated lawyers can easily grasp. All of this he relates to the power politics of the day and the posturing of the political candidates of our time. I wish I had written this book. It is a masterpiece which is not marred by its one bad sentence on page 84 or the interminable footnoting so dear to the hearts of law review editors.

He points out repeatedly that it is the insiders who enforce the law and try to remake it in a morally corrupt politic still capitalizing on the fears of domination born in the anti bellum south where white fathers, husbands or brothers would do anything to preserve white male dominance of the helpless females they saw themselves as protecting by God's order from the enslaved under class that owned no morals, no decency, no abilities comparable to their own, but who were needed to preserve things just as they were. It's all about men being men and women being women. All glandular.⁴

These Warren Court Bashers were and still are he says, those who dominate what he calls the counter revolution against Brown vs. the School Board, Griswald, The Civil Rights Acts of 1964 and 1991, the lines of cases decreeing it our law that the majorities with power cannot erect public or indeed, certain kinds of private barriers (which by the force of law become public) against minorities they seek to exclude or stigmatize in our polity.

He shows that, no matter how the terms are defined in religious or political debate, Blacks, females, gay/lesbians, welfare recipients, illegal immigrants, flag burning protesters, Godless people, pornographers, all deemed "Secular Humanists," are on the hit list of the counter revolutionaries. Whether they pass laws by referendum in Colorado so as to exclude Gay/Lesbians or poor people or women from any kind of social services, or decry any kind of social spending, preach prayer in the schools, prate about "the right to life" or seek to build more prisons

4. Professor Karst actually says this in describing the beatings of both Rodney King and Reginald Denny (p. 72). Although he doesn't say so, it becomes true again when we think of the 1991 Tailhook incident (p. 122), the *lutte* against announced homosexuals in the military (p. 124 *et seq.*) or The Morality of the Poor (P. 137).

designed primarily to punish their weaker enemies, their agendas ranging from welfare recipients and taxes to permissible discrimination in the military and from Willie Horton adds to finding so-called strict constructionists for the high court, comes under his scrutiny.

Professor Karst reminds us again and again that it is the "in group," the advantaged group who must continue to assert their dominance that we must guard against. Because of the decline of Party Politics as it was practiced a few decades ago and the incipient disappearance of the old Democratic Coalition, he reminds us that different splinter groups can be mobilized to supplant the mostly benign compromises we have made in order to suppress inclusion of "the outs" in favor of the exclusive priorities of the counter revolution. In the process, he praises Justices O'Connor, Kennedy, Souter and Powell among others; while gently chiding Mr. Justice Scalia. Read this book. It is nice.

This book anticipates then explains as well, the coming battles over voucher systems for our public schools, California's Proposition 187 and the expected continuing battles over the meaning of the Judicial Review in the federal courts. On all of these matters he is eloquent in explicating the Madisonian fear of factionalism without calling for the exclusion of either the Goldwater Republicans and Christian Fundamentalists, or the unwed parents, poor or disadvantaged people that they seek to discipline.

Merely to show how times have really changed, he points out the interesting fact that John Jay resigned from the high court to become a state governor whereas 150 years later, Earl Warren resigned the governorship of California to serve on the Supreme Court of the United States. He does not say that he is on John Stewart Mill's side of the great debate because he would include in our republic even those whom he is convinced are for exclusion of their enemies, but he is clearly thinking in that tradition.

We can conclude that the American Agenda is now national not local. Yet his stances are not what one might call those of an unreconstructed federalist or a card carrying liberal of our times. True, he repeatedly uses that unfortunate expression, Afro-American; true, he occasionally uses the familiar *she* when the word *he* is still called for in our language, but most of us are guilty of the same absurdities because we must write for kids on Law Reviews. He does seem to oppose some Feminist anti-pornography positions and seemingly, group libel laws as well as "politically correct" university administrations.

This book is truly one that should be read by all of us in the power game because of the sweep of its constitutional and historical perspectives and its dispassionate call for inclusion of even the Pat Robertson, Pat

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Buchanan — Dan Quayle crowd. So, damn the maddening deans, I will write only when I have something important to say.

I do. Read this book. It is marvelous.

