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Book Review: Protesters on Trial: Criminal Justice in the Southern Rights and Vietnam Antiwar Movements. by Steven E. Barkan.

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mendous potential for judicial activism that ratification of the Equal Rights Amendment would have created. In their discussion of *Frontiero* and the Equal Rights Amendment, the editors describe those who sought to achieve the goals of the ERA not through the formal amendment process of Article V but through judicial policymaking as "constitutional purists." That strange description attests to how fully the editors have succumbed to the dominant assumptions of constitutional jurisprudence. It also encapsulates the reason their book fails to achieve its stated objective of arming readers with evidence and reasoning to think about the hard questions of civil liberties. By attributing constitutional purity to those who would dispense with the Constitution, Phelps and Poirier not only display a contempt for the Constitution but provide evidence that they lack the ammunition to augment any reader's intellectual arsenal.

**PROTESTERS ON TRIAL: CRIMINAL JUSTICE IN THE SOUTHERN RIGHTS AND VIETNAM ANTIWAR MOVEMENTS.** By Steven E. Barkan.<sup>1</sup> New Jersey: Rutgers University Press. 1985 Pp. x, 198. \$25.00.

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In *Protesters on Trial*, Professor Barkan addresses the relations between protest movements and the legal system. He focuses on the impact that legal procedure (in particular criminal prosecutions) had on two key social movements (southern civil rights and Vietnam antiwar). "To what degree, and under what conditions," he asks, "may the law and legal order serve as vehicles of harassment of social movements or, conversely, aid their efforts to change the status quo?" By showing how various factors (such as protester needs and the strategies of officials) affect litigation strategies of defendants and the movements they endorse, Barkan shows how the rule of law is also a force in its own right which legal authorities may deploy to achieve other than neutral ends.

Two types of trials are important to the "resource mobilization" of protest groups: trials in which the defense simply seeks acquittal using normal legalistic defenses, and political trials in which the defense seeks publicity. In political trials, use of defense

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lawyers is avoided because they might divert the defense to legalistic concerns; Barkan's analysis of pro se defenses is fascinating and lively, perhaps because he conducted his own defense in an antiwar trial in 1972. At any rate, the critical, difficult choice between these two defense strategies depends upon many factors: the general political climate surrounding the trial (how hospitable or hostile might it be to the underlying political issue?); the nature of the defendants (how appealing is he? Is she willing to risk a political trial?); the nature of the jury (how amenable to the potential political claim?); the press; and the nature of the prosecutor and judge. In general, "political" trials are discouraged by a hostile environment and by the legal formalities of criminal process. They also risk the neglect of a legally sound defense, as the goal of acquittal is supplanted by the politicization of the trial. Yet political trials can also mobilize political movements by appealing to the moral sentiments of the jury and the nation, and they can sometimes lead to jury nullification.<sup>3</sup>

Based on research of numerous trial court cases, Barkan maintains that the southern civil rights movement witnessed fewer political trials than the antiwar movement because of unfavorable conditions. As is well known, southern authorities sacrificed the neutrality of the rule of law to prejudice and expediency. Legal harassment in the form of unjust arrests, illegal injunctions, and improper court procedure supplemented political and social harassment of protesters and defense lawyers. The small number of able and willing defense lawyers available in all but the most visible and celebrated cases also meant that lawyers were less willing to risk the time and expense of a protracted political trial. Furthermore, key defense organizations like the Legal Defense Fund desired to establish legal and constitutional precedents for appeal, so they discouraged political trials as strategy. In short, Barkan says "[t]he entire legal machinery of the South became a tool for social control of civil rights efforts."

Legal repression, Barkan asserts, successfully thwarted protest movements in such cities as Albany, Georgia and Danville, Virginia. In these cities, authorities managed to divert the resources and emotions of civil rights movements from the streets to the courts. The famous movements at Selma and Birmingham succeeded, however, because authorities were less astute. Federal intervention protected the march at Selma, and uncontrolled violence inflicted by authorities brought national sympathy to the protesters. Yet Barkan maintains that these successes were the exception, not

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3. Barkan's analysis of nullification is particularly interesting.

the rule. "This analysis underscores the civil rights movement's weaknesses in the face of stubborn white resistance that resorted to legal repression. . . . [T]he most intransigent cities were able to use legal means to defeat civil rights forces or could have successfully used legal means had not police and civilian brutality occurred." Barkan fails, however, to consider two complicating facts: authorities may have used the legal system to squelch protest movements in many southern cities, but their actions were often patently illegal (as the federal courts came to hold); and in the long run, the civil rights movement in the South succeeded precisely because these illegal tactics were struck down by federal intervention. Barkan's view of the rule of law seems to lose the forest for the trees.

The Vietnam cases exhibited more politicization. "[T]he legal experience of the movement differed in several ways from that of the civil rights effort. For several reasons, the criminal courts during the Vietnam years presented far more opportunities for resource mobilization than was true in the South and fewer opportunities for social control by state officials." The Vietnam protests did not take place in one hostile geographic area; defense lawyers were more willing to take cases and to allow politicization; defendants were less committed to large institutional groups and therefore more willing to take personal stands based on principle; and judges and juries tended to be more sympathetic to defendants' political claims. Consequently, though such famous defendants as Benjamin Spock and Daniel Ellsberg reluctantly settled for de-politicized trials, many others did not (e.g., the Oakland Seven, Chicago Eight, Catonsville Nine, and Barkan himself). Significantly, many political trials were conducted with pro se defenses which allowed defendants to make personal appeals of juries or judges. Barkan's analysis of these trials is interesting and moving; he depicts scenes of juries—and even judges—fraught with emotional and intellectual conflict, torn between the specifics of law and appeals to higher principles.

Barkan concludes by considering the implications of his findings for social and legal theory. Pluralist theory, which assumes that the state and law are independent of society (which, in turn, consists of many competing groups) fails the test. So do crude formulations of Marxism such as "instrumentalism," which posits a direct control of legal institutions by the dominant class, and "structuralist" Marxism, which posits a less direct yet substantially similar relation. These cruder forms of Marxism ignore the legal and moral victories won by the protesters under discussion. Instead, Barkan adopts a third variant of Marxism, "dialectical" Marxism, which construes legal principles as independently impor-

tant, but as incompletely independent of state and class power. He concluded that the protest movements under analysis were both hindered and furthered by the legal process, thereby substantiating the dialectical interpretation.

Barkan's conclusion and other findings raise many questions, however. First, it is not at all obvious that the antiwar movement cases were more successful than the civil rights cases. Barkan's focus on politicization of trials is hardly a sufficient gauge for measuring social and political success. The legal victories of blacks in the South that erupted in the 1960's were definitely products of the movement, whereas it is not at all clear that antiwar protests were the cause of our eventual disengagement from Vietnam. In terms of the civil rights movement, Barkan's focus on local trial courts obscures the crucial role of the appellate courts. Barkan's law and society orientation compels him to discount the importance of appellate courts (they are too removed from the heartbeat of reality), yet such courts have important impacts on the real world as well as on legal theory, as proved during the civil rights movement. Furthermore, the conclusions than Barkan draws concerning the independence of the legal system from the state are clouded by the fact that southern authorities acted *illegally* and were eventually overruled by federal authorities. Hence, it is disingenuous to attribute their actions to *the* legal system. And in the Vietnam cases, the protesters Barkan discussed intentionally broke the law in order to make their points. Contrary to Barkan's views, legal neutrality would not allow the type of personal politicization that Barkan celebrates, for this would compel juries to consider idiosyncratic (i.e. non-neutral) factors.

These problems cry out for a deeper theoretical analysis of the rule of law and civil disobedience in a democratic society. That is, Barkan's conclusions suffer from a dearth of political theory. Yet Barkan intentionally eschews political theory for a rather mechanical application of Marxist and sociological categories, which cast little light on the troublesome yet important issues that he addresses so well from an empirical standpoint.