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# Law and Social Action: Selected Essays of Alexander H. Pekelis

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**Law and Social Action.** By Alexander H. Pekelis. Ithaca: Cornell University Press, 1950. Pp. xi, 263. $3.50.

This collection of fourteen papers of Alexander H. Pekelis makes an effective memorial for one who was clearly a gifted man of law.

The most arresting thing about the essays, although they lay considerable claim to attention in their own right, is that they were written by a foreign-trained lawyer who did not come to the United States until 1941 and who thus was to have only five years here prior to his death in an air crash in 1946 at the age of forty-four. Only two of the pieces are directly concerned with comparative law and even these are chiefly interesting for what is said about American law. The command of American legal idiom is so complete that it is almost unfair to emphasize it. The book is a tour de force in the mastery of a foreign legal system.

The book has been attractively edited and the materials selected so as to illustrate well the range of Pekelis' interests. There are a sustained essay on jurisprudence, two studies in comparative law, a technical but very sprightly discussion of constitutional law, a lengthy prospectus for the organization of the Commission on Law and Social Action for the American Jewish Congress, a proposal for an extensive annual study of the Supreme Court; and there are two excellent briefs, a book review and a series of short informal comments. But despite the variety of purposes for which the various pieces were written the collection achieves considerable unity.

There is first a unity of approach, whatever the legal subject matter. Pekelis always wrote with a contagious enthusiasm for using law in action, for doing something about social problems through law. He found the opportunities for action overwhelmingly great and he clearly felt that the doing even of little things, the taking of small practical steps was irresistibly important. His friends describe him as a man of imposing physique and great energy and the image comes through almost every page he writes: the image of the confident energetic man with a zest for welfare. And even where we would disagree with the analysis or wonder whether he is paying only lip service to difficulties, we cannot but applaud the zest.

Coupled with the desire to do something is a first rate legal imagination. He outlines in detail a half dozen new approaches for extending the meaning of state action under the Constitution; he challenges the psychological validity of *Plessy v. Ferguson*[1] regardless of how equal the segregated physical facilities may be; he explores the possibilities of using boycott pressures as a substitute for group libel; he urges the use of city police ordinances and in almost the same breath the United Nations Charter as sources of needed power to combat discrimination; he challenges the right of the *Daily News* to a radio station on the grounds that its editorial policy has been racially discriminatory and uses content analy-

[1] 163 U.S. 537 (1896).

sis to support his point.[2] It is refreshing and moving to find so competent an ingenuity so securely on the side of the angels.

There is also considerable unity of theme. As might be expected he is enthusiastic about the contribution the sister social sciences can make to law. In fact the welfare standard against which he would explicitly measure legal rules is given its content largely by the findings of the economists, psychologists, and sociologists. It would not be too much to say that he has substituted the social sciences for the natural law of another day. We are told that there are only legal questions, but no legal answers and reminded that law is too serious a business to be left to lawyers. He delights in the discovery in Anglo-American law of "the justiciability of philosophical, sociological, and jurisprudential questions." And yet he is not simply writing the familiar exhortation to look to the social sciences, nor is he greatly optimistic as to their aid. But they will be better than nothing and something must be done now. In the brief on segregation in education in the *Westminster School* case he offers a fine, lucid, restrained example of their use in tracing through the necessary assertion of racial inferiority behind any segregation.

The opening essay, *The Case for a Jurisprudence of Welfare*, focuses on another of his principal interests: the role of the judge as law-maker. Here with unusual candor he argues for explicit law making by the judiciary under an explicit social welfare standard. The essay is a lively contribution to a well-worn theme and raises in passing some interesting queries such as whether a judge once fully conscious of what he is doing will do it as well, and whether the legislature, after all, has been a body more responsive to public opinion than the courts. The theme is picked up again in the comparative law study of administrative agencies wherein he presents the thesis that wide administrative discretion has been more congenial to Anglo-American law than to continental. It reappears in the short paper advocating that an International Human Rights Agency be set up without waiting for the agreement on a Bill of Human Rights, and in the papers on the Supreme Court.

His ultimate approach is always severely pragmatic. The courts in fact are unavoidably making law in many areas today; hence the only question is whether they should not do so openly. And since they are, making law through the courts offers unlimited possibilities for important social reform today without waiting, perhaps forever, for the legislature. In the final essay in his prospectus for the Commission on Law and Social Action, he summarizes his case well:

> In the second place, it is important to note that we do intend to place only limited reliance upon legislative action. A great many public-spirited groups and individuals have treated legislation as if it were the only conceivable vehicle of social reform. The truth of the matter is that it is neither the only nor the best. Great strides toward general welfare have been achieved through changes in judicial or administrative attitudes, changes which were often due to intense educational influences. We intend

[2] Content Analysis—A New Evidentiary Technique, 15 Univ. Chi. L. Rev. 910 (1948).

to follow and adopt the latter technique. A great many of our proposals . . . are inspired by our belief that a new statute, or at least a new substantive law, is not always either necessary or sufficient.

The formulation of new and sometimes controversial claims, based on propositions which are on the very frontier of legal thinking, is a difficult task and may require frontier imagination and frontier ingenuity. . . . The very formulation of the trend, the choice of scattered decisions, holdings, and dicta, and the selection of proper occasions presents a more difficult task than the drafting and endorsing of a legislative measure. We believe that it is also a more fruitful one.

The jurisprudential point has thus an almost ad hoc aspect and it is not meeting Pekelis on his own ground to raise questions about the desirable limits of judicial discretion in general or to query the application of his views to fields other than those of race discrimination.

An equally important concern is stated in the essay, *Private Governments and the Federal Constitution.* He is much impressed with the metaphor, plural sovereignties, and finds particularly in the United States innumerable aggregations of power which are like private government within government. The Fourteenth Amendment has made the defining of "state action" a very familiar question, especially in recent years as the antidiscrimination groups have taken the legal offensive. And his first point of course is to urge that the private governments be bound by the same constitutional limitations as the state itself. But his concern seems to go beyond the immediate constitutional question and it would have been of great interest to see what other use he would have made of the "private government" insight. It is this concern which in the *Daily News* case is behind the insistence on the special responsibilities of mass communications, and it is the point to the highly entertaining review of Ruml's *Tomorrow's Business*, "a book about business written by one of its most talented lovers." It reappears in the comparative law study, *Techniques and Ideologies*, where having found American law less individualistic than its continental counterparts, he analyzes American individualism as the collectivism in the many private governments or communities within the state. And finally in the last essay he advocates the continued existence of a distinctive Jewish community in America as part of our cultural pluralism.

Once again it is easy to see the unity of his interests under his socially conscious pragmatic approach. If the constitutional inhibitions can be made to run against private governments, the courts, not the legislatures, are the final arbiters. And, as he says of *United States v. Classic*,[3] "breath-taking constitutional vistas" open before us. And if the identifying of private power becomes the key to legal action we clearly can use our fellow economists and sociologists to help us draw the necessary profiles of power.

This is then a good book, a stimulating one. If it fails altogether to satisfy, that is the necessary price of the approach and of the tragic cutting off of Pekelis' career. He is too much the advocate at times, too fluent, too anxious to

[3] United States v. Classic, 313 U.S. 299 (1941).

roll up his sleeves and start. He sometimes appears to name the difficulties but not to wrestle with them. And so in the end we are not given much light on the questions that remain: the possibilities of the tyranny of judges and of experts and of the ultimate loss of freedom when too many affirmative steps are taken through government to protect freedom.

But there can be no disagreement that the loss to law in the plane crash over Ireland in 1946 was a very real one indeed.

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**The Nature and Tax Treatment of Capital Gains and Losses.** By Lawrence H. Seltzer, with the assistance of Selma F. Goldsmith and M. Slade Kendrick. New York: National Bureau of Economic Research, 1951. Pp. xxii, 554. $7.50.

Mr. Seltzer's volume makes an important addition to tax literature. Its topic is a central one concerning which there has been much controversy since the First World War. The treatment of the subject is factual, objective and complete. The arrangement is good, and the style is adequately suited to the presentation of the author's careful analysis. If a lawyer may be permitted to express such an opinion about economic research, the scholarship of the study was painstaking and sound. Well over two hundred pages are devoted to appendices presenting tables with relevant data largely derived from tax returns and the varying treatment of capital gains and losses between 1917 and 1946.

Notwithstanding the excellence of the book, it is somehow unsatisfying. Perhaps it should not surprise us that an able and exhaustive statement of the known facts with respect to capital gains and losses does little more than emphasize the difficulty of achieving a satisfactory solution. We are reminded of the dual nature of such gains and losses and their close relationship to so-called ordinary income and losses. But we are also given new awareness of the undesirability and unfairness of not differentiating in tax treatment between some kinds of capital gains and some kinds of ordinary income. We also gather a negative bit of information—the proper tax treatment does not emerge from a careful study of the five or six variations our country has tried in dealing with the matter and of the systems of several foreign countries.

Mr. Seltzer does not seek a conclusion, though he devotes his final chapter to competing proposals for a solution of the problem. It is unfair to judge the book in relation to a goal which the author did not set for himself. Yet it must have been as disappointing to the author as it is to us that the analysis does not point more compellingly in the direction of a particular equitable and desirable solution. The necessity for adequate averaging is indicated—or if not adequate, at least far more complete than the few existing steps in that direction. Yet the author tends to dismiss the averaging that seems to appeal to him most—Vickrey's cumulative averaging—"as unlikely to command legislative atten-

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