

## Compared to What?

MARTIN KRYGIER<sup>1</sup>

---

Scott Veitch's new book, *Law and Irresponsibility*, seeks to expose 'the macabre logic that is law's involvement in organised irresponsibility' (4).<sup>2</sup> Veitch argues that law has a central, if too rarely acknowledged, role in 'normalising the production of suffering' (2). It does so in many ways, among them 'disaggregating responsibility for harms suffered,' (3) 'obliteration of the possibility of responsibility' (28), 'the organised disappearance of responsibility' (33). The 'irresponsibility practices' of law operate not to produce occasional 'excesses', pathological eruptions of irresponsibility, but rather generate irresponsibility as a routine product of normal operating procedures.

These are large claims and Veitch makes them polemically, provocatively and intelligently. Occasionally the polemic is heavy-handed in the way of Katharine MacKinnon: sentences bludgeon with contemptuous rhetoric, rather than seek to persuade in a register more inviting of discussion. But the book is exemplary in many ways. It is powerful, both in its argument and in its prose. It is a clever book, wide-ranging and passionate; a combination of sophisticated analysis and eloquent jeremiad, or at least lament.

In what follows I have chosen to pose some critical questions about the extent to which the analysis supports the lament. My comments have as much to do with what is *not* said in the book as with what is. This is not because I think the argument is without foundation or poorly made or unimportant, or that he should have written a different book. On the contrary. Veitch frequently manages to do what Foucault at his best so often did: analyze what had seemed to us perfectly familiar, in ways that had not occurred to us before and that put what we thought we knew in a quite different, usually less palatable, light. However I think the argument overreaches, and lacks 'controls' in the experimental sense. As a result, law's role as a cause and legitimator of human suffering looms larger than it otherwise might, while

---

<sup>1</sup> Gordon Samuels Professor of Law and Social Theory, University of New South Wales.

<sup>2</sup> Numbers in brackets in the text refer to pages in *Law and Irresponsibility*.

many other sources of suffering, while not quite denied, are so little discussed that they disappear from view.

My first question has to do with the overall weight Veitch gives to irresponsibility, among the various effects of law in our lives. He claims to be 'upsetting conventional viewpoints' by exposing the irresponsibilising roles of law. To accept his argument, he argues, 'requires a fair degree of upsetting of conventional viewpoints; it requires an acknowledgement that that which is commonly believed can, and sometimes does, promote social goods and benefits, also and at the same time is capable of producing extensive harms and covering these up' (95). How upset should those of conventional views be?

Some people will be upset simply to learn that law, which they take to be on the whole – but surely not always - a good thing, can be involved as well, and intimately, in bad things. But that should not be a surprise. It is a familiar story, particularly for readers of Max Weber, that few goods come without bads, and that very often the bad is the flip side of the good: bureaucratic efficiency and the iron cage; formal rationality and substantive irrationality, scientific explanation and loss of meaning, and so on. Readers of Kirchheimer's *Political Justice*<sup>3</sup> will have learnt in some detail how this can be true of law. The analytical, as also the moral, task of social theory is to come to terms with the tension-filled complexities of social structures in the round, not merely be beguiled or appalled by one or other of the parts.

Is that what Veitch wants to say? At times it seems so. Often he insists that while he is unearthing the hidden story of law, its role in organising, producing, facilitating, legitimating irresponsibilities, there is the familiar cover story too – that of the organisation of responsibility – and one should not lose sight of that. An analysis true to its subject must be alert to both elements. As he writes, in a particularly fair-minded characterisation of the options:

to place at the door of legal institutions and concepts responsibility for any, or all, large-scale humanly produced suffering would be to give a false account of the historical reality. ... it would be inadequate to fail to acknowledge the capacity of law to hold to account, either in fact or potentially, actors involved in the production of suffering. But it would just as equally be mistaken to allow belief in that fact to exclude ... from judgment and analysis the reality that the law does – in the past, present, and, if things continue in the same way, the future – also play a central role in the

<sup>3</sup> Kirchheimer, *Political Justice* (1961).

profoundly irresponsible production and legitimation of human suffering.(10-11)

‘The appropriate response to this perceived ambivalence,’ he writes, ‘is not to lose sight of either extremity: it is – and this is the more radical task of this book – to explore in nuanced ways precisely where and how the extremes meet ... our dual sensitivity should always remain in place and the notion of ambivalence explored productively.’ (11)

That is a fine aim and, to the extent that either ‘extremity’ is ignored or marginalised in common thought, it is a valuable corrective. However, the balanced sentences I have quoted are hardly reflected in the balance between responsibility and irresponsibility in the book. For in this book, law as organizer of responsibility hardly gets a look in. And when it does, it is in the way that Ernest Gellner once identified, when he observed that ‘the English expression “to be sure” belongs to the interesting class of phrases like “I would be the last to suggest”, which mean the opposite of what they seem to mean.’<sup>4</sup> So, in a book devoted to exposing law’s complicity in massive harms, Veitch stresses that ‘I will not be arguing that law and legal institutions are incapable of holding people and institutions responsible.’ (10) That, even as a double negative, is nice to know. And indeed he concedes later that law ‘can, and *sometimes does*, promote social goods and benefits’ (95 my italics); this is a concession, to be sure, but not a huge one. Particularly in a book which is indefatigable in suggesting ways that law irresponsibilizes the modern world.

Now an obvious response is that law’s contribution to responsibility is not Veitch’s topic, it is the topic of a different book: Peter Cane’s for example.<sup>5</sup> But it seems that there is a deeper ground for this disparity of attention. Veitch claims on the first page of his first chapter that ‘legal mechanisms in fact play a key role in organizing *irresponsibility* and that they do this *as much as* they determine responsibility.’(p.7, my italics) This suggests a sort of moral (or immoral) equivalence and mutuality between the generation of responsibility and its opposite. That is a large claim, and by the end of the book it is dwarfed by an even larger implicit message, that seems to point to the priority of irresponsibility in the normal life and workings of the law: responsibility is what we proclaim, irresponsibility – aided and abetted by our pious boasts - is what we get. I give some examples in a moment. I was surprised when Veitch praised Foucault for his ‘nuanced’ analysis, for whatever else I might say about Foucault – and I would happily concede brilliance – I would never accuse him of nuance. I fear this is Foucaultian nuance at work.

<sup>4</sup> Gellner, ‘Reply to Critics’ (1997) 221 *New Left Review* 99.

<sup>5</sup> Cane, *Responsibility in Law and Morality* (2002).

Hangover over the whole work, as one might expect, are large questions of structure and agency. I don't think they are satisfactorily resolved here, either in particular contexts or more generally. Thus, Veitch discusses the South African Truth and Reconciliation process. He finds emblematic and appalling the difficulties encountered by the post-apartheid government of South Africa 'associated with doing justice to its apartheid past – of establishing ... who was responsible for what, who the perpetrators were and of bringing them to account in any meaningful way' (p.3). So many perpetrators of so many wrongs 'simply got away with it' (30). The significance of these impunities is not merely local or transitional, Veitch argues, but exemplary: they show 'how easy it is for responsibility to be avoided should those who might be thought most responsible for the commission and production of harm gain effective impunity. And yet ... this is the normal condition of the socially organised production of suffering.' (p.3)

I have two comments. First, where Veitch exhorts us not to 'get too caught up in the "transitional" nature of this example' (30), I think he gets too little caught up in it, and in particular in the specific dilemmas and strains of post-dictatorial and conflict transitions, especially in circumstances where wealth, skills, training, power, etc. have been in the hands of the former despots, tyrants, bloodsuckers and so on. This has been a familiar post-dictatorial and post-conflict problem and no one has dealt with it with resounding success. Too much responsibility, too many scapegoats; too many new-old elites, trading their ill-gotten gains for more of them. 'Transitional justice' as Veitch knows, is a thriving academic industry (to which he has contributed), but not one with a lot of success stories. Many of the reasons for these equivocal results have more to do with the truly enormous and truly specific pains of post-dictatorial and post-conflict transition; they are not simply the ills of modernity writ small.

But Veitch seems to believe that they are. And so, he positions the South African discussion at the start of his chapter on the way modern social structures work to disperse and deny responsibilities. This then leads to another question. This chapter draws upon Zygmunt Bauman's and other analyses of modernity, which have a huge structural dimension. Individuals are in the power of large processes and structures, from which nothing seems to escape: rationalisation, bureaucracy, the division of labour, consumer culture, capitalism, and so on. And in the next chapter, on law, we see how the normal workings of a modern legal system reinforce these structural sources of irresponsibility. All these conspire, though without conscious conspirators, to generate numerous paradoxes of responsibility and irresponsibility in, it appears, overwhelming ways. And so, the book is littered with such paradoxes, all evidence of socially generated irresponsibility at the core and at the expense of rhetorically trumpeted individuality, autonomy and responsibility. Thus we learn that 'irresponsibility is the mark of the

obliteration of the possibility of responsibility. And our paradox is that it is in the organization of responsibility that this achievement is made possible.’ (28) The division of labour distances everyone from everything and ‘transforms role responsibility into non-responsibility in the fulfilment of that role’ (45); large organizations, according to a quoted source, ‘turn the quest for responsibility into a quest for the Holy Grail’ (41); Foucault via Agamben reveals that ‘the modern Western state has integrated techniques of subjective individuation with procedures of objective totalisation to an unprecedented degree’ (55); the proud modern autonomous individual is victim of multiple illusions: ‘merely the *conduit* for larger processes and definitions *over which* he or she has little, or no, control’ (44); ‘rather than being an end in itself, [the individual] has all the real autonomy of a swimmer’s body in rough seas’ (56). And the real tragedy is that we moderns are blind, indeed blinded, to all of this. There is a *tu quoque* issue here that I will leave aside.

More important is that, if all these irresponsibilising social processes are in play, and if legal processes are so interwoven with them, then it’s hard to see how anyone really can be responsible for anything. This is what Hannah Arendt called the ‘cog theory’ of Nazi self-exculpators taken to an extreme, but there is a certain socio-logic to it. It is obvious from Veitch’s contempt for the people he actually names – Blair, Bush, Albright, and so on – that he doesn’t buy the cog theory, at least normatively. He despises these people, after all, for what *they have done*, not because they were mere cogs in bureaucratic machines which left no one responsible for anything. However, I find scant reason in the book’s *analysis* to reject the cog theory. There is a sense in which law becomes one among a number of unstoppable, homogeneous, reified and anthropomorphised creatures, wrenching people from their responsibilities, at the same time as those people become puppets. Structures become the unmoved movers of the story; people, shielded from responsibilities, relieved of meaningful choices but replete with pre-formed and programmed ‘irresponsibility practices’, just move along pre-set tracks while themselves spewing harm about, without actually being responsible for any of it.

And yet some people are responsible for massive harms. For there is another question here about individuals and structures, to do less with the masses, whose evil is so easily taken as ‘banal’ in this treatment, than with their leaders. As I mentioned, Veitch’s language becomes contemptuous when he speaks of modern leaders, but he actually has little to say about them. There is little analysis in this book of the role of individual leaders and decision-makers, the imposers of sanctions, declarers of wars, amassers of nuclear weapons, beneficiaries of irresponsibilizing laws. This neglect flows, I think, from the emphasis on the bureaucratic, legalistic structures of modernity which, so it appears, carry everything before them. It is ‘the law’ that does so much, not leaders who use law, or abuse it and deform it and at the worst

moments dispense with it, all of which Hitler relentlessly did,<sup>6</sup> or simply use it as a stage for murderous plays written elsewhere, as Stalin notoriously did, or have no truck with anything that even the most arch positivist would recognise as law, as Stalin again, Pol Pot, and countless other state murderers have typically done.

Of course leaders must have followers, individuals never make history on their own, and there are times and circumstances in which things are possible that would be unlikely elsewhere or elsewhere. No analysis which ignores underlying structural and sociological considerations can make any sense of leaders or their consequences. But Hitler was not a puppet or a cog, or for that matter a lawyer, nor Stalin, nor Mao Tse Tung, nor Pol Pot, nor Saddam Hussein, nor the murderers of Darfur, Somalia, Rwanda, and so on. Lenin was a lawyer but it was not what he practised in power, and he was also not a puppet. And they were responsible for the death of a lot of people in the last century, on many estimates, many more than the figure of 100 million that Veitch gives for the total so killed<sup>(8)</sup> (some authors, eg the editor of the monumental *Black Book of Communism*<sup>7</sup> attribute that figure to deaths from communism alone). An account of human suffering in the modern age that gives such prominence to the normal workings of modern western law, is somewhat unbalanced, I believe, to the extent that it washes out the malign significance of evil leaders and evil regimes that used law, if at all, for very different purposes, in the tragedies of our times. They aren't the whole story, but their role is an enormously important part of it, that Veitch's book does not integrate and indeed makes difficult to raise.

And in relation to those individuals named, with the sometimes apparent but, in my view, not real exception of Hitler, the normal workings of law, legal reasoning, roles and the rest, had nothing much to do with their worst crimes. There has been a lot of suffering in the world, a spectacular amount in the last century, as Veitch reminds us, and it has had many fathers. A great deal of it, a great deal of the worst of it, murders in the scores of millions, had nothing to do with Veitch's usual suspects: with the hand, visible or invisible, of the market, with consumer culture, legal roles, with law, still less legal reasoning; or indeed anything to do with any of that.

---

<sup>6</sup> Kristen Rundle has recently published an excellent discussion of the role of law in the Holocaust, and the significance of the fact that when the Nazis moved from persecution to extermination, law 'stopped short'; from then on, the Nazis 'decided to leave legality behind at the door of the cattle cars in which so many million people were transported to their deaths.' See Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59 *University of Toronto Law Journal* 65-125.

<sup>7</sup> Stéphane Courtois (et al), *Black Book of Communism* (1999).

---

I doubt that Veitch would deny this, and again he might think that it is outside his subject, which is limited to the role of law, not non-law, and primarily modern western law. However, in a book determined to demonstrate that 'it is, perhaps more than any other factor, legal *right* that is capable of legitimating the extensive commission of suffering of innocents' (131), it might be interesting to ask, for example, why so many who have irrigated killing fields with blood were not scrupulous apostles of the rule of law. How handy it would have been for them to have read Veitch's book, learnt 'that the harms caused by legality are far harder to combat than the harms caused by illegality,' (91) and mended their ways. And yet they were pretty effective without it.

To conclude: Veitch makes the point that "complexity" shares its linguistic root with "complicity" and in all of this we should not lose sight of the fact that, particularly from the point of view of the victims, the experience of suffering is not complex' (12). Maybe so, but the causes of suffering may well be complex and unknown; *a fortiori* explanations for it; so too, the appropriate moral tones in which it is to be appraised. Veitch quotes a splendid line from Stanley Cohen: 'the world of suffering makes moral imbeciles of us all.' I think that is a deep truth. I don't quote it as criticism, or if it is it is self-criticism as well. What enables people to happily kill people, not to notice that people are being killed, not to care, even to rejoice? These are problems as deep as any we know. And we haven't scratched the surface.