

REMARKS OF DAVID KENNEDY*

A Critical Approach to the Nuclear Weapons Problem

All I really wanted to do was link Saul Mendlovitz's very inspirational remark about political mythology¹ and Ved Nanda's remark about the Emperor's clothes,² and ask whether what we really want is another political mythology, once we have realized that the Empire is illegitimate. It seems difficult to oppose the notion that law and lawyers ought to get involved in the debate about nuclear weapons. In the first place, we want to involve everyone who might be helpful in the debate about nuclear weapons, and that certainly would seem to include lawyers. Moreover, to the extent we think of ourselves as "lawyers," we imagine "law" and "legal thinking" to be our greatest asset. If we want to participate, that is what we want to offer.

Nevertheless, I believe that although there is a form of activism by lawyers which might be useful, a look at today's legal debate suggests that discussion of the nuclear threat would be better off without the intrusion of law, legal thinking or the normative elaboration most often used by lawyers and legal academics. I would like to describe some elements of today's debate, suggest some ways to criticize it, and talk briefly about what else lawyers might do. In doing so, I would like to talk mostly with those of you who, like me, are just getting started in the legal community and are unsure what law and a legal education provides as a way of acting in the world.

It seems to me that the legal debate about nuclear arms, whether it's a "policy" debate or a "normative" debate, whether it's about rules or whether it's about values, whether it comes from a "naturalist" or from a "positivist," is characterized by two tendencies which render it incoherent and trivial. This incoherence masquerades as "ambiguity" which can be resolved by "careful and rigorous analysis." This triviality masquerades as the necessary irrelevance of hope or as the unavoidable speculative nature of utopian aspiration. Only a fool would mistake am-

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1. *Remarks of Saul Mendlovitz*, 9 BROOKLYN J. INT'L L. 297, 298 (1983).

2. Nanda, *Nuclear Weapons and the Right to Peace under International Law*, 9 BROOKLYN J. INT'L L. 283 (1983).

biguity for incoherence. Only a Philistine would despair when the Utopia seems trivial. But the legal debate is neither aspirational nor difficult to dissect. It is incoherent and distracting.

Two notions seem responsible for this incoherence. The first is the belief that normative propositions and outcomes can be connected in some relatively fixed fashion. Most of today's debate about nuclear weapons has been grounded in the assumption that a thought process exists which allows us to connect an abstraction like "sovereign consent" to some norm like a "right to peace" and then to some behavior which is precluded or reinforced. No one thinks this process is easy or clear, but the very attempt to discuss nuclear weapons in normative terms reveals the assumption that this process is possible.

It seems to me that if the realists have told us anything, they have told us that legal reasoning doesn't work that way. They have told us that the values and the norms out of which we produce those behavioral outcomes are simply too indeterminate to be controlling. We have seen this today. We have been told, for example, that peace is violence, as well as the preclusion of violence. We have heard that peace and democracy are mutually supportive, as suggested by both Ved Nanda³ and President Wilson. On the other hand, we have also heard that peace precludes violence and that democracy in some sense precludes peace. We have been told that peace is both a creative changing thing and a stable status quo thing. We can understand consent to mean what people say or to mean what they leave unsaid.

The second aspect of the debate which leads to incoherence is our tendency to treat these concepts as though they were really things, with concrete contents and relationships to one another. We talk about "this Administration," "United States interests," "values," "rights," as though those were real things which have some concrete relationship to one another that could be described and analyzed. This tendency to reify concepts and values seems to allow us to resolve the conflicts among them by finding an appropriate compromise, or by limiting one as the exception to the other. However, the resolutions which reification permit are phony. They separate us from each other and demean the values they seem to enshrine. In family life, we shudder at resolving personal disagreements by extrapolating from

3. *Id.* at 292-93.

the abstract relationships among the roles of "wife" and "husband," or "parent" and "child." We hope that a child is embraced out of love, not out of fealty to a notion of "parenthood."

To my mind, the tendency to treat concepts as things and the tendency to engage in determinative deduction are the two things that lawyers are inclined to bring to this debate and those lead us to a dead end. It is not an impasse which more complex, rigorous analyses conducted with greater candor will overcome. We cannot develop "better" definitions of the idea of peace which resolve these contradictions. In fact, the call for rigor simply disempowers all but the most sophisticated rhetorician from participating in the debate.

As a result of these tendencies, international lawyers who talk about nuclear weapons tend on the one hand to be utopian, postulating rules that could be adopted in a wonderful society which might someday be established and suggesting that until then, we can do no more than to preserve these rules, holding them sacred. On the other hand, they say, "Well, you know, basically international law is very strong, because anything States do invokes international law." In this view, international law seems a great thing, although its doctrines are not critical. Neither approach is very helpful if our goal is to avoid nuclear catastrophe. Deference to the political structure is no more helpful than utopian speculation. Consequently, in searching for a middle ground, scholars and lawyers knit together arguments which are inconsistent and divorced from the concepts or values that are invoked. Moreover, nobody is convinced by anybody else's argument about any of these things.

Such a debate is not only unhelpful, however. I also think it has bad effects. For one thing, it encourages people to believe that the roles and the rights are real, that we live as "fathers" and as "citizens" and as "right holders" rather than as people—that in fact we should choose what we do in the world as "lawyers," rather than as people. As a result, we tend to believe that this form of social life is the only "real" one available to us. We lose our capacity to imagine and transform precisely the social order which supports nuclear weaponry. Moreover, oppression which is legitimated in this way may become more perverse. Politicians may say, for example, "Look, you guys have told me that I'm free until you can come up with a convincing argument to constrain me, and you haven't come up with it, so I'm going to continue to act badly." This is the ultimate sort of "kiss-off."

"I'm sorry," they say, "I'd love to help you, but the norms are indeterminate."

It strikes me that a more insidious consequence of this form of discourse, and the thing that I'm really most concerned about, is that when we focus our attention, as people interested in changing the world, on the manipulation of abstractions, we tend to encourage ourselves and those who are oppressed by the system to believe that this is the rhetoric of emancipation, rather than just a mythology. The result is that our critique is in some way "de-fanged." It just turns into criticism. We do not feel empowered by becoming lawyers, but in some way stripped of the moral power that we thought we had when we entered law school.

So what can we do as lawyers? What specific contributions can lawyers make if it's not defining the intricate details of a "right to peace?" Well, I guess my thought is that we just have to take a walk on the wild side, that in some way we have to recapture our sense of outrage. If lawyers had devices and means of legal thinking for inventing and spitting out elaborate arguments about the meaning of rights, those strategies and those structures could be turned in another direction. They could be turned in the direction of critique. They should be able to consume arguments as easily as they produce them.

To my mind, the one thing that lawyers ought to be good at is not the rigorous development of the meaning of peace, but the absolute relentless critique of the strategies of justification that are presented for the current world order. Moreover, that's really what's at stake for us in the nuclear debate. It is a specific activism in which we can engage. As lawyers, we can move in the direction of freeing people from our belief in abstraction, and force ourselves to face each other in a world in which we have to confront the facts of our life together directly. That's all I wanted to say.