North Carolina Central Law Review

Volume 8
Number 1 *Volume 8, Number 1*

Article 8

10-1-1976

Book Reviews

North Carolina Central Law Review

BOOK REVIEW

The Impact of Inflation and Devaluation on Private Legal Obligations By Eliyahu Hirschberg Ramat Gan, Israel: Book Publishing Committee. Bar-Ilan University. 1976. Pp. 384.

"The book is an only book of its kind in the whole modern Anglo-Saxon legal literature," the comment made in a letter accompanying the book when it was passed to the reviewer, defies refutation. To those who have read Mr. Hirschberg's THE NOMINALISTIC PRINCIPLE,[1] the framework of inquiry will have a familiar ring. The author is to be commended for having adopted a more interesting style in his new book. There is still the obvious encyclopedic knowledge as reflected in the painstakingly scholarly structure and meticulous documentation of this work.

The book is the outgrowth of research carried out over a period of many years, and represents "a recast and enlarged version" of two studies submitted to the University of London for which the author was awarded the M. Phil. and PH.D. degrees respectively. It also includes materials and ideas developed by him in some twenty-six articles which were printed in various periodicals. To quote Mr. Hirschberg, the study is ". . . intended primarily for those interested in Monetary Law, especially the legal aspects of contemporary monetary problems." However, due to its timeliness, the book should prove to be of interest to practitioners, law students, economists, and businessmen. It comes at an opportune time, a time when inflation—the increase of the prices of goods and services and the decrease of the value of money—has become "galloping inflation." Laymen are conscious that money has lost some of its value—they suffer from a loss of purchasing power—and that private parties to contracts are unable to preserve the original value of the obligations.

On the problem of the extent of monetary obligation, the author offers three theoretical approaches as existing in modern legal thought: (1) nominalism—a pound is a pound, a dollar is a dollar, with the extent of a monetary obligation being defined according to the sum of nominal units of currency included within it, and the *value* of such units being irrelevant in the eyes of the law; (2) metallism—a unit of account identical with a certain quantity (weight) of standard metal, which is an expression of money as a commodity, though no distinction may be made between unit of account and means of payment; and (3) valorism—the *value* (purchasing power) included in each

1. See 7 N.C. CEN. L.J. 87 (1975).

monetary unit, and not the nominal sum of the units of currency. Valorism is intended to replace nominalism and metallism.

Formerly, fluctuations in the value of currency were adjusted by means of the gold standard; however, since the abandonment, in theory and practice, of the traditional gold standard, devaluation has become the drastic remedy designed to achieve economic and social objectives. It is a final resort, usually, in an effort to restore the purchasing power parity between local currencies and world currencies—to revive the equilibrium in the balance of payments—with exports becoming cheaper and imports becoming more expensive. With this change in the value of money, the creditors, according to the nominalistic principle, have to bear all the loss within the field of private legal obligations.

The author explores at length the different kinds of value clauses—gold, foreign currency, and cost of living—intended to protect the creditor in the contractual relationship from changes in the value of currency. One of the most fascinating sections of the book is Chapter 5, which treats gold value clauses, including their creation, operation, validity, and abrogation by the courts and by legislation in United States of America. He interprets the Joint Resolution of the United States Congress,[2] and the decision of the Supreme Court.[3]

The discussion of "Value Clauses" constitutes Part Two of the four-part work with parts one, three, and four entitled, respectively, "The General Solution", "Special Problems," and "Public Policy and Monetary Law." Each part is divided into chapters and alphabetically-identified sub-chapters, with each topic in each sub-chapter titled in a decimally-numbered section.

Under "Special Problems", the impact of monetary changes on bilateral executory contracts is analyzed. Mr. Hirschberg introduces this section as follows:

> A clear distinction should be drawn between two groups of contracts, one group known as simple contracts, their subject matter being only payment of money and the duty of performance lying only on one side, and contracts known as bilateral executory contracts, where the duty of performance has to be fulfilled by both sides in the future. This distinction is very material to my subject matter. (p. 159)

American legal writers probably would not consider this acceptably definitive;[4] however, the author's familiarity with Israeli, English, and

2. Public Resolution No. 10 of the 73rd Congress, "Joint Resolution to insure value to the coin and currency of the United States," approved June 5, 1933, Ch. 48 § 1, 48 Stat. 112, 113; 31 USC § 463 (1970).

3. Norman v. Baltimore & Ohio Ry. Co., 294 U.S. 240 (1935).

4. RESTATEMENT OF CONTRACTS § 6 (1932). "Contracts are classified as formal or informal; as unilateral or bilateral."

RESTATEMENT (SECOND) OF CONTRACTS, Explanatory Note § 12, at 17. "Section 12 of the original Restatement defined unilateral and bilateral contracts. It is deleted because of doubt as to the utility of the distinction, often treated as fundamental, between the two types. As defined in

German contract law compensates for such a minor blemish. Documenting and supporting his contentions with case law, he sets forth novel concepts of monetary problems and reform, and argues them provocatively and persuasively. Among the topics which he encompasses in chapters and subchapters are: frustration of bilateral executory contracts caused by monetary changes; rescission; damages in delayed payment; assessment of damages in torts; equitable reliefs and changes in the value of money; and public policy and monetary law. The author indicates methods of compensation in each instance, and formulates hypothetical cases which are generally illuminating. At times, however, the reviewer is confused by certain categorizations and explanations, of which the following is an example:

> Inadequacy of consideration, when it is closely connected with other inequitable conduct like concealment, innocent misrepresentations, unreasonable advantage on the part of the one who takes advantage, ignorance, financial want, ignorance of commercial dealings, inequality of standing of the two parties and their aptitude for negotiation, justifies the refusal of the grant of specific performance. (p. 318)[5]

At other times, the language is perplexing; the passage below exemplifies such expression:

> Being variable, public policy is treated as different from other rules of law. It does not look to the judicial precedents but to the opinion of what is the common good of the public.
>
> Public policy is necessarily disabling and negative. The judges are allowed only in certain instances to declare a contract or a condition to be void. They are not allowed to proclaim positively what is for the public good. (p. 342)[6]

Criticisms of the book have an inessentiality when the work is considered in totality. It evidences exhaustive scholarship and exactitude in detail. Most

---

the original RESTATEMENT, 'unilateral contract' included three quite different types of transactions (1) the promise which does not contemplate a bargain, such as the promise under seal to make a gift, (2) certain option contracts, such as the option under seal . . . and (3) the bargain completed on one side, such as the loan which is to be repaid. This grouping of unlike transactions was productive of confusion."

5. According to American jurisprudence, "innocent misrepresentation," "ignorance," "financial want," and "ignorance of commercial dealing," would not be placed in the category of "inequitable conduct" with "concealment" and "unreasonable advantage on the part of the one who takes advantage."

6. 20 Am. Jur. 2d *Courts* § 64 (1965). "Courts are not concerned with purely ethical principles, and are generally not arbiters of public policy, but a court may be called upon to determine what the public policy is, as, for example, where it has to determine whether a contract is or is not invalid because it is or is not against good morals, or where it has to determine whether a foreign law that would otherwise be inapplicable in the particular case should be denied application because it is contrary to the public policy of the forum state.

Notwithstanding the general principle that it is not the function of courts to make law, certain courts have the power to issue rules that have the same effect as statutory rules. And where there is no statutory authority or binding judicial precedent on a question of law with regard to which there is a conflict among other authorities, a court is free to adopt the rule it considers preferable."

comprehensive are the tracing of doctrinal history and variant historical development of legal principles, and the comparison of legal monetary systems of the United States, Israel, Germany, England and other European nations. The extensive bibliography alone makes it worthwhile for the average law student.

In summary, the author recommends qualified valorism as a solution to monetary ills accompanying devaluation. Parties should be compensated for loss of value as measured by the cost of living index. While the exact point of application of the valoristic solution should be determined by the legislature, judicial adoption and the opinion of the professional community may be necessary and helpful. If Mr. Hirschberg's conception of the equitable fulfillment of private legal obligations can be realized, professionals and laymen alike will bless his name.

MILDRED BRIGHT PAYTON

Unequal Justice By Jerold S. Auerbach. Oxford University Press, 1976. Pp. 395.

Jerold S. Auerbach's *Unequal Justice* traces the history of the legal profession in America from the Civil War to the present day, examining the role of lawyers in a century of substantial social change. Auerbach found that a significant segment of the profession, a corporate law elite, ignored basic problems of social justice. As a consequence, people gradually lost respect and confidence in the profession as a whole. The history concluded that restoration of faith in legal authority "depended upon the unlikely prospect that the legal profession would [develop] a broader and deeper definition of social responsibility than the bar had ever tolerated."[1]

Traditionally, the legal profession had been "a cottage industry of single practitioners;" in the last decades of the nineteenth century, however, corporate law firms were organized to serve the needs of corporate capital in the modern industrial age. In a speech at Harvard in 1905, Louis D. Brandeis commented on this development:

> Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a great extent, allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people. We hear much of the "corporation lawyer", and far too little of the "people's lawyer."[2]

Woodrow Wilson delivered the same message to the American Bar Association in 1910:

> Lawyers . . . have been sucked into the maelstrom of the new business system of the country . . . . They do not practice law. They do not handle the general miscellaneous interests of society. They are not general counsellors of right and obligation. . . . The country . . . distrusts every 'corporation lawyer'.[3]

Unequal Justice follows the legal profession through each era of American history, reviewing the role of corporate lawyers as well as the representation of competing demands for the public interest. The Depression of the 1930's, for example, provided this country with an opportunity to re-examine the powers and obligations of corporate capitalism. The best and brightest of the bar flocked to Washington for a career in "the responsible, craftsmanlike handling of the power of the state".[4] Government service enabled lawyers to represent the new corporate power—the federal government—and to mediate

* Assistant Professor of Law and Director of Clinical Education, North Carolina Central University School of Law. B.A. 1962, Yale University; J.D. 1966, University of Chicago; LL.M. 1976, Duke University.

1. J. Auerbach, UNEQUAL JUSTICE 306 (1976).
2. *Id.* at 34-35 (*see* n. 55 at 313).
3. *Id.* at 34 (*see* n. 54 at 313).
4. *Id.* at 170 (*see* n. 18 at 339).

between public good and private interest. Auerbach concluded that the profession turned the New Deal into "a lawyer's deal": "in service to power, lawyers made government by a legal elite the culmination of New Deal liberalism."[5]

Unequal Justice also chronicles the development of alternatives within the profession. Legal Aid, for example, originated in the late nineteenth century and expanded after the publication of Reginald Heber Smith's *Justice and the Poor* in 1919. Legal Aid began to function more effectively when the War on Poverty infused the program with federal financial support, but remains at present a form of practice with limited funding and scope. Blacks, long excluded from many law schools (and the American Bar Association), began to find educational and professional opportunities in the 1930's, when Charles Houston, Jr., and others, upgraded Howard Law School and planned the NAACP's attack on racial discrimination. Present-day efforts to encourage entry of blacks, minorities and women into law schools and into all segments of the profession are, however, still in the early stages and already under attack as "reverse discrimination."

Unequal Justice demonstrates that a significant part of the legal profession chose to serve the particular needs of corporate capitalism. This service contributed to America's economic strength, but promoted neglect of all other societal values. This history shows that work remains to be done. If we are to correct the mistakes of the past, we must learn to encourage developments within law and society so that the legal profession will be able to respond to the full range of social concerns. We have at present an equivocal mandate in the Legal Services Corporation Act, problematic funding for public interest law practice, and a cynical realism about public service and public good. We need suggestions, guidance, participation and support, if we wish some future historian to be able to tell the tale of the generation that established equal justice under law.

JAMES A. LEWIS*

5. *Id.* at 230.

Criminal Justice in America: A Critical Understanding. Edited by Richard Quinney. Little, Brown and Company, 1974. Pp. 448.

This collection of essays/readings by various authors is an extensive, probing critique of the American system. It proposes to examine the American way of life, from an economic, historical, social and political perspective, by using Marxism as the underlying methodology. This assemblage of readings is designed to jar and cause one to examine basic assumptions that many people have concerning the criminal justice system in America.

The book format is seven chapters. The introductory chapter seeks to develop a new level of critical consciousness/awareness, and outlines the framework for development of a critical understanding of criminal justice in America. The next five chapters examine the fabric of the American system as revealed in its legal order, the development of criminal law in America, law enforcement, the administration of criminal justice and the penal system. The final chapter considers prospects for the future—ending with an eerie choice between computerized facism or humanistic socialism.

In the preface, the editor, Richard Quinney, states that his purpose is to critically examine the larger context within which criminal justice operates in the United States. His objective is to provide the understanding necessary for the creation of an authentic human existence.

In Quinney's opinion, Karl Marx proposed the strongest alternative to the juridical concept of justice. Since the state and its legal order are an expression of the prevailing mode of production, and given that capitalist production is destructive of a human existence, the legal system supporting this kind of social and economic order is not capable of promoting justice. To accept the more traditional legal point of view is to adopt a mystified conception of reality. Thus, a critical understanding of social reality requires a frame of reference that goes beyond the notion of justice.

The editor's goal is the demystification of crime and justice in America. He exhorts that the false reality by which we live, the one that serves the established system, must be understood. He summarizes the underlying concepts of the critical theory of criminal law:

1. American society is based on an advanced capitalist economy.
2. The state is organized to serve the interests of the dominant economic class, the capitalist ruling class.
3. Criminal law is an instrument of the state and ruling class to maintain and perpetuate the existing social and economic order.
4. Crime control in capitalist society is accomplished through a variety of institutions and agencies established and administered by a government elite, representing ruling class interests, for the purpose of establishing domestic order.
5. The contradictions of advanced capitalism—the disjunction between existence and essence—require that the subordinate classes

remain oppressed by whatever means necessary, especially through the coercion and violence of the legal system.

6. Only with the collapse of the capitalist society and the creation of a new society, based on socialist principles, will there be a solution to the crime problem.[1]

In setting out a broad outline of "A Critical Theory of Criminal Law",[2] Quinney proposes that an understanding of crime is necessarily based on assumptions about the meaning of human existence. Even our initial conception of crime depends on how we regard the nature of our being. He asserts that no understanding of crime can proceed without a recognition of the existing order and how it relates to a higher ideal. All explanations of crime are both moral and political.

The editor provides highlights of the various schools of thought in criminology, from the dichotomy of the Classical and Positivistic Schools through legalist criminology and the sociology of criminal law. It has been observed that there exists a dual problem of explanation in criminology: Crime always involves both human behavior (acts) and the judgment or definitions (laws, customs, mores) of fellow human beings as to whether specific behavior is appropriate and permissible, or is improper and forbidden. There is danger in the sole reliance on the state's definition of crime because it can lead to the acceptance of the existing order.

Quinney observes that most criminology research is dominated by the Positivistic mode of thought, and therefore takes for granted the necessary existence of the legal system. Little attention is devoted to questions about why law exists, whether law is indeed necessary, or what a just system is like. Criminology, including the theories and practices of what is to be done about crime, continues to be dominated by a single purpose: preservation of the existing order.

The prevailing schools of thought are contrasted with a radically critical theory of criminal law. Its operation is one of demystification, the removal of the myths—the false consciousness—created by the "official" reality. Then, the true meaning of current reality is thereby understood. Quinney contends that without critical thought, we are bound to the only form of social life we know—that which currently exists. Our current cultural and social arrangements, supported as they are by a bureaucratic—technological system of production and distribution, are a threat to the fulfillment of human possibilities—including the freedom to know that this system is oppressive and may be altered.

In the development of a critical understanding of criminal law, the state is viewed as a creation of the class of society that has the power to impose its will on the rest of society; it is a political organization created out of force and coercion. The state is established by those who desire to protect their material

1. p.24.
2. Ch. 1, p.1.

basis and have the power (because of material means) to maintain it. The law in capitalist society gives political recognition to powerful social and economic interests. The legal system provides the mechanism for forceful and violent control of the rest of the population. The state and its accompanying legal system reflect and serve the needs of the ruling class.

It is submitted that the military abroad and law enforcement at home are two sides of the same phenomenon—the preservation of the interests of the ruling class. We are told that to understand crime radically is to understand the making and workings of the American empire. The primary interest of the ruling class is to preserve the existing capitalist order in order to protect its existential and material base. Any threats to the established order can be dealt with by invoking the final weapon of the ruling class, its legal system.

Continuing the demystification, it is asserted that threats to American economic security abroad are dealt with militarily; our armed forces are ready to attack any foe that attempts (as in revolution) to upset the foreign markets of American capitalism. [e.g. Cuba, Chile, Vietnam, Angola]. American imperialism fosters and perpetuates the colonial status of foreign countries, securing American hegemony throughout as much of the world as possible. Such has been the history of American foreign relations. Similarly, the ruling class uses the criminal law at home to maintain domestic order; it secures its interests by preventing any challenge to its moral and economic structure.

The beginning of a critical understanding of law in capitalist society is the awareness that the legal system does not serve society as a whole, but serves the interests of the ruling class. The ruling class, however, is not in direct control of the legal system, but must operate through the mechanisms of the state. Viewed historically, the capitalist state is the natural product of a society divided by economic classes. Only with the emergence of a division of labor based on the exploitation of one class by another, and with the breakup of communal society, was there a need for the state. The new ruling class created the state as a means for coercing the rest of the population into economic and political submission.

In a discussion of "The Legal Order,"[3] the demystification process continues as Quinney states that an unquestioning belief in the state prevents an analysis that would allow us to view the state, as Marx did, as the coercive instrument of the economically dominant class. Stanley Diamond in "The Rule of Law Versus the Order of Custom" observes that law, thus, is symptomatic of the emergence of the state. In Diamond's opinion, Engles epitomizes the West's awareness of itself:

> The state, then is by no means a power forced on society at a certain stage of evolution. It is the confession that this society has become hopelessly divided against itself, has estranged itself in irreconcilable contradictions which it is powerless to banish. In order that classes

3. Ch. 2, p. 26.

> with conflicting economic interests may not annihilate themselves and society in a useless struggle, a power becomes necessary that stands apparently above society and has the function of keeping down the conflicts and maintaining 'order'.[4]

Alan Wolfe, in "Political Repression and the Liberal Democratic State", indicates that a full understanding of political repression would be obtained if a comprehensive theory of the state existed, because repression is a form of rule, a method of preserving capitalism. Wolfe has developed several propositions, concerning a capitalist system, in which he proposes that repression is one of a number of reproductive mechanisms which capitalism requires in order to maintain itself as a system. Repression is the physical use of force or the threat of force by those in power to meet challenges to their legitimacy.

An inquiry into "Criminal Law in America"[5] discloses that criminal law emerged simultaneously with the creation of the political state. In early societies, custom prevailed and injuries to wronged persons were handled by the family and the community. The concept of criminal law developed only when the custom of private or community redress of wrong was replaced by the principle that the state is injured when one of its subjects is harmed. Thus the right of the community to deal with wrongdoing was taken over by the state as the "representative" of the people. As such, the state could now employ criminal sanctions to protect its own interests and those of the dominant ruling (economic) class. Criminal law, therefore, could develop only with the achievement of political domination by the state—allowing law to be established and administered in the name of a centralized governmental authority.

During the last decade, the control of crime has entered a new stage. The rapid increase in criminal legislation, law enforcement programs, and judicial activity marks the attempt by the government and the ruling class to respond to the crisis in the capitalist system. Instead of responding by changing the social and economic system to relieve or eliminate the oppressive conditions of advanced capitalism, the state has reacted by protecting the existing order.

Only with an examination of the American social and economic system can we understand the meaning of criminal law, including the recent crime control programs. The conclusion is that crime control serves the existing order, the economically dominant class and the state. And as long as that order is oppressive, criminal law will be used to further the oppression.

In an examination of "Law Enforcement,"[6] it is observed that the substantive criminal law is but one aspect of the legal order. The state, in addition, creates a complex of bureaucracies to enforce and administer the law. Their agencies protect and secure the interests of the state and its ruling

4. *See*, Fredrick Engels, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE (1942).

5. Ch. 3, p. 93.

6. Ch. 4, p. 147.

class. Law enforcement agencies, including local police departments, are coercive bureaucracies that serve the state and its material interests. The role of the police in the capitalist society has always been to preserve the existing order. In fact, the rise of police institutions in the nineteenth century was a response by the propertied classes to attacks made on domestic order. This institution relieved the propertied classes themselves of the need to coerce and control the population and provided a domestic force (other than the military) for the purpose of maintaining domestic order.

Jeff Gerth, in the "Americanization of 1984", concludes that American society is well on the way to becoming a police state. The enactment of this police state—less conspicuous, yet far more threatening, than one dominated by the military—is a scientific enterprise. Its low-profiled selective repression is based on surveillance, fear, intimidation, and information control, rather than on the massive deployment of police. More insidious and pervasive than the older form of law enforcement, the new crime control system seeks to provide the ultimate means of preserving the existing social and economic order. Through LEAA and the FBI's new version of SEARCH, a prototype intelligence system, the legal and technological groundwork has been furtively laid. But the creators of Big American Brother—an apparatus designed to keep track of people's thought and actions—have carefully avoided a military image. For his brain, they have chosen the "Criminal Justice Information Center", rather than the more ominous-sounding, "National Data Bank."

In an investigation of "The Administration of Criminal Law,"[7] it is noted that if the legal order itself is not just, no amount of just administration can correct its basic injustice. Robert Lefcourt writes in "Law Against the People" that the legal system is bankrupt, beyond technical solutions and reform. The legal superstructure is neither designed to dispense justice to a whole community nor to allow change in property relations. It legitimizes the power of the few and punishes those who have been defeated by or challenge this power. His view of the future indicates that as the establishment uses its law to cut off resistance, people will begin to see legal relationships as they actually are, coexisting with the economic and political system. Lefcourt visualizes that law will be demystified. People will no longer accept the pluralist mask behind which the law pretends to be an impartial voice among conflicting groups or individuals. People will no longer tolerate a system in which large corporations, wealthy individuals, and property owners receive the greatest benefits.

Haywood Burns points out in "Racism and American Law" that law is not only discriminatory, but it also perpetuates the racism in American society. The law has been used against minorities "to make sure that these inferior beings stayed in their place—whatever that might be at the moment."[8] Laws

7. Ch. 5, p. 227.
8. p. 233.

have thus excluded Indians, Orientals, and Blacks from their lands, from participation in the political process, and from basic human rights. Racism in the law is institutionalized as a product of caste and class subordination in capitalist society. Burns observes that law cannot transcend racism but can only confirm it, as long as the social order is racist and class-determined.

In the final chapter, "Prospects",[9] it is suggested that the contradiction within modern capitalism is that a system which violates human essence leads to resistance and rebellion by the people. And the more the people attempt to remove the oppression, the more the capitalist state brings repressive measures to bear on them. It is noted that reform is the capitalist state's way of adjusting the system so that it will survive according to its own terms. An alternative to current reality and a future of "friendly" fascism is liberation of the capitalist state and achievement of our authentic being in a socialist society. It is urged that we be the advocates of direct popular democracy—of the reconstruction of society from below, of popular power over all institutions which will meet human needs, not to serve the interests of profit and domination.

JANET OCTAVIA KNIGHT

9. Ch. 6, p. 390.