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BOOK REVIEWS

The Nominalistic Principle. By Eliyahu Hirschberg, Ph.D. Jerusalem, Israel: Bar Ilan University. 1971. Pp. 138.

Should the equilibrium between the rights and obligations of contracting parties according to the manifest intent at the time of the making be maintained despite changes in the value of money? Eliyahu Hirschberg thinks so, and has devoted much of his book to inquiry as to the need to protect private rights from monetary change, taking into account the purchasing power included in the sum of money when the contract was made. These rights, he asserts, are at the mercy of a government which adopts the nominalistic approach.

Illustrating the operation of the nominalistic principle—a dollar is always a dollar in the eyes of the law—the author cites the case of *Anderson v. Equitable Life Assurance Society of the United States*, 42 T. L. R. 302: "In 1887 a life insurance contract was made in St. Petersburg and its monetary obligation was fixed in German marks. The premium was paid during the whole duration of the contract. In 1922 the insured died. The claim was filed when German inflation had reached its climax. The sum awarded was barely sufficient for the purchase of a packet of cigarettes." Conceding that deviation from nominalism causes difficulties in the public sector by disturbing "the equivalence between expenses and revenues," and drawing a distinction between "short-term transactions," "medium-term transactions," (contracts of sale, supply, etc.), and "long-term transactions" (mortgages, long-term credit, certain insurance policies, bonds listed on the stock exchange, etc.), Dr. Hirschberg insists that "the changes in the monetary and political sphere during the duration of long-term contracts are so frequent and so rapid that no relationship exists between the anticipations of the parties when the contract was made and its maturity." He suggests as alternative solutions "qualified valorism," and revaluation of debts.

Author Hirschberg traces the history of valorism from its beginning in the nineteenth century, and discusses its adoption in Germany during an inflationary period comparable to that of the Confederate South during the Civil War. Valorism regards the extent of a monetary obligation not as defined by a nominal sum of money or the metallic value of such sum, but as determined by the purchasing power of such sum of money, thus the valoristic principle is "not a principle of the law of currency but of the law of obligation." In commercial intercourse, according to the

nominalistic solution, the extent of a monetary obligation is absolutely and unconditionally fixed and thus easily understood; in contradistinction, the extent of that obligation according to the valoristic principle is more difficult to ascertain, and is given effect through a measure of value like a cost of living index and/or index of wholesale commodity prices. Asserting that "attempts to create an abstract measure of value which will function as a substitute for national currency have not met success," Dr. Hirschberg offers three possible solutions to problems arising due to price fluctuations: (a) authorization of trial court to apply appropriate index, (b) division of different bargains into different classes, and (c) arbitrary adoption of one index to ascertain changes in the purchasing power of money.

Revaluation applies to debts and not currency. Contending that "revaluation faces the past, valorism faces the future," the author illustrates his discussion of this theoretical solution with a detailed account of revaluation in Germany during its catastrophic post World War I period, and of revaluation in the southern United States in the post Civil War period. The judiciary took the initiative in revaluation in Germany, beginning with a 1923 judgment of the Supreme Court in a case which concerned the right of redemption of a mortgage registered prior to World War I on a certain tract situated within a German colony which was taken over by the British. The Supreme Court decided that the debtor was not entitled to repay the debt in depreciated money.

No common standard was known in the evaluation; lower courts had broad discretion but were "directed to take into account the value of the dollar, the cost of living index, the wholesale commodity price index, the market price of certain commodities, and a special index prepared by Zeiler, one of the members of the Supreme Court." The author considers revaluation an emergency solution and not a theoretical alternative solution to nominalism; and in contradistinction to valorism "it does not suggest its own solution and an independent approach to the problem of the content of a monetary obligation," but strives to find a just and practical solution to the new situation.

This book is a revised version of part of a study in monetary law, accepted by the University of London as the author's *M. Phil.* (Laws) thesis. It is written in the ponderous, scholarly language of research. With a multi-language bibliography listing more than a hundred references, Dr. Hirschberg has adequately supported the pros and cons of his argument. Among solutions offered by him are a return to the metallic standard, restriction or partial or complete abolition of the nominalistic principle in private law, and an adequate system of constitutional safeguards. As to these safeguards, Dr. Hirschberg states in his concluding paragraphs that "the ideal solution, however, would be a legislative

instrument, prepared before any emergency, for the solution of the problems arising as a result of changes in the value of money." He goes no further; he does not outline contents of the "legislative instrument", nor does he suggest appropriate legislative bodies or other organization guidelines for administration. This is unfortunate and disappointing, as the writer has probed so deeply into a fundamental matter on which comparatively little has been written in the United States. The uniqueness of the book, and the present inflationary near-crisis enhance the value of such a treatise and recommend it of priority on any law student's reading list.

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Race, Racism, and American Law. By Derrick A. Bell, Jr. Little, Brown and Company, 1973. Pp. 1076.

This monumental work, written at a time when critics within and without America are questioning the country's commitment to equal justice to all, is both comprehensive and provocative. The author, a professor of law at Harvard Law School and formerly a civil rights attorney for the NAACP, has compiled cases and relevant social science materials to focus on the problem of racism.

The book begins with an historical analysis of slavery. It includes a lengthy excerpt from the 1857 Dred Scott opinion in which Chief Justice Taney sanctioned the official policy of political circles for the treatment of Blacks. To document his suggestion that the governmental triumvirate was against Blacks, Bell illustrates with selected court cases, (e.g., The *Armistad Case, Brandenburg v. Metropolitan Package Store Association, Ali v. United States*) and excerpts from notable scholars on the subject, including John Hope Franklin's *The Emancipation Proclamation.* Not only does the book portray the vicious prongs of racism toward Blacks, but in Chapter 2, similar treatment received by other non-white groups is summarized. Part I ends the question of whether America's laws can be used as instruments of social change.

With the assumption that the benefits of democracy accrue from the recognition of citizenship, Bell in Part II outlines how these promises (voting, marriage, protecting access to public facilities, military service) to Black citizens are flouted and unfulfilled. The right to education, also a citizen's right, is treated separately in Part III because the author asserts that "the struggle on the part of Blacks to attain an education has been and currently is an important ingredient for personal success and the foundation upon which all legal claims to full citizenship for Blacks have been built." (p. 431). The avowed counterparts of education—housing, employment and right to personal justice—are the focal points of Parts IV, V, and VI. Thus, Bell presents to the reader a casebook approach to the study of racism in law from a perspective not often emphasized in the basic law school curriculum.

As stated before, the purpose of this book is to enable an in depth study of the significance of laws and decisions dealing with racial issues. Why? Because, as the author states, "many of the changes in racial patterns and policies attributed to civil rights" cases are now regarded as obsolete and have little if any contemporary value. For example, while noting that although *Brown v. Board of Education* promised Blacks an integrated education, the author, through the use of inserted materials,

questions the value of an integrated education *per se*. Through excerpted writings, the book reminds the reader that many school districts even now maintain segregated schools. Alternatives to integration such as community control and free schools are discussed by noted authorities in the field of education. Courts have strengthened fair employment laws, but workers' attempts to bring about a change through self-help methods have resulted in subsequent discharge in most cases. The courts are unable or unwilling to provide adequate relief in these cases.

Underlying the main thesis is the point that lawyers should adopt a more pragmatic approach to racial problems and should fashion legal remedies for Black clients who, having won the symbols, need the substance of equal opportunity. Throughout the book, for class discussion purposes and for developing legal strategies to attack racism, Bell has written seventeen hypothetical litigation problems, called "Racism Hypos." The suggested use is to assign student teams to represent and present oral arguments for the parties. Each argument is to be judged by the class to determine the winning side. Hopefully from this verbal interplay and exchange, students can formulate legal strategies to use when confronted with real situations.

These hypos are interspersed within the six parts of the book. Not only are hypos used to provoke ideas as to strategy, but the materials, notes, and questions after the sections augment this design. For example, in Chapter Six, "The Right to Interracial Sex and Marriage," (the case of *Loving v. Virginia* (1967) which invalidated miscegenation laws), Bell points out in a note that post-*Loving* state legislatures did not hasten to repeal outdated miscegenation statutes. Some state courts refused to recgonize the *Loving* decision. In *U.S. v. Britain*, 319 F. Supp. 1058, the court voided Alabama statutes relied on by a probate judge who refused a white army sergeant a license to marry a Black woman.

In another area, conscientious objection to military service, the author pointed out that the Supreme Court in the Cassius Clay case (*Muhammad Ali v. U.S.* 403 U.S. 698 (1971)) reversed the conviction on procedural grounds, thus avoiding a direct holding that Muslim beliefs qualify for conscientious objector status.

Another illustration of this technique is found on p. 58 where Arnold Schuchter's *Reparations* (a discussion of reparations paid to the Jews by the Germans) is excerpted. Here, the question is posed: Is not the difficulty in organizing powerless people the main reason why the Emancipation Proclamation experience has been repeated during the last one hundred years in subsequent civil rights laws and decisions?

Though one may nurture an inkling that the author's selection of

materials was to feather his nest of biasness, such a notion disappears under the weight of support of scholars in various fields that accords with his thesis. Bell, to say the least, is inconclusive on many points. He does, however, present vital issues faced by this country and indicates how these issues were handled in the past. His own article, "School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools" (p. 574), merely describes rather than takes sides with the issue of decentralized (local) control of Black schools. The sources upon which he relies are in the main primary, projecting a balanced attempt to penetrate the promises of America to all citizens to evaluate whether they have been fulfilled. The bibliographical materials are critical of the topics for which they were selected; some are prefaced with comments by the author as to their relevance and significance.

Admittedly, even though it is currently fashionable in many places throughout America to disclaim and even denounce the existence of racist practices (exclude the President's Commission on Urban Disorders, 1969, and the famous or infamous Dred Scott decision), the author sparingly uses rival viewpoints. His use of Franklin's *Emancipation Proclamation* (p. 55), which projected the view that Lincoln's motives for "freeing the slaves" were basically the result of humanitarian or moral imperatives, is unpersuasive to some Black scholars. Reference is made to Jensen's article, "How Much Can We Boost IQ and Scholastic Achievement?" (p. 86) which many Blacks assert is avowedly racist. One may say that this work is noteworthy for its absence of unsupported generalizations and sweeping assertions without insufficient evidence.

Without reservation, the book may be relied on for its forthrightness and straight-forwardness in meeting the fundamental issue of racism in our society. The author's use of sources and treatment of the issues are commendable. His reliance on and use of non-legal materials may be questioned by some of the legally trained as unsound and not analytical. However, those critics should address themselves to comments Bell makes concerning the overall thrust of Chapter Three, "Ending Racism Through Law." The question is put as follows: "Why do judicial opinions ignore available knowledge on the subject (race) while continuing to accept the myths about race—which, are, of course, no less dangerous because their accuracy is assumed?" (p. 117). Justice Harlan's dissent in *Plessy v. Ferguson* that the Constitution is color-blind is of questionable value as posed by materials in the book. Does Taney's dictum that Blacks "had no rights which the whites were bound to respect" remain a tenet of the American creed? Can the law be used as a vehicle for correcting racial injustices? These questions and more are confronted and discussed in the book.

Along with other classics in this field such as Dubois' *Black Reconstruction*, Frazier's *The Negro Family in the United States* and Franklin's *From Slavery to Freedom*, this work, in time, should receive similar deserving acceptance.

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