Duquesne Law Review

Volume 11 | Number 1 Article 19

1972

Book Reviews

Robert S. Barker

Robert Broughton

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation

Robert S. Barker & Robert Broughton, *Book Reviews*, 11 Duq. L. Rev. 107 (1972).
Available at: https://dsc.duq.edu/dlr/vol11/iss1/19

This Book Review is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Book Reviews

THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY. By *F. Raymond Marks*,† with *Kirk Leswing*†† and *Barbara A. Fortinsky*.†† Chicago: American Bar Foundation, 1972. Pp. xii, 305. $7.95.

This is the era of public service—or a reasonable facsimile thereof. Steel companies are "involved," lending institutions are "doing a lot for America," and automobile manufacturers are planting trees. In this milieu of self-proclaimed dedication to the common good (and, presumably, a concomitant repudiation of commercialism), it is not inappropriate that some large law firms in major metropolitan areas have adopted the trappings of public service. During the past decade, they have designated public interest partners and committees, set up branch offices in the ghettos, become consultants to activist groups, and approved released-time for pro bono work.

The Lawyer, the Public, and Professional Responsibility is the product of a study by the American Bar Foundation of these mechanisms and procedures developed by the private bar to accommodate the legal needs of non-fee-paying clients. The study draws principally upon interviews with practicing attorneys who have worked, directly or through their firms, in "public interest law."

The fundamental thesis of the study may be summarized as follows: The legal profession has traditionally operated on a "price demand" basis, *i.e.*, legal services have been allocated to those who are able to pay. Beginning in the 1960's, many "establishment" firms have departed somewhat from this pattern through a variety of formal arrangements which commit the firm and its members to some activity on behalf of what is deemed to be the public good. However, despite these new forms, there has been no substantial change in the fact that private practice is dominated by corporate clients and corporate interests:

> Our general impression is that the way in which large firms practice remains substantially the same after they have adopted

† Research Attorney, American Bar Foundation; Professional Lecturer in the Graduate School of Business and the School of Social Service Administration of the University of Chicago; and former Staff Counsel and member of the Board, American Civil Liberties Union, Illinois Division.

†† Research Associate, American Bar Foundation.

> public interest forms. For the most part public interest responses are mere diversions for their firms—they remain ancillary to the practice of law. Public interest work then, though explicitly directed, continues to look like a dispensation of grace rather than a discharge of professional duty. The ways in which those law firms make their money, relate to their regular clients, and practice law limit—or threaten to limit—a fully integrated public interest response.[1]

The authors argue that lawyers, if they are to be professionals rather than just tradesmen, must respond to social needs. In the concluding chapters, they outline alternatives for making practitioners more aware of and responsive to the legal needs of the disadvantaged, the oppressed, and the public at large. Particularly noteworthy are the analogy of the practice of law to a public utility, and the recommendation that the obligation to make legal services available be imposed upon each individual lawyer, rather than simply upon the profession.[2]

While its commentary is interesting, the study is seriously deficient when viewed as an argument for change. To begin with, the term "public interest law" is never defined. Instead, the authors proceed on the assumption that "public interest" law is whatever each practitioner-interviewee believes it to be. While such subjectivity might suffice for an attitudinal survey, it precludes, a fortiori, any objective analyses of the alleged problem and the proffered solutions. One may, perhaps, infer that the authors intend public interest law to include all legal services rendered outside the scope of a firm's regular billing system. But such an expansive description would fail to distinguish between, for example, an indigent accused and an affluent ecology club. The needs of the "public interest" sector are diverse, and the ways in which the legal profession ought to respond to these demands is not necessarily the same in all instances. In the mid-1960's, public interest law was almost synonymous with representation of the poor.[3] Since that time there has been greater emphasis on the need to serve the non-indigent lower middle-class.[4] Many authorities, such as Ralph Nader and John W. Gardner, identify the public interest with reform in broad

1. F. Marks, The Lawyer, The Public, and Professional Responsibility 252 (1972).
2. ABA Canons of Professional Ethics No. 2 states:
A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.
3. A classic work on neighborhood legal services is Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 Yale L.J. 1317 (1964).
4. *See, e.g.*, Cheatham, *Professional Privilege Brings Professional Responsibility*, 58 A.B.A.J. 805 (1972).

areas of the nation's political, economic, and social life. The point is that recent literature has so expanded the concept of the "public interest" that its meaning is not self-evident. Moreover, no effort is made to apprise the reader of the magnitude of the need. The absence of an explanation of what public interest law is and how much it is needed, renders hollow the conclusion that the bar's present response is inadequate.

Second, the scope of inquiry is limited to a small number of large firms in a handful of large cities. It is doubtful that such a select, homogeneous sample is a valid basis for conclusions and recommendations purporting to have universal applicability throughout the profession.

Third, while the phenomenon of the public interest law firm is discussed and evaluated, no similar analysis is made of the impact of government-related legal programs. Obviously, OEO legal services, VISTA lawyers, and public defender offices have to some extent met the need for the practice of law in the public interest. An evaluation of the accomplishments and shortcomings of these and other public programs is a prerequisite to any meaningful discussion of what and how much the private bar can or should do.

The book is worth reading because it is topical and well-written, its conclusions are probably correct, and its discussion is thought-provoking. It should serve to reinforce the beliefs of those who are already convinced of the need for greater professional response to public interest causes. But because it fails to meet its burden of proof, it is unlikely to sway the undecided.

*Robert S. Barker**

THE NOMINALISTIC PRINCIPLE. By *Eliyahu Hirschberg*.† Jerusalem: Daf-Chen Printing Press, 1971. Pp. 138.

Eliyahu Hirschberg deals with one major problem in this essay: the injustice to creditors (including insurance policy recipients, pensioners, and investors) of being forced by law to accept the nominal[1] money value of any loan or investment as full payment of the loan or invest-

* Assistant Dean and Assistant Professor of Law, Duquesne University School of Law.

† M.J. (Jerusalem); M. Phil. (London); attorney in private practice, specializing in commercial law, in Jerusalem, Israel.

1. Hence "nominalism."

ment, despite possibly drastic reductions in the purchasing power (real value) of that nominal quantity of money. He is concerned with the fact that people who contract to receive a specific sum of money may, because of inflation, actually get something that is quite different from what they expected. He traces the historical and legal bases for that problem, and discusses three possible solutions: (1) Develop a custom whereby all or most contracts include a price-index provision (for example, cost-of-living clauses in labor agreements);[2] (2) When inflation becomes especially bad, revalue the currency so as to redistribute the losses from inflation equitably between creditor and debtor;[3] (3) Change the legal rule to one that systematically awards to creditors the real value (as distinguished from the nominal value)[4] of the debt or obligation as of the time it was entered into, at least where inflation has significantly altered the value of the obligation.[5] Mr. Hirschberg prefers the third alternative.[6]

In one way, this is a very difficult book to write a review of: Mr. Hirschberg has a potentially very important idea for dealing with inflation and its effects, but it is presented badly. The essay is to a great extent pioneering, and the ideas contained in it deserve careful study. On the other hand, the writing is quite repetitive, and the economic analysis is weak.

Two qualifications of Mr. Hirschberg's analysis should be noted before criticizing it in any detail. First, he is dealing with inflation, not deflation; he would apparently extend his preferred solution to deflation,[7] but he does not analyze the problems associated with appreciation of the value of money. Second, his principal reference example appears to be the German inflation following the First World War, when, as

2. E. HIRSCHBERG, THE NOMINALISTIC PRINCIPLE 38-39, 55 (1971) [hereinafter cited as HIRSCHBERG]. Mr. Hirschberg does not favor the "cost-of-living clause" approach, largely on the ground that legislatures have abrogated similar clauses in the past (*e.g.*, "gold value" clauses), but also on the ground that if the principle of such clauses is valid, they ought to be extended "to the whole public and not only to those who have included value clauses in their contracts." *Id.* at 56.

3. *Id.* at 95-126; *see also id.* at 65-68, 70-72.

4. The term "real value" is used by economists to refer to the value of a given quantity of goods and services, regardless of changes in the value of money. For a hypothetical example, during an inflation of 6% per year, the Gross National Product in "real" terms might remain steady, showing no growth and no shrinkage, while Gross National Product in "money" terms was growing 6% per year.

5. Termed "valorism." *Id.* at 68-69, 73-94. For completeness, Mr. Hirschberg also treats the possibility of a return to a metallic money standard, but this is rather easily dismissed. *Id.* at 30-35, 48, 67-68.

6. *Id.* at 132-34.

7. *Id.* at 36-37, citing an Iowa case, Federal Land Bank v. Wilmarth, 218 Iowa 339, 252 N.W. 507 (1934), where the court refused to allow a decrease in the amount of a debt proportional to the increase in the value of money since the loan was made.

he points out, "at the last stage, one *deutschmark* was exchanged against one billion former marks. . . ."[8] Other inflations, of 1 to 8.4 in fourteen years, and 1 to 6 in twelve years,[9] he regards as at least "less severe";[10] and possibly even, in the context of his discussion, so insubstantial as to be *de minimis*. Clearly, in the United States, we have not experienced anything like the post-World War I German inflation, however serious the current (1961 to date) American inflation seems, subjectively, to be.

For an essay on monetary theory Mr. Hirschberg's analysis is perhaps overly restricted to the legal, as distinguished from economic, theory of money. In fact, his economic exposition is marred somewhat by excessive naivete. He notes several times that money is defined, functionally, as (a) a medium of exchange, and (b) a measuring unit of value;[11] but he then implicitly treats only currency—primarily paper money—as money,[12] and is thus led to treat money as though the quantity in circulation were under the absolute and simplistic control of government.[13] He does recognize the possibility of bank creation of money through issuance of credit based on deposits,[14] in the amount of the reciprocal of the reserve requirement times the amount of the deposits,[15] and also notes that other means of payment may supplement or even supplant currency in some circumstances.[16] However, he seems to regard the latter as occurring only in unusual circumstances. The fact that credit instruments may be such a large proportion of the total money stock as to overwhelm any increase or decrease in the "issue of currency" by government is not recognized. In the United States, for example, total currency in circulation as of January 1, 1967, was approximately $38 billion; bank demand deposits were approximately $136 billion; total credit outstanding was $2,129 billion, of which con-

8. *Id.* at 47; *see id.* at 60, 95-138 (compare his discussion of the post World War I Polish, Hungarian, and Austrian inflations).
9. These rates of inflation occurred respectively in Israel from 1948-1962, and in France from 1914-1926. *Id.* at 72.
10. *Id.*
11. *E.g., id.* at 12, 16, 45, 56.
12. *Id.* at 24-25, 40-41, 45. *But see id.* at 64 (the reference to "unrestricted banking credit"). He refers to the acceptance of bank credit by an increase in the national debt as a means of creating money, but his discussion is mostly in terms of "currency." *Id.* at 24. Even the admission of bank demand deposits to the status of "money" does not resolve the stock versus flow problem, and its corollaries, discussed below. The admission is also marred by a few careless statements about the nature of bank deposits. *E.g., id.* at 86.
13. *Id.* at 28-29, 45, 54, 59, 62. *But see id.* at 61, for an apparent contradiction.
14. *Id.* at 18.
15. This is the "bank multiplier," though that term is not used by Mr. Hirschberg. For expositions see any elementary Money and Banking text, *e.g.*, L. CHANDLER, THE ECONOMICS OF MONEY AND BANKING 92-111 (4th ed. 1964).
16. HIRSCHBERG at 20.

sumer credit was about $95 billion.[17] This credit figure does not even include open purchasing credit—for example, credit cards, or thirty-day open credit.

Money tends to be treated solely as a stock item, which makes the whole problem much more amenable to government control.[18] The fact that money is also a flow variable, with a velocity of circulation that can be as important as the stock of money in supporting shifts in the value of money,[19] is not dealt with. Nor is it noted that some determinants of the velocity are not easily subject to government control. Money, for example, as a means of payment can become not merely a measure of value but also a store of value, and the degree to which people decide, for rational or irrational reasons, to change their holdings of idle balances, affects the velocity of circulation of money. Furthermore, ease or tightness of credit can affect both the velocity of circulation and the total stock. For example, if all sellers of goods decided to extend open credit for ninety days, instead of thirty days, this would have the same effect as increasing the amount of currency in circulation, and/or increasing its velocity; conversely, if all open creditors suddenly decided to call in their unsecured loans, and hold them, for example, in anticipation of economic collapse—depression—and bankruptcy of their debtors,[20] this would effectively reduce the amount of money in circulation and/or its velocity.[21] These effects of private action are not under the absolute control of government, except in the

---

17. B. PESEK & T. SAVING, THE FOUNDATIONS OF MONEY AND BANKING 227-28, 239 (1968).

18. "If we put all the national assets of a certain State on one side of a balance and on the other side the total amount of means of payment, the result will reflect the value of money." HIRSCHBERG at 45.

19. The familiar economic identity (which may or may not express any of several causal relationships, depending on who one is reading), is $MV = PT$, where M is the stock of money, V is the velocity of circulation (the average number of times a given unit of money changes hands per unit time), P is the price level, and T is the total quantity of goods and services produced by the economy in some period of time. If this is expressed as $MV/T = P$, then the price level will be affected exactly the same by a doubling of the velocity of circulation of money as by a doubling of the stock of money. *See* G. ACKLEY, MACROECONOMIC THEORY 109-19 (1961); L. CHANDLER, *supra* note 15; B. PESEK & T. SAVING, *supra* note 17.

20. The most familiar example of this sort of change may be the "run" on a bank that depositors lose confidence in. Large scale withdrawals of demand deposits from commercial banks operate to "destroy" money in proportion to the bank multiplier, just as deposits operate to create money in that same proportion.

21. The word "money" is often used by economists, now, to refer to any instrumentality having a sufficient degree of liquidity—"moneyness"—that it effectively serves as a medium of exchange in the economy. *See, e.g.*, B. PESEK & T. SAVING, *supra* note 17, at vii. For a more detailed analysis of the place of private credit in a monetary system, *see* Smith, *Is the Growth of Private Debt a Cause for Concern?*, in MONETARY PROCESS AND POLICY: A SYMPOSIUM 73 (G. Horwich, ed. 1967).

sense that any action of any citizen can theoretically be made illegal and brought under government control. Aside from analytical limitations resulting from a too narrow definition of money, and a failure to deal with money as a flow variable, the book suffers somewhat from a very limited concept of the causes of inflation. Mr. Hirschberg treats inflation as the result, solely, of the issuance of currency[22]—solely, that is, as a result of the exercise of monetary policy. I know of no economist that believes that inflation will occur simply as a result of the issuance of currency[23]—although it is perhaps true that inflation will not occur without an increase in liquid assets, or in their velocity of circulation. Inflation may possibly be controlled through the exercise of monetary policy,[24] although, to date, the unemployment resulting from such efforts has prevented, for political reasons, the wholehearted application of monetary policy to that end.[25] The Keynesian analysis of the causes of inflation is ignored. So, also, is almost all of the post (and neo) Keynesian literature on the causes of inflation, with the notable exception of G. L. Bach's 1958 opus.[26] The influence of fiscal policy—"pumping" the economy by lowered taxes and increased government expenditures—is also ignored.[27]

Some of this can perhaps be excused, given that his reference to inflation is such an extreme one. Almost certainly a one billion to one inflation over a period of less than ten years could not have occurred without government complicity. But the deficiencies make the book considerably less useful in current contexts, where governments are justly concerned about trade-offs between more moderate levels of inflation and unemployment.

The only real problem with Mr. Hirschberg's legal analysis is that

22. HIRSCHBERG at 59.

23. This is a strong statement, and there are some who come close. *See* Friedman, *The Quantity Theory of Money—A Restatement*, in STUDIES IN THE QUANTITY THEORY OF MONEY 3 (M. Friedman, ed. 1956); D. PATINKIN, MONEY, INTEREST, AND PRICES (2d ed. 1965).

24. *See* Friedman, *supra* note 23; Friedman, *The Role of Monetary Policy*, 58 AM. ECON. REV. 1 (1968), for strong expositions and analyses of this hypothesis.

25. A reader will need no citation to document the truth of this statement in the United States over the last few years. For a discussion of European experience with inflation, *see* Kervgn, *Inflation and Stabilization Policies in Western Europe*, in MONETARY PROCESS AND POLICY: A SYMPOSIUM 30 (G. Horwich, ed. 1967).

26. G. BACH, INFLATION (1958). *See* Bronfenbrenner & Holzman, *A Survey of Inflation Theory*, in I SURVEYS OF ECONOMIC THEORY 46 (1967); *see also* Tobin, *Inflation and Unemployment*, 62 AM. ECON. REV. 1 (1972), for a more recent discussion.

27. HIRSCHBERG at 60. Mr. Hirschberg notes, citing G. BACH, *supra* note 26, that inflation follows almost every war. The causal links are not investigated, however. Just possibly, it would seem that such inflation is a result of the massive governmental spending that necessarily accompanies any war, and is therefore completely predictable based on a Keynesian macroeconomic model. *See* G. ACKLEY, *supra* note 19, at 422-26; Bronfenbrenner & Holzman, *supra* note 26.

he assumes—it seems to me a little too easily—that the intent of the parties to any loan transaction is that the purchasing power of the money loaned is to be returned.[28] On the contrary, many lenders, especially commercial lenders, are in my experience quite conscious of the rate of inflation, and set interest rates accordingly. This defect is again mitigated by the fact that Mr. Hirschberg is dealing with a rate of inflation that is very unlikely to be within the contemplation of any parties,[29] and also by the fact that the major classes of creditors he is concerned with appear to be longer term lenders, especially individual insurance policy holders and pension plan recipients.[30]

While making his preferred solution—altering the legal rule applicable to such contractual obligations to conform to the "true" intent of the parties to receive real value, instead of nominal money value, in payment—applicable only to longer-term obligations such as insurance policies and pension plans, the line of demarcation between short and long term obligations is not made clear.[31] Nor is the degree of inflation necessary before the real-value principle should be called into effect made clear.[32] These unclarities, on the other hand, do not detract especially from his thesis, since the book is, as noted already, to a large extent a pioneering work, and such loose ends are therefore to be expected.

Nor should any of the defects noted above be allowed to detract from the importance of the suggestion—for a change in legal rules to require real value repayment of many obligations[33]—as a means of dealing with

---

28. This is asserted several times, *e.g.*, HIRSCHBERG at 48, 57-58.

> The aim of the parties to a bargain is not to acquire a nominal sum of units of currency but to acquire purchasing power included in monetary units when the binding contract between the parties was made. The writers writing on the problems of monetary law are nearly unanimous, that the aim of the parties is to acquire purchasing power.

Id. at 58. With respect to this last sentence, one is constrained to ask: (1) What writers? Felix Eckstein is the only one to whom this view is explicitly attributed, but he is cited on page 48, not page 58. The book occasionally suffers from a lack of this sort of documentation. (2) Are writers on monetary law qualified to testify? Are they not, probably, speculating on the basis of introspection and conversations with a few friends and neighbors (just as I am, in the next sentence in the text)? If they are speculating, is there any way of obtaining firm data?

29. *Id.* at 60.

30. *Id.* at 69-70.

31. This problem is, indeed, left open for further development. *Id.* at 94.

32. *E.g.*, *id.* at 42, 72, 97.

33. It may increase the acceptability of this suggestion, assuming it is decided that the problem is an important one, and that secondary effects of the solution will be tolerable, negligible, or beneficial, to point out that the proposed method of making the change—a reinterpretation of what the parties to a contract or other legal transaction intended relative to a problem they did not deal with, and probably never even thought of when they entered into the transaction—is a reasonably conventional way of making similar changes

many of the problems of inflation. Obligations to pay pensions, for example, are currently almost universally on a nominal basis, making retired people among the prime sufferers from inflation; interpreting pension obligations as being on a real value basis would protect retirees from inflation.[34]

The idea should also be given thorough consideration by economists as a possible means of control of inflation. In the United States the change in the legal rules would probably have to be accomplished by the actions of fifty state legislatures (fifty-three counting the District of Columbia, Puerto Rico, and Guam), and one could foresee some horrendous conflict-of-laws problems arising during the process of change; but these things would not prevent the adoption of a real-value-of-obligations rule if the public interest would be served thereby.

If *everyone's* obligations were tied to the real value contracted for at the time the obligation was undertaken, would this have the effect of dampening borrowing, and hence investment, to the point where unemployment might increase unacceptably (for example, would it cause a recession or depression); would it tend to dampen inflation without increasing unemployment; or would it tend to drive prices up faster as producers sought to repay larger numbers of depreciated dollars when debts came due? I do not know, although, I suspect it would be more likely to dampen inflation than to cause or aggravate it.

Mr. Hirschberg's idea, as a means of dealing with the effects of inflation and possibly with inflation itself, is entirely novel. It has been dealt with in a limited way in the legal literature as a means of dealing with the effects of inflation,[35] but has received no treatment at all in

in the common law. *See, e.g.*, PA. STAT. ANN. tit. 21, § 2 (1955) (making words of inheritance no longer necessary to pass a fee simple title); PA. STAT. ANN. tit. 20, § 301.14 (1950) (providing for a definite failure of issue construction of the words "die without issue"). The only real difference between these examples and Mr. Hirschberg's proposal is that there *may* be significant side effects from his proposal. The manner of making the change is completely traditional, and is the same in all three cases.

34. The only question I would have, here, is whether such a change, especially if made retroactive to protect current retirees, would bankrupt any substantial number of pension plans. Unfortunately, the greater the rate of inflation, and the longer the term of the obligation, the more likely such bankruptcy would be. This latter statement would be true even if the change were made applicable only to the future, if the rate of inflation were not wholly predictable. It is perhaps worth noting that many people attempt to hedge against inflation, now, by investing part of their retirement savings in stocks, or by attempting to save more. The first is very (often unduly) risky; the latter is, for most people, impossible. The difficulty of funding the real-value-of-obligations proposal may well be much more difficult than Mr. Hirschberg admits. He dismisses it rather too easily. HIRSCHBERG at 81-82.

35. *E.g.*, Dawson, *Effects of Inflation on Private Contracts: Germany, 1914-1924*, 33 MICH. L. REV. 171 (1935); Dawson & Cooper, *The Effect of Inflation on Private Contracts:*

economic literature. Considering the intractability of inflation to other tools that have been utilized in the United States, and the apparent inability to escape the unemployment-inflation dilemma,[36] it should be thoroughly studied.

*Robert Broughton**

United States, 1861-1879, 33 MICH. L. REV. 706, 852 (1935); *see also* Dawson & Coultrap, *Contracting by Reference to Price Indices*, 33 MICH. L. REV. 685 (1935).

36. "Macroeconomic policies, monetary and fiscal, are incapable of realizing society's unemployment and inflation goals simultaneously. This dismal fact has long stimulated a search for third instruments to do the job. . . ." Tobin, *supra* note 26, at 17.

* Chairman of the Allegheny County Air Pollution Variance Board; Professor of Law, Duquesne University Law School.