

Spring 1974

Eliahu Hirschberg, *The Nominalistic Principle*

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Recommended Citation

Philipp L. Brockington Jr., *Eliahu Hirschberg, The Nominalistic Principle*, 8 Val. U. L. Rev. 715 (1974).
Available at: <https://scholar.valpo.edu/vulr/vol8/iss3/8>

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BOOK REVIEWS

THE NOMINALISTIC PRINCIPLE. By Eliyahu Hirschberg.
Jerusalem: Daf-Chen Printing Press. 1971. Pp. 138. \$4.50

If your response to the term, "Nominalistic Principle" is the same as my own, here are a few words of encouragement: The essential concern of this book is law, not economics, and it provides the excitement of examining—and finding wanting—a legal principle which is so basic that I would guess most persons in the legal profession have not heard it discussed or even stated.

[T]he nominalistic principle is a principle of private law based on the supposed intention of the parties, who contract with each other according to the nominal value of money. . . .¹

[A] unit of currency is always equal to itself, a pound is equal to a pound, a dollar is always equal to a dollar, a.s.o., and neither external changes in the value of currency, namely the rate of exchange in relation to other currencies, nor internal changes of value of money are taken into account.²

This is to say that when we contract to pay a stated number of dollars in the future—and perhaps a long time in the future—the legal result is that the obligation will always be to pay the specified number of dollars even though inflation (or deflation, for that matter) may have changed substantially the value of those dollars in terms of purchasing power.

The principle is obvious and well understood in commerce. The problem is to see the principle as a legal principle, and a legal fiction at that,³ and not as a fact of life—so that a questioning analysis of the principle becomes possible. We have experienced decades of general inflation. We are aware that our mortgages become easier to pay as time goes by, and we become uneasy when we realize that our rights in life insurance, annuities, savings and pensions are decreasing in real value. Newspaper reports of inflation are accompa-

1. E. HIRSCHBERG, NOMINALISTIC PRINCIPLE 129 (1971).

2. *Id.* at 37.

3. *Id.*

nied by accounts of the plight of the elderly and others who must live on fixed incomes. The interest of Hirschberg's volume is that it places responsibility for this result on the law.

I believe that Hirschberg can convince you, first, that nominalism does not reflect the intention of contracting parties in many classes of contracts. One can easily doubt that the purchaser of a life insurance contract, for example, intends to bear the risk of significant inflation. He has no real means of assessing the probability of such inflation, and certainly has no control over central banks, national emergencies or catastrophes, or the myriad other things which effect inflation.

Why, then, is nominalism allowed to reign supreme as a principle of private contract law? Hirschberg finds the explanation in public policy. Briefly, it has been in the interests of governments to promote the prestige of their national currencies and to reduce their debts through inflation.⁴ In the United States, for example, inflation between 1939 and 1952 had the effect of cancelling 500 billion dollars in real debt.⁵ Although inflation may not have been a declared policy, the government was a large debtor, and a great deal of purchasing power was transferred from households to the government.

Since nominalism is a principle of private contract law, the most relevant criticisms of the principle point out the injustice of its application to the rights of contracting parties. Nevertheless, the arguments relating to public policy have real interest. If nominalism has the effect in an inflationary period of transferring purchasing power from creditors to debtors, one might suppose that a Robin Hood principle is at work. If so, nominalism may be interpreted as economically or socially progressive. The hitch is that the public as a whole is a net creditor as the owner of insurance, savings, pensions and the like. The list of net debtors is headed by government and includes industry, trade and agriculture. *Ergo*, nominalism is a regressive social and economic policy in the ordinary definitional sense.⁶

Nominalism discriminates between the owners of fixed prop-

4. *Id.* at 129.

5. *Id.* at 25.

6. *Id.* at 82.

erty and the owners of liquid property by subjecting liquid property to partial (and sometimes complete) destruction.⁷ Moreover, in a progressive economy rights in liquid property are more important than rights in fixed property,⁸ in that rights to receive money payments assume an importance which does not exist in a simpler economy in which land and other fixed assets may have principle importance.

One might argue that revaluation of currency is an adequate means to remedy the shortcomings of nominalism. Much of Hirschberg's volume is a study of the problems of revaluation, particularly as illustrated by the German revaluation of the 1920's. Hirschberg rebuts this approach—successfully in my opinion.

Perhaps the real problem is to determine whether there exists any reasonable alternative to nominalism. Hirschberg argues for "qualified valorism."⁹ Essentially this means that a cost of living index would determine the extent of certain monetary obligations under certain conditions. It is not within the scope of the book to develop this alternative, since the book is limited to analysing nominalism. The "certains" therefore remain undefined. Alternatives to nominalism are not, however, unheard of. Cost of living indices have been incorporated into labor contracts, long-term leases and other contracts. Hirschberg reports that in Israel bonds registered on the stock exchange and insurance contracts are affected by a cost of living index and that in Finland the use of such indices is widespread even in relation to certain types of bank deposits.¹⁰ These examples, however, do not represent legal departures from nominalism since these indices were made relevant to obligations by the specific agreement of the parties and not by courts or legislatures.

Legal alternatives to the nominalistic principle may seem frightening if one imagines, for example, a provision whereby, *as a matter of law*, the rights of first mortgagees, second mortgagees, holders of unsecured long-term obligations, holders of unsecured short-term obligations and general creditors will be adjusted, by reference (to whatever extent appropriate) to a cost of living index.

7. *Id.* at 71.

8. *Id.* at 123.

9. *Id.* at 132.

10. *Id.* at 80-81.

On the other hand, what do you suppose the real value of your insurance and savings will be in, say, twenty years? Hirschberg's little book makes it much easier to see where the problems in these questions lie.

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