

Walter J. Blum and My Brilliant Career

Marvin A. Chirelstein†

Most social science research—legal writing included—has a painfully short after-life. By and large, our work is additive or incremental and at best offers other writers an opportunity to bring their own ideas into focus and advance the issues in some useful direction. Despite the effort that goes into legal scholarship, few works survive as intellectual milestones. I am not complaining (however it may sound) but simply recognizing the fact that any law review article that is published today is likely to be superseded, or at least displaced, by the next two or three articles on the same topic. Casebooks, which are the nearest thing to anthologies in our field, usually cite and excerpt only the most recent things written; older works sink back into the shadows.

Walter Blum's scholarly output has had a remarkably different fate, which puts the man in a category that is very special. *The Uneasy Case for Progressive Taxation*,¹ written with Harry Kalven, Jr. and published in the Law Review in 1952, is an essay in law, public finance, welfare economics, childcare, and the use of baseball-as-metaphor that has no rival for scope and quality in the federal tax field and, I would guess, few in other areas of legal inquiry. Its strengths begin with what was then an act of defiance. The concept of a sharply graduated rate structure appeared to be as well-fixed in national policy as any idea could be, and anyone attacking its validity—even with the euphemism “uneasy”—ran the very considerable risk of being regarded as a crank. To take that risk was bold; to win the gamble by generating a work of profound and lasting scholarship was and is an amazing triumph.

The Uneasy Case contemplates the tax system in its largest dimension, as a problem in philosophy and human experience, without ever for a moment abandoning the close and careful mode of analysis that characterizes legal writing at its best. It also has

† Isidor and Seville Sulzbacher Professor of Law, Columbia University.

¹ 19 U.Chi.L.Rev. 417 (1952). For later reflections by the same authors, see Walter J. Blum and Harry Kalven, Jr., *The Anatomy of Justice in Taxation*, Occasional Papers from the Law School (1973), and Walter J. Blum, *The Uneasy Case for Progressive Taxation* in 1976, in Colin D. Campbell, ed., *Income Redistribution* 147 (1976).

the merit of exhausting the subject. I do not mean that others haven't written on the same topic since, or that all writers have found themselves in agreement with the authors' position. The point, rather, is that no one can, and no one does, discuss the subject of progressive taxation as anything but a reaction to *The Uneasy Case*. You may agree, or disagree, or you may have additions or reservations, but it is always *this* text that you are writing about and reacting to. The very word "uneasy"—used by anyone debating our tax structure—at once summons up the argument and spirit of the essay. This is not to say that *The Uneasy Case* lacks weaknesses—critics have suggested that the logic that supports proportionate taxation is essentially the same, and hence just as uneasy, as the logic that supports progressive taxation.² But the more important fact, as I have said, is that the article has proved unanswerable in its main thesis and has served as a rally-point for academic and political debate over more than thirty years.

Perhaps the *most* important fact is that in the end Blum and Kalven carried the day. As amended in 1986, our tax structure now is "degressive"—roughly a flat-rate tax above an exemption for the poor and a low-income bracket—and thus reflects a concept that closely approximates the one that Blum and Kalven had the temerity to recommend. Maybe they were just lucky—no one, after all, could have foreseen that the White House would finally pass into the hands of a President who viewed progressive taxation as contrary to the Will of God.³ But however that may be, *The Uneasy Case* cast a beam into the future, and it remains among the most enduring and consequential legal essays of our time.

The Uneasy Case is only the most obvious of a long list of publications notable for their influence and durability. Almost as important has been Walter's separate career in corporate finance. Commencing in the early 1950's—while one hand was presumably busy with *The Uneasy Case*—Walter found time to launch a series of articles on insolvency reorganizations—most intriguing of all fi-

² See Charles O. Galvin and Boris I. Bittker, *The Income Tax: How Progressive Should It Be?* 37 (1969); James Tobin, *Considerations Regarding Taxation and Inequality*, in Campbell, *Income Redistribution* at 127 (cited in note 1). See also, *Revising the Individual Income Tax*, Congressional Budget Office at 146 (1983).

³ "There can be no moral justification [for] the progressive tax . . . Proportionate taxation we would gladly accept on the theory that those better able to pay should remove some of the burden from those least able to pay. The Bible explains this in its instruction on tithing. We are told that we should give the Lord one tenth and if the Lord prospers us ten times as much, we should give ten times as much. But, under our progressive income tax, computing Caesar's share is a little different . . ." Ronald Reagan, *Encroaching Control: Keep Government Poor and Remain Free*, 27 *Vital Speeches of the Day* 677, 680 (1961).

nance topics in my opinion—the aim of which was to expose the wobbly premises and doubtful assumptions which “underpin” that curious system.⁴ Whatever people may have thought or said previously, Blum’s analyses made it difficult to regard Chapter X—even more, the present law—as anything other than a debtor-relief device, a mechanism for the issuance of watered securities, and as such both intellectually and politically discreditable. There is, of course, a moral or ethical relationship between the view expressed in the “insolvency” pieces and the position taken in *The Uneasy Case*; he who opposes wealth redistribution through the tax system ought to feel the same way about redistribution undertaken on even less explicit grounds through the manipulation of reorganization doctrine. Somehow I find that I can support one redistributive device while opposing the other, but I am glad that I do not have to face close questioning about my rationale from Walter.

What is striking, at all events, is that a single scholar should have accomplished major works in two substantively distinct fields, both requiring enormous technical mastery, and in the process discovered the common element that gives each its special character and interest. Perhaps other social scientists can avoid it, but lawyers must surely be concerned with the question of “What’s fair?” or “Who gets what?” In a sense, it is the only question worth discussing seriously. Walter’s stand, both in the tax and the reorganization area, has been twofold: first, that the answer should be made explicit rather than being delivered surreptitiously and under cover of some other legislative aim; and second, that the case for so-called distributive justice is intellectually soft and morally doubtful. Whether or not one agrees, the insight is hugely illuminating and properly serves to unify Walter’s scholarship at a fundamental level.

As a kind of by-product of his research in the reorganization field, Walter (with Wilbur Katz) worked up a set of pioneering class materials—later published under the title *Materials on Insolvency and Reorganization*⁵—that brought something quite new to

⁴ Walter J. Blum, *The Law and Language of Corporate Reorganization*, 17 U.Chi.L.Rev. 565 (1950); Walter J. Blum, *The “New Directions” for Priority Rights in Bankruptcy Reorganizations*, 67 Harv.L.Rev. 1367 (1954); Walter J. Blum, *Full Priority and Full Compensation in Corporate Reorganizations: A Reappraisal*, 25 U.Chi.L.Rev. 417 (1958). And more recently, Walter J. Blum and Stanley A. Kaplan, *The Absolute Priority Doctrine in Corporate Reorganizations*, 41 U.Chi.L.Rev. 651 (1974).

⁵ The current and expanded version appears as Blum and Kaplan, *Corporate Readjustments and Reorganization* (1976). For a model of “law-and” writing in the finance field, see

corporate law teaching in general. The new element, briefly stated, was "financial theory," just then (1948 or so) beginning to emerge from the business schools as a subject of serious academic investigation. Along with legal issues, the *Materials* actually dared to raise basic theoretical questions about business and finance. Thus, for example, what are the aims of company managers in choosing to finance the firm by issuing debt rather than common equity, or preferred stock rather than debt, or equity rather than either of the latter? Much of corporate law and practice—at least in hard times—consists of making painful adjustments among competing classes of security-holders. In fashioning those adjustments, whether before or after the fact, shouldn't lawyers have some sense of what it is that managers *think* they are accomplishing by issuing different kinds of securities in the first place? Or is this the sort of "business" question that lawyers should avoid, presumably because it belongs to another field of expertise? If we do get into it, should it be (as is usually the case) anecdotally and by the seats of our pants, or should we actually expose ourselves to financial theory in some systematic way?

Blum and Katz' *Materials* chose the latter course, and the choice proved highly significant for the future of teaching and research in corporate law. Little by little—and it did take time and mental effort—corporate law teachers began to see that "economics" could be used to convert a specialty which had theretofore consisted of ad hoc solutions based on personal intuition into a "discipline," one with some pretense of rigor about it and with at least a hint of theoretical consistency. The result, not solely due to the *Materials*, is that "Corporations" is now a "law-and" course and has attained a quality of intellectual vitality that it plainly lacked in earlier times.

The original *Materials* never enjoyed wide adoption in the law schools because, for many years, there was little practical reason to interest students in insolvency problems. Indeed, Walter once offered to mail me his annual royalty check if I would send him a postage stamp. But the influence this novel work has had on class materials subsequently published by other academics—which do enjoy wide and profitable adoption—and on the teaching of corporate law has been considerable.

Having completed this brief appreciation, I must add that in at least one important undertaking Walter Blum failed utterly.

This was his earnest and determined effort—buttressed by threatening notes from the Dean's office—to get the writer, then a second-year student, to attend his early morning classes in federal taxation. Actually, I did attend a few times, but the hour and the subject matter—together with personal considerations which I do not care to discuss—speedily proved terminal. We had small classes in those days, one's identity was known to the instructor, and, accordingly, Walter sought me out individually with the warning that a student who did not attend class could not possibly *earn* a respectable grade on the final exam. This seemed to me arrogant, presumptuous and in my case directly contrary to experience. I took his warning as a challenge and a dare. I did, however, put some extra effort into exam preparation and felt confident that I would do very well under a blind (i.e., non-vindictive) grading system.

The grade I received was a low C—70 is the number I seem to recall (distinctly)—and thus was answered for me the elemental question “Who gets what?” though not quite in the way I expected. Years have passed, but I have not forgotten. Indeed, looking back on my own career as an academic—largely devoted to the study of federal taxation, with a minor in corporate finance—it occurs to me that what I have *really* been trying to do—everything else aside—is to up that miserable grade.

Talk about influence.