

BOOKS

CASES AND MATERIALS ON LAW AND POVERTY. Paul H. Dodyk, General Editor. St. Paul, Minn: West Publishing Co., 1969. Pp. xxiv, 1234. \$14.00.

The emergence of poverty as a social issue has exposed the parochialism of legal education and the emphasis in law school training on the interests of the holders of private wealth. There has been a resulting demand for the incorporation of the issues embraced by "law and poverty" into the curriculum. But how is this to be achieved? How are these issues to be related to the existing curriculum? Which definitions of poverty, which views of the roots of poverty, and which prescriptions for the necessary changes are to be presented?

The significance of this first, formal, bound, West-published treatment of poverty for study in the law school is in the manner in which it answers these questions. The issues of "law and poverty" are sufficiently far-ranging and resonant, with implications in most subject matter areas, to provide the law school an opportunity to transcend its trade-school origins. Accordingly, it is appropriate to consider the book as a response to the challenges and criticisms of legal education which arise from the recognition of poverty, to situate the book within this basically political controversy, and to point up the implications of the contents and organization of the book for the development of legal education.

The book is organized into five chapters, entitled respectively "Income Maintenance" (Welfare), "Racial Discrimination in Employment," "Housing," "Consumer Credit," and "Selected Problems in Family Law and Poverty." Each of these sections contains edited judicial opinions, editors' notes, statutory material, excerpts from books and articles, and other secondary material of the kind customarily found in law school casebooks currently in use. Each of the individual chapters may be obtained in separate pamphlets for incorporation as supplementary materials into existing law school courses. When so employed, the materials could, in the hands of an imaginative and capable teacher, significantly enhance those courses, despite the absence of guidelines by the editors for the integration of the materials into the traditional courses. Unfortunately, the book is more likely to be used in its entirety to make possible the offering of a special "poverty law" course as one more elective to be added to the multitude of traditional courses already offered in the law schools.

The focus of *Law and Poverty* is on the assertion of "legal rights" by the poor within the five subject matter areas. To a lesser extent, ameliorative schemes are presented. But the approach taken fails to confront in what we would consider a significant manner the political and economic reality of the

factors underlying poverty—the undue inequalities in the distribution of income, resources, and social honor. Nor does it adequately come to grips with the impact of economic and political choices implicit in governmental decisions affecting the distribution of wealth.

There is thus the danger that the book will be used as a means of providing an overly facile response to the demands of students for “relevance” in their educational experience rather than as a tool for introducing a genuinely constructive first (albeit small) step toward revamping the entire law school curriculum in response to the desperate need of our society to cope with those causes and conditions of poverty which are amenable to treatment through judicial, legislative, and administrative processes. *Law and Poverty* is a casebook of the traditional variety (“Cases and Materials”) which pulls together edited judicial opinions and secondary materials whose common thread is that the particular problems or controversies involved in them concern poor people, although the legal issues may not be peculiar to the poor, or may be of less importance to the poor than other issues which are omitted from the book, and all of which ought to be included in existing law school courses rather than in a separate “poverty law” course.

The editors have done a thorough and intelligent job of assembling and editing the casebook. They have provided for the student and practicing lawyer a large amount of interesting and useful material, most of which is not available in any other source book. However, in our view, what really matters about the book, representing as it does the first formal treatment in the law school curriculum of the problem of poverty, is not the style of editing, the occasional omission or questionable inclusion, but the book’s approach to and conception of the problem. And it is here that the reviewers find themselves in fundamental disagreement with what appears to be the viewpoint of the editors of *Law and Poverty*.

The creation of a separate law school course in “poverty law” implies that a special course is required to deal with the legal problems of the poor, that the legal problems of the poor are somehow unique, and that a separate set of rights and duties exist or need to be developed which are applicable only, or primarily, to poor people. But there is no such thing as “poverty law.” Lawyers who represent poor clients are not persuading, or even asking, judges to create “new law” for poor people. Rather they are seeking the application of old law to new clients. They are, for example, demanding that courts view welfare departments as government administrative agencies, which they are, rather than as dispensers of charity, which is how they have too often viewed themselves. When so viewed, the welfare department is limited in its actions by the constitution and by applicable statutes and regulations. Thus, the agency may not impose arbitrary or irrational eligibility requirements;¹ it may not

1. *King v. Smith*, 392 U.S. 309 (1968).

—absent the justification of a compelling state interest—deny benefits to an applicant because he has exercised a constitutional right,² require the relinquishing of a constitutional right as a condition to the receipt of benefits,³ nor terminate a recipient's benefits without notice and hearing.⁴ Such limitations have not been created by the courts as special rights for poor people. Rather, they represent the extension to poor people of principles established in the existing legal system. In other words, "welfare law" is really constitutional and administrative law, and ought to be included in those regular law school courses.⁵ A similar analysis applies to public housing.⁶

Legal rights are not self-fulfilling. They must be asserted by and on behalf of those who are entitled to them. Thus, the statutory, contractual, and common law rights of tenants in private housing, such as those rights created by housing and health codes, civil rights laws,⁷ rent withholding and rent control laws, lease provisions, express or implied covenants of quiet enjoyment, habitability and repair, and those created by public policy, such as the defense of retaliatory eviction,⁸ provide little, if any, relief to a tenant unless the tenant, or an attorney representing the tenant, asserts those rights. The rights are not new rights for the poor; they are available to all tenants, indigent and affluent alike. However, the absence in the past of lawyers in any significant number to represent poor tenants have prevented those tenants from realizing and enjoying their rights. In the area of private housing, as in the welfare area, "poverty law" is properly seen to be not a new law for the poor, but rather the application of old law to new clients. And just as "welfare law" is really constitutional and administrative law, so tenants' rights is a part of property law and ought to be included in the regular law school property courses.

The analysis we are suggesting for welfare and housing law applies also to the chapters in *Law and Poverty* dealing with consumer credit and family law. Existing law school courses in contracts, sales, bills and notes, secured transactions, and creditors' rights ought to include consideration of the problems and rights of consumers and borrowers, whether they be poor or affluent. Such "test cases" as *Sniadach v. Family Finance Corporation*⁹ do not establish new rights exclusive to poor persons; they enunciate and vindicate the rights

2. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

3. *James v. Goldberg*, 303 F. Supp. 935 (S.D.N.Y. 1969).

4. *Goldberg v. Kelly*, 90 S. Ct. 1011 (1970).

5. Of course, the technicalities of welfare administration, and the particular statutory and regulatory schemes which create and govern welfare programs, are appropriate concerns for an advanced specialized administrative law seminar in welfare, in the same sense as are other regulatory and benefit-dispensing agencies.

6. *Escalera v. New York City Housing Authority*, Docket Nos. 33226-33229 (2d Cir. Apr. 29, 1970).

7. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

8. *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).

9. 395 U.S. 337 (1969).

of all consumers and borrowers. Similarly, in the area of family law, the rights of children and parents in juvenile delinquency, neglect, and child abuse proceedings are not applicable only to the poor. A decision such as *In re Gault*¹⁰ declares and extends constitutional protections to all children accused of juvenile delinquency, not just to the children of the poor, and ought to be included in the regular constitutional law and family law courses in the law school curriculum.

There is no need to belabor the point. What we are saying is simply this: the bulk of the material presented in this book involves legal issues which are not in principle peculiar to poor people and which ought to be included in existing law school courses rather than in a separate "poverty law" course.

It is hoped that the text, whose editors include the Dean of the University of Virginia Law School and a Professor since appointed the Dean of the Columbia Law School, does not represent a conscious decision to leave unchanged the basic character of the law school which is at present dominated by a curriculum and ethos of advocacy for wealthy interests. Yet use of the book not only could leave the traditional curriculum undisturbed, but the book itself incorporates a set of assumptions implicit in the law of the affluent into the "law for the poor." The usual casebook set of appellate decisions without a description of their legal, institutional, real-life context is saturated with assumptions—about values and the way things happen—which are most powerful because they are implicit and unexamined, embedded in the material.

The casebook approach implies a vision of the respective positions of the parties to a law suit and of the nature and capabilities of the judicial process. It implies that the client faces the problem as an autonomous agent who is in a position, both financial and social, to mount a challenge; that the act at the root of the grievance is sufficiently visible to permit the challenge; that each party has an opportunity to present his case before an impartial trier of fact and law willing and able fully to hear and deliberate each case; that cases set precedents which will be implemented to modify the system. For the purposes of training lawyers for the affluent, this idealized model may well have heuristic value. Even if it inculcates a set of beliefs which legitimate institutions and life styles regardless of everyday experience, it is nevertheless desirable perhaps to have servants who accept the mythology of the system.

Affluent litigants are relatively free men, involved in legal entanglements more or less as equals. If the host of institutions designed to keep them out of the cumbersome and unpredictable court system somehow fails, they command respect and get a neutral tribunal. They are at arm's length with their adversaries; they have the power, position, and distance to challenge. If many life decisions are made with due consideration to their tax aspects, no one is thought of as being "on tax" the way many refer to the poor as being "on

10. 387 U.S. 1 (1967).

welfare." And the affluent are not involved with welfare, public housing, public hospitals, public food, school officials, police or the family court.

But the incorporation of these assumptions into "poverty law" distorts understanding, for it is the failure to realize in practice these and related assumptions which is one of the defining features of poverty.

The poor gain their identities from their relation to a set of public institutions on which they are semi-permanently dependent. "On welfare," a term of definition, is more like a feudal, than an arm's length contractual status. The legal problems peculiar to poverty involve the relationship of poor people to other people and to institutions which possess great power over their lives. The poor are not autonomous agents capable of asserting rights. When a poor man does challenge authority, either as plaintiff or defendant, he finds himself without the capacity to obtain justice. Poverty is not just being poor, but in addition it is being at the bottom and being powerless to demand respect or good treatment. As long as we portray rich men and the higher courts as typical of poor men and the poor men's courts, we are failing to face up to the essential facts of poverty.

This contradiction, between the traditional law school assumption and the reality of social position and courts, is one piece of an ideological conflict encountered when the law school begins dealing with social problems. Trade schools are partisan. The law school has always been closely aligned with established economic interests and has thus taught and promoted an ideology compatible with those interests. A study of social problems, however, entails a criticism of the established institutions and a questioning of the official ideology. The politics, values, and explanations of reality in the law of the affluent seem tenuous when viewed from the perspective of the poor. Thus, political issues settled without argument or never encountered in the old curriculum become live issues.

Take the problem of class. This book focuses on the problem of minorities, particularly the Black minority. Blacks do contribute more than their share to the impoverished population. But most poor people are white and a good portion of these are of Western European origin. The United States has a poverty-stricken minority in all geographic areas, including those where there are few blacks or other visible minority groups. By its emphasis and concentration, however, the book tends to give the suggestion of an equivalency between poverty and racial or ethnic discrimination.

One of the five chapters in the book treats Employment Discrimination, but no space is devoted even to stating, much less really examining the policies and institutions that result in the United States' having by far the highest unemployment rate of the highly industrialized nations. A great deal of the unemployment in the United States within all racial and ethnic groups is not a function of racial discrimination.

The editors reprint in full Moynihan's "The Negro Family." Whatever the relationship between family structure, male child development, and poverty, one thing is certain: the effect is not confined to Negroes. The white lower-class exhibits the same family instability and breakdown characteristics as the Negro lower-class. This text, however, to the extent that it treats the issue, examines it again as if it were a problem of minorities, particularly the Black.

The law is keyed to ameliorating racial or ethnic discrimination, not economic class discrimination. Few distinctions based on racial or ethnic criteria can stand up to legal challenge; but all sorts of distinctions based on economic position are *de rigueur*, built into the system, unquestioned, not perceived as discrimination. The equal protection clause may get poor people access to the courts,¹¹ but it is not very useful in obtaining subsistence, medical care, housing, or education.¹²

Indeed it is a fair generalization to say that laws are written and the legal process structured in such a way that existing class inequalities are maintained. This book, however, manages to evade the fact that we do have disparate classes in our society. Much less does it analyze the problems of insuring justice under the law for the lower economic class. A text and course in "law and poverty" should recognize the real issue, which is the unequal distribution of income and resources. Who are the poor? How do they become poor? Why do they remain poor? What role has the law played in creating, reinforcing, and exacerbating economic inequalities? To what extent can litigation and legislation effect an amelioration of the undesirable effects of existing law?

We would like to suggest an alternative way to incorporate the issues of "law and poverty" into the curriculum. These tentative notes are toward the goal of remaking the law school curriculum so that each course examines the social implications and underlying values of the material included in it, assesses the different impact on the various classes, and provides a more accurate picture of the real world. We believe that this can be done without sacrificing, and perhaps in a manner better serving, the goal of training people to become competent lawyers, familiar with legal materials, procedures, and research techniques and with the processes of legal reasoning.

In the first place, many legal problems of the poor could fit quite easily

11. *Jeffreys v. Jeffreys*, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1969).

12. *But cf. Hazard, Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242, 246 (1970):

[W]hereas the problem of poverty is essentially that of unequal income distribution, one of the least formally restricted guarantees in the Constitution is the equal protection clause. Surely the advocate can be found who would be willing to argue that equal protection is denied under a system of taxation and wealth transfer that fails to result in substantial equality of income. Most other proposals to reform the law for the benefit of the poor would follow a *fortiori*.

into the regular law school courses. As we have stated, the welfare cases and materials belong in the constitutional and administrative law courses; consumer problems fit naturally into the commercial law courses; tenants' problems should be considered in the property courses; and so forth. This shuffling of cases involving poor people into the standard curriculum is the first step. In addition, materials and cases should emphasize the integrated nature of social problems and permit comparison of the respective positions of the classes. Courses should be designed to examine systems, such as income distribution, to permit a comprehensive view.

Each course should be revised, and some courses amalgamated, to highlight the important policy areas, to discuss the economic or social interests being served, to compare the legal framework to other similar systems, to inspect institutional implementation. Thus, tax law would be integrated into a larger course studying the legal framework of income distribution, concentrating on who gets what and how it's done. Federal taxation today is not merely a levy; it is a very significant form of government regulation of the economy, a guide to economic decisions, a system of subsidies. Materials and cases challenging specific provisions of tax laws, discussing their social impact and comparing them to schemes in other countries would be included.

This course might also examine the extent to which federal housing programs, such as those of the FHA and Veterans Administration, highway programs, and tax incentives and deductions subsidize the middle classes and help create the urban slums. The course should also examine the economic aspects of Welfare, Unemployment Compensation, Social Security, and various new schemes such as the Family Allowance and the Negative Income Tax.

A text for a separate course dealing with the problems of the poor should concentrate on the unique problem of the poor: i.e., that many people at the bottom of the opportunity and income pyramid are deprived of honor and self-respect. Such a text would examine the total employment picture, as well as the public institutional network with which the poor are involved. The employment sections would deal with unemployment, minimum wages, wage differentials, child labor laws, employment discrimination, and the possible methods by which full employment could be attained with complementary legislation to maintain the equilibrium.

The components of the public institutional network would not be dealt with individually, but from a perspective of their common features and the manner in which they complement each other to form a system. Instead of the traditional breakdown, this section would be organized functionally:

1. discretion in low-echelon agents;

2. features of bureaucracy that guide exercise of the discretion;
3. the relationship between the low-echelon agent and the poor person;
4. class criteria in agency administration;
5. devices for redressing grievances; and
6. participation in degrading rituals.

These headings, obviously appropriate to welfare, are equally applicable to the schools, public housing, police, mental hospitals, and the poor man's courts (criminal, juvenile and family courts) that review the decisions of the institutional personnel. The public service bureaucracies have common properties and ways of functioning. And, more important, they have been insulated from responsiveness to and control by the poor ward-client in similar ways. The roles of civil service rules, administrative procedures, and limited judicial review by virtue of rules of exhaustion of remedies and broad discretion should be examined.

A text on poverty must also address the problem of how to establish institutions and devices through which the poor can make these agencies responsive. This demands a recognition of the limitations of legal action and a familiarity with the range of ways of controlling administrative discretion. How can the decision-making processes in the agencies be made more responsible to the needs of the client? How can the ambit of discretion be narrowed, the criteria of discretion strengthened, the visibility of the decisions enhanced? Can we devise institutional structures that will be disposed toward feelings of cooperation, that will create pressures for closeness and responsibility, that will harmonize the interest of police officer, teacher, welfare worker and poor person? Why do these structures as constituted today fail in their objectives? How do conflicts arise? What are the opposing interests?

The conflicts between agency workers and the poor have given rise to many cases. Instead of using these cases merely as illustrations of legal principles, we can examine them by considering the parties and the basis of the controversy, as well as the legal issues in dispute. An excellent example is the California "midnight raid" case.¹³ The raids involved in that case were apparently commenced in order to gather statistics demonstrating that there was little cheating and that the bureaucracy was doing its job.

A text on poverty law should also deal with the various schemes that have been devised to modify poverty-related institutions, to give some power to the poor, to provide devices to redress grievances. The law, and some history, of the Community Action Programs and "maximum feasible participation," the utility of administrative hearings and Police Review Boards, and the

13. *Parrish v. Alameda Civil Service Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967). (The raids actually took place in the early morning—at 6:00 A.M.)

possible benefits of decentralization, local courts, para-professional aides, and Ombudsmen should be included.

All organization is somewhat artificial, exaggerating some relationships, obscuring others. In any selection, some goals will be maximized. The major differences between the present system and this suggested curriculum are the criteria and purposes. Organization and selection in today's texts reflect the interests and perspectives of private wealth. A drastically changed curriculum acknowledging the presence in the United States of all economic interests would have as its goal the study of the legal framework and its impact on the lives of people in *all* classes.

It should be noted that these suggestions are directed to content. Style and method of teaching are other matters. Any curriculum can be utilized to train lawyers. The legal mind and the skills of research can be developed through close attention to collapsing buildings or collapsible corporations.

In a new curriculum, selected and organized according to new criteria and purposes, the cases and materials in Law and Poverty would surely merit inclusion. The book contains the fundamental cases. Even more important, it does contain some insights into the relations between poverty and the entire economic organization, some challenges to the assumptions underlying our system of courts as grievance-redressing devices, and some recognition of the oppressiveness of the administrative network. However, these ideas are included in such a way that their significance is crippled if not destroyed. The organization of the book, its major themes, and the book's relation to (or insulation from) the rest of the curriculum suppress and vitiate them.

The character of the law school as presently dominated by the curriculum and ideology of advocacy for wealthy interests will not be greatly influenced by one course or a few minutes of various courses of law related to the poor, even if some of the materials in the course do challenge the message of the other materials. Setting up a course in poverty law, unrelated to the rest of the curriculum but incorporating the same politics, is comparable to the practice of some law firms in permitting their staff to contribute a small percentage of their efforts to work *pro bono publico*, while maintaining their central focus on money-making and service to the affluent.

We believe that the contemporary law school must transcend its trade school origin. It is not just a matter of academic morality. However difficult, higher education should be objective, dispassionate and detached. It should attempt to serve truth (or at least consider all reputable versions of it) rather than the interests that support the school. In a time of great change, the large class of public intellectuals trained in law schools should graduate with more flexibility and knowledge than the presently constituted law school provides. *Law and Poverty*, although reflecting an intelligent and concerned effort, does

not, in our opinion, meet these standards when appended to the traditional curriculum and when measured against the need and the opportunity.

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PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE.
Edited by Boris I. Bittker. Branford, Conn.: Federal Tax Press, Inc., 1970.
Pp. xii, 485. \$15.00.

What should an attorney do if, in preparing an income tax refund claim, he discovers errors on the taxpayer's prior tax return, some of which are unfavorable to the taxpayer? What course should tax counsel retained in an estate tax audit follow upon learning that the decedent's widow may have executed a contract with the decedent whereby she agreed not to exercise her power of appointment over the marital deduction trust established by his will? What standards of conduct or other restraints are there to guide the attorney in the preparation of the minutes for a closely held corporation with substantial accumulated earnings? Must the attorney in the first illustration call unfavorable errors to the attention of the Internal Revenue Service? In the second example, what disclosure to the Service might counsel make, and if the client refuses to agree to counsel's making any disclosure at all, what should the attorney then do?

In each of these situations, the tax adviser possesses information adverse to his client's interests. His viscera may or may not tell him whether he ought to make any disclosure to the Service. He may find it useful to know that attorneys and accountants who devote much of their practice to income tax matters seem to have developed an unusually keen sense of the need to disclose even adverse facts to the government and that this attitude is believed by some thoughtful practitioners to cause a divided loyalty in the attorney's relationship to his client. Indeed, forthright and candid disclosure is not particularly compatible with the attorney's traditional role as advocate in an adversary proceeding; in such a role, the attorney has no difficulty in refusing to give any quarter to his opponent because the Canons of Ethics exhort undivided loyalty to the client and a no-holds-barred attitude toward the opposition. Many tax practitioners believe that such traditional standards of conduct are quite inadequate when applied to tax practice; after all, the argument goes, the government (representing one's fellow citizens) is not wholly an "adversary" and, moreover, the