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Creeping Impoverization: Material Conditions, Income Inequality, And ERISA Pedagogy Early In The 21st Century

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Maria O'Brien Hylton

Abstract

This Essay argues that the current trend focusing on the law and economics theory does a disservice to the full-spectrum of legal issues. Law and economics, according to the author, is a value -neutral approach to the law. It fails to take into account poverty and other social values when thinking about the law. Finally, law schools should recalibrate their approach and, in some instances, take social values into account when teaching the law.

KEYWORDS: Law and Economics, Poverty, Legal Education

CREEPING IMPOVERIZATION: MATERIAL CONDITIONS, INCOME INEQUALITY, AND ERISA PEDAGOGY EARLY IN THE 21ST CENTURY

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INTRODUCTION

To say that poverty remains one of the most pressing issues of our time is a colossal understatement. A staggering number of people on the planet live in poverty. In the United States alone, the working poor and those living at or below the poverty line make up 12.6 percent of our populace.¹ While these individuals may not all be in imminent danger of starving or homelessness, they often lack basic safeguards that those in the upper socio-economic levels of society take for granted: basic health insurance, access to pension programs, disability coverage, and the certainty of a living wage that keeps pace with inflation. Poverty and its attendant social manifestations (crime, illiteracy, malnutrition, etc.) are urgent social problems.

Why, then, is poverty often ignored in law school? Even though religion and philosophy, two areas deeply concerned with social issues such as income inequality, inform many legal doctrines, there is, in my experience, noticeably less discussion now about poverty and income inequality in law schools than there was twenty years ago. Whether in the classroom or in faculty workshops and other forums for legal conversation, the problems of poor people do not command the attention they did a generation ago.

According to the great scholar of comparative religion Diana Eck, all major religious traditions share a strong emphasis on the

* Professor of Law, Boston University School of Law. An earlier draft of this paper was presented at Fordham Law School on March 5, 2007. Except where absolutely necessary, I have not included many citations in this short Essay; most of the statistics about poverty and insurance will be familiar to even the most casual newspaper reader.

1. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & CHERYL HILL LEE, U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 13 (2006), <http://www.census.gov/prod/2006pubs/p60-231.pdf>.

centrality of compassion.² A corollary of compassion for others is mindfulness of the material conditions of the impoverished. John Rawls, whom many students read in law school, bases his utilitarian theory of justice on the logic that in a society where one's position is uncertain, a person should always maximize the well being of the society's poorest members.³ Rawls is not alone in advocating a philosophy or world view that takes into account the material conditions of our least advantaged citizens.⁴ These considerations form integral parts of the several academic disciplines from which the study and practice of law emerges.

With such strong foundations and current need, it is more than a little disappointing that poverty issues seem to be falling by the wayside in almost every area of the law school experience. Legal discourse is now dominated by the language and analytical tools of law and economics. The focus has shifted to economic efficiency, wealth maximization, the development of optimal default rules, and other language imported into the legal academy through the law and economics movement.⁵ While the discourse of law and economics has made many impressive contributions to the pantheon of legal scholarship, its rise has had unfortunate consequences for those concerned about fostering discourse in the areas of poverty law and material conditions.

Partly because the language and method of law and economics place a heavy emphasis on value-neutral discourse, the poverty conversation has, itself, become impoverished, when it takes place at all. The singular emphasis on economics leads to the regrettable omission of candidly compassionate and morality-centered solutions to many of society's most pressing issues. Solutions which aim to decrease income inequality and focus on the material conditions of our most vulnerable and impoverished citizens are in desperately short supply, particularly in the areas in which I teach—ERISA (Employee Retirement Income Security Act), insurance, and employment law. The central problem is that it is not always

2. See generally DIANA ECK, *ON COMMON GROUND: WORLD RELIGIONS IN AMERICA* (Columbia Univ. Press 1997) (exploring fifteen religious traditions in the United States).

3. Christopher Jencks, *Does Inequality Matter?*, *DAEDALUS*, Winter 2002, at 49, 51; see generally JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press 1971).

4. See, e.g., JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789).

5. See, e.g., A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (3d ed. 2003); RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* (5th ed. 1998).

useful to have value-neutral conversations about subjects that cannot be fully understood without some measure of compassion.

I. WHAT ARE THE MATERIAL CONDITIONS ISSUES IN INSURANCE AND BENEFITS LAW?

The conditions of the working poor and a growing number of the middle class in the United States have been declining steadily over the past decade, especially in the areas of insurance and benefits. There are nearly forty-seven million Americans without any health insurance at all.⁶ This number includes children and working adults whose employers are not required by the Employee Retirement Income Security Act (“ERISA”) to offer even basic coverage, as well as those who might be offered coverage but cannot afford to accept it.⁷ There are also millions of working adults with inadequate private pension coverage.⁸ No faithful reader of a newspaper is unaware of the less than secure financial circumstances of the public pension program, commonly known as Social Security.

Just as problematic are changes in the economic system, which threaten the certainty and stability of many working class families. Millions of workers’ defined benefits pensions have been replaced by defined contribution plans, resulting in the loss of benefits and certainty of pay-outs.⁹ Seventy million working adults have no pri-

6. DENAVAS-WALT ET AL., *supra* note 1, at 20.

7. *Id.*; see, e.g., PATRICK PURCELL, CONGRESSIONAL RESEARCH SERV., PENSION SPONSORSHIP AND PARTICIPATION: SUMMARY OF RECENT TRENDS (2006), available at http://www.conversationoncoverage.org/studies_and_statistics/pension_sponsorship_participation_2006.pdf; Geoffrey Sanzenbacher, *Estimating Pension Coverage Using Different Data Sets*, ISSUE IN BRIEF, Aug. 2006, http://www.bc.edu/centers/crr/issues/ib_51.pdf.

8. CHARLES R. MORRIS, APART AT THE SEAMS: THE COLLAPSE OF PRIVATE PENSION AND HEALTH CARE PROTECTIONS 19 (2006), available at <http://www.tcf.org/Publications/RetirementSecurity/morris3.pdf>.

9. A *defined benefits plan* is marked by a plan document which defines the amount of money an individual will be paid at retirement. The risk of investment or other losses falls to the employer, who is obligated to fund and invest the assets of the plan. Defined benefit plans are also insured by the federal government, which will pay participants their promised benefits in the event of an employer’s insolvency. A *defined contribution plan* is characterized by a set sum that an employer contributes to the plan each year, which is then divided among individual employee accounts. The amount in the individual accounts is vested over time with the result that there is no guarantee that the participant will receive a specified amount at retirement. The risk of investment losses lies with the plan participants who derive much of their account assets from investment earnings. For a more detailed discussion of different retirement plans, see COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE (2004).

vate short- or long-term disability insurance.¹⁰ The federal minimum wage has lost a staggering amount of purchasing power since it was last raised in 1997 and its value is now at its lowest level since 1955,¹¹ a trend that has left many low income families unable to make ends meet.

The poor also rely disproportionately on an array of public benefits programs that are in dire need of reform. Worker's compensation, unemployment insurance, and Social Security, for example, are intended as mere safety nets, but for many low income families they can become lynchpins of economic survival.

Income inequality in the United States has increased dramatically in the last two decades and is now wider than in any other developed country.¹² The United States is the only wealthy democracy in the world where there is a correlation between income inequality and life expectancy.¹³ Americans appear to be vastly more tolerant of income inequality than citizens of other developed nations.¹⁴ Tolerance (or ignorance) of these phenomena cannot simply be rationalized or left out of the model altogether. The underlying causes of income inequality in America appear to have a lot to do with *a priori* distribution of resources.¹⁵ Legal rules govern everything from the minimum wage and the ability of unions to organize workers, to the tax treatment of benefits available only to highly compensated employees. Both the *a priori* distribution of resources (including access to education, nutrition, parental values, family wealth, income, etc.) and the legal rules which create (or restrict) access to these resources are legitimate subjects for conversation in the law school. So, why are so few faculty and students talking about them?

10. Soc. Sec. Admin., Fact Sheet: Social Security, Jan. 31, 2007, <http://www.ssa.gov/pressoffice/factsheets/basicfact-alt.pdf>.

11. JARED BERNSTEIN & ISAAC SHAPIRO, CTR. ON BUDGET & POLICY PRIORITIES, NINE YEARS OF NEGLECT: FEDERAL MINIMUM WAGE REMAINS UNCHANGED FOR NINTH STRAIGHT YEAR, FALLS TO LOWEST LEVEL IN MORE THAN HALF A CENTURY 1 (2006), <http://www.cbpp.org/8-31-06mw.pdf>.

12. Jencks, *supra* note 3, at 49.

13. *Id.* at 59-62.

14. See, e.g., Alberto Alesina et al., *Inequality and Happiness: Are Europeans and Americans Different?*, 88 J. PUB. ECON. 2009, 2034 (2004); William A. Sundstrom, *The Income Gap*, ISSUES IN ETHICS, Fall/Winter 1998, <http://www.scu.edu/ethics/publications/iie/v9n3/income.html>.

15. JOHN E. MORTON & ISABEL V. SAWHILL, ECONOMIC MOBILITY PROJECT, ECONOMIC MOBILITY: IS THE AMERICAN DREAM ALIVE AND WELL? 3 (2007), <http://www.economicmobility.org/assets/pdfs/EMP%20American%20Dream%20Report.pdf%20>.

II. BROAD SCOPE OF PROBLEMS

Beyond the litany of statistics that point to the dire straits of the impoverished and working poor, there are broader problems to be considered, particularly in the teaching of poverty, insurance, and benefits law in law school. It is difficult to think of a significant issue in any of these fields that does not have substantial implications for the material conditions of the impoverished and working poor. In addition, occasionally there is a personal dimension to the issue. In the field of insurance, for example, I have noticed a startling trend among my own students over the past few years. I have discovered that many of them lack adequate health insurance, either because they are no longer eligible for coverage under their parents' insurance, or because their parents lack coverage as well and, therefore, have no "umbrella" with which to cover their law student children. Several have volunteered stories about their parents' long periods of unemployment, loss of health insurance, and inability to afford premiums under the Consolidated Omnibus Budget Reconciliation Act ("COBRA").

It is unnecessary for me to remind students with such backgrounds that, in the current legal environment, the material conditions of the least advantaged impact more than just the traditional arenas of civil rights and constitutional law. They understand how one illness can lead directly to bankruptcy. They are familiar with the "Law of Large Numbers"¹⁶ and the enormous advantage that purchasers of insurance who are part of a group enjoy, relative to those who try to purchase insurance on their own. They appreciate how one catastrophe, such as a lost job, can trigger a domino effect of attendant crises and losses.

For example, as many know, the first important litigation now emerging from the catastrophe following Hurricane Katrina is insurance litigation. Not surprisingly, property owners and their insurers are fighting over whether the damage in question was caused by floodwaters or by some other source.¹⁷ In the United States, flood insurance is not typically included in the conventional homeowners' insurance product. Those wishing to insure against flood damage generally purchase coverage directly from the fed-

16. Richard Zeckhauser, *Insurance*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (The Library of Economics and Liberty), available at <http://www.econlib.org/library/Enc/Insurance.html>.

17. Theo Francis, *In Katrina's Wake—Paying for Flood Damage Looms as Big Challenge*, WALL ST. J., Sept. 8, 2005, at A1.

eral government through an approved agent.¹⁸ In my experience, students who are already intensely aware of what it means to live without shifting some of the most serious risk of loss to another party quickly identify with the (usually hopeless) arguments put forward by homeowners in these kinds of cases.¹⁹ Typically, someone will timidly suggest that a court should take seriously the level of a policy holder's education, or the fact that the loss is huge for the homeowner and trivial for the insurance company.²⁰ Invariably, other students will firmly remind the class that these "emotional" arguments are "not rational." The question is then posed rhetorically: what would happen if the court did not enforce the insurance contract as written? A parade of horrors follows: costs would increase for everyone, the market for insurance would become unstable as legal outcomes proved more uncertain than expected, and so on.

In my experience, these compassion-based arguments never hold their own against the confident (even smug) language of law and economics.²¹ On the contrary, students whose instincts tend toward the poor or less powerful usually find themselves disadvantaged by their inability to translate their arguments into the language and tools of law and economics. Efficiency and optimal incentives generally trump the other, unquantifiable values that students try to inject into the conversation. After a while, no one tries anymore.

18. The National Flood Insurance Program is administered by the Federal Emergency Management Agency. For more information on the program and a list of approved insurance agents, see Fed. Emergency Mgmt. Agency, The National Flood Insurance Program, available at <http://www.fema.gov/business/nfip> (last visited May 12, 2007).

19. See generally *Sexton v. State Farm Fire & Cas. Co.*, No. Civ. A. 03C01008JRS, 2003 WL 23274849 (Del. Super. Dec. 30, 2003) (finding plaintiff's public policy plea unpersuasive).

20. This position has found support with both the legislative and judicial branches of the Louisiana government. The Louisiana Legislature allocated the cost of claims to insurance companies, instead of policyholders, following Katrina by extending the prescriptive period for filing claims resulting from Hurricanes Katrina and Rita. See generally *State v. All Prop. & Cas. Ins. Carriers*, 937 So. 2d 313 (La. 2006); *Constitutional Law—Contracts Clause—Louisiana Supreme Court Permits Retroactive Extension of Prescriptive Period in Insurance Contracts—State v. All Prop. & Cas. Ins. Carriers*, 937 So. 2d 313 (La. 2006), 120 HARV. L. REV. 844, 850 (2007); see also Carmel Sileo, *After Katrina, A Deluge of Denials*, TRIAL, Dec. 2005, at 22 (noting that Hurricane Katrina victims maintain that provisions in their insurance contracts are "unconscionable" and "contrary to public policy").

21. See, e.g., *Sexton*, 2003 WL 23274849, at *3 (maintaining that "[a] court cannot rewrite a contract under the guise of construing it," no matter how dire its consequences).

In order to combat this worrying trend, employee benefits, insurance, and employment law should be taught like many other areas of the law, with reference to the policy issues that underlie and influence them, both in the past and present. Taught without any political agenda, much of employee benefits law and a not insignificant portion of insurance and employment law *is* poverty law. It is simply not possible to credibly prepare law students for practice in these fields without devoting substantial time and effort to the issues that unequal material conditions raise.

III. REJECTING VALUE NEUTRAL DISCOURSE

As Christopher Jencks noted, “the social consequences of economic inequality are sometimes negative, sometimes neutral, but seldom—as far as I can discover—positive.”²² The law is a social discipline. While law and economics discourse has many useful analytical applications, it does not adequately account for the values and circumstances that underlie so many of the legitimate concerns raised by inequality of material conditions.

The law is fundamentally concerned with power, particularly the exercise and distribution of power, across society. Whether it is characterized as economic or political power, those who lack it are almost invariably those whose material conditions are substandard. Thus, any law school curriculum that does not address the underlying distribution of power is, at best, mediocre.

Yet much of what passes for great teaching in the legal academy does just this. As first years, students are ostensibly taught to “think like a lawyer”²³ and admonished “not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses.”²⁴ They are told to “set aside their desire for justice”²⁵ and focus solely on the so-called legal issues. This is highly objectionable on many grounds, most importantly because it deflects attention from the most critical areas of scholarship and practice. Teaching ERISA without a focus on material conditions is like teaching torts without a focus on negligence. It is tantamount to malpractice by the law school.

As it stands, however, there is little, if any, room in the present first year curriculum for candid, value-based discussions. This flaw

22. Jencks, *supra* note 3, at 64.

23. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 22 (2007).

24. *Id.* at 187.

25. *Id.*

is inherent in the socialization process that is the ultimate objective of the first year of law school.²⁶ Learning to “think like a lawyer” through the Case and Socratic Methods almost completely discounts the social, moral, and ethical dimensions present in the actual practice of law.²⁷ As a result, most law students are not fully conscious of the social contexts in which the law exists and are thus not adequately prepared to address the issues that accompany them in practice.

No area of the law can or should be taught without regular, thoughtful reference to material conditions. Toward this end, faculty workshops should be conducted with the *a priori* distribution of material goods and attendant power considerations front and center. Yet I cannot remember the last workshop I attended where that was the case. Likewise, students deserve more than the often shallow rhetoric of efficiency, personal choice, and incentives that frequently informs most class discussions. Inequality of material conditions is not a side issue—it is at the heart of the law.

26. *Id.* at 186.

27. *Id.* at 187-88.