

## BOOK REVIEW

LAW, LAWYERS, AND SOCIAL CHANGE. By *Harold Horowitz* and *Kenneth Karst*. Indianapolis: The Bobbs-Merrill Co., 1969. Pp. 531.

*Law, Lawyers, and Social Change*<sup>1</sup> is the rather ambitious title of a new law school casebook for a course in what is commonly called "legal process." To the extent casebooks can determine course coverage, legal process courses traditionally have focused on matters such as the judicial function, including development of the common law, interpretation of statutes, the writing of opinions, and prospective overruling; the legislative function, including enactment procedure; and, perhaps, something on the nature of law. A survey of the books in this field indicates that the authors of the legal process texts usually feel called upon to offer an explanation for the publication of a separate book on the legal process,<sup>2</sup> and the present authors are no exception.<sup>3</sup> Such explanations are perhaps a response to the oft-made assertion that any law school course properly taught is a course, at least in part, on the legal process, therefore precluding the necessity for separate treatment of legal process topics.

A separate course in legal process could be justified on several grounds. First, one might argue that a separate course is a more efficient allocation of instructional time and allows the other teachers to concentrate on the substance of their courses. A related argument is that a separate course is institutionally necessary to insure that certain issues will be discussed in the curriculum. Third, and perhaps more fundamental, one may urge that separate treatment is pedagogically required, because mastery of these subjects can only be achieved if they are studied in depth through material which draws from a large number of traditional doctrinal classifications. Horowitz and Karst, professors of law at the University of California at Los Angeles, offer the following explanation for their legal process book:

Every course in law school is a course in the legal process, reflecting the entire legal system as it comes to bear on a single subject area. Most courses, however, emphasize the development of the legal doctrine that governs their

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1. H. HOROWITZ & K. KARST, *LAW, LAWYERS, AND SOCIAL CHANGE* (1968) [hereinafter cited as HOROWITZ & KARST].

2. *E.g.*, W. FRYER & H. ORENTLICHER, *LEGAL METHOD AND LEGAL SYSTEM* ix (1967); B. GAVIT, R. FUCHS & M. PAULSEN, *CASES AND MATERIALS ON AN INTRODUCTION TO LAW AND THE JUDICIAL PROCESS* iii (1952); P. MISHKIN & C. MORRIS, *ON LAW IN COURTS* 3 (1965).

3. HOROWITZ & KARST 1.

fields, and not the institutional process that produces the doctrine. . . . Our focus is institutional, not doctrinal. . . .<sup>4</sup>

The authors seek to explore no new ground in the legal process issues they raise. Indeed, in this respect their venture is traditional.<sup>5</sup> The "introduction to an introduction" outlines five areas of inquiry which provide a standard legal process menu: the role of courts in resolving disputes and declaring law; the role of legislatures as lawmakers; the role of judges in interpreting statutes and constitutions; the role of administrative process in the making and application of law; and the role of the legal profession.<sup>6</sup> However, the book attempts innovation in two respects. First, it is not organized around the legal process issues with, for example, one chapter on statutory interpretation and another on the role of precedent. Instead, it is organized chronologically around the development of a "social issue": the abolition of slavery and the development of case and statutory law banning segregation in schools and requiring equality of educational opportunity. And second, although the authors say that "any subject would serve [the legal process education] purpose of this course,"<sup>7</sup> clearly their choice of subject matter is viewed as crucial in advancing the other purpose of these materials: "demonstrating to the law student some of the ways in which the legal system can be made an instrument for effectuating changes in society."<sup>8</sup>

*Law, Lawyers, and Social Change* is divided into four chapters. The first deals with the abolition of *de jure* slavery in England and the United States. The second, focusing on the segregation in public schools remaining after the formal abolition of slavery, traces the demise of *de jure* school segregation through the *Brown v. Board of Education* decision.<sup>9</sup> The core of these chapters is approximately sixteen appellate opinions, ten of which are from the Supreme Court of the United States. In notes following the principal cases, the authors attempt to raise many of the issues traditionally covered in a legal process course. For example, the student is asked to consider the proper method of statutory interpretation<sup>10</sup> and the function of the

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4. *Id.*

5. The legal process issues were explored in the Hart and Sacks epic, *The Legal Process: Basic Problems in the Making and Application of Law* (tent. ed. 1958), and the authors fully acknowledge an intellectual debt.

6. HOROWITZ & KARST 2.

7. *Id.* at 1.

8. *Id.*

9. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

10. Primarily, the authors seek to show that the "plain meaning" approach, if taken to mean

canons of interpretation; the difference in a judge's role in determining whether a prior case controls or whether a statute "controls" the resolution of a controversy; and the significance of the inherent differences between courts and legislatures for the proper role of each institution. Perhaps because they fear that the chronological organization of the materials may obscure the legal process issue they seek to raise, the authors present, at the end of chapter two, an "anticipatory epilogue" which serves as a cross reference to the notes and as a reminder to students of the significance of the preceding material. For example, they ask "are the courts properly equipped to acquire the factual information that may be essential to their lawmaking role? (Recall the discussions of this question in connection with cases like *Plessy v. Ferguson* and *Brown v. Board of Education*.)"<sup>11</sup>

The final chapters trace the development of two areas of law since *Brown*. Chapter three explores the various devices by which southern states sought to avoid the result of *Brown* and the judicial and federal legislative responses to these avoidance techniques. The chapter includes cases dealing with pupil assignment plans, closure of the public schools, tuition grants to private schools and individual students, and background material on the Civil Rights Act of 1964. The authors also include some material on the role of NAACP lawyers in litigating these matters and raise questions about the bearing of cause litigation on the traditional notions of the lawyer-client relationship. Chapter four contains material on *de facto* segregation, including the power and the duty of state governments to combat it, and on inequality in educational opportunity generally, concluding with *Hobson v. Hansen*.<sup>12</sup> Again, the notes discuss the legal process issues raised by the cases and, in addition, elaborate on many of the issues presented in the first half of the book.<sup>13</sup>

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that the role of the judge is merely to "find" the proper meaning of the statute or constitution from a textual analysis alone, is inadequate. They make a plea instead for the "purpose-oriented" approach. Unfortunately the differences in these two approaches are never fully explored.

11. HOROWITZ & KARST 235.

12. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1967).

13. For example, early in chapter one the notes raise questions concerning statutory interpretation, including the usefulness of the concept of the "intent of the framers" as a means of interpretation. HOROWITZ & KARST 56-57. In chapter three the authors return to the subject with a more detailed treatment of the problem, one which asks students to consider the relevance of specific methods of determining legislative intent. *Id.* at 340-48.

Since the authors acknowledge that any subject would serve as the focus for the legal process issues they discuss, the chronological organization of the book apparently reflects their conclusion that legal process materials are more effective when organized around a particular substantive law development.<sup>14</sup> This conclusion is, I suspect, grounded in a judgment that when legal process courses treat process issues separately from the development of a specific problem and legal response, students often fail to relate their legal process learning to the problems raised in other courses. To authors of traditionally organized legal process materials, this recognition should indicate a change in approach. Either their texts should be used in conjunction with a substantive course already taught<sup>15</sup> or their material should be reorganized around a new body of doctrine. Horowitz and Karst seem to have adopted the second alternative.<sup>16</sup> But they have a goal beyond more effectively educating law students about the legal process. They aim to create a *new* course, one in the legal process *and* social change through law. Given the loudly articulated skepticism of many about the capability of the "system" to effectuate meaningful change, the aim is timely and laudable.

Unfortunately, although the ideas behind the organization may have merit, *Law, Lawyers, and Social Change* fails to achieve its announced goals. The materials are not satisfying *either* as legal process materials *or* as law and social change materials, possibly because the two purposes the authors seek to further are incompatible or because they have attempted a task too vast for a single law school course. However, I think the book's failure is traceable to the authors' limited view of what qualifies as adequate material for a study of legal institutions, their choice of a substantive area in which to demonstrate their social change points, and their overemphasis on changes in legal rules, an emphasis which permits too easily the inference that changes in legal rules are equivalent to changes in society.

Several factors detract from the book's usefulness as a vehicle for teaching traditional legal process materials. First, the cases are not

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14. See *id.* at 1. This is also the conclusion of the author of another new book on the legal process, M. FRANKLIN, *THE DYNAMICS OF AMERICAN LAW* (1968). "To give [the legal process] analysis greater cohesion and relevance, we shall confront these problems in the context of a single substantive legal area." *Id.* at v.

15. Gavit, Fuschs & Pausen, *supra* note 2, suggest this as an alternative use of their book.

16. Another new text is organized around material more likely to be covered in a standard curriculum. See M. FRANKLIN, *supra* note 14.

primarily about the issues the notes raise, and the reader is therefore left without the benefit of the judge's views on the matters the notes discuss. Of course, one useful means of studying the issues is to examine cases which assume without discussion the proper method of, for example, statutory or constitutional interpretation. However, it is also important to read cases in which the proper method is enough at issue to have provoked a response from the judge.<sup>17</sup> In *Law, Lawyers, and Social Change* the student is generally left with the extrajudicial statements of judges not involved in the principal cases.<sup>18</sup> Second, the notes provide too little textual material on the legal process issues to demonstrate their complexity or to assist the student in resolving the questions posed by the authors. The treatment of statutory interpretation is a good example. The notes question the proper method of statutory interpretation principally at three points in the book,<sup>19</sup> but the total treatment is superficial. While the authors ask whether the "plain meaning" approach is useful, suggest the "mischief rule" as an alternative, and question the helpfulness of legislative history and the validity of seeking the "intent of the framers," no readings are provided to amplify these difficult questions. For instance, the works of H.L.A. Hart,<sup>20</sup> Lon Fuller,<sup>21</sup> and other important commentators<sup>22</sup> are not discussed, much less excerpted. Even Frankfurter's views receive only citation treatment.<sup>23</sup> The result is that the issue, spread through the book, is obscured and underdeveloped.

The author's treatment of questions traditionally grouped under a consideration of the judicial function similarly fails to present sufficient material to enable students to deal with the issues in a sophisticated manner. For example, in one note the authors ask the student what justifies overruling a precedent. But the materials give the student few readings which would be helpful in formulating an

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17. See, e.g., *Schwegman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring); *United States v. Butler*, 297 U.S. 1, 62 (1936); *Church of The Holy Trinity v. United States*, 143 U.S. 457 (1892).

18. The authors do report Justice Black's later thoughts about an aspect of the second *Brown* decision. HOROWITZ & KARST 396.

19. *Id.* at 58-59, 71-78, 339-50.

20. E.g., H.L.A. HART, *THE CONCEPT OF LAW* (1961); Hart, *Positivism and the Separation of Morals*, 71 HARV. L. REV. 593 (1958).

21. E.g., Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

22. See cases cited at note 17 *supra*.

23. HOROWITZ & KARST 341.

answer to the question. Neither Llewellyn,<sup>24</sup> Frank,<sup>25</sup> nor Dworkin<sup>26</sup> is discussed, and Cardozo is given a few lines much earlier in the materials. These writers all have important ideas about the role of precedent and the legitimate latitude a judge may exercise short of overruling a prior case, ideas which ought to be considered in evaluating the questions the authors pose.

A problem more fundamental than the exclusion of some significant material by noted commentators is the book's almost exclusive focus on *legal* writers. The authors propose to study legal institutions but, with few exceptions, the materials involve only the comments of lawyers and legal scholars about legal institutions. Such a narrow view of relevant material in a modern book is distressing, especially in a book which is also concerned with social change. One need not agree with psychoanalytic explanations of history or with radical interpretations of societal structures to acknowledge that such views at least ought to be considered in a study of legal institutions.<sup>27</sup> Moreover, many traditional legal process issues involve the functions and limits of language, and the insights of "non-legal" writers concerning these matters seem especially relevant to an understanding of the "legal" problems.<sup>28</sup>

Horowitz and Karst chose slavery and segregation as the doctrinal focus for their book because "during the professional lifetime of today's law student . . . racial equality will be the Theme that dominates all others in our society." Some may dispute this assessment. But even if the authors' judgment on the course of legal debate in the next forty years is entirely correct, their choice of substantive issue poses pedagogical problems for the study of the role of law in social change. First, the choice of substantive issues necessitates the inclusion of a substantial number of opinions of the Supreme Court of the United States. Some of the most complicated issues in American jurisprudence involve the jurisdictional doctrines of the Supreme Court, especially those that involve the Court's decision not to hear a particular case. These doctrines, evolved in

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24. *E.g.*, K. LLEWELLYN, *THE BRAMBLE BUSH* (1951).

25. *E.g.*, J. FRANK, *LAW AND THE MODERN MIND* (1930).

26. *E.g.*, R. DWORKIN, *Judicial Discretion*, 60 *J. PHIL.* 624 (1963).

27. *See, e.g.*, N. BROWN, *LIFE AGAINST DEATH* (1959); E. FROMM, *ESCAPE FROM FREEDOM* (1941); H. MARCUSE, *EROS AND CIVILIZATION* (1955).

28. *See, e.g.*, B. RUSSELL, *THE PROBLEMS OF PHILOSOPHY* (1912); A. WHITEHEAD, *THE FUNCTION OF REASON* (1929); L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1958); *cf.* Stone, *Towards a Theory of Constitutional Law Casebooks*, 41 *S. CAL. L. REV.* 1, 5-9 (1968).

varying degrees to protect the Court's independence, to further the concept of federalism, and to insure efficient and well-informed adjudication, are difficult enough when studied in the context of courses in constitutional law or federal courts. The authors determine not to discuss any of these matters in depth, but unfortunately discussion cannot be avoided altogether, and the general result is a superficial treatment of complex issues.<sup>29</sup> Therefore, the Supreme Court decisions are presented without accompanying materials concerning the unique institutional characteristics of the Court and with little discussion of the peculiar problems faced by a federal supreme court in a dual court system. To constitutional law teachers the book will, I think, seem too thin; for legal process teachers it will seem too complex, unless the teacher is willing to gloss over the important subtleties or add supplementary materials.

Second, certainly the authors are correct in asserting that, at least since 1954, segregation and discrimination have been central social issues. But precisely because these issues have been so dramatically discussed elsewhere and because the resolution of at least the problem of *de jure* segregation now seems so clear, the materials lack the tension that a book on social change ought to have. To best understand the complexities of social change one needs to recognize—indeed *feel*—the weight of the conflicting interests involved. But for most of today's law students the question of *de jure* segregation is a closed one. It is very difficult to empathize with the slave owner or with the legislature which tries to circumvent Supreme Court rulings on school segregation, and the result, then, is that the majority of the book concerns issues about which there seems little room for strenuous argument in 1970.

To be sure, subtle discrimination remains and to those discriminated against the issue is still vital. Moreover, "benevolent quotas," *de facto* segregation, and busing are all issues of current impact. In fact, the book is enlivened in the concluding pages when the authors finally move from a discussion of *de jure* segregation devices

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29. E.g., HOROWITZ & KARST 379-82 (discussion of advisory opinions). Even Professor Wechsler's famous article, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), is given an apologetic footnote:

A beginning law student may find the materials in this note to be very difficult. The materials are included at this point in order to introduce—not resolve—some fundamental questions about the judicial process, which questions will arise frequently in other law courses, and are treated more fully in the courses in constitutional law. HOROWITZ & KARST 206.

to a treatment of the role of state government in combating the lasting effects of the prior *de jure* condition. Here, too, the book expands to include a wider range of materials. For example, in discussing the duty of the states to counter the effects of segregation in housing through their assignment of pupils to public schools, the authors present some interesting material on the Pasadena, California, school system, material containing more than cases and the rules they announce. The book gives substantial background information which illuminates the tension between the parties involved in the dispute over neighborhood schools, busing, and *de facto* segregation. It also includes reports of school board hearings and a history of political maneuvering and school board elections. Unfortunately, there is not enough of this sort of material in the book. The student is overwhelmed with cases and legislative enactments, leaving him primarily with the notion that social change results from change in particular rules of law and consequently with little appreciation for the complex dynamics of effective social progress.

In summary, this book generally pictures the lawyer rather traditionally as the litigator and the legislator, one who looks to law reviews and legal scholars to understand and evaluate the legal process. This is disappointing because the beginning law student is left with too narrow a view of his possible future role as a lawyer, both in regard to his notion about relevant sources of scholarly evaluation of the legal system and in regard to his idea about the lawyer's role in social change.<sup>30</sup> But criticism of the execution should not be taken for criticism of the basic aim of Horowitz and Karst. Their aim is laudable and, perhaps, achievable. Expansion of the legal process notes, inclusion of fewer cases<sup>31</sup> and more social science material, and less emphasis on the historical development of the demise of *de jure*

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30. But these roles are in many instances merely follow-up procedures. When pertinent litigation is successful or when social legislation passes, the events are more often *evidence* of social change rather than the stimulus behind it. The function of lawyers as recorders of social change is important, of course. But lawyers also have a causitive function, perhaps better seen by studying examples of lawyers counseling, negotiating, and exhorting clients and others.

31. Some currently included are fine teaching vehicles and would provide a sound foundation for expanded notes. See *United States v. Biloxi Municipal School Dist.*, 219 F. Supp. 691 (S.D. Miss. 1963); *United States v. County School Board*, 221 F. Supp. 93 (E.D. Va. 1963). Both cases, dealing with the meaning of 20 U.S.C. §§ 631 *et seq.* (1958), reach opposite conclusions, although both district judges rely on the "plain meaning" of the statute. HOROWITZ & KARST 326-35, 338-39.

segregation would produce an improved second edition, one which might come closer to fulfilling the promise of the book's introduction.

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