Vanderbilt Law Review

Volume 20
Issue 1 *Issue 1 - December 1966*

Article 8

12-1966

Book Reviews

Henry N. Wieman

Jerome Hall

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Law and Society Commons, Legal Ethics and Professional Responsibility Commons, and the Tax Law Commons

Recommended Citation

Henry N. Wieman and Jerome Hall, Book Reviews, 20 *Vanderbilt Law Review* 231 (1966)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol20/iss1/8

This Book Review is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

BOOK REVIEWS

Morality and the Law. By Samuel E. Stumpf. Nashville: Vanderbilt University Press, 1966. Pp. xiv, 247. $5.00.

The problem discussed by Professor Stumpf in his book *Morality and the Law* can be summarized by these questions: Do we have two kinds of prescribed conduct, one prescribed by morality independent of the government, the other prescribed by government independent of morality? Or is prescription by government necessarily moral because government is necessarily moral by reason of being the government? If not, under what conditions, if any, does prescription by government become a moral prescription? Under what conditions, if any, is government, by law, a matter of expedience, not to be confused with morality?

Mr. Stumpf analyzes rather extensively the nature of law and government in dealing with this problem. He does not analyze the nature of morality to any comparable degree. He mentions various interpretations of morality, such as the private moral judgment of the individual, the moral consensus of the community, the will of God, natural law and the moral judgment of those who enact the law. But he makes no attempt to determine which of these, if any, provide the standard for judging the morality of law.

It would seem that an adequate treatment of the problem requires some clarification concerning the moral standard by which law is judged to be moral or immoral or amoral. Perhaps Mr. Stumpf did not discuss this side of the problem because of the confusion and disagreement, almost the anarchy, prevailing in the field of moral standards. This comment is made not necessarily in criticism of Mr. Stumpf's work but to indicate what the present writer will attempt to do. He will try to treat this neglected side of the problem.

As Mr. Stumpf indicates, the court seeks, in great part, to exclude private moral judgments concerning what the law prescribes. Conduct is penalized if it deviates from the law's requirements, regardless of what one may think of the morality or immorality of such conduct when judged by any other standard. This is necessary because the law is designed to establish uniformity of conduct so that people can know what is legally expected of them and similarly what they can expect of others. If each individual were guided by his private judgment of moral right and wrong, anarchy would prevail, and this would be true even if everyone chose to do what he thought was morally right. This is because of the diversity and limited perspective of pri-

vate moral judgments, individual ignorance of the intentions and interests of other parties concerned, and the many other propensities which distort moral judgment.

Even when morality is identified with the moral consensus of the community, the law cannot yield in many cases. Today, this is seen most vividly in the conflicts between the moral consensus of some white communities and some Negro communities. The law cannot yield to either of these opposing moral demands if it is to maintain social order. The law can, of course, be changed. But so long as it stands, it cannot be subject to the moral judgment of diverse communities when these communities disagree within its jurisdiction. The law must stand above these conflicting moral judgments.

All this shows why morality, in many of its forms, must be excluded from law. Yet whatever profoundly determines the values of human existence must be subject to moral judgment, and with advancing civilizations the law increasingly shapes the course of human conduct. Therefore law must be subject to moral judgment. But by what moral standard can we judge the rightness and wrongness of any proposed or established law?

To place this problem in perspective, one must examine three features of our civilization which show how government by law increasingly determines the values of human existence.

The first of these is the interdependence of human activities due to specialization and diversity. Increasingly, what any one individual, or organization of individuals, does becomes only a fragmentary part of the completed activity. That is to say, what any individual or organization does would be worthless effort if it were not connected with other activities leading to the same ultimate goal. Transportation, for example, would not be worth doing if it did not connect some initial activity with some destination. Yet millions of people are engaged in public transportation without knowledge or thought about why people travel, or where they are going beyond the transport terminal, or why they load their goods, or where goods are sent after they are deposited by truck or ship or plane. This is only one small example of the fragmentation of all human activities into units of activity performed by different individuals and organizations without personal concern beyond the fragment that happens to be their particular responsibility.

For this reason, law imposed by government must regulate these activities so that they will connect with one another in such a way as to attain the ultimate ends sought by the participant individuals. This applies to the banker, the broker, the merchant, the farmer, and the teacher in the classroom. In time it will even apply to such intimate personal matters as the number of children that parents may

have, a necessary step to prevent over-population. Increasing interdependence illustrates how the development of our civilization necessitates the continual extension of law into all the activities of life. This required connection of mutual support between a vast network of specialized activities cannot be maintained without the uniformity of conduct imposed by law, whereby the required connections are made automatically beyond the perspective of the moral judgment of the individuals who carry on these fragmented activities.

The second feature of modern civilization, making it necessary to extend the control of law is the increasing span of time and space across which the mutual support of diverse and specialized activities must be maintained. People remote from one another in time and space are increasingly dependent upon each other's activities to attain their objectives, whether it be to get food, to assure health, to prevent war, to eliminate air and water pollution, to encourage scientific research, education, safety and care of children, or to further any other important human good. The more remote these activities are in time and space, the more incompetent become the private moral judgments of individuals and groups to sustain the interconnection of these remote activities whereby they yield the values sought. Hence, there is a need to maintain mutual support automatically through the uniformity imposed by law, undisturbed by local moral judgment which cannot know what these remote connections should be.

The third feature of our civilization, forcing us to extend control by law, is the enormous increase in speed and power with which human activities are being conducted. The power and speed of the automobile is an example, requiring regulation by law of the operation of automobiles with a precision and detail far beyond that required when men could only travel on foot or on horseback. Almost everything we do is equipped with more power and speed than in the past, making our activities dangerously destructive unless subject to legal regulation. The moral judgment of the individual cannot appreciate the consequences of his use of power unless his judgment is supplemented by over-all regulations connecting his activities with many others of which he can have no knowledge at the time and place of his operations. These regulations are provided by law.

Thus, private moral judgment and consensus of the local community is the kind of morality that must be excluded from the law. This is the negative side of the problem. To move in a positive direction, seeking the kind of morality that should be included in the law, let us look at the way law is made, the ends in view and the over-all design.

Laws are often made to serve special interests in opposition to the interests of others. In this sense law is immoral unless there is some

way to demonstrate that these special interests are moral and the opposing interests are immoral. Such demonstration is often lacking. To a certain degree in every society, a dominant group determines what the laws shall be, and this group inevitably views the demands of justice from its own perspective. Laws shaped under this limited perspective are likely to embody blinding self-interest, prejudice and limited knowledge and insensitivity to the interests of others.

Democracy is designed to correct these evils, but even in the most democratic society the great mass of people cannot express their needs with the fullness and effectiveness of the dominant minority. Hence, the law often serves the few to the exclusion of the needs of the many, except when deprivation of the demands of the many impairs the fortunes of the few. For example, in a modern industrial economy the few can have great wealth only if the many have wealth sufficient to buy the goods produced. The fortunes of the few would be impaired if it were otherwise. Thus, we have a more just distribution of the wealth in our economy than is present in many other economies.

A given law is often a compromise between groups competing for power without regard for any other interests save their own. In a democracy, the great majority cannot be entirely ignored; but they can be misled, deceived and psychologically conditioned to favor what the dominant group wishes to attain, even when this is opposed to the needs of that majority. We can see this in other societies; but we cannot see it in our own when we are the ones who are misled, deceived and phychologically conditioned.

It is notorious that men are addicted to confusing moral righteousness with their own special interests, no matter how unjust these may be; and this propensity is most pronounced when these special interests are shared by a dominant minority bound together by shared views. Criticism of this "ruling group" lacks the prestige required to win acceptance or be considered competent. Criticism within such a group is also silenced because its members are intimately dependent upon one another to sustain the prestige, power, privilege and moral standards necessary to maintain self-respect.

If we ask, whence comes the morality embodied in the law, the answer often must be that it comes from the moral standards of the ruling group, because this group is the chief agency in determining what the law shall be. Can we find a source from which to derive the morality to be embodied in the law of governments which will be more just than the morality derived from the ruling group or from any group or part of humanity opposed to others? The claim is made here that a creativity operates throughout the whole of human existence which progressively creates the valuing consciousness of each

individual in community with others to the measure that required conditions are present. Many conditions obstruct, divert and distort the working of this creativity. But to the measure that conditions are favorable, it operates to create a community of mutual support and mutual understanding between individual participants. In its most effective form, it is limited to relatively small groups, but, to the measure that its demands are implemented by laws and other conditions, it can operate between groups, peoples and cultures remote in time and space and infinitely numerous.

If the law is to be effective in sustaining the values of human existence, it must derive its standards from this creativity. It must seek to impose those regulations which will provide social and other conditions most favorable to the operation of this creativity, which is a kind of interchange between individuals and peoples.

This interchange is creative because it creates four events in close interdependence. The first is the sensitive response by one individual to the values motivating other persons and peoples. The second is the integration of these new values into one's own value system. Undoubtedly, there will be some modification to fit the individuality of the recipient; but such integration will expand the range of values one can experience and will create a better community of understanding between persons. It is possible that the person sensing the values motivating another person may consider something to be evil which that other person held to be good. Even so, knowledge of what is good and evil in the minds of other people is, for me, a positive value, provided my judgment of good and evil is valid. Furthermore, if I recognize a value to be good for another person but not good for me, this also is a positive value. Only with understanding of one another can there be communication, cooperation, friendship, goodwill and love.

The standard by which a person judges the values of another to be morally right or wrong is crucial. If the moral standard is derived from the demands of creative interchange, then whatever is judged to be morally right is that which promotes this creativity, and the morally wrong is that which obstructs it. This resulting moral standard will be better stated after the creativity has been more fully described.

The third event created by this kind of interaction has already been indicated. It is an expansion of the valuing consciousness in community with others. The fourth event is also obvious. It is a widening and deepening of the community of mutual understanding between individuals and peoples who engage in this kind of creative interaction with one another. A further feature of this creativity should be noted. It creates human history when "history" is defined

as the transmission to the future of values acquired in the past, through a sequence of generations. This creativity also creates the universe when "universe" refers to the totality of all that is known at any one time.

Even the most immediate biological satisfactions take on whatever value they can have for the individual by his evaluation of them; and this evaluation is determined by his valuing consciousness which, in turn, depends upon the way this valuing consciousness has developed. Since creative interaction creates progressively from infancy all the values the individual can ever experience in relations of mutual support with others, it provides the standard for judging better and worse and right and wrong. Evil and what is morally wrong is not merely what I happen to dislike for myself, but anything which obstructs or corrupts creative interaction. Good and what is morally right is what sustains and promotes this creativity, whether or not I happen to like it for myself.

There are many obstructions and corruptions encountered by this creative interchange as it operates throughout human existence. One of these is the mistaken interpretations of the value motivating the activity of another person. Often malicious, this misinterpretation may be due to prejudice, hate, fear, arrogance, slavish devotion, or ideological conflict. Yet despite this, we know that when conditions are favorable individuals do engage in the kind of interchange whereby they apprehend, more or less correctly, the values motivating others and integrate these, positively or negatively, into the system motivating their own activities. This we know because, if it did not occur, it would be impossible for human existence to display the far-ranging cooperation, communication and mutual understanding which sustain civilization. Furthermore, if this apprehension of the values of others did not occur, and if their integration into the valuing consciousness of the beholder did not result, it would be impossible for an individual to acquire the values of the culture into which he is born. Similarly, it would not be possible to have what we call education.

A morality founded on the demands of creative interchange is sufficiently objective, universal and basic to all human existence to prescribe justly the laws to be enacted and how they should be interpreted and enforced. Since law increasingly determines how human life is lived, law must assume a form prescribed by this kind of morality if human life is to be saved from self-destruction, and is to attain the values which make it worth living. Further, laws made to promote creative interchange provide maximum freedom when freedom is measured by the range of diverse values accessible to choice

and by the range of mutual understanding and social support which one can muster when making a decision.

Every law should be moral in the sense of providing those social and other conditions most favorable to the effective operation of that creative interaction between people which expands the valuing consciousness of the individual in community with others. Knowledge of these conditions should be sought by all the sciences, and this kind of research should be required by law. Only when law assumes this twofold responsibility—namely, to acquire the knowledge needed, and to enact and revise the laws required—can we have the conditions most favorable for the creativity which expands the valuing consciousness of individuals in community with one another, thereby bringing freedom and all other values to the maximum for each.

HENRY NELSON WIEMAN*

*Professor of Philosophy, Retired, Southern Illinois University.

MORALITY AND THE LAW. By Samuel E. Stumpf. Nashville: Vanderbilt University Press, 196. Pp. xiv, 247. $5.00.

Some of the most important advances in jurisprudence since the last world war are the result of an increased interest among philosophers in law. Prominent among such philosophers is the author of the book here reviewed. As far as students and general readers are concerned, Professor Stumpf's book is a valuable supplement to his earlier articles on difficult jurisprudential problems; for professional legal philosophers, however, the book is likely to be problematic.

Stumpf addresses himself to the important issue of natural law versus legal positivism. This he formulates as follows: "The fundamental question is whether the concept of law must include the element of morality if we are to describe adequately and correctly the phenomenon of law, or whether the concept of law is sufficiently defined as the regime of official power or coercive force. What, in short, is the relation between law and morality?"[1]

It is directly apparent that the last sentence in the above quotation does not summarize, nor is it the equivalent of, the preceding sentence. Surely, to state that "the concept of law must include the element of morality" is not to state that law and morality are related or even that they are closely related. Because this difficulty permeates

1. STUMPF, MORALITY AND THE LAW xii (1966).

the book, it is impossible for the reader to decide whether Professor Stumpf is a natural law philosopher or a legal positivist, or whether he is trying to present a new legal philosophy.

The first sentence in the above quotation states the classical natural law position in St. Augustine's terms, "an unjust law is not a law." If one applies this criterion to the book, especially the last chapter, he must conclude that Professor Stumpf is not a natural law philosopher. For example, he states that

> The separation of law and morality is not solely a result of the stringent process of definition. This separation is mandatory if we are to preserve both the clarity of the concept of law, on the one hand, and the purity of moral obligations on the other.[2]
>
> The law is *made*, whereas a rule of morality is *discovered*.[3]
>
> It is certainly not the case that every law is the extension of morality. Law in the making often reflects the weakness, selfishness, and predatoriness of which men are capable. There is no guarantee that the law will be made in accordance with man's moral insights or the requirements of his moral nature.[4]
>
> Every legal system is made up, on the one hand, of laws which reflect clear moral imperatives and on the other hand of laws which clearly cannot be justified morally.[5]
>
> We constantly speak of good laws and bad laws. . . .[6]

There is nothing in the above statements which would draw criticism from legal positivists; in fact, they might be in full agreement with these statements. The reader may well infer, therefore, that Professor Stumpf adheres to legal positivism.

On the other hand, Professor Stumpf repeatedly emphasizes the close relationship of law and morality—but this suggests the central tenet of natural law. He does not attempt to reconcile these apparent inconsistencies. Rather, his main purpose seems to be that of bringing a fresh approach to the perennial natural law versus legal positivism polemic. Unfortunately, the argument, as presented in this book, leaves too many problems unexamined, too many loose ends and perplexities which one can only hope will be resolved in Professor Stumpf's future publications.

The first chapter is concerned with the theory that "law is what the courts do in fact"—the American Realists' theory, inspired by Holmes' famous epigram. The usual criticism of this theory is that it is fatally defective in omitting the normativity of law. But this ignores the Realists' intention to build a science of law as well as the obvious

2. *Id.* at 219.
3. *Id.* at 235.
4. *Id.* at 238.
5. *Id.* at 239.
6. *Ibid.*

fact that Llewellyn, Frank and Arnold understood the normativity of legal rules at least as well as their current critics. Professor Stumpf takes a different, sounder direction for criticizing legal realism, saying in effect, "let us take the Realists at their word and see what it is that the courts are actually doing." He then points out that courts function to solve social and political problems, a function which necessarily involves moral standards and goals. Hence custom, social data, philosophies and ideals inevitably influence the judges, sometimes more effectively than legal precedents. The conclusion can thus be drawn that the connection between law and morality is a close one. But Professor Stumpf relies on the United States Supreme Court to support his thesis, and thus raises questions which a legal positivist might challenge. Suppose he had instead selected Nazi or Communist courts which have functioned, or do function, not to find the right solution to problems, but to carry out the dictator's or the party's program. What, then, of law and morality? This chapter also falls short of the level of discussion maintained among constitutional lawyers interested in the divergent philosophies of Supreme Court Justices with reference to the judicial function.

The more pertinent question concerns the fact that legal positivists do not deny that all sorts of ideas, including those concerning morality, influence legislators and judges and, therefore, the content of positive laws. The positivists do insist, however, that law and morality are separate—that laws need not be morally valid. The author seems to take this same position. But what then is one to make of his insistence on the dependence of law on morality? If his position is that some laws are unjust or immoral and that sound or good laws are just or morally valid, his theory may be compatible with legal positivism, but it does not meet the principal thrust of natural law philosophy.

Chapter two discusses the Soviet conception of law and, more generally, the theory that "law is the will of the economically dominant class." There is appropriate criticism of the Marxist thesis of historical materialism, *i.e.*, that economic factors are decisive and that law is only a "superstructure." Professor Stumpf's research seems to have been confined to publications a decade or more old; neither the 1958 legislation purporting to restore the principle of legality in criminal law nor the recent jurisprudential literature is discussed.

More serious difficulties concern the author's failure to include a critical discussion of the relevant ethics. This failure is aggravated by his vagueness regarding the claim that Soviet law is morally valid. Professor Stumpf writes, "But just as it was not possible to eliminate law from Soviet society, so also it is not possible to reinstate law without at the same time providing it with moral content."[7] He does

7. *Id.* at 76.

not state what he means by "moral content," but he continues, "However incorrect this moral system may be, it does represent the indispensible element in the law."[8] Since this is far from natural law theory, the consequent puzzle about Professor Stumpf's moral philosophy and his jurisprudence is only increased. If the "moral system" is incorrect, what does the author mean when he says that it nevertheless represents "the indispensible element in law"? He says, "For the Soviets, the law has moral ends, and the obedience to the law becomes in itself a moral act." And he adds, "Ideology has now become not only respectable but has assumed the ethical characteristic of 'ought.'"[9] These comments raise many questions which a reader might reasonably expect a moral philosopher to elucidate. Professor Stumpf's failure in this regard, together with other of his statements, indicates that he confuses morality with ideology and mores and that he has not grasped the thesis of natural law theory which postulates a true and objective, or at least, a rationally justifiable, morality.

The third chapter, which deals with the imperative theory of law, is easily the best chapter in the book. Of special value is its critical discussion of Kelsen and its demonstration that legal positivists, despite their avowal, cannot escape some use of morality in order to understand law. Again, however, the central ambiguity of the book is revealed. Professor Stumpf first points to the separation of law and morality, which Gray and other legal positivists extolled as Austin's greatest achievement; and then he states his opposition to that separation. Presumably, he is now on the natural law wagon, and one would expect him to criticize legal positivism. Instead, he writes, "But after the law has been made, it is still necessary to consider whether it is morally justifiable."[10] "[L]aws do not in every instance have a moral basis."[11] He also repeats the current positivist thesis that, "If we make such a close identification between law and morals, . . . we run into the danger of losing the basis for a moral criticism of laws . . . ."[12]

I believe this argument is invalid for several reasons, including the rather obvious one that it assumes that what is law for the positivist is also law for the natural lawyer, but an enactment ("command of the sovereign") must meet the test of moral validity *before* it is recognized as law by natural lawyers. This argument also appears to steal the thunder of natural law philosopry while remaining in the

8. *Id.* at 78.
9. *Id.* at 81.
10. *Id.* at 111.
11. *Id.* at 237.
12. *Id.* at 93.

popular, sophisticated camp of legal positivism. The need for a new approach (or if one prefers, for the revival of the distinctive philosophic impulse to interrelate and synthesize various segments of experience) is evident in current jurisprudence. Professor Stumpf often reveals his sensitivity to that need. For example, he states, "There are . . . areas of agreement between legal positivism and natural law, for positivists recognize that moral ideals have influenced the development of law, and advocates of natural law recognize the roles of the sovereign, command, and sanction."[13] Although the problem is recognized, the book does not offer any solution of it.

In the fourth chapter the author argues that none of the theories he has been discussing—*i.e.*, that law is what courts do, that it represents the ideology of the economically dominant class, and that it is merely the command of the sovereign—fits international law. Unfortunately, his argument is vitiated by the assumption that international law is positive law. This again is an issue to be faced, a problem to be analyzed; it is not something which can be settled by assumption, preference or linguistic usage.

In chapter five, after criticizing the classical theory of natural law, Professor Stumpf concerns himself with what he thinks is the most persuasive case for natural law theory—a "minimum argument" for it. He selects Hobbes as the philosopher who best exemplifies this position: "The striking feature of Hobbes' theory of natural law is his insistence that law and morality have the same content and that the obligatory force of law is to be found in morality."[14] Apparently, he has adopted the Taylor-Warrender interpretation of Hobbes. There are other interpretations of Hobbes, however, which would seem to be much more cogent. According to Mintz and Watkins, for example, Hobbes is far from being a natural law philosopher; in fact, he is the perfect model of legal positivism. Professor Stumpf writes as though Hobbes' use of "morality," "moral," "right," "good" and "obligation" is that of traditional deontological ethics. Yet Mintz and Watkins maintain that, for Hobbes, those terms only meant the expediency indicated by reason in the service of the instinct of self-preservation. The author does not face the problems raised by these diverse interpretations.

Another principal thesis of natural law philosophy concerns human nature. Although the author discusses Hobbes' views at some length, refers to a theological view of man, and gives other indications of his awareness of the importance of this subject, he presents no critical discussion of it.

The remaining two chapters examine some differences or alleged

13. *Id.* at 186.
14. *Id.* at 189.

differences between law and morals, and bring the book to the conclusion urged throughout—that law and morality are often closely "related." They do not resolve the ambiguities in the current confrontation of self-styled legal positivists and natural law philosophers.

The critical notes in this review are not to be taken as a lack of appreciation of Professor Stumpf's contribution to legal philosophy. The problems he has formulated, even though not solved, focus attention on some of the shortcomings in the recurrent polemics on natural law and legal positivism. The progress of jurisprudence in this important area requires moral philosophers to study the position of "legal positivists" who claim to be interested in the morality of positive law. This study should include an examination of the underlying metaphysical and epistemological bases of natural law philosophy and of the relevance of deontological and teleological eithics as well as that of "cognitivism." Current moral philosophy has much to contribute to the solution of these problems and thus to the progress of jurisprudence. Despite the problematic character of this book, Professor Stumpf has shown great sensitivity to current jurisprudential difficulties. One hopes he will turn his attention to some of the ethical problems suggested here, and relate his analysis of them to the philosophy of law.

JEROME HALL*

*Distinguished Service Professor of Law, Indiana University.

THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS. By Richard B. Covey. Indianapolis: The Bobbs-Merrill Company, Inc., 1966. Pp. xvii, 115.

The estate tax marital deduction[1] allowed by the Internal Revenue Code of 1954 is indeed a complex subject. Even more complex is the choice, upon comparative analysis, of an appropriate or desirable formula clause in planning for the estate tax marital deduction. This requires the planner and his client to work carefully through three relevant considerations, *i.e.*, the estate tax consequences, the income tax implications, and the probate problems of fiduciary administration. This book is another, and perhaps the most penetrative, of several recent efforts[2] since the announcement of Revenue Procedure 64-19

1. INT. REV. CODE OF 1954, § 2056.

2. For other exeellent discussions, see Polasky, *Marital Deduction Formula Clauses in Estate Planning—Estate and Income Tax Considerations,* 63 MICH. L. REV. 809 (1965); Stevens, *How to Draft Marital Deduction Formula Clauses Under New Rev. Proc. 64-19,* 20 J. TAXATION 352 (1964); *Symposium—Federal Taxation, Current Marital Deduction Problems: An Analysis In Depth,* 16 W.RES.L. REV. 237-305 (1965).

on March 19, 1964, to provide an in-depth, comparative analysis of these three relevant considerations with respect to each of the principal types of marital deduction formula clauses.

The purpose of formula clauses is to assure (1) that the maximum marital deduction will be obtained for the owner's estate regardless of value changes and other developments concerning both his probate and non-probate assets subsequent to the planning of his estate, and (2) to prevent, so far as practicable, the surviving spouse's estate from being over-funded upon her [or his] subsequent death, so that the same assets will not be taxed in the estates of both spouses. Because of their reasonable assurance in this regard, formula clauses have a broad appeal to, and acceptance by, both clients and lawyers notwithstanding some dire predictions in the earlier years.[3] The author of this book defends the use of formula clauses with persuasive answers to stated criticisms.[4] In the preface he states that while he is convinced that formula clauses are used more frequently than non-formula provisions in estates of 200,000 dollars or more, he is concerned that the majority of lawyers using formula provisions do not have a "satisfactory understanding of their operation."[5]

There are two basic types of formula provisions. One of these may be called the true pecuniary formula because it gives to the surviving spouse a specific dollar amount ascertained by the formula. Like a gift of a savings account, this amount does not fluctuate in value during the executorial period between the date of death and the date when the estate is finally distributed to the legatees, which is frequently two or more years after the date of death. The other basic formula provides for a fractional share of the residue. This gives to the surviving spouse a fractional interest or percentage-ownership interest in the assets comprising the defined "residue" of the estate remaining after the payment of claims, expenses of administration, general legacies, and, in the case of the "true residue fractional share," after the payment of death taxes. Since the surviving spouse is a co-owner of assets under the fractional share gift, as distinguished from being the owner of a right to a specific dollar amount under the pecuniary gift, it is fundamental to understand that the surviving spouse "rides with the market" with respect to fluctuations in value during the executorial period. The client should be allowed to make a basic choice between these two types of gifts because they are fundamentally different. If a "bear" market develops during the

3. TRACHTMAN, ESTATE PLANNING 38 (1965); Durand, *Marital Deduction Litigation*, in 101 TRUSTS & ESTATES 8, at 76 (1962); Trachtman, *Marital Deduction, Leaping In the Dark*, in 93 TRUSTS & ESTATES 922 (1954).

4. COVEY, THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS 98-101 (1966) [hereinafter cited as COVEY].

5. *Id.* at v.

executorial period, the surviving spouse will be protected by a pecuniary gift, but will not be allowed to share in the appreciation of a "bull" market.

Unfortunately, the author, while introducing these two basic types of formulas at the outset,[6] waits until the middle of his book[7] before presenting a comparative statement of the five principal formulas in use today. These five principal types of formula gifts may be described as follows:

1. *The true pecuniary formula.*—Distribution in satisfaction of this gift will consist of cash or assets in kind at their date of distribution values.

2. *The minimum worth pecuniary.*—This is a tax value hybrid which allows the gift of a pecuniary amount to be satisfied by the distribution of assets in kind to be valued "at their income tax bases or their date of distribution values, whichever are lower."[8] Note that this requires that each asset distributed be valued at the lower of the two values specified. It is more restrictive than Revenue Procedure 64-19, section 2.02, which requires as one alternative limitation to the tax value hybrids that the fiduciary must be obligated to distribute assets "having an aggregate fair market value" at distribution amounting to no less than the pecuniary gift.[9]

3. *The ratable sharing pecuniary.*—This is a somewhat more popular "tax value" hybrid[10] which allows a pecuniary gift to be satisfied by the distribution of assets in kind at their estate tax values provided that the fiduciary is obligated to distribute in satisfaction thereof assets whose date of distribution value is fairly representative of appreciation or depreciation during the executorial period.

4. *The true residue fractional shares.*—A gift of a fractional or percentage share of the residue of the decedent's estate in which "residue" is defined in the instrument as that group of assets remaining in the estate after the payment of debts, expenses of administration, special and general legacies, and death taxes.

5. *The pre-tax residue fractional share.*—A gift of a fractional or percentage share of the residue of the decedent's estate in which "residue" is defined in the instrument as those assets remaining in the estate after making all the payments required for determining the residue except death taxes.

6. *Id.* at 2.

7. *Id.* at 53.

8. *Ibid.* See also *id.* at 48-53 for the detailed explanation of this hybrid.

9. See Polasky, *supra* note 2, at 833-35. The clause is criticized in Dane, *Marital Deduction Questions*, in 103 TRUSTS & ESTATES 112, 114 (1964).

10. Perhaps its best known advocate is William K. Stevens, an attorney and trust officer who is vice president of the First National Bank of Chicago. See Stevens, *supra* note 2, at 354-55 for his comparative analysis of true pecuniary formulas, tax value formulas, and fractional share formulas, with suggested forms.

With respect to the two fractional share types, the author states that "the true residue provision is to be preferred . . . ."[11] With respect to the ratable sharing hybrid pecuniary, he feels that this "is not really a legacy but rather a fractional share provision and should be considered only when the decedent desires the widow to share in appreciation or depreciation and yet does not want a specific fraction of each asset allocated to the marital fund."[12] In making the remaining choice among the true pecuniary formula, the true residue fractional share, and the minimum worth hybrid pecuniary, the author states that if the client has no real preference as between a fixed dollar amount and a fractional share, a choice should be based upon secondary objectives—"minimizing taxes in the estates of both spouses and administrative convenience."[13] With respect to the administrative convenience of the fiduciary, it is said that either of the pecuniary legacies is to be preferred because they "avoid the problems of allocating income and gains and losses present with a fractional share of residue provision."[14] At an earlier point,[15] the author makes clear that he would essentially equate the true pecuniary with his "minimum worth" legacy by adding to the requirement of the latter (*i.e.*, that each asset distributed in kind be valued either at the lower of its income tax bases or at the date of distribution values) the requirement that any such distribution in kind be made with assets having a date of distribution value which does not exceed, or exceeds by the smallest amount possible, their income tax basis. Having equated the two pecuniary formulas, and thus reduced the choice to true pecuniary or true residue fraction, he concludes that "on balance, the legacy provision is preferable in attempting to minimize the estate taxes upon the widow's death. It is more satisfactory when the estate has increased in value during the period of administration by avoiding a distribution of any part of the increase in satisfaction of the legacy and will, if a distribution is made in substantial satisfaction thereof shortly after the first anniversary of the decedent's death, for the most part achieve the same result as a fractional share of residue provision when the estate has decreased in value during this period."[16]

The author also prefers the pecuniary provision because of the availability of the election given the executor by Internal Revenue

11. COVEY 53. See also *id.* at 32, where it is said, "In conclusion, I can see no useful purpose to be served by the use of a pre-tax provision rather than a true residue provision. As indicated, it does not simplify, but rather complicates, the administration of the estate. Furthermore, it does not hasten the determination of the fraction because this determination must await the closing of the estate tax audit."

12. *Id.* at 53-54.

13. *Id.* at 54.

14. *Ibid.*

15. *Id.* at 50-51.

16. *Id.* at 57.

Code section 2032 to value the decedent's gross estate as of the alternate date one year after the date of death.[17] It is not clear why this is an advantage over the true residue fractional share, and an earlier reference to an ambiguity under which the residuary "might be determined on the basis of date of death values"[18] is not helpful. It is interesting, however, to note the suggestions (1) that the pecuniary legacy should be satisfied to the extent possible shortly after the expiration of the one-year period, and (2) that prudence would dictate that the fiduciary take prompt action immediately after the decedent's death to produce the cash in the estimated amount of the legacy.[19] Tris should of course negate the likelihood of any substantial gain or loss to be realized by the executor, and the distribution of the cash as soon as practicable puts the responsibility of investment management of the funds on the surviving spouse or her trustee.

The preferences of the author for the true pecuniary formula may be compared to the preference of Stevens for the ratable sharing hybrid,[20] which has also been adopted by some state legislatures since 1964[21] because of its appeal to probate equity. Furthermore, it may be compared to the apparent preference of Polasky for a somewhat broader type of minimum value hybrid, or the true pecuniary formula.[22]

The functional problem with respect to the pecuniary formula is an income tax problem, not an estate tax problem. If the assets to be sold or distributed in satisfaction of a pecuniary gift are marketable securities which are valued at date of death, and their value increases during the executorial period, a capital gain will be realized when the gift is satisfied with the appreciated property at its date of distribution value. Suppose the gift is 100,000 dollars, that assets have increased in value, and that the executor satisfied the gift by sale or distribution in kind of assets which were valued at 80,000 dollars at date of death, but worth 100,000 dollars at distribtuion. There would be a 20,000 dollars capital gain realized by the executor.[23] This income tax can often be minimized by the selection of some assets which have gained in value and some that have decreased in value, so that

17. *Id.* at 55.
18. *Id.* at 5.
19. *Id.* at 56.
20. See Stevens, *supra* note 2.
21. See, *e.g.*, TENN. CODE ANN. § 30-1317 (Supp. 1966), enacted in 1965, providing that whenever an executor is authorized to satisfy a pecuniary bequest in kind with assets at their value for federal estate tax purposes, unless the instrument provides otherwise, the fiduciary must distribute assets which are fairly representative of appreciation and depreciation in value of all property available for distribution.
22. See Polasky, *supra* note 2, at 830-35, 882-85.
23. Kenan v. Commissioner, 114 F.2d 217, 219 (2d Cir. 1940); Suisman v. Eaton, 83 F.2d 1019 (2d Cir. 1936).

the gains and losses tend to equalize. But in a long bull market, such as those of past years, it would be quite possible that there would be no assets with decreased values available for the satisfaction of the pecuniary gift. The purpose of the tax value hybrid formulas which allow a pecuniary gift to be satisfied by the distribution of estate assets in kind at their date of death (or income tax bases) rather than their date of distribution values is simply to avoid the income tax on the capital gains realized on the assets during the executorial period. The author prefers the true pecuniary rather than the tax value hybrid. He would apparently compensate for the potential tax on capital gains by selling the assets as near after the death of the decedent as is practicable, invest the proceeds in Treasury bills or other income-producing dollar investments during the executorial period, and satisfy the bequest with a distribution of cash plus earned income as near after the twelve month alternate valuation date in Code section 2032 as is possible. He feels that the ratable sharing tax value hybrid really converts a pecuniary gift into a type of fractional share, and this is no doubt true under Revenue Procedure 64-19. But this in itself is not a criticism of the hybrid. Indeed, as long as the alternatives, *true pecuniary, tax value hybrids,* and *true residue fractional shares,* are clearly understood, it seems that the client should be in a reasonable position to dictate the choice, the welfare of his surviving spouse being the primary value.

A substantial part of the first half of the book is given to new problems of fiduciary administration which are developing with respect to the allocation of estate income through marital deduction formula clauses. This may be both a plus and a minus with respect to the book—a plus in that other recent publications[24] have not discussed these interesting state law problems, and a minus because the author does not provide an adequate statement of facts, or explain with illustrations the probate problems that he obviously understands. In this complicated fiduciary accounting area, a simple illustration with numeral symbols can be most helpful. This becomes almost imperative when it is recognized that the author's preference for the pecuniary formulas over the fractional share formulas is supported only by the statement that they "avoid the problems of allocating income and gains and losses present with a fractional share of residue provision."[25] While the reader suspects that the author can demonstrate this to be true, the reader is left with the feeling that he will have to work it out on his own, and that the author has not done it adequately.

Probate law has traditionally allowed the donee of a pecuniary gift

24. See note 2 *supra.*
25. COVEY 54.

no income on it during the first year after death; thereafter "interest"[23] is allowed to the legatee until the gift is satisfied. Gifts in trust, however, are entitled to income from the date of death. For an easy example, assume an adjusted gross estate of 1,000,000 dollars which produced 40,000 dollars of estate income during the first year of administration. At the end of the first year, the executor paid federal and state death taxes in the total sum of 250,000 dollars, leaving 750,000 dollars in the residue. During the second year, while the executor waited for audits on his tax returns and releases from personal liability for the taxes, the residue produced an income of 30,000 dollars. Assume a formula marital deduction trust for W, a direction that taxes are to be paid from the non-marital deduction trust, and that W is not an income beneficiary of the non-marital deduction trust; also, assume that W is entitled to a distribution of estate assets in the amount of 500,000 dollars because there have been no other assets passing to her. How shall the 70,000 dollars of estate income held by the executor at end of the second year be allocated between the marital deduction trust and the non-marital deduction trust? Does it really make a difference in probate equity whether the gift is a pecuniary formula or a fractional share formula?

During the first year of the executorial period W's marital deduction trust was the equitable owner of 50 per cent of the assets held by the executor, and should be entitled to 50 per cent of the income received by the executor. During the second year, however, W's trust was the equitable owner of 50/75ths or 2/3rds of the assets held by the executor and should accordingly receive that amount of the estate income received by the estate. It would thus appear that W's trust is entitled to 20,000 dollars from the first year, less taxes, and 20,000 dollars from the second year, less taxes. To give W's trust only 50 per cent of the 30,000 dollars estate income during the second year, when her trust comprised 2/3rds of the assets held by the executor (the gross share method or *Shubert* rule[27]), seems quite unfair. The administrative inconvenience, if it can be called an inconvenience, of changing the fraction or percentage of her interest in the estate assets from 1/2 to 2/3rds after the payment of the death taxes does not justify such an unfairness, particularly when it is remembered that fiduciaries are professionals, or usually have professional assis-

26. Query as to whether this will be treated as "interest" paid by the estate for federal income tax purposes. If so, it would reduce distributable net income. It may, however, be regarded as a right to estate income after one year, to be taxed to the legatee only if distributed. See COVEY 37. *Compare* Davidson v. United States, 149 F. Supp. 208 (Ct. Cl. 1957), *with* United States v. Folckemer, 307 F.2d 171 (5th Cir. 1962), *and* Wolf v. Commissioner, 84 F.2d 390 (3d Cir. 1936).

27. See COVEY 22 in particular, and 13-25 in general.

tance. Likewise, to allocate 2/3rds of the 40,000 dollars earned in the first year to W's trust because that is her "net share"[28] is obviously disproportionate and would not seem to be justified by the administrative convenience of a capable fiduciary. There would seem to be no worthwhile point in attempting an intelligent choice between either the "gross share rule" and the "net share rule" when the purpose is to choose only one fraction for the entire executorial period. In fact W's share has represented two different fractions of the estate assets—a one-half interest during the first year and a two-thirds interest during the second year. While partial distributions will require an adjustment in the fractional interests owned in the remaining estate assets, such adjustments would seem to be among the easier chores of probate and tax administration performed by a competent fiduciary.

It would have been helpful if the author had provided an illustration such as that above in his somewhat abstract discussion of this evolving probate problem. The author apparently feels that a similar problem exists with respect to the allocation of capital gains realized during the executorial period. Since W's trust owned a one-half interest in estate assets during the first year, it would seem that one-half of the capital gains realized during the first year would automatically become allocable to W's trust, but that two-thirds of the gains realized in the second year would be allocated to her trust. This would seem to be an automatic result because capital gains have traditionally been allocable to corpus and accounted for as such. While there have been no cases on the allocation by the executor of capital gains and losses between the marital and non-marital interests, the *Meerbaum*[29] case supports the above allocation by analogy. The author feels that the problem deserves special language in the will.[30]

It will require a considerable amount of professional accomplishment in fiduciary administration, the federal estate tax marital deduction, and the income taxation of estates and trusts for this book to be read meaningfully. Even then it will not read easily. But after an intensive reading this reader feels that it is indeed a penetrating analysis of a very important subject—the choice of a marital deduction formula clause. Appreciation is also expressed for a better basic understanding of the functional problems in both tax and probate law, and this is true regardless of whether the reader agrees with the preferences expressed by the author. After all, what is needed is not

28. See *id.* at 22. The paragraph beginning at the bottom of p. 22 and continuing on p. 23 is a typical example of a difficult and frustrating statement in this book. Precisely what does it say?

29. N.Y.L.J., Sept. 29, 1961, at 14; cited in COVEY at 26.

30. COVEY 28.

for the lawyer to have a preference, but rather for the lawyer to be able to explain the differences in formulas to the client so that he can make an intelligent choice.

HERMAN L. TRAUTMAN*

* Professor of Law, Vanderbilt University.