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## George Lefcoe, Land Finance Law: A Symposium Review

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WITH the publication of *Land Finance Law*, Professor Lefcoe has completed his reform and restructuring of the basic real property curriculum which he began with the publication of *Land Development Law*<sup>1</sup> in 1966. The author's assumptions about the operation of the legal system in modern land development sharply challenge prevailing conceptions which have served as organizing matrices for the traditional real property curriculum. In this review I will discuss the assumptions Professor Lefcoe makes about the operation of the legal system in real estate financing and of the skill which the law trained person should have to participate effectively in structuring complex transactions or formulating and administering public housing policy and programs. His perceptions of the skill training necessary to produce a generation of sophisticated housing lawyers underlie the organization of these materials and hold important implications for future curricular developments and perhaps the direction of legal education. An evaluation of the book on any other grounds would be premature, for I have not yet used the book in class, although I intend to at the first opportunity, and thus can offer no valid observations on the quality of its substance.

Before turning to a discussion of *Land Finance Law*, it will be useful to review briefly the development of the real property curriculum in the past quarter century. The basic organizational concepts which currently dominate curriculum planning were formulated in the late 1940's. Between 1948-49 two contrasting models for the study of real property were offered American legal education. A. James Casner and W. Barton Leach of Harvard proposed that much of the former emphasis on the transfer of accumulated family wealth stressed by John Chipman Grey be stripped from the first year course and replaced with problems of land transfer.<sup>2</sup> However, they remained generally faithful to the Langdellian conception of the case method. In Calvin Woodward's description, "law is divisible into rather clear-cut fields based on rationally determined 'principles'; that these fields (as defined since 1870) are inherent in the nature of law itself; and that accordingly, their bounden duty is to teach, socratically, the students to analyze the cases until they have reached immutable underlying 'principles'.<sup>3</sup> Casner and Leach would add, "which then be applied to the drafting of legal documents which do not end up in a future casebook as an object lesson in how not to do it."

If the Casner and Leach casebook could be described as a radical break with past thinking, it had been preceded by a casebook which can only be

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1. G. LEFCOE, *LAND DEVELOPMENT LAW* (1966).

2. A. CASNER and W. LEACH, *CASES AND TEXT ON PROPERTY* (1st ed. rev. 1964). Professor Leach explained the book in *Property Law Taught in Two Packages*, 1 J. LEGAL ED. 28 (1948).

3. Woodward, *The Limits of Legal Realism: A Historical Perspective*, 54 VA. L. REV. 689, 729 (1968).

classified as revolutionary. This was, of course, Myers S. McDougal and David S. Haber's *Property, Wealth, Land: Allocation, Planning and Development*.<sup>4</sup> McDougal and Haber had a much more expensive and complex view of the legal system. They differed fundamentally from Casner and Leach in their conception of the proper skills in which a lawyer should be trained and in the substantive areas which should be used as problems for analysis. McDougal, in collaboration with the political scientist, Harold Lasswell, went on to expand his system of legal analysis primarily by focusing on problems of international law. While it would be beyond the scope of this review to attempt a detailed description of the system, John Norton Moore in his introduction to the McDougal-Lasswell jurisprudence for lay-scholars has concisely described the basic tenet of their system which underlay *Property, Wealth, Land*:

Law is a process . . . by which judges, legislators, litigants and many others pursue particular values through the authoritative community decision-making. . . . McDougal and Lasswell also emphasize that law as an on-going process is located in a larger social context law as a normative and social science is concerned with social interaction, and legal problems are generally attributable to the larger social setting in which they always occur.<sup>5</sup>

Much of their focus was on the increasing public intervention in the allocation of land and other natural resources through the use of planning and land use controls. Their casebook was not, however, widely adopted for a number of reasons aside from disagreement over its approach. Many were sympathetic but thought it to be unteachable while others were concerned with its overly simplistic view of the function of the legal system in the planning process. The authors expounded the New Deal fallacy that planning was good and that the basic function of law was to remove constraints to the implementation of decisions made by informed planners.<sup>6</sup> While the McDougal and Haber casebook was more admired than used, it remains far advanced for its time. It continued to influence property scholars and is a major influence in many of the recent casebooks and literature, including Professor Lefcoe's *Land Development Law and Land Finance Law*.

Study of the legal problems of financing real estate development has always been somewhat of a stepchild of the property curriculum. Land finance law has historically meant only the study of mortgages. First year materials seldom covered security interests in land. For example, John Chipman Grey's six volume collection of materials does not treat them at all. Later casebooks intended for first year courses included an introduction to land security devices, but their detailed study was considered an appropriate subject for an advanced course. The separate course contemplated by an early casebook such as Camp-

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4. 1948 edition.

5. Moore, *Prolegomenon to the Jurisprudence of Myers S. McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 667 (1968).

6. See Dunham, Book Review, 62 HARV. L. REV. 1414 (1949).

bell's *Cases on Mortgages*<sup>7</sup> was carved out of the courses on contracts and equity. Subsequent authors such as Osborne<sup>8</sup> brought mortgage law up to date with the liberalization of debtor's remedies which occurred as a result of the depression of the 1930's, but the course remained primarily a consideration of doctrines developed in the nineteenth century. The major defect in the traditional mortgage course is that it described a doctrinal system which was developed under a credit structure which bears little resemblance to the modern real estate market. In the nineteenth century when most of the basic mortgage doctrines were formulated, private individuals were the source of much development capital for real estate construction. Small loans for short terms were the subject matter of many early cases, and the law proceeded to adjust relations between the lender and borrower with these assumptions in mind. This primitive money market bears little resemblance to the institutionalized lenders offering long term financing which dominate the modern money markets in real estate.

Curricular reforms designed to adjust course offerings to this economic reality did not come about through a critical re-evaluation of the separate course in mortgages but rather from a restructuring of the traditional conveyancing course. Professor Allison Dunham's *Modern Real Estate Transactions*<sup>9</sup> broke new ground in 1953 by eliminating the barriers between specialized property courses to extract the materials which could be functionally organized around the theme of "the marketing of land use." Influenced by Karl Llewellyn's thesis that commercial law should be studied through the examination of the transactions which take place in the financial world, Dunham organized his materials around the process of residential subdivision. He started from the first stage, public control over the subdivision of raw land, and took the student, more or less sequentially through the legal problems which can arise at various stages of a land sale transaction. Topics such as private planning by agreement, land security devices to obtain financing, the transfer of title, the seller's duty as to quality and the adequacy of title insurance were covered. *Modern Real Estate Transactions* thus merged topics which might be taught in a variety of traditional property courses—equity, conveyancing, vendor and purchaser, landlord and tenant, mortgages and land use planning—and reorganized them along functional lines. In the area of land finance his major innovation was to present the four principal land security techniques—the mortgage, trust deed, land sale contract, and lease—as methods of accomplishing the same or similar purposes.

Dunham's casebook was an argument that the financing of land sales should not be studied apart from other problems of land development and transfer. This was an argument which Professor Lefcoe accepted in *Land Development Law*. The book concentrated on the activities of large scale land subdividers. The range of topics covered was much broader, but the basic

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7. M. CAMPBELL, *CASES ON MORTGAGES* (1st ed. 1925).

8. G. OSBORNE, *SECURED TRANSACTIONS* (1967).

9. A. DUNHAM, *MODERN REAL ESTATE TRANSACTIONS*, Preface to First Ed. xii (2d ed. 1958).

functional perspective was similar to Dunham's. However, Professor Lefcoe went beyond Dunham and others by arguing that the land development materials be substituted for the conventional first course in real property which had often degenerated into an arid exercise in classifying interests without any clear understanding of the real significance of the labeling process—or generating any student interest in finding out why it was significant. This remains the radical position within the real property fraternity. Others such as Professor Curtis Berger have accepted Dunham's thesis as applied to materials for an advanced course but argue that the first year course should remain an introduction to classification and that the materials on conveyancing should be replaced by much of what was formerly taught in the advanced land use controls class.<sup>10</sup> Professor Lefcoe's choice of financial credit rather than the broader problems of land development as a focus for an advanced course remains unique. To appraise the validity and significance of his approach, an examination of the scope of the book is first necessary.

*Land Finance Law* continues Dunham's tradition of extracting doctrinal areas relating to real estate finance which has found a home in other areas of the curriculum and also includes coverage of topics which are new to the standard law school curriculum. The first quarter of the book entitled Housing for Moderate Income Families and the Poor falls in this later category. Here is the most sophisticated treatment of the operation of the statutory programs of the three levels of government to subsidize shelter for those excluded from the private market available.<sup>11</sup> Part two, Mortgages and Mortgage Markets, is an example of the former category. It includes materials on the organization of management of financial institutions and covers topics, such as shareholders' rights, which would normally be covered in the business planning area. The materials on federal and state supervision incorporate the bank merger cases which would normally be covered in government regulation of business along with other financial institution regulatory problems which have probably never been included in any but a specialized law school course in banking. Other examples of borrowing are chapter 10, Some Tax Aspects of Leasing and Mortgaging, and chapter 13, Public Sale of Real Estate Transactions, which examine material usually taught in securities regulation. The bulk of the remaining chapters are devoted to an examination of land security techniques in light of the contemporary money market and represent a revitalization of the traditional courses in mortgages.

*Land Finance Law* is really two or perhaps three separate books. The ma-

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10. For an extended discussion of the Berger approach see Tarlock, Book Review, 21 STAN. L. REV. 1266 (1969).

11. *Land Finance Law* is complemented by the approach of Professor Krasnowiecki. *Housing and Urban Development* proceeds from the assumption that useful generalizations about the efficiency of federal housing subsidy programs can only be drawn after the student has a detailed understanding of their operation. Thus, the book takes the student step by step through the creation of a 221(d)(3) and 221(h) project. J. KRASNOWIECKI, HOUSING AND URBAN DEVELOPMENT Part II (1969).

terials on low income housing can be severed from the rest of the book and taught as a separate course. Professor Lefcoe justifies this inclusion as an experiment "to see if by studying the three parts as a unit, the student is more enlightened, satisfied or productive." While the low income housing materials may respond to current student demands for "relevance" in the curriculum, students and teachers should heed the author's warning that "it would be a mistake, I think, for the putative poverty lawyer not to elect the other three courses. A hard look at real estate lending and investment is usually high on the agenda for black capitalism."<sup>12</sup> In my opinion the optimum method of teaching the book would be to offer the second and third parts of the book as a second year advanced property course and the first part as a third year seminar. The student who comes to the problems of low income housing with a firm background in the technicalities of secured real estate transactions and an understanding of the operation of the credit markets for real estate development will have a better understanding of the role of legislative subsidy and incentive programs in providing a decent level of shelter for poor and moderate income families. The theme of the first part is that the existing programs have had a limited impact on improving housing quality because they operate on the questionable assumption that the private market can provide the bulk of the necessary capital if the right mix of incentive and subsidy can be found. To evaluate critically this assumption, an understanding of the second and third parts of the book is useful because the student will have a better comprehension of the economic background against which government programs operate.

Professor Lefcoe's choice of subject matter stems from his conception of the legal system as an ongoing process and of the varying roles the lawyer should perform. The book has multiple objectives, and the materials can be used on several levels. However, in order to do this successfully, it is necessary that the teacher have a classical background in real property. While this appears paradoxical at first glance, given Professor Lefcoe's clean break with past tradition, it is not so. Advances in learning are revisions of past modes of conceptualization. When a radical revision is presented for the first time, the mind's initial reaction is to reject the restructuring. As, for example, the public did when Picasso moved from his red period to cubism. To work with a radically restructured mode of conceptualizing a process, it will be constantly necessary to provide referents to the past. In time either the new mode will become the conventional wisdom or it will be modified as the result of necessary accommodations with past concepts. Professor Cunningham's review<sup>13</sup> is an understandable reaction to this process, for he attempts to characterize the components of *Land Finance Law* by traditional course categories. It is, therefore, not surprising that he finds the book deficient in terms of subject matter coverage

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12. P. ix.

13. Cunningham, *supra* at 305.

by these criteria. His review performs the useful function of alerting the user to the need to supplement the book, but it also obscures consideration of the fundamental pedagogical issue raised by Professor Lefcoe. The question is whether the study of the problems that are involved in procuring and providing debt and equity financing for low-income, middle and high income housing or commercial construction constitute an organizing matrix superior to conventional course categories.

My opinion is that focusing on the flow of money into the real estate market is an advance over the organizational constructs used by existing materials because of the range of skill training opportunities provided by *Land Finance Law*. On one level the book can be used to convey a heightened appreciation of the manner in which substantive principles can be applied in modern land transactions. As in *Land Development Law* the emphasis is not on the lawyer's role as an appellate advocate but as a planner. Legal doctrine for this purpose is presented as a series of constraints to be manipulated to respond to the pressures of the market. This is, in my opinion, the ideal way to teach students to practice law, for they study doctrine from the perspective of those who have participated in its development. And, a more rigorous analysis of the case is required in the manipulation of doctrine to structure complex transactions than is required by the more conventional use of cases. Specifically, the student learns more about the purpose of the doctrine than when he is forced to play moot court for three years or make simplistic arguments which pass for "policy" considerations.<sup>14</sup>

On a more sophisticated level the materials can be used to train students in the evaluation of legal structures and doctrines from the perspective of their performance in allocating resources to maximize individual satisfactions. The student (and teacher) are stimulated to examine the basic policy choices which must be faced if in the design of credit institutions we are able to attract the necessary share of the nation's capital resources to all segments of the real estate market. An example of this is the author's inclusion of excerpts from economic studies of the differences between stock and mutual savings and loan associations. One argues:

Other evidence of more aggressive stock association behavior is also reported. The average size of individual savings accounts at stock associations is much smaller than at mutuals. Because a part of the cost of servicing accounts is independent of the size of an account, this result suggests that stock associations reach for less rewarding sources of funds than mutuals. The average size of new mortgage loans is larger at stock associations than at mutuals. This fact suggests that stock associations are less diversified than mutuals. In states where stock and mutual associations coexist, there is evidence that mutuals must pay higher deposit rates of interests than associations in other states in order to grow at a given rate. Finally, because stock associa-

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14. For a more extended presentation of this argument see Guido, *supra* at 331.

tions have relatively larger amounts of free income from initiating mortgage loans, their net income was probably overstated; in principle this income should be, but was not, distributed over the life of a mortgage loan.

Further, empirical results are reported which suggest that both for individual associations and state averages of associations, there was a strong positive cross-section relation between the rate of growth of savings deposits and interest rates paid on deposits. In the case of individual associations this was true after allowance was made for differences in behavior by stock and mutual associations. This result suggests that the savings and loan industry was quite far from an equilibrium. It raises an interesting issue about whether restrictions on behavior, including restrictions on conversions, imposed by regulatory agencies have impaired the perfection of markets to the point of exacting a sacrifice in efficiency. Evidence concerning this issue is very ambiguous, and it remains an open question.<sup>15</sup>

Another is more positive arguing:

If mutuality is characterized by public benevolence and stock ownership by private cupidity, it might be better if the nation opted for the latter. Mutuality is a euphemism which has effectively shielded powerful monopolistic forces from the public scrutiny. Furthermore, if California experience is any guide, the mutual is an institution which can survive only at the cost of continued governmental restriction of competition: i.e. through achieving a 'sacred cow' status similar to agriculture.

The remedy for the excessive margins of mutuality is obvious. If mutuals were converted into stock associations, not only would profit provide a basis for rational decision-making, but the necessity for maintenance of nonequilibrium margins would vanish. Removal of the profit constraint on management eliminates the pressure to "second best" choices such as nepotism, infrequent management changes, and tie-in 'deals'—all of which increase the price to borrowers while reducing the interest paid to savers. The diversion mechanism is not only restrictive, it is inefficient.<sup>16</sup>

While these distinctions have been largely eliminated by the Housing and Urban Development Act of 1968 and recent state legislation,<sup>17</sup> the inclusion of these studies still serves a useful pedagogical function. This form of interdisciplinary scholarship introduces the student to the performance criteria the economist applies to institutional evaluation. It thus gives the student new methods to evaluate institutional structures and hence to answer questions such as if a given

15. *Ownership and Behavior in the Savings and Loan Industry*, CONVERSION OF MUTUAL SAVINGS AND LOAN ASSOCIATIONS TO STOCK FORM: LEGAL AND ECONOMIC ISSUES 329-38 (K. Scott and D. Hester ed. 1967).

16. Nichols, *Property Rights and Behavior—Stock Versus Mutual Savings and Loan Associations: Some Evidence of Differences in Behavior*, 57 AMERICAN ECONOMIC REVIEW (May 1967).

17. Housing and Urban Development Act of 1968, Pub. L. No. 90-448. See Prather, *infra* at 349.

societal result is desired, such as liberal credit policies for more persons desiring to obtain a home, what sort of financial institutions should the law encourage and how should they be structured?

This brings me to the most significant contribution of *Land Finance Law*. Professor Lefcoe has applied the basic organizing model developed by McDougal and Lasswell to the study of land finance law while correcting some of the important deficiencies which limited its utility in the 1950's and early 1960's. He has focused on the relationship between the legal system and the allocation of income among various socio-economic classes to point up the distributional distortions which result by contemporary values. He has emphasized the limits of the legal system in effectuating meaningful reforms in the absence of structural changes in the allocation of public and private resources and income distribution. Finally, he has rejected the McDougal and Lasswell position that there is a set of abstract values which can be applied to the solution of every controversy.<sup>18</sup> Rather, he has accepted Stewart Macauley's thesis that:

A more fruitful approach might be to direct our efforts toward understanding the formal and informal processes of government as they effect people and are affected by them. Social processes can be understood and described even prior to value analysis, and social science can contribute markedly toward an understanding of how the wheels of society go round. Understanding how society operates is a critical first step in framing effective social policy.<sup>19</sup>

In describing his emphasis on process over doctrine, the author states that "my primary focus has not been on the judicial but instead on the legislative and administrative (both government and private) experience. And even where judicial decisions take the center, it is rarely to explicate the fine points of legal doctrine but rather to examine the place of judicial decision in national housing policy or real estate finance."<sup>20</sup>

This emphasis has important long range implications for future curricular planning because it is a frank recognition of the need to differentiate the skill training second and third year students receive from that offered in the first year. I would argue that it is time that the law schools recognize that the essentials of legal analysis—the extraction of doctrine from fact patterns and case synthesis—can successfully be conveyed in the first year, and that the second, and especially the third years become increasingly sterile repetitions on the same theme. We must admit that new forms of instruction should predominate in the last two years. Implicit in this argument is the notion of internal differentiation within and among law schools. Patterns of student interests must be identified and tracks devised to accommodate them. One solution would

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18. See Macauley, *Law Schools and the World Outside Their Doors: Notes on the Margins of "Professional Training in the Public Interest,"* 54 VA. L. REV. 617, 623-31 (1968).

19. *Id.* at 635.

20. Pp. vii-viii.

be to track courses on the basis of whether they are skill or policy directed.<sup>21</sup> Students with a firm commitment to private practice should be trained in the craft skills in which it has long been realized law schools are deficient. Courses built around well constructed problems with simulated negotiations and litigation would be the hallmark of this track. Students opting for a policy directed track could be trained in skills such as the extraction of authoritative principles from a mass of official and semi-official public documents designed to formulate policies relevant to decide specific controversies, the use of inter-disciplinary materials to shape legal principles and to test their validity, the evaluation of established decision-making structures in terms of the way they allocate over time the goods and services they are likely to produce, the creation of new legal institutions and structures and the use of scientific and economic data in the decisional process.

Tracking should not, however, result in the rigid compartmentalization of students at the early stages of their legal education. As Professor Lefcoe demonstrates in *Land Finance Law* the would-be policy planner must understand the impact of laws and policies on those involved in supplying housing. It is essential that he see the legal system from the perspective of those representing clients in the process of financing land development, in order to develop functional solutions to the problems he is studying. More explicit separation of course functions should be postponed until the final stages of the student's legal education, either a third year devoted to specialized study and individual research or a graduate year.

Given these assumptions Lefcoe's choice of subject matter makes a great deal of sense. Fundamentally, *Land Finance Law* is an experiment in merging the techniques developed in the social sciences to find out how law operates so we can begin to speculate on how it should operate.

Implementing the merger will not be easy because of the fundamental tensions between the long range model building in which the social sciences are now engaged and the short range judgmental nature of the legal system.<sup>22</sup> *Land Finance Law* will be a difficult book to teach for this reason. It does not serve up a series of neat doctrinal problems in measured increments, although the materials are well chosen and edited, but instead demands that the student and teacher become involved in an in depth examination of a series of complex economic markets and financial transactions. However, if we are to gain some appreciation of the costs and benefits to legal education of new instructional patterns and perspectives, experiments such as *Land Finance Law* are a necessary and welcome addition to the law school curriculum.

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21. See Johnstone, *Models for Curricular Reform*, 21 *MIAMI L. REV.* 544 (1967) for a discussion of possible organizational models for future law schools.

22. For some perceptive comments of the limits of merging social sciences approaches with legal education, see H. KALVEN, *The Quest for the Middle Range*, *EMPIRICAL INQUIRY AND LEGAL POLICY, LAW IN A CHANGING AMERICA* (G. Hazard ed. 1968).

