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LAW AND
POVERTY

Frank Munger

Law and Poverty

Edited by

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Series Preface

The International Library of Essays in Law and Society is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

AUSTIN SARAT

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Introduction

The relationship between poverty and unequal justice has been remarked upon by writers of literature and jurisprudence from the dawn of social thought. In Western thought, the Enlightenment laid a foundation for modern and postmodern examination of this relationship, emphasizing individual merit, equality, the material foundation for social relations, while de-emphasizing connections between social status, religion and law. The latter may still influence Western thought – perhaps more so in a period of conservative retrenchment and fundamentalist revival – although they have been displaced as modes of analysis by empirical methods that reflect the Enlightenment impulse to understand and *change* the world.

Empirical tools of analysis – whether economic, sociological, ethnographic, or interpretive – attempt to understand human actions, often patterned, in ways that allow change. The most pervasive Enlightenment enterprise is governance, both through the state and through the development of a culture of self-regulation. Historically, much empirical research has been intended, directly or indirectly, to guide or critique the policies of governance or to reveal and understand the social ‘discipline’ that plays an important part in making the state’s policies – through law – meaningful. This volume draws on the rich empirical literature on the social meaning and effects of law that has emerged since the mid-twentieth century, especially in the United States, blending the jurisprudence of American Legal Realism and a selective US reception of European social theory. While an empirical literature produced largely in the United States has some obvious limitations, it also provides a depth of understanding about the relationships between poverty and law. Furthermore, this body of research and theory has been influential among scholars worldwide. Other starting points are available that may provide useful alternative perspectives, and the reader who desires a deeper and fuller understanding of the relationship between poverty and law will want to seek them out (see, for example, Cook and White, 1998; Foucault, 1995; Sen, 1984).

Sociolegal research on the legal experiences of the poor reflects an understanding of the close connection between economic inequality and law. Yet economic inequality has always created a dilemma for sociolegal scholars, particularly in the United States. Early US sociolegal research was embedded in the values of liberal legalism and the perspectives of American social science. Although sociolegal scholarship is often critical of liberal legalism, it has been strongly influenced by it. Liberal legalism accepts the legitimacy of economic inequality and simultaneously maintains that equal justice is achievable. Because economic inequality is morally acceptable there is a presumption that legal inequities are transient, that law can be insulated from social differences and, at the same time, that many policies creating or preserving economic differences are legitimate. As a result, injustice caused by morally condemned extremes of poverty has been an easier target for sociolegal scholars than class inequalities sustaining the economic core of capitalism. Further, American social science was shaped from its early stages by the pragmatism of the Chicago School, which turned away from European social theories of class according to which poverty and class conflict are inevitable by-products of unregulated capitalism (Simon, 1999). Chicago School sociology

embraced a perspective more consistent with the faith that the United States is a 'classless' society, conceiving of poverty as a product of transient social disorganization, dysfunction and individual failure, while the forces of the market were considered an inevitable, indeed foundational, aspect of American society. This perspective underlies the many studies of law and poverty that focus on differences between the poor and the mainstream and on how law matters to poor *individuals* – their perceptions of law, legal capacities and experiences with the legal system and its culture.

If sociolegal studies of law and poverty have been swept along by the tide of development in American social science, they have also kept alive a critical perspective, growing from Legal Realism and later strengthened by the contributions of the Critical Legal Studies movement. According to this perspective, legal inequality has political and economic, as well as social, roots in the relationship between the social positions in society that benefit from a capitalist economy and those which are exploited to yield these benefits (see Wright, 1994). According to this *relational* perspective, poverty arises from systemic sources, and poverty policy inevitably reflects conflict between groups with different political and economic interests. Few sociolegal studies fully articulate the relational underpinnings of legal inequality or pursue its implications. Yet many important sociolegal studies validate the relational theory of law and economic inequality (see, for example, Galanter, 1974; Chambliss, Chapter 1, this volume; Fraser and Gordon, Chapter 4 this volume; Simon, Chapter 3 this volume).

Parts I and II of this volume illustrate general analytic approaches to law and poverty. Parts III through VI contain essays that examine more specific issues: poverty, gender and race; access to law; identity and legal consciousness; and poverty and social change. Although these essays are issue-focused, their analyses of the problems confronted by the poor often resonate, and sometimes explicitly reference, a systemic understanding of the relationship between law and poverty.

Class, Poverty and Law

Part I includes three essays that have had an important influence on analytic approaches to the empirical study of law and poverty. Typical of sociolegal studies of inequality, they focus exclusively on a marginal group, namely the poor, but they have broader implications that illuminate the systemic nature of legal inequality. More broadly, they suggest that law legitimates inequality and subordination throughout modern societies and that the pattern is strongly influenced by power and politics (see also Thompson, 1975; Fineman, 1999; McCann, 1994). William Chambliss's historical study of vagrancy laws (Chapter 1) locates their source in economic class interests. In 'Civil Justice and the Poor' Jerome Carlin, Jan Howard and Sheldon Messinger review the vast range of economic, political and institutional relations that place the poor at a disadvantage before the law. While they do not discuss reasons for this profoundly significant pattern, their suggestive overview is an invitation to a further study of law and inequality that is still vital. An important example of subsequent work constructed on this foundation is Mark Galanter's seminal essay, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) which describes the advantages of 'Repeat Players', typically corporations and wealthy individuals who have greater access to legal knowledge and other resources, over 'One Shoters', who are typically individuals of lesser

means and experience. Drawing on the implications of Carlin's, Howard's and Messinger's exhaustive overview and subsequent studies, Galanter provides a conceptual framework for relational inequality that a great many scholars have found compelling. The third essay in Part I, Jonathan Simon's 'Governing Through Crime', offers a profound interpretation of governance of the poor and other marginal groups at the end of the twentieth century. Simon suggests that a principal function of law – across a wide variety of fields from policing to land planning to highway construction – is to maintain the isolation of groups that threaten the mainstream socially, economically and culturally.

Legal Foundations of the Welfare State

Part II focuses on the modern institutions that provide for poverty and economic dependency, namely the welfare state. T.H. Marshall's (1987) conception of social citizenship rights, though derived from England's social history, has had far-reaching influence (for a subsequent, pan-European perspective on the origins of the welfare state, see Esping-Anderson 1990 and Williams 2001). Social citizenship comprises rights to protection from the ravages of the competitive labour market and a capitalist economy, including pensions, workers' compensation, child and family assistance programmes, healthcare and benefits for the poor, but welfare, generally speaking, also includes business subsidies and grants, middle- and upper-class tax breaks and bail-outs that support the economic well-being of more affluent groups.

Critical analysis has suggested that fundamental economic conflicts which divide society along lines of class, gender and race also underlie welfare state policies: the desire of employers and the well-to-do to preserve the advantages they derive from the market versus the desire of workers, the working poor, unemployed care-takers and others for greater economic security. The history of Anglo-American welfare policy shows that the economic interests of groups divided by class, race and gender have been expressed in a discourse of moral identity and social citizenship. Eligibility for social provision for the poor has never been a universal right but, rather, a residual for those deserving poor deemed unable to support themselves. Sociolegal poverty scholars, among others, have described the important distinction drawn between the *deserving* poor, who merit social insurance and protection against the hardships of the free labour market, and the *undeserving* poor, who merit no help or help only in times of severe hardship and under conditions intended to reform their flawed moral character (Katz, 1989; Handler and Hasenfeld, 1991; Fraser and Gordon Chapter 4, this volume). In this respect, social rights resemble a contract rather than a universal citizenship entitlement. Individuals are obligated to make themselves self-sufficient by fulfilling the roles – as a wage-earner, as a wife of a wage-earner, as a married parent – which society envisions for them. Those who do not conform are undeserving of welfare.

The moral content of the discourse of social citizenship has provided a powerful tool for explaining the details of welfare policy (see Fraser and Gordon, Chapter 4, this volume), the evolution and impact of social movements for poverty rights (see Piven and Cloward, Chapter 14, this volume) and the role of gender and race in the relationship between poverty lawyers and their clients (see White, Chapter 7, this volume). In Chapter 4, Nancy Fraser and Linda Gordon ('A Genealogy of *Dependency*: Tracing a Keyword of the U.S. Welfare State') trace the relationship between the changing moral stigma of 'dependency' and welfare in the

twentieth century. Early welfare programmes stigmatized particular women – poor, immigrant, unmarried – but not others – for example, the white widow. With the increasing enrolment of unmarried African-American women in the Aid to Families with Dependent Children (AFDC) programme in the 1960s, the image of deviant dependency once more became a mirror image of white, middle-class normality; it was now epitomized by the unmarried female head of an African-American household. Disturbed by rising rates of employment among mothers in white families, increasing divorce and declining marriage rates, Americans experienced a ‘moral panic about dependency’ in the 1980s. Welfare reform in the 1990s reflected the latest politically inspired image – generations of African-American teenage mothers trapped by welfare in a cycle of helpless dependency.

Joel Handler’s influential essay “‘Constructing the Political Spectacle’: The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History” (Chapter 5), provides an in-depth study of the functions of Anglo-American poverty relief and the continuing contradiction between the welfare rhetoric and administrative practice – termed the ‘myth and ceremony’ of welfare institutions. The next essay (Chapter 6), by Martha McCluskey, examines the use of economic efficiency discourse in the 1996 reform of American federal poverty relief programmes. This powerful discourse has been used widely by reformers favouring deregulation, devolution and privatization. McCluskey’s analysis of welfare reform, like her previous analysis of workers’ compensation reform, demonstrates that the decisions made by reformers are purely political choices that are unsupported by economic theory. Her analysis is a paradigm for critical analysis of the economic discourse deployed to shrink the contemporary welfare state.

Poverty, Gender and Race

Part III explores complex and overlapping relationships between poverty, gender, and race. The relationship between race and gender is complex (see Crenshaw, 1991; Fineman, 1999; Schneider, 1986), and poverty defines a special terrain where race and gender intersect. The essays in this Part, by noted feminist scholars, explore the subtle forms of legal subordination that affect economically marginal black men and women, but their analyses, once again, resonate with broader patterns of systemic race and gender subordination (see Williams, 1999 for a thoughtful examination of the intersection of race, gender and class in employment law). Lucie White’s ‘Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.’ (Chapter 7), offers an interpretation of the unexpected triumph of a woman contesting a reduction in welfare over race and gender subordination. Regina Austin’s “‘An Honest Living’: Street Vendors, Municipal Regulation, and the Black Public Sphere’ (Chapter 8), discusses the economic and institutional effects of racial isolation. Austin examines the economic and legal status of street vending, arguing forcefully that the law’s marginalization of street vending is a microcosm of the disrespect shown towards black entrepreneurship. Finally, the influence of race on the legal status of housework emerges from Dorothy Roberts’ analysis in ‘Spiritual and Menial Housework’ (Chapter 9). Welfare law contributes to the subtle characterization of housework as spiritual for white women who can afford to stay at home or hire others to care for their children, but as menial for poor black women who are compelled

by economic necessity to fill their need. Seeing this problem clearly is a prerequisite for a united women's movement and for effecting social change, she argues.

Access to Law

Parts IV and V span a quarter-century of scholarship on the way in which law becomes active in individual lives, from early scholarship on 'mobilization of law' to contemporary research on 'legal consciousness' and legal ideology that influences the way in which we perceive and think about the everyday world. A large literature explores mobilization issues, in particular the availability and effectiveness of legal services both in the United States and worldwide. Two important contributions to the mobilization literature have been selected for Part IV. Abraham Blumberg's classic essay, 'The Practice of Law as Confidence Game' (Chapter 10), describes the institutional barriers to representation of criminal defendants – poor defendants in particular – created by the interdependence among professionals who formally represent different interests in the criminal justice system but who also have strong mutual interests that may or may not align with a defendant's interest in justice. Richard Abel, in 'Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?' (Chapter 11), examines the importance of a 'Repeat Player' advantage, namely the availability of competent counsel. Assuming that the poor have counsel, Abel considers whether equal justice can be achieved through competent legal representation alone. Unsurprisingly, he concludes that the existence of many other institutional barriers to legal equality would limit the ability of lawyers to achieve equal justice for the poor.

Identity and Legal Consciousness

Law's effects on poor people also arise from the way in which rights and legal institutions are perceived and come to have meaning in particular contexts. Perceptions of one's social circumstances may be constituted in part by law, and, in turn, the meaning of law itself may be mutually constructed through the interplay of perceptions of the social context (Sarat and Kearns, 1993). Writing in the late 1960s, Elizabeth Preston and Felice Levine (Chapter 12) characterize these variable aspects of perception and meaning as 'knowledge' of law, and they examine the relationship between knowledge and the mobilization of law. Nearly, 30 years later, mutually constituted perceptions and meanings of law are characterized by Patricia Ewick and Susan Silbey (Chapter 13) as 'legal consciousness' in a path-breaking study describing the law's power to shape (and be shaped by) the cognition and discourse of a poor woman required to answer to legal authorities for a minor infraction (see also Ewick and Silbey, 1998; Engel and Munger, 2003).

Law, Poverty and Social Change

The essays in Part VI address the implication of the systemic perspective on law and poverty that the relationship between law and poverty is partly political and will require a political solution. Underlying the moral politics of welfare, much research suggests that welfare for

the poor or unemployed in all its forms has been strongly influenced by dominant economic interests, especially their need to stabilize the supply of labour. Some political movements by poor people have been sufficiently destabilizing in domestic politics to influence the passage of more favourable legislation, but often, as Frances Fox Piven and Richard Cloward observe in their essay 'Low-Income People and the Political Process' (Chapter 14), they have achieved a carefully limited liberalization of public welfare supported by the largest employers, an outcome exemplified by the New Deal (see Klein, 2003). More often, the poor do not protest, and their interests are not well represented when welfare and social citizenship are renegotiated. Thus, welfare programmes – from workers' compensation to cash benefits for poor people – continue to demand more work and less dependency, while the actual administration of such reforms continues to reflect the 'myth and ceremony' that has characterized previous programmes which attempt to draw a line between deserving and undeserving recipients.

Recently a new empirical and jurisprudential literature has arisen on local activism and local political change to ameliorate poverty and economic inequality. This literature builds in part on roots stretching back to the New Deal, the Progressive Era and even earlier to working-class cooperative movements (see Klein, 2003). Serious questions are raised about the capacity of local politics to remedy problems created by a national or global system of economic power, and advocates have been challenged to identify circumstances when such odds can be overcome. Scott Cummings, in 'Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice' (Chapter 15), reviews the weaknesses of some historical movements for locally-based economical development and suggests preconditions for overcoming the barriers to achieve gains for the poorest members of a community. The volume concludes with an essay by Frank Munger, 'Beyond Welfare Reform: Can We Build a Local Welfare State?', which reviews both goals of poverty relief and the literature, suggesting that the answer is a politics of local redistribution.

Conclusion

Scholarship on the relationships between poverty, inequality, and governance still leaves many questions unanswered. Fortunately, sociolegal research suggests places to begin to seek the answers to the questions that poverty scholars find compelling. Scholars are pursuing a better understanding of who controls the market and how law helps or hinders them. They want to know more about how moral identity is formed and changed. Research may eventually suggest how to 'democratize' poverty by making the identity of poor people more visible and less alien to a large proportion of the citizenry in modern, economically developed societies. Further, power and change are often mediated by local social organization and politics, a vast uncharted terrain concerning the relationships between local empowerment and laws that guide devolution, privatization and deregulation.

Finally, there is an emerging consensus that social change through rights will frequently depend on politics. Politics may include the micropolitics of individual resistance, but, more significantly, will require organizing movements in the public arena. Scholars have suggested that there are openings for the political escalation of poverty issues. Movements may successfully deploy new rights, but have often failed in their attempts to do so. Thus, scholars' most ambitious project may be to understand how the experiences of the poor – including their

experiences of subordination and a stigmatizing moral identity – can merge with the political interests of other citizens in movements for rights that will enable the reconstruction of a more democratic and egalitarian welfare state.

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Part I
Class, Poverty and Law

