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# Law, the Problems of Poverty, and the "Myth of Rights"

*Michael Diamond\**

The subject of this symposium is the relationship between law and moral order. This relationship has been the subject of scholarly debate for centuries and yet it remains difficult to define, primarily because the nature of the moral order itself remains obscure. In recent years the debate has been joined by Professor H.L.A. Hart and Professor Lon Fuller. In a series of books and articles<sup>1</sup> they have argued about the meaning of law and its relationship to morality. I will touch on both of their theories later in this paper, but because I find neither approach satisfying, I will suggest a different analysis.

The position I take is (1) that there is no moral order using the common or religious meaning of the word "moral"; (2) that there is a disparity between what the law promises and what it provides; and (3) that this disparity is due to the inability of the law to change relationships which are basically economic rather than legal in nature.

When I say that there is no moral order—using the common or religious meaning of "moral"—I do not mean to deny the existence of individual moral sensibilities or judgments. Rather, I deny the existence in society of a normative consensus that is based upon some underlying, more or less fixed, "religious" morality. I believe there is an order in society, but it is an order based more on economic and political considerations than on

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1. See, e.g., L. FULLER, *THE MORALITY OF LAW* (1964); H. HART, *THE CONCEPT OF LAW* (1961); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

moral or ethical ones. Given our limited resources,<sup>2</sup> the struggle to shape societal goals becomes a political one in which power, often economic power, is the controlling factor. Thus, I believe what some writers have viewed as a moral order is actually more of a power order. It is an order in which economic, social, and political power, rather than morality, play the fundamental roles. At the root of the problem of defining the relationship between law and morality is our pluralistic society,<sup>3</sup> attempting to develop law which will fulfill the needs of all its members.

The core question of the relationship of law and morality is to what extent the law can in practice fulfill the sense of justice or the moral norms of members of society. Clearly, I think, the law can articulate strongly held convictions of large segments of the society. These formulations, however, suffer from relativistic and majoritarian tinge that detracts from the concept of morality. It appears that law, rather than reflecting a universal (or nearly universal) set of basic principles and goals, reflects and fulfills the goals of those in control of the political apparatus. And even if the law were neutrally benign—the result of Rawls' veil of ignorance<sup>4</sup>—I would argue that in certain spheres any currently foreseeable use of the law is incapable (from an economic standpoint) of resolving problems of the society. This implies a clear distinction between law as a social norm and law as a political reality.

The direction I propose to pursue in analyzing the relationship of law to social norms avoids the fascinating but, I think, unanswerable (although not unarguable) question of the source

2. For a discussion of the distribution of limited resources see Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

3. I use the term "pluralistic society" to mean a society that encompasses several different value systems. Moreover, unlike primitive societies in which there may be group value consensus on a range of issues, the pluralistic society may find individuals crossing group lines for value orientation. Therefore, the "value system group" is less likely to be found today than in primitive times.

4. See J. RAWLS, *A THEORY OF JUSTICE* 17-22, 136-42 (1971). Professor Sam Donnelly defines Rawls' "veil of ignorance" as follows:

Briefly stated, he imagines that hypothetical contracting parties meet to agree upon principles of justice and structure of government for their society, which could be any society. The parties are ignorant of their own particular situation in life with its peculiar advantages and disadvantages. Rawls argues that this veil of ignorance reproduces the conditions necessary for making objective decisions.

Donnelly, *A Theory of Justice, Judicial Methodology, and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 *SYRACUSE L. REV.* 1109, 1118 n.55 (1978).

and nature of law. Instead, I will address the relationship between law on the one hand and politics and economics on the other and ask, "How far can the law go in achieving goals of political and economic equality?"

To illustrate my analysis I will refer to the problem of providing housing for low-income citizens, a problem that graphically illustrates the shortcomings of the law.<sup>5</sup> In the housing field one might ask, "To what extent can the law achieve 'decent, safe and sanitary'<sup>6</sup> housing at affordable prices for the nation's urban poor?" This has been a stated goal of the law both on a national and local level for years.<sup>7</sup> The goal has not been reached and progress in the area has been minimal. Why, when statutes have been enacted, amended to meet new problems and redesigned to accommodate new theories, does the problem of low-income housing remain intractable? I believe the answer lies in the hard reality that the law is often isolated from the social context in which it purports to operate. Decisions concerning the composition of a law often leave out of their calculations the basic social, political, and economic conditions in which the law must be applied.

For instance, shortly after the depression, the government instituted a program of government owned housing<sup>8</sup> to accommodate the poor and homeless. However, social and economic factors were not accommodated in creating the program. Building design was unimaginative; amenities were minimal or nonexistent; and economic segregation was the universal, if not the inevitable, outcome. The result was a social stigmatization of the poor which was, ostensibly, not intended.

[T]he initial proponents of the program had operated on the assumption that changing the physical housing conditions of the poor would have a major impact on tenants' behavior. It has become increasingly difficult to demonstrate the program's effectiveness in these terms. . . . [T]he product has often been

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5. Although I will focus on low-income housing problems in this article, other issues—such as environmental protection, public welfare, or women's rights—could have been effectively used to illustrate my position.

6. See United States Housing Act of 1937, ch. 896, § 1, 50 Stat. 888 (1937), which set the goal of providing a "decent, safe and sanitary" home for all Americans.

7. See, e.g., CAL. HEALTH & SAFETY CODE § 50002 (WEST 1979); *JAVINS v. FIRST NAT'L REALTY CORP.*, 428 F.2d 1071 (D.C. Cir. 1970).

8. United States Housing Act of 1937, ch. 896, § 1, 50 Stat. 888 (1937). See also Friedman, *Public Housing and the Poor*, in *HOUSING URBAN AMERICA* 448 (J. Pynoos, R. Schafer & C. Hartman eds. 1973).

of inferior quality because of lack of maintenance and an unwillingness to provide more than a minimal level of amenities to the poor.<sup>9</sup>

In the 1960's the federal government turned to subsidizing private development of low-income housing, but costs soon outstripped the government's ability to subsidize.<sup>10</sup> Local governments became involved and tried to force owners of rental property to maintain those properties,<sup>11</sup> but here, too, economic realities as well as conflicting laws resulted in little improvement in housing conditions.

The problems of low-income housing traditionally have not been legal ones. The law has adopted the problems in the countless statutes, regulations, court opinions, and programs which have been promulgated pertaining to the field; yet housing remains too expensive for those at the lower end of the economic spectrum to obtain or adequately maintain.

The following example illustrates the problem. Posit a tenant who is careful and considerate about the property he or she rents but who has little money. Posit also an owner who wishes (and attempts) to maintain a clean, safe building while making a reasonable profit. Further assume a base period in which rent paid has been reasonable in terms both of tenant income and owner costs. Finally, assume that an inflationary period similar to that of the 1970's exists. In the 1970's costs escalated at a rate far in excess of the increases in the incomes of the urban poor (many of whom receive relatively fixed government transfer payments and others of whom are in jobs with little upward mobility and little internal financial leverage).

Given this hypothetical, the increasing housing costs due to inflation (labor, materials, taxes, insurance, etc.) put pressure on the owner to increase rents in order to maintain a reasonable profit margin. If, however, the tenant is poor, he or she might not be able to afford the increased rent. If a new tenant cannot

9. HOUSING URBAN AMERICA 16 (J. Pynoos, R. Schafer & C. Hartman eds. 1973).

10. For studies and criticism of housing subsidy programs, see A. DOWNS, *FEDERAL HOUSING SUBSIDIES: HOW ARE THEY WORKING?* (1973). Swan, *Housing Subsidies and Housing Starts*, in 2 HOUSING IN THE SEVENTIES, WORKING PAPERS (U.S. Dep't of Hous. & Urb. Dev. 1976).

11. Building and housing codes and warranties of habitability have set requirements for the construction and maintenance of housing. The National Commission on Urban Problems reported that such building and housing codes are rarely enforced. See U.S. NATIONAL COMMISSION OF URBAN PROBLEMS, *BUILDING THE AMERICAN CITY*, H.R. DOC. NO. 34, 91st Cong., 1st Sess. 273-307 (1968).

be found who is able and willing to pay the increased rent (this situation is most likely to exist in hard core, poor neighborhoods where the prospect of wide-scale rehabilitation that would change the economic composition of the community is too small to be realistically hoped for), the owner's next option for maintaining a profit is to cut costs by deferring and eliminating maintenance, thus beginning what is known as "disinvestment." Disinvestment may be a result of a conscious choice by the owner to maintain an acceptable profit margin, or it may result from the fact that the owner, like the tenant, simply cannot afford to absorb the increased costs of maintaining the building.

The law on occasion may be able to deal with the acute effects of disinvestment. But given many great societal needs competing for limited societal resources, the law cannot eliminate the chronic causes of acute manifestations of disinvestment. What, for instance, does the law provide in circumstances such as the one just posited? It mainly provides for the eviction of tenants who fail to pay their rent. If the tenant in this example is evicted, the law has merely changed the nature of the social problem. It is unlikely that the tenant will be able to find suitable housing (if any housing is available at all) at an affordable price, and it is unlikely that the owner will be able to attract a tenant who can pay the necessary rent. If, on the other hand, the law attempts to force owners to maintain their property without allowing them to raise rents, they may have to abandon the property if they are financially unable to comply with the law. For wealthier owners, the law will have a chilling effect on further investment. Housing investment, unlike criminal matters or divorce, is governed primarily by economics, not law. Building owners who cannot afford to maintain their buildings do not become able to do so simply because the law requires that the buildings be maintained. By contrast, in the case of either criminal law or family law, the rules tend to be abstract expressions of societal norms (whether derived from a moral base or otherwise). These norms are personal in that to a great extent each person is individually responsible for his or her conduct. It is reasonable for society to expect that people who can choose between various options confine their conduct to the range of behavior acceptable to society. If, however, due to factors beyond the control of the individual, there are no options or the only available options are unsatisfactory, the law is unable to solve that particular social problem, and if it attempts to do so, its

attempts will be erratic or arbitrary.<sup>12</sup> With low-income housing, as with other problems of our society, factors other than societal norms affect conditions. Elements beyond the control of the various actors create circumstances that the law, which deals in the realm of personal norms, cannot control.

Laws pertaining to housing certainly express norms in the sense of what ought to be. The National Housing Act of 1937 speaks of a "decent, safe and sanitary" home for all Americans.<sup>13</sup> Local building codes set minimum standards for the quality of housing and warranties of habitability provide remedies for a tenant whose landlord does not comply.<sup>14</sup> Our laws in this area appear to have the glow of the moral order. But while the laws articulate what might be taken as societal norms, forces in society work against the realization of these values. The lack of correlation between the norms of the law and their realization in actual practice may be due to the unwillingness of the powerful in society to enforce norms which contravene their own interests or goals. Another, less morally damning hypothesis is that the law, which is an abstract set of societal norms, cannot mandate what economics and politics deny. In a society with a private enterprise economy and without sufficient governmental resources to accomplish all societally articulated norms, the law cannot systematically improve the quality of housing. At best, some small number of tenants may achieve success in improving the quality of their own housing, but their success, I submit, is the result of changing the power relationship between themselves and their landlords (with which the use of law certainly plays some part) rather than a direct reliance on the terms of a law purporting to provide relief.

Given the disparity between legal norms and societal realities, one might question the relationship between law and morality. As I have already stated, I believe that there is no "moral" order, but rather a power order that dictates the nature of our laws and, perhaps more importantly, the effect of our laws. The Hart-Fuller debate, which I alluded to earlier, provides a basis

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12. For an application of this principle in a different context, see the Model Penal Code's insanity defense and accompanying commentary. MODEL PENAL CODE § 4.01(1) Comment (Tent. Draft No. 4, 1955).

13. United States Housing Act of 1937, ch. 896, § 1, 50 Stat. 888 (1937).

14. See M. TEITZ & S. ROSENTHAL, HOUSING CODE ENFORCEMENT IN NEW YORK CITY (Rand Corp. Report No. R-648-NYC 1971). For a discussion of these remedies, see Diamond, *Rehabilitation of Low-Income Housing Through Cooperative Conversion by Tenants*, 25 AM. U.L. REV. 285, 289-95 (1976).

for further discussion on this point.

Professor Hart takes the positivist position. He argues that there is a distinction between law and morality. The fact that a law exists does not mean that it is morally defensible. Law, according to Hart, is a pronouncement purporting to be law made by one with the authority to make such a pronouncement and made according to the required procedures. Therefore, law exists even if the law is substantively immoral.<sup>15</sup>

Fuller, on the other hand, argues that law, to be considered law, must merge at some point with morality. If not, he asks, how can law be deserving of the respect and fidelity which we concede it is owed?<sup>16</sup> For Fuller, law must be composed of two "moralities": an external morality that goes to the substance of a law and an internal morality that goes to the process of interpretation and application used by the judge. The external morality is apparently based on a "constitution" that is generally accepted among the population. The inner morality requires that the laws promulgated thereunder be interpreted with a "coherence" and "inner logic" that Fuller assumes will follow. He states, "I shall have to rest on the assertion of a belief that may seem naive, namely, that coherence and goodness have more affinity than coherence and evil."<sup>17</sup> Fuller presumably would argue that a pronouncement purporting to be law but which lacks either of the moralities is not law at all.

While both Professors Hart and Fuller argue cogently for their positions, there seem to be serious flaws in each of their positions, which, at least for our purpose, diminish the force of their arguments. Primarily from a logical point of view, neither defines the concept of morality clearly enough to give one a sense of stability. Hart recognizes the problem by saying that what "ought" to be is subject to countless variations depending who is asked and at what point the question is posed. Further, he recognizes that what "ought" to be does not necessarily coincide with morality. It may be a function of one's desire for self-aggrandizement, of pure necessity, or of one's musings ("I ought to be able to dance more gracefully").<sup>18</sup>

Even when dealing only with a vaguely defined concept of morality, it is clear that different cultures view morality differ-

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15. Hart, *supra* note 1, at 615-21.

16. Fuller, *supra* note 1, at 632.

17. *Id.* at 636.

18. Hart, *supra* note 1, at 613.

ently, and the same cultures view it differently at different times. Moreover, the shared beliefs that were common to less sophisticated societies are less prevalent in the complex, industrial society in which we live. This moral fragmentation of the populace is not only visible among groups but also within them. For instance, consider the issue of abortion to be raised in this symposium. Can one point to cultural homogeneity among opponents of abortion? Clearly this major moral issue cuts across religious, economic, and racial lines. People and groups with totally different needs and aspirations can join on either side of this issue, while on another issue—the problem of strip mining for instance—the constituencies of the competing viewpoints, while still heterogeneous, may be completely different from those in the abortion debate.

Rather than a body of law based upon shared beliefs, or even a body of law that shapes beliefs in society, we have law that reflects, to a great extent, the result of the political struggle between competing beliefs. The question of how benefits should be divided in a society with finite resources—a question of prioritization of goals—is not a question for judges or for law. Such questions are questions of policy and are fought in legislatures and at the polls. The results of such struggles take on the symbolic legitimacy of law, but such laws are not solely the result of a debate concerning moral or ethical norms but rather the result of political and economic compromises.

The changes in the nature of law and the decline of its ability to state (or create) widely held norms to some extent corresponds with the growth of economic society and its resulting social complexities.<sup>19</sup> Much of what was based on custom or tradition gave way as an influx of people from various cultures changed the composition of society and as rapid urbanization changed its nature. As technology and economic sophistication intruded on a largely agrarian economy the requirements of regulation changed the face of the law. With the depression the government's involvement in the economy seemed irrevocably ordained. Not only did the government attempt to control through administrative regulation railroads, communications, trucking, and securities, it also became heavily involved in hous-

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19. For a discussion of law in primitive societies, see E. HOEBEL, *THE LAW OF PRIMITIVE MAN* (Atheneum 1974); Bohannan, *The Differing Realms of the Law*, *AM. ANTHROPOLOGIST*, Dec. 1965, at 33; and Diamond, *The Rule of Law Versus the Order of Custom*, 38 *SOC. RESEARCH* 42 (1971).

ing, public works, and trade practices. As time went on, the government entered the fields of environmental protection, energy, and health. All of these had aspects of private activity and were deeply infused with economic elements. These issues, one may argue, are significantly removed from questions of morality. They are, rather, questions of resource management and prioritization—questions of political policy.

To this point, much of what I have discussed has dealt with the political nature of law, particularly with the legislative process. Litigation, on the other hand, has been thought of as less political and more closely connected with concepts of fairness and justice. Judges, however, are not free to determine what is “right” and are not particularly well equipped to identify or establish norms. Rather, they are trained and commissioned to interpret the meaning of rules and apply them to particular facts. The rules they are asked to apply are often those that result from the political process. Moreover, those rules that are derived from the common law are limited by constitutional principles protecting property rights.<sup>20</sup> These facts, among others, have led many lawyers and commentators to criticize the idea that litigation, in itself, is a major force in accomplishing social change.

Stuart Scheingold, one of these critics, argues in his book *The Politics of Rights*<sup>21</sup> that there has developed among social activists a “myth of rights”—an idea that judicial intervention will both recognize and enforce rights which essentially redistribute power.<sup>22</sup> He argues that judicial decisions that broaden the scope of public entitlements have been viewed as the end point in the struggle for societal change. He cites, for instance, the Supreme Court’s decision in *Brown v. Board of Education*,<sup>23</sup> which struck down the “separate but equal” system of public education by which schools were de jure segregated by reason of race. Yet despite the great significance of that decision, desegregation of public schools remains a major challenge confronting

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20. The fifth and fourteenth amendments to the United States Constitution provide that no person shall be deprived by the state of property without “due process of law.” The development of this doctrine has often elaborate procedures for protecting the property rights of individuals. These procedures stand as a practical barrier to a government sponsored redistribution of wealth. More importantly, the concept found in the due process clause represents a significant philosophical obstacle to redistribution. See S. SCHEINGOLD, *THE POLITICS OF RIGHTS* 105-07 (1974).

21. *Id.*

22. *Id.* at 84-85.

23. 347 U.S. 483 (1954).

our society two and one-half decades later.<sup>24</sup> The judicially proclaimed "right" to a desegregated education has not filtered down—at least not to the extent envisioned—to the classroom where its effects were supposed to be felt.

The declaration of the right was not the ultimate goal of its proponents—desegregation of the public schools was. Thus, to view the Court's decision as a stopping place would be, in effect, admitting defeat. This is not to say, however, that the judicial decision is meaningless, for it is not. It represents a judicial recognition of what one ought to be entitled to. This judicial recognition provides a resource—a tool—to be used in the political forums where the "right" identified by the court will be shaped and have its impact.

The problem, as Scheingold points out, is that there is a certain flux between society's values and its behavior. The difference between input and output, between one's moral beliefs and one's societal activity, is influenced by external factors such as economic or political well-being. These are elements which the law often fails to account for. Indeed, it has been argued that the law, designed as it generally is by the "haves" of society and fraught with procedural safeguards to avoid hasty, ill-considered decisions, is a major obstacle to change.<sup>25</sup>

With our limited resources and the growing demand for goods and services, accomodating the needs of the poor often requires taking from the remainder of society. This fact often reduces lofty values to behavior motivated by material self-interest. In such circumstances the political question is whether the law *will* enforce moral values. In circumstances such as the housing examples suggested above, the question is also whether the law *can* enforce moral values. Because of economic realities and the constitutional obstacles to redistribution, my response would be in the negative. However, the law, viewed as a tool of political struggle rather than as the result of the struggle, offers hope for change. The legitimization by the law of new norms, the recognition of personal "rights," provides a basis around which people can organize so that the legal abstractions may be

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24. S. SCHEINGOLD, *supra* note 20, at 100.

25. *Id.* at 118. Scheingold argues that the law is designed to break problems down to small, legally cognizable elements. Moreover, remedies fashioned by courts generally respond to individual injuries caused by these discrete elements. When the cause of the problems before the court is not, in a practical sense, capable of being broken down in this manner, the remedial result is almost certain to be incomplete.

achieved, at least in part.

Lawyers may play important but not all encompassing roles in mobilizations of this sort. They may be technicians or planners, advocates or advisors, but they are not, nor is the discipline in which they function, sufficient to change the political and economic organization of our society. Instead, law must be recognized as merely one of many, often competing elements that shape society and its norms (as well as its behavior). Until this is recognized, the law will continue to hold out, particularly for the poor of our society, a "myth of rights."