Law, Democracy, and Domination: Law and Society Research as Critical Scholarship

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It is an instructive irony that Frank Munger delivered his Presidential Address in Miami Beach. As someone who was there on Memorial Day weekend of 2000, I can report that at the time of the address there was more than the usual contrast between setting and substance. Munger issued his call for connecting law and society research to the real world of struggle and politics in the cool, windowless expanse of a plush convention-hotel ballroom. The response of the audience was polite, if not inspired. In sharp contrast, immediately outside the hotel, the hot and humid streets of South Beach buzzed and blared with a Hip Hop convention that had drawn masses of young people from around the country. This was an audience that really was turned on to the message of its leaders.

A more profound irony unfolded in Florida five months later, when the state became the focal point for the legal battle over the counting of presidential votes. When the conservative majority of the United States Supreme Court in *Bush v. Gore* (2000) swept aside its usual reverence for federalism to stop the recounting of ballots that might have jeopardized the election of the Republican candidate, it undercut the ideal of the autonomy of law in the American constitutional system. This is the very ideal (tacitly modeled on American courts) that Munger found had inspired law reform activists in Sri Lanka, India, and Japan.

What fraction of the American people could recognize the rather remarkable doctrinal reversal the majority undertook? The decision has drawn protest from hundreds of law professors and will be the target of withering attacks in the law reviews in coming months. But how many Americans will understand or care? Florida became a sobering lesson in the relationship among law, democracy, and domination. And it raises some deep questions about Munger's program for reintegrating activism and inquiry in law and society research.

Munger's speech in part is an individual existential statement. He talks about how he has derived personal meaning from

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his work and the example of others. How Munger finds personal meaning is not subject to debate. It must only be true for him. But in suggesting a collective project for law and society research, he necessarily makes claims that should be critically assessed. One of the great contributions of Munger's address is that it is global and eclectic. He usefully points out the significance of context for evaluating both law reform activity and sociolegal research. In some contexts the liberal legal project about which American scholars are suitably cynical is a potent vehicle for arguing against the arbitrary use of power and human rights abuses. The tragic assasination of Neelan Tiruchelvam vividly illustrates the political risks that scholars and activists face in some societies. It makes the political calculations that American law and society scholars engage in seem trivial. Moreover, Munger at least gestures toward the need to develop theories that connect context with broader structures, as when he offers a twist on Lawrence Friedman's famous phrase that "law is too important to be left to the lawyers" by suggesting that "governance is too important to leave to the bankers, regulators, investors, international lawyers, and political leaders of the world" (Munger 2001).

Although Munger's address is provocative and insightful, I worry that it offers an unrealistic view of law as a vehicle for achieving social justice and an unrealistic assessment of prospects for law and social science research to influence the direction of policy. Consider three recent trends involving the relationship between law and inequality in the American context.

First, consider new judicial restraints on affirmative action and equal employment opportunity. In a series of cases beginning in the mid-1980s, the Supreme Court narrowed the bases for voluntary affirmative action by public employers and contractors (see *Wygant v. Jackson Bd. of Educ.* 1986; *City of Richmond v. J.A. Croson Co.* 1989; *Adarand Constructors, Inc. v. Pena* 1995). The Court has now set for argument a decision by the 10th Circuit Court of Appeals that held that a minority contractor preference program passed muster under a strict scrutiny standard (*Adarand Constructors, Inc. v. Mineta* 2001). Thus the Court may be poised to declare affirmative action illegal, except in cases where there is proof that the employer in question was guilty of past discrimination. Similar tests have cast a cloud over affirmative action in education. (See *Hopwood v. Texas* 2000.) In the current term, the Supreme Court struck down the application of the Americans with Disabilities Act of 1990 to the states under an expanding interpretation of the 11th Amendment (*Bd. of Trustees, Univ. of Alabama v. Garrett* 2001), held that employees who signed mandatory arbitration agreements were barred from bringing suit in court (*Circuit City v. Adams* 2001), and ruled that private individuals may not sue to enforce disparate-impact regulations promulgated by federal agencies under the Civil Rights Act of 1964 (*Al-*

exander v. Sandoval 2001). These cases represent significant limitations on affirmative action programs and civil rights.

Second, consider the shift of representational resources from personal clients to business clients. In 1975 Chicago lawyers devoted 53% of their total effort to business clients and 40% to personal clients. By 1995, 64% of lawyers' time in Chicago was devoted to business and 29% was spent on personal clients (Heinz et al. 1998). Nationwide census data reveal much the same pattern. There has been a corollary expansion in income inequality across employment sectors over the time period. In 1975 the highest-paid category of private practitioners in Chicago made about four times what government lawyers made. By 1995 the income difference had grown to seven-fold (Sandefur & Laumann 1997). The growth in the amount and compensation for business clients is a complex process, only some of which has implications for social justice. Yet it is clear that individuals who choose to work outside the corporate sector face more significant salary penalties now than two decades ago.

Third, consider the dramatic rise in incarceration, especially of African-American men. As a result of a sharp increase in incarceration rates in the past decade, the United States leads the Western world in per capita prison population. The Justice Department reports that there are just under two million prisoners, and that young, African-American men are significantly overrepresented in this group. Some 13.1% of black, non-Hispanic males age 25 to 29 were in prison or jail in 2000, compared to 4.1% of Hispanic males, and 1.7% of white males in the same age group. Overall, blacks are five and one-half times more likely to be incarcerated than whites (U.S. Department of Justice 2001). Though the effect of incarceration on crime rates is debatable, the social costs of such a policy are high, both in terms of the costs of running prisons and in the effects on the lives of prisoners and their families.

These are just three examples of how law is implicated in policies and processes that are likely to produce more social inequality, rather than ameliorate inequality. A critique of the myth of rights does not go far enough in capturing the problematic impact of these legal processes on society. I would push Munger to assert that law and society research should expand its theoretical and empirical ambition in analyzing the mechanisms through which law and legal actors construct, legitimate, but also sometimes ameliorate, social inequality. Munger suggests that we need an emboldened link between activism and research in our field. I do not necessarily disagree. But I also think that law and society research must be emboldened as a research enterprise in its own right, that it must strive to become a form of critical scholarship that develops and tests theories about the relationship of law to social processes.

One of the central themes of Munger's address is that law and society scholars "ought to learn to write"; that is, to communicate effectively to policy- and community-based audiences. No one could disagree about the need to write well. (And I have made a personal practice never to disagree with Bette Sikes, whose editing talents I have admired for years.) But we should be realistic about the likely impact of law and society research, even the best written. Very often the questions we investigate are politicized within the academy and policy circles. In research on gender inequality in pay, for example, there are ongoing debates between orthodox labor economists and sociologists over the sources of the male-female wage gap. These disagreements allow courts and policymakers to invoke research that comports with their policy preferences, despite problems with the research (Nelson & Bridges 1999). The economists' explanations of wage patterns largely have been adopted by the courts in cases concerning wage differentials, with the effect that one side in the social scientific debate now has the imprimatur of law. This particular economic theory triumphed not because of the ability of its authors to communicate but because it resonated with a powerful ideology about markets and the gendered nature of occupational choice. Alternative explanations failed, not from lack of communicative skills so much as from a lack of power.

Grossman, Kritzer, and Macaulay (1999:805–6) describe a telling example of how Judge Richard Posner cites Marc Galanter's article on the advantages that accrue to repeat players in litigation, while ultimately concluding that there is nothing the court can do to alter an advantage that exists in "settled law."

Does this mean that we abandon law and society research? Or that we turn from research to political action? Clearly not. Law and society scholarship is engaged in a critical conversation about the role of law in society. The dialectical character of law means that it sometimes is an instrument of social justice, and sometimes is an institution that produces and legitimates hierarchies of race, gender, and class. Law and society scholars face the challenge of developing theories that capture both aspects of law. The search for this deeper understanding of law and society, of the limits and potential for social change through law, is worthy of individual and collective effort.

References

Grossman, Joel B., Herbert M. Kritzer & Stewart Macaulay (1999) "Do the Haves Still Come Out Ahead?" 33 *Law & Society Rev.* 803–10.

Heinz, John P., Robert L. Nelson, Edward O. Laumann & Ethan Michelson (1998) "The Changing Character of Lawyers' Work: Chicago in 1975 and 1995," 32 *Law & Society Rev.* 751–75.

Munger, Frank (2001) "Inquiry and Activism in Law and Society" (herein).

Nelson, Robert L., & William P. Bridges (1999) *Legalizing Gender Inequality: Courts, Markets, and Unequal Pay for Women in America.* New York: Cambridge Univ. Press.

Sandefur, Rebecca L., & Edward O. Laumann (1997) "Changing Patterns of Income Stratification in the Chicago Bar." Paper presented at the Annual Meetings of the Law & Society Association, St. Louis Missouri, May 29, 1997.

U.S. Department of Justice (2001) *Prison and Jail Inmates at Midyear 2000.* Bureau of Justice Statistics. http://www.ojp.usdoj.gov/bjs/abstract/pjim00.htm

Cases Cited

Adarand Constructors, Inc. v. Mineta, cert. granted, Mar. 26, 2001, 00–730, 2001 U.S. LEXIS 2689.

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

Alexander v. Sandoval, No. 99–1908, 2001 U.S. LEXIS 3367, *decided* April 24, 2001.

Bd. of Trustees, Univ. of Alabama v. Garrett, No. 99–1240, 2001 U.S. LEXIS 1700, 69 U.S.L.W. 4105 (2001), *decided* February 21, 2001.

Bush v. Gore, No. 00–949, 2000 U.S. LEXIS 8430, 69 U.S.L.W. 4029, *decided* Dec. 12, 2000.

Circuit City Stores, Inc. v. Adams, No. 99–1379, 2001 U.S. LEXIS 2459, 69 U.S.L.W. 3628, *decided* Mar. 21, 2001.

City of Richmond v. J.A. Croson, 488 U.S. 469 (1989).

Hopwood v. Texas, 236 F. 3d 256 (5th Cir. 2000).

Wygant v. Jackson Bd. of Education, 476 U.S. 267 (1986).