



Book Review

Poor Justice: How the Poor Fare in the Courts

Lens, Vicki. (2016). New York: Oxford University Press. ISBN 9780199355440 (paper) CDN\$39.95; ISBN 9780199355464 (eBook) CDN\$33.99. 256 pages.

KERRI A. FROC
Carleton University, Canada

Poor Justice (2016), written by lawyer turned social justice scholar, Vicki Lens, shows the aptness of Raymond Chandler's description of the law, at least as it relates to poor people's experiences of the justice system. In *The Long Goodbye*, Chandler (1992, p. 56) wrote, "The law isn't justice. It's a very imperfect mechanism. If you press exactly the right buttons and are also lucky, justice may show up in the answer."

Having years of experience "in the trenches" conducting public interest litigation and then becoming a social work professor, Lens gives a detailed, interdisciplinary analysis of how public interest lawyers and sometimes poor people themselves have managed to press the right buttons to effect justice. In essence, she argues that the luck of which Chandler spoke is often dependent upon whether litigants draw a judge who is willing to give them an opportunity to express their legal dilemmas in their own voice, whether their lawyers are able to use legal levers in creative ways and transcend class-based paternalism to challenge vigorously government evidence and experts, and which judges' personal ideologies predominate when their cases reach the US Supreme Court. Each chapter begins with a vignette taken from the legal stories of poor people; these animate her analysis. In evocative prose, Lens provides a rare glimpse of the inner workings of the legal system, providing a clear-eyed evaluation of the successes and frailties of legal strategies to effect change, and documenting the trajectories of doctrinal developments in areas of law important to historically marginalized groups.

Correspondence Address: Kerri A. Froc, Department of Law and Legal Studies, Carleton University, C473 Loeb Building, 1125 Colonel By Drive, Ottawa, ON, K1S 5B6; Email: kerri.froc@carleton.ca

ISSN: 1911-4788



In Part I, Lens turns to ethnography to analyze welfare “fair hearings” (administrative proceedings conducted by judges to review the termination of welfare benefits) and child maltreatment hearings held in formal courtroom settings to adjudicate charges of abuse and neglect and monitor parental “rehabilitation” (p. 46). The author uses both types of cases to assess whether the poor achieve not only procedural, but substantive justice in these fora. Her analysis is based on an impressive collection of primary research, namely her observations of over two hundred of the latter and almost a hundred of the former, and supplemented by participant interviews.

In her study of these hearings, she describes the significance of a judge’s “style” in managing the hearing process (pp. 14, 61), either drawing those affected into the hearing process and treating them as the “experts” in their own case or discursively (and sometimes literally) excluding them from the room. These aspects affect the litigants’ perception of justice, as their treatment in court is sometimes as important to them as the outcome, or even more important. (p. 15). However, they also bear upon substantive justice, in that they influence the extent to which litigants are able to make submissions and prove their case. While appropriately lauding those extraordinary judges who, with seemingly small changes in demeanour and language, are able to educate and elicit necessary information to effect justice and change lives, Lens’ discussion is equally an indictment of “objective” judges who, in following a script and enforcing “the rules,” often make rulings laced with impatience, and larded with arbitrariness and their own ego. A vignette called “Stop Speaking” particularly resonated with my own experiences in family court a little more than a decade ago. In one instance, a judge, who no longer wished to entertain the submissions I was advancing vigorously on behalf of my client seeking support, stated that unless I stopped talking he would make an award against her.

Part I also illustrates, often in the rarely-heard words of the poor and marginalized themselves, the yawning chasm between what the law fixates upon as indicative of due process (e.g., receipt of a letter, proof of sickness on the date of a hearing, court decorum, legal representation), and what is critical for those caught up in the system themselves (e.g., being able to tell their story, what is at stake for them personally, the legitimacy of their underlying claim). However, the idea that due process is quite dependent on decision-makers is not new; neither is the diversity between judges who value “voice” and those who value process and rules (i.e., Philips, 1998). Nor is research documenting the disjuncture between legal facts and what Lens calls “social facts” and the bureaucratized silencing of the poor in administrative hearings (i.e., White, 1991), although Lens’ qualitative research provides an important and needed substantiation of this phenomenon beyond the anecdotal.

I had hoped Lens would expand her analysis toward a discursive analysis of the transcripts she collected, which would have enriched and complicated these findings. For instance, Lens indicates that child protection hearings

were unable to address systemic issues of social, racial and economic inequalities because, while they formed the “subtext” in such cases, “the focus is on the individual family, not the system” (p. 52). I question, however, whether it is simply the transparent and neutral “nature of the case” that impeded such interrogation (p. 52). Could it be that the discursive moves of judges during the hearings assisted in producing the gendered, racialized and classed figure of the neglectful parent (read: mother), and the nuclear family who, to paraphrase Tolstoy, is unhappy in its own individualized, idiosyncratic way? Could it also be that the “style” of individual judges, silencing or directing the voices of parents during the hearings, is also reflective of ideology (Philips, 1998)? Yet, while Lens repeatedly decries the absence of systemic considerations, she steers clear of interrogating whether the discursive frame established by the judges made such considerations an impossibility.

In Part II, Lens undertakes an analysis of lower court proceedings instigated by social justice lawyers and organizations on behalf of persons with mental disabilities facing non-consensual commitment or treatment, and homeless individuals and families denied adequate shelter. She presents these two case studies as a primer to show how cases are won or lost through the ability of lawyers to use broadly worded statutes and precedents creatively, as well as to develop strategies based on their knowledge of how social institutions work and how far courts are capable or willing to go in effecting justice. From a Canadian legal perspective, perhaps the most fascinating element of the book is the author’s description of the successful litigation concerning the right to shelter and emergency housing for the homeless. Canadian courts have been decidedly tentative in this regard. Judges have recognized only the modest, “negative” right of individuals to erect, without interference from the state, temporary shelters in public spaces to avoid exposure to the elements (and possible death), under Section 7 of the *Canadian Charter of Rights and Freedoms* guaranteeing life, liberty and security of the person (*Abbotsford (City) v Shantz*, 2015; *Victoria (City) v Adams*, 2009). Disappointingly, when it came to a broader systemic claim to a right to shelter and impugning government action that undermined the accessibility of affordable housing and increased homelessness as constitutional violations, the Ontario Court of Appeal pronounced that the issue was a political, “nonjusticiable” one (*Tanudjaja v. Canada (Attorney General)*, 2014).

It is the case that the public interest lawyers whose efforts Lens describes were able to unearth more helpful – albeit generally worded – legislation to support the imposition of duties upon the state to provide assistance to the indigent than exist in the Canadian context. Nevertheless, their strategies remain instructive. One lawyer started with a class action to establish a simple right to (temporary) shelter for homeless men, forgoing a request for more complex supports or long-term housing that would have triggered the courts’ concerns about justiciability. Then, most significantly, he focused on

a winnable preliminary injunction given the onset of winter and the available proof that homeless men without shelter risked death from exposure during past New York winters. Other lawyers expanded on the preliminary injunction win through class actions to achieve the right to shelter for women and homeless families.

Because of the lawyers' decisions to confine the remedy, courts were willing to engage in long-term supervision over the implementation of the orders, sometimes for decades, to ensure the adequacy of the shelter, resulting in further legislative changes in other jurisdictions according to the standards courts set. Lens rightfully points out the limitations of the outcomes achieved, including that they simply nibbled around the edges of the more systemic causes of homelessness and that they had negative financial consequences for resources expended in other areas of the system; they nevertheless seem extraordinary and a lesson on harnessing the possible within law to achieve justice for the poor.

In the last part of the book, Lens conducts a doctrinal analysis of US Supreme Court's Fourteenth Amendment ("equal protection") cases in the area of school segregation and "stop and frisk" jurisprudence under the Fourth Amendment (unreasonable search and seizure). She characterizes the segregation cases as showing the courts as "unreliable" interpreters of precedent, using the emancipatory dicta from the Court in *Brown v Board of Education* (1954) to thwart contemporary attempts at integration, and the stop and frisk cases as "tone deaf," facilitating racial profiling and a degradation of the rights (primarily) of African American males (p. 206). Such cases, she says, illustrate the tendency of courts to "dive too quickly into the ideological currents of the day or reflect the views of the dominant and affluent rather than the poor and disenfranchised" (p. 206).

Lens justifies the inclusion of these two jurisprudential areas in a book on "poor justice" because of "the nexus between race and poverty," with school integration cases representing "one route out of poverty, through education," and because criminalization represented by the stop and frisk cases "illustrate[s] a route to greater poverty" (p. xii). Yet, she does not attempt to connect the themes from these cases to judicial treatments of poor people's rights in previous chapters. In fact, in the chapter on stop and frisk cases, Lens herself seems to suggest that the phenomenon of police pretext stops of African American males and the resulting jurisprudence weakening constitutional protections against unreasonable searches and seizure, affects poor and affluent racialized men alike (p. 195). Commentators debate and courts deliberate on whether there is a sufficient basis in the US Constitution to recognize socioeconomic rights, in the sense of some type of state duties to ensure certain "social outcome targets" related to "adequate of subsistence, housing, health care, education, and safety or to the means of obtaining the same" (Michelman, 2008, p. 667). But the US Supreme Court has certainly confronted issues with redistributive implications (Michelman, 2008, pp. 677-679), and addressed the treatment of the poor under the Fourteenth

Amendment (Rose, 2010). The author missed an opportunity to broach directly the subject of “how the poor fare” in the highest court of the land *qua* poor people, if only to show whether and how the segregation and stop and frisk cases are illustrative, or at least, connected to, the Court’s ideologies concerning poverty and state responsibility for citizens’ wellbeing more generally.

Further, when it comes to these cases, Lens suddenly changes her analytic frame. Whereas she chooses to explain the behaviour of judges in her ethnographic studies as matters of “style,” distinctions between opinions by the various US Supreme Court judges are characterized as ideological. I share her assessment that ideology is at work when a nation’s highest court interprets the constitutional rights of the marginalized and poor (Froc, 2012, p. 141). However, she explains the role of ideology only by indicating that the jurisprudence she studies generally tracks the “changes in the Court’s composition” (p. 170), noting the popular recognition of certain courts (such as the Warren and Burger courts) as conservative or liberal, and that the room for discretion in interpreting precedent and applying legal analysis means “it is inevitable that ideology will influence the results” (p. 171). The author then goes on to note the vast areas of disagreement amongst various members of the Court in interpreting precedent and setting legal doctrine to the detriment of marginalized groups. While Lens prefaces her chapters by explaining the different interpretive approaches to the Constitution seen as markers of conservatism and liberalism,¹ she scarcely alludes to them in her analysis.

The conclusions that ideology has the potential to seep into judgements because law is subject to interpretation, that Supreme Court judges have in practice interpreted precedent and doctrine differently (sometimes dramatically so), and that judges are of diverse backgrounds and political proclivities, does not seem to be particularly revelatory. Perhaps the more important questions are what ideology is employed by Court majorities in various opinions, why a *particular* ideology becomes dominant at a certain moment in constitutional jurisprudence, and what that ideology enforces about our conceptions of marginalized groups and social subordination. In relation to the school segregation cases particularly, constitutional theorists have provided compelling explanations of the jurisprudence subsequent to *Brown* as reflecting societal struggles arising out of its enforcement (e.g., Siegel, 2004). These elements of Lens’ doctrinal analysis, are, in my view, undertheorized.

Lens’ book nevertheless makes an important contribution. Law is often resistant to the insights from other disciplines; in turn, other disciplines often look upon law as hide-bound, excessively doctrinal and uniformly predisposed towards retrenching the social status quo. Her ethnographic studies powerfully demonstrate how, for poor people, justice is not only what

¹ Notably, her explanation of the interpretive approach of originalism, identified with conservatism, as based exclusively upon “framers intent” is dated and no longer correct.

is written or decided in the name of law, but what is said to them and the manner in which it is said. Her studies benefit both those who study law by revealing the limitation of traditional doctrinal analyses, and practitioners of the law (both judges and lawyers) by showing the workings of justice in the smallest details, such as how affected persons are addressed in court. In turn, her analysis of social reform litigation provides a more complex and complete picture of law as a means of social change than what many commentators are willing to acknowledge, something to which critical studies scholars ought to pay heed. Law is indeed an imperfect mechanism, but better understandings of when justice does or does not “show up” for the poor are critical.

References

- Abbotsford (City) v. Shantz*, 2015 BCSC 1909, 392 DLR (4th) 106.
Brown v Board of Education, 347 U.S. 483 (1954).
Chandler, R. (1953/1992). *The long goodbye*. New York: Vintage Books.
Froc, K. (2012). Will watertight compartments sink women’s Charter rights? The need for a new theoretical approach to women’s multiple rights claims under the Canadian Charter of Rights and Freedoms. In B. Baines, D. Barak-Erez & T. Kahana (Eds.), *Feminist constitutionalism* (pp. 132-148). Cambridge: Cambridge University Press.
Michelman, F. (2008). Socioeconomic rights in constitutional law: Explaining America away. *International Journal of Constitutional Law*, 6(3&4), 663-686.
Philips, S. (1998). *Ideology in the language of judges: How judges practice law, politics and courtroom control*. Oxford: Oxford University Press.
Rose, H. (2010). The poor as a suspect class under the Equal Protection Clause: An open constitutional question. *Nova Law Review*, 34, 407-421.
Siegel, R. (2004). Equality talk: Antisubordination and anticlassification values in constitutional struggles over Brown. *Harvard Law Review*, 117(5), 1470-1547.
Tanudjaja v. Canada (Attorney General), 2014 ONCA 852, 379 DLR (4th) 467; leave to appeal to SCC refused, 36283 (25 June 2015).
Victoria (City) v Adams, 2009 BCCA 563, 313 DLR (4th) 29.
White, L. (1991). Subordination, rhetorical survival skills and Sunday shoes: Notes on the hearing of Mrs. ‘G’.” In M. Fineman & N. Thomadsen (Eds.), *At the boundaries of law: Feminism and legal theory* (pp. 40-58). New York: Routledge.