Half Empty, Half Full, or Neither: Law, Inequality, and Social Change in Capitalist Democracies

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Abstract

Reviewing research on organizational compliance, the politics of law, law and social movements, law and inequality, and law and social change, this article examines conditions under which legal institutions have more or less capacity to promote inequality-reducing social change in democratic capitalism. Law produces social change through a combination of rational adaptation to legal incentive structures, cultural meaning making and institutional diffusion, and political mobilization and counter-mobilization. Substantive effects-oriented administrative, adjudicative, and organizational interpretations of welfare-oriented legislation maximizes inequality reduction. These interpretations are most likely to be achieved through a combination of collective mobilization for strategic litigation in conjunction with sustained political mobilization from below both in society and in organizations, accompanied by the influence in implementation and also active monitoring by law and social science–savvy reformers representing the interests of disadvantaged classes and groups.

INTRODUCTION

Founded in the United States in 1964, the Law & Society Association (LSA) began life coterminous with Johnson's War on Poverty, expansion of legal services to the poor, and enactment of landmark civil rights legislation. A few years later, I majored in sociology in college and learned not only about institutionalized racism, but also, consistent with McCann's (1994, p. 288) assessment of the "relatively optimistic" tenor of law and society scholarship at the time, that formal law could change behavior, although it probably could not change people's attitudes. However, as McCann (1994, p. 288) notes, for law and social scientists, it was not long before "hope gave way to frustration as scores of studies detailed the institutional and ideological limitations of legal strategies for advancing social change."

The changing tenor of scholarship is highlighted by such works as "Why the 'Haves' Come Out Ahead" (Galanter 1974), *The Politics of Rights* (Scheingold 1974), and *The Hollow Hope* (Rosenberg 1991). Supported by claims that plural, contradictory forms of legal consciousness exhibited in everyday life provide powerful support for the status quo (Ewick & Silbey 1998), the pessimist might argue: "Don't be naive! Everything you do will end up reproducing capitalism, patriarchy, institutional racism, and Western hegemony."

Forty plus years after the LSA's founding, there is substantial scholarship suggesting how law creates, extends, reinforces, or at best leaves intact class, race, gender, and other inequalities. But there also is much literature specifying how and under what conditions law can mitigate or undermine such inequalities, contributing to progressive social change. Juxtaposing the two suggests that boundless pessimism is as unwarranted as boundless optimism. There clearly are limits to law as a force for mitigating inequality. But there also may be limits to those limits.

This article reviews extant literature, assessing the cumulative import of what we know and identifying where we might usefully go from here. It first lays out general parameters of the more pessimistic versus optimistic approaches, using labor law to show why law's capacity to reduce inequality can be seen as a glass half empty or half full. The review then discusses foundational studies and recent research. Given space constraints, the review is confined to the prodigious literature on law, inequality, and social change in democratic capitalism.

GENERAL PARAMETERS

Study of law, inequality, and social change in democratic capitalism begins with more general approaches to law and political economy (Trevino 1996, Sutton 2001, Edelman & Stryker 2005). On the one hand, "liberal legal philosophy holds that western legal systems are neutral, impartial as between the parties and autonomous from the rest of society, such that law is indifferent to economic, political and social inequalities among litigants" (Stryker 2006, p. 348). On the other hand, inequality was foundational to the classical social science of law. Both Karl Marx and Max Weber focused on whether and how law helped construct, reproduce, and transform systems of inequality. In Marx's historical materialism, law, with the polity, was superstructure, reflecting and reinforcing class inequalities built into relations of production. For Marx, law could become a battleground or object of class struggle, but law was not a major causal force in history (Edelman & Stryker 2005). Despite this foundation for the total absence of hope in law's capacity to reduce class inequality, Marx himself sometimes acted as if law mattered for progressive social change by engaging in legal critique (Stryker 2006).

Weber complicated things by positing a reciprocal, two-way street between law and other social institutions. Emphasizing the conjoint, mutually reinforcing rise of formal-rational law and of capitalism in Western

Europe, Weber argued that formal-rational law provided legal rights and guarantees to parties in economic exchange. These rights and guarantees increased predictability and certainty in contractual relations that, in turn, enhanced the likelihood that promises were kept, promoting market exchange. Market exchange then promoted further change in business and contract law (Trevino 1996, Stryker 2003).

Law, polity, and economy intertwined in the concept of legal personhood. With other key concepts, including agency and negotiable instruments, legal personhood facilitated high degrees of calculability, predictability, and systematization in the economy and capital and economic power concentration in large-scale business corporations (see also Commons 1924). Legal personhood, making business organizations bearers of universal rights entitling them to formal equal treatment under law, also "bridges between development of 'rule of law' institutions and belief in legality in the polity, and the construction and reproduction of capitalist economic ideologies," firms, and markets (Stryker 2003, p. 339).

Indeed, there is a large empirical literature showing how economic law in capitalism facilitated trade, development, and economic growth, while promoting concentration and centralization of capital and shaping models of competition and cultures of control (Dobbin & Dowd 2000, Fligstein 1990, Fligstein & Stone Sweet 2002, Sklar 1988, Roy 1990, Traxler et al. 2001). Most such studies do not focus on law and inequality per se, but they show the association between capitalist law and a social change trajectory tending toward increasing inequalities of wealth and power.

Law and social science research focused directly on law, inequality, and social change inhabits terrain configured by confronting Marx's assumptions against those of Weber. Within this terrain, all presume that legal action and institutions are embedded in social action and institutions, such that the idea of legal autonomy presented by liberal legal philosophy is false (Edelman & Stryker 2005, Ewick & Silbey 1998). Marx and Weber presumed that dominant classes and groups seek to perpetuate their dominance. Research based on this assumption specifies how wealth, status, and economic and social power provide resource advantages to shape legislation in polities constituted on the formally egalitarian "one person, one vote" principle (Lempert & Sanders 1986, Stryker 2003, Edelman & Stryker 2005). Elites try and often succeed in enacting economic and social stratification systems into law (Stryker 2006). Blatant examples are voting restrictions based on property and gender prior to adult universal suffrage in the United States and Western Europe, Jim Crow laws perpetuating second-class citizenship for blacks in the U.S. South after Reconstruction, South African race laws under apartheid, and property and family laws reinforcing women's subordination in North Africa and South Asia (McIntyre 1994, Frederickson 1981, Agarwal 1995, Charrad 2001).

Nonetheless, if history convinces that economically determinist readings of Marx must give way to Weber's image of intersecting, reciprocally constructed domains for legal and other social institutions, then law must have some autonomy. If so, there is room for law to mitigate inequality. It is no accident that neo-Marxists were pushed to invent theories of the capitalist state and law featuring the concept of relative autonomy, to assimilate the advent of social welfare and regulatory legislation including minimum wage, maximum hour, and occupational safety and health laws; labor laws promoting collective bargaining; antidiscrimination laws protecting women and racial, ethnic, and religious minorities; and pensions, unemployment assistance, accident insurance, and public assistance (Miliband 1969, Poulantzas 1973, Balbus 1977, Skocpol 1980, Stone 1985).

Lempert & Sanders (1986) help situate current debates. Expanding on Weber's (1978) distinction between formal-rational and substantive-rational law to clarify when legislative and adjudicative law is more or

less autonomous from dominant political-economic actors and interests in democratic capitalism, the authors specify the arena most likely to lead to law-induced, equality-promoting social change.

Noting that legislation can be differentiated according to whether it is "on [its] face status neutral" or "take[s] explicit account of social or economic position," Lempert & Sanders (1986, pp. 431, 436) suggest that, because purposive statutes "openly seek to advance specific subsets of social interests," they are on their face "distributively-oriented." Meanwhile, because status-neutral laws "attribute meaning to behavior based on the legal categories into which the behavior fits and not on the meaning it may have in the larger society . . . [such laws] give the same rights and duties to all who fit the category created." Because they "do not on their face mandate actions imposing special costs on a preexisting class of organization or individuals or give special benefits to another such class," status-neutral laws "are well suited to judicial formalism," and "have the appearance of distributive neutrality" (Lempert & Sanders 1986, pp. 431, 436).

Nonetheless, status-neutral legislation has distributive consequences, "determined by the actions of individuals and organizations and the way these parties choose to invoke the law . . . . [I]mplications of formally neutral law for social justice depend crucially on the distribution of power in nonlegal spheres" (Lempert & Sanders 1986, pp. 431, 437). Moreover, "if the law does not recognize the way that individuals are unequally situated, it can neither compensate for inequalities nor develop programs to obliterate them" (Lempert & Sanders 1986, p. 437). In short, status-neutral law only appears autonomous from dominant class interests. Appearing autonomous legitimates it, but its formal egalitarianism masks, legitimates, and often exacerbates substantive inequality (Lempert & Sanders 1986, p. 439; Balbus 1977). This restates in more general terms Marx's argument that formally egalitarian political rights deny the importance of class while ensuring that class determines people's lives (Sutton 2001, p. 75).

Although status-neutral legislation is not distributively neutral, its impact is more equivocal than the impact of legislation that is, on its face, distributively oriented. Within the latter, Lempert & Sanders (1986, p. 431) distinguish between legislation providing class-oriented endowments that benefit dominant classes and groups and welfare-oriented endowments that benefit subordinate classes and groups. The former are an especially "powerful force for the preservation or extension of existing inequalities, since [they] reinstitutionalize the power of the dominant class in the legal arena." The latter are "potentially a means to increased social justice" (Lempert & Sanders 1986, p. 433). For legislative law to reduce social and economic inequality, it may be necessary, but not sufficient, for law to be substantively oriented to provide benefits to the disadvantaged (Pedriana & Stryker 2004).

At the same time and following Weber (1978), legislation can be interpreted in ways that are more substantive than formal (Lempert & Sanders 1986, pp. 444, 451; Sutton 2001). When courts use substantive standards for interpreting law to realize the same "extralegal norms and values" that motivated a legislature to enact welfare-oriented legislation, this is likely to maximize equalizing social impact (Pedriana & Stryker 2004; Lempert & Sanders 1986, pp. 444–45). Debate between relative optimists and pessimists revolves around whether, how, and how much administrative and court enforcement combined with organizational compliance behavior in response to enforcement of welfare-oriented statutes reduces wealth, status, and power disparities originating outside the formal legal system or, conversely, co-opts subordinate groups through symbolic displays leaving elite wealth, status, and power in society intact.

Although the correlation is imperfect, relative pessimism also tends to be associated with emphasizing law's constitutive rather than

instrumental resource value (Paris 2006). As Stryker (2006, p. 342) notes,

> [W]hen actors use law strategically to get what they want—whether money, power, social status or self esteem—legal rules operate as cultural resources that are mobilized instrumentally. When legal rules provide interpretive scripts to help actors define and understand and/or evaluate themselves, others and their situations, they are resources operating—often unselfconsciously—in constitutive or normative fashion.

Thus, law shapes social action and institutions through cognitive or constitutive, normative and instrumental social mechanisms (Stryker 2003). These in turn are building blocks of two intersecting processes—political resource mobilization and counter-mobilization and cultural meaning making and institutional diffusion—through which legal and economic institutions, interests, actors, and norms are mutually endogenous (Edelman & Stryker 2005, Stryker 2003).

Whereas Lempert & Sanders (1986) emphasize especially a concept of law as strategic resource mobilized in conflicts of interest and power among contending groups, today's "theoretical conception of law and its relationships to culture and politics . . . is more often characterized as 'constitutive,' but perhaps is best called 'culturalist,' viewing law as seamlessly part of the social construction of identities, understandings, problem definitions and the like" (Paris 2006, p. 1015). For example, Steinberg (2003) showed how eighteenth- and early nineteenth-century labor relations in England were constituted in part by interpretations of master-servant law by local courts that employers mobilized for help controlling workers. Master-servant law and associated workplace cognitive and behavioral repertoires did not stem from control relations somehow pre-established in the economy, but rather formed a general sphere of legality that helped constitute and legitimate changing workplace relations. Law's constitutive power here is antithetical to political-economic equality. Meanwhile, examining the relationship between American labor law and the collective identity of the American labor movement, Forbath (1991) showed the complexity of political and cultural change mechanisms operating to make law and society mutually endogenous in ways that simultaneously mitigate and reinforce inequality. In totality, labor law research is a perfect fit to the glass half-full/half-empty image of law's capacity to reduce inequality.

LABOR LAW AS PARADIGMATIC EXAMPLE

Focusing on the late nineteenth–early twentieth centuries, Forbath (1991) showed that U.S. judicial review contrasted with continental code law and also with common law in Britain, in which judicial review's absence meant that Parliament's decisions reigned supreme. As state repression and the aborted revolutions of 1830, 1848, and 1870 in France illustrate, negative incentives confronted working-class action in Europe as well as in the United States. But there were greater rewards to radical working-class politics, offsetting costs, where legislative law could not be nullified by courts, than where legislation had to pass court scrutiny for constitutionality.

U.S. courts in the nineteenth century routinely invoked common law criminal conspiracy doctrines to repress unionizing or striking workers. As this strategy waned, employers mobilized courts to extend notions of property and issue injunctions against employees' workplace collective action (Hattam 1993, Forbath 1991, McCammon 1993a,b). Quantitative analyses by McCammon (1993b) show that, from the early 1880s to early 1930s, labor injunctions ended strikes specifically enjoined and also lessened other workers' willingness to strike. Judges issued injunctions especially to limit strikes over workplace control and broad-based sympathy strikes and boycotts (McCammon 1993b, Forbath 1991). Courts also vitiated amendments to the Sherman

Antitrust Act designed to eliminate labor injunctions, permitting injunctions to continue. As European labor movements achieved legislative rewards for political mobilization, American unions likewise campaigned successfully for state-level legislation setting minimum wages, maximum hours, and improved working conditions. But American judges repeatedly used judicial review to invalidate gains as unconstitutional violations of freedom of contract (McCammon 1993b, Forbath 1991).

This exceptional lose-lose combination of legal incentives contributed strongly to the evolving character of the American labor movement, deradicalizing it and moving it away from broad-based political action toward the voluntarist, relatively narrow, and economistic trade unionism associated with the American Federation of Labor (AFL) (Stryker 2003). Injunctions on labor's workplace collective action combined with invalidating labor-friendly legislation to transform AFL leaders' strategic calculi and reconstitute labor's collective identity. Court language casting striking workers as outlaws prompted union leaders to partially internalize this negative identity even as they resisted the labor injunction. Over time, AFL leaders saw that mobilizing "recessive" and "radical" possibilities in U.S. rights discourse to gain collective action rights was essential, while pursuing political-economic reform through legislation was futile (Forbath 1991, p. 135). "The negative antistatist goal of 'industrial liberty' became labor's watchword, but success in obtaining the right to unionize would come at the cost of abandoning a broad-based and political class unionism with its 'more radical ways of describing and criticizing the nation's political economy'" (Stryker 2003, p. 351, quoting Forbath 1991). Labor "entered a discourse in which the legitimacy of corporations' power over economic life was not 'dangerously questioned'" (Forbath 1991, p. 135, citations omitted). At the same time, labor mobilized "recessive, radical strains and possibilities" in the courts' constitutional rhetoric of private rights, reinforcing the economic and legal power of a rights discourse that "ratified many of industry's asymmetries of power" (Forbath 1991, p. 135).

The Norris LaGuardia anti-injunction bill of 1933 and the National Labor Relations Act of 1935 (NLRA) helped U.S. workers organize. From 1935 to 1947, the NLRA made the federal government an affirmative promoter of unions and collective bargaining, helping to increase workers' wages (Stryker 1989). In 1938, the Supreme Court declared the NLRA constitutional, and federal legislation established a minimum wage. In short, as Stryker (2003, p. 351) noted, for the American labor movement, "mobilizing law worked in contradictory fashion. It helped improve labor's economic well-being, but it also helped keep labor in a subordinate role in an increasingly taken-for-granted business-hegemonic political economy" (see also Tomlins 1985, 1993).

Research on later time periods also shows law's contradictory impact on U.S. labor's economic well-being and power. NLRA promotion of unionization and collective bargaining prompted strong employer backlash. In 1947, Congress enacted the Labor Management Relations Act (LMRA) (Stryker 1989). Weakening protection for workers' rights to strike and unionize and setting out union unfair labor practices to balance those for employers, the LMRA dramatically reshaped employer-union relations from what they were in 1935–1947. The original NLRA effectively undermined key antiunion strategies mobilized by early twentieth-century American employers (Griffin et al. 1986, Stryker 1989). Similarly, time series analyses by Rubin et al. (1983) show that during the NLRA, but at no other time, increased labor militancy—measured by strikes—and increased unionization were mutually reinforcing.

In contrast, Rogers (1990) suggests that LMRA implementation intensified U.S. unions' weakness and fragmentation relative to strong, centralized, or more political unions in Western Europe. McCammon (1990, 1994) emphasizes that, although the NLRA gave

workers the right to strike, the LMRA and its interpretations restricted strikes that seriously challenged workplace authority. When strikes were allowed, the LMRA permitted employers to hire replacements for striking workers. The right to strike became more symbolic than real, and to the extent exercised, it focused on bread and butter issues of wages and working conditions rather than on transforming workplace power relations (see also Rogers 1990). Not fully repressive, the LMRA was a contradictory regime of "integrative prevention," permitting worker collective organization but limiting labor militancy (McCammon 1993a).

In addition to illustrating that a half-empty/half-full assessment of law's inequality-reducing capacity is appropriate, research on law and the U.S. labor movement shows that concepts and measures of such capacity must be multidimensional. We must care about both short- and long-term material benefits, restructuring power relations, and transforming personal and collective identity (Crenshaw 1988, McCann 1994, Kostiner 2003). Considering this multiplicity of measures, labor law research shows how and why scholars often argue that law's constitutive power trumps its instrumental power. Similarly, pessimism often trumps optimism in law and society research on law, inequality, and social change (e.g., Sarat 1990, Ewick & Silbey 1998, Edelman & Suchman 1999). Labor law research is not unique for the contradictions it elucidates. Rather, these are replicated elsewhere.

GALANTER AND SCHEINGOLD: LITIGATION, INEQUALITY, AND SOCIAL CHANGE

Galanter's "Why the 'Haves' Come Out Ahead" (1974) and Scheingold's *The Politics of Rights* (1974) are two of the most influential law and society writings. Commemorating the 25th anniversary of Galanter's article, the *Law & Society Review* published an issue reexamining his hypotheses (Grossman et al. 1999). In 2004, Scheingold published a second edition of *The Politics of Rights*, unchanged but for an updated preface reflecting on legacies of the original work. Where Galanter (1974) focused on inequalities generated within formal-legal institutions, Scheingold (1974) investigated the law-polity interface as it shaped and limited attorneys seeking to promote progressive change through litigation.

Distinguishing between "one shot players who have only occasional recourse to the courts . . . and repeat players who are engaged in many similar litigations over time" (p. 97), Galanter (1974) suggested that the two kinds of players typically have different goals in going to court and find it strategic to "play the litigation game" differently. An accused criminal in court on a first offense or a person who files for divorce from a (first) spouse are examples of the paradigmatic one-shot player. State prosecutors, insurance companies, and major corporations dealing with the same specialized matters repeatedly in court are examples of the paradigmatic repeat player. Outlining likely strategies, Galanter (1974) argued that one-shot players typically concern themselves with outcomes of their particular cases, caring about general rules only to the extent that they relate to getting preferred outcomes. Divorcing parents fighting over child custody care about whether or not they get custody, not about general rules of child custody cases.

Meanwhile, Galanter (1974) hypothesized that repeat players, e.g., insurance companies litigating to establish liability, can and will pick and choose strategically among cases. Repeat players allocate more resources where more is at stake in terms of financial interest and legal precedent, choosing to settle cases likely to produce unfavorable legal rulings. In civil cases, a one-shot player may prefer to gain certain monetary compensation by accepting a proffered settlement, even though, on balance, she might win more by assuming the time and monetary costs of taking the case to trial. In a criminal case, a

one-shot player may accept a plea bargain to avoid maximum penalties such as death or lifetime incarceration.

Repeat players have prior experience and familiarity with courts and judges, resources not available to one-shot players. Repeat players also find it rational to invest in developing expertise, including ready access to specialist attorneys and other experts. For any specific litigation, "repeat players already know a great deal about the relevant legal precedents, increasing their capacity to pursue strategically [those] cases likely to produce maximally favorable legal rules. The upshot is that, other things equal, being a repeat player gives the actor mobilizing the courts more litigation relevant resources. The body of legal precedent produced by litigation between one-shot players and repeat players is likely to be skewed systematically in favor of the repeat players" (Stryker 2006, p. 349). Precedent's import is not just a taken-for-granted assumption of doctrinal legal scholars. McCammon & Kane (1997) investigated American labor's post–World War II mobilization of law to prohibit employer unfair labor practices, such as employers' interference with union elections, running company unions, discriminating against union workers, and refusing to bargain collectively in good faith. Their time series analysis examined when this mobilization of law was more or less successful and found that prior precedent-setting court decisions favoring employers significantly reduced labor's success in later litigation.

Lawyers are a special type of repeat player, so access to lawyers is important for all litigants (Galanter 1974). Large companies that are repeat players typically have in-house counsel as well as enduring relationships with outside firms specializing in litigation, which amplifies their advantage. One-shot players who are represented by specialized attorneys benefit from a more balanced arena. Where fee-for-legal-service markets prevail, retaining lawyers usually is expensive, so that have-nots may find themselves without attorneys or with lesser-quality counsel (Galanter 1974). Increasing the prevalence of contingency-fee arrangements and pro bono work helps lessen this disadvantage, as do reforms increasing availability of legal services to the poor (Galanter 1974, Lempert & Sanders 1986). Advantages accruing to parties with lawyers are not confined to the United States. In a study of litigation involving 328 Russian companies during the transition to a market economy, Hendley et al. (1999) showed that those companies represented by counsel were more likely to undertake litigation to protect or advance their economic interests, controlling for diverse other factors. Finally, Galanter (1974) also hypothesized that overloaded criminal and civil court dockets increase advantages of the haves because financially well-off civil defendants can use delaying tactics to their advantage, and overstressed public defenders in the criminal justice system lack time to gain detailed knowledge of their clients' cases.

In an informative essay, Paris (2006, p. 1006) credited Scheingold for being "first to develop a systematic argument for the proposition that litigation and court decisions could be used as part of a broader strategy to organize and mobilize political action. Things legal could be a vital part of political processes resulting in a redistribution of political power. In turn, the redistribution of political power could bring about changes in policies and behaviors." Yet Scheingold (1974) was no unbridled optimist. He wrote a cautionary tale about reform lawyers who, blinded by rights discourse, misread possibilities as a done deal.

Addressing his topic from the have-nots' vantage point, Scheingold (1974) asked whether litigation could play a role in changing public policy to the benefit of the disadvantaged. The answer was yes, but only if lawyers were willing to "abandon the conventional legal perspective and replace it with a political approach to law and change" (Scheingold 2004, p. 4). Conventional perspectives, embodying a "myth of rights" were

ineffective, but a "politics of rights" was promising:

> Legal frames of reference tunnel the vision of both activists and analysts leading to an oversimplified approach . . . that grossly exaggerates the role that lawyers and litigation can play in a strategy for change. The assumption is that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and finally, that realization is tantamount to meaningful change. The myth of rights is, in other words, premised on a direct linking of litigation, rights, and remedies with social change (Scheingold 2004, p. 5).

American law disproportionately embodies profound faith in markets, opposition to government regulation, and individualism. Rights claims are limited to those that lawyers envision as at least possibly successful, given such doctrine. Steeped in legalism, reform lawyers tend to view change strategies exclusively in terms of litigation, distrusting political protest and grossly overestimating the political impact of court rulings. Strategies of exclusive litigation have substantial opportunity costs, leaving "change agents . . . dependent on the will, powers, and technical capacities of the courts" (Paris 2006, p. 1005). Victory in court "might provide only symbolic reassurance without changing much of anything on the ground" (Paris 2006, p. 1005). In short, new legal rights do not, in themselves, transform power-asymmetric social relations (Scheingold 1974, cf. McIntrye 1994).

At the same time, the glass was not empty for Scheingold (2004, pp. 6–7), as long as "judicially asserted rights" were thought of not "as accomplished social facts or moral imperatives" but rather as "authoritatively articulated goals of public policy [that serve] as political resources of unknown value in the hands of those who want to alter the course of public policy." Rather than thinking of law as distinct from politics, reform lawyers should see law as part of a broader political process. Key questions involved the optimal relationship between mobilization in formal-legal institutions and more general political mobilization. Described by Paris (2006, p. 1006), Scheingold's (1974) bottom line is that success is not guaranteed, but "litigation and court decisions [can] be catalysts for the political organization and mobilization of relatively powerless groups . . . . [L]egal challenges might help activate citizens, cue expectations about the possibility of winning, and help bring new groups and coalitions into being." If attorneys and movements were savvier about both limits and opportunities, they could mobilize legal institutions to promote real, inequality-reducing social change (Paris 2006). Scheingold (1974) suggested that "traditional activists," such as ACLU and NAACP lawyers, comprised the greatest portion of the reform-oriented bar and also were the biggest believers in the myth of rights. "Radical activist" lawyers, such as those who defended black liberationists or worked for the National Lawyers Guild, operated on the strongest version of critical ideology, equating law with repression and trying to defend their marginal clients from the worst of it. Figures such as Ralph Nader were potential harbingers of how litigation could be part of reform-producing political activism. The greatest chance of success lay in seeing that "law and politics are inextricably intertwined and in this combination politics is the senior partner" (Scheingold 2004, pp. 203–4).

Paris (2006, p. 1007) read Scheingold as "very clearly put[ting] the accent on [law's] limitations," but "also argu[ing] that, in many contexts, it could be a fatal mistake to forego the opportunity side of a politics of rights." In fact, Scheingold (1974) is a key progenitor of the half-empty/half-full image of law's capacity to mitigate inequality. On the basis of Galanter and Scheingold, we see why formal-legal rule change alone may penetrate society minimally. At the same time, Scheingold argued that strategic litigation within a broader social movement also relying

on political protest could help produce social change.

OPPORTUNITIES AND LIMITS: FURTHER SPECIFICATION AND FINDINGS

Research that examines empirically law's opportunities and limits is multifaceted. It includes work building directly on Galanter and Scheingold, but also research on law and organizations and on the politics of law enforcement.

Exploiting case-oriented comparisons to identify institutional factors likely to increase or decrease courts' impact, Rosenberg (1991) highlighted that court orders benefiting have-nots are not self-enforcing. When court decisions are unpopular, only the state's political branches have the money and power to send federal troops to enforce them. Only the political branches have money and power to provide financial incentives to recalcitrant noncompliers (Chesler et al. 1988, Sutton 2001). The position of economic elites likewise is central. When such elites are united strongly against making good on a court-enunciated right, political branches more likely will refrain from aggressive enforcement (Rosenberg 1991). Given constraints under which courts operate, landmark court decisions and legislation on education, employment, and voting rights in the 1950s and 1960s represented mostly a hollow hope, because courts alone lack capacity to coerce or inspire others to provide the disadvantaged with real benefits.

In research on school desegregation litigation, Chesler et al. (1988) emphasized that judges are trained in legal doctrine rather than in understanding social relations. Professional socialization and training tend judges toward a hands-off approach to implementation, rather than encouraging day-to-day monitoring and social-relational adjustments required to translate court decrees into organizational change. Most judges were disinclined—or even if inclined, ill prepared—to interfere in crucial day-to-day activities of school boards and parent groups. These difficulties were exacerbated as the legal horizon moved from de jure to de facto segregation. With inequalities in education, employment, income, and wealth entrenched across generations in cycles of cumulative disadvantage, sociologists argue that cumulative disadvantage often is "cumulative discrimination" (Blank et al. 2004) that neither courts nor legislatures are inclined or prepared to confront.

Whereas Rosenberg (1991) illuminated courts' impact under various configurations and degrees of support or opposition by economic and political elites, Handler (1978) found that legal victories for progressive reform might be isolated and dismantled in the absence of an organized social movement sustaining change efforts. McCann (1994) added much to our knowledge by emphasizing a complex relational dynamic among actors from above and below in an evolving political-institutional field.

Law, Politics, and Rights at Work

In the early 1980s, gender pay equity was at the forefront of U.S. feminist reformers' agenda. Examining how law and politics combined in four successive phases of the movement for gender pay equity, McCann (1994, p. 279) found that the "most obvious positive contribution of legal tactics was in the initial movement building phases" when "progressive lawyers" schooled in battles over workplace affirmative action and equal treatment adapted and built on legal victories and discursive resources developed and institutionalized in these battles to devise an argument for "equal pay for work of comparable worth." Jobs done disproportionately by females tended to pay less than jobs done disproportionately by males, and activists wanted to equalize pay for such jobs, as long as the disproportionately female and disproportionately male jobs could be shown to be of equal worth in terms of such underlying dimensions as skill, effort, responsibility, and working

conditions (Nelson & Bridges 1999, McCann 1994):

> From the start, [progressive lawyers] aimed to use litigation to dramatize the wage discrimination issue and to build an actively supportive constituency among working women and their allies. That endeavor proved quite effective. A handful of successful trial and appellate cases generated hopes and focused attention among many leading feminists and union activists around the country. These leaders in turn used both landmark decisions and local legal challenges as resources for mobilizing grassroots support among workers, feminists and community groups in multiple venues throughout the nation (McCann 1994, p. 279).

Highlighting that actors mobilizing law were activists, not judges, and that their goal was recruiting and energizing movement members and beneficiaries, McCann's (1994) study demonstrated a key theme of social movement research more generally: that pre-existing organizations and networks matter (Pedriana 2004, 2006). "Activist elites and organizations" could mobilize resources effectively because of prior connections to "potential constituents." On the basis of these connections, the movement gained "financial and organizational support from allies in government, community groups and the public at large—which sustained defiant action for new rights even as initial judicial support faded" (McCann 1994, p. 280).

In the remaining three movement phases identified by McCann, formal-legal institutions made important contributions only in the first, early stages of "maneuvering [by reform activists] to compel formal policy concessions" (McCann 1994, p. 280). Here, "parading lawyers" and threatening and undertaking litigation "provided leverage for negotiations in official policy forums . . . . [L]itigation provided the movement one of its most consistently potent leveraging resources in negotiations for over a decade, even though the courts were unreliable allies" (McCann 1994, p. 280). Consistent with research on implementing affirmative action, public sector employers were especially vulnerable to this leveraging effect because they were especially vulnerable to bad publicity and to the threat of financial costs and administrative uncertainty (see Stryker 2001 for factors increasing the likelihood that affirmative action plans will be implemented and produce real gains for the disadvantaged). But threat diminished as the courts became more unfriendly and employers learned how to reduce litigation risks and raise fears about possible adverse consequences of reform.

In the late 1980s, pay equity activists tried circumventing negative court rulings by amending federal civil rights legislation in ways that could reinstate litigation as a credible threat. They failed, but legislation and collective bargaining at the local and state levels achieved much. Activists almost never achieved pure gender pay equity, but gender wage gaps "were significantly narrowed" (McCann 1994, p. 281). Pay equity reform in Iowa shows how political realities converged to result in pay augmentation for all public sector jobs, especially for jobs done disproportionately by women and shown through job evaluation to be undervalued. Thus, Iowa's comparable worth legislation significantly increased gender pay equity for Iowa public sector employees, although it would have increased gender equity still more had jobs done predominantly by males and shown to be overvalued been subjected to a pay cut, which was politically unpalatable to the state and to public sector unions (Orazem & Mattila 1989). In an imaginary world in which we need not take into account what is or is not objectively possible, Iowa could have implemented reform in ways that would have been more gender equalizing, while costing less. But given that McCann's (1994) findings suggest that solidarity and leadership commitment among diverse movement allies increased social gains to pay equity activism, perhaps Iowa's implementation gauged things about right.

Characterizing the movement's final phase as its legacy for later struggles, McCann (1994, p. 281) found that "political advances in many contexts matched or exceeded wage gains. One important advance was at the level of rights consciousness, [such that] legal rights . . . became increasingly meaningful both as a general moral discourse and as a strategic discourse for ongoing challenges to status quo power relations." Although the pay equity movement was contained, it strengthened organizational ties among women workers and allies, spurring other successful battles for workplace reform and thus demonstrating "a variable but broadly significant pattern of political empowerment among many working women" (McCann 1994, p. 292).

In sum, McCann's (1994) work showed that, as long as there are early judicial wins to recruit and galvanize movement beneficiaries and allies, spur resistance, and leverage political negotiations, court decisions need not be so consistent, nor victories as long-term and permanent as might have been thought. Although litigation lacked power to produce social change directly, it had important indirect empowering effects, changing women's sense of who they were and what was possible, as well as their propensity to engage in further struggle. Knee-jerk responses denigrating economic, political, and cultural reform short of dismantling capitalism itself were unwarranted.

Consistent with McCann, much research has shown that rights discourse from below involves active reinterpretation, not passive acceptance of prevailing elite views (Forbath 1991, Tomlins 1993, Pedriana & Stryker 1997). Rights discourse is powerful because it resonates with elites and subordinates alike (Crenshaw 1988, Pedriana & Stryker 1997, McCann 1994, Forbath 1991). Small-scale, issue-based resistance mobilizing rights discourse is not necessarily "a co-opted alternative to transformative politics. Rather [it] often provide[s] rehearsals of opposition that prepare the way for bolder challenges in more propitious moments" (McCann 1994, p. 307).

At the same time, political and legal mobilization of rights discourse from below shapes rights interpretation by economic and political elites, legal scholars, and judges. Pedriana & Stryker (1997) showed how early proponents of affirmative action converted into opportunity the apparent constraints placed on them by the individualistic, intent-oriented meanings of equal opportunity previously institutionalized into law. They did so by reinterpreting equal opportunity so that achieving it required proactive, group- and results-oriented measures to compensate for past discrimination against African Americans. Courts enacted transformed meaning into formal law, promoting diffusion of affirmative action offices and policies broadly in the U.S. economy (Pedriana & Stryker 1997, 2004; Stryker 2001; Dobbin & Sutton 1998; Edelman 1992).

Likewise, Pedriana (2004) showed how the women's movement was both recipient and creator of legal opportunity structures. Skrentny (2006) noted that decisions of those in power always play a role in shaping social movements' impact. Thus, elite perceptions of movements from below, especially those about what defines a potential beneficiary group, its moral deservingness, and the threat it poses, shape the impact of mobilization of rights discourse from below. Although perceived moral worthiness of a disadvantaged group is important, perceived threat can trump ambivalent or negative evaluations of worthiness at least in the short term (Skrentny 2006).

McCann's (1994) work suggests a minimum of three key strands of follow-up research. First, we need research at the intersection of social movements and legal mobilization that examines conditions under which small reforms produce satisfaction and complacency as opposed to those under which small reforms whet appetites and accumulate resources for further mobilization and conflict. As previously discussed, much research focuses on empowering versus limiting aspects of rights discourse (e.g., Hull

2001; Bernstein 2001; Pedriana 2004, 2006). Zippel's (2006) recent multi-level political-institutional account of the origin and implementation of policies against sexual harassment in the United States, Germany, and the European Union is especially interesting. Whereas the United States relied on a rights-oriented law enforcement route to defining and combating harassment, Germany relied on a more flexible corporatist path, expecting unions and employers to negotiate sensible policies at the workplace. Zippel (2006) suggested that a combined approach that strengthens rights but also relies on corporatism to help implement rights would empower women most.

Beyond examining complexities of rights discourse, we need studies showing which specific conditions are more or less likely to generate combinations of formal law and social movement activism that McCann (1994, pp. 307–8) terms "expansionist" in achieving both short-term benefits and "significant new resources, opportunities and aspirations for continued counter-hegemonic struggle." At minimum, such expansionist reforms "sustain the momentum for change," and at maximum, these reforms "snowball into ever more comprehensive demands and conflicts" (McCann 1994, p. 308; see also McCann 1998). Surveying prior literature on the civil rights, women's rights, and mental health rights movements as well as liberal public interest groups, McCann (1994) suggested that when litigation competes with and diverts energy from grassroots political activity, it tends to be disempowering, consuming rather than producing more material and power resources.

Second, although court wins are not sufficient to produce inequality-reducing social change, and consistent, sustained wins may not even be necessary, some wins usually are required to extend movements across multiple locales. Thus, we need research on conditions under which the relatively disadvantaged are more or less likely to win in court.

Third, we need research on the politics of implementing legislation that provides welfare-oriented endowments, that is, rights and benefits to the disadvantaged.

Who Wins in Court and How Do They Do It?

Writing about inequalities produced in and by the U.S. court- and litigation-centered legal system, Galanter (1974) was clear that there can be low-status, impoverished repeat players—stereotypical underclass street criminals come to mind—and also wealthy, high-status, one-shot players—O.J. Simpson was just such a player when tried, then acquitted of his wife's murder. But Galanter and his interpreters tended to draw implications of the one-shot/repeat player distinction with examples and research confounding it with differences in pre-existing economic and social position (Lempert 1999).

Many studies examined relative litigation success of diverse types of litigants. Wheeler et al. (1987) examined win rates on appeal in 16 state supreme courts, 1870–1970. Analyzing both published and unpublished decisions, Songer & Sheehan (1992) investigated whether upperdogs routinely beat underdogs in three federal circuit courts in 1986. Songer et al. (1999) took a random sample of cases from the U.S. Courts of Appeals Data Base, 1925–1988, to examine success rates by time period. They estimated a multivariate logistic regression equation assessing the impact of appellant and respondent strength on the likelihood of success in published decisions, controlling for the court's ideological makeup and whether or not the appeal involved criminal law or procedures. Sheehan et al. (1992) looked at success rates of diverse party types in the U.S. Supreme Court, 1953–1988. Similar studies have been done for other countries (e.g., McCormick 1993, for Canada; Haynie et al. 1994, for South Africa, India, and the Philippines).

All studies save for those on the Supreme Courts of Canada and the Philippines show that haves disproportionately win in court. But research design and coding do not allow us

to attribute this to Galanter's original hypothesis. Studies typically differentiate between litigants who are individuals or organizations, and among organizations, between those that are businesses or state or federal governments. Studies sometimes distinguish between large and small businesses and among local, state, and federal governments (Songer et al. 1999, p. 815). Paradigmatic resources distinguishing one-shot from repeat players may be driving some of what we observe. But money and power stemming from actors' positions outside the legal system probably drive much of it, especially because, as studies suggest, government is especially advantaged in litigation (Songer et al. 1999, p. 815; Lempert 1999; Farole 1999). As Lempert (1999, pp. 1103, 1007) put it:

> It is clear from what we know about criminal cases that a pure repeat player effect does not generally exist. At the most, there seems to be an interaction effect, such that those who have power and are repeat players do better than those who are not powerful, whether or not the latter are repeat players. We cannot be sure from the empirical work that there is even an interaction effect because we are missing the crucial comparison between powerful parties who are repeat players and those who are not.... [W]e need research that looks at the importance of repeat playing when litigants are equally situated with regard to other attributes of power. [But] most research that seeks to evaluate the importance of repeat playing ... focuses on litigation between unequals [so] we cannot specify the degree of advantage uniquely associated with actual or contemplated repeat playing.

Future research should refine design and coding to extend to, and distinguish between, both types of haves and have-nots, while examining potential confounding factors. The better our data and models allow us to chart specific mechanisms through which diverse types of advantages accruing to haves translate into legal outcomes, the better we can specify how to disrupt these mechanisms. Whether government litigation success is attributable to repeat player status, state actor status, or a combination, the consistent relative success of government in litigation suggests that aggressive state enforcement of welfare-oriented legislation will help maximize law's capacity to produce equality-enhancing social change.

Bridging general studies of court outcomes and of enforcement politics are studies examining who wins when enforcement of legislation benefiting the disadvantaged proceeds through litigation. Scholars emphasize difficulties facing individuals who are victims of discrimination when they—rather than government enforcers—must vindicate their rights (Bumiller 1988, Edelman 1992, Albiston 1999). Discrimination victims may not perceive that their rights have been violated, and if they do, they may fear retaliation, lack financial resources or social validation and support, or for myriad other reasons fail to invoke law (Edelman & Stryker 2005). One recent study found that less than 1% of blacks who felt they had experienced discrimination filed a complaint with the Equal Employment Opportunity Commission (EEOC) (Nielson & Nelson 2005, p. 704).

Much research shows that collective mobilization strategies for litigation produce more positive outcomes than does litigation by individuals. Burstein (1989) analyzed the content of 675 published appellate sex discrimination cases between 1963 and 1985, decided under Title VII of the Civil Rights Act of 1964 or the Equal Pay Act of 1963. Counting all plaintiff wins, including those that did not represent final outcomes as well as those that did, and those in which women got all or part of what they sought, Burstein (1989) found that women won over half the appeals. About 17% of the cases involved government as a party, and 42% of them were class actions, aggregating similarly situated aggrieved plaintiffs into one suit. Class action plaintiffs were 15% more likely to win than plaintiffs who sued as individuals, and plaintiffs also were more

likely to win when the federal government was involved as a party or by contributing an amicus brief. With respect to direct social impact, Burstein (1989) found that only 27% of appeals resulted in final decisions with awards favoring plaintiffs. Two-thirds of these required monetary compensation alone. The remaining one-third required some change in organizational practice, most in conjunction with requiring financial compensation. Investigating final outcomes in all equal employment appellate litigation between 1963 and 1985, Burstein (1991a) found a substantial, statistically significant, positive effect on employee-plaintiffs' chances of winning when government was a party in the case. He also found that class actions were significantly and positively associated with plaintiff victory. The most common form of collective action in litigation was the class action, with government as a party a distant second, and federal government or other organizations writing amicus briefs an even more distant third.

In short, collective mobilization of legal, financial, and technical resources for litigation matters. What then of counter-movements to progressive reform that also mobilize the courts? Investigating court decisions in reverse discrimination employment cases between 1965 and 1985, Burstein (1991b) found that there were few reverse discrimination suits, reverse discrimination plaintiffs typically were not collectively organized, and they usually lost. But just like other equal employment plaintiffs, reverse discrimination plaintiffs did better when collectively organized than when not.

McCammon (2001) conducted time series regressions for 1948–1978 and found that as union representation elections increased, so did labor's filing of unfair labor practice charges. Investigating when labor's post–World War II legal mobilization was more or less successful, McCammon & Kane (1997) found that the more unfair labor practice charges filed against employers, the more likely it was that courts ruled in favor of workers. But this effect weakened when employer associations also were mobilized. Although heightened strike levels did not affect court rulings, prior precedent-setting judicial decisions favoring employers significantly reduced labor's successes in later cases. In contrast to doctrinal legal scholars' presumption that law's path dependence on legal precedent is oblivious to the identity of litigating parties, cases offering prolabor precedent did not significantly influence later judges' decisions. McCammon & Kane (1997) suggest that perhaps judges disproportionately use precedent in labor law cases to rule against workers and unions, while tending to rely on individual fact situations when they rule in favor of workers and unions. This hypothesis should be tested directly for labor law and welfare-oriented law more generally. If judicial rulings are systematically unequal in resource value as precedents for later cases depending on the winner's wealth, status, and power outside the legal system, this is another route by which haves come out ahead in court and proequality reforms can be blunted.

Albiston (1999) studied the first five years of published judicial opinions enforcing the Family Medical Leave Act (FMLA), requiring employers to give up to 12 weeks of unpaid leave to care for newborns or seriously ill family members. Employees can seek redress in court if they perceive they have been illegally deprived of this employment benefit or have been subject to demotion, termination, etc., because they used the benefit. Albiston highlights how the procedural posture of the sequence of judicial decision points in civil litigation gives employer-defendants more opportunity to prevail on published final outcomes, independent of any other explanatory factor.

The vast majority of published opinions interpreting the FMLA in its early years involved motions for summary judgment and motions to dismiss. Success on these by the moving party ends the case. Because employers alone can file motions to dismiss, they have strategic control of this decision point. Employers who filed motions to dismiss

won twice as many of these as did employees (Albiston 1999). Both parties can file motions for summary judgment in their favor, and when both did so, employers won only half the time. Employees won the rest of these cases, but only in a little more than 25% did they win on their own motion, thus constituting a final decision. The rest of the time they won by defeating the employer's summary judgment motion, permitting the case to proceed to trial. There were many more cases in which only the employer moved for summary judgment than cases that required courts to address cross motions. Overall, by far the largest group of published opinions was judicial grants of employer motions for summary judgment (Albiston 1999).

Given her findings, Albiston (1999) argued that plaintiffs and defendants do not have the same opportunities to win lawsuits through published court rulings that serve as legal precedent. Numbers of published bench trial and appellate decisions increase with the life of legislation. But the percentage of such cases relative to those stemming from summary judgment and motions to dismiss is likely to remain small (Albiston 1999). On the one hand, then, studies of published opinions will substantially understate tangible benefits that employees receive when they win through unpublished settlements or jury trials, or by leveraging law in negotiating benefits with employers, or when employers comply voluntarily with law (see also Donohue & Siegelman 1991). On the other hand, the paradox of these kinds of wins is that they are legally invisible and so cannot promote positive feedbacks in an endogenous system of communicated, authoritative rules. What is visible to employers and employees—and to the general public through media reports on published cases—is likely to dampen later rights mobilization by employees. Likewise, sustained negative rulings can convince the public that the problem the right was enacted to solve no longer exists. Over time, the moral force the right communicated erodes, and its impact is blunted (Albiston 1999, pp. 902–5).

Albiston (1999) sets up a plausible, deeply pessimistic scenario that must be examined empirically. Involving a complex dynamic with intermediate mechanisms and feedbacks, multiple causal factors, and a series of selection points, the scenario presents challenges for operationalization. But research examining hypothesized causal relationships forming subsets of the total argument can be designed readily and should be done. Those mathematically inclined could model and simulate the scenario as a whole, to locate the most strategic points for interventionist reform.

Politics of Enforcement

Research on the politics of enforcing welfare-oriented legislation highlights additional leverage points shaping variable impact (see Stryker 2000a, Huber & Stephens 2005 for general reviews of the comparative politics of redistributive and regulatory law). Whether enforcement occurs through adjudicative or administrative rulemaking by government agencies and/or courts, institutionalized understandings of property rights, legal liability based on pinpointing individual responsibility, and a more general culture of faith in markets predispose enforcers away from aggressive enforcement of welfare-oriented legislation (Nelson & Bridges 1999, Yeager 1990). Corporate organizational forms themselves encourage leniency and negotiated compliance (Stone 1975, Yeager 1990). Organizational haves find that market defenses to liability and arguments that stringent enforcement interferes with economic viability are potent resources for blunting social impact (Melnick 1983, Yeager 1990, Nelson & Bridges 1999). Similar to McCann (1994), Nelson & Bridges (1999) found that politics—in their case politics within the large public and private sector organizations they studied seeking causes of gender pay inequalities in litigated cases—matters in shaping impact. In contrast, the overall picture Nelson & Bridges (1999) painted, in which federal courts quickly closed the window of legal

opportunity opened by the 1981 Supreme Court decision in the *Gunther* case, shows how the courts legalized between-job gender pay inequalities by accepting and institutionalizing market defenses for inequalities produced through organizational processes that did not and could not follow market logic.

Limited social impact also results from agency procedures tilted in favor of large organizations with greater technical and financial resources. Melnick (1983) showed how narrow adversarial enforcement for U.S. pollution control led courts to extend the scope of Environmental Protection Agency (EPA) programs, while also lessening EPA resources to achieve program goals. Yeager (1990) showed that formally neutral EPA sanctioning decisions reproduced private sector inequality—and with it the water pollution generated disproportionately by big business—by favoring large firms over small in enforcement. Using regression to highlight both direct and indirect mechanisms of advantage, Yeager (1990) found that, because large firms were financially and technically advantaged relative to small firms, they were better able to mobilize EPA administrative hearings to negotiate and appeal charges. Firm economic strength was negatively related to the number and severity of sanctions because large firms were more likely to invoke administrative hearings, and invoking a hearing then reduced the likelihood of violations and/or of sanctions for law violation.

A counterpoint comes from Harris's (1999) demonstration that when interests of have-nots are represented throughout administrative processes implementing court decrees in favor of the disadvantaged, more is achieved in terms of real benefits. Comparing conditions for more and less successful implementation of court decrees stemming from three major "right to home" class action lawsuits, Harris (1999) identified strategic trade offs and a conjunction of factors most likely to maximize benefits for the disadvantaged. Showing how and why poverty lawyers were critical to developing and defending "new redistributive programs for the 'have-nots,'" Harris emphasized the positive causal import of judicial oversight, combined with an appropriate strategy of organizational politics pursued by poverty lawyers themselves within implementation. Where prior research showed how agency bureaucracy could impede implementation of redistributive court decisions challenging agency goals, Harris's research (1999, p. 933) echoes Heimer's (1996) suggestion that previously existing organizational routines are more likely to be modified when "legal actors who are empowered to enforce the new reforms are present."

Because judicial oversight allowed previously outsider poverty lawyers to become insiders to state implementation, judicial oversight was a necessary, albeit not sufficient condition for maximizing "on the ground" housing and other antipoverty benefits to have-nots. To ensure success, poverty lawyers negotiating implementation with agency officials had to "mobilize intra-agency support for reform by convincing the administrative leadership that the new programs would enhance the reputation of the agency within its political environment and provide the staff with adequate resources to carry out their responsibilities" (Harris 1999, p. 934; see also Skrentny 1996, Pedriana & Stryker 2004). Finally, although "even well functioning program(s) could be vulnerable to funding cuts . . . in political environments in which the legislative leadership was retreating from previous commitments to maintaining a safety net for poor people," when "a diverse set of constituencies" (including some economic haves) "were mobilized on behalf of the program during implementation," then "the program was more likely to be able to withstand political pressures for elimination," even when very costly (Harris 1999, p. 934). Harris (1999) also cautioned that, to maximize gains for the disadvantaged, reform lawyers must work to mobilize support for reform and influence program rules during implementation, but they should not assume administrative roles. Doing the latter made

them "program constituents with their own set of interests as rule enforcers . . . and threatened the legitimacy of the Legal Aid Society among its own staff" (Harris 1999, p. 934).

With much litigation settled outside judicial purview, the role played by judicial oversight in providing Harris's (1999) poverty lawyers with essential symbolic resources for negotiating implementation has potentially far-reaching import. In the early stages of design and data collection, a study of antidiscrimination consent decrees undertaken by the Institute for Women's Policy Research and The Wage Project follows up on the import of judicial oversight, given court antidiscrimination consent decrees of variable content, duration, and provisions for monitoring.

Supportive constituencies are needed for state enforcement of legislative law benefiting the disadvantaged just as they are for public and private organizations responding to welfare-oriented judicial mandates. Sabatier (1975) showed how environmental agencies lacking social movement constituencies pressuring them toward aggressive enforcement could work proactively to create them, increasing technical and monitoring capacity, as well as communication and helpful publicity. This in turn dramatically reduced the likelihood of the agency being captured by the powerful economic interests it regulated. Examining how an initially weak EEOC expanded its capacity to enforce Title VII of the 1964 Civil Rights Act, Pedriana & Stryker (2004) signaled the import of overt, sustained movement pressure from below to maximize benefits to the disadvantaged.

Both Title VII on the books and the newly established EEOC were weak, but in 1965–1971, civil rights advocacy groups pressured the EEOC relentlessly and combined forces with EEOC staff to convert weakness into strength. They accomplished this by coupling victories in procedural battles expanding real access to the courts with winning an uphill battle for a substantive effects-oriented Supreme Court interpretation of Title VII (Pedriana & Stryker 2004). The authors empirically supported a causal chain in which sustained social movement pressure from below increases the likelihood that legislative law designed to benefit the disadvantaged is given a broad, effects-oriented interpretation that, in turn, maximizes state capacity to provide benefits.

As Pedriana & Stryker (2004) showed, substantive effects-oriented methods of establishing liability for discrimination were possible but not favored by extant doctrine. Recessive possibilities had to be actively constructed when most incentives, including the threat of adverse decisions in the federal courts, worked in the opposite direction. Despite all this, social movement pressure promoted EEOC adoption of an effects-oriented method of proving discrimination (disparate impact). EEOC adoption of this method facilitated the Supreme Court's endorsement of disparate impact in the 1971 *Griggs* case, reversing contrary decisions in the lower federal courts.

Pedriana & Stryker (2004) examined expansion of state capacity in equal employment law, not the law's social impact. But Donohue & Heckman's (1991) careful review of equal employment law's impact on black-white inequalities found that federal antidiscrimination efforts in employment, in conjunction with those in voting rights and education, improved blacks' economic status in 1965–1975, approximately the same period as that for which Pedriana & Stryker (2004) suggested that expansionist legal interpretations increased state capacity to reduce inequality. Social impact diminished in later periods, coincident with legal retrenchment (Stryker 2001, Pedriana 2004).

In sum, research findings are consistent with Lempert & Sanders (1986) in highlighting the import of substantive orientations to adjudicative enforcement of legislation that itself is welfare-oriented. In employment discrimination litigation, proving that an employer has discriminatory motive or intent often is difficult. Disparate impact liability does not require this, instead requiring

plaintiffs to show that business practices have disproportionate negative impact on minority group members and are not required by business necessity. Although plaintiffs' proof of adverse effects does not automatically resolve the case in their favor, it does shift proof burdens to make it harder for employers ultimately to prevail (Stryker 2001). Burstein & Pitchford (1990) found that employees succeeded in proving disparate impact in 17 of 21 education cases and 54 of 66 testing cases in 1971–1985. Relative to win rates for equal employment cases more generally, employees fared especially well and employers fared especially poorly in education and testing cases. (The last figures are given for disparate impact and treatment education and testing cases combined, but most of these claimed disparate impact.)

Focusing on indirect as well as direct effects, substantial evidence from diverse enforcement arenas supports claims that substantive, relative to formal, and effects-oriented, relative to intent-oriented, interpretations of welfare-oriented legislation are more likely to reduce inequality (Lempert & Sanders 1986, Chesler et al. 1988, Stryker 2001, Sutton 2001, Pedriana & Stryker 2004). In totality, the research suggests that, when substantive effects-oriented methods of proving liability are coupled with substantive effects-oriented remedies (such as affirmative action interpreted not just to permit, but to require workplace results benefiting minorities and women), then inequality reduction will reach its maximum. It will do so through a combination of direct and indirect effects, including media coverage in more general venues and the business press, perceived litigation threat, and associated voluntary and pre-emptive compliance (Donohue & Heckman 1991, Stryker 2001, Pedriana & Stryker 2004). These mechanisms can work even if the total number of effects-oriented litigations among published opinions is small (Stryker 2001). According to Stryker (2001, p. 30), the middle course that courts steered in formal versus substantive interpretations of liability and remedy in equal employment law, combined with typical employer compliance strategies, gave rise to positive effects on labor market outcomes "sufficient to attribute effectiveness to EEO law, but . . . too modest to warrant any inference of pervasive preferential treatment."

Noting how courts in the late 1970s and 1980s retreated from effects-oriented Title VII jurisprudence, Pedriana & Stryker (2004) suggested that state legal capacity to promote equality reduction is a moving target, expanding and contracting over time. This is so at least in part because the breadth, intensity, and content of social movement pressures from below and counter-pressures from above vary over time (Sabatier 1975, Stryker 1989, Pedriana & Stryker 2004). Many enforcement studies of welfare-oriented legislation show a political dynamic in which, over time, mobilization from below begets counter-mobilization from above. Often, counter-mobilization from above succeeds in retrenching enforcement (and sometimes legislation itself) in ways that blunt its social impact—with both the level of retrenchment and its timing and duration relative to the next potentially expansionist cycle dependent on multiple factors outside formal-legal institutions (Stryker 1989, Yeager 1990; see reviews in Stryker 2000a, Edelman & Stryker 2005 for further specification).

Because effects-oriented enforcement is so important, it is likewise important that enforcers have high-quality social science expertise. As Stryker (1989) showed, when the politics of retrenchment permanently deprived the National Labor Relations Board from employing economic analysts, government capacity to empower labor was likewise diminished. Indeed, because quality scientific and technical expertise is essential for devising sensible and effective effects-oriented perspectives on liability and remedy (Chesler et al. 1988; Stryker 1989, 1994), law and social science research on law, inequality, and social change is itself a resource shaping social impact.

Orientation to effects in litigation also leads us back to class actions. Large class action lawsuits against leading companies (such as the sex discrimination class actions underway against Wal-Mart and Costco) create large financial threats for employers while also raising risks of widespread adverse publicity. Class actions increase chances of winning in court, with resulting settlements or judicial rulings affecting many people (Burstein 1991a). Communicating successes in such landmark cases should promote egalitarian change through positive feedbacks (cf. Albiston 1999). Class actions winning effects-oriented remedies should be especially effective.

Overall, maximizing real world inequality reduction through law requires combining a number of factors or conditions. Law interpretation and enforcement must be subject to sustained social movement pressure from below through a combination of litigation and mass political mobilization. Such pressure from below must be accompanied by political entrepreneurship among law enforcers within the state and/or by the participation of technically savvy and ideologically committed representatives of the have-nots in law implementation efforts. And such within-the-state and within implementation entrepreneurship must be mobilized for effects-oriented interpretation and enforcement of welfare-oriented legislation.

Organizational Legalization and Mediation

Although Harris (1999) studied implementation of court decisions by government agencies, her study has implications for compliance undertaken by organizations, both public and private, in response to welfare-oriented legislation and administrative and adjudicative rules interpreting that legislation. This area has received substantial attention, with much work exploring the processes and import of legalization of the workplace (e.g., Dobbin et al. 1993; Sutton et al. 1994; Dobbin & Sutton 1998; Edelman 1992; Edelman et al. 1999, 2001; Kelly & Dobbin 1999).

Inspired by Selznick (1969), Sutton et al. (1994) used longitudinal data on almost 300 American employers, 1955–1985, to detail patterns of adoption of disciplinary hearings and grievance procedures for nonunion hourly and salaried employees. Such due process governance procedures diffused widely in the U.S. workplace, with rates of adoption that increased with expanded political and legal pressures of the 1970s (see also Edelman 1990, Dobbin et al. 1993). Similarly, Dobbin & Sutton (1998) suggested that the formalized business procedures and policies they documented as transforming the U.S. workplace were the "institutionalized embodiment of broader conceptions of legality diffusing through the economy as an interpretive response to change in occupational safety and health and pension legislation as well as to change in equal employment law" (Stryker 2003, p. 356). On the basis of data from a nationwide survey of 346 organizations, Edelman (1992) found that cumulative risk of creating equal employment opportunity–affirmative action offices and policies increased over time. By 1989, six-sevenths of the organizations had created affirmative action policies, so that firms without them risked being seen by government regulators and their peers as lacking commitment to a new economic, as well as legal, norm.

Some scholars emphasize that workplace legalization restrains elites from exercising arbitrary workplace power, enhancing democratic egalitarianism. But others emphasize how such legalization may blunt egalitarian social impact. Edelman & Suchman (1999, p. 976) argued that "organizations acting as private legal systems gain increased control over the construction, implementation and impact of law, not only within their own boundaries but also throughout their organizational fields . . . . [This] truly cements organizational power, both to regulate social behavior and to constitute social reality."

Indeed, Edelman (1992) and her colleagues (Edelman et al. 1999, 2001) proposed a managerialist perspective, in which managerial elites, who decide what laws mean when taking steps to comply, interpret ambiguous antidiscrimination laws. Engaged in a normative organizational mediation process, human resource professionals and managers interpret welfare-oriented law in ways consistent with what they already see as good business practice (Edelman 1992, p. 1531). Title VII and Executive Order 11246, mandating affirmative action for government contractors, become subsumed into managerial logics highlighting how due process governance and formalized rules improve productivity and smooth business operations. Operationalizing this logic, managers create formal structures, including affirmative action offices and policies, providing "visible symbols of compliance" to employees and government regulators (Edelman 1992, p. 1531; see also Edelman et al. 1999, Sutton et al. 1994.)

Doubtful that such symbols translate into major social impact, Edelman et al. (1999) argued that "as symbolic compliance strategies diffuse broadly, courts will adopt ideas of compliance institutionalized in the economy without inquiring deeply into whether or not these compliance strategies are effective. Formal law itself will become . . . endogenous to economic practice in ways that undercut tough enforcement and lessen the law's impact" (Stryker 2006, p. 348). Edelman et al.'s (2006, p. 1006) preliminary findings from quantitative content analysis of 1024 federal civil rights cases, 1965–1999, supported this hypothesis. Carefully ensuring reliability of coding documenting court reference to a panoply of due process governance structures, other structures and policies expressing symbolic commitment to compliance, Edelman et al. (2006) examined how often judicial opinions consider these structures and policies relevant to finding discrimination or nondiscrimination. Likewise, they examined how often judges formalistically defer to the presence of a structure they deem relevant versus engaging in more substantive review of whether the structure is adequate. They found that the incidence of perceived relevance of business structures emphasized by workplace legalization studies was relatively high during the whole period. The incidence of deference to these structures by district and circuit courts increased gradually over time. Because deference appeared in district courts—whose job it is as trial courts to find facts—a decade earlier than in the courts of appeal, the authors argued that "it is in the lower courts—where employers' arguments about the facts of the case are given the most play—where judges are most likely to accept the symbolism of structures as compliance, without scrutinizing the adequacy of those structures" (Edelman et al. 2006, p. 24).

Deference processes outlined by Edelman et al. (2006) provide a powerful route through which elites shape the meaning of employment discrimination law in ways that condition its impact. Analogous studies of organizational mediation and endogeneity of law should be designed and conducted for court enforcement of other types of legislation to benefit the disadvantaged. Given the import of organizational mediation, it is imperative to know whether and which organizational structures and policies adopted to pursue or demonstrate compliance do in fact reduce inequality. Ongoing research addresses these questions for key white-minority and male-female workplace inequalities by combining annual EEOC data on workplace demographics with a survey of more than 800 private firms covered by the EEOC data (Kalev et al. 2006). The survey gathered further information on employer practices and experiences with Title VII lawsuits and Executive Branch affirmative action compliance reviews.

Examining the impact of seven organizational affirmative action and diversity strategies on the percentage of top managers who were women and minorities, Kalev et al. (2006) suggested that these strategies fit into three broad approaches: establishing organizational responsibility, lessening managers'

bias through training and evaluation, and counteracting social isolation through mentoring and networking. Using fixed effect time series analyses for 708 firms, 1971–2002, and controlling for other relevant explanatory factors, the authors found that affirmative action plans, diversity committees and task forces, and diversity managers and departments—all strategies for enhancing organizational responsibility and accountability—were most effective in increasing the proportion of white women, black men, and black women in the private sector. Diversity training and diversity evaluations were ineffective or counter-productive. Networking and mentoring showed very small positive effects. Some of the other programs did become a bit more effective for one or another group when combined with programs assigning organizational responsibility for change. Some strategies were more effective for federal contractors because these employers, subject to Executive Order affirmative action requirements, "typically assign responsibility for compliance to a manager" (Kalev et al. 2006, p. 589).

Using the same data set and time period, Kalev & Dobbin (2006) examined the independent impact of lawsuits and federal government administrative compliance reviews on change in the proportion of white and black men and women in top management. By creating incentives not to discriminate, lawsuits increased managerial diversity, but compliance reviews had "stronger and more lasting effects" (Kalev & Dobbin 2006, p. 855). Moreover, lawsuits required repetition for continued efficacy, whereas initial compliance reviews had sustained effects, suggesting to the authors that government interventions promoting change in organizational routines have the most lasting and substantial impact on workforce diversity. Emphasizing that civil rights enforcement has not been "merely symbolic," Kalev & Dobbin (2006, p. 892) nonetheless pointed out that the social impact of lawsuits is not always what we might anticipate. White women benefited more than blacks from lawsuits, and black men and women benefited only from repeated lawsuits. Finally, consistent with the Reagan administration's deregulatory approach, the efficacy of 1980s compliance reviews was substantially less than the efficacy of the more aggressive reviews of the 1970s. These findings suggest trade offs such that, as long as administrative approaches fix responsibility for and monitor organizational routines, they will be more effective than court enforcement. However, administrative approaches are vulnerable to political pressures that can blunt their impact in a direct, immediate way, whereas court enforcement is not (see also Sutton 2001).

In sum, to increase their social impact, courts too should focus on remedies that fix responsibility for and monitor changing organizational routines and their impact. Courts can and should monitor change in organizational routines for their adequacy. However, especially given research suggesting that courts do not do such monitoring (Edelman et al. 2006), scholars must know which changes in organizational structure and routine are more or less effective. Law and social scientists then can promote more effective changes at the organizational level, where multiple contending expert groups seek to persuade management of the utility of diverse compliance strategies (Dobbin & Kelly 2007, Stryker 2000b). Research by Kalev et al. (2006) is a promising step in this direction. Also promising is Sturm's (2001) case-intensive exploratory research, in which she used data on three major companies to identify strategies increasing organizations' institutional capacity for finding and preventing, as well as remedying, discrimination.

Whereas more small-*N*, case-oriented comparative studies are needed to examine complex conjunctures of factors enhancing or diminishing inequality-reducing social impact, more large-*N*, hypothesis-testing research is needed to increase confidence that we have identified what works relative to what does not. Complementing our expanding knowledge base is another promising development: An increased number of venues

now exist in which reform lawyers and social scientists can pool information and expertise regarding which organizational changes—and which combination of political, legal, and institutional strategies—work to reduce inequality (see, e.g., websites of the Center for Work-Life Law, founded by Joan Williams, at **http://www.uchastings.edu/?pid=3624**; The Impact Fund, founded by Brad Seligman, at **http://www.impactfund.org**; and the Institute for Women's Policy Research, President Heidi Hartmann, at **http://www.iwpr.org**).

CONCLUSION

Paradigmatically illustrated by research findings on labor law and rights discourse, half empty/half full is an appropriate approximate image of law's capacity to reduce inequality in democratic capitalism. However, if democratic capitalism is the glass, and we broaden our gaze to the full range of situations encompassed by Lempert & Sanders's (1986) typology, we would find the glass more than half empty. Conversely, confining our gaze to welfare-oriented legislation, we can progressively add additional conditions until research findings on factors shaping impact justify viewing the glass as more than half full. Whether one tends toward optimism or pessimism, however, perhaps a more appropriate image comes from thinking about the shape of the glass itself. Given accumulated reforms, and notwithstanding inevitable retrenchments, advanced, monopoly, or welfare capitalism is a different glass than competitive capitalism. Both are asymmetric glasses, tilted toward haves. But depending on the dimension of inequality and the time frame and locale or institutional level we choose, inequality may be increasing or decreasing for reasons that may or may not involve law.

As for law's impact on social inequality, research identifies multiple leverage points and feedbacks shaping direct and indirect effects of litigation and legislation across multiple measures of impact, including concrete material benefits, power relations, and the transformation of individual and collective identities. Understanding how and under what conditions law undermines, reinforces, or extends social inequality requires examining multiple change mechanisms, from cost-benefit calculi in response to legal incentive structures, to cultural meaning making and institutional diffusion, to political mobilization and counter-mobilization. The greatest inequality reduction likely comes from substantive effects-oriented interpretation of welfare-oriented legislation, including both effects-oriented strategies of liability and effects-oriented remedies. But research also suggests that both achieving these and converting them into maximal social impact requires combining litigation with sustained political mobilization from below, both in society at large and in the public and private agencies and organizations that mediate between formal law and its social impact.

Internalizing legal and political pressures from below into day-to-day organizational life can help thwart the dark side of legalization and endogeneity, ensuring that victories won in legislatures and courts through political mobilization from below in the broader societal arena are not confined to symbols alone. Ensuring that have-nots are represented in on-the-ground implementation and monitoring of welfare-oriented legislative and court mandates, whether implementation requires further policy design by government agencies or by business organizations or both, helps ensure benefits to the disadvantaged. Mobilizing communication networks, media coverage, and sustained publicity helps convert short-term wins for have-nots, whether in court or within organizations, into longer-term improvements in have-nots' material well being and power.

Meanwhile, collective mobilization of have-nots for litigation, through government enforcement and class actions, helps the disadvantaged win in court. Given the importance of class actions and of legal services to

the poor, it is telling that these have been retrenching rather than expanding. Procedural rules pertaining to other legal incentives, including assessment of attorneys' fees to diverse parties, jury versus bench trials, damage caps, and availability of punitive and compensatory damages, likewise are variable and changing across arenas. Their impact must be researched. Law and social scientists are beginning to identify what organizational policies, structures, and practices work best to decrease workplace inequalities. This research must be expanded. Actively publicizing research among lawyers and human resource and other professionals who shape organizations' compliance can help spur more, rather than less, effective change in organizational routines, especially if this is complemented by strategies that promote within-organization influence of have-nots. At minimum, this converts the exercise of covert power into overt organizational and institutional politics.

Finally, strategic opportunities for social movements from below to ally with segments of elites in the broader political arena and within public and private organizations designing and implementing compliance can be developed and exploited. That buy-in for inequality-reducing change is needed from at least some members of advantaged classes and groups typically will limit the types and extent of change. But there is substantial room to maneuver, especially because research shows that movements from below often can convert apparent constraints into opportunities. As well, inequality reductions that seem relatively small in the aggregate often are very large and meaningful from the vantage point of daily life. By definition, the disadvantaged and their advocates are not number one in democratic capitalism. Thus, they must try actively and try harder to ensure inequality reduction through law. Research suggests that the effort is well worth it.

DISCLOSURE STATEMENT

The author is not aware of any biases that might be perceived as affecting the objectivity of this review.

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