

2009

# Foreword: Poverty Law Issue

Ann Juergens

*William Mitchell College of Law*, [ann.juergens@wmitchell.edu](mailto:ann.juergens@wmitchell.edu)

## Publication Information

35 William Mitchell Law Review 754 (2009)

---

## Repository Citation

Juergens, Ann, "Foreword: Poverty Law Issue" (2009). *Faculty Scholarship*. Paper 69.  
<http://open.wmitchell.edu/facsch/69>

This Article is brought to you for free and open access by Mitchell Open Access. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Mitchell Open Access.

---

## Foreword: Poverty Law Issue

### **Abstract**

This Poverty Law Issue provides testimony as to why and how the legal profession, the government, and society can better provide justice for people of small means. Overall, this Poverty Law Issue contributes to understanding how we may ensure that the difficulty of poverty borne by our fellow citizens does not become compounded by injustice. For when justice is compromised for one group, its integrity as a whole may rightly be questioned.

### **Keywords**

Poverty Law, United States Law, Jurisprudence, Social Justice

### **Disciplines**

Human Rights Law | Jurisprudence | Law and Society | Social Welfare Law

## FOREWORD

Ann Juergens<sup>†</sup>

The Minnesota Constitution pledges that “every person is entitled . . . to obtain justice freely and without purchase, completely and without denial, promptly and without delay . . . .”<sup>1</sup> This text reflects a high ideal for justice—that the courts be open and fair to all regardless of ability to pay.<sup>2</sup> The hope that justice cannot be bought is at least as old as the Magna Carta.<sup>3</sup> Yet the phrase “justice freely and without purchase”<sup>4</sup> suggests not just the absence of bribes, but also a legal system where outcomes do not depend upon one’s wealth.

Do our courts and state offices realize this promise that justice

---

† Professor and Co-Director of Clinics, William Mitchell College of Law.

1. MINN. CONST. art. I, § 8 (citing the remedies clause) (“Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformably to the laws.”).

2. These phrases have been interpreted to permit courts to charge for their costs, but otherwise have not attracted much attention. *Cf. Adams v. Corrison*, 7 Minn. 456 (1862) (finding that “[t]he constitution does not guar[an]tee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law, or impede the due administration of justice.”). *See also Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 209, 68 N.W. 53, 54 (1896) (finding that charging litigants for the costs associated with a jury trial did not violate the remedies clause but noting that “[c]osts and fees imposed on suitors to defray the expenses of courts might be made so great as to be unreasonable, and to result in a practical denial of justice and for that reason unconstitutional. Where the limit is we need not now inquire . . . .”). Most of the invocations of Article I, Section 8 have involved remedies, immunities from suit, and other aspects of the clause. Ruth A. Mickelsen, *The Use and Interpretation of Article I, Section 8 of the Minnesota Constitution 1861–1984*, 10 WM. MITCHELL L. REV. 667, 668 (1984). This foreword suggests that we take another look at the “freely and without purchase” words of the remedies clause and attempt to give them meaning.

3. The Magna Carta, granted by King John at Runnymede on June 15, 1215, promises, *inter alia*, “[t]o none will we sell, to none will we deny, or delay, right or justice.” HAROLD F. KUMM, CONSTITUTION OF MINNESOTA ANNOTATED 36 (Univ. of Minn. 1924) (citing *Lommen*, 65 Minn. at 208–09, 68 N.W. at 54).

4. MINN. CONST. art. I, § 8.

be free, complete, and prompt? To lawyers, the question should seem urgent and its answer obvious—barriers to that kind of justice have grown high. This has been true particularly for persons who are poor.

The articles in this special Poverty Law Issue are especially timely in that they examine issues of justice for people in poverty as we face an economic downturn of daunting dimensions. The numbers and proportion of persons who are poor in the United States have been climbing over the last decade.<sup>5</sup> And now, as the financial, housing, manufacturing, and other industries collapse and the economy breaks apart, persons at the lower end of the income ladder are increasingly insecure in the necessities of life. Unemployment insurance claims are up dramatically even as employers contest and defeat more employees' requests for benefits.<sup>6</sup> Bankruptcy, food shelf visits, nights spent at homeless shelters, evictions of tenants by banks who have foreclosed on their landlords, property crimes, and emergency room visits are rising.<sup>7</sup>

---

5. Minnesota's poverty rate has risen from 5.7% in 2000, representing 276,000 persons in poverty, to 9.3% in 2007, representing 482,000 persons in poverty. See U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLE 21: NUMBER OF POOR AND POVERTY BY STATE, <http://www.census.gov/hhes/www/poverty/histpov/hstpov21.xls> (data found in "Number" column). The United States poverty rate rose from 11.3% in 2000 to 12.5% in 2008. See U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLE 5: PERCENT OF PEOPLE BY RATION OF INCOME TO POVERTY LEVEL, <http://www.census.gov/hhes/www/poverty/histpov/hstpov5.xls>. In 2007, the 12.5% poverty rate meant that 37.3 million people were in poverty, up from 36.5 million in 2006. See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (CPS), 2008 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, <http://www.census.gov/hhes/www/poverty/poverty07/pov07hi.html>.

6. See Jeannine Aversa, *Continuing Jobless Claims Rise Sharply in December*, ASSOCIATED PRESS, Dec. 31, 2008, available at <http://minnesota.publicradio.org/display/web/2008/12/31/economy>. See also Peter Whoriskey, *Out of Work and Challenged on Benefits, Too*, WASH. POST, Feb. 12, 2009, at A1. Whoriskey states that: It's hard enough to lose a job. But for a growing proportion of U.S. workers, the troubles really set in when they apply for unemployment benefits. More than a quarter of people applying for such claims have their rights to the benefit challenged as employers increasingly act to block payouts to former workers. The proportion of claims disputed by former employers and state agencies has reached record levels in recent years, according to the Labor Department numbers tallied by the Urban Institute.

*Id.*

7. Filings in United States bankruptcy courts rose by 30% from 801,269 cases in 2007 to 1,042,993 cases in 2008. See *Workload of the Courts, THE THIRD BRANCH: NEWSL. OF THE FED. CTS.*, Jan. 2009, at 41 No. 1, available at [http://www.uscourts.gov/ttb/2009-01/article02.cfm?WT.cg\\_n=TTB\\_Jan09\\_article02\\_teaserTitle](http://www.uscourts.gov/ttb/2009-01/article02.cfm?WT.cg_n=TTB_Jan09_article02_teaserTitle). See also U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS

And as need escalates because of the economy, the resources for ameliorating that need have declined. Governments are scrambling to sustain even basic services. Foundations and charitable donors are finding that they have less to give as the value of their investments shrinks to 75% or even 50% of their levels from a year ago.<sup>8</sup>

---

SURVEY: A STATUS REPORT ON HUNGER & HOMELESSNESS IN AMERICA'S CITIES, A 25-CITY SURVEY 14 (Dec. 2008), [http://www.usmayors.org/pressreleases/documents/hungerhomelessnessreport\\_121208.pdf](http://www.usmayors.org/pressreleases/documents/hungerhomelessnessreport_121208.pdf) (similarly showing double digit percentage rises in homelessness); *Demand Spikes, Minnesota Economy Leaves Food Shelves Scrambling*, MINN. FOODSHARE (Greater Minneapolis Council of Churches), Fall 2008, at 1, *available at* <http://www.gmcc.org/foodshare/images/2008MFSFallNewsletter.pdf> ("In the 41 counties of central and southwestern Minnesota (including the Twin Cities metro area) food shelves have seen demand jump 13 percent from last year."); Wendy Koch, *Cities See 'Alarming' Homeless Numbers: More Families Seek Aid in Face of Financial Crisis*, USA TODAY, Oct. 21, 2008, at 1A (reporting national survey of twelve of the largest cities in the United States, including Minneapolis, almost all of which had a marked increase in requests for shelter by homeless families); Julie Bosman, *Newly Poor Swell Lines at Food Banks*, N.Y. TIMES, Feb. 19, 2009, at A1 ("Demand at food banks across the country increased by 30 percent in 2008 from the previous year . . .").

Property crime rates, while lower during the first half of 2008, were beginning to rise late in the year. *See* Press Release, Police Executive Research Forum, 44 Percent Cite Increases in Crime Due to Economic Crisis: 63 Percent of Local Police Departments Are Facing Cuts in Their Total Funding, Survey Shows (Jan. 27, 2009), *available at* [http://policeforum.org/upload/PERF%20Survey%20on%20Policing%20&%20Economy\\_908860847\\_222009153254.pdf](http://policeforum.org/upload/PERF%20Survey%20on%20Policing%20&%20Economy_908860847_222009153254.pdf). A national nonprofit organization for police executives, the Police Executive Research Forum, recently surveyed 233 police departments. *Id.* at 1. The survey found that one hundred of the responding departments (43%) reported rising levels of what they believed to be recession-related crimes. *Id.* at 3. Forty percent said that thefts had increased in recent months, 39% reported that robberies were up, and 32% said burglaries had gone up 20%. *Id.* *See also* Susan M. Schappert, M.A. & Elizabeth A. Rechtsteiner, M.S., *Ambulatory Medical Care Utilization Estimates for 2006*, 8 NAT'L HEALTHCARE STAT. REP., Aug. 6, 2008, *available at* <http://www.cdc.gov/nchs/data/nhsr/nhsr008.pdf> (noting that according to the National Center for Health Statistics, emergency room visits were up by 26% from 1996 to 2006, the most recent years for which data were available).

8. Interview by Twin Cities Public Television (tpt) with Sandra Vargas, Minneapolis Found. President & CEO, and Carleen Rhodes, St. Paul Found. & the Minn. Cmty. Found. President & CEO (Twin Cities Public Television broadcast Feb. 6, 2009), *available at* [http://www.tpt.org/aatc/videos/2009/02/06/almanac\\_february\\_6\\_2009/foundation\\_heads\\_talk\\_about\\_the\\_economy](http://www.tpt.org/aatc/videos/2009/02/06/almanac_february_6_2009/foundation_heads_talk_about_the_economy) (noting that endowment values went down 25% to 30% as demand for services went up 15% to 18%; that "there [is] a whole new cadre of people who are newly vulnerable" to homelessness, hunger, and utility cutoffs; and that the challenge is to address needs of the newly vulnerable while maintaining service to the traditionally vulnerable communities). *Cf.* Bill Myers, *Economic Collapse Will Affect Legal Aid to Poor*, WASH. EXAM'R, Feb. 17, 2009, *available at* <http://www.dcexaminer.com/local/Economic-collapse-will-affect-legal-aid-to->

It is not surprising that legal institutions are being asked to squeeze more services from fewer budget dollars, even after consecutive years of similar calls. For example, the Chief Justice of the Minnesota Supreme Court, appointed by the conservative Republican governor, has been speaking out against proposed large cuts in the courts' budget, warning that they will gravely injure our judicial system.<sup>9</sup> The state office of public defense has eliminated all services except those mandated by the constitution, and its attorneys still have an average load of 757 cases per lawyer, almost twice the caseload standard.<sup>10</sup> Legal aid funding for civil legal problems of the poor has declined by 54% since its peak in 1980, and ebbing interest from lawyers' trust accounts foretells further erosion of funding.<sup>11</sup> The budget crisis has diminished the offices of prosecutors and other public lawyers as well.<sup>12</sup>

---

poor-0217-39690412.html. Myers writes:

The collapsing economy has created an overwhelming demand for low-income legal assistance, as newly poor scramble to reorganize their debt, pay their utilities, keep their homes or fight for severance packages. The same economic forces that are creating the demand for services are also eating away at the legal aid community's capacity to provide the services. "Let's not kid ourselves: The demands of the nonprofit delivery sector have gone up, but the resources of the philanthropic sector have gone," said Steve Gunderson, president of the D.C.-based Council on Foundations, which tracks charitable trends.

*Id.*

9. See, e.g., *Chief Justice: Courts Need an Additional \$43 Million* (Minn. Public Radio broadcast Jan. 14, 2009), available at [http://minnesota.publicradio.org/display/web/2009/01/14/chief\\_justice\\_courts\\_need\\_an\\_additional\\_43\\_million](http://minnesota.publicradio.org/display/web/2009/01/14/chief_justice_courts_need_an_additional_43_million) (quoting the following statement by Justice Magnuson: "Trespass, worthless checks, traffic and ordinance violations, juvenile truancy, runaways, underage drinking, consumer credit disputes, property related and small civil claims. Imagine we take all that off the table because we can't do it . . ."). See also Patricia Lopez, *Showdown Could Leave Our Courts in Chaos*, STAR TRIB. (Minneapolis), Feb. 22, 2009, at A1.

10. STATE OF MINN., 2010–2011 BIENNIAL BUDGET (2008), <http://www.mmb.state.mn.us/doc/budget/req-non-exec/pub-def.pdf>.

11. See ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW AND SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 38 (Jan. 2007), [http://www.clasp.org/publications/legal\\_aid\\_history\\_2007.pdf](http://www.clasp.org/publications/legal_aid_history_2007.pdf). See also Diane Curtis, *Economic Downturn Puts a Crimp in Legal Services*, CAL. BAR J., Feb. 2009, at 1 ("This was the year IOLTA funds were supposed to swell and California legal aid organizations, which get much of their funding from trust account interest, were going to reap the benefits of the bulging coffers. The high hopes couldn't have been more misplaced . . .").

12. For example, the Governor of Minnesota has proposed that the Attorney General cut its budget by 5% for the 2010–2011 biennium. STATE OF MINN., 2010–2011 BIENNIAL BUDGET 7 (2009), <http://www.mmb.state.mn.us/doc/budget/narratives/gov/att-gen.pdf>. Minnesota's Hennepin County Attorney's budget for

The ubiquity of pain in a deep recession would seem to justify cuts in services for the poor, including to legal and judicial system services. But that reason looks more like an excuse when one gazes at legal institutions from the perspective of those outside that system, including those outside of the United States.

At a recent international conference on justice education, I attended a session titled “Teaching Legal Ethics in a Corrupt Legal System.”<sup>13</sup> Interested in the topic after a short teaching turn in a former Soviet state, I assumed that the group would grapple with the challenges of teaching ethics in countries where bribery of judges, police, and other officials is a necessary cost of business, and where justice is, quite literally, purchased. In a room of lawyers and law professors from Asia, Australia, Europe, Africa, and South America, it was soon apparent that those of us from the United States were also members of the set who teach ethics in a tainted system. We may not have to inoculate our students against bribery to the degree that teachers in other countries must.<sup>14</sup> But other people at the session reminded me that it is not a stretch to use the word “corruption” when comparing the reality of our legal system with its ideals.<sup>15</sup>

---

2009 is \$40,351,249, larger by \$1,656,677 than the 2008 budget. E-mail from Carolyn Marinan, Director, Hennepin County Public Affairs Dep’t, to Ann Juergens (Feb. 25, 2009, 12:08:54 CST) (on file with author). See also telephone interview with Mike Freeman, Hennepin County Attorney (Feb. 24, 2009) (notes on file with author). Yet, expenses for health insurance, among other things, are up so that the net effect is a 4% cut in staff including lawyers. *Id.* In sum, 4% of all positions are empty and will not be filled because of the county funding shortfall (there are 340 total staff members, 165 of whom are lawyers). *Id.*

13. The Global Alliance for Justice Education held its fifth worldwide conference—*Justice Education in Community Context*—in Manila in December 2008. See <http://gaje.org/index/conference> for a description of the conference, its sessions, and participants.

14. Though, as if in further mockery of my assumptions, newspapers that day featured the story that Illinois Governor Rod Blagojevich was accused of soliciting bribes in exchange for appointment to the Senate seat just vacated by Barack Obama. See Monica Davey & Jack Healy, *Illinois Governor Charged in Scheme to Sell Obama’s Seat*, N.Y. TIMES, Dec. 9, 2008, at 1. It is heartening to note that this was front page national news and that Governor Blagojevich has since been impeached and now faces criminal charges for that alleged conduct.

15. In fact, the United States is not immune from bribery; it is ranked eighteenth in the world—after the United Kingdom, Germany, and Australia, among others—in Transparency International’s corruption perceptions index that measures citizens’ confidence in those entrusted with power. Transparency International defines corruption as “the misuse of entrusted power for private gain.” See Transparency International, *Frequently Asked Questions About Corruption*, [http://www.transparency.org/news\\_room/faq/corruption\\_faq](http://www.transparency.org/news_room/faq/corruption_faq) (last visited Mar.

It should be neither inevitable nor acceptable that poor people cannot find a lawyer's help in cases where their shelter, food, security, health, and families are at stake. In fact, in 2006, the American Bar Association found that access to lawyers in such cases is limited and recommended that every person have the right to a free lawyer in cases where these life essentials are in jeopardy.<sup>16</sup>

This Poverty Law Issue provides testimony as to why and how the legal profession, the government, and society can better provide justice for people of small means. One group of articles confirms the need for legal and policy help for persons who work full-time but must borrow every payday to meet the cost of necessities,<sup>17</sup> who are tricked by debt collectors,<sup>18</sup> disabled and trying to get back to work while receiving Social Security,<sup>19</sup> homeless<sup>20</sup> or in dispute with their landlords,<sup>21</sup> or sending their children to resegregated schools despite having sought better life opportunities for them.<sup>22</sup>

Three authors analyze practices and laws affecting debtors. Patrick Hayes investigates the exploitation of low-income individuals by the expanding industry of payday lending, which can charge triple-digit interest rates, for example, and nevertheless stay within the law.<sup>23</sup> Hayes recommends changes to state statutes and other alternatives to bring the industry's troublesome practices into check.<sup>24</sup> Sam Glover shows how Minnesota debtors may be

---

16, 2009).

16. ABA Task Force on Access to Civil Justice, Formal Op. 112A (2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (calling for publicly funded lawyers for poor persons in cases involving "shelter, sustenance, safety, health and child custody.").

17. Patrick L. Hayes, *A Noose Around the Neck: Preventing Abusive Payday Lending Practices and Promoting Lower Cost Alternatives*, 35 WM. MITCHELL L. REV. 1134 (2009).

18. Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans' Due Process Rights?*, 35 WM. MITCHELL L. REV. 1115 (2009).

19. Stella L. Smetanka, *The Disabled in Debt to Social Security: Can Fairness Be Guaranteed?*, 35 WM. MITCHELL L. REV. 1084 (2009).

20. Katherine Barrett Wiik, *Justice for America's Homeless Children: Cultivating a Child's Right to Shelter in the United States*, 35 WM. MITCHELL L. REV. 875 (2009).

21. Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense in 2009 Still Is Much More Than "Did You Pay the Rent?"*, 35 WM. MITCHELL L. REV. 762 (2009).

22. Margaret C. Hobday, Geneva Finn & Myron Orfield, *A Missed Opportunity: Minnesota's Failed Experiment with Choice-Based Integration*, 35 WM. MITCHELL L. REV. 936 (2009).

23. Hayes, *supra* note 17, at 1142.

24. *Id.* at 1136-54.



deprived of due process by procedural rules that allow default judgment even for defective claims and that permit a bank account to be frozen before the alleged debtor has received notice of any collection suit.<sup>25</sup> Persons who unwittingly become debtors to the Social Security Administration (“SSA”) are the concern of Stella Smetanka who writes about disabled persons who learn they have received an overpayment of Social Security benefits.<sup>26</sup> Too frequently, the SSA assumes that any overpayment is the recipient’s fault and thus reduces the disabled person’s already small income, even if the SSA’s mistake caused the overpayment.<sup>27</sup> Good counseling services for disabled people who want to work is one of several solutions that the author identifies.<sup>28</sup>

Principles and laws governing shelter are explored by two authors. Katherine Barrett Wiik musters sobering social science data about homeless children, then references international human rights principles to argue that American law should provide every child a right to shelter.<sup>29</sup> Once a child has housing, however, she will still need competent legal advice if her landlord tries to evict her family.<sup>30</sup> Lawrence McDonough’s exposition of Minnesota eviction defense law is a detailed account of the sometimes surprising requirements for an eviction lawsuit and its potential defenses.<sup>31</sup> His work is an essential reference for any attorney representing a tenant in a matter involving eviction.<sup>32</sup>

Margaret Hobday, Geneva Finn, and Myron Orfield critique Minnesota’s attempt at choice-based school integration.<sup>33</sup> They argue that it has failed as evidenced by increased school segregation that harms children regardless of the school administrators’ intent.<sup>34</sup> They analyze judicial decisions and prescribe specific policies to end the isolation of students of color in high-poverty, low-performing schools.<sup>35</sup>

Three articles by legal educators speak to the special duty that law schools bear for the quality of justice for the poor. Robert

---

25. Glover, *supra* note 18, at 1117–18.

26. Smetanka, *supra* note 19, at 1087–90.

27. *Id.* at 1091.

28. *Id.* at 1097–98.

29. Barrett Wiik, *supra* note 20, at 909.

30. McDonough, *supra* note 21, at 781–860.

31. *See generally id.*

32. *See generally id.*

33. Hobday et al., *supra* note 22, at 964–73.

34. *Id.* at 976.

35. *See generally id.*

Hornstein's illumination of the importance of poverty law in the law school curriculum is an eloquent rebuttal to Associate Supreme Court Justice Antonin Scalia's recent dismissal of it as "made-up stuff" that law students should not take.<sup>36</sup> Law school clinics' responsibilities to train new lawyers to represent low-income clients is Nina Tarr's subject.<sup>37</sup> She reveals clinics as important loci of ethics instruction within the law school and analyzes the unique ethical challenges inherent in their law office practices.<sup>38</sup> Deborah Schmedemann lays out her research into the complex motivations that go into the decision to do pro bono work and provides useful counsel on how we may increase the numbers of lawyers and law students who make this commitment.<sup>39</sup>

Overall, this Poverty Law Issue contributes to understanding how we may ensure that the difficulty of poverty borne by our fellow citizens does not become compounded by injustice. For when justice is compromised for one group, its integrity as a whole may rightly be questioned.

---

36. Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum*, 35 WM. MITCHELL L. REV. 1057 (2009).

37. Nina W. Tarr, *Ethics, Internal Law School Clinics, and Training the Next Generation of Poverty Lawyers*, 35 WM. MITCHELL L. REV. 1011 (2009).

38. See generally *id.*

39. Deborah A. Schmedemann, *Pro Bono Publico as a Conscience Good*, 35 WM. MITCHELL L. REV. 977 (2009).