

Introduction

The financial crisis of 2008 and its debt-deflationary aftermath have, for all of their tragedy, brought at least one critical benefit: what until recently had been a growingly ominous yet curiously unmentionable subject — namely, steadily worsening wealth and income inequality in the advanced capitalist economies — is now the hottest of “hot topics” in policy discussions worldwide. The runaway “bestseller” success of Tomas Piketty’s *Capital in the Twenty-First Century*¹ is but the latest expression of a renewed interest in foundational questions of polity and economy.

While it is undeniably good news that it is once again safe to talk about inequality, public discussion of the subject thus far has been unfocused and, partly in consequence, inconclusive. Which inequalities matter, and why? What *drives* such inequalities, and how are they best addressed, if addressed they must be? Moral and political philosophers have admirably tackled the “which inequalities matter” and “why” questions for decades now, while some social scientists have done helpful work on the questions of causation and cure. These camps have had little intercourse *inter se*, however, and, worse yet, *lawyers* have had next to nothing to say on these subjects. This is a great pity, inasmuch as law critically constitutes economies, and inasmuch as lawyers in consequence typically are those through whom societies address collective challenges of the kind that inequalities pose, when at last they legislate and then regulate.

This issue of *Theoretical Inquiries in Law* aims to advance a dialogue among lawyers, policy analysts, philosophers and social scientists on the nature, significance, and best collective responses to growing inequality in advanced capitalist societies. What roles do laws — from property to contract and tort, from tax to corporate and finance-regulatory law — play in generating and underwriting normatively salient inequalities? What roles might law potentially play in rectifying or otherwise mitigating such inequalities? Why do current legal mechanisms fail to mitigate inequalities? And which fundamental conceptual changes are needed for law to be able to fulfil this task? These questions and others are explored in the articles gathered in this issue.

1 THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014).

One major legal mechanism discussed and critiqued in this issue is the prevalent tax-and-transfer system. Traditionally, this system is conceived as one of the main tools that states possess to redistribute capital and reduce economic inequality. Progressive taxation, essentially the transfer of income and capital from the rich to the poor, is considered justified on both moral and efficiency grounds. However, as revealed in some of the articles in this issue, this system has proven to yield only minor changes — if any at all — in economic gaps. The reasons for this are varied. Tsilly Dagan shows that globalization and tax competition between states diminishes states' ability to collect taxes and redistribute them among their poor populations. Moreover, as Yoram Margalioth contends, tax policies that ostensibly aim at redistribution may generate unintended consequences and fail in the advancement of the redistribution of wealth. David Singh Grewal and Jedediah Purdy point to the fact that some such policies were formulated during a period in which it was thought that economic inequality is diminishing due to massive economic growth; these policies have not been changed or replaced even after this period turned out to be a historical anomaly. Those problems of the tax-and-transfer system, it should be noted, are structural in nature and thus cannot be solved merely by changing taxation policies.

Alongside revealing the weaknesses of the current tax-and-transfer system, some articles in this issue draw our attention to other causes — and consequences — of inequalities, in various, usually unnoticed, contexts. Tamar Kricheli-Katz and Tali Regev address the causes of inequality in online markets and point to persistent stereotypes as one of its major causes. Matthew P. Drennan reveals the deep connection between the substantial, growing economic gaps among households and growing household indebtedness that led to the 2008 crisis. Anne L. Alstott highlights the effects of inequality on the welfare of the elderly. Edward H. Stiglitz addresses the overlooked distributive effects of legal rules and their judicial and administrative application, by discussing the waivers given to American states in safety net programs. Those various causes and consequences of economic inequalities clarify as well how deep and broad these inequalities are, and how much a fundamental change is needed.

And indeed, the last two articles in this issue provide new frameworks through which inequalities and their causes, consequences and remedies should be considered, and through which new mechanisms should be developed. Robert Hockett shows that the common framings of basic concepts regarding distribution and equality both marginalize inequality and prevent us from using the law to change it, and he therefore reconceptualizes the basic components of distribution: its conductors, recipients, objects, patterns and mechanisms. Tamara Lothian advocates for deep structural legal changes in the market, aimed at enhancing both equality and democracy. Both authors call for developing

the ideas set forth in their articles and cast major responsibility on law, legal scholars, lawyers and policymakers to attend to economic inequality.

Taken together, the articles in this issue challenge common perceptions, reframe old normative questions, offer new readings in prominent economic literature, suggest new distributive mechanisms, and highlight the crucial role of law in this regard. They provide a pregnant starting point for the reconceptualization of distribution and the formation of new legal policies and mechanisms aimed at mitigating inequalities. To paraphrase the last sentence of Tamara Lothian's article, which closes this issue: we hope it will continue.

The issue opens with Tsilly Dagan's article, which addresses the challenges faced by nation states due to globalized tax competition between states. On the one hand, states are still responsible for their citizens' welfare through the tax-and-transfer system; but on the other hand, globalized tax competition creates incentives for states to reduce their taxes and enables strong market players to avoid tax payments by transferring their businesses or residence to tax shelters. This undermines not only the welfare of citizens in many states, but also states' legitimacy. To eliminate both consequences, traditional treatments of the issue maintain that cooperation between states is necessary. Nonetheless, Dagan contends, such cooperation would not suffice unless it includes a duty of all cooperating states to ensure the welfare of the least well-off citizens in all states. While such a duty may be attractive to cosmopolitan global justice scholars, it is much less obvious to statist scholars, and hardly feasible as a matter of treaty negotiation. However, Dagan relies on Thomas Nagel's writing and shows that since the lack of such a duty undermines states' legitimacy, statist as well should support the suggested multilateral transnational responsibility.

Yoram Margalioth explores the justifications for the charitable contribution deduction in the U.S. Internal Revenue Code and suggests that it does not serve any direct redistributive purpose. Rather, Margalioth finds that the rule could potentially be justified on other grounds: it might serve as an efficient method of financing public goods and contribute to solving problems of asymmetric information regarding public preferences; in addition, it might allow government funding, through the tax system, of public goods required by minorities, hence having a positive effect on democracy. Margalioth also suggests that the deduction may have some redistributive effects, but those are usually indirect.

David Singh Grewal and Jedediah Purdy address the economic optimism that characterized Western economic thought for several decades in the mid-twentieth century. This optimism is usually tied to what has been called the Golden Age of Capitalism, and was prominent in economic and legal scholarship from the end of World War II until the early 1970s. The scholars

of this era assumed that economic growth would be distributed and would minimize social inequality. Nevertheless, as revealed by Piketty's findings and those of other scholars who have concentrated on inequality, this assumption proved to be wrong: in fact, inequality has been growing since the 1970s. Following those findings, Grewal and Purdy analyze similar developments in the economic and legal literature of the second half of the twentieth century. They show that alongside the growing inequality, Golden Age optimism was increasingly criticized by scholars from both the left and right sides of the political map. Nonetheless, a new dominant paradigm to replace Golden Age optimism has yet to emerge. Grewal and Purdy suggest a set of reorientations for legal theory and social theory more broadly, taking aim at generating an outlook on political economy that will be able to come to grips with inequality.

Tamar Kricheli-Katz and Tali Regev attempt to classify the types of gender stereotypes and cultural beliefs about trust, competence and desert that dominate transactions in online markets. They do so by a controlled experiment through which they show that the price people are willing to pay in an online transaction (purchasing a \$100 Amazon gift card) varies based on the gender of the seller. Strikingly, their experiment reveals that when the data on sellers' competence and desert is manipulated and both male and female sellers are introduced as more competent and entitled, the price gap between male and female sellers decreases. No such effect was apparent when the sellers were introduced as trustworthy. The authors' conclusion is that gender stereotypes relating to men's and women's competence and entitlements explain the gap in the prices buyers are willing to pay for exactly the same product, whereas social beliefs regarding men's and women's trustworthiness do not have a similar influence on the price buyers are willing to pay.

Matthew P. Drennan unveils an underexplored consequence of economic inequality: the growing indebtedness of households. While it is uncontroversial that the surge in household debt, alongside other factors, led to the financial crisis and Great Recession in 2008, some causes of this surge — mainly economic inequality — have not been sufficiently discussed thus far. Most analyses identify unusually low interest rates and the housing price bubble as the main causes of increased household indebtedness. Drennan suggests that stagnant incomes, related to the long-term rise in income inequality, substantially fueled household indebtedness as well. Crucially, the stagnation in income was accompanied by a sharp rise in the costs of living. Consequently, the share of families' income spent on necessities rapidly grew, and in time many families needed to borrow money for the purchase of necessities. Throughout the article, Drennan provides econometric evidence supporting the argument that rising income inequality in the United States led to stagnant incomes and to the rise in household indebtedness.

Anne L. Alstott addresses inequalities among the elderly and highlights aspects that have escaped attention in the literature on inequality thus far. While the standard of living of the elderly (men and women over sixty-five) has improved dramatically in the twenty-first century, the benefits of this improvement have not been equally distributed. Instead, there is a growing gap in terms of lifespan, health problems and disabilities, financial stability and retirement options among different elderly groups. This growing gap undermines the success of legal institutions, such as Social Security and Medicare, which aim at guaranteeing sufficient quality of life for the elderly. Hence the urgent need for reform. For this purpose, one should not only consider technocratic budgetary solutions, such as increasing financial governmental support. Rather, questions regarding redistributive justice between and within age groups should also be taken into consideration when determining the baseline for such legal reforms.

Edward H. Stiglitz explores another cause of inequality: waivers given to U.S. states in the application of federal safety net programs. While many scholars, policymakers, administrative agents, and judges favor and promote the option of waivers as a path around legislative inactivity and gridlock, Stiglitz emphasizes the distributive consequences of such waivers. Through the case study of the American Medicare program, he demonstrates the motivation of states to request waivers, the willingness of the administrative agents to grant them, and the approval given by the courts. All of these, he argues, not only bear unequal distributive consequences, but also tend to rely on partial information presented by the states that request the waivers. Such information gaps and other political agendas, according to Stiglitz, are usually overlooked and thus exacerbate economic inequality. Stiglitz concludes his article with an appendix containing a model illustrating how information problems affect state-agency bargaining.

Robert Hockett criticizes welfare policy analysts for focusing mainly on utilitarian maximization and lays the basis for an innovative reconceptualization of distribution and equality. Utilitarians, according to Hockett, neglect the fact that maximizing any one thing entails redistributing and equalizing other things, and, accordingly, that policies based upon the goal of maximization entail consequent distributive effects. He therefore suggests shifting the focal point of welfare policies towards what he names “putting distribution first.” This theory refers to the consequences that stem from recognizing that law and policy are as equalizing and distributive as they are aggregative and maximizing. Hockett proposes various perspectives through which distribution should come first in normative legal and policy analysis, thus improving the dissemination of material opportunity. He concludes that while it might be

incumbent upon us to return to our normative roots, doing so will free us from our fixation on unmeasurable end-states.

This issue's closing article is by Tamara Lothian, who critiques the conventional social democratic response to the problem of inequality. She explores the shortcomings of the retrospective response of tax and spend as a central means of redistribution, and suggests transforming the framework and structure of our market order. Only such intrinsic transformation, according to Lothian, can change and improve the distribution of income and opportunity and solve current endemic social inequality. For instance, rather than increase the size of the financial sector and promote consumption through taxation, Lothian advocates deepening the connection between finance and the real economy. She also argues against the customary tiptoeing of market and state around each other's spheres. Finally, she suggests that a deepening of democracy, by using the power of the state to reshape the market and thereby broaden economic and educational opportunities, may result in positive implications for reducing inequality. Legal scholars, according to Lothian, have a major responsibility in the suggested structural transformations. Sadly, Tamara Lothian passed away shortly after completing this article. We are certain, nonetheless, that her legacy and thought-provoking ideas will long prevail.

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