# What's Law Got to Do with It? Crisis, Growth, Inequality and the Alternative Futures of Legal Thought

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*The most striking economic and political fact of the past forty years has been the dramatic increase in economic and political inequality throughout the advanced economies. This Article considers this development as an occasion to explore the contribution of contemporary law and legal thought to the problem of inequality. I focus on two main themes: the naturalization of the present institutional form of the regulated market economy, and the naturalization of the present low-energy form of democracy. I argue that in each case, the absence of structural vision in law prevents us from understanding the sources of and remedies for inequality. We must rescue the insight from the compromise and begin to develop a better way of thinking about law and the economy, if we are to understand and address the rise of inequality. Therefore, three programmatic implications are suggested in this Article regarding three domains: politics, production and finance.*

## Introduction

The most striking economic and political fact of the past forty years has been the dramatic increase in economic inequality throughout the advanced economies.[1] At the most superficial level, the facts are reasonably clear. In

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* Prof. Tamara Lothian was a Principal at the International Strategies Group and a lecturer at the Columbia Law School. She passed away a few months after writing this Article and presenting it at the conference on *Law, Economy, and Inequality*, held in New York City in December 2015. We send our condolences to Prof. Lothian's family.

1 Thomas Piketty, Capital in the Twenty-First Century (Arthur Goldhammer trans., 2014).

Citation: 18 Theoretical Inquiries L. 229 (2017)

the closing decades of the twentieth century, income and wealth inequality in the United States and other leading capitalist countries achieved heights not seen in nearly a century. Much of the increase in income and wealth has been concentrated among a tiny corporate and financial elite. Meanwhile, the pay and benefit packages of the vast majority of the labor force have either stagnated or declined. Access to well-paying jobs and employment security is no longer expected as a matter of right even for graduates of America's finest universities.

This new inequality is offensive on many grounds. It makes a mockery of the Western aspiration to uphold individual and collective freedom. Democracy, understood as the practice of collective deliberation and self-determination in all major theatres of social life, is undermined in both the political and civil spheres. Politics, which should be governed by equal citizens with equal claims, becomes instead the plaything of political and economic power to the benefit of privileged minorities.[2]

The purpose of this Article is to consider the conventional, social democratic response to the problem of this new inequality and to propose an alternative to it. In developing my analysis, I emphasize three ideas. My first claim regards the inadequacy of the conventional response to the problem of inequality. As a practical matter, it is incapable of addressing problems of deep inequality. Beyond a certain limit, the shocks to the status quo would prove inherently counterproductive in a regime based on "tax and transfer."[3] My second claim concerns the deficiency in the intellectual premises underlying the conventional response. There are two main premises, each erroneous. The first premise is the naturalization of the present institutional form of the regulated market economy. The second premise is the naturalization of the present, low-energy form of democracy. Together, these premises produce a theoretical illusion that diminishes the possibility of bolder strategies of reform. My third claim is that we can find in the traditions of classical political economy and legal

2 My reference to normative issues is deliberately meager to allow for more extensive treatment of basic legal and institutional arrangements. Among the excluded themes: moral dimensions, including the wastage of life and opportunity for development beyond things and material goods; growth implications buried beneath the reification of supply-side arrangements and an emphasis solely on demand.

3 See also the recent Brookings Institution paper arguing that steeply progressive taxation in America would have only a marginal effect on inequality. William G. Gale, Melissa S. Kearney & Peter R. Orszag, *A Significant Increase in the Top Income Tax Rate Wouldn't Substantially Alter Income Inequality*, Brookings (Sept. 28, 2015), https://www.brookings.edu/research/would-a-significant-increase-in-the-top-income-tax-rate-substantially-alter-income-inequality/.

thought points of departure for the development of an alternative "structural" understanding and approach to the problem of inequality, if by structural we mean the institutions and assumptions that shape how economies and societies work. Such an understanding is imperative for addressing many of the most important problems of our time, including economic crisis, growth and inequality.

My argument begins in Parts I and II with a brief exploration and criticism of the conventional progressive approach to the problem of inequality. For reasons set out below, I refer to this response as the social democratic response. However, my objective is less to criticize this approach than to put a better alternative in its place. I exemplify the alternative in Part III by developing a series of programmatic proposals in the areas of finance and the real economy, decentralized strategic coordination, and the deepening of democracy through structural reform piece by piece.

## I. The Conventional Response to the Problem of Inequality

The conventional social democratic approach to the problem of inequality includes a practical focus on retrospective redistribution by tax and transfer. The appeal of the conventional approach is the path of least resistance; an appeal to widely shared assumptions and aspirations in a manner compatible with established arrangements of the market economy, confirming the existing order and the dangers of wholesale reform. The problem with this approach is that it is inherently limited. Corrective and retrospective redistribution can only go so far. If it were massive, it would disrupt economic incentives to save, work and invest and produce economic trauma.

Despite this limitation, the cause of retrospective redistribution remains the preferred response to the problem of inequality. Piketty is only the most recent example of someone who proposes to fix inequality through taxes and other mechanisms of redistribution.[4] So established is the practice of tax and transfer as a solution to the problem of inequality that it may be called, quite simply, the conventional approach or conventional social democracy.

Two main ideas underlie this conventional progressive response. The first idea is a theoretical premise: the naturalization of the market system. According to this idea, there are no systemic or structural choices to be made in the design of a market economy or in its relation to the state. If something goes wrong, as it spectacularly did in the 2008 economic and financial crisis, it must be

4 Piketty, *supra* note 1.

because there was a localized imperfection in the market — for example, a failure of competition or an asymmetry of information or a localized failure in the regulatory response to the localized market failure. However, according to this view there is no prospect of designing a market economy in a different way and of reshaping the extent to which, as well as the way in which, the economy serves the productive agenda of society.

The second idea is a corollary of the first: the legal expression of the naturalization of the market system. According to this idea, the market is the market and the state is the state. Neither is intelligible apart from law. But each institutional idea corresponds to a natural and necessary legal order. Thus, the concept of a market economy is embodied in a system of private rights (contract and property). The role of the state is to protect this private order against internal subversion and external attack. The constitutional arrangements should be designed to prevent any sectional groups from using governmental power to advance sectional interests. Either set of arrangements may fail; but in each case, the failure is assumed to be minor, thus requiring only minor adjustment.

These implicit premises go a long way toward explaining the popularity of the standard response to inequality. But they alone cannot account for the paucity of debate. The conventional view is popular because it provides a "path of least resistance," naturalizing inequality and creating a barrier to any more fundamental challenge to the forces responsible for the dramatic increase in inequality in the past forty years.

Two implications flow from this way of thinking: first, the frequently ad hoc nature of the phenomenon of inequality selected for analysis; and second, the plausibility of the naturalizing assumption underlying the analysis as a whole. The more detailed the description of the forms and mechanisms of inequality, the more obvious the legal and institutional dimensions of the problem as well as the cure(s).

One further clarification is in order before considering an alternative to the approach sometimes referred to as the social democratic compromise. Social democracy does not mean just what goes under the name of social democracy in Europe. It is the way of thinking and acting that takes the established market order for granted and seeks to attenuate the inequalities it generates by retrospective tax and transfer. I have already argued that the approach is inherently limited. What, then, is the alternative? A more far-reaching effect would be achieved if we built the inclusion and redistribution into the arrangements of the market order.

By the established market order, I do not mean a supposedly indivisible and recurrent system — as Marxists means by capitalism or Hayekians mean by the market order. Nor do I mean the actual or idealized outcome of a supposedly narrowing funnel of institutional convergence. I mean a contingent set of arrangements that, once entrenched, resist change but form no recurrent and indivisible system. It is the way in which the market economy happens to be organized now in the United States. It is the contingent outcome of many historical conflicts among visions as well as among interests. It is not a system with an in-built institutional and legal content.

## II. Structural Critique of the Conventional View and Its Expression in Political Economy and in Legal Thought

If there were no alternative to conventional tax-and-transfer as a remedy for inequality, then the limitations of the method might be acceptable. But there are, in fact, alternatives; following earlier work of my own, I refer to the second approach as the "structural alternative."[5]

For purposes of this discussion, we can define the term "structural alternative" to mean a willingness to innovate in the policies and arrangements used to define either the economic or the political order. Thus, we may speak of a democracy or a market economy. A change in the basic legal and institutional arrangements used to define a democracy or market economy qualifies as a structural change or a structural alternative to the conventional forms. By contrast, a policy of "tax and transfer" redistribution would qualify as mere regulation or retrospective compensation for the inequalities generated by the market, rather than a structural reform.

In relation to the problem of inequality, a structural alternative will mean the effort to build inclusion and distribution into the arrangements of the market itself. Suppose, for example, that the operation of the current market economy generates a hierarchical distribution of wealth and income, with each rung associated with a different level of comfort, security, and livelihood. In terms of the categories of this Article, the resulting distribution of income forms the "primary" distribution — meaning the distribution of income prior to any retrospective rearrangement by the government or tax authority. Conversely, the decision to interfere with the policies and arrangements responsible for the primary distribution of income would amount to a program of structural reform.

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5 Tamara Lothian, *Beyond Macroprudential Regulation: Three Ways of Thinking About Financial Crisis, Regulation and Reform*, 3 Global Pol'y 410 (2012); Tamara Lothian, *Democratized Market Economy in Latin America (and Elsewhere): An Exercise in Institutional Thinking within Law and Political Economy*, 28 Cornell Int'l L.J. 169 (1995).

The great advantage of the structural approach is its willingness to deal with the structural sources of inequality. We can clarify the nature and sense of what I am calling the "structural view" through two polarities:

1. The first approach — the structural approach — influences the primary distribution, which necessarily involves institutional change; the second approach involves retrospective compensation, which disregards institutional change. In other words, the first approach redefines the logic of the market system; the second approach accepts the logic of the established market system, softening through retrospective compensation the inequality produced in the primary distribution.

2. The first approach combines attenuation of inequality with enhancement of agency, both economic and political; the second approach attenuates the problem of inequality without the enhancement of agency (either economic or political).

In each case, the first side of the polarity — i.e., the "structural alternative" — has priority over the second. The reason for this priority is simple: with the structural approach to inequality, there is almost no inherent limit to the amount of equality compatible with the operation of the "system." Conversely, the approach I am calling "tax and transfer" faces an obvious limitation: the need to stop before disrupting the organization of production. Or, put differently, the alternative approach to attenuating the problem of inequality involves using institutional arrangements to shape the primary distribution of income or in the broadening of organized access to economic and educational opportunity. Tax and transfer mechanisms influence only the secondary distribution of income.

One final point should be made with respect to the second approach to inequality — i.e., the mechanism I have described as influencing the secondary distribution of income: what matters most is the aggregate level of the tax and how it is spent, rather than the progressive profile of taxation.

From the standpoint of political economy, this theoretical view finds expression in a progressive approach to the supply side, through innovation in economic arrangements, as opposed to what we now find — a progressive focus on demand, coupled with an abandonment of the supply side to the economists, who reify a certain form of the market economy. In terms of legal thought, the structural approach implies putting the discovery of the legal indeterminacy of the market to practical and programmatic use, as I illustrate in great detail below.

## III. Implications of the Alternative Way of Thinking: Three Programmatic Initiatives

The approach taken here encourages experiments in institutional innovation in each area associated today with the conventional regulated market economy. For purposes of illustration, I choose three domains: finance, production and politics. The first programmatic initiative involves finance and the real economy (i.e., the theme of financial deepening over hypertrophy, combining the attenuating of inequality with change in the primary distribution of income and advantage); the second programmatic initiative involves reshaping the gateways of access to the advanced sectors of production (broadening access and inclusion to economic resources and advantage); the third set involves the deepening of democracy and the enhancement of the experience of agency, both economic and political: challenging and changing the structure piece by piece.

### A. Finance and the Real Economy: Financial Deepening over Hypertrophy

Contrary to much conventional thinking, the relation between finance and the real economy, or between saving and the funding of production, is not a constant, much less a tautological identity. It is a variable. It is susceptible to institutional variation in the light of the institutional arrangements that govern the relation of finance to the real economy. Such arrangements may either tighten or loosen the link. The looser the link, the greater the danger that the accumulated saving of society will be squandered in speculative financial transactions, unrelated to the requirements of production and consumption, and that the excesses of speculation will help ignite periodic financial crisis.

The familiar categories and the prevailing ideas may make it difficult to study how different institutional arrangements may either tighten or loosen the link between finance and the real economy. They may make the very statement of such a problem seem nonsensical. It is nevertheless a real problem in a real world. It will not vanish simply because our preferred ways of talking and thinking fail to accommodate it.

To grasp the significance of this problem, it is useful to distinguish between financial deepening and financial hypertrophy. By financial deepening I mean an increase in the service that finance renders to the real economy: to the production of goods and services. By financial hypertrophy I mean an increase in the size of the financial sector and of its share of GDP unaccompanied by an enhancement of the contribution of finance to real economy activity. The premise of this distinction is a controversial theoretical claim: that the relation of finance to the real economy is variable and that it varies according to institutional arrangements defined in law. This claim contradicts assumptions shared by the leading currents of opinion in economics, including the tendencies in economics that profess to be inspired by Keynes's intellectual legacy.

That institutional arrangements, expressed in law, decisively modify the extent to which savings are channeled into production and productive investment can be shown by homely examples. All agents of finance, including all manner of banks, are themselves legal constructions, subject to a long, variable, and often surprising institutional evolution. The pension regimes of the present — a major way in which savings have come to be held and deployed — are relatively recent creations. The way in which pension savings become available for productive investment is entirely determined by the rules under which they operate. A particular form of financial activity such as venture capital that seems very directly to exemplify the putative major role of finance is an innovation with an uncertain future: what, for example, can and should be the respective roles of private and public venture capital?

Under the institutional arrangements of present-day market economies, production is largely self-financed on the basis of the retained and reinvested earnings of private firms. The extent to which it is self-financed, although always overwhelming, is nevertheless variable. We have reason to suppose that the existing variations are only a subset of a much broader range of possible variation.

We have only to consider historical experience to appreciate how in the past institutional innovations have succeeded in making finance more useful to production. If they have made it more useful in the past, they can again make it more useful in the future. The early nineteenth century United States, for example, witnessed a struggle over the national bank.[6] This struggle culminated, during the presidency of Andrew Jackson, in the disbanding of the national bank and in the subsequent development of the most decentralized system of credit that had ever existed in a major country: a network of local banks the potential of which remains to this day far from being exhausted. This banking network placed finance more effectively at the service of the local producer as well as of the local consumer than it had previously been, in the United States or elsewhere.

An advance of this kind can be achieved again, not by repeating the institutional formulas of an earlier epoch but by institutional innovations suited to the present circumstances. Such innovations would give practical content to the idea of financial deepening. Their working assumption must be that it is not enough to cut finance down to size — by requiring, for example,

6 *See, e.g.*, Bray Hammond, Banks and Politics in America: From the Revolution to the Civil War 114-18, 279-81, 369-450 (1957).

more stringent capital-leverage ratios or even by imposing absolute limits on the size of financial firms — if we fail to establish arrangements that make finance more useful to production and innovation. We do not serve the deepening of finance — in the sense in which I have defined it — merely by combating its hypertrophy. The relation between financial deepening and financial hypertrophy becomes clear in the course of the effort to deal with these troubles. In the spirit of a pragmatist experimentalism, the answer to the speculative question comes in practice.

To the susceptibility of finance to destabilizing forces that arise from the institutional setting in which it operates — forces beyond its reach and even beyond its view — there is no effective response other than financial deepening: the broadest possible grounding of finance in the whole work of the real economy, in every step of the cycle of production and exchange. Such grounding does not advance spontaneously or automatically as a result of the sheer quantitative expansion of financial activity; it depends on the institutional arrangements governing finance and its relation to the real economy. Such arrangements may so disfavor the connection that they help generate financial hypertrophy without financial deepening. This is a recurrent phenomenon in world economic history. We have seen an example of it in the events leading up to the recent worldwide financial and economic crisis.

This reasoning shows that the only way in which we can effectively deal with the problem of financial instability is by dealing with the problem of financial hypertrophy. The idea of financial deepening marks out the conceptual space in which to address, through institutional innovation detailed in law, the relation of finance to the real economy in general and to production in particular. Just as economic institutions can organize a market economy in different ways, with different consequences for the trajectory of growth as well as for the distribution of advantage, so the part of this institutional order that deals with the role of finance can either tighten or loosen its link to production and to the real economy as a whole.

It is this simple but vital fact that our established ideas and nomenclature prevent us from fully acknowledging or even describing. A discourse about regulation that identifies as its guiding task the redress of localized market failures further entrenches this way of thinking and talking. In every real dispute about regulation, the subtext has to do with alternative pathways for the reorganization of the area of social and economic practice in question. Regulation, properly understood, is the first step toward institutional reconstruction.

Nothing in this view implies any reason to deny or to suppress the speculative element in finance. These ideas do not contradict the conventional view that speculative financial activity can be useful in generating information and in organizing risk. It is an intrinsic feature of finance to make informed bets about future states of affairs. Some of these gambles may function (as in hedging devices) to limit rather than to extend risk. Others may have no such risk-containing use without thereby ceasing to be useful and legitimate.

One of the many dimensions in which one way of organizing a market economy in legal detail may be better than another is by encouraging greater diversity and experimentation in the forms of production and exchange. That means making use, in the organization of a market economy, of the principle that market economies can take alternative legal-institutional forms.

The conventional idea of freedom to recombine factors of production within an institutional framework of production and exchange that is left unchallenged and unchanged can and should be broadened into an unconventional idea of greater freedom to experiment with the institutional forms of a market economy. Among such forms are its regimes of contract and property. A national economy should not be fastened to a single conception of property rights or contractual arrangements. Its institutional organization should radicalize the organized anarchy that is the genius of a market economy.

One of the many terrains for such variation in the legal-institutional regime of a market economy regards the room for speculative activity, which may properly be much greater in some economic sectors and contexts than in others. Instead of allowing only a modicum of speculation, it may be better to prohibit speculation altogether in some settings and to give it the freest rein in others. In that way, we refuse to entrench as institutional dogma what can and should be open to experiment and to collective learning.

Whether, however, society gives greater or lesser space to speculative activity, it must still shape the relation of financial speculation to the agenda of production in the real economy. In this respect, neither what the government wants nor what the financiers want is decisive. The crucial point lies in the institutional arrangements that make finance, including the most speculative forms of financial activity, either more or less useful to the expansion of output and to the enhancement of both total factor and labor productivity. The problem of speculative finance turns out to be just one more field in which to confront the distinction between the hypertrophy and the deepening of finance.

## B. Finance and the Project of Socially-Inclusive Growth

A market economy and economic growth can be organized in ways that either broaden or narrow access to the resources and opportunities of production. The long reign of what I called "the hydraulic model" in previous works[7] has

7 *See, e.g.*, Tamara Lothian, *Democracy, Law and Global Finance: An Example of a Research Agenda for a New Practice of Law and Economics* (Columbia Law &

supported the mistaken idea that a market economy is a market economy, a contract is a contract, and property is property, as if these economic categories had a single natural and necessary form. According to these ideas, we can give a larger role to the market or government, and strike one or another balance between them, but we cannot fundamentally alter the legal content and constitution of a market economy.

It follows from these ideas that the redistributive correction of the inequalities generated by a market economy must be achieved retrospectively, through the mechanisms of tax and transfer. In this picture, finance is useful primarily to the broadening of consumption: the organization of a market in mass consumption goods, reliant on consumer credit in housing, dependent on a primary and secondary mortgage market. This is the same conceptual world inhabited by the most influential contemporary theories of justice (e.g., Rawls[8]).

In fact, however, the main effect of economic organization on economic opportunity and equality occurs earlier in the institutional arrangements that influence the primary distribution of advantage. The struggles in nineteenth-century America over agriculture and over finance were notable examples of contests over the institutional basis of greater economic opportunity and equality. One of the outcomes was the organization, in the nineteenth century, of family-scale agriculture on the basis of what we today call cooperative competition among the family farmers and decentralized strategic coordination between them and governments. Another outcome was the establishment of the most decentralized systems of finance and credit, at the service of the local producer (not just the local consumer), that had ever existed in the world.

Today these problems and opportunities take special form in the light of what has been described as the post-Fordist transition in industrial organization. This transition can occur in a socially narrower form — the path of least resistance, because it imposes less trauma to dominant interests — or a socially inclusive path, which requires institutional innovation, established in law. The chief target should be the small- and medium-sized businesses that in every major economy in the world represent the chief sources of jobs and output. Its method should be the expansion of access to credit, to technology, to advanced knowledge and practice, and to facilities for the organization of networks of cooperation that combine the benefits of flexibility and of scale. Its characteristic concern should be to propagate successful organizational and technological innovations wherever they may arise. Its temper should be that of a patient and fearless experimentalism.

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Economics, Working Paper No. 479, 2014), https://ssrn.com/abstract=2438857 or http://dx.doi.org/10.2139/ssrn.2438857.

8 John Rawls, A Theory of Justice (1971).

The major developed and developing economies have moved beyond forms of industrial organization that emerged in the late nineteenth century and that came to prevail in the first half of the twentieth century: the mass production of standardized goods and services, with rigid machines and production processes, dependence on semi-skilled or narrowly skilled labor, stark contrasts between jobs of supervision and of execution as well as among specialized tasks of execution, and clear-cut separations of areas of activity considered appropriate to cooperation or to competition. However, no contemporary national economy has gone beyond such mass production in all its activity, but only in particular sectors.

The rich and emerging economies alike boast advanced sectors characterized by the relatively decentralized and flexible production of non-standardized goods and services, by knowledge-intensive labor, by the softening of contrasts between supervision and execution as well as among rigid specialties at the factory or office floor, by a more thoroughgoing mixture of cooperation and competition and, above all, by a practice of permanent innovation. Under the aegis of this form of production, the best firms come more closely to resemble the best schools. The thrust of this shift is toward an economy in which the relation between labor and machines is so arranged that labor time is increasingly devoted to those operations that we have not yet learned to repeat and, consequently, cannot yet express formulaically and embody in machines.

However, even in the richest and most egalitarian contemporary societies (some of the European social democracies), such vanguard practices remain confined to relatively isolated parts of the economy, from which the majority of the workforce continues to be excluded. The power of the state can and should be used to open the economic and educational gateways of access to this productive experimentalism. To this end, we need a form of association between governments and firms that is neither the American model of arm's-length regulation of business by government nor the northeastern Asian model of formulation of unitary trade and industrial policy, imposed top-down by a governmental bureaucracy. Rather, we need a form of strategic coordination between governments and firms that is pluralistic, participatory, and experimental. Its aim is to help make the conditions and instruments of advanced production available to larger parts of the economy and the society.

The United States, like all the advanced industrial economies, now faces two tasks simultaneously in economic and particularly industrial reconstruction. The more familiar task is to accelerate and to broaden the movement beyond Fordist mass production — the large-scale production of standardized goods and services, on the basis of rigid machines and production processes — to post-Fordist forms of production, which combine cooperation and competition in the same domains, and increase the extent to which production is undertaken as ongoing group learning. The problem is to determine who is in on this new world of productive experimentalism and who is not. The second, more demanding task of reconstruction is to organize in many sectors of the economy and society a direct passage from pre- to post-Fordist types of production: from a world of undercapitalized rearguard small and medium-sized businesses to a world of frontline innovators.

## C. Deepening Democracy: Structural Reform Piece by Piece

We are accustomed to thinking that there are only two major ways in which law and politics may engage a market economy under democracy: by regulating it or by attenuating inequalities of income and wealth. They may attenuate such inequalities through retrospective redistribution thanks to progressive taxation and redistributive social spending. There is, however, a third activity that we can undertake with respect to markets: we can change them, reshaping the institutions that make them what they are and that shape the primary distribution of economic advantage — the distribution existing before any attempt at correction of what the market has wrought.

This third activity amounts to a deepening of democracy and an enhancement of the experience of agency by transforming the structure piece by piece. Applying the structural approach to equality by influencing the primary distribution of wealth and income depends on institutional innovation in the institutions of the market economy — in opposition to dominant interests. The reason for this is simple. The market doesn't create its own arrangements; these are created in thought, politics and law. Moreover, to approach the structural alternative to equality as merely a project in market reorganization has the appearance of a technocratic plan. For the proposal to be taken seriously against dominant interests and preconceptions (i.e., the path of least resistance) requires a political movement. There is a reciprocal relation between democratizing the market and deepening democracy. The bolder the plan to deepen the market economy, the more likely it will be necessary to imagine and implement a deepening of democracy itself. So, too, the deeper the democracy, the more likely will be the imagining and implementation of alternative approaches to the market economy.

We should understand the deepening of democracy to include at least three dimensions:

1. Increasing the level of popular engagement and participation in public life; such initiatives would include those that provide for the public finance of political activity and limit or prohibit private funding, and that extend to organized social movements as well as political parties' free access to the

means of mass communication as a condition of the revocable licenses under which they do their business;

2. Capacity for decisive action and resolution of impasse — the facility for resolving rather than perpetuating deadlock; and

3. The ability to combine decisive action at the center of government with the creation of counter-models of the future, either by experimental federalism or a unitary state with radical devolution (as in the European states).

The cumulative effect of these three sets of innovations would be to produce a democracy that is more democratic because it would be more capable of enlisting the energies of ordinary people and of channeling those energies into projects that both address and are able to master the basic structure of society, in thought as well as in practice. The effect, in other words, would be to deepen democracy.

## IV. Conclusion: Attenuating the Problem of Inequality and the Alternative Futures of Legal Thought

The problem of inequality is many-sided. Here I have focused on the contingent legal and institutional structures that give rise to a series of formative arrangements and ideological assumptions that shape and reinforces practices of exclusion and inequality in the domains of politics, production and law. We claim that we no longer believe in systems, but in practice we do. The ideas of capitalism and of the regulated market economy are merely among the most tenacious.

Economists may be excused from devoting themselves to the understanding and imagining of institutional alternatives. But lawyers cannot. Our failure is even more inexcusable when we confront particular instances of reform. For every time a legal conception gets translated into a detailed set of arrangements and rights, we find that the conception admits alternative possibilities of imaginative and practical development. From this truth arises the possibility of a mutually subversive and progressive interaction between legal and institutional conceptions and their detailed legal translations.

Lawyers and legal analysts are not the only category of citizens capable of engaging in this task, but they do have at least two advantages. First, they alone have the experience and training to consider legal-institutional regimes at the required level of detail. Second, lawyers are often the ones most frequently called upon to consider feasible and desirable variations among existing institutional regimes. Not whether to adopt a market, but what kind of market. Not whether to adopt a new form of government, but what kind of government. Not whether to establish a new property regime, but what kind of property regime.

The problem of inequality today provides an extraordinary opportunity to consider once again the dialectic between ideals and their practical realization, across many areas of social practice and social thought. I have touched upon only a few. But each area of concern is filled with promise. Identifying and addressing the many different opportunities for structural understanding and transformation allows us to attend to some of the deepest problems of our age. It will also, I have argued, require a new way of thinking and new ideas.

This task is both difficult and easy. It is easy if we take as points of departure the traditions of classical political economy and legal thought. It is difficult if we recall the limits of the progress made so far, even within these traditions. However difficult, the task remains imperative. Even a cursory look at our circumstances today makes this clear. And, as I've suggested throughout these remarks, the problem of inequality is intimately linked to the problems of crisis, growth and stagnation, in practice and in legal thought. As lawyers, forever anxious to demonstrate our relevance, these crises are a good place to begin.

I hope we will continue.

# *In Memory of Tamara Lothian*

We are very saddened that, while this issue was still in preparation, one of its extraordinary contributors — Tammy Lothian — died. As both an academic and a prominent investment banker with a wealth of experience in both New York and the Southern Hemisphere, Tammy brought a unique combination of theoretical sophistication and practical experience to the study of finance and its troubled relations with human progress. A conspicuous feature of all of her work was its never permitting even the most sophisticated theoretical engagement to impede her forthrightly political quest for justice. Tammy traced much of the trouble in contemporary financial arrangements to a tendency on the part of many to assume that there is only one way to envisage, construct, and maintain a market economy. In combatting this tendency, Tammy found legal analysis, in its capacity as a uniquely potent form of imaginative institutional reverse-engineering, to offer profound and still untapped promise as a method of re-envisaging and redesigning financial institutions and markets. In so doing, Tammy both argued and demonstrated, we can likewise reimagine and reconstruct market arrangements themselves with a view to putting them at the service of equitable and sustainable — i.e., true — human flourishing. This aim, which is manifest in all of her work, is on full display in her contribution to this volume, which we dedicate to her memory, her family, and her mission.

Citation: 18 Theoretical Inquiries L. 229 (2017)