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INTENTIONAL DISCRIMINATION THAT PRODUCES ECONOMIC INEQUALITY: TAKING PIKETTY AND HSU ONE STEP FURTHER

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Thomas Piketty in *Capital in the Twenty-First Century*,[1] citing to a vast array of data, demonstrates that over the long haul capital grows more rapidly than income or the economy generally—his formula is $r > g$. When I read Piketty's book, I thought he had presented a tremendously important new way to discuss and decide public policy questions.[2] It was clear his work would be subject to challenge, critique, and development. Shi-Ling Hsu in *The Rise and Rise of the One Percent: Considering Legal Causes of Wealth Inequality*,[3] accepts Piketty's data that capital grows faster than the economy, but he also criticizes and develops Piketty's thesis. Hsu's main criticism is that Piketty fails to understand the role law plays in distributing wealth and in protecting the growth of capital.[4] For Hsu, "Piketty . . . [is] missing a *huge* piece of the puzzle: the role of law in distributing wealth."[5] The thrust of Hsu's article is to show how, in making and administering law, our legal system has failed to focus on the interests of society broadly, especially the impact law has on levels of economic inequality. Instead, all too often, the focus of lawmaking is exclusively on the effects on the private interests that would be directly affected by the legal issue presented. Absent a specific and systemic focus on

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

2 Michael J. Zimmer, *(Re)Booting the Dismal Science*, JOTWELL (July 8, 2014), http://worklaw.jotwell.com/rebooting-the-dismal-science/pdf/ (reviewing PIKETTY, *supra* note 1).

3 64 EMORY L.J. ONLINE 2043 (2015).

4 For a review of Piketty's CAPITAL that seems to be tenaciously holding to Chicago School microeconomics in the face of the overwhelming data that Piketty has used to demonstrate that microeconomics cannot by itself explain the real world, see Saul Levmore, *Inequality in the Twenty-First Century*, 113 MICH. L. REV. (forthcoming 2015) (reviewing PIKETTY, *supra* note 1), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488057. Levmore explains that the ongoing extreme compensation for top corporate and hedge fund managers could not continue if Chicago School microeconomic theory applied—competition for those jobs would drive down the rate of return. *Id.* (manuscript at 11–12). He concedes that Piketty's data demonstrates that those extraordinary returns continue unabated and concludes that "data do not lie. . . . At every turn it is useful to remember that this is a thesis driven by data rather than by theory." *Id.* (manuscript at 6). But, he fails to take the next step to disavow the usefulness of Chicago School microeconomics to fully describe the operations of the economy. *See id.*

5 Hsu, *supra* note 3, at 2047.

economic inequality, law allows, and frequently protects, the growth of inequality.

With this note, I want to take the question of economic inequality a step beyond where Piketty and Hsu have gone. The study of law for its effect on increasing economic inequality can allow us insights into why some social groups have been, and continue to be, economically disadvantaged. For all his strengths, Piketty does not address gender or race issues and how they influence economic inequality.[6] Adding that inquiry to the more general analysis of the effect of law on economic inequality that Hsu suggests might overcome some of the divisions between the interests of white males and those of women and minority males. A brief look shows how long-standing laws and legal policies have helped keep members of minority groups economically unequal.

The New Deal Era and its legislation tend to be viewed as instances when the government acted to help the people in need. These laws were important to that end, but some of the people most in need were intentionally excluded from the benefits these laws provided for others similarly situated but for their race. The Social Security Act of 1935 left out most blacks because the jobs they held were not within the coverage of the Act. "[M]ost southern blacks were excluded from old-age benefits and unemployment insurance by explicit exclusion of agricultural and domestic labor."[7] Agriculture and domestic work were the only jobs available to blacks in the South at that time. In order for FDR to get the Social Security Act, the Fair Labor Standards Act of 1938, and the Wagner Act of 1935 through Congress, he was forced to agree to these exclusions, which on their face were racially neutral but which were the result of intentional race discrimination: The Southern Democrats in Congress conditioned their needed support for the bills on the exclusion of blacks.[8] Slender as these social safety nets are and continue to be, they were an element of security for workers and their families that was denied to most black workers and their families until they escaped the limited categories that they were forced into because of general race discrimination.

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[6] Kathleen Geier et al., *How Gender Changes Piketty's 'Capital in the Twenty-First Century,'* THE NATION: THE CURVE BLOG (Aug. 6, 2014, 11:50 AM ET), http://www.thenation.com/blog/180895/how-gender-changes-pikettys-capital-twenty-first-century.

[7] Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 109 (2011).

[8] *Id.* at 109 n.89 (citing ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE 25 (1998)).

As World War II was ending, Congress enacted the G.I. Bill,[9] which is widely credited with creating the economic basis for an emerging American middle class.[10] Providing educational and housing benefits to returning members of the military allowed them to become homeowners with good paying jobs commensurate with their rising levels of education. Like the New Deal legislation, the G.I. Bill was racially neutral on its face, but it was "carefully designed . . . to require federal benefits to be administered locally and so to conform to local prejudices."[11] Federal underwriting guidelines for the housing benefit were explicitly discriminatory.[12] In the New York metropolitan area in 1950, only 69 of almost 70,000 loans to buy houses went to black veterans.[13] It was much worse in the South. While the educational benefits of the G.I. Bill were available to black veterans, there was a paucity of seats available to them in higher education. Most colleges and universities excluded blacks, and those that did had strict quotas.[14] The predominately black colleges in the South were small, underfunded, and could not nearly meet the needs of the large group of black veterans.[15] The failure to provide housing and educational opportunity for the World War II veterans of color continues to have a negative impact on black families. In 2010, the median net worth, including home equity, of white households was $110,729, while for black households it was only $4,955, or 4.4% of the new worth of whites.[16]

The express discrimination against blacks helps keep them as a group near the bottom of the economic pyramid. If that discrimination had not happened and did not have continuing impact, then the level of economic inequality would likely be less overall, even if those at the very top continued to capture almost all of the gains of economic growth.

Addressing how law generates increased economic inequality, whether through the failure of lawmakers to focus on it or through their intentional discrimination should be a top social, economic, and political priority. Piketty forecasts a dystopian future unless some fundamental steps at reform are taken.

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9 Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284.

10 Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 76 PITT. L. REV. (forthcoming 2015) (manuscript at 9) (on file with the Emory Law Journal).

11 *Id.*

12 *Id.* (manuscript at 16).

13 *Id.* (manuscript at 19).

14 *Id.* (manuscript at 12).

15 *Id.* (manuscript at 13).

16 *Id.* (manuscript at 22).

Even voices from the Harvard Business School argue that increasing economic inequality in a democracy is "unsustainable."[17] Dystopia is more than a theoretical threat long in the distance. It exists now in the context of natural resources in an undeveloped country, Equatorial Guinea. Oil was first discovered there in 1995:

> By 2006, Equatoguineans had the third highest per capita income *in the world*, higher than many prosperous European countries. Yet the typical citizen remains very poor. In the middle of the oil boom, an international observer noted that "I was unable to see any improvements in the living standards of ordinary people. In 2005, nearly half of all children under five were malnourished and [e]ven major cities lack[ed] clean water and basic sanitation."[18]

All of the wealth from the oil, some $600 million so far, is in the hands of the country's President, Teodor Obiang.[19] While the dystopia of Equatorial Guinea is not on the immediate horizon for the United States, Piketty's data shows that unless significant steps are taken, economic inequality will continue to gain force so that our present supposedly democratic political structure will become unsustainable. What stopped the inexorable increase in economic inequality in the twentieth century—two world wars and the Great Depression—should not be our only options.

Chicago school microeconomists think that the only thing that is important is the overall size of the pie. How the pie is distributed is not significant because it will take care of itself based on the talents of the population participating as workers and consumers. If Piketty is right, at some point the size of the slices of pie will matter if democracy is to be sustained. To be optimistic, before catastrophe strikes, we still have the chance to change direction in important and fundamental ways. These chances are, however, quite difficult to undertake, given our present social, economic, and especially political environment.

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[17] Roger L. Martin, *The Rise (and Likely Fall) of the Talent Economy*, HARV. BUS. REV., Oct. 2014, at 41, 43; *see also* MICHAEL E. PORTER & JAN W. RIVKIN, AN ECONOMY DOING HALF ITS JOB: FINDINGS OF HARVARD BUSINESS SCHOOL'S 2013–14 SURVEY ON U.S. COMPETITIVENESS (2014), *available at* http://www.hbs.edu/competitiveness/Documents/an-economy-doing-half-its-job.pdf.

[18] Frank Pasquale, *Capital's Offence: Law's Entrenchment of Inequality*, BOUNDARY2 (Oct. 1, 2014), http://boundary2.org/2014/10/01/capitals-offense-laws-entrenchment-of-inequality/ (reviewing PIKETTY, *supra* note 1) (alternations in original) (footnotes omitted) (quoting Peter Maass, *A Touch of Crude*, MOTHER JONES, Jan.–Feb. 2005, at 48, *available at* http://www.motherjones.com/politics/2005/01/obiang-equatorial-guinea-oil-riggs).

[19] *Id.*