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## THOMAS PIKETTY AND THE FUTURE OF LEGAL SCHOLARSHIP

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That the surging cultural phenomenon sometimes called “Pikettymania”<sup>1</sup> has now reached the redoubts of the *Harvard Law Review* is very much to be welcomed.<sup>2</sup> After all, social inequality has not been a prominent topic of legal scholarship over the last generation, though the French economist Thomas Piketty has incontrovertibly documented that it exploded over that period.<sup>3</sup> In his review, Professor David Singh Grewal performs an excellent service in prompting lawyers to engage with Piketty’s findings, and offers a straightforward digest, literate survey, and penetrating analysis of Piketty’s now-celebrated book to help them do so. Grewal’s elegant and insightful review is a notable event, even in the massive reception of *Capital in the Twenty-First Century*, during which so much ink has already been spilled.

It is on what legal scholars might add to the discussion of the contemporary explosion of inequality that this Response focuses. Alongside his summary of the book and interrogation of Piketty’s empirical conclusions, Grewal’s most significant intervention, after all, is his demand that legal scholars join the debate, with their specific interests and particular skills. And there is an opportunity to do so, Grewal reports. If there are “laws of capitalism,” Grewal contends, they have to function in and through the actual laws that we legal scholars study.

But are there laws of capitalism? It might seem at first that Grewal assumes that there are, casting legal scholars in the role of deciphering the small-scale mechanisms in law through which the large-scale necessity in economics of Piketty’s proposed “law” produces its result. “Understanding why  $r > g$  has generally held — and why it briefly did not — requires an account of capitalism as a socioeconomic system structured through law,” Grewal notes.<sup>4</sup> It is almost as if legal ordering were best analogized to the system of cogs that make up the

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<sup>1</sup> For the label, see Alan S. Blinder, “Pikettymania” and Inequality in the U.S., WALL ST. J., June 22, 2014, <http://online.wsj.com/articles/alan-blinder-pikettymania-and-inequality-in-the-u-s-1403477052>.

<sup>2</sup> David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014) (reviewing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014)).

<sup>3</sup> PIKETTY, *supra* note 2.

<sup>4</sup> Grewal, *supra* note 2, at 652.

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machine of aggregate outcomes that an economist like Piketty prefers to place under study. While economic analysis takes up the bottom line, legal analysis, according to this division of labor, reconstructs the pathways that produce it. As Grewal explains, “[c]apitalism is fundamentally a legal ordering.”<sup>5</sup>

But we might be dealing either with a distracting misnomer or an antiquated mistake in thinking of law merely as the path traveled to reach the outcomes dictated by “laws of capitalism.” If there are “statistical regularities” (as Grewal calls them) in the economy,<sup>6</sup> the nineteenth-century figures like David Ricardo and Karl Marx who initially described them wanted them to be more like scientific necessities than the humdrum, messy, and contingent laws that mere mortals have made to structure transactions or organize politics. And it is largely a matter of agreement that the classical economists were wrong to do so.

Fortunately, Grewal himself clarifies the limits of Piketty’s move from his breakthrough data to the iron law of inequality he wants to be their theoretical consequence. Grewal signals that the laws that structure the economy are not at all like the law of inequality sought by Piketty — sharing only a name. Grewal calls for “study of the actual laws of capitalism — those behind the statistical regularities discussed as ‘laws’ — that is, of the various legal and institutional arrangements governing capitalist economic systems.”<sup>7</sup> He is right to do so: the contribution of the most interesting legal scholars has often been to show that what have been mistakenly identified as necessities of the social world are in fact contingent effects of legal rules and legal choice. But then the role of their scholarly heirs today cannot possibly be restricted to the study of intermediate legal mechanisms of the alleged “laws” of capitalism.

Piketty’s nineteenth-century search for a general account of market orderings, that is, may respond wrongly to his own empirical breakthrough. And it is precisely in response to this move that legal scholars — like other institutionally careful students of the social order — can find their true opportunity. Piketty’s search risks blinding his readers to how inequality has been achieved, worsened, and moderated through specific legal innovation rather than the necessary logic of “capitalism.” What legal scholars know is that there is no such logic, at least not of the kind that produces laws of capitalism.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 652–53. A similar insight may lie behind Grewal’s observation that Piketty tacks ambivalently between implausibly treating capital as a flow of the same measurable entity over time and more persuasively defining it as a changing “social relation produced through political contest,” in which “access to the variety of resources that people use to produce things” is “legally structured.” *Id.* at 652.

In one of the best reviews of *Capital in the Twenty-First Century*, Professors Daron Acemoglu and James A. Robinson have indicted the very notion of “general laws of capitalism,” as a nineteenth-century relic that twentieth-century economists, with their institutionalist insights, plausibly abandoned.<sup>8</sup> Legal scholars should have no trouble agreeing. An institutionally sensitive skepticism about the existence and workings of grand systems is hardly new, and is hardly foreign to progressive thought or legal analysis. In a once-famous (but very different) study by another Frenchman, Michel Foucault argued similarly: the notion of the economy as a domain with characteristic laws of distribution restricted “both nineteenth-century bourgeois economics and nineteenth-century revolutionary economics” to a superannuated identity of thinking, in spite of the superficial opposition of Ricardo’s and Marx’s systems.<sup>9</sup> For Professor Roberto Unger, “nineteenth-century social theories such as Marxism, with their characteristic belief in . . . indivisible institutional systems driven forward by lawlike forces” have long since fallen by the wayside, even if people “cling to their left-overs, confusedly using the vocabulary of theoretical systems we claim to have renounced,” including “concepts like capitalism that presuppose the existence of a single, typical economic and legal regime.”<sup>10</sup> The very notion of such a lawlike phenomenon called “capitalism,” Timothy Shenk observed in another of the notable responses to Piketty, began as a socialist term of abuse, only later acquiring the aura of a stable entity or “system” that could come into being or (its opponents hoped) pass away.<sup>11</sup> In short, though we now talk about “capitalism” as a matter of convenience, we cannot make the mistake of regarding it as a domain where necessary laws like those of gravity or thermodynamics apply.

If these insights are right, trying to discover the small laws that account for Piketty’s one big law could be the wrong approach for legal scholars, even or especially if Piketty’s data convince them that some explanation must be discovered for the dynamics of inequality. I hasten to add that there is no denying the empirical findings that Piketty has heroically recovered concerning the wealth and income structures of the North Atlantic societies he has studied. But the question is not: given that capitalism produces inequality as a matter of systemic necessity, by what legal pathways does it do so? Rather, one should ask:

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<sup>8</sup> Daron Acemoglu & James A. Robinson, *The Rise and Fall of General Laws of Capitalism* (Aug. 2014) (unpublished manuscript), <http://economics.mit.edu/files/9834> [<http://perma.cc/UT4K-7PSH>].

<sup>9</sup> MICHEL FOUCAULT, *THE ORDER OF THINGS* 285 (Routledge Classics 2002) (1970).

<sup>10</sup> ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 3 (1996).

<sup>11</sup> Timothy Shenk, *What Was Socialism?*, *THE NATION*, May 5, 2014, at 27.

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what legal arrangements promote or lessen inequality? What legal scholars know is that whatever general and seemingly necessary phenomena are observed follow from highly contingent and institutionally specific arrangements. It is not the other way around. Instead of reducing the role of legal scholarship, in deference to the economist's lawlike outcome, merely to the description of its intermediate mechanisms, one might insist that lawyers can recover the legal choices that created the illusion of a monolithic capitalism with its inexorable necessities in the first place.

Grewal's own focus, in the relevant section of his review, not surprisingly takes up his own research into the origins of the modern concept of the economy. That research focuses on what one might call the microeconomic foundations involved in the invention of an interest-bearing and -maximizing agent whose appearance made a new sort of commercial society imaginable. It is a valuable contribution: the move from ancient *oikos* to modern "economy," alongside the anthropological invention of its characteristic actor who satisfies preferences and maximizes interests, was the deep precondition for everything that followed — though it is still taken for granted by standard economic and legal analysis alike.<sup>12</sup> Grewal is right to insist that legal scholars continue to study the institutionalization of the arm's length relations among formally equal individuals characteristic of both classical liberal and classical economic thought. And he is surely correct that legal rules — the displacement of status relationships by contractual relationships for example — were fundamental parts of the story.<sup>13</sup> Even so, predominant focus on this early stage could inadvertently ratify Piketty's decision to treat capitalism as a quasi-permanent ensemble of arrangements and practices, which of course had to start somewhere and somehow — but afterward functions according to the lawlike processes he wants to formalize.

As Grewal also notes (albeit very briefly), some very different and much more macroeconomically oriented approach is necessary to account for the variability of modern "capitalist" orders, whether with respect to inequality or along other dimensions.<sup>14</sup> Acemoglu and Robinson have taken this argument far further, and in a far more critical direction. An institutional focus of the kind Grewal properly recommends makes the quarry of the economist of "capitalism" elusive as much as or more than it allows the legal pathways of its systemic regu-

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<sup>12</sup> DAVID SINGH GREWAL, *THE INVENTION OF THE ECONOMY: A HISTORY OF ECONOMIC THOUGHT* (forthcoming 2015) (offering a contrast between the ancient *oikos* (standardly translated as household) and the rather different modern "economy" to which it etymologically gave rise).

<sup>13</sup> Grewal, *supra* note 2, at 654–56.

<sup>14</sup> *Id.* at 658–59.

larities to be traced.<sup>15</sup> We learn that, even within the constraints imposed by the early modern developments on which Grewal lavishes the bulk of his attention, there is a multitude of ways to legally institutionalize a market. And if this is the case, then the prime outcome of a more institutionally sensitive understanding — as well as the central opportunity for legal scholars — is an inventory of this diversity, rather than merely a search for the “legal foundations” of a single and invariant capitalist bottom line.<sup>16</sup> Most of all, this shift in framework would exploit the opportunity for legal and political understanding in the fact that, in Piketty’s own narrative of the history of the transatlantic scene, capitalism’s alleged law of necessarily increasing inequality was one made to be broken.

In spite of his overwhelming focus on the early modern period, Grewal is certainly onto the significance of this much later disruption. The temporary reversal of the patterns of rising inequality, he says, depended on “deep changes in the [legal] regulation of the market.”<sup>17</sup> But partly because for him the invitation of *Capital in the Twenty-First Century* from the title on is an explicit comparison with Marxism, Grewal is more interested in how more institutionally minded Marxists like Andrew Glyn and Wolfgang Streeck might more easily account for Piketty’s law of capitalism.<sup>18</sup> Arguably, however, the institutionalist framework that legal scholars ought to be so useful at applying to the problem poses a deeper challenge precisely because, as Grewal himself suggests, asking why some capitalist societies somehow broke an allegedly fundamental law of capitalism is a classic *question mal posée*. The point is not so much to explore how law (and politics) spoiled an otherwise applicable economic “law of capitalism.” It is to show that markets are malleable and come in many forms because of variations in legal institutionalization.

Piketty explains the surprising disruption of the middle of the twentieth century, which saw the moderation of both income and wealth inequality, mainly by appealing to the massive destruction of capital due to the Great Depression and above all World War II.<sup>19</sup> This explanation is symptomatic of his assumptions: having sketched

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<sup>15</sup> See, e.g., Acemoglu & Robinson, *supra* note 8 (comparing outcomes in South Africa and Sweden, as well as deemphasizing top income rates for a more holistic evaluation of the income scale, whose structure may differ radically even across cases in which top income rates have soared).

<sup>16</sup> Grewal, *supra* note 2, at 660.

<sup>17</sup> *Id.* at 657.

<sup>18</sup> *Id.* at 656–57, 662–63. The tip of the enormous iceberg of Marxist reckoning with Piketty is the insightful review by Benjamin Kunkel, *Paupers and Richlings*, LONDON REV. BOOKS, July 3, 2014, <http://www.lrb.co.uk/v36/n13/benjamin-kunkel/paupers-and-richlings> [http://perma.cc/T58P-TGA4].

<sup>19</sup> PIKETTY, *supra* note 2, at 146–50.

the origins of his regularities so lightly, distracted by belief in a natural law of capitalism, Piketty also fails to explain satisfactorily why those regularities suddenly failed to obtain.<sup>20</sup> Grewal is right to imply the role of a host of other factors than those Piketty offers; if anything, Grewal understates their range.<sup>21</sup> All of the areas of public and private law, from antitrust to worker's compensation, were part of the mix of the redistributive moment of the middle of the twentieth century under the auspices of burgeoning welfare states. In fact, Piketty's self-presentation as bringing the insights of history to an otherwise arid economics profession masks how little of what historians (including legal historians) have shown about the nature of the midcentury welfarist settlement actually enters his analysis. And in turn, the loss of the redistributive legal mechanisms achieved at midcentury in the transition to the "neoliberal" moment of today also occurred not out of the inexorable necessity of capitalism but — as Grewal has begun to show elsewhere — out of changes in legal ideology, legal rules, and legal outcomes, which have likewise attracted the attention of legions of analysts.<sup>22</sup> For Piketty, the contemporary era is one during which, after a confusing midcentury hiatus, capitalism returns to type. But clearly, it would be false to reduce all of these multifarious factors of the ideology and institutionalization of market fundamentalism to the status of "determinants of  $r > g$ " that were "legally structured."<sup>23</sup> There is no law of which these vast changes are legal determinants; there are only legal and more broadly political arrangements in which inequality improves or — in our case — worsens.

Alongside its appearance at a time in the first half of 2014 when Democratic politicians in the United States were momentarily willing to take inequality seriously, it is the convergence of *Capital in the Twenty-First Century* with what Shenk calls "millennial Marxism" that accounts for much of the interest in the book's reception.<sup>24</sup> Much of

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<sup>20</sup> "The world wars intervene as contingent events, akin to natural disasters. Political pressure from organized labor is virtually discounted as a relevant variable," Knox Peden comments. Such a picture flows from "the presumptive naturalism that underlies Piketty's thoroughly historical and ostensibly political account. Perversely, Piketty's problem is the same as Marx's: the history of political economy becomes so naturalised that the only political solutions he offers seem plainly utopian." Knox Peden, *The Abstractions of History*, SYDNEY REV. BOOKS (July 22, 2014), <http://www.sydneyreviewofbooks.com/capital-twenty-first-century-thomas-piketty> [http://perma.cc/72SD-4Y9R].

<sup>21</sup> See Grewal, *supra* note 2, at 650–52.

<sup>22</sup> See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. (forthcoming 2014). See, for example, in an American context, STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

<sup>23</sup> Grewal, *supra* note 2, at 660.

<sup>24</sup> See Shenk, *supra* note 11, at 30. Already the Democratic Party has moved on from the theme. See Zachary A. Goldfarb, *With Democrats Split on Inequality Issues, Obama Shifts Talk Away from Income Gap*, WASH. POST, July 4, 2014, <http://www.washingtonpost.com/politics/with>

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Grewal's review regards some sort of Marxist political economy as the necessary completion of Piketty's discovery of the bottom line of capitalist dynamics. It is a plausible assumption, but mainly because Piketty (in spite of his otherwise acerbic differences from Marxist frameworks) does think of "capitalism" as a system. Indeed, one of the most interesting features of Grewal's review is that, unlike many of the Marxist critics the French economist has attracted, Grewal seems to want to view Piketty's enterprise and the contemporary revival of Marxian political economy as allied rather than alternative projects. But in some ways the most obvious point of compatibility between the two is precisely their least salvageable premise: the assumption that there are laws of capitalism to be discovered. It follows that those interested in bringing legal analysis to the moral and analytical problem of inequality that Piketty has suddenly made so prominent might be most interested in a style of analysis that broke with this shared premise.

For its most insightful critics, Marxism remained irretrievable precisely to the extent it was caught in a nineteenth-century mythology in which the regularities of society were akin to the laws of nature. (Marxism, Foucault famously proclaimed, "exists in nineteenth-century thought like a fish in water: that is, it is unable to breathe anywhere else."<sup>25</sup>) Correspondingly, the institutionalist respect for the construction of market relations in and through law that Grewal pioneeringly foregrounds provides the rationale for a twenty-first-century intellectual response. The legal scholarship that will properly situate Piketty's indubitable finding about the rise, fall, and rise of social inequality is likely to be anything but Marxist in the end. Its deepest assumption, after all, will have to be that there are no general laws of capitalism to explain in the first place, because there is no such thing as capitalism.

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-democrats-split-on-inequality-issues-obama-shifts-talk-away-from-income-gap/2014/07/04/102ff32-02be-11e4-b8ff-89afd3fad6bd\_story.html [http://perma.cc/72RC-8HD5]; Noam Scheiber, *Hillary Has a Plan to Attack Inequality — Without Attacking Her Corporate Donors*, NEW REPUBLIC (July 2, 2014), <http://www.newrepublic.com/article/118540/hillary-clintons-inequality-strategy> [http://perma.cc/DRA4-G886].

<sup>25</sup> FOUCAULT, *supra* note 9, at 285.