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INTRODUCTORY REMARKS:
AN ANALYTICAL FRAMEWORK FOR THINKING
ABOUT ECONOMIC JUSTICE

RUDOLPH J.R. PERITZ¹

What is economic justice? It certainly means something to our three speakers this afternoon,² and I suspect that economic justice means something to each one of you. Everyone from Marie Antoinette to Karl Marx has had an opinion about economic justice—whether it was “Let them eat cake” or “From each according to his ability; to each according to his need.”

In trying to make sense of this open-textured idea, I did what any 21st century person would do. I went to the Internet. I surfed the net for signs of economic justice. After precisely .09 seconds, the Google search engine returned 104,000 hits on the phrase “economic justice”,³ including the following: There was an Institute for Economic Justice and Indigenous Technologies as well as a local exchange about

1. Pennsylvania State University, B.S. 1969; University of Texas, J.D. 1975 (Texas International Law Journal). Langdell Fellow, Harvard Law School, 1981-82. Expert in antitrust law, particularly in matters involving information technology, as well as economic regulation, jurisprudence, and information technology and the law. In private practice was consultant on computer-related cases and complex litigation. Worked as computer programmer, systems engineer, Assistant Attorney General of Texas in Antitrust Division, and Senior Research Scholar, American Antitrust Institute. The text is a lightly edited transcription of my introductory remarks at the “Economic Justice” session of Faculty Presentation Day, New York Law School (Apr. 3, 2002).

2. Ed Samuels, who later spoke about the forgotten equities of performers, stated that he wrote his paper before the panel was organized and, impliedly, did not necessarily have any particular notion of economic justice in mind. Indeed, it was Associate Dean Steve Ellmann who organized the panel under the rubric of economic justice. But that should not concern us, particularly in light of post-structuralist notions of the author, especially the so-called reader-response criticism associated with such literary critics as Stanley Fish, himself the author of the (in)famous *Is There a Text in the Class?* (STANLEY FISH, *IS THERE A TEXT IN THE CLASS?* (Harvard University Press 1983)). Reader-response critics insist that a text is little more than an inkblot that allows readers to project their interpretive frameworks into texts, texts that by their nature are open to all manner of interpretation. So there is nothing to stop us from reading Samuels’ paper through the lens of economic justice, even if the lens is not of his making. As an aside, what might that account of interpretation have to say about the uniqueness and originality of texts and other copyrightable materials?

3. Google.com is currently the most popular Internet search engine.

fair trade, whose motto is Shop Without Sweatshops. There was an economic justice network that had a specialized search engine for economic reform called "Ask Henry". I wondered whether there was a physical namesake, a human forerunner for the virtual Henry but did not take time to satisfy my curiosity. I found centers of economic justice in California, North Carolina, Vermont, Texas, Washington, D.C., and Arkansas. The D.C. center won my out-of-touch-with-the-fact-that-William Jennings Bryant-lost-three-times-a-hundred-years-ago award for its guiding principle that economic justice requires a return to a gold or silver monetary standard. I found Jews for Racial and Economic Justice, as well as an "Economic Justice for All" Pastoral Letter written by the U.S. Catholic Bishops in the mid-1980s, an Economic Justice Loan Committee of the Episcopal Church, and, of course, an Ecumenical Coalition for Economic Justice—which was formerly known as "GATT-fly". Citizen coalitions for economic justice exist in Korea and Japan. And there is the Women's International Coalition for Economic Justice right here in New York City.

What sense can be made of so much economic justice—from Marx to Marie Antoinette to the Internet? Perhaps the best we can hope for is an analytical structure or framework for thinking, if not about economic justice writ large, then about the three papers that follow. Here is a framework, writ small, that you might find useful for our session today.

Let's begin by isolating the "justice" part of economic justice. Justice often refers to legal rights, particularly to fairness or equity in the substance and enforcement of those rights. The idea is to treat equals equally and unequals unequally — but only in proportion to their relevant differences. So much hinges on the controversial question of relevant difference. What differences are relevant? Differences are relevant when the criterion of distinction is fair, a notion that goes back at least to Aristotle. When distinctions are seen as unfair, *e.g.*, distinctions based on race and gender, then we call them "discrimination". Much of modern debate over economic justice has to do with the question of fairness in the making of distinctions.

Economic justice has something to do with fairness in economic matters. And so I want to develop a rudimentary framework for thinking about economic fairness. It seems to me that questions of economic fairness can entail three inquiries: fairness of process, fairness of outcome, and appropriate level of inquiry.

Economic justice can be a matter of fair process. For some, fair economic process is a minimalist notion of maintaining open access to an unfettered process. In western common law countries, that has often been understood to mean a process free of government interference. For others, a more capacious conception of fair process requires some supervision, typically by government, to assure the conditions for meaningful access and participation.⁴ In the United States, we can see both views in the idea of free competition when we ask the question: From what do we want to free competition? On the one hand, we want to unfetter competition from oppressive government power. On the other hand, we also want to free competition from private economic domination — and sometimes we need government to help us in that endeavor. In consequence, these two views of fair process, of competition on the merits, can sometimes conflict with one another.⁵ Economic justice as fair process is not an easy matter.

The second aspect of economic justice reflects differing ideas about fair outcomes rather than fair process. I want to mention five well-known ideas about fair outcomes.

First, an outcome might be considered fair when there is arithmetic equality. For example, when Beaver Cleaver's Mom cut that apple pie, everyone got a slice of equal size. That was only fair. Second, many consider outcomes fair only when the process is seen as a meritocracy, and those who have earned the benefits get them. Third, fair outcomes might entail apportionment according to need. In his influential book, *The Theory of Justice* (1971), political philosopher John Rawls conjures an economic decision-making process whose criterion for action is that the least-well-off must benefit. Fourth, there is the utilitarian approach, which holds that outcomes are fair when, on balance, gains outweigh losses. The identity of individual winners and losers, the conditions of gain and loss, and the amount of losses are all immaterial. Traditionally, the gains and losses in this approach refer to a subjective notion of personal satisfaction but they can also refer to wealth or gender equality or to anything else, for that matter. Economists tend to prefer wealth as the value because they are trained to view the world in terms of markets and because using wealth, they claim, allows for easier measurement of gains and losses. Fifth and finally, some consider out-

4. These notions reflect English philosopher Isaiah Berlin's well-known conceptualizations of negative and positive liberty.

5. I discuss these matters at some length in, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* (Oxford University Press, 1996 & rev. ed. 2001).

comes to be fair when no one is worse off and at least one person is better off. This view of economic justice is attributed to Italian sociologist Wilfredo Pareto and is called "Pareto optimality". Here, too, the traditional standard for gains and losses is personal satisfaction.

All five of these standards for thinking about fair outcomes as the framework for economic justice cannot escape the controversial requirement of defining the criteria: What are relevant differences? How do you define merit or need? What is personal satisfaction? These are all political questions in the large sense that call for value judgments. Sometimes, the value judgment is explicitly stated and argued. At other times, it is adopted implicitly, perhaps because it is seen as self-evidently correct, as neutral, or as a majoritarian sentiment that should bind us all. Finally, there are times when policy makers fail to recognize the presence of value judgments. When is it that we can reasonably demand explicit recognition and defense of value judgments?

In addition to the notions of fair process and fair outcomes, there is a third aspect of economic justice. This third aspect relates to the level of inquiry for process and outcome evaluation. Do you look at individuals or at groups to determine economic justice? If groups, which ones? Do you think in terms of race, class, gender, ethnicity, age, sexual preference, or other identification criteria? What of geography as a guide—local, state, regional, national, multilateral, global? For example, wealth and personal satisfaction balancings could tip in different directions. Moreover, a balancing of wealth gains and losses could play out quite differently when comparisons are made across age groups or when geographic contexts are shifted from local to global. In sum, different levels of inquiry can produce different conclusions about the fairness of process or outcome.

I will end with an observation: All three aspects of economic justice reveal gaps, ambiguities, contradictions, and overlaps, as well as other difficulties for making decisions. As you read the papers that follow, think about their spoken and unspoken assumptions about economic justice, their criteria for fairness, and the importance of process and outcome. Pay attention to their levels of inquiry. Where do you agree and where do you take issue with their treatment of the subject matter? And finally, where do you come out on questions of economic justice?