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## Economic Justice and Economic Theory: Limiting the Reach of Neoclassical ideology

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# ECONOMIC JUSTICE AND ECONOMIC THEORY: LIMITING THE REACH OF NEOCLASSICAL IDEOLOGY

*Charles R.P. Pouncy\**

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## I. INTRODUCTION

The concept of economic justice finds no robust expression in the law of the United States. Although the term “justice” is replete with ambiguity, it nonetheless evokes relatively familiar notions of equity and fairness in the administration and application of law.<sup>1</sup> However, the term “economic justice” is rarely discussed in judicial decisions or in scholarly analysis and commentary. In fact, the term “economic justice” has been used only once by the U.S. Supreme Court, appearing in a footnote in a concurring opinion.<sup>2</sup> The term appeared a few times in state court decisions, but those

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1. For the purposes of this Article two definitions of the term justice found in the Oxford dictionary of the English language, are helpful. First, “justice” is understood to embrace “the quality of being [morally] just” and as “the exhibition of this quality or principle in action.” OXFORD DICTIONARY 326 (2d ed. 1989). Additionally the phrase “to do justice” is described as “to render [one] what is his due, or vindicate his just claims; To treat [one] fairly by acknowledging his merits or the like; hence, to treat [a subject or thing] . . . as is right or fitting.” *Id.*

2. Fullilove v. Klutznick, 448 U.S. 448, 506 n.6 (1980).

cases dealt almost exclusively with unemployment or worker's compensation claims.<sup>3</sup> This tends to suggest that the concept of economic justice, is outside the purview of judicial process, if not law itself. For example, in 1916 the Connecticut Supreme Court said, "our concern is not with the wisdom or economic justice of our statute . . . but with its meaning."<sup>4</sup>

However, discerning the meaning of a statute is an exercise in both understanding language and in understanding what that language means as a function of the culture which has produced it.<sup>5</sup> Although the term "economic justice" is not a term of art in the common law tradition, it is reasonable to assume that considerations of economic justice would arise as one of the policy concerns that our legislatures and courts address in formulating and interpreting law. That, for the most part, it is not a consideration, raises interesting questions about the interaction of our legal and economic cultures and our culture at large, particularly with regard to the ways the benefits and burdens of society are allocated among its people. This Article argues that today's mainstream economic theory, the neoclassical paradigm,<sup>6</sup> interacts with legal culture to obviate considerations

3. See, e.g., *Melendez v. Johns*, 76 P.2d 1163, 1163, 1171 (Ariz. 1938) (Lockwood, J., dissenting) (denying worker benefits under the Workmen's Compensation Law on the grounds that he was performing uncovered work when injured. The dissent observed that such a limitation was based on notions of economic necessity rather than on economic justice); *Great W. Mushroom Co. v. Indus. Comm'n*, 82 P.2d 751, 752 (Colo. 1938) (suggesting that unemployment compensation law should be interpreted with regard to modern views of economic justice); *State ex rel. Hughes v. Cleveland*, 141 P.2d 192, 206 (N.M. 1943) (Bickley, J., dissenting) (observing that the provision of old age assistance is premised, among other things, on grounds of economic justice); Economic justice also appears as a concern in some divorce proceedings. See, e.g., *McCartney v. McCartney*, 50 Pa. D. & C.3d 339, 341 (Pa. Com. Pl. 1988).

4. *Miller v. Am. Steel & Wire Co.*, 97 A. 345, 350 (Conn. 1916) (Wheeler, J., dissenting) (considering where lead poisoning constituted an "injury" within the meaning of the workers compensation statute).

5. For example, the Sapir-Whorf hypothesis suggests that language is not merely a function of the culture which creates but operates in a feedback loop impacting the way each native speaker understands concepts like being, causality, and time. RICHARD R. WILK, *ECONOMIES AND CULTURES: FOUNDATIONS OF ECONOMIC ANTHROPOLOGY* 104 (1996).

6. Generally:

[n]eoclassical economics describes the economy as a state of equilibrium, in which the forces of supply and demand interact to achieve optimal allocation of society's resources. The focus of neoclassical economics is on the decision-making activity of entrepreneurs, households and firms. It assumes that economic decision-making is voluntary, informed and rational (i.e., utility maximizing). The models used in neoclassical economics are based on transactions occurring in exchange (i.e., barter) markets, in which perfect competition prevails. In these

of economic justice. By the law's reliance on a methodology that is blind to considerations of group status and group processes, and by its adoption of values that marginalize conventional notions of equity and fairness in the economic arena, supplanting them with the values of efficiency and self-interest, the law becomes oblivious to its role in achieving and maintaining the unjust distribution of assets, resources, and opportunities countenanced by the neoclassical paradigm.

## II. WHAT IS ECONOMIC JUSTICE?

Bruce Ackerman has formulated a fairly conventional notion of justice. Ackerman argues that the notion of justice embraces three fundamental values: rationality, consistency, and neutrality.<sup>7</sup> Rationality requires that the exercise of power or privilege be subject to reasonable and arguably persuasive explanation.<sup>8</sup> When a distributive outcome is questioned, the questioner is not suppressed, but is provided with acceptable justifications for the ostensibly unjust consequence. Consistency requires that the explanation advanced for the exercise of power or privilege in one instance be in agreement with explanations provided for such behavior in other circumstances.<sup>9</sup> Finally, neutrality rejects an a priori claim of preference or superiority as the basis for the exercise of power and privilege.<sup>10</sup>

Thus, a defensible notion of economic justice would have three requirements. First, in keeping with Ackerman's rationality construct, the financial disparities between African-Americans and Whites, for example, must be subject to a legitimate objective inquiry. Such an inquiry may not be suppressed by force, coercion, willful blindness, or claims of impotence.

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markets, goods are exchanged for goods, with money serving only as a neutral intermediary in the exchange. Economic models based on exchange markets also assume gross substitution effects. The axiom of gross substitution states that the demand for good A will change only in response to a pricing differential between good A and a substitute product. Exchange transactions also are envisioned as being costlessly reversible, and as occurring in an ergodic environment, in which there are no financial institutions. The market becomes the instrument of allocation, and individual self-interested economic decisions collectively achieve an optimal societal equilibrium.

Charles R.P. Pouncy, *Contemporary Financial Innovation: Orthodoxy and Alternatives*, 51 SMU L. REV. 505, 540-41 (1998) (citations omitted).

7. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 4-12 (1980).

8. *Id.* at 4-7.

9. *Id.* at 7-8.

10. *Id.* at 10-12.

Traditionally, the economic aspirations of African-Americans have been suppressed by violence.<sup>11</sup> In contemporary society, the economic well-being of African-Americans is suppressed by the willful blindness protected by colorblind notions of equality, and institutions of racial subordination are protected by supposed limitations on constitutional interpretation and law enforcement.<sup>12</sup> These protections flow from the law, which is best understood in this context as an instrument used to justify and defend the status quo.<sup>13</sup> Therefore, the U.S. Supreme Court decisions that have consistently beaten back attempts to provide greater economic opportunities for racial and social minorities<sup>14</sup> defy Ackerman's first criterion for justice. These decisions are based on constructions of the U.S. Constitution that ignore the legacy of slavery and the contemporary

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11. For example, in July 1917 African-American homes were attacked and burned in East St. Louis, Illinois as a result of employment competition; White mobs attacked African-American Chicago neighborhoods in July 1919 leaving over one thousand people homeless; six African-American residents of Ocoee, Florida were killed and twenty-five African-American owned homes were burned in November 1920; thousands were left homeless following a White attack on the African-American community in Tulsa, Oklahoma in June 1921. Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737, 775 n.223 (2000). Moreover, although the lynching of African-American men is popularly thought to have resulted from alleged or imagined sexual transgressions involving White women, it in fact resulted when African-Americans became successful competitors against White businesses. Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 895 (1995).

12. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 16 (1991) (arguing that colorblindness actually enables racial discrimination in governmental decision-making); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 162-63 (1994) ("to assume that ignoring race in making social policy will bring about justice or achieve morality is legal fantasy.").

13. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 661 (1990) ("[L]aw is a tool with which to achieve other independently defined purposes."); Kenneth Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. J. 323, 353-56 (1997).

14. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding there is no implied private right of action to enforce disparate impact regulations adopted by federal agencies under Title VI of the Civil Rights Act of 1964, thereby denying plaintiff's right to challenge the Alabama drivers license requirement that the licensing examination be administered only in English); *Rice v. Cayetano*, 528 U.S. 495 (2000) (upholding white American rancher's claim that a Native-Hawaiians-only voting limitation for trustees to the state's Office of Hawaiian Affairs constituted unlawful racial discrimination); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding there was no compelling state interest shown that would justify a minority set aside program in awarding municipal contracts where 50% of Richmond population was black and historically only 0.67% of municipal contracts had been awarded to minority-owned businesses).

institutional structure of racism in the United States.<sup>15</sup> These decisions accept the disparities in wealth between African-Americans and Whites produced by the ideology of white privilege without explanation, and reject affirmative action remedies which would limit the benefits of whiteness. Thus, these decisions are irrational under Ackerman's analysis.

Similarly, much of the affirmative action jurisprudence of the U.S. Supreme Court makes no genuine effort to achieve consistency, Ackerman's second criterion. In her analysis of the opinions of Justice O'Connor on affirmative action, Joan Tarpley demonstrates O'Connor's willingness to advocate judicial restraint with respect to decisions she perceives to be in the interest of middle-class white women, while embracing judicial activism with respect to dismantling efforts promoting economic equity for African-Americans.<sup>16</sup> O'Connor's inconsistent application of judicial policy violates Ackerman's consistency requirement, further demonstrating the law's disinterest in justice in the economic sphere. Finally, by its dedication to the maintenance of the status quo, the law memorializes economic claims based on white privilege and seeks to perpetuate them.<sup>17</sup>

Our courts feign impotence and our legislatures lack incentive. A just economic system would recognize race-based economic disparity and

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15.

Disparities in wealth between blacks and whites are not the product of haphazard events, inborn traits, isolated incidents or solely contemporary individual accomplishments. Rather, wealth inequality has been structured over many generations through the same systemic barriers that have hampered blacks throughout their history in American society: slavery, Jim Crow, so-called de jure discrimination, and institutionalized racism.

Joan Tarpley, *A Comment on Justice O'Connor's Quest for Power and its Impact on African American Wealth*, 53 S.C. L. REV. 117, 132 (2001) (quoting MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 12-13 (1995)). The essay by Tarpley presents a forceful dissection of the jurisprudence of Justice Sandra Day O'Connor, demonstrating it to be deeply embedded in a narrow, self-interested view of both reality and the law.

16. *Id.* at 136-39. Tarpley also demonstrates the inconsistency between O'Connor's respect for states' rights except when states' rights are being used to advance the economic well-being of African-Americans and other people of color. *Id.*

17. Tarpley points to Justice O'Connor's introduction of a new standard into the jurisprudence of affirmative action, i.e., that "the Government cannot employ race classifications that unduly burden individuals who are not members of the favored racial and ethnic groups." *Id.* at 127. The U.S. Supreme Court fails to acknowledge that "individuals who are not members of the favored racial and ethnic groups," i.e., whites, have benefitted for centuries from this country's policies of racial terrorism, forced enslavement, and genocide; it is these wrongfully obtained benefits that it requires not to be "unduly burdening." *Id.*

intervene to remedy the disorder. The failure of our system is not merely a function of intransigent law, but is assisted by economic ideology that forms the foundation for legal analysis and the justification for legal rules promoting economic disparity. In this regard, Ackerman's notions of rationality, consistency, and neutrality are subverted by the intervention of the assumptions, values, and mechanisms of the neoclassical paradigm.<sup>18</sup> Moreover, unlike mere legal precepts, neoclassical economic theory promotes itself as a scientific discipline, imbuing its policies with the halo of scientific truth. The result is a pseudoscientific rationalization of the status quo.<sup>19</sup> Without recognizing that the scientific character of economics is based on misapplied analogies from the physical sciences, society will continue to use ideology which masquerades as science as the foundation for public policy and the methodology for allocating assets, resources, and opportunities.<sup>20</sup>

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18. Anti-essentialist Marxian thought argues that theory, like all societal processes helps structure our understanding of reality from both descriptive and normative perspectives. Unfortunately, the ability of a theory to impact consensus is not a result of its accuracy or correctness, but merely of its acceptance. See STEPHEN A. RESNICK & RICHARD D. WOLFF, *KNOWLEDGE AND CLASS: A MARXIAN CRITIQUE OF POLITICAL ECONOMY* 2, 11 (1987).

19. The physical sciences are distinguished from the social sciences, inter alia by their discovery of and reliance on fundamental models.

Fundamental models reflect cause and effect relationships and can be used to draw reliable conclusions about dynamic process. Most financial models are either phenomenological models or statistical models. Phenomenological models are "as if" models that reach conclusions by analogizing from known phenomena to the unknown. As such, they offer interpretations rather than predictions. Statistical models are used to find correlations between variables when a dynamic process is not fully understood. Therefore, these models can generate answers, but such answers have no necessary relationship to cause and effect.

Charles R.P. Pouncy, *Contemporary Financial Innovation: Orthodoxy and Alternatives*, 51 SMU L. REV. 505, 557-58 (1998). See also E. Ray Canterbury & Robert J. Burkhardt, *What Do We Mean By Asking Whether Economics is a Science?*, in *WHY ECONOMICS IS NOT YET A SCIENCE* 15-22 (Alfred S. Eichner ed., 1983).

20.

However, in the neoclassical paradigm, methodological individualism and economic rationality do not merely express the preferences of certain schools of economic thought about normative issues, i.e., values, but are characterized as scientific discoveries about the nature of reality, i.e., truth. When economic rationality takes on the imprimatur of truth, human behavior that is inconsistent with economic rationality becomes suspect both as irrational, in the sense that it operates at odds with consensus reality, and immoral, in that it is less likely to result in an efficient solution, a moral imperative in an economic theory based on presumed scarcity. Rationality therefore assumes a privileged position above

### III. TALKING ABOUT ECONOMICS

In American society, when we talk about economics we do so from the perspective provided by the three lynch pins of the neoclassical paradigm. First, we talk about the individual, meaning the individual person, household, or firm. Neoclassical economic theory employs methodological individualism, which assumes that the individual is the proper unit of analysis for discussion.<sup>21</sup> Only individuals exist. To the extent that group behavior is considered at all, it is merely the aggregation of the behavior of various individuals. Therefore, the ideas most closely associated with the absence of genuine equality in society, such as racism, classism, and discrimination, simply do not exist in the neoclassical paradigm. Or, if these ideas do exist, they are thought to constitute rational, rather than wrongful, conduct.<sup>22</sup>

Racism and classism are insulated from approbation by the second lynch pin of neoclassical theory, economic rationality. Economic rationality assumes that the origins of human behavior are both simple and discernible. People are thought to make decisions based on their desire to achieve an outcome that best serves their personal interests, or personal utility.<sup>23</sup> However, over time this assumption has become more difficult to sustain

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views of human motivation based on theology, philosophy, or even ordinary observation. Imbuing rationality with such privilege is essential if it is to be used as a policy instrument to advance market capitalism as the only legitimate economic way of life.

Pouncy, *infra* note 24, at 292. See also PHILIP MIROWSKI, MORE HEAT THAN LIGHT: ECONOMICS AS SOCIAL PHYSICS: PHYSICS AS NATURES ECONOMICS 3, 107-08 (1989) (arguing convincingly that economics has sought to model itself on the physical sciences, physics in particular, to among other things, share in the legitimacy and authority bestowed on scientific discourse).

21. Methodological individualism is the assumption that the individual is the only relevant source of economic data and information and the appropriate unit of analysis. Social phenomena are viewed as merely the aggregation of the behavior of individuals. WILLIAM M. DUGGER, UNDERGROUND ECONOMICS: A DECADE OF INSTITUTIONAL DISSENT xxviii (1992).

22. Howard J. Sherman, *A Holistic-Evolutionary View of Racism, Sexism, and Class Inequality*, in INEQUALITY 39-41 (WILLIAM M. DUGGER et al. eds., 1996).

23. John T. Harvey, *Heuristic Judgment Theory*, 32 J. ECON. ISSUES 47 (1998); Richard H. Thaler, *Behavioral Economics*, NAT'L BUREAU OF ECON. RES. REP. 9-10 (1995).

because of psychological,<sup>24</sup> anthropological,<sup>25</sup> sociological,<sup>26</sup> and even neurological data<sup>27</sup> demonstrating that human decision-making is far more complex than neoclassical theory presumes.

Therefore, some members of the neoclassical community have bounded the concept of economic rationality. This view recognizes that people try to behave in a manner that best serves their interests, but may not achieve the results they desire because of their imperfect ability to acquire,

24. See generally Lola L. Lopes, *Psychology and Economics: Perspectives on Risk, Cooperation, and the Marketplace*, 45 ANN. REV. PSYCHOL. 197 (1994) (discussing psychological studies that go beyond the neoclassical assumption of rationality and self-interest to identify other dimensions of decision-making).

25.

Beginning with Max Weber, anthropologists have viewed economic behavior as a function of a society's culture and belief system rather than a universal psychological motivation. . . . ("Weber, with his strong emphasis on institutional variability, was almost completely free of the grosser biases involved in the received doctrine of 'rational self-interest.' He was aware of the complexity of the motivational forces underlying economic Activity.") . . . [B]ronislaw Malinowski viewed economic rationality as merely ethnocentric, and viewed economic behavior as resulting from the interaction of social and symbolic forces. . . . Although Franz Boas believed that rationality plays some role in economic decision-making, he concluded that customs and traditions were the more typical bases of decisions. . . . Even when people in traditional societies are exposed to Western values, Manning Nash's study of the Quiche-Maya suggests that they insulate their customary practices from Western notions of rationality.

Charles R.P. Pouncy, *The Rational Rogue: Neoclassical Economic Ideology in the Regulation of the Financial Professional*, 26 VT. L. REV. 263, 287 n.81 (2002).

26.

See, e.g., Richard R. Nelson, *Evolutionary Theorizing about Economic Change*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 111 (NEIL J. SMELSER & RICHARD SWEDBERG eds., 1994)

(rational choice theory provides an explanation for behavior that takes the actor's objectives and constraints as given. One can argue that an explanation that considers how cultural and social institutions have evolved and affect the choices currently available to actors may provide a deeper and more illuminating understanding of behavior than a rational choice explanation alone, even if the latter can explain at one level).

*Id.*

27. Michael L. Platt, *Neural Correlates of Decisions*, 12 CURRENT OPINION IN NEUROBIOLOGY 141 (2002) ("Recent research suggests that sensory judgments unfold through the gradual accumulation of neuronal signals in sensory-motor pathways . . . Stored representations of the outcome of prior actions activate neurons in many of these same areas during decision-making.").

understand, and use information.<sup>28</sup> Other segments of the neoclassical community substitute revealed preferences for utility maximization in understanding human motivation.<sup>29</sup> However, such alternative constructions of neoclassical theory concerning human motivation only constitute a minor embellishment on the essential theme of economic rationality, which is that individuals make decisions that they believe will best serve their interests as they understand them. Economic rationality remains a foundational construct in neoclassical thinking, and the neoclassical goals of prediction and optimization would be impossible without an understanding of human motivation as a function of individual self-interest. Thus, economic rationality has become impervious to real science.

Even though we know that we are not instinctively rational decision-makers, so many of us have been taught that we are, that we believe that employing economic rationality, or some variant thereof, is the scientifically correct way to make decisions.<sup>30</sup> Thus, we tend to use economic rationality as our heuristic device because formal education and popular culture has told us that we should, not because it is the way that we would naturally decide a matter. As one would expect, economists tend to demonstrate a much greater propensity to behave in a manner consistent with economic rationality than non-economists.<sup>31</sup> Moreover, as rationality is absorbed by the law, social sciences, and human culture, it ceases to be a mere assumption of a particular theory, but intervenes with consensus reality.<sup>32</sup>

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28. Peter J. Buckley & Malcolm Chapman, *Economics and Social Anthropology — Reconciling Differences*, 49 HUM. REL. 1135-36 (1996).

29. E. RAY CANTERBERY, *THE MAKING OF ECONOMICS* 178 (1980).

30. General Marwell & Ruth E. Ames, *Economists Free Ride, Does Anyone Else?*, 15 J. PUB. ECON. 295, 296 (1981) (economics graduate students were much more likely to employ the rationality heuristic in decision-making than noneconomics majors). *See also* Pouncy, *supra* note 24, at 293-97 (contemporary financial professionals and people generally are indoctrinated to accept and use economic rationality as their motivation for decision-making).

Rationality as an interpretative construct does not explain human decision-making as much as it structures the decisional processes of those who believe that rationality is an appropriate, legitimate, and natural mode of decision-making. From this perspective, rationality as a necessary component of neoclassical economic theory becomes a specific policy intervention in society, which operates to achieve particular concrete consequences.

*Id.* at 293.

31. Pouncy, *supra* note 24, at 294-95.

32. George DeMartino, *Anti-Essentialist Marxism and Radical Institutionalism: An Introduction to the Symposium*, 33 J. ECON. ISSUES 797-800 (1999) (Theory intervenes in society to help produce the result the theory predicts.). Consensus reality is a shared view of the nature

When we combine a belief that the individual is the proper unit of economic analysis and that individuals base their decisions on their perception of their own best interests, then discrimination and racism are transformed from indicia of hatred or irrational hatred to good business decisions.<sup>33</sup> A good business person, as the focus of an individualistic inquiry in economic justice ideology, will only make those decisions that advance the best interest of her business. In the free, competitive labor market assumed by neoclassical economics where employers and employees have equal bargaining power and people consent to be unemployed or underemployed, the rational business person will hire the best qualified person regardless of race. By doing so, the rational business person will promote the efficiency of her firm. This brings us to efficiency, the third lynch pin of neoclassical theory.

It can be argued that efficiency, as a societal value and as the value premise of the neoclassical paradigm, finds its moral expression in the Protestant Reformation.<sup>34</sup> The concept of efficiency, embodied in truisms such as "waste not, want not" and "a stitch in time saves nine," has progressed from one of many policy considerations to the most important, if not singular, consideration. It can be argued that the Protestant Reformation converted efficiency from an evaluative consideration to a moral imperative. Waste, sloth, and inefficiency became sinful, which served the interests of the early entrepreneurial capitalists who used this value to make performance of hard, poorly compensated, and frequently dangerous work an indication of righteousness.<sup>35</sup> Therefore, being inefficient on the job, or in life in general, could be thought to impact not only one's material existence, but also the eternal destination of one's soul.

Therefore, to the extent that the law recognizes the concept of economic justice, such justice is evaluated from the perspective of the individual acting rationally to achieve an efficient result. However, the concept of economic justice does not seek to alleviate racial or gender-based oppression because the foundational economic premises view the behavior of groups as merely the aggregation of the behavior of rational individuals. If the rational decisions of individual actors result in consequences that could be viewed as racially discriminatory, then the discrimination must be a function of the individual characteristics of a

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of reality expressed in a paradigmatic set of assumptions. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-12 (1970).

33. Sherman, *supra* note 21, at 41.

34. WILK, *supra* note 5, at 110-12 (citing MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 97 (Charles Scribner's Sons 1958) (1905)).

35. *Id.*

person suffering the adverse consequences,<sup>36</sup> not the result of the ideologies of subordination, including white privilege and white superiority.<sup>37</sup> Thus, any individual's economic position is largely, if not exclusively, a function of their personal characteristics, rather than oppression or exploitation.

It is not surprising that in the United States the middle class views poverty as the result of the individual characteristics of the poor.<sup>38</sup> Furthermore while most of the poor view their poverty as the result of forces over which they have little control, many view their poverty as their own fault.<sup>39</sup> This is highly problematic because we live in an economic culture where, for the vast majority of individuals, participation in the economy is a function of having a job. If you are unemployed or underemployed, poverty is the likely consequence.

However, for economic policy makers, employment is not primarily viewed as the means by which individuals participate in the economy, but is seen as a policy instrument which can be used to enhance overall economic performance.<sup>40</sup> The policies that result from the acceptance of neoclassical theory induce poverty for the purposes of enhancing corporate profitability, encouraging capital market investment, and depressing wages.<sup>41</sup> Thus, in a society where employment is viewed as a policy

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36. Sherman, *supra* note 21, at 44.

37. Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1409-13 (1990) (discussing white privilege and white superiority as ideologies that sanction the subordination of racial and ethnic minorities of color in the United States).

38. Catherine Cozzarelli et al., *Attitudes Towards the Poor and Attributions for Poverty*, 57 J. SOC. ISSUES 207, 209-11 (2001). Interestingly, White participants in the study by Cozzarelli et al. were much less likely to attribute poverty to structural causes than African-American participants. White participants were much more likely to view poverty as resulting from the characteristics of poor individuals, i.e., lack of effort, laziness, low intelligence, and drug addiction. *Id.* at 209-10, 224.

39. Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 284 (1991) (identifying a defining characteristic of underclass status as the belief among the poor that their poverty is their own fault).

40. The Federal Reserve uses its ability to influence interest rates as a policy instrument to either increase or decrease employment in the belief that such actions will enhance economic performance. See Federal Reserve Board, *Monetary Policy Report to the Congress*, FED. RES. BULL. 161 (2000).

41.

The rationale usually given for downsizing is that it will increase profits. Some firms do find that downsizing increases their productivity and profits, and it may lead to at least short-term increases in companies' stock prices. But there is now a considerable body of evidence that reveals that these results are often ephemeral. Studies show that downsizing companies "went on to trail their industries in productivity, profitability and shareholder value."

instrument, poverty is frequently the result of governmental policies, not the characteristics of individuals. Nevertheless, mainstream neoclassical economics invariably blames the victim for her oppression and often convinces her to blame herself as well.<sup>42</sup>

#### IV. CONFRONTING THEORY

The scientific pretenses of the neoclassical paradigm attempt to cloak distributive consequences in an aura of inevitability while disconnecting policy interventions from group and community consequences. For instance, neoclassical theory, as used in law and economics, makes the individual responsible for the quality of education received. Therefore, the decision to drop out of school because you were never given a real opportunity to master English is treated as a voluntary and rational decision. Similarly, the decision to put your father in a nursing home rather than to care for him yourself in your home becomes the most efficient use of your time. The Machine Age values of the neoclassical paradigm do not represent who we are or who we want to be as people.<sup>43</sup> Moreover, the neoclassical triumvirate of methodological individualism, economic rationality, and efficiency ignores the human telos, or who we should

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Judith D. Fischer, *Public Policy and the Tyranny of the Bottom Line in the Termination of Older Workers*, 53 S.C. L. REV. 211, 230-31 (2002).

42.

The second major insidious consequence of stereotyping, is the internal effect, or the negative effect on the stigmatized. This internal effect attributes a discrediting quality to the victim, which the victim struggles against but may eventually internalize as part of his or her self-image. Thus, the internal effect of stereotyping serves the hegemonic function of having the victim accept his or her negative attributes. The stereotype in essence forces the stigmatized group [to] reflect those qualities that are being stereotyped.

Ediberto Roman, *Who Exactly is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 41 (2000).

43. Efficiency, the primary value of neoclassical theory, is important to the operation of a machine; however, an economically efficient result may not be a socially desirable result. Charles R.P. Pouncy, *The Rational Rogue: Neoclassical Economic Ideology in the Regulation of the Financial Professional*, 26 VT. L. REV. 263, 274 (2002). It may be economically efficient to "mechanize" the adoption process by implementing Judge Posner's call for the establishment of a free market in "healthy white infants" available for adoption. Richard A. Posner, *Adoption and Market Theory: The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 61 (1987). The social desirability of reducing the establishment of families to mere market mechanisms appears less clear.

become.<sup>44</sup> Instead, neoclassical theory consigns the fate of humanity to the vagaries of markets that we permit to determine who we are,<sup>45</sup> how we live,<sup>46</sup> and increasingly when and how we die.<sup>47</sup> Thus, the animating assumptions of neoclassical theory operate to convert people from community-based, compassionate creators, to automated Machiavellian consumers.<sup>48</sup> Economic justice is not a concern of neoclassical theory. Neoclassical theory is not designed to achieve economic justice, and in fact intervenes to prevent it.

Thus, because the neoclassical paradigm is blind to issues of economic justice, thereby blinding the law to such concerns, it becomes necessary to find additional theoretical constructs of the concept. Institutional economics, unlike the neoclassical paradigm, does not maintain that only the interaction of supply and demand should establish economic policy.<sup>49</sup> Nor does it hold that the individual is the proper unit of economic analyses, but is much more concerned with the interaction of individuals and groups

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44. The concept of the human telos in this context assumes that humanity is, or should be, more than the sum of its material processes, and should therefore adopt economic values that promote justice and equality, consequences that the neoclassical value of efficiency fails to contemplate.

45. See generally Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 618-21 (2000) (arguing that advertisements play a critical role in maintaining racial identity).

46. See generally Vernellia R. Randall, *Racist Health Care: Reforming an Unjust Health Care System to Meet the Needs of African-Americans*, 3 HEALTH MATRIX 127, 130-32 (1993) (describing the difference in health care in regards to African-Americans).

47. See, e.g., Vince Galloro, *Study: Death Rates Higher at For-Profits*, 32 MOD. HEALTHCARE 10 (2002) (reporting that patients in Canadian investor-owned hospitals were two percent more likely to die when compared to patients at not-for-profit hospitals).

48. As used in social psychology, Machiavellianism as a personality characteristic refers to "a cool detachment, which makes them [Machiavellians] less emotionally involved with other people, with sensitive issues, or with saving face in embarrassing situations." Anusorn Singhapakdi & Scott J. Vitell, *Analyzing the Ethical Decision Making of Sales Professionals*, J. PERS. SELLING & SALES MGMT., Fall 1991, at 1, 3 (quoting JOHN P. ROBINSON & PHILLIP R. SHAVER, MEASURES OF SOCIAL PSYCHOLOGICAL ATTITUDES 592 (1973)).

49. Institutional economists maintain that economic theory premised on assumptions of economic rationality and methodological individualism is so incomplete as to be of negligible usefulness. Instead, institutionalists hold that a genuine economic analysis requires both an examination of the behavior of real economics in real time and an analytical process that relies on social, psychological and cultural forces in addition to economic theory. See Pouncy, *supra* note 24, at 313-22. "Institutional economics suggests an entirely different relationship between the individual and economic theory than the relationship constructed by neoclassical theory. Institutional economics recognizes that transactions or other economic decision-making reflect the individual's personal psychology and ethical structure." *Id.* at 323. See also DUGGER, *supra* note 20, at xxviii.

by means of transactions.<sup>50</sup> For the institutional economist, the economy is an evolving set of institutions which should be primarily focused in provisioning society.<sup>51</sup>

A construct of economic justice can be derived from institutional economics value premises. Unlike the neoclassical paradigm, institutional economics does not view efficiency as the principal value underlying economic activity. Instead, institutional economic theory views efficiency as a stagnant value with the tendency to memorialize and maintain the existing distribution of assets, resources, and opportunities. Therefore, institutional economics, focused on real economies in real time and the consequence of economic decision-making for all people, not merely the privileged and powerful, adopts the expansion of opportunity as its basic value.<sup>52</sup> Thus, institutional economics envisions understanding economic justice in terms of the purposeful expansion of opportunities to participate in the economy,<sup>53</sup> and the absence of limitations on rightful access to the assets, resources, and opportunities present or available in society.<sup>54</sup> Therefore, economic justice is the absence of impediments or barriers to the rightful access to assets, resources, and opportunities.

One of the main consequences of the neoclassical paradigm's lynch pins of methodological individualism, economic rationality, and efficiency is the promulgation of impediments and barriers to rightful access to assets, resources, and opportunities. The neoclassical paradigm is a preservative doctrine.<sup>55</sup> It will maintain whatever distribution of assets, resources, and opportunities exist in societies that accept its precepts. Because neoclassical theory focuses on individual rather than group or societal processes, it renders itself oblivious to historical inequities and oppression. Neoclassical theory would have us believe that both market processes and the efforts of market participants to maximize personal utility eliminate racial prejudice, gender bias, and homophobia, among other things. Therefore, according to

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50. DUGGER, *supra* note 20, at xix.

51. "Conventional economics defines the economy as choices made in the face of scarcity. OIE [old institutional economics] defines the economy as an instituted process for provisioning society." James Ronald Stanfield, *The Scope, Method, and Significance of Original Institutional Economics*, 33 J. ECON. ISSUES 231, 232 (1999).

52. DUGGER, *supra* note 20, at 7-8.

53. *Id.*

54. Dugger uses this construction in discussing the institutionalist view of property rights, which is developed from the basic institutionalist value premise, equality. *Id.* at 5, 7. Therefore, "rightful access to opportunities" embraces both the institutionalist value premise of equality and operationalizes it with regard to the appropriate distribution of assets, resources, and opportunities. *Id.* at 5.

55. *Id.* at 5.

neoclassical theory, the reason why assets, resources, and opportunities appear to be distributed preferentially to members of a certain race or gender is because such individuals are better than others since race or gender-based exploitation and oppression would be irrational.<sup>56</sup> If we are waiting for the economic policies inspired by the neoclassical paradigm to produce a just and equitable distribution of assets, resources, and opportunities, we will be waiting for a very long time.<sup>57</sup>

It is not merely fortuitous that the operation of economic law has resulted in the allocation of the vast majority of assets, resources, and opportunities to some people as opposed to others. Rather, the confluence of law and neoclassical economic theory seeks to preserve the current distribution regardless of the fact that our current distribution results from race and gender-based oppression and exploitation. Therefore, to the extent that the preservative character of neoclassical economic theory is the enemy of social, political, and economic change, neoclassical theory is the enemy of economic justice.

Unfortunately, neoclassical economic theory has so thoroughly infiltrated legal thinking that the result is a theory of law in which capitalism is viewed as the only viable and legitimate form of economic life. Moreover, the law marginalizes or ignores ideas and understandings that are outside the purview of the neoclassical paradigm. The concept of economic justice has received limited recognition in American jurisprudence because it requires an understanding of human beings and human processes that lies outside the parameters of conventional economic theory. Consequently, neoclassical theory intervenes in society not just to preserve economic inequality, but to recruit the economically oppressed to cooperate in their own oppression.

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56. However, as Sherman has demonstrated, racism functions as an enabling myth of racial exploitation "because it helps the powerful to exploit and oppress minorities and to feel justified in doing so. To propagate the irrational myth of racism may thus be perfectly rational for the ruling class." Sherman, *supra* note 21, at 39, 44.

57. For example, Haynes & Husan examined the neoclassical inspired assumption of global economic convergence, that is, in time, with appropriate neoclassical economic policies, underdeveloped economies will "catch-up" with developed economies, providing their citizens with vastly improved standards of living. Michael Haynes & Romy Husan, *National Inequality and the Catch-Up Period: Some "Growth Alone" Scenarios*, 34 J. ECON. ISSUES 693, 693-95 (2000). Using economic growth assumptions that ranged from the pessimistic to the optimistic Haynes & Husan concluded that under the more optimistic assumptions it would take developing African economies approximately 89 years to catch-up to the developed Western economies. *Id.* at 699. Using more pessimistic, but arguably more realistic years Haynes & Husan concluded it would take 269 years to catch-up. *Id.*; see also Charles R.P. Pouncy, *Stock Markets in Sub-Saharan Africa: Western Legal Institutions as a Component of the Neo-Colonial Project*, 23 U. PA. J. INT'L ECON. L. 85 (2002).

## V. ECONOMIC INEQUALITY IN THE MARKETPLACE

In January 1999 the *Wall Street Journal* published an article by Angelo B. Henderson, entitled "Choosing a Caucasian Clone."<sup>58</sup> The article recounted the experience of Judy Wiles, a White owner of an employment agency. Although Eric Giles, an African-American employee, performed most of the work that resulted in the acquisition of new clients for Wiles' firm, the clients never got to meet him.<sup>59</sup> After Giles had done all of the work on a file, it was turned over to a White employee to present to the client and close the deal.<sup>60</sup> Wiles said that she lost at least twenty contracts because potential clients reacted negatively when she sent an African-American to close the deal.<sup>61</sup> The article also described Mel Farr, an African-American owner of fifteen automobile franchises in Detroit, who had a White man impersonate him in TV commercials because he was afraid that Whites would not buy cars from an African-American owned dealership.<sup>62</sup> The article recounted numerous examples of African-American entrepreneurs who do not represent their firms or themselves when dealing with White customers, but instead choose to send a white clone to impersonate them or to simply show up to close the deal.

Behavior resulting from self-hatred is beyond the scope of this Article.<sup>63</sup> However, this phenomenon emphasizes the role of economic theory in perpetuating a distribution of assets, resources, and opportunities based on race. First, Henderson's article suggests that people do not make decisions rationally, but take irrational criteria, such as race, into consideration when making business decisions or developing business policies and practices. Second, it indicates that people do not base their decisions concerning individuals exclusively on the characteristics of the individual with whom they are transacting. Instead, a decision-maker will frequently base decisions concerning individuals on beliefs held about the group of which

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58. Angelo B. Henderson, *Choosing a Caucasian Clone*, WALL ST. J., Jan. 26, 1999, at A1.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* This phenomena is particularly discouraging because of its tendency to perpetuate the mythology of African-American underachievement, thereby reinforcing the exceptionality of African-American accomplishment, reinforcing the beliefs that dissuade Whites from doing business with African-Americans to begin with. See, e.g., Robert S. Chang, *Who's Afraid of Tiger Woods?*, 19 CHICANO-LATINO L. REV. 223 (1998).

63. For a discussion of self-hatred and its impact on African-Americans, see RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 83-88 (2000).

the individual is a member.<sup>64</sup> The Detroit automobile dealer believed that customers would not view him as a member of the millionaire community, but rather as a member of the African-American community, a community with which focus groups suggest that most Whites would prefer not to deal.<sup>65</sup> If neoclassical theory were correct, it would not be necessary for African-American business people to send white clones to represent them. Nevertheless, in this society Mr. Farr, the automobile dealer, is an example of the absence of racism and discrimination because he was able to parlay his football career into business success despite his blackness. The unfortunate message conveyed by Henderson's article is to encourage members of discriminated groups to be more like Mr. Farr, who was willing to put on and take off undesirable group affiliations when doing so was rational, meaning when it tended to increase his personal utility.<sup>66</sup>

This is just one of the many ways that society burdens the economic aspirations of African-Americans and other people of color while pretending, thanks to the limitations of neoclassical theory, that such impediments simply do not exist. However, the excellent work of Cassandra Jones Havard<sup>67</sup> and Phyllis Craig-Taylor<sup>68</sup> documenting the role of race in the expropriation of ownership rights of African-American farmers,<sup>69</sup> and the work of Dorothy Brown detailing the differential impact of the Internal Revenue Code on African-Americans,<sup>70</sup> provide two examples of many ways in which laws prevent African-Americans and other people of color from attaining economic justice.

## VI. CONCLUSION

All theories originating in the social sciences have the potential to serve as societal interventions, depending on how widely they are adopted and how strongly they are supported. The development of a theory of economic

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64. See Cozzarelli et al., *supra* note 37, at 207-08.

65. Henderson, *supra* note 57.

66. *Id.* Interestingly, when Mr. Farr ran a promotion in which he was selling cars at \$100 over invoice, he felt it was safe to come out of the closet and play himself in his TV ads, in the belief that a deal this good could even overcome color. *Id.*

67. Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333 (2001).

68. Craig-Taylor, *supra* note 11.

69. Havard, *supra* note 66, at 333-34; Craig-Taylor, *supra* note 11, at 740.

70. See, e.g., Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got to Do with it*, 21 U. ARK. LITTLE ROCK L. REV. 759 (1999); see, e.g., Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287 (1999).

justice in American jurisprudence has been retarded by the predominance of the neoclassical paradigm in the construction of economic behavior and policy. Neoclassical theory intervenes in consensus reality to support the notion of colorblind economics, an economic system in which markets negate the impact of irrational criteria, such as race, in economic decision-making. However, the neoclassical paradigm is a model-making project with little concern for the extent to which the models mirror reality. Neoclassical theory works in concert with the preservative nature of law to prevent the development of a jurisprudence of economic justice. Therefore, one of the primary goals of critical scholarship must remain the demonstration of the role of economic ideology in the support and maintenance of the ideologies of subordination.