

# BARGAINING WITH GIANTS AND IMMORTALS: BARGAINING POWER AS THE CORE OF THEORIZING INEQUALITY

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## I

### INTRODUCTION

The time seems ripe for a new radical movement in legal academia. The nexus between private law, the institutions of capitalism, and the rise of global inequality has once again become the object of critical inquiry by a body of scholarship which consciously identifies itself as Law and Political Economy.<sup>1</sup> This comes after decades of relative academic acquiescence. Central ideas developed within the context of 1970s and 1980s critical legal studies—such as the insight that there is no such thing as an apolitical private law or, even more fundamentally, that it is the indeterminacy of the ground rules of private law which turns them into a malleable tool in the hands of the mighty—have almost entered the legal mainstream.<sup>2</sup> But something new has occurred in recent years. Something has gone awry in the intellectual economy of the liberal consensus in law, economics, and politics. There is renewed interest in the distributive effects of the ground rules of property, contracts, and corporate law. Thus, Law and

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1. See generally, e.g., David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014) (book review); David Singh Grewal & Jedediah Purdy, *Inequality Rediscovered*, 18 THEORETICAL INQ. L. 61 (2017); Robert C. Hockett, *Putting Distribution First*, 18 THEORETICAL INQ. L. 157 (2017); Tamara Lothian, *What's Law Got to Do with It? Crisis, Growth, Inequality and the Alternative Futures of Legal Thought*, 18 THEORETICAL INQ. L. 227 (2017); Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy-Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020); Corinne Blalock, *Introduction: Law and the Critique of Capitalism*, 121 S. ATL. Q. 223 (2022) (introducing vol. 121 issue 2: “Law and the Critique of Capitalism”). From the European debate, see, e.g., THE LAW OF POLITICAL ECONOMY: TRANSFORMATION IN THE FUNCTION OF LAW (Poul F. Kjaer ed. 2020); Moritz Renner & Torsten Kindt, *Wirtschaftsrecht und Politische Ökonomie*, 78 JURISTENZEITUNG [Germany] 313–20 (2023). An important common point of reference is THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans. 2014).

2. For a representative statement of critical legal studies methodologies and tenets, see generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} (1997).

Political Economy has moved beyond the paths of previous critical scholarship.<sup>3</sup> It has shifted the emphasis from the deconstruction of the law's entanglement with power to a critical reconstruction of the law's own power to break with the hegemony of neoclassic economics, and to rebuild the market economy on the basis of more politically conscious, democratic, and egalitarian values.<sup>4</sup>

Along these lines, Law and Political Economy scholarship has opened up new avenues in dealing with a host of topical legal problems. Why, for instance, should an efficiency-based approach in antitrust law, favoring the vertical concentration of power in large firms while restraining horizontal cooperation between small businesses, be the best or, indeed, the only way to regulate corporate concentration?<sup>5</sup> Why, to cite another example, does intellectual property law still privilege individual exclusionary rights in intellectual property rather than foster knowledge commons?<sup>6</sup> Why is today's environmental law, a staple of public regulation, designed around efficiency goals and markets solutions when it attempts to fight climate change via carbon taxes and pollution rights, rather than through public infrastructure and equal access to natural resources?<sup>7</sup> In these and comparable issues, Law and Political Economy has made a strong case against the dominance of the law and economics paradigm in legal scholarship. Law and economics, so the critique goes, has narrowed not only the normative but also the analytic potential of legal scholarship by solely targeting efficiency.<sup>8</sup> In the view of the movement, efficiency comes with a distinctive normative bias that neutralizes and naturalizes markets and their distributive outcomes.<sup>9</sup> But the efficiency of markets is not an economic given. It is a conscious political choice which entails that the unequal distributive outcomes of markets modeled on the goals of growth and efficiency are also conscious political choices open to critique and rejection. One of the fundamental tenets of Law and Political Economy is that law makes markets.<sup>10</sup> "Capitalism is fundamentally a legal ordering: the bargains at the heart of capitalism are products of law."<sup>11</sup> But if this is true, why shouldn't the law also be able to unmake markets, or transform them into

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3. For the legacy of critical legal studies and its relation to the current Law and Political Economy movement, see generally Samuel Moyn, *Reconstructing Critical Legal Studies*, YALE LAW SCHOOL, PUBLIC LAW RESEARCH PAPER (August 4, 2023), <http://dx.doi.org/10.2139/ssrn.4531492> [<https://perma.cc/TPJ5-EQGD>].

4. See Britton-Purdy et al., *supra* note 1.

5. *Id.* at 1801–02; Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 380–95 (2020); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1664 (2020) (book review); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 731–36 (2017).

6. Britton-Purdy et al., *supra* note 1; Amy Kapeynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1494–96 (2020) (book review).

7. Britton-Purdy et al., *supra* note 1. See generally JEDEDIAH PURDY, *THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH* (2019); DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE. ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* (2010) (illustrating the contemporary approach of environmental law).

8. Britton-Purdy et al., *supra* note 1.

9. *Id.* at 1818–23.

10. *Id.* at 1799.

11. Grewal, *supra* note 1.

something different by placing its own goals, including equality and democracy, ahead of efficiency?

Here lies a fundamental methodological problem. It is already questionable whether the fundamental attack directed at efficiency and, more generally, at the methodological repertoire of classical and neoclassical economics does not overshoot its target by depriving legal critique of a valuable analytical tool.<sup>12</sup> As I will show in the course of this article, there are insights into the functioning of the market mechanism that cannot be reaped otherwise than by applying the analytical toolbox of economics. In what follows, I argue that there is an economic constitution of market function, irrespective of how much the law influences their setup and distributive outcomes. From this follows yet another, perhaps even more important, insight: It is a *non sequitur* to argue that if the law makes markets, it can, by the same mechanism, unmake or regulate their outcomes. Once the market mechanism is in place, there is no conclusive way to control the economic forces leading to unequal bargaining outcomes. Inequality is an inextricable feature of the market mechanism, and the law does not have the power to reverse its consequences by regulating the bargaining mechanism, even if it aspires to do so by directly interfering with it. Unequal bargaining power seems to escape the reach of the regulatory power of the law.

I argue that this is not just an accident. Rather, regulatory attempts to mitigate the unequal outcome of market transactions by creating a level playing field between the parties detracts from the economic structure of bargaining power, which is highly resilient to redistribution through the law. As long as legal scholarship and, for that matter, Law and Political Economy systematically underestimate the direct economic impact of bargaining power, its attempt to rebuild the market along democratic and egalitarian principles will remain futile, if not utopian. As a corollary, rejecting the toolbox of classical and neoclassical economic methodology is not a good idea if one wants to gain further insight into the market as the target of one's regulatory zeal—notwithstanding the doubtlessly legitimate argument that economic methodology itself might need a novel horizon beyond the imperative of growth.<sup>13</sup>

What is bargaining power? It is a core feature of market relationships. It has a major impact on the distribution of cooperative surplus generated between the partners of a market transaction. There are, thus, good reasons that bargaining

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12. Duncan Kennedy has convincingly shown that critical legal studies and technical economic methodology fit well together. See generally Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) [hereinafter Kennedy, *Distributive and Paternalist Motives*]; Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. L. REV. 485 (1987) [hereinafter Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing*]; Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465 (P. Newman ed., 1998).

13. AMARTYA SEN, DEVELOPMENT AS FREEDOM 3-5, 35-53 (1999); cf. Hockett, *supra* note 1 at 158-63.

power has been a staple of both legal and economic analyses of market transactions for a long time. Yet, legal and economic scholars seem to be at cross-purposes when using this concept. Legal scholarship is mostly directed at compensatory regulation aiming to undo the effects of unequal bargaining power at a largely symptomatic level. The law looks at the unequal outcome of bargains as the consequence of legally regulated market interactions and assumes that altering the legal ground rules underlying the bargain is sufficient to shift the balance of power between the parties.<sup>14</sup> Legal regulations designed to equalize bargaining power thus include mandatory statutory rules on boilerplate clauses in consumer contracts, rights of information and cancellation, mandatory warranties of liability, or collective bargaining between employers and unions. Such legal measures seek to redistribute power in order to achieve fairer outcomes or even prohibit altogether certain outcomes that typically arise from common situations of unequal bargaining power. What this approach is missing, however, is an insight into the deep economic structure of bargaining power and its fundamental resilience to redistribution through the law. This is not to say that there are no well-reasoned economic explanations for most of the situations in which asymmetrical bargaining power is an issue. This is the case for potential legal remedies as well, such as in the ubiquitous cases of boilerplate contracts.<sup>15</sup> Yet, what seems to be missing is an insight into the irremediably inegalitarian structure of the bargaining process itself, which cannot be offset by ex-ante or ex-post legal interventions. I argue that it is this mechanism which profoundly shapes the distributive outcome of market transactions. No understanding of markets or, indeed, the capitalist economy and its unequal distribution of wealth is adequate without grasping the economics of bargaining power underlying it.

The argument proceeds in four parts. The first part asks how the neoclassic economic paradigm neutralizes distributive effects caused by market transactions and how legal regimes that govern markets reproduce and obscure this effect. This part also highlights the importance of legal theories that emphasize the considerable distributive impact of the ground rules of private law. In the second part, I will ask how these ground rules of private law enable the unequal distribution of wealth in capitalist economies and in what sense we can speak of a genuine law of capitalism. The third part will turn to bargaining power as the analytic key to explaining how markets and capitalism cause and maintain inequality. Based on Ariel Rubinstein's game-theory model of bargaining, I will argue that legal regulation cannot overcome the crucial time-sensitivity which lies at the heart of the bargaining process as institutionalized in the entitlement-based capitalist market structure. The fourth and final part assesses strategies that

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14. For a critique of this assumption and the resulting "myth of equality" in the context of employment law, see generally Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579 (2009).

15. See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013); Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883 (2014) (explaining the asymmetrical bargaining power found in certain boilerplate contracts).

nonetheless propose to mitigate the inegalitarian outcomes of capitalism through law. I argue that such approaches cannot offset the economic effect of unequal bargaining power and are thus unlikely to have any substantial effect on the distributive outcomes of capitalist market regimes. In other words, it does not follow from the legal setup of markets that the law, when aiming at more equality and democracy in market transactions, actually has the power to implement such values. This also means that Law and Political Economy might have to rethink the theoretical premises of its political tenets. It is up to the reader to draw further political or, indeed, radical conclusions from this insight.

## II

### THE CONSTRUCTION AND CRITIQUE OF “NEUTRAL” MARKETS

One of the main tenets of classical and neoclassical welfare economics is that competitive markets lead to an efficient allocation of goods. Markets generate and disperse information about available goods and services as well as the buyers and sellers present in the market. Most importantly, markets function as price-generating mechanisms for the goods and services offered. Thus, markets determine which goods are produced—those in which demand price is above production cost—and at what prices they can be sold. Through the price mechanism, competitive markets allocate goods to those buyers who value them most. That is why, in the language of economics, the outcomes of competitive markets are efficient. As a corollary, the redistribution of market outcomes should be left to the state via the systems of public law and to ex-post taxation, that is, tax law regimes that do not interfere with the ex-ante efficiency of the market mechanism.<sup>16</sup>

This is the picture of the market as the proverbial invisible hand—one that can only be disturbed but not furthered by state regulation.<sup>17</sup> Arguably, this is a strong argument which carries considerable force among economists even today. Thus, it comes as no surprise that legal theorizing mirrors the same argumentative pattern in the formalist understanding of private law. According to this view, the ground rules of private law, particularly property and contract law, provide a politically neutral framework that enables market transactions among equals.<sup>18</sup> Under the premise of a formalist reading of private autonomy

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16. Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 669–74 (1994).

17. Locus classicus is ADAM SMITH, THE THEORY OF MORAL SENTIMENTS, IV.1., at 296 (1759; A. Finley, 1817); ADAM SMITH, 2 AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, IV.2., at 242 (1776; Stirling & Slade, 1819). For a comprehensive history of ideas, placing Smith in the genealogy of Anglo-Saxon Calvinist culture, see generally BENJAMIN M. FRIEDMAN, RELIGION AND THE RISE OF CAPITALISM (2021).

18. In the American discourse, the picture of private law formalism is mostly associated with the Lochner era. See generally *Lochner v. New York*, 198 U.S. 45 (1905). For a historical reconstruction, see generally DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006). For the German discourse, see WERNER FLUME, 2 ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS: DAS

and freedom of contract, bargaining power or, indeed, distributive issues are irrelevant for the conclusion and judicial review of contracts. When private law subjects enter into a contract, they do so voluntarily and on equal footing. State and public law are expected to mitigate the social hardships caused by the working of markets in marginal fields like consumer, employment, and landlord-tenant law.

Just like its economic counterpart, however, this extreme formalist-libertarian reading of private law never reflected the reality of the law of the market.<sup>19</sup> By the end of the nineteenth century, theories of social law, free law, and legal realism blossomed both in Europe and in the United States. Indeed, they became a necessary critical counterpart to liberal private law.<sup>20</sup> Legal realism delivered a forceful critique of private law as a function of social power. The most compelling account of this novel reading of the relationship between markets, law, and power might still be Robert L. Hale's critique of contract not as an exercise in private autonomy and voluntary bargaining, but as coercion in the shadow of the law.<sup>21</sup> This is when bargaining power re-entered the picture. Though it didn't play a role in a conception of contract law based on the formal freedom of equal parties, it now came back as a specifically legal concept of structurally unequal bargaining power to challenge the idea of free contracting. This was the birth of consumer law, landlord-tenant law, employment law, as well as equal opportunity law—all understood as adding a “materialized” or “social” layer to private law.<sup>22</sup>

However, in fields like consumer, housing, or employment law, there are cases where the strategy of redistributing bargaining power through mandatory terms in private law transactions systematically fails to reach its goal, and is

RECHTSGESCHÄFT 1-22 (4th ed. 1992); Marietta Auer, *Two Centuries of Private Law Theory on Formal and Material Equality*, in FROM FORMAL TO MATERIAL EQUALITY 63-80 (Stefan Grundmann & Jan Thiessen eds., 2023).

19. In the German context, the narrative of the supposedly formalist nineteenth century has been subject to considerable reinterpretation by legal historians more recently. See SIBYLLE HOFER, FREIHEIT OHNE GRENZEN?, PRIVATRECHTSTHEORETISCHE DISKUSSIONEN IM 19. JAHRHUNDERT (2001); MARIETTA AUER, DER PRIVATRECHTLICHE DISKURS DER MODERNE 1–9 (2014).

20. Germany: EUGEN EHRLICH, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS (1913); GNAEUS FLAVIUS [HERMANN KANTOROWICZ], DER KAMPF UM DIE RECHTSWISSENSCHAFT (1906); France: RENÉ DEMOGUE, LES NOTIONS FONDAMENTALES DU DROIT PRIVÉ. ESSAI CRITIQUE (1911); FRANÇOIS GENY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF. ESSAI CRITIQUE (2d ed., 1919); LEON DUGUIT, LES TRANSFORMATIONS GENERALES DU DROIT PRIVE DEPUIS LE CODE NAPOLEON (2d ed., 1920). See generally Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Roscoe Pound, *Law in Books and Law in Action*, 44 AM L. REV. 12 (1910). For a historical interpretation, see generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL 19 (David Trubek & Alvaro Santos eds., 2006) [hereinafter Kennedy, *Three Globalizations*].

21. See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SC. Q. 470 (1923) (illustrating contracts' role as coercion in the shadow of the law). For Hale's impact, see, e.g., KENNEDY, *supra* note 2, at 86–87.

22. Kennedy, *supra* note 20, at 37–62. For Germany, see FRANZ WIEACKER, DAS SOZIALMODELL DER KLASSISCHEN PRIVATRECHTSGESETZBÜCHER UND DIE ENTWICKLUNG DER MODERNEN GESELLSCHAFT (1953).

actually “hurting the people one is trying to help,” as Duncan Kennedy likes to put it.<sup>23</sup> I use Kennedy’s catchy phrase as shorthand for the following recurring argument: The additional cost imposed by the mandatory contract term on the seller, landlord, or employer will likely not lead to the intended redistribution of wealth to the weaker market side, but will in fact be passed on to the buyer, tenant, or employee through higher prices or fewer opportunities of contracting. This means that the weaker market side ends up carrying the extra cost for the distributive or paternalist intervention, leading to an inverse redistribution of wealth as well as cross-subsidizing effects among different groups of buyers, tenants, or employees. The intervention might even have the self-defeating effect of driving the weakest out of the market altogether if the additional cost makes the regulated commodity unaffordable to the bottom segments of the market.<sup>24</sup> This means, for instance, that stricter housing code enforcement may reduce the private housing supply and thus increase homelessness;<sup>25</sup> consumer protection laws that allow for the early repayment of loans might increase capital costs for all consumers;<sup>26</sup> and excessive minimum wages in an employment contract may result in higher unemployment or underemployment.<sup>27</sup> In other words, such measures might actually be hurting the people one is trying to help.

Modeling these instances of adverse effects of distributive and paternalist interventions into the market mechanism in private law transactions is an easy and standard task of microeconomic methodology. After the turn to “the social,” it thus came as no surprise that the economic paradigm entered the methodological repertoire of private law, even if it was only via the runaway victory of the narrowed version of neoclassic law and economics. In fact, the explanatory power of the neoclassic paradigm in examples like those above is so powerful that it is difficult to refute its pervasive methodological impact on theorizing the distributive consequences of private law. Thus, the formerly opposed paradigms now appear side by side. On the one hand, the economically oriented, post-realist, post-critical legal studies private law scholarship now mostly acknowledges or even presupposes that the ground rules of private law

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23. See, e.g., Duncan Kennedy, *Law Distributes: Ricardo Marx CLS*, in *BEYOND INEQUALITY AND THE FUTURE OF WORK: THINKING WITH RACIAL CAPITALISM, WORLD-SYSTEMS, AND DISTRIBUTIONAL ANALYSIS CRITIQUES* (Karen Engle & Neville Hoad eds., 2024) (forthcoming 2024) [hereinafter Kennedy, *Law Distributes*].

24. For the framework of this analysis as well as for possible exceptions, see generally Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *YALE L.J.* 1093 (1971); Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 *HARV. L. REV.* 1815 (1976); Kennedy, *Distributive and Paternalist Motives*, *supra* note 12; Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing*, *supra* note 12.

25. Ackerman, *supra* note 24; Markovits, *supra* note 24.

26. Hans-Bernd Schäfer & Alexander J. Wulf, *Premature Repayment of Fixed Interest Mortgage Loans Without Compensation, a Case of Misguided Consumer Protection in the EU*, 53 *EUR. J. L. & ECON.* 175, 204 (2022).

27. Bagchi, *supra* note 14; Christopher J. Flinn, *Minimum Wage Effects on Labor Market Outcomes Under Search, Matching, and Endogenous Contact Rates*, 74 *ECONOMETRICA* 1013, 1017 (2006).

are neither politically nor distributively neutral. Indeed, there is a broad consensus that the initial assignment of entitlements carved into the forms of private property and contract determines the distribution of private wealth. On the other hand, the main tenet of the post-critical legal studies consensus of law and economics still favors efficiency over distributive justice. Even if private contract and property regimes are conducive to the unequal distribution of private wealth, so the argument goes, it is nevertheless the primary task of private law to enable the generation of private wealth.<sup>28</sup> Thus, efficiency is prioritized over equality. The normative picture underlying this view is that market economies have actually succeeded—at least more so than competing economic models—in generating both private and social wealth.<sup>29</sup>

This “twentieth-century synthesis” of law and economics translates into a triad of tenets: First, private law should focus on fostering efficiency through enabling market transactions.<sup>30</sup> A major theoretical underpinning of this tenet is encapsulated in the Coase theorem: In the absence of transaction costs, the market mechanism will lead to an efficient allocation of assets irrespective of the efficiency of the initial endowment of entitlements.<sup>31</sup> The Coase theorem provides a strong case against redistribution through private law because the distributive policies implied in private law regulations might in fact be unattainable. Not only will the distribution favored by the regulation likely be undone or watered down by post-regulation bargaining, but the regulation might also be at odds with the efficient solution of the externalities problem generated by the market itself—all assuming that transaction costs are not prohibitively high. Conversely, the Coase theorem underscores that the law has a good reason to intervene wherever markets fail due to imperfect information or prohibitive transaction costs.<sup>32</sup> This is especially the case where markets fail to internalize negative externalities such as environmental damages, and therefore cannot provide an efficient valuation of the assets bargained for. From all of this, it follows that the concept of transaction costs plays a key role in the twentieth-century synthesis, both as an analytical framework for the regulation of markets

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28. Cf. Kaplow & Shavell, *supra* note 16 and accompanying text.

29. See, e.g., Hans-Bernd Schäfer, *National Wealth and Private Poverty Through Civil Law? A Review of the Book “The Code of Capital” by Katharina Pistor*, 53 EUR. J. L. & ECON. 125, 129–33 (2022) (distinguishing between wealth-increasing, wealth-neutral and wealth-reducing private law regimes). That capitalist economies have actually contributed considerably to global wealth in the past three decades is also the upshot of the “elephant curve,” also known as Lakner-Milanovic graph or global growth incidence curve. See generally Christoph Lakner & Branko Milanovic, *Global Income Distribution. From the Fall of the Berlin Wall to the Great Recession* 31 (The World Bank Development Research Group Poverty and Inequality Team Working Paper, Paper No. 6719, 2013), <https://openknowledge.worldbank.org/handle/10986/16935> [<https://perma.cc/N4HF-5LPQ>]. For the opposite conclusion. See also KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 1–2 (2019) [hereinafter PISTOR, *THE CODE OF CAPITAL*]. For critiques of the growth paradigm, see SEN, *supra* note 13.

30. For this term and the underlying paradigm, see Britton-Purdy et al., *supra* note 2.

31. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2–15 (1960).

32. See generally Bruce C. Greenwald & Joseph E. Stiglitz, *Externalities In Economies With Imperfect Information And Incomplete Markets*, 101 QU. J. OF ECON. 229, 257–60 (1986).



and, when it comes to minimizing transaction costs, as a normative project.<sup>33</sup> It should be noted, however, that none of these analytical, theoretical, or even normative choices naturalize markets to the extent that they suggest the priority, let alone immunity, of market outcomes vis-à-vis legal regulation. Yet, the neoclassic paradigm of economics arguably does provide compelling reasons for not interfering with markets with the well-meaning, yet ill-theorized, aim of helping the poor when such regulation will ultimately hurt those one is trying to help.

### III

#### PRIVATE LAW AS THE CODE OF CAPITAL?

So why have Law and Political Economy theorists renewed the argument that the preferable theoretical choice should be “putting distribution first”?<sup>34</sup> Perhaps looking at markets alone is insufficient. The present part will take the argument one step further by asking how the rules of the market are intertwined with the rules of the capitalist economic system. This requires a shift of focus from the microeconomics of the market to the macroeconomics of market economies and to capitalism at large. It is important not to conflate both levels of the argument. Capitalism is, in a much more profound sense than the market, a historical concept. The “varieties of capitalism” famously described by historians of economics provide an apt picture to capture the manifold organizational forms capitalist economies have taken over the course of history.<sup>35</sup> Since the late nineteenth century, the early anarchic industrial capitalism was replaced by different national styles of managed capitalism, characterized by large corporations, corporatist class organizations, as well as state regulation and welfare—including the public ownership of utility providers. By the 1970s and 1980s, however, managed capitalism, designed to protect individuals against the hardships of the market, faced a global crisis. Since then, yet another re-marketized form of capitalism has emerged—one characterized by neo-liberal beliefs in the freedom of the individual and the market forces, the privatization of public utilities, and a rolling back of the welfare state. Ironically, this newest metamorphosis of capitalism comes with more, rather than less, state regulation

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33. See generally Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233, 233–61 (1979); cf. Britton-Purdy et al., *supra* note 1, at 1798–1800.

34. See generally Hockett, *supra* note 1.

35. See VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1-68 (Peter A. Hall & David Soskice eds., 2001) (distinguishing between “liberal market economies” and “coordinated market economies”; however, the distinction cannot be drawn easily and the concurring roles of history, culture, law, politics, finance, and religion in the genesis of capitalist systems are too complex to merge into one single picture). For additional perspectives, see generally DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD. A NEW ECONOMIC HISTORY* (1973); TAMARA LOTHIAN, *LAW AND THE WEALTH OF NATIONS: FINANCE, PROSPERITY, AND DEMOCRACY* (2017); FRIEDMAN, *supra* note 17.

of markets.<sup>36</sup>

While it is obvious that the law shapes markets, the concrete import of the law on the institutions of capitalism is much less clear. In particular, there is no obvious connection between more leeway for market freedom, on the one hand, and a lesser degree of legal regulation of markets, on the other. Thus, at first glance, it seems difficult to single out a genuine corpus of capitalist law that effectively shapes the structure of markets and is responsible for the inequality of their outcomes. Yet, in her landmark work, *The Code of Capital*, Katharina Pistor argues that such a code in fact exists and that it is nothing other than the ground rules of private law.<sup>37</sup> Capitalists, aided by sophisticated lawyers in a process stretching over centuries, have used the legal ground rules of property, contract, collateral, bankruptcy, and corporations to turn certain assets—but not others—into capital. Through legal coding in the forms of contracts, corporations, and property rights, assets have become a tool to accumulate wealth for capital holders but not, as Pistor argues, for their unentitled bargaining partners. More specifically, Pistor identifies four legal attributes that, when attached to an asset, turn it into capital, namely *priority*, *durability*, *universality*, and *convertibility*.<sup>38</sup> Priority serves to rank prioritized claims over weaker titles and thus provides a trump card when reclaiming a prioritized asset in bankruptcy procedures. Durability extends prioritized claims in time and thus expands the life span of a title to assets against competing claimants, creating vested rights over centuries. Universality ensures that priority and durability can be held against not only the parties who agreed to them, but against anyone. Finally, convertibility guarantees asset owners the ability to convert their assets into state money when no private takers are available. From this analysis, Pistor concludes that “[t]he legal code confers attributes that greatly enhance the prospects of some assets and their respective owners to amass wealth, relative to others—an exorbitant privilege.”<sup>39</sup>

But Pistor’s argument goes further. In her most recent work, *The Law of Capitalism*, she asks whether there is a genuine law of capitalism to its most ardent opponents, namely, to the legal theorists of socialism.<sup>40</sup> The point of this shift of perspective is a head-on attack on the blind spot of liberal legal theorizing. From a liberal legal standpoint, the formal equality presupposed by freedom of contract will always provide an argument for downplaying the factual inequality caused by private power. In making this argument, Pistor relies heavily on Evgeny Pashukanis, quite possibly the most sophisticated Marxist legal

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36. For summaries, see generally JAMES FULCHER, CAPITALISM: A VERY SHORT INTRODUCTION 41–56 (2004); Peter A. Hall & David Soskice, *Introduction to Varieties of Capitalism*, in VARIETIES OF CAPITALISM, *supra* note 35, at 1–6.

37. PISTOR, *THE CODE OF CAPITAL*, *supra* note 29, at 1–22.

38. *Id.*, at 13–15. Pistor restates the point in her most recent work. See KATHARINA PISTOR, *THE LAW OF CAPITALISM. HOW THE LAW ENABLES CAPITALISM AND MUTES ITS REGULATION* 131 (forthcoming, 2024) [hereinafter PISTOR, *THE LAW OF CAPITALISM*].

39. PISTOR, *THE CODE OF CAPITAL*, *supra* note 29, at 19.

40. PISTOR, *THE LAW OF CAPITALISM*, *supra* note 38, at 17–34.

theoretician whose work has enjoyed a small revival as of late.<sup>41</sup> Pashukanis extends Marx's famous critique of the "fetishism of commodities" to the legal form.<sup>42</sup> Classically, the critique of the fetishism of commodities targets the deliberate confusion of exchange value and use value in the capitalist valuation system. By assigning marketable property rights to goods, the capitalist valuation process abstracts value from their use and essentializes their exchange value, thus reducing them to marketable commodities. As a consequence, the fetish of commodities forges all social relations in the capitalist society into the one-dimensional mold of relations of appropriation. Goods—including labor as a commodified asset—become agents of alienation, tools of domination, and levers of inequality.

Pashukanis, followed by Pistor, not only endorses this argument but takes it one step further: There is no commodity fetish without a legal fetish.<sup>43</sup> The commodity fetish turns natural objects into marketable assets. The underlying legal fetish turns the relation between owner and thing into the legal relation between property owner and marketable property right, thereby stripping the person of the social embeddedness of her relations to other persons in precisely the same way as the process of commodification reduces the object to its exchange value.<sup>44</sup> The legal form, encapsulated in the legal subject and its legal relations to other legal subjects, is a *fetish*: It reconstructs social inequality as legal equality. It conceals the exclusion from access to propertized objects behind a smokescreen of equal right to ownership. It disintegrates the social sphere into bipolar relationships between the potential holders of commodified entitlements, thereby disguising collective identity and, in particular, class identity. The legal form, encapsulated in private law and built upon the concept of the legal subject, creates a fetish that neutralizes, naturalizes, normalizes, and stabilizes social power. Moreover, capitalist law is essentially private—or subjective—law, because the depoliticized sphere of private law insulates private power against political organization. "Subjective law is the primary law, for it is based, after all, on material interest, which exists independently of the external, or conscious, regulation of social life."<sup>45</sup> In essence, it is the fetishization of the very form of private right that endows the legal structure of capitalism with legitimacy.

From this detour into socialist legal theory, one might indeed draw the

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41. *Id.* at 21–23. On Pashukanis, see ANDREAS ENGELMANN, RECHTSGELTUNG ALS INSTITUTIONELLES PROJEKT: ZUR KULTURELLEN VERORTUNG EINES RECHTSWISSENSCHAFTLICHEN BEGRIFFS 77–116 (2020); DARIA BAYER, TRAGÖDIE DES RECHTS (2021).

42. See EVGENY B. PASHUKANIS, LAW AND MARXISM: A GENERAL THEORY. TOWARDS A CRITIQUE OF THE FUNDAMENTAL JURIDICAL CONCEPTS 109–33 (Barbara Einhorn trans., Chris Arthur ed., 3rd ed. 1989) [hereinafter PASHUKANIS, LAW AND MARXISM].

43. See *id.* (exploring the relationship between property and the person as the basis of capitalist law); cf. PISTOR, THE LAW OF CAPITALISM, *supra* note 38, at 21.

44. For the broader issue of the social embeddedness of market transactions, see generally Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 481–510 (1985).

45. PASHUKANIS, LAW AND MARXISM, *supra* note 42, at 99; cf. PISTOR, THE LAW OF CAPITALISM, *supra* note 38, at 22.

conclusion—as Pistor does—that the legal edifice of capitalism is built on fetishized power relations. Pistor’s argument in *The Code of Capital* turns on the privileged situation in which the holders of capital find themselves via their superior access to advanced coding strategies. For Pistor, capital owners are privileged through their power to make a more sophisticated use of freedom of contract than their non-privileged counterparts. She actually frames this perceived distortion of the level playing field between the capitalist haves and the unentitled have-nots as metaphorical doping. “Capitalism, it turns out, is more than just the exchange of goods in a market economy; it is a market economy in which some assets are placed on legal steroids.”<sup>46</sup> But Pashukanis adds yet another layer of sophistication to this argument. It is not just the privileged access to sophisticated coding strategies that shields capitalist power against the egalitarian participation of the many. It is the *legal form of private right itself* that normalizes and neutralizes this power by cloaking it in the presumption that, theoretically, every member of the liberal egalitarian society possesses the same formal freedom to make contracts and acquire property, while, in fact, “[t]he free and equal owners of commodities who meet in the market are free and equal only in the abstract relation of appropriation.”<sup>47</sup> For Pashukanis, this is just power in the guise of right, that is, “the fundamental principle of the bourgeois society: ‘The equal opportunity to attain inequality.’”<sup>48</sup>

And yet, none of these arguments can explain what power and privilege understood in this sense actually mean. Instead, the reasoning in each case seems circular: private law causes inequality because it privileges the power of those who use private law to privilege their power. Yet, it seems clear—at least to Marx—that capitalist property is not a feudal privilege.<sup>49</sup> Freedom of contract and property are *actually* and not just theoretically open to all. None of the arguments on the basis of privilege and power put forward by Pistor or Pashukanis invalidates the formally egalitarian structure of private law. What, then, remains of the supposed capitalist privilege beyond a revived Marc Galanter claim that the haves always come out ahead?<sup>50</sup> In the following part, I argue that there is a way to decode the myth of private power: understanding bargaining power.

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46. PISTOR, *THE CODE OF CAPITAL*, *supra* note 29, at 11.

47. PASHUKANIS, *LAW AND MARXISM*, *supra* note 42, at 147.

48. *Id.* at 123.

49. See Karl Marx, *On the Jewish Question*, in KARL MARX, *SELECTED ESSAYS* 40 (H.J. Stenning trans., 1926). The German original is *Zur Judenfrage* (1844).

50. Cf. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 95, 95–160 (1974) (arguing that the “haves” always come out ahead because they have layers of advantage that interlock, reinforce and shield one another).

## IV

BARGAINING POWER, TIME-SENSITIVITY, AND THE CAPITALIST  
DISTRIBUTION PATTERN

Bargaining power, when theorized in economic terms, provides the missing link between the power relations underlying markets, their distributive effects, and the greater or lesser power of the law to regulate both. While bargaining power has been the subject of much discussion in both law and economic theory, the conceptualization of unequal bargaining power in the law often remains on a pre-theoretical, if not to say economically naïve level. Courts and regulators, both applauded and harshly criticized within the legal scholarship, have used concepts like “structurally unequal bargaining power”—in which “structural” remains notoriously underdetermined—or “contractual imparity” to fill in blanket doctrines like good faith, duress, and unconscionability in cases where contracts seem “unfair” because of the perceived power differential between the parties.<sup>51</sup> There is, however, no clear methodology to measure this perceived power differential. The rough idea is that slight imparities that do not deviate far from the ideal 50%–50% distribution of bargaining power between both parties leave the contract intact, but can be compensated for by means of regulations like information duties, mandatory terms, or collective bargaining. Thus, if the perceived balance lies at, say, 60%–40%, the courts’ response, in accordance with the law, will be to regulate and adjudicate 10% of the bargaining power to the disadvantaged party in order to put things back into balance. The farther the balance tilts to one side, however, the more likely it becomes that the contract will be voidable under doctrines like duress or unconscionability. The threshold for when the court has to act to restore balance and what exactly has to happen between the parties in order to reach that line, however, remains wholly undefined and largely a matter of judicial lay sociology and the courts’

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51. See, e.g., *Macaulay v. Schroeder Publishing Co. Ltd.* [1974] 1 W.L.R. 1308 (H.L.) (holding that a standard form agreement between a novice songwriter and a music publisher was void due to a lack of bargaining power on the side of the plaintiff as well as exploitative contract terms in favor of the defendant). This case is sharply criticized by Michael J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 359–385 (1976). Cf. also Hugh Beale, *Review: Inequality of Bargaining Power*, 6 OXFORD J. LEGAL STUD. 123, 123–36 (1986) (critiquing the vagueness of the concept of unequal bargaining power); Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 153–92 (2005) (reviewing the comprehensive history and sociological typology of legally relevant power constellations). In the German context, the Supreme Constitutional Court has invoked unequal bargaining power as a condition for judicial review of contracts and direct horizontal effect of fundamental rights. See, e.g., *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE]* 81, 242; 89, 214; 148, 267 [Germany]. For critiques, see, e.g., Manfred Lieb, *Sonderprivatrecht für Ungleichgewichtslagen? Überlegungen zum Anwendungsbereich der sogenannten Inhaltskontrolle privatrechtlicher Verträge*, 178 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 196–226 (1978); Wolfgang Zöllner, *Regelungsspielräume im Schuldvertragsrecht: Bemerkungen zur Grundrechtsanwendung im Privatrecht und zu den sogenannten Ungleichgewichtslagen*, 196 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 1–36 (1996) [Germany]; MARIETTA AUER, *MATERIALISIERUNG, FLEXIBILISIERUNG, RICHTERRECHT: GENERALKLAUSELN IM SPIEGEL DER ANTINOMIEN DES PRIVATRECHTS* 30–31 (2005).

discretion.<sup>52</sup>

I argue that this understanding of unequal bargaining power is undertheorized because it misses the economic functioning of the mechanism of bargaining power in capitalist bargaining situations. This is a serious theoretical shortcoming because lawyers systematically overestimate the regulatory potential of the law with respect to offsetting the effects of unequal bargaining power. Lawyers do so as a consequence of the sociological fallacy of intuiting the power differential between the parties from an ad hoc mélange of criteria oscillating between the actual power to negotiate and the social status of the negotiators.<sup>53</sup> As it turns out, the law cannot do much about unequal bargaining power in capitalist market transactions.

In order to make this argument, one need not consider advanced economic theories nor subtle economic modeling. In fact, the core argument can be found in the classic works of economics, namely in David Ricardo's *Principles of Political Economy and Taxation* and Marx's *Capital*.<sup>54</sup> Duncan Kennedy provides a concise account of both authors' surprisingly similar analytical theories on how the cooperative surplus of a capitalist market transaction is distributed amongst the parties.<sup>55</sup>

In Ricardo's model, the capitalists are landlords who rent their land to farmers. Between landlords and farmers, there is a competitive rental market over agricultural land. Both parties will bargain over the price to be paid as rent to the landlord for the farmer's right to raise crops on the land and to sell them. This rent is the profit the landlord can extract "just by owning the land."<sup>56</sup> The landlords will try to maximize their profit by renting out the land to the farmers at the maximal rate of return, or the maximum share of profit the marginal farmer is willing to cede to the landlord as rent. But not each piece of land will yield the same profit because not all parcels are of the same quality. The more fertile the land, the lower the cost of production per unit of wheat compared to less fertile land. Since the selling price for wheat remains the same for all farmers on all types of land, less fertile land results in a higher cost of production per unit of

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52. For a spot-on critique, see Trebilcock, *supra* note 50, at 385 ("For a general doctrine such as inequality of bargaining power to be an effective instrument in controlling transactional abuses, it needs to be sharp in its focus, conceptually sound and explicit in its policy underpinnings, and operational in terms of both the process of judicial inquiry it envisages and the remedial instruments available to a court to abate objectionable phenomena. A general doctrine bearing on transactional unfairness that cannot meet these criteria will rapidly degenerate, in its applications, into the crassest forms of ad hocery.").

53. For a comprehensive mapping and critique of the various criteria employed by American courts, see Barnhizer, *supra* note 50, at 199–223.

54. See generally DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY (1817); KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY (Samuel Moore & Edward Aveling trans., Frederick Engels ed., 3 vols., 1974), online available at <https://archive.org/details/capitalvol1> [<https://perma.cc/M723-DSR9>]; <https://archive.org/details/capitalvol2> [<https://perma.cc/8TUR-Z286>]; <https://archive.org/details/capitalvol3> [<https://perma.cc/Z886-SCVE>]; German original: DAS KAPITAL. KRITIK DER POLITISCHEN ÖKONOMIE, 3 vols. (1867, 1885, 1894).

55. Kennedy, *Law Distributes*, *supra* note 23, at 3–12. My reading of Ricardo and Marx follows Kennedy's reconstruction.

56. *Id.* at 7.

wheat. The rent the prospective farmer will offer to the landlord will, therefore, depend on the average rate of return the farmers can expect on their capital. If renting this particular parcel of land does not appear profitable, the farmer will abstain from renting it and will invest his or her capital into another parcel or into an altogether different activity.<sup>57</sup>

Ricardo's insight is this: All the farmers receive the same return on their capital investment regardless of whether the land is good or bad, meaning that it makes no difference whether the production cost per unit is low or high. At first glance, this appears counterintuitive. Wouldn't one expect the farmer on the good land to make more profit than the farmer on the bad land, given that the price for wheat is constant for all farmers? Kennedy's answer—in line with Ricardo—is that the farmer on the good land “won't make more profit on each bushel of wheat because he will pay all the difference in cost to the landlord as rent.”<sup>58</sup> The reason is that the demand for wheat regulates the market price and thus the number of potential farmers competing for farms. If the demand for wheat is low, the market price will fall under the cost of production on all but the most productive land. In this case, only the landlords with the best land will find farmers to rent, while farming on the bad land will not be profitable, even if the landlords forgo demanding the payment of rent. But when prices for wheat go up, farming will become a profitable activity on more than only the best land. Now all parcels will be under cultivation where farmers can at least reap the standard average profit from farming. On the bad land, this is exactly what the farmers will get as the difference between the selling price for wheat and the cost of production.

But what happens on the good land, where the cost of production per unit is much lower? Ricardo's insight is that the farmers on the good land are nonetheless in no position to bargain with the landlord for more than the average rate of profit. Farmers will compete for the good land, and landlords only have to wait until they find a farmer who will work for the average profit. The higher the price of wheat, the more profitable the land, the greater the number of potential farmers, the greater the competition for good land, and the more pressure to farm the good land for the standard profit. In effect, the entire surplus beyond the average profit will go to the landlord as rent, regardless of the quality of the land.<sup>59</sup>

Kennedy uses the following example to illustrate the point. The price of wheat is \$50. The cost of production is \$49 on the worst land and only \$29 on the best land. The average profit for the farmer is \$1. On the worst land, the landlord will earn no rent. On the best land, the landlord will put up a rental price of \$20 and wait until he finds a farmer willing to work for \$1. Such a farmer exists and the landlord knows it; otherwise, the bad land would not be under cultivation. Thus, the farmer on the good land is in no position to bargain for a greater share than

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57. *Id.* at 7–8.

58. *Id.* at 8.

59. *Id.* at 9–10.

the \$1 the landlord will offer out of the cooperative surplus of \$21. Whenever the farmer attempts such a move, “the landlord just says ‘bye-bye!’ and puts up a little sign saying ‘farmer wanted’ and a line of a hundred people forms, and he waits for a person to say, ‘well, I’ll do it for the standard profit.’”<sup>60</sup>

The market between landlords and farmers is a true Haeian bargaining situation.<sup>61</sup> The farmers know they will be “exploited” because the landlords will take *all* the surplus value beyond the standard profit. The farmers contract nonetheless because they have to earn an income and thus freely consent to forego most of the profit reaped from their activity. Note that the farmers are not consumers; they are entrepreneurs who choose farming as a profession because it offers an average rate of profit above subsistence.<sup>62</sup> If this condition is not met, farmers will change to another line of work, and farming will discontinue altogether. At the same time, the landlords have no other choice than to rent out their land. If the land is bad and the price of wheat is low, the lack of profitability might make it difficult to find any farmers to cultivate the land. In that case, ownership of the land is useless. On the other hand, the owners of good land will always be able to control prices because they can hold out until they find a farmer willing to rent for the average rate of profit. It’s a winner-takes-all situation in which the capitalist, through the very composition of the market, siphons the lion’s share of the cooperative benefit generated by the market transaction.

Moreover, in Kennedy’s reading, Marx’s theory of profit makes a similar point about the bargaining situation between capitalists and workers.<sup>63</sup> Capitalists are the owners of the means of production. They hire workers to produce commodities that are sold on competitive markets. The difference between the market price and the cost of production, including the cost of labor, is profit that goes entirely to the capitalist. Similar to Ricardo, Marx argues that the competition among workers will drive wages down to subsistence levels, regardless of how much surplus a given worker creates. All workers, whether more or less productive, have to contract with the capitalist in order to gain their subsistence, whereas the capitalist can hold out for the lineup of workers for as long as the commodity produced is in demand. Kennedy concludes that “for both Ricardo and Marx, it is ‘mere ownership’ that permits appropriation of all the surplus.”<sup>64</sup> But what exactly turns “mere ownership” into the capitalist power of being able to extract nearly all the surplus from the bargain? Given that the farm or the factory cannot run without farmers or workers, why does the other party have almost no bargaining power at all? The abstract concept of capital alone — let alone its “metaphysical fertility” — cannot explain this dramatically one-sided

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60. *Id.* at 10.

61. *Cf. supra* note 21 and accompanying text.

62. *See* Kennedy, *Law Distributes*, *supra* note 23, at 7–8 (analyzing the economic incentives relevant for farmers).

63. *Id.* at 12–17.

64. *Id.* at 16.



distributive effect.<sup>65</sup> This raises the question of whether the explanation is hidden inside any of the legal ground rules that define the properties of capital.<sup>66</sup>

Let us briefly return to Katharina Pistor's four features of legally coded capital—priority, durability, convertibility, and universality.<sup>67</sup> The four features of capital define a legal structure that uses every legally possible means to achieve one central goal that Pistor never makes explicit: to escape the bonds of time. Durability stands out because endowing assets with this quality literally forges them into a source of wealth of superhuman scope. Property rights by far surpass the lifespan of human beings. When such rights are attached to sources of productivity, they create the possibility for the owners—as well as their heirs, suggesting that the law of succession is one of the neglected fields of capitalist law within Pistor's analysis—to hold out indefinitely in a given bargaining situation.

Durable property rights detach the sources of wealth production from the individual owner and turn them into a social institution. For the unentitled other party, bargaining with such an institution must indeed feel like bargaining with a giant or an immortal being. While the capitalist can afford to hold out, the bargaining table constantly reminds the individual farmer or worker of the finitude of their situation. Since they have nothing to which durability can be attached, their marketable labor force declines with each passing day and year. Thus, it is not strictly speaking the durable property right as such which provides the capital owner with superior bargaining power over the worker or farmer, nor is it the priority, convertibility, or universality of property rights. It is one particular feature of property, namely, the legal construction of time-insensitivity embodied in the property right that turns it into an institutionalized, quasi-immortal source of surplus production. Capitalism has created more than just a fetish—it has created a god.<sup>68</sup>

There remains one further argumentative step to be taken from the time-insensitivity embodied in capital and the crucial impact of time on the bargaining process. Why does time matter for bargaining, and why does its passing hurt the unentitled much more than the capitalist—who is, after all, also a human being? This is where bargaining as a game comes into play. In the competitive market between capitalists and farmers or workers, bargaining can be imagined as an effectively simultaneous cooperative two-player game where capitalist C bargains with a group of farmers or workers  $F_1, F_2, \dots, F_n$ . Of course, there is more than one capitalist involved in the market, and bargaining between different actors will likely not be simultaneous, but *de facto* sequential. Yet, the

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65. Cf. *id.* at 13 (explaining the metaphysical fertility of labor).

66. As Barak Richman has beautifully described in his homage, Oliver Williamson might have put the question: “Just what is going on here?” See Barak Richman, “*Just What is Going on Here?*”, *An Homage*, 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 131 in this issue.

67. Cf. PISTOR, *supra* note 38 and accompanying text.

68. That there is a deep connection between religion and the rise of capitalist culture is not a novel claim. See generally FRIEDMAN, *supra* note 17; Max Weber, *Die protestantische Ethik und der “Geist” des Kapitalismus*, 20 ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK 1-54 (1904); 21 ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK 1-110 (1905) [Germany].

analytically important point is to break down the multipolar network of market relations into discrete one-shot two-player games in order to assess the crucial relationship between time-sensitivity and the distribution of the bargaining output for each of the independent two-party relations.

As Ariel Rubinstein has shown, the distribution of the bargaining outcome between two players directly reflects their relative time-sensitivity.<sup>69</sup> The key insight of Rubinstein's bargaining model is that the cost of bargaining can be expressed as a discount rate that represents the players' relative valuation of time. Rubinstein's model thus shows that if bargaining has a cost, the equilibrium partition, that is, the ratio between the shares of the outcome both players can obtain, directly depends on the ratio between both players' discount rates reflecting their time-sensitivity.<sup>70</sup> Moreover, the game's sequential structure implies a first-mover advantage favoring the player who gets to make the first offer.<sup>71</sup> It is not unrealistic to assume that this will often be the capitalist who, armed with boilerplate language, deals with farmers or workers on a daily basis. Note that to obtain a larger share of the cake, it is enough to be relatively more patient than one's opponent.<sup>72</sup> Thus, capitalist property rights need not be protected absolutely in order to create a huge difference in time-sensitivity between capitalists and their unentitled counterparts. What matters is only their relative durability when compared with the position of the unentitled counterpart. For this relative durability, it makes no difference whether property rights are protected—like some intellectual property rights—for 20 years,<sup>73</sup> 70 years,<sup>74</sup> or infinitely. From the point of view of the unentitled player, these durations all more or less amount to the same time span: infinity. But if infinity, and thus the potential to hold out indefinitely, is all on one side of the equation, it mathematically follows that the other player's share of the outcome approaches zero regardless of how hard they bargain. In the end, they simply lose out against the capitalist.

This insight is important because it implies that the conventional legal reading that envisions unequal bargaining power as a straightforward differential of social power capable of being measured against a host of sociological criteria and readjusted on an imaginary sliding scale towards the ideal of parity is utterly wrong.<sup>75</sup> Rubinstein's model shows that there is no legally viable way to restore

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69. Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 *ECONOMETRICA* 97, 109 (1982). For an overview of the economic theory of bargaining and an in-depth exploration of Rubinstein's model, see generally ABHINAY MUTHOO, *BARGAINING THEORY WITH APPLICATIONS* (1999).

70. MUTHOO, *supra* note 69, at 51–55.

71. *Id.* at 46.

72. *Id.* at 47.

73. 35 U.S.C. § 154 (stating that patent terms are twenty years); PATENTGESETZ (PATG) § 16 (same) (1980, last amended 2021) [Germany].

74. 17 U.S.C. § 302 (stating that copyright terms are seventy years after the author's death); URHEBERRECHTSGESETZ (URHG) § 64 (same) (1965, last amended 2021) [Germany].

75. *Cf. supra* note 51 and accompanying text (delving into the discourse around the use of unequal bargaining power by courts in cases where contracts seem unfair).

equal bargaining power or to establish contractual parity in capitalist market transactions short of abolishing property. Irrespective of how much additional bargaining power the unentitled player brings to the table compared to other unentitled players—for example, in the form of skills, education, social status, or even political organization—these differences tend to be negligible when weighed against the infinity factor brought into the equation by capitalist property. By the same token, legal attempts to remedy unequal bargaining power via judicial review of unfair contracts, information and cancellation rights, mandatory clauses, or collective bargaining will have little or no effect on the overall distribution of bargaining power in capitalist market transactions. They simply do not remedy the crucial time-sensitivity on the side of the players who have no durable right on their side. To sketch out the numbers, let us assume that the cooperative benefit in a typical bargaining situation will go almost 100% to the capitalist. This outcome will remain surprisingly stable irrespective of what the law does to protect the unentitled party. Perhaps the law can shift the balance a little to something like 95%–5% or, at best, 90%–10%. But the hope of achieving equal or near-equal bargaining power between entitled and unentitled parties in capitalist market transactions—parity or even 70%–30%—will prove futile. The reason is the crucial importance of time-sensitivity for the distribution of bargaining power in capitalist market transactions.

## V

### RESTORING EQUALITY THROUGH THE LAW?

This finally brings us back to the claim of Law and Political Economy that if the law makes markets, it should also take on the responsibility to regulate their outcomes and transform them into something more egalitarian and democratic.<sup>76</sup> The insight we gleaned in the previous part suggests that the tacit assumption behind that claim—that is, that the law actually has the power to shift the grossly unequal distribution of bargaining power in a market transaction where one of the parties has the god of immortal capital on her side—is mistaken. I argued that the law can do very little to directly offset the power imbalance between the parties in such a transaction. The law could, of course, fall back on the frowned-upon liberal solution of redistribution through taxation.<sup>77</sup> To propose something truly radical, the law could also abolish all property rights or at least all corporate ownership of assets. But one does not need to be clairvoyant in order to see that none of this is ever going to happen. Why not? The simple answer is that property rights are often efficient.<sup>78</sup> They generate wealth in capitalist markets and help

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76. See *supra* note 1 and accompanying text (background sources on Law and Political Economy).

77. Cf. *supra* note 16 and accompanying text.

78. For an in-depth argument along these lines, see Hans-Bernd Schäfer, *National Wealth and Private Poverty Through Civil Law? A Review of The Book “The Code Of Capital” by Katharina Pistor*, 53 EUR. J. L. & ECON. 125, 131 (2022), <https://doi.org/10.1007/s10657-021-09710-9> [<https://perma.cc/ZN9X-NEKZ>]. For further refinement, compare Zachary Liscow, *Is Efficiency*

internalize externalities. Once in place, the twentieth-century synthesis of liberal law and economics seems to be a hard thing to get around.<sup>79</sup>

So, what can the law do to make the capitalist world a better place? In *The Code of Capital*, Katharina Pistor has argued that, against all odds, the law might still be the best antidote against the excesses of capitalism it has helped create:

For democracy to prevail in capitalist systems, politics must regain control over law, the only tool they have to govern themselves, and this must include the modules of the code of capital. At the very least, they must roll back the many privileges capital has come to enjoy over and above the modules of the code of capital.<sup>80</sup>

Pistor's list of eight proposals opens with "a bright-line rule to refrain from offering capital privileges over and above the basic modules of the code. The default answer to requests for new exemptions, special regulations, or preferential tax treatments should simply be 'no.'"<sup>81</sup> This point is certainly well taken. Yet, it seems to beg the question: Wasn't the argument that capitalism itself was the root cause of inequality? This argument is sidetracked by solutions that concentrate not on the ground rules of capitalist law, but rather on the reduction of exceptions within the outer regulatory framework of capitalist markets. It is particularly telling that tax law appears on Pistor's list because it belies the credo that her critique of capitalist institutions moves substantially beyond the liberal consensus.<sup>82</sup> Next, Pistor argues that "choosing the law that is most convenient for your own interest should be made more difficult."<sup>83</sup> Yet, conflict of laws seems to be an unusual venue for dealing with problems of safe harbors. Again, international tax law seems best suited to address the issue of tax evasion. All in all, Pistor believes in incrementalism as a viable path towards a more humane face of capitalism.<sup>84</sup> But in what way can incrementalism be a viable strategy within a system wherein the power balance, as I argued, cannot be readjusted in terms of percentage on a sliding scale? This is not to say that Pistor's points don't carry any weight. It's only that they don't address the root cause of the inegalitarian outcomes of capitalist bargaining.<sup>85</sup>

Yet, the Law and Political Economy approach to redesign the laws of capitalism in order to get rid of its worst excesses, as exemplified by Pistor, is not

*Biased?*, 85 U. CHI. L. REV. 1649 (2018) (distinguishing between "rich-biased" and "poor-biased" efficient policymaking).

79. See Britton-Purdy et al., *Framework*, 129 YALE L.J. 1784, 1806–1818 (2020) (examining the "Twentieth-Century Synthesis and its subparts of economic and public law"); cf. *supra* note 30 and accompanying text.

80. PISTOR, note 37, at 224.

81. *Id.* at 224–25.

82. Cf. *supra* note 16 and accompanying text.

83. PISTOR, *supra* note 37, at 225. Further points on the list include cutting back on arbitration, internalizing the cost of crises through imposing them on capitalists, limiting the conversion of assets into capital, finding new mechanisms to give voice to the underprivileged, resurrecting traditional limitations on capital, enabling democracies to join forces in fighting capitalist excesses, and, finally, reforming the market for lawyering. *Id.*, at 226–28.

84. *Id.* at 229.

85. In her most recent work, Pistor paints the reformatory potential of the law in much darker colors. See PISTOR, *supra* note 38, at 156–71.

the only way to understand redistributive incrementalism. In search for further theoretical refinement, let us return to critical legal studies once more.<sup>86</sup> Duncan Kennedy, drawing consequences from his reconstruction of Ricardo and Marx, proposes another strategy in which incrementalism does not purport to roll back that which mathematically cannot be done. What Kennedy develops instead is a classic case study of the theoretical hallmark of critical legal studies that it is not the law as such, but rather its indeterminacy that turns law into a tool of power and privilege.<sup>87</sup> In Kennedy's view, it is a mistake to assume that the abstract concepts of property and contract will determine the outcome of bargaining. Instead, the classic critical legal studies move is to argue that the indeterminacy of the ground rules of private law will likely leave at least some leeway for bargaining in favor of the weak. Among the many factors that shape the outcome of capitalist bargaining is, for instance, the extent to which the law can be enforced. Without enforcement, the capitalist's property right is only valid on paper. But there are many more factors to consider that are, notably, not a mere function of legal entitlements: Who controls the judiciary? Is it farmer-friendly or landlord-friendly?<sup>88</sup> A likely question that a landlord versed in critical legal studies might ask himself when confronted with a potentially violent farmer on his remote rural premises might be "Where is the nearest fire department?"<sup>89</sup> The upshot of all of this is that "neither the abstract concept of property nor that of contract—and certainly not the chaos of tort theory—gives a plausible description of what the rules are going to be in actual country sides and urban neighborhoods."<sup>90</sup> In other words, a truly radical critique of capitalist law will not stop at the fetishized form of private rights, but will go on to deconstruct the legal form itself as a randomly malleable tool of power.

What does this mean in practice? Kennedy considers it a worthy project for left-wing legal theory and activism to look for pockets of capitalist profit that could be exploited in favor of the poor, provided, of course, that the legal theorists or activists are sufficiently certain that in doing so, they will not hurt the people they are trying to help.<sup>91</sup> Yet, there will most certainly remain doubts whether unintended costs to the beneficiaries can be fully avoided.<sup>92</sup> This follows from the very logic of the critique of legal indeterminacy. If legal entitlements are too indeterminate to predict the outcomes of capitalist bargains, so are the legal

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86. See generally Samuel Moyn, *Reconstructing Critical Legal Studies*, YALE LAW SCHOOL PUBLIC LAW RESEARCH PAPER (2023), <http://dx.doi.org/10.2139/ssrn.4531492> [<https://perma.cc/TPJ5-EQGD>] (reinterpreting the legacy of critical theories of the law).

87. KENNEDY, *supra* note 2, at 81–92; cf. Kennedy, *supra* note 23, at 29–36. To be sure, Kennedy concurs with Pistor that capitalism can and actually should be regulated by embracing classic social democratic and even straightforwardly socialist tenets. *Id.* at 34–35.

88. For these and further examples, see *id.* at 30–33.

89. *Id.* at 31. With respect to the undertheorized impact of violence on bargaining, see *Id.* at 32 (citing Arthur Allen Leff, *Injury, Ignorance, and Spite. The Dynamics of Collective Coercion*, 80 YALE L.J. 1 (1970)).

90. KENNEDY, *supra* note 23, at 32.

91. Cf. *supra* note 23 and accompanying text.

92. Bruce Ackerman, *Regulating Slum Housing Markets*, 80 YALE L.J. 1093, 1167 (1971).

remedies in favor of the poor. In the end, the capitalists might once again come out ahead. Ironically, neoclassical welfare economics remains the methodology of choice to attain at least relative clarity about the potential outcomes of redistributive policies, whether beneficial or detrimental. According to Kennedy, the results of such a marginally random strategy of redistribution should be preferred to no redistribution at all, regardless of whether “the rule changes in question are merely palliative of oppression and exploitation . . . or ‘structural,’ meaning promising substantial and permanent shifts in surplus in an egalitarian direction.”<sup>93</sup>

Yet, the telling epithet “palliative” in the last sentence points to an even more crucial limitation of this argument: Kennedy offers no explanation on how the proposed strategy of small-scale exploitation of pockets of capitalist wealth, wherever local activism can find them and muster enough resources to attack them, can ever meaningfully tilt the structural balance of capitalist power encapsulated in the economic analysis of bargaining power Kennedy himself embraces. There is no place in the argument to suggest how the gap between the first alternative of a merely palliative redistribution of capitalist wealth and power, which would shift the balance a little from, say, 99%–1% to 95%–5%, and the second alternative of truly “structural” changes into an overall more egalitarian distributive pattern of 50%–50% or at least 70%–30% can be closed. What Kennedy’s argument doesn’t question at all—and consistently so on the basis of his exegesis of Ricardo and Marx—is the grossly inequalitarian pattern of the distribution of bargaining power in capitalist transactions as a function of microeconomic laws reflecting the relative time-sensitivity of the bargaining partners. The mere existence of durable property rights, however indeterminate they may be, plays a crucial role in the constitution and perpetuation of this pattern.

In the end, Kennedy’s argument for redistribution via indeterminacy boils down to a moral claim on why it should be considered legitimate to use the tools of private law to selectively redistribute wealth from some capital owners to the poor while letting others get away scot-free. This approach becomes even more contentious if the ones attacked happen to be the relatively most vulnerable within the capitalist class, say “upwardly mobile black owner-occupant landlords of slum buildings.”<sup>94</sup> For Kennedy,

[t]he ethical justification for opportunism, that is, going after whichever exploiting transaction partner appears vulnerable to local expropriation, is first that the profit in question has no ethical claim to respect. Second, given the very limited power that the system makes available for the defense of the interests of the poor, whoever has a chance to use some of it has to use it situationally or not at all.<sup>95</sup>

But this, again, begs the question: Capitalist profit does indeed have an ethical claim to respect unless one were to argue that private law, private property, and

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93. KENNEDY, *supra* note 23, at 36.

94. *Id.* at 40.

95. *Id.* at 39 (following Bruce Ackerman, *Regulating Slum Housing Markets*, 80 YALE L.J. 1093, 1169–74 (1971)).

a liberal market economy are altogether illegitimate and unsupportive of social wealth and well-being.

It leaves a bad aftertaste to use the capitalist economy as an activist playground for a “modern law of war” in which a romantic reading of radical chivalry translates into a triadic code of honor—“don’t target innocents,’ ‘when you can’t avoid hurting them, observe an idea of proportionality in terms of the gains obtained at their expense,’ ‘excessive force is wrong no matter what the provocation.’”<sup>96</sup> This is the case not least because it comes at a cost to the rule of law. The maximum return of palliative redistribution seems to be that some of the unentitled get a modicum of compensation at the expense of some randomly selected asset owners for whom this strategy will likely smack of expropriation, corruption, and despotism. Moreover, the owners will always attempt to pass on the cost to the unentitled side, and thus hurt the people. Again, one stands at a crossroads. Accepting the law’s defining power for the existence of capitalist markets implies accepting that the law, taken seriously, protects injustice. Rejecting the law as a constructive power of social organization and putting private assets up for grabs for anybody who happens to set the master’s house on fire comes at the cost of revolution.<sup>97</sup>

## VI

### CONCLUSION

The point of departure of this article has been the proposal of recent Law and Political Economy scholarship that the law should be used as a productive force to regulate the excesses of capitalism by setting goals of democracy and equality ahead of efficiency. In this article, I argued that this claim is problematic for several substantive as well as methodological reasons.

First, I argued that unequal bargaining power lies at the core of the structurally unequal distribution of the cooperative surplus in capitalist bargains. This insight, based on the methodological repertoire of classical and neoclassical economics, is much more powerful than it appears at first sight. In particular, it implies that bargaining power should not be imagined—as it is usually done by the law—as a power differential between the parties that can be readjusted on a sliding scale towards the ideal of parity. I argued that bargaining power in capitalist bargaining has to be understood as strongly one-sided due to the crucial relevance of time-sensitivity for the outcome of the bargaining process which, in capitalist markets, is largely a function of the one-sided distribution of durable property rights. Bargaining power can thus be formulated as the economic core of theorizing inequality.

Second, a corollary of the inescapable impact of the economics of bargaining power is that conventional legal strategies to remedy unequal bargaining power

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96. KENNEDY, *supra* note 23, at 41.

97. See generally AUDRE LORDE, *THE MASTER’S TOOLS WILL NEVER DISMANTLE THE MASTER’S HOUSE* (1984).

through regulations like mandatory statutory rules on boilerplate clauses, rights of information and cancellation, mandatory warranties of liability, or collective bargaining are highly unlikely to change the general pattern of the outcomes of capitalist bargaining. Instead, such approaches incur the systematic danger of imposing an additional cost on those they are aiming to protect.

Third, incremental strategies of legal regulation that primarily address the outer legal framework of capitalist bargaining—that is, tax law or conflict of laws—will have limited or no effect on the outcomes of capitalist bargaining because they fail to address the root cause of unequal bargaining power. As opposed to current Law and Political Economy approaches, critical legal studies has proposed a slightly different path to selectively exploit legal indeterminacy in order to redistribute wealth from capitalists to the poor. Yet, this path will at most effectuate palliative redistribution, meaning that it will not change the overall distribution of capitalist wealth in more than marginal cases, where it comes at an additional cost to the rule of law.

Finally, the argument throughout the article has shown that the methodological repertoire of classical and neoclassical economics is indispensable as an analytical tool for theorizing markets. Microeconomic and macroeconomic arguments, methods, and models have appeared in various approaches and arguments, especially those purposing to regulate markets in favor of the underprivileged. Critical legal studies has not shied away from using this methodological repertoire for its progressive goals in the 1970s and 1980s. Today's Law and Political Economy scholarship might benefit from this methodological legacy.