Law, Inequality, and Power: The Legal Construction of 21st Century Capitalism

Thursdays, 5-7pm, WCC Room 3009
Harvard Law School | Fall 2017

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SYLLABUS
VERSION 1.2 (Last revised: December 21, 2017)

How does law construct inequities of economic opportunity and power? How have changing ideas of political economy shaped law and public policy—and in turn, 20th and 21st century capitalism—over time? What are the normative and historical foundations for today’s movements for structural racial and economic justice? What are the prospects for these efforts in a rapidly changing political context of 2017?

The seminar will address these questions through a variety of readings that include (i) historical theories of law and political economy; (ii) new scholarship on law, inequality, capitalism, and social movements; and (iii) cutting-edge legal and policy debates to explore the construction of inequality today, and to imagine what a more equitable, inclusive, and democratic 21st century social contract might look like.

Specific topics of discussion may include: the changing nature of work in an increasingly automated, fissured and on-demand economy; the eroding safety net; new forms of worker organizing; structural racism and new movements for racial equity; economic segregation and the city; competition policy and 21st century corporate power; finance and financialization.
Contact information

Feel free to stop by my office anytime, or you can email me to set up a specific time. You can also contact my Faculty Assistant, Anna Kim Reilly (anreilly@law.harvard.edu; Griswold 2 South, tel. 617-495-3117).

Class commitments

- **Attendance.** Students should plan to attend class regularly. If there is an emergency or a personal situation that might affect your attendance and your ability to keep up with the material, please get in touch and if need be, we can meet separately to make backup arrangements.
- **Reading.** The syllabus below outlines reading assignments for each class. Most readings will be posted on the course website. Assignments may be updated or revised over the course of the semester (with advance notice of course!).
- **Participation and engagement.** As a seminar, this class depends on everyone’s willingness to engage with one another and participate. I strongly encourage each of you to come to class with questions, comments, and reactions, and to engage with one another’s points throughout our discussions.
- **Mutual respect and consideration.** We will be engaging some contentious questions over the course of the semester. I ask all of us to engage in these discussions in a spirit of shared respect and consideration for the different life experiences and viewpoints represented in the room.

Reading assignments

Assigned readings are listed in the syllabus below. I recommend that you read them in the order listed.

Almost all the readings will be in PDF or web link form on the course website. Readings marked with (\(^\)) are from books that you should purchase online, or borrow from the library—these are books where we are reading longer selections beyond what is permitted to post online.

Occasionally, “SUPPLEMENTAL” readings will be listed – these are truly optional: they are listed for your information, in case any of you want to dig deeper into a particular area of interest.

Assessment

- **Response papers:** Each student will be required to submit FOUR response papers of approximately 2-4 pages each. You can pick which weeks you would like to submit a response paper. Response papers will be due via email by 11:59pm Wednesday night, the night before class.
- **Class participation** will also contribute towards the final grade.
- **Optional alternative - longer paper:** If any of you would like to do a longer research paper project (e.g. ~20 pages or more), you may do so in lieu of the response papers. If you pursue this option, please get in touch with me to discuss possible topics by Oct 6. We will discuss topics, and a reasonable timeline for your paper.
Course timeline

1. Thursday, September 7
2. Thursday, September 14
3. Thursday, September 21
4. Thursday, September 28
5. Thursday, October 5 [Paper writers – meet to discuss paper topics]
6. Thursday, October 12
7. Thursday, October 19
8. Thursday, October 26
9. Thursday, November 2
10. Thursday, November 9
11. Thursday, November 16

November 22-24, 2017 [Thanksgiving Break]

12. Thursday, November 30

December 11-19, 2017 [Upper-level Fall Term Exam Period]
   [Paper writers submit final papers]
(1) Inequality as a product of structure

Thursday, Sept 7

Social, economic, and racial justice as a property of structure
- Iris Young, Responsibility for Justice, Oxford University Press, 2011, pp. 43-64

What does structural equality require?
- Elizabeth Anderson, “What is the Point of Equality?” Ethics 109 (January 1999), pp. 287-9, 308-9; 312-4; 315; 316-21, 336-7

Inequality, opportunity, and constitutional political economy
  - OPTIONAL: Skim pp. 63-79 (on inequality and oligarchy in the Jacksonian era)

Supplemental readings
- K. Sabeel Rahman, Democracy Against Domination (Oxford University Press, 2017), pp. 78-88 (on dyadic and structural domination)
Documenting inequality: Wealth and capitalism in the 21st century


Inequality accelerated? Automation and technology


Legal drivers: The changing nature of work

- David Weil, *The Fissured Workplace*, pp. 1-3, 10-26, 30-42, 44-75

Debt, finance, and political economy


Political drivers:


Supplemental

- John Maynard Keynes, “Economic Possibilities for our Grandchildren” (1930)
- *Planet Money podcast # 641*, “Why we work so much” (on Keynes)
- *Planet Money podcast # 715*, “The Sewing Robot” (on automation)
- Rana Foroohar, *Makers and Takers*, especially Ch. 4 (on the rise of activist investors), and Ch. 8 (on finance and the erosion of the safety net and pensions)
(3) Social contract gone wrong: exclusion and extraction

Thursday, Sept 21

The exclusionary New Deal


Inequality and the safety net: welfare, housing, social services

- Kathryn Edin and H. Luke Shaefer, $2 A Day: Living on Almost Nothing in America, 1-33, 42-8
- Mike Konczal, The Violence of Eviction, Dissent (Spring 2016), available online here: https://www.dissentmagazine.org/article/the-violence-of-eviction-housing-market-foreclosure-gentrification-finance-capital

Inequality and basic goods


Supplemental

- Matthew Desmond, Evicted (Crown, 2015)
- Michael Katz, The Undeserving Poor (Oxford University Press, 2013), 1-34, 269-77
- Shayna Strom and Mark Schmitt, “Protecting Workers in a Patchwork Economy”, The Century Foundation (April 2016)
Universal basic income, or portable benefits?

- Andrew Flowers, “What would happen if we just gave people money?” *FiveThirtyEight* (2016)

Radical reform in administration


Case studies: READ AT LEAST ONE

(5) Building countervailing power Thursday, October 5

Power, citizenship, and the welfare rights movement
- Premilla Nadasen, Welfare Warriors (Routledge), pp. 15-43, 45-77

The collapse and potential rebirth of organized labor

Supplemental

- Michael Katz, The Undeserving Poor, pp. 103-113, 119-135
- Kate Andrias, Separations of Wealth: Inequality and the Erosion of Checks and Balances, 18 J. Const. L. 419 (2015)
- Daryl Levinson, Looking for Power in Public Law, 130 Harv. L. Rev. 33 (2016)


Supplemental


Austerity, under-investment, and urban inequality


The financial and corporate takeover of the city


Policy and legal responses?

- Anderson, The New Minimal Cities, pp. 1195-1205
- *Bank of America et al. v. City of Miami and Wells Fargo et al. v. City of Miami*, 15-1111 and 15-1112, Brief of Housing Scholars as Amici Curiae in Support of Respondent, City of Miami, Florida, in the Supreme Court of the United States

Supplemental

Social movements and urban equity

Policy Responses to the crisis of urban inequality
- David Madden and Peter Marcuse, In Defense of Housing: The Politics of Crisis, Chapter 5 (on a more radical right to housing)
  - Rise Together Detroit, “Proposed Community Benefits Ordinance”.

Supplemental
- David Harvey, Rebel Cities: From the Right to the City to the Urban Revolution (Verso, 2013), pp. 3-25
- Patrick Sharkey, Stuck in Place, Chapter 7, esp. pp. 169-199
- Partnership for Working Families, “Common Challenges in Negotiating Community Benefits Agreements” (January 2016)
Reclaiming antitrust: Market structure and private power  Thursday, Nov 2

A) Antitrust and corporate concentration as a deep driver of inequality

- Joseph Stiglitz, America Has a Monopoly Problem—and It’s Huge, The Nation, October 23, 2017
- The Economist, “Too Much of a Good Thing?” March 26, 2016
- Council of Economic Advisors, “Benefits of Competition and Indicators of Market Power” Issue Brief (April 2016)

B) Is our concentration problem a failure of antitrust law?

- Daniel Crane, “All I Really Need to Know About Antitrust I Learned in 1912,” 100 Iowa L. Rev. 2025 (2014)

C) Case study: antitrust revived today?

- Barack Obama, Executive Order, “Steps to Increase Competition” (April 2016)
- Sherman Act and Clayton Act – excerpts

Supplemental

- Elizabeth Warren, “Reigniting Competition Policy” (June 2016)
- Spencer Weber Waller, Matthew Sag, “Promoting Innovation,’ 100 Iowa L. Rev. 2223 (2014), pp. 2223-9, 2237-47
(10) Technology as a driver of structural inequality

Thursday, Nov 9

Technology, private power, and the new platforms

- Lina Khan, Amazon’s Antitrust Paradox, 126 Yale L. J. 710 (2017), pp. 746-756, 768-783

Big Data, AI, and structural discrimination and inequality

- Frank Pasquale, Black Box Society: The Secret Algorithms That Control Money and Information (Harvard University Press, 2015), Chapter 2

Combining platform power and AI: the case of information platforms

- Zeynep Tufekci, We’re building an artificial intelligence-powered dystopia, one click at a time, TED Talk, September 2017. Online here: https://www.ted.com/talks/zeynep_tufekci_we_re_building_a_dystopia_just_to_make_people_click_on_ads/transcript

Policy responses

- Khan, Amazon’s Antitrust Paradox, pp. 790-802
- Madden et al, Privacy, Poverty, and Big Data, pp. 113-122
- Rahman, “Monopoly Men,” Boston Review, October 2017
  - Online here: https://bostonreview.net/science-nature/k-sabeel-rahman-monopoly-men

Supplemental

A) Diagnosing tech platforms

- Robert Epstein, “How Google could rig the 2016 election,” Politico, August 2015

B) Big data and AI

- Cathy O’Neil, Weapons of Math Destruction (Crown, 2016)
  - Online here: https://www.youtube.com/watch?v=gdCJYsKIX_Y
- Barocas and Selbst, Big Data’s Disparate Impact, 104 Cal. L. Rev. 671 (2016)

C) Policy responses and challenges

- Paul Ohm and Blake Reid, Regulating Software When Everything Has Software, 84 Geo. Wash. L. Rev. 1672 (2016)
- Pasquale, Black Box Society, pp. 140-79, 208-18
- Frank Pasquale, “Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines,” University of Chicago Legal Forum (2008), Part III
The problem: financial crisis, finance sector, financialization

- Rana Foroohar, American Capitalism’s Great Crisis, Time Magazine, May 12, 2016

Putting finance back in its place

- Mehrsa Baradaran, It’s Time for Postal Banking, 127 Harv. L. Rev. F. 165 (2014)

Supplemental

- ^Foroohar, Makers and Takers, especially: pp. 29-61, 62-89 (on changing culture of business); 99-120, 152-70 (on business education).
- Michael Barr, The Financial Crisis and the Path of Reform, 29 Yale J. Reg. 91 (2012)
- Eileen Appelbaum, Private Equity At Work, especially Chs. 1, 3.
- Benjamin Friedman, “Is our financial system serving us well?” Daedalus (2010)
- Roosevelt Institute, Untamed, Part 2 (on financialization) and Part 3 (on regulatory reform)
Race, class, and the challenges of inclusive populism:
- Keeanga Yamahtta-Taylor, From #BlackLivesMatter to Black Liberation (Haymarket Books), Chapter 7, pp. 191-219

Economic opportunity and social inclusion in the 21st century?
  - Note: pp. 63-79 cover the Jacksonian and early republic era, read if interested, but for our discussions that part can be skipped.
- Movement for Black Lives platform, online at: https://policy.m4bl.org/platform/

Supplemental