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Closing Remarks: Law and Inequality After the Crisis

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I am honored to have been asked to give the closing remarks to what has been an inspiring and insightful conference, and humbled to do so before so many respected friends and colleagues.

I think my most important duty before doing so is to thank the truly amazing students who conceived of and executed this conference from start to finish: Brian Highsmith, Lina Khan, Urja Mittal, and Jake Struebing, and also all of the student moderators too.

I also want to thank all the marvelous panelists who traveled from far and near to be here with us. It has meant so much for us to have you share your thinking and research on these urgent questions. And a particular thank you to those who gave the keynote and lunchtime addresses—Vanita Gupta, Zephyr Teachout, Justice Goodwin Liu, and Daniel Markovits.

It has been a fantastic conference—and for that reason, I will not prevail upon your alertness too much at the end of a long day, but will simply offer a few remarks about what I have heard and learned, and will try to connect that with some of the things I have been thinking about recently.

It might be easiest to begin with how we got to this point: to a large, well-attended conference on law and inequality at Yale Law School, in which my fellow panelists have called for experimenting with new forms of democracy, transformative socioeconomic changes, and a renewed and deepened commitment to the rule of law. I must say, if you would have told me ten years ago that we would be having this conversation in this hallowed room, I would have doubted it. Of course, Bernie Sanders and Hillary Clinton were having a rather similar conversation on national television just a few days ago, so the first lesson is that we should always be ready for surprises.

For me, and I suspect for many in this room, the immediate prompt to thinking about law and inequality was the vigorous conversation about economic inequality that Thomas Piketty's *Capital in the Twenty-First Century* kicked off last year.¹ For all that remains contentious in the book, its extraordinary reception seemed to lift a stigma from discussions of inequality in main-

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1. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2013).

stream and even elite settings. Like many folks here—Jedediah Purdy, Amy Kapczynski, Daniel Markovits, Jacob Hacker, and others—I have drawn on Piketty’s scholarship in my own written work.² I believe that my broadly sympathetic review of *Capital in the Twenty-First Century* was probably behind the student organizers’ decision to privilege me with these closing remarks. So I will use Piketty’s work as a frame for them.³

Piketty’s book sparked an unusually rich set of debates about the consequences of capitalist development and the production and reproduction of inequality across several centuries. In brief, he found that over the past several centuries, economic inequality has mostly increased across all the countries for which he had adequate data (meaning, mostly countries with relatively developed tax systems). The one exceptional period was the roughly three decades of post-war economic recovery, known by a variety of superlatives across different countries: the “post-war economic miracle” or the “Golden Age of Capitalism,”⁴—and translations or more particular names in France (“*les trente glorieuses*”⁵), Germany (“*wirtschaftswunder*”⁶), Italy (“*miracolo economico*”⁷), Japan (“economic miracle”⁸), Sweden (“*rekordåren*”⁹), and pretty much any other in-

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2. See JACOB HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 14–20 (2010); DANIEL MARKOVITS, MERITOCRACY AND ITS DISCONTENTS (forthcoming 2017); David Singh Grewal & Jedediah Purdy, *Introduction: Neoliberalism and Law*, 77 LAW & CONTEMP. PROBS. 1, 21–23 (2015); Jedediah Purdy, *Wealth, Inequality, and Democracy*, NOMOS (forthcoming); Amy Kapczynski, *Four Hypotheses on Intellectual Property and Inequality* 1–4 (Working Paper Prepared for the SELA Conference, 2015), <http://piketty.pse.ens.fr/files/Kapczynski2015.pdf> [<http://perma.cc/7QPV-YSZW>].
 3. David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014).
 4. STEPHEN MARGLIN & JULIET SCHOR, THE GOLDEN AGE OF CAPITALISM: REINTERPRETING THE POSTWAR EXPERIENCE 41–46 (1990).
 5. JEAN FOURASTIÉ, LES TRENTE GLORIEUSES, OU LA RÉVOLUTION INVISIBLE DE 1946 A 1975 (1979). For a retrospective on French post-war economic performance in the *trente glorieuses*, see JEAN PIERRE DORMAIS, THE FRENCH ECONOMY IN THE TWENTIETH CENTURY ch. 2 (2004).
 6. Rolf H. Dumke, *Reassessing the Wirtschaftswunder: Reconstruction and Postwar Growth in West Germany in an International Context*, 52 OXFORD BULL. ECON. & STAT. 451 (1990).
 7. VALERIO CASTRONOVO, L’ITALIA DEL MIRACOLO ECONOMICO (2014).
 8. See, e.g., Hugh Patrick & Henry Rosovsky, *Understanding the Japanese Economic Miracle*, 13 BROOKINGS BULL. 4 (1976).
 9. The use of the term “record years” to describe Sweden’s post-war boom was, in fact, originally ironic—the title of a controversial documentary, *Rekordåren 1966, 1967, 1968 . . .*, which criticized the ideal of constant growth. See Anders Kreuger, *The Welfare State Is Not a Thing of the Past*, L’INTERNATIONALE, at n.3, http://www.internationaleonline.org/research/real_democracy/28_the_welfare_state_is_not_a_thing_of_the_past [<http://perma.cc/RUU9-LRMV>].

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dustrial country that saw exceptionally high growth rates *and* widely shared growth from roughly 1945–1975.¹⁰

But the post-war boom was not to last. Starting in the 1970s and 1980s—and continuing through to today—inequality reasserted itself, with increasing vigor, and across a broad swathe of the world, even in European countries with much more progressive welfare states and government redistribution than the United States.¹¹

This inequality has many consequences, including an increasing accumulation of capital and concentration of its ownership; a higher share of capital's take of overall national income; an increase not only in inequalities of wealth but also in incomes, given the portions coming from capital; and the possibility of “super salaries” for the managers of capital assets. Fundamentally, it signals a preponderance of capital over labor in the generation and distribution of income and wealth: as Piketty describes it, “[C]apital reproduces itself faster than output increases.”¹²

But what is behind this inequality? Piketty's argument was popularly associated with a “law” expressed in the unexpectedly charismatic inequality $r > g$, meaning the rate of return on capital exceeds the rate of economic growth generally (producing disproportionate accumulation to the wealthy, who hold capital).¹³ But this expression simply summarizes empirical findings across a great variety of settings—from the antebellum plantation South, to the England of Jane Austen's marriageable “incomes,” to Silicon Valley—disconnected from any account of what produces the inequality. As I have argued along with other scholars, it is here that lawyers and legal scholars—people who know the institutional details that Piketty's analysis elides—need to bring their insights to bear.

Over this conference, we have heard from remarkable scholars and practitioners about the different ways that law has interacted with this increasing economic inequality over the past decades—sometimes resisting or transforming it, but more often conceding to it, consolidating it, and brokering its conversion into more basic and worrying inequalities of other kinds, including in access to justice and to political power. The next step for legal scholars and activists who want to use Piketty's work, it seems to me, is to understand the trends he highlighted in light of the legal construction of the economy—and the changing juridical landscape in America, and elsewhere, across the last half century. In other words, many of the otherwise disparate trends we have canvassed here—

10. For a set of essays on post-war European economic growth, see *INDUSTRIAL POLICY IN EUROPE AFTER 1945: WEALTH, POWER AND ECONOMIC* (C. Grabas & A. Nützel eds., 2014). For an analysis that questions the coherence of the post-war boom narrative, and identifies divergent trends in different parts and across different sectors of the advanced industrial world, see MICHAEL J. WEBBER & DAVID L. RIGBY, *THE GOLDEN AGE ILLUSION: RETHINKING POST-WAR CAPITALISM* 485–86, 493–95 (1996).

11. For an overview of this increasing inequality, see Grewal, *supra* note 3, at 633–41.

12. PIKETTY, *supra* note 1, at 571.

13. For a discussion of this “law” of capitalism, see Grewal, *supra* note 3, at 641–44.

from the legal consolidation of class through procedural restrictions, to the intersections of racial discrimination and economic inequality, to the increasing power of mega-firms and the super-rich—may have a shared context, which Piketty’s enormous effort in data collection and analysis helps reveal.

The surprising success of Piketty’s book has a context that is relevant here too. Even more surprising than the fact that a seven-hundred-page book filled with graphs was a runaway international bestseller—and this, let me emphasize as an academic, is amazing—is the fact that a sitting Senator who calls himself a “democratic socialist” explained what he means by that to the American people on live television in a campaign for the presidency.¹⁴ If I never expected the former to happen, I certainly never predicted the latter—at least not in my lifetime. Meanwhile, across the Atlantic, a left-wing populist, Jeremy Corbyn, has just routed the extremely well-organized and well-financed vestiges of Tony Blair’s new Labour,¹⁵ while continental Europe is embroiled in major problems whose solution, I think, no one can clearly see, but which has sharpened calls for democratic transformation.¹⁶

Both this burst of radical politics and Piketty’s bestseller would be hard to imagine without the financial crisis of 2008, which I take it for many of the students in this room has been the ongoing backdrop to your late high school, college, and immediate post-college years. For us who were a bit older—and I know many of the folks in this room shared this view, since I was speaking to them about it at the time—the extraordinary thing was how calm things seemed in 2008 and after, especially given the scale of the calamity. I know that Bob Hockett and Jed Purdy both spent time in the Occupy camp at Zuccotti Park, doing good work among well-meaning folks, but outside these small eruptions—and perhaps especially in the policy world and in establishment circles—it was as if nothing had happened that a few new financial rules and a massive bailout could not fix. From 2008 to about 2014, I think a lot of us were in disbelief about how little elite and mainstream discourses had changed in response to the crisis. But it turns out that there were pent-up political frustrations all around that finally did emerge. The Piketty phenomenon, Sanders’ success, and Corbyn’s leadership of Labour—and more elsewhere, and surely more to come—now attest to that.

Piketty’s detailed empirical analysis helped consolidate a new narrative, which we might call the “post-war as exception.” This narrative is now in contest with an older one, which we might call the “post-war as destiny.” Piketty showed that the post-war years were exceptional in their brief reversal of the in-

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14. Jedediah Purdy, *Bernie Sanders’s New Deal Socialism*, NEW YORKER (Nov. 20, 2015), <http://www.newyorker.com/news/news-desk/bernie-sanderss-new-deal-socialism> [<http://perma.cc/PPM5-5255>].
 15. Rowena Mason, *Labour Leadership: Jeremy Corbyn Elected with Huge Mandate*, GUARDIAN (Sept. 12, 2015, 8:27 AM), <http://www.theguardian.com/politics/2015/sep/12/jeremy-corbyn-wins-labour-party-leadership-election> [<http://perma.cc/3LDJ-Z2QE>].
 16. For critical analyses of the crisis in Europe, see Susan Watkins, *Vanity and Venality*, 35 LONDON REV. BOOKS 17 (2013); and Wolfgang Streeck, *Why the Euro Divides Europe*, 95 NEW LEFT REV. 5 (2015).

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equality between r and g ,¹⁷ and this empirical confirmation that they were exceptional has helped many of us ratify our intuitions that things have not been going well in advanced democracies for many decades.

The other, older narrative is “the post-war as destiny.” On this account, the post-war miracle was not an exception, but reflected essentially how capitalism is supposed to function—and the deviation from positive post-war trends is not the return to what Piketty argues is the natural operation of the market, but rather a distortion of what the natural operation of the market would be, if some other factor—usually involving unions or government—could be made to do the right thing.

The ideas of post-war as exception or as destiny implicate different world views—with differences not just in what level of inequality in wealth and incomes you can expect, and how you interpret them, but in how you understand fundamentally the relation between the market and democratic politics. The post-war boom allowed for both high growth and widely shared growth. A lot of political possibilities emerged from that combination—and if you see the post-war as destiny, you will expect these possibilities to continue and probably, too, to globalize.

First, and most important, it became not just desirable, but feasible to think of the economy as a managed domain, an engine for the whole country, which would chug along at a decent clip, generating surpluses that were widely shared among most citizens, all without much need for government redistribution. Of course some people might be left out—but their exclusion was rationalized in this narrative as the result not of the running of the engine, but of outside factors, often contingent and ugly ones: racism, sexism, a historical legacy of slavery or colonialism, and poverty traps of one kind or another. And the policy response in such a world was the response of post-war liberalism, including post-war legal liberalism, of which this school has always been such a remarkable center.¹⁸ Post-war legal liberalism supposed that we could focus on remedying particular exclusions without the need for a comprehensive reassessment because the economy had been tamed through Keynesian planning. And, after all, on issues such as inequality, as Piketty has noted, the elite consensus was that economic inequality might increase with growth initially, but that further growth would eventually tame it—this is the upside-down, U-shaped curve that Simon Kuznets famously mapped.¹⁹

More generally, the idea of post-war as destiny consolidated a particular picture of the possible and desirable relation between markets and democracy, between economics and politics. It also allowed—for a time—those scholars and activists concerned with inequality to focus on non-economic exclusions, even while they also recognized at some level what we now call “intersectionali-

17. PIKETTY, *supra* note 1, at 356.

18. For an account of post-war legal liberalism, see STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 24–57 (2008).

19. See generally Simon Kuznets, *Economic Growth and Income Inequality*, 45 *AM. ECON. REV.* 1 (1955). For a discussion of Piketty’s role in correcting and updating this data, see Grewal, *supra* note 3, at 629–32.

ty,”²⁰ which is to say, the way that different kinds of exclusions or subordinations overlap and ramify. But in the post-war years, the problem was not so much inequality as it was deprivation: we could thus declare a war on poverty without needing also to declare a war on plutocracy. The idea that a tenth of a percent of the population would own a quarter of all national assets, as is now the case,²¹ was not our future, but our past—something from the Gilded Age that we thought we had left behind.

Something changed, of course, and just what it is will continue to be the subject of research and controversy. But the facts on the ground seem to have changed much more quickly than our narrative about them. This is probably because the narrative of post-war as destiny is intimately tied to the idea of the American dream to which it gave rise.

We can and should put all this in concrete generational terms. The parents of the boomers returned from the war to an economic miracle that lasted to roughly the end of their lifetimes. The boomers grew up in the post-war exception, and learned to take it for granted during their formative years. These two generations are not just your grandparents or possibly your parents, depending on your age; they are the people who helped to describe and rationalize, in all the elite discourses of culture, media, and academia, and to inscribe in policy, in all the ways that policy happens, including through law, a vision of the United States as an inclusive democracy in which the terms of economic life had been more or less settled.

This was a wonderful ideal. But what the “post-war as exception” narrative now emphasizes is that it was underwritten by a socioeconomic context that was fading just as those discourses and policies were becoming entrenched. As Wolfgang Streeck argued in a series of compelling works, the history since the mid-1970s across a large swathe of advanced economies—prominently but not just the United States—can be understood as a series of ultimately futile efforts to replicate the conditions of the post-war miracle even after they no longer existed.²² These efforts tried to hide the fact that the glorious years were over—first through inflationary politics in the 1970s; then through the massive expansion of public debt in the 1980s; and then in the privatization of that debt under conditions of low interest rates in the 1990s and 2000s—with the result that only the financial crisis of 2008 really laid bare: that the *trentes glorieuses* are over. We must now return to the fundamental questions concerning the organization of economic life with an understanding of the post-war as exception—not, alas, as destiny.

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20. For a seminal discussion, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.
 21. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* (Nat'l Bureau Econ. Research, Working Paper No. 20625, 2014), <http://gabriel-zucman.eu/files/SaezZucman2014.pdf> [<http://perma.cc/7SPK-HLBX>].
 22. WOLFGANG STREECK, BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM (2014); Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 NEW LEFT REV. 5 (2011).

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We may see all of this clearly enough now, but it was not very clear when I was a student here at Yale in the 1990s. In fact, the contradiction between how we were supposed to understand our world and how it actually *was* proved a source of tremendous frustration and puzzlement for me as a student and young adult, no doubt like many of the other panelists.²³ My late high school, college, and immediate post-college years were spent not in the aftermath of the 2008 financial crisis, but in the immediate aftermath of the end of the Cold War. At that time, the collapse of the Soviet Union was widely interpreted not as the particular failure of a distorted political regime with its highly inegalitarian socioeconomic system, but as the vindication of the “post-war as destiny” narrative. Perhaps paradoxically, but tellingly, the collapse of the Soviet system did not open up a new space for critical self-reflection in the United States. Rather, it helped to consolidate a conception of the market and its relation to democratic politics that had been losing its plausibility for about fifteen years already.

What orientation should we have to our new dispensation? The narrative of “post-war as exception” suggests rather naturally that we look back, before the post-war miracle, to draw lessons and insights from past struggles for justice, including economic justice. What were people who cared about inequality and exclusion—exclusion on grounds of class, race, gender, citizenship status, and so on—doing and thinking in earlier decades of the twentieth century? When we look back to when America was last in a Gilded Age, we see the rise of Progressivism, a renewed commitment to democracy in many forms, and a fundamental struggle over the constitutional order of the republic. Considering that history, we should be hesitant to attribute the post-war economic miracle to reconstruction after the war, as Piketty sometimes suggests; it was also what an economy looked like that had been tamed through new laws in a new regulatory regime, set up after decades of earlier struggle.

The post-war as exception narrative also suggests that we should scrutinize the mainstream views of law, politics, and economics that grew up during and depend upon that exception. Chief among these are the separation of public and private law into distinct domains in which one aims at efficiency and the other deals with public values and redistribution. This fundamental framing persists in large and small ways in much legal scholarship and in the organization of legal instruction, and many of the speakers at this conference have emphasized these and other elements of legal pedagogy and practice as things to criticize and change.

The old view was that markets would self-correct in relevant respects; the new view has to be that they will not, and that they cannot be considered the default state of affairs but rather policy tools whose unequalizing effect must be

23. For a personal account of what it was like to be a young intellectual on the left at that time, see Jedediah Purdy, *The Accidental Neoliberal*, 19 N+1 17 (2014). Purdy now understands his first book, *For Common Things*, which achieved national recognition, as “a symptom of the time . . . between 1989 when I was 14 and the Berlin Wall fell, and 2008, when the financial crisis brought capitalism into fresh question.” *Id.* at 18 (I was Purdy’s Yale Law School roommate at the time his first book appeared, and I share his memory of what it felt like trying to think against the grain at that juncture in history).

guarded against. But as lawyers we know that the devil is in the details: and the details of any regulatory scheme leave open many possible points of capture, as our speakers have made all too clear. And it is not obvious how to build an administrative state capable of deploying market relations to democratic effect without reworking democracy and administration in some fundamental ways that we have not yet started thinking about deeply enough.

To put all this much more plainly: if post-war legal liberalism had a necessary economic context, then those of us who share its values must now think deeply and perhaps more radically about the economy, which we can no longer take for granted as a machine that generates the material basis for our democratic life.

This brings me to the final orientation, which necessarily goes beyond intellectual diagnosis, since we cannot simply allow this criticism of our condition to remain theoretical, as many folks have emphasized over the last few days. To make good on justice and the rule of law, we need to look to institutional solutions, and these will take time. Jacob Hacker yesterday mentioned the cynicism that afflicts most ordinary citizens, who mistrust politics and thus end up ceding power to an organized super-elite. I understand this cynicism, and suspect that many of us share it, at least in our weak moments. But I think this cynicism thrives on our misconstrual of the relation between hope and action. I learned from Roberto Unger that getting this relation right is crucial: if you think that action follows hope, you will remain immobilized, passive in the face of so many seeming “facts-on-the-ground” and highly elaborated reasons for which any transformative action will fail. But this is the wrong way around. Hope does not precede and enable action. It follows it. Action discloses the reasons for hope: it reveals the possibilities for transformation, and that is what generates hope.²⁴

But how is it possible to act without hope? I think it is only possible in solidarity—when you are acting *with* others, and for them—and here I must thank once again my fellow panelists, the audience members, and especially the student-organizers for helping me to feel that solidarity as we together confront a world in which we must learn again to think and to act in powerful new ways.

Thank you.

24. See CORNELL WEST & ROBERTO MANGABEIRA UNGER, *THE FUTURE OF AMERICAN PROGRESSIVISM: AN INITIATIVE FOR POLITICAL AND ECONOMIC REFORM* 11 (1999) (“For hope is more the consequence of action than its cause.”); see also ROBERTO MANGABEIRA UNGER, *PASSION: AN ESSAY ON PERSONALITY* 244–46 (1984).