Economic Justice

Race, Gender, Identity and Economics

Cases and Materials

SECOND EDITION

Emma Coleman Jordan

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CASES AND MATERIALS

ECONOMIC JUSTICE:
RACE, GENDER, IDENTITY AND ECONOMICS

SECOND EDITION

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For the late E. W. Coleman and M. H. Coleman,
my daughters Kristen and Allison and my sisters Betty, Jean and Earlene

INTRODUCTION TO THE SECOND EDITION

We live in a society organized according to two master principles: capitalism and democracy. Although principles and their associated values, institutions, and norms are integral to American life, they often seem to exist in different worlds. Capitalism is often thought of as belonging to the "private" sphere, whereas democracy belongs in the "public" sphere. Capitalism is the business of business organizations and of economic analysis; democracy is the business of politicians and voters and of political analysis. Within the academy, a similar split seems to have created two cultures, like the "two cultures" of science and the humanities of which C.P. Snow originally spoke. Economic analysis has developed a culture of scientific expertise in which developing testable hypotheses with mathematical rigor, constructing quantitative analyses, and making predictions are principal values. Although social scientists increasingly analyze democratic institutions in this way as well, discussions of democracy have more traditionally been the bailiwick of moral philosophers, and more recently critical theorists, who use the language of morality, justice, and the methodological tools associated with the humanities to pursue the "ought" rather than the "is."

The split obtains in legal scholarship as well. In the last few decades, the law and economics movement has had a tremendous impact on legal studies. Like its parent discipline economics, law and economics focuses on questions of transactional efficiency and tends to ignore questions of distribution or justice; it seeks to accurately describe how legal rules work (or don't work), and to the extent it is normative rather than descriptive, the assumed goal is greater efficiency. Traditional legal scholarship, however, has taken the pursuit of distributional justice, fairness, and democratic process as central to its analyses. In the last few decades critical legal scholarship has developed an even more openly moral discourse of justice, focused on the pursuit of equality. Traditional and critical scholars, however, have seldom ventured into the territory of efficiency or the systematic analysis of transactions, just as law and economics scholars have seldom ventured into the territory of fairness and equality.

Interesting exchanges between the two cultures have begun to occur in the last few years. Economics generally, and law and economics in particular, has begun to alter its once iron-clad assumption that people always act as rational maximizers; with the abandonment of perfect rationality, economic analysis is increasingly equipped to address issues, like cooperative behavior, that involve trust as well as immediate self-interest, and motivations more complicated than direct instrumentality. For their part, philosophers and traditional scholars–and even a few critical scholars—have

become increasingly interested in what economic analysis can tell us about institutions and the aggregate behavior of groups in response to incentives. New sub-disciplines like "socio-economics" have emerged to explore the convergence between traditional legal scholarship and law and economics. Yet, a productive conversation between critical legal scholarship and law and economics has only tentatively begun. This casebook is offered as a means of furthering that conversation.

The phrase "economic justice" signals our aim: rather than maintaining the tacit assumption that "justice" has nothing to do with economics and economics nothing to do with social justice, we hope to engage the two cultures with one another. What can economics tell us about democracy and the law? What can theories of justice tell us about economic theory and the law? Why is there no legal language of "class" in the United States, and what might one look like? Rather than asking students to specialize in one or the other discourse, as current legal pedagogy implicitly does, this casebook openly engages students in the project of learning from both discourses, and using each as a means to gain insights on the other.

Moreover, our project here is not only to engage traditional legal scholarship with law and economics, but more specifically critical legal scholarship with law and economics. Critical legal scholarship is not only distinctive in its wholehearted embrace of a moral perspective on politics and law and in its commitment to equality as the master principle; it is also distinctive in its ambition to place issues that have long stymied American society, especially the issue of racial and gender justice, at the center of its normative agenda. Race and gender are so thorny, in part, because they introduce a third principle—community—into the debate between liberty and equality. Neither traditional legal analysis nor economic analysis has paid much attention to the question of who constitutes America, what full citizenship means to those who were originally not included in the American vision, and how a multicultural, multinational society can function within a single economic and political system. Neither traditional legal analysis nor economic analysis has adequately addressed issues like the market value of racialized culture and sexual difference, the borders of national and cultural community, and the problem of remediating long-standing inequalities in both economic and social spheres.

In this casebook, we use the problem of racial and gender injustice as a vehicle for engaging both critical theory and economic theory. Just as race, gender, and class seem inextricably intertwined, economic and critical analysis both seem crucial to unraveling the knot of racial and gender inequality. Moreover, economic analysis and critical analysis may need to influence and be influenced by one another in order for a truly incisive and transformative dialogue about race and gender to emerge in the legal academy and in American society more generally.

This casebook involves students in creating this dialogue. In Chapter 1, we identify a central tension between the culture of traditional legal analysis, with its claims of neutrality and the culture of critical race theory

with its emphasis on subjective narrative. We ask whether legal analysis is (or should it be) a science? Or is legal reasoning inherently interpretive, more art than science? Is the law a neutral and objective forum for conflict resolution, or is it a tool of the powerful? As legal scholars concerned with the impact of subordination in law and in markets, we examine the role that traditional legal analysis plays in reinforcing the rational choice, efficiency, and wealth maximization assumptions of traditional economic views of the operation of markets. It is not surprising to find that claims of neutrality play as central a role in traditional legal theory, as they do in traditional economic analysis.

The challenge to the premise of legal neutrality has brought to the surface the conflict between the two cultures of law. In this first chapter we extend the anti-subordination critique to classic market economics and to law and economics. We believe that the question of method—whether there is an objective science of society, or whether knowledge is inherently perspectival—is of such central importance to understanding the structure of economic inequality that it is the indispensable starting point from which we must begin the three-way conversation between the traditionalists in economics, the traditionalists in law, and the anti-subordination-oriented legal theorists.

The central organizing question of this first chapter: what methods and normative assumptions are most useful in evaluating the complex landscape of law, markets, and culture? What tools are best suited to sort truth from ideology and myth? What would "truth" look like if we found it? We begin with these questions because we believe that unless these intensely contested, yet often invisible, first premises of analysis are explored, it will be impossible to make sense of the claims and arguments of the traditionalists in economics and in law or the contradictory positions of critical race feminist scholars concerned with the problem of intertwined structures of subordination. Throughout this book we will use a variety of tools to pursue our interest in fostering a conversation between economics and the critical perspectives. We will use methodologies and insights from sociology, psychology, and behavioral economics, as well as the various schools of modern legal thought.

Chapter 2 is an entirely new chapter in which we explore the economic and financial collapse of 2008. This crisis began with unregulated and often predatory origination of high cost loans. American financial institutions operated free of important regulatory constraints. In the years between 2004 and 2007, banks and mortgage brokers escalated irresponsible origination and underwriting standards. These loans were then packaged and structured into pools of derivatives linked to subprime home mortgages. The securitization process was an essential element in creating an interdependent a global financial market. However, when the basic assumption of rising home prices proved to be wrong, the home price asset bubble burst, launching a worldwide financial panic. The crisis produced an extraordinarily painful natural experiment in which the neoclassical model of

macroeconomic theory and the deregulatory legal arguments of law and economics failed spectacularly. The failure of the economic and legal theories that we challenged in the first edition gives us no comfort because the economic dislocation of so many ordinary citizens is still unfolding.

Chapter 2 examines the conflicting narratives of the crisis. Members of the private financial sector portray the crisis as an unpredictable natural disaster, a once-in-a-century "tsunami" that "no one could have predicted." Financial regulators, including the Securities and Exchange Commission and the Federal Reserve, tell a story of a stealthy, unregulated "shadow banking" sector over which they had no statutory. In the political narrative, the collapse was a triumph of private greed over civic responsibility, the "fat cat bankers" of Wall Street gaming the system against Main Street. For homeowners, this is a story of easy subprime home loans that turned the American Dream into a personal finance nightmare of foreclosures, job losses, vanishing home equity, constrained family finances for college, and disappearing retirement portfolios. Finally, for taxpayers, the bailout unleashed a deep seated populist outrage that was directed at both politicians and bankers. The competition among these stories continues, more than two years later.

As the second edition goes to press in the fall of 2010, the official autopsy of the crisis is still in progress. The Financial Crisis Inquiry Commission was established to "examine the causes, domestic and global, of the current financial and economic crisis in the United States.".

In Chapter 2 we extend our evaluation of law and economics and its inattention to pervasive problems of economic and social inequality. We begin with a history the Federal Housing Administration (FHA) policies that laid the foundation for racially discriminatory housing finance. One consequence of this FHA history was the creation of a persistent asset gap based on disparities in housing ownership. We provide a history of the subprime loan market. The financial collapse brought a wave of foreclosures on homes that had been financed with deeply flawed loans. The wave of foreclosures has overwhelmed courts and lawyers representing lenders. The problem of mistaken foreclosures and incomplete or fraudulent legal documentation of foreclosure proceeding prompted two important extralegal reactions that we document here: strategic default and squatters. We conclude with a discussion of sustainable housing for low wealth borrowers.

Chapter 3 introduces students to two ways of thinking about the idea of economic justice: one drawing on the Weberian notion of class stratification, and the other drawing on Marx (who drew on early economists like Adam Smith and John Stuart Mill) and the notion of political economy. It introduces students as well to the concept of the United States as a capitalist democracy in which capitalism and democracy popularly inhabit two different spheres, a "public" and a "private," and it helps students see how law is actively engaged in creating and maintaining both spheres, as well as in drawing the line between them. Chapter 1 also engages students in trying to answer the question why there is no developed discourse of

economic inequality within American constitutional law. In pursuing answers to this question, the chapter introduces themes that will reappear throughout the book, including racial injustice and the tangled relationship between racial inequality and economic inequality.

Chapter 4 introduces students to the basic principles of economic theory and the key ideological assumptions that undergird the discipline of economics and thereby law and economics, through an engagement with "classical," free-market economics and some of its critics. We use familiar cases from the first year curriculum in torts and property to provide examples of judicial reasoning that relies upon the law and economics theoretical premises.

Chapters 5 and 6 extend the exploration of the basic tenets of modern economic theory as it has been applied in legal reasoning. Chapter 5 is concerned with the critiques of classic market theory coming from those who share its basic premises. Chapter 6 introduces students to the major challenges to market economics from those who reject the basic premises of that field. In this chapter, we explore the challenges to price theory, rational choice, and wealth maximization premises that have come from those who do not share the faith in markets and private ordering. Within law, these criticisms include doctrinalists who are unconvinced by the positive claim that the common law converges on efficiency, critical legal scholars who reject the normative premise that wealth maximization is a coherent value for evaluating the legal rules that govern the distribution of material goods in a democracy.

In Chapters 7 and 8 we take up the data that confirms the picture of economic inequality. Beyond the numbers, we listen to the voices and narratives of those who are at the bottom rung of wealth and income. We see the role of class and the influence of material culture in degrading the participation of those with the least in the common forums of this society. Finally, these two chapters are concerned with the barriers to economic mobility.

Chapters 9, 10, 11, and 12 take up specific topics that illuminate the interactions among race, gender, and economic inequality, and the sometimes complementary, sometimes conflicting values of liberty, equality, and community. Chapter 9 concerns the family; Chapter 10 concerns culture and identity; Chapter 11 concerns the market value of culture; Chapter 12 concerns underground and informal economies; and Chapter 13 concerns economic borders to community.

Finally, Chapter 14 addresses questions of remediation and transformation. How might familiar legal debates like the one on "affirmative action" be transformed when seen from a perspective that incorporates a sophisticated understanding of the relationship between race and class, and a vision that is enriched by both efficiency and justice concerns?

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EMMA COLEMAN JORDAN

Washington, D.C.
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I would like to thank my faculty assistant at the University at Buffalo, Sue Martin, for getting so quickly up to speed on the thankless task of collecting permissions to reprint; the participants in the 2010 ClassCrits workshop at the University at Buffalo, for provocative and insightful discussion and commentary on the global financial crisis and the state of heterodox economics; and, as always, my brilliant co-author Emma Jordan.

ANGELA HARRIS

Berkeley, California
October 2010

ACKNOWLEDGEMENTS FOR THE FIRST EDITION

The idea for creating teaching materials to introduce law students to a systematic examination of the interdisciplinary dimensions of increasing economic inequality and the role of identity in the distribution of wealth first occurred to me more than ten years ago. My decision to create this casebook arose from my mounting frustration with the conceptual limitations of the consumer protection features of commercial law and banking, the two traditional areas in which I had been working over the course of my career. I deeply appreciate the contributions of Nancy Ota who came to Georgetown Law Center in 1992–93 as a graduate Fellow in the Future Law Professor Program to work with me. She invested her unique imagination and commitment to assist me in creating the first set of teaching materials for the first course on Economic Justice.

This casebook owes much to the confidence and support I enjoyed from my publisher, Steven Errick. His enthusiasm and shared vision for the innovations of this effort and his never-failing generosity in responding to and initiating additional publishing opportunities for the Economic Justice topic were important at critical points in the process. Steve's departure in the weeks before this book went to press was a real personal loss. I look forward to working with the new publisher, John Bloomquist in future editions.

I especially want to thank the many Georgetown University Law Center students who enrolled in the early courses in Economic Justice, and who became my most enthusiastic cheering section (offering rap and pop lyrics, African proverbs, Equal Access to Justice/E.A.T. Justice, a socially conscious business venture and strong counterarguments) as this project moved forward to completion. I learned so much from our intense classroom investigations of some of my then forming hypotheses about educational capital, wealth and income inequalities, intergenerational economic effects, linguistic differences, the relationship of the Constitution to economic outcomes, and the limits of conventional market theory. The richness and complexity of this project owe much to my students.

From my Georgetown law students, I chose outstanding research assistants who worked with passion and conviction on the research for this book. They found many truly important additions to the materials. They designed the critical copyright accounting system, chased elusive copyright holders with the zeal of a "repo" man/woman They kept me laughing when I might have otherwise turned grouchy. They discussed this newly emerging field with me with intelligence and energy. My special thanks go to Angela Ahern '05, Rashida Baskerville '06, Katherine Buell '04, Cassandra Charles '05, Kenneth Leichter '06, William Morriss '05, Michael Radolinski '06, and Joshua Soszynski '07.

Shaping the boundaries of this project required many hours of conversation with colleagues. Steven Salop was exceptionally generous with his time and the contents of his library on economics. The time we spent talking about economics and shuttling from my office to his across the hall, undoubtedly accelerated my understanding of the intellectual framework of modern economics. I benefited greatly from the expertise and gentle prodding of several colleagues: Alex Aleinikoff, William Braxton, Jerry Kang (during his visit in 2004–5), Carrie Menkel–Meadow, Michael Seidman, Gerry Spann, Rebecca Tushnet, Kathy Zeiler and the colleagues who participated in the Georgetown Law Center Summer Faculty Workshop in 2004. If there are any errors in what follows, it must be because I didn't listen to their sage advice.

This project could not have been finished without the superb institutional arrangements in place at Georgetown University Law Center to support faculty manuscripts. Georgetown enjoys an organizational structure that would be the envy of most casebook writers. I received several summer research grants to allow me to devote time to developing and completing the project. In their capacities as lead manuscript editor and faculty services librarian for this book, Zinta Saulkans and Jennifer Locke and her staff were truly indispensable to achieving a high technical quality for the final manuscript. Diane McDonald, my faculty assistant, Derreck Brown, Sylvia Johnson, Toni Patterson, Ronnie Reese, and Anna Selden in the Office of Faculty Support were always optimistic in the face of frustrations and the unexpected nightmares of formatting, and other technical melt-downs. They were responsive to my many requests during the development of this book. Finally, the Office of Information Systems and Technology introduced me to new equipment and software for managing the project. My special thanks go to Dianne H. Ferro Mesarch, Dimo Michailov, Pablo Molina and Barry Wileman.

In 2001, Angela Harris visited at Georgetown from Boalt Hall at the Univ. of California at Berkeley. As we discussed her work on class and race, it became clear that I could benefit from working with her on this casebook. When she agreed to join the project, I could not know then what a terrific contributor she would be. Her intelligence and humor made the work flow effortlessly to conclusion. We truly had fun doing this work; my only regret is that I didn't think to ask her to join me sooner.

Finally, I want to thank my two daughters Kristen and Allison for their patience and understanding during the many hours I devoted to completing this project.

EMMA COLEMAN JORDAN

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