

Wages, Work, Privilege, and Legal Education

*Gene R. Nichol**

In an earlier life, it was my singular fortune to do political work with the late United States Senator from Minnesota, Paul Wellstone. Paul argued, across the nation, that our greatest shortcoming as a people was a growing willingness to “turn our gaze away” from those locked at the bottom of American life.¹ Perhaps our children were doing well, and our friends’ children, and even their children’s children. We understood, no doubt, that life could be a good deal tougher, maybe impossibly so, for lots of others. But they lived across the tracks, or across the state, or across the country from us. We suspected their hardship, and maybe if we saw it close-up we would even have deemed it unacceptable, incapable of being squared with the American promise. But we were not forced to face it. We simply averted our eyes to more tolerable terrain. We could consider ourselves “one nation,” “under God,” replete with “liberty and justice for all.” It was just crucial to cast “our gaze” in the right direction.

This willful blindness, Wellstone argued, enabled a vibrant and boastful democracy to take the economic travails of so many low-wage working Americans off the agenda of both major political parties. Poor and near-poor² citizens constitute the “disappeared” of our politics—state and federal.³ In times of economic growth and broader prosperity, they are largely invisible as we assume, despite many facts to the contrary,⁴ that a rising tide will lift all boats. In times of recession and broad hardship, we focus, oddly, on Wall Street, bankers, and hedge fund magnates as bellwethers of our longed-for recovery. But those who cause economic devastation often escape its woundings. They typically manage, either by speculation or proffered subsidy, even to prosper from the economy’s downturns. Come hell or come high water, the interests of those at the bottom register only lightly, rhetorically. We rarely govern with poor Americans in the lens.

It is well to ask, then, as this Symposium does, whether we might develop, post-recession, a political and legal agenda more congenial to low-

* Professor of Law and Director, Center on Poverty, Work and Opportunity, University of North Carolina; President Emeritus, College of William & Mary.

¹ See generally Gene R. Nichol, *America’s Economic (and Legal) Apartheid: We Simply Turn Our Gaze Away from the Problems of the Poor*, MONT. LAW MAG., Dec. 5, 2003, at 5.

² The term “poor” can be used as a rough approximation to describe those living below the federal poverty standard—or about \$22,000 a year for a family of four. U.S. CENSUS BUREAU, POVERTY THRESHOLDS FOR 2009 BY SIZE OF FAMILY AND NUMBER OF RELATED CHILDREN UNDER 18 YEARS (2009), available at <http://www.census.gov/hhes/www/poverty/data/threshld/thresh09.xls>.

³ See, e.g., LARRY M. BARTELS, UNEQUAL DEMOCRACY 252–54 (2008).

⁴ See, e.g., Joint Legislative Study Commission on Poverty Reduction and Economic Recovery, 2008 Gen. Assemb., 2008 Sess. (N.C. 2008) (testimony of Gene R. Nichol), available at http://www.law.unc.edu/documents/poverty/nicholtestimony_povertycommission.pdf (discussing the rise of poverty in North Carolina from 2000 to 2008).

income working people. Like Yogi Berra, I am not one for prognostication. But there is great room, and great call, for economic policies and practices more potently designed—through employment, wage enhancement, tax relief, and essential social-services support—to lift the prospects of those facing the most acute hardship and most daunting barriers to meaningful opportunity. After briefly describing the impacts of the last two years of massive economic downturn, I will explore an array of policies directed toward a more broadly shared prosperity. And with the reader's grace, I won't stop there.

In the second half of this short essay, I will turn closer to home. I inquire whether some of the claims of economic bias and privilege cast so accurately at our politics might also be directed, with validity and justification, at our own efforts in the legal academy. I ask, consistent with the recent, potent challenge of a national labor leader, whether we work in this arena more readily as "critics" or as "servants" of "economic privilege."⁵ I argue that it is difficult to be satisfied with an honest answer to that query.

I. A SEVERE (AND RISING) AMERICAN ECONOMIC INEQUALITY

The nation is beginning, at least fitfully, to emerge from one of the most devastating economic slides in our history. Following a fraud-, theft-, and greed-induced meltdown of the financial sector, we have experienced the highest rates of unemployment in a half century. Sixteen million of us are, at present, out of work.⁶ Another nine million, against preference, are relegated to part-time employment.⁷ Shattering losses of health care coverage, so often tied to available and secure jobs, have escalated.⁸

Massive wealth and pension assets have disappeared. Long-earned retirements are being deferred or abandoned. Access to needed credit and investment has been radically diminished. Those who produce or manufacture are thus potently burdened—in favor of those who speculate, often betting against the tide of our broader progress. Residential and commercial foreclosure has been epidemic. Whole communities, usually disproportionately populated by persons of color, have been debilitated or financially drowned.⁹ The foundational value of the central and buffeting asset owned by many

⁵ See Richard L. Trumka, *Why Working People are Angry and Why Politicians Should Listen*, Remarks at the Harvard Kennedy School (Apr. 7, 2010) (transcript available at <http://thepage.time.com/remarks-trumkas-harvard-speech>).

⁶ ECON. POLICY INST., *AMERICAN JOBS PLAN: A FIVE POINT PLAN TO STEM THE U.S. JOBS CRISIS 3* (Tom Kiley ed., 2009).

⁷ *Id.*

⁸ See, e.g., CTR. ON POVERTY, WORK AND OPPORTUNITY, UNIV. OF N.C. AT CHAPEL HILL, *DOCUMENTING POVERTY, ECONOMIC DISTRESS AND CHALLENGE IN NORTH CAROLINA 11* (2010), available at http://www.law.unc.edu/documents/poverty/publications/documenting_poverty_finalreport.pdf.

⁹ See, e.g., Michael Powell, *Blacks in Memphis Lose Decades of Economic Gains*, N.Y. TIMES, May 30, 2010, at A1.

low- and middle-income Americans—their home—has been compromised and often worse.

The Department of Agriculture reports that astonishing numbers of us are “food insecure.”¹⁰ One in eight uses food stamps.¹¹ Family homelessness has risen by thirty percent.¹² Over one in five kids lives in stark, unrelenting poverty.¹³ And the numbers are far worse for black, Latino, and Native American children.¹⁴ Racial wealth disparities, long daunting, have exploded.¹⁵ Meanwhile, Wall Street financiers receive government bailouts and use these tax dollars grudgingly wrung from waitresses and coal miners to fund bonuses¹⁶ more patently pornographic than anything ever envisioned under the *Miller* obscenity standard.¹⁷ Anger—real and created, justified and trumped up, direct and displaced, perilous and pretend, beleaguered and bigoted—roils. We have created an astonishing hole out of which we must dig ourselves, and it is not clear that we trust those holding the shovels to accomplish the task. As a result, progress will, no doubt, be slow, and the light above the horizon will likely remain flickering and dim for some time.¹⁸

¹⁰ Food Security in the United States, U.S. Department of Agriculture (Nov. 16, 2009), <http://www.ers.usda.gov/Briefing/FoodSecurity/> (on file with the Harvard Law School Library) (“In 2009, 85 percent of U.S. households were food secure throughout the entire year, and 14.7 percent of households were food insecure at least some time during that year, essentially unchanged from 14.6 percent in 2008.”); see also John Quintero, *Rising Caseloads: Severe Recession Fuels Dramatic Growth in Food Stamp Program*, BTC BRIEF (N.C. Justice Ctr.), May 19, 2009, available at <http://www.ncjustice.org/sites/default/files/2009-FNS%20Caseload%20Brief.pdf>.

¹¹ Rev. Jesse Jackson, *Congress Ignores Nation’s Job Crisis*, HUFFINGTON POST (June 8, 2010, 9:05 AM), http://www.huffingtonpost.com/rev-jesse-jackson/congress-ignores-nations_b_604126.html.

¹² Tony Pugh, *Report Finds 30% More Homeless Families Since 2007*, RALEIGH NEWS AND OBSERVER, June 17, 2010, at 5A (discussing U.S. Department of Housing and Urban Development’s 2009 Homeless Assessment Report).

¹³ CARMEN DE NAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE U.S.: 2009, at 16, 22 (2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf>.

¹⁴ *Id.*

¹⁵ See Powell, *supra* note 9; INSIGHT CTR. FOR CMTY. ECON. DEV., *LIFTING AS WE CLIMB* (2010), available at <http://www.insightcced.org/uploads/CRWG/LiftingAsWeClimb-WomenWealth-Report-InsightCenter-Spring2010.pdf>; CTR. ON POVERTY, WORK AND OPPORTUNITY, UNIV. OF N.C. AT CHAPEL HILL, *RACIAL WEALTH DISPARITY IN NORTH CAROLINA* (2010), available at http://www.law.unc.edu/documents/poverty/publications/racial_wealth_disparity_in_nc_unc_cpwo.pdf; see also Gene R. Nichol, *Toward a People’s Constitution: How Democratic is the American Constitution?*, 91 CALIF. L. REV. 621 (2003).

¹⁶ *Wall Street Bonuses Leap 17 Percent*, RALEIGH NEWS & OBSERVER, Feb. 24, 2010, at 3A.

¹⁷ See *Miller v. California*, 413 U.S. 15 (1973) (providing the standards for defining obscenity).

¹⁸ See, e.g., Christopher Rugaber, *Companies Hire 67,000 Workers, But Jobless Rate Rises*, RALEIGH NEWS AND OBSERVER, Sept. 2, 2010, at A1 (“[H]iring has been weak for four straight months . . . [A]nalysts expect economic growth to be tepid for the rest of the year.”); Bob Herbert, *The Horror Show*, N.Y. TIMES, Aug. 10, 2010, at A19 (arguing that government is not responding to “full-blown unemployment crisis”); Paul Krugman, *The Feckless Fed*,

Still, as improvement beckons, one hopes that our future processes and policies will more clearly focus on the development of an economy that works for us all, one that embraces a heightened concern for those most routinely imperiled and jeopardized in our risky economic pecking order—the bottom third of American life, those who frequently work harder, with less return, than the bulk of us.¹⁹

The American economic landscape, though, is not just one of hardship; it is also a portrait of rank and imposing unfairness. The wealthiest nation on earth, the richest nation in human history, allows shocking numbers of its members to live in severe poverty.²⁰ Income inequality has risen to levels that mock our claimed commitments to equal dignity and citizenship.²¹ We lead, if that is the correct term, the advanced industrial nations in economic disparity.²² It is not a close competition. One scholar has noted that our “income inequality doubles the levels of most European societies,”²³ while the top one percent earns a quarter of all our income and the top ten percent rakes in half.²⁴ Another editorialist notes that the richest one percent “own financial wealth six times greater than the financial wealth of the entire bottom eighty percent” combined.²⁵ We are beyond top heavy.²⁶

Political officials of both parties have embraced breathtaking and even radical steps to rescue our wealthiest financiers from peril, altering foundational economic presuppositions and underpinnings in the process. The longstanding plight of millions of chronically poor and burdened Americans, on the other hand, has triggered no such emergency agenda. It has, for us, long resided snugly within the scope of accepted, natural, and nondiscomforting realities.

A 2005 study of the world’s most affluent democracies found that “the United States stands out as the one country in which increased market inequality [in the latter half of the 20th century] did not produce any increase

N.Y. TIMES, July 20, 2010, at A17 (“[N]ot only is unemployment disastrously high, but most forecasts say that it will stay very high for years.”).

¹⁹ See generally KATHERINE NEWMAN & ELISABETH JACOBS, WHO CARES? PUBLIC AMBIVALENCE AND GOVERNMENT ACTIVISM FROM THE NEW DEAL TO THE SECOND GILDED AGE (2010) (arguing that progress in social legislation requires strong presidential leadership in the face of public disapproval or ambivalence).

²⁰ See DENAVAS-WALT ET AL., *supra* note 13, at 14 fig.4 (showing that 43.6 million Americans were in poverty in 2009).

²¹ See BARTELS, *supra* note 3, at 283–84.

²² See Org. for Econ. Co-Operation & Dev., *Country Note: United States, in GROWING UNEQUAL?: INCOME DISTRIBUTION AND POVERTY IN OECD COUNTRIES 1* (2008), available at www.oecd.org/dataoecd/47/2/41528678.pdf (showing that U.S. income inequality and poverty rates are the highest among advanced nations).

²³ Kenneth A. Dodge, Op-Ed., *Make CEOs Help the Little Guy*, PITT. POST-GAZETTE, Feb. 7, 2010, <http://www.post-gazette.com/pg/10038/1033820-109.stm>.

²⁴ *Id.*

²⁵ Nicholas Kristof, *A Modest Proposal: A King and Queen for America*, N.Y. TIMES, June 8, 2010, at A31.

²⁶ See ROBERT B. REICH, AFTERSHOCK: THE NEXT ECONOMY AND AMERICA’S FUTURE 32–38 (2010) (arguing that American economic inequality has become so pronounced that it threatens our economic vibrancy).

in redistribution.”²⁷ Ten of the eleven nations studied witnessed dramatic increases in income and wealth inequality over the past three decades. In each, except the United States, greater chasms of inequality produced more significant steps towards redistribution.²⁸ While social scientists were proving that unequal societies produce poorer health, greater conflict, and increased violence among their members, we remained unmoved.²⁹

We consistently talk about a defining and constitutive commitment to equality. We pledge our allegiance and dedicate our fates to it, rhetorically. But we do a good deal less to actually bring it about. We seem to move mountains and shove aside claimed central tenets of competitive capitalism to secure the ascendancy of the already economically privileged. But those lodged at the bottom of the ladder are expected to endure hardship, forgo opportunity, jeopardize family security, and abandon investment in their children’s futures in order to navigate the shoals of recession caused by the adventurism of their betters. One can call such a regime many things. But fair and democratic and equal are not likely among them.

II. A BROADENED AGENDA—LETTING THOSE AT THE BOTTOM COUNT

It is not hard to outline at least some steps that could be pursued at both the federal and state levels of government to offer those mired at the bottom a better shot at working their way out of debilitating hardship and poverty. The first, and surely most central, efforts concern employment. As we crawl toward economic expansion, even optimistic estimates assume that unemployment will stay well above eight percent for at least another half decade.³⁰ For perspective, an eight percent official jobless rate is higher than anything we had witnessed in the twenty-five years prior to 2009.³¹ The economy presently shows little ability to create jobs at anything like the rate and the levels we need to become fully utilized.³²

The effects of high unemployment are hugely corrosive. It ushers in tides of human calamity. Families buckle under the strain. Marriages fail,

²⁷ See Lane Kenworthy & Jonas Pontusson, *Rising Inequality and the Politics of Redistribution in Affluent Countries*, 3 *PERSP. ON POL.* 449, 459 (2005).

²⁸ *Id.*

²⁹ See generally RICHARD WILKINSON, *THE IMPACT OF INEQUALITY: HOW TO MAKE SICK SOCIETIES HEALTHIER* (2005) (comparing U.S. with other market democracies to demonstrate that economic inequality leads to potent social stress and mistrust).

³⁰ See, e.g., Bob Herbert, *A Very Deep Hole*, *N.Y. TIMES*, June 8, 2010, at A23; Krugman, *supra* note 18 (claiming that analysts predict high unemployment in United States for years to come).

³¹ Chris Isidore, *Unemployment Hits 25-Year High*, *CNNMONEY.COM* (Mar. 6, 2009, 11:29 AM), http://money.cnn.com/2009/03/06/news/economy/jobs_february/index.htm (on file with the Harvard Law School Library).

³² See, e.g., Herbert, *supra* note 18 (“The economy is showing absolutely no sign of countering the nation’s staggering jobs deficit.”).

abuse rises, children are neglected, and homelessness escalates.³³ Depression, addiction, and despair frequently follow. Workers lose both confidence and capability. Young women and men can't afford to go to college. Those who do go to college face demoralizing job prospects upon graduation—constrained markets that are likely to mar the trajectory of their careers for years. Wages are depressed even for those who aren't cast aside. Entrepreneurial energy succumbs to fear. Needed investment in research and development is deferred. Instead, we move to eat our seed corn. We become more fragile as a society and more broadly jeopardized, more lastingly scarred.³⁴ As Jesse Jackson has put it, “Our 10 percent unemployment is a national emergency, not an acceptable condition.”³⁵ Public sector investments in infrastructure, transportation, and educational facilities would help to fill the gap of under-utilization.³⁶ Tax credits for private sector job creation are crucial as well.³⁷ Chronic, elevated unemployment may suit the fancy of some investors and various low-wage employers, but it is not a tolerable policy for a society looking to the prospects of all its members. We “cannot allow joblessness on this scale to fester.”³⁸

Other actions would aid low-wage workers, once employed, to more effectively lift themselves from poverty. The Federal Earned Income Tax Credit (EITC), created in part to offset the often-regressive impacts of Social Security and payroll taxes,³⁹ has proven to be a successful tool in rewarding work.⁴⁰ A hard look at the disparate American wage structure—where the average compensation for a chief executive officer of an S&P 500 company is over \$10 million annually, 300 times the average employee compensation in those companies⁴¹—suggests that the EITC could be gainfully increased

³³ See Pugh, *supra* note 12 (claiming number of homeless families has risen 30% in past two years).

³⁴ See Katherine Newsome & David Padulla, *Economic Inequality*, NATION, July 19–26, 2010, at 17 (“Scarring is produced by biographies that are deemed deviant or suspect: long periods of unemployment, jobs with fewer responsibilities than one’s education should lead to and the like.”).

³⁵ Jackson, *supra* note 11.

³⁶ ECON. POLICY INST., *supra* note 6, at 12–13.

³⁷ *E.g.*, *id.* at 16–17.

³⁸ Herbert, *supra* note 18, at A25 (quoting Charles McMillion, the president and chief economist of MBG Information Services as stating, “[w]hen you combine the long-term unemployed with those who are dropping out and those who are working part-time because they can’t find anything else, it is just far beyond anything we’ve seen in the job market since the 1930s.”).

³⁹ ANTONIO AVALOS & SEAN ALLEY, NEW AM. FOUND., LEFT ON THE TABLE 4 (2010), available at http://www.newamerica.net/sites/newamerica.net/files/policydocs/Left_on_the_table_NewAmerica.pdf (“Congress originally approved the tax credit legislation in 1975 in part to offset the burden of Social Security taxes and provide an incentive to work.”).

⁴⁰ See *id.* at 5; *cf.* PETER EDELMAN ET AL., GEORGETOWN CTR. ON POVERTY, INEQUALITY AND PUB. POLICY, EXPANDING THE EITC TO HELP MORE LOW-WAGE WORKERS 3–6 (2009), available at http://www.urban.org/uploadedpdf/1001341_eitc.pdf (suggesting that the EITC has created an incentive for low-income women with children to increasingly enter the workforce).

⁴¹ Dodge, *supra* note 23.

and expanded.⁴² State analogs have also proven beneficial—though fewer than half of state governments offer a local EITC.⁴³ Equally important, both state and federal programs could be improved to assure that much higher percentages of low-income workers, eligible for the credits, actually take the steps necessary to secure them. Too many poor families, and their often-distressed communities, leave these crucial resources on the table, unclaimed.⁴⁴

Debates of recent months have again shown an essential need to bolster our tattered economic safety net. Ample and secure unemployment compensation,⁴⁵ temporary assistance with still-necessary COBRA⁴⁶ payments for those who lose employer-provided health care coverage, and federal food assistance are crucial cornerstones for a society of astonishing core wealth that believes in the dignity of its displaced members. The costs of these efforts, and an expanded EITC, could be largely and satisfyingly met with the introduction of a long-overdue federal sales tax on the transfer of various financial assets—similar to what occurs in Great Britain.⁴⁷ A financial transactions tax would, of course, be hugely progressive; the wealthiest ten percent of United States households have over forty-five times the mean financial holdings of the poorest seventy-five percent.⁴⁸

A society concerned with massive and debilitating economic inequality would also make the Social Security system less regressive by lifting the cap on payroll taxes. It would ensure, as well, that our largest governmental housing subsidies don't flow so dominantly to those with the biggest and most expensive homes via the mortgage interest tax deduction. If there is anything good about having a set of economic and political structures heavily stacked in favor of the wealthiest among us, it is, perhaps, that it is not hard to find room for improvement.

⁴² See, e.g., DANIEL P. GITTERMAN, ET AL., CTR. ON POVERTY, WORK AND OPPORTUNITY, UNIV. OF N.C. AT CHAPEL HILL, EXPANDING THE EITC FOR SINGLE WORKERS AND COUPLES WITHOUT CHILDREN 36 (2007), available at <http://www.law.unc.edu/documents/poverty/publications/gittermanpolicybrief.pdf>.

⁴³ See INST. ON TAXATION AND ECON. POLICY, REWARDING WORK THROUGH EARNED INCOME TAX CREDITS (2009), available at <http://www.itepnet.org/pdf/pb15eitc.pdf> (noting that twenty-two states, including the District of Columbia, offer a state EITC—though in eight states the credit is less than ten percent of the federal credit).

⁴⁴ See AVALOS & ALLEY, *supra* note 39, at 6–9.

⁴⁵ At the time of writing, such compensation currently falls short of adequate. See generally Editorial, *The Unemployed Held Hostage*, N.Y. TIMES, June 15, 2010, at A28 (noting that 325,000 workers were cut off of unemployment compensation in first two weeks of June 2010).

⁴⁶ See generally FAQs For Employees About COBRA Continuation Health Coverage, U.S. DEPT OF LABOR, http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.html (on file with the Harvard Law School Library).

⁴⁷ ECON. POLICY INST., *supra* note 6, at 18–19 (suggesting a 0.5 percent financial transactions tax).

⁴⁸ *Id.* at 19.

III. LOOKING MORE BROADLY, LOOKING WITHIN: THE LEGAL ACADEMY AND ECONOMIC PRIVILEGE

Changing public policies in order to assure that government, purportedly dependent on the consent of the governed, does not systematically ignore the economic interests of the majority is beyond crucial. So steps like those I've described above are vital—more important, no doubt, than anything I'll move to pinpoint now. Still, it would be a mistake, in my judgment, not to take advantage of the rare opportunity to contribute to a distinguished American law review symposium, dedicated to economic fairness for working people, by looking somewhat more broadly than any particular set of proffered policy proposals. That is especially true, I think, when presented with the chance to explore analogous questions of the centrality of economic justice, for law students and professors, somewhat closer to home.

One way to do that, particularly in this journal, is to highlight a telling speech given at Harvard University a few months ago by Richard Trumka, president of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).⁴⁹ Trumka noted, and emphasized, the growing anger of ordinary Americans, an anger that now, too frequently, turns to polarization and bigotry, between self-described real patriots and despised others, between those who belong and those who don't.⁵⁰ Given the locale, it was perhaps unsurprising that Trumka called for a bold "alliance between working people and public minded intellectuals."⁵¹ For surely, in his view, a platform directed toward sustaining, high-wage jobs—rejecting mass unemployment and grotesque inequality—is within our ken. A program "other than the dead-end choice between the failed agenda of greed and the voices of hate and division" is central to democratic progress.⁵² We need, Trumka argued, "public intellectuals who will help design the policies that will replace the bubble economy with a real, sustainable economy that works for all of us."⁵³ Ultimately, you "cannot fight hatred with greed."⁵⁴

Most pointed, for our purposes, was Trumka's central challenge: "At this moment of economic pain and anger, political intellectuals face a great choice—whether to be servants or critics of economic privilege."⁵⁵ Servants or critics. Tough words.

I am not as young as I used to be. I am unable, therefore, to give full purchase to such stark dichotomy. Life, economics, law, politics, and even equality are too complex, too contingent, too contradictory for that. Still,

⁴⁹ Trumka, *supra* note 5.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

even here, in the theoretically more activist legal academy, there is too much truth in Trumka's claim—and in its implicit suggestion that our default position, our status quo, is work in the service of economic privilege. We consider ourselves, after all, among the leading students and critical exponents of our varied substantive and procedural fields and disciplines. No assumption goes unchallenged, no predisposition unexposed. Our classroom processes turn on channeled and long-honed practices of skepticism. Students learn a cautious and testy semi-sophistication. We are, in theory, unwilling to take any previously-ordained regime for granted. No squishiness, no untested hegemony reigns here. Our scholarship purports to probe beyond the facile habits of bench and bar—drawing on the varied disciplines of the academy to question the standards, applications, predispositions, and ideologies of law. Surely, the distortions and dominances of economic privilege remain securely, and keenly, within our sights.

It doesn't seem so. We spend, I can attest, endless hours on a curriculum of agreement and expectation, wrongdoing and regulation, taxation and finance, governmental powers and limitations—and the tattered rules and practices that accompany them. The framework is not markedly different than it was generations ago. Yet we dedicate shockingly little time and energy to examining the actors who control the systems we study. Law firms, lobbyists, activists, corporate advocates, regulators, financiers, and the deft turns they execute—the questions of power behind the implementation of all purported legal regimes—largely escape our focus. I would not make the claim that our practices and pedagogies led to the brutal economic inequalities that mark our fortunes. We are too insignificant a cast of players for that. But even a quick examination of our patterns reveals that we too play a part in the marginalization and exclusion of economically disenfranchised Americans. And even if we choose not to think about it, we perform a good deal more readily and more frequently as friends and apologists for economic privilege than as counterweights and opponents to its ascendancy. We do more to thwart equality than to advance it.

A. *Political Outcomes and Legal Legitimacy*

To offer an obvious example, two years ago Larry Bartels published a highly-regarded study entitled, "Unequal Democracy: The Political Economy of the New Gilded Age."⁵⁶ In it, he demonstrated that the "views of poor people have no *direct* effect on the behavior of Democrats or Republicans after they get elected" to the United States Senate.⁵⁷ Senators showed an "utter lack of responsiveness to the views of millions of people whose

⁵⁶ BARTELS, *supra* note 3.

⁵⁷ *Id.* at 282 (but noting the "indirect effect of public opinion through the electoral process," since "the differences in voting behavior between Democratic and Republican senators representing similar constituents are substantial.").

only distinguishing characteristic is their low incomes.”⁵⁸ Economic inequality, Bartels claimed, “has pervasive, corrosive effects on political representation and policy making in contemporary America.”⁵⁹ In Aristotelian terms, he concluded, “our political system seems to be functioning not as a ‘democracy’ but as an ‘oligarchy.’”⁶⁰ It is perhaps understandable, therefore, that we take fewer steps to ameliorate economic hardship than our international peers. According to Bartels, “the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.”⁶¹ These conclusions apparently mirrored another, broader review released by Martin Gilens in 2005. According to Bartels, Gilens found that on “issues on which rich and poor people had divergent preferences . . . the well-off were vastly more likely to see their views reflected in subsequent policy changes” than their economic inferiors. Gilens concluded, Bartels explains, “that ‘influence over actual policy outcomes appears to be reserved almost exclusively for those at the top of the income distribution.’”⁶² This might help explain why massively wealthy fund managers at private equity firms pay lower income tax rates than their secretaries.⁶³

My point, perhaps oddly, is not necessarily that Bartels and Gilens are right—though I’m certain they are. It is, instead, that I am confident most law professors assume these empirical conclusions are apt to be accurate. Three decades of conversations in faculty lounges across the country convince me of at least that. Even so, we press on with our mostly traditional explorations of the law of property, contracts, torts, environmental law, securities regulation, banking, corporate law, constitutional law, and the like—though such economic disenfranchisement would seem to call into question the underlying assumptions of and justifications for much in these varied legal orders. We master our allocated fields, publish our nuanced discourses, produce our (we hope) law-firm-bound graduates, and press on. We assume, despite the purported underpinnings of the rule of law, that there is a “rich people’s” and a “poor people’s” justice—realities that fly in the face of our foundational, constitutive promises of equal participation. But we don’t explore the charade, we don’t measure it, we don’t criticize it, we don’t attack it, and we don’t dwell on it. Mostly, we don’t even mention it. We’re interested, apparently, in other things—though it is hard to imagine how our professorial musings could rival in significance the purchase and subversion of democratic prerogative.

⁵⁸ *Id.* at 285.

⁵⁹ *Id.* at 284.

⁶⁰ *Id.* at 287.

⁶¹ *Id.* at 254.

⁶² *Id.* at 286 (quoting Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. 778, 794 (2005)).

⁶³ See Editorial, *The Unemployed Held Hostage*, *supra* note 45, at A28 (noting an “egregious tax loophole that allows wealthy fund managers at private equity firms and other investment partnerships to pay a top tax rate of just 15 percent on much of their earnings . . .”).

B. Access to the Civil Justice System

The legal academy is similarly inattentive to the largest shortcoming of the actual operation of the American justice system—the denial of access that results for the millions who cannot afford to pay the fare. We know the drill, or at least the tip of the nationally embarrassing iceberg. Study after now-repetitive study demonstrates that approximately eighty percent of the legal need of the poor and near poor in the United States goes unmet.⁶⁴ This means, briefly put, that for about one-third of Americans—in a very broad swath of legal disputes dealing with matters close to the core of human existence—despite the vaunted efforts of legal aid lawyers, pro bono volunteers, and often-heroic non-profit advocates, no meaningful access to the civil justice system is afforded. We claim “equal justice” as the literal linchpin of our regime of constitutional adjudication. What we do, however, has little in common with what we say.

And, of course, we know it. For almost eighty years, in the criminal context, we have declared, flatly, that “the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”⁶⁵ The Justices have declared it to be “an obvious truth” that anyone “haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless one is provided.”⁶⁶ This “obvious” verity escapes us in the civil justice system, though it does not escape our peers around the world. As one ABA resolution put it, “Most European and Commonwealth countries have had a right to counsel in civil cases for decades.”⁶⁷ In rulings that bind over forty nations and 800 million people,⁶⁸ the European Court of Human Rights has determined that, at least in complex cases, indigents will not receive a fair hearing unless represented by counsel at public expense.⁶⁹

We are not, as we sometimes pretend, mere disengaged, neutral arbiters here. We have created overarching tribunals, state and federal, that are the only effective means of finally resolving a huge array of civil controversies.

⁶⁴ See ABA House of Delegates, Resolution 112A 14 (2006) (“Most needs studies conclude the U.S. is already meeting roughly 20 percent of the need”), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>; KEN SCHORR & CAROL SPRUILL, THE INITIAL REPORT OF THE NORTH CAROLINA EQUAL ACCESS TO JUSTICE COMMISSION 8 (2008) (explaining that in North Carolina, “[w]hen they need assistance with a civil legal matter, over 80 percent of low-income people and people of modest means cannot afford to pay attorneys and are unable to secure representation by publicly funded attorneys or pro bono volunteers”), available at <http://www.ncbar.org/download/probono/nceatjFullSummitReport.pdf>; Gene R. Nichol, *Access to Civil Justice in North Carolina*, 14 N.C. ST. B.J. 12, 12 (2009) (“Over 80% of the legal need of the poor and near poor in North Carolina . . . is unmet”).

⁶⁵ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). See also Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to Civil Justice*, 60 CASE W. RES. L. REV. 325 (2010).

⁶⁶ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁶⁷ ABA House of Delegates, *supra* note 64.

⁶⁸ EUROPEAN COURT OF HUMAN RIGHTS, EUROPEAN COURT OF HUMAN RIGHTS IN BRIEF 2 (2009), available at http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404A-AF5BC585/0/Brochure_EN_Portes_ouvertes.pdf.

⁶⁹ See *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) 305 (1979); *Steel & Morris v. United Kingdom*, 41 Eur. Ct. H.R. 22 (2005).

We have also assured that they are complicated, mysterious, cumbersome, professionally technical, adversarial, and expensive. They are as far beyond the ken of even intelligent laypersons as rocket science is to me. We could, of course, have done otherwise. Even now it would be possible to dramatically simplify the rules and resolution methods for large categories of disputes, making the use of lawyers less necessary. We have chosen not to do so. We're responsible for the choice.

One might assume that this largest transgression of the American justice system would have made it to the heart of the variegated, three-year law school curriculum. Not so. Nor is the pervasive exclusion of millions from the effective implementation of the civil justice system a central focus of the academic research of American law professors. Deconstruction, cognitive theory, anthropology, economic modeling, religious hermeneutics—of course. Rank, blatant, long-standing, and undeniable exclusion of poor people? Not so much. They will, as it's said, always be with us.

Most of legal education occurs as if there were no poor and near poor persons in America. Their effective exclusion from the actual implementation of so much of the civil justice system is swept unceremoniously aside. In the halls of the legal academy, the poor are allowed simply to disappear—as they do, typically, before the bench and the organized bar. Economic justice plays virtually no role in the exploration and aspiration of American justice. Economic privilege, however, sits securely center stage.

C. *Legal Education Itself*

Ignoring the impact of economic inequality on the development of legal norms, or on the actual operation of the adjudication system, raises significant questions about whether American legal education bends under the weight of economic ascendancy. It is also reasonable to ask whether the structure of legal education itself—the frameworks, economies, and practices of American law schools—serves principally to foster and strengthen economic privilege, rather than to criticize and call it to task in fulfillment of democratic promise. The answer is not heartening.

The cost of legal education, tied to either tuition or per-student expenditures, has risen dramatically in the past several decades. One broad-ranging study indicated that average per-pupil spending at accredited law schools had increased from \$5,000 to over \$20,000 between 1980 and 2000.⁷⁰ In a 2009 report on higher education, the United States Government Accountability Office (GAO) concluded that public in-state law school tuition had gone up by over seven percent a year, on average, from 1995 to 2008. This

⁷⁰ John A. Seberty, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516, 519 (2002).

was, it reported, a good deal sharper than the experience in some other branches of professional education.⁷¹

In 2008, the average public law school tuition was nearly \$17,000 a year for residents and over \$28,000 for non-residents; average tuition at private law schools exceeded \$34,000.⁷² At least six public schools, remarkably, charged over \$30,000 for in-state students.⁷³ The tuition at several private schools exceeded \$40,000 in 2008.⁷⁴ One scholar has compared the law school “tuition bubble” with the infamous sub-prime market crash.⁷⁵ For students at public law schools who had taken out loans, the average debt in 2007 was nearly \$60,000; for students at private law schools, that figure exceeded \$90,000.⁷⁶ A dramatic drop has occurred in the percentage of law schools whose tuition burden can be met by low-interest Stafford loans.⁷⁷ The executive director of the Association of American Law Schools, Dean Susan Westerberg Prager, has fretted that middle-class access has been fatally compromised.⁷⁸ Kevin Johnson, the dean at the University of California, Davis School of Law, has indicated, more frankly, that “affordable public legal education is no longer in existence.”⁷⁹

This war on access is bad. The reasons it has transpired are worse. The GAO study concluded that “[a more] resource-intensive approach to legal education and competition among schools for higher rankings appear to be the main factors driving law school cost.”⁸⁰ Administrators at most ABA-

⁷¹ U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 11, 16 (2009), available at <http://www.gao.gov/new.items/d1020.pdf>.

⁷² ABA SECTION ON LEGAL EDUCATION, LAW SCHOOL TUITION (1985–2008) (2008), available at <http://www.abanet.org/legaled/statistics/charts/stats%20-%205.pdf>.

⁷³ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 71, at 29.

⁷⁴ EQUAL JUSTICE WORKS, AMERICAN BAR ASSOCIATION LIST OF LAW SCHOOL TUITION AND FEES (2008), available at http://www.equaljusticeworks.org/files/aba_tuition_fees.pdf (listing Columbia, Cornell, New York Law School, New York University, Northwestern, the University of Southern California, and Yale as having tuitions over \$40,000 in 2008).

⁷⁵ Christine Hurt, *Minding Our Own Business Forum: Bubbles, Student Loans and Sub-Prime Debt*, CONGLOMERATE (Apr. 19, 2010), <http://www.theconglomerate.org/2010/04/death-of-big-law-forum-bubbles-student-loans-and-subprime-debt.html> (on file with the Harvard Law School Library).

⁷⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 71, at 17.

⁷⁷ *Id.* at 38.

⁷⁸ Karen Sloan, *At Public Law Schools, Tuition Jumps Sharply*, NAT'L L. J., Aug. 3, 2009, at 1, available at <http://www.law.com/jsp/article.jsp?id=1202432727154>. Of course, it is not accurate to examine questions of access to legal education only by listing rising tuition bills. Financial aid does, in many instances, render legal education affordable to those who could not take advantage of it otherwise. As one who has been both a law school dean and a public university president, though, it has seemed clear to me that law schools, broadly speaking, do not take need-based aid obligations with anything like the seriousness shown by thoughtful undergraduate institutions. The various efforts at Ivy League schools and some of the strongest public universities—like the University of North Carolina and the University of Virginia—to assure that low and modest income students can graduate without debt have not been matched by their respective law schools. And the skyrocketing average law school student loan burden gives irrefutable testament to the fact that need-based aid in law schools is not keeping pace—by a very wide margin—with dramatic and unwarranted tuition increases.

⁷⁹ *Id.*

⁸⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 71, at 11.

accredited law schools said that their efforts to boost their *U.S. News and World Report* rankings had a major impact on tuition levels because “[r]ankings are determined in part by such cost-related factors as per student expenditures, student-faculty ratios, and library resources.”⁸¹ An empirical study commissioned earlier by the Law School Admissions Council similarly determined that the rankings have “created pressure on law schools to redistribute resources in ways that maximize their [*U.S. News and World Report*] scores . . . even if [law school officials] are skeptical that this is a productive use of these resources.”⁸²

This latter report listed massive marketing expenses to improve reputation, merit scholarships to compete for high LSAT students, huge dean and faculty salaries, and spending to “game” (i.e., cheat) the system as causes triggering dramatic cost acceleration.⁸³ Any candid American law school dean would add: significantly reduced faculty teaching loads, dramatically expanded research and leave policies, imposing technological expenses, showy physical facilities, and increased tuition dollars charged to redistribute to high-end merit scholarship recipients as drivers that dominate the modern law school budgeting process. What these causes have in common, of course, is that they offer almost nothing to improve the actual educational experience of law students.

Rising budgets have, though, made life a good deal more palatable for those of us in the trade. We have secured the highest, or among the highest, salaries in the academy.⁸⁴ Our research support, academic leave benefits, and teaching loads have become extraordinarily and needlessly generous.⁸⁵ At the same time, by dramatically increasing the cost of legal education,

⁸¹ *Id.* at 21. See also Eric Kelderman, *Law-School Cost Is Pushed Up by Quest for Prestige, Not Accreditation*, GAO Survey Finds, CHRON. HIGHER EDUC. (Oct 26, 2009), <http://www.chronicle.com/article/Competition-Not/48940> (on file with the Harvard Law School Library).

⁸² MICHAEL SAUDER & WENDY ESPELAND, LAW SCHOOL ADMISSIONS COUNCIL, FEAR OF FALLING: THE EFFECT OF U.S. NEWS AND WORLD REPORT RANKINGS ON U.S. LAW SCHOOLS 1 (2009), available at <http://www.lsac.org/LSACResources/Research/GR/GR-07-02.pdf>.

⁸³ *Id.* See also Sebert, *supra* note 70, at 524–25 (“A more significant portion of the cost increases is due to competition by law schools for students . . . and for reputational rankings How can law schools avoid . . . the ‘positional arms race’ of ever increasing competition for students, faculty and ranking, and the resulting rapidly increasing tuition costs and debt that nonscholarship students bear?”); Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 25–26 (2000) (rankings “often distort law schools’ priorities; the temptation is to underinvest in features that *U.S. News and World Report* editors find unimportant”).

⁸⁴ See, e.g., Jack Crittenden, *Why is Tuition Up? Look at All the Profs*, NAT’L JURIST, Mar. 2010, at 40 (finding that law school faculty salaries have increased by 40% in the last decade, accounting for an estimated 48% of the costs that have driven up tuition 102% at public law schools and 71% at private schools); Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465, 483 (2004) (noting that faculty hiring competitions, increased benefit packages, and a greater focus on research “have only a tangential relationship to the core education of law students [But they] are essential in the arms battle for reputation.”); David Margolis, *The Trouble With America’s Law Schools*, N.Y. TIMES MAG., May 22, 1983, at 21 (reporting on law faculty salaries).

⁸⁵ See Matasar, *supra* note 84, at 482–84.

excluding more low- and middle-income students from enrolling, driving debt rates through the ceiling, effectively closing off opportunities to work in the public service, and indirectly elevating the ultimate cost of the delivery of legal services, we have contributed mightily, if unintentionally, to the crisis in equal access to the justice system. And the marginalization of the concerns and interests of poor people is made notably easier and more “natural” in an academic setting in which almost no students of the most modest economic means appear. When we turn our gaze away, few will be expected to notice. We seem clearly to have served economic privilege, rather than to have thwarted it. And on this front, we have managed not only to foster the fortunes of our most inordinately blessed students; we have secured an impressive ascendancy for ourselves. No chumps here.

CONCLUSION

I introduced the second half of this Foreword with reference to Richard Trumka’s challenge to those who enjoy the happy coincidence of imposing intellect and surpassing educational opportunity—to act as “critics” rather than “servants” of “economic privilege.” Robert Kennedy chided, similarly, “history will judge [us] . . . on the extent to which [we] have used [our] gifts to lighten and enrich the lives of [our] fellow man.”⁸⁶

In one sense, of course, Trumka’s dialectic is too stark. Some in the legal academy, in perhaps modest numbers, press issues and causes of economic injustice with passion, talent, and, on occasion, success. Others, no doubt, overtly embrace an exclusive sanctity for purportedly untrammelled markets—rejecting accommodations to equality in favor of libertarian or utilitarian aims. But most law professors, no doubt, see themselves as adherents of neither camp. They need not be either critic or servant of economic forces and hierarchies. We don’t all see the world in similar ways. We needn’t all fight the same battles. Sometimes, maybe most times, it is possible, even beneficial, just to let things alone. And whether correct or not, that is the way most of us actually lead our professional and intellectual lives. Trumka, one might say, be damned.

The modest point with which I seek to conclude is that this untroubled terrain becomes increasingly difficult, in authenticity and candor, to occupy. It is hard for the piercing, objective student of legal norms to ignore the reality that an overarching source of those norms, the United States Congress, is demonstrably unresponsive to the claims and interests of millions of low income Americans merely because they are low income Americans—despite the purported guarantees of equal membership that undergird our legal order’s legitimacy. It is fanciful, and hugely inaccurate, to explore an adjudicatory process premised on “equal justice under law” while omitting

⁸⁶ Robert F. Kennedy, Address to Students at the University of California, Berkeley (Oct. 22, 1966), in *RFK: COLLECTED SPEECHES* 139 (Edwin O. Guthman & C. Richard Allen, eds., 1993).

from central consideration the knowing, pervasive, and accepted exclusion of millions of poor citizens from the effective operation and implementation of that process because they cannot afford to pay the fare. It is hypocritical, perhaps beyond measure, to operate a regime of legal education designed to provide the democratizing influence of equal opportunity pursuant to professional standards in commitment to the rule of law, while magnifying platforms of economic privilege for both faculty and the students they accredit. It is impossible, in other words, to continue to escape the claim that we work in service of economic privilege merely by closing our eyes.