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ARTICLE: CLUSTER VI: Class, Economics, and Social Rights: Institutional Economics and Critical Race/LatCrit Theory: The Need for a Critical "Raced" Economics

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SUMMARY: ... Critical race scholars and LatCritters have employed the teachings of psychology to inform our understanding of the operation and consequences of unconscious racism and stigma. ... LatCrit and critical race theory have made important contributions to praxis with respect to the functioning and operation of our legal system, for example, with respect to the constitutional dimensions of the criminal justice industry. ... LatCrit and critical race theory have and will continue to alter the ways in which the contemporary instrumentalities of subordination impact subaltern lives. ... As such, the important institutionalist question is not the procedural issue of equality of opportunity, but the substantive issue of equality of outcome. ... When faced with the claim of individual white injury or innocence, institutional theory offers the same response that neoclassical theory offers to the groups injured by class or race-based exploitation. As neoclassical theory is insensitive to group claims because its unit of analysis is the individual, institutional theory is insensitive to individual claims since its unit of analysis is the transaction. ... Therefore, institutional theory views the belief that an individual's value is based on race as an enabling myth of racism. ... Racism served as an effective justification for this unequal distribution of power and resources. ...

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I. Introduction

Critical race theory has made tremendous strides in deconstructing the operation of racialized power and the processes that render it invisible to the individuals

at the sites at which such power is concentrated and exercised. In constructing its analyses, this critical movement has often relied on interdisciplinary sources. Critical race scholars and LatCritters have employed the teachings of psychology to inform our understanding of the operation and consequences of unconscious racism and stigma. From sociology we have gained an appreciation of microaggressions and the consequences of culture. The use of constructs from other disciplines has also contributed to our understanding of the processes of subordination, both explicit and implicit.

In the midst of its continuing development as arguably the most significant jurisprudential innovation in the history of Anglo-American law, the call has come to transform critical race and LatCrit theory from primarily analytical methodologies into pathways to praxis. LatCrit and critical race theory should be operationalized to transform the nature of consensus reality, because the implementation of critical race and LatCrit perspectives will result in a dramatic change in the world view of all the individuals and organizations that are embedded in racialized cultures.

LatCrit and critical race theory have made important contributions to praxis with respect to the functioning and operation of our [*842] legal system, for example, with respect to the constitutional dimensions of the criminal justice industry. Our ability, as critical legal scholars, to formulate appropriate praxis methodologies is limited, however, by the historic conflict between the competing jurisprudential schools of critical legal studies and law and economics. Orthodox law and economics has corrupted the legal process by removing any genuine considerations of ethics and morality from its analysis and by its confusion of an optimal result with a just result. Therefore, critical race and LatCrit scholars have been appropriately skeptical of the consequences of introducing economic constructions into their analyses and prescriptions for praxis.

This creates a serious deficiency in LatCrit and critical race scholarship. Our appropriate distrust of the tools and policy instruments of economic orthodoxy have limited our ability to do what must be done to eliminate the ideologies and instrumentalities of subordination from this society. If we believe that the roots of the ideologies of subordination lie in the structures used to maintain particular distributions of assets, resources, and opportunities, i.e., in privileging

certain financial claims, then we recognize that the processes by which these distributions are maintained will become the battle lines and boundaries that circumscribe and limit our ability to achieve praxis - for those boundaries protect the financial claims that flow to people with white skin as a consequence of the ideologies and white privilege and white superiority.

LatCrit and critical race theory have and will continue to alter the ways in which the contemporary instrumentalities of subordination impact subaltern lives. But standing alone the policy instruments created to date by LatCrit and critical race theory are unlikely to change the underlying distribution of assets, resources and opportunities. The beneficiaries of unearned and undeserved privilege will simply resort to alternative subordinating processes to maintain their privileges. Thus, decoupling the ideologies of subordination from the distributions of the assets, resources and opportunities that they seek to maintain will, at best, result in an ostensible equality - an equality rendered irrelevant by the continued existence of the current distribution of financial power and the new, and quite possibly, unanticipated institutions that will arise to reinforce those boundaries. n5

If LatCrit and critical race theory are to create lasting change [*843] reaching to the heart and roots of the subordination project they must overcome their resistance to economic analyses as a mode of interdisciplinarity. Economics and economic concerns have so thoroughly infiltrated the law that it is difficult to discuss any topic of law without a concomitant descent into considerations of efficiency, utility and rationality, goals, values, processes keyed to the conservation of the present allocation of assets, resources, and opportunities. Since these discussions cannot be avoided, they must be embraced; for unless we do so, we will be unable to engage in effective praxis around the issue of the just distribution of assets, resources and opportunities. That does not mean, however, that we must rely on the economic adjunct of political conservatism, i.e., orthodox economics as expressed in the neoclassical paradigm. n6 Instead we must adopt an economics compatible with the goals of the eliminating unearned privileges and unjust power distributions, and the de-racializing privilege and power in this society. Although much of heterodox economic thought is compatible with the goal of critical praxis, institutional economics is well positioned to permit the development of policy instruments that can be used both to deepen our descriptive analyses and to concretize our efforts at constructing systemic policy interventions.

II. Discussion

A. History

Institutional political economy is based on an evolutionary analysis of the institutions mediating production, distribution and exchange in society. n7 Its focus on long-term change, historical contextuality and socio-cultural factors distinguish it from neoclassical economic theory and render it a critical system of economic thought. n8

Institutionalism has its origins with Thorstein Veblen (1857-1928), its theoretical parent, and John R. Commons, its initial translator of theory into practice. Veblen, rather than view the economy in terms of the development and maintenance of equilibria, saw the role of Darwin's evolutionary theory in the behavior of real economies in real time. n9

[*844] Therefore, his view of economic behavior focuses on the processes of change, rather than on the establishment of static or even dynamic equilibria. Veblen's use of evolutionary concepts lead to the development of the ideas of circular and cumulative causation as more accurate explanations of cause and effect in the economic sphere than the linear causal processes envisioned by neoclassical theory. n10 In his causal network he emphasized the role of institutional processes in mediating the economic and financial relationships between individuals and groups. n11

At this point it may be helpful to examine what the term "institution" signifies in institutional economics. An institution is not the same thing as an organization. Instead, organizations, as is true of any human artifact, are composed of numerous institutions, and are impacted by a wide variety of exogenous institutional processes. For institutional economists, an institution is not a material or physical phenomenon. Instead, "an institution is a socially constructed belief system about the ways things are and the way things should be" n12 Institutions are prevalent patterns of thought that impact the structure, operation, and consequences of all processes in societies, including economic and financial processes. For example, racism is an institution. It is a belief system about the way things are and the way things should be.

John Commons (1874-1948), an early labor economist, located the focus of economic activity at the level of the transaction, rather than at the level of the individual as does neoclassical theory. n13 Therefore, the environment within which the transaction occurs dictates which transactions are possible and the rules that should be used in constructing the terms of the transaction. Commons focused on the legal environment in which transactions occur, the collective as opposed to the individual structure of action, and the role of government in resolving competing economic claims. n14 Commons used his research to help

develop models upon which New Deal labor and social welfare legislation was based. n15 Subsequent institutional economists would develop the concepts of "business cycles", "overhead [*845] costs", and "transaction costs." n16 Gardiner Means, an institutionalist, in conjunction with Adolph Berle, wrote the seminal work on the modern corporation and the consequences of the separation of ownership from control. n17 Economists such as Gunnar Myrdal, Clarence Ayres, John Kenneth Galbraith and Karl Polanyi are a few of the other well known economists who have used, advanced, or contributed to institutional economic thought.

Oliver Williamson and Nobel laureate Douglas North are also institutionalists, but of a different stripe. Their brand of "new" institutionalism seeks to use institutional principles to modify or complete neoclassical economics. So, to traditional or old institutionalists, the new institutionalism is simply an alternative construction of the neoclassical paradigm, which helps explain why ideas such as transaction costs are part of the lexicon of neoclassical theory.

B. Institutional Basics

For institutionalists, there is nothing "natural" about the economy or markets. n18 "The economic process is not a natural one, shaped by forces beyond human discretion. Instead, the economic process is an artificial one, shaped by human action through the exercise of power." n19 It is "a time dependent, institutionally determined social system, not a natural system or an automatic mechanism." n20 Markets are also not natural in the sense that free market economists argue. Instead, markets are policy interventions designed to benefit some and burden others. n21 Therefore, markets appropriately may be used to make certain policy determinations. The relative bagginess of pants, whether the fronts of shoes are rounded or square, or the colors [*846] available to paint your living room are a few examples.

Markets, however, should not be used to allocate the opportunities necessary for human existence. n22 This includes the ability to have a job. Institutional economics is not an exercise in optimality, the allocation of scarce resources to various preferences, but the process of "social provisioning." n23 The animating value of institutional economics is not efficiency, a static preservative concept, but opportunity, a dynamic evolving concept. n24 The institutional concept of property extends beyond the material artifacts of existing markets. Rather, the institutionalists view property rights as the "rightful access to opportunity," with the view that opportunities must constantly expand. n25 And most importantly,

economic policy does not result from plugging numbers into an algebraic expression. Despite the efforts to establish a scientific authenticity, neoclassical economic theory and its search for equilibrium remains unable to meaningfully predict the impact of a change in any aspect of the economic environment other than supply and/or demand. n26 Therefore, institutional theory makes no claim to scientific authority as exemplified by the physical sciences. Instead, institutionalists hold that economic policy should result from what Commons called a "four-language hypothesis," embracing the interplay of law, psychology, physiology, and economics. n27 Therefore, abandoning the primacy of supply and demand relationships and interjecting institutional principles into our understanding of the law, in particular, the role of law as an instrumentality of subordination, could result in dramatic changes in the way this society rations its benefits and imposes its burdens. n28

[*847] We can explore the potential impact of institutional theory on the law's role in the maintenance of racialized power distributions by looking at the ways in which institutional theory impacts our understanding of racism.

C. Racism

The neoclassical paradigm has a decidedly limited ability to address issues of racism because of its analytical focus on methodological individualism. Methodological individualism assumes that the individual is the appropriate unit of analysis and examination. Therefore, the neoclassical paradigm understands economic behavior by aggregating the activity of individuals. n29 All social activity is understood by reference to individual motivation and economic rationality. n30 Because of neoclassical theory's focus on the individual and individual processes, issues involving group activity - behavior resulting from class interests, or racial or ethnic interests - are outside the theoretical boundaries of the neoclassical paradigm. n31 Without an appreciation of group processes, the concept of racism, that is, the subordination and exploitation of one group by another, has no point of entry into a neoclassical economic analysis. n32 Therefore, racist behavior can only be understood as expressing the preferences of specific individuals. n33

The individualistic approach of law and economics jurisprudence is largely consistent with the way the law views issues of racism and [*848] racial discrimination. The law focuses on the individual as the relevant unit of analysis and finds discrimination where it can be demonstrated that the individual

intended to discriminate. n34 An institutionally oriented analysis, however, will produce a different thought process and a different result.

D. A Critical Economic Examination of Intent

Applying an institutional analysis, the role of intent in discrimination litigation can be understood as one of the institutions that works to preserve and perpetuate race-based allocations of assets, resources, and opportunities. Since institutional theory takes the increase of opportunity as its primary value premise, it will focus on the intent requirement to determine its salience in achieving the expansion of opportunities. Certainly, intent may be useful in interpreting coercive or predatory transactions, which we regulate with the criminal law. But intent becomes irrelevant when interpreting the transactions that ration the ability to participate in the economy by holding a job, or inhibit the ability to acquire claims resulting from participation in educational programs. As such, the important institutionalist question is not the procedural issue of equality of opportunity, but the substantive issue of equality of outcome. As critical scholars, we have been limited in creating policy instruments to redress discrimination because the law either explicitly or implicitly views the allocation of opportunities as subject to market processes between individuals. Therefore, race or ethnic based employment discrimination would not take place if the hiring of subordinated minorities would enhance the utility of the employer. Institutional theory, through its focus on the transaction as the unit of analysis and the use of methodological collectivism rather than methodological individualism as the analytical tool, recognizes the employment decision as a rationing transaction based on group membership, in which one group uses its power to set aside certain opportunities as the principal, if not the exclusive, domain of certain racial or ethnic groups. n35 Although neoclassical theory claims that market processes [*849] obviate the ability of individual economic actors to exercise power in economic transactions, institutional theory recognizes that this particular theoretical assumption is part of an effort to mystify power relationships by encouraging the subordinated to accept the naturalness of their oppression. n36 When power is considered with respect to the way markets function, it becomes clear that the market processes that neoclassical theory argues will eliminate discrimination are not natural processes but arrangements resulting from the ability of market participants to structure the market environment and processes to their own advantage. n37

With respect to race relations, power is exercised based on, inter alia, the myths of racism, which are opportunistic rationalizations for the inequitable distribution of assets, resources, and opportunities. n38 During the period of African enslavement in this country, the myths of racism were used to justify slavery as an appropriate way to relate to inferior beings. Slavery was promoted as in the best interests of the enslaved Africans and as part of the natural order created by the Christian God. n39 When racial discrimination became "illegal," the myth of racial equality, i.e., "color blindness," became an effective way to construct the intent requirement so as to preserve the current distribution of assets, resources, and opportunities, by creating what has become a presumption of nonracial motivation. Therefore, when the intent requirement in the antidiscrimination laws is viewed as an institution created through the exercise of political power for the purposes of advantaging one group at the expense of other groups, the requirement that intent be demonstrated becomes part of the institutional structure which supports racial subordination and oppression. n40

[*850] Rather than the notions of "color blind" policy that flow from the individualistic perspective of the neoclassical paradigm, institutional theory can be used to argue that achieving the legitimate goal of the economy, i.e., the expansion of opportunity, race, and ethnicity must be among the criteria used in the rationing transactions that allocate opportunities. Of course this view is terrifying to the proponents of the cult of the individual because it means that individual white people may lose opportunities that were once theirs as a matter of right. When faced with the claim of individual white injury or innocence, institutional theory offers the same response that neoclassical theory offers to the groups injured by class or race-based exploitation. As neoclassical theory is insensitive to group claims because its unit of analysis is the individual, institutional theory is insensitive to individual claims since its unit of analysis is the transaction. However, neoclassical theory's response to subordinated groups is first to require them to disaggregate themselves from a group identity, and then: be a better individual and you will compete effectively in the market place. Institutional theory's response to the individual who may lose an opportunity to which she assumed entitlement is the systemic expansion of opportunities so that each individual, irrespective of group membership, will be able to participate in transactions that will permit her to obtain appropriate and desirable opportunities. Such progress cannot be made by an economic system that operates according to market principles animated by supply and demand, but becomes much more likely in

an economic system operated pursuant to democratic economic planning. n41

Institutional theory also raises a more fundamental criticism of the notion of intent in racial discrimination actions based on its understanding of causation. In institutional theory, causation is seldom linear. Therefore, there are rarely any direct cause and effect relationships in social interactions, including those associated with social provisioning (which the institutionalist views as the work of the economy). n42 Instead, institutionalists view causation as circular or cumulative. n43 So, whether someone intended to discriminate, that is, cause another individual to be deprived of opportunity because of her race, is irrelevant, because, to the institutionalist, that one person's intent to discriminate standing alone could not have caused the elimination of opportunity for the victim. The discriminatory event is the consequence of the coincidence of all of the institutions that support [*851] race-based allocations of opportunities. Therefore, the victim's opportunities are limited not by the intent of one actor, but by the cumulative interactions of all the societal institutions erected to perpetuate race-based privileges. As individual intent is but one of a myriad of events and institutions that cumulatively result in the victim's loss of opportunity, there is no reason, other than ideology, to make its existence determinative of the right to recover on a claim of discrimination.

Additionally, institutionalists recognize that intent is largely unknowable. Institutional theory obviates the question of intent by focusing not on internal psychological processes, which are opaque, particularly in the aggregate, but on behavior - the activities that people actually engage in - which can be predictive of what they may do in the future. If we focus on behavior as one of the processes impacting the operation of a rationing transaction, then the transactions that lead to a racially discriminatory result constitute discrimination, irrespective of the ability to locate an individualized intent to discriminate. n44

E. Additional Institutional Perspectives

Institutional theory also provides an analysis of the continuation of racism despite evidence of its invalidity as a biological construct and its disfavor as a societal institution. Institutional theory argues that racism, like any institution that does not serve to maximize opportunity, must be supported by a strongly inculcated system of mythology in order to prevent that institution from becoming subject to a market related process that may result in its change or destruction. n45 Therefore, institutional theory views the belief that an individual's value is based on race as

an enabling myth of racism. n46 The myth retains vitality because it continues to be an effective way to allocate benefits and burdens between the powerful and the disempowered. n47

As a result of the persistence of racism after the end of slavery, the distribution of assets, resources, and opportunities favored whites. Racism served as an effective justification for this unequal [*852] distribution of power and resources. n48 Today, racism persists as an effective way of persuading poor whites that their interests are materially different from those of racially subordinated people. Therefore, racism prevents the development of trans-racial coalitions to challenge distributions that disadvantage both racial minorities and poor whites. n49 Moreover, because it is a myth, it can exist and function at a tacit or unconscious level, free from the constraints of logic and reason. Institutionalists recognize this and other enabling myths n50 as a policy intervention operating beneath consciousness to support the perpetuation of racism by: (1) rationalizing race-based privilege; (2) making the absence of the constraints imposed by racism something to be feared by those who are privileged by it; (3) reducing the victim to the status of an undeserving other; and (4) encouraging the victims to blame themselves for racial injustice. However, when the transactions in which this and other enabling myths function are interrogated, they can be reconstructed to eliminate the impact of racism by affirmatively taking race and the role that it plays in the transaction into consideration.

III. Conclusion

The call for praxis is a call to change the world. Any job can be accomplished if we have the right tools. Institutional political economy and the other heterodox theories of economics can provide critical scholars with one of the tools we need to transcend the barriers between theory and praxis. Moreover, unlike the neoclassical paradigm, which obscured meaning by its reliance on mathematic symbolism, institutional theory is highly accessible, as should be any theory of political economy. An economics that recognizes race, racialization, and racism can be used to address these issues. A theory that ignores these issues is an institutional foundation of racism.

FOOTNOTE-1:

n1. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in *Critical Race Theory* 235, 236-38 (Kimberle Crenshaw, et al., eds. 1995).

- n2. Ediberto Roman, Who Exactly is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media, 4. J. Gender Race & Just. 37, 63-66 (2000).
- n3. Peggy C. Davis, Law as Microaggression, [98 Yale L.J. 1559, 1565-66 \(1989\)](#).
- n4. Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, [67 Fordham L. Rev. 13, 17-18 \(1998\)](#); Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, [105 Yale L.J. 677, 679 \(1995\)](#).
- n5. See Charles R. P. Pouncy, Marriage and Domestic Partnership: Rationality and Inequality, [7 Temp. Pol. & Civ. Rts. L. Rev. 363, 366-67 \(1998\)](#).
- n6. The values subsumed in the neoclassical paradigm are conservative in the sense that they seek to preserve the current distribution of assets, resources, and opportunities. William M. Dugger, Underground Economics: A Decade of Institutional Dissent 7 (1992) [hereinafter Dugger, Underground].
- n7. Id. at xix.
- n8. Wendell Gordon, Institutional Economics: The Changing System 5-6 (1980).
- n9. Steven G. Medema et al., Institutional Law and Economics, in Encyclopedia of Law and Economics 418, 421-22 (Boudewijn Bouckaert et al. eds., 2000).
- n10. John T. Harvey, Circular Causation and the Veblenian Dichotomy in the General Theory: An Introduction to Institutional Method, 17 J. Post Keynesian Econ. 69, 77-78 (1994).
- n11. See Medema et al., supra note 9, at 421-22.
- n12. Johan Stein, How Institutions Learn: A Socio-Cognitive Perspective, 31 J. Econ. Issues 729, 730 (Sept. 1997).
- n13. See Medema et al., supra note 9, at 427-30.
- n14. Dugger, Underground, supra note 6, at 4-7.
- n15. Harry Arthurs, Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture, 22 Berkley J. Emp. & Lab. L. 271, 278 (2001).
- n16. See Medema et al., supra note 9, at 424 (discussing economist Wesley C. Mitchell's research on "business cycles").
- n17. See generally Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property (1932).
- n18. Dugger, Underground, supra note 6, at xxii ("Natural law does not shape the economic process; human law shapes the economic process.").
- n19. Id.
- n20. Charles J. Whalen, Money-Manager Capitalism and the End of Shared Prosperity, 31 J. Econ. Issues 517, 523 (1997).
- n21. For example, William Dugger wrote:
- Institutionalists have stressed that our economy is more than a market system. Our economy is also a system of power, power that goes far beyond supply and demand in the market, power that extends to the rules and laws that govern specific markets, and power that extends to the benefits bestowed and the burdens imposed by specific markets. The exercise of power, through private means or through public ones, shapes and channels the economic process to the benefit of some and to the detriment of others
- Dugger, Underground, supra note 6, at xxii.
- n22. See Hyman P. Minsky, Stabilizing an Unstable Economy 101 (1986) (finding that the market mechanism should not be used to rectify important social problems such as the distribution of income and the training and education of the young).
- n23. Dugger, Underground, supra note 6, at xix.
- n24. See id. at 7.
- n25. Id. at 5 (quoting Kenneth H. Parsons, The Basis to Commons' Progressive Approach to Public Policy, in Labor, Management and Public Policy 322

(Gerald G. Somers ed., University of Wisconsin Press 1963)).

n26. Alfred S. Eichner, Introduction to A Guide to Post-Keynesian Economics 12 (Alfred S. Eichner ed. 1979).

n27. J. Dennis Chasse, The Transaction in a Many Language Hypothesis, 31 J. Econ. Issues 375, 375 (June 1997).

n28. Unlike the neoclassical paradigm, institutionalism makes few essentialist claims. There is nothing sacred about institutional theory or any other theory. There are no inter-theoretic truths in social theory. Each theory is simply a partisan epistemological position. Likewise, whether there are fifty or five million economists who agree on a particular point, that agreement is not a substitute for truth. Theories are selected and implemented because of the specific interventions they make into consensus reality, not because they are "true" or "real." Additionally, the claim that a theory results from dispassionate observation is problematic because observation is not theory neutral. Separate and apart from the Heisenberg principle, which holds that the process of observation can change the phenomena being observed, it is the process of theory that structures observation and informs the observer of the significance of what is being seen. It is for this reason that neoclassical theory seeks to dignify itself through the use of mathematics and the mythology that view economies and markets as natural processes. If we acknowledge that all theories concerning social or cultural behavior have similar claims to validity, then neoclassical theory loses its privileged position, and as members of an ostensibly democratic society, we should have the ability to choose which economic theories we want implemented. See generally, Stephen A. Resnick & Richard D. Wolff, Knowledge and Class (1987) (discussing the basic parameters of a "Marxian theory" of political economy); see also Robert F. Garnett, Jr., Postmodernism and Theories of Value: New Grounds for Institutional/Marxist Dialogue?, 33 J. Econ. Issues 817 (1999).

n29. See Edward L. Rubin, Putting Rational Actors in Their Place: Economics

and Phenomenology, [51 Vand. L. Rev. 1705, 1713-15 \(1998\)](#).

n30. Howard J. Sherman, A Holistic-Evolutionary View of Racism, Sexism, and Class Inequality, in Inequality: Radical Institutional Views on Race, Gender, Class, and Nation 39, 41 (William M. Dugger ed., 1996) [hereinafter Inequality].

n31. Id.

n32. See id.

n33. See id.; see also Milton Friedman, Capitalism and Freedom 109 (1962) ("The preserves of discrimination in any society are the areas that are most monopolistic in character, whereas discrimination against groups of particular color or religion is least in those areas where there is the greatest freedom of competition.").

n34. Lawrence, *supra* note 1, at 236. Professor Lawrence constructs the difference between intentional acts that results in a discriminatory impact and unintentional acts that result in a discriminatory impact as a false dichotomy.

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional - in the sense that certain outcomes are self-consciously sought - nor unintentional - in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs desires and wishes.

Id. at 237.

n35. Institutional theory identifies three basic types of transactions: (1) bargaining transactions that fix contract terms; (2) managerial transactions that effectuate contractual provisions; and (3) rationing transactions that distribute a contract's benefits and burdens to individuals other than the bargaining parties. See Chasse, *supra* note 24, at 378. Rationing transactions are not voluntary transfers but authoritative allocations in which those who are ultimately impacted may not participate. See Yngve Ramstad, John R. Common's Puzzling Inconsequentiality as

an Economic Theorist, 29 J. Econ. Issues 991, 993-94 (1995).

n36. See Carl Boggs, Gramsci's Marxism 39-40 (1976) (suggesting that hegemony discourages socialism and encourages resignation and passivity).

n37. Mitchel Y. Abolafia, Making Markets: Opportunism and Restraint on Wall Street 9-10 (1996).

n38. See William M. Dugger, Four Modes of Inequality, in *Inequality* supra note 30, at 30 [hereinafter Dugger, Four Modes].

n39. Sherman, supra note 30, at 44.

n40. This discussion of employment suggests an interesting aside. Neoclassical theory uses employment as a policy instrument and specifically alters the economic environment to encourage decisions that reduce employment as a way of fighting inflation, i.e., preserving the financial claims of the individuals and institutions whose wealth would be diminished by inflation. Despite that, poverty in the neoclassical paradigm is a reflection of the personal attributes of the individual and is not a function of oppression or exploitation. As a result of stigma, the poor and other subordinated groups, having been inculcated into market mythology view themselves as responsible for their conditions, rather than the institutions that create and maintaining equality. Dugger, *Four Modes*, supra note 38, at 29-33.

n41. Dugger, *Underground*, supra note 6, at xiii.

n42. Harvey, supra note 10, at 77-79.

n43. *Id.*

n44. Neoclassical theory would argue that, without intent, we will be unable to construct a remedy discrete enough to burden only the wrongdoer. Institutional theory could be used to argue that if the transaction is reconstructed to expand opportunity so that both candidates are hired, instead of just the white candidate, that expansion of opportunity will not merely benefit the victim, but society as well, including the wrongdoer. Dugger, *Underground*, supra note 6, at 5-8.

n45. Sherman, supra note 30, at 42-43.

n46. *Id.* at 43-44.

n47. *Id.* at 45-47.

n48. *Id.* at 43-47.

n49. *Id.* at 45-47.

n50. See Sherman, supra note 30, at 42-51 for a discussion of the enabling myths associated with gender and class.

