

OBLIGATIONS OF PRIVILEGE

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ABSTRACT

Little attention is paid to the nature of the high incomes of the rich or to the legal and norm-based obligations the rich owe society. This popular and scholarly inattention reflects the general acceptance of the idea that the rich have earned their high incomes and owe society little. After considering income equations revealing society's role in high incomes and identifying the existing obligations of the rich, the article urges a strengthening of the obligations of the rich and rejects the argument that the legal community ought not consider the moral demands associated with high incomes.

The man of great wealth owes a peculiar obligation to the State, because he derives special advantages from the mere existence of government.

-Theodore Roosevelt¹

Individual effort is indispensable to wealth building. But success is not entirely the result of individual brains and effort. Success is a product of having been born in this country, a place where education and research are subsidized, where there is an orderly market, where the private sector reaps enormous benefits from public investment. For someone to assert that he or she has grown wealthy in America without the benefit of substantial public investment is pure hubris.

-William H. Gates Sr. and Chuck Collins²

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1. 41 CONG. REC. 27 (1906) (remarks of Theodore Roosevelt) *quoted in* Reuven S. Aviyonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391, 1405 (2002) (book review).

2. WILLIAM H. GATES SR. & CHUCK COLLINS, *WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES* 122 (2002).

INTRODUCTION

Indebted to the society that enabled their high incomes and wealth, the rich have societal obligations that exceed those of people with lower incomes.³ Despite a shared (though often ignored) recognition that income level is not entirely driven by hard work, the obligations properly associated with high personal incomes are only infrequently considered. Such a hands-off approach to considering the incomes of the rich stands in marked contrast with the in-depth scholarship explaining both the low incomes of the poor and how poverty justifies subjecting the poor to moral reproach as well as societal work requirements. Given the diminished commitment to a publicly supported welfare state, the responsibilities of those with high incomes take on added significance and warrant our attention. It is time to reconsider the accepted idea that high incomes are devoid of attendant responsibilities and obligations.

This article explores the obligations of privilege (understood principally in terms of income, but also more broadly). Part I examines the factors that contribute to personal income. Where components are not merit based, simplified income equations are applied to link these income components to larger societal obligations.⁴ Part II describes the existing legal obligations of the rich, and then argues that these obligations should be strengthened to reflect the duties to repay society for personal benefits, to expand the market to all willing Americans, and to rescue those in need. Part III presents a debate regarding the moral relevance of the responsibilities of privilege to the law and to the legal community. My conclusion urges society to reinvigorate the notion of a noble obligation both in the law and in society's norms. While this stance may be controversial, the need to examine the incomes of those in the top income brackets—instead of focusing solely on those of the poor—should not be.

I. EARNED INCOME?

The contrast between the deserving and undeserving poor is noted in hundreds of law review articles, but the rich are not subjected to such categorization. The deserving poor are thought to be those who are married, work hard (to the extent that they are physically able to do so), and limit the size of their families. The poor who are unmarried, unemployed, and need help to

3. In this paper, I will be using terms such as "rich," "poor," and "wealthy," which at times are associated with an emotional response. As a 1974 *New York Times* editorial argued, "To talk of the poor in the richest country in history is to suggest an intolerable condition that demands an urgent moral and political response; to speak of the 'low-income population' is to refer to a statistic whose impersonality need not trouble anyone's conscience." Michael Harrington, Editorial, *Dog Food Isn't Yummy*, N.Y. TIMES, Sep. 2, 1974, at 15. Because being "rich" can be considered according to both absolute and relative measures, I have resisted drawing a line in the sand separating the rich from the non-rich (I have done the same with the poor).

4. Merit-based inputs to income might include work effort, good choices, and other qualities.

support their children are considered undeserving.⁵ But, as commonly conceived, the rich are considered deserving regardless of their actions or the characteristics of their families.⁶ In part, this disparate willingness to judge reflects the perception that the undeserving poor impose costs on society. The inequality also reflects a strong American belief in individual opportunity as epitomized by the Horatio Alger success story.⁷ For our purposes, deserving or undeserving will not refer to the individuals *as* individuals, rather we will use these categories to answer the more limited question of whether their income is deserved or undeserved.

The next two sections of this article will challenge traditional notions about when income is earned. Once we have considered this question we will move to a discussion of whether unearned income is also undeserved.

5. See Amy Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 LAW & CONTEMP. PROBS. 257, 276 (2000) (contrasting single parents with “two parent-families [who] are almost always self-supporting and able to live decently without public subsidy . . . [and who] are generally regarded as living up to expectations” of society) [hereinafter Wax, *Rethinking Welfare Rights*]. The *deserving* and *undeserving* categories shift depending on the policies that are in place. Thus, mothers who stay at home might be found in the deserving or undeserving categories depending on the policy regime. For different characterizations of these categories, see, for example, Joel F. Handler, “Constructing the Political Spectacle”: *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 906 (1990) (“ . . . the heart of poverty policy centers on the question of who is excused from work. Those who are excused are the ‘deserving poor’; those who must work are the ‘undeserving.’ Ultimately, this is a moral distinction”); Kimberly J. McLarin, *For the Poor, Defining Who Deserves What*, N.Y. TIMES, Sept. 17, 1995, at E4 (presenting Professor Lawrence Mead’s view that “in the public eye, the line that separates deserving from undeserving has always been crystal clear: the willingness—given the physical ability—to work”); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1505 (1991) (arguing that the deserving/undeserving “distinction created a line running through the poor, putting the aged, infant, and disabled on one side of the line, and the able-bodied on the other side”).

6. Society largely does not consider whether the rich are deserving or not. Yet, when such lack of consideration is placed next to the excessive interest in judging the poor, the choice to ignore whether the rich are deserving or not is revealed to be an implicit conception of the rich as deserving.

7. According to survey data, eighty percent of Americans believe it is “possible to start out poor, work hard and become rich.” TOM HERTZ, CENTER FOR AMERICAN PROGRESS, UNDERSTANDING MOBILITY IN AMERICA 1 (2006), available at http://www.americanprogress.org/issues/2006/04/Hertz_MobilityAnalysis.pdf. “The idea that qualities for which people can be held responsible make all the difference is deeply ingrained,” Professor Brian Barry has observed, noting that this idea “has been most vociferously pressed in the USA in periods when it has been most manifestly false.” BRIAN BARRY, WHY SOCIAL JUSTICE MATTERS 140 (2005) (comparing the last twenty years with the gilded age of Horatio Alger). As Bill Gates’s father, William Gates Sr., and Chuck Collins observe, “[o]ur society is particularly enamored with the ‘great man’ theory of wealth creation.” GATES SR. & COLLINS, *supra* note 2, at 113.

For a modern version of the Horatio Alger story, see, for example, SAM WALTON & JOHN HUEY, SAM WALTON: MADE IN AMERICA (1992).

A. Income Equations

In this section, I explore the factors—from personal effort to nepotism—that determine individual income. Using very simple income equations, I consider how these factors reflect differing degrees of societal participation in the generation of individual income. For the moment, I am less concerned with quantifying the proportion of individual income that is entirely earned against that which is generated by society. It will be enough if, through the descriptions of the many factors that contribute to income, I can convince you that the rich did not ‘earn’ all of their income.⁸

1. Baseline income equation:

If we assume that income is a function (f) solely of effort, then our income equation can be written as:

$$\text{income} = f(\text{effort})$$

In a society which has roots in the Protestant work ethic and which continues to venerate hard work, if income is purely a function of personal effort, it is hard to argue that it is unearned.⁹ Whether explicitly stated¹⁰ or

8. Who qualifies as “rich” is not of particular importance to the argument in this section of the paper since the intent is merely to show how some portion of income is not “earned.”

9. The near-complete acceptance that income produced out of effort is earned owes much to John Locke’s Labor Theory of property, which “has been monumentally influential in the history of the United States as a justificatory scheme [justifying entitlement to property].” JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 168 (2000). Locke wrote:

Though the Earth and all inferior creatures be common to all men, yet every man has a “property” in his own “person.” This nobody has any right to but himself. The “labour” of his body and the “work” of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this “labour” being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 130 (Ernest Rhys ed., J. M. Dent & Sons Ltd. 1947) (1690) (Book II, Ch. 5, § 26). Locke himself recognized that this definition taken by itself might lead to an overly expansive understanding of the right to private property; in addition to the closing “where there is enough” proviso in the preceding quote, he also limited the reach of his labor theory by capping how much property one could properly acquire under it:

It will, perhaps, be objected to this, that if gathering the acorns or other fruits of the earth, etc., makes a right to them, then any one may engross as much as he will. To which I answer, Not so. The same law of Nature, that does by this means give us property, does also bound that property too. “God has given us all things richly.” Is the voice of reason confirmed by inspiration? But how far has He given it us—“to enjoy”? As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others.

merely implied, this highly simplified income equation underlies most descriptions found in legal literature concerning the roots of individual income.¹¹ One may quibble that even this simple relationship between effort and income, as it plays out over the course of people's lifetimes, can lead to certain unfair results.¹² However, where such critiques are still grounded within this baseline income equation, Americans will probably view them as nit-picking.¹³ These concerns are unlikely to dislodge people's initial intuition that if effort is all there is to income generation,¹⁴ income is earned.

Id. at 131 (Book II, Ch. 5, § 30). I believe that most Americans would agree with Professor Munzer that "desert based on labor should play a significant, though by no means the only, role in justifying rights of property." STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 254 (1990). I also believe that many Americans would be willing to agree with his statement if the "by no means the only" clause were struck.

The high regard conservatives have for Lockean ideas does not prevent them from accusatorily attacking their intellectual guide—Locke himself—as "insufficiently Lockean." Charles Fried, *Protecting Property—Law and Politics*, 13 HARV. J.L. & PUB. POL'Y 44, 48 (1990) (questioning Locke's "espousal of the Lockean proviso"). While such criticism seeks to undermine Locke's distributive concerns by falsely pigeonholing his ideas into a libertarian ideal, it does reveal the reverence Locke's ideas of property enjoy. For a brief overview of Locke's theory, see J. W. HARRIS, *PROPERTY AND JUSTICE* 189–191, 197–199 (1996).

10. See, e.g., Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 285 (2000) ("the unequal possession of wealth[] originat[es] in people's choices to labor [that is, exert effort] and save at different times and in different ways") (italics omitted).

11. This simplified model requires accepting that at least in theory effort can be separated out from societal influences that might express themselves through choices regarding the type of effort expended.

12. For example, the selection of which period in life to work can lead, through savings and investment, to dramatically different lifetime earnings for the person whose effort is concentrated in the earlier portions of his or her life compared to the person whose effort takes place in old age. See, BARRY, *supra* note 7, at 44–45 (illustrating the importance of initial success and education qualifications by analogy to a bike race in which those riders not in early contention for the yellow jersey are forced to carry more and more weight, making it "virtually impossible for any rider who is not among the leaders at the end of the first few stages to win").

13. For an example of "nit-picking" that by its own terms acknowledges the persuasiveness of rewards linked to effort, see ROBIN BARROW, *INJUSTICE, INEQUALITY AND ETHICS: A PHILOSOPHICAL INTRODUCTION TO MORAL PROBLEMS* 120 (1982) ("Even if we reduce merit to little more than effort, which certainly more nearly approaches something morally acceptable, there is still a problem, since some people 'inherit or acquire certain kinds of handicap' . . . that give them 'little opportunity to acquire the motivation even to do their best.'").

The simplistic equating of effort with income ignores many of the additional factors such as education and luck that play a role in how effort is rewarded and even how effort is directed. See *infra* §§ I(A)(2)–(3).

Additionally, by equating effort with earned income without considering the forces that direct how effort is translated into income, we gloss over the continuing effect of historical wrongs on income generation: for example, most readers in the United States are working on land taken from Indian tribes. The model presented in this paper reflects an uncomfortable acceptance, for the sake of the argument, that for many people "whatever distribution of opportunities and resources exists is just as long as it came about without force or fraud—and even then that force or fraud establish a clear title today as long as they occurred far enough in the past." BARRY, *supra* note 7, at 24.

14. The effort-to-income function included here is presented not as the full description of how income is generated but to provide a starting point for analysis. As Professor Amy Wax observes, "[T]he role of effort in the operation of labor markets is elusive at best. . . . the rewards

2. Baseline plus Education:

Let us now assume that income is determined by two factors, effort and education, and let's assume that that we can disaggregate the two:

$$\text{income} = f(\text{effort}) + f(\text{education})$$

This minor modification on the baseline income equation should be easy to swallow and makes the income equation more realistic. Education corresponds with “significant increases in income,”¹⁵ in part because “[w]hereas once employers paid for strong backs, today they pay for strong minds.”¹⁶ The average real hourly wage in 2005 (in 2005 dollars) was \$10.53 for those without a high school degree, \$14.14 for high school graduates, \$24.67 for college graduates, and \$31.49 for those with advanced degrees.¹⁷

While it is undeniable that education impacts income, one might question whether it does so in ways that make such additional income describable as earned. If it is impossible to disaggregate effort and education, then the Baseline plus Education equation is merely a disguised version of the Baseline income equation. Are these two factors inseparable? They often seem to be. The thinking goes: I worked hard while in school, so haven't I earned the higher income that I receive or expect to receive as a result of that hard work? This thought process can become the norm even by the end of high school for those students who have been subjected to a particularly rigorous and non-stop education at America's elite boarding schools.¹⁸ Top universities also encourage this mode of thinking.¹⁹ The idea that one's effort while attaining education is an entitlement to higher earnings is seductive.²⁰

Accepting that hard work (effort) during school merits additional earned

of work bear little relationship to it.” Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 EMORY L. J. 1, 26 (2003) [hereinafter Wax, *Something for Nothing*].

15. Donald B. Tobin, *Investing in Our Children: A Not So Radical Proposal*, 73 U. CIN. L. REV. 457, 463 (2004) (crediting Gary Becker and Theodore Schultz for this observation).

16. CLAUDE S. FISCHER, MICHAEL HOUT, MARTÍN SANCHEZ JANKOWSKI, SAMUEL R. LUCAS, ANN SWIDLER & KIM VOSS, *INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH* 102 (1996) (presenting this as part of THE BELL CURVE (1994) authors' explanation of how inequality is determined by the market).

17. LAWRENCE MISHEL, JARED BERNSTEIN & SYLVIA ALLEGRETTO, *THE STATE OF WORKING AMERICA 2006/2007* 150 (2007).

18. PETER W. COOKSON, JR. & CATHERINE HODGES PERSELL, *PREPARING FOR POWER: AMERICA'S ELITE BOARDING SCHOOLS* 206 (1985).

19. I attended Yale University as an undergraduate and vividly remember the first lecture that I attended for Directed Studies: the professor described the program as akin to being in continual conversations with today's equivalents of Socrates and stated that the students, then only eighteen and nineteen years old, were the future rulers of America.

20. Lani Guinier describes the seductive power of success in educational contexts for the “winners” who “seem to take their privileged position for granted.” *Confirmative Action*, 25 LAW & SOC. INQUIRY 565, 573–74 (2000).

income does not mean that there is no room for an education function as a separate factor in our income equation for three reasons. First, the societal support for education arguably acts as an unearned income subsidy. Second, although the effort function may include the *expected* benefits of education as understood when the choice to seek further education was made,²¹ societal changes that favor education but are outside of the range of expectation should be separated from that same effort function. The choice to expend effort in pursuit of education is made based on an expectation of a certain reward for that choice, but extraordinary return on that choice reflects a windfall that can be attributed solely to education. Finally, although every alumnus can tell stories of nights without sleep, some skepticism regarding the effort required of students in higher education relative to their non-student peers is needed when determining how to approach education as an income factor.

a. Subsidized credentials

While an education reflects student effort, it also reflects a significant societal subsidy. Given our society's compulsory education system, we can take a high school education as a starting point for an educated citizen and a subsidy available to all members of society.²² Thus, this analysis of the income subsidy associated with education will focus on post-secondary education.²³

In 2001, there were 4,197 higher education institutions, with more than one million instructors (at the lecturer level or above) teaching almost sixteen million enrolled students.²⁴ At public institutions, tuition and fees amounted to less than

21. An expectation of future income fits within the individual preference model at "the core of our political and economic theory," and through which "a college education can be evaluated for its success in enabling its owner to satisfy his preferences—perhaps by giving him higher income . . ." Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 89, 90 (1994).

22. Establishing such a starting point through education can in effect be viewed as a subsidy for the wealthy by, among other things, producing citizens "who have a vested stake in the maintenance of a capitalist society in which they believe there is a chance to achieve high social, economic, and political status." Marjorie E. Kornhauser, *Choosing a Tax Rate Structure in the Face of Disagreement*, 52 UCLA L. REV. 1697, 1712 (2005).

23. The choice to focus on higher education does not mean that many of the ideas developed in this section are not also applicable to individuals who have not yet attained adulthood. Arguing that subsidies or direct grants to those over the age of 18 comes "too late," Donald Tobin proposes that direct payments be made to benefit the human capital development of children through a Child Investment Fund. Tobin, *supra* note 15, at 493. Tobin's writing about children might also be applied to those studying in America's universities:

Investing in children, however, provides a specific benefit to the child as well as to society as a whole. If a child is better educated and earns a higher income, the child is a direct beneficiary of that investment. It is therefore appropriate to require that child, or at least the aggregate of all children who receive a benefit, to contribute or pay back some of the money he received for investment.

Id. at 472.

24. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005, at 168 tbl. 261, <http://www.census.gov/prod/2004pubs/04statab/educ.pdf> (last visited Aug. 20, 2007).

19% of the total educational costs.²⁵ Even for students attending top private universities, the amount that students pay to their school does not equal the full cost of their education.²⁶ Federal student loans are the largest form of federal higher education aid,²⁷ but it is important to bear in mind that society subsidizes post-secondary education in many other ways that together surpass the federal aid programs.²⁸

Recognizing that the education function exists separately from the effort function, in part because of the social subsidy, does not necessarily mean that we want to make policy choices based on the distinction. First, as a policy matter, we might choose not to acknowledge the division because there is a “general pattern of not taxing in-kind government transfers”²⁹ including education subsidies. Second, defining education as part of the effort function is attractive if we would like to encourage educational investments (either by society or by individual students and their families). The decision to repack “education” into “effort” is a normative choice that could have the practical advantage of promoting educational investments.

The first counter argument is purely definitional.³⁰ However, the second counter argument, which promotes private investment in education in place of the current subsidy system could ultimately undermine the concept of education as a separate factor. While education is currently subsidized by society, perhaps it does not have to be. If we see the current arrangement of societal educational subsidies as driven solely by a market failure, though an understandable one,³¹ to

25. *Id.* The average price of attendance for undergraduate education from 1999–2000 was \$9,283, but this includes cost of living expenses that do not remit to the particular university. *Id.* at 174 tbl. 271.

26. FISCHER, HOUT, JANKOWSKI, LUCAS, SWIDLER & VOSS, *supra* note 16, at 138.

27. Evelyn Brody, *Paying Back Your Country Through Income-Contingent Student Loans*, 31 SAN DIEGO L. REV. 449, 453 (1994). Brody argues, given that education allows graduates to make enough extra money to repay their educational debt, that market interest rates could and should be charged to “all but those most disadvantaged.” *Id.* at 454. A switch towards a greater reliance on loans, perhaps coupled with income-contingent repayment, has recently been advocated as a way of improving educational equity across income groups. WILLIAM G. BOWEN, MARTIN A. KURZWEIL & EUGENE M. TOBIN, *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* 201–03 (2005).

28. Examples include research grants, tax-exempt status for educational institutions, and direct grants to public (and private) institutions. “[B]y the largest transfer of government money to higher education occurs via the appropriations made by state governments to public colleges and universities.” BOWEN, KURZWEIL & TOBIN, *supra* note 27, at 204.

29. Paul B. Stephan III, *Federal Income Taxation and Human Capital*, 70 VA. L. REV. 1357, 1394 (1984) (discussing damage awards to explain how even hard-to-tax human capital accumulation can sometimes be measured and dealt with).

30. And it is a definitional reduction to effort alone that is rejected, at least implicitly, by Louis Kaplow: “Human capital is an asset—often the only significant asset an individual owns.” Louis Kaplow, *Human Capital Under an Ideal Income Tax*, 80 VA. L. REV. 1477, 1496 (1994).

31. See BARRY P. BOSWORTH, ANDREW S. CARRON & ELISABETH H. RHYNE, *THE ECONOMICS OF FEDERAL CREDIT PROGRAMS* 130–31 (1987) (“A student loan is a perfect example of the type of loan that private lenders find costly: the loan is for a small amount, there is no marketable asset that can provide collateral, and the highly mobile borrower generally has no credit history.”).

adequately “lend against future earnings,”³² we can reasonably predict that once financial institutions solve the market failure, societal subsidies will dry up. After all, banks can anticipate that graduates, in the aggregate, will be able to repay educational lending: “Although estimates vary, it has generally been found that the return on a person’s investment in education exceeds ten percent.”³³

Such a market solution, should education become entirely funded by students, would diminish the subsidy portion of this argument. But for the time being students continue to benefit from educational subsidization. This means that, contrary to principles of equity, it is those who do not enroll in college and who are generally less well off than college graduates who end up subsidizing the increased income of college graduates.³⁴ The education function captures this inequity.

b. The range of expectations regarding education benefit

Societal change, separate from any effort on the part of the individual, can make the individual’s educational credentials more valuable than she initially expected. This is the second justification for considering the effort and education functions as distinct: Despite some powerful counter-examples, it is commonly known “that people with less investment in human capital generally will make less money and be less successful.”³⁵ This common knowledge extends in differing degrees³⁶ to those deciding whether to pursue higher education. This section explores the factors that enter an individual’s calculus, recognizing that individuals have some expectation that higher education leads to personal gain.

Though the choice is a personal one, a similar process is repeated by all those who go into higher education; in a sense, each person’s story is both unique and common. The projected life and income stream without additional education is contrasted in the mind of the rational potential student with the income available (minus tuition and opportunity costs) with greater education

32. Brody, *supra* note 27, at 451.

33. Tobin, *supra* note 15, at 463.

34. Brody, *supra* note 27, at 466–67.

35. Tobin, *supra* note 15, at 464.

36. For students from impoverished communities or poorer families, the monetary rewards of education may be less evident than it is for students from more affluent areas. In advocating for greater investment in children, Donald Tobin writes:

Duncan and Brooks-Gunn found that young children’s outcomes were particularly sensitive to family income. Greater family income during a child’s younger years significantly increased the child’s chances of graduating from high school.

A recent study by Eric Turkheimer found that almost 60 percent of the variance in IQ for low-income individuals is the result of their environment and almost none of the variance is due to heredity. This means that intervening in a low-income child’s life can have a significant positive impact on IQ . . . [increasing] the chances that the child will succeed economically

Tobin, *supra* note 15, at 467.

and a decision is made.³⁷ This forecasting includes the expectations regarding how society will change over the course of the potential student's career. This expected benefit calculation theoretically drives the choice to put effort into education.³⁸ Where the educational effort is tied to expected benefits, the value arguably should be imputed to the effort function rather than a separate education function.

Where the benefits of education exceed expected benefits, education deserves a separate functional status within the income equation: Although individuals often receive extra income by virtue of society changing around them through no effort of their own, such extra income is not "earned" in the same way as the income that is earned through personal effort. Human capital, among other things, is acquired through both education and "exogenous changes such as technological or social transformation."³⁹ Furthermore, while an individual arguably does take into account the projected path of technological advancement and whether such changes favor the educated when deciding to pursue education, such changes can surpass the projected path.⁴⁰ When this happens—as it has for the last 30 years as a result of technologically biased change⁴¹—and educated individuals are in greater demand than they projected they would be, they receive a partially unearned windfall.⁴²

37. This discussion is based upon a rational choice understanding of decision making. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 21 (4th ed. 2004) ("The economist's general theory of how people make choices is referred to as the theory of rational choice."). Of course there are many other motivations for pursuing higher education, such as intellectual interest, non-financial prestige, and parental pressure, among others.

38. *But see* Brody, *supra* note 27, at 451 (discussing "the college student[] who incurs expenses that he or she probably only vaguely associates with an economic payoff.").

39. Stephan, *supra* note 29, at 1359 (emphasis added).

40. The variance in the percentage return to a year of schooling from 1915–2000, included in a recent major work on education, does urge caution regarding the accuracy of an individual's estimates regarding the returns they can expect from extra schooling. See BOWEN, KURZWEIL & TOBIN, *supra* note 27, at 71 fig. 3.8 ("Educational Wage Differentials for All Workers and Young Male Workers, 1915–2000").

41. Technological change has "increased the demand for higher-skilled workers," and this can increase inequality because of the aggregate "skill-biased" nature of the technological change in the 1980s and 1990s. Larry W. Hunter & John J. Lafkas, *Opening the Box: Information Technology, Work Practices, and Wages*, 56 *INDUS. & LAB. REL. REV.* 224, 225 (2003) (reviewing the literature on the effect of technological change). In his examination of the changes in wage structure during the 1980s, Alan Krueger concludes:

Although it is unlikely that a single explanation can adequately account for all the wage structure changes that occurred in the 1980s, these results provide support for the view that technological change—and in particular the spread of computers at work—has significantly contributed to recent changes in the wage structure.

Alan B. Krueger, *How Computers Have Changed the Wage Structure: Evidence from Microdata, 1984–1989*, 108 *Q. J. OF ECON.* 33, 55 (1993). *Accord* David H. Autor, Lawrence F. Katz & Melissa S. Kearney, *The Polarization of the U.S. Labor Market* 7–13 (Nat'l Bureau of Econ. Research, Working Paper, 2006), available at <http://post.economics.harvard.edu/faculty/katz/papers/akk-polarization-nber-txt.pdf> (last visited June 15, 2007) (relating polarization of the U.S. labor market to the declining price of computation).

42. This conclusion, that separation between the effort and education functions is appropriate,

c. Student effort⁴³

In addition to subsidies and society-induced benefits, there is a third reason to question the notion that the full amount of income attributable to education should be thought of as “earned.” This third reason applies to students who, in acquiring their education, do not expend extra effort relative to their non-student peers. While some all-nighters are caused by excessive workloads, others are attributable to slacking in the preceding days. The same is true, of course, for those who do not pursue an education; different people exert different amounts of effort. However, former students receive high wages for their supposed effort, despite my assertion that the demands of student life are generally manageable and relaxed.

Professor Paul Stephen’s description holds true for many students in higher education: “For many people, some portion of their education involves personal consumption without significant prospects of future return. Parties, athletic events, and creative writing courses, for example, may be largely consumption rather than investment.”⁴⁴ Even ignoring college parties, many full-time workers have reason to be jealous of the student lifestyle. A full course load typically requires that a student be any particular place for only twelve to fifteen hours a week, and Fridays off are the norm.⁴⁵ And yet, some students have trouble meeting even such minimal requirements: “Absenteeism is rampant in undergraduate economics courses at major American universities.”⁴⁶ Finally, non-student efforts—whether working in an office, in construction, or in the service industry—must be weighed against student work when considering the

is not inherently foreclosed by a desire to allow for some sort of risk reward for those who pursue higher education. *Ex ante* expectations reflect a range of possible outcomes: I pursued my education expecting a projected path based upon that education, but I of course hoped/hope for even better consequences. If that better outcome comes to pass, haven’t I still earned such an outcome from my educational effort, even though it is better than my initial expectation? Expectation has to be considered as a range rather than a precise accounting of expected future income. Yet, unless the degree of variance is defined so broadly as to swallow any possible outcome, the idea that our expectations are best thought of as an expectation range does not negate the advantages that exogenous societal changes can hand individuals. A similar argument exists with respect to entrepreneurial activity generally—that success from entrepreneurial risk explains and justifies existing inequalities. However, according to Professor Munzer, even if such a payoff is not merely a reflection of luck, “studies favoring the entrepreneurial explanation are too anecdotal, unrigorous, and otherwise methodologically flawed to offer a suitable demonstration.” MUNZER, *supra* note 9, at 390.

43. This section is included out of recognition that some readers will not accept the premise of the baseline plus education equation, namely that the effort and education functions are by definition not overlapping.

44. Stephan, *supra* note 29, at 1369.

45. See Katie Hafner, *How Thursday Became the New Friday*, N.Y. TIMES, Nov. 6, 2005, at 4A22.

46. David Romer, *Do Students Go to Class? Should They?*, J. ECON. PERSP., Summer 1993, 167 at 173 (focusing on economics courses in particular). Accord Hafner, *supra* note 45 (“It is not unusual for college class attendance to languish at about 60 percent.”).

effort expended by those pursuing higher education.

3. Baseline plus Education plus Luck:

Let us now add another layer to our income equation by assuming that income is determined by three separable factors—effort, education, and luck:

$$\text{income} = f(\text{effort}) + f(\text{education}) + f(\text{luck})$$

Disaggregating luck from effort and education reflects an appreciation of how income can be affected by those events “that occur independently of intention, design, control, and the like.”⁴⁷ Luck matters in ways we must take into account in order to understand how income is generated.⁴⁸ Robert H. Frank and Phillip J. Cook for instance, “posit that high income labor markets present a winner-take-all payoff, somewhat like a lottery.”⁴⁹ An individual’s achievements are impacted by factors entirely outside of her control, since the results of her overt actions “depend on countless other causes and conditions.”⁵⁰ Are high incomes attributable to an individual’s effort, or are they hopelessly a product of luck?⁵¹

For the sake of simplicity I have separated luck out from effort or education and I will not speculate regarding which function dominates our now complex income equation.⁵² For our purposes, it is enough to observe that we have all had the experience of having our desires at times thwarted and at times aided by luck that seems to bear no relation to our past actions.⁵³ Income derived from

47. Note, *The Luck of the Law: Allusions to Fortuity in Legal Discourse*, 102 HARV. L. REV. 1862, 1863–64 (1989) [hereinafter *The Luck of the Law*]. For the sake of definition, “the sphere of luck (good or bad) for a person may be understood as the sphere of things having the following two properties: the person does not control them; even so, they affect his or her life.” Alfred R. Mele, *Ultimate Responsibility and Dumb Luck*, in RESPONSIBILITY 274, 274 (Ellen Frankel Paul, Fred D. Miller, Jr., & Jeffrey Paul eds., 1999).

48. See Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 71 (1990). The definition of what constitutes “luck” can be defined by society in certain respects. In arguing against inheritance, Mark Ascher argues that “we certainly cannot control many types of luck [b]ut we can—and ought to—curb one form of luck.” *Id.* at 74.

49. Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1, 52 (1998). Similarly, if “there are not enough desirable jobs to go around,” and if identical talent does not lead to identical reward, “[t]hose lucky enough to snag the best jobs will earn undeserved ‘job rents.’” Wax, *Something for Nothing*, *supra* note 14, at 58 (summarizing the views of Philippe Van Parijs).

50. *The Luck of the Law*, *supra* note 47, at 1864.

51. See *id.* (“because so much depends on fortuity”).

52. As Professor Avi-Yonah observes, “there is some evidence that economic success depends more on luck than on skills, although those who are lucky tend, of course, to impute their success to skill.” Avi-Yonah, *supra* note 1, at 1405.

53. Some experiences blend luck and past actions. Beauty is arguably one such example that mixes good and bad genes with health habits and can, among other things, lead better looking people to make more money than homely people even where beauty does not relate to the work being done. Markus M. Mobius & Tanya S. Rosenblat, *Why Beauty Matters*, 1,11–12 (2005),

such luck is by definition not “earned.”⁵⁴

* * * *

The analysis above is not meant to be a complete listing of all the factors that can independently influence income, nor is it intended to convince you that the particulars described under each function are exactly as you would understand and describe effort, education, or luck. Rather, the goal is to force a reconsideration of the idea that *all* income is “earned” income. As a society, we worship financial success, and we attribute a long list of positive characteristics to those people who are successful.

Of course, it is true that many successful people have worked hard for their income. But we must not lose sight of the ways in which factors such as luck and educational credentials can lead to higher incomes independent of effort. The preceding discussion of income equations casts into some doubt, in the minds of the rich and the poor alike, the idea that income—particularly for people who have most benefited from subsidized education, exogenous societal shifts, and good luck—is entirely “earned.”

B. Societal Structure

Societal institutions—laws and norms—define the field on which an individual works, helping to establish the rules determining the ability to make money and to feel as if such money is or is not devoid of societal obligations. As Jack Knight explains: “[i]n the rational-choice framework, social institutions affect the calculus used by rational actors to assess their potential strategies and to select their rational choice of action.”⁵⁵ Knight argues that institutions are shaped by interest group conflicts regarding the distributional effects of those institutions and that these institutions crucially shape the expectations held by actors regarding their possibilities.⁵⁶

Institutions matter for both the generation of income and how we understand the incomes of the rich, even if we accept institutional descriptions that stress a more neutral stance with regard to groups’ attempts to skew distribution in their favor.⁵⁷ Echoing their title, the authors of *Inequality by Design* write: “To

<http://trosenblat.web.wesleyan.edu/home/beauty2005.pdf> (last visited Jun. 30, 2006) (presenting experimental findings of a sizeable beauty premium though beauty did not correspond to success on the assigned task: solving computer mazes); *see also* Jeff E. Biddle & Daniel S. Hamermesh, *Beauty, Productivity, and Discrimination: Lawyer’s Looks and Lucre*, 16 J. LABOR ECON. 172, 197 (1998) (concluding that “evidence strongly suggests that beauty is not merely correlated with but actually causes differences in earnings” for graduates from a sample law school).

54. This does not mean that we might not want to consider a percentage of such luck-driven gains as earned income to answer the challenge that good things happen to those who make their own luck (though by definition, this sort of “luck” would not fit within the luck function).

55. JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 17 (1992).

56. *Id.* at 13–14, 49.

57. This assertion that institutions matter when we consider income is a subset of the larger assertion by New Institutional Economics (NIE) that “Institutions matter.” *Id.* at xi. Douglass North is credited with developing and explaining the consequences of this assertion. *See*

understand the nature of inequality in America, we must look at economic, social, and political conditions—the *systems* of rules and rewards that shape inequality.”⁵⁸ In this section we will explore two sets of norms that shape individuals’ income—inheritance and compensation systems—and conclude with an aside exploring the relevance of these structures to the legal community in particular.

1. Inheritance:

In considering whether the rich have earned their high incomes and hence deserve their present unfettered ability to enjoy these incomes without being subjected to attendant obligations, disparate inheritance is the easiest case for making a firm claim that some income is not earned. The current system that permits unlimited inheritance is morally indefensible when it is looked at from the perspective of two babies, one rich and one poor, born into worlds of disparate wealth. This is not to say that inheritance has no *practical* (and perhaps, from the perspective of the testator, even liberty) advantages for a society,⁵⁹ but that if we consider the comparison between a child born into poverty and another born into wealth, there is no *moral* justification for such unequal treatment of the less fortunate child.⁶⁰ This is true even if the less fortunate child’s family can meet all the child’s needs, since the disparate treatment of the two children is ultimately an accident of birth.⁶¹

DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

58. FISCHER, HOUT, JANKOWSKI, LUCAS, SWIDLER & VOSS, *supra* note 16, at 103 (emphasis in original). As Martha McCluskey writes about contemporary politics, “neoliberalism embraces a racialized, gendered, and class-biased vision of social equity and community solidarity that favors the interests of the most privileged members of society.” Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 785 (2003).

59. Mark Ascher, in his article advocating for more strict limits on inheritance, identifies eight arguments *against* curtailing inherited wealth: (1) the effect on the economy in terms of the incentive to work, increased consumption and decreased savings, and the decrease in capital privately held; (2) destabilization of the family; (3) nationalization of the means of production; (4) the failure of the Soviet experiment; (5) tax evasion and fraud; (6) emigration—of capital and citizens; (7) decreased state revenues; and (8) the prospect that this change would severely undermine the American dream. Ascher, *supra* note 48, at 100–121.

60. See Michael J. Graetz, *To Praise the Estate Tax, Not To Bury It*, 93 YALE L.J. 259, 277 (1983) (responding to the liberty interest heirs to estates have with an argument that that there is “very little justification for protecting the rights of [a wealthy person’s] lineal descendants to enjoy an enormous advantage over others.”). The focus on the two babies is important because the advantage is unearned from the perspective of the babies—even though the inherited advantage might reflect income that *was* earned by prior generations. See, BARRY, *supra* note 7, at 46 (“a new-born baby cannot possibly be responsible for the material and social conditions into which it is born”).

61. Inheritance has been described by Mark Ascher, an author of FEDERAL INCOME TAXATION OF ESTATES, TRUSTS, AND BENEFICIARIES (3d ed. 2003), as “something we should tolerate only when necessary—not something we should always protect.” Ascher, *supra* note 48, at 73. The lack of a moral justification for inheritance can create emotional costs aside from any material

This article is about the obligations of privilege, and is not an attack on inheritance as such.⁶² This discussion of inheritance, then, is limited to a critique of the notion that the recipient of such inheritance “earns” the income derived from his or her inheritance. In *Curtailing Inherited Wealth*, Mark Ascher writes:

For no particularly good reason, we allow some players, typically those most culturally and educationally advantaged, to inherit huge amounts of wealth, *unearned in any sense at all*. So long as we continue to tolerate inheritance by healthy, adult children, what we as a nation actually proclaim is, “All men are created equal, except the children of the wealthy.”⁶³

Just as the children of wealthy parents did “not participate in the acquisition of the property they inherit,”⁶⁴ their ability to claim their participation in the income generated from such inheritance is nearly as limited.⁶⁵ Even though those inheriting considerable wealth tend “to stress their own accomplishments

disadvantages or hardships for those born without a silver spoon: “If some people live in luxury not through their own efforts but from large inheritances, then resentment is understandable on the part of those who have a minimum amount of property but still far less than those who have inherited.” MUNZER, *supra* note 9, at 249.

62. The critique here is limited in part because with today’s politics, such an attack seems futile. See *infra* Part II, § B(2).

63. Ascher, *supra* note 48, at 71 (emphasis added). In his article, Ascher lays out seven practical arguments in favor of curtailing inherited wealth: (1) leveling the playing field, (2) reducing the deficit in a painless and appropriate fashion, (3) protecting elective government, (4) increasing privatization in the care of the disabled and elderly, (5) expanding public ownership of national and international treasures, (6) increasing lifetime charitable giving, and (7) neutralizing the corrosive effects of wealth. *Id.* at 87–99. While Ascher’s retorts to arguments *for* inheritance are generally satisfying, he should have gone further in his response to concerns about the overall economic impact of curtailing inherited wealth. Leveling the playing field has the potential to allow more ideas from those of the lower classes to impact society. By expanding the numbers of people whose ideas might contribute to technological change, curtailing inherited wealth could lead to more rapid economic expansion, offsetting the problems raised by shortsighted critiques that accept inequitable inheritance in order to avoid rocking the economic boat. Furthermore, as Ackerman and Alstott insisted in their defense of a stakeholder society, “[w]e cannot begin to grapple with the growth objection without placing it within a moral framework.” BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 114 (1999).

64. Ascher, *supra* note 48, at 81.

65. There is an argument that the inheritors can claim that they earned the income from the use of their inheritance to the extent that they managed their inheritance wisely. However, since those from poorer backgrounds never had the opportunity to either manage wisely or squander an inheritance, this argument has weak equitable grounding. In discussing the need to separate, in a just system, the effects of luck from deserved income, Professor Amy Wax writes:

Holding people responsible for life choices only squares with egalitarianism if those decisions proceed from fair starting points that in themselves satisfy the demands of the luck egalitarian framework. Since real people differ substantially in their unchosen endowments—external, material, and intrinsic—applying the choice/chance paradigm to determine who “deserves” what in the real world is fraught with difficulty: every choice, and hence the outcome of every choice, is to some extent the product of unearned antecedents and accidental features of the world outside the pertinent agent’s control.

Wax, *Something for Nothing*, *supra* note 14, at 22–23.

or to downplay the importance of what they ha[ve] inherited,”⁶⁶ income advantages based on inheritance are not earned advantages.

Ascher, and other writers who argue for increased limitations on or prohibition of inheritance,⁶⁷ have not found much traction for their arguments in American politics.⁶⁸ Despite the inequities involved, the American public strongly supports the privilege to inherit and, as the successful campaign to get rid of the “death tax” demonstrates,⁶⁹ is unlikely to accept curtailing inheritance any time soon.⁷⁰

2. Compensation Systems:

In its assumption of a single immutable form of market, the standard explanation for why some people make more money than others—because that is the market compensation for their particular talents or background—is falsely deterministic.⁷¹ It is important to recognize that there is not a single set of rules

66. FRANCIE OSTROWER, *WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY* 107–08 (1995).

67. See, e.g., ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 209 (1998) (arguing for the creation of social endowment accounts in part through “more aggressive taxation of family inheritance”).

68. This is, in part, the result of the dominant conservative attitudes in current American politics (which are not comparable with European perspectives). For a vivid portrayal of the influence of conservative thought, see JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* (2004); see also, JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S SOCIAL AGENDA* (1996) (describing the role think tanks and foundations played in pushing for a more conservative America); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 131–35 (2004) (arguing that our understanding of the world is being defined by powerful, corporate interests, and that as a result these interests become even more powerful).

69. For an insightful analysis of the colorful players involved and the tactics employed in the campaign against the “Death Tax,” see MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2005); see also DAVID CAY JOHNSTON, *PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE* 73–91 (2003), GATES SR. & COLLINS, *supra* note 2, at 13–24; OSTROWER, *supra* note 66, at 103–05 (describing the attitudes of philanthropic donors towards the estate tax); Paul Krugman, *For Richer: How the permissive capitalism of the boom destroyed American equality*, N.Y. TIMES, Oct. 20, 2002, at Mag. 62, 141 (“There is an economic argument for repealing the estate tax, but it’s hard to believe that many people take it seriously.”). Those seeking to repeal the tax were only able to abolish the tax entirely for a single year, with Senate Republicans failing recently to get enough votes to force a vote on a bill to permanently repeal the tax. Floyd Norris, *The ‘Death Tax’ Lives on Despite Senate Republican Efforts to Kill It*, N.Y. TIMES, June 11, 2006, at C3.

70. An additional concern with inheritance is that “[t]he status quo is partly the result of past discrimination.” SINGER, *supra* note 9, at 164. Allowing inheritance of the fruits of such discrimination perpetuates this discrimination—whether it is land taken from Indians or property initially gained through the labor of slaves—into the next generation. Thus, to accept a continued privilege to inherit entails the acceptance of direct and indirect gains from inheritance that are not “earned” income.

71. Of course, the rich may take this view because the current set of institutions and rules have worked well. These institutions play an important role even in the quintessential market, the

that defines a market or defines capitalism. After all, American capitalism is different from that found in the European social democracies,⁷² and today's capitalism is different from that of fifty years ago.⁷³

Salary is particularly dependant on societal rules regarding the market. Though infrequently recognized, “[i]t is society that decides which talents to reward and by how much.”⁷⁴ Whether because of restrictions on entry to higher paid positions or through the operation of minimum wage laws, policies that structure the market determine labor market earnings by individuals.⁷⁵ The mechanism for keeping out new entrants and maintaining higher salaries for some jobs and not for others differs by occupation, with the government playing a crucial role in permitting or thwarting such efforts to limit competition. For example,

[g]overnments stipulate the requirements necessary to practice a wide range of professions, from hair-cutting to neurosurgery. The tighter those requirements, the fewer the practitioners, and the higher their earnings. Imagine what would happen to the incomes of the top-earning 5 percent of Americans if entry into medicine, or law, or the professorate were made considerably easier?⁷⁶

What is true for white collar workers also holds true for those with blue collars; the government shapes individuals' abilities to receive higher salaries by defining the terms under which they interact with the market. A recent analysis of American labor observed that “one-third of the growing wage inequality” was

stock market: “when a person makes a trade on the stock exchange, he benefits not just from securities laws and regulations, but from an entire statutory and regulatory scheme that supports capital markets in a variety of ways including general monetary policy, tax policy, and economic policies.” Kornhauser, *supra* note 22, at 1716. As J. R. Lucas observes: “The perfect market of the economists has been idealized beyond all actuality.” J. R. LUCAS, RESPONSIBILITY 162 (1993). As Joseph Singer notes, “private property cannot exist without regulation.” SINGER, *supra* note 9, at 8.

72. The United States, for example, provides citizens lower levels of welfare than many European countries do, making the U.S. economy arguably more flexible at the expense of greater security for its citizens. WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 153–57 (1996).

73. Corresponding to recognition that markets can vary should be recognition that success in a particular market environment is not entirely a result of an individual's effort.

74. Kornhauser, *supra* note 22, at 1723. Warren Buffet's own perspective on the importance of society is worth noting:

I personally think that society is responsible for a very significant percentage of what I've earned. If you stick me down in the middle of Bangladesh or Peru or someplace, you'll find out how much this talent is going to produce in the wrong kind of soil. I will be struggling 30 years later. I work in a market system that happens to reward what I do very well—disproportionately well.

GATES SR. & COLLINS, *supra* note 2, at 115, quoting “Warren Buffett Talks Business,” Univ. of North Carolina, Center for Public Transportation, Chapel Hill, 1995; see also, Alan B. Krueger, *Economic Scene: When it comes to income inequality, more than just market forces are at work*, N.Y. TIMES, Apr. 4, 2002, at C2.

75. FISCHER, HOUT, JANKOWSKI, LUCAS, SWIDLER & VOSS, *supra* note 16, at 118.

76. *Id.*

attributable to “[s]ignificant shifts in the labor market, such as the severe drop in the minimum wage and de-unionization.”⁷⁷ A choice to use government power to break a union strike, for example, can weaken the power of unions in general to demand higher wages.⁷⁸

Our popular culture and government rhetoric tends to reinforce the mischaracterization of the market as existing independent of policy. Even books advocating progressive policies sometimes overlook the role policy can play in giving a privileged few gains disproportionate to their effort or contributions.⁷⁹ Ackerman and Alstott write:

If starting points were fair and some of us decided to work, innovate, and accumulate while others spent more on leisure and consumption, we would not challenge the ensuing distribution of wealth merely because the innovative savers had accumulated much more than the leisurely consumers. To the contrary, the ensuing distribution would simply be testimony to the diversity of ideals that motivate free men and women in a just society.⁸⁰

Yet, wealth distribution reflects the particular rules governing how much Ackerman and Alstott’s innovative savers can make for their work within the market, and these rules may unjustly harm those with less. Consequently, there is room to question some distributions of wealth even in a world in which the starting points were fair. As Professor Brian Barry asserts, even in a society with equal opportunity, “[t]here would still be no reason for accepting the assumption of the meritocrats that any size of the reward is justifiable as long as there has been fair competition for it.”⁸¹

We see the market as a given and do not see the way the market is shaped

77. Economic Policy Institute, *Facts and Figures: Wages*, STATE OF WORKING AMERICA 2004/2005, http://www.epinet.org/books/swa2004/news/swafacts_wages.pdf (last visited June 18, 2007). As Professor William Quigley writes, “[i]t is impossible to discuss why there is so much work that does not pay living wages without also discussing the decline in the role of organized labor.” WILLIAM P. QUIGLEY, *ENDING POVERTY AS WE KNOW IT: GUARANTEEING A RIGHT TO A JOB AT A LIVING WAGE* 79 (2003).

78. President Reagan’s decision to use federal power to crush the strike by the air traffic controller union despite their support for his candidacy is representative of the sort of government shaping of the market that can have real effects on individual income. See Douglas L. Leslie, *Retelling the International Paper Story*, 102 *YALE L.J.* 1897, 1906 (1993) (“My impression is that managers, who used to think that union-busting was in some vague moral sense wrong, no longer think so. Reagan’s notorious discharge of the air traffic controllers may have set this change in motion.”).

79. This discussion has focused on the particular market’s institutional framework, but disproportionate gains also can occur through advantages caused by the “vicissitudes of consumer demand or the size of the labor supply available” that were not created by any particular economic agent. Wax, *Something for Nothing*, *supra* note 14, at 26. Professor Graetz explains in more detail that “even when the market is functioning perfectly, returns to both capital and labor inputs depend upon the demand for the product or service being produced. The rewards the market place bestows depend on factors outside an individual’s control.” Graetz, *supra* note 60, at 275. This takes us back to the concept of luck from the first section.

80. ACKERMAN & ALSTOTT, *supra* note 63, at 96.

81. BARRY, *supra* note 7, at 185.

by policies that are not necessarily inherent in a functioning capitalist economy. Professor Roberto Mangabeira Unger argues that assumptions embodied in *institutional* and *structural fetishism* make us believe that our options are limited and that only a certain institutional and structural set is available to society.⁸² Together, these fetishisms might explain our blindness to the choices underlying the structure of the United States market and the related way in which high wages are contingent on the particular features of the institutions of capitalism in the United States. Unger argues that this view represents “an unwarranted denial of our power to change society, and, therefore, ourselves.”⁸³

At the very least, these fetishisms restrict the ability of the rich to look beyond ego when considering whether high incomes are purely a product of what an individual brings to the job market. Phrased slightly differently and with a focus on the economy, a market “is embedded in a set of policies, many of which may be so longstanding that we assume them to be ‘natural.’ Nevertheless, they are policy *choices*.”⁸⁴ To some degree, we *choose* to reward “the 13,000 richest families . . . [with] almost as much income as the 20 million poorest families.”⁸⁵ An individual’s income can thus simultaneously reflect the working through of the preceding income equations and the policies embedded in the market.⁸⁶

3. Relevance to the Legal Community in Particular:

The centrality of societal structure to individual incomes, especially for the rich who are able to influence the shape of the market, is perhaps best understood by considering our own backyard: the legal community. “While many students enter law school with social activist ideals of helping people and promoting social justice, few graduating law students take jobs in public interest law.”⁸⁷ The majority of the graduates from elite law schools decide to work in corporate law firms. These graduates immediately receive both very high salaries⁸⁸ and “special perquisites, such as expensive meals (billed to clients) and

82. UNGER, *supra* note 67, at 25–26.

83. *Id.* at 26.

84. FISCHER, HOUT, JANKOWSKI, LUCAS, SWIDLER & VOSS, *supra* note 16, at 118 (emphasis in original).

85. Krugman, *supra* note 69, at 65.

86. *Cf.* FISCHER, HOUT, JANKOWSKI, LUCAS, SWIDLER & VOSS, *supra* note 16, at 121 (“[i]n general, [America’s] high earners earn relatively more and low earners earn relatively less than do workers elsewhere”).

87. ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 143 (1992). *But cf.*, Earl Edward Muntz, Jr., *Opinions of Divinity and Law Students on Social Class*, 34 J. EDUC. SOC., 221, 229 (1961) (comparing the egalitarian concerns of divinity students with those of law students and finding that “[l]aw students are almost wholly lacking in egalitarian ideology.”).

88. For Harvard Law graduates, the approximate average starting salary for those entering private practice upon graduation is \$125,000 for recent graduates. Harvard Law School, J.D. Student Financial Services, <http://www.law.harvard.edu/students/sfs/> (last visited June 18, 2007).

memberships in clubs.”⁸⁹ In terms of the income equations described above, such junior associates have the perfect markers for high income: they are expected to bill an amazing number of hours each year (effort),⁹⁰ they have a minimum of seven years of post-secondary schooling (education),⁹¹ and they had been accepted by an elite school (luck).⁹² In addition to giving up free time, to make the high salaries of large corporate firms many associates also choose to sacrifice their happiness,⁹³ personal lives,⁹⁴ and pre-law school ideals.⁹⁵

89. RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 15 (1996); see also CAMERON STRACHER, *DOUBLE BILLING: A YOUNG LAWYER’S TALE OF GREED, SEX, LIES, AND THE PURSUIT OF A SWIVEL CHAIR* 40–41 (1998) (describing the satisfaction he felt as an associate ordering expensive food billed to the client and being surrounded by paralegals working on his project).

90. According to one examination of young lawyers, “the naked truth is that law firms have an overwhelming interest in working young lawyers to death.” DOUGLAS LITOWITZ, *THE DESTRUCTION OF YOUNG LAWYERS: BEYOND ONE L* 71 (2006). The author continues:

In most law firms nowadays, the young lawyer is a mere entry on a ledger, an hourly wage-slave trying to compete in a scarce economy, with every move being monitored by law firm administrators in much the same way that telemarketers are forced to make a certain number of calls per hour while the supervisor listens.

Id. at 72.

91. The U.S. requirement that lawyers have seven years of higher education is an example of a restriction on entry into a profession. In many other countries, the norm is what we would consider a mere undergraduate degree in law. Arguments have also been made that the U.S. legal education could be shrunk from three years to two. See Curriculum Study Project Committee, Association of American Law Schools, *Training for the Public Professions of the Law: 1971, in* HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 93–328 (1972) (known as the Carrington Report).

92. As the spokesperson for Connecticut’s Department of Education told the New York Times, “we live in an era when valedictorians are rejected.” Diane Sierpina, *College Admissions, the Consultant’s Way*, N.Y. TIMES, Oct. 11, 1998, at 14 CT, 16 CT. A private college counseling company reports both that 40% of valedictorian applicants were rejected by Dartmouth and that a Yale Admissions officer stated that 85% of the class of 2003 applicants “had numerical qualifications which meet all the historical standards.” CollegeLab, *Our College Admissions Quiz*, <http://www.collegelab.net/416610.html> (last visited June 18, 2007).

93. See Litowitz, *supra* note 90, at 9–26 (describing the endemic unhappiness of young lawyers). Unhappiness causes a number of problems and can be linked to the occupation:

People who are this unhealthy—people who suffer from depression, anxiety, alcoholism, drug abuse, divorce, and suicide to this extent—are almost by definition unhappy. It should not be surprising, then, that lawyers are indeed unhappy, nor should it be surprising that the source of their unhappiness seems to be the one thing that they have in common: their work as lawyers.

Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 881 (1999).

94. RUTH SIDEL, *ON HER OWN: GROWING UP IN THE SHADOW OF THE AMERICAN DREAM* 174 (1990) (“All too often women working in law firms must choose between a successful professional career and a satisfying personal life.”).

95. One Harvard Law 3L interviewed by Robert Granfield explained, “[t]he conventional wisdom is that everyone comes in [to law school] saying they don’t want to do corporate law, but when they leave everybody does just that.” GRANFIELD, *supra* note 87, at 48. Granfield said of one student who was representative of a significant number of his peers and chose to work at a New York firm despite his stated commitment to public interest work, “it seems that the desire to succeed overwhelmed his desire to do good.” *Id.* at 49.

According to the preceding analysis, these young associates seem like the perfect example of a group of workers who should be well compensated, who earn their incomes.

But before concluding that legal associates fully earn their high incomes, let us first re-examine some of the contributing income factors, luck, education, and effort. Elite law schools are disproportionately filled with children fortunate enough to have been born into wealthy families—whose post-college education continues to be supported by transfers and gifts from their parents, making associates from working-class backgrounds an oddity.⁹⁶ Furthermore, after the notoriously difficult first year,⁹⁷ the last two years, or at least the last year,⁹⁸ of law school can make the college lifestyle and work load seem relatively

Students frequently explain away their choice to do corporate work in spite of stated public interest commitments by pointing towards their heavy debt burden. As Professor Derrick Bell explains, “[m]any of my students are facing the repayment of college and law school loans totaling upward of \$150,000.” DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* 6 (2002). Yet, at least for those students attending elite schools, the statement that the choice is determined by educational loans is a red herring, a justification revealed as merely an excuse by the guaranteed availability of grants (labeled Loan Repayment Assistance Programs or alternatively Low Income Protection Plans) that cover student loan payments for those students who pursue lower paid public interest careers. *See e.g.*, Harvard Law School Student Financial Services, Low Income Protection Plan, <http://www.law.harvard.edu/students/sfs/lipp/> (last visited June 18, 2007); Stanford Law School, Loan Repayment Assistance Program, <http://www.law.stanford.edu/program/tuition/assistance/> (last visited June 18, 2007).

As you go down the U.S. News and World Report rankings, the LRAP programs become increasingly less generous and more restrictive with regard to eligible jobs, making law school loans a more realistic determinant of career choice. *See e.g.*, Georgetown Law, Loan Repayment Assistance Program, <http://www.law.georgetown.edu/finaid/lrap/> (last visited June 18, 2007) (requiring student to switch from a 10-year to 15-year repayment schedule and limiting eligibility to direct legal services or work for the government) (I transferred from Georgetown University Law Center to Harvard Law School in part so that my loans would be covered by a better LRAP program). Equal Justice Works, an organization supporting public-interest minded law students, has compiled a list of schools with LRAP programs, at <http://www.equaljusticeworks.org/finance/index.php?view=detail&id=6176> (last visited June 18, 2007), and has also co-authored a report presenting the effect of debt on the career choices of law students. *See* Equal Justice Works, NALP & Partnership for Public Service, *From Paper Chase to Money Chase: Law School Debt Diverts Road to Public Service* (Nov. 2002), <http://www.equaljusticeworks.org/choose/lrapsurvey.php> (last visited June 18, 2007). For an overview of the literature on the relationship between educational debt and social justice ideals, see MARTHA R. MAHONEY, JOHN O. CALMORE & STEPHANIE M. WILDMAN, *SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW* 25–34 (2003).

96. *See*, GRANFIELD, *supra* note 87, at 109–122 (discussing the identity challenges faced by the few working-class students at Harvard Law School).

97. Two popular portrayals of the 1L year are the 1973 movie “The Paper Chase,” which earned John Houseman a best supporting actor Oscar for his role as the tough Professor Kingsfield, and Scott Turow’s *ONE L. THE PAPER CHASE* (20th Century Fox 1973); SCOTT TUROW, *ONE L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL* (1977).

98. *See* Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL ED. 235, 247 (2001) (“Law students, in the aggregate, are not taking advantage of the opportunities offered to them in the third year [T]hey are pulling out early, perceiving their third-year courses as unhelpful or irrelevant.”). A draft version of the paper is available at http://www.law.ucla.edu/sander/LL_Educ/Sander-Gulati-HappyCharade-final.pdf.

challenging.⁹⁹ Effort, experienced primarily through billable hour requirements, is the factor that gets the most attention for those seeking to justify the high salaries of associates. While not disparaging such effort, this attention on the hard work of attorneys stands in sharp contrast with society's choice to overlook the number of hours many working poor put in to hold down second and third jobs.¹⁰⁰ The acclaim that greeted Barbara Ehrenreich's writing—assisted by the credibility accorded to her descriptions because of her middle-class status—is a testament to just how far removed wealthier individuals are from the poor; only a book could help bring some appreciation for the amount of stressful work required of the poor in order to make ends meet.¹⁰¹ The point is not that associates, or more generally other high-income individuals, do not work hard, but simply that the same holds true for many other people who make a lot less money.¹⁰²

C. From Unearned to Undeserved

The goal of Part I has been to call into question whether all income is earned. In what follows, I will briefly explore the relationship between the descriptive, “unearned,” and the normative, “undeserved.” The poor are routinely categorized, popularly and under the law, according to “the familiar distinction between the ‘deserving’ and ‘undeserving’ poor.”¹⁰³ Figuring out why the rich are immune—and if they should remain so—from such labeling will help us to consider what obligations the rich have to society for the unearned portion of their incomes.¹⁰⁴

99. A personal aside may make this point more clear. I attended Georgetown University Law Center for my 1L year and then transferred to Harvard Law School for my 2L & 3L years. My first class at Harvard, I switched from being a nervous transfer student slightly intimidated by my new peers to having confidence in my surroundings in the first five minutes when the professor's question of how many students had done the reading was greeted by silence. In my personal take on Harvard Law School was that, while filled with bright people, many students—after realizing at the end of the 1L summer that there are enough corporate jobs to go around for Harvard graduates—decide to not spend time on homework or class readings. Based on conversations with friends who attended other law schools, the experience of having a lot of free time for two of the three years of law school does not seem to be limited to those studying at Harvard.

100. See, e.g., GRETCHEN PURSER, AMY SCHALET & OFER SHARONE, *BERKELEY'S BETRAYAL: WAGES AND WORKING CONDITIONS AT CAL 11* (2d ed. 2004), <http://www.berkeleybetrayal.org/bbetrayal.pdf> (discussing the need to take second jobs experienced by Berkeley's custodians, groundskeepers, and clerical and food service workers). It is not surprising that such efforts go relatively unrecognized; as Professor William Quigley observes, “[t]he working poor are everywhere, yet many of us don't see them.” QUIGLEY, *supra* note 77, at 72.

101. See BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).

102. Societal demand, rather than individual effort, arguably explains the premium salaries of lawyers: “As attorneys, we have been fortunate that the American demand for legal services has been remarkably robust.” Graetz, *supra* note 60, at 276. Such demand is fueled in part by legal structures limiting the practice of law to legal professionals. For more on the role of societal structure, see *supra* footnotes 74–78 and accompanying text.

103. Wax, *Something for Nothing*, *supra* note 14, at 2.

104. While not directly addressing this discussion, an observation of Cass Sunstein's reflects

The accepted belief that the poor can properly be placed into “deserving” or “undeserving” boxes leads to policy choices that provide assistance to some but not all of the poor.¹⁰⁵ William Julius Wilson has observed the profound impact that the “public framing of social outcomes” has upon society’s efforts to address its “sensitive problems,” and upon the scholarly study of these problems.¹⁰⁶ America’s poor find themselves defined by this public framing, a framing which assigns blame for poverty to the poor themselves.¹⁰⁷ Professor Mechele Dickerson observed that “while we are happy to give economic assistance to the ‘truly needy,’ we want to make sure that none of the assistance goes to the ‘merely greedy.’”¹⁰⁸ The partial victory of those opposed to the “Death Tax”¹⁰⁹ hints at our tendency to not feel the same moral indignation when the merely greedy rich siphon off societal resources.

One might claim that the moralistic appraisal of poor Americans as undeserving applies only in the context of welfare assistance. We might prefer to think that deserving or undeserving applies only to whether the individual or family is “‘deserving’ of public assistance . . . if complete self-sufficiency cannot be attained through reasonable, good faith efforts.”¹¹⁰ Yet, the poor are not the only parties receiving financial benefits from the country. To give just one example, the wealthy benefit from tax expenditures¹¹¹ such as the mortgage

some of this disparate treatment, especially if class is included alongside race and gender:

In some cases, existing norms may be part and parcel of a caste system. They may turn a morally irrelevant characteristic—race and gender are the most obvious examples—into a signaling device with respect to social role and associated norms. If a caste system is unjust, it is appropriate to alter norms, roles, and meanings that perpetuate it.

Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 954 (1996).

105. See, e.g., Amy L. Wax, *Rethinking Welfare Rights*, *supra* note 5 (using reciprocal norms to explain why society subjects non-working single mothers to moral judgments but does not do the same to non-working married mothers).

106. WILSON, *supra* note 72, at 159. See, e.g., A. Mechele Dickerson, *America’s Uneasy Relationship With the Working Poor*, 51 HASTINGS L.J. 17, 39 (1999) (observing that “we cannot expect to solve the ‘welfare problem’ until we correctly define the problem”).

107. The process used by the federal government when classifying people as poor or not poor arguably lowers the number of people who are considered poor, which plays a significant role in framing the issues. James T. Patterson explains,

[The process] left the impression that poverty mainly affected the long-term welfare poor, . . . enabling Americans to imagine that all poor people belonged to a special class of the “undeserving.” If higher income levels had been set including a percentage of the working poor among those defined as living in poverty, Americans might have better appreciated the magnitude of the poverty problem

JAMES T. PATTERSON, *AMERICA’S STRUGGLE AGAINST POVERTY 1900–1994* 235 (1994); see also QUIGLEY, *supra* note 77, at 33–51 (arguing that we need a new definition of poverty that moves away from the current “unrealistic” official poverty line). For more on the U.S. poverty line, see generally Gordon M. Fisher, *The Development and History of the Poverty Thresholds*, SOC. SECURITY BULL., Winter 1992, at 3, available at <http://www.ssa.gov/history/fisheronpoverty.html> (last visited June 19, 2007).

108. Dickerson, *supra* note 106, at 17.

109. See *supra* note 69 and accompanying text.

110. Wax, *Something for Nothing*, *supra* note 14, at 3.

111. For more on likening tax expenditures to revenue expenditures, see MICHAEL J. GRAETZ

deduction.¹¹² Thus there is no justification for categorizing the poor as deserving or undeserving without also categorizing the rich.¹¹³

Disapproval of the undeserving poor is linked to celebration of the middle class and veneration of the upper class.¹¹⁴ “[T]he litmus test for social legitimacy focuses on material accumulation[,]” a Harvard Law Review Note observed, explaining that “[p]oor people, because they have accumulated very little, are presumed not to possess the same work ethic as those who are more materially successful, and the rest of society assigns them a low societal value.”¹¹⁵ As highlighted by Professor Quigley, the poor are stigmatized, shamed, and stereotyped as immoral.¹¹⁶ According to this view, the system rewards are reserved for the worthy.¹¹⁷ Attacks on the morality of the poor implicitly serve as a *moral* affirmation of those with higher incomes. President Reagan’s campaign statements denigrating the “welfare queen” only make sense when she is compared to an upstanding (wealthier and whiter) American.¹¹⁸

& DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 39–53 (Rev. 4th ed. 2002).

112. See FISCHER, HOUT, JANKOWSKI, LUCAS, SWIDLER & VOSS, *supra* note 16, at 136–148 (discussing invisible policies that subsidize the middle and upper-classes); see also, Kornhauser, *supra* note 22, at 1710–11 (suggesting that tax expenditures benefit the wealthy more than the poor). The contrast between the political support for government expenditures benefiting the poor versus the tax expenditures benefiting the non-poor is vivid in America’s housing policies. The New York Times reported:

The death of affordable housing—what a strange notion in a nation as spectacularly housed as this one. Overall, the United States shelters more people in better-quality homes than any other country in the world. (Ask the Japanese.) And it does so by offering the middle and upper classes exactly what it tells the poor it can no longer afford: generous Government subsidies. The \$66 billion a year the Federal Government now spends on mortgage-interest and property tax deductions is about four times as much as it spends on low-income housing. More than two-thirds of it goes to families with incomes above \$75,000.

Jason DeParle, *Slamming the Door*, N.Y. TIMES, Oct. 20, 1996, at Mag. 52, 53.

113. Judging the poor as people may help satisfy a need to create emotional separation between the poor and ourselves: “The impulse to blame the victim for his own plight . . . is . . . part of a general tendency to put distance between the victim and ourselves. We want to know that the victim is very different from ourselves, so that the faculty of sympathetic identification need not be awakened.” JAMIE MAYERFELD, *SUFFERING AND MORAL RESPONSIBILITY* 102 (1999).

114. See Handler, *supra* note 5, at 926 (“The distinction between the deserving and undeserving poor is a moral issue that affirms the values of the dominant society by stigmatizing the outcasts.”).

115. Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 HARV. L. REV. 2013, 2015 (1994) [hereinafter *Dethroning the Welfare Queen*].

116. QUIGLEY, *supra* note 77, at 31.

117. See Graetz, *supra* note 60, at 274. *Accord*, BARRY, *supra* note 7, at 135.

118. In an article exploring the ascendancy of Southern style Republicanism which includes a reliance on racism, Michael Lind relates, “One of Reagan’s favorite stories on the stump, when he ran for president, was an anecdote about a ‘welfare queen,’ whom everyone understood to be black, making \$150,000 a year. Though delivered in a denatured Midwestern voice, this was Dixie demagoguery at its finest.” Michael Lind, *The Southern Coup*, THE NEW REPUBLIC, June 19, 1995, at 20, 26. For more on media images of poor welfare recipients and the effect of such images, see generally Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs*

Understanding the morality assigned to the poor requires an understanding of the rich: to understand judgments of those who live in trailers, we must consider those who live in McMansions.

While numerous law review articles critique the myths and images surrounding the poor,¹¹⁹ there is deafening silence regarding the myths supporting attribution of moral superiority to higher income individuals. The undeserving poor are chastised and subject to social and legal sanctions while the rich are celebrated, admired, and honored by our society.¹²⁰ Most importantly for our purposes, the unearned income of the poor provided by society carries with it moral disapproval while the unearned income of the rich—hidden by education, luck, and societal structure—is not burdened by either societal judgments or a sense that the underlying root of the income, or justice broadly understood, requires that the rich share their wealth.¹²¹

The collective reluctance of American legal scholars to consider whether high incomes are earned or unearned, deserved or undeserved, is perhaps reflective of a latent fear of being labeled Marxists. But such an examination need not signal as much: a committed capitalist can reject the “Marxist attack on wealth as ill-gotten exploitation,”¹²² while still being concerned with the ways in which high incomes reflect societal contributions to income. Given the current academic reluctance¹²³ to ask whether high incomes are merited, it is a significant step to describe some portion of high incomes as unearned. Michael Graetz’s position on this matter may reflect the beliefs of many readers: “One need not believe that the rewards of personal dedication and integrity are nil, or

Welfare Legislation Debate, 22 *FORDHAM URB. L.J.* 1159 (1995).

119. See, e.g., Lucie E. White, *No Exit: Rethinking “Welfare Dependency” from a Different Ground*, 81 *GEO. L.J.* 1961, 1963–71 (describing the idea that welfare causes poverty as a “myth that won’t yield to reason”).

120. The difference in treatment of welfare recipients and the better off is particularly striking in the context of welfare rules; “[f]or example, unlike recipients who are subject to ‘learnfare’ rules, wealthy individuals whose children do not attend school regularly are not economically penalized. Nor are such individuals economically punished if they remain unmarried, if they have a child outside marriage, or if they do not work.” Brigid Kennedy-Pfister, *Continuity and Contradiction in the Theory and Discourse of Dependence*, 28 *FORDHAM URB. L.J.* 667, 718 (2001). For more on learnfare and enforced family caps for welfare recipients, see Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 *YALE L.J.* 719, 726–41 (1992).

121. Professor Quigley relates how students laugh when he exposes them to the idea that justice required as much during his Law and Poverty class. QUIGLEY, *supra* note 77, at 34.

122. Jeffrey D. Sachs, *Twentieth-Century Political Economy: A Brief History of Global Capitalism*, *OXFORD REV. ECON. POL’Y*, Winter 1999, at 90, 91, available at <http://oxrep.oxfordjournals.org/cgi/reprint/15/4/90> (last visited June 19, 2007). Marx and Engels believed that the bourgeoisie created a system of “naked, shameless, direct, brutal exploitation.” KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO* 12 (ElecBook London 1998) (1848), available at <http://www.elecbook.com/>.

123. This reluctance disappears in the context of CEO compensation. See, e.g., LUCIAN A. BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004) (arguing that high CEO pay reflects a separation of ownership and control caused by legal rules insulating managers).

that the lazy and inefficient do better than the industrious and efficient, to conclude that little of what we own is truly attributable to individual merit alone.”¹²⁴

While conservatives tend to demonize and vilify the “undeserving” poor and welfare recipients,¹²⁵ liberals’ welfare discourse “seeks to avoid blaming . . . poor people themselves,” and consequently, stories of a poor person’s laziness or other undeserving traits are “simply ignored.”¹²⁶ But with very few exceptions conservatives and liberals alike take for granted the moral worth and desert of the rich.

If our goal is to subject the rich to the same judgments as the poor, then conservatives and liberals must begin to debate the “deserving” and “undeserving” nature of the rich. Of course, labeling individuals and income this way can be indicative of overconfidence in one’s own moral compass and one’s reliance on a falsely dichotomous worldview. Placing a person’s income, and by proxy that person, into a single category of deserved or undeserved requires overlooking the ways in which each individual can be both deserving and undeserving.¹²⁷ However, the exercise would encourage members of our society to think critically about the negative categorization of the poor and the attachment of moral worth to wealth.

II. WHAT IS REQUIRED FROM THE MANSION ON THE HILL

If we accept the notion that not all of the wealthy’s income is earned, then we are left with the question, so what? This section will consider the obligations that result from this undeserved income.

Determining the appropriate level of obligation to which the privileged should be held requires first acknowledging the existing obligations of the privileged and then inquiring into whether these obligations should be augmented.¹²⁸ Americans famously and popularly see themselves, and are seen, as being individualistic and freer from societal obligations than is true in other nations. Given this perspective, it might not seem troubling that some income of the rich is unearned.¹²⁹ Yet, the recipients of unearned income, largely the rich,

124. Graetz, *supra* note 60, at 277.

125. See *Dethroning the Welfare Queen*, *supra* note 115, at 2013.

126. White, *supra* note 119, at 1974.

127. Nonetheless, the author favors a guaranteed social income that does not take into account the personal attributes of any particular citizen.

128. This paper embraces the basic assumption that the existing minimal obligations are a starting point for a fuller understanding of a just scheme of obligations. Conversely, arguments from a libertarian perspective would highlight the reasons to reduce rather than augment the obligations of the privileged. See Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 637 (2001) (for libertarians, “freedom from coercion [such as income-based obligation] is not understood as a value, much less an instrumental value in the service of positive liberty, but rather, simply, as a natural right”).

129. Arguably, unearned income is unrelated to what an individual owes society. The

are required through a whole range of policies to meet heightened obligations and are subjected to laws that have the *de facto* effect of disproportionately burdening them (progressive taxation is only the most obvious example of these current obligations).

Though they already exist in our society, a completely convincing basis for higher obligations on the rich is elusive. A valid, and damaging, critique of Part I's income equations is the charge that even if we accept (and this would be a significant change from the norm today) that the rich have some "unearned" income, there is no logical mechanism translating unearned income into obligations of privilege.¹³⁰ It is beyond the scope of this article, and arguably beyond the proper space of legal argumentation,¹³¹ to attempt to provide the elusive basis connecting unearned income with obligation. Therefore, while Part II will describe a few central justifications for expanding the obligations of the rich, the basis for the initial connection between unearned income and obligation should be inductively evident in the existing obligations and the arguments for strengthening the obligation.

The existing obligations on the rich are based in part on societal knowledge of right and wrong.¹³² Yet, as is suggested by the disparate language used to describe the unearned income of the poor relative to descriptions of the rich's unearned income, such obligations fall short along both practical and moral lines. In exploring the idea that obligations of the rich ought to be expanded, and momentarily ignoring *where* these obligations are properly enforced, the focus is on these heightened obligations themselves. Since many Americans are unaware of society's contribution to the high incomes of the rich and therefore do not recognize the attendant obligations that such contributions demand, merely raising awareness of societal participation and obligations is a sufficiently

thinking goes: suppose I work for eight hours and earn eighty dollars and then, on my walk home from work, I buy a used monopoly game that has within it a hundred dollar bill, I do not owe any portion of that windfall to anybody, do I? I *should* get to keep the whole \$100. The Internal Revenue Service (hereinafter, the IRS) disagrees: unearned windfalls are subject to societal demands. See *Cesarini v. United States*, 296 F. Supp. 3 (N.D. Ohio 1969) (requiring taxes be paid on money discovered inside a piano the taxpayer purchased second-hand). This general rule requiring taxation of windfalls is of course in tension with current limitations on inheritance taxation that permit heirs an untaxed windfall.

130. Thanks to Lee Ann Fennell for highlighting this criticism.

131. *But cf.* Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243, 300–329 (2006) (arguing that legal scholars should not shy away from using religion to support secular arguments). Singer asks, "Where can we find a basis for a sense of obligation?" *id.* at 289, and concludes that *religion* is an "obvious and powerful source for a human sense of obligation to others," *id.* at 302.

132. Professor Singer argues that those with progressive ideas "should be brave enough to say what we want to say." *Id.* at 330. Singer continues, "it is not amiss to make value statements that explain how things ought to be. We can use the words 'should,' or 'ought,' or 'right and wrong.'" *Id.* The Author is perhaps guilty of following too closely his former advisor's advice. In receiving critiques urging that more of the connection between unearned income and heightened obligation be fleshed out, I must confess a gut reaction favoring the idea that the connection immediately reflects what I hope is a shared sense of right and wrong.

challenging first step.

A. Existing Obligations of the Wealthy

According to current laws and social norms the wealthy must meet certain heightened obligations beyond those imposed on the middle class or the poor. The most visible of these obligations is that, in theory at least, the rich pay a larger percent of each dollar to the government in taxation. This Section will consider the formal obligations imposed on the wealthy in the form of taxes and the less formal normative obligations that are already in place; progressive taxation should be the starting point, not the ending point, for understanding the existing obligations of the wealthy.

1. Progressive Taxation

The American commitment to progressive taxation has varied,¹³³ but progressive taxation stands as a reminder that our society, in principle, believes that the rich *owe* more, or at least *should pay* more, to the government for each additional dollar of income than the poor ought to pay.¹³⁴ The difference between the highest and lowest income tax rate has shrunk since a high point during World War II when the highest marginal rate was over ninety percent,¹³⁵ but despite continual efforts to lower taxes (particularly the tax rates affecting the rich),¹³⁶ our system retains its progressive character. Nowhere is the progressive tax scheme more starkly evident than in the tax tables that accompany the IRS's Form 1040 instructions.¹³⁷ Perhaps because taxes are subject to so much popular ire and attention, the debates about progressive taxation and "the proper rate structure [are] so longstanding and intense that no analysis, no matter how strong, will resolve [them]."¹³⁸

133. McMahon and Abreu write, "From both the political and theoretical perspectives, progressive income tax rates always have been controversial." McMahon & Abreu, *supra* note 49, at 12.

134. Throughout this section, the focus will be on income taxation, but other forms of taxation can also be progressive. See Akhil Reed Amar, *Fourty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 40–41 (1990) (describing public education financing in terms of progressive taxation). Income tax is progressive both through an increasing marginal rate and through income-based deduction phase-outs.

135. McMahon & Abreu, *supra* note 49, at 12 (observing that the rate remained close to ninety percent until as late as 1964).

136. *Id.* at 13 (describing President Reagan's 1981 Tax Act as "the first step in the statutory attack on progressivity"). The Gingrich-led Republican Revolution in 1994 brought a renewed emphasis on lowering taxes on income, such as capital gains income, that primarily benefits the rich. See GINGRICH COMMUNICATIONS, CONTRACT WITH AMERICA 10 YEAR ANNIVERSARY (2004), <http://www.newt.org/UserFiles/CWA10Year.pdf> (last visited Aug. 20, 2007) (listing the capital gains tax cut as one of the successful results of the Contract with America).

137. INTERNAL REVENUE SERVICE, 2006 TAX TABLES, 1040 FORM (2006), <http://www.irs.gov/pub/irs-pdf/i1040tt.pdf> (tax tables) (last visited Aug. 20, 2007).

138. Kornhauser, *supra* note 22, at 1698. For a brief overview of optimal tax theory and the academic attacks and defenses of progressive taxation, see Avi-Yonah, *supra* note 1, at 1399–

Most of the debate regarding progressive taxation focuses on the imposed costs of taxation rather than the gains that flow implicitly from the rich to the poor. Critiques and justifications for progressive taxation alike focus on the effect such taxation has on the motivations of those in the higher tax brackets. Because an income tax “drives a wedge between the value of an individual’s labor and the amount an individual receives for that labor[,]”¹³⁹ scholars seek to highlight (if they are in favor of a flat tax or value-added tax alternative) or minimize (if they favor progressive taxation) the impact of this wedge on the labor of the wealthy. Bankman and Griffith, for example, argue that a tax-based reduction in the effective wage will not cause males to diminish their labor significantly.¹⁴⁰ Furthermore, the historical “coincidence of high rates and high productivity [from 1951–1963]” seriously challenges the belief that high marginal tax rates stifle productivity.¹⁴¹ McMahon and Abreu argue that “[i]n a winner-take-all market, progressive taxation may be not only efficient, it may be nearly optimal; it may raise revenue from people whose incentive to make more money is nearly unaffected by the existence of the tax.”¹⁴² This article does not seek to resolve the motivations debate;¹⁴³ the controversial nature of productivity arguments itself demonstrates that such rationales do not support abolishing the present progressivity of the tax code.

Progressive taxation is justified by more than debatable efficiency arguments, for progressive taxation reflects an underlying recognition of the obligation of the wealthy to the rest of society.¹⁴⁴ Given the reduced marginal utility of the dollar to the rich, McMahon and Abreu argue, “proportional sacrifice requires progressive rather than proportional tax rates.”¹⁴⁵ However, *sacrifice* is arguably the wrong term, for one should only be properly considered to be sacrificing something if it is one’s to sacrifice. When the government reclaims a stolen vehicle from a thief, there is no *sacrifice* on the thief’s behalf. The analogy strikes us as false because most of us have internalized the idea that the rich have earned their high incomes; because such income is perceived as

1413.

139. Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1920 (1987).

140. *Id.* at 1921–23. Married women are much more responsive to tax-based reductions in the effective wage. *Id.* at 1925–29.

141. Avi-Yonah, *supra* note 1, at 1392.

142. McMahon & Abreu, *supra* note 49, at 10.

143. *See, e.g., id.* at 37 (highlighting the importance of the burden of proof in the motivation debate).

144. *See* Daniel N. Shaviro, *Commentary: Inequality, Wealth, and Endowment*, 53 TAX L. REV. 397, 398–402 (2000) (arguing that considerations of tax proposals must consider inequality and not just efficiency).

145. McMahon & Abreu, *supra* note 49, at 32. McMahon and Abreu assert that those, such as Richard Posner, who suggest that money does not have a diminishing marginal utility bear the burden of proof because of the self-evident truth “that a dollar means more to a poor person than to a middle class person and that it means more to a middle class person than to a truly rich person.” *Id.* at 34; *accord* Kornhauser, *supra* note 22, at 1717–21.

earned, progressive taxation does seem to require a *sacrifice* by the rich.

Even if we reject the analogy to the thief, the unearned portion of income could be likened to a loan, repaid through progressive taxation. Such a characterization avoids the “sinister” connotations of active theft, however, it retains the idea that if the unearned-income-loan is not repaid to society, then wealth is stolen.¹⁴⁶

The continued existence of a progressive taxation scheme is arguably the best and most significant reflection of our uneasy awareness that the wealthy should have some heightened obligations to society—obligations that would be less appropriate if the rich “earned” their entire incomes.

2. Business, Professional, and Personal Obligations

Though enforced privately and not monitored by an arm of the state, the wealthy have additional societal obligations grounded in business, professional, and personal norms. Arguably, minimum quality and safety standards are among these obligations on the wealthy. Laws prevent business owners or their managerial proxies from engaging in certain forms of labor exploitation, from maintaining conditions that endanger workers, from paying less than a minimum hourly wage, and from abusing insider information for unfair gain; additionally, businesses must contribute to national unemployment and injury compensation insurance schemes.

Obligations to the poor exist for a number of professions typically associated with wealth: landlords must keep even their cheapest units above the warranty-of-habitability floor, lawyers have a professional obligation to work pro bono and financially support legal assistance for the indigent, and doctors have ethical obligations to provide treatment regardless of whether patients have insurance coverage. Service, along with teaching and scholarship, is one of the three pillars of academic life.

The least formal, but perhaps the strongest, obligations of the relatively wealthy are those rooted in personal relations. Joseph Singer, in his book *Entitlement*, tells the story of Aaron Feuerstein, the owner of a textile company called Malden Mills, who continued to pay his workers after a fire destroyed three of Malden Mills’ nine buildings, “even though he was not legally required to do so.”¹⁴⁷ Singer describes Feuerstein’s choice:

He was entitled, by law, to consider his own interests alone, and yet he did not do so. Instead, he felt obligated to his employees and to his community. . . . They were not the recipients of the kindness of a stranger; rather, Feuerstein acknowledged that he had benefited from his relationship with his workers and that, in some sense, *he owed this to them*.¹⁴⁸

On one hand, Singer’s celebration of Feuerstein demonstrates the rarity of

146. Thanks to Molly Beutz for suggesting this analogy.

147. SINGER, *supra* note 9, at 197.

148. *Id.* at 198–99.

such a gesture and of a feeling of connection with one's workers. In his need to tell the story he reveals a sense of surprise regarding Feurstein's reaction. Yet, the story is also a manifestation of existing norms of obligation, unusual only because of the extent to which those norms had been accepted and internalized by Feuerstein.¹⁴⁹

We instinctively feel that George Bailey in *It's a Wonderful Life*¹⁵⁰ is not only a good man but is doing the right thing by caring for his community, Bedford Falls. This instinct is reinforced by the constant contrast between George and the cold-hearted banker, Mr. Potter. Charles Dickens's *A Christmas Carol*¹⁵¹ resonates not because we see charity in Scrooge's eventual kindness towards Tiny Tim—"Dickens makes a point of connecting Tiny Tim's fate directly to the miserliness of Ebenezer Scrooge"¹⁵²—but because we recognize his return to the community's norms of mutual care and concern. The same can be said of Clark Griswold's grudging financial support for his hick brother-in-law, Eddie, in *National Lampoon's Christmas Vacation*.¹⁵³ Mirroring Dickens's tale, the movie also includes Clark's boss ultimately returning to the community fold by agreeing to reinstate the company's Christmas bonus. Each story uses the holidays to highlight community, employer, and familial bonds that reflect existing norm-based obligations.

Such obligations, based in personal relationships, are less powerful motivators where the wealthy do not share connections with those they may be able to help. "[H]ow can we carry out the Golden Rule unless we feel the brotherhood of man or empathize with others?" Ralph Ross asks, positing that "empathy requires—except in unusual cases—the creation of some equalities in the human condition."¹⁵⁴ American society is to some extent being continually constructed to allow the wealthy to deny the humanity of the poor. Labels such as *undeserving* allow the poor to be "cast as different, deviant, and morally weak. These assumptions make coherent the physical separation of the poor from the affluent."¹⁵⁵ Such divisions and our participation in the creation of these divisions reveals "the great efforts we go to—some conscious, some not so conscious—to shield ourselves from the perception of other people's

149. Feuerstein understood that the choice to continue paying his employees would affect not only his company's bottom-line but also his employees' lives. This focus on the "well-being of others" is a form of internalizing the externalities of the otherwise individual choice about whether to minimize the company's loss in the wake of the factory fire. See Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1348 (1986).

150. *IT'S A WONDERFUL LIFE* (Liberty Films 1946).

151. CHARLES DICKENS, *A CHRISTMAS CAROL* (Stanley Appelbaum ed., Dover Publications 1991) (1843).

152. Note, *A Look Inward: Blurring the Moral Line Between the Wealthy Professional and the Typical Criminal*, 119 HARV. L. REV. 2165, 2169 (2006).

153. NATIONAL LAMPOON'S CHRISTMAS VACATION (Warner Bros. 1989).

154. RALPH ROSS, OBLIGATION: A SOCIAL THEORY 180–81 (1970).

155. Ross, *The Rhetoric of Poverty*, *supra* note 5, at 1503.

suffering.”¹⁵⁶

In an updated telling of *National Lampoon's Christmas Vacation*, Eddie would have been unable to drag Clark's boss to the Griswold home; gates and guards would have prevented him from ever reaching the boss's front door. As William Gates Sr. and Chuck Collins observe, “Nothing demonstrates the fragmentation of community in the United States more vividly than the rise in gated residential communities for the affluent and the simultaneous record number of people in prison.”¹⁵⁷ Gated communities do more than prevent criminals from entering exclusive communities, they also ensure that those living within only encounter people of similar economic fortune when walking their dog: in short, such communities shield the wealthy from having to be confronted by the poor.¹⁵⁸

Robert Putnam, in *Bowling Alone*, presents convincing evidence that Americans have become less connected with one another, and that following the WWII generation, America's social capital declined significantly, with both Baby Boomers and their children disengaging from civil life.¹⁵⁹ The decline in social connectedness, and in shared lived space, might make it more difficult for the wealthy to recognize an existing obligation to the poor because they are less

156. MAYERFELD, *supra* note 113, at 101.

157. GATES SR. & COLLINS, *supra* note 2, at 23. For more on the connection between the parallel growth of prisons and gated communities, see Mona Lynch, *From the Punitive City to the Gated Community: Security and Segregation Across the Social and Penal Landscape*, 56 U. MIAMI L. REV. 89, 95–112 (2001).

158. Professor Evan McKenzie, a common interest housing development (CID) expert, explains:

[T]he demand for such a lifestyle cannot be ignored. Many middle and upper class home-buyers, fearful of crime and disenchanted with government, are in search of a privatized utopia offering security, a homogenous population, and a small-scale managerial private government that enforces high standards of property maintenance. For many people, the gated community is especially attractive, as it adds fortification to all the other attributes of CID living . . . [T]he rise of residential private government facilitates the emergence of a two tier society in which the “haves” are increasingly separated—spatially, institutionally, socially, and economically—from those of lesser means.

Evan McKenzie, *Private Gated Communities in the American Urban Fabric: Emerging Trends in their Production, Practices, and Regulation* 4 (2003), <http://www.bristol.ac.uk/sps/cnrpapersword/gated/mckenzie.pdf>; see also Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities* 4 (Univ. of Chicago John M. Olin Program in Law & Economics, Working Paper No. 250, 2005), available at http://www.law.uchicago.edu/Lawecon/WkngPprs_226-50/250-Is-exclusionary-amenities.pdf (arguing generally that people will join clubs because they know that “by purchasing this club good they are simultaneously receiving the ‘benefits’ of exclusion without violating anti-discrimination laws”). Even though there has not been a popular reaction against these symbols of America's second gilded age, stark inequalities, such as those that gated communities embody, “reinforce myths offensive to equal moral worth.” MUNZER, *supra* note 9, at 249.

159. ROBERT D. PUTNAM, *BOWLING ALONE* 247–76 (2000); see also Henry Fountain, *The Lonely American Just Got a Bit Lonelier*, N.Y. TIMES, July 2, 2006, at D12 (reviewing a study finding that “most adults only have two people they can talk to about the most important subjects in their lives”).

likely to encounter the poor.¹⁶⁰ However, social distance does not mean that the norm-based obligations cease to exist. Rather, the move by the middle-class and the wealthy to live separated from the poor might reflect a latent desire to insulate themselves from the obligations that exist once the shared humanity of the poor is appreciated.

B. Ideal Obligations for the Rich

In the March 27, 2000 issue of the *New Republic*, the title of John Judis's article provocatively asked, "Whatever happened to noblesse oblige?"¹⁶¹ Judis's critique of "[t]he replacement of a public-spirited elite with a narrowly self-interested one"¹⁶² calls into question the existing obligations of the privileged and implicitly urges the consideration of heightened obligations that would signal a renewal of a noble obligation expectation. Ideal societal obligations—whether enforced formally through the law or through social norms—would minimally require that the rich: (1) repay society for unearned personal gain and (2) expand market participation to those who were not in a position to become wealthy. Given that the rich have not independently "earned" the entirety of their income or wealth, calls for heightened obligations should not be summarily rejected.

1. Repaying Society for Personal Gain

Society's role in producing individual wealth merits a corresponding obligation for those who become wealthy to repay society. In support of the estate tax, Gates and Collins argue that

society has a just claim on the accumulated wealth of its most prosperous citizens. This is not rooted in a belief in enforced charity or redistribution,

160. See BARRY, *supra* note 7, at 183 (arguing that sense of social solidarity and responsibility to others in local community deteriorates with increased inequality). The homogeneity of many people's groups of friends was presented by Charles Murray and Richard J. Herrnstein in the form of a mental checklist:

Think of your twelve closest friends or colleagues. . . . Does it surprise you to learn that the odds of having even *half* of them be college graduates are only six in a thousand, if people were randomly paired off? Many of you will not think it odd that half or more of the dozen have advanced degrees. But the odds against finding such a result among a randomly chosen group of twelve Americans are actually more than a million to one. Are any of the dozen a graduate of Harvard, Stanford, Yale, Princeton, Cal Tech, MIT, Duke, Dartmouth, Cornell, Columbia, University of Chicago, or Brown? The chance that even one is a graduate of those twelve schools is one in a thousand. . . . The chance of finding four or more is less than one in a billion.

RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 47 (1994). Though many of the book's arguments are controversial, I hope that the value of this segment is apparent. For a critique of the main arguments of *The Bell Curve*, see generally FISCHER, HOUT, JANKOWSKI, LUCAS, SWIDLER & VOSS, *supra* note 16.

161. John B. Judis, *Top Down: Whatever happened to noblesse oblige?*, *THE NEW REPUBLIC*, Mar. 27, 2000, at 17.

162. *Id.* at 20 (focusing primarily on the political sphere).

but in an assessment of the undervalued role of society's investment in each of us. This investment is substantial and often invisible. This is not an easy discussion to have in the United States. It cuts against the grain of our ethos of individual achievement and free enterprise.¹⁶³

Without repeating the argument that society contributes to the incomes of the rich,¹⁶⁴ it is worth reminding ourselves, as Professor Cass Sunstein has, that "[e]ven the most seemingly independent among us owe their status to a range of emphatically collective institutions."¹⁶⁵

Whether through subsidized education or advantages from publicly regulated and even publicly created markets,¹⁶⁶ the winners benefit from a market created collectively by society.¹⁶⁷ Professor Kornhauser explains:

The belief that the poor benefit more than the rich from government rests on a narrow, simplistic view of government benefits . . . [T]he government plays a role—at least indirectly—in the creation of all wealth and income because all private property is “a legal convention” constructed from “an elaborately structured legal system governing the acquisition, exchange, and transmission of property rights” . . . Without this governmental structure protecting, regulating, and enforcing property rights, neither the free market nor individual property rights would exist. Consequently, the robust argument holds that all wealth and income depends on (and benefits from) the government because it is government that defines and secures property rights.¹⁶⁸

Even if we reject the idea that “all wealth and income depends” on the government, general acceptance that the government does indeed have a role, and a large one at that, should not be too great a demand on the wealthy. The wealthy have an obligation, flowing from the recognition of societal benefit, to repay society for unearned societal largesse. “To the extent that [wealth] is the product of others (including government), those others have a claim to it if they have not been properly compensated for their efforts.”¹⁶⁹ The claim the poor have to wealth they helped create but do not enjoy is simply the mirror image of

163. GATES SR. & COLLINS, *supra* note 2, at 110.

164. *See supra* Part I § B.

165. Cass Sunstein, *Cash and Citizenship*, THE NEW REPUBLIC, May 24, 1999, 42 at 46 (reviewing ACKERMAN & ALSTOTT, THE STAKEHOLDER SOCIETY, *supra* note 63).

166. In describing a benefit theory of progressive taxation, Kornhauser writes:

[D]espite a nominally laissez-faire government, much private wealth in America always has been based on government largesse, such as land grants to railroads, below market-rate grazing rights to ranchers, water rates to farmers, and low royalty payments by miners. The fortunes of many current millionaires (and billionaires) rest on government sponsored technology, such as the Internet and the genome project. The great danger to the continued prosperity of the wealthy, it has been said, is not high taxes but reduced government spending . . .

Kornhauser, *supra* note 22, at 1710.

167. McMahon & Abreu, *supra* note 49, at 68.

168. Kornhauser, *supra* note 22, at 1709.

169. Kornhauser, *supra* note 22, at 1724.

the corresponding obligation of the rich.

2. Expanding Market Participation

Repaying society for personal gain should not be the sole criteria by which a heightened set of obligations associated with high incomes or wealth is established. For the sake of both justice and economic growth, there ought to be an obligation to expand the market to those who have been unable to fully participate in the nation's economic life. An obligation to expand market participation would account for unfairness stemming from enjoying wealth when others did not have the same opportunities (or probability) of being in a position to earn such high incomes. Perhaps as important to society—though not tied to the “unearned” portion of the high incomes of the rich—is the possibility that facilitating the entrance of additional participants and their ideas to the market will expand not just participation but the market itself. After considering the relationship between the rich and this sort of obligation, I will briefly discuss the potential economic gains of a more equitable society.

Simply asserting higher obligations for the wealthy does not make this “a soak-the-rich polemic nor a plea for rejection of the tools of traditional economic analysis.”¹⁷⁰ This article attempts to critically consider the factors that skew income distribution and to propose modifications to the market to promote more equitable outcomes. For the rich, wealth distribution is remarkably stable: “Top to bottom mobility is . . . quite rare, as is its converse, notwithstanding the emotional appeal of the American Dream.”¹⁷¹ Even for the fortunate few who manage to obtain upward mobility, the general stagnation should be troubling, as Ackerman and Alstott explain:

Even wealthy citizens who emerge from humbler backgrounds cannot rightfully claim that their wealth is fairly earned. These people may think of themselves as modern-day Horatio Algiers, but they too have enjoyed an unequal opportunity surplus. At the very least, they would have encountered much stronger competition had their fellow citizens *not* been disadvantaged by the existing system. How can they tell how they would have fared in a truly fair race?¹⁷²

Belief in the primacy of one's own effort relative to society's role when thinking about what explains success creates separation between classes. Yet, limited class mobility undercuts the legitimacy of this separation.¹⁷³ The

170. McMahon & Abreu, *supra* note 49, at 11.

171. *Id.* at 31. Professor Unger argues that aside from the singular exception of blue-collar and farm children becoming white-collar workers, the American class structure has been “rigid” for the last 100 years. UNGER, *supra* note 67, at 145.

172. ACKERMAN & ALSTOTT, *supra* note 63, at 97.

173. In an unusual collaboration, the American Enterprise Institute, the Brookings Institution, the Heritage Foundation, and the Urban Institute joined together to work on the Economic Mobility Project. See Economic Mobility Project, Partners, <http://www.economicmobility.org/partners/> (last visited Nov. 16, 2007). These four organizations, two conservative and two

wealthy use this divide, whose basis is illegitimate, to justify “exempting themselves from concern for the poor.”¹⁷⁴ With the American emphasis, popularly and academically, on negative freedoms,¹⁷⁵ such exemptions are generally understood as a personal choice and one that should not be challenged.¹⁷⁶ Yet, as Professor Singer reminds us, there is more to ownership than merely the right to exclude, there is a requirement to work for a base level of equality for all.¹⁷⁷ The rich who exempt themselves from concern for the poor fail to participate in Singer’s project of establishing the base level of equality. By doing so, they benefit from the American property system without respecting the responsibilities attendant upon their privilege.¹⁷⁸

Lack of concern for the poor harms the country through the effective exclusion of many from full participation in the economy.¹⁷⁹ When groups of people—because they are born into poor families living on an Indian reservation, in an inner city, in a poor rural area, or in any number of other locations—are

progressive, are focusing on economic mobility because:

Americans have historically shown a unique tolerance to accept high levels of inequality. This springs from an embedded national belief in mobility: a conviction that hard work and honest labor deserve just reward, and a confidence that our society is and should be constructed to provide equality of opportunity, not to guarantee equality of outcomes. But if the ladder of opportunity truly is—or is perceived to be—inaccessible to a great number of Americans, this value system is at risk of crumbling. A discussion that identifies and quantifies the drivers of and obstacles to economic mobility should be a top priority for those interested in preserving and protecting the spirit and reality of the American Dream.

Economic Mobility Project, About the Project, <http://www.economicmobility.org/about?id=0001> (last visited Nov. 16, 2007).

174. John Kenneth Galbraith, *The Heartless Society*, N.Y. TIMES, Sep. 2, 1984, Mag. at 20, 21.

175. Professor Connie de la Vega argues that by only ratifying the International Covenant on Civil and Political Rights, which protects negative freedoms, and not doing the same with the International Covenant on Economic, Social, and Cultural Rights, which protects positive rights, “the United States contradicted the vast authority in the international community which maintains that the enjoyment of both sets of rights is indivisible and interdependent.” Connie de la Vega, *Protecting Economic, Social and Cultural Rights*, 15 WHITTIER L. REV. 471, 471–72 (1994).

176. See Singer, *supra* note 131, at 263 (arguing that “recent changes in our economy, our tax system, and our culture” have made it so that, “[m]ore and more, the haves may be unwilling to do what is necessary to enable the have-nots to obtain the tools necessary to become haves”).

177. SINGER, *supra* note 9, at 162 (“Property requires neither that we acquiesce in the inequality it creates, nor that we commit to realizing an impossible ideal of absolute equality, but a willingness to establish a base level of equality that gives every person the ability to enter the property system on terms that are fair and the means necessary to sustain a dignified human life.”).

178. As Professor Singer writes, “[o]wnership without obligation is a form of dictatorship. It is a claim to rule without regard for the needs or interests of others.” *Id.* at 209.

179. A full accounting and categorization of those excluded from meaningful economic participation is beyond the scope of this article. Exclusion does not necessarily mean that individuals can not obtain jobs or earn a living, simply that their life choices are overly constrained to begin with such that their creative or novel ideas never have a way to enter the market. See George W. Bush, *Faith, Compassion, and the War on Poverty*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 329, 331 (2002) (“[W]e must build our country’s unity by extending our country’s blessings When millions are hopeless, all of us are diminished by the loss of their gifts.”).

systematically denied the opportunity to effectively enter the American economy, we all lose out on their ideas, productivity, and potential technological innovations.¹⁸⁰ These losses are quantifiable: countries with greater inequality tend to have lower growth rates too.¹⁸¹

Professor Martha McCluskey's critique of neoliberals for relying upon a flawed "division between redistribution and efficiency"¹⁸² can inform our consideration of the consequences of inequality. Redistribution and efficiency are not opposites and neither are obligations on the wealthy and efficiency. From the Homestead Act to delaying the taxation on internet sales or allowing municipal wireless provision, the U.S. has at different points pursued policies that not only opened up new markets but opened those markets to a broad group of Americans.¹⁸³ Even if a more egalitarian market in which the poor had a greater ability to enter the market, created through heightened obligations on the rich, did not increase the growth rate, such a situation might still be preferable along equitable grounds.¹⁸⁴ Altering our laws or social norms to make the market inclusive could well pay a growth rate dividend and at minimum would pay a distributional one.¹⁸⁵

One may object that no one can know for sure whether a more equal America would have a higher rate of growth; this objection must be granted.¹⁸⁶

180. Asserting that some do escape such poverty is non-responsive, as the few that manage to find a break in the system serve as the proverbial exceptions that prove the rule. So long as career paths and economic participation continue to closely track economic background, the only explanation that does not involve the systematic exclusion of sectors of the population from effectively entering the market is a distasteful one (that the intelligence of children rises in concert with the wealth of their parents).

181. Avi-Yonah, *supra* note 1, at 1411; see also GATES SR. & COLLINS, *supra* note 2, at 20–21 ("Economists have tended to look narrowly at the impact of wealth inequality on economic efficiency—and they have left it to the worldly philosophers to speculate on the social dangers of concentrated wealth. But a number of economic studies show how too much inequality of income and wealth can be a drag on economic growth.").

182. McCluskey, *supra* note 58, at 787 (writing about social citizenship).

183. Professor Amar, for example, notes, "we did not auction off lands to the highest bidder. Behind the homesteading provisions was a distributional vision of giving subsidized land to folks if they were going to farm their own homesteads." Amar, *supra* note 134, at 41.

184. Similarly, we would be better off on equitable grounds (and no worse off on efficiency grounds) if we reversed our national choice to minimize welfare expenditures. For, as Professor Unger writes, "comparative study fails to suggest that the welfare-stingy industrial democracies gain any sustained productive advantage over the welfare-generous ones." UNGER, *supra* note 67, at 37.

185. See, SINGER, *supra* note 9, at 164 (noting that "sometimes two different rules are equally efficient but have very different distributive consequences"). Even accepting for the moment the possibility that pure self-interest would provide the greatest incentives for individual effort and would lead to a larger economic pie does not mean the distributive consequences of a polarized society should be ignored—distributive losses should not automatically be trumped by efficiency gains: "Changing the rules to allow for more redistribution of property might lower productivity somewhat, but it might also alleviate the degrading conditions in which the working poor labor, thereby increasing their autonomy—a trade-off that might itself be normatively preferred." Kennedy-Pfister, *supra* note 120, at 730–31.

186. Krugman explains, "We can't rerun our own history and ask what would have happened

As is true with universal endowment accounts or basic income guarantee proposals, “we can make surprisingly few definitive predictions until it actually happens.”¹⁸⁷ But the nay-sayer argument that the rich would deliberately slack or reduce their work effort in the face of heightened obligations is similarly proscribed.¹⁸⁸ Indeed, financial compensation can be less important than “social forces and mores” in encouraging individual productivity.¹⁸⁹ This may be particularly the case for those most affected by a heightened obligation to the poor:

[T]here is evidence that the very individuals who become winners—the high-income lawyers, doctors, entertainers, major league athletes, investment bankers, and corporate CEOs who receive the winners’ compensation—may respond more to nonpecuniary factors, such as personal gratification and prestige, than to changes in their after-tax compensation.¹⁹⁰

The harm to the economic growth rate that would come from ignoring the powerful effect self-interest has on motivation to work does not mean that a different sort of disservice is not possible where we pretend that self-interest alone motivates people.¹⁹¹

C. *Moral Monsters and the Duty of Rescue*

The duties that fellow humans owe each other fall into two categories: legal requirements and moral requirements. Legal rules, which narrow liability in duty of rescue cases, dictate the duties we owe to strangers. While legal liability attaches in few American duty of rescue cases, this failure does not diminish *moral* duty. Although the inaction of the rich is immunized by legal non-recognition of a duty to act on behalf of the poor, moral failings are not excused by judicial apology.

So far, this article has argued that society’s role in high-income generation

if the social norms of middle-class America had continued to limit incomes at the top, and if government policy had leaned against rising inequality instead of reinforcing it, which is what actually happened.” Krugman, *For Richer*, *supra* note 69, at 67, 76 (using comparisons with the development as it occurred in other advanced countries to support his conclusion that “inequality in the United States has arguably reached levels where it is counterproductive. That is, you can make a case that our society would be richer if its richest members didn’t get quite so much.”).

187. Wax, *Something for Nothing*, *supra* note 14, at 12.

188. To quote Albert Einstein, “Too many of us look upon Americans as dollar chasers. This is cruel libel, even if it is reiterated thoughtlessly by the Americans themselves.” OF THEE I SPEAK: A COLLECTION OF PATRIOTIC QUOTES, ESSAYS, AND SPEECHES 86 (Steven Fantina ed., 2006); *see also* BARROW, *supra* note 13, at 125 (asking, “why is it assumed that people will only work for dollars?”).

189. Bankman & Griffith, *supra* note 139, at 1924 (discussing this in the context of progressive taxation).

190. McMahon & Abreu, *supra* note 49, at 65.

191. As President George W. Bush observes, “materialism, ultimately, is boring . . .” Bush, *supra* note 179, at 334; *see also*, Sunstein, *Social Norms*, *supra* note 104, at 945 (providing an example of self-interest not being fully determinative: “[e]xperimental work shows that people contribute to a shared good, and refuse to free ride, far more often than economists predict”).

and the advantages of allowing the poor greater access to the market mandate increasing the obligations on the rich. Next this article will argue that morality demands on the rich echo our insights from the nature of income generation (and from a society that believes wealth reflects good character¹⁹²). The duty to rescue emphasizes the obligations the wealthy have to the poor. Importantly, wealthy individuals have moral obligations, regardless of whether the system that creates wealth disparities is efficient: “an *individual* who decides to maintain concentrated wealth within this system may still be personally culpable for contributing to the harms of poverty that remain.”¹⁹³ Moral theories reinforce this article’s general argument that the obligations of the rich should be enhanced.¹⁹⁴ We will focus on one such theory.¹⁹⁵

Under one such moral theory, a 2006 Harvard Law Review Note argues for an expansive duty of rescue owed to the poor.¹⁹⁶ The Note argues “that the characteristic spending and maintenance of excessive wealth by the educated and privileged is the moral equivalent of a number of criminal offenses.”¹⁹⁷ According to the author, an analogy exists between criminal acts such as drug dealing or drunk driving and the wealthy’s “knowing and selfish choices to maintain resource control”¹⁹⁸ with their “exorbitant hoarding and consumption” despite the known harms of poverty.¹⁹⁹ Though “rarely condemned,” greed is like a criminal act in that it is pursued out of “selfish focus on personal gain,” and results in harm which is or should be known.²⁰⁰ The Note concludes, “the educated and privileged are responsible for more suffering than they might like to believe.”²⁰¹

The weak reception that the duty to rescue has received in the U.S. diminishes the possibility that it will be enforced legally. In *Osterlind v. Hill*, the defendant “heard and utterly ignored” a half hour’s worth of the cries for help as a drunk clung to an overturned canoe.²⁰² Eventually the drunk drowned

192. See *supra* notes 114–118 and accompanying text.

193. Note, *A Look Inward*, *supra* note 152, at 2181.

194. By turning to morality, I do not mean to insist on the primacy of moral authority, nor does the article’s general argument fail without the support of morality.

195. This section draws heavily on the analysis of Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, *supra* note 128.

196. Note, *A Look Inward*, *supra* note 152.

197. *Id.* at 2165.

198. *Id.*

199. *Id.* at 2170; see also Alan B. Krueger, *Economic Scene: It turns out Thorstein Veblen was right*, N.Y. TIMES, Jan. 6, 2005, at C2 (reporting on Ori Heffetz’s findings that “conspicuous items make up a greater share of the consumption budget in wealthier families”).

200. Note, *A Look Inward*, *supra* note 152, at 2165, 2170. The Note’s author writes, “the Note’s moral analogy succeeds to the extent that the connection between excessive wealth and poverty is the *moral* equivalent of the causation involved in the crimes discussed earlier.” *Id.* at 2174.

201. *Id.* at 2186.

202. 160 N.E. 301, 302 (1928).

in the lake where the defendant operated his canoe rental business.²⁰³ In a decision that might seem incredible to the non-lawyer, the *Osterlind* defendant was not found liable despite his cruelty.²⁰⁴ The American position on the duty of rescue is perhaps best conveyed by the *Buch v. Amory Manufacturing Co.* court:

Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury²⁰⁵

The results in *Osterlind* and *Buch* do not apply where there is "some special relationship between the defendant and the victim, such as the relationship of husband and wife, parent and child, and others."²⁰⁶ However there is no duty resulting from unequal footing by itself, for example, where one party is rich and the other is poor.

A distinction in how courts consider acts versus omissions underlies the rejection of legal enforcement of a duty to rescue.²⁰⁷ But as Murphy argues, the requirement of action prevents the "criminalization of thought alone," but it should not prevent the law from being able to establish guilt in cases where the action required is particularly evident.²⁰⁸ Combining *Osterlind* and *Buch*, Murphy writes, "[i]f I fail to rescue a child I know to be drowning in front of me, for no reason other than that I cannot be bothered to get out of my chair, it is not at all unnatural to say that I intentionally failed to prevent the drowning."²⁰⁹

Murphy makes an even more compelling argument for dispensing with the act/omission split. He notes that enforcement of negative duties will more significantly burden the poor, while positive duties will more heavily burden the wealthy:

There is, indeed, an obvious and simple political point to be made about the claim that negative duties as a class interfere with liberty less than positive duties as a class: The richer one is, the more plausible this will seem; the poorer one is, the less plausible it will seem. If we focus our minds on the options of a destitute and uneducated person in the United States, and think of the entire range of negative criminal duties lined up against her, the suggestion that she remains free of significant interference with her liberty, because, thank goodness, she has no positive duties imposed on her, should strike us as absurd.²¹⁰

203. *Id.*

204. *Id.*

205. 44 A. 809, 810 (1897), *quoted in* Murphy, *supra* note 128, at 622.

206. Murphy, *supra* note 128, at 613.

207. *See id.* at 612–21.

208. *See id.* at 616, 619–621.

209. *Id.* at 619.

210. *Id.* at 635–36.

Ultimately, concern over the duty to rescue's "potential for serious material cost"²¹¹ has greater explanatory power for the legal resistance to the duty than the act/omission split. The rich, who have the means and resources to act, want to constrain the scope of the duty to act in order to safeguard their assets. Yet, the duty to rescue's moral implications survive the judicial system's tolerance of moral monsters.

We should be humiliated by the sharp contrast between many Americans' conspicuous consumption (even the sheer holding of wealth) and the suffering, deprivation, and death²¹² linked to poverty around the world.²¹³ But, even if our concern is falsely defined to include only the United States or our more immediate communities, there is suffering to confront. Seemingly innocuous decisions, such as where to go out on a date, have a moral edge when others have difficulty putting food on the table: "People need food and clothing, but no one has an inherent need for steak as opposed to hamburger, or designer clothes instead of clothes from Wal-Mart."²¹⁴ For individuals facing struggles—will I pass this exam, will I finish this article in time, can I afford an air-conditioned car—"[i]t is easy to slip into a charmed world where the *prima facie* duty to relieve suffering becomes a distant echo of itself—where suffering is rarely allowed to make an appearance and our ability to prevent it goes unnoticed."²¹⁵ As our world narrows, naturally (as a result of stress, work, and other commitments) or deliberately (through membership in exclusive communities or

211. *Id.* at 607.

212. *See, e.g.*, WORLD BANK, GLOBAL MONITORING REPORT 2006: MILLENNIUM DEVELOPMENT GOALS: STRENGTHENING MUTUAL ACCOUNTABILITY, AID, TRADE, AND GOVERNANCE xviii (2006), <http://siteresources.worldbank.org/INTGLOBALMONITORING2006/Resources/2186625-1145565069381/GMR06Complete.pdf> ("Over 10 million children under the age of five die each year from treatable causes. Most of these deaths could be prevented by simple, known, and low-cost treatments.").

213. The durability of this contrast should be equally troubling for those who believe in the idea of human progress. The end of the war on poverty brought with it increased public doubt in our ability to solve problems of poverty. PATTERSON, *supra* note 107, at 126. As President Carter argues, this public doubt strikes against a tradition of American optimism: "We've always believed in something called progress. We've always had a faith that the days of our children would be better than our own. Our people are losing that faith." Jimmy Carter, Address to the Nation, July 15, 1979, *quoted in* PAUL BLUMBERG, INEQUALITY IN AN AGE OF DECLINE 253 (1980). At the same time that Americans are losing faith in the ability to "cure" poverty, there are powerful groups trying to deny its existence in this country. *See, e.g.*, ROBERT E. RECTOR, THE HERITAGE FOUNDATION, THE MYTH OF WIDESPREAD AMERICAN POVERTY: EXECUTIVE SUMMARY (1998), <http://www.heritage.org/Research/Welfare/BG1221es.cfm> (arguing that there are few poor persons left in the United States, according to the traditional definition of poverty); ROBERT E. RECTOR, THE HERITAGE FOUNDATION, EXECUTIVE SUMMARY: UNDERSTANDING POVERTY IN AMERICA (2004), <http://www.heritage.org/Research/Welfare/BG1713es.cfm> (arguing that the ownership of material items, such as TVs, indicates that the poor are not really poor). Regardless of whether the poor do have TVs, "to measure wealth maximization without regard to distribution . . . is to abdicate important decisions about overall societal welfare." McMahon & Abreu, *supra* note 49, at 35–36.

214. Kornhauser, *supra* note 22, at 1720.

215. MAYERFELD, *supra* note 113, at 193.

private clubs) concern with other people diminishes. Like the social insulation described above, this allows us to deny national or community based obligations to those in need.²¹⁶

If I choose not to open my credit card bill, I am not free from my obligation to Bank of America. Similarly, if rich Americans choose not to acknowledge the poor or the harms of poverty, they are not free from their obligations to the poor. Peter Unger's *Living High & Letting Die: Our Illusion of Innocence* presents a rather strict interpretation of the obligations of the wealthy, concluding that "the cost, for a well-off adult like you and me, to live a morally decent life . . . is enormous."²¹⁷ Yet, most readers' "lust after moral *bargains*"²¹⁸ overshadows Unger's ethical demands. This lust, disparaged by Unger, plays a primary role in societal analysis of whether to have a robust duty to rescue the poor from the effects of poverty. Does Professor Mayerfeld's emphasis on "the obligation to spend money on the relief of other people's suffering rather than luxuries for yourself"²¹⁹ mean that we are allowed no luxuries? "If needs create rights to their satisfaction," Professor Charles Fried asks, "how are we to prevent them from claiming so much that there is no energy left to pursue other goals?"²²⁰ Such commentary, insofar as it criticizes the recognition of need-based rights, presents only the dangers of action without acknowledging what is lost by inaction. According to Unger, one such loss may be of our moral values.²²¹ However, even if readers of Unger reject his strict moral requirements,

216. As the Dalai Lama writes, "When we neglect others' well-being and ignore the universal dimension of our actions, it is inevitable that we will come to see our interests as separate from theirs." HIS HOLINESS THE DALAI LAMA, *ETHICS FOR THE NEW MILLENNIUM* 163 (1999). With respect to a community-based obligation to the needy, Hadley Arkes insists that,

[i]f the relief of the poor were established as an obligation flowing from the capacity to help, the question would be set up for us in a way that [would] direct[] our attention at once to the moral considerations which must govern the assessment of responsibility. When the matter is viewed from the perspective of the "obligation to rescue," we would recognize in the first instance that we are not speaking about the kind of responsibility that is assigned to a person through a finding of fault The responsibility flows, rather, to the community as a whole by virtue of its character as a political association. Citizens who are joined together in a relation of polity bear a special responsibility for the well-being of their members

HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* 311 (1986) (asserting further that this obligation does not translate into a justification for progressive taxation).

217. PETER UNGER, *LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE* 133 (1996).

218. *Id.* at 148 (disparaging this lust).

219. MAYERFELD, *supra* note 113, at 208. Mayerfeld also argues that "[w]e have a prima facie duty to relieve suffering, because suffering is bad and ought not to occur." *Id.* at 111. This duty "holds true in the absence of other moral considerations." *Id.* at 113.

220. CHARLES FRIED, *RIGHT AND WRONG* 122 (1978). Not only does Fried's question raise the issue of excess consumption, but it also calls attention to the potential losses in other areas, even socially altruistic or advantageous ones like cancer research.

221. UNGER, *supra* note 217, at 145 (noting that it is "badly wrong" for his average reader to fail to provide aid, even costly aid, to others, including those suffering at a great distance from the location of his average reader).

acceptance of *some* duty of rescue undermines a defensive claim that the rich owe *nothing* to those in need.

III. SO WHAT? MORALITY AND THE LAW

Reintroduction of a noble obligation to the upper classes is a powerful idea, and as Fried's question suggests, some limits arguably should be placed on the obligation. At the same time, the possibility of a better society should not be falsely constrained by pessimists who reject the notion that our world could improve through non-market forces. Professor Fried dogmatically rejects arguments about the structure of society that consider an obligation to meet "the possibly all-consuming needs of the least fortunate."²²² However, Fried's rejection only rings true where each argument extends to its principled limit. While an argument that the rich owe the poor special duties might be taken to have no limit,²²³ it is also possible to place pragmatic limits on the argument—requiring, for example, merely that the rich repay society for society's contribution to their wealth. The possibility of pragmatic limits means that the argument should not be rejected simply because in principle it could overly constrain the freedom of the wealthy.

This paper will not attempt to define the limits on the obligations. At this stage, when the argument faces great resistance from a public enamored with the Horatio Alger version of moral worth, I present only the first half of the argument without fleshing out the details of implementation.²²⁴

A. *Academic Moral Claims and the Role of Ideas*

Judge Richard Posner strongly critiques academic moral arguments²²⁵—like this paper's call for heightened obligations based on high incomes. Posner argues that "academic moralism cannot succeed in its aim of improving human

222. FRIED, RIGHT AND WRONG, *supra* note 220, at 124.

223. Such arguably is Peter Unger's perspective. Yet, as Lucas argues:

The doctrine of unlimited negative responsibility is a hard doctrine. It loads everyone with unbearable burdens and induces unassuageable feelings of guilt. For that very reason, we sense, it must be wrong. . . . This is not to say that money should be spent on one's family and oneself regardless of the needs of others, as it too often is.

LUCAS, *supra* note 71, at 38–39.

224. Modesty regarding change coupled with lofty goals in line with the thinking in this article forms the conclusion to Liam Murphy & Thomas Nagel's recent work:

Progress in moral thinking is slow But the acceptance of socioeconomic inequality as inevitable can coexist with an insistence that those who do worst out of our common system should not fare too badly, and that those who do well out of it have no cause for complaint if the universal guarantee of a decent social minimum leaves them with less than they would have if low earners were left in poverty.

LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 188–90 (2002).

225. Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1673–74 (1998) (explicitly relating his argument that academic moralism is ineffectual to a fortunate person reading Rawls and discarding the idea that she should not be rewarded for her natural endowments).

behavior”²²⁶ But after considering the assumptions upon which Posner makes this assertion, we may draw a different conclusion, namely that ideas do indeed matter.

That academic moralism is ineffective in achieving its goal of improving human behavior is an assertion based upon particular descriptive—and I should add pessimistic—claims made by Posner regarding human behavior. The first reason Posner gives for why we should accept his claim of ineffectual academic moralism is that, “[k]nowing the moral thing to do does not furnish a motivation for doing it; the motivation has to come from outside morality.”²²⁷ This motivation can be as simple as “the pride you take in being a ‘good’ person, which is to say better than other people.”²²⁸ Although Posner belittles this as moral pride and not morality per se, because it is knowledge of what the moral thing to do is that permits pride to come in as a motivation, Posner’s distinction between being motivated by “moral pride”²²⁹ and inherent morality arguably is a mere tautology.²³⁰ Posner must distinguish between moral pride and inherent morality because of his underlying doubt that people are “innately good.”²³¹ There is no sense trying to disabuse Posner of his doubt in human goodness,²³² but it is largely immaterial whether people better their behavior in response to moral arguments per se or merely out of moral pride; academic moralism can change human behavior and, perhaps, contrary to Posner’s assertion, actually improve it.

Posner’s pessimism regarding the potential for human progress—he does not believe in moral progress²³³—through academic morals is most pronounced with regard to the possibility of individuals voluntarily forgoing “selfish joys and comforts.”²³⁴ “The analytical tools employed in academic moralism,” Posner claims, “are too feeble to override either narrow self-interest or moral intuitions.”²³⁵ The idea that those with high incomes have a right to the entirety of their income reflects Posner’s observation that “the vast majority of us . . . are

226. *Id.* at 1641.

227. *Id.* at 1641.

228. *Id.* at 1665. It is unclear to me why Posner asserts that pride in being a good person necessarily involves imagining that you are better than other people; one might rightly experience pride simply by doing the right thing, even if most other people would also make the same choice.

229. *Id.*

230. In taking on rational choice defenders, Professors Korobkin and Ulen note, “expanding the conception of ‘self-interest’ to include other-regarding preferences in addition to selfish ones would rob the notion of ‘self-interest’ of all of its predictive value.” Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1065 (2000).

231. Posner, *supra* note 225, at 1665.

232. My own beliefs regarding the innate goodness of people are based upon the Quaker teaching that there is a light in everyone.

233. *Id.* at 1641 (“My analysis also suggests that no useful meaning can be given to the expression ‘moral progress’ and that no such progress can be demonstrated.”).

234. *Id.* at 1666.

235. *Id.* at 1641.

reluctant to pay *any* price to be good.”²³⁶ Posner notes that “[w]e can avoid having to pay any price, without suffering any pangs of conscience—we can have our cake and eat it—by denying that morality requires us to change our behavior.”²³⁷ The sort of person envisioned by Posner, however, not only is capable of denying the demands of moral arguments, but actively closes off the possibility of personal moral growth or persuasion by new ideas. Posner believes that moral theory cannot alter moral intuitions²³⁸ and that even if an academic moral argument does “stir the conscience,” simply reading opposing arguments will make someone “return[] to one’s starting point.”²³⁹

I believe that ideas matter and that compelling academic moral arguments can convince me, and others, to alter behavior. How can the impasse between my perspective and Posner’s be rectified? Arguably Posner provided the answer himself in his very next paragraph: as we go through our life, we may have “a sequence of selves (young, middle-aged, old, healthy, sick, and so on) with different preferences”²⁴⁰ Our disagreement perhaps is merely an illustration of life changes regarding openness; stereotypically his belief accords with the conservative mindset associated with his demographic and my belief reflects the naivety commonly attributed to my age group.²⁴¹ Yet, Posner deserves more respect than for his argument to be dismissed so lightly.

A second way to defend moral arguments against Posner’s position is also grounded in his own work. Posner observes, “moral theory might be an inescapable concern of law” given “the overlap between moral and legal obligations.”²⁴² Posner dispenses with the objection by showing that there is not

236. *Id.* at 1666.

237. *Id.*

238. *Id.* at 1673.

239. *Id.* at 1674. Posner’s claim is expansive; it is not merely the lesser assertion, made by the late Professor Ralph Ross, that “[n]ot everyone who accepts an obligation intellectually feels it keenly enough to act on it.” ROSS, OBLIGATION, *supra* note 154, at 102. Posner’s claim is that everyone will return to their pre-intellectual argument starting point. This expansive claim is a consequence of Posner’s siding with those who are “impatient with reflection” or with theory—a choice that, according to Dworkin, is associated with Posner “misunderstand[ing] the motives and assumptions of more reflective people.” Ronald Dworkin, *Darwin’s New Bulldog*, 111 HARV. L. REV. 1718, 1723 (1998). Dworkin characterizes the bulk of Posner’s article as being focused on this issue, on “the remarkably implausible . . . claim[] that no general moral theory or argument can persuade someone to accept a moral judgment that he initially rejects.” *Id.* at 1726.

240. Posner, *supra* note 225, at 1675.

241. Professor James R. Ozinga’s description of the optimism of youth and the pessimism of old age arguably explains my own naivety:

Altruism is a word that can excite a strong response from people. To some people the word must be a reminder of their own youth, a time when they had expectations of a kind world Somewhere in the process of growing up, even the romantic individual realizes how unromantic the world can be, how utterly selfish and uncaring people can be and begins to expect others to run away from an accident rather than running toward it to see if help is needed.

JAMES R. OZINGA, ALTRUISM xv (1999).

242. Posner, *supra* note 225, at 1694.

a one-to-one overlap between law and morality; in the process, he provocatively labels those who would like to bring greater morality into law as being “the Taliban of Western legal thought.”²⁴³ By doing so, Posner sets up a straw-man argument, demonizing by analogy *any* effort to more closely align law and morality, even if advocated in only a few narrowly proscribed areas.²⁴⁴ Such a presentation properly condemns a perfect overlap between Church and state for example, but says little about an academic moralist argument that the overlap between law and morality should be more or less pronounced in a particular area of law, provided liberty is protected.

Perhaps most importantly, academic moralism bothers Posner in part because it is espoused by academics.²⁴⁵ Posner believes that “a modern academic career in philosophy is not conducive to moral innovation or insight[,]”²⁴⁶ such that “the modern university professor is not well situated to play the role of moral entrepreneur.”²⁴⁷ Academics should carefully consider the personal relevance of Posner’s critique that modern philosophy is the creation of lifetime academics who take “few professional risks” and live “comfortable bourgeois li[ves],” either “think[ing] Left and liv[ing] Right” or “think[ing] Right and liv[ing] Right.”²⁴⁸ I am more sympathetic and find more realistic “[t]he ambition of the academic moralist [] to change people’s moral beliefs and thus change their behavior,”²⁴⁹ perhaps partly out of friendship and respect for Duncan Kennedy—who Posner derides as “that oxymoron, the ‘tenured radical.’”²⁵⁰

Yet Posner’s broadside-attack contains within itself a possible way of escaping his conclusion that there is nothing to academic moralism. Citing Peter Unger for the idea, Posner concedes that the thinking of academic moralists

243. *Id.* at 1695.

244. As Dworkin writes, “no one has to subscribe to the absurd claim that the law should enforce all and only moral obligations in order to think that moral convictions are sometimes—even often—relevant in deciding what the law is.” Dworkin, *supra* note 239, at 1729.

245. In explaining why he chooses to write his lectures given his belief that academic moralism is ineffective at creating change, Posner tellingly came close to acknowledging that he was motivated by fear:

Why then have I written them, especially if I am right that the academic moralists, against whom I am writing, have no impact on either personal behavior or public policy? May it not be that I fear their impact, that it is this fear which has motivated me? I am enough of a Freudian not to consider myself an expert on my own motivations, so I shall say only that fear is not the only possible motivation

Posner, *supra* note 225, at 1655.

246. *Id.* at 1641.

247. *Id.* at 1642.

248. *Id.* at 1688. Charles Fried goes further, claiming that he has “noticed there is much more money to be made if you are an academic espousing egalitarian and redistributive causes” compared to that received by the libertarians and Lockians that he identifies with. Fried, *Protecting Property*, *supra* note 9, at 44.

249. *Id.* at 1664.

250. *Id.* at 1667.

might be picked up by charismatic leaders and “absorbed into our moral code through moral or religious middlemen.”²⁵¹ And while Posner doubts this will occur, we are free to disagree regarding the efficacy of academic thought with someone who, after all, sees himself as being “basically” an academic.²⁵²

Our ideas about social obligations matter. As Professor Dworkin writes, “It is part of our folk-wisdom, as well as the opinion of formidable historians, that ideas sometimes do, in the end, move mountains and armies. Posner offers no real empirical evidence to the contrary.”²⁵³ Posner’s argument stands as a placeholder for an orthodoxy which describes progressive ideas and actions in a way that makes those ideas seem purely the domain of an impossible utopia, unworthy of pursuit in an imperfect world.²⁵⁴ By making “human characteristics of altruism, love, sense of fairness, and equality” part of “an impossible future,”²⁵⁵ those opposing change can disparage progressive ideas without offering alternative theories of the good. Instead they suggest a future rooted in the conservative—and unimaginative—idea of fighting against change.

Within Posner’s framework, progressive arguments, including this article’s advocacy of heightened obligations for the wealthy, are seemingly doomed: either they evoke an unrealistic utopia or they are confined to argue for minor adjustments to humanize the orthodoxy;²⁵⁶ or, worse yet, they are derided as being “communistic” and immediately discarded.²⁵⁷ Yet, openness to not only

251. *Id.* at 1689.

252. *Id.* at 1688. Indeed, while Posner “calls for the death of moral theory, . . . he only means the triumph of his own theory.” Dworkin, *supra* note 239, at 1737–38. Since readers of this article are likely themselves academics, they might be more predisposed to accept the possibility of change propelled by charismatic leaders than those who are not ‘basically’ academics. ROSS, OBLIGATION, *supra* note 154, at 119 (“[t]he intellectual is far more open to change than the custom-loving man”).

253. Dworkin, *supra* note 239, at 1726.

254. See OZINGA, *supra* note 241, at 75 (writing about altruism).

255. *Id.*

256. Barry, *supra* note 7, at 216, 243 (explaining that social justice ideas can be criticized as utopian, later asserting that a book about social justice should do more than put “forward a few technical fixes of the status quo”); see also BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 231 (1980) (describing dichotomy between utopian visions and minor adjustments differently: “On the one hand, a theory that cannot serve as a practical guide is merely a utopian fantasy, an inferior form of fiction. On the other hand, a book that offers a detailed action program is merely a symbol of the theorist’s power lust . . .”).

257. In an editorial, Alan Wolfe reports, “income inequality is still viewed as a cause of zealots.” Alan Wolfe, Op-Ed., *The New Politics of Inequality*, N.Y. TIMES, Sept. 22, 1999, at A27. Labeling “communistic” those arguments that do not strictly accept an equity-neutral version of capitalism is a particularly troubling conservative response to progressive ideas, a response attempting to stifle debate rather than deal with concerns regarding the shape of *our* capitalism. Professor Amar for example felt compelled, when speaking before the Federalist Society, to map out “common ground”: “Pure socialism is bad. A system of private property, at least up to a point, is good.” Amar, *supra* note 134, at 37. As one of Amar’s colleagues argues, “the ultimate question is not capitalism against socialism, but liberalism against elitism.” ACKERMAN, SOCIAL JUSTICE, *supra* note 256, at 264. Indeed, progressives can question the dominant, limited, understanding of the market without their arguments being communist ones. Professor Charles Pouncy argues that

progressive ideas but also movement in the direction of such ideas is fundamental to a full analysis of the law and of social institutions. Simultaneously offering a defense of progressive arguments and presenting a way “dreamers” might find space for their ideas, Professor Ackerman writes, “[c]all it *revolution on a human scale*, and define it as a self-conscious effort to mobilize the relevant community to reject currently dominant beliefs and practices in one or another area of social life.”²⁵⁸ Ackerman claims that revolutionaries tell three types of stories, one of which prioritizes the idea that “[n]o self-respecting person can settle for less than a sharp break with the injustices rooted deeply in the status quo.”²⁵⁹ It is this type of story that most corresponds with the duty, recognized by Professor Fried, to move our institutions “in appropriate situations . . . in the direction of justice.”²⁶⁰

Work within the legal community to improve our understanding of the obligations of privilege is not an obvious source for revolutionary stories. The untenured radical enjoys most of the same privileges enjoyed by the tenured radical,²⁶¹ and neither is in a very good position to understand either the challenges facing the poor or, perhaps, the factors motivating the super-rich. Nonetheless, as Professor Sunstein explains, “changes in norms might be the best way to improve social well-being; and [] government deserves to have, and in any case inevitably does have, a large role in norm management.”²⁶² Laws do not simply codify the most efficient rules, they set and influence norms by defining what is acceptable.²⁶³ Since law “explicitly deals with right and wrong and the external effects of our actions,”²⁶⁴ the legal community might be the best arena within which to challenge the excessive wealth and consumption of the rich in the face of the hardships confronted by the poor.

today’s mainstream economic theory, the neoclassical paradigm, interacts with legal culture to obviate considerations of economic justice. By the law’s reliance on a methodology that is blind to considerations of group status and group processes, and by its adoption of values that marginalize conventional notions of equity and fairness in the economic arena, supplanting them with the values of efficiency and self-interest, the law becomes oblivious to its role in achieving and maintaining the unjust distribution of assets, resources, and opportunities countenanced by the neoclassical paradigm.

Charles R. P. Pouncy, *Economic Justice and Economic Theory: Limiting the Reach of Neoclassical Ideology*, 14 U. FLA. J.L. & PUB. POL’Y 11, 12–13 (2002). Professor Pouncy expands on this argument by explaining, “[m]oreover, unlike mere legal precepts, neoclassical economic theory promotes itself as a scientific discipline, imbuing its policies with the halo of scientific truth. The result is a pseudoscientific rationalization of the status quo.” *Id.* at 16.

258. Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2283 (1999).

259. *Id.*

260. FRIED, RIGHT AND WRONG, *supra* note 220, at 129.

261. The author wishes to sincerely thank the American University hiring committee!

262. Sunstein, *supra* note 104, at 907.

263. *Id.* at 964 (“Many laws have an expressive function. They ‘make a statement’ about how much, and how, a good or bad should be valued. They are an effort to constitute and to affect social meanings, social norms, and social roles.”).

264. Harrison, *supra* note 149, at 1362.

1. Strengthening the Obligations of the Rich

Although it is tempting to detail a precise formula showing what the rich owe the poor and how such obligations ought to be enforced, much can be accomplished simply by changing the norms surrounding the relationship between high-income individuals and the poor.²⁶⁵ The poor have gotten more attention recently than they normally receive: Hurricane Katrina provided a limited window in which America's inequality was depicted day after day on television as the government belatedly responded to the mostly poor who could not evacuate the city.²⁶⁶ President Clinton, in a *Meet The Press* interview, stated, "Katrina is going to force us to go back and think about three things. What are our obligations to the poor, there, and in America? What is the role of government? And who's going to pay for it?"²⁶⁷ This article does not aim to solve the problem of what is owed to the poor, nor the role of government. However, by examining our starting assumptions 1) that moral worth is connected to income, and 2) that society plays no role in the high income of the rich, we begin to change our understanding of the nature of wealth and of who has an obligation to the poor.

The rich have a greater obligation to the poor than that which society currently imposes. This is not solely because the rich have money but also because of how they came to have such wealth. Participation in the labor force divides the deserving from the undeserving poor; similarly, the societal attribution of moral worth to work and earnings encourages celebration of the success and consumption of the rich. America simultaneously "blames the victim for her oppression"²⁶⁸ and "enshrine[s] individual success and undervalue[s] society's role in wealth building."²⁶⁹ But, as Gates and Collins argue, "for the good of the country, we need to better account for the origins of wealth and success."²⁷⁰ This is not simply because we want to know who has the money; we also care about whether high incomes should be considered

265. Lucas explains: "It is difficult, indeed misleading, to attempt to lay down guidelines [related to giving amounts]. . . . Few of us err on the side of actually giving too much to charity." LUCAS, *supra* note 71, at 180.

266. Professor Thomas Ross relates the vulnerability of the poor to disasters: "Just as the separation and stigmatization of the poor is a recurring cultural assumption, the intensified suffering of those in poverty in times of natural or man-made disaster has been a recurring societal reality." Ross, *The Rhetoric of Poverty*, *supra* note 5, at 1503 (citing the plague, wars, and the spread of AIDS in an article published well before Hurricane Katrina).

267. *Meet The Press with Tim Russert* (MSNBC television broadcast Sept. 18, 2005), transcript available at <http://www.msnbc.msn.com/id/9327333/>.

268. Pouncy, *supra* note 257, at 22 (characterizing the attitude of mainstream neoclassical economics). According to Thomas Ross, the rhetoric of Supreme Court opinions contains the idea that poor people "have bad attitudes and are the cause of their own poverty." Thomas Ross, *supra* note 5, at 1499. As Professor Singer argues, if every person cannot escape poverty through hard work, "then it is cruel and oppressive to pretend . . . that the poor have only themselves to blame for their plight in our Panglossian world." Singer, *After the Flood*, *supra* note 131, at 318.

269. GATES SR. & COLLINS, *supra* note 2, at 112.

270. *Id.*

entirely the result of individual effort.

The income equations of Part I, which illustrate society's role in high income generation, provide particular reasons why the rich should feel some responsibility for the needs of the poor.²⁷¹ Where income reflects more than your own effort, "being moral on Sundays"²⁷² fails to satisfy the demands attendant on the recognition of society's role in facilitating great wealth for some and poverty for others. Warren Buffett's recent pledge to selflessly donate the bulk of his fortune to the Gates Foundation²⁷³ is perhaps an exception; people cannot "typically discharge [their] debt to the exploited classes by one grand gesture."²⁷⁴

The obligation owed to the poor is shaped by the circumstances of the non-poor. Professor Amar asserts, albeit with some hesitation, that "each of us may well have an obligation as a citizen to help assure each of our fellow citizens some minimal entitlements."²⁷⁵ This obligation reflects both the needs of the poor, as would be suggested by acceptance of the duty to rescue, and the unearned incomes of the rich.

Professor Fried and others posit that the "possibly extravagant needs of the least fortunate" might "interfere excessively with the pursuit of happiness" by the better off.²⁷⁶ If we focus on the incomes of the rich, we turn Professor Fried's concerns on their head. Given the excess wealth and consumption of the rich, fueled in part by societal institutions favoring some over others,²⁷⁷ America should be concerned about the extravagant *needs* of the rich interfering with the health and well-being of the poor. Professor Ackerman observes, "a privileged person cannot evade an ongoing personal conflict between his pursuit of self-advantage and the demands of social justice."²⁷⁸ Shamefully, for too long our laws and norms have been attempting to deny the existence of this conflict.²⁷⁹

271. See LUCAS, *supra* note 71, at 53 ("Only if there is some special reason why I should have done something . . . am I obliged to justify my inaction.").

272. *Id.* at 155.

273. Timothy L. O'Brien & Stephanie Saul, *Buffett to Give Bulk of Fortune to Gates Charity*, N.Y. TIMES, June 26, 2006, at A1.

274. ACKERMAN, SOCIAL JUSTICE, *supra* note 256, at 376.

275. Amar, *supra* note 134, at 43.

276. FRIED, RIGHT AND WRONG, *supra* note 220, at 123.

277. Paul Krugman argues that changes in social norms that now are more accepting of social inequality have greater explanatory power than theories based on globalization, skills-biased technological change, or the winner-takes-all market for America's growing inequality. Krugman, *supra* note 69, at 65–66.

278. ACKERMAN, SOCIAL JUSTICE, *supra* note 256, at 377.

279. Our psychological response to recognition that we have been undeservedly advantaged shows why modifying the starting assumptions of what we deserve matters:

A person who experiences relative advantage [in terms of actual reward versus expected reward], and therefore views himself as a beneficiary of injustice, is apt to feel some degree of guilt and to increase what he gives in a social exchange and thus increase what the other gets—if he is able to do so and it doesn't cost too much to do so.

Scholarship, content to point to the possibility of greater progressive taxation, approaches the obligations of wealth hesitantly, if at all.²⁸⁰

Arkes argues that “[t]o say that it is morally wrong for some people to have more while others have less is to fall, once again, into the fallacy of extracting a moral conclusion from facts that are barren of moral significance.”²⁸¹ That might be so for some societies, but I believe that moral judgments are an appropriate starting point for changing norms in the United States, where the rich have significant unearned income that is unaccompanied by adequate corresponding obligations.²⁸²

CONCLUSION

The time has come to focus on the obligations of the rich. The paternalism and punishment in America’s welfare programs reflect government choices to enforce certain unequal societal obligations upon the poor.²⁸³ But the attention

MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE* 10 (1985) (summarizing the views of G.C. Homans); *see also* P.S. GREENSPAN, *PRACTICAL GUILT: MORAL DILEMMAS, EMOTIONS, AND SOCIAL NORMS* 132 (1995) (discussing the motivational potential of guilt); ALF ROSS, *ON GUILT, RESPONSIBILITY AND PUNISHMENT* 7 (1975) (“a person who has violated a system whose validity he himself recognizes . . . must disapprove of his own conduct and become angry with himself.”); *see generally* GUILT: MAN AND SOCIETY (Roger W. Smith ed., 1971) (containing essays on guilt by, among others, Nietzsche and Freud).

280. There is no hiding behind the idea that progressive taxation could solve everything when the lack of such taxation means you can freely enjoy what is wrongly not taxed. Though progressive taxation might (in theory) be the most efficient way of transferring income from the rich to the poor, the mere possibility of higher progressive rates does not immunize the rich from acting on their obligations where the tax and transfer system does not adequately tax the higher tax brackets. At some point, arguments urging legal rules chosen solely for the sake of efficiency—such that “distributional considerations [are] addressed (if they are to be addressed at all) exclusively through the tax and welfare systems”—become merely a disguised protection of wealth in a society unwilling to return to the higher progressive rates that would justify turning a blind eye to distribution in all other contexts. *See* Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 *VAND. L. REV.* 1653, 1654 (1998) (concluding on page 1676 that, because of the human tendency to underestimate losses, “there are reasons to think that redistributive legal rules may perform better than taxes” in terms of efficiency distortions caused by such redistribution). *But see* David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 *U. CHI. L. REV.* 439, 439 (2003) (“[T]he tax system is a better tool for redistribution of income than legal rules. We should, therefore, use the tax system rather than legal rules to address income inequality, and, correspondingly, legal rules should not systematically favor the poor.”).

281. ARKES, *supra* note 216, at 320. *Contra* HIS HOLINESS THE DALAI LAMA, *supra* note 216, at 175 (“On a recent visit to New York, a friend told me that the number of billionaires in America had increased from seventeen just a few years ago to several hundred today. Yet at the same time, the poor remain poor and in some cases are becoming poorer. This I consider to be completely immoral.”).

282. As Professor Fried acknowledges, we have a duty “to contribute a fair share” to our fellow man—though he and I may define “fair” differently. FRIED, *RIGHT AND WRONG*, *supra* note 220, at 130.

283. An example of both paternalism and punishment is the policy of evicting HUD residents from their housing if drugs are discovered in their unit, regardless of whether the resident was personally responsible for the presence of the drugs. *See* Adam P. Hellegers, *Reforming HUD’s “One-Strike” Public Housing Evictions Through Tenant Participation*, 90 *J. CRIM. L. & CRIMINOLOGY* 323, 324–27 (1999).

to the societal obligations of the poor should not crowd out consideration of the obligations of the rich. Our nation's singular focus on the obligations of the poor reflects our assumptions regarding the nature of income.²⁸⁴ While many poor receive some type of obvious token of societal support for their income in the form of food stamps, section 8 vouchers, or welfare checks, the support the rich receive is often invisible, or at least not acknowledged. But some part of each paycheck, or dividend check, of the rich is unearned: behind high pay lies effort *and* educational subsidies, good fortune, societal institutions favoring a select few, and often some advantage gained at birth.²⁸⁵ The rich contribute a great deal to society, but the reverse is also true; nonetheless the societal role in the creation of individual wealth is under-appreciated and the related obligations of the rich are understood as being merely optional.

This article is about the income of the rich, but by focusing on the income of the rich rather than on the income of the poor, this article also calls into question the standard practices of "mainstream welfare scholarship"²⁸⁶ that consider the problems of the "undeserving" poor but ignore the unearned and partially undeserved income of the rich.²⁸⁷ Just as "it is unfair to vilify and demonize people whose main fault seems to be that they find themselves unable to move from the ranks of the working poor[,]"²⁸⁸ it is also unfair to categorically celebrate those who have been financially successful.

Labeling someone poor or rich allows a "focusing on the single variable of economic wealth . . . [to] create a class of people who are them, not us."²⁸⁹ This article is guilty of separating out the other for special examination, even if we—most readers and the author—are in fact the members of the class being examined. But it is a necessary component of the project of this article. Our culture consistently denies that the rich owe society for personal gain and does

284. One powerful assumption is that the income of the poor is unrelated to the income of the rich; yet, as Krugman writes, "here's a radical thought: if the rich get more, that leaves less for everyone else." Krugman, *supra* note 69, at 67. Scholars and progressive are hesitant to discuss the connection between high and low incomes in part because the preceding statement, "which is simply a matter of arithmetic[,] is guaranteed to bring accusations of 'class warfare.'" *Id.*

285. According to Professor Tom Hertz, "By international standards, the United States has an unusually low level of intergenerational mobility: our parents' income is highly predictive of our incomes as adults." HERTZ, *supra* note 7, at i. For more on advantages or disadvantages obtained at birth, see Alan B. Krueger, *Economic Scene: The Apple Falls Close to the Tree, Even in the Land of Opportunity*, N.Y. TIMES, Nov. 14, 2002, at C2 (stating that "[f]ive or six generations are probably required, on average, to erase the advantages or disadvantages of one's economic origins"); see also Paul Krugman, Op-Ed., *The Sons Also Rise*, N.Y. TIMES, Nov. 22, 2002, at A27 ("Underlying economic, social and political trends will give the children of today's wealthy a huge advantage over those who chose the wrong parents.").

286. White, *supra* note 119, at 2002.

287. By doing so, the article engages in a similar sort of analysis focusing on the unspoken "norm" as critical race scholars do through their studies examining the unexplored history of whiteness. For a critical collection of essays on whiteness, see CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).

288. Dickerson, *supra* note 106, at 20.

289. Ross, *The Rhetoric of Poverty*, *supra* note 5, at 1499.

not recognize the reciprocal moral duty of the rich to aid those suffering under the effect of poverty. It is time to assert that the rich should be held to a level of obligation reflecting the ways they have benefited from our society.

