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Something for Nothing: Liberal Justice and Welfare Work Requirements

Amy L. Wax

University of Pennsylvania Carey Law School

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SOMETHING FOR NOTHING: LIBERAL JUSTICE AND WELFARE WORK REQUIREMENTS

Amy L. Wax*

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INTRODUCTION

Following decades of attempts to overhaul the federal system of poor relief, President Clinton signed a bill in 1996 that dramatically reformed "welfare as we know it" by repealing the New Deal program of Aid for Families with Dependent Children (AFDC) and replacing it with Temporary Assistance for Needy Families (TANF). Although the revised statute left some welfare programs untouched,¹ it transformed poor relief for most families by incorporating strict time limits and mandatory work requirements. The lifetime limit on cash assistance for families is now fixed at sixty months. Recipients must engage in part-time work and move toward full-time employment to remain qualified for benefits.² In the wake of these reforms, many beneficiaries have left the welfare rolls altogether, while many others receive some public assistance to supplement their (often meager) earnings at low-wage jobs.

The enactment of TANF represents the triumph of the familiar distinction between the "deserving" and "undeserving" poor. That distinction rests on the widespread and popular view that the able-bodied should work and that public assistance should be available only to those who cannot work or who cannot support themselves by working. Although the historical absence of poor relief for able-bodied men shows that this paradigm has always held sway in the United States, TANF extends its hold by imposing work requirements on caretakers of children—most importantly single mothers. The categories of "deserving" and "undeserving" are now applied regardless of sex.

¹ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in 42 U.S.C. § 1305 (2000)) (leaving in place some means-tested, in-kind programs (Medicaid and food stamps) and maintaining the basic elements of the federal program for the poor, disabled, and elderly (SSI)).

² See HELEN HERSHKOFF & STEPHEN LOFFREDO, *THE RIGHTS OF THE POOR* 32-54 (1997) (providing a broad analysis of rights and restrictions under TANF); DAN BLOOM, *AFTER AFDC: WELFARE-TO-WORK CHOICES AND CHALLENGES FOR STATES* 74-77, available at <http://www.mdrc.org/Reports/AfterAFDC/After%20AFDC.htm> (last visited Feb. 8, 2003) (documenting state increases in earned-income disregards and consequences for "work plus welfare" combinations). Revisions to the 1996 Welfare Reform Act are now under consideration in Congress (though temporarily stalled in the Senate), and President Bush has recommended strengthening the statute's work requirements. See Mike Allen, *Bush Pushes Bigger Workload for Welfare Recipients*, WASH. POST, May 14, 2002, at A5; Robert Pear, *House Passes a Welfare Bill with Stricter Rules on Work*, N.Y. TIMES, May 17, 2002, at A1; Shawn Fremstad et al., *Summary Comparison of TANF Reauthorization Provisions: Bills Passed by Senate Finance Committee and the House of Representatives, and Related Proposals*, at <http://www.cbpp.org/7-2-02tanf.pdf> (last updated on August 9, 2002); see also Robert Pear, *House Endorses Stricter Work Rules for the Poor*, N.Y. TIMES, Feb. 14, 2003, at 25.

As argued previously,³ the various reforms introduced by the enactment of TANF represent a convergence towards a consensus model of "conditional reciprocity" under which individuals are expected to contribute to their own support through paid employment if they are able, with the government owing nothing to those who could contribute but do not. This model allows individuals to establish themselves as "deserving" of public assistance by making a reasonable contribution to their own economic support, but obligates the government to "make up the difference" if complete self-sufficiency cannot be attained through reasonable, good faith efforts.⁴

Few outside the academy openly question the reigning tenet that the government should help only those who help themselves. Politically there is widespread acceptance of the idea that the "quid pro quo" for public assistance is the willingness to perform some kind of gainful activity. Objections to welfare reform are rarely couched as a full frontal assault on the idea that government should require work as a condition of welfare,⁵ and unqualified arguments that public assistance should be made available to the poor—or to everyone—regardless of work efforts are rarely voiced in the United States today.⁶

³ See Amy Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL'Y & L. 477 (2001) [hereinafter, Wax, *A Reciprocal Welfare Program*]; Amy Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 LAW & CONTEMP. PROBS. 257 (2000) [hereinafter, Wax, *Rethinking Welfare Rights*].

⁴ The principal federal cash transfer program, TANF, is structured to supplement earnings through work. Another large federal poor relief program, the Earned Income Tax Credit, provides a refundable tax credit for workers only. States have also created myriad "work-support" and "workfare" programs to supplement and encourage employment in the paid economy. See, e.g., State Policy Documentation Project, *Work Requirements: Adult Basic Education (ABE)*, at http://www.spdp.org/tanf/abe_esl.pdf (last modified Oct. 1999).

⁵ Although this distinction between the deserving and undeserving is virtually unchallenged in the political arena, a lively political debate continues about who actually falls into these categories. Most critics of welfare reform question the application of work requirements to mothers or sole caretakers of young children on the grounds that there are too few jobs for the unskilled, that work requirements harm children, or that mothers should be regarded as "working already." See discussion *infra* pp. 33-34.

⁶ An exception is BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 4 (1999) (proposing an \$80,000 grant to all 21-year-olds). See also Forum, *Delivering a Basic Income*, BOSTON REV., Oct.-Nov. 2000, at 4 (various commentators), reprinted in PHILIP VAN PARIJS, *WHAT'S WRONG WITH A FREE LUNCH?* (2000); Michael Kinsley, *The Ultimate Block Grant*, NEW YORKER, May 29, 1995, at 36, 37 (advocating a guaranteed income administered as part of the income tax system).

Although championed by Milton Friedman, see *CAPITALISM AND FREEDOM* (1962), and James Tobin (in the form of a refundable negative income tax) and briefly floated by the Nixon administration in a means-tested form under the rubric of the Family Assistance Plan, see DANIEL P. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN* (1973), guaranteed income programs have never played a prominent or sustained role in the American welfare debate. The case for an unconditional basic income (or "demogrant") and its means-tested variants has been aired more

This Article examines the normative notion that is central to welfare reform: that individuals must work if they are able in order to receive public financial support. The goal of the Article is to analyze the politically influential conviction that welfare without work is "unfair" or "unjust" in light of ideas about just societies developed by liberal egalitarian theorists. Can the popular rejection of welfare without work be squared with more sophisticated theories that seek to set forth a blueprint for just societies? Is it possible to say, on first principles, what is wrong with "something for nothing"?

In examining this question, this Article relies on a critical distinction between an unconditional, or guaranteed, basic income (UBI), and public financial assistance conditioned on work. Although societies confront a nuanced range of options for designing public welfare programs, the choices considered here represent convenient polar opposites for the purpose of analysis. Universal work requirements are the flip side of unconditional assistance. A society committed to providing a basic minimum standard of living to everyone regardless of "deservingness" will abandon work requirements as a qualification for receiving public aid.⁷ In contrast, a society committed to helping only the "deserving" as defined by principles of

extensively in Europe. See, e.g., SAMUEL BRITTAN & STEVEN WEBB, *BEYOND THE WELFARE STATE: AN EXAMINATION OF BASIC INCOME IN A MARKET ECONOMY* (1990) (making the case for basic incomes); TONY FITZPATRICK, *FREEDOM AND SECURITY: AN INTRODUCTION TO THE BASIC INCOME DEBATE*, (1999); HERMIONE PARKER, *INSTEAD OF THE DOLE: AN ENQUIRY INTO THE INTEGRATION OF THE TAX AND BENEFIT SYSTEM* (1989); PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM* 32-35, 112 (1995) [hereinafter, VAN PARIJS, *REAL FREEDOM FOR ALL*] (arguing for a basic income system with additional income provided to workers to comport with the "notion that workers should be adequately rewarded"); TONY WALTER, *BASIC INCOME: FREEDOM FROM POVERTY, FREEDOM TO WORK* (1989); Philippe Van Parijs, *Competing Justifications of Basic Income*, in *ARGUING FOR BASIC INCOME: ETHICAL FOUNDATIONS FOR A RADICAL REFORM* (Van Parijs ed., Verso 1992) (summarizing the varying justifications set forth by proponents of a basic income and providing examples of actual implementations). Although the idea of a universal minimum has greater currency in Europe, no European country has adopted an across-the-board guaranteed income policy. See, e.g., Robert E. Goodin, *Work and Welfare: Toward a Post-Productivist Welfare Regime*, 31 *BRIT. J. POL. SCI.* 13, 38 (2001) (noting that the Netherlands, although coming closest, has increasingly moved towards a system where "[e]veryone is being pressed to do some work"). Many European countries provide cash subsidies of varying generosity to families with children, the unemployed, and the disabled through programs that would be considered lax by American standards. Disability criteria, for example, are applied loosely and unemployment benefits are often granted without careful scrutiny of the reasons for joblessness. *Id.* at 37 (remarking that disability benefits were even used to "buy out" surplus labor in the Netherlands).

⁷ A program that guarantees basic income without work requirements—in contrast to one that requires work—can be either means-tested or non-means-tested. In the latter case, everyone would receive a basic demogrant, regardless of level of earned income. In the former case, only the poor would receive aid, but assistance would be offered regardless of the reason for poverty. Those poor through misfortune or by choice would be treated the same. The uneducated single mother, the disabled former steelworker, the educated bohemian performance artist, and the footloose drifter, would all qualify for a check from the government.

conditional reciprocity will reject the option of establishing a minimum level of cash assistance for all and will require the able-bodied to work for their benefits.

This discussion shows that another way to ask whether liberal societies should adopt policies that condition public assistance on work is to analyze whether an unconditional basic income is more consistent than work requirements with fundamental principles for governing just societies. Objections commonly voiced against unconditional assistance generally and income guarantees in particular are that they "exploit" workers, license "free riding," unfairly favor idle freeloaders over upstanding, industrious citizens, run contrary to sound notions of "desert," and violate basic principles of social reciprocity. Drawing on the work of liberal egalitarian political theorists such as John Rawls, Ronald Dworkin, Philippe Van Parijs, Elizabeth Anderson, and others, this Article investigates whether sense can be made of these objections within the analytic frameworks established by standard liberal theories of justice, with an emphasis on contractarian approaches so dominant in this arena. Should an unconditional income be a central feature of a truly just society, or would basic tenets common to such societies rule out this arrangement? Alternatively, should a guaranteed, universal basic income be regarded as one option among many that comport with basic principles of justice and that a fair society might choose to adopt? If so, under what conditions?

The Article does not attempt an exhaustive exploration of issues bearing on the design of fair systems of resource allocation or of just social welfare policies. Although it draws on more general analyses of allocational issues as well as on specific discussions of the fairness of guaranteed benefits and work requirements, its focus is on a choice between starkly contrasting options for public welfare policy that confronts western liberal societies today. The goal is to bring together and synthesize theoretical approaches with the aim of determining whether common intuitions are vindicated by, or are consistent with, the basic commitments that inform conceptions of just societies within the liberal theoretical framework.

The Article concludes that, although the work of liberal theorists offers valuable perspectives on the normative question of whether just societies should guarantee everyone minimal financial support, a definitive answer remains elusive. Any notion that transferring earnings from workers to able-bodied nonworkers is "unfair," "unjust," or exploitative, is difficult to derive

from the fundamental building blocks for liberal formulations of just societies. Liberal egalitarians start from a baseline of equal initial shares of resources, skepticism about desert, and an obligation to hold persons harmless for unlucky outcomes and endowments (including bad upbringing, lack of talent, and even unproductive temperament) that does not clearly yield a bedrock obligation to work for a living. Rather, arguments about the fairness or unfairness of placing conditions on the redistribution of resources tend to smuggle in underived, foundational, moralistic assumptions that rest on their own intrinsic appeal. If these commitments are indeed *sui generis*, they must either command our assent or fail on their own terms.

The Article concludes by drawing on an evolutionary analysis that speculates on the origins of the politically prevailing view that granting benefits regardless of work licenses unfair "free riding." The thesis, set forth in previous work, is that the widespread tendency to express moralistic disapproval of the "undeserving"—defined as those who draw on group assets without making reasonable efforts to contribute to their own self-support—may have originated in the adaptive advantages enjoyed by cultures that discouraged free riding on collective resources.⁸ The Article examines the implications of this conjecture for theories of justice and most especially for the development of contractarian approaches that dominate liberal political thought. It speculates that the tension between the stance dictated by liberal theories and ordinary persons' notions of fairness may be due to the failure of contractarian hypotheticals to capture the conditions that gave rise to the basic structure of our moral sentiments. Hostility to freeloading may have emerged as a feature of human psychology or culture from a competitive process that pitted individuals or groups with different behavioral strategies against one another in round after round of competition. These processes are best captured by dynamic, iterative models. The logic of evolutionary development is

⁸ See Wax, *A Reciprocal Welfare Program*, *supra* note 3, at 483; Wax, *Rethinking Welfare Rights*, *supra* note 3, at 266-67. Recent empirical data confirms that the tendency to punish free riding, norm violations, and some forms of selfish and nonreciprocal behavior, even at great personal cost, is a widespread and robust feature of human psychology. See, e.g., Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137, 137 (2002) [hereinafter, Fehr & Gächter, *Altruistic Punishment in Humans*] (showing that cooperation "flourishes if altruistic punishment is possible"); Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 AM. ECON. REV. 980, 993 (2000) (providing evidence that punishment occurs, despite personal costs, and intensifies the "more an individual negatively deviates from the contributions of the other group members . . ."); Karl Sigmund et al., *The Economics of Fair Play*, SCIENTIFIC AM., Jan. 2002, at 83, 87 (explaining human altruism as a function of "achieving biological success in complex social networks"); see also PAUL RUBIN, *DARWINIAN POLITICS: THE EVOLUTIONARY ORIGINS OF FREEDOM* 40, 67-72 (2002).

fundamentally at odds with the static, one-shot thought experiments that liberal theorists favor. The Article speculates on the implications of this explanation for the divergence between principles derived from rational analysis and the realities of political psychology.

I. HOW TO THINK ABOUT WORK REQUIREMENTS AND GUARANTEED INCOME

A. *Pragmatic Concerns*

Arguments for or against the opposed possibilities of universal guaranteed income for all or work requirements for the able-bodied can be divided into those grounded in consequentialist or pragmatic concerns and those based on judgments that are normative, moralistic, or prescriptive in form. The first set of objections looks to the economic, personal, and social consequences of doling out public assistance with no strings attached. The second set of objections, while not heedless of practical economic and social consequences, treats those factors as informing ultimate judgments about fairness. Moralistic and pragmatic approaches often proceed from the starting point of a market-based economy. Although egalitarian liberal theory is centrally concerned with critiquing the market and its outcomes, most liberal theorists accept markets as a basic institution of economic life and assign them a central role in regulating exchange, generating resources, and distributing wealth. The reluctance to jettison this institution means that most discussions of redistribution assume public welfare programs will operate in conjunction with some kind of market-based system of allocation.

The arguments that there is something fundamentally wrong with unconditional basic income programs are often couched in terms that are moralistic, prescriptive, and universalizable: they assume or assert basic norms of conduct applicable to all. Pragmatic and consequentialist arguments, in contrast, emphasize outcomes that are linked to largely uncontested social goals, such as maximization of wealth or well-being, efficiency, human self-development, socially constructive behaviors, or social harmony. A principal focus on the consequentialist side is the size of the pie: the key issues are the effect of a tax and transfer system on economic efficiency and the overall amount of resources available for distribution within society. This type of analysis speculates on the incentives created by disturbing market allocations and on how behavior responds to those changes. Obviously, money to fund a massive redistributive undertaking like an unconditional basic income must

come from somewhere. Proponents generally assume it will come mainly from taxes on workers' income, and it will flow out either to the poor (if the program is means-tested) or to everyone (if it is not). The analysis must take into account individuals' behavioral reactions as members of two (variably overlapping) groups: those who relinquish wealth or earnings (by paying taxes) and those who receive resources (by getting benefits). The consequentialist's job is to predict and canvass those responses, individually and in the aggregate, and to assess their effects on the functioning of the economy, on the well-being of individuals and families, and on cultural and social life.

The critical behavioral questions concern work and productivity: will the taxes and the benefits cause people to work less?⁹ Which people and how much less? How high will the marginal tax rate climb? Will the resultant rate structure end up discouraging work on the part of the most productive persons with the greatest earning power, or will it have more impact lower down on the income scale? And what effect will the promised benefits have on people's work effort? Common sense suggests that a basic income is most likely to induce persons with lower earning power to cut back or quit work altogether. But common sense may deceive. A non-means-tested guaranteed basic income may allow persons with meager earning potential to "price themselves into a job," by relieving them of having to rely on inadequate earnings alone.¹⁰ But how many of the lowest paid or idle will actually respond in this way, and to what extent?

In working through these issues, the devil is in the details, and all questions are ultimately empirical. Everything depends on specifics, including the design of the benefits program, the structure and vitality of the economy, and the vagaries of human labor market and capital investment behavior. The actual mix of effects will depend on whether the guarantee is means-tested or not (since means-tested programs tend to increase effective marginal tax rates for low earners), and on whether the amount of the demogrant is more or less than enough for a minimally decent standard of living. It will turn on highly contingent details of the structure of existing labor markets, including how

⁹ See, e.g., ARTHUR OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 96-98 (1975) (noting the difficulty of assessing such costs). For a description of an attempt to answer this question empirically, see MARTIN ANDERSON, *WELFARE: THE POLITICAL ECONOMY OF WELFARE REFORM IN THE UNITED STATES* 102-27 (1978) (describing and summing up the major results and methodological problems of basic income experiments run by the Department of Health and Human Services in the 1970s).

¹⁰ Brian Barry, *Survey Article: Real Freedom and Basic Income*, 4 J. POL. PHIL. 242, 243 (1996) ("Basic income puts a floor under all earnings, thus making jobs paying less than a living wage viable.").

much those on the lowest rung of the job market can expect to earn, how many people occupy that position and others arrayed above it, the size of the gap between what most jobs pay and the guaranteed income amount, and how hard it is to climb the job ladder and exceed the basic income amount. It will also turn on idiosyncratic responses to material incentives, which vary greatly as between individuals—responses economists denominate as income and substitution effects. Even people with similar earning power and economic prospects have very different tastes for leisure, work, and what money can buy. This means that particular individuals will vary widely in their behavioral response to the changes in the costs of leisure that unearned cash grants create, or to shifts in effective marginal tax rates that redistributive programs generate both at the low and high end of the income scale.¹¹ While guaranteed income may cause low-earners to work more or less, the large tax burden necessary to sustain such a massive program will hit hardest at the top of the income scale. This could have variable effects on persons with the greatest earning power, but may cause many of them to work, spend, save, or invest less than they would under a more modest redistributive regime, resulting in a reduction in social wealth overall.¹²

More broadly, a guaranteed income policy could have myriad far-reaching and interesting effects on our social, cultural, and economic life. The availability of a “free lunch” large enough to enable people to quit the paid labor force without starving will likely roil low-wage labor markets, with potential repercussions for producers and consumers. Some individuals may experience a substantial positive income effect, which will raise their effective reservation wage for a range of jobs. Hamburger flippers and other low-wage and low-skill service workers may become harder to find at prevailing wage

¹¹ Robert H. Frank explains:

As every basic economics textbook makes clear, . . . a fall in the after-tax wage rate simply does not lead to an unambiguous prediction about the quantity of effort supplied. Thus, whereas a lower real wage constitutes a reduction in the reward for effort and hence an incentive to work less, it also exerts an opposing effect: By making the individual poorer than before, it provides an incentive to work more to recoup his loss. Economic theory is completely silent on the question of which of these two opposing effects will dominate. The case for [any particular outcome] must therefore be made on empirical grounds.

ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* 228-29 (1999). See also FRANCINE BLAU ET AL., *THE ECONOMICS OF MEN, WOMEN, AND WORK* 101-02, 120 (3d ed. 1998) (describing the opposing behavioral tendencies of substitution effects—which cause work effort to decrease as wage rates and effective returns from work decline—and income effects—which cause work effort to increase as total income declines).

¹² See *infra* note 16 and accompanying discussion.

rates, and employers may find themselves paying more. This could make life harder for working families employing domestic help, or drive some employers of low-wage workers out of business. Consumers of services or products provided by low-wage workers (a group that includes many low-wage workers themselves) may end up paying more. On the other hand, part-time options may become more attractive and financially feasible for a greater number of individuals, as workers will be less concerned with finding jobs that pay enough to support an individual or family. A greater willingness to work part-time might expand the effective labor pool, thus potentially driving down costs. Employers flexible enough to employ several part-time workers in lieu of a full-time worker might benefit from that shift in worker behavior. Two part-time nannies, effectively subsidized by a basic income, might be willing to work for less money overall than one full-time caretaker, although the level of taxation necessary to sustain the income subsidy might make it harder for well-off families to afford help. It is impossible to say before the fact which of these effects will dominate.

Also to be considered are the costs and drawbacks of alternative poor relief policies a guaranteed income might supplant. Programs that condition benefits on "true need" carry irreducible administrative costs associated with sorting would-be recipients into those who are unable to make a living despite best efforts and those who fall outside that category.¹³ Conditional benefits create perverse incentives for workers to qualify as deserving. A universal work requirement may also force the government to take on the cumbersome role of employer of last resort by creating workfare positions.¹⁴ The value of lost leisure entailed by the enforcement of work among the unwilling and the costs

¹³ See Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 972, 1038-42 (1999) (contrasting unconditional cash grant's ease of administration with the complexities of qualified programs); Barry, *supra* note 10, at 245-46 (discussing drawbacks of programs based on contributions or other qualifications); T. Besley & Stephen Coate, *The Design of Income Maintenance Programmes*, 62 REV. ECON. STUD. 187 (1995) [hereinafter Besly & Conte, *Income Maintenance Programs*]; T. Besley & Stephen Coate, *Workfare Versus Welfare: Incentive Arguments for Work Requirements in Poverty Alleviation Programs*, 82 AM. ECON. REV. 249, 250 (1992) (noting the difficulty in determining whether persons seeking aid have deliberately reduced hours or chosen not to work altogether); Craig Brett, *Who Should be on Workfare?*, 50 OXFORD ECON. PAPERS 607 (1998); Alexis DeTocqueville, *Memoirs on Pauperism*, reprinted in PUB. INTEREST, Winter 1983, at 102, 111 (lamenting that early English conditional benefits programs failed because "[n]othing is so difficult to distinguish as the nuances which separate unmerited misfortune from an adversity produced by vices").

¹⁴ Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 27 (1998) (discussing the potential creation of a "workfare caste" undermining traditional employment).

of employing persons with very low ability and poor work habits¹⁵ must also be taken into account. Finally, the effects of alternative poor relief programs on those at the top of the income scale must be compared. As already noted, the tax increase that a basic income program will almost certainly entail could cause high-earners to work and invest less, which may reduce the total size of the pie. These behavioral effects are by no means inevitable, however.¹⁶

That the freedom to work less could also have profound consequences for personality, character, and community life gives rise to both fear and hope. Many persons, tempted by idleness and deprived of the discipline of paid work, may fall into disorder, mischief, vice, or anomie. A pessimistic elaboration of the resulting dire social consequences underwrites the paternalistic case for programs that promote, encourage, and reward work.¹⁷ On the other hand, some people might find their lives enriched by the possibilities for uninterrupted leisure and previously unimaginable freedom. More poor women can leave husbands who abuse (or merely annoy) them, more mothers (and fathers) can choose to dedicate themselves to their children (or to themselves), more people can walk away from oppressive "dead-end" jobs, aspiring novelists (good, bad, or indifferent) can secure long-dreamed-of time to write, and anticonsumerist beachcombers can spend their days surfing off Malibu. The view that guaranteed income opens desirable and humane possibilities proceeds from an Aristotelian vision that exalts creative leisure and disparages a perfectionist work ethic that sees economically exigent labor as best realizing human potential.¹⁸ But whether the Aristotelian vision or the

¹⁵ Besley & Coate, *Income Maintenance Programs*, *supra* note 13, at 189 ("Poverty seems universally to be measured without trying to gauge the value of any leisure enjoyed by the poor. Nor does one hear that a benefit of many systems of poor support is that the recipients enjoy so much leisure!"). See also Kinsley, *supra* note 6, at 36 (suggesting that work requirements will actually make welfare more expensive).

¹⁶ See *supra* discussion pp. 10-11; see also, e.g., Liam Murphy & Thomas Nagel, *THE MYTH OF OWNERSHIP* 135-39 (2002) (discussing empirical evidence for responses to taxation); Joel Slemrod, *DOES ATLAS SHRUG?* (2000) (discussing evidence for and against predicted reductions in high-earners' effort, savings, and investment in response to taxes on wealth and income).

¹⁷ See, e.g., EDMUND PHELPS, *REWARDING WORK: HOW TO RESTORE PARTICIPATION AND SELF-SUPPORT IN FREE ENTERPRISE* 36-48 (1997) (outlining the damage done to families, neighborhoods, and society by serious economic disadvantage and unemployment).

¹⁸ For a cultural and historical discussion of attitudes towards work, see JOANNE B. CIULLA, *THE WORKING LIFE: THE PROMISE AND BETRAYAL OF MODERN WORK* (2001) (drawing on history, mythology, pop culture, management theory, and practical experience); HANNAH ARENDT, *THE HUMAN CONDITION* 71-117 (1959) (discussing labor); ANDREW LEVINE, *RETHINKING LIBERAL EQUALITY: FROM A "UTOPIAN" POINT OF VIEW* 13-32 (1998) (defending a right not to work based on differing conceptions of the good life that emphasize work or leisure); VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 92-130 (confronting the opposing values of devotion to high income and devotion to leisure); Alstott, *supra* note 13, at 989-90

pessimistic, paternalistic one is closer to the truth must await the test of experience. Neither can be vindicated ahead of time, and the dominance of either depends on dynamic cultural effects that are contingent and unpredictable.

Although it may be argued that the American experience with welfare so far provides little support for an optimistic view, a radical departure from past policies may yield greater vindication. AFDC is notorious for its association with severe social disorganization, despondency, and pathology, but it is hard to know whether the culprit is the element of "something for nothing" as such, or the preexisting cultural and social malaise of the persons who qualified for these benefits coupled with the stigma of being earmarked as a social failure. A *universal* grant might carry very different cultural baggage and could well have less corrosive and demoralizing effects.

In sum, although armchair speculation about the consequences of imagined tax and transfer programs can be useful, it is important to remember that incentives are not behavior. The magnitude, direction, and distribution of resulting trends simply cannot be predicted ahead of time. How each person would actually respond if everyone woke up tomorrow to the prospect of a yearly check from the government for \$15,000 is something we might not wish to find out. But we can make surprisingly few definitive predictions until it actually happens.

The important point for our purposes is that even a rather generous unconditional basic income would not inevitably entail a downward spiral into economic collapse and social destitution. That program is not inconsistent *in theory* with a stable economy, substantial prosperity, and high labor market participation rates. It is easy to imagine scenarios in which the great majority of people would continue to work and work hard in the teeth of even a substantial income guarantee. That is most likely to happen if the economy is robust enough to offer people of ordinary ability substantial intrinsic and monetary rewards from work, and most people are inclined to seek those rewards. In short, the behavioral effects of even a significant program of economic redistribution could well be fairly modest.

(rejecting the communitarian claim that "community values require hard work"); Claus Offe, *Full Employment: Asking the Wrong Question?*, 42 DISSENT 77 (1995).

Although the precise behavioral effects of AFDC on work and childbearing are a subject of great controversy,¹⁹ sixty years of experience with that program belie the prediction that making cash assistance widely available for the asking will necessarily cause dramatic, adverse changes in behavior. AFDC was not a universal benefit. It was restricted almost exclusively to single parents with children. However, the program incorporated no requirement that recipients demonstrate "desert" by proving their inability to earn a living or to help themselves. Dependency, and thus desert, was presumed. And although AFDC did grow steadily and relentlessly in the four decades after its enactment before leveling off in the 1980s²⁰—and even assuming that the existence of the program itself contributed to this growth—the welfare rolls always included but a small fraction of the potentially eligible population. The reason for this is obvious: most people decided not to take the steps necessary to qualify for AFDC. AFDC was available to low income families with children abandoned by or deprived of the support of one parent. Thus, qualifying for AFDC required becoming a single parent and being poor. But most people chose either not to be single, or not to be a parent, or to avoid poverty. More particularly, the great majority of American women voluntarily disqualified themselves from AFDC by getting married, earning a living, or relying for the support of their children on private sources of funding such as fathers, husbands, or other family members. It perhaps belabors the obvious to say that, because most people by their own motion took themselves out of the running for these benefits, the program was self-limiting and its cost always modest compared to what it could have been and compared to some other contemporaneous government benefits programs.²¹ In sum, not everyone responded to the incentives created by AFDC by changing behavior.

¹⁹ Compare CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980*, at 9 (1984) (arguing that AFDC rules made receiving welfare more attractive than working), with ANDREW J. CHERLIN, *THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY* 1, 26 (1988) (citing broader economic and cultural trends as the dominant factors in growth of the AFDC program), and David T. Ellwood & Lawrence H. Summers, *Is Welfare Really the Problem?*, 83 PUB. INTEREST 57 (1986) (finding little evidence that social welfare policies increased the unemployment rate by reducing work incentives).

²⁰ SAR A. LEVITAN ET AL., *PROGRAMS IN AID OF THE POOR*, 70-76 (7th ed. 1998). The cost of the program increased only about \$13 billion from 1960 to 1993 and enrollment has never exceeded about 14 million persons. *Id.* at 70-71.

²¹ See MEMBERS OF HOUSE COMM. ON WAYS AND MEANS, 106TH CONG., 2000 GREEN BOOK, *BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS*, available at <http://www.utdallas.edu/~jargo/green2000/contents.html> (last visited Feb. 8, 2003). The peak in total expenditures for AFDC occurred in 1995 at \$30.1 billion and declined to \$21.5 billion for the 1998 fiscal year, *id.* at 397, 404 tbl.7-15, with enrollment declining to about seven million recipients. *Id.* at 376 tbl.7-4. Meanwhile, Medicare, for example, reached a cost of \$132 billion in 1999, *id.* at 100 tbl.2-1, with about 39 million recipients. *Id.* at 98. See also LEVITAN, *supra* note 20.

This discussion suggests that the prediction that a universal guaranteed income program is destined to send the economy into a downward spiral of ruin, inefficiency, and social chaos cannot be justified a priori and could easily prove untrue. Yet it is not hard to understand why dire scenarios might dominate: the idea of a basic income guarantee generates widespread uneasiness and indignation, and support for welfare work requirements is staunch among the general population. It is more acceptable on matters of policy to predict negative economic consequences than to express negative emotions, and easier to say "It can't work" than "I disapprove." Because UBI strikes some as unsavory or even vaguely immoral, it must follow that it will prove ruinous, disastrous, or impossible to maintain. But it doesn't follow that the normative and the positive will align. A UBI might be sustainable and economically feasible and might have few if any detrimental effects. The benefits of providing these resources might outweigh the drawbacks—or they might not. Once again, the actual consequences depend on circumstances and on numerous contingent and ever-changing facts about human preferences and tastes, about the shape of the economy, and about the world we live in. We can speculate at length but can say little with confidence ahead of time about what a UBI world would actually look like.

B. Is a Guaranteed Income Fair?

Leaving aside the possibility that an unconditional income guarantee in some circumstances might prove more efficient and less expensive overall than commonly proposed alternatives including mandatory work for welfare, what is left of the case against the UBI and in favor of work requirements as the condition for receiving cash assistance? If we as a society can afford some kind of UBI, if its effects on labor markets would be minimal or at least tolerable, and if many people would benefit from it (or would think they do) even if others pay higher taxes to foot the bill, what is the basis for resistance?

One intuition is that, even assuming this rosy picture is realistic, a UBI should be rejected—and work requirements or a work test for public support imposed—because unconditional transfers are somehow *unfair*. They violate fundamental notions of reciprocity, mutual obligation, and the duty to "do one's part." They permit nonworkers to "free ride" on workers and allow the idle to exploit the productive. This "exploitation" or "reciprocity" objection can be, and has been, stated in various ways. Exhortative and normative formulations abound and are celebrated in story and parable. Although

academics and social thinkers are divided on this issue,²² many align with popular views to dismiss unconditional public aid as unfair. John Elster has stated, for example, that unconditional public assistance "goes against a widely accepted notion of justice: it is unfair for able-bodied people to live off the labor of others. Most workers would, correctly in my opinion, see the proposal as a recipe for exploitation of the industrious by the lazy."²³ Deborah Stone suggests that "societies depend on their members to perform work of some kind; in varying degrees, people are expected to be self-sufficient and to produce a little bit extra to trade, sell, or give to others in order to improve the condition of society as a whole."²⁴ William Galston speaks of the "simple but profound idea of [reciprocity] . . . that people who receive benefits should make contributions—if they are able."²⁵ Robert Ellickson refers to "the traditional informal norm that an employable person has a duty to be in the workforce."²⁶ Stuart White asserts that "those who willingly enjoy the economic benefits of social cooperation have a corresponding obligation to make a productive contribution, if they are so able, to the cooperative community which provides these benefits,"²⁷ and expresses the fear that unconditional benefits "will lead to the exploitation of productive, tax-paying citizens by those who, while capable of working, instead choose to live off their [benefits]."²⁸ Elizabeth Anderson writes disapprovingly of guaranteed income as "indulg[ing] the tastes of the lazy and irresponsible at the expense of others who need assistance."²⁹ She recommends that able-bodied adults' "access to a decent income . . . be conditioned on responsible performance of one's duties in one's job, assuming a job was available."³⁰ Joanne Ciulla summarizes the lesson of the parable of the grasshopper and the ant by quoting the ant's own words: "If you were foolish enough to sing all the summer, you must dance supperless to bed in winter."³¹ Even Philippe Van Parijs, the most

²² See discussion *infra* pp. 31-33 (providing examples of academics who see conditional public aid as unfair).

²³ Jon Elster, *Comment on van der Veen and Van Parijs*, 15 *THEORY & SOC'Y* 709, 719 (1987).

²⁴ DEBORAH A. STONE, *THE DISABLED STATE* 15 (1984).

²⁵ William A. Galston, *What About Reciprocity?*, *BOSTON REV.*, Oct.-Nov. 2000, at 9, reprinted in Van Parijs, *supra* note 6, at 29.

²⁶ Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 *HARV. J.L. & PUB. POL'Y* 17, 21 (1992).

²⁷ Stuart White, *Liberal Equality, Exploitation, and the Case for an Unconditional Basic Income*, 45 *POL. STUD.* 312, 317 (1997).

²⁸ *Id.* at 312.

²⁹ Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287, 328 (1989).

³⁰ *Id.*

³¹ CIULLA, *supra* note 18, at 10 (quoting AESOP'S FABLES (G.F. Townsend trans., 1924)).

vigorous proponent of a basic income policy, worries endlessly that "the Little Red Hen was right in turning down the animals who wanted to share the bread she made after having ignored all her requests for help in making it."³²

These formulations find echoes in popular attitudes as revealed by empirical work in the field. Voter surveys, focus groups, and data collected by social psychologists reveal that the categories of the deserving and undeserving recipients of group resources are firmly entrenched in public thinking about redistribution. Most people stand ready to assist others through centralized public welfare programs, but the willingness is conditional on the recipient's blameless inability to achieve self-sufficiency despite reasonable, good faith efforts.³³ Persons who depend unnecessarily on collective largesse are not viewed as entitled to assistance, although they may become the objects of charitable beneficence or pity. Because they are regarded as violating generalized norms of conduct to which all are expected to adhere, these persons elicit moralistic "reactive attitudes," including indignation, disapproval, and resentment.³⁴

³² VAN PARUS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 133. For other recent expressions of the "exploitation objection" to unconditional public aid in the context of defending work requirements and the deserving/undeserving distinction in welfare policy, see, e.g., MICKEY KAUS, *THE END OF EQUALITY* 137 (1992) (noting the undeserving citizen's reliance on welfare as a subject of scorn); LAWRENCE MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATION OF CITIZENSHIP* (1986); LAWRENCE MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 61-65 (1992) (noting that nonworking poor are viewed as undeserving in the face of a general trend of increased workforce participation); DENNIS THOMPSON & AMY GUTMANN, *DEMOCRACY AND DISAGREEMENT* (1996).

³³ See MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 2 (1999) (noting that hostility to welfare is not based on opposition to the general "principle of government support for the needy" but rather on the "perception that most . . . [recipients] are undeserving"); DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* 76 (1999) (deriving such from public opinion data); Lauren D. Appelbaum, *The Influence of Perceived Deservingness on Policy Decisions Regarding Aid to the Poor*, 22 *POLITICAL PSYCHOLOGY* 419 (2001) (noting that "[t]he determination of fault for poverty may play an important role in discussions around welfare policies," and providing evidence that liberal vs. conservative views correlate with judgments about how responsible most poor people are for their own predicament); Steve Farkas et al., *The Values We Live By: What Americans Want from Welfare Reform* 16-17 (Public Agenda 1996) (providing data from a national public survey); Linda J. Skitka & Philip E. Tetlock, *Of Aints and Grasshoppers: The Political Psychology of Allocating Public Assistance*, in *PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND APPLICATIONS* 205, 219 (B. A. Mellers & J. Baron eds., 1993) (reporting that in a study involving the allocation of public assistance to AIDS patients, notions of responsibility explained most decisions to give aid); Wax, *Rethinking Welfare Rights*, *supra* note 3, at 271-74.

³⁴ See, e.g., MILLER, *supra* note 33, at 76 (pointing out that the nineteenth-century conflict between "the deserving and the undeserving poor is still alive and well"); Samuel Bowles & Herbert Gintis, *Is Equality Passe? Homo Reciprocans and the Future of Egalitarian Politics*, 23 *B. REV.* 6, 26 (1998) (observing that in surveys and experiments people have a propensity to punish violators of such norms); see also Skitka & Tetlock, *supra* note 33, at 216.

Once again, the concerns of ordinary voters seem to be the same as the concerns expressed above; that such arrangements will license "exploitation" and "free riding." Although all workers would receive benefits under a truly universal (non-means-tested) guaranteed income program, all nonworkers would as well. A means-tested but otherwise unconditional program would allow persons to draw benefits by ceasing to be a worker and becoming a nonworker at will. Assuming something like a free or lightly regulated market for labor, both types of UBI programs would effectively transfer some portion of the market earnings of industrious and productive persons to those who work less or not at all. It is tempting to describe this situation as "exploitative" of workers by nonworkers, with nonworkers acting as "free riders" on the efforts of others.

This description might strike some as transparently valid and self-evident, but it is not. Although intuitions about which situations are exploitative are commonplace, formulating exact criteria for identifying exploitative relationships is notoriously difficult,³⁵ and that task will not be undertaken here. Likewise with free riding. Although ordinary persons possess some notion of who is a free rider and who is not, coming up with a rigorous definition of free riding demands technical forays into microeconomics, bargaining theory, and moral philosophy. Indeed, the accounts of free riding that most concern law and economics scholars resist easy application to the case of unconditional basic income. The nature of the resources transferred through a UBI, and the political setting in which the supposed "free riding" takes place, present particularly puzzling challenges.

The claim of exploitation by free riders is most familiar in the context of nonexcludable public goods, where sharing is unavoidable given the nature of the commodity and the relationship between the persons who supply and enjoy it. Clean air and clean water are familiar examples. Persons who want to breathe clean air cannot easily exclude others. The choice to produce and enjoy a benefit entails supplying it to persons who bear none of the costs. A somewhat different—and more problematic—situation arises where the "free

³⁵ For extensive discussion, see BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 59-62 (1998) (discussing exploitation in the economic and labor market sphere); ALAN WERTHEIMER, *EXPLOITATION* 10-12 (1996) (providing 16 different and in large part incompatible definitions of exploitation); David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317-410 (2000) (discussing the difficulties of identifying exploitative personal and sexual relationships); Amy Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998) (exploring different notions of exploitation in marriage and private relationships).

riding" is not mandated by ineluctable structural features of the shared physical or social world but is the byproduct of an association or transaction that is itself optional and thus voluntarily entered into by the persons claiming to be "exploited." One such situation occurs when individuals with divergent tastes for leisure and order cohabit—a circumstance that is a commonplace of family life. Voluntary cohabitation can be modeled as a "chicken" game that can produce an equilibrium in which one person does most of the work and others enjoy large net benefits despite little or no investment. Philippe Van Parijs provides an example as follows:

Some years ago, I spent a few months with my family in a house we were sharing with my father-in-law. Very soon, one feature of our daily routine started disturbing me greatly. I noticed that my father-in-law was quite sensitive to the floor getting dirty, far more sensitive at any rate than I was myself. As soon as dust started covering the lounge floor, he would take out the vacuum cleaner and deal with it, long before I would start thinking it was necessary. The result, of course, was that the floor was tidied up for me beyond my wishes, without my doing anything for it. This bothered me because I could not help feeling it was unfair. . . . I had to concede . . . such a situation, if continued—and taken in isolation from other aspects of the interaction—*was unfair*.³⁶

This example diverges from the classic situation of non-excludable public goods because the player who makes the lion's share contribution presumably could choose to end the association. If he does not, that must be because the cohabitation arrangement is Pareto-superior to living apart and all players elect to continue the relationship despite the supposed "exploitation." That the supposedly exploited individual gains from the relationship and could choose to walk away makes it particularly hard to argue for outside intervention or for placing such deals off limits.

³⁶ Philippe Van Parijs, *Free-Riding Versus Rent-Sharing: Should Even David Gauthier Support an Unconditional Basic Income?*, in *ETHICS, RATIONALITY, AND ECONOMIC BEHAVIOUR* 159, 159 (Farina et al. eds. 1996) (admitting that his conclusions were "particularly annoying because of a puzzling connection with an idea which I was beginning to explore at the time and to which I soon became committed to the point of spending a considerable amount of time advocating it in all sorts of circles"—that is, the universal basic income).

For a specific game-theoretic example of a "chicken game" as played within families, see the "slob" and "neat" example in Wax, *supra* note 35, at 555-59; see also Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2240-41 (1994) (describing working couple's wrangling over child care as a "chicken" game in which mothers end up providing most of the care).

The type of "free riding" entailed by an unconditional public benefit arguably differs in important ways both from non-excludable public goods and from persons making unequal contributions to a mutually beneficial arrangement. Workers' support of able-bodied nonworkers is neither an ineluctable structural feature of the production of a valuable collective good, nor the byproduct of the differing preferences and resulting bargaining positions of parties engaged in a Pareto-superior—that is, mutually beneficial—course of dealing. Rather, it would appear to be a purely optional feature of our communal association and political life—an arrangement that we could freely choose to adopt or not without facing up to any structural or preference-driven hard choices. In our system, cash assistance is a completely excludable and divisible good. And there is no chicken game because free riding could cease without making the exploited "victims" absolutely worse off. The government could simply decline to enact a tax or effect a transfer to persons who would otherwise receive benefits. Persons would keep the money they earn on the open market, and all would be left to fend for themselves.³⁷

The real question of interest, and the one that is central to this Article, is a normative and political one: how should our view of what constitutes "free riding," and our understanding whether and when "free riding" is unjust or unfair, influence our political choice whether to adopt an unconditional basic income program for all? How might we go about deciding whether to vote for or against a program in which workers in some sense "share" their earnings with others who do not work for pay? The answer must take into account that, once enacted, such a program would put all citizens to a structural choice not wholly unlike that facing Van Parijs's compulsively neat father-in-law: a basic income tax and transfer regime will effectively operate to hold some citizens hostage to their own desire to get ahead by forcing them to contribute to the

³⁷ In Van Parijs's example, one way to avoid the quandary would be to call off the chicken game altogether. The parties could part ways by Van Parijs electing to take leave of his father-in-law's house or by his father-in-law asking him to go. If the parties stopped living together, both would lose the benefits of cohabitation. Alternatively, Van Parijs could stay and one or both of the parties could decide willfully to ignore their own preferences—which would effectively alter the payoffs to transform the chicken game out of existence. In the guaranteed income case, however, neither measure would be necessary. The citizenry could just refuse to enact the program.

Although basic income might be Kaldor-Hicks efficient in that the benefits to recipients might outweigh losses to taxpayers, it is hard to argue that *everyone* in society would be better off with a basic income program than without it. That is, it is unlikely that a guaranteed income program would be strictly Pareto-superior to its absence. To be sure, the choice between basic income and no public welfare program at all is not very realistic. As the foregoing discussion suggests, basic income might be more efficient than feasible policy alternatives. But that does not undermine the point: Exploited taxpayers lose nothing if a basic income program is never enacted and resources are never shared with the less fortunate.

less ambitious as the price of generating more earnings for themselves. The robust, widespread opposition to putting the most industrious workers in such a position raises the question of where that opposition comes and whether it should be permitted to inform our political choices. Are these values to be regarded as the appropriate starting point for determining what is to be regarded as fair? Can an analysis that purports to set forth basic principles of a just society be valid if it flies in the face of deep-seated and common intuitions about exploitation? Can a society be just that mandates, or even accommodates, an arrangement that so many ordinary people find unpalatable? Or should the goal of any analysis be to develop a framework that permits a critique of everyday attitudes with the aim of unmasking them as unjustified and irrational forms of prejudice to be superseded by more refined understandings?

These questions are key to deciding whether conditional or unconditional redistributive schemes best comport with just societies. The remainder of the Article undertakes to consider how principles of justice developed by liberal egalitarian political theorists might deal with the choice between unconditional benefits and benefits conditioned on work. Because most theorists considered here address this specific question only briefly and in passing, the analysis extrapolates from more general discussions. The next Part begins with an exploration of fundamental assumptions that form the starting point for deriving principles for just social arrangements. It then takes up in more detail the work of specific commentators as applied to the particular question at hand.

II. LUCK EGALITARIANISM AND THE PROBLEMATICS OF WORKER DESERT

The work of dominant theorists who seek to discover basic principles of justice proceeds from an egalitarian vision that sees society's fundamental aim as rectifying inequalities. Not all inequalities are suspect or illegitimate. Only differences that are "arbitrary from a moral point of view" warrant corrective intervention. A just system would be one that would aim to ensure that the distribution of resources "was not propelled by factors due to [undeserved] luck, on the grounds that luck is morally arbitrary and ought not to influence one's prospects."³⁸ The most common device for rectifying illegitimate

³⁸ Seana Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation 2* (Mar. 2, 2002), available at <http://www.law.nyu.edu/clppt/program2001/readings/shiffrin/egalitarianism.pdf> (unpublished draft, on file with author). See also Larry Alexander & Maimon Schwarzschild, *Liberalism, Neutrality, and Equality of*

inequalities is a sharing of the costs of misfortune through a system of collective compensation that holds individuals harmless for luck's ill effects. On the luck egalitarian view, luck-insensitive choices generate no claims for collective compensation. Rather, it is perfectly reasonable for individuals to bear the costs of their deliberate decisions within an otherwise fair context and it would be unfair to expect others to do so for them.³⁹

At first blush, luck egalitarianism would seem to yield a simple answer to the question of whether a just society would require work for public assistance or would guarantee that assistance unconditionally. If factors outside a person's control prevent him from holding a job or earning a living, then society ought to compensate that person for the results. But if someone decides to forgo employment or refuses to work towards his own support, then society owes him nothing: he should be charged with the consequences of his actions.

This simple conclusion gives way to complications that arise from both empirical and theoretical concerns. The implications of this paradigm are unclear within a market economy such as ours that appears to be characterized by residual unemployment. Although economists disagree about how much observed unemployment is "behavioral" rather than "structural,"⁴⁰ few believe that joblessness could be pushed to zero. Assuming a commitment to a luck egalitarian ethos, how does intransigent structural unemployment bear on the fairness of imposing work requirements on "able-bodied" poor? Although structural unemployment is not in any sense jobless workers' "fault," the implications of its existence for the decision to impose work requirements is ambiguous. The pressures exerted by welfare work requirements, by sending

Welfare vs. Equality of Resources, 16 PHIL. & PUB. AFF. 85 (1987); Anderson, *supra* note 29, at 290-307 (describing luck egalitarianism).

³⁹ The literature on luck egalitarianism is enormous and the idea that society owes persons a duty of compensation for unchosen misfortune has generated endless discussion. For a review of important work in the field, see, e.g., MILLER, *supra* note 33; ERIC RAKOWSKI, *EQUAL JUSTICE* (1991); Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE L.J. (forthcoming June 2003); Samuel Scheffler, *What is Egalitarianism?*, 31 PHIL. PUB. AFF. 5 (2003).

⁴⁰ See, e.g., Philip Harvey, *An Analysis of the Principal Strategies that Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century*, 21 BERKELEY J. EMP. & LAB. L. 677, 730-32 (2000) (noting disagreement over whether joblessness could be significantly reduced if "job seekers demonstrated a greater commitment to finding jobs and performing them adequately," or if more resources were devoted to retraining and education). For a pessimistic view of the potential effects of more extensive training, see James Heckman, *Doing it Right: Job Training and Education*, 86 PUB. INTEREST 86, 86 (1999) (arguing that extensive retraining to raise skills would be prohibitively expensive and largely ineffective).

everyone scrambling to get jobs, are designed to separate victims of bad luck from those who bear some responsibility for their fate. The conclusion that work requirements in the face of structural unemployment is fundamentally unfair assumes that the only people who remain unemployed under the pressure of longstanding work requirements are those who really cannot find jobs. But this conclusion is not necessarily valid. First, some people may have such a pronounced work aversion that they will willfully avoid jobs even in the face of destitution.⁴¹ Second, the job market is not static. An employment market in which there are more employees than jobs is like a game of musical chairs that never ends and that can be played fast or slowly. A person's chance of holding a job at any time is not just a function of the number of positions and would-be workers, but also of "how rapidly jobs 'turn over.'"⁴² More turnover means that more people are employed (and unemployed) at least some of the time. The question comes down to how much sharing, as opposed to how much "hogging," will occur in the job market. High turnover rates lead to more sharing of existing jobs among would-be job holders, with more episodes of hiring and job loss punctuated by spells of unemployment. Although characterized by lower earnings and more job instability—which are distressful and socially disruptive—a higher turnover market potentially gives all willing workers the chance to join the ranks of the productive and to contribute something to self-support, even if they cannot achieve full economic independence. Under this scenario, luck egalitarian fairness would not require dropping work requirements altogether, but rather recommends government subsidies of low-wage workers that would ensure every worker and his or her family a tolerable standard of living. Indeed, our current welfare system is converging, however haltingly, towards such a system of supported or compensated work.⁴³

On a more theoretical level, the problems with the luck egalitarian choice/chance distinction that are pertinent to the policy question here go deeper. 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

⁴¹ See discussion, *infra* pp. 53-54 (discussing Dworkin's comments on the least advantaged idlers).

⁴² Harvey, *supra* note 40, at 733.

⁴³ See Wax, *A Reciprocal Welfare Program*, *supra* note 3, at 506-08 (documenting programs that provide income supplements for earnings that fall short of subsistence).

"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. Indeed, the question of whether it is possible to formulate a coherent notion of individual desert to which just arrangements must respond is arguably the most central to liberal political theory, and one that bears critically on the practical design of redistributive schemes.⁴⁴

John Rawls has been famously influential on this issue. On the basis of an oft-quoted passage in *A Theory of Justice*, Rawls is commonly held to take the position that persons are effectively responsible for very little of what they do, and hence deserve no more than can be justified on grounds unrelated to individual desert. Rawls asserts that "one of the fixed points of our considered judgments [is] that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society."⁴⁵ Rawls goes on to deny that any person deserves even "the superior character that enables him to make the effort to cultivate his abilities."⁴⁶ Rather, personal character "depends in large part upon fortunate family and social circumstances for which [a person] . . . can claim no credit."⁴⁷ Based on these remarks, Rawls is widely understood to reject any foundational, pre-institutional notion of personal "desert."⁴⁸ Because, for Rawls, all choices are hopelessly tainted by arbitrary preconditions and unchosen antecedents, he disavows reliance on a robust choice/chance distinction in constructing rules for distribution of social goods.⁴⁹ Rather, his method is to first decide on other grounds what a just society would look like. What people deserve is then what they can legitimately claim within a framework that satisfies principles of justice.

⁴⁴ On desert generally, see, e.g., JOEL FEINBERG, *DOING AND DESERVING: ESSAYS ON THE THEORY OF RESPONSIBILITY* 55 (1970) (analyzing the conception of desert); MILLER, *supra* note 33, at 131-55 (arguing that there is in fact a sound conception of desert); GEORGE SHER, *DESERT* 22-36 (1987) (reviewing and criticizing Rawls's anti-desert argument).

⁴⁵ JOHN RAWLS, *A THEORY OF JUSTICE* 104 (1971).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CAL. L. REV. 965, 966 (2000) (discussing Rawls's rejection of the idea of "pre-institutional" desert as following from his view that "[t]here is no independent principle of desert that provides a normative standard for the design of social institutions themselves").

⁴⁹ But see discussion *infra* pp. 48-49 (noting the tension between disavowal of desert and Rawls's holding persons responsible for "expensive tastes" as well as for criminal conduct).

Based on this passage alone, the decision to work or not would appear to be like any other that arises from the mix of characterological and behavioral traits that are given to us. It is hard to see how Rawls could countenance any differences in entitlements to assistance arising from conduct-based distinctions between "deserving" and "undeserving" individuals.⁵⁰ In contrast with Rawls, other liberal egalitarians struggle to retain some concept of desert by trying to identify choices and outcomes for which individuals can fairly be held responsible.⁵¹ As with Rawls, the focus is on the characteristics and antecedents that influence choices and the determinants of real-world consequences of choices. Ronald Dworkin, for example, distinguishes between fixed attributes and conditions of upbringing (such as talents and abilities developed through early education), for which individuals are arguably blameless, and tastes, preferences, and exertions, which are so caught up with our identity and our vision of a worthwhile life that they must be regarded as amenable to influence or control by the autonomous self.⁵² Others, like G.A. Cohen, view at least some tastes, such as the desire to perform certain kinds of work, as endowments for which persons cannot rightly be held responsible.⁵³ This division of opinion among luck egalitarians bears directly on the question whether society should hold persons to work requirements and charge them with full responsibility for the effort they put forth in the labor market. Specifically, should they bear the market-based costs of choosing to exert no effort at all by refusing to work in exchange for government help?

The strongest luck egalitarian case against an income guarantee would seem to start from the stark fact of an "inexorable zero": leaving aside any "undeserved" diversity in job rewards and preferences, those who decide to

⁵⁰ See discussion *infra* pp. 42-43.

⁵¹ See, e.g., RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 73-78 (2000) (making a distinction between "brute luck" and "option luck"); RAKOWSKI, *supra* note 39, at 74 (defending an "equality of fortune" whereby inequalities arising from "variations in people's option luck are morally unobjectionable"); Richard J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFF. 158, 174-83 (1990) (stating that it is a "commonsense claim" that individuals can and should be held solely responsible for certain choices); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 914 (1989) ("To the extent that people are indeed responsible for their tastes, the relevant welfare deficits do not command the attention of justice."); T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 658-60 (1975) (arguing for an objective view of the grounds for redistribution independent of a person's tastes).

⁵² See, e.g., DWORKIN, *supra* note 51, at 81-83. Although Dworkin is ambivalent about social responsibility to compensate for differences in talent, see discussion *infra* pp. 53-54, he ultimately holds that societies should strive to make outcomes "talent-insensitive" and "ambition-sensitive." DWORKIN, *supra* note 51, at 89.

⁵³ Cohen, *supra* note 51, at 928-29.

seek work on the market at least take positive steps towards achieving self-support. Those who fail to take a job, assuming one is available, do not. Most people *can* make some productive effort if they so choose, so the decision to make that effort would appear to be an example of responsible choice if anything is.⁵⁴

The simplicity of this conclusion gives way to complications under further scrutiny. The decision to expend effort is a function of traits and tastes like aversion to work, how hard work is for us, and what kinds of work we like to do. The quality of a person's performance, the kinds of jobs available to him, and the intrinsic and extrinsic rewards he reaps from employment, will all be affected by fixed endowments or inborn, unchosen "accidents of birth." Some people may find it difficult, stressful, or unpleasant to work for pay in any capacity or in the jobs they can obtain given their abilities. Other persons may find it easier to work hard, long, or well. Some may be industrious and conscientious and possess great powers of concentration. Others may have a pronounced aversion to work of any kind, may value idleness or freedom, may prefer nonremunerative activities, or may suffer terrible spiritual and psychological pain from having to go to work every day. Even short of hard determinism, the liberal egalitarian debate shows how much room there is to argue over whether the factors that influence persons to obtain or maintain paid employment, or that determine the personal costs of those choices, are ones for which persons can be held fully responsible. It seems unfair to hold persons who find work hard, tedious, unpleasant, and unrewarding to the same requirements as persons for whom work is pleasant, satisfying, interesting, and lucrative. Why is society no less responsible for mitigating these differences in personal costs than it is for assuaging other unfortunate endowments such as physical handicaps, personal deficiencies, and mental afflictions?

The unfairness of holding diverse workers to the consequences of their work behavior is further exacerbated by the wildly erratic nature of the market returns on individual effort. One intuition underlying the common hostility to programs that offer "something for nothing"—and which is thought to warrant different treatment for workers and nonworkers—is that the former expend at

⁵⁴ Heather Milne, *Desert, Effort and Equality*, 3 J. APP. PHIL. 235, 236 (1986) (arguing for an egalitarian version of desert theory with an emphasis on effort rather than successful contribution). *But see* Nien-He Hsieh, *Moral Desert, Fairness and Legitimate Expectations in the Market*, 8 J. POL. PHIL. 91, 106-07 (2000) (suggesting that effort is not a valid basis for desert in the market context due to a lack of proportionality between the effort expended and the resulting fruits of one's labor).

least some effort whereas the latter do not.⁵⁵ But the role of effort in the operation of labor markets is elusive at best. And however we choose to define that element, the rewards of work bear little relationship to it. Is effort a matter of time spent working? Persons working very similar hours routinely earn wildly disparate rewards. Does it have to do with time spent acquiring skills to do the work? There is no proportionality there as persons with less education or training often earn more than their more educated counterparts. Although some forms of work that are unpleasant or risky carry a salary premium, some of the most enjoyable and intrinsically rewarding work is among the highest paid. People choose a line of work in part because their tastes and talents allow them to produce more with less effort. Indeed, pegging rewards to effort is very inefficient because it creates an incentive to choose jobs that require *more* exertion or that generate more disutility or unpleasantness per unit of output. Workers are unlikely to be most effective at jobs that cost them more to do.⁵⁶

There are yet other factors bearing on market outcomes that reveal how thoroughly arbitrary and unchosen elements infect the structure of market rewards from beginning to end. Worker characteristics and exertions have value in the market and produce more or less lucrative outcomes, but only to the extent that they match up with the demands for goods and services. But there seems nothing for which potential providers of goods and services are less responsible than whether people want what they have to offer. If two persons of equal talent prefer different jobs, it is hard to see how each is responsible for one earning ten times more than the other since neither created the vicissitudes of consumer demand or the size of the labor supply available to meet it. Even if all workers were otherwise equal in resources and upbringing, these unchosen differentials would persist.⁵⁷

⁵⁵ See Milne, *supra* note 54, at 240 ("Only insofar as effort is expended in producing the achievement or contribution, or in acquiring a skill, is there the basis of a desert-claim.").

⁵⁶ See, e.g., FEINBERG, *supra* note 44, at 55; MILLER, *supra* note 33, at 183-84 (following Hayek's point that effort rewards result in bizarre consequences at times, but still identifying effort as a *factor* in determining a person's rewards).

⁵⁷ There is a large literature on "job rents" and the distribution of scarcity-based rewards within market economies. See, e.g., FRIED, *supra* note 35, at 143-59 (summarizing the development of rent theory); DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 90-91, 108-19 (stating that job rents would exist even with identically skilled persons under perfectly competitive conditions); see also James C. Dick, *How to Justify a Distribution of Earnings*, 4 PHIL. & PUB. AFF. 248, 269 (1975) (arguing that the large rents in the current rates of remuneration for workers in short supply "could be drastically reduced without ill effects on the supply of labor"); Barbara Fried, *Wilt Chamberlain Revisited: Nozick's "Justice in Transfer" and the Problem of Market-Based Distribution*, 24 PHIL. & PUB. AFF. 226, 242 (1995) (showing that a Lockean rights argument could support either Chamberlain's full rights to all he was

Any defense of the proposition that workers deserve something whereas nonworkers should get nothing thus runs up against the wildly erratic nature of the rewards that markets assign to work. The arbitrariness of labor market returns is part of the larger problem of "moral luck," or the lack of control over consequences that flow from human action generally. Even if choices are in some sense autonomous, the outcomes of our decisions are unchosen and given because they are radically conditioned by external factors that we have no hand in selecting. Moreover, many actions are not tightly linked to consequences, but involve risk and gamble. If things go sour for us despite prudent conduct and best efforts, do we somehow "deserve" the disaster, such that a just society need not come to our aid? Although some believe that we should be held responsible for adverse outcomes if we could avoid the gamble or insure against it, others contest that we should be forced to live with the consequences of risk-taking, whether prudent or imprudent, that turns out badly.⁵⁸

These observations have led some liberal egalitarians to conclude that, at least with respect to market outcomes, the distinction between responsible choices and bad luck is inherently unstable. Because market compensation is fundamentally heedless of any meaningful distinction between luck and human agency, the structure of returns to labor on the market can make no claim to

paid or society's claim on surplus value); Nien-He Hsieh, *supra* note 54, at 109 (noting that ordinary market compensation results in people "more often than not be[ing] paid more than they are said to deserve"); Julian Lamont, *Problems for Effort-Based Distribution Principles*, 12 J. APPLIED PHIL. 215 (1995); Eric Mack, *Gauthier on Rights and Economic Rents*, 9 SOC. PHIL. & POL'Y 171 (1992); Jeff H. Reiman, *The Labor Theory of the Difference Principle*, 12 PHIL. & PUB. AFF. 133, 142 (1983).

⁵⁸ The question of how stringently society should hold persons responsible for bad outcomes of past choices bears directly on the design of welfare policy. The path-dependency of personal circumstances means that past reproductive and educational choices may generate intractable obstacles to self-sufficiency in the future—obstacles that do not yield to present efforts. The refusal to offer aid under these circumstances has been criticized as unduly harsh and counterproductive because it makes no provision for fresh starts and forgiveness and undermines important social goals. Compare, e.g., ROBERT GOODIN, *REASONS FOR WELFARE: THE POLITICAL THEORY OF THE WELFARE STATE* 295 (1988) (suggesting that social policy should alleviate some instances of suffering of those who brought misfortune upon themselves), Anderson, *supra* note 29, Robert Goodin, *Negating Positive Desert Claims*, 13 POL. THEORY 575, 586 (1985) (noting that at times "needs trump deserts"), and Shiffrin, *supra* note 38, at 30 (arguing that welfare policy should eschew a strict "luck egalitarian" framework), with DWORKIN, *supra* note 51, at 287 (taking the position that people should not be relieved of responsibility "flowing from their own choices"). RAKOWSKI, *supra* note 39, at 73-87 (arguing that inequalities resulting from poor choices are morally unobjectionable), and Richard J. Arneson, *Luck Egalitarianism and Prioritarianism*, 110 ETHICS 339, 349 (2000) (noting that a social commitment to compensate for bad choices, or even for some forms of bad luck, can unfairly drain or even "swallow[] up all social resources"). For a recent discussion of the puzzle surrounding the "moral luck" that links actions to the outcomes of risky choices or gambles, see Kasper Lippert-Rasmussen, *Egalitarianism, Option Luck and Responsibility*, 111 ETHICS 548 (2001). For a discussion of fresh starts and second chances within a system that acknowledges personal responsibility, see Wax, *A Reciprocal Welfare Program*, *supra* note 3, at 497-500.

being inherently just. But if market-based allocations bear no relationship to any coherent notion of desert—if there is no rhyme or reason to the pattern of returns to labor—then there may be no reason to honor those patterns in any respect, even to the extent of denying social support to those who refuse to labor at all. Liam Murphy and Andrew Levine have gone so far as to derive from the market's erratic allocations a *reductio ad absurdum* on the issue here: whether the government should require work for benefits or should guarantee a living to all. For them, that persons do not “deserve” the rewards they obtain from work fatally undermines the legitimacy of the expectation that anyone work *at all*. If the rewards assigned to work are not systematically related to effort or anything else for which individuals can be held responsible, how does it follow that some work should get something and no work should get nothing?

Levine, for example, emphasizes that work-based productivity is not just a function of unchosen supply and demand, but also of inherited technological know-how and collectively maintained infrastructure for which most persons pay no compensation and which are conferred on everyone gratis. For Levine, this insight makes nonsense of the notion of free riding by some members of society on others, because free riding on unearned benefits is rife: “free riding and being free ridden upon are inevitable facts of social life.”⁵⁹ Since free riding on others’ past and present contributions is “an ongoing venture, existing across both space and time, paying one’s own way is an unrealizable goal.”⁶⁰ In light of this, living off income derived from collective resources cannot be selectively condemned unless it can be distinguished in principle from other forms of free riding that are inherent in labor markets and in all productive endeavors. Because such distinctions cannot be maintained, a universal obligation to make a productive contribution to the collective enterprise cannot stand as a fundamental precept of social or collective governance. Levine claims that “reciprocity is an impossible standard to meet . . . with a degree of specificity sufficient for justifying income inequalities.”⁶¹ Since we can never determine what amount constitutes a “fair” return for any particular contribution, it follows that we cannot pronounce upon the fairness of handing out compensation despite the absence of any contribution at all.⁶²

⁵⁹ Andrew Levine, *Rewarding Effort*, 7 J. POL. PHIL. 404, 410 (1999).

⁶⁰ *Id.*

⁶¹ *Id.* at 409.

⁶² See Levine, *supra* note 59, at 410-11 (discussing the difficulties of ascertaining values within transactions); see also LEVINE, *supra* note 18, at 29-31 (noting that the payoffs for contributions depend on

Likewise, Liam Murphy also questions the coherence of any "pre-institutional" notion of desert for rewards assigned within markets.⁶³ That defect is not cured by the equalization of resources in starting points so long as people differ in talents and tastes affecting costs of labor supplied and the demands for what labor produces. Because "[r]eturns to labor are unjustly distributed even in competitive markets in which equality of opportunity and resources is presupposed," it makes no sense to say that the rewards that attach to work are "deserved" in any fundamental or nonderivative sense.⁶⁴ But then it follows that there can be no basic unfairness or injustice in assigning resources regardless of whether any work is performed at all. Any objection that might be made to the confiscation and redistribution of earnings can readily be parried by pointing to the unearned conditions for market success. As Murphy states, there is no reason to assume that "getting something for doing nothing is always more significant morally than getting more than one deserves for doing something."⁶⁵ Rather, "[a]n assumption that the first kind of undeserved income [redistribution to the voluntarily idle] is more worthy of redress than the second [undeserved pay for workers] could be based only on confusion caused by the greater salience of income, all of which is undeserved, as compared to income, some (possibly) very great part of which is undeserved."⁶⁶ For Murphy, as for Levine, the lack of any coherent basis for counting market rewards as deserved must silence any complaint that transfers from workers to nonworkers are unfair. To put it bluntly, because no reward is deserved, no reward can be undeserved. Valid principles of limitation on just allocations of resources generally cannot be grounded in anything like the relationship of inputs to outputs in the market system. If those limitations exist, they must derive from elsewhere.

what others do so that there is "no way to coordinate individuals' behaviors that is not significantly redistributive").

⁶³ Liam B. Murphy, *Liberty, Equality, Well-Being: Rakowski on Wealth Transfer Taxation*, 51 *TAX L. REV.* 473, 491 (1996) (noting that market outcomes do not justly track contributions to the social good).

⁶⁴ *Id.* at 491.

⁶⁵ *Id.*

⁶⁶ *Id.* In response to this argument, G.A. Cohen comments:

If Rawls is right that not all effort is deserving, then, we might agree, not all effort deserves reward. But why should it follow that effort deserves no reward at all? The practical difficulty of telling how much of it merits reward hardly justifies rewarding it at a rate of 0 percent, as opposed to at a rate somewhere between 0 percent and 100 percent.

Cohen, *supra* note 51, at 915. See also VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 112 (noting that a guaranteed basic income is not inconsistent with greater rewards for more effort, but only with denying any rewards for no effort).

III. WHAT COUNTS AS WORK? THE PUZZLE OF WORK OUTSIDE THE MARKET

Yet another set of voices can be heard to disparage the logic of providing compensation only for labor market work. Feminist critics draw strength from the argument that market-based rewards have nothing to do with desert and thus can be altered at will without injustice to anyone. Indeed, the feminist contention is that the collective refusal to reallocate resources generated on markets to those who operate outside it is itself unjust. Most feminist writers in this vein, although generally disdainful of distinctions between the "deserving" and "undeserving," do not aspire to offer a global or rigorous critique of the concept of desert itself. Rather, their motivation is to broaden the category of persons who are regarded as deserving of society's approbation and material support.

The common thread is the objection that welfare work requirements slight the kinds of domestic and caretaking tasks traditionally performed by women. Because many nonworkers with whom the welfare system is concerned are caretakers of young children, critics maintain that welfare work rules threaten to burden women disproportionately and to discourage the performance of nonmonetized domestic functions. Indeed, the crux of the debate over how the welfare system should treat "caretaking units"—usually single mothers and their children—centers on what should count as work. The oft-heard claim is that caretaking performed without pay is no less socially useful than work performed for wages and should be rewarded. Society should offer collective support to those who care for others.⁶⁷

⁶⁷ See, e.g., SHIRLEY P. BURGGRAF, *THE FEMININE ECONOMY AND ECONOMIC MAN* 182-183 (1997) (tracing the historical roots of the devaluation of women's reproductive and caretaking work); ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 186 (2001) (arguing that the welfare state contributes to the "feminization of poverty"); MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 9 (1995) (calling for recognition of caretaking as work and a major contribution to society); EVA F. KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 109 (1999) (placing importance on the public acknowledgment of the "value of receiving care and giving care" so that the burdens and costs would be shared); Anderson, *supra* note 29, at 323-25 (locating the problem as confusing the economy with the market sector); Anne L. Alstott, *No Exit: Justice for Caretakers* 6 (June 4, 2002) (proposing an annual grant to caretakers to be used for child care, personal education, or retirement savings) (unpublished manuscript, on file with author); Martha C. Nussbaum, *Disabled Lives: Who Cares?* N.Y. REV. OF BOOKS (2001), available at http://www.nybooks.com/articles/article-preview?article_id=13956 (book review of Kittay arguing that a theory of justice must extend its scope to the family and include care as a primary good). For a cogent critique of the feminist "ethic of care," see WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 262-86 (1990).

The principal problem with the assertion that society should support caretakers and their dependents is that it threatens to prove too much. Any recommendation that resources be reserved for these individuals begs the question of why other persons who volunteer to generate a variety of goods and services that either appear to create value or require effortful exertion cannot also lay claim to social support. Consider the example of the third rate artist, dedicated to his craft, who labors strenuously at his sculptural creations in his basement studio. What exactly is he doing down there? Can we deny that he "works hard?" We know that he enjoys his work—that is, that he gets "consumption value" from the performance—because he chooses to sculpt rather than to do something more lucrative. But neither consumption value nor choice distinguish his case from that of many others in the paid economy, including law professors. Yet we harbor the intuition that we owe him nothing. But why treat a second-rate single mother differently than a third-rate visual artist? That no one wants to buy the artist's creations is important to us. It counts as good evidence that they are of little value to anyone but the artist himself. That no one wants to pay the mother to raise the child may indicate something similar, however callous that sounds.

This discussion suggests that those who bemoan society's treatment of caretaking must supply a theory of compensation or social reciprocity that disposes of demands to subsidize a range of nonmarket activities. What is needed is nothing less than a comprehensive theory of what work is and of what society owes to its members based on how they choose to spend their time. Yet the preceding discussion suggests that such a theory eludes us. Does work include "[c]leaning one's clients' shoes, cleaning one's children's shoes, cleaning one's own shoes, cleaning one's doll's shoes?"⁶⁸ If market measures of work are too narrow and should not be the test, then what measure should be put in its place and what criteria should be used? And how are we to determine the magnitude of any subsidy that is due? Is the answer partial support, full support, or more? Should the caretaking unit be maintained at subsistence level or should it be granted something closer to a middle-class existence?

That the "unemployed"—that is, persons outside the market—are rarely ever completely idle confounds the problem. Few people "[lie] in bed all day and drink[] beer all night."⁶⁹ Rather, those without paid jobs "almost always

⁶⁸ VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 97.

⁶⁹ Joseph H. Carens, *Rights and Duties in an Egalitarian Society*, 14 *POL. THEORY* 31, 36 (1986).

‘work’ according to some legitimate understandings of the term”⁷⁰ and many occupy themselves in part with the very same domestic tasks that are the mainstay of the traditional caretaker’s life. To confine “work” to the market and the rest to leisure goes against the strong intuition that much that is done outside the market—most notably caring for children and keeping house—is not accurately characterized as leisure, but really is work. Is it important to this intuition that, although a mother enjoys “consumption value,” the child gains something too? Although the requirement that the performer benefit someone other than himself offers some promise of a limiting principle, it would not disqualify many extra-market activities far afield of caretaking for public subsidy.

Although the market as a reference point is claimed to produce too narrow a measure of what is socially useful, the absence of clear benchmarks once markets are left behind tempts us to justify the claim for subsidy by pointing to a market failure of some kind—a reason, for example, why the artist’s product is ignored by would-be purchasers despite its value, or why no one steps forward to bankroll the mother-child duo despite the value for others or for society. One possible account is grounded in the assertion that childrearing generates mild positive “externalities” that benefit all of society and for which society should compensate caretakers. As suggested elsewhere, however, that rationale arguably would not justify the government paying full freight for caretakers and their children.⁷¹ Another defense looks to the transactional impediments to compensation for care across generations⁷² or within the

⁷⁰ LEVINE, *supra* note 18, at 15.

⁷¹ Amy L. Wax, *Is There a Caring Crisis?* 16 YALE J. ON REG. 327, 341 (1999) (reviewing SHIRLEY P. BURGGRAF, *THE FEMININE ECONOMY AND ECONOMIC MAN* (1997)); Amy L. Wax, *Caring Enough: Sex Roles, Work, and Taxing Women*, 44 VILL. L. REV. 495, 514 (1999) (suggesting that parents’ consumption value in their children outweighs the benefits to all of society); Amy L. Wax, *A Reciprocal Welfare Program*, *supra* note 3, at 492. The externalities from childrearing are greatly enhanced in modern western societies by large public pension systems, which currently operate on a pay-as-you-go basis. These pensions effect a subsidy to the elderly that is paid for by other people’s children. See, e.g., BURGGRAF, *supra* note 67, at 76 (questioning if such a scheme is fair for children who did not ask to be born). Nonetheless, most of the benefits of the effort parents and other caretakers expend are enjoyed by private individuals—that is, the parents themselves and their offspring.

⁷² The argument is that because we all received care as children from others that enabled us to become functioning independent adults, we now collectively owe the same to rising generations. See, e.g., KITTAY, *supra* note 67, at 107, 107-09 (arguing for an extended notion of reciprocity to avoid “chronological unfairness”); ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS* 100-01 (1999) (asserting that what we receive in terms of care and education forms the basis for what is owed to future generations). But see ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 78-84 (1974) (rejecting compensation for unsought benefits); RAKOWSKI, *supra* note 39, at 153-54 (arguing that, because unasked-for benefits produce no obligations, society owes parents no compensation or gratitude for producing the next generation).

parent-child unit, for the benefits to children at parents' expense.⁷³ But, once again, these observations can be extended to argue for collectivizing almost anything. We reap the benefits of all social contributions that have gone before us. We are the recipients of a myriad of valuable gifts from past generations and present humanity. Enforcing a payback for all these enhancements creates an accounting nightmare and begs the question of why caretakers should be singled out among other benefactors for a steady stream of reciprocal returns.

Feminist writing on this subject manifests a wholesale hostility to an economic approach that sees the alternatives of markets or market failure as exhausting the analytic universe. It rejects the method of carefully identifying the elements of value generated by traditionally female activities and then assigning costs and benefits to discrete social actors. Seana Shiffrin and Elizabeth Anderson, for example, refuse to buy into a luck egalitarian framework that worries obsessively over the choices for which individuals can be held responsible and that proceeds with a compulsive accounting of the benefits and costs those choices generate. For these authors, this approach is misguided in generating harsh policies that slight important social goals. Rather, the central concern should be to identify the social circumstances most conducive to human flourishing and to cherished values of autonomy, dignity, and deliberative integrity and then to undertake to create the desired conditions with any resources at our disposal. For Elizabeth Anderson, in particular, the paramount aim is to spare every person the humiliation, stigma, and powerlessness of abject material want. Since the harmful consequences of unmet need are unrelated to how those needs arose or how they would be priced on the market, it is unnecessary to delve into the genesis of any person's dilemma. For Anderson, "[t]he proper . . . aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed."⁷⁴ Ending oppression does not require that "everyone get[] what they morally deserve," but rather that steps be taken to "create a community in which people stand in relations of equality to others."⁷⁵

⁷³ BURGGRAF, *supra* note 67, at 69-81 (suggesting, but describing the difficulties of, an arrangement whereby children would compensate their investing parents with dividends based on their success in the marketplace).

⁷⁴ Anderson, *supra* note 29, at 288.

⁷⁵ *Id.* at 289. For similar arguments, see GOODIN, *supra* note 58.

What are the implications of Anderson's vision for the central issue here: whether societies should require work as a condition of assistance? Although Anderson does not see the vindication of moral desert as the aim of a just society and rejects the market-centered premises of a luck egalitarian framework, she nonetheless denies that "in an egalitarian society everyone somehow could have a right to receive goods without anyone having an obligation to produce them."⁷⁶ She asserts that help in achieving basic "functionings" should be "conditional on participating in the productive system" and that "citizens do not owe one another the real freedom to function as bench bums."⁷⁷ Despite these statements, Anderson does not appear to endorse welfare work requirements as written into current law. Although she does not expressly advocate full public support for all caretaking units either, her assertion that "non-wage-earning dependent caretakers and children . . . [do not] fall outside the purview of society as [a] system of cooperation" implies that such support should be forthcoming.⁷⁸ After noting that society benefits from traditional feminine activities, she states that "no role in the productive system [should] be assigned such inadequate benefits that, given the risks and requirements of the job, people could be deprived of the social conditions of their freedom because they have fulfilled its requirements."⁷⁹ In sum, although Anderson expressly disavows an unconditional basic income guarantee, her rhetoric suggests she would embrace the functional equivalent for those she regards as assuming an approved "role in the productive system." She appears to believe that traditional caretakers play that role.

Anderson's approach, like that of other "ethic of care" feminists, is question-begging in many respects. As a matter of theory, Anderson fails to explain how her rejection of "something for nothing" basic income fits in with her disavowal of causal responsibility and moral desert as principles governing the distribution of resources. She also does not discuss why unconditional benefits are inconsistent with the goals of equal dignity and an "end to oppression" that she identifies as central to social policy. She fails to consider, for example, whether a universal expectation of work might not operate as a form of oppression for the least skilled and poorest endowed citizens, or whether the absence of an option to reject jobs a worker considers too menial is degrading in itself. Also, Anderson never fully grapples with the issue of

⁷⁶ Anderson, *supra* note 29, at 321.

⁷⁷ *Id.* Cf. Goodin, *supra* note 6, at 15-18 (discussing the post-productivist rejection of an expectation of participation).

⁷⁸ Anderson *supra* note 29, at 323.

⁷⁹ *Id.* at 325.

what sorts of activities qualify as more than "nothing" for purposes of triggering entitlement to the social minimum. Although, for Anderson, entitlement arises from fulfilling a "role in the productive system," she offers no specific criteria for which activities fill that bill. She thinks that caretaking is a prime candidate, but offers no theoretical framework for dealing with claims for support from other quarters. What becomes of the hard-working, third-rate artist in her universe? These issues Anderson leaves unresolved.

IV. CONTRACTARIAN APPROACHES TO CONDITIONAL AND UNCONDITIONAL BENEFITS

The conceptual puzzles explored so far complicate the choice between providing a basic income for all and tying public assistance to fulfilling market work requirements. As noted, the main challenge that confronts luck egalitarians in trying to ground just distributions in a conceptually coherent distinction between choice and chance stems from the difficulties inherent in identifying choices untainted by luck. Yet if responsibility or desert is too elusive a ground for distribution, where should we turn? To help finesse this conundrum and bring more determinacy to the debate, theorists like Ronald Dworkin, John Rawls, and Philippe Van Parijs have adopted a contractarian approach to the question of which outcomes of transactional systems should remain undisturbed and which should give rise to collective reallocations. The contractarian framework has been described by David Miller as based on "claims that valid principles of justice are those that would be agreed on by people under certain ideal conditions."⁸⁰ Those ideal conditions are generally taken to include hypothetical initial equality and partial ignorance about subsequent outcomes, including participants' "personal characteristics" and subsequent "place in society."⁸¹ The principles of justice are those that rational individuals would collectively adopt to regulate their common practices and would be able to accept "once the veil of ignorance is lifted and people are restored to full knowledge" both of their circumstances and of their "conceptions of the good."⁸²

The next Part examines some contractarian approaches for the purpose of investigating the relationship between theoretical visions of a just society and the claim that public assistance without work is "unfair" or "unjust." In his

⁸⁰ MILLER, *supra* note 33, at 57.

⁸¹ *Id.* at 81.

⁸² *Id.* at 57.

central work, *A Theory of Justice*, John Rawls derives basic principles of organization by imagining the social arrangements that individuals would choose from an "original position" behind a "veil of ignorance" in which endowments and social position are unknown. Although the basic liberties and resource-based difference principle he derives arguably would not force a categorical choice in all cases between the two social welfare possibilities under consideration here, Rawls has curiously resisted this conclusion by coming out against unconditional basic income in other writings. Ronald Dworkin posits a hypothetical insurance market in which participants are endowed equally and allowed to engage in market trades. He asks which outcomes we would collectively warrant ourselves against if we knew our talents and tastes but not how the economy would reward them. The device sets the stage for asking a version of the question at issue here: whether people would vote *ex ante* for a basic income arrangement in which they were, in effect, held harmless by the group for voluntary unemployment, or whether they would prefer to inhabit a society in which those who refused to work were left to their own devices. Like Rawls, Dworkin is inconsistent in his treatment of the issue: although his insurance scheme would not appear to rule out the choice to supply a basic income, his more specific discussion of welfare policy strongly suggests that a guaranteed basic income is neither required nor even permitted under his scheme. Finally, Van Parijs also begins with a hypothetical formulation that assigns individuals equal material shares and equal intrinsic endowments, but disparages work requirements from two directions: by pointing to the undeserved "rents" that accrue to all jobholders, to the detriment of the unemployed, by virtue of the ineluctable structure of any free market; and by identifying as a central goal of social life the maximization of "real freedom for all," which he defines as "the greatest possible opportunity to do whatever [one] might want to do."⁸³

Of these three theorists, only the last, Philippe Van Parijs, unequivocally embraces a guaranteed income arrangement. To the extent they address the issue at all, both Dworkin and Rawls cast aspersions on the suggestion that a basic income guarantee is required by, or even consistent with, principles of justice. As the discussion below suggests, however, Dworkin's and Rawls's resistance is in tension with other aspects of their analysis. Rawls's contractarian framework, which builds on an express rejection of a primary concept of desert, is difficult to reconcile with his avowed hostility to the idea of an unconditional income. Although Dworkin does not disparage desert

⁸³ VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 25.

outright and strives to maintain a stable line between choice and brute luck, his rules for just distribution ultimately rely on a contractarian hypothetical insurance device that, despite Dworkin's protestations to the contrary, need not rule out a universal and unconditional basic income guarantee. Like many ordinary voters, Rawls and Dworkin give in to the elemental intuition that "something for nothing" cannot possibly be "fair" or "just," even though that view is difficult to reconcile with the basic commitments that otherwise inform their frameworks for just societies.

A. Rawls's Original Position: Surfers off Malibu and Skid Row Bums

Although John Rawls shares Levine's and Murphy's nihilistic view of desert as attached to market rewards,⁸⁴ he is less pointed on the question of the efforts individuals must make in exchange for resource allocations within just societies. In *A Theory of Justice*, he offers a general description of society as a system of reciprocal cooperation for the common good, but does not apply the idea of reciprocity at the retail level to recognize an express obligation to work. Rather, the concept of reciprocity motivates Rawls's basic procedure for deriving fundamental principles of justice. Rawls asks what rules rational, self-interested, and morally autonomous individuals, placed in an "original position" without knowledge of their endowments and future social position, would choose to live by. He concludes that they would agree to basic liberties for all, fair equality of opportunity, and a system of distribution for primary goods, or basic material resources, that is governed by the minimax or difference principle, which dictates that inequalities in resource allocation be permitted only if the least-well-off members of society benefit.

As the economist Edmund Phelps has noted, Rawls recognizes that the "'social surplus' generated by the interaction of people's diverse talents and skills within . . . the . . . economy . . . can be legitimately redistributed, since the way a free market would distribute it is morally arbitrary."⁸⁵ But Rawls never openly states whether a portion of the surplus is "owed only to those who, being able and willing, participate and contribute at least something to the economy's pie" or whether those who refuse to contribute would also receive something.⁸⁶ In designating the category of "the least advantaged,"

⁸⁴ See *supra* pp. 31-33.

⁸⁵ Edmund S. Phelps, *Subsidize Wages*, BOSTON REV., Oct.-Nov. 2000, at 12-13. In extensive conversations and correspondence with Rawls, Phelps could not induce Rawls to "endorse" or to "protest" either alternative of unconditional benefits or public aid contingent on work. *Id.* at 13 n.1.

⁸⁶ *Id.*

Rawls omits any mention of how the least well off got to be that way and why they remain so. Those who can be viewed as placing themselves in this category by their own choice—who decide, for example, to “[lie] in bed all day and drink[] beer all night”⁸⁷ instead of pursuing gainful employment—appear no less entitled to be made better off as the price for inequality than those who suffer deprivations through no fault of their own.

In other writings, however, Rawls equivocates on the question of who belongs in the “least advantaged” category. In *A Kantian Conception of Equality*, he states that the category of the worst-off includes “the overlap between those who are least favored by each of the three main kinds of contingencies [including] . . . persons whose family and class origins are more disadvantaged than others, whose natural endowments have permitted them to fare less well, and whose fortune and luck have been relatively less favorable”⁸⁸ At least one commentator has suggested that, although *A Theory of Justice* defines the least advantaged “solely in terms of their current economic conditions,” Rawls’s later formulation is a “moralistic, desert-based account” that focuses on the causal antecedents of destitution and restricts the category to those who would be conventionally regarded as deserving victims because not personally responsible for their fate.⁸⁹ However, Rawls does not follow up on the implications of this arguably narrower formulation nor expand on its implications for the permissible design of social welfare programs.

Although Rawls’s dominant formulation in *A Theory of Justice* fails to make express distinctions among categories of the most deprived, he has addressed the question whether a just society should expect work from the able bodied in a different context. His position is stated in his answer to an objection advanced by the economist Richard Musgrave that Rawls’s nonwelfarist principle for distribution, which looks to “primary goods” rather than to subjective well-being or utility as the measure of just allocation, entails the inequitable treatment of persons with similar native capacities but different preferences for work. Musgrave argued that by leaving individuals free to choose what jobs they will take and how hard they will work, and by taxing only monetary income to effect resource allocations, Rawls’s social order

⁸⁷ Carens, *supra* note 69, at 36.

⁸⁸ John Rawls, *A Kantian Conception of Equality* (1975), reprinted in JOHN RAWLS: COLLECTED PAPERS 258-59 (Samuel Freeman ed., 1999).

⁸⁹ Walter E. Schaller, *Rawls, the Difference Principle, and Economic Inequality*, 79 PAC. PHIL. Q. 368, 370 (1998). See also Roy C. Weatherford, *Discussions Defining the Least Advantaged*, in EQUALITY AND LIBERTY: ANALYZING RAWLS AND NOZICK 37, 38 (J. Angelo Corlett ed., 1991).

favors those "among individuals with equal earnings ability . . . with a high preference for leisure."⁹⁰ That is, the hardest workers earn more money and pay more taxes, while persons who work little and choose to consume leisure keep more value for themselves.⁹¹

In response to this critique, Rawls proposes to add leisure to the list of "primary goods" that are to be distributed in accordance with the difference principle. He explains:

[T]wenty-four hours less a standard working day might be included in the [primary goods] index as leisure. Those who are unwilling to work would have a standard working day of extra leisure, and this extra leisure itself would be stipulated as equivalent to the index of primary goods of the least advantaged. So those who surf all day off Malibu must find a way to support themselves and would not be entitled to public funds. This merely indicates . . . that if necessary the list of primary goods can in principle be expanded.⁹²

In *Political Liberalism*, Rawls repeats the suggestion that "twenty-four hours less a standard working day might be included in the index as leisure."⁹³ He adds that "[t]hose who were unwilling to work under conditions where

⁹⁰ R.A. Musgrave, *Maximin, Uncertainty, and the Leisure Trade-Off*, 88 Q.J. ECON. 625, 629, 632 (1974) (providing further that "[w]hile a person's welfare depends on his consumption of both goods and leisure, the nature of things is such that redistribution can be expedited through the transfer of goods or income only"). See also Richard J. Arneson, *Property Rights in Persons*, 9 SOC. PHIL. & POL'Y 201, 215-16 (1992) (concurring with and further developing Musgrave's objection).

⁹¹ This critique is the flip side of the well-known objection that using subjective metrics like welfare or well-being rather than objective measures of resources as the currency of egalitarian justice threatens to "enslave the talented" by crediting the happy and well-endowed with the advantages they enjoy, thereby forcing them to work to subsidize the talentless and miserable. See, e.g., DWORKIN, *supra* note 51, at 90, 89-99 (objecting to the "slavery of the talented"); RAKOWSKI, *supra* note 39, at 120-21, 128 (criticizing Dworkin's hypothetical insurance scheme as still leading to the enslavement of talent); VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 65 (objecting to any requirement forcing one to have less leisure in consequence of more native talent); Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77, 90 (1989) (divorcing the expensive preference of a talented person's taste for personal liberty from the class of voluntary expensive preferences). For a defense of enslaving the talented, see Barry, *supra* note 10, at 271-72. Rawls avoids this problem by rejecting a welfarist approach to redistribution and using objectively measured "primary goods," rather than subjective utility, as the benchmark of well-being and the currency of allocation. But in avoiding forcing "those with greater talents to work for the less favored" Rawls gives a leg up to "recluses, saints, and (nonconsulting) scholars who earn but little and hence will not have to contribute greatly." Musgrave, *supra* note 90, at 632. Musgrave's alternative proposal returns to a welfarist approach: he suggests using lump-sum taxation to equalize some combination of "goods and leisure potentials," based on unrealized ability to work and enjoy. *Id.* For a similar suggestion, see Daniel N. Shaviro, *Inequality, Wealth, and Endowment*, 53 TAX L. REV. 397, 412-16 (2000) (proposing a tax based on endowments).

⁹² John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 257 n.7 (1988).

⁹³ JOHN RAWLS, *POLITICAL LIBERALISM* 181-82 n.9 (1993).

there is much work that needs to be done (I assume that positions and jobs are not scarce or rationed) would have extra leisure stipulated as equal to the index of the least advantaged."⁹⁴ Although Rawls does not elaborate further, his comments seem to suggest that employable persons who refuse to work at all, by arrogating to themselves "extra" primary goods in the form of a full day's worth of leisure, should be regarded as engaging in a form of "self-help" that lifts them above the least advantaged, thus disqualifying them from any further mandatory public assistance. That such persons may still be financially poor to the point of starvation does not make them candidates for the bottom rung category, and thus does not entitle them to improvement of their lot under the difference principle. It is open to them to trade some or all of their extra eight hours of leisure for the material goods that would relieve their destitution. Rawls's remarks also suggest that, if relinquishing this extra leisure in favor of paid employment would still leave someone unable to "make ends meet" because he earned too little to survive, he would then qualify as among the least advantaged and lay claim to more resources from others. By implication, that claim could be made only by those unable to better their situation by working harder, either because they were already putting in a reasonable work effort or were unable to work very much or at all.

If this gloss on Rawls is accurate, then his answer to Musgrave suggests that a just society could require the able-bodied to work—and work "full-time"—for public assistance and could fairly refuse to provide basic income to voluntary idlers. But Rawls's recommendation to add leisure to the list of primary goods fits uneasily with other elements of his scheme. First, even if including leisure on the list makes sense—if only because, assuming a system of free occupational choice (to which Rawls and other liberal theorists seem committed), individuals can appropriate more benefits to themselves at will simply by choosing to be unemployed—it is unclear why Rawls distinguishes between those who exceed the sixteen-hour standard allotment of leisure through voluntary idleness and those who are relegated to excessive leisure through involuntary unemployment. Assuming material resources are otherwise equal (as between, for example, the willfully idle beach bum and the skid row bum who tries and fails to get a job), it is not obvious why the latter would be counted among the least advantaged and the former should not. Rawls's dominant framework, which defines the least advantaged solely in terms of resources possessed and not how those resources are acquired or lost, and which denies any role to fault, desert, or agency, provides no clear basis

⁹⁴ *Id.* at 182 n.9.

for distinguishing between these cases. Both persons have paltry material resources and abundant leisure time. Indeed, they are equivalent on everything except happiness or preference satisfaction.⁹⁵ The beach bum enjoys greater subjective welfare or well-being, since, despite his poverty—and unlike the involuntarily jobless skid row bum—he is doing what he wants to do. But why should it matter that the beach bum likes it that way and indeed eschews alternatives, whereas the skid row bum is miserable and would embrace the very option—employment—the first person despises? To distinguish these individuals on the basis of individual preference satisfaction indulges the very welfarist, or subjectivist, measure of well-being that Rawls is at pains to reject.

Another way of understanding Rawls's suggestion that leisure be included in the index of primary goods is that it serves as a device for re-importing fundamentally desert-based considerations into a framework that expressly disavows reliance on any underived or pre-institutional notion of desert. By denying assistance to those who refuse to work, designating leisure as a primary good has the effect of making work-directed effort something for which individuals can take credit and upon which distributive decisions should be based. This analytic move suggests that, notwithstanding Rawls's view that desert is incoherent unless established through idealized consensus, he is curiously dissatisfied with a distributional result that wanders too far afield of ordinary notions of deservingness. Because Rawls balks at treating the voluntary, well-endowed idler the same as the involuntarily unemployed, he comes up with a jerry-rigged solution—adding leisure to primary goods while simultaneously (and implicitly) discounting the value of excess *unchosen* leisure—that effectively incorporates a perfectionist, Calvinist work ethic into his liberal scheme.

Are there alternative ways to derive a work requirement from the basic elements of Rawls's framework without adding leisure to primary goods? One possibility is that the difference principle itself might dictate the result if universal work for the able-bodied could be expected to generate more material resources available for distribution to the least advantaged than alternatives.⁹⁶

⁹⁵ Another possibility is that the existence of the opportunity to engage in gainful employment might be counted in itself as a "resource benefit" that would put the beach bum ahead of the skid row bum and make the former more advantaged. Rawls hints at this possibility in the footnote in *Political Liberalism* in which he expressly distinguishes between those who are at leisure from choice, and those who are involuntarily unemployed. See *id.*

⁹⁶ See DWORKIN, *supra* note 51, at 330 (suggesting that, when choosing between a program under which "only those who attempt to work receive welfare" and one in which "everyone who does not work, for whatever reasons, receives benefits," the former might better vindicate Rawls's difference principle "because

But, as already noted, whether work requirements would maximize wealth in all circumstances is unclear: the burdens and expense of administering such a system, and the perverse incentives on recipients to prove themselves exempt, might eat into the benefits of expecting work from everyone. If this did not happen, however, the difference principle might rule out a basic guaranteed income, since that program would then generate fewer resources to give to the least well-off. That proscription would not be a matter of basic principle, but rather of economic contingency.

There are other ways of analyzing the difference principle that might yield the opposite result. Some people may be so indolent or so work averse that they will stubbornly refuse to get a job despite complete destitution and the threat of losing government help. Within the context of a public welfare system that offers aid only to the "deserving," those persons place themselves among the least-advantaged by choice. But if we take Rawls at his word on desert, choice or chance should not matter. Moreover, that some person's work aversion makes their poverty "worth it" to them is irrelevant to their degree of disadvantage and their eligibility for special solicitude within Rawls's scheme. If a work-for-welfare regime would indeed generate such a group of truly destitute individuals impervious to expectations and incentives, then it can be argued that a basic income scheme is mandated by the difference principle because it would make this group better off (since at least they would have basic resources). That is, because some especially recalcitrant persons would be worse off under work-for-benefits than with an unconditional basic income program, we ought to elect the latter even if the work disincentives it generates reduces the sum total of wealth.⁹⁷

An approach that counts poor work-refuseniks among the least advantaged, although at odds with Rawls's suggestion that leisure should count as a primary good, is arguably more consistent with his discussion of the difference principle in *A Theory of Justice*.⁹⁸ A definition of the least advantaged that

the worst-off group in any society would be better off if its economic system provided incentives to work for all who can work").

⁹⁷ This appears to be what Dworkin is getting at in his brief remarks on how Rawls's difference principle would regard the alternatives of unconditional welfare benefits and benefits conditioned on work. He states somewhat cryptically that "some people . . . would so strongly prefer idleness that they would be financially better off under a scheme that did not punish that choice." DWORKIN, *supra* note 51, at 331. He explains further that "[i]t might be that no group in the second program [guaranteed income] is as badly off as the stipulated worst-off group in the first one [work-for-welfare], in which case the difference principle would recommend the second program." *Id.*

⁹⁸ RAWLS, *supra* note 45.

looks to resource endowment (as opposed to preference satisfaction) and that is heedless of fault, causation, or performance would seem to entail a responsibility to improve the lot of the most work-averse if at all possible. But that result throws into sharp relief the tension between Rawls's commitment to equalizing resources in the form of primary goods—a commitment that self-consciously refuses to compensate "expensive tastes" and that insists that those tastes be satisfied out of the standard allotment—and a difference principle that, regardless of desert, effectively holds the least-advantaged harmless for preference-driven choices.⁹⁹ Counting persons who are poor because they refuse to work as among the least advantaged is tantamount to compensating them for their aversion to work and their taste for leisure. It is a form of compensation for expensive tastes. Yet those who stand above the least advantaged and choose to work less—or spend more—for similar preference-based reasons are entitled to no compensation or relief from the financial consequences of their decisions. Thus, Rawls looks both ways on preference-driven choices.

Yet even if the category of the least advantaged should not be deemed to include all persons who make themselves poor by avoiding work, there is still an argument to be made that a guaranteed income is better for the least-advantaged, including perhaps some of the least-able working poor, than aid conditioned on work. Low-skilled employees may not be worse off *financially* than they would be with basic income alone, but they could well be far less happy and less free. What Rawls ignores is that people who take jobs under the constraint of work-for-welfare could arguably be regarded as among the most wretched of the earth. Many "bottom rung" workers labor at miserable, tedious, mind-numbing, or degrading jobs. Basic income would enable the most dejected and oppressed workers to quit or work less. Giving these persons "something for nothing" is a plausible and effective way of alleviating one possible source of their misery, which is work. A just society committed

⁹⁹ Rawls defends himself against the objection from some quarters that the use of primary goods as the currency of distributive justice does not do *enough* to accommodate those with expensive tastes by stating that "as moral persons citizens have some part in forming and cultivating their final ends and preferences" and by denying "that citizens' preferences are beyond their control as propensities or cravings . . ." John Rawls, *Social Unity and Primary Goods*, in *UTILITARIANISM AND BEYOND* 159, 168-69 (Amartya Sen & Bernard Williams eds., 1982). But as G.A. Cohen notes, Rawls's "picture of the individual as responsibly guiding his own taste formation is hard to reconcile with claims Rawls elsewhere uses in a fundamental way," including the "skepticism which he expresses about extra reward for extra effort." Cohen, *supra* note 51, at 914. See also KYMLICKA, *supra* note 67, at 75 (noting the tension between Rawls's view that "we are responsible for the costs of our choices" and the failure of the difference principle to "make any . . . distinction between chosen and unchosen inequalities").

to a difference principle might therefore recognize an obligation to enhance the well-being of abject "wage slaves" as the price of others being better off.

Rawls's framework cannot easily accommodate an argument of this kind, which is grounded in a notion of well-being that is subjective rather than objective and resource-based. That some people do hateful work or hate the jobs they do would get little weight within his distributive scheme except, perhaps, at the extremes of jobs that are wholly inconsistent with dignity and self-respect.¹⁰⁰ The question is not whether some persons in society are unhappy, but whether they have fewer primary goods than the rest. But a worker who suffers a deficiency in primary goods can always be helped by a material transfer to supplement the resources he procures through his own efforts. If a job does not pay enough to achieve a minimally decent standard of living, then assistance should take the form of cold cash or supplementation of earnings (such as our system currently provides through welfare-plus-work, the Earned Income Tax Credit, wage supplements, and various other forms of assistance for workers). Alternatively, we should put our efforts into improving working conditions. But the way to go is to throw money at the problem, not to relieve able-bodied persons of the expectation of labor. On this view, alleviating disadvantage never requires excusing the refusal to make any effort at all, and thus would appear not to mandate a guaranteed basic income as a matter of fundamental justice.

In sum, it is difficult to establish whether Rawls's theory of justice would mandate work for the able-bodied, or would permit or require unconditional benefits for all. On the one hand, Rawls's disparagement of desert as a basis for resource distribution would appear to require societies to make the idle poor less poor, regardless of why they are poor. A guaranteed income is the best way to do this. On the other hand, Rawls himself has rejected this position by suggesting that leisure be considered a "primary good" with which the voluntarily idle must be considered well-endowed. A guaranteed income then becomes unnecessary to, or even inconsistent with, Rawls's scheme.

¹⁰⁰ But perhaps no (legal) job within a market economy that pays enough for minimal self-support ought to be regarded as so distressing, degrading, or intolerable that it automatically places the person who performs it among the least well off. See, e.g., PHELPS, *supra* note 17, at 11-15 (listing the intellectual and social benefits of work); Phelps, *supra* note 85, at 13 (positioning factory workers as better off than the surfer).

B. Dworkin's Hypothetical Insurance Scheme

Another framework that might yield a choice between conditional and unconditional welfare is Ronald Dworkin's scheme for egalitarian distributive justice.¹⁰¹ To derive principles that operate in a just society, Dworkin imagines a desert island on which all inhabitants receive initial equal shares of found material resources. This equality forms the starting point for an auction, which is designed to mimic a free market, in which citizens use their initial endowments to bid for resources and the products created with them. In using this device to defend the justice of market outcomes within a framework of equal opportunity, Dworkin asserts that the resource allocation that results from the auction over time vindicates equality "over entire lives" because it ensures that people will "pay the price of the life they have decided to lead, measured in what others give up in order that they can do so."¹⁰² Honoring choices—including market-based decisions—and the consequences of such choices is "equality-maintaining" because the results of voluntary transactions reflect the value and cost of exchanged commodities and services to other persons. It follows that the outcomes of chosen risks and gambles, including the risks taken through trade and economic enterprise, should be left undisturbed. Dworkin explains that "the possibility of loss was part of the life [market participants] chose . . . it was the fair price of the possibility of gain."¹⁰³

Justice is thus consistent with holding people to results of voluntary actions from idealized conditions that mimic fair starting points. But what are those ideal conditions and what starting points are fair? A key problem for Dworkin is that real life differs from his hypothetical: actual people do not begin life with equal material shares, nor do they possess identical intrinsic endowments. We come to the market with different attributes, talents, desires, aversions, ambitions, and preferences. Dworkin cannot avoid identifying which antecedents of choice must be equalized to charge people fairly with the consequences of their actions and to make good on the claim that market transactions are fairly "equality maintaining."

In attempting to get at the conditions that would be equivalent to fair starting points, Dworkin distinguishes between "option luck" and "brute luck." "Option luck is a matter of how deliberate and calculated gambles turn out—

¹⁰¹ See DWORKIN, *supra* note 51, at 65-71.

¹⁰² *Id.* at 74.

¹⁰³ *Id.* at 74-75.

whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined.¹⁰⁴ "Brute luck is a matter of how risks fall out that are not in [some] sense deliberate gambles."¹⁰⁵ Brute luck appears to be a category reserved for events that cannot be influenced or avoided by the victim's choices.¹⁰⁶ Dworkin and his critics acknowledge that brute and option luck blend into one another¹⁰⁷ with each category threatening to swallow the other. On the one hand, all misfortunes other than pure accidents of birth or defects in upbringing can in some sense be regarded as causally linked to volitional acts, however improbably, indirectly, or tenuously. (Even being hit by a meteorite is the "result" of placing ourselves in the wrong place at the wrong time).¹⁰⁸ Defining "brute luck" to include only misfortunes that would befall us "no matter what" seems too narrow.¹⁰⁹ On the other hand, that a gamble knowingly made turns out badly can, in some sense, be regarded as a matter of brute luck too, in that the gambler cannot fix the gamble's actual outcome.¹¹⁰

Assuming that the line between brute and option luck can be made reasonably precise, Dworkin suggests that the outcomes of exchanges are just if some way can be found to compensate for differential results due to brute luck. Only differences due to unavoidable risks or misfortunes qualify for collective warrant. But Dworkin does not see society as duty-bound to hold persons harmless for *all* types of bad brute luck: The possibility of anticipating and insuring against some unavoidable risks effectively transforms some brute luck into option luck.

Dworkin cannot avoid identifying which attributes or conditions must be equal or equalized to make good on the claim that transactions are "equality maintaining" and to charge people fairly with the consequences of their

¹⁰⁴ *Id.* at 73.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 73-74 (citing examples such as being hit by a meteorite).

¹⁰⁷ *See, e.g.,* RAKOWSKI, *supra* note 39, at 75 (noting that past voluntary decisions can make the ultimate difference in the occurrence of bad brute luck situations); Richard J. Arneson, *Egalitarianism and the Undeserving Poor*, 5 J. POL. PHIL. 327, 331-33 (1997); Cohen, *supra* note 51, at 911 (noting the grey area between fault and bad luck); Lippert-Rasmussen, *supra* note 58, at 549-57 (attempting to distinguish between differential option and differential brute luck).

¹⁰⁸ *See* RAKOWSKI, *supra* note 39, at 75-77.

¹⁰⁹ Moreover, whether a misfortune is avoidable—and a matter of option luck rather than brute luck—is sensitive to descriptive formulation and to state of knowledge. There are ways of describing a risk that makes it seem unavoidable ("the risk of a flood destroying my business") or potentially avoidable by making a different choice ("a 20% chance of a flood destroying a business located in this flood plain").

¹¹⁰ *See* Lippert-Rasmussen, *supra* note 58, at 573-74 (discussing "regulative" control over outcomes).

activities in the world. He devotes considerable energy to the issue of which specific *attributes* of persons are candidates for effective equalization. Particularly important is Dworkin's treatment of the factors that make for occupational or economic success.¹¹¹ Like Rawls, he acknowledges that tendencies to persevere and work hard are highly influenced by innate endowments and genetic accidents of birth over which persons exercise little control. But he also insists that talents and the ability to exploit them are difficult to disentangle from ambition and other elements of our identity that are inextricably caught up with our values, plans, and conceptions of the good life.¹¹² This leads him to assimilate some determinants of job success and earning power to tastes and preferences and to resist a full-blown commitment to social correction for their effects. In the end, he suggests that proper regard for a principled distinction between brute luck and option luck arguably recommends a system that "leave[s] each person with the income he would have had if, counterfactually, all talents for production had been equal," but does not disturb differences traceable to occupational choice, "ambition," and "industry." Nonetheless, as explained more fully below, Dworkin avoids concluding that a just society must hold all persons harmless for perceived lack of talent. Indeed, Dworkin's ambivalence about collective compensation for talent differentials finds expression in his reliance on a hypothetical insurance scheme, which employs as the ultimate test of justice the degree to which the group would collectively agree to compensate its members for particular shortcomings. He concludes, in effect, that compensation would be forthcoming only for extreme lack of talent.¹¹³

Although the line Dworkin draws between natural talent and effort-based attributes can be questioned,¹¹⁴ his position would seem to bode ill for any claim that an unconditional guaranteed income for the able-bodied would be

¹¹¹ See DWORKIN, *supra* note 51, at 92 ("We want to find some way to distinguish fair from unfair differences in wealth generated by differences in occupation.").

¹¹² See *id.* at 91 ("Talents are nurtured and developed, not discovered full-blown, and people choose which talents to develop in response to their beliefs about what sort of person it is best to be.").

¹¹³ See *infra* pp. 48-50 (discussion of hypothetical insurance paradigm).

¹¹⁴ See, e.g., Cohen, *supra* note 51, at 928-29 (noting that behind effort-based attributes are unchosen preferences); see also RAKOWSKI, *supra* note 39, at 110 ("It is important . . . not to overstate the extent to which fortitude, concentration, perseverance, and whatever other attributes comprise the more amorphous quality of effort are characteristics within a person's control. The abilities with which people are born . . . frequently affect . . . their consequent desire—and over time their capacity—to strive and succeed."). For a general critique of Dworkin's approach, see *Symposium on Ronald Dworkin's Sovereign Virtue*, 113 *ETHICS* 5 (2002).

consistent with justice, let alone required by it.¹¹⁵ Dworkin's discussion of attributes that inform earning power suggests that "[l]aziness or an aversion to a certain type of work cannot furnish title to the rewards of another's exertions."¹¹⁶ The consequences of the decision not to take a job (assuming one is available) would seem to be as close to the core of option luck as one could get.

On the other hand, there are aspects of Dworkin's framework for justice that create trouble for the position that no forms of option luck should be candidates for collective compensation. To deal with unequal endowments like natural talent and to sidestep the need definitively to classify such attributes as "brute" or "option" luck, Dworkin develops a hypothetical insurance scheme that recognizes a social obligation to compensate for deficiencies only to the extent that idealized persons ignorant of their future position in society would agree to insure against them, assuming everyone had to pay the cost of that insurance. As elaborated more fully below, the operation of that scheme potentially undermines his position, grounded in first principles, that holding people harmless for the costs of their voluntary choices—including the choice not to work—is inconsistent with a just regime. Indeed, Dworkin's express views on specific questions of welfare policy, although perhaps mandated by an absolutist position that holding people harmless for differential option luck is unjust because it violates principles of equality "over whole lives," cannot easily be squared with his insurance-based analysis. An unconditional basic income—and the corresponding relaxation of any universal expectation of work for the able-bodied—may be more consistent with Dworkin's insurance framework. In general, the conclusions that emerge from hypothetical collective decision making do not necessarily respect a principled line between brute and option luck: as even Dworkin acknowledges, some forms of brute luck will not be insured against. But Dworkin seems less willing to recognize that some forms of option luck (including, as suggested below, the results of some decisions to be idle) may be held harmless by ideal decisionmakers, at least in some circumstances.

Conceding that some personal characteristics that influence market success would at least be candidates for equalization through resource reallocation, Dworkin tries to get at what forms of redistribution would be just by imagining

¹¹⁵ Dworkin's suggestion that compensation for option luck violates principles of equality over lifetimes implies that government warrants against option luck—including, arguably, a basic income guarantee that effectively cushions decisions to work less hard—are not merely permissive, but might be ruled out as *unjust*.

¹¹⁶ RAKOWSKI, *supra* note 39, at 108 (discussing Dworkin's position).

which conditions rational actors would insure themselves against *ex ante* if they were cognizant of the workings of markets, the general occupational structure, and their own talents, ambitions, and preferences, but were ignorant of the position and economic fortune these would yield in the real-world.¹¹⁷ He suggests that the test of whether justice requires or permits the group to compensate those who do poorly in the market is whether persons operating under ideal conditions would collectively choose to purchase insurance against those outcomes. A decision to insure would require everyone to pay “premiums” out of the resources they generated through their market activity to cover the cost of compensating persons who suffer the insured event.¹¹⁸ The hypothetical recognizes that the bill for holding people harmless for certain deficiencies or forms of bad luck must be paid by everyone, including the persons who potentially stand to benefit from that commitment prior to their qualifying for compensation. Thus, what actors in the hypothetical would choose will ultimately be influenced by the premiums they would be willing to pay in light of their expected insurance dividend weighted by the probability of the eligible event. Dworkin ultimately concludes that, because the cost of a more generous system of coverage and redistribution will outweigh the benefits for most people, the hypothetical decisionmakers will elect to cover no more than the inability to earn up to a decent minimum amount and will implement that decision through a progressive income tax scheme.¹¹⁹

The insurance hypothetical invites us to ask the particular question at issue here: whether a just society would require the able-bodied to work as a condition of receiving public aid, or would provide an unconditional basic income. The test would be whether rational actors with ordinary prudence, ignorant of their earning power and future occupational prospects, would vote collectively to cover themselves against the consequences of choosing not to work for pay. At first glance, the answer seems obvious. Our ordinary

¹¹⁷ DWORKIN, *supra* note 51, at 94 (“[The hypothetical decisionmaker] knows the projected income structure but is . . . radically uncertain what income level his own talents would permit him to occupy.”).

¹¹⁸ Insurance could be provided “against failing to have an opportunity to earn whatever level of income, within the projected structure, the policyholder names, in which case the insurance company will pay the policyholder the difference between that coverage level and the income he does in fact have an opportunity to earn.” Although “[p]remiums will vary with the level of coverage chosen,” the premiums must “be the same for everyone at any particular coverage level.” Then the question becomes “[h]ow much of such insurance would the . . . [participants], on average, buy, at what specified level of income coverage, and at what cost?” *Id.*

¹¹⁹ *Id.* at 97-99 (stressing that the “lower the income level chosen as the covered risk,” the more likely that its burden can be fulfilled through the insurance scheme and that those earning above that level will not be excessively penalized by paying higher premiums for what they already have).

understanding of insurance is that it is available only against conditions that represent risks "beyond one's control." That would rule out the possibility of voting to warrant people against an event—voluntary unemployment—that isn't really a "risk" at all, but results from a deliberate decision that, by hypothesis, is within each person's power to make or not. Indeed, in his discussion of welfare policy Dworkin does ask a variation on this question, and answers it as one might expect.¹²⁰ In addressing the issue of which labor market risks would be insured against within his hypothetical world, Dworkin leaves open the possibility of insurance for some forms of *involuntary* unemployment. He dismisses with little discussion the possibility that his framework would yield a pledge to hold people harmless for deciding not to work or not to work enough to achieve a certain level of income.¹²¹ That position comports with Dworkin's suggestion that option luck outcomes of deliberate choices should never be grounds for social compensation, whereas brute luck warrants compensation to an extent determined by the operation of the insurance paradigm.¹²²

In predicting how hypothetical actors would decide which circumstances give rise to compensable claims against the group, however, Dworkin ultimately places pivotal reliance on the projected *costliness* of group compensation for particular shortfalls. On this criterion, Dworkin concludes that there are some forms of "brute" bad luck—such as mild deficiencies in native talent—for which just societies would not choose to compensate its citizens. Dworkin suggests that shortcomings in native endowment that detract from earning power on the market should be compensable only in extreme cases because more extensive coverage would almost certainly be a bad buy for everyone. Because mediocre ability is quite commonplace, the chance of receiving compensation will be high, and the costs of paying compensation to those entitled to it would consume enormous resources.¹²³ But that means that "the cost of the premium will be extremely high as well,"¹²⁴ and will eat up a large portion of the earnings of those better-endowed persons not in the

¹²⁰ See *id.* at 333 (asking "what unemployment insurance people with a representative mixture of the tastes and ambitions most Americans have . . . would buy if they had the wealth that is average among us and were acting prudently").

¹²¹ See *id.* at 335-36 (stating that "any affordable policy would stipulate that the beneficiary . . . seek employment . . . [and would] terminate if it is proved that he had been offered and declined a job").

¹²² See VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 65-72 (describing Dworkin's views).

¹²³ DWORKIN, *supra* note 51, at 96 (noting that very few will have maximum earning power and thus the funds necessary to make up the difference for everyone else will be extremely high).

¹²⁴ *Id.*

position to collect.¹²⁵ Because more generous coverage would entail, at most, a “very large chance of a very small gain,”¹²⁶ rational actors would not choose to redistribute resources beyond what is necessary to provide a decent “floor” or minimum level of support.

Citing the moral hazard inherent in such an arrangement, Dworkin insists it follows inexorably from his analysis that none of us would vote from the hypothetical *ex ante* position to guarantee everyone a decent share of resources regardless of willingness to work. But moral hazard comes into the equation here as going to the cost of holding individuals harmless. Dworkin obviously relies on the prediction that, because persons could self-qualify for this form of compensation *and*, arguably, opt out of paying positive premiums by failing to generate any income whatsoever,¹²⁷ the working population would have to devote too many resources to paying the premiums to bankroll the insured event. Workers would have to pay oppressive taxes and governments would slight other worthy projects so that able-bodied persons could choose to stop working.¹²⁸

To decide that voluntary unemployment would not be made an insurable event within Dworkin’s paradigm requires us to conclude that persons would not commit themselves to paying the taxes necessary to make the system work if offered the option under hypothetical conditions of partial ignorance about their individual economic fate. We must conclude that rationally prudent persons would not vote for an unconditional basic income sufficient to support

¹²⁵ The relatively small number of people who fell above the (substantial) level of earning power guaranteed by the insurance rule would have to work that much harder and longer just to keep up the premium payments (which would be collected as taxes on earnings to fund compensatory payments to others who were not so talented).

¹²⁶ DWORKIN, *supra* note 51, at 97.

¹²⁷ Presumably everyone would have to devote some portion of their original allotment of resources, or returns from investing their allotment, or some portion of their earnings, to paying these premiums, but most persons who elected to take advantage of the option to be unemployed would necessarily be unable to pay their share directly. Alternatively, the requirement that everyone pay, by necessarily requiring that everyone work to raise the premiums, would seem to negate the very possibility of any voluntary unemployment compensation whatsoever.

The problem with this conclusion is that it proves too much: The requirement that all persons actually pay the same premium on every type of insurance regardless of whether they qualify for a payout or not would seem to rule out insurance against forms of brute luck (such as profound handicaps) that obviate work altogether for the very persons who are the targeted beneficiaries. It would rule out insurance for involuntary unemployment as well. It is unlikely that Dworkin would agree with this result. But then there is no reason not to consider making insurance available for a lack of resources that is self-imposed.

¹²⁸ *See* DWORKIN, *supra* note 51, at 101, 335-40 (discussing the “moral hazard” involved in unemployment insurance).

all those who elected to be idle or to work less hard than necessary to achieve basic self sufficiency. But if this conclusion is grounded in cost concerns, it is open to question. As explained earlier, the fiscal and distributional consequences of offering a basic income that makes it feasible to work less or not at all is ultimately an empirical question. What happens depends on how people will actually react if offered a minimum income guarantee. This is a function of contingent facts about human psychology, cultural norms and values, the state of the economy, and markets for labor. Any prediction that this form of insurance will not be chosen by hypothetical actors because, given the parameters within which free markets operate, it will simply prove too costly—a prediction upon which Dworkin must ultimately rely—is not grounded in any principled distinctions between option luck and brute luck, choice and chance, or endowments versus tastes, and indeed has nothing to do with those categories. Rather, it is ultimately based on projections about real-world behavior under a system of allocation that, because it permits self-qualification, generates moral hazard. As such, it is vulnerable to a demonstration that the magnitude and costs of the moral hazard will not be as large as feared. And if they are not so large, then opting for insurance against the choice not to work or to work less might not be such a bad bet after all.

This observation points to a deeper tension in Dworkin's analysis and highlights the potential disconnect between the results yielded by the hypothetical insurance device and the egalitarian assumptions from which he seeks to derive just principles of resource distribution. On the one hand, Dworkin seems to rule insurance for option luck off limits ahead of time on the ground that taxing everyone to pay for the poor outcomes of some people's voluntary choices is unfair and disturbs equality as between persons "over entire lives." On the other hand, in considering which social welfare policies just societies should adopt, Dworkin does not reject insurance against willful unemployment (tantamount to a guaranteed income) out of hand as violating equality principles. Rather, he relies on the conclusion that this type of guarantee will never be made on grounds of cost. But, as noted above, it is not clear what those costs will be. Although Dworkin resorts to the insurance paradigm as an alternative device for sorting out borderline cases of brute and option luck and for identifying which brute luck outcomes just societies should compensate, his analysis ends up begging the question of why equality principles should stand in the way of insurance for all types of luck or even for the deliberate expression of preferences. Dworkin never makes clear why the hypothetical insurance inquiry should not operate as a universal criterion for social responsibility—that is, why the consensus of impartial rational actors

should not be the sole and ultimate test of whether social compensation shall be due for contingencies of any kind. If hypothetical decisionmakers collectively decide to buy themselves the freedom not to work when and if they choose—and are willing and able to pay for the privilege—why allow equality principles to stand in the way?

Dworkin's insurance device weakens his initial categorical position that failed option luck can never permit group compensatory action in the interests of justice because there are good reasons why hypothetical insurers may elect to extend protection against the consequences of at least some kinds of choices. Although Dworkin suggests that justice requires governments to hold persons harmless only for brute misfortunes for which no private insurance is available or can feasibly be obtained, insurance in the real world is not confined to brute luck. Private insurance and government assistance are available against outcomes that reflect differential "option luck," including bad business decisions (as with bankruptcy protection), destruction of property contingent on calculated choices (as with insurance for property located in flood zones) and self-inflicted health risks and injuries (as with medical insurance). But if the latter eventualities can be covered through private markets or real-world political choices, why not by idealized collectives? As already noted, the link between human decisions and their outcomes is highly variable. Since ordinary commercial insurance routinely covers choices that turn out badly, this suggests that insuring against more or less controllable risks is not always prohibitive or infeasible on grounds of cost.

Thus, the explanation for why hypothetical insurers will not cover option luck—and would never cover voluntary unemployment—cannot be that such insurance will *necessarily* prove crippling expensive. Although moral hazard can render some forms of insurance prohibitively costly, that is not always the case because moral hazard is not all or nothing, but is often a matter of degree. Just as instances of unalloyed brute luck are few and far between, so risks of events over which beneficiaries have *no* control whatsoever are the exception rather than the rule. And even when insureds have a high degree of control over the insurable event, the effects of moral hazard may be self-limiting. The fact that we could make some choices that would impose large costs on others does not mean that we *will* make them because negative consequences that are not fully compensable restrain us. People can choose whether to smoke or not. Yet many people will not smoke regardless of whether health insurance covers lung cancer because the benefits of health coverage do not make up for the unpleasantness of dying young from a rapidly

fatal disease. As already noted, AFDC was historically available to anyone who took the steps necessary to become a poor single parent. Although the AFDC rolls grew over the decades, the numbers never exceeded a small minority of families.¹²⁹ Likewise, a universal insurance fund to cover the costs of paid parental leave hardly looks like "real" insurance because people can easily self-quality for benefits by electing to reproduce.¹³⁰ Yet such a program is unlikely to raise the birth rate because factors other than job benefits loom far larger in the decision whether to have a child.¹³¹

In the same vein, the costs of covering voluntary nonwork may be self-limiting if most people's rewards from working are large enough and most people value those rewards. As already noted, that could occur if most jobs in the economy offered compensation well above the subsistence level, and basic income was set no higher than that. In those circumstances, the answer to the question whether there will be too many freeloaders and not enough "suckers" to keep the system afloat is "probably not." The state's coercive power to tax, in combination with the rewards available on the market, will lure (or bribe) large numbers of people into the "sucker" role by making an offer they can't refuse: to transfer some of their earnings to others as the price of getting ahead. That deal may be galling, but it need not be ruinous. Whether a stable and reasonably prosperous equilibrium will emerge depends on many contingent social facts. No definitive answer can be gleaned from the hypothetical paradigm Dworkin has devised.

¹²⁹ See discussion *supra* p. 17 (setting out factors limiting "self-qualification" for AFDC).

¹³⁰ See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 336-37 (1992) (asserting that an insurance scheme covering pregnancy would not be sustainable as it would lead to a rise in costs in excess of benefits). But see Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 *COL. L. REV.* 2154, 2214 (1994) (proposing such a social insurance scheme).

¹³¹ Countries with generous paid parental leave policies have among the lowest birth rates in the world. See, e.g., U.S. Bureau of the Census, *IDB Summary Demographic Data for Demographic Indicators: 2000 and 2025* (listing Sweden's birth rate at 1.5 children per woman, Netherlands's at 1.6, Germany's at 1.4, and Italy's at 1.2), at <http://www.census.gov/ipc/www/idbnew.html> (last visited Oct. 30, 2002); U.S. Bureau of the Census, *Report WP98, World Population Profile: 1998* (U.S. Government Printing Office, Wash. D.C. 1999) (reporting that such European countries have a declining birth rate, far lower than less-developed countries and lower than even the replacement rate necessary to sustain population levels), at <http://www.census.gov/ipc/www/wp98.html> (last visited Oct. 30, 2002). Nevertheless, some European countries are instituting parental preference policies in an attempt to offset the decline in birth rates. See, e.g. Kajsa Sundstrom, *Can Governments Influence Population Growth?*, *OECD OBSERVER*, Dec. 4, 2001, at http://www.oecdobserver.org/news/fullstory.php/aid/563/Can_governments_influence_population_growth_.html (last visited Oct. 30, 2002) (discussing Sweden's use of generous parental benefits and improved childcare to raise the birth rate); U.S. Office of Personnel Management, *Report to Congress on Paid Parental Leave*, Nov. 21, 2001, at <http://www.opm.gov/oca/leave/HTML/ParentalReport.htm> (last visited Oct. 30, 2002).

As noted, this suggestion that it might sometimes be feasible to warrant collectively against some choices and their consequences simply highlights the instability of the categories of brute and option luck and undermines the suggestion implicit in Dworkin's analysis that justice requires compensation for brute luck only (and then only to a limited extent). If justice consists of allocations that would be chosen *ex ante* by actors using the hypothetical insurance scheme, then compensation for some types of option luck may sometimes be what justice requires.¹³² Indeed, it is unclear why insurance choices made in the hypothetical situation should not be the all-purpose criterion for whether society should compensate people for bad outcomes of any kind, whether from brute or option luck. Since most human decisions, whether prudent or reckless, involve gambles, there seems to be no reason why hypothetical actors would categorically rule out protecting themselves against choices that go sour or carry costs. With its ultimate reliance on the bottom-line criterion of rational actors' willingness to wager and pay, Dworkin's hypothetical decision-making scheme opens the door, at least potentially, to insurance against outcomes of *all* sorts of luck, option as well as brute.¹³³ Dworkin's insurance device thus undermines the suggestion that failed option luck never permits collective compensation in the interests of justice.

With respect to the choice between work requirements and guaranteed income, hypothetical insurers might choose to warrant society's members against the risk of having to work at dead-end, burdensome jobs—a risk that would turn out to be particularly onerous for the lazy and untalented. Even more boldly, the group might wish to secure to its members the possibility of playing the footloose Bohemian or the dreamy surfer off Malibu.¹³⁴ Once

¹³² See, e.g., GOODIN, *supra* note 58, at 300 (arguing that failure to extend compensation in some cases where deliberately chosen courses of action lead to bad outcomes "would constitute a morally improper" decision); Anderson, *supra* note 29, at 309 (criticizing Dworkin's option and brute luck distinction and hypothetical insurance scheme); Goodin, *supra* note 58, at 585 (making an expectations argument in which unlucky risk-takers may not deserve to suffer as much as they do); Shiffrin, *supra* note 38, at 4 (concluding that "measures of accommodation" in which society absorbs some of the costs of others' free choices would help achieve and maintain a "full, meaningful freedom" and would foster tolerance of disparate life choices).

¹³³ Indeed, one of Dworkin's reasons for adopting this device appears to be to relieve him of having to decide which form of luck talent differences represent. See DWORKIN, *supra* note 51, at 77; discussion, *supra* text accompanying note 77.

¹³⁴ It can be argued that Dworkin constructs his hypothetical paradigm in a way that excludes the possibility of a collective choice to support the involuntarily unemployed through a basic income guarantee: he establishes that the hypothetical actors know their personal talents and preferences, but are unaware only of the market value of those characteristics. See *id.* at 94. It would violate the terms of his paradigm to permit decisionmakers to be ignorant of whether they are leisure-loving or work-averse. But if everyone knew whether he would personally prefer playing the beach bum to making a killing on Wall Street, everyone would

again, the objection that this will bankrupt the system—that insurance against these options would not be a “good bet”—cannot form the basis for a categorical opposition to this rule of allocation nor to its operation within a just society. We might rationally and impartially choose to guarantee a basic income or give up on a perfectionist work ethic if that commitment does not prove too expensive or require us to sacrifice too many other material goals. The more affluent a society, the more likely that these aspirations can be met.¹³⁵ It might be objected that permitting collective protection against an exaggerated love of leisure or aversion to work proves too much: if society elects to compensate for these “expensive tastes,” why not all others? If we hold harmless for the desire to be free of work, on what basis do we deny resources to indulge the whole range of other desires? But the point of the insurance hypothetical is that it relieves us of the need to come up with a principled way to distinguish among desires and choices *other than on the basis of how much money indulging those choices will cost*, as that is assessed ahead of time under a range of possible conditions. Decisionmakers must reach a consensus that looks to the value of options to the group’s members and the predicted burdens compensation will impose. The choice-based satisfaction of preferences that are judged more valuable and prove less costly will be the ones the group will elect to guarantee. Although this formulation raises awkward questions about how the judgments of value will be made, the point still holds that the mere fact of moral hazard is not an a priori bar to insurance unless we smuggle in the normative assumption that bankrolling certain choices really is *immoral* or *unfair*. But if our aim is to determine whether collective support for the voluntarily idle is consistent or inconsistent with principles of justice, the conclusion should not be assumed.

This analysis suggests that a hypothetical framework that attempts to determine what impartial rational actors would insure themselves against collectively yields no categorical answer to our question whether suspending

know whether the insurance rule would favor him over others. That knowledge would presumably negate the element of impartiality that is key to the validity of the hypothetical device, thus tainting any decision regarding basic income. But Dworkin’s condition that we know our preferences, including our preferences regarding work, just begs the question of why we should *not* be kept in the dark about our actual tastes, regardless of whether we have some role in shaping or indulging them. The question comes down, once again, to why we would *on principle* rule out collective compensation for choices that some people, given their makeup and preferences, might wish to make.

¹³⁵ See LEVINE, *supra* note 18, at 31 (suggesting that whether justice requires the offer of a guaranteed income may depend on level of affluence); VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 84 (positing that in some affluent, healthy, diverse, advanced industrial societies of today, a sustainable basic income can be quite substantial and even exceed what is considered necessary for the bare necessities).

work requirements and guaranteeing basic support for everyone constitutes objectionable free riding in the absence of some prior judgment about the intrinsic fairness of this arrangement. In Dworkin's case, that prior judgment depends on his broader generalization that holding persons to the consequences of avoidable choices (including the choice not to support oneself by working at available jobs) is "equality preserving" within a world that allows compensation for brute luck differentials through an income tax scheme. In effect, Dworkin's hypothetical insurance construct cannot help but cycle back on a set of empirical assumptions that vary with circumstances and undermine the quest for principled conclusions. Unless we assume that the guaranteed income option is intrinsically unfair, the upshot depends only on whether there would be too few workers and too many idlers, which does not seem to be a matter of fairness at all but rather of what happens when individuals act from self-interest under prevailing economic conditions. The response is highly contingent, which is not the form we hope a fundamental principle of allocative justice will take. Arguably, then, the answer to the question posed in this Article for Dworkin—like the answer for Rawls—is "it depends."

C. Van Parijs: *Unearned Assets and "Real Freedom for All"*

Philippe Van Parijs has written extensively in defense of a guaranteed basic income and in opposition to conditional forms of distribution.¹³⁶ Van Parijs begins by identifying "real freedom" as a fundamental good of liberal societies. Defined as "the greatest possible opportunity to do whatever [one] might want to do,"¹³⁷ "real freedom" is concerned not only with "the freedom to purchase or consume," but more broadly with "freedom to live as one might like to live."¹³⁸ Borrowing contractarian elements from Dworkin and Rawls, Van Parijs suggests that the most desirable society is one that not only secures basic rights and self-ownership, but also that "leximins" real freedom—that is, that maximizes the minimum amount of real freedom enjoyed by persons with the fewest advantages. The arrangement within a capitalist system that will best accomplish this objective—that is, that will give the least advantaged more real options than any others—is one that provides the highest sustainable basic income for all.¹³⁹ In sum, the imperative to maximize the minimum

¹³⁶ See, e.g., VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6; Philippe Van Parijs, *The Second Marriage of Justice and Efficiency*, in *ARGUING FOR BASIC INCOME* 215, 227-34 (Philippe Van Parijs ed., 1992).

¹³⁷ VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 25.

¹³⁸ *Id.* at 30.

¹³⁹ *Id.* at 25 ("[A basic income secures to those] with the least opportunities . . . [a set of] opportunities

amount of "real freedom" mandates a basic income that allows everyone the choice to make some degree of labor-leisure tradeoff.

Van Parijs undertakes to defend basic income against the standard charge that allocating wealth regardless of work violates principles of reciprocity and licenses the exploitation of productive persons by idlers. Recalling Dworkin's "desert island" hypothetical, Van Parijs assigns to each person a pro-rata share of the initial set of undeveloped, external material resources used to generate wealth within a capitalist economy. In addition, each person is entitled to a share of infrastructure and know-how generated by the collective efforts of prior generations, which are the necessary conditions of any present creation of wealth through personal effort or investment. Finally, Van Parijs widens the basis for redistribution even further by identifying jobs as a scarce resource within capitalist societies. Because there are not enough desirable jobs to go around, even persons with identical talents may enjoy different packages of "tasks and benefits." Those lucky enough to snag the best jobs will earn undeserved "job rents." These can be legitimately taxed away and distributed among persons with less attractive positions or with no jobs at all.¹⁴⁰ Unconditional redistribution thus does not exploit those who engage in productive work because no worker can generate wealth without making use of resources that are earmarked for others. Working people are not entitled to keep the full product of their efforts, but rather owe compensation to those who cede their shares of collective resources. Granting everyone credit for "unearned shares"—including a portion of undeveloped natural resources, the collective products of previous generations' cooperative efforts, and wealth reflecting a pro-rata share of "job rents"—justifies the transfer of an amount sufficient to support basic subsistence and secure leximin real freedom.

that are no smaller than those enjoyed by the person with least opportunities under any other feasible arrangement.").

¹⁴⁰ See, e.g., Robert J. Van Der Veen, *Real Freedom Versus Reciprocity: Competing Views on the Justice of Unconditional Basic Income*, 46 POL. STUD. 140, 152 (1998) (explaining Van Parijs's position that "[t]he opportunity to earn and to enjoy non-pecuniary benefits, by holding a job, now becomes a scarce and unequally distributed external asset"). "Thus, in the real world, equal talent is consistent with an unequal distribution of job assets, hence with a distribution of employment at different wages and different durations, in which some have highly agreeable and remunerative work to do," while others have "part-time, badly paid, and disagreeable jobs." *Id.* See also Scheffler, *supra* note 48, at 984-86 (expounding on the "holistic" idea of building on antecedent collective resources); Michael Howard, *Liberal and Marxist Justifications for Basic Income 14* (paper presented to the First Congress of the U.S. Basic Income Guarantee Network, CUNY Graduate Center, New York) (March 8-9, 2002) (on file with author) ("The key point is that, although some wealth and income is due to labor, some results from the appropriation of external assets which, from the standpoint of justice, are common, and thus those who appropriate unearned wealth owe compensation to those who don't, which compensation can take the form of unconditional basic income.").

Like Dworkin, Van Parijs embraces the concept of “luck invariance,” which holds that individual outcomes should be insensitive to aspects of talent that individuals cannot control, but sensitive to ambitions that persons may choose to harbor, cultivate, and pursue. He accepts that persons are responsible for—because they can shape and control—their tastes and preferences, and he disavows any social duty to compensate for inequalities resulting from differences in aspirations and occupational choices. Although he accepts that talents and other innate endowments are undeserved, he nonetheless advocates only a limited social obligation to compensate for unlucky attributes.¹⁴¹ This limited obligation to make up for bad luck in endowments is key to Van Parijs’s project, since minimizing the duty to hold people harmless for inequalities in fixed attributes such as talents frees up resources for a per capita basic income that achieves *leximin* “real freedom for all.”

Several aspects of Van Parijs’s defense of guaranteed income are problematic. First Van Parijs’s program for expanding “real freedom for all” is selective and inconsistent in the way it deals with different tastes, preferences, and aspirations—especially those that influence success on the job market and determine choices for consumption, work, and leisure. This inconsistency is revealed in Van Parijs’s discussion of “Lazy” and “Crazy,” whom he describes as “identically talented but rather differently disposed characters.”¹⁴² As Van Parijs explains, “Crazy is keen to earn a high income and works a lot for that

¹⁴¹ Borrowing from an idea first elaborated by Bruce Ackerman, Van Parijs endorses “a criterion of justice in matters of internal endowments” that relies on people’s freedom to choose among conceptions of the good life and thus to assign certain attributes more or less value. According to his test of “undominated diversity,” only if *no one* would prefer a particular bundle of attributes to any available alternative is compensation due, since then those attributes could not be said to fulfill any reasonable conception of the good life. In sum, if no one would choose a particular set of traits, those traits are said to be “dominated” in all respects. And, as Van Parijs explains, such dominance is rare: “[A] blind and deaf spastic may still have nicer hair than some or be better than others at arithmetic, which would be deemed sufficient to make for a more favourable endowment by at least one person, given her conception of the good life.” VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 73. In sum, if someone has an endowment that anyone else would envy, that person is not entitled to be held harmless for their misfortunes in any other respect.

The logic behind choosing this strict criterion of “dominance” is that, since each person is in some sense “responsible” for his or her conception of the good life, the possibility that someone (person *A*) could prefer an attribute possessed by another (person *B*) (and, by extension, that person *B* could have chosen to value it as much as *A*, even if he in fact does not), negates any claim *B* might have to compensation for that characteristic. A deficit is not a misfortune worthy of compensation unless everyone regards it as such; the fact that some do not shows that its status as a misfortune is a subjective matter of taste. Thus, even if some traits are part of the endowment that is given to us, our judgment of the desirability of our endowments is, in an important sense, “optional” and thus not compensable.

¹⁴² *Id.*

purpose. Lazy is far less excited by the prospect of a high income and has decided to take it easy.¹⁴³ In suggesting that a guaranteed income expands "real freedom" (or potential options) for both Crazy and Lazy—and thus is even-handed in this respect—Van Parijs nonetheless dismisses Crazy's complaint that this expansion comes at his expense by noting that Crazy should be "held responsible for [his] tastes."¹⁴⁴ These tastes include the desire to work harder and earn more. However, Van Parijs readily acknowledges that the same "expensive taste" argument is available against Lazy's objection to a world without basic income.¹⁴⁵ Or, as Brian Barry explains:

If we can tell people with expensive tastes that they might have had cheap tastes, and we regard that as a sufficient reason for denying them additional resources, why cannot we tell Lazies that they might have been Crazies, and that that is a sufficient reason for not caring whether or not they can satisfy their taste for leisure? Why cannot we say that leisure is an expensive taste?¹⁴⁶

By defining real freedom as preserving the option of doing whatever one might want to do (whether or not one harbors the desire to do it), and by defining the goal of a liberal society as providing the maximal amount of sustainable "real freedom for all," Van Parijs cushions the harshest consequences of preferring leisure over hard work and consumption, thereby selectively suspending responsibility for one kind of "expensive taste": the taste for leisure. Although basic income appears to give both Lazies and Crazies an "identical" option set, its practical effect is to protect Lazies from the consequences of their preferences and to tax Crazies for theirs.

Because the goal of evenhandedness as between Lazies and Crazies is elusive or even impossible, a principle of neutrality towards different choice sets or conceptions of the good life cannot stand as a stable and independent justification for a program of unconditional benefits.¹⁴⁷ But even if we accept that expanding options (rather than achieving preference-dependant results) is desirable in vindicating neutrality towards ideas of the good, basic income does not necessarily advance that goal. It is far from clear that an

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 93.

¹⁴⁵ *See id.* at 94 ("[Lazy] cannot usefully point out that it is up to Crazy to adopt the same easy-going lifestyle as himself and hence that he cannot claim to be treated unfairly at any level of the grant. For under the assumption of equal talents, Crazy can use exactly the same argument" (footnote omitted)).

¹⁴⁶ Barry, *supra* note 10, at 263.

¹⁴⁷ For an elaboration of the argument that basic income secures neutrality towards conceptions of the good life, see LEVINE, *supra* note 18, at 18-20.

unconditional income guarantee will in fact expand the potential choices for different ways of life available to all. Unconditional benefits that permit more work-leisure tradeoffs could well curtail possibilities for realizing higher levels of income by working harder—a choice that some persons might value.¹⁴⁸ It might make available some options (surviving by working less or not at all), but only at the price of eliminating others (getting much richer by working harder).

Finally, however, the problem goes deeper than the inability to justify basic income as a neutral policy that is equally hospitable to different ways of life. Rather, the key is the challenge of fending off the objection that basic income violates reciprocity or is exploitative because it gives something to people who fail to contribute to the social product.¹⁴⁹ Van Parijs's discussion reveals that it is as difficult for basic income defenders to refute the exploitation objection on the basis of commonly held assumptions as it is for basic income opponents to defend the objection. Critics of basic income cling to the intuition that, even denying workers' full entitlement to the value the market assigns to their labor, nonworkers can make no claim to support from society "in the absence of any return to society."¹⁵⁰ On this view, the abstract assignment of passive credit for shares of preexisting resources fails to satisfy the bedrock obligation to contribute to the "economic benefits of social cooperation." Rather, this obligation can be satisfied only through some type of active participation, exertion, or exercise of human agency.¹⁵¹ Pro-rata shares of material resources plus "job rents" thus cannot substitute for affirmative contribution through work.¹⁵² Van Parijs himself worries endlessly over this objection,¹⁵³ but never

¹⁴⁸ See, e.g., Barry, *supra* note 10, at 264:

[T]axation required to pay for the basic income is virtually certain to foreclose other combinations of income and leisure obtainable under a system in which benefits are conditional on willingness to work. Anybody who chooses to work a lot will almost certainly find that the net income derived from a given effort will be less [when basic income is provided]. Thus some gain and some lose, according to their relative tastes for income and leisure. The implication is therefore that we cannot say that one situation has more real freedom in it than the other.

¹⁴⁹ See, e.g., Eugene V. Torisky, Jr., *Van Parijs, Rawls, and Unconditional Basic Income*, 53 ANALYSIS 289, 296 (1993) (describing a "minimal cost of membership in society"); Van Der Veen, *supra* note 140; White, *supra* note 27, at 317-20 (stating the exploitation objection).

¹⁵⁰ See Torisky, *supra* note 149, at 296.

¹⁵¹ White, *supra* note 27, at 318. See also Van Der Veen, *supra* note 140, at 155 (discussing White).

¹⁵² See, e.g., White, *supra* note 27, at 320 (arguing that natural resource shares and job rents are structural elements that "do not originate from the efforts of social cooperation; they are, so to speak, the pre-existing material on which social cooperators (or non-cooperating hermits) go to work"); see also Gijs Van Donselaar, *The Benefits of Another's Pains: Parasitism, Scarcity, Basic Income* 170-74 (1997) (unpublished thesis, University of Amsterdam) (on file with author) (characterizing compensation extracted for others' use of

definitively refutes it. Rather, he simply rejects its basic assumption—that reciprocity by definition demands a personal effort to create wealth and cannot be vindicated by passively assigning credit for valued resources that “no one alive created.”¹⁵³

Ultimately, Van Parijs’s endorsement of credit for scarce resource shares, like his opponents’ rejection of that idea, relies on intuitive notions of fairness that resist demonstration through reasoned arguments from common starting points. The difficulties inherent in bridging the gap between these positions is evident in discussions of the idea of reciprocity generally, in the confusion surrounding the concept of exploitation, and in the absence of any precise account of what reciprocity entails for individual obligation despite the repeated embrace of that abstract concept as a starting point for liberal social organization. On the one hand, the logic of luck invariance, holism, and equal initial shares—which recognizes that labor does not “deserve” any particular quantity of the market returns it enjoys—is unassailable. On the other hand, deep-seated moral sentiments and a revulsion against freeloading are at odds with these insights and uneasily resist their implications. As the following section explains, the tension between the conclusions derived from the rational analysis of markets and market-based desert on the one hand, and the generally hostile reactions of ordinary people to “something for nothing” on the other, is

shares in inert resources as an “abuse of rights”). *But see* Karl Widerquist, *Reciprocity and the Guaranteed Income*, 27 POL. & SOC’Y 387, 389 (1999) (questioning whether critics of guaranteed income can square their position with the defense of a “rentier class” and a system that permits “the owner of a significant amount of assets . . . [to] derive a permanent income from it without expending any personal effort”).

The argument that rejecting guaranteed income is inconsistent with letting persons live off accumulated assets is easily refuted in the case of non-inherited wealth: whatever else its value, leisure is also a consumption good, and a person might choose to work, invest, and save at one point in his life so as to purchase leisure for another. Living off inherited wealth may be more problematic. However, societies might still choose to respect the consumption choices of persons who desire to make a gift of earned wealth—and uninterrupted leisure—to their children, even though that decision will be in tension with recognizing everyone’s (including the heir’s) obligation to contribute actively to the social product. That tension finds expression in ambivalent feelings towards the idle rich, who are often condemned as “parasites.” For a discussion of attitudes towards the idle poor and idle rich, see, e.g., Wax, *Rethinking Welfare Rights*, *supra* note 3, at 281 n.75.

¹⁵³ See Van Parijs, *supra* note 36; Philippe Van Parijs, *Reciprocity and the Justification of an Unconditional Basic Income—Reply to Stuart White*, 45 POL. STUD. 327 (1997); see also VAN PARIJS, *REAL FREEDOM FOR ALL*, *supra* note 6, at 102-13 (discussing pro-rata shares of material resources and “job rents”).

¹⁵⁴ Karl Widerquist, *Who Exploits Who?* 3 (paper presented at CUNY Basic Income Conference) (March 8-9, 2002) (on file with author). For recent wide-ranging critical commentary on Van Parijs’s arguments, see ANDREW REEVE & ANDREW WILLIAMS, *REAL LIBERTARIANISM ASSESSED: POLITICAL THEORY AFTER VAN PARIJS* (2003).

not surprising. Political theory and political psychology emerge from very different processes, which can be expected to give divergent results.

V. SOCIAL CONTRACT VS. EVOLUTION: THE DISPARITY OF THEORY AND PRACTICE

Attempts to derive from some variation on the liberal contractarian perspective a definitive answer to the question whether providing public support with no strings attached or imposing work requirements for aid is either consistent with or required by basic principles of justice yield equivocal results. Although the work of liberal theorists offers valuable insights into this question, a definitive answer remains elusive. The conclusion that transferring earnings from workers to able-bodied nonworkers is "unfair," "unjust," or exploitative is difficult to derive from the building blocks for just liberal societies. Specifically, liberal egalitarians start from a baseline of assignment of equal initial resource shares, skepticism about desert, a commitment to luck invariance that entails the obligation to hold persons harmless for unearned misfortune, and an ambivalence about the status of personal antecedents and attributes (including deficient upbringing, lack of talent, and even unproductive temperament) that does not clearly yield a bedrock obligation to work for a living. Rather, the theoretical commitments of egalitarian theorists like Dworkin, Rawls, and Anderson would appear to permit, or even require, unconditional support for all. On the other hand, those writers ultimately endorse a perfectionist work ethic that reflects the same psychology of fairness dominant in the political arena. After criticizing in his well-known *A Theory of Justice* a premarket notion of desert and defining there a class of the disadvantaged that takes no overt account of personal responsibility or antecedents of distress, Rawls elsewhere attempts to rule out an unconditional income for the least advantaged—or for anyone—by adding leisure, albeit provisionally, to the list of primary goods. Ronald Dworkin defends a robust distinction between unavoidable bad luck (which is at least potentially compensable) and choices for which we are responsible (which are not), with the later appearing to cover the decision whether or not to work at available jobs. But the inherent instability of these categories leads him to fall back on a hypothetical insurance mechanism for identifying the consequences against which rational actors would collectively hold themselves harmless. Yet that device does not by its own terms always rule out insurance against the outcomes of adverse choices, including the choice not to work at all. Elizabeth Anderson rejects the luck egalitarian framework in favor of a society

committed to providing for basic needs and securing basic dignity for all. Although she embraces an ethic of care and disparages the market as an exclusive measure of productivity and worth, she staunchly endorses the position that collective assistance must remain conditional on each person making some (undefined) contribution to the social product. For these writers, as well as for basic income advocates such as Philippe Van Parijs, arguments in favor of placing conditions on the redistribution of resources tend to smuggle in underived, foundational, moralistic assumptions that rest on their own intrinsic appeal. If these commitments are indeed *sui generis*, they must either command our assent or fail.

The tension between theory and political psychology finds specific expression in uncertainties surrounding the characteristics possessed by idealized decisionmakers who determine the rules of our future existence. Dworkin's hypothetical insurers, for example, are bloodless creatures who harbor no resentment towards free riders, layabouts, or feckless Malibu surfers seeking to share resources with hard workers. Dworkin's prudent decisionmakers are not endowed with reactive attitudes or moral sentiments, and they have no permission to indulge their notions of desert by giving free reign to high dudgeon or righteous indignation towards slackers. Good evidence exists that fealty to elemental norms of cooperation, and the spontaneous tendency to punish and reward those who honor or defy them, are a commonplace of human psychology.¹⁵⁵ Yet those impulses are banished from the scene. These omissions should not surprise us. Contractarian theorists do not seek to discover principles of justice that simply reiterate ordinary attitudes and impulses, but rather to identify the moral and political views that can be justified by building ideas of justice from the ground up. Since the entire exercise proceeds from the assumption that "a political theory need not or should not track the familiar structure of our personal morality and ethics,"¹⁵⁶ there is no guarantee that what most people believe about justice will correspond to the rules adopted in hypothetical circumstances. Rather, the point of the analysis would appear to be to distance ourselves from prevailing opinions and to sit in judgment upon them by testing their validity against a structure that rests on a few (self-evident) elements. Because an analysis that "incorporate[s] common opinion" cannot be expected to "expos[e] the

¹⁵⁵ See e.g., Fehr & Gächter, *Altruistic Punishment in Humans*, *supra* note 8, at 139 (contending that negative emotions propel punishment of free riders); Sigmund et al., *supra* note 8, at 87 (explaining the success of altruistic behavior over selfish behavior in group experiments as a function of Darwinian theory).

¹⁵⁶ DWORKIN, *supra* note 51, at 297 (discussing G.A. Cohen's views).

inadequacies of common opinion,"¹⁵⁷ the temptation is to leave basic intuitions and emotions—including emotional responses that inform the very notions of fairness we wish to scrutinize—out of the equation altogether.

Yet how strong a claim to validity do resulting principles of justice possess if they fly in the face of precepts and norms—such as the norm against the type of free riding that appropriates the effortful contributions of others—that are widely shared across eras and cultures and so intuitively seductive that they confound the logic of sophisticated thinkers? As Rawls himself has recognized in expounding on his notion of "reflective equilibrium," rules for the operation of just societies cannot stand in complete isolation or opposition to "certain fundamental ideas seen as implicit in the public political culture of a democratic society."¹⁵⁸ Rawls's paradigm of the original position charges future citizens with the task of outlining a fundamental framework for society's governance behind a veil of ignorance. He suggests that if the principles that emerge from behind the veil run contrary to "reactive attitudes" or intuitive convictions that "we take provisionally as fixed points," then we should not accept those principles uncritically.¹⁵⁹ Rather we should engage in the following deliberative process:

By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted.¹⁶⁰

The potential dissonance between Rawls's seemingly inclusive and nonjudgmental definition of the least advantaged entitled to solicitude under the difference principle, and a strong, intuitive norm against collective support of the "undeserving poor," poses the type of dilemma to which the doctrine of reflective equilibrium would appear designed to respond. But how would Rawls decide to reconcile this tension? Does the process of reflective deliberation that Rawls describes point to a definitive answer to the question here described? Or is the answer that there is no one answer—that

¹⁵⁷ MILLER, *supra* note 33, at 52.

¹⁵⁸ RAWLS, *supra* note 93, at 13. See also KYMLICKA, *supra* note 67, at 66-67 (noting Rawls's view that the principles of justice derived from the original position should be scrutinized to see if they "match our considered convictions of justice or extend them in an acceptable way" quoting RAWLS, *supra* 45, at 19).

¹⁵⁹ RAWLS, *supra* 45, at 20.

¹⁶⁰ *Id.*

fundamental justice can be squared with offering "something for nothing" or with less generous arrangements?

An alternative that sidesteps the thorny difficulties of applying the concept of reflective equilibrium looks to Rawls's framework for the original position, and asks what kinds of attitudes the hypothetical denizens of that realm are permitted to possess. It is generally accepted that our judgments from behind the veil should be "impartial"—that is, they should be unaffected by our parochial and selfish personal concerns.¹⁶¹ The requirements of ignorance about individual circumstances and of consensus among all participants are designed to safeguard this impartiality and protect deliberations from the taint of narrow self-interest. But that still leaves the question of which elements of human psychology should be allowed to operate consistent with that constraint. Specifically, which common human emotions and attitudes are creatures behind the veil of ignorance allowed to possess?¹⁶² On the one hand, if we want to sit in judgment on popular views of justice for the purpose of constructing our ideal of justice, we might be well-advised to factor out unelaborated norms and moralistic sentiments and indeed to banish emotional responses entirely. On the other hand, it is hard to believe that Rawls's "reflective equilibrium" would recommend purging all intuitions, reactions, and feelings about fairness, if only because it is hard to see how a society arrayed against all such responses could stand. But even if we want our final vision of the just society to reflect sympathies and understandings that are deeply felt and widely shared, how do we decide which reactions should be indulged? Specifically, should hypothetical rational actors be permitted to harbor and act upon the kinds of "moralistic sentiments" and "reactive attitudes" that express an abhorrence of free riding?

One way to approach the question might be to observe that judgments about the fairness of "something for nothing" take the form of general, universalized standards for conduct—standards that, at least as stated, apply across the board and demand adherence from all. If such attitudes transcend immediate self-interest and express categorical, exceptionless views of

¹⁶¹ See MILLER, *supra* note 33, at 57 (observing that Rawls's adherence to a form of contractarian reasoning requires qualities such as impartiality so that no unreasonable burdens will be created); Barry, *supra* note 10, at 262 (discussing impartiality as an ideal of justice).

¹⁶² Cf. MILLER, *supra* note 33, at 55 (suggesting that the "beliefs about justice . . . that deserve to be included as 'considered judgments'" are those unaffected by "our emotions or by our personal interests"). The suggestion herein, however, is that not all emotions vindicate personal interests alone, and thus some might be a valid basis for just rules.

acceptable behavior, that would appear to satisfy the test of impartiality that is essential to the integrity of the decision-making process behind the veil or in a hypothetical situation.¹⁶³ Alternatively, a key factor might be whether we can show that the reactions at issue are innate elements of human psychology or common threads in diverse cultures—that we bring them with us as human beings rather than as contingent or malleable products of particular social settings.¹⁶⁴

These queries tie into a longstanding debate about whether our moral lives are best organized around norms derived from abstract reasoning without guidance from natural emotions, or whether moral sentiments should be primary.¹⁶⁵ That debate is directly pertinent to how we go about judging the fairness of work expectations within contractarian frameworks. As already noted, there is evidence that basic ideas about desert are deeply entrenched and widely shared elements of human psychology and culture. The question of who deserves public assistance out of pooled collective resources, if framed with sufficient generality, elicits a remarkable consensus. Not many take issue with the proposition that individuals should strive towards self support if possible and should be given help only if unable to sustain themselves despite reasonable efforts.¹⁶⁶ Although there is disagreement about what efforts are reasonable, those who seek or receive group help in violation of the agreed-upon conditions almost always risk collective disapproval as free riders.

How these basic paradigms for determining desert and entitlement ought to figure in any contractarian analysis will in part depend on our views of the origins of the consensus and on where these attitudes come from. Suppose, for example, that we credit an evolutionary account, which suggests that human

¹⁶³ See, e.g., GILENS, *supra* note 33; MILLER, *supra* note 33; Barry, *supra* note 10 (emphasizing impartiality).

¹⁶⁴ See Wax, *Rethinking Welfare Rights*, *supra* note 3, at 266-68 (reviewing support for the view that some moralistic attitudes might have evolved as innate features of our psychology or as common elements in convergent cultural evolution); see also RUBIN, *supra* note 8 (arguing for evolutionary origins of moralistic human sentiments); ELLIOT SOBER & DAVID SLOAN WILSON, *UNTO OTHERS* 150-51 (1998) (suggesting that abhorrence of free riding may be a key feature of successful cultures and social groups).

¹⁶⁵ Compare DAVID HUME, *A TREATISE OF HUMAN NATURE* 517 (L.A. Selby-Bigge ed., 1978) (theorizing that any concept of abstract reason actually stems from preceding "passions" such that "[a]ll morality depends upon our sentiments"), with IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 376 (Mary Gregor trans., 1991) ("[N]o moral principle is based . . . on any feeling whatsoever . . .").

¹⁶⁶ See, e.g., GILENS, *supra* note 33, at 62-64; MILLER, *supra* note 33, at 176; Bowles & Gintis, *supra* note 34; Galston, *supra* note 25; Wax, *Rethinking Welfare Rights*, *supra* note 3, at 270-73; Stuart White, *Social Rights and the Social Contract—Political Theory and the New Welfare Politics*, 30 *BRIT. J. POL. SCI.* 507, 508 (2000).

societies that minimized shirking enjoyed greater stability and reproductive and material success. Social disapproval of freeloading, and the tendency to disdain and punish those who violated cooperative norms, helped enforce behaviors that may have conferred an adaptive advantage.¹⁶⁷ By showing why it might have been advantageous for groups to suppress freeloading behaviors, this story shows how the tendency to react negatively to various forms of free riding may have become firmly rooted in human culture and psychology.

If these habits of thinking are indeed widespread and robust features of organized human societies, this may help explain why ordinary notions of “deservingness” that fuel demands for “work for welfare” may be hard to reason with. It is difficult to argue persons out of the position that work requirements are “only fair” even when they accept basic propositions and insights that point in a different direction. The arguments that all production builds on unearned antecedents, that everyone benefits from unreciprocated gifts, that components of productive value cannot be related in any coherent way to market rewards, and that paid labor is not the only form of contribution, often fail to make headway against allegiance to the *moral* duty to be self-sufficient if possible, and against *moral* condemnation of unnecessary dependency on others.

The evolutionary account can potentially shed light on why our intuitions about free riding, exploitation, and deservingness appear fundamental and resist derivation from the assumptions that liberal theorists take as their starting points. If we cannot get there from here, perhaps it is because contractarian hypotheticals fail to capture the conditions that gave rise to the basic structure of our moral sentiments. Evolutionary forces operate through the repetition of dynamic processes that pit individuals or groups with disparate behavioral strategies against one another in round after round of competition. These forces, which play themselves out over time and often yield counterintuitive results, are best captured by dynamic, iterative models.¹⁶⁸ The logic of

¹⁶⁷ For such an evolutionary account, see Bowles & Gintis, *supra* note 35; Wax, *A Reciprocal Welfare Program*, *supra* note 3, at 478-79; Wax *Rethinking Welfare Rights*, *supra* note 3, at 266-68; see also SOBER & WILSON, *supra* note 164; DAVID SLOAN WILSON, *DARWIN'S CATHEDRAL* 156 (2002) (suggesting that religion developed universally to curb free-riding).

¹⁶⁸ See Wax, *Rethinking Welfare Rights*, *supra* note 3, at 263-74 (detailing Sugden's multi-round, mutual insurance game and applying its principles to group members who have access to labor markets); see also RUBIN, *supra* note 8, at 11-13 (discussing dynamic game theoretic models of evolutionary development); ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION, AND WELFARE* 8-9 (1986) (describing repetitive games to illustrate the evolutionary creation of “spontaneous order”). For a comprehensive review

evolutionary development is fundamentally at odds with the static, one-shot thought experiments that liberal theorists favor. The method of choice for mimicking evolutionary forces is game theory, not a single, idealized, analytic exercise conducted by rational actors placed behind a veil of ignorance or in an original or hypothetical position or on a pristine desert island. There is no reason to believe that the logic of justice that emerges from the human mind's evolution over time and under intense competitive pressure would coincide with the basic principles that issue from contractarian constructs.¹⁶⁹ This is especially so because the psychology that informs our notions of justice was forged under conditions that are very different from those that prevail today. Our sentiments evolved to hold together voluntary cooperative structures of mutual support under conditions of great risk and scarcity. Small-scale cooperative forms of social organization dominated human societies for eons, long before strong centralized governments and large political units came upon the scene.¹⁷⁰ Yet the existence of such centralized governments is precisely what theorists take for granted in constructing the ideal scenarios from which they derive modern liberal theories of justice.

An account from evolved psychology suggests that any analytic framework that leaves certain moral sentiments completely aside may do violence to the basic intuitions that most people bring to moral judgments. On the other hand, the consensus on these issues is far from complete. Theorists such as Robert Goodin and Philippe Van Parijs, who are passionate believers in basic income, deplore the application of conventional notions of deservingness in the realm of public welfare. That these thinkers and other basic income advocates¹⁷¹ have managed to overcome any impulse to deplore free riding and unnecessary dependency suggests that these norms, however widespread, are not ineluctable. They may be amenable to modification through the emergence of counter-norms and new cultural conventions or by the simple use of reason.

of work on computer simulations of human social interactions, see Jonathan Rauch, *Seeing Around Corners*, ATLANTIC MONTHLY, Apr. 2002, at <http://www.theatlantic.com/issues/2002/04/rauch.htm>.

¹⁶⁹ For discussions of the relationship between moral and political theory and evolutionary psychology, see RICHARD ALEXANDER, *THE BIOLOGY OF MORAL SYSTEMS* (1987); RUBIN, *supra* note 8 and sources cited therein, at 72-75; Michael Ruse, *Morality and Commitment*, in *EVOLUTION AND THE CAPACITY FOR COMMITMENT* (Randolph M. Nesse ed., 2000); PETER SINGER, *A DARWINIAN LEFT: POLITICS, EVOLUTION AND COOPERATION* (2002).

¹⁷⁰ See CHRISTOPHER BOEHM, *HIERARCHY IN THE FOREST: THE EVOLUTION OF EGALITARIAN BEHAVIOR* (1999) (describing organization of ancient hunter-gatherer groups); RUBIN, *supra* note 8, at 94-117 (describing small hunter-gatherer societies and emergence of larger political units over the course of human history).

¹⁷¹ For additional work advocating basic income, see references in Wax, *Rethinking Welfare Rights*, *supra* note 3, at 262 n.17.

Indeed, two insights offer hope in persuading political actors to tame or restrain their customary reactions. First, as noted above, there may be compelling practical or prudential justifications for abandoning work-conditioned welfare programs in favor of a simple basic income guarantee. Within affluent capitalist economies, basic income might advance important social objectives more effectively and at less cost than alternatives that are more politically popular. If those factors are properly emphasized, opposition might erode to some extent. Second, a deeper understanding on the part of voters of the origins of opposition to basic income and of why that opposition may be obsolete might also make some headway against entrenched attitudes. Because the conditions that gave rise to reactive attitudes against freeloaders in the past have abated to some extent, those attitudes may serve a less important social function today. Unlike primitive nations, modern western societies do not face extreme scarcity and can tolerate some degree of shirking. Also, the rise of centralized governments with efficient and effective taxing power has obviated the need to rely on reciprocal norms to maintain group cooperation and effect redistribution for emergencies. The power to tax and spend effectively holds workers hostage to their desire to get ahead, superseding the need for coordination conventions in the informal context.¹⁷² In sum, the realization that strong norms against free riding are no longer necessary and may indeed be counterproductive, coupled with insights into the genesis of these attitudes, may help wean many enlightened citizens away from hostility to "something for nothing." That at least some individuals can be swayed by these understandings suggests that we should not give in too readily to the popular tendency to divide the poor into the deserving and undeserving, to classify some dependencies as free riding, and to react negatively to persons who violate norms of self-help.

It is possible, however, that reason never will succeed completely in overcoming the elemental aversions and objections that inform our political life. Despite its practical advantages, an arrangement that just "feels" unfair to many ordinary people may always meet resistance in the voting booth and fall short of commanding popular support. Even if abandoning work requirements as the centerpiece of social redistribution would work well in practice and make life better for some or all of the least advantaged, it does not follow that such a policy would be adopted or would gain voter support. Basic income may always have an uphill road in the political arena.

¹⁷² For more on this point, see Wax, *Rethinking Welfare Rights*, *supra* note 3, at 288-97.