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**SOMETHING FOR NOTHING:
LIBERAL JUSTICE AND WELFARE WORK REQUIREMENTS**

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Something for Nothing: Liberal Justice and Welfare Work Requirements

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I. 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 60 months. Recipients must engage in part-time work and move towards 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 assistance should be available only to those who cannot work or who cannot support themselves despite work. 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.

As argued previously,³ the various reforms introduced by the enactment of TANF represent a

¹ See the Personal Responsibility and Work Opportunity Act of 1996. The statute left in place some means-tested, in-kind programs (medicaid and food stamps) and maintained the basic elements of the federal program for the poor disabled and elderly (SSI).

² See Dan Bloom, *After AFDC: Welfare to Work Choices and Challenges for States*, at 74-77 (documenting state increases in earned-income disregards and consequences for “work plus welfare” combinations); Loffredo and Hershkoff, *The Rights of the Poor*. Revisions to the 1996 welfare reform act are now under consideration in Congress, and President Bush has recommended strengthening the statute’s work requirements. See [newspaper reports].

³ See Amy Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes and the Political Economy of Welfare Reform*, 63 *Law & Contemporary Problems* 257 (Winter/Spring 2000); Amy Wax, *A Reciprocal Welfare Program*, *Virginia Journal of Social Policy and Law*, Fall 2001.

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 don’t. 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 or “work.” 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

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.

⁵ Although this distinction between the deserving and undeserving is virtually unquestioned, 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*.

⁶ An exception is Alstott and Ackerman, *The Stakeholder Society* (1998) (proposing an \$80,000 grant to all 21 year olds); see also Michael Kinsley, *The Ultimate Block Grant*, *New Yorker*

This paper examines the normative notion that is central to welfare reform: that individuals must work or “do something” in order to receive welfare. The goal of the article is to analyze the politically influential intuition that welfare without work is “unfair” or “unjust” in light of ideas about just societies developed by liberal egalitarian theorists. Can popular intuitions that welfare without work is “unfair” or “unjust” can be squared with more sophisticated theories that seek to set forth principles 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 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

5/29/95; 25 Boston Review, Delivering a Basic Income, various commentators (October/November 2000).

Although championed by Milton Friedman (see *Capitalism and Freedom*) 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, 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 extensively in Europe. See, e.g., Tony Fitzpatrick, *Freedom and Security: an introduction to the basic income debate*, Macmillan London 1999; Sam Brittan and Steven Webb, *Beyond the Welfare State: An Examination of Basic Income in a Market Economy*; Tony Walter, *Basic Income*; Philippe Van Parijs, *Arguing for Basic Income*; Van Parijs, *Real Freedom for All*; Hermione Parker, *Instead of the Dole*. 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., Goodin, Work and Welfare: Towards a Post-Productivist Welfare Regime, *Brit. J. Pol. S.* 31, 13-39 (2001). 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.

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 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, or UBI, 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 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

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 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 un-educated single mother, the disabled former steelworker, the educated bohemian performance artist, and the footloose drifter, would all qualify for a check from the government.

regarded as one option among many that comports with basic principles of justice and that a fair society might choose to adopt? If so, under one conditions?

The paper 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 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 theoretical commitments that inform conceptions of just societies within the liberal theoretical framework.

The paper concludes that, although the work of liberal theorists offers valuable perspectives on the normative question of whether everyone should be guaranteed minimal financial support, a definitive answer remains elusive. Any notion that transferring earnings from workers to able-bodied non-workers 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.

The article concludes by drawing on an evolutionary analysis that speculates on the origins of the dominant 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 are so dominant in the liberal arena. It concludes that the tension between the stance dictated by liberal theories and ordinary persons’ notions of fairness are due to the failure of contractarian hypotheticals to capture the conditions that gave rise to the basic structure of our “moral sentiments.” Hostility towards freeloading may have emerged as the product of evolutionary forces that 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 processes are best captured by dynamic, iterative models. The logic of evolutionary development is 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

⁸ Wax, Rethinking Welfare Rights, *supra.*; Wax, A Reciprocal Welfare Program, *supra.* Recent empirical data confirms that the tendency to punish free riding, norm violations, and some forms of selfish and non-reciprocal behavior, even at great personal cost, is a widespread and robust feature of human psychology. See, e.g., Fehr and Nowak, *The Economics of Fair Play*, January 2002 *Scientific American*; Fehr and Gächter, Cooperation and Punishment in Public Goods Experiments, 90 *American Economic Review* 980; Fehr and Gächter, Altruistic Punishment in Humans, 415 *Nature* 137 (January 2002).

the realities of political psychology.

II. How to Think About Work Requirements & Guaranteed Income

A. Pragmatic Concerns

Arguments for or against the starkly 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 arguments or 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 that any public welfare system 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 wealth maximization, 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 issue is the effect of a tax and transfer system on economic efficiency and the overall amount of resources available for distribution within society. This 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 key behavioral questions will be about 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 guaranteed basic income may allow persons with meager earning potential to "price themselves into a job," by relieving them of having to

⁹ See, e.g., Arthur Okun, *Equality and Efficiency: The Big Tradeoff* (1975). For the description of an attempt to answer this question empirically, see Martin Anderson, *Welfare* (describing basic income experiments run by the Department of Health and Human Services in the 1970s.)

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 the labor markets, including how 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 on 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

¹⁰ Brian Barry, Survey Article: Real Freedom and Basic Income, 4 J. of Political Phil. 1996 at 243 (“Basic income puts a floor under all earnings, thus making jobs paying less than a living wage viable.”)

programs generate both at the low and high end of the income scale.¹¹

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 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

¹¹ Robert Frank, in *Luxury Fever*, at 228-229, 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 rewards 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 and 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.

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 families to afford help. It is also impossible to say before the fact which of these effects will dominate.

Added to this equation must be some consideration of 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.¹² 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.¹³ The value of lost leisure entailed by the enforcement of work among the unwilling and the costs of employing persons with very low ability and poor work habits¹⁴ must also be

¹² See Alexis DeTocqueville, *On Pauperism*, reprinted in *The Public Interest*; Brian Barry, Survey Article: Real Freedom and Basic Income, 4 *J. of Political Phil.* 1996 242-276 (discussing drawbacks of programs based on “contributions” or other qualifications); Ann Alstott, *Work vs. Freedom*, 108 *Yale L. J.* 967 (1999); T. Besley and Stephen Coate, *Workfare v. Welfare: Incentive Arguments for Work Requirements*, 82 *American Economic Review* (March 1992) 249, 250; Craig Brett, *Who Should be on Workfare*, 50 *Oxford Economic Papers* (1998) 607; T. Besley and Stephen Coate, *The Design of Income Maintenance Programmes*, 62 *Rev. of Economic Studies* April 1995, 187-221.

¹³ Matt Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 *Stanford Law & Policy Review*, Winter 1998, 23-43.

¹⁴ T. Besley and Stephen Coate, *The Design of Income Maintenance Programmes*, 62 *Rev. of Economic Studies*, April 1995, 187, 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 Michael Kinsley, *The Ultimate Block Grant*, *The New Yorker* (5/29/95).

taken into account.

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.¹⁵ 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, and indifferent) can secure long dreamed-of time to write, and anti-consumerist beachcombers can spend their days surfing off Malibu. The view that guaranteed income opens desirable and humane possibilities proceeds from an Aristotelean vision that exalts “creative” leisure and disparages a perfectionist work ethic that sees economically exigent labor as best realizing human potential.¹⁶ But whether the Aristotelean vision, or the 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 is contingent on dynamic cultural effects that are contingent and unpredictable.

¹⁵ See, e.g., Edmund Phelps, *Making Work Pay*.

¹⁶ For a cultural and historical discussion of attitudes towards work, see Joanne Ciulla, *The Working Life*; see also Anne Alstott, Work vs. Leisure, Yale L. J.; Philippe Van Parijs, *Real Freedom for All*; Andrew Levine, *Rethinking Liberal Equality*; Claus Offe, Full Employment: Asking the Wrong Question? (*Dissent* 1995); Hannah Arendt, *The Human Condition*.

Although it may be argued that the American experience with welfare so far provides little support for optimism, a radically 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 pre-existing 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 social consequences.

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 learn that they were automatically entitled to a yearly check from the government for \$15,000 is something we might not wish to find out. But it is also something about which we can make surprisingly few definitive predictions until it actually occurs.

The important point for our purposes is that even a rather generous UBI 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 modest.

Although the precise behavioral effects of AFDC on work and childbearing are a subject of great controversy,¹⁷ sixty years of experience with AFDC does not stand as a counterexample to the assertion that making cash assistance widely available for the asking need not change behavior very much, or at least not too adversely. 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 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 1980s,¹⁸ 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 is available to low income families with children abandoned by or deprived of the support of one parent. Thus, qualifying for AFDC requires becoming a single parent and being poor. But most people choose 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

¹⁷ See, e.g., Charles Murray, *Losing Ground* and responses.

¹⁸ Levitan, *Programs in Aid of the Poor*, 70-77 (2000). The cost of the program increased only about \$13 billion from 1960 to 1993 and enrollment has never exceeded about 14 million persons, or 7 million families.

modest compared to what it could have been, and compared to some other contemporaneous government benefits programs.¹⁹

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 gain, 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. Very little can be said with confidence ahead of time.

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

¹⁹ Sar Levitan, *Programs in Aid of the Poor* (2001); most recent Green Book, U.S. Ways and Means Committee [cost of and enrollment in AFDC]

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 are minimal or at least tolerable, and if many people benefit from it (or think that they do) even if some 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 “expert opinion” is divided,²⁰ many academics, and social thinkers 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.”²¹ Deborah Stone suggests that “[s]ocieties depend on their members to perform work of some kind; in varying degrees people are expected to be self-sufficient, to produce a little bit extra to trade, sell, or give to others in order to improve the condition of society as a

²⁰ See discussion *infra*.

²¹ Jon Elster, Comment on van der Veen and Van Parijs, 15 *Theory and Society* 709, 719 (1987).

whole.”²² William Galston speaks of the “simple but profound idea of reciprocity -- that people who receive benefits should make contributions -- if they are able.”²³ Robert Ellickson refers to “the traditional informal norm that an employable person has the duty to be in the workforce.”²⁴ 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,”²⁵ 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].”²⁶ 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.” 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.”²⁷ 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 summer, you must dance supperless to bed in winter.”²⁸ Even Philippe Van

²² Deborah Stone, *The Disabled State* (1979), at --.

²³ W. Galston, Comment on Van Parijs, Delivering a Basic Income, 25 *Boston Review* (October/November 2000).

²⁴ Robert Ellickson, The Untenable Case for an Unconditional Right to Shelter, 15 *Harv. J. Of Law & Public Policy* 17, 21.

²⁵ Stuart White, Liberal Equality, Exploitation, and the Case for an Unconditional Basic Income, *XLV Political Studies* (1997) 312, 318.

²⁶ *Id.* at 312.

²⁷ Elizabeth Anderson, What is the Point of Equality, 109 *Ethics* (Jan. 1989) 287, ---.

²⁸ J. Ciulla, *The Working Life*, at 10.

Parijs, the most 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.”²⁹

These expressions of “expert opinion” 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 social redistribution. Most people express willingness 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.³⁰ 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” and negative “moral sentiments” of indignation, disapproval, and resentment.³¹

²⁹ Van Parijs, *Real Freedom for All* (1995), at 132. 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*; Thompson and Guttman, *Democracy and Disagreement*; Lawrence Mead, *The New Politics of Inequality*; Lawrence Mead, *Beyond Entitlement*.

³⁰ See Martin Gilens, *Why Americans Hate Welfare*; David Miller, *Principles of Social Justice*; Wax, Rethinking Welfare Rights, *supra*; Farkas, et al, *The Values We Live By: What Americans Want from Welfare Reform* (Public Agenda 1996); Skitka and Tetlock, Of ants and grasshoppers: The political psychology of allocating public assistance, from Mellers and Baron, *Psychological Perspectives on Justice* (1993).

³¹ See, e.g., Gintis and Bowles, Is Equality Passe? Homo Reciprocans and the Future of Egalitarian Politics, 23 *B. Rev.* 26 (1998); David Miller, *supra*; see also Skitka and Tetlock, *supra*.

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 non-worker at will. Assuming something like a free or lightly regulated market for labor, 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 non-workers, 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, coming up with exact criteria for identifying exploitative relationships is notoriously difficult,³² 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 unconditional basic income setting, where the nature of the resources being transferred and the political setting in which the supposed “free riding” takes place present particularly puzzling challenges.

³² For extensive discussion, see Alan Wertheimer, *Exploitation*; Barbara Fried, *The Progressive Case Against Laissez Faire* (discussing exploitation in the economic and labor market sphere); Amy Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage*, 84 Va. L. Rev. 509 (May 1998) (exploitation in marriage and private relationships).

The claim of exploitation by free-riders is most familiar in the context of non-excludable 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-riding” is not mandated by ineluctable structural features of the shared physical or social world but is the byproduct of an association that is itself optional and thus voluntarily “chosen” 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 spend 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 the dirt started covering the lounge floor, he would take out the vacuum cleaner and deal with it, long before I would start thinking it 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*.³³

³³ Van Parijs, Free Riding vs. Rent Sharing, in Farina et al, *Ethics, Rationality and Economic Behavior* (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

This example diverges from the classic situation of nonexcludable 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 association is Pareto-superior to living apart and all players elects 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 arrangements off limits.

The type of "free riding" entailed by an unconditional public benefit arguably differs in important ways both from the kind observed nonexcludable public goods and with persons making unequal contributions to a mutually beneficial arrangement. Workers' support of able-bodied non-workers 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 an otherwise 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 "victims" worse off. The government could simply decline to enact the tax or effect any transfer to persons who would otherwise receive the benefits. Persons would keep the money they earn on the open market, and everyone would be left to fend for

"slob" and "neat" example in Wax, *Bargaining in the Shadow of the Market*, 68 Va. L. Rev. (1996). See also Joan Williams, *Is Coverture Dead?*, 82 Geo. L.J. (1994)(describing working couple's wrangling over child care as a "chicken game" in which mothers end up providing most of the care).

themselves.³⁴

The real question of interest, and the one that is central to this paper, 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 less ambitious as the price of generating more earnings for themselves. The robust, widespread, opposition to putting persons to such “hard” choices 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

³⁴ 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. If the parties stopped living together, both would lose the benefits of cohabitation. Alternatively, he 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 affect the point: forgoing a basic income would not require the “exploited” to sacrifice the net benefits of the exploitative relationship.

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 fundamental fairness? 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 to develop a framework that permits a critique of everyday attitudes with the aim of perhaps unmasking them as unjustified and irrational forms of prejudice to be discarded and superseded by more refined understandings?

These are questions are key to deciding whether conditional or unconditional redistributive schemes best comport with just societies. The remainder of the paper 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 discussions. This section 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.

III. 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."³⁵ The most common device for rectifying illegitimate 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 choices within [a] fair context and it would be unfair to expect others to do so for them."³⁶

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 persons' 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

³⁵ Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, March 2 draft at 2. See also Anderson, *What is the Point of Equality?*, 109 *Ethics* at 287; Larry Alexander & Maimon Schwarzschild, *Liberalism, Neutrality and Equality of Welfare vs. Equality of Resources*, 16 *Phil. & Public Affairs* 85 (Winter 1987). See also the work of Ackerman, Rawls, Dworkin, Nagel, Scanlon, Rakowski, Van Parijs, G.A. Cohen, Arneson, Ripstein.

³⁶ Anderson, *What is the Point of Equality?*, at –.

much observed unemployment is “behavioral” rather than “structural,”³⁷ few believe that the joblessness could be pushed to zero. Assuming a commitment to a “luck egalitarianism,” 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 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.³⁸ Second, the job market is never 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 given 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.’”³⁹ More turnover means that more people are

³⁷ See, e.g., Phillip Harvey, *Combating Joblessness: 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. of Employment and Lab. Law* 675, 729 (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, *The Public Interest*.

³⁸ See discussion, *infra* (Dworkin’s comments on the least advantaged idlers), at —.

³⁹ Harvey, *supra*, at --.

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 “working family” a tolerable standard of living. Indeed, our current welfare system is converging, however haltingly, towards such a system of supported or compensated work.⁴⁰

On a more theoretical level, the problems with the luck egalitarian choice/chance distinction 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 “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. Indeed, the question of whether it is possible to formulate a coherent notion of individual desert to which just arrangements

⁴⁰ See Wax, A Reciprocal Welfare Program, *supra* (documenting programs that provide earnings and income “supplements” for work that falls short of subsistence).

must respond is arguably the most central to liberal political theory, and one that bears critically on the practical choice of redistributive schemes.⁴¹

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 anymore than one deserves one’s initial starting point in society.”⁴² Rawls goes on to deny that any person deserves even “the superior character that enables him to make the effort to cultivate his abilities.” He explains that personal character “depends in large part upon fortunate family and social circumstances for which [a person] can claim no credit.” Based on these remarks, Rawls is widely understood to reject any foundational, pre-institutional notion of personal “desert.”⁴³ 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.⁴⁴ Rather, his

⁴¹ On desert generally, see, e.g., David Miller, *Principles of Social Justice*; George Sher, *Desert*; Joel Feinberg, *Doing and Deserving*.

⁴² Rawls, *A Theory of Justice*, at --.

⁴³ See, e.g., S. Scheffler, Justice and Desert in Liberal Theory, 88 Calif. L. Rev. 965 (discussing Rawls’s rejection of the idea of “pre-institutional” desert, -- that is, that “there is no independent principle of desert that provides a normative standard for the design of social institutions themselves.”)

⁴⁴ But see discussion, *infra* (tension between disavowal of desert and Rawls’s holding persons responsible for “expensive tastes” as well as ascription of responsibility for criminal conduct).

method is to first decide, based 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.

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.⁴⁵ 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.⁴⁶ As with Rawls, the focus is on the characteristics and antecedents that influence choices and the real-world consequences of choices. 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.⁴⁷ 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.⁴⁸ This division of opinion among

⁴⁵ See discussion *infra*.

⁴⁶ See, e.g., Dworkin, Arneson, Rakowski, Scanlon, G.A. Cohen.

⁴⁷ See, e.g., *Sovereign Virtue*. Although Dworkin is ambivalent about social responsibility to compensate for differences in talent, see discussion *id.* and *infra*, he ultimately holds that societies should strive to make outcomes “talent-insensitive” and “ambition-sensitive.”

⁴⁸G.A. Cohen, On the Currency of Egalitarian Justice, 99 *Ethics* 906 (July 1989).

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 be charged with the market-based consequences 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 choose to 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 responsible “choice” if anything is.⁴⁹

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 enjoys 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,

⁴⁹ Heather Milne, Desert, Effort, and Equality, 3 J. Of Applied Philosophy 235, 237 (1986); see also Nien-He Hsieh, Moral Desert, Fairness and Legitimate Expectations in the Market, 8 J. Of Political Philosophy #1 (2000) 91, 106.

may value idleness or “freedom,” may prefer non-remunerative 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 handicaps, deficiencies, and afflictions?

The unfairness of holding diverse workers to the costs of their work behavior is further exacerbated by the wildly erratic nature of the market returns on “effort.” One intuition underlying the “something for nothing” mentality is that the key difference between workers and non-workers -- the difference that warrants their differential treatment by the public welfare system -- is that the former make an “effort” but the latter do not.⁵⁰ 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 who work 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. Although some forms of work that are unpleasant or risky or that generate “disutility” carry a salary premium, some of the most pleasant and intrinsically rewarding work is among the highest paid. People choose a line of work in part because their tastes and talents

⁵⁰ See supra.

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.⁵¹

There are yet other factors bearing on market outcomes that reveal how thoroughly the structure of market rewards is shot through with arbitrariness and unchosen elements from beginning to end. Worker characteristics and exertions have value on the market, and produce more or less lucrative outcomes, only as 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 supply of labor available to meet it. Even if all workers were otherwise equal in resources and upbringing, these elements of arbitrariness would persist.⁵²

Any defense of the proposition that workers deserve something whereas nonworkers should

⁵¹ See, e.g., Joel Feinberg, *Doing and Deserving*; David Miller, *Principles of Social Justice*.

⁵² There is a large literature on “job rents” and the distribution of scarcity-based rewards within market economies. See, e.g., Philippe Van Parijs, *Real Freedom for All*; Barbara Fried, *The Progressive Case Against Laissez Faire*; David Gauthier, *Morals by Agreement*. See also James C. Dick, How to Justify a Distribution of Earnings, 4 *Phil and Public Affairs* Spring 1975; Julian Lamont, Problems for Effort-Based Distribution Principles, 12 *J. Of Applied Phil.* 215; Eric Mack, Gauthier on Rights and Economic Rents, *Social Philosophy and Policy* (1992); Nien-He Hsieh, Moral Desert, Fairness and Legitimate Expectations in the Market, 8 *J. Of Political Philosophy*(2000) 91-114; Jeff Reiman, The Labor Theory of the Difference Principle, 12 *Philosophy & Public Affairs* Spring 1983; Barbara Fried, Wilt Chamberlain Revisited: Nozick’s ‘Justice in Transfer’ and the Problem of Market-Based Distribution, 24 *P & PA* (Summer 1995) 226-245.

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 hold 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 risks, whether prudent or imprudent, that turn out badly.⁵³

These observations have led some liberal egalitarians to conclude that, at least with respect to

⁵³ 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., Elizabeth Anderson, *What Is Equality For?*, supra; Robert Goodin, *Reasons for Welfare*; Robert Goodin, *Negating Positive Desert Claims*, 13 *Political Theory* Nov. 1985 575; Seana Shiffrin, workshop paper, supra (arguing that welfare policy should eschew a strict “luck egalitarian” framework) with Richard Arneson’s reply to Anderson, in *Ethics*, supra; Eric Rakowski, *Equal Justice*; R. Dworkin, *What is Equality?* in *Sovereign Virtue* (taking a contrary view). 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.

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 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 an 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 no one pays 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.”⁵⁴ Since is “an ongoing venture, existing across both space and time, ‘paying one’s

⁵⁴ Levine, *Rethinking Liberal Equality*.

way' is an unrealizable goal." 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 not a sufficiently precise standard to govern economic life." 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.⁵⁵

Likewise, Liam Murphy also questions the coherence of any "preinstitutional" notion of desert for rewards assigned within markets.⁵⁶ 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 "returns 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. 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

⁵⁵ Andrew Levine, *Rewarding Effort*, 7 *J. Of Political Phil.* 404 (1999); see also Levine, *Rethinking Liberal Equality*.

⁵⁶ Liam Murphy, *Commentary Liberty, Equality, Well-Being: Rakowski on Wealth Transfer Taxation*, 51 *Tax L. Rev.* 473, 491.

always more significant morally than getting more than one deserves for doing something.” Rather, “an assumption that the first kind of undeserved income is more worthy of redress than the second (different pay for workers vs. redistribution to the voluntarily idle) 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.”⁵⁷ 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.

IV. What Counts As Work? The Puzzle of Work Outside the Market

Yet another set of voices can be heard to disparage the logic of just compensation for 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

⁵⁷ Liam Murphy, *supra*, at 491. Cf. G.A. Cohen, On the Currency of Egalitarian Justice, 99 *Ethics* 906, 915 (1989)(commenting, in response to Rawls’s attack on desert, that “If Rawls is right that not all effort is deserving then we might agree not all effort deserves rewards. 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 a rate somewhere between 0 percent and 100 percent.”). See also Van Parijs, *Real Freedom for All* (noting that a guaranteed basic income is not inconsistent with greater rewards for more effort, but only with denying any rewards for no effort).

“deserving” and “undeserving,” do not aspire to offer a global or rigorous critique of the concept of desert as such. 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 non-monetized 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.⁵⁸

The principle 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 caretakers begs the question of why 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

⁵⁸ See, e.g., Eva Kittay, *Love’s Labor*; Martha Nussbaum, review of Kittay in *New York Review of Books* (2001); Martha Fineman, *The Neutered Mother*; Elizabeth Anderson, *What is the Point of Equality*, supra, at p. [5]; S. Burggraf, *The Feminine Economy and Economic Man*; Ann Crittenden, *The Price of Motherhood*; Ann Alstott, *No Exit* (draft on file with author). For a cogent critique of the feminist “ethic of care,” see Will Kymlicka, *Contemporary Political Philosophy*.

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 other non-market 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 “cleaning one’s clients’ shoes, cleaning one’s children’s shoes, cleaning one’s own shoes, cleaning one’s doll’s shoes?”⁵⁹ 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 provided with something closer to a middle-class

⁵⁹ Van Parijs, *Real Freedom for All*, at 97.

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.”⁶⁰ Rather, those without paid jobs “almost always ‘work’ according to some legitimate understandings of the term”⁶¹ and many occupy themselves in part with 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 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 a particular mother-child duo despite the value for others or for society. One possible “market-failure” 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,

⁶⁰ Joseph H. Carens, *Rights and Duties in an Egalitarian Society*, 14 *Political Theory* 31, 35(1986).

⁶¹ Levine, *Rethinking Liberal Equality* at 15.

that rationale arguably would not justify the government paying full freight for caretakers and their children.⁶² Another defense looks to the transactional impediments to compensation for care across generations⁶³ or within the parent-child unit.⁶⁴ 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 myriad 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, and rejects the method of carefully dissecting the skeins of “value” generated by traditionally female activities and then

⁶² Amy Wax, *Is There A Caring Crisis? A Review of Shirley Burggraf, The Feminine Economy and Economic Man*, 16 *Yale Journal on Regulation* 327 (Summer 1999); Amy Wax, *Caring Enough: Sex Roles, Work, and Taxing Women*, 44 *Villanova L. Rev.* 495 (1999); Amy Wax, *A Reciprocal Welfare Program*, *supra*. The “externalities” from childrearing are greatly enhanced in modern western societies with 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, *The Feminine Economy and Economic Man*. 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.

⁶³ 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, *Love’s Labor*; Alasdair MacIntyre, *Dependent Rational Animals*. But see Rakowski, *Equal Justice* (arguing that, because unasked-for benefits produce no obligations, society owes parents no compensation or gratitude for producing the next generation); see also Robert Nozick, *Anarchy, State, and Utopia* (rejecting compensation for unsought benefits).

⁶⁴ Burggraf, *The Feminine Economy and Economic Man*.

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 then 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 desirable 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, it is unnecessary to delve into the genesis of any person’s dilemma. For Anderson, “the 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.” “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.”⁶⁵

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 premises of a luck egalitarian framework, she nonetheless denies that “in an egalitarian society everyone somehow could have a right to receive goods

⁶⁵ Anderson, *What is Equality*, supra; see also work by Robert Goodin, *Reasons for Welfare*; Goodin, *Negating Positive Desert Claims*, 13 *Political Theory* 575 (Nov. 1985)(making similar arguments).

without anyone having an obligation to produce them.” 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 beach bums.”⁶⁶ 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. 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.”⁶⁷ 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 a 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 fails explain why unconditional benefits are inconsistent with the goals of equal dignity and an “end to oppression” that she identifies as central to

⁶⁶ What is Equality, at --. Cf. Goodin (rejecting enforcement of an expectation of participation in the productive system).

⁶⁷ Anderson at --.

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 not to take a job is oppressive in itself. Also, Anderson never fully grapples with the issue of 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 to help determine 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 unaddressed.

V. Contractarian approaches to conditional and unconditional benefits

The conceptual puzzles explored so far reveal the difficulties inherent in choosing between providing a basic income for all and tying public assistance to fulfilling market work requirements. The challenge that confronts “luck egalitarians” in trying to ground just distributions in a conceptually coherent distinction between choice and chance stems from the difficulty inherent in identifying choices untainted by luck. Yet if responsibility or desert are 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 looked to a by now familiar 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.”⁶⁸ Those ideal conditions include initial equality and partial ignorance about subsequent outcomes, including “personal characteristics” and each person’s subsequent “place in society.”⁶⁹ The principles of justice are those that rational individuals would collectively adopt to regulate their common practices “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.”⁷⁰

The next section 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 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 principles 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 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 the particular question presented 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

⁶⁸ David Miller, *Principles of Social Justice* at 57.

⁶⁹ *Id.* at 81.

⁷⁰ *Id.*

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 question at issue here: 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 “the greatest possible opportunity to do whatever [one] might want to do.”⁷¹

Of these three theorists, only the last, Philippe Van Parijs, embraces a guaranteed income arrangement head-on. 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 at odds with implications of 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 express skepticism about the idea of an unconditional income. Although Dworkin does not disparage desert 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

⁷¹ Van Parijs, *Real Freedom For All* at 25.

the contrary, need not rule out a universal and unconditional basic income guarantee. Like ordinary voters, Rawls and Dworkin may be influenced by the elemental intuition that “something for nothing” cannot possibly be “fair” or “just.” That intuition is difficult reconcile with the basic commitments that 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,⁷² 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 avoids applying the idea of reciprocity at the retail level to recognize an obligation to work. Rather, the concept of reciprocity motivates Rawls’s basic procedure for deriving fundamental principles of justice. Rawls asks what rational, self-interested and morally autonomous individuals, placed in an “original position” without knowledge of their endowments and future social position, would choose as rules 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 maximin, or difference, principle, which dictates that inequalities in resource allocation be permitted only if they benefit the least-advantaged members of society.

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

⁷² See supra.

be legitimately redistributed, since the way a free market would distribute it is morally arbitrary.” 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.⁷³ In designating the category of “the least advantaged,” 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”⁷⁴ 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 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.”⁷⁵ 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

⁷³ Edmund Phelps, Arguing for Basic Income, Boston Review (Oct./Nov.2000). In extensive conversations and correspondence with Rawls, Phelps could not induce Rawls to “endorse” or to “protest” either alternative. Boston Review at 13.

⁷⁴ Joseph H. Carens, Rights and Duties in an Egalitarian Society, 14 Political Theory 31, 36 (1986).

⁷⁵ Rawls, A Kantian Conception of Equality,” reprinted in S. Freeman, ed., *Rawls Collected Papers* (Harvard), at 258-259.

“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.⁷⁶ 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 non-welfarist principle for distribution, which looks to allocations of “primary goods,” entails the inequitable treatment of persons with similar native capacities but different preferences for work. 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 favors those “among individuals with equal earnings ability * * * with a high preference for leisure.”⁷⁷ 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

⁷⁶ Schaller, Rawls, the Difference Principle, and Economic Inequality, 79 *Pacific Philosophical Quarterly* (1998) 368, 370. See also Roy Weatherford, *Discussions Defining the Least Advantaged*, in J. Angelo Corlett, *Equality and Liberty: Analyzing Rawls and Nozick*

⁷⁷ R.A. Musgrave, Maximin, Uncertainty, and the Leisure Trade-Off, 88 *Quart. J. of Economics* 625, 629 (1974)(“While 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 Arneson, Property Rights in Persons, 9 *Soc. Phil. and Policy* 201 (1992).

themselves.⁷⁸

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:⁷⁹

twenty-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 could not be entitled to public funds. This merely indicates that if necessary the list of primary goods can in principle be expanded.

In *Political Liberalism*,⁸⁰ Rawls repeats the suggestion that “twenty-four hours less a standard working day might be included in the index as leisure.” He adds that “[t]hose who were unwilling to work under conditions where there is much work that needs to be done (I assume that positions and jobs are not

⁷⁸ This critique is the flip side of the well-known objection that using subjective metrics like welfare, 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., Eric Rakowski, *Equal Justice*; Dworkin, *Sovereign Virtue*; Philippe Van Parijs, *Real Freedom for All*, at 65; Richard Arneson, Equality and Equal Opportunity for Welfare, 56 *Philosophical Studies* 77 (1989). For a defense of enslaving the talented, see Brian Barry, Survey Article: Real Freedom and Basic Income, 4 *J. of Political Phil.* 1996, 242, 271-272. Rawls avoids this problem by rejecting a welfarist approach to redistribution and using objectively measured “primary goods,” rather than subjective utility, as the measure 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*, at –. 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 earn, produce, and enjoy.” See Musgrave, *supra*. For a similar suggestion, see Daniel Shaviro, Inequality, Wealth and Endowment, 53 *Tax L. Rev.* 397 (Spring 2000).

⁷⁹ John Rawls, The Priority of Right and the Ideas of the Good, 17 *Philosophy & Public Affairs*, 251, 257 n. 7 (1988).

⁸⁰ See 181-182 n. 9.

scarce or rationed) would have extra leisure stipulated as equal to the index of the least advantaged.”

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 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 want. Rawls’s remarks also suggest that, if relinquishing this extra leisure in favor of paid employment still leaves some persons unable to “make ends meet,” then they might still be able to 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 free occupational choice, individuals can appropriate more to themselves at will), it is unclear why Rawls distinguishes between those who exceed the 16 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 obvious basis 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.⁸¹ 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 rejects alternatives, and the skid row bum is miserable and would embrace the very alternative – employment -- the first person rejects? To distinguish these individuals on the basis of individual preference satisfaction indulges the very welfarist, or subjective, measure of well-being that Rawls is at pains to reject.

An alternative 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

⁸¹ One alternative 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 *supra*.

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, since universal work for the able-bodied could be expected to generate more material resources available for distribution to the least advantaged than alternatives.⁸² 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. In circumstances where this was not the case, however, the difference principle would effectively rule out a basic guaranteed income program. That proscription would not be a matter of basic principle, but rather of

⁸² On this point, see Dworkin, *Sovereign Virtue* 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 latter might better vindicate Rawls's difference principle “because the worst off group in any society would be better off if its economic system provided incentives to work for all who can work.”

social 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 shouldn’t matter. Moreover, that some person’s work aversion makes their poverty “worth it” to them is irrelevant to their disadvantage and their eligibility for special solicitude within Rawls’s scheme. If a work-for-welfare regime did 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 not be poor). 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 of basic income might reduce the sum total of resources.⁸³

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

⁸³ 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.” He then explains further that “it 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.” *Sovereign Virtue*, at 331.

his discussion of the difference principle in *A Theory of Justice*. A definition of the least advantaged that 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, heedless of desert, effectively holds the least-advantaged harmless for preference-driven choices.⁸⁴ 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 persons who

⁸⁴ Rawls defends himself against the claim that the use of primary goods as the currency of distributive justice “does not 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 rejecting the view “that citizens’ preferences are beyond their control as propensities or cravings.” Rawls, *Social Unity and Primary Goods* in Sen and Williams, *Utilitarianism and Beyond*, 168-169. 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, *On the Currency of Egalitarian Justice*, 99 *Ethics* at 914. See also Will Kymlicka, *Contemporary Political Philosophy* 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.”)

are desperately poor because they hate work enough to avoid it at great financial cost, there is an argument to be made that a guaranteed income would still be mandated by concern for the least-advantaged. Poor or low-skilled working persons may not be worse off *financially* than they would be with basic income, 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 improving their lot by relieving them of the prime source of their misery, which is work. A just society committed 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 this argument, however, because it 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.⁸⁵ 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

⁸⁵ 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., Edmund Phelps, *Rewarding Work*; Phelps, Comment in Boston Review (Oct./Nov. 2000) issue on basic income.

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 work. On this view, alleviating disadvantage never requires excusing the refusal to make any effort at all, and does mandate the adoption of a guaranteed basic income as a matter of basic 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. On the other hand, Rawls's himself has rejected this position by suggesting that leisure be considered a "primary good" with which the voluntarily idle must be considered well-endowed.

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.⁸⁶ 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

⁸⁶ *Sovereign Virtue*.

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.” Honoring choices and the consequences of choices is “equality-maintaining” because the results of voluntary transactions reflect the value and cost of exchanged commodities and services to other persons. The consequences that should be honored, and left undisturbed, include the outcomes of chosen risks and gambles. Dworkin explains that “the possibility of loss was the part of the life [gamblers] chose – * * * it was the fair price of the possibility of gain.”⁸⁷

Justice is thus consistent with holding people to the consequences 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

⁸⁷ *Sovereign Virtue* at —.

distinguishes between “option luck” and “brute luck.” Option luck is “a matter of how deliberate and calculated gambles turn out -- whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined.” “Brute luck” is a matter of “how risks fall out that are not in some sense deliberate gambles.” Brute luck appears to be a category reserved for events that cannot be influenced or avoided by the victim’s choices.⁸⁸ Dworkin and his critics acknowledge that brute and option luck blend into one another,⁸⁹ 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 a volitional act, 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).⁹⁰ Defining “brute luck” to include only misfortunes that would befall us “no matter what” seems too narrow.⁹¹ 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 lacked control over the gamble’s actual outcome.⁹²

Assuming that the line between brute and option luck can be made reasonably precise,

⁸⁸ *Sovereign Virtue*, at –.

⁸⁹ See, e.g., G.A. Cohen, Erik Rakowski, Lippert-Rasmussen, Arneson.

⁹⁰ See Eric Rakowski, *Equal Justice*, at 75-77.

⁹¹ 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”).

⁹² See Lippert-Rasmussen, *supra* note – (discussion of “regulative” control over outcomes).

Dworkin's position is that the outcomes of exchanges are just only so long as some way can be found to compensate for differential results due to brute luck. This suggests that only differences due to unavoidable risks or misfortunes qualify for collective warrant. But not all bad outcomes due to brute luck are compensable. 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 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.⁹³ 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 in our values, plans, and conceptions of the good life.⁹⁴ 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 chooses to split the difference by recommending an income tax scheme designed to "leave each person with the income he would have had if, counterfactually, all talents for production had been equal," but does not

⁹³ See *Sovereign Virtue*, at – ("We want to find some way to distinguish fair from unfair differences in wealth generated by differences in occupation.").

⁹⁴ See *id.* at – ("Talents are nurtured and developed, not discovered full-blown, and people choose which talents to develop in response to their beliefs about what sorts of person it is best to be.")

disturb differences traceable to occupational choice, “ambition,” and “industry.”

Although the line Dworkin draws between natural talent and effort-based attributes can be questioned,⁹⁵ his position would seem to bode ill for any claim that an unconditional guaranteed income for the able-bodied would be consistent with justice, let alone required by it.⁹⁶ Dworkin’s discussion of attributes that inform earning power suggests that “laziness or an aversion to a certain type of work cannot furnish title to the rewards of another’s exertions.”⁹⁷ 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 can 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

⁹⁵ See, e.g., G.A. Cohen, *On the Currency of Egalitarian Justice*, supra. See also Rakowski, *Equal Justice*, at 110 (“It is important not to overstate the extent to which fortitude, concentration, perseverance, or 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 desire – and over time their capacity – to strive and succeed.”)

⁹⁶ 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 -- are not merely permissive, but might be ruled out as *unjust*.

⁹⁷ Eric Rakowski, *Equal Justice* at 108 (discussing Dworkin’s position).

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. In addition, Dworkin’s analysis of how the insurance paradigm would apply to specific questions of welfare policy signals a retreat by Dworkin himself from an absolutist position that holding people harmless for all forms of differential option luck is unjust because it violates principles of equality “over whole lives.” A closer look at these aspects of Dworkin’s work reveals that 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 framework for justice than is at first apparent.

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 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.⁹⁸ He suggests that the test of whether justice requires or permits the group to compensate those who suffer particular adverse outcomes in the market is whether persons operating under these 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

⁹⁸ *Sovereign Virtue*, at – (The hypothetical decisionmaker knows “the projected income structure” but is “radically uncertain what income level his own talents would permit him to occupy.”)

insured event.⁹⁹ 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 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 progressive income tax scheme.¹⁰⁰

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 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

⁹⁹ For example, insurance could be provided “against failing to have an opportunity to earn whatever level of income within the projected structure the policy holder names, in which case the insurance company will pay the policy holder the difference between that coverage level and the income he does in fact have an opportunity to earn.” Although “premiums 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 “how much of such insurance would the [participants] on average buy, at what specified level of income coverage, and at what cost?” *Sovereign Virtue* at –.

¹⁰⁰ *Sovereign Virtue*, at

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.¹⁰¹ 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.¹⁰² 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.¹⁰³

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 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 "winning" compensation will be quite high, and the

¹⁰¹ Dworkin, *Sovereign Virtue* 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.")

¹⁰² See *Sovereign Virtue*, chapter 8.

¹⁰³ See Van Parijs, *Real Freedom for All*, at 227 (describing Dworkin's views).

costs of paying compensation to those entitled to it would consume enormous resources.¹⁰⁴ But that means that “the cost of the premium will be extremely high as well,”¹⁰⁵ and will eat up a large portion of the earnings of those well-endowed persons not in the position to collect.¹⁰⁶ Because more generous coverage would entail, at most, a “very large chance of a very small gain,”¹⁰⁷ 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 income,¹⁰⁸ the working population would have to

¹⁰⁴ *Sovereign Virtue*, at --

¹⁰⁵ *Id.* at --.

¹⁰⁶ 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).

¹⁰⁷ *Id.* at --

¹⁰⁸ 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 this form of “involuntary unemployment” compensation at all.)

devote too many resources to paying the premiums to bankroll the insured event, which is deliberately staying out of the workforce. Workers would have to pay oppressive taxes and governments would slight other worthy projects so that able-bodied persons could choose to stop working.¹⁰⁹

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 all those who elected to be idle. 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 cease working 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, and the state of the economy. 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, and endowments versus tastes and indeed has nothing to do with those categories. Rather, it is ultimately based on

Yet the requirement that everyone 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 earnings altogether for the very persons who are the targeted beneficiaries. 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.

¹⁰⁹ See *Sovereign Virtue* (discussion of unemployment insurance).

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 nearly as large as feared. And if they are not so large, then opting for insurance against the choice not to work 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 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 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 is available against outcomes that reflect differential "option luck," including bad business decisions (as with bankruptcy protection), destruction of property contingent on avoidable decisions (as with insurance for property located in flood zones) and health insurance (for self-inflicted injuries). But if the latter eventualities can be covered through private markets, 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 "controllable" risks is not always prohibitive or infeasible on grounds of cost.

Thus, the explanation for why hypothetical insurers won't cover option luck -- and would never cover voluntary unemployment -- cannot be that such insurance will *necessarily* prove cripplingly 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 by their nature resist full compensation 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.¹¹⁰ 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.¹¹¹ 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.¹¹²

In the same vein, the costs of covering voluntary non-work 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

¹¹⁰ See discussion *supra* of factors limiting “self-qualification” for AFDC.

¹¹¹ See, e.g., Issacharoff and Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 *Columbia Law Review* (1994)(proposing such a social insurance scheme); but see Richard Epstein, *Forbidden Grounds* (benefits for pregnancy and childbirth are not insurance).

¹¹² Countries with generous paid parental leave policies have among the lowest birth rates in the world. See Germany, Italy, Scandinavia, Netherlands.

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.

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.¹¹³ 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 outcome 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 decisionmaking scheme opens the door, at least

¹¹³ See, e.g., Robert Goodin (2 cites), *supra*; Elizabeth Anderson, *What is the Point of Equality?*, *supra*; Seana Shiffrin, *supra*.

potentially, to insurance against outcomes of *all* sorts of luck, option as well as brute.¹¹⁴ 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.¹¹⁵ Once 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

¹¹⁴ Indeed, one of Dworkin's reasons for adopting this device appears to be to relieve him of having to decide which form of luck differences in talent represent. *Sovereign Virtue*, at –. See *supra*.

¹¹⁵ 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. *Sovereign Virtue*, at –. Thus, 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 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 ignorant of whether we will possess these 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 preference-driven choices that some of us might turn out to want to make.

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.¹¹⁶ 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 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 insure. 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*. 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 work requirements and guaranteeing basic support for everyone constitutes

¹¹⁶ See Van Parijs, *Real Freedom for All*; Andrew Levine, *supra* (suggesting that whether justice requires the offer of a guaranteed income may depend on level of affluence).

objectionable “free riding” in the absence of some prior judgment about the intrinsic fairness of this possibility. 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 work 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 the 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 a matter 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.¹¹⁷ 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,”¹¹⁸ “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.”¹¹⁹ Borrowing

¹¹⁷ See, e.g., *Real Freedom for All; Arguing for Basic Income*.

¹¹⁸ Van Parijs, *Real Freedom For All* at 25.

¹¹⁹ *Id.* at 30.

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.¹²⁰ In sum, the imperative to maximize the minimum 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 otherwise. 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 will enjoy different packages of “tasks and benefits.” Those lucky enough to snag the best jobs will earn

¹²⁰ Van Parijs, *Real Freedom for All*, at 25 (A basic income secures to those “with the least opportunities” a set of “opportunities no smaller than those enjoyed by the person with least opportunities under any other feasible arrangement.”)

undeserved “job rents,” which can be legitimately taxed away and distributed among persons with less attractive positions or with no jobs at all.¹²¹ 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.

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 and pursue. He accepts that persons are

¹²¹ See, e.g., Robert Van Der Veen, *Real Freedom vs. Reciprocity: Competing Views on the Justice of Unconditional Basic Income*, XLVI Political Studies March 1998 (explaining Van Parijs’s position that “The opportunity to earn and to enjoy non-pecuniary benefits, by holding a job, now becomes a scarce and unequally distributed external asset.” Hence, “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.”). See also Michael Howard, *Liberal and Marxist Justifications for Basic Income*, 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), at – (“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.”). See also Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 Calif. L. Rev. 965 (expounding on the “holistic” idea of building on antecedent collective resources).

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.¹²² This limited obligation to compensate 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

¹²² 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 their freedom 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. 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 an 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 favorable endowment by at least one person, given her conception of the good life.” *Real Freedom for All* at 73. 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 their 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 might “choose” to value it even if he does not), negates any claim B might have to compensation for that attribute. 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. The attribute may be given, but our judgment of its desirability is “optional” and thus not compensable.

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." As Van Parijs explains, "Crazy is keen to earn a high income and works a lot for that purpose. Lazy is far less excited by the prospect of a high income and has decided to take it easy."¹²³ In suggesting that a guaranteed income expands "real freedom" (or potential options) for both Crazy and Lazy – and thus is evenhanded in this respect -- Van Parijs nonetheless dismisses Crazy's complaint that this expansion comes at her expense by noting that Crazy should be "held responsible for [her] tastes." These tastes include the desire to work harder and earn more. However, Van Parijs readily acknowledges that the same "expensive taste" objection is available to answer Lazy's objection to a world without basic income.¹²⁴ 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 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?"¹²⁵ By defining real freedom as preserving the option of doing whatever one might one 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

¹²³ *Real Freedom for All*, at 92-93.

¹²⁴ 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 she 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.")

¹²⁵ Brian Barry, Survey Article: Real Freedom and Basic Income, 4 *J. of Pol. Phil.* 242, 263 (1996).

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 even-handedness as between Lazies and Crazies is elusive or even impossible, a principle of neutrality towards different choice sets or towards conceptions of the good life facilitated by broadening feasible options cannot stand as a stable and independent justification for a program of unconditional benefits.¹²⁶ 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 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.¹²⁷ It

¹²⁶ For an elaboration of the argument that basic income secures neutrality towards conceptions of the “good life,” see Andrew Levine, *Principles of Liberal Equality*.

¹²⁷ See, e.g., Brian Barry, Survey Article, *supra*, at 264:

Taxation 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.”

might make available some options (surviving without working), but only at the price of eliminating others (getting 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.¹²⁸ 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 opponents to defend it. Critics of basic income cling to the intuition that, even denying workers' entitlement to the full value of labor, nonworkers can make no claim to support from society "in the absence of any return to society."¹²⁹ On this view, the abstract assignment of passive credit for shares of pre-existing resources fails to satisfy the obligation to contribute to the "economic benefits of social cooperation," which must be generated through some type of active participation, exertion, or exercise of human agency.¹³⁰ Pro-rata shares of material resources plus "job rents" thus cannot substitute for affirmative contribution through work.¹³¹ Van Parijs himself worries endlessly

¹²⁸ See, e.g., Stuart White, *Liberal Equality, Exploitation, and the Case for an Unconditional Basic Income*, *XLV Political Studies* (1997); Eugene Torisky, Van Parijs, Rawls, and Unconditional Basic Income, *53 Analysis* (Oct. 1993) 289, 296 ; Robert Van Der Veen, *supra*.

¹²⁹ See Torisky, *supra*.

¹³⁰ See, e.g., White, *supra*. See also Van Der Veen, *supra*, at 155 (discussing White).

¹³¹ See, e.g., Stuart White, *supra*, at 320 (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* (Thesis, Dept. of Philosophy, University of Amsterdam 1997) (on file with author.)(characterizing compensation

over this objection,¹³² but never 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.”¹³³

Ultimately, Van Parijs’s acceptance of entitlement to credit for scarce resource shares, like his opponents’ rejection of that idea, relies on intuitive notions of fairness that are not amenable to 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 the abstract concept of

extracted for others’ use of shares in inert resources as an “abuse of rights”).

But see Karl Widerquist, *Reciprocity and the Guaranteed Income*, *Politics and Society* Volume 27, #3, Sept. 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 it’s 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 each person’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*, at –.

¹³² See Van Parijs, Free Riding vs. Rent Sharing, Farina et al, *Ethics, Rationality and Economic Behavior* (1996) (responding to this objection); Van Parijs, *Reciprocity and the Justification of an Unconditional Basic Income*. Reply to Stuart White, *XLV Pol. Studies* (1997) 327. See also *Real Freedom for All*, at –.

¹³³ See Karl Widerquist *Who Exploits Who*, at 3 (paper presented to March 8-9 CUNY Basic Income Conference) on file with author.

reciprocal cooperation 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 free-loading are at odds with these insights and uneasily resist their logic. 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 reactions of ordinary people to “something for nothing” are not surprising. Political theory and political psychology emerge from very different processes, which can be expected to give divergent results.

VI. 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 consistent with or required by basic principles of justice yield equivocal results. Although the work of liberal theorists offers valuable insights into this normative questions, a definitive answer remains elusive. The conclusion that transferring earnings from workers to able-bodied non-workers is “unfair,” “unjust,” or exploitative is difficult to derive from the fundamental building blocks for liberal formulations of just 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. On the contrary, 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 a pre-market notion of desert for market rewards and defining a class of the disadvantaged that takes no overt account of personal responsibility or antecedents of distress, Rawls then 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 latter appearing to include the choice whether or not to work. But the inherent instability of these categories leads him to fall back on a “hypothetical insurance” mechanism for identifying the outcomes against which rational actors would collectively hold themselves harmless. Yet that device does not by its own terms 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 a measure of productivity and worth, she staunchly endorses the position that collective assistance must remain conditional on each person making some (undefined) kind of 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 who seek 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, indignation, or gratitude towards slackers in the group. 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.¹³⁴ 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,"¹³⁵ 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 exercise 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 as few basic and uncontested elements as possible. Because an analysis that "incorporate[s] common opinion" cannot be expected to "expos[e] the inadequacies" of common opinion,¹³⁶ the temptation is to leave basic

¹³⁴ See e.g., Fehr and Gächter, *supra*; Fehr and Nowak, *supra*.

¹³⁵ Dworkin, *Sovereign Virtue* at 297 (citing G.A. Cohen).

¹³⁶ Miller, *Principles of Social Justice*, at 52.

intuitions and emotions -- including emotional responses that inform the very notions of fairness we wish to scrutinize -- out of the equation.

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 borrows from 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,” the rules he derives 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.”¹³⁷ 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. 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. Rather we should engage in the following deliberative process:¹³⁸

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.

The potential dissonance between Rawls’s seemingly inclusive and nonjudgmental definition of

¹³⁷ *Political Liberalism*, at 13. See also Will Kymlicka, *Contemporary Political Philosophy* 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.”)

¹³⁸ *A Theory of Justice*, at 20.

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 go about deciding how to reconcile this tension?

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 place are permitted to possess. It is generally accepted that our judgments from the behind the veil should be “impartial” -- that is, they should be unaffected by our parochial and selfish personal concerns.¹³⁹ 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 these creatures behind the veil of ignorance allowed to possess?¹⁴⁰ 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

¹³⁹ See Brian Barry, *supra*; David Miller, *Principles of Justice*

¹⁴⁰ Cf. David Miller, 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.”). This discussion suggests that not all emotions vindicate personal interests alone.

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, 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 acceptable behavior, that would appear to satisfy the test of impartiality that is essential to the integrity of the decisionmaking process behind the veil or in a hypothetical situation.¹⁴¹ Alternatively, a key factor might be whether we can show that the reactions at issue are intrinsic or 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, or even that they form a common element for all cultures.¹⁴²

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 the moral sentiments should be primary.¹⁴³ 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

¹⁴¹ See, e.g., Gilens, Miller, Brian Barry (emphasis on impartiality).

¹⁴² See Wax, *Rethinking Welfare Rights*, *supra* (reviewing support for the view that some moralistic attitudes might have evolved as innate features of our psychology).

¹⁴³ Kant; Hume.

that basic ideas about desert are deeply entrenched and widely shared elements of human psychology. 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.¹⁴⁴ 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 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.¹⁴⁵ By showing why it might have been advantageous for groups to suppress freeloading behaviors, this story shows how the tendency to react negatively to behaviors that can be described as “free riding” may have become firmly rooted in human culture and psychology.

¹⁴⁴ See, e.g., Miller, *supra* (chapter on popular attitudes); Wax, *Rethinking Welfare Rights*; Galston, *Comment on Arguing a Basic Income*; Martin Gilens, *Why Americans Hate Welfare*; Gintis and Bowles, *Is Equality Passe?*, *supra*; Stuart White, *Social Rights and Social Contract -- Political Theory and the New Welfare Politics*, 30 *British J. Of Political Science* 507-522 (July 2000); see also Sober and Wilson, *Unto Others*, at -- (suggesting that abhorrence of free riding may be a key feature of successful cultures and social groups).

¹⁴⁵ For such an evolutionary account, see Bowles and Gintis, *Is Equality Passe?*, *supra*; Wax *Rethinking Welfare Rights*; Wax, *A Reciprocal Welfare Program*.

If these habits of thinking are indeed widespread and robust features of organized human societies, this may help explain why the ordinary notions of “deservingness” of the kind that fuel demands for “work for welfare” may be hard to reason with. It is difficult to argue persons out of these ideas even when they accept basic notions 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 a *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 the components of 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.¹⁴⁶ The logic of evolutionary development is fundamentally at odds with the static, one-shot thought experiments that liberal theorists

¹⁴⁶ See Wax. Rethinking Welfare Rights, *supra*. See also Robert Sugden, *The Evolution of Rights, Cooperation, and Welfare*. For a comprehensive review of work on computer simulations of human social interactions, see Jonathan Rauch, Seeing Around Corners, April 2002 Atlantic Monthly.

favor. The method of choice for working out evolutionary forces is game theory, not a single, ideal 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 as it emerges from the human mind’s evolution over time and under competitive pressure would coincide with the basic principles that issue from contractarian constructs. 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. Cooperative forms of social organization dominated human societies for eons, long before strong centralized governments came upon the scene. 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 advocates of basic income,¹⁴⁷ 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

¹⁴⁷ For additional work advocating basic income, see references in Wax, *Rethinking Welfare Rights*, at 262 n. 17.

cultural conventions, or by the simple use of reason. 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 where the opposition to basic income may have come from, and 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 no longer hold, they may not serve any important functional purpose today. Unlike primitive societies, modern western societies do not face extreme scarcity and can tolerate some degree of shirking. Also, the rise of centralized governments with sophisticated 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. 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 us 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 classify the poor as deserving and undeserving, to classify some dependencies as “free riding,” and to react negatively to persons who violate these norms.

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 our policies of social redistribution would make life better for some or all of the least advantaged, it does not follow that it would be adopted or would remain politically stable. Even though it might work well in practice, basic income may always have an uphill road in the political arena.