Donna M. Byrne*

Locke, Property, and Progressive Taxes

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* Associate Professor of Law, William Mitchell College of Law, St. Paul, MN. This essay had its genesis in the Summer of 1996. Before it was finished, I was diagnosed with breast cancer and underwent a series of treatments that made it difficult to work (to say the least). I would never have picked this up again if not for the love, support, and encouragement of my former colleagues at Widener Law School in Wilmington, Delaware, my new colleagues at William Mitchell College of Law in St. Paul, Minnesota, my family, and the many positive thinking folks I have encountered in the last two years. I owe a particular debt of gratitude to Natan Paradise, Alice Abreu, Phyllis Bookspan, Neil Hamilton, Dan Kleinberger, Denise Roy, and Spencer Tilmon for pushing me, putting up with me, and commenting on earlier drafts. I am also grateful to Nathan Kellett, Eric Fasking, Mark Berhow, and Liz Holland of William Mitchell and Maureen Middleton of Widener for research assistance. Of course, if the ideas are silly, the writing awkward, or the statements wrong, it’s my fault, not theirs.

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I. INTRODUCTION

Although tax scholars have long scrutinized progressive taxation from a variety of vantage points, most of my academic friends take it as given that progressive tax rates are fair. The recent popularity of the flat tax idea, however, is testimony to the possibility that Americans are not as convinced of the fairness of progressive taxes as a sampling of leftist academics might suggest. So what is fair about progressive taxation? Why have taxpayers accepted progressive rate structures for so long? Are progressive taxes compatible with the philosophical underpinnings of our society?

A small, but swelling, wave of recent tax policy scholarship questions the assumptions on which our analytical approaches depend.


2. By flat, of course, I refer to proportional taxes where the rate of tax is flat, although the amount certainly is not.


The recent "flat tax" proposals would do more than change the tax rate structure. They would also significantly change the tax base and are actually consumption taxes, rather than true proportional income taxes. While this important distinction was reasonably clear to tax professionals, it was mostly invisible to the lay public. Most people seemed not to understand that only wage income, and not investment income, would be part of the tax base under the Armey-Shelby proposal (and similarly, under the Forbes flat tax). Under the USA tax, deposits and investments would have been deductible, resulting in the economic equivalent of a tax on consumed wage income.

4. I am grateful to Edwin S. Cohen for pointing out that the federal income tax has always exhibited some degree of progressivity and that progressivity itself seems not to have been at issue when the tax was originally enacted. (Actually, Professor Cohen, in true law professor form, raised the point as a question.)

Sacred norms of economic efficiency, neutrality, and even fairness can (and should) be the subject of critical examination, both in legal and economic scholarship. Recent scholarship has asserted that philosophically and as a matter of Constitutional law, progressive taxation is impermissible.

One recent article, for example, presents the argument that only a lump sum head tax (an "absolutely equal" tax) would be fair and consistent with liberal ideals of individual autonomy. This unpopular position is a response to claims about the fairness of various "flat" tax structures voiced in recent political campaigns. While the lump-sum-head-tax suggestion is unusual, the assumptions and attitudes on which it rests are not. Many of the arguments against progressive taxation seem to rely on attitudes about the poor and assumptions about the rich that are, at best, discriminatory and that would tend to be exploitive if put into practice. Political rhetoric surrounding the tax system often obscures the underlying assumptions and motivations of the speakers. In this essay I examine the often hidden assumptions, attitudes, and philosophical approaches to entitlement to property that appear to support the claims of the anti-progressivity movement. Specifically, I consider the notions of entitlement deriving from the writings of John Locke. The essay responds most participation, 4 FLA. TAX REV. 1 (1998); Nancy C. Staudt, The Hidden Costs of the Progressivity Debate, 50 VAND. L. REV. 919 (1997); Nancy C. Staudt, The Political Economy of Taxation: A Critical Review of a Classic, 30 L. & SOC'Y REV. 651 (1996) (reviewing HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM IN FISCAL POLICY (1938)); Nancy C. Staudt, Taxing Housework, 84 GEO. L.J. 1571 (1996).


7. See Schoenblum, supra note 1, at 270-71.

8. See Marjorie E. Kornhauser, The Rise of Rhetoric in Tax Reform Debate: An Example, 70 TUL. L. REV. 2345 (1996); see also HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM IN FISCAL POLICY 1 (1938) (appearance that fiscal policy is free of "mere ethical considerations" is an empty pretense); Anne L. Alstott, The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform, 108 HARV. L. REV. 533, 546 n.49 (1995). ("A critical evaluation of discourses about welfare and work might also question the social function of the work ethic and punitive treatment of nonworkers.").

9. Such as it is. Professor Schoenblum asserts that there really is no anti-progressivity movement. See Schoenblum, supra note 1, at 223 n.12 (noting that Marjorie Kornhauser, The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction, 86 MICH. L. REV. 465, 468 (1987), expresses concern over the increasing attacks on progressivity). Schoenblum states, "[t]his is difficult to discern in the academic literature, which almost, without exception, uncritically supports progressivity." Nevertheless, the various "flat" tax proposals of the last presidential campaign, the move to reintroduce substantial capital gains preferences, and the appearance of scholarly articles such as Schoenblum's suggest that the opponents of progressivity are more than a few. See also Massey, supra note 1.
ularly to Jeffrey Schoenblum's "absolutely equal" (lump sum) tax proposal because it is the most extreme of the anti-progressive proposals. My objections also apply to the milder forms of anti-progressivity, albeit less starkly.

Some tax scholarship, as well as much of the popular rhetoric, accepts as given a liberal philosophical approach to the world in which individuals are supreme and property is, and should be, owned absolutely by individuals. In this view, individuals are entitled to all wealth that is justly acquired. This idea goes back at least to the seventeenth century and is often attributed to John Locke (unnecessarily, as I argue below). Locke reasoned from the premise that individuals own their own labor, and that mixing labor with a previously unowned resource entitles the individual to own the resulting product. In this way, once upon a time, natural resources originally became subject to private ownership. For Locke, establishing this natural right to property was a necessary step in establishing a role for government in protecting property. Locke's theory of why we own property also sets up a framework within which to analyze the propriety of a government exacting some of that property. In certain extreme versions of the Lockean right to property, to tax land or its proceeds is to deny an individual some aspect of individual autonomy.

Moreover, when an individual makes an effort to produce that which society deems valuable, the individual should be entitled to the resulting accumulation. There are several possible justifications for this entitlement, some of which we explore below. The significance of the theory, however, is that different levels of labor mixing result in differences in wealth.

This approach seems to suggest that voluntary effort is the only reason (or substantially the main reason) that wealth accumulates.

10. See, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985); Nozick, supra note 1; Schoenblum, supra note 1.
12. Locke was responding to Sir Robert Filmer, a contemporary who held that kings, by divine right, had total authority over their subjects. See John Locke, First Treatise of Government, in Two Treatises of Government § 3, at 160 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) [hereinafter Locke, First Treatise]; see also John Locke, Second Treatise of Government, in Two Treatises of Government, § 22, at 301 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) [hereinafter Locke, Second Treatise] (to the contrary, Locke responded, "[t]he Natural Liberty of Man is to be free from any Superior Power on Earth . . . ").
13. See Locke, Second Treatise, supra note 12, § 27, at 305-06. This argument was to fly in the face of notions such as divine right, absolutism, and patriarchy. Locke's predecessors such as Filmer and Hobbes believed that property was derived from divine authority or patriarchy and that, therefore, no property could exist in the state of nature.
and that by virtue of their efforts, people are entitled to their accumulations. While differences in talent and ability also affect accumulation of wealth, we must respect these differences in talent if we respect people as individuals. Thus, the argument proceeds, differences in talent and ability are not to be taxed away. Rather, if the market rewards an application of talent, respect for the individual means that we must respect the rewards to the individual's efforts.14

What are the implications of such a belief system for policy choices? At the extreme, a strong theory of private property including entitlement to all returns to labor precludes most taxation.15 Under more moderate versions it precludes progressive taxation and may even require regressive taxation.16

In this essay, I argue that the version of liberal philosophy that opponents of progressive taxation espouse is not the only possible modern interpretation of Locke's respect for individual autonomy and, indeed, is not the best application of Lockean property rights to tax

15. A somewhat related argument is that progressive taxation constitutes a taking under the Fifth Amendment. See Massey, supra note 1. Although usually not taken seriously, the takings argument has reappeared in a recent article by Professor Calvin Massey. Borrowing from Richard Epstein, Massey argues that the Takings clause requires that federal taxation satisfy the benefit theory of taxation, which says simply that taxes should be levied relative to the benefits the taxpayer receives from the government. Because the benefit theory does not conclusively require progressive tax rates, Massey argues, progressive rates must violate the Takings clause. Massey's analysis of the benefits derived from government is incomplete, poorly reasoned, and reveals typical anti-progressive attitudes about wealth accumulation.

While the lump sum suggestion and the takings suggestion usually do not get serious attention, the suggestion that only a lump sum tax is consistent with the philosophical underpinnings of society should be taken very seriously. See generally Schoenblum, supra note 1. If Professor Schoenblum is correct, we have a real problem. We ascribe simultaneously to two mutually exclusive theories: First that all wealth obtained is morally deserved and should not be taken, and second that it is somehow unfair to expect someone who has landed in unfortunate circumstances to be able to contribute as much as someone who has experienced greater financial success.

rate discussions. Because I conclude that a philosophical middle ground is also defensible, I reject the suggestion that the only philosophically honest tax is a lump sum tax. Nevertheless, I applaud those who raise the question of how we decide what is "fair."

I argue here in favor of a philosophy derived from Lockean individualism but compatible with "unequal" taxation. I begin by outlining John Locke's theory of property and consider the possible justifications for that theory. Next I examine the implications of the theory and its usefulness for tax rate theory, emphasizing the failings of the traditional arguments in light of this discussion. Finally, I suggest a new model of "marginal deservedness of income" based on the justifications of Locke's theory of property.

II. LOCKE

The purpose of this section is to outline John Locke's theory of entitlement to wealth and to examine two ways of justifying this theory. One of the main objections to unequal taxes is really an objection to mandatory redistribution of wealth, which in turn, is based on some sense of entitlement to that wealth. To address the issue of unequal taxation, then, it makes sense to unpack the underlying theory of entitlement to wealth.

In Book II of his famous Two Treatises on Government, John Locke addressed the question of how property came to be privately owned. He started from the premise that God had given all resources to all of humanity in common, a position that was a rebuttal argument to another theorist of the time, Sir Robert Filmer. According to Filmer, kings had a divine right to claim all property for themselves, and consent from the monarch was thus required for appropriation of hitherto unclaimed property. Filmer's position on property derived from his belief that monarchs had absolute authority over

17. My colleague Dan Kleinberger points out that the objection could really be leveled at government choices affecting how wealth is redistributed.
19. As this starting point demonstrates, Locke was basically a natural rights theorist. While "natural law" may be somewhat out of vogue these days, "natural" notions of property seem to underlie much of modern thinking about markets, fairness, and entitlement to wealth.
21. See Locke, First Treatise, supra note 12, § 3, at 160. See generally, e.g., Edward Rutherford, London (Ballantine Pub'l'g Group 1998) (1997) (containing a fascinating account of the rise of modern London from its pre-Roman beginnings). According to Rutherford, "[K]ing James had somehow persuaded himself that since monarchs were anointed by God, they ruled by Divine Right—which meant that their subjects must obey them because they could do no wrong." Id. at 708.
their subjects. Under Locke's view, however, unclaimed resources belonged to all of humanity, not to the monarch, and were thus available to all for the satisfaction of subsistence needs.\textsuperscript{22} In addition, unclaimed resources really were unowned and not commonly owned, so there was no need to seek permission from the community before appropriating such resources for private use.\textsuperscript{23} Rather, anyone could appropriate as much of the common abundance as necessary for personal consumption by simply expending the effort to do so.\textsuperscript{24}

In response to Filmer's claim that monarchs had total authority over their subjects, Locke argued in favor of a natural freedom. Locke argued that each individual owns, at a minimum, his or her own labor.\textsuperscript{25} By mixing (personally owned) labor with unclaimed resources, one could establish private property rights in previously unowned resources and one could appropriate as much as necessary for personal survival.\textsuperscript{26} No one was entitled to more than was necessary for subsistence, however, because the excess would spoil before it could be consumed. Locke saw this waste as a bad thing.\textsuperscript{27} In addition to the no-waste limitation, Locke qualified his labor-mixing principle with the proviso that one must leave “enough and as good” for others.\textsuperscript{28} For

\begin{quote}
This belief continued with Charles I who “believed implicitly in his Divine Right.” Id. at 711.
\end{quote}
\textsuperscript{22} See \textit{Locke, Second Treatise}, supra note 12, § 25, at 303-04; see also Justin Hughes, \textit{The Philosophy of Intellectual Property}, 77 Geo. L.J. 287, 288-298 (1988) (outlining the Lockean property theory with the statement that individuals acquire goods held in common through a grant from God). God grants the bounty of nature to all of humanity with the requirement that individuals must mix their labor with the goods before converting them into private property. This labor thus adds value to the goods.

\textsuperscript{23} See \textit{Locke, Second Treatise}, supra note 12, §§ 27-28, at 305-07.
\textsuperscript{24} See id. § 31, at 308.
\textsuperscript{26} See \textit{Locke, Second Treatise}, supra note 12, § 37, at 312 (“Men had a Right to appropriate, by their Labour, each one to himself, as much of the things of Nature as he could use . . . .”).
\textsuperscript{27} See id. §§ 37-38, 41, at 312-15. But this raises another question: in the pre-market state, does Locke see any limit to appropriation other than the fact that some wealth might go to waste? Is there something inherently morally wrong about overappropriating if it does not mean too little left for others? In other words, should we have cared about waste in the first place if it did not hurt anyone? See id. § 46, at 318 (“[It was a foolish thing, as well as dishonest, to hoard up more than he could make use of.”).

Indeed, the reason hoarding of gold and silver is acceptable for Locke is that these metals “may be hoarded up without injury to any one, these metalls [sic] not spoiling [sic] or decaying in the hands of the possessor.” Id. § 50, at 320.

\textsuperscript{28} This qualification, sometimes referred to as the “Lockean Proviso,” has been the topic of much scholarly attention. See, e.g., Sanders, supra note 20, at 373 (“Because there is a restriction on the whole notion of private property, one that involves the need of others, this restriction must be taken into consideration in the initial acquisition of property.”); see also Hughes, supra note 22, at 297 (“The
Locke, the "enough and as good" proviso was not particularly limiting, since all of America seemed to be a vast source of unclaimed resources ripe for labor-mixing. Modern scholars, however, have puzzled about how to apply the proviso in a world with relative scarcity. As long as there is plenty to go around, there is nothing controversial about the labor-mixing principle, but under modern conditions of relative scarcity, the contours of the labor-mixing theory are less clear.

Markets and money also complicate the applicability of Lockean labor mixing because money makes accumulation beyond subsistence possible without spoilage. One might gather extra acorns, for example, and trade them for another's extra venison. As long as only perishables are traded, the spoilage restriction remains operable; the total harvest will be the amount necessary for everyone to subsist. But if people trade for money, the spoilage limitation loses its force. By using money, one may appropriate resources beyond immediate needs and trade the excess for something that doesn't spoil—gold. If some goods are scarce relative to the demand for them, their owner will be able to trade the scarce good for more than enough money to satisfy subsistence needs. The extra accumulation is a reward derived from the scarcity-driven demand for the product of the gatherer's labor. The use of money in a state of scarcity allows some first appropri-
ators to accumulate large amounts of wealth not only by appropriating more than they can use themselves, but also by reaping the rewards of scarcity-driven demand for the products of their labor.

Locke specifically allowed for excess accumulation in a money economy, noting that differences in "industry" would result in differences in the amount of money accumulated. But some level of scarcity is nearly a prerequisite for currency to function. In Locke's words, "where there is not something both lasting and scarce, and so valuable to be hoarded up, there Men will not be apt to enlarge their Possessions of Land were it never so rich, never so free for them to take." The result is to allow excess accumulation when, by definition, at least one good is scarce. For Locke, money (a durable, non-spoiling, scarce good) explains how an individual could "fairly possess more land than he himself can use the product of." This inequality is fair, only because the scarce good is money, the accumulation of which harms no one. But when something necessary for subsistence becomes scarce, the theory offers no justification for inequality. So in addition to questions about how to apply the "enough and as good" proviso, issues can be raised about how to view greatly unequal accumulations resulting from market forces, when the underlying property principle is the Lockean labor-mixing theory, and something needed for survival is scarce. This is exactly the context in which liberal theory matters to us now, and if we want to discuss the fairness of government taking a portion of one's accumulation, the first question we have to ask is who holds what moral claim to the property.

Why exactly should the mixing of labor with a resource establish ownership? As Justin Hughes has pointed out, the labor-mixing approach can be viewed in two ways, depending on one's view of human nature. In both views, economic activity is a positive value that should be encouraged. In the instrumentalist view, labor is unpleasant and people will be induced to perform labor only if they can be

33. See id. at 319 ("And as different degrees of Industry were apt to give Men Possessions in different Proportions, so this Invention of Money gave them the opportunity to continue and enlarge them.").
34. In theory, markets arise whenever there are advantages to specialization or when consumer preferences do not match the initial distribution of resources. From an individual perspective, some resource is scarce and must be purchased at a negotiated price. When a resource is in abundant supply, however, producers stop producing or leave the market until the product becomes scarce enough to bring a price that will sustain the producers. When that relative scarcity is absent, producers fail, as is now happening in certain agricultural sectors.
35. Locke, Second Treatise, supra note 12, § 48, at 319.
36. See id. § 50, at 319-20.
37. See Sanders, supra note 20, at 378 (noting interpretation questions revolving around "enough and as good").
38. Should this position be challenged? Consider environmental destruction, slavery, and cultural imperialism as products of the absolute value of economic activity.
assured of the right to keep the product of the labor. So one possible justification for Locke's labor-to-private property result is that the possibility of accumulating property is an incentive to give up leisure in favor of labor, and the institution of private property (beyond subsistence needs) is necessary to induce economic activity. In the more extreme versions of this approach, strong property rights are necessary to provide protection against the "limitless self-interest" of freeloaders. Without adequate rewards, economic activity simply would not be worth the effort.

Market behavior supports the instrumentalist position only to a point. It is not necessarily true that people work more in response to higher after-tax wages, for example. Professor Robert Frank notes that over the last century the average real wage in this country has increased dramatically. Theoretically, this should have encouraged people to work more hours. Yet the length of the average workweek is now shorter than it was at the beginning of the century. In the most recent part of that century, however, median after-tax wages have declined slightly over the last twenty years but the number of hours worked has been increasing over this period. Rather than responding to a lack of incentive, people seem to be trying to maintain a constant level of purchasing power in the face of lower wages.

Professor Frank theorizes that a far more significant inducement to increased effort is the extent to which higher relative performance results in higher rewards. The incentive to perform is the chance of coming out on top, rather than the promise of greater absolute re-

39. See Hughes, supra note 22, at 288 ("This [Lockean] labor justification can be expressed either as a normative claim or as a purely incentive-based, instrumental theory."); see also Margaret Jane Radin, The Liberal Conception of Property: Cross Currents In the Jurisprudence of Takings, 88 COLUM. L. REV. 1667, 1683 (1988) ("In this [Hobbesian] model of human nature, limitless self-interest and the consequent urgent need for self-defense require the most expansive possible notion of private property . . . .").

40. See Hughes, supra note 22, at 288-298 (advancing two theories to explain why property rights should be the reward for mixing labor with land).

41. See Radin, supra note 39, at 1683-84.


43. See FRANK, supra note 42 at 5. This is the income effect in action.

44. See id. at 14 ("Indeed, it is fair to say that virtually all top decile earners in the U.S. are participants in labor markets in which the rewards depend heavily on relative performance.").
wards. Thus it is not even clear that as an empirical matter, absolute entitlement to economic rewards is necessary to induce economic activity.

The second view of Lockean labor-mixing is that labor is virtuous and, therefore, deserves reward—a desert theory. This view has a much more moral overtone and may be reflected in current attitudes about wealth and virtue. There are at least two variations on the desert theme. One is that labor is virtuous in its own right. Locke saw the plenitude of the natural world as a divine gift that could only be enjoyed through the application of labor; God intended that humankind prosper by using the abundance provided. Thus, in a sense, labor fulfills divine design by making the riches of the natural world available. In addition, Locke saw labor itself as divinely commanded. If labor fulfills some holy design, then it may be seen as virtuous in its own right and deserving of some reward.

A second possible desert theory is that labor deserves reward because private property ultimately provides benefit to society.


46. Some entitlement to reward is necessary to the extent that money functions as the "grades that grown-ups get." If money represents levels of prestige, then the existence of any difference in reward is more important than the magnitude of that difference. (Thanks to Dan Kleinberger for this analogy).

47. See Kornhauser, supra note 11, at 131 (stating that Americans are impelled to save money as a result of moral and economic virtues in order to help oneself and society); see also Marjorie E. Kornhauser, Equality, Liberty, and a Fair Income Tax, 23 Fordham Urb. L.J. 607, 614 (1996) (defining the principle of desert as when an individual "deserves" or merits the distribution because of some personal characteristic such as ability, effort, or talent).

48. Locke, Second Treatise, supra note 12, § 31, at 308 ("God has given us all things richly." (quoting I Timothy 6:17)).

49. Id. at § 32, at 308 ("God, when he gave the World in common to all Mankind, commanded Man also to labour, and the penury of his Condition required it of him."); see also Marjorie Kornhauser, supra note 47, at 125 (noting that American ideas about wealth and money stem partly from the notion of service to God through a vocation).

50. See Waldron, supra note 31, at 402 (stating that some account is needed of why productive labor is meritorious).

51. See Hughes, supra note 22, at 305 ("[W]hen labor produces something of value to others—something beyond what morality requires the laborer to produce—then the laborer deserves some benefit for it.")
Wealth is evidence of society's gratitude for value created. For Locke, uncultivated, non-productive land was practically worthless. Working the land added value in the form of produce which could be used for subsistence or for trade, ultimately to provide subsistence for others. Even excess accumulation is beneficial in this view because it creates potential value for the rest of society. In the case of land, productive use of privately owned land means that goods become available for purchase. Some theorists have interpreted the “enough and as good” proviso as applying to the market as a whole so that making goods available for purchase is somewhat analogous to leaving “enough and as good.” In addition, because labor is necessary for land to be productive, bringing land into productive use creates yet more demand for the labor of others.

Thus, desert may also result from the value that those with high incomes have contributed to society. The notion is related to Pareto optimality, the economics principle that suggests that a voluntary trade will only take place if both parties are as well or better off after the trade than they were before. In a voluntary trade, the two things traded have relatively equal value, since neither side would willingly pay more than the value of the good or service being received. The

52. See Locke, Second Treatise, supra note 12, § 43, at 316 (“‘is Labor then which puts the greatest part of Value upon Land, without which it would scarcely be worth any thing.”).

53. “Thus the Lockean proviso is not violated if someone takes land out of the commons in excess of his or her pro rata share, so long as the benefits to others resulting from the excess land being placed in productive use exceed the value of the excess land which is taken.” Geoffrey P. Miller, Economic Efficiency and the Lockean Proviso, 10 Harv. J.L. & Pub. Pol’y 401, 407 (1987); see also Hughes, supra note 22, at 305 (stating that labor-desert theory provides reward for labor because labor creates social value); cf. Sanders, supra note 20, at 393 (arguing that society should not prohibit labor that does not provide benefit to the community).

54. Locke, Second Treatise, supra note 12, § 40, at 314 (“[C]onsider, what the difference is between an Acre of Land planted . . . and an Acre of the same Land lying in common, without any Husbandry upon it, and he will find, that the improvement of labour makes the far greater part of the value”). So, for example, even if one country were to scoop up all the ocean floor manganese nodules, this would be far better than leaving this “common heritage” of mankind on the ocean floor. See Arvid Pardo, An Opportunity Lost, in Law of the Sea: U.S. Policy Dilemma 23 (Bernard H. Oxman et al. eds., 1983).

55. This is somewhat problematic. Under the labor-mixing theory, labor that makes land productive should result in ownership of the land or at least its produce. See Barbara Fried, Wilt Chamberlain Revisited: Nozick’s “Justice in Transfer” and the Problem of Market Based Distribution, 24 Phil. & Pub. Aff. 226, 245 n.39 (listing possible arguments for property rights in economic rents).

56. This assumption is reflected in the tax definition of fair market value: “The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.” 26 C.F.R. § 20.2031-1(b).
seller, then, is seen as providing value to the buyer, the extent of which value is measured by the amount the buyer is willing to pay. Accordingly, we can be confident that high incomes simply reflect the value that their recipients have contributed; the evidence is that others voluntarily paid the sums involved in return. In other words, one could argue that an individual is entitled to the marginal product of his or her labor.58

There are two fundamental problems with this form of desert argument. First, the fact that something has market value need not imply that providing it should create an entitlement to wealth in any moral sense. Anecdotal evidence suggests that there is a mismatch between what people deem to be important and what is highly compensated. For example, most parents would rate their children and their obligations to their children as of very high importance. But daycare workers command relatively low salaries. Similarly, the teachers who are entrusted with the education of the next generation of leaders and citizens receive only moderate salaries at best, notwithstanding the importance to society of the function they perform. Recent challenges to the quality of public school education notwithstanding, it is hard to argue that these jobs do not add considerable value to society. But this “value,” apparently, is not something the market rewards. On the other hand, many people despise lawyers because they are seen as contributing to the unnecessary complexity of the law and as inducing people to be more adversarial and litigious. Yet lawyers are often very highly paid. Do lawyers create value in the same way that teachers create value? Some kinds of value do not translate well into market terms.59

Second, to the extent that markets are incomplete or imperfect, the price something reflects in the market may not be the equilibrium price that would result in perfect competition, but may represent some level of monopoly rent. How can value conferred on society, as measured by income, accurately determine desert when the producer or seller has monopoly power? This is a problem of scarcity. A scarce good commands a high price because consumers who value the good very highly will outbid other consumers for the limited quantities

58. See Fried, supra note 56, at 245 n.39 (defending individual entitlements to her marginal product of labor on Lockean and Hayekian grounds).

59. Those differences in pay may not trouble us from an instrumentalist perspective when we consider the intangible, psychic benefits of teaching that may be lacking in the practice of law such that the net utility of the one job is not so different from that of the other. From a desert perspective, however, focusing on the net benefit to the teacher is improper; our focus now is the benefit conferred on society.

In some cases, market values may reflect historical attitudes and values. For example, teachers and nurses may be undercompensated because these positions have typically been held by women.
available. Potential consumers who are outbid presumably do not value the good as highly as the successful bidders. But this analysis assumes that the only relevant question in determining price is willingness to pay. Ability to pay is simply assumed (or disregarded). It may be that poor individuals would derive even greater utility from the good if they had the means to purchase it. A concept of value that assumes across-the-board ability to pay, then, seems to be an inaccurate way of determining the moral brownie points that should accrue to provision of goods or services in an imperfect market. In addition, the market model only registers improvements in utility for the direct participants. The preferences of non-participants are ignored.

Thus the definition of value as it applies to economic market models is inadequate in describing desert. By definition, the market value of a good is the amount people are willing and able to pay. That definition of value may be fine for analyzing market incentives. But if our theory is that a seller is morally entitled to all of the proceeds from a sale because the seller has contributed value to society, a different understanding might be more appropriate. A utility-based concept of value, for all of its difficulty of measurement, might be more appropriate to a theory of desert than a value theory that is limited by ability to pay. Development of such a desert theory, however, is beyond the scope of this essay since it shifts the focus from the individual providing goods and services, whose autonomy we wish to respect, to a focus on those individuals acquiring the goods and services. A utility-based theory would require assumptions about the utility of goods and services to various purchasers independent of the price actually paid. The focus here, however, is whether the provider of the good/service is morally entitled to it.

We usually speak of income as if there were a direct correlation between income and effort—more effort means more income, and high income implies high effort. We would have a much more accurate picture if we recognized that a part of most incomes derives not directly from effort, but from luck, inheritance, or some other type of serendipity. Since both the desert theory and the instrumentalist theory of labor-mixing derive entitlement to wealth from the combination of labor (effort) and an unowned resource, neither form of the labor-mixing theory adequately explains our apparent belief in equal moral entitlement to all income.

Under either a desert or instrumentalist theory of labor-mixing (where desert is tied to the labor itself rather than to the market society's response to the product), it is possible to make a distinction between that part of the market returns that truly rewards an individual's efforts and that part of the returns that rewards luck, in-
heritance, or scarcity. Yet this is a distinction that usually is not made. Indeed, the level of effort almost seems irrelevant.

It seems clear that Locke had a high regard for individual effort as well as for individual autonomy, and to a large extent, effort is still a factor in desert. Indeed, a frequent argument against redistribution of income is that someone who worked hard should not be penalized merely to benefit one who chose leisure over work. Moreover, recent empirical studies show that people feel the most morally entitled to wealth they earn through personal efforts. But even though on a conscious level we seem to believe that effort should matter, as a society we do not reward effort. Rather, effort or exertion only appears to be the justification for accumulation of private property. Actually, the level of effort or exertion seems to be of minor significance when compared to the effectiveness of the effort. Actual achievement, rather than the labor that went into it determines desert to a greater extent than does effort.

The conclusion that effort matters little and outcome matters a lot is somewhat consistent with the basic Lockean labor-mixing theory. If a resource is unowned, then even a small amount of personal effort

60. This concept of value has been called the "social increment theory of valuation." See John J. Costonis, The Disparity Issue: A Context for the Grand Central Decision, 91 Harv. L. Rev. 402, 415-416 (1977).

61. In some cases, even a value-added formula may be difficult to identify. For example, in 1996 the CEO of Green Tree Financial reportedly earned $102 million. Under a revised formula, he would have earned a meager $7 million plus stock options, according to the St. Paul Pioneer Press. See D.J. Tice, What's the Answer on Skyrocketing CEO Pay?, St. Paul Pioneer Press, July 23, 1997, at 6A.

62. See David Miller, Distributive Justice: What the People Think, 102 Ethics 555, 562 (1992) (explaining that in studies where people judge an appropriate reward depending upon achievement, the notion of effort is also important because "it is possible for a person who achieves less but tries harder to deserve more than another who tries less but achieves more.").

63. See Kornhauser, supra note 11, at 139 (noting that income tax has been denounced as "rewarding the idle and the wastrel"); see also Elizabeth Hoffman & Matthew L. Spitzer, Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice, 14 J. Legal Stud. 269, 273 (1985) (describing broad theories of distributive justice and empirically testing behavioral responses against these theories). Professors Hoffman and Spitzer showed that in an experimental setting, people behave as if effort is the most important factor in deciding how rewards should be distributed among participants. See id. at 266.

64. See Miller, supra note 62, at 562 (explaining that "effort does not obliterate achievement: with effort held constant, the one who achieves more deserves more, so presumably the view is that ability can count toward desert when it is combined with effort but not when it stands alone").

65. This is one of the arguments against high compensation for corporate executives. See Tice, supra note 61 ("People try to believe that skill, hard work and a decision to focus on monetary rewards (plus luck, usually) largely explain why some Americans are richer than others. Corporate America can't afford executive pay so extravagant and seemingly exploitative that it destroys this fragile confidence.").
will convert the resource to private property simply by establishing a right in the property that is stronger than any other right. One who is able to gather a lot of acorns with little effort is just as entitled to them as is someone who expends a lot of effort.66 In the face of plenty, a lot of ineffective effort brings no greater reward than a little effective effort.67 The effectiveness principle is even clearer, however, in a money economy. The use of money, as we noted above allows appropriation of scarce resources beyond an individual's personal needs. Scarcity creates demand at a relatively higher price, allowing even greater accumulation of wealth. So as a theoretical matter, Lockean regard for individuals results in rewarding effort, but in practice something else must be going on.

As noted above, money effects a fundamental change in the application of the labor-mixing theory because money does not spoil. The result is “disproportionate and unequal possession of the Earth.”68 Differences in “industry” result in unequal appropriations, and these differences can then be enlarged in the marketplace. The resulting distribution is unequal partly because of differences in effort but even more so because of differences in the market demand for different goods. In other words, wealth accumulates as a result of effort that is effective in producing market value. Ineffective effort, no matter how earnest, is simply not rewarded. Property ownership, then, is the reward of individual effort, to be sure, but it is greatly affected by the workings of the market as well. So what was forbidden in a state of abundance—appropriation beyond immediate needs—is perfectly acceptable and even rewarded in a money-driven market economy.

III. SOCIAL INCREMENT APPROACH

As we have seen, a Lockean-derived respect for the autonomy of the individual does establish the appropriateness of some disparity of wealth or income. But it does not account for all of the disparity. Part of the disparity results from societal factors for which the individual is not responsible. To backstep just a bit, I have described how Locke's theory of property derives from individuals' ownership of their own labor. But how much property must necessarily be the reward for labor? Neither the instrumentalist nor the desert theory provides a clear answer. Under a desert theory—that property is a reward for

66. Consider Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805), which held that a dead fox belongs to the hunter who shot it, not to hunter who chased it all day and cornered it. The only labor that counts for anything is the labor that actually brings down the fox.

67. See Sanders, supra note 20, at 393 (arguing that not all labor is “successfully” invested, but that this is irrelevant to the labor-mixing criterion from a justice perspective).

virtue or a sign of virtue—if the virtue being rewarded is effort, wealth only needs to be proportionate to effort.\textsuperscript{69} In fact, wealth is often (if not usually) vastly disproportional to effort. Thus, if effort is the virtue to be rewarded, a lot of wealth is not morally deserved, but is a windfall. Under the instrumentalist theory—that material reward is necessary to induce effort—only the material effort necessary to induce effort is justified. In fact, other factors also induce effort, and material compensation is likely to rise far beyond the level necessary to assure continued effort. These claims deserve closer examination.

IV. DESERT THEORY

If effort is the virtue to be rewarded, a lot of wealth is not morally deserved. But we have said that we do not reward the virtue of effort so much as the virtue of efficacy.\textsuperscript{70} Does the fact that we do reward efficacy mean that we respect it as a virtue? We also reward luck. Studies have shown that people regard effort as more virtuous and deserving of reward than luck. For example, in one study, subjects in one group were asked to play a short game that appears to require skill, but actually requires very little, the outcome generally depending on who gets to go first.\textsuperscript{71} The winner of the game becomes the "controller" for a decision regarding how much money each player will be paid. Another set of subjects also had to make a decision regarding distribution of money, but the controller was chosen by coin toss. When the subject "earned" the right to be controller by winning the game, the distribution of money chosen was much more likely to be

\textsuperscript{69} But, the reader argues, not all effort is equal. Some effort amounts to just going through the motions, not real effort. Of course it is possible that some people would muck along making only half-hearted effort. A system that rewarded quantifiable effort rather than outcome would certainly have some free riders. The current system of rewarding outcome has the same effect, however, along with the failure to reward a lot of honest hard effort that produces little or that is abundantly available. If desert accrued to effort, everyone would at least have to go through the motions. The market could enforce the integrity of the effort. Those who did not really exert would find themselves without the opportunity to make an effort at all. In theory, this is already true. The problem is that we seem to assume that lack of effort is the only factor.

\textsuperscript{70} See Rose, \textit{supra} note 28, at 437 (original appropriators seen to deserve reward "because they do a public service by starting a property system that encourages investment and care in the use of resources"); John Stick, \textit{Renegotiating a RUM Deal}, 81 Nw. U. L. Rev. 443, 448 (1987) (stating that rational utility maximizer suggests that only property owners are productive members of society).

\textsuperscript{71} See Hoffman & Spitzer, \textit{supra} note 63, at 268-69, 273. The game was very simple. Two players are shown a series of 17 vertical hash marks, which they must take turns crossing off. Each player in turn crosses off 1, 2, 3, or 4 hash marks. The person who crosses out the last hash mark loses the game. (Go ahead, try it. Great stuff for faculty meetings.)
disproportionate in favor of the controller. When the controller was chosen by coin toss, however, the distribution of proceeds was more even, the principle apparently being that effort and ability create desert but luck does not.\footnote{See id. at 282-283 (noting that subjects regarded position of controller as justified right after playing the hash mark game).}

How could it be then, that we would regard the lucky investor as more virtuous than the wage laborer? On its face, the question seems absurd, but higher incomes are likely to include investment income, while lower incomes are more likely to consist solely of wages. If high income is somehow a sign of virtue, then the lucky investor exhibits more evidence of virtue than the wage laborer. The failure to make a distinction between effort and outcome leads us to treat efficacy as a surrogate for effort,\footnote{See Thomas Ross, Taking Takings Seriously, 80 NW. U. L. REV. 1591, 1601 (1986) (describing Epstein's argument that "providing welfare increases the number of people who will forego productive lives and choose to be supported by society" as at best "perfunctory and lethargic").} and in our confusion, we assume that the greater output required the greater input. Opponents of progressive taxation often invoke images of idle poor and industrious wealthy people to support arguments against redistributive taxes.\footnote{See Schoenblum, supra note 1, at 261 (presenting a situation where a person worked her way up from poverty to be a successful medical doctor while her old friends can now barely get by because of their "lack of willpower and determination").}

But where Locke's theory starts with effort (labor) to explain an entitlement to wealth, our approach is backwards and circular. We take the existence of wealth and assume it all resulted from effort (labor) and then rely on that very effort to establish entitlement to wealth, an entitlement that resists taxation. Locke's theory does not explain an entitlement to all wealth, but only to that wealth that results from effort (labor). We add a first step of converting all wealth into the result of effort.

V. INSTRUMENTALIST THEORY

Material compensation often exceeds the amount needed to induce effort. Under an instrumentalist approach to wealth the analysis is similarly inadequate. The instrumentalist rationale, again, is that the effective effort must be rewarded to induce people to engage in more productive effort. Yet this rationale for property does a poor job of justifying rewards that are disproportionate to effort. If the role of property is to encourage effort, then one should be entitled to as much property as is necessary to induce the desired effort, but not more. Yet when reward is based on efficacy of effort—efficacy in terms of pro-

\footnote{See Hoffman & Spitzer, supra note 63, at 273. ("Lockean theory . . . has room within it for differences in efficacy of effort: even if two people spend the same}
viding something that the market is willing to pay for—rather than the level of exertion—76 the reward may go beyond that needed incentive. Individual levels of effort, like individual utility curves,77 cannot be quantified. It is easy, however, to measure the amount that society is willing to pay for the results of that effort. It is only when the amount of a good or service is directly tied to the time spent providing it that we make any clear attempt to reward the effort itself. So hourly workers earn more if they work forty hours a week than if they work thirty. The hourly rate, itself, however, has little to do with the amount of effort involved in the task.78 Rather, it is a measure of the “value” placed on the product of the labor, and only a very small portion of that value is tied to the actual effort expended.79

VI. THE REST OF THE STORY—THE SOCIAL INCREMENT OF VALUE

There is room within Lockean property theory for a distinction between wealth that is the fair reward for engaging in productive labor and wealth that is the result of luck.80 Locke’s theory really only re-

76. For a more vernacular statement of this principle, see Rosina B. Barker and Jasper L. Cummings, Jr., Interview With Thomas F. Field, 15 ABA Sec. of Tax’n Newsl. 13 (Summer 1996). Thomas Field, the founder of Tax Analysts, a major tax information publisher describes his start in tax publishing as “an illustration of the old adage, ‘better lucky than smart’ . . . . And step-by-step, little by little, very much to our surprise, we have found ourselves to be a factor in tax publishing. It is all an accident.” Id. at 13-14.

77. The inability to make satisfactory comparisons of utility functions among individuals has long confounded the declining marginal utility of income theory. But see Mark S. Stein, Diminishing Marginal Utility of Income and Progressive Taxation: A Critique of the Uneasy Case, 12 N. Ill. U. L. Rev. 373, 374 (1992) (defending the concept of declining marginal utility of income).

78. Jennifer Hochschild interviewed people to determine their attitudes about income distribution and desert. She concluded that people believe that factors within the workers’ control, such as effort, should create desert, but that they also believe that actual achievement should create desert. For example, a lazy janitor should receive less than a hardworking one, but even a lazy doctor should receive more than either. Jennifer Hochschild, What’s Fair: American Beliefs About Distributive Justice 112 (1981), cited in Miller, supra note 62 (reviewing works in political theory on social or distributive justice and empirical studies of attitudes about distributive justice).

79. See Henry C. Simons, Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy 20 (1938) (noting the effect of market demand on wages over and above the amount of wages necessary to induce performance of services: “What competing firms must pay to get experts away from one another is vastly different from what society would be obliged to pay in order to keep the experts from being ditch-diggers”).

80. See Hoffman & Spitzer, supra note 63, at 273; Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1685 (1988) (stating that commitment to individual secur-
quires the conclusion that individuals are entitled to some return for their own labor or for the unpleasantness of having worked. To the extent that wealth accumulation results not from labor, but from luck, inheritance, or heredity, an individual's moral claim to that wealth is much weaker. Society, itself, may also have a role in the production of wealth even if only through the facilitation of markets that allow the trading that produces unequal accumulations of wealth.

Professor Barbara Fried makes this point with respect to natural talent, which can be seen as the result of pure luck. If one mixes labor with that natural talent, the labor deserves to be rewarded, but because labor per se is not in short supply, the market price represents more than fair compensation for the labor. The part of the market price that exceeds the fair return to labor is more like monopoly rent—the price is high not because of any virtue of the talented worker, but because there is more demand for the talent than there is supply of it. Fried notes that there is an argument that society, which has supplied the demand for the talent, has just as good a claim on the surplus value generated by talent as does the athlete who simply has the good fortune to be born with that talent. No amount of innate talent would have value if it did not match the preferences of some market segment.

Intellectual property offers another example that supports this point. Intellectual property scholars make a distinction between an idea and its expression. There is no market for ideas without expression, just as there is no market for talent without effort and no

81. See also Barbara H. Fried, Fairness and the Consumption Tax, 44 Stan. L. Rev. 981, 1008 (1992) (extending Lockean theory to the act of saving because of the sacrifice involved).
82. Inheritance raises interesting cross-generational issues. Part of the incentive for parents to work may be to leave a legacy for their children, and that legacy should be treated as part of the parent's desert. But when we consider the child's income derived from that inherited wealth, it is appropriate to focus on the child's efforts rather than the parent's. Thus inherited wealth provides an income stream for which an individual does not labor.
84. See David N. Hyman, Economics 386-87 (3d ed. 1994).
85. See id.
87. See Curtis C. Berger & Joan C. Williams, Property, Land Ownership and Use 77-85 (4th ed. 1997); Justin Hughes, supra note 22, at 310. Professor Hughes notes, however, that courts have never developed a clear distinction between idea and expression, but goes on to develop the idea at least on a conceptual level. See id. at 312-13.
market for unappropriated natural resources. It makes sense that there should be no market for unexpressed talent and ideas. From an instrumentalist perspective, no amount of incentive can induce talent to appear where it does not exist, and to a certain extent, incentives cannot create "aha" experiences. Although "aha" experiences may follow extensive research and thought, they are often serendipitous.

Once an idea is expressed, however, it becomes owned because of the expression. Thus it is only the effort involved in expressing the idea that creates entitlement to the idea and its proceeds. Accordingly, that effort should be rewarded either to encourage more of it, or as a reward for having made a valuable product available. But the price the market places on the expressed idea often reflects much more than the effort that went into expressing the idea. The market price also reflects society's response to the idea. Thus it is the interaction between society and the fortunate talented individual that results in accumulation of wealth.

Similarly, actions of government in the public interest may result in private profit. For example, when a transportation authority plans rail routes to converge on a single train station, the owners of that station reap a windfall in higher rents. In the celebrated landmark preservation case, Penn Central Transportation Co. v. City of New York, Justice Brennan, writing for the Supreme Court, acknowledged the contributions of society and government to the value of the Grand Central Station property in New York City. The state court opinion relied on this reasoning to an even greater extent. The New York Court of Appeals asserted that "society as an organized entity especially through its government, rather than as a mere conglomer-

88. A recent issue of Discover magazine highlighted the role of creativity in scientific advancement. One article focused specifically on discoveries that are made completely by accident.

For example, Teflon was the result of an accidental polymerization of tetrafluoroethylene ("TFE") that was being stored in preparation for an unrelated experiment. See Robert Friedel, The Accidental Inventor: Some Inventions Result from Unexpected Consequences, Discover, Oct. 1, 1996, at 58; see also Hughes, supra note 22, at 303 (explaining the instrumental argument for property that labor should be rewarded because people must be motivated to perform labor).

89. This discussion should not be interpreted to mean that there is little or no effort involved in expression. The effort can be considerable, as anyone who has written a law review article is well aware.

90. See Hughes, supra note 22, at 305.

91. Teflon, discovered quite by accident, was a valuable discovery because of its possible military and industrial uses. Scientists needed something that would resist the corrosive action of uranium hexafluoride that served as fuel for the atomic bomb in World War II. See Friedel, supra note 88.

In addition, patent protection may also allow the inventor to enjoy monopoly rent for the duration of the patent.


ate of individuals, has created much of the value of the terminal property.94 Accordingly, the value that would require compensation in a takings case was something less than the full fair market value of the property. "A fair return is to be accorded the owner, but society is to receive its due for its share in the making of a once great railroad."95

It is thus possible to embrace a Lockean respect for individuals that rewards effort yet simultaneously to recognize a role for society in the production of wealth. Although some libertarian scholars would argue that personal freedom means we are entitled to all of the value that is generated by our own labor mixing,96 it is difficult to see why we should be entitled to whatever the market will pay.97 Because entitlement to wealth is justifiable only to varying extents even in a Lockean sense, it is not particularly surprising that American society embraces and has embraced seemingly conflicting attitudes about wealth.98 In her article, The Morality of Money, Professor Marjorie Kornhauser traces American attitudes about wealth and its distribution.99 She identifies a tension between a view that saving is more moral than spending so that unearned income somehow indicates undeservedness and a view that labor is virtuous so that earned income is morally superior.100 In addition, we hold competing views of the individual: we "extol individualism and the sacred right to property," but at the same time our regard for individuals leads to emphasis on equality.101

What does this have to do with tax rates? If the argument is that progressive rates are unfair because high income folks are entitled to their high incomes, then an argument that challenges the claim of entitlement may also help to establish the fairness of progressive (or at any rate "unequal") taxes. For example, in 1942, Congress enacted significant tax legislation. One of the debated issues was the appropriate rate of corporate income taxation. There was incentive to raise corporate taxes because corporations had become very profitable as a result of the war. Reported net corporate income had increased 146%

94. Id. at 332.
95. Id. at 333; see also Costonis, supra note 60, at 416 (defining social increment of value as "the portion of a property's value that is attributable to public investment and concomitant community growth").
96. See generally Nozick, supra note 1; Schoenblum, supra note 1, at 39-40.
97. See Fried, supra note 56, at 228.
98. See generally Kornhauser, supra note 11.
99. See id.
100. See id.
101. Id. at 120. Professor Kornhauser develops the roles of these attitudes in determining tax policy through the history of the U.S. income tax. See also ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Steele Commager ed., Henry Reeve trans., Oxford Univ. Press 1959) (pt. 1, 1835 & pt. 2, 1840) (asserting that these two views are antipathetic).
from 1939 to 1942, for example.\textsuperscript{102} Senator La Follette testified that "these increased incomes can be considered as direct consequences of Government expenditures arising out of the national emergency" and concluded that it was not unjust for the government to "recover the additional net income."\textsuperscript{103} At that time corporations were subject to a "normal" income tax, a surtax, and an excess profits tax.\textsuperscript{104} The Treasury proposed a combined normal and surtax rate of 55\%, which would have soaked up most of the additional profits.\textsuperscript{105} The rationale behind the surtax was thus explicit recognition of the role of society as a whole in producing high incomes.

A similar concept appears in respect to the valuation of mobile homes. When mobile home sites are scarce, the market value of a mobile home in a park is much higher than the value of one not in a park. Karl Manheim discusses the concept of "placement value" and notes that courts have recognized this separate component of value but have disagreed about how to allocate it.\textsuperscript{106} Certainly there are those who would argue that the "placement value" belongs clearly and only to the park owner,\textsuperscript{107} but the scarcity of mobile home sites is often as much a result of very restrictive zoning laws that create virtual monopolies for the few mobile home parks allowed as it is a result of the landlord's foresight in choosing a good location.\textsuperscript{108} Thus at least one court has found that legislation allocating the benefit of that placement value to the tenant does not violate any constitutional principles. No value has been taken \textit{from} the landlord. Rather that value which the state has created, the state has now allocated.\textsuperscript{109}

Barbara Fried has also described the ways in which a mere existence of government affects returns to investors. Increasing the money supply, for example, has an effect on interest rates, which in turn affects investors.\textsuperscript{110} To the extent the effect is a positive one, government or society can be seen as playing a role in determining the

\begin{footnotesize}
\begin{enumerate}
\item[103.] Id. at 7.
\item[104.] See id. at 8.
\item[105.] See id. at 7.
\item[106.] See Karl Manheim, \textit{Tenant Eviction Protection and the Takings Clause}, 1989 Wis. L. Rev. 925, 964.
\item[108.] See Manheim, \textit{supra} note 106, at 965.
\item[109.] See id. at 965 n.225 (discussing Eamiello \textit{v.} Liberty Home Sales, 546 A.2d 805, 820 (Conn. 1988)).
\item[110.] See Fried, \textit{supra} note 81, at 1007-1008.
\end{enumerate}
\end{footnotesize}
rewards to investment activity. This effect also serves to highlight the larger point that differences in rewards result from many factors other than differences in "industry."

Finally, Ronald Dworkin has also identified market-generated returns that result from luck or inheritance, as opposed to effort. Dworkin does not suggest that differences in effort would not generate differences in accumulation. Rather, he begins by describing the differences in accumulation that would quickly appear even in a closed economy where everyone starts out with the same level of ability and resources. Differences in ambition and willingness to take risks result in differences in accumulation, but these differences are acceptable because they result purely from individual choice; everyone could accumulate as much as the person who accumulates the most, if they were willing to expend the effort or make the same sacrifices. But when the inability to accumulate is due to "brute bad luck," Dworkin proposes a taxing scheme that would account for differences in income due to factors other than effort.

VII. APPLICATION TO TAX POLICY

Fundamental disagreements are likely to stem from underlying attitudes and assumptions, which usually are not the focus of debate. But underlying attitudes should be the focus. Opponents of progressive taxation argue that the usual theories of progressivity do not


112. This also is not quite the same as the more direct effects usually identified as "benefits" for purposes of the benefit theory, although advocates of progressivity do cite some indirect effects such as the availability of an educated labor force as factors in successful accumulation of wealth. See, e.g., Kornhauser, supra note 9, at 484-85.


114. See Dworkin, supra note 113.

115. See id. at 292-93, 306; see also Byrne, supra note 6, at 778-79.

116. Dworkin, supra note 113, at 320-22. Dworkin sets forth a hypothetical model of social "underemployment" insurance whereby a person would be compensated in relation to the amount of insurance they would have bought had they not known what type of natural abilities they would possess. People would find it worth their while to buy at least the minimum amount necessary to ensure that they did not end up at the bottom of the employment ladder given the marginal utility of the policy. See also Byrne, supra note 6, at 778-779.

117. See my earlier article in which I presented in some detail the philosophical issues which inform the rate structure discussions. See generally Byrne, supra note 6.

118. Marjorie Kornhauser has made this argument in her articles on Tax Reform Rhetoric. See Kornhauser, supra note 9; Kornhauser, supra note 8; Kornhauser, supra note 47; see also Byrne, supra note 6; Schoenblum, supra note 1.
prove the fairness of redistributive taxes and that high income earners thus "have an especially compelling claim that there is no justice in being taxed more harshly than other taxpayers who do not earn as much." Accordingly, there can be no ethical quality to differentiated rates of taxation; mere preferences for redistribution on egalitarian grounds are simply at odds with the value of individual autonomy. In this section, I argue that a preference for individual autonomy as a normative value does not preclude redistributive taxes and respond to arguments to the contrary.

A. Why Taxes Don't Interfere with the Instrumentalist Version of Lockean Respect for Individual Autonomy

Under the instrumentalist version of Lockean theory discussed above, the reason for allowing an individual to reap the rewards of effort is to provide an incentive for that effort. If enough incentive is left in place after taxation, the effort should still occur under this theory. Taxing the product of labor, however, reduces the incentive to engage in productive labor, at least in theory. Thus taxes, which

119. Schoenblum, supra note 1, at 224.
120. I use the term "redistributive" loosely here to mean taxes that result in a transfer of benefit from the wealthy to the poor. A tax could also redistribute from the poor to the wealthy. For example, the absolutely equal tax that Schoenblum advocates could also be a redistributive tax if it is true, as benefit theory proponents suggest, that better-off people derive greater benefits from government than those less well off. If it is true at all that the wealthy benefit more (regardless of whether or not that disparity supports progressivity), then a lump sum tax would mean that poor folks, through their equal contributions, are paying for benefits that go only to the wealthy. See Schoenblum, supra note 1, at 249. For purposes of the discussion in this section, however, I will go along with the usual characterization of income taxes as redistributive in the sense of redistributive from high income to low income.
121. Schoenblum's proposal is not a pure head tax. He allows for a zero tax bracket and a phase-in range. Thus, under his proposal the poorest of the poor would not support the wealthy, although the fairly poor would. See Schoenblum, supra note 1, at 270.
122. In particular, Professor Jeffrey Schoenblum has argued that the only tax that is fair to all individuals is an "absolutely equal" tax—a lump sum head tax. See Schoenblum, supra note 1, at 271 (emphasizing that even if "equal" taxation is unattainable, it should serve as a standard by which tax models are evaluated for their fairness).
123. The extent to which this is true depends on the elasticity of labor. Studies have shown that the supply of labor provided by primary wage earners is inelastic with respect to income (and therefore taxes). See Jane G. Gravelle, Behavioral Responses to Proposed High-Income Tax Rate Increases: An Evaluation of the Feldstein-Feenberg Study, 59 Tax Notes 1097, 1100 (May 24, 1993) (claiming that most studies find that labor supply elasticity for males is negative and small). There are several possible reasons for this phenomenon. First, upper income workers may work for reasons other than incremental salary increases. Nonmonetary considerations such as prestige and a sense of responsibility may be
remove some of the incentive, seem to be antithetical to the instrumentalist form of Lockean labor theory. This is only true, however, if there is no windfall inherent in the rewards to labor. Windfalls by definition are unexpected and unpredicted and should have no effect on incentives. The windfall portion of market prices is analogous to economic rent—that part of, say, an individual's salary that exceeds the price the individual could command in the next best activity. If a lawyer is willing to work for $45,000 a year, the lawyer will probably be delighted to work for $200,000 a year. The additional $155,000 per year does not perform the instrumentalist function of inducing the lawyer to practice law; it is more like a windfall or a bonus. To the extent that taxes are taken out of this “windfall” amount, there should be little or no effect on the lawyer's willingness to engage in the practice of law. Of course, at least some of the lawyers working for $200,000 would, at least in theory, not work for less.

In fact, there is considerable evidence to suggest that the motivation for working more or harder is not greatly dependent on the absolute monetary compensation for making the effort. The possibility of greater consumption is not likely to be a motivating factor, particu-

more important. At lower income levels, workers may not have the option of changing the amount of work supplied, since most jobs require a fixed time commitment. Finally, the “income effect” may operate at low income levels. The income effect is the tendency of some workers to work more hours as the after tax wage goes down in order to maintain a constant standard of living. See Bankman & Griffith, supra note 16, at 1922-26 (explaining that work helps determine social standing and self-esteem and reviewing studies of compensated elasticity of labor showing that elasticity of labor is generally lower, but higher for married women) (citing Gramm, Labor, Work, and Leisure: Human Well-Being and the Optimal Allocation of Time, 21 J. Econ. Issues 167, 175 (1987)); see also David G. Davies, United States Taxes and Tax Policy 68 (1986); Stein, supra note 77, at 388-89 & n.42 (1992) (presenting table showing hours worked at different income levels).

124. Economics textbooks define “economic rent” as the earnings that exceed the opportunity cost of an activity. See Hyman, supra note 84, at 386; Steven M. Crafton & Margaret F. Brinig, Quantitative Methods for Lawyers 854-55 (1994); John Gowdy & Sabine O'Hara, Economic Theory for Environmentalists 86 (1995) (defining economic profits as those profits over and above those obtainable in the best alternative in the economy). In the case of labor, however, opportunity cost may represent the value of foregone leisure, rather than some other salary-paying occupation. If a lawyer's best paying alternative pays only half as much as being a lawyer, but is more pleasant, then the lawyer's minimum price for legal work should include inducement to give up that pleasure. For purposes of my argument, it is the difference between the lawyer's minimum price for being a lawyer and what the lawyer actually receives that is relevant. This is only a portion of the “economic rent” that the lawyer receives if economic rent is calculated using only monetary compensation (as opposed to utility).

125. The market is supposed to work this way. The price increases until there are just enough lawyers. I do not mean to suggest that this function is inappropriate; rather, that for all except the very last lawyer to enter the market, the price received for services rendered is more than necessary to induce the performance of those services.
larly for very high income earners. At some level of income, presumably, greater consumption is difficult at best. Christopher Carroll notes, for example, that Bill Gates would have to spend more than $10 million a day simply to avoid further accumulation. Carroll also notes that very wealthy people make references to "having enough." Although a diminished interest in greater consumption does not necessarily translate into a lack of interest in more money, it does suggest that the incentive to work more and earn more at some point comes from something other than the desire to eat more acorns.

For example, in a study of affluent male workers, Robert Moffitt and Mark Wilhelm reported no change in hours worked in response to changes in marginal tax rates between 1983 and 1989. Moffitt and Wilhelm speculate that these workers are working so many hours already that they cannot respond to lower tax rates by working more. In other words, taxes did not seem to be depressing the number of hours these workers worked before rates were lowered. These findings are also consistent with the possibility that at least part of a high salary does not serve an ongoing incentive purpose. Carroll suggests several other motivations for work, namely, job satisfaction, philanthropic ambitions, and power-lust.

Robert Frank has also argued that a primary incentive for market effort is relative performance. Relative standing in terms of income and wealth is more significant than one's actual absolute standard of living. Further empirical evidence based on cross-cultural studies does not support the notion that higher tax rates result in less work effort.

Thus as long as greater effort results in some improvement in position and in some increase in wealth after tax, imposition of tax does not confound the role of incentive as a motivator for productive effort. Of course, a tax that simply confiscated all income above some level would be inappropriate because it would completely eliminate incen-

127. See id. at 18.
128. Id.
129. In some cases, the challenge of earning more for its own sake may provide some incentive to increase productive activity.
130. See Moffitt & Wilhelm, supra note 42, at 41.
131. See id.
132. See Carroll, supra note 126, at 19.
133. See Robert H. Frank, Choosing the Right Pond: Human Behavior and the Quest for Status (1985). Professor Frank suggests that most people would be less than satisfied to move from a standard of living that is higher than that of their neighbors to a higher standard of living well below that of all of the new neighbors.
134. See Frank, supra note 42.
tives and would fail to reward high-income efforts at all. But some degree of progressivity would be acceptable so long as greater effort results in some after-tax increase.

B. Why Taxes Don’t Interfere with the Desert Version of Lockean Theory Either

The analysis under the desert view of property is similar. The emphasis is simply shifted from reward as necessary to induce effort to reward as moral desert. If effort deserves reward, then effort should be rewarded. But once we recognize the role of luck or of society in the accumulation of wealth, it is easy to see a fairness in taxing the returns that do not stem purely from effort, even while embracing the notion that effort deserves reward.

VIII. TAX THEORIES

As we have seen, the imposition of tax does not interfere with the reasons for property as desert. Taxes that are not confiscatory do not unreasonably reduce the incentive to engage in productive effort and they do not eliminate the reward due to a virtuous worker. Income taxes, in other words, are not inconsistent with a Lockean property theory. One can respect individual autonomy and yet favor redistributive taxes.

We now shift perspective to the arguments that are used to support redistributive taxes, namely the benefit theory and the ability-to-pay or equal sacrifice theory. These theories have been subject to criticism from many corners, including my earlier work. I discuss them here, though, because when they are examined through a lens of Lockean property theory, the arguments against them seem less persuasive. There are two main problems with the usual theories. The first is that whether or not the benefit theory can produce a fair result depends partly on which version of Locke one starts with. A view that there is no social increment windfall to income produces a conclusion that the benefit theory does not justify graduated taxes. A view that takes luck and effort into account would redeem the benefit theory at least on this count. The second problem with the usual theories is largely an empirical one. Both sacrifice and benefit theories rely on internally subjective variables. The sacrifice/ability-to-pay theories depend on assumptions about the marginal utility of income curves of different taxpayers. The benefit theory depends on the value of government to the taxpayer. Because the value to the taxpayer of having government control or regulation of markets and infrastructure is almost impossible to measure and is probably somewhat subjective, the benefit theory uses income as a proxy for benefit received. But using income to determine the fairness of a tax on income is circular at best.
A. The First Tax Theory Problem: Benefit Theory

This section will review representative arguments of the anti-redistributionist approach and will show how they are colored by a philosophical position that makes no distinction between the rewards of effort and the rewards of luck. The benefit theory of taxation merely states that government should not be allowed to extract more from an individual in taxes than it provides in benefits. The question thus becomes, how much benefit does government bestow, and upon whom? Proponents of progressive taxes have sometimes argued that high-income individuals receive more benefit from government than do low-income individuals. Extreme opponents of progressivity argue, however, that the benefit theory cannot justify any tax structure that requires high-income individuals to pay more tax than low-income individuals. Thus, even many regressive rate structures would violate the benefit theory because the poor, could it only be proven, would be seen to receive more benefits than the wealthy.

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135. Although I focus on Professor Schoenblum's arguments, he is not alone in making them, although as he points out, law review articles are more likely to argue in favor of redistribution than against it. See Schoenblum, supra note 1, at 223 n.12 (stating that most of the academic literature uncritically supports progressivity).

136. See Byrne, supra note 6, at 769. See generally Radin, supra note 39.

137. As I have emphasized before, however, the benefit theory only justifies progressive taxes if the level of benefits rises faster than the level of income; in other words, if the wealthy receive not only more benefits, but disproportionately more benefits than the poor. The benefit theory would call for proportionate taxes (a "flat tax") if the wealthy receive proportionately more benefits, if the level of benefits rises proportionate to income. Note that it is possible for benefits to rise with income, but at a slower rate. The tax rate structure in such case would be regressive. High-income individuals would pay more taxes than low-income folks, but the taxes would be a smaller part of that high income. See Byrne, supra note 6, at 770.

138. See Schoenblum, supra note 1, at 226. Less extreme opponents of progressivity argue only that the benefit theory cannot justify progressive taxes, although it could, presumably justify higher absolute taxes (whether regressive or proportionate) on higher incomes.

139. It is sometimes difficult to sort out the arguments against the benefit theory of taxation. Professor Schoenblum, for example, clearly does not believe the premise that rich people benefit more from government than poor people, but he does not exactly say what he would think if it could be proven empirically that such were the case (and of course that the amount of benefits rose faster than income). Philosophically, Professor Schoenblum seems to approach the benefit theory from a contractarian perspective. Taxation is justified as if individuals had contracted with the state for the provision of services. A problem arises with this justification for taxes to the extent that an individual prefers not to purchase some benefits. Professor Schoenblum acknowledges that it would be impossible not to provide benefits for which an individual did not wish to contract. Because some benefits must be provided, however, some taxation is appropriate. See Schoenblum, supra note 1.
The actual examples of benefit typically presented to show that the poor receive more benefit than the rich bear examination.\footnote{See Schoenblum, supra note 1, at 226.} This view is consistent with a philosophy of entitlement to wealth that makes no distinction between wealth acquired because of exertion and wealth acquired because of one's natural endowments, or because of the luck of being in the right place at the right time. Since, in this view, society plays no role in income disparities, high income folks receive little or no indirect benefit as a result of social forces, the markets, or government. Rather, all differences in income are the result of differences in industriousness.

On the other hand, the great benefits that the poor receive are, by and large, empirically determinable transfer payments. Means-tested programs, public education, public transportation, and health care are all examples of the benefits that flow to poor people, but not to rich people.\footnote{See id. at 227 ("[M]any government programs are means-tested, thus limiting benefits that flow to the higher income earners.").} Furthermore some government programs or policies are even detrimental to the interests of wealthy people. For example, foreign trade policies that are designed to protect domestic labor may be detrimental to the interests of high-income owners of business capital.\footnote{See id. at 126-27 ("When persons are required to incur significant personal expenditure for security devices and insurance . . . the contention that high income earners particularly benefit from a safe society is not a compelling argument.").} Finally, many government benefits, although available to rich and poor alike, are of greater benefit to the poor because the poor have no choice but to rely on government provision of some services. For example, rich people can pay for home security systems and are thus less dependent on local police protection.\footnote{See id. at 228 ("[H]igh income earners who do not avail themselves of the infrastructure may be required to incur substantial additional costs to obtain reliable, quality services; examples include Federal Express, UPS, e-mail, and private schools.").} Similarly, high income individuals are more likely to use private mailing services rather than the U.S. Postal Service.\footnote{See id. at 227 ("[I]nsular trade and other policies, responsive to the demands of political majorities or special interest groups, may even be detrimental to the economic interests of many high income earners.").} Moreover, since the services provided to low-income people often are necessary for survival, they must surely have a higher utility value to the poor than they would to the rich.\footnote{Note, however, that this "value" is not the same as "value" from a market perspective. For a service to have value from a market perspective, there must be someone who is both willing and able to pay for the service.}

Thus, Lockean libertarians see only the direct benefits going to poor people, and not the indirect ones going to the wealthy. In part, they cannot see indirect benefits going to the wealthy because they believe as a philosophical matter that all income earned by the high
income folks is the result of enormous effort and is, therefore, morally deserved. The notion that an organized society itself could be a contributor to the success of the successful is simply incompatible with such beliefs about entitlement to wealth. The belief that success is the result of individual worthiness and effort is evident from the examples chosen to rebut the benefit theory. For example, a worker who works overtime and does good work is compared to a "slothful, sloppy" employee who performs at the "minimum tolerable level of quality." Similarly a doctor who got where she was through "studying and suffering considerable self-denial" is compared to her less successful friends who spent their time "partying" and exhibiting a "lack of willpower and determination." One scholar poses the question explicitly: "what if lack of achievement is largely ascribable to choice?" Thus it is effort, and effort alone that is to be regarded as responsible for accumulation of wealth.

Notwithstanding the assumption that effort, and effort alone, gives rise to income, anti-redistributionists argue that one of the most important ways that the poor benefit more from government than the rich is that our strong national defense provides an "environment with opportunity." At least formally, the lower-income classes in the United States have the opportunity to move up the economic ladder, a possibility that would be formally foreclosed in some societies. Nevertheless, crediting the poor with a benefit in the form of opportunity while arguing simultaneously that the rich do not get rich

146. Professor Schoenblum addresses this point in one sense when he argues that there is "no demonstrable correlation" between the success of the wealthy and the accident of their being citizens or residents of the United States. Schoenblum, supra note 1, at 227-28. To the contrary, successful individuals would be successful anywhere and might even be more successful elsewhere with less governmental intervention. Id. Compare Schoenblum, supra note 1, with Rose, supra note 28, at 440 (a property regime makes everyone better off).

147. Schoenblum, supra note 1, at 261.

148. Id. Professor Schoenblum at least explicitly acknowledges that he is assuming equal intelligence and economic backgrounds in an effort to show that achievement due to effort deserves reward.

149. Id. at 263 (Schoenblum presenting the reader with situations where the diligent are rewarded and the lazy have rough lives because the determinate factor of success in society is the free exercise of autonomous choice).

150. Id. at 227. It seems, however, that Professor Schoenblum has failed to recognize the possibility that such defense of the system could be the preservation of the status quo where the top of society holds the vast majority of the wealth. This would be to argue that the poor benefit from having power structures protected that have roots in the institutions of racism, sexism, and classism.

151. See id.

152. See McMahon & Abreu, supra note 5, at 31 (citing evidence showing that "[t]op to bottom mobility is . . . quite rare, as is its converse, notwithstanding the emotional appeal of the American Dream").
because of greater opportunity in the U.S. seems at first to be inconsistent.

But these positions are quite consistent with a desert theory that treats all wealth obtained as the rewards to individual effort. If the state or society or luck had nothing to do with, say, Bill Gates or Ross Perot getting rich, then it is certainly not a benefit of government that there was the opportunity to become affluent. Gates and Perot, so the argument goes, would have gotten rich anywhere. On the other hand, someone who makes subsistence level wages must be too lazy, stupid, or busy partying to be troubled to go make a decent living. The existence of the opportunity to acquire wealth is necessary to the view that essentially blames the individual for any measure of economic failure. It is a disguised way of assuming that individuals have equal capabilities. Those who are very sure that high-income people have high incomes because of their own efforts and that luck plays no role can thus confidently say that the benefit theory does not allow "unequal" taxation, and certainly not progressive taxation.

B. The Second Tax Theory Problem: Measurement

The second problem with the usual theories is one of measurement. Both are based on the value or amount of an intangible, subjective variable that is largely personal to the taxpayer. The benefit theory, even if we could agree on what "benefits" are benefits, depends on the "value" to the taxpayer of the benefit received. There are several problems inherent in this concept of benefit. First, taxpayers may receive benefits they don't want. If the benefit theory is seen as taxpayers purchasing benefits with their tax dollars, the involuntary purchase presents a challenge. There is, generally speaking, no way

153. But see Jeremy Waldron, Property, Justification, and Need, 6 CAN. J.L. & JURISPRUDENCE 185, 204 (1993) (deriding the notion that poverty is the victim's own fault).

154. There is no need for a further, more philosophical, argument that would explain why the benefit theory as a theory is misguided. There is such an argument available, and Schoenblum mentions it. The benefit theory derives from contractarian notions of the state, according to which taxation is the price for having some central provision of defense and some other services, and presumably most individuals voluntarily would enter into such a "contract." But taxation is not voluntary; there is no real possibility of "opting out." Accordingly, a "contract" does not really exist between the individual and the state and regardless of the amount of benefit conferred, one should not be compelled to pay taxes for unwanted benefits. In other words, the state has no moral claim on part of an individual's wealth simply because it has provided some benefits. See Schoenblum, supra note 1, at 232.

155. Note that it is the value to the taxpayer and not the cost to government that matters, since the point of the benefit theory is to justify the contribution the taxpayer will make in return.
to opt out of the provision of government.156 Even libertarian liberals recognize a role for some taxation to support government, whether the taxpayer approves or not.157 Second, benefits that do not have a market price may nevertheless have value. In some cases the existence of government may increase the taxpayer’s utility, for example, by providing a sense of security, clean air, transportation for employees or visitors. If so, any successful measure of total utility or satisfaction would also give a pretty good measure of benefit.158 In other cases government provides benefits that should have market value, but that are almost impossible to measure, such as clear air and the sound of birds singing that result from pollution control measures.

The measurement problem applies even more clearly to the ability-to-pay/sacrifice theories. One of the reasons that we are still discussing progressivity after all of these years is that we insist on trying to justify a progressive structure with some sort of utility measure. This is like trying to make the trousers fit by sucking in your stomach. It seems to make some intuitive sense, and it would be great if it really worked, but in the final analysis it’s not a good fit. There is no way to measure utility absolutely. Although we can rank an individual’s preferences in order of priority, we have no way satisfactorily to assign absolute comparative rankings. Further, we cannot compare utility between taxpayers. Some theorists get around this problem by assuming it away. Others approach the problem as if only utility that is backed by market purchases counts.159 But the parameter of utility can only be defined from the inside out, by the individual taxpayer. An individual without the means to participate in the market has little input into the assigning of values. Accordingly, utility does not provide a very good measuring stick for discussing tax rates with those who are generally opposed to taxation.

Thus even if one believes that respect for individuals is consistent with recognizing the role of luck and of society in producing wealth

156. Expatriation, being a hermit in the woods, joining a self-government religious community. All of these are imperfect.
157. See generally Nozick, supra note 1.
158. Indeed, one of Professor Schoenblum’s criticisms of the ability-to-pay theory is that it is the benefit theory in disguise. See Schoenblum, supra note 1, at 233.
159. Market prices do not even tell the whole utility story for market purchasers. Purchasers only pay the price that the seller asks. In many cases, a buyer would be willing to pay more than market price. For these inframarginal buyers, the market price understates utility. Similarly, some sellers may be willing to take less than the market price. In such cases the market price overstates the utility the seller attached to the item sold. Thus there is always consumer surplus and producer surplus. For example, in the movie Pretty Woman, Richard Gere and Julia Roberts agree that she will stay for a week in return for $3000. After the deal is closed, she proudly reports that she would have stayed for $2000. He smugly replies that we would have paid $4000. See Pretty Woman (Touchstone Pictures 1990).
such that wealthy folks get more benefits from government or even if we accept one of the ability-to-pay theories as a theory, if only it could be measured, we are still doomed to the conclusion that the case for progressivity is uneasy at best. The problem here is that there is no externally measurable factor that determines fairness. There should be. Fairness inherently involves interpersonal comparisons and would seem to require some basis external to the person for making the comparison. That factor cannot be income or wealth alone. Somewhere we need to decide when it is fair to require that wealth be redistributed and when it is not.

IX. TAX FAIRNESS FROM THE OUTSIDE

If we are trying to determine from the outside what is fair, then the measure that we use should also be somehow externally determined. Several possibilities suggest themselves. For example, personhood could be the sole criterion for imposing tax. If an individual is a person, then some amount of tax is expected. This criterion leads to Professor Schoenblum's lump sum head tax. A dog would not pay tax, but a human person would. Beyond that there is no basis for distinguishing between individuals. This is the approach that Schoenblum advocates. He argues that this is the only tax structure that would preserve our respect for individual autonomy. The problem with such an approach, of course, is that it is regressive with respect to income or wealth. Poor people would pay a higher percentage of their wealth than rich people would. The revenue raising potential of such a tax is compromised by its regressivity. To raise enough revenue, the amount of the tax would have to be so high that poor folks could not pay it.

A second alternative might be a straightforward income tax. Personhood is taken as a given and within the category of persons, those with more income would owe more tax, the amount of tax being proportionate to the amount of income; a flat tax. A flat income tax suffers from the same revenue raising limitation as the lump sum tax, only to a lesser degree. The rate imposed would have to be high to raise enough revenue. If we add a low-income exemption, we introduce progressivity, and we have to decide where to draw the line on the exemption. If a flat income tax were not tied to some underlying concept, it would seem arbitrary. If it were tied to some underlying concept such as utility, then we would have all the definitional problems that we have now. Why base the tax on income? Why not an increasing tax that is not proportionate to income? Although income presents the virtue of being measurable, without some elaboration, it is hard to see how it points to fairness.

Another alternative, and frankly, my favorite, would be to assign levels of deservedness to different levels of income. This approach
would be theoretically similar to Justice Breitel's social increment of value approach in *Penn Central.*\textsuperscript{160} It attempts to distinguish the role of effort from the roles of other factors in creating wealth.\textsuperscript{161} Whether or not someone deserves income or shelter or anything else is surely a matter of opinion. But it is probably also the subject of some degree of societal consensus. Since it is a matter of external opinion, deservedness does not present quite the same difficulties that utility does. There is no need to look inside people's minds to determine the extent to which they deserve their income. Rather, perhaps we could agree on specific criteria for determining levels of deservedness. Income that is highly deserved should have more protection from tax than income that is barely deserved or that is a windfall.

For example, perhaps we would agree that everyone, even the lazy, deserves some subsistence level of income absolutely. Thus, rather than personhood as a criterion for tax liability, personhood would bestow a level of absolute deservedness of income. Many features of our existing tax system and welfare system lend support to the claim that agreement on this point would be possible. For example, the income tax has consistently allowed for some sort of zero bracket; the earned income tax credit has the further effect of exempting subsistence income from payroll taxes. Flat tax proponents base the fairness of the proposals partly on the presence of a large tax-free amount of income. Even Professor Schoenblum in advocating his "absolutely equal" tax, concedes that the tax should include an exempt amount for subsistence income. The subsistence amount then would have the highest level of deservedness and would be subject to the lowest level of taxation (or none).\textsuperscript{162} All other income would be subject to tax. An extreme version of this approach would tax other income at 100%.

But if personhood were the only factor in determining deservedness and deservedness were the only basis for the imposition of tax, the result would be a strongly progressive tax—the personhood amount would be taxed at 0%; all other income at 100%, much like the equal marginal sacrifice tax, which also levels off income above a certain level. The difference is that a personhood exemption would be based on objective facts rather than on an assumption about levels of utility.

\textsuperscript{160} See supra notes 92 to 105 and accompanying text for a discussion of the *Penn Central* case and the social increment of value reasoning.

\textsuperscript{161} See Linda A. Malone, *The Future of Transferable Development Rights in the Supreme Court,* 73 Ky. L.J. 759, 785 (1984-85) ("The most innovative section of the . . . opinion . . . concluded that the base for computing a reasonable return should exclude the 'social increment' of value attributable to the government's activities rather than to private investment.").

\textsuperscript{162} The extent to which this level of deservedness requires public assistance is a separate issue from whether or not some basic amount of income should be exempt from taxation.
Personhood alone would be unsatisfactory as the sole determinant of deservedness, however, because it would take no account of effort. As studies have shown, people generally believe that the expenditure of effort creates desert. But effort as a basis for desert would not yield a minimum level of tax-free income. Rather, the amount of tax free income (or highly deserved income) would depend on the units of effort expended. This factor would create a flexible level of absolutely deserved income—flexible because the amount of wealth an individual deserves depends on the amount of effort the individual exerts. The deserved amount of wealth per unit of effort would be somewhat fixed, however, so that an hour of burger flipping in terms of effort should create the same level of desert as an hour of law review article writing. Basing entitlement to wealth on the number of hours of effort alone leaves some problems unresolved, however. What hours count? Is child-rearing counted? Or only market labor? If non-market activities count, which non-market activities? Although these problems are significant, at least there is no need to fall back on the time-worn notion of "utility" with its inherent subjectivity.

To take this hours-of-effort approach to another level, the effort consumed by time-consuming education and lifestyle sacrifices should be accounted for somehow, so it may be that the law review article-writing should carry a slightly higher level of desert than burger flipping. The anti-redistributionist approach seems to be that education and forbearance together describe all the variation in incomes, and that no amount of accession to wealth is a result of anything but effort or forbearance. Although it may be difficult to make a distinction between rewards to effort and rewards to luck, it seems a necessary step.

In reality, however, accession to wealth is often also a result of luck in the form of innate intelligence, childhood advantage, native talent, or pure serendipity. To the extent that wealth results from the existence of one or more of these forms of luck, people are much less likely to agree on the deservedness of that wealth. Initially, then, income resulting from luck would carry no additional deservedness, since the individual did not make any choices that created this source of wealth. Yet the individual does choose to apply the talent or intelligence in a way that produces wealth for society, and people do tend to believe that those with innate intelligence or talent deserve at least some of

164. Now is the time for some time physicist to come forward and say that hours are subjective.
165. The theory that bases desert on positive contribution to society would obviously arrive at the opposite result.
166. See Penn Cent. Transp. Co. v. New York City, 366 N.E.2d 1271, 1276 (N.Y. 1977) ("It is exceedingly difficult but imperative, nevertheless, to sort out the merged ingredients and to assess the rights and responsibilities of owner and society.").
the additional reward that flows to that talent in the presence of effort. Perhaps a talent premium is appropriate to induce people to apply their extra talents or intelligence. Accordingly, our deservedness scale could increase with the uniqueness of the intelligence or talent employed in making the effort. Because deservedness is a socially defined parameter, however, there is no reason that it would have to rise proportionate to intelligence or talent. Since innate intelligence and talent depend on luck, they should have less influence on absolute deservedness than does effort.

The practical result of a system based on deservedness would be a progressive tax schedule. Subsistence incomes, absolutely deserved as an incident of personhood would be exempt or taxed at the lowest possible level. Income beyond this minimum, to the extent it is the result of effort alone, say the number of hours worked times the minimum wage, would be very highly deserved and subject only to minimal taxation. The amount of income in the effort category would be increased somewhat to account for choices made along the way, such as lifestyle economy to acquire education and training. Finally, income in the luck category, to the extent it involves individual choice to apply windfall resources, would be subject to a higher rate of taxation, and income resulting from pure serendipity, brute luck (money falling out of the sky and the like) would be subject to the highest rates of taxation.

Presumably, extremely high incomes result from luck to a much greater extent than do lower incomes. For example, Bill Gates would deserve some subsistence amount just by virtue of being a person. He would deserve to be compensated for the eighty hours per week that he spends working, which would create a deservedness level twice as high as that of a forty hour per week burger flipper, and he would deserve some higher amount of income because he has chosen to employ his intellect in such a way that it produces income. But a large portion of his income would be subject to the highest level of taxation reflecting the elements of luck or serendipity that went into his success: being born with intelligence, being born to a part of society that would give him access to computers, having the good fortune to latch onto a hobby that could grow into something the rest of the world really needed, becoming a virtual monopolist. All of these factors generate income beyond that resulting from application of effort, and

167. See Bill Gates et al., The Road Ahead (1996).

My argument is not that monopoly rents are immoral. Even antitrust law recognizes that a person can lawfully become a monopolist through superior vision, skill, ingenuity and industry. If so, and if the person does not unlawfully exploit the monopoly power, antitrust law does not object to the monopolist taking the profits the market will bear. My argument is that those profits carry a lower degree of deservedness and that, therefore, subjecting them to a higher rate of tax is not unfair.
it is thus fair to tax that high income at higher rates than we would tax a lower income.

This deservedness model has several advantages over the utility based systems, over Schoenblum's head tax, and over the Hall & Rabushka flat tax (a la Armey-Shelby). This system incorporates the philosophical position that effort and forbearance are meritorious and should be rewarded. It also incorporates the philosophical position that by virtue of personhood alone, each individual is equally entitled to something—a livelihood, respect, comfort. The deservedness model leaves relative holdings intact. There is no net penalty for making greater efforts. It does not rely on any internally determined factor such as utility. While deservedness is abstract, it is an externally abstract concept. Finally, people seem to believe that relative position should not be disturbed—the wealthiest should remain the wealthiest after imposition of tax. So our scale of absolute deservedness would start above zero (reflecting the personhood amount), would rise in proportion to effort (to reflect only the number of hours), and would rise somewhat with the level of talent applied (to induce people to apply unusual talent). With the deservedness model, then, the Lockean connection between labor and wealth is preserved. But the roles of factors other than effort are also recognized.

X. CONCLUSION

What significance does deservedness have for the tax structure? Dollars that are deserved more should be taxed less. Some subsistence level of income should be free of tax, not because those dollars have the greatest utility where they are, but because as human beings, people absolutely deserve to have some minimum lifestyle.168 The marginal deservedness of those first few dollars earned is very high. The tax burden on those dollars should be very light. Highly deserved dollars should generally not be taxed, or not much anyway. As income rises purely through effort and industry, the marginal deservedness of income may decline somewhat, reflecting a societal judgment that some balance is important. Or perhaps marginal deservedness does not decline with returns solely to effort and industry; perhaps we would agree that increased earnings that result

168. What that minimum should entail is also socially constructed. For example, Thomas Jefferson thought that every adult should be entitled to an appropriation of 50 acres in "full and absolute dominion." Stanley N. Katz, Thomas Jefferson and the Right to Property in Revolutionary America, 19 J.L. & Econ. 467, 470 (1976), excerpted in Curtis J. Berger & Joan C. Williams, Property: Land Ownership and Use (4th ed. 1997). I heard on public radio once that in the Netherlands, a social minimum is defined as enough to provide shelter, food and a daily newspaper. Query whether a daily newspaper would be considered a bare necessity in other parts of the world.
purely from working more hours should be taxed somewhat more heavily. At some point, however, the role of increasing effort becomes *de minimis* and luck and circumstance or returns to innate intellect start to become more significant. A very low level of deservedness attaches to such income, yet these are the factors that produce huge earnings increases.

By starting from the right position on Locke and using a measurement that is externally determinable, the case for progressive taxation becomes much easier. The opponent of progressive taxation must now show first that the windfall of social increment of value is deserved (and should not be taxed), and second that deservedness is not a culturally derived norm.