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SCHOOL OF LAW

“ATLAS NODS: THE LIBERTARIAN CASE FOR A BASIC  
INCOME”

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April 17, 2017  
Vanderbilt Hall – 208  
Time: 4:10 – 6:00 p.m.  
Week 12

## SCHEDULE FOR 2017 NYU TAX POLICY COLLOQUIUM

(All sessions meet from 4:10-6:00 pm in Vanderbilt 208, NYU Law School)

1. Monday, January 23 – Lily Batchelder, NYU Law School. “Accounting for Behavioral Biases in Business Tax Reform: The Case of Expensing.”
2. Monday, January 30 – Mark Gergen, Berkeley Law School. “How to Tax Global Capital.”
3. Monday, February 6 – Alan Auerbach, Berkeley Economics Department. “U.S. Inequality, Fiscal Progressivity, and Work Disincentives: An Intragenerational Accounting.”
4. Monday, February 13 – Allison Christians, McGill Law School. “Human Rights at the Borders of Tax Sovereignty”
5. Tuesday, February 21 – Jason Oh, UCLA Law School. "Are the Rich Responsible for Progressive Marginal Rates?"
6. Monday, February 27 – Stephen Shay, Harvard Law School. “‘A Better Way’ Tax Reform: Theory and Practice.”
7. Monday, March 6 – Scott Dyreng, Duke Business School. “Trade-offs in the Repatriation of Foreign Earnings.”
8. Monday, March 20 – Daniel Hemel, University of Chicago Law School. "Federalism Safeguards of Progressive Taxation."
9. Monday, March 27 – Leonard Burman, Urban Institute. “Is U.S. Corporate Income Double-Taxed?”
10. Monday, April 3 – Kathleen Delaney Thomas, University of North Carolina Law School. “Taxing the Gig Economy.”
11. Monday, April 10 – Julie Cullen, UC San Diego Department of Economics. “Political Alignment and Tax Evasion.”
12. **Monday, April 17 – Miranda Perry Fleischer, University of San Diego Law School. “The Libertarian Case for a Universal Basic Income.”**
13. Monday, April 24 – Joel Slemrod, University of Michigan Business School. “Taxing Hidden Wealth: The Consequences of U.S. Enforcement Initiatives on Evasive Foreign Accounts.”
14. Monday, May 1 – Richard Vann, University of Sydney Law School. "International tax post-BEPS: Is the corporate tax really all that bad?"

# ATLAS NODS: THE LIBERTARIAN CASE FOR A BASIC INCOME

Miranda Perry Fleischer\*

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## ABSTRACT

*Proposals for a universal basic income are generating interest across the globe, with pilot experiments underway or in the works in Finland, Kenya, the Netherlands, and the city of Oakland, California. Surprisingly, many of the most outspoken supporters of a universal basic income have been self-described libertarians—even though libertarians are generally considered to be antagonistic toward redistribution and a universal basic income is, at its core, a program of income redistribution. What explains such strong libertarian support for a policy that seems so contrary to libertarian ideals?*

*This Article seeks to answer that question. We first show that a basic safety net is not only consistent with, but likely required by, several strands of libertarianism. We then explain why libertarians committed to limited redistribution and limited government might support a system of unconditional cash transfers paid periodically. Delivering benefits in cash, rather than in-kind, furthers autonomy by recognizing that all citizens – even poor ones – are the best judges of their needs. Decoupling such transfers from a work requirement acknowledges that the state lacks the ability to distinguish between work-capable and work-incapable individuals. Providing payments periodically, rather than through a once-in-a-lifetime lump sum grant, ensures that all individuals can receive a minimum level of support over lifespans of variable lengths, while also allowing individuals to adjust payment flows through financial market transactions.*

*Although our main objective is to assess the fit between libertarian theory and a universal basic income, we also address various design choices inherent in any basic income scheme: who should receive it?; how large should it be?; which programs might it replace?; and should it phase out as market income rises? Lastly, we consider the relationship between a basic income and the political economy of redistribution. We find that the case for a basic income as a libertarian “second-best” is surprisingly shaky: libertarians who oppose all redistribution but grudgingly accept a basic income as the least-worst form of redistribution should reconsider both aspects of their position. We conclude by drawing out lessons from our analysis for non-libertarians, regardless of whether they are supportive or skeptical of basic income arguments.*

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\*\*Assistant Professor of Law, University of Chicago Law School. We thank Matt Enloe, Matt Zwolinski, and participants at workshops at NYU, Northwestern, the University of San Diego, the Mid-Level Tax Scholars’ Conference, and the Bowling Green Workshop in Applied Ethics and Public Policy for helpful suggestions.

## INTRODUCTION

Proposals for a universal basic income (“UBI”) are generating interest across the globe, with pilot experiments underway or in the works in Finland, Kenya,<sup>1</sup> the Netherlands, and the city of Oakland, California.<sup>2</sup> Surprisingly, many of the most outspoken supporters of a UBI have been self-described libertarians. Nobel laureate economist and libertarian icon Milton Friedman supported a UBI as part of his “negative income tax” proposal. More recently, eBay cofounder Pierre Omidyar<sup>3</sup> and prominent public intellectual Charles Murray<sup>4</sup>—both of whom identify with libertarianism—have come out in favor of a UBI. The Libertarian Party’s standard bearer in the last two presidential elections, Gary Johnson, has said he is “open” to the idea of a UBI,<sup>5</sup> and his tax plan during both campaigns incorporated elements of a UBI.<sup>6</sup> Indeed, support for a UBI today may well be stronger on the libertarian right than on the progressive left.<sup>7</sup>

What makes libertarian support for a UBI so surprising is that a UBI is, at its core, a program of income redistribution.<sup>8</sup> Under a UBI, each member of society receives a guaranteed

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<sup>1</sup> Michael J. Coren, *eBay Founder Pierre Omidyar Is Financing a Universal Basic Income Experiment*, QUARTZ (Feb. 11, 2017), <https://qz.com/907943/eBay-founder-pierre-omidyar-is-financing-a-universal-basic-income-experiment>.

<sup>2</sup> Michael J. Coren, *Y Combinator Is Running a Basic Income Experiment with 100 Oakland Families*, QUARTZ (June 1, 2016), <https://qz.com/696377/y-combinator-is-running-a-basic-income-experiment-with-100-oakland-families>.

<sup>3</sup> On Omidyar’s libertarianism, see ADAM COHEN, *THE PERFECT STORE: INSIDE EBAY* 7, 16, 27, 90 (2002).

<sup>4</sup> CHARLES MURRAY, *IN OUR HANDS: A PLAN TO REPLACE THE WELFARE STATE* (revised and updated ed. 2016). Murray’s case for a UBI is intelligent and important—worthy of careful consideration and critique. This Article provides one such critique. We ultimately conclude that Murray undersells the libertarian argument for a UBI as a first-best and overstates the libertarian argument for a UBI as a second-best. Unfortunately, others have refused to engage with Murray’s arguments except through violence. See Laura Krantz, ‘Bell Curve’ Author Attacked by Protesters at Middlebury College, BOS. GLOBE, Mar. 5, 2017, <https://www.bostonglobe.com/metro/2017/03/04/middlebury/hAfpA1Hquh7DIS1doiKbhJ/story.html>.

<sup>5</sup> Brett Linley, *Gary Johnson Is Open to Universal Basic Income and That’s Not Bad*, LIBERTARIAN REPUBLIC (July 20, 2016), <http://thelibertarianrepublic.com/gary-johnson-is-open-to-universal-basic-income>.

<sup>6</sup> See Christopher E. Baecker, *The ‘Fair Tax’ Fairly Understood*, SAN ANTONIO EXPRESS-NEWS, Sept. 17, 2016, <http://www.mysanantonio.com/opinion/commentary/article/The-fair-tax-fairly-understood-9228383.php>. Johnson’s plan provided for 28% sales tax (39% if calculated on a tax-exclusive base), coupled with a “prebate” check to ensure that households below the poverty line end up with no net tax liability. The prebate would have been approximately \$12,000 per adult and \$4,000 per child, and would have operated like a basic income of that amount. See *id.*

<sup>7</sup> For progressive critiques of the UBI, see Joel Dodge, *The Progressive Case Against a Universal Basic Income*, QUARTZ (Sept. 23, 2016), <https://qz.com/789889/a-universal-basic-income-could-wind-up-hurting-the-poor-and-helping-the-rich>; Robert Greenstein, *Universal Basic Income May Sound Attractive But, If It Occurred, Would Likelier Increase Poverty Than Reduce It*, CTR. ON BUDGET & POLICY PRIORITIES (May 31, 2016), <http://www.cbpp.org/poverty-and-opportunity/commentary-universal-basic-income-may-sound-attractive-but-if-it-occurred>; Vicente Navarro, *Why The Universal Basic Income Is Not The Best Public Intervention To Reduce Poverty Or Income Inequality*, SOCIAL EUROPE (May 24, 2016), <https://www.socialeurope.eu/2016/05/why-the-universal-basic-income-is-not-the-best-public-intervention-to-reduce-poverty-or-income-inequality>; and Max Sawicky, *Guest Post: Max Sawicky on the Liberal Case Against a Universal Basic Income*, ROOSEVELT INST. (Dec. 17, 2013), <http://rooseveltinstitute.org/guest-post-max-sawicky-liberal-case-against-universal-basic-income>.

<sup>8</sup> In this Article, we address only the “right” libertarian theories of minimal state libertarianism and classical liberalism, theories to which most people who self-identify as libertarians subscribe. We do not address “left” libertarian theories of justice here. Although both assume an initial right of self-ownership, right and left libertarian theories diverge as to the initial ownership of natural resources. Right libertarian theories assume that such resources are initially *un-owned*, while left libertarian theories assume that such resources are initially *jointly* owned.

payment from the government on a periodic basis—perhaps \$10,000 a year, though potentially less or more. That money has to come from somewhere, and that “somewhere” is taxation. Moreover, the tax-and-transfer scheme inherent in a UBI is necessarily redistributive: some (presumably wealthier) taxpayers pay more than \$10,000 a year to fund the UBI and other (presumably poorer) taxpayers pay less than \$10,000 a year. If everyone paid \$10,000 a year to fund a UBI, then the transfer would be circular and the program would accomplish nothing. Yet libertarianism is—or at least is generally thought to be—in hospitable to redistribution. What explains the libertarian support for a policy that seems so contrary to libertarian ideals?

This Article sets out to answer that question. In doing so, we aim to expand the legal literature’s understanding of libertarian theory. Although most legal academics associate libertarianism with Robert Nozick’s assertion that “taxation is on par with forced labor,” a closer look at libertarian ideals reveals that limited redistributive tax-and-transfer schemes can be justified on a number of libertarian grounds. We argue that the conversation within libertarianism about redistribution can yield insights useful to libertarians and non-libertarians alike. Part of our objective in this Article is thus to draw connections that bridge the libertarian/non-libertarian divide.

Moreover, by evaluating a UBI on libertarian grounds while writing for an audience of both libertarians and non-libertarians, we respond to a demand from non-libertarian UBI supporters for a fuller understanding of the libertarian basis for a UBI. Currently, many non-libertarian supporters of a UBI are hesitant to ally with their libertarian fellow travelers. As one writer notes, “[p]rogressives often see the universal basic income . . . as a Trojan horse devised by conservatives to dismantle the welfare state and replace it with something less adequate.”<sup>9</sup> Here, we look inside the horse to see whether it is indeed hollow, and conclude that it is not. Libertarianism offers normative support for pursuing a UBI as a permanent policy objective. Of course, whether or not *we* think a UBI is consistent with libertarian principles does not reveal the motives of other UBI supporters. We do think, though, that our examination of the libertarian bases for a UBI will help non-libertarians evaluate the sincerity of their potential coalition partners, and will give them greater confidence that committed libertarians can support a UBI as an end in itself rather than a mere waystation on the road toward the evisceration of the welfare state.

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As a result, left libertarians justify redistributive taxation in order to compensate non-appropriators for their lost rights to resources appropriated by others, although debate exists as to how much compensation is owed. Because left libertarians generally agree that redistribution is justified, we do not rehash those arguments here and instead focus on right libertarianism, which is generally thought to be hostile to redistribution. Although “right-libertarianism” overlaps with with “right” political doctrines on many economic matters (for example, opposition to most governmental economic regulation), the two often differ when it comes to social policies. “Right-libertarians,” for example, generally support drug legalization, equal rights regardless of sexual orientation, and abortion rights while opposing the death penalty and prayer in schools. Some suggest that a better term is “market” libertarians. See, e.g., Matt Zwolinski, *Classical Liberalism and the Basic Income*, 6 BASIC INCOME STUD. 1 (2011) [hereinafter Zwolinski, *Basic Income*]. For useful overviews of left libertarianism generally, see Peter Vallentyne, *Left-Libertarianism and Liberty*, in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 136, 138-44 (Thomas Christiano & John Christman, eds., 2009) and MICHAEL OTSUKA, LIBERTARIANISM WITHOUT INEQUALITY 11-22 (2003). For a left-libertarian argument in favor of a basic income, see PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL (1995).

<sup>9</sup> Sebastian Johnson, *The Progressive Case for a Universal Basic Income*, OPEDSPACE (Jan. 28, 2015), <http://opedspace.com/2015/01/28/the-progressive-case-for-the-universal-basic-income>.

We begin by considering whether some amount of redistribution can be reconciled with libertarianism. We believe that the answer is yes: a basic safety net is not only consistent with, but likely required by, both minimal state libertarianism and classical liberalism. As our title suggests, the libertarian Atlas does not shrug at the sight of poverty; we explain why individuals committed to libertarian first principles should care about providing a minimum level of material well-being for all.<sup>10</sup> We then explain why libertarians committed to limited redistribution and limited government might support a system of cash transfers. As compared to redistribution in kind, cash transfers further autonomy by recognizing that all citizens – even poor ones – are the best judges of their needs. Next, we consider whether a system of cash transfers should be universal or conditional. On this point, we diverge from other libertarian writers who have argued for coupling cash transfers with a work requirement. We show that the minimal state libertarian argument for cash transfers plus a work requirement rests on the premise that the state can distinguish between work-capable and work-incapable individuals. Libertarians, who are generally skeptical of state capacity, will almost certainly reject that premise and so should reject a work requirement as well. We then evaluate whether universal cash transfers should occur through periodic payments or through a once-in-a-lifetime lump sum grant. We present a novel argument as to why libertarians should prefer the former to the latter. Lump sum grants, we explain, will either be overcompensatory with respect to the short-lived or undercompensatory with respect to the long-lived. While luck egalitarians might conclude that overcompensation for the short-lived is desirable, libertarians—we argue—will not.

Although our main goal is to assess the fit between libertarian theory and a UBI, we would be remiss if we did not address various design choices policymakers will face in implementing a UBI: Should it be limited to adults? Citizens? Should it be phased-out with income? How large should it be, and what programs would it replace? Here, we show how various strains of libertarian theory might shed light on these design decisions. Lastly, we consider the political economy of a UBI from two directions. We discuss the ways that the political economy of redistribution affects the prospects for a UBI and the ways in which a UBI might affect the political economy of redistribution. Somewhat surprisingly, our analysis undercuts the arguments of those libertarians who are opposed to any government redistribution but grudgingly accept a UBI on second-best grounds. Libertarians who reject our argument that a UBI is first-best should, we think, be skeptical of the second-best case for a UBI as well.

This Article proceeds as follows. Part I provides a brief overview of the UBI, its historical roots, and current UBI experiments. Part II considers whether libertarianism is consistent with some amount of redistribution. Part III then asks whether the libertarian case for limited redistribution translates into a case for unconditional cash transfers paid out periodically. Part IV explores design choices and assesses how the theoretical justification for a UBI influences those choices. Part V examines the political economy surrounding a UBI. Part VI concludes.

## I. HISTORICAL AND STRUCTURAL OVERVIEW

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<sup>10</sup> Cf. AYN RAND, *ATLAS SHRUGGED* (1957).

Proposals for a universal basic income—sometimes known as a basic income guarantee—call for the government to ensure that all citizens (or, in some versions, all adult citizens, or all citizens and non-citizen residents) receive a minimum income on a periodic basis (e.g., monthly, quarterly, or annually). Such a minimum income would be paid in “cash” rather than in kind (though we put “cash” in quotation marks because a UBI could be paid out through checks, debit cards, or direct deposit arrangements rather than in physical currency). It would not be dependent on whether the recipient holds a job—and is in this sense distinct from the earned income tax credit (“EITC”), which provides benefits only to wage-earners. Nor would it be dependent on whether the recipient participates in job training or otherwise seeks employment.

### A. *A Brief History*

The concept of a guaranteed income has deep historical roots. In fact, Thomas Paine championed one variation – an unconditional once-in-a-lifetime grant – over 200 years ago. Paine proposed the creation of a “national fund, out of which there shall be paid to every person, when arrived at the age of twenty-one years, the sum of fifteen pounds sterling, as a compensation in part, for the loss of his or her natural inheritance, by the introduction of the system of landed property.”<sup>11</sup> In the century and a half after Paine, a variety of thinkers and policymakers – including British economist and philosopher Bertrand Russell and Louisiana politician Huey Long – also expressed support for programs of universal cash grants.<sup>12</sup>

Milton Friedman’s 1962 book *Capitalism and Freedom* drew further attention to the UBI idea. More specifically, Friedman proposed a “negative income tax” (“NIT”) that would replace existing welfare programs. Friedman and his coauthor (and wife) Rose Friedman later described their NIT proposal as follows:

The basic idea of a negative income tax is simple . . . . Under the current positive income tax you are permitted to receive a certain amount of income without paying any tax. . . . This amount is composed of a number of elements—personal exemptions . . . , standard deduction . . . , [etc.] To simplify the discussion, let us use the simpler British term of “personal allowances” to refer to this basic amount.

If your income exceeds your allowances, you pay a tax on the excess at rates that are graduated according to the size of the excess. Suppose your income is less than the allowances? Under the current system, those unused allowances in general are of no value. You simply pay no tax. . . .

With a negative income tax, you would receive from the government some fraction of the unused allowances. . . . When your income was above allowances, you would pay tax, the amount depending on the tax rates charged on various amounts of income. When your income was below allowances, you would receive

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<sup>11</sup> THOMAS PAINE, *AGRARIAN JUSTICE* (1797).

<sup>12</sup> See ALLAN SHEAHEN, *BASIC INCOME GUARANTEE* 173 (2012).

a subsidy, the amount depending on the subsidy rates attributed to various amounts of unused allowances.<sup>13</sup>

Under an NIT, any individual whose taxable income is below the allowance amount thus receives a subsidy back from the government in the amount of the subsidy rate multiplied by their unused allowance. To illustrate, assume that the non-taxable allowance is \$10,000 and that the subsidy and tax rates are 50 percent. In an NIT, *Adam*, with income of zero, receives a subsidy of \$5,000 (50 percent of his unused allowance of \$10,000). *Bonnie*, with income of \$10,000, neither receives a subsidy nor pays tax. *Christine*, with income of \$50,000, pays tax of \$20,000 (50 percent of the \$40,000 excess over her allowance).

This is economically equivalent to a UBI coupled with a tax system that taxes all non-UBI income. Now assume that each of *Adam*, *Bonnie*, and *Christine* receive a UBI of \$5,000 but that all non-UBI income is taxed at 50 percent. *Adam* receives a UBI of \$5,000 and pays no tax. *Bonnie* receives a UBI of \$5,000 but pays tax of \$5,000 (50 percent of \$10,000), so the net transfer between *Bonnie* and the government is zero. *Christine* receives a UBI of \$5,000 but pays tax of \$25,000 (50 percent of \$50,000), giving her a net tax bill of \$20,000. Economically, all three taxpayers are in the same position under both a UBI and an NIT, although the optics of the two systems differ.

The concept of an NIT attracted the support of numerous economists as well as widespread attention from policymakers, leading to its inclusion in President Nixon's 1969 Family Assistance Plan ("FAP"). Written by Daniel Patrick Moynihan, the FAP essentially proposed replacing the Aid to Families with Dependent Children ("AFDC") program with something approximating an NIT. The FAP differed from a true NIT (and thus from a true UBI) in two important respects: first, the FAP was limited to families with children; second, the FAP required that recipients either be employed or be seeking employment. Yet despite these important differences, the push for an FAP in the late 1960s can be considered a precursor to the modern-day UBI movement.

Nixon unveiled the plan in a televised address in August 1969, and the concept initially enjoyed broad public and Congressional support.<sup>14</sup> Wilbur Mills (chair of the House Ways and Means Committee) and John Byrnes soon translated the FAP into H.R. 16311, which sailed through the House Ways and Means Committee by a vote of 21-3.<sup>15</sup> It also easily passed the full House by a margin of 243-155, with roughly 60 percent of each party's members voting for it.<sup>16</sup> Soon, however, a coalition of liberals (who thought it too stingy) and conservatives (who believed that it would discourage work) joined forces against the bill.<sup>17</sup> After months of debate, the Senate Finance Committee killed H.R. 16311 in November of 1970, largely due to the opposition of chair Russell Long, a Democratic Senator from Louisiana (and, ironically, the son

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<sup>13</sup> MILTON & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 120-21 (1980).

<sup>14</sup> DANIEL PATRICK MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME* 3 (1973); Dennis J. Ventry Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969-99*, 53 NAT'L TAX J. 983, 989 (2000).

<sup>15</sup> MOYNIHAN, *supra* note 14, at 3; Ventry, *supra* note 14, at 989.

<sup>16</sup> MOYNIHAN, *supra* note 14, at 437-48.

<sup>17</sup> Ventry, *supra* note 14, at 989-992.



of UBI supporter Huey Long).<sup>18</sup> The FAP reappeared as H.R. 1 during the next Congress, and again passed the House but not the Senate.<sup>19</sup> George McGovern made it part of his platform during the 1972 election, but after his defeat and Nixon's impeachment and resignation, political interest in the FAP as such withered.<sup>20</sup> The FAP did, however, lay the groundwork for the Earned Income Tax Credit ("EITC"), which continues to this day.<sup>21</sup> But while the FAP would have boosted families whose breadwinners were out of work, the EITC—as the name implies—only flows to workers who are earning wages, salaries, tips, other employee compensation, or income from self-employment.<sup>22</sup>

## B. Current UBI Programs

After lying dormant for over 40 years, the UBI is once again generating widespread interest.<sup>23</sup> While no country has yet implemented a broad-based UBI, several pilot schemes are underway or in the works. These include:

- An experiment launched in Finland in January 2017 that will give 560 euros (approximately \$600), no strings attached, to 2,000 unemployed citizens for two years;<sup>24</sup>
- A pilot in the Dutch city of Utrecht providing 960 euros a month (about \$1,100) to 250 citizens for two years,<sup>25</sup>
- A trial in Oakland, California, run by the Silicon Valley startup accelerator Y-Combinator that will include approximately 100 families for five years;<sup>26</sup> and
- A program in rural Kenya run by the nonprofit GiveDirectly that will involve cash transfers to more than 26,000 people.<sup>27</sup>

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<sup>18</sup> *Id.*; MOYNIHAN, *supra* note 14, at 533.

<sup>19</sup> MOYNIHAN, *supra* note 14, at 441.

<sup>20</sup> See ANDY STERN WITH LEE KRAVITZ, *RAISING THE FLOOR: HOW A UNIVERSAL BASIC INCOME CAN RENEW OUR ECONOMY AND REBUILD THE AMERICAN DREAM* 176 (2016).

<sup>21</sup> See Ventry, *supra* note 14.

<sup>22</sup> See 26 U.S.C. § 32(c)(2).

<sup>23</sup> Some of this interest has been motivated by concerns about automation and artificial intelligence leading to widespread unemployment. We are skeptical that a UBI can be justified on those grounds, for reasons that one of us has explained elsewhere. See Daniel Hemel, *Bringing the Basic Income Back to Earth*, NEW RAMBLER REV. (Sept. 19, 2016), <http://newramblerreview.com/book-reviews/economics/bringing-the-basic-income-back-to-earth> (reviewing MURRAY, *supra* note 4, and STERN WITH KRAVITZ, *supra* note 20).

<sup>24</sup> See Press Release, Ministry of Social Affairs and Health (Finland), Ministry of Social Affairs and Health Requests Opinions on a Basic Income Experiment (Aug. 25, 2016), [http://stm.fi/artikkeli/-/asset\\_publisher/sosiaali-ja-terveysministerio-pyytaa-lausuntoja-osittaisen-perustulokeilun-toteuttamisesta?\\_101\\_INSTANCE\\_yr7QpNmJmSj\\_languageId=en](http://stm.fi/artikkeli/-/asset_publisher/sosiaali-ja-terveysministerio-pyytaa-lausuntoja-osittaisen-perustulokeilun-toteuttamisesta?_101_INSTANCE_yr7QpNmJmSj_languageId=en).

<sup>25</sup> Tracy Brown Hamilton, *The Netherlands' Upcoming Money-for-Nothing Experiment*, THE ATLANTIC, June 21, 2016, <https://www.theatlantic.com/business/archive/2016/06/netherlands-utrecht-universal-basic-income-experiment/487883>.

<sup>26</sup> Sam Altman, *Moving Forward on Basic Income*, Y COMBINATOR POSTHAVEN (May 31, 2016), <https://blog.ycombinator.com/moving-forward-on-basic-income>.

<sup>27</sup> *Launch a Basic Income*, GIVEDIRECTLY, <https://www.givedirectly.org/basic-income> (last visited Mar. 9, 2017).

Experiments in Ontario, India, Italy, and Uganda are also moving ahead.<sup>28</sup>

While we are optimistic that these UBI demonstration projects can generate useful data regarding the welfare effects of a minimum income, these projects will not “prove” the case for a UBI for two reasons. First, the argument for a UBI is not strictly welfarist: as we discuss below, libertarians may embrace a UBI on the grounds that it strengthens private property rights and enhances individual autonomy, freedom, and dignity. These values may be (and we think are) worth pursuing regardless of whether a UBI is less costly than the current system of redistributive transfers, whether it increases labor force participation, or whether it improves measurable outcomes related to health, education, or welfare.

Second, although these experiments may shed some light on whether a UBI distorts individual choices more or less than other redistributive schemes, these experiments cannot provide a complete picture. Consider the UBI’s potential impact on workforce participation. This question will be examined by the Finnish experiment, which will randomly assign some adults currently receiving unemployment benefits to a treatment group that will instead receive a basic income of 560 euros a month. That amount corresponds to the allowance under the existing unemployment scheme, but unlike existing unemployment benefits, the basic income will continue even after the recipient is reemployed. The Finnish experiment will compare employment outcomes for subjects in the treatment group with outcomes for subjects in a control group, which will continue to be governed by the status quo.<sup>29</sup>

What will the Finnish experiment show? Let’s say that subjects in the treatment group turn out to be more likely to resume work than subjects in the control group. (Indeed, it would be surprising if this were *not* the result. In Finland, as in most countries, the existing unemployment scheme imposes a very high marginal tax rate on recipients who return to work. Most UBIs are structured such that implicit marginal income tax rates never approach the levels encountered by some low-income households under current law.) Does that “prove” the case for a UBI according to a welfarist perspective? Not necessarily. Providing all adults with a basic income of 560 euros a month is more expensive than providing only unemployed adults with a basic income of 560 euros a month. To pay for a UBI, Finland would have to raise taxes, which may have its own negative effect on labor supply. The Finnish experiment seeks to measure the UBI’s impact on labor participation by recipients but not the effect of increased taxes on others.

Consider next the question of whether a UBI increases recipients’ “happiness, well-being, and financial health,” which the Y-Combinator experiment in Oakland seeks to study.<sup>30</sup> It would be surprising if low-income individuals randomly selected to receive a basic income *aren’t* happy about the extra money. Proving that point, however, doesn’t make the case for a UBI any more than the Finnish experiment might, for two reasons.

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<sup>28</sup> See Chris Weller, *8 Basic Income Experiments To Watch Out for in 2017*, BUSINESS INSIDER (Jan. 24, 2017), <http://www.businessinsider.com/basic-income-experiments-in-2017-2017-1>.

<sup>29</sup> See Press Release, Ministry of Social Affairs and Health (Finland), Ministry of Social Affairs and Health Requests Opinions on a Basic Income Experiment (Aug. 25, 2016), [http://stm.fi/artikkeli/-/asset\\_publisher/sosiaali-ja-terveysministerio-pyytaa-lausuntoja-osittaisen-perustulokokeilun-toteuttamisesta?\\_101\\_INSTANCE\\_yr7QpNmJmSj\\_languageId=ens](http://stm.fi/artikkeli/-/asset_publisher/sosiaali-ja-terveysministerio-pyytaa-lausuntoja-osittaisen-perustulokokeilun-toteuttamisesta?_101_INSTANCE_yr7QpNmJmSj_languageId=ens).

<sup>30</sup> Sam Altman, *Moving Forward on Basic Income*, Y COMBINATOR POSTHAVEN (May 31, 2016), <https://blog.ycombinator.com/moving-forward-on-basic-income>.

First, determining which policies increase overall welfare more than other policies is extremely difficult, due to the near-impossibility of interpersonal comparisons of utility. To illustrate, consider three individuals: *Lazy*, who is an inframarginal non-worker; *Grind*, who is an inframarginal worker; and *Fence-Sitter*, whose decision whether to work is dependent on the effective tax rate. Let's also imagine two possible policies: a UBI, which provides unconditional benefits, and a wage subsidy that goes only to workers. For the same total cost of \$300, the government can provide a UBI of \$100 to *Lazy*, *Grind*, and *Fence-Sitter*, or a wage subsidy of \$150 that goes only to *Grind* and *Fence-Sitter*.

The Y Combinator study might be able to show whether *Lazy*, *Grind*, and *Fence-Sitter* are better off with a UBI than with no redistribution (we assume they would be). But what about a UBI versus a wage subsidy? Almost undoubtedly, *Lazy* is better off with the \$100 UBI (versus nothing under a wage subsidy) and *Grind* is better off with the \$150 wage subsidy (versus a \$100 UBI). But what about *Fence-Sitter*? His income is certainly higher with a wage subsidy, but income is not the same as welfare. *Fence-Sitter* might well prefer *not* to work and to receive a \$100 UBI rather than working and receiving a \$150 wage subsidy. Perhaps we could run a randomized trial in which some individuals are offered a UBI, others are offered a wage subsidy, and members of both groups self-report their own happiness at various points along the way. And yet even assuming that we trust the accuracy of self-reported happiness, we are still left with the challenge of interpersonal utility comparisons. Recall that *Lazy* is unambiguously better off with a UBI and *Grind* is unambiguously better off with a wage subsidy: how do we weigh *Lazy's* welfare against *Grind's*? Again, the answer is nonobvious. What does seem apparent is that the answer is not one that a randomized controlled trial will reveal.

Moving beyond empirics, however, we again emphasize that the libertarian case for a UBI does not depend on whether a UBI increases well-being (or utility, or welfare) more than other redistributive policies. Libertarianism is not utilitarianism: in the minds of (most) libertarians, the fact that a policy increases overall welfare according to some metric is neither a necessary nor sufficient condition for support.<sup>31</sup> Our goal here is to assess whether redistribution in the form of a UBI is consistent with libertarian principles. It is to that question that we presently turn.

## II. LIBERTARIANISM AND REDISTRIBUTIVE TRANSFERS

Although a number of theories of distributive justice – including resource egalitarianism and utilitarianism – could support an argument for a basic income, our Article is grounded in libertarian ideals. This may seem like a surprising choice to some readers, who likely associate libertarianism with Robert Nozick's assertions that “only a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is

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<sup>31</sup> We note that some libertarians and classical liberals – such as Richard Epstein – employ a utilitarian framework in justifying libertarianism and/or classical liberalism as being the social and economic system that maximizes social utility. Here, however, we use the phrase “utilitarianism” (alternatively, “welfarism”) to refer to non-libertarian, non-classical liberal theories of justice, under which an expansive state with substantial redistribution can be justified based on diminishing marginal utility of income. On the relationship between diminishing marginal utility of income and welfarist arguments for redistribution, see generally Sarah B. Lawsky, *On the Edge: Declining Marginal Utility of Income and Tax Policy*, 95 MINN. L. REV. 904 (2011).

justified”<sup>32</sup> and that “taxation is on par with forced labor.”<sup>33</sup> This view (“minimal state libertarianism”), however, is but one of several that can be classified as libertarian. What binds these theories together is a celebration of the individual’s right to be free from coercion, strong respect for private property rights, a belief in the general superiority of the free market, and the notion that the market’s results should generally remain undisturbed.<sup>34</sup>

These theories differ, however, in whether any state is justified, and if so, its proper contours. On one end of the spectrum is “anarcho-capitalism.” This theory holds that there is no justification for any state at all, and that voluntary associations can adequately protect life and property.<sup>35</sup> Next along the spectrum is minimal state libertarianism, which, as the name implies, tolerates only an extremely limited state. Third is “classical liberalism,” which sees some role for government in providing a very limited number of public goods and a minimal safety net to the poor. Classical liberalism, however, contemplates a much narrower role for the state than under the status quo and rejects the large-scale redistributive measures favored by utilitarians and resource egalitarians as well as many current government programs that do not meet strict definitions of public goods.<sup>36</sup> At the far end of the spectrum is left-libertarianism, which countenances a considerable amount of redistribution based on the premise that natural resources are initially commonly-owned, as opposed to un-owned.<sup>37</sup> As we note above,<sup>38</sup> our focus here is on right libertarian theories that are generally assumed to be hostile to redistribution.

Not surprisingly, the literature contains a lively debate as to whether all of the foregoing interpretations “count” as libertarian. Anarcho-capitalists assert, for example, that the only social arrangement consistent with libertarian ideals is anarchy.<sup>39</sup> Other theorists argue that “libertarianism” and “classical liberalism” are distinct from each other, while some scholars consider the latter simply a subset of the former.<sup>40</sup> This Article sidesteps that debate. For our purposes, what matters is that there is a set of beliefs that are distinguishable from utilitarianism

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<sup>32</sup> ROBERT NOZICK, *ANARCHY, STATE & UTOPIA* ix (1974)

<sup>33</sup> *Id.* at 169.

<sup>34</sup> For overviews of libertarian thought, see HARRY BRIGHOUSE, *JUSTICE* 86–94 (2004); WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 102–65 (2d. ed. 2002); Eric Mack & Gerald F. Gaus, *Classical Liberalism and Libertarianism: The Liberty Tradition*, in *HANDBOOK OF POLITICAL THEORY* 115, 124–29 (Gerald F. Gaus & Chandran Kukathas eds., 2004); Zwolinski, *supra* note 7; Peter Vallentyne & Bos van der Vossen, *Libertarianism*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2014), <http://plato.stanford.edu/archives/fall2014/entries/libertarianism> [<http://perma.cc/TG2J-ECJ5>]; Matt Zwolinski, *Libertarianism*, *INTERNET ENCYC. PHIL.*, <http://www.iep.utm.edu/libertar> [<http://perma.cc/SA9D-NX9L>]; JOHN TOMASI & MATT ZWOLINSKI, *A BRIEF HISTORY OF LIBERTARIANISM* (forthcoming 2017) (manuscript on file with author).

<sup>35</sup> *See, e.g.*, DAVID D. FRIEDMAN, *THE MACHINERY OF FREEDOM* (3d ed. 2014); MICHAEL HUEMER, *THE PROBLEM WITH POLITICAL AUTHORITY* (2013); MURRAY ROTHBARD, *THE ETHICS OF LIBERTY* (1982).

<sup>36</sup> Even here, however, classical liberals differ among themselves in how strictly they define “public goods.”

<sup>37</sup> Although left-libertarians debate precisely how much redistribution is justified, agreement generally exists that left libertarianism countenances more-than-minimal redistribution.

<sup>38</sup> *See* note 7.

<sup>39</sup> *See, e.g.*, ROTHBARD, *supra* note 35.

<sup>40</sup> *Compare* E-mail from Richard A. Epstein, James Parker Hall Distinguished Serv. Professor Emeritus of Law, Univ. of Chi. Law Sch., to author (Apr. 7, 2015, 07:06 PST) (on file with author) (distinguishing between classical liberalism and libertarianism), *and* RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 1-12 (2003), *with* TOMASI & ZWOLINSKI, *supra* note 34 (classifying classical liberalism as a subset of libertarianism).

and liberal egalitarianism and that have much in common with each other. Despite differing in how rigidly they adhere to these views, many who hold them refer to themselves as “libertarians” and are often referred to as such by others, even if the most rigid seek to limit the term’s use. It is therefore reasonable to consider these theories as a class, just as resource egalitarianism includes room for both those who do and do not believe in the legitimacy of resource claims based on expensive tastes.<sup>41</sup>

Within this family of theories, justifications for limited amounts of redistribution can be found in both minimal state libertarianism and classical liberalism. Of course, no such case can be found in anarcho-capitalism, which rejects even a minimal state devoted only to protecting life and property. Although anarcho-capitalism has some staunch defenders among philosophers, its supporters are a very small minority both within and without the legal academy, even among self-identified libertarians. Our acknowledgement that a UBI cannot be justified on anarcho-capitalist grounds is, we think, a modest concession and an obvious one; we do not think the concession seriously undermines the claim that (the bulk of) libertarians should consider seriously the case for a UBI. This Article therefore omits further mention of anarcho-capitalism, focusing instead on minimal state libertarianism and classical liberalism. The remainder of this Section fleshes out these theories and demonstrates how each supports some – albeit limited – redistribution of resources mediated by the state.

#### A. *Minimal State Libertarianism*

Most legal scholars associate minimal state libertarianism with Robert Nozick’s entitlement theory and John Locke’s theory of natural property rights and self-ownership, so we shall begin there. According to Locke, (1) natural resources in the state of nature are un-owned, but (2) each individual has a property right to his own person and labor.<sup>42</sup> This latter principle of self-ownership means that individuals have the same type of ownership rights over themselves that property owners hold with respect to inanimate objects: “each individual has strong moral claims over the elements which constitute her person, e.g., her body parts, her talents, and her energies.”<sup>43</sup> These ownership rights include control rights, meaning the right to use one’s body and to preclude others from using it.<sup>44</sup> A key component of all libertarian theories is that individuals own their own labor and are not, as a first principle, required to contribute that labor for the common good.

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<sup>41</sup> Some resource egalitarians argue that individuals are born with expensive tastes, much like one might be born with brown hair or a bum leg. Someone who prefers champagne, for example, is at a disadvantage vis-à-vis a beer lover in terms of pursuing her vision of the good life, given that she requires more resources to do simply because of the chance circumstances of her birth – much like Tiny Tim requires more resources than an able-bodied individual. Other resource egalitarians, however, reject this notion. For an overview of this debate, see Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 629-31 (2011).

<sup>42</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 19 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

<sup>43</sup> Eric Mack, *The Self-Ownership Proviso: A New and Improved Lockean Proviso*, SOC. PHIL. & POL’Y 186, 186 (1995); Vallentyne & van der Vossen, *supra* note 34.

<sup>44</sup> Vallentyne & Van der Vossen, *supra* note 34.

Because each individual owns her labor, Locke reasons that each individual can acquire property rights in a given resource by mixing her labor with it.<sup>45</sup> Yet the justifiability of property rights acquired through such mixing is subject to several conditions, the most important of which (known as the “Lockean proviso” or the “sufficiency requirement”)<sup>46</sup> is that one can justifiably acquire property rights in natural resources only if “enough, and as good” is left for others.<sup>47</sup> If this requirement is met, Locke maintains that nobody else has a right to those resources, suggesting that taxation violates property rights.<sup>48</sup>

These ideals appear almost three hundred years later in the most influential modern exposition of libertarian thought, Robert Nozick’s 1974 book *Anarchy, State and Utopia*. Nozick builds upon Locke’s thought in crafting the entitlement theory. Although he does not fully detail the complete theory, Nozick outlines the three principles that form its core: (1) justice in acquisition, (2) justice in transfer, and (3) rectification of past injustice. An acquisition is just if it satisfies the Lockean proviso, which, as Nozick notes, cannot be interpreted literally to mean that one must leave “enough, and as good” of the exact resource in question for others. If it were, the provision would be impossible to fulfill with respect to any finite resource.

To see why, imagine a field of 100 farmable acres, and assume that one acre of farmland is enough to feed a family. If *Adam* is the first farmer to find the field, it appears that he can appropriate one acre of it by mixing with it his labor. After all, there is plenty left for *Bonnie*, the next farmer who happens along. It appears she too can appropriate an acre, since more than enough is left to meet the needs of *Charlie* (the third arrival). And so on. The problem becomes clear when *Zach*, the 100<sup>th</sup> farmer arrives. He cannot claim the last acre, for then nothing is left for the 101<sup>st</sup> arrival. But under that reasoning, *Yvonne* should not have been able to claim the 99<sup>th</sup> parcel, since her claiming the 99<sup>th</sup> parcel prevented *Zach* from claiming the 100<sup>th</sup>. Likewise, *Xavier*’s appropriation of the 98<sup>th</sup> parcel prevented *Yvonne* from claiming the 99<sup>th</sup>. Working backwards then, it turns out *Adam*’s claiming of the first acre did not, after all, leave “enough, and as good” for others.<sup>49</sup>

What then, does it mean to leave “enough, and as good” for others? As we shall see, much debate surrounds this question. Nozick and most other minimal-state libertarians interpret the proviso to mean that others are not made worse off *overall* by *Adam*’s appropriation of the farmland, even if others are made worse off in the sense that they cannot appropriate for themselves that particular acre of farmland. *Adam*’s appropriation of the farmland, for example, is just if it leaves others in a similar or better position than before his appropriation. This could happen if *Adam* employs *Bonnie* to farm the fields, and *Bonnie*’s wages allow her to live as well or better than if she farmed that acre herself.<sup>50</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 21. Locke also noted a second limitation – the spoilage limitation – which prohibits an individual from appropriating more resources than can be used before they spoil. *Id.*

<sup>47</sup> Jeremy Waldron, *Nozick and Locke: Filling the Space of Rights*, 22 SOC. PHIL. & POL’Y 81, 89 (2005).

<sup>48</sup> LOCKE, *supra* note 42, at 30.

<sup>49</sup> NOZICK, *supra* note 32, at 176, 178.

<sup>50</sup> KYMLICKA, *supra* note 34, at 115–17; Clark Wolf, *Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations*, 105 ETHICS 791 (1995).

If the proviso is satisfied, *Adam's* acquisition is just and he can do with his holdings whatever he pleases.<sup>51</sup> Nozick's second principle, justice in transfer, follows. If *Adam* voluntarily transfers a holding to *Carter*, be it in a market exchange or gratuitously, then *Carter's* holding is also just and he can do with it whatever he pleases. If, however, the principles of either justice in acquisition or transfer are not met, then the principle of rectification becomes relevant. Perhaps *Adam's* initial acquisition of his holding was not just, or perhaps the transfer to *Carter* was not just (imagine *Carter* stealing from or defrauding *Adam*). In that case, whomever was harmed is owed compensation, thus justifying taxation for that limited purposes.<sup>52</sup>

Nozick's famous Wilt Chamberlain example illustrates these principles. Imagine that one million people each pay Wilt Chamberlain a quarter each time they watch him play basketball.<sup>53</sup> At season's end, Chamberlain has \$250,000, far more money than anyone else. Nozick argues against looking only at end results to judge the justice of the resulting distribution: If the audience members' initial holdings were just and they freely transferred their quarters to Chamberlain, then nothing is unjust about the result. Taxing Chamberlain to obtain a different distribution therefore violates his justly acquired property rights.<sup>54</sup> If, however, Chamberlain's \$250,000 was unjustly acquired (e.g., by force, or theft, or perhaps by fraud), then taxation would entail no such violation because Chamberlain's property was not justly acquired.<sup>55</sup>

Based on the foregoing, the common wisdom concerning Locke and Nozick is that minimal state libertarianism prohibits taxation for redistributive purposes other than rectification. On this point, few would contend that all past acquisitions and transfers have been "just," even on Nozickian terms. Indeed, as Jeremy Waldron noted:

[Nozick] was never prepared to say that the historical-entitlement critique of equality and welfarism in his book amounted to a defense of actually existing market

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<sup>51</sup> More precisely, *Adam* can do almost whatever he wants, for Nozick recognizes limits on one's use in times of catastrophe. Nozick notes, for example, that if *Adam* owns an island, he cannot force a shipwrecked castaway to leave. Nozick, *supra* note 32, at 180. Nor could *Adam* charge monopolistic prices if he owns the only source of water in a desert. *Id.* This essentially creates a "Lockean proviso" on use, because *Adam* cannot use his property in a way that makes others worse off.

<sup>52</sup> *See id.* at 152–53. Nozick can be read as viewing rectification as a duty of the state and therefore justifiably financed by taxation. *See, e.g.,* Jan Narveson, *Present Payments, Past Wrongs: Correcting Impressions from Nozick on Restitution*, 1 LIBERTARIAN PAPERS 1, 3 (2009) (stating that many scholars view the appropriateness of taxation as an "implication[] widely attributed" to Nozick's theory "including, apparently, . . . Nozick himself" but disagreeing with that implication); Adam James Tebble, *The Tables Turned: Wilt Chamberlain Versus Robert Nozick on Rectification*, 17 ECON. & PHIL. 89, 93 (2001) (assuming "safely" that the source of rectifying compensation will be taxation).

<sup>53</sup> NOZICK, *supra* note 32, at 161–63.

<sup>54</sup> *Id.* A bit later, Nozick offers a second argument against redistributive taxation. He supposes that requiring "unemployed hippies to work for the benefit of the needy" would be opposed on the grounds that it is forced labor. *Id.* at 169. If forcing one person to work five hours for another is forced labor, he reasons, then taxing the fruits of five hours of labor is also forced labor. Both interfere with self-ownership rights, rendering taxation for redistributive purposes illegitimate on two grounds.

<sup>55</sup> Many scholars interpret Nozick as implying that rectification is a duty of the state and therefore justifiably financed by taxation. *See, Narveson, supra* note 52 (noting that many scholars view the just use of taxation for purposes of rectification as an "implication[] widely attributed" to Nozick's theory "including, apparently, . . . Nozick himself" but disagreeing with that implication); Tebble, *supra* note 52, at 93 (assuming "safely" that the source of rectifying compensation will be taxation).

institutions . . . . On the contrary, he thought it undeniable that contemporary holdings would be condemned as unjust by any remotely plausible conception of historical entitlement. (The point of Nozick’s argument . . . was that egalitarians were condemning the existing distribution for the wrong reason—that is, simply as unequal—rather than on account of the violence, fraud, expropriation, ethnic cleansing, state corruption, and so on, involved in the history of most holdings of property in America.)<sup>56</sup>

Redistribution in pursuit of rectification, however, would (likely) not take the form of a universal program such as a UBI. Instead, it would be targeted to the victims of past injustices and (perhaps) their descendants.<sup>57</sup> As the remainder of this section shows, however, one can potentially justify limited redistributive taxation within a minimal-state libertarian framework on two grounds: preventing incursions on private property rights and validating those rights in the first instance.

### 1. *Protecting Private Property Rights*

A first argument for redistributive taxation within a minimal-state libertarian framework is that providing a minimum safety net to some strengthens the private property rights of others. How so? Eric Mack supplies the foundation for such an argument. Mack, who “confess[es] to a fondness for the dictum that all taxation is theft,”<sup>58</sup> nonetheless concludes that some amount of taxation and redistribution is justified on minimal state libertarian premises. We trace that argument here and then explain why the last step of Mack’s argument requires amendment.

Mack begins by asking us to imagine a fully-prepared hiker on a well-planned excursion. Through no fault of her own, she encounters unpredicted fatally cold temperatures.<sup>59</sup> The hiker comes across a locked but unoccupied cabin in the woods whose shelter, fire, and blankets would save her life. Entering the cabin to save her life, however, would violate the owner’s property rights. Yet according to Mack, the “most basic intuition” is that “no plausible moral theory” would require the faultless hiker to freeze to death.<sup>60</sup> “Even more clearly,” Mack writes, “no moral theory that builds upon the separate value of each person’s life and well-being can hold that Freezing Hiker is morally bound to grin and bear it.”<sup>61</sup> For these reasons, Mack believes that libertarianism must tolerate some violation of private property rights—at least in the extreme circumstances of the freezing hiker.

Only instances of extreme need, however, justify violating the owner’s property rights in Mack’s view. If our hiker were simply tired and sore (and not in fatal peril), no violation would

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<sup>56</sup> Waldron, *supra* note 47, at 103.

<sup>57</sup> Unfortunately, Nozick barely discusses rectification. NOZICK, *supra* note 32, at 153 (choosing “not [to] attempt [the] task” of specifying the details of the principles of acquisition of holdings, transfer of holdings, and rectification). He does, however, suggest in passing that Rawls’s difference principle might serve as a rough means of implementing rectification. *Id.* at 231.

<sup>58</sup> Eric Mack, *Non-Absolute Rights and Libertarian Taxation*, 23 SOC. PHIL. & POL’Y 109, 109 (2006).

<sup>59</sup> *Id.* at 119.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*



be justified.<sup>62</sup> Mack reasons as follows: As the number of people who are allowed to ignore a cabin owner's rights grows, so does the incentive of a cabin owner to avoid situations where his rights will be violated. A cabin owner could, for example, put stronger defenses around his cabin or move to a warmer climate or more remote location with fewer hikers.<sup>63</sup> Cabin owners, therefore, have an incentive to limit the situations in which hikers ignore their rights so that they may place their cabins where they wish without costly defenses and still have adequate assurance that their rights will be respected in all but the most extreme instances. Hikers are likely to acquiesce to such limits, because they care much more about avoiding death than discomfort.<sup>64</sup>

How does this translate to taxation? Instead of a freezing hiker breaking into a cabin, imagine a homeless person who trespasses in our garage to sleep there or who steals a loaf of bread cooling in our window.<sup>65</sup> Mack reasons that if property owners pre-empt these types of incursions by providing a minimal safety net, then those in dire straits are less likely to steal food from us or break into our garages and tool sheds for shelter.<sup>66</sup> And aside from any empirical prediction about the frequency of trespasses, the minimal safety net insures property owners against the "moral risk" of preventing the starving person from obtaining the loaf of bread.<sup>67</sup> In the absence of a minimal safety net, private property rights are not only less secure, but also less legitimate. A safety net strengthens property rights by removing the conditions under which others can legitimately violate such rights.<sup>68</sup>

Recall that in minimal state libertarianism, one of the few justifiable purposes of government is to protect property. If providing a minimal safety net furthers that purpose, then the government should legitimately do so – just as it provides a police force.<sup>69</sup> The foregoing reasoning, however, limits the provision of this safety net in several ways. First, the state should only provide it to people whose plight is not their fault.<sup>70</sup> Second, the safety net should be limited to necessities like food, clothing, and shelter.<sup>71</sup> These constraints ensure that encroachments on private property rights occur only when necessary to protect a life, thereby maximizing the encroachees' property rights without endangering the lives of those in dire need. Third, Mack reasons that individuals who ignore others' property rights due to extreme need should compensate the encroached-upon property owners whenever possible. This leads him to favor some type of workfare requirement.

Mack does not consider, however, the problem that no government can distinguish without error between those who are capable of work and those who are not. The problem arises

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<sup>62</sup> *Id.* at 129.

<sup>63</sup> *Id.* at 133.

<sup>64</sup> *Id.* at 134.

<sup>65</sup> *Id.* at 112.

<sup>66</sup> *Id.* at 141.

<sup>67</sup> *See id.* at 125, 140.

<sup>68</sup> *Id.* at 140.

<sup>69</sup> *See id.* at 141. This argument should not be confused with whether individuals can trespass in times of necessity, or whether individuals have a moral or legal duty to help those in need. This argument is about what activities the state may permissibly coerce its citizens to pay for.

<sup>70</sup> In some respects, narrowing beneficiaries in this manner overlaps with some of the insights of luck egalitarianism, though luck egalitarianism supports a far greater amount of redistribution and to a greater number of people. *See* Fleischer, *supra* note 41.

<sup>71</sup> Mack, *supra* note 58, at 140.

because work capability is not readily observable (and the very notion of capability is a subjective one). Consider the types of people incapable of work but likely to be classified as capable: individuals with various mental illnesses (e.g., depression), extreme cases of attention hyper-deficit disorder, and difficult-to-diagnose forms of chronic pain. Libertarians—who are generally skeptical of the state’s social-engineering capabilities—should be especially skeptical of any claim that the state can distinguish the work-capable from the work-incapable without error.

The resulting irony is that a skepticism of state capacity militates in favor of a *more* expansive state-provided safety net, given the state’s (assumed) incapability of limiting the safety net to the truly work-incapable. The individual who is incapable of work would be entitled to the support of a minimal safety net under Mack’s argument, and absent such a safety net, private property rights are “non-absolute” as against the work-incapable individual. A minimal safety net with a workfare requirement would thus fail to absolutize private property rights because it would still leave a class of individuals—those wrongly classified as capable of work—who legitimately can encroach upon the property of others.

In sum, minimal state libertarians accept some amount of coercive taxation so that the state can protect private property rights against unjustified encroachment. Yet at least arguably, individuals who faultlessly find themselves in dire need are justified in encroaching upon the property of others. The state can absolutize private property rights against such justified encroachments by providing a minimal safety net for individuals who are in need without fault of their own. Yet if the state is incapable of determining whose dire needs are faultless, then the absolutization of private property requires a universal system of redistribution.

## 2. *Satisfying the Lockean Proviso*

Apart from the argument that a safety net absolutizes owners’ property rights, minimal state libertarians may also accept a limited amount of redistributive taxation as a necessary precursor for satisfying the Lockean proviso. This argument, of course, turns on the interpretation of the Lockean proviso. As explained above, it is clear that the proviso does not require that “enough, and as good” of the precise resource being appropriated be left for others. So doing is impossible not only when resources are finite but also when they vary in quality. Imagine that *Dana* is one of ten inhabitants on a ten-acre desert island. *Dana* appropriates one acre for herself, leaving “as much” for the others. But if she appropriates the acre containing all the fertile soil and the best views of the beach, she has arguably not left the others “as good.”

The proviso is thus frequently interpreted as meaning that others cannot be made “worse off” in some sense by an appropriation or use, which Nozick and most other minimal state libertarians take to mean that others are not made “worse off” in terms of welfare by an appropriation as compared to before an appropriation. In their view, the Lockean proviso is satisfied as long as appropriation generates positive externalities equal to or in excess of the value of the land at the time it is appropriated.<sup>72</sup> For example, *Dana* may comply with the Lockean proviso if she plants a coconut grove on part of her acre and uses the rest to build a

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<sup>72</sup> See Geoffrey P. Miller, *Economic Efficiency and the Lockean Proviso*, 10 HARV. J. L. & PUB. 401, 409 (1987).

hotel that attracts tourists to the island, thus providing jobs to the others and contributing to the island's economy such that they are no worse off than before her appropriation.

According to most holders of this view, private appropriation almost always comports with the proviso, since it encourages value-enhancing cultivation: *Dana* is more likely to plant a coconut grove if she is assured that she can reap its bounty without the risk that those who did not share in the labor will harvest some of the coconuts for themselves. In other situations, private appropriation encourages conservation by solving tragedy of the commons problems that can occur from over-grazing, over-fishing or over-cultivation.<sup>73</sup> Assuming that the non-appropriators benefit (for example, by being able to trade labor or other goods for *Dana*'s coconuts or the fish from her beach), then the proviso is satisfied. In such situations, *Dana*'s appropriation actually exceeds the baseline set by the proviso in that she leaves "enough, and more, for others."

That said, the fact that private property rights generate positive externalities *on net* does not necessarily mean that *nobody* is made worse off. As Matt Zwolinski has noted:

Fortunately for fans of strong rights of private property, private appropriation of natural resources generally *does* leave enough and as good for others . . . . Unfortunately for fans of strong rights of private property, the *general* prosperity produced by private appropriation leaves open the possibility that some, perhaps many, individuals are made worse off by that appropriation. . . . But that doesn't mean that we should ignore the fact that the tide is rising and that property rights are an important part of the cause. If rights of private property fail to make everyone sufficiently better off to satisfy the Lockean proviso, this doesn't mean that we should throw out such rights altogether. We just need to make sure that something is done to help those whom the general tide of prosperity has left behind. This is the role of a government-financed safety net in libertarian theory.<sup>74</sup>

Significantly, Zwolinski's argument for a safety net on the basis of the Lockean proviso assumes that private property rights make some set of individuals worse off. How might this be? Although Zwolinski does not address this specifically, we believe the following is plausible. A market economy based on the voluntary transfer of private property generally satisfies the Lockean proviso on the assumption that non-appropriators can trade their labor for a portion of the surplus generated by appropriation. In modern society, then, a functioning employment market essentially replaces the opportunity to appropriate and use unowned natural resources that existed in the state of nature. Instead of resources being there "for the taking" as they were in the pre-property state; now jobs are there "for the taking."<sup>75</sup> When, however, individuals are locked out of the labor market, then the private property regime has not provided them with "enough, and as good." Even if *Dana*'s appropriation of resources has left "enough, and more," for some,

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<sup>73</sup> See Garrett Harding, *The Tragedy of the Commons*, SCIENCE 162 (1968); David Schmidtz, *When Is Original Appropriation Required?*, 73 THE MONIST 504, 513 (1990); Wolf, *supra* note 50, at 799-800; Mack.

<sup>74</sup> Matt Zwolinski, *Property Rights, Coercion, and the Welfare State: The Libertarian Case for a Basic Income for All*, 19 INDEP. REV. 515, 521, 523 (2015) (paragraph breaks omitted) [hereinafter Zwolinski, *Property Rights*].

<sup>75</sup> Eric Mack, *The Self-Ownership Proviso: A New and Improved Lockean Proviso*, 12 SOC'L PHIL. & POL'Y (1995) [hereinafter Mack, *Self-Ownership*].

she does not satisfy the Lockean proviso so long as “not enough, and less,” is left for individuals deprived of labor market opportunities.

Some individuals might be unable to access the labor market due to constraints imposed by the state, such as the minimum wage or licensing laws. Of course, the fact that the state itself stands in the way of full employment would likely not convince a minimal-state libertarian to expand the state further by taxing for redistributive purposes. That said, only the truest of free-market true believers would argue that all unemployment is a function of state-imposed labor market constraints. Disability (physical and intellectual), old age (and youth), and lack of education, among other factors, would continue to prevent some individuals from selling their labor at a wage rate above a subsistence level even in the absence of any labor market regulation whatsoever.

A hard-liner might argue that anyone living today, even if unemployable, is still better off than he or she would be if no private property existed at all. Yet the hard-liner’s hypothetical argument is far from self-evidently correct. In a world without private property, some individuals would starve—but not all. In a world with private property, most individuals do not starve—but some do. The question of whether *anyone* is worse off today with private property than she would have been without is difficult to answer—and, we think, impossible to answer confidently in the negative.

The minimal state libertarian thus finds herself facing something of a dilemma. On the one hand, a regime of private property with no redistribution runs the risk of violating the Lockean proviso. On the other hand, it is not obvious that the Lockean proviso requires redistributive taxes and transfers because it is not obvious that any (or an appreciable number of) individuals are worse off in a world with private property than they would be without. Exacerbating the dilemma is the fact that neither the non-redistributive minimal state nor the propertyless condition exist at present, and even if either did, it would be impossible to observe how the utility of any single individual changes across alternative regimes.

We cannot claim to have here a solution for the minimal state libertarian’s dilemma, at least insofar as the minimal state libertarian insists on evaluating the Lockean proviso against a propertyless baseline. It seems unlikely, however, that the proper comparison point is one’s material well-being before private appropriation of property, when humans led extremely primitive lives constantly on the brink of starvation and death. If so, then all appropriations would be just, rendering any proviso pointless. *Edmund* could appropriate all the property in the world and employ everyone else on terms essentially akin to slavery, and if his employees had it slightly better than cavemen, the proviso would be satisfied. On the other hand, the comparison cannot be that individuals must be made better off by a given appropriation than they would be under all possible alternative appropriations. Not only is this unknowable, but it would veer too far in the other direction and render the proviso essentially impossible to meet.

There are, however, two other plausible interpretations of the Lockean proviso. The first interprets the proviso as meaning that “enough, and as good,” is left for others if everyone has a sufficient level of resources to meet their basic needs.<sup>76</sup> One individual’s self-ownership can be

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<sup>76</sup> Vallentyne & van der Vossen, *supra* note 34.

impacted by how others use their resources if that use impinges on her ability to interface with the world.<sup>77</sup> So too, an individual needs some baseline amount of resources to exercise her own self-ownership. In order to be able to use one's self, an individual needs oxygen, food, water, and other basic necessities. Resources provide opportunities for one's "self-preservation and self-government,"<sup>78</sup> meaning that after appropriation, "[w]hat must be guaranteed to each person is the opportunity of *a living* – a condition of nondependence, in which one is free to better oneself, govern one's own existence, and enjoy the goods God has provide for all."<sup>79</sup> If private appropriation or use denies an individual access to these necessities, the individual's self-ownership is infringed.<sup>80</sup>

By focusing on an individual's ability to exercise self-ownership, this interpretation suggests that the private appropriation or use of property must allow for others to shape their own environment to reflect their own goals. Although the positive externalities created by a free market and private property will on net enhance most individuals' abilities to do so, some individuals will unfortunately find their powers diminished. In the latter situations, others are exercising their property rights in ways that impinge on these individuals' self-ownership. Providing these individuals with basic necessities protects their rights to self-ownership and by so doing assures that the proviso is met with respect to all members of society. At the same time, however, limiting any such redistribution to the necessities protects the self-ownership and private property rights of the individuals who are made better off by private appropriation.

We offer here a second interpretation of the proviso, one that posits that the appropriate basis of comparison is not any prehistoric state of nature, but plausible modern-day alternatives to the extant property rights regime. Under this interpretation, private appropriation of resources leaves others at least as well off if and only if such others—thinking rationally and looking out for their own interests—would not choose to prevent such appropriative acts from occurring. In making this judgment, individuals consider the range of likely outcomes under alternative property regimes (or propertyless regimes), rather than the unlikely possibility of permanent reversion to statelessness.

To illustrate: Imagine a country with 100 acres of land and 100 people living under primitive conditions. One of the 100, *Gaston*, then appropriates all the land for himself and employs his compatriots as low-wage workers. When the 99 others object, *Gaston* responds that his compatriots are all better off than they were in the primitive state preceding his act of appropriation. The others disagree. They say that if *Gaston* had not appropriated all 100 acres for himself, they eventually would have organized themselves into a community that allocated one acre to each individual. They also argue that they would be better off as yeoman farmers in an egalitarian society than as low-wage workers under *Gaston's* control. And when *Gaston*

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<sup>77</sup> This has led Eric Mack to call for a "self-ownership proviso," arguing that individuals should not be able to use their resources in ways that *severely* impact another's "'world-interactive powers,' i.e., capacities to affect [one's] extra-personal environment in accord with [one's] purposes." Mack, *supra* note 75.

<sup>78</sup> A.J. SIMMONS, *THE LOCKEAN THEORY OF PROPERTY RIGHTS* 292 (1994).

<sup>79</sup> *Id.* at 293 (emphasis in original).

<sup>80</sup> See Avery Kolers, *Review of Removing the Commons: A Lockean Left-Libertarian Approach to the Just Use and Compensation*, NOTRE DAME PHIL. REVS. (Feb. 2, 2014) (arguing that if use of natural resources degrades natural resources such as air impedes self-ownership); SIMMONS, *supra* note 78 at 288 (grounding this argument in Locke's assertions that appropriation can do no harm and in his discussions of money).

disputes that this ever would have happened, the others point out that many countries around them ultimately arrived at political and economic arrangements that did not result in all but one individuals being serfs to a single lord.

*Gaston* then offers two counterarguments. First, he says, even if his compatriots ultimately would have arrived at a more egalitarian allocation of resources, that would have taken time. *Gaston* says he has improved their welfare over the long run because he lifted them out of the primitive state much earlier. And second, he says, while it is possible that the country otherwise would have evolved into a Sweden-like social welfare state, it also might have evolved into a Democratic Republic of the Congo-like state—ravaged by civil unrest, and with a per-capita income even below the meager wages that *Gaston* pays each worker.

*Gaston* then puts the point another way: “If you all could go back in time and prevent me from appropriating all 100 acres for myself, would you? Even if that means you would have spent (indefinitely) longer living in the primitive state? And even if that means you might have ended up as a modern-day Congo instead of a modern-day Sweden? Would you really rather roll the dice again instead of having me take charge?”

*Gaston*’s challenge to his compatriots is a difficult one. But the fact that his compatriots are better off than in the primitive state does not prove that their answer to his question would be negative. Popular uprisings occur not because the populous believes it would be better off in the state of nature, but because the populous believes it would be better off rolling the dice again. In other words, we might say that the Lockean proviso that others be left “at least as well off” is satisfied if others, knowing what they know at the time, would prefer that (or are would be indifferent as to whether) the act of appropriation occurs. Such a judgment entails a comparison between circumstances under the status quo and the range of plausible scenarios that might have transpired in the absence of the appropriative act.

This approach is similar in many ways to the classical liberal approach, to which we will turn momentarily. We suggest that it may be a valid interpretation of the Lockean proviso too: an act of appropriation leaves others at least as well off if and only if such others—thinking rationally and looking out for their own interests—would not choose to prevent the appropriative act from occurring. Importantly, whether individuals would choose to prevent the appropriative act from occurring depends (in part) on how well off they are given the appropriative act. In the case of *Gaston* and his 99 compatriots, the answer depends (at least in part) on how much *Gaston* pays his employees.

On this view, a basic income raises the welfare of individuals who gain the least from the current allocation of resources and, accordingly, increases the probability that the present regime of private property rights makes those individuals at least as well off as if prior appropriative acts had not occurred. Insofar as a basic income increases the probability that the Lockean proviso is satisfied, it strengthens the argument that the existing property regime is just. The argument thus operates similarly to the “absolutization” argument above: a basic income serves a legitimating function in a state with robust protections for private property.

## B. *Classical Liberalism*

We have first explored whether libertarianism justifies a safety net on minimal state libertarian grounds. We should be clear, however, that although some such theorists (such as Mack) may accept the legitimacy of minimal redistribution, other minimal state libertarians disagree that so doing is within the state's purview. In these theorists' view, the only purposes the state may legitimately pursue are providing physical protection and enforcing contracts. And while we have argued that the minimal state libertarians' rejection of redistributive taxation does not necessarily follow from Lockean and Nozickian premises, we also acknowledge that our argument will not win universal acceptance in minimal state libertarian quarters.

A second group of libertarians – classical liberals – believe, however, that a slightly-more-than-minimal state can be justified. Within classical liberalism, we identify two arguments for supporting a UBI: first, that providing a “sufficientarian”<sup>81</sup> safety net is mandated by classical liberalism, and second, that a UBI is the best way to distribute revenue raised from Pigouvian environmental taxation.

To provide context for these arguments, a brief explanation of classical liberalism is in order. Although classical liberals – like minimal state libertarians – oppose large scale welfare programs and reject much current governmental regulation, they admit that in some instances the government can engage in activities beyond acting as a night watchman, such as providing public goods, prohibiting monopolies, and reducing negative externalities. As Richard Epstein has explained:

The missing . . . element of many classical libertarian theories is that they do not offer a comprehensive explanation of the role of *forced exchanges* in structuring a political system. The principle of autonomy never permits a draft in times of war. . . . The principle of freedom of contract cannot distinguish between an ordinary sale and a cartel arrangement. A categorical prohibition against taking does not recognize any privilege to take property of others in time of necessity. The stripped-down libertarian theories . . . preclude[] the use of taxation, condemnation, and the state provision of infrastructure. These practices were part and parcel of government action long before the rise of the modern welfare state. Figuring out why these institutions are needed and how they should be designed and funded requires a major correction to the starker versions of libertarian theory, which is what the classical liberal approach seeks to supply. Yet by the same token, the effort to respond to these difficulties does not require us to abandon the vision of limited government and fall into the deadly embrace of the welfare state. Even after all these adaptations are made, government would occupy a far smaller place than it holds under contemporary political theory and constitutional law.<sup>82</sup>

While most minimal state libertarians clearly ground their arguments in deontological theories, classifying the theoretical roots of classical liberalism is a bit complicated. Many classical liberals – such as Epstein, Friedman, and Hayek – use consequentialist arguments that

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<sup>81</sup> We further explain what we mean by “sufficientarian” below. See *infra* text accompanying note 93.

<sup>82</sup> EPSTEIN, SKEPTICISM, *supra* note 40, at 7 (paragraph break omitted).

focus on the costs from government action and the benefits from free markets coupled with robust private property rights. Hayek, for example, emphasizes that free markets are superior to centralized planning because of the diffusion of knowledge across individuals.<sup>83</sup> In a slightly different vein, Epstein focuses on the ability of private property rights to solve problems such as the tragedy of the commons and information asymmetries more efficiently than statist interventions. These theorists, however, also incorporate deontological arguments about the evils of coercion.<sup>84</sup> In their view, an individual's right to be free from coercion simultaneously limits what government may do to further any given consequentialist goal (such as efficiency) and justifies strong private property rights and free markets. The latter, moreover, allows for the free expression of individual preferences in a variety of domains.<sup>85</sup>

A third type of reasoning used to justify a limited, classical liberal state is contractarianism. Under this view, the coercion stemming from the establishment of the state is legitimate only if it is justifiable to all citizens. All citizens need not actually consent, but the order must be such that they would consent. To illustrate, consider Epstein's elucidation of classical liberalism, in which "the justification for the state depends upon [a] *network of forced hypothetical exchanges*" whereby every individual is "required to surrender his right to use force in exchange for the like promise of every other individual to so refrain."<sup>86</sup> According to Epstein, these hypothetical exchanges amount to a "Pareto-superior move," meaning that the exchanges leave each person at least as well off as she would be in the state of nature (and leave at least some people better off).<sup>87</sup> "In principle," Epstein says, "no person can object" to a "world in which the use of sovereign power leaves him better off than he was with his natural endowments."<sup>88</sup>

Gerald Gaus offers a similar justificatory argument in the philosophy literature. He starts from the premise that a just society treats individuals as free (meaning that "each has a fundamental claim to determine what are her obligations and duties") and equal (meaning that "members of the public are symmetrically placed insofar as no one has a natural or innate right

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<sup>83</sup> See generally FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960) [hereinafter HAYEK, *CONSTITUTION*] (arguing, inter alia, that free markets are more efficient than central planning because in a free market, those with the power to make decisions, the individuals, are the same as those with the information on which those decisions need to be based). Similarly, Friedman notes that "the great advances of civilization, whether in architecture or painting, in science or in literature, in industry or in agriculture, have never come from a centralized government." MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 3 (1962, 40<sup>th</sup> anniv. ed. 2002).

<sup>84</sup> See, e.g., EPSTEIN, *SKEPTICISM*, *supra* note 40, at 2–5 (discussing the interrelation of consequentialism and natural rights).

<sup>85</sup> According to Friedman, for example, free markets are a necessary precursor to political freedom because they allow individuals to generally do whatever they like with their freedom and to resolve ethical problems as they see fit. In contrast, government-run economies involve coercion by forcing individuals to do what they would not otherwise. See FRIEDMAN, *supra* note 83, at 1–22; BRIGHOUSE, *supra* note 34, at 86–94 (summarizing Friedman's arguments). Hayek's famous refrain that government planning is "the road to serfdom" likewise reflects this sentiment. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 75–78 (2d ed. 1994) [hereinafter HAYEK, *SERFDOM*]. More recently, John Tomasi has argued that economic liberty is just as important as religious and political freedom and that economic freedom and social justice are complementary. See generally JOHN TOMASI, *FREE MARKET FAIRNESS* (2012) (arguing that economic liberty and social justice are complementary, rather than conflicting, ideals).

<sup>86</sup> Richard A. Epstein, *Taxation in a Lockean World*, 4 SOC. PHIL. & POL'Y 49, 53 (1986).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



to command others or to impose obligations on them”).<sup>89</sup> Because individuals are free and equal, any coercion must be justified to them. Free and equal individuals, however, will have differing conceptions of how much coercion (if any) is justified. Gaus reasons that given these different opinions, a just society is one which each individual concludes is better than no state at all: “[i]f a system of strong property rights is to be publicly justified, it must be the case that everyone has reason to accept it and no one has reason to reject it.”<sup>90</sup>

### 1. *Classical Liberalism and a Safety Net*

As we just saw, a variety of theoretical approaches support classical liberalism. And although classical liberalism generally militates against large-scale government redistributive efforts, several theorists in the classical liberal tradition – including Adam Smith, Hayek, Friedman, and Epstein – have argued that providing a limited safety net to the poor is consistent with classical liberalism.<sup>91</sup> This concern is sufficientarian in nature, however, and not egalitarian.<sup>92</sup> By this, we mean that classical liberal theorists are concerned with providing a minimum level of material resources for all individuals, but are not concerned with inequality as such.<sup>93</sup> Hayek, for example, supports a minimum income that provides “security against severe physical privation” rather than trying to assure “a given standard of life . . . determined by comparing the standard enjoyed by a person or a group with that of others.”<sup>94</sup> As to the latter, Hayek notes that aiming for a “more even or more just distribution of goods”<sup>95</sup> interferes with freedom to a degree that providing a minimal safety net does not.

Justifications for this safety net tend to fall into three camps, though classical liberal supporters of a safety net tend to mix and match them. One argument – which many scholars interpret Locke as making – is simply that we have a moral duty to care for the poor.<sup>96</sup> We

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<sup>89</sup> Gerald Gaus, *Coercion, Ownership, and the Redistributive State: Justificatory Liberalism’s Classical Tilt*, 27 SOC. PHIL. & POL’Y 233, 234 (2010) [hereinafter Gaus, *Coercion*].

<sup>90</sup> GERALD F. GAUS, SOCIAL PHILOSOPHY 188–91 (1999) [hereinafter GAUS, SOCIAL PHILOSOPHY].

<sup>91</sup> TOMASI, *supra* note 85, at 125.

<sup>92</sup> *Id.* at 126–27; *see also* Jason Brennan & John Tomasi, *Classical Liberalism*, in OXFORD HANDBOOK OF POLITICAL PHILOSOPHY 115, 122–23 (David Estlund ed., 2012) (explaining a sufficientarian case for the **well-being** of the disadvantaged).

<sup>93</sup> On the distinction between sufficientarianism and egalitarianism, *see* Richard Arneson, *Egalitarianism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., 2013), <https://plato.stanford.edu/archives/sum2013/entries/egalitarianism>.

<sup>94</sup> HAYEK, CONSTITUTION, *supra* note 83, at 259.

<sup>95</sup> *Id.*

<sup>96</sup> This stems from the following passage:

God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods; so that it cannot justly be denied [sic] him, when his pressing Wants call for it. . . . As *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every man a Title to so much out of another’s Plenty, as will keep him from extream [sic] want, where he has no means to subsist otherwise . . . .

Waldron, *supra* note 47, at 91 (quoting JOHN LOCKE, FIRST TREATISE ON GOVERNMENT 21 (1689)). Although some scholars debate how demanding this passage is, many believe it justifies government aid to the poor. *See* Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B. C. L. REV. 1345, 1381 (2015). Regardless,

bracket the moral duty argument for present purposes and focus on two other grounds for supporting a safety net, which require a bit more elucidation: (1) poverty relief is a public good subject to free rider problems, and (2) a safety net is necessary to ensure that state coercion is justifiable to all.

*a. Redistribution as a Public Good*

As mentioned previously, classical liberalism – unlike minimal state libertarianism – makes room for the provision of public goods (although most classical liberals would argue that much of what the government currently provides under the guise of public goods are not actually such goods).<sup>97</sup> Under this view, the main role of government is to provide the framework necessary for a smoothly functioning free market.<sup>98</sup> Yet even a functioning market is unlikely to provide public goods in optimal quantities. Consider clean air: once clean air is provided for one person, it is impossible to preclude others from also enjoying it. This non-excludability is thought to lead to free-riding, which in turn causes private actors to under-produce such goods. If so, the government may justifiably act to remedy market failure so that the optimal level of public goods is produced.<sup>99</sup>

Mark Pauly suggests two ways in which redistribution might bear the qualities of a public good. One is that poverty might contribute to crime, and so poverty alleviation through redistribution might reduce crime. In this way, redistribution is a public good to the same extent that policing is a public good.<sup>100</sup> The theoretical and evidentiary support for the redistribution-reduces-crime claim, however, is mixed. On one hand, redistribution that is limited to the non-incarcerated population increases the relative cost of crime, which we might expect to result in a lower crime rate. On the other hand, redistribution financed through income taxation reduces the return from licit income-generating activity relative to illicit activity, assuming that the former is

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almost 300 years later, Hayek also relied on moral duties when discussing aid to the poor. HAYEK, CONSTITUTION, *supra* note 83, at 285; FRIEDRICH A. HAYEK, LAW LEGISLATION AND LIBERTY, VOLUME 1: RULES AND ORDER 152 (1973); FRIEDRICH A. HAYEK, LAW LEGISLATION AND LIBERTY, VOLUME 2: THE MIRAGE OF SOCIAL JUSTICE 87 (1976). Even more notably, some scholars also believe that Thomas Hobbes supported the state provision of a minimal safety net. *See, e.g.*, Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 705 (1994) (“As Hobbes puts it, those who by unavoidable accident ‘become unable to maintain themselves by their labour . . . ought not to be left to the Charity of private persons; but to be provided for, (as far[]) as the necessities of Nature require,.) by the Lawes [sic] of the Commonwealth.” (quoting THOMAS HOBBS, LEVIATHAN 239 (Richard Tuck ed., Cambridge Univ. 1991) (1651))).

<sup>97</sup> Gaus, *Coercion*, *supra* note 89, at 235; *accord* Gerald F. Gaus, *Public and Private Interests in Liberal Political Economy, Old and New*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 183, 192–93 (Stanley I. Benn & Gerald F. Gaus eds., 1983) [hereinafter Gaus, *Public and Private*].

<sup>98</sup> FRIEDMAN, *supra* note 83, at 25–28.

<sup>99</sup> *See, e.g., id.* at 27-32; LIONEL ROBBINS, THE THEORY OF ECONOMIC POLICY IN ENGLISH CLASSICAL POLITICAL ECONOMY 188-89 (1953); GAUS, SOCIAL PHILOSOPHY, *supra* note 90 at 170, 188-91. A second reason for the underprovision of public goods by the free market is nonrivalry: that any one individual’s enjoyment of the good does not reduce the utility of the good to others. Thus the marginal cost of providing the good to an additional individual is zero. Yet the provider of the good must charge more than zero in order to cover costs (much less make a profit). The result is that some individuals who value the good at more than marginal cost but less than the provider-set price do not enjoy the good. Goods that are nonrival but excludable are considered to be “quasi-public goods.”

<sup>100</sup> Mark V. Pauly, *Income Redistribution as a Local Public Good*, 2 J. PUB. ECON. 35, 37 (1973).

taxed and the latter is not. That, in turn, might be expected to result in more crime. Which of these effects predominates is an empirical question without a clear answer.<sup>101</sup>

Second, Pauly posits that poverty “offends the esthetic and moral sensibilities” of individuals who encounter it.<sup>102</sup> Poverty alleviation through redistribution might thus be a public good in much the same way that city beautification is a public good: it increases the aesthetic pleasure (or decreases the aesthetic displeasure) experienced by all. Milton Friedman conceptualized poverty relief in this manner when advocating for the negative income tax. Although he first expresses a preference for voluntary charity, he then proceeds to accept “governmental action to alleviate poverty; to set, as it were, a floor under the standard of life of every person in the community.”<sup>103</sup> As Friedman explains:

I am distressed by the sight of poverty; I am benefited by its alleviation; but I am benefited equally whether I or someone else pays for its alleviation . . . . To put it differently, we might all of us be willing to contribute to the relief of poverty, *provided* everyone else did. We might not be willing to contribute to the same amount without such assurance. In small communities, public pressure can suffice . . . . In the large impersonal communities that are increasingly coming to dominate our society, it is much more difficult for it to do so.<sup>104</sup>

By emphasizing how we all benefit from poverty relief regardless of whether we contribute to it, Friedman illustrates how we can conceptualize poverty relief as a public good for which voluntary contributions are insufficient.<sup>105</sup>

To be sure, the fact that Friedman would be willing to contribute to poverty relief does not mean that everyone shares the same charitable impulse. A less beneficent individual (we’ll call him *Scrooge*) might ask: “Why should I be compelled to pay for a safety net just because *Friedman* has an aesthetic or ethical preference for poverty alleviation?” Friedman does not anticipate or answer this objection but it is not hard to see how he might.

*Scrooge*’s objection to taxation for the purpose of poverty alleviation is not unlike, say, *Lance*’s objection to taxation for the purpose of highway construction: “Why should I be compelled to pay for roads just because others prefer to travel by automobile? I would be happy to get around on my bicycle.” Of course, even the professional cyclist benefits from roads: he eats food and wears clothes that have travelled by truck (and he might ride on those roads when not training on trails). But we can without difficulty imagine individuals who do not desire

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<sup>101</sup> For a further explanation of the uncertain theoretical connection between redistribution and crime rates, as well as a survey of the then-existing empirical literature, see Ayse Imrohorglu, Antonio Merlo & Peter Rupert, *On the Political Economy of Income Redistribution and Crime*, 41 INT’L ECON. REV. 1 (2000). See also Pablo Fajnzylber, Daniel Lederman & Norman Loayza, *Inequality and Violent Crime*, 45 J. L. & ECON. 1, 7 (2002) (concluding on the basis of cross-country comparisons that higher poverty is correlated with more crime); John R. Hipp & Daniel K. Yates, *Ghettos, Thresholds, and Crime: Does Concentrated Poverty Really Have an Accelerating Increasing Effect on Crime?*, 49 CRIMINOLOGY 955 (2011) (concluding on the basis of a comparison across census tracts that poverty has a positive but diminishing effect on crime).

<sup>102</sup> Pauly, *supra* note 100, at 38.

<sup>103</sup> FRIEDMAN, *supra* note 83, at 191.

<sup>104</sup> *Id.*

<sup>105</sup> See *id.*; see also Mack & Gaus, *supra* note 34, at 124 (explaining Friedman’s approach).

particular public goods (e.g., the pacifist who does not want a military; the Amish farmer who does not want highways). Few classical liberals believe that taxation for the purposes of public good provision should be subject to a heckler's veto.<sup>106</sup>

This still leaves us to ask whether Friedman's argument for poverty relief as a public good proves too much. Suppose that *Leona*<sup>107</sup> says: "I am distressed by the suffering of Malteses; I am benefited by its alleviation; but I am benefited equally whether I or someone else pays for its alleviation." Should the classical liberal state then pay for the care of small hypoallergenic dogs with long and silky white hair? The fact that a good is nonrival and nonexcludable (and therefore "public" in the technical sense) cannot be a sufficient condition for funding it through taxation.

Instead, it is quite likely that a classical liberal would also insist upon some proof of market failure before funding a given "public" good through taxation. Recall that classical liberalism justifies government funding of public goods to remedy market failure, that is, the sub-optimal funding of such goods due to free-rider or other problems. The fact that a good is nonrival and nonexcludable does not necessarily mean that free-riding is a problem leading to sub-optimal levels of the good. It is, of course, quite difficult to determine the optimal level of a given public good due to the very absence of a market.<sup>108</sup> But the fact that few Maltese dogs are suffering in the streets and in animal shelters might suggest there is a working market for caring for such dogs.<sup>109</sup> In contrast, the glut of pit bulls at animal shelters might suggest that the market provides for their care at suboptimal levels.

To determine whether poor relief and other public goods suffer from market failure, perhaps a requirement of majority (or supermajority?) support should be added to the conditions of nonrivalry and nonexcludability. This raises its own set of problems, however, and does not fully resolve our dilemma. It is true that, as Charles Murray notes, the vast majority of the population supports some amount of redistribution. Murray puts the figure at "upward of 90 percent."<sup>110</sup> That said, just because a majority supports provision of a good through taxation does not mean a classical liberal will support government intervention: majoritarian preferences cannot undercut the limits that classical liberalism imposes on government. At the same time, just because a majority does not support provision of a good through taxation does not mean that the classical liberal will feel the same: the classical liberal might, for instance, ascribe the lack of majoritarian support to an information deficit among voters.

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<sup>106</sup> See GAUS, *SOCIAL PHILOSOPHY*, *supra* note 90, at 188-98 (reasoning that since no public good would garner unanimous support, individuals instead consent to the provision of a bundle of public goods that they prefer when compared to a world with no public goods).

<sup>107</sup> Cf. Cara Buckley, *Contested Life and Secret End of Millionaire Maltese*, N.Y. TIMES, June 9, 2011, <http://www.nytimes.com/2011/06/10/nyregion/leona-helmsleys-millionaire-dog-trouble-is-dead.html> (noting that the billionaire real estate and hotel tycoon Leona Helmsley left \$12 million to her Maltese dog Trouble, though a court later lowered the amount to \$2 million).

<sup>108</sup> For a longer discussion of this dilemma, see Fleischer, *Libertarianism*, *supra* note 96, at 1393, 1398.

<sup>109</sup> Perhaps one could view enjoying the companionship of a Maltese as a tie-in that minimizes free-riding. *See id.* at 1396-97.

<sup>110</sup> MURRAY, *supra* note 4, at 3.

*b. Justificatory Arguments*

The final set of arguments for a safety net rests on the ideal that a societal order must be justifiable to all. Several variations of this appear in the philosophy literature.<sup>111</sup> Recall that philosopher Gerald Gaus argues that because individuals are free and equal, any coercion must be justified to them.<sup>112</sup> A system of strong private property rights, therefore, is justifiable only if “everyone has a reason to accept it and no one has reason to reject it.”<sup>113</sup> Gaus then recognizes that “some people inevitably are left out of the general abundance of modern economies,”<sup>114</sup> and that rational individuals will not consent to a social and economic system with strong private property rights if that system makes them worse off. A sufficientarian safety net should therefore be provided to those individuals so that they have reason to accept a system with strong property rights.<sup>115</sup> A variant of this reasoning is that to give all individuals a “rational stake in the moral community established by [a] system of [private property] rights,” a minimal safety net is necessary to get the buy-in of those lacking basic necessities.<sup>116</sup>

A similar argument also might be made based on Epstein’s conception of the classical liberal state as a “*network of forced hypothetical exchanges*” whereby individuals surrender their rights to use force in exchange for others’ promises to do the same.<sup>117</sup> Because these exchanges amount to Pareto-superior moves,<sup>118</sup> Epstein believes that “no person can object” to a “world in which the use of sovereign power leaves him better off than he was with his natural endowments.”<sup>119</sup> The absence of a basis to object therefore legitimizes the state.

It is not entirely clear, however, what Epstein means when he says that “[i]n principle, no person can object” to a bargain that entails a “Pareto-superior” move. If the statement is an empirical claim about the way that individuals behave when confronted with proposed exchanges that would leave them at least as well off materially as before, then the statement is manifestly false. Experiments involving “Ultimatum Game” scenarios consistently demonstrate that individuals reject offers they perceive to be lopsided, even if Pareto-superior. In one familiar

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<sup>111</sup> See, e.g., Zwolinski, *supra* note 7, at 7.

<sup>112</sup> See text surrounding notes 89-90.

<sup>113</sup> GAUS, SOCIAL PHILOSOPHY, *supra* note 90, at 188-91.

<sup>114</sup> *Id.* at 170.

<sup>115</sup> *Id.*

<sup>116</sup> See LOREN LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 126-29 (1989). Lomasky’s argument stems from his characterization of individuals as project pursuers who have an incentive to adopt a cooperative strategy of non-interference with others’ pursuit of their projects. *Id.* at 25-27, 31-34, 65-79. The boundaries of this non-interference (which is quite large, since each person wants as much freedom as possible for project pursuit) become rights, including property rights. *Id.* at 73. This justifies a limited state with limited taxation, but no more. *Id.* at 79-83. With respect to a safety net, Lomasky reasons:

If a person is otherwise unable to secure that which is necessary for his ability to live as a project pursuer, then he has a rightful claim to provision by others who have a surplus beyond what they require to live as project pursuers. In that strictly limited but crucial respect, basic rights extend beyond liberty rights to welfare rights.

*Id.* at 126. For a critique of this argument, see Tibor R. Machan, *Against Lomaskyan Welfare Rights*, 14 REASON PAPERS 70-75 (1989).

<sup>117</sup> Epstein, *Taxation in a Lockean World*, *supra* note 86, at 53.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

version of the game, an “Allocator” is told that she can divide \$10 between herself and a “Recipient.” The Allocator’s division of the \$10 serves as an offer, which the Recipient can accept or reject. If the Recipient accepts the offer, then the Allocator walks away with the amount that she allocated to herself, and the Recipient walks away with the amount that the Allocator offered to him. If the Recipient rejects the offer, then the Allocator and Recipient both walk away with zero. Note that for any offer greater than zero, the Recipient is better off in material terms if he accepts the offer rather than rejecting it. And yet across countries and cultures, Recipients tend to reject offers that they perceive to be too low (even though above zero). Richard Thaler finds in a review of such studies that recipients tend to reject offers of less than about a quarter of the pot.<sup>120</sup>

The forced hypothetical exchange imagined by Epstein is similar to the Ultimatum Game in that acceptance is surplus-generating: individuals are capable of generating greater material wealth with the rule of law than without. Epstein’s claim is that so long as the surplus is allocated such that all individuals are at least as well off as in the state of nature, then the hypothetical exchange is justified even though it entails force. The Ultimatum Game results pose a challenge for Epstein: why is force justified under circumstances in which we have strong reason to believe that the target of such force would object? One can anticipate at least two possible responses. First, Epstein might say that results of the Ultimatum Game in experimental settings lack external validity. After all, the stakes in the experimental setting are much smaller than in the state of nature. Yet even in high-stakes versions of the Ultimatum Game, researchers observe individuals in the Recipient role rejecting offers equivalent to their expenditures for an entire month if they perceive the surplus division to be too lopsided.<sup>121</sup> Second, Epstein might say that even if as an empirical matter individuals *do* reject lopsided offers in the Ultimatum Game, as a moral matter such rejections are unjustified. Yet the latter response would amount to a concession that the classical liberal state cannot in fact rest on hypothesized consent—a concession that seems to amount to giving away the store.

To put the point more concretely, we can imagine two individuals—“High Endowment” (or “*High*”) and “Low Endowment” (or “*Low*”)—each of whom gains materially from the rule of law. We know that *High* gains more in material terms from the rule of law than *Low* does, because we can observe the delta between the income of *High*-types in well-functioning states and the income of *High*-types in failed states, and can compare that to the delta between the income of *Low*-types in well-functioning states and *Low*-types in failed states. Epstein’s version of classical liberalism would seem to require that both *High* and *Low* would consent to the network of exchanges that the state embodies. The findings from the Ultimatum Game suggest that Pareto superiority is not a sufficient condition for *Low*’s consent. *Low* must perceive the division of surplus to be fair enough that he does not exercise his prerogative in the Recipient role to reject *High*’s offer.

One might at this point ask why we have styled *High* as the Allocator and *Low* as the Recipient. Why not allow *Low* to occupy the Allocator role, in which case the hypothetical-

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<sup>120</sup> See Richard H. Thaler, *Anomalies: The Ultimatum Game*, 2 J. ECON. PERSPS. 195, 196-98 (1988) (reviewing literature).

<sup>121</sup> See Lisa A. Cameron, *Raising the Stakes in the Ultimatum Game: Experimental Evidence from Indonesia*, 37 ECON. INQ. 47, 56 & n.16 (1999).

consent constraint is satisfied as long as *Low*'s offer to *High* is sufficiently generous to *High* such that *High* accepts the offer in her Recipient role? Instead of the minimally redistributive arrangement that arises when *High* is the Allocator, the assignment of *Low* to the Allocator role results in maximal redistribution (i.e., redistribution up to the point that *High* is indifferent between *Low*'s offer and the state of nature). Instead of asking how much redistribution is needed so that *Low* does not walk away from the table, we would ask how much soaking of the rich can be sustained before *High* walks away from the table.

Epstein responds that “within the Lockean world, the redistribution of income through the tax system is an unacceptable function of government, for no exchange can be Pareto-superior if it leaves some persons worse off.”<sup>122</sup> Yet presumably even a redistributive state can leave *High* at least as well off as in the state of nature. Indeed, this conclusion follows arithmetically from the claim that the rule of law is surplus-generating: the rule of law is Pareto-superior even if *all* the surplus is appropriated by *Low*. So if the baseline is the state of nature, then both the nonredistributive state and the redistributive state satisfy the Pareto superiority requirement. Epstein assesses the redistributive state against the baseline of the nonredistributive state and says, in effect: “Aha! The redistributive state is unjustifiable because it leaves some people (high-endowment individuals) worse off than they would be in the nonredistributive state.” And yet symmetrically, one could assess the nonredistributive state against a baseline of the redistributive state and say similarly: “Aha! The nonredistributive state is unjustifiable because it leaves some people (low-endowment individuals) worse off than they would be in the redistributive state.”

We do not seek to solve this challenge for classical liberal theory here. Our more limited point is as follows: Insofar as classical liberalism's argument from hypothetical consent is based on an actual hypothesis as to how individuals would behave in bargaining, then the state with zero redistribution appears to be problematic (because of the likelihood that low-endowment individuals would reject the offer notwithstanding the fact that it leaves them better off in material terms). A classical liberal state that is justified on the basis of hypothetical consent must redistribute at least enough such that the low-endowment individual accepts the offer. We do not here attempt to identify the upper boundaries of that redistribution. Our claim here is that *some* amount of redistribution may be required by the classical liberal framework.

## 2. *Classical Liberalism and Pigouvian Taxation*

Classical liberals also recognize that correcting negative externalities can be an appropriate state role.<sup>123</sup> To that end, some classical liberals have recognized a role for the government to help curb pollution by imposing Pigouvian taxes, which reduce negative externalities by requiring polluters to internalize more of the costs of their activities. This concept overlaps somewhat with Lockean limits on use, insofar as any individual who emits

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<sup>122</sup> Epstein, *Taxation in a Lockean World*, *supra* note 86, at 68.

<sup>123</sup> EPSTEIN, SKEPTICISM, *supra* note 40, at 7, 190-91 (acknowledging that in some instances, the state may legitimately act to curb pollution). Recently, two prominent Republicans suggested a carbon tax coupled with what is essentially a UBI. See John Schwartz, “A Conservative Climate Solution”: Republican Group Calls for Carbon Tax, N.Y. TIMES, Feb. 7, 2017, <https://www.nytimes.com/2017/02/07/science/a-conservative-climate-solution-republican-group-calls-for-carbon-tax.html>.

pollutants into the air or water that negatively affect others does not leave “enough” and “as good” for her fellows. To satisfy the Lockean proviso, the polluter would need to compensate her fellows for the harm she has caused, and a Pigouvian tax with the revenues distributed among all affected is one way of providing that compensation.

Based on these rationales, a minimal state libertarian might be amenable to a UBI funded through Pigouvian taxation. Note that a UBI funded through Pigouvian taxation might not be insubstantial. Consider that according to one estimate, the gross external damages from air pollution across all sectors of the U.S. economy in 2002 amounted to \$184 billion (at 2000 price levels).<sup>124</sup> That would translate to \$257 billion at 2016 price levels, or roughly \$800 per person per year.<sup>125</sup> Soil and water pollution externalities add to that figure. A comprehensive Pigouvian tax on environmental externalities, with revenues redistributed to all who are harmed by air, soil, and water pollution (which is to say, pretty much everybody), might well be consistent with even a Nozickian version of libertarianism while still resulting in a UBI of modest but not negligible proportions.

The argument that classical liberals should favor a UBI funded from Pigouvian taxation strikes us as a strong one, but we acknowledge two counterarguments that might be mustered. First, one might argue that the increase in welfare from the polluting activity acts as compensation enough already (“Yes, coal pollutes, but we all benefit from the electricity thereby generated”). Yet it is far from obvious that pollution ultimately redounds to everyone’s benefit (and the claim almost certainly does not hold for all forms of pollution). Accordingly, we believe that most classical liberals will accept the argument for Pigouvian taxation with some redistribution of revenues. A second counterargument would accept the desirability of a Pigouvian tax but question why the revenues should be distributed on a per-capita basis. Why not distribute the revenues to the particular individuals harmed by pollution? Again, this rejoinder will be more persuasive in some contexts than in others. With respect to carbon, for instance, a strong argument might be made that all are harmed and so all deserve a share of the revenues that Pigouvian taxation raises.

### III. WHY A UNIVERSAL BASIC INCOME IN THE FORM OF CASH?

Part II considered the case for limited redistribution on libertarian grounds. We have said little thus far about the form that such redistribution should take. Here we consider (1) whether transfers should be in cash or in kind, (2) whether such transfers should be conditional or universal, and (3) whether such transfers should be one-time or periodic. We then address common objections to a UBI.

#### A. *The Case for Periodic Unconditional Cash Transfers*

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<sup>124</sup> Nicholas Z. Muller, Robert Mendelsohn & William Nordhaus, *Environmental Accounting for Pollution in the United States Economy*, 101 AM. ECON. REV. 1649, 1664 tbl.1 (2011).

<sup>125</sup> This figure assumes a U.S. population in the range of 325 million. For an up-to-the-minute population estimate, see U.S. CENSUS BUREAU, U.S. AND WORLD POPULATION CLOCK, <http://www.census.gov/popclock> (last visited Aug. 24, 2016).



## 1. *In Cash vs. In Kind*

### a. The Case for Cash

A defining feature of a universal basic income is that comes in cash rather than in kind. Libertarians will generally prefer cash transfer schemes rather than in-kind programs on the grounds that cash transfers promote recipients' autonomy and self-ownership, whereas in-kind transfers undermine them and exemplify the type of paternalism libertarianism abhors. In-kind transfers (at least arguably) imply a lack of trust in recipients to make decisions about what would best further their pursuit of their life goals, as well as implying value judgments about what recipients "should" and "should not" spend money on. In contrast, cash transfers allow individuals to decide for themselves what would be best for them. Recipients decide how much to allocate on food versus clothing versus child care versus other uses. Libertarianism generally implies a respect for individual autonomy and self-ownership, with an accompanying suspicion of government interference with decisions about how to live one's life. For this reason, we might expect that libertarians who support some amount of redistribution will want that redistribution to come in cash.

Aside from arguments based on autonomy and self-ownership, we believe there are pragmatic reasons to favor cash transfers as well. The pragmatic case for a UBI generally stems from its efficiency advantages when compared to in-kind benefits. First, implementing a UBI in lieu of the current maze of overlapping welfare programs will likely reduce the size of the government bureaucracy and administrative costs. To illustrate: Four different cabinet departments – including the Department of Energy – operate 33 different housing programs. Three cabinet departments and one independent agency operate 21 food or food-purchasing assistance programs. Twenty-seven cash or general-assistance programs are run by six different cabinet departments and five other independent agencies.<sup>126</sup> Replacing this glut of programs with one streamlined program run by one agency would presumably reduce administrative and overhead costs. While the costs for the programs just mentioned are fairly modest – generally under 5 percent – the administrative costs of cash transfers are considerably lower. Social Security provides cash payments at an administrative cost of less than 8/10ths of one percent. In 2013, for example, it paid out benefits totaling roughly \$812 billion while spending only \$6.2 billion on administrative and overhead costs.<sup>127</sup> Channeling redistribution through the Social Security Administration—likely the agency best equipped to implement a UBI—would almost certainly increase the benefits received per tax dollar spent. There will only be one agency with one set of overhead costs, instead of multiple agencies with multiple levels of bureaucracy.

Second, cash transfer programs are more efficient at the recipient level. As an initial matter, by transferring cash instead of in-kind benefits, a UBI minimizes the deadweight loss associated with the latter. To illustrate: Individuals with preferences that do not match the state's preferences may find ways to turn in-kind benefits into cash. Reports of a soda "black market" in rural Appalachia reflect this concern. According to Kevin Williamson, some recipients of Supplemental Nutrition Assistance Program (SNAP) benefits buy large quantities of

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<sup>126</sup> Michael Tanner, *The Pros and Cons of a Guaranteed National Income*, CATO INST. POL'Y ANAL., no. 773, at 7 (May 12, 2015).

<sup>127</sup> *Id.*

soda that they then resell for cash at steeply discounted values – as much as fifty cents on the dollar, meaning that they have given up, say, \$400 of in-kind benefits for \$200 cash.<sup>128</sup> For these individuals, asserting their autonomy comes at a steep price; there is also a cost to the government in that half the value of the benefits have been captured by black market soda purchasers who are not the target beneficiaries. Moreover, consolidating the work of numerous agencies into one means that recipients will no longer have to spend time and energy navigating multiple welfare programs, each with their own forms, many requiring office visits, and which often have conflicting eligibility requirements.<sup>129</sup> Reducing the cost to beneficiaries leaves them more time for work or family.

## b. Additional Considerations

Although we believe both the normative autonomy and pragmatic efficiency arguments just discussed to be generally correct, they do not address certain complexities that arise in comparing cash aid to in-kind benefits. We discuss below several potential pragmatic and theoretical arguments in favor of in-kind transfers that are generally overlooked in libertarian discussions of a UBI.

### i. Pragmatic complexities

Consider the argument that cash is more efficient because of the deadweight loss associated with in-kind benefits: While it might be relatively easy for SNAP beneficiaries to exchange food stamps for cash, it is much more difficult for a Medicaid beneficiary to sell his benefits on a secondary market. Thus, the pragmatic argument for cash transfers based on convertibility only goes so far.

Moreover, there are, pragmatic non-paternalistic reasons why the state may decide to provide benefits in kind rather than in cash. First, the state may enjoy an advantage relative to the free market in providing a particular good or service. Studies suggest that Medicaid provides access to health care services that is comparable in quality to private market options at a much lower cost.<sup>130</sup> One might imagine that the government enjoys scale economy advantages in providing meals to low-income students through the National School Lunch Program, though it is not obvious that this is the case.<sup>131</sup> This cost-advantage argument does not apply to all in-kind transfers: for example, SNAP recipients generally use their benefits to buy food from private-sector vendors at private-sector prices, and public housing often costs much more to build on a per-unit basis than private housing.<sup>132</sup> Even so, libertarians who reject paternalistic arguments

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<sup>128</sup> Kevin D. Williamson, *The White Ghetto*, NAT'L REV., Jan. 9, 2014, <http://www.nationalreview.com/article/367903/white-ghetto-kevin-d-williamson>.

<sup>130</sup> See Teresa A. Coughlin et al., *What Difference Does Medicaid Make?* (Henry J. Kaiser Family Found., Issue Brief, May 2013), <https://kaiserfamilyfoundation.files.wordpress.com/2013/05/8440-what-difference-does-medicaid-make2.pdf>.

<sup>131</sup> On the relative costs of subsidized and paid lunches, see Zoe Neuberger & Tina Fritz Namian, *Who Benefits from Federal Subsidies for Free and Reduced Price School Meals?*, CTR. FOR BUDGET & POLICY PRIORITIES (Jan. 30, 2010), <http://www.cbpp.org/research/who-benefits-from-federal-subsidies-for-free-and-reduced-price-school-meals>.

<sup>132</sup> See Gilbert A. Rosenthal, *The High Costs of Low-Income Housing*, WHARTON REAL ESTATE REV., Fall 2011, <http://realestate.wharton.upenn.edu/review/index.php?article=112>.

for in-kind redistribution might nonetheless favor in-kind benefits if and when the state enjoys a cost advantage vis-à-vis the private market.

Second, reliance on in-kind benefits may serve a screening function, which is relevant if the ideal UBI would be targeted only to those who are unable to support themselves through no fault of their own. Accepting that starting point, assume that the state also lacks the ability to distinguish the involuntarily unemployed from those who choose not to work. Suppose, moreover, that in-kind benefits (a) are of lower quality than those that can be purchased, and/or (b) come with a certain amount of stigma. The involuntarily unemployed may choose to accept the lower quality goods and the associated stigma, while the voluntarily unemployed might decide that they would prefer to work so that they can afford higher quality goods without any stigma attached. Quality and stigma accomplish what the government cannot: they increase the likelihood that the benefits of redistribution flow to the intended beneficiaries only.<sup>133</sup> Along the same lines, the effort necessary to obtain benefits by applying to multiple agencies might serve a similar screening function. The stigma of visiting these agencies and the hassle of dealing with multiple applications forms and the like may discourage those who do not truly need assistance from applying. On the other hand, those same hurdles may also preclude those who are least able to fend for themselves in the job market from obtaining benefits, while those able to navigate the bureaucracy (and perhaps therefore the labor market) do acquire aid.

The argument for in-kind benefits as a screening mechanism is highly speculative. Note that if the provision of benefits in kind fails to reduce take-up among the voluntarily unemployed, then the lower quality and associated stigma represent pure social costs. For this reason, we expect that the autonomy argument in favor of cash benefits will trump the uncertain screening argument for in-kind benefits in the minds of most libertarians. And yet we should be careful before rejecting in-kind redistribution out of hand. Libertarians who believe in a minimal safety net still will generally think that the safety net should be provided at minimum cost. Even if some taxation can be justified on libertarian premises, limiting the cost of redistribution and thus the amount of taxation remains a libertarian desideratum. Libertarians therefore need to weigh the autonomy arguments for cash transfers against whatever screening benefits and efficiencies of scale might be generated by an in-kind system.

## ii. Theoretical complexities

The final potential argument for in-kind transfers springs, somewhat surprisingly, from the classical liberal argument for redistribution as a public good. Recall that Milton Friedman's case for redistribution as a public good depends on the preferences of the transferor, not the transferee. "*I am distressed* by the sight of poverty," Friedman's argument begins.<sup>134</sup> What if non-poor members of society are distressed by visible manifestations of poverty—starvation, disease, homelessness—but not by the fact that low-income individuals lack the resources to pursue their own life goals? From the perspective of the non-poor, redistribution in kind might mitigate distress just as well as redistribution in the form of cash. Indeed, we can take the argument a step further and imagine that the *Friedmans* are distressed by the sight of poor people

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<sup>133</sup> For a similar argument focusing on quality (without consideration of stigma), see Timothy Besley & Stephen Coate, *Public Provision of Private Goods and the Redistribution of Income*, 81 AM. ECON. REV. 979 (1991).

<sup>134</sup> See FRIEDMAN, *supra* note 83, at 191 (emphasis added).

living in substandard housing even when the individuals living in substandard housing would prefer to spend their money on other things. Under these circumstances, alleviation of visible manifestations of poverty might be a public good even though redistribution in the form of cash is not.

We might hope, of course, that the non-poor members of society—the *Friedmans*—will themselves be libertarians who respect the autonomy and self-ownership of the poorer members of society who benefit from redistribution. If everyone thinks like we do (and, indeed, like Friedman did), then the case for redistribution in cash would be much easier. The difficulty with the classical liberal argument for redistribution as a public good is that it depends upon the actual preferences of the non-poor, which may or may not align with the preferences that we might wish the non-poor to have.

In all likelihood, the non-poor will have a range of preferences, as with our example of *Friedman*, *Scrooge*, and *Leona* above. *Friedman* is willing to contribute to the relief of poverty through cash transfers provided everyone else does; *Scrooge* is unwilling to contribute at all; *Leona* prefers transfers only to Maltese dogs; and a fourth individual, *Jamie*, is willing to contribute to the provision of fresh fruits and vegetables for the poor provided that everyone else does. *Jamie* does not support a cash transfer to the poor because he fears that they will use the money to buy soda and chips. From *Jamie*'s perspective, in-kind transfers are a public good but cash transfers are not.<sup>135</sup> Again, if the provision of public goods by the classical liberal state is subject to a heckler's veto, no amount of redistribution occurs. If the provision of public goods by the classical liberal state is determined on the basis of a majoritarian or supermajoritarian voting rule, then the outcome depends upon the frequency of *Friedmans*, *Scrooges*, *Leonas*, and *Jamies* in the general population. *Friedman* can, of course, try to convince his compatriots that cash transfers are preferable for all the reasons mentioned above. We then reach the peculiar conclusion that the persuasiveness of one classical liberal case for redistribution in the form of cash depends on the persuasiveness of the classical liberal case for redistribution in the form of cash.

## 2. *Universal vs. Conditional*

We have so far considered whether libertarian arguments for redistribution support redistribution in the form of cash. A second feature of a UBI is that it is *universal*. Providing a *universal* basic income to all, regardless of ability or willingness to work, reflects libertarian ideals by minimizing governmental invasiveness and removing the possibility of governmental error. Here, we explain the basis for this conclusion and consider potential objections.

Recall that some of the theoretical justifications for limited redistribution discussed above rest on the premise that certain individuals, through no fault of their own, cannot obtain the basic necessities for survival. This is particularly true of the arguments arising from minimal state libertarian commitments. A basic safety net serves (1) to absolutize private property rights by

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<sup>135</sup> With apologies to the British celebrity chef. Cf. David Milward, *Jamie Oliver Sparks Poverty Row After He Attacks Families for Eating Junk Food and Buying Expensive TV Sets*, TELEGRAPH (London), Aug. 27, 2013, <http://www.telegraph.co.uk/news/celebritynews/10266648/Jamie-Oliver-sparks-poverty-row-after-he-attacks-families-for-eating-junk-food-and-buying-expensive-TV-sets.html>.

removing a “life-saving necessity” justification for incursions on those rights, and (2) to assure that some individuals aren’t made worse off by the private appropriation of property. These arguments support redistribution to those faultlessly in need but do not countenance redistribution to those who are able to work for a living but choose not to.<sup>136</sup> Such individuals neither need to violate others’ rights to preserve their own lives, nor are they made worse off by others’ appropriation: before appropriation, such individuals had to expend their own labor for sustenance (be it to gather apples, or fish, or hunt), and the same holds true after.

In theory, then, a safety would be limited to those who are unable to work through no fault of their own, or some type of workfare requirement would be imposed on those who are capable of work. Distinguishing among these two groups, however, is both error-prone and intrusive. Consider the myriad information the government would need to determine if someone was poor through no fault of their own or not, such as how hard they have tried to look for work and whether they have wasted any money they might have had.<sup>137</sup> As Matt Zwolinski has noted:

When a person shows up to file a claim for benefits because he lost his job and can no longer afford to feed his family, how is the bureaucrat in charge of his case supposed to determine whether his misfortune is due to poor choices, poor luck, or an unjust restriction of his opportunities? .... Distinguishing between the deserving and undeserving is difficult business and requires a variety of invasive, demoralizing, and degrading inspections into the intimate details of applicants’ lives. ‘Fill out this form, tell us about that man you live with, pee in this cup, and submit to spot inspections of your home by our social workers – or else.’<sup>138</sup>

These questions are dehumanizing and rob individuals of their dignity. Some might respond that this is the price such individuals must pay to obtain state benefits. Our discussion of stigma above becomes relevant again here: on the one hand, the demoralization involved in means-testing may serve a valuable screening mechanism; on the other hand, the demoralization itself is a social cost. A separate concern is that officials charged with making these distinctions will inevitably bring their own biases and value judgments to the process. This will result in uneven implementation, in tension with the rule of law. Relatedly, the success of individuals in convincing government officials that they are unable to work may turn on factors that are orthogonal to work ability. Or, worse yet, the individuals who succeed in persuading officials of their inability might be the ones who are in fact most capable of work. As James Greiner and Cassandra Pattanayak suggest, individuals who succeed in enlisting pro bono representation or other legal aid might be “disproportionately worldly.”<sup>139</sup> These same individuals also may be the ones most capable of finding and filling jobs. Perversely, the result of screening efforts might be to screen in the least deserving and screen out the most.

Lastly and most importantly, even perfectly objective state actors will make mistakes about who is and is not deserving – presumably in both directions. Aid will be mistakenly given

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<sup>136</sup> See Zwolinski, *Property Rights*, *supra* note 77, at 525.

<sup>137</sup> Zwolinski, *Basic Income*, *supra* note 7, at 8.

<sup>138</sup> Zwolinski, *Property Rights*, *supra* note 77, at 525.

<sup>139</sup> See D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2192 (2012).

to some individuals who can work and mistakenly withheld from some who are unable to do so. These government errors mean that even with a basic income, there will remain some number of individuals who will either (1) have a justification rooted in self-preservation to infringe upon others' property rights, (2) be made worse off by the private appropriation of property, rendering the Lockean proviso unfulfilled, or (3) be unwilling to consent to the exchange of liberty for the state. The inevitable existence of error therefore means that unless the basic income is made universal, it will not fulfill its role as absolutizing and legitimizing property rights. Just as providing a basic income essentially acts as justificatory and legitimizing insurance for a system of property rights, making the basic income universal acts as insurance for the insurance.

### 3. *Periodic vs. Lump Sum*

A final defining feature of a UBI is that it is periodic. In this respect, a UBI differs from the one-time payment proposed by Paine<sup>140</sup> and from the more recent call by Bruce Ackerman and Anne Alstott for "stakeholder grants."<sup>141</sup> Recall that Paine proposed to pay fifteen pounds sterling to each adult at age twenty-one. Ackerman and Alstott suggest a grant of \$80,000 paid to young adults in four installments from age twenty-one to age twenty-four.<sup>142</sup> Upon first glance, these proposals seem quite different from a monthly or annual payment that continues over the course of a lifetime. Upon further inspection, the difference becomes much less dramatic.

Against a backdrop of freedom of contract, a lump sum payment can be transformed into a series of periodic payments, and a series of periodic payments can be transformed into a lump sum. The conversion from lump sum to period payment is straightforward: buy an annuity. The conversion in the other direction involves a loan and a life insurance policy. To elaborate: Assume that the UBI is \$10,000 per year, the interest rate is 5 percent, and *Igor* desires to transform his UBI into a lump sum. *Igor* can borrow \$200,000 from *Bank* and use his UBI to meet the interest payments. Of course, *Bank* will also want to guarantee repayment of principal, and so presumably it will require *Igor* to purchase a single-premium whole life insurance policy naming *Bank* as beneficiary. *Igor* thus receives a lump sum equal to \$200,000 minus the cost of the life insurance policy. We anticipate that if a UBI were implemented, financial institutions would come to offer an even more explicit UBI-to-lump-sum conversion product that would allow *Igor* to accomplish the conversion with one transaction rather than two. For a 31 year-old male living in Illinois and in good health, a single-premium whole life insurance policy from StateFarm would cost approximately \$55,000 as of this writing. If *Igor* meets this description, he receives approximately \$145,000 when he transforms his UBI into a lump sum (assuming, as in text, a 5 percent interest rate).<sup>143</sup>

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<sup>140</sup> See *supra* note 11 and accompanying text.

<sup>141</sup> BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999).

<sup>142</sup> *Id.* at 4, 51.

<sup>143</sup> We anticipate that if a UBI were implemented, financial institutions would come to offer an even more explicit UBI-to-lump-sum conversion product that would allow *Igor* to accomplish the conversion with one transaction rather than two.

Ackerman and Alstott note that “basic income proposals typically do not allow recipients to ‘cash out’ their stream of payments by pledging them to a bank in exchange for a big cash payment.”<sup>144</sup> But presumably a state committed to libertarianism would allow a “cash out,” based on the justice-in-transfer principle discussed above.<sup>145</sup> The choice between a one-time grant and a series of periodic payments would then become a choice between two default rules, with individuals retaining the ability to tailor their payments to their interests and desires.

This is not to say that everyone should be indifferent between a periodic-payment UBI and a lump sum grant. There are winners and losers under either approach. Consider *Lyndon*, who has a family history of heart disease (or any other observable indicator of short-livedness),<sup>146</sup> and *Jimmy*, who has traits indicating that he will live into his nineties.<sup>147</sup> If *Lyndon* tries to transform his basic income into a lump sum, then the amount that he can cash out will be smaller than what *Jimmy* can cash out because *Lyndon* has to pay more for life insurance. On the other hand, if *Lyndon* tries to transform his lump sum grant to a basic income by purchasing a life annuity, then he will receive larger monthly or annual payments than *Jimmy*: the annuity provider might be willing to pay \$12,000 a year for life to *Lyndon* but only \$8,000 a year to *Jimmy* (given that *Jimmy*’s payments are likely to last longer). More generally, a lump sum grant will be preferable to individuals who expect shorter lives and a UBI will be preferable to individuals who expect to live longer.

Our own intuition is that libertarians should have a preference for a UBI on these grounds. Minimal state libertarians want to ensure that *Lyndon* and *Jimmy* both have enough to satisfy basic needs. Otherwise, *Lyndon* and *Jimmy* are (arguably) justified in violating the private property rights of others, and private property owners are (arguably) unjustified in stopping *Lyndon* and *Jimmy* from doing so. Likewise, classical liberals who consider redistribution to be a public good presumably want to ensure that *Lyndon*’s and *Jimmy*’s basic needs will be satisfied throughout their lives. Moreover, minimal state libertarians and classical liberals alike want the amount of redistribution to be equal to—but not in excess of—the amount that *Lyndon* and *Jimmy* need to live on. Let’s say that \$10,000 is the annual income sufficient to meet basic needs (the actual amount may be more or less). And let’s say that an annuity provider would be willing to sell *Lyndon* an annuity for \$140,000 that yields an annual income of \$10,000 a year. A \$140,000 lump sum payment to *Lyndon* would thus satisfy the “equal to but not in excess of” criterion above. Yet the same annuity provider would charge more than \$140,000 to *Jimmy* for the same product, given *Jimmy*’s longer life expectancy. And so either (1) we have to raise the lump sum payment above \$140,000, so that *Jimmy* can buy an annuity yielding sufficient payments above, or (2) we need some mechanism for adjusting the size of the lump sum payment to the estimated life expectancy of the recipient. The first option seems suboptimal because it involves paying *Lyndon* more than the “equal to but not in excess of” amount. The

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<sup>144</sup> ACKERMAN & ALSTOTT, *supra* note 141, at 212.

<sup>145</sup> See *supra* notes 52-54 and accompanying text.

<sup>146</sup> See Charles McGrath, *Robert Caro’s Big Dig*, N.Y. TIMES MAG., Apr. 12, 2012, <http://www.nytimes.com/2012/04/15/magazine/robert-caros-big-dig.html> (noting that Lyndon Johnson “all along predicted an early end for himself” and died at 64).

<sup>147</sup> On Jimmy Carter’s longevity, see John Dillon, *The Record-Setting Ex-Presidency of Jimmy Carter*, THE ATLANTIC, Sept. 9, 2012, <https://www.theatlantic.com/politics/archive/2012/09/the-record-setting-ex-presidency-of-jimmy-carter/262143>.

second option seems suboptimal as well because it involves the government prying into individuals' health status and lifestyle choices.

The same dilemma does not arise if a UBI is structured as a series of periodic payments. We can guarantee that *Lyndon* and *Jimmy* both have the option of receiving \$10,000 a year for life, without overpaying either. *Lyndon* and/or *Jimmy* might decide to cash out and might end up with less than \$10,000 a year, but if that occurs, it will be by their own volition.

Note that if we think society should redistribute from the lucky to the unlucky, then we might come to the opposite conclusion. The long-lived are, by most measures, luckier than the short-lived, and most of us would prefer to be in the long-lived category. Insofar as lump sum grants favor the shorter-lived and periodic payments favor the longer-lived, then luck egalitarianism would push us in the lump sum grant direction. Since we do not see luck egalitarianism as an inherent element of the libertarian theories limned above, we do not think that the luck egalitarian argument for lump sum grants factors into the libertarian UBI calculus.<sup>148</sup> Those who do believe in redistribution from the lucky to the unlucky might, however, favor a lump sum grant over a basic income on these grounds.

### *B. Common Objections to the UBI*

Our claim is that an unconditional, universal basic income better serves the values of autonomy and dignity than in-kind and restricted spending programs. To that end, our claim does not rest on empirical evidence about what recipients do with their funds or on outcomes related to education, health, and the like. That said, we would be remiss in not addressing such issues.

#### *1. Won't people just waste cash?*

A frequent objection to the UBI's unconditional nature is that recipients will waste cash transfers.<sup>149</sup> After all, most current welfare programs emphasize in-kind benefits or somehow limit purchases: Housing assistance is provided in-kind in the form of Section 8 vouchers or the opportunity to rent public housing; health care for the poor is provided in-kind via Medicaid. Supplemental Nutrition Assistance Program benefits may be used only to purchase foods, and only certain foods at that. Recipients may not purchase "food that will be eaten in the store" or "hot foods" with their benefits, nor may they purchase vitamins.

Even cash assistance comes with strings. Most states, for example, provide Temporary Assistance for Needy Families ("TANF") funds through electronic benefit transfer ("EBT") cards. Functionally, recipients can use their EBT cards anywhere one could use a debit card. Legally, however, both the federal and state governments limit the places at which recipients may use these benefits. Federal law prohibits their use in "liquor stores, gaming or gambling establishments, and adult entertainment venues;" a number of states impose additional

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<sup>148</sup> For an argument that luck egalitarianism has no place in left-libertarianism either, see Jonathan Quong, *Left-Libertarianism: Rawlsian Not Luck Egalitarian*, 19 J. POL. PHIL. 64 (2011).

<sup>149</sup> See, e.g., Scott Goldsmith, *The Alaska Permanent Fund Dividend: A Case Study in Implementation of a Basic Income Guarantee* 6 (2010).



restrictions on using benefits for tobacco, tattoos and body piercing. Kansas imposes the most prohibitions, also forbidding the use of EBT cards at sporting events, jewelry stores, nail salons, movie theaters, and swimming pools.

As this section will demonstrate, however, such restrictions are not only unnecessary but administratively costly to the government and psychically costly to recipients.

*a. Such restrictions are unnecessary*

First, there is little evidence that recipients of various forms of cash or cash-like aid waste their benefits on purchases other than necessities or investments. Although evidence concerning the uses of cash transfers in the United States is scant, a number of studies in other countries shed some insight into how participants in cash transfer programs use their benefits. Most empirical evidence suggests that recipients do not waste their benefits by increasing spending on alcohol, cigarettes and gambling. A recent World Bank paper examined 19 studies containing within them 44 estimates of the relationship between cash transfer programs and alcohol and tobacco spending. The authors concluded that “[a]lmost without exception, studies find either no significant impact or a significant negative impact of transfers on temptation goods.”<sup>150</sup>

Instead of wasting money, recipients tend to either increase spending on food, education, and health or make capital investments such as livestock or replacing thatched roofs with iron roofs.<sup>151</sup> Consider livestock. In Kenya, cash transfers increased livestock holdings by 51 percent;<sup>152</sup> in Zambia, such transfers almost quintupled the number of households owning goats.<sup>153</sup> Often, increased spending translates into better outcomes. A study of GiveDirectly’s program in Kenya found, for example, that transfers increased food consumption by 19 percent, which in turn reduced the likelihood of going to bed hungry by 30 percent, cut the number of days children went without food by 42 percent, and increased by 20 percent the chance of having enough food for the next day in the house.<sup>154</sup> In Zambia, cash transfer correlate with a 62 percent decrease in households who were still hungry after a meal and increased consumption of foods containing vitamins and protein such as fruits, vegetables, fish and meat.<sup>155</sup>

The poor in the developing world, of course, face very different circumstances than those in the United States. Here, human capital and the skills needed to access the job market are crucial factors for exiting poverty, whereas in less developed countries, unskilled workers can more easily escape poverty by purchasing livestock or investing in other small entrepreneurial activities. In the United States, however, even running a small business requires a certain amount of education and skill.

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<sup>150</sup> David K. Evans & Anna Popova, *Cash Transfers and Temptation Goods: A Review of Global Evidence*, WORLD BANK POLICY RESEARCH WORKING PAPER NO. 6886 at 3 (2014).

<sup>151</sup> See, e.g., Johannes Haushofer & Jeremy Shapiro, *Policy Brief: Impacts of Unconditional Cash Transfers 2-3* (2013); Esther Schuering, *Social Cash Transfers Zambia: A Work in Progress*, in Degol Hailu & Fabio Veras Soeres, eds., *Cash Transfers: Lessons from Africa and Latin America* (2008)

<sup>152</sup> Haushofer & Shapiro, *supra* note 151, at 16.

<sup>153</sup> Schuering, *supra* note 151.

<sup>154</sup> Haushofer & Shapiro, *supra* note 151 at 17-18.

<sup>155</sup> Schuering, *supra* note 151.

That said, there is reason to believe that the underlying findings – that individuals generally make productive use of the funds instead of spending them on gambling, drugs, and alcohol – translate to the United States. One study tracked American Indian and non-native households in North Carolina before and after a casino opened on an Eastern Cherokee reservation; after the casino opened, each American Indian household received an average transfer of \$4,000 paid from casino profits. The study found that children in households receiving transfers had higher levels of educational attainment: the \$4,000 per year transfer to each household correlated with one additional year of schooling for each child. The same study also found a lower incidence of criminal behavior among children in households receiving transfers, with no effect on parents’ labor force participation.<sup>156</sup> Another study of EITC recipients found that a \$1,000 increase in family income was associated with a 6 percent increase in child math and reading scores.<sup>157</sup> These studies confirm what might already seem intuitive to many readers: giving cash to families makes them better off in measurable ways.

*b. Such restrictions are costly*

While cash transfers appear to make households better off even when the transfers come with no strings attached, strings themselves impose a variety of costs. As a practical matter, drawing lines between acceptable and unacceptable purchases is administratively burdensome. To illustrate, Congress has frequently considered and then rejected imposing limits on SNAP purchases based on nutritional value. Some of the burden is definitional. Consider the fact that dietary standards generally apply to overall diets, not individual foods. For example, many dietary standards suggest limiting fat, yet at the same time several foods that contain fat – such as meat and nuts – are considered to be part of a healthy diet if eaten in moderation. Even accepting that some foods have no place whatsoever in a healthy diet, should nutritional value be defined by the absence of nutritional “bads” (which could result in diet soda seeming preferable to orange juice), or the presence of nutritional “goods” (which could favor high-fat, high-sugar items that are fortified with vitamins)? Even straightforward distinctions often result in arbitrary lines. SNAP, for example, covers food but not vitamins. As a result, recipients may use SNAP benefits to purchase energy drinks that have a nutrition label (and are therefore “food”), but not energy drinks that have a supplement facts label (and are therefore “vitamins”).

Even if suitable definitions could be formulated, restrictions create an additional set of enforcement costs. The more restrictions, the more confusion about which purchases are eligible. The final determination will often be made by whoever happens to be manning the check-out line, resulting in arbitrary and uneven application of the rules. Keeping track of acceptable versus unacceptable purchases will also be more difficult for recipients, who will then face the embarrassment of having their EBT cards rejected more frequently. Such embarrassment increases stigma and likely lowers take-up. Lastly, restrictions on eligible foods will impose costs on food producers who want their products to be eligible. A number of stores that accept food stamps, for example, are considering exiting the program due to the increased costs from new requirements concerning the amount of fresh and organic food that they carry.

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<sup>156</sup> See Randall K. Q. Akee et al., *Parents' Incomes and Children's Outcomes: A Quasi-Experiment Using Transfer Payments from Casino Profits*, 2 AM. ECON. J.: APPLIED ECON. 86 (2010).

<sup>157</sup> See Gordon B. Dahl & Lance Lochner, *The Impact of Family Income on Child Achievement: Evidence from the Earned Income Tax Credit*, 102 AM. ECON. REV. 1927 (2012).

## 2. *What about the children?*

A somewhat related objection is that parents who are addicts, mentally ill, or otherwise negligent might waste their children's UBI on themselves instead of using it to benefit their children.<sup>158</sup> A parent might, some fear, spend money on drugs instead of safe housing or basic necessities, resulting in ill-clothed, hungry children who live in unsafe conditions. In contrast, these critics argue, the in-kind nature of, say, public housing or food stamps assures that at least some benefits reach children.

We believe this fear is overblown for three reasons. As an initial matter, we note that implementing a UBI does not do away with the current legal system that addresses (even if imperfectly) child abuse and neglect. With or without a UBI, a legal system will still exist that can remove a neglected or abused child from unsafe conditions. Second, many assistance programs for parents already provide benefits that are either in cash (TANF, the EITC, the child tax credit) or near-cash (SNAP). This fear, then, is not unique to a UBI.

Third, many current assistance programs have hurdles that preclude the neediest families from participating. It is quite likely, for example, that drug-addicted or mentally ill parents are unable to hold a job, thus preventing them from benefiting from programs such as the EITC that are tied to work. A number of states already impose restrictions related to drug and alcohol abuse or past criminal activity on participation in TANF, SNAP or housing aid programs, thus shutting out many drug users.<sup>159</sup> To illustrate, almost half the states drug test TANF applicants in certain circumstances (usually those with past drug convictions or upon reasonable suspicion of drug abuse). Ten states permanently ban convicted drug felons from TANF, and 27 others have non-lifetime restrictions on TANF participation by drug felons.<sup>160</sup> And finally, many programs – such as applying for housing assistance – require cumbersome application procedures that require a level of sophistication that drug-abusers and mentally-ill parents likely lack. It is thus quite plausible that many current programs effectively exclude the children of such parents. While there is a risk some such parents might waste all of their children's UBI, they might also spend at least some of it on their children. For these children, something is better than nothing, and it is hard to see how such children would be worse off under a UBI than the current system.<sup>161</sup>

## 3. *Won't low-income individuals just stop working?*

A third objection to a UBI is that recipients will reduce work effort or drop out of the labor force altogether. A UBI may affect labor output through two channels: an income effect and a substitution effect. The income effect arises if leisure is a normal good (i.e., a good the consumption of which increases as income increases). If so, individuals whose overall income

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<sup>158</sup> For further discussion of the place for children in a UBI, see *infra* Section IV.A.1.

<sup>159</sup> Maggie McCarty et al, *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, CRS Report R42394 (2016).

<sup>160</sup> *Id.* at 7-9.

<sup>161</sup> This response also applies to those concerned that a UBI might harm drug-addicted or mentally ill adults when compared to in-kind benefits. For the reasons just discussed, we doubt that a UBI would provide less aid to such individuals.

increases due to a UBI would consume more leisure (that is, work less), while individuals whose overall income decreases would consume less leisure and work more. The substitution effect arises if a UBI alters the opportunity cost of labor.<sup>162</sup> In this case, if higher taxes make work relatively more expensive, and leisure relatively less expensive, individuals will work less. We think the income effect concern is often overstated. The substitution effect concern is a real one but is not specific to low-income individuals; any scheme of redistribution from high-income to low-income individuals and households will reduce labor output through a substitution-effect channel.

Starting with the income effect: We begin by emphasizing that a UBI founded on libertarian principles would be sufficientarian, not extraordinarily generous. Murray contemplates a UBI of \$10,000 plus another \$3,000 that must be allocated for health care;<sup>163</sup> below we discuss a UBI of a similar magnitude. Will low-income individuals decide that they would prefer to live on \$10,000 a year rather than work? Intuition and empirical evidence suggests not. For the intuition, consider the fact that as of this writing, a 27 year-old male in California can, for approximately \$212,000, purchase an annuity that will pay \$10,000 a year for the rest of his life.<sup>164</sup> (The figure does not vary dramatically across states.) Also consider the fact that a number of top national law firms pay their associates a starting salary of \$180,000 a year.<sup>165</sup> With less than two years of work (taking into account taxes), a law firm associate would earn enough to be able to retire on \$10,000 a year for life. Next ask yourself how many newly minted law school graduates have a life plan that includes working for less than two years and then retiring on a \$10,000 annual income. The set might not be empty, but it is certainly not full. Very few people in the United States today would be satisfied with an annual income of \$10,000.

If the argument based on intuition is not persuasive, consider the empirical evidence. As noted above, adults in American Indian households in North Carolina did not measurably reduce their labor output once they began receiving \$4,000 a year from casino profits.<sup>166</sup> Concededly, a sufficientarian UBI might be larger than that on a per-household basis, and so a forecast based on the North Carolina experience would be out of sample. Even so, what we can say is that we have little reason to believe on the basis of intuition or evidence that a UBI in the \$10,000-a-year range would lead to large-scale exit from the workforce due to an income effect.

Exiting the workforce altogether, however, is only one possible response to the income effect. Labor supply adjustments can occur on two margins: an intensive margin and an extensive margin. The intensive margin refers to the decision about how many hours to work; the extensive margin refers to the decision whether to participate in the labor force at all.<sup>167</sup> Many low-income individuals do not have a choice as to how many hours they log; they work as

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<sup>162</sup> On income vs. substitution effects, see GEORGE J. BORJAS, *LABOR ECONOMICS* 35-39 (7th ed. 2016).

<sup>163</sup> See MURRAY, *supra* note 4.

<sup>164</sup> See *Income Annuity Estimator*, CHARLES SCHWAB, [http://www.schwab.com/public/schwab/investing/accounts\\_products/investment/annuities/income\\_annuity/fixed\\_income\\_annuity\\_calculator](http://www.schwab.com/public/schwab/investing/accounts_products/investment/annuities/income_annuity/fixed_income_annuity_calculator) (last visited Mar. 22, 2017).

<sup>165</sup> See Staci Zaretsky, *Salary Wars Scorecard: Which Firms Have Announced Raises?*, ABOVE THE LAW (June 30, 2016), <http://abovethelaw.com/2016/06/salary-wars-scorecard-which-firms-have-announced-raises>.

<sup>166</sup> See Akee et al., *supra* note 156.

<sup>167</sup> See Raj Chetty et al., *Are Micro and Macro Labor Supply Elasticities Consistent? A Review of Evidence on the Intensive and Extensive Margins*, 101 AM. ECON. REV.: PAPERS & PROC. 471 (2011).

much (or as little) as their boss orders. Even if the income effect of a UBI did motivate low-income individuals to work less, many would not have the option of adjusting labor output on the intensive margin, and we expect that relatively few would respond with a more drastic extensive margin adjustment (i.e., exit from the workforce altogether).

Furthermore, it is unclear how the overall income effect of a UBI compares to those of existing transfer programs. According to one study, parents in 35 states already can receive more in government benefits than they could earn at a minimum-wage job; in Connecticut, Hawaii, Massachusetts, New Jersey, New York, Rhode Island, Vermont, and Washington D.C., one can potentially collect more in benefits than one can earn at a job paying \$20 an hour.<sup>168</sup> To be sure, many low-income individuals and families do not qualify for many of these programs, and so stand to receive much less under the status quo than these calculations contemplate. Our point is simply that switching from the status quo to a UBI will raise incomes for some households (and so reduce labor output, assuming leisure is a normal good), while at the same time lowering incomes for other households (and so increase labor output).

Finally, remember that in any redistributive scheme there are net payors and net payees. Transfer payments funded through taxation reduce the after-tax income of the rich just as they increase the after-tax income of the poor. Focusing solely on the income effect channel, we would expect that introducing a redistributive scheme causes the rich to work more than before and causes the poor to work less. Which of these effects predominates is ambiguous theoretically and difficult to discern empirically, because the income effect generally operates at the same time as a substitution effect.

Turning to the substitution effect: We have acknowledged from the start that a UBI requires higher marginal tax rates relative to a world without a UBI. Whether these higher marginal tax rates fall on the rich or the poor (or both) is a design choice; either way, we expect that higher marginal tax rates will have *some* negative effect on work effort. How large the effect is depends, of course, on how large the increase to marginal tax rates is, which—in turn—depends upon the size of the UBI. We return to this question in Section IV.B.

As an initial matter, we emphasize that the current system of transfers likely leads to a reduction in labor output through the substitution effect. Many existing programs for the poor phase out with income, and these phaseouts essentially act as taxes.<sup>169</sup> To illustrate, a food assistance program in which benefits are reduced by 50 cents for each dollar of additional income contains an implicit 50 percent tax. These implicit taxes generate their own work disincentives. On the other hand, the EITC and the child tax credit rise with earned income (to a point), offsetting some of these phaseouts. The result is an extraordinarily complicated schedule of real marginal rates that depends upon which programs a household is receiving. A tenth of households who fall between 1 and 1.5 times the federal poverty line end up with marginal tax rates above 65 percent. The median marginal rate for households in that income band is 34 percent.<sup>170</sup> All this makes it hard to predict how low-income individuals might adjust work effort

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<sup>168</sup> Tanner, *supra* note 126, at 11.

<sup>169</sup> *Id.*

<sup>170</sup> See CONG. BUDGET OFFICE, EFFECTIVE MARGINAL TAX RATES FOR LOW- AND MODERATE-INCOME WORKERS IN 2016 (Nov. 2015).

under a UBI of say, \$10,000 coupled with tax rates of 30 to 40 percent, as compared to the current system. We believe, however, that a UBI plausibly would lead to less distortion of labor decisions than the status quo.<sup>171</sup>

For present purposes, we emphasize three points. First, a reduction in labor output is not necessarily a reduction in social welfare. It may actually be beneficial if over-worked parents are able to replace some paid work outside the home with more family-oriented work. Consider the myriad stories of single mothers who must work multiple jobs to make ends meet while relying on unstable child care situations. More time at home with children allows parents more time to spend developing their children's human capital, for example, by reading to them, having dinner together, playing games, and so on. Recalled one researcher about the effects of earlier experiments in the United States: "Some of [the work response] came from cutting down hours, say from 65 to 60 hours a week, which doesn't seem like a tragedy."<sup>172</sup>

Second, evaluating the income and substitution effects of a UBI requires a specification of the baseline. If the baseline is a world with no redistribution, then the income and substitution effects look more significant; if the baseline is the status quo, then the effects are less dramatic. Insofar as we argue that a UBI is a libertarian first-best, then our justificatory burden is to show that from a libertarian perspective a UBI is preferable even to a redistribution-free state. The comparison to the status quo becomes more relevant when evaluating the UBI as a change from current policy rather than as an ideal.

Third, ultimately some bullets must be bitten. By this we mean that any society must choose between (A) a world with no redistribution and (B) a world in which redistribution reduces labor output through a substitution effect. We have argued that option (A) is intolerable for minimal state libertarians and undesirable from a classical liberal perspective. This suggests that a basic income should be designed to minimize the negative consequences of option (B). We think that a UBI scheme can be crafted so that the negative effects on labor output are limited (though still nonzero). But the devil is in the details, to which we now turn.

#### IV. DESIGN DETAILS

So far we have set out the argument for a basic income—not conditional on work or inability to work—paid in the form of cash on a periodic basis. In this Part we discuss further details of a UBI. While the primary objective of this Article is theoretical, we believe that the theory underlying a UBI should also inform the implementation of a UBI. Here, we focus on four important elements of a basic income scheme: (1) to whom should a basic income be paid?; (2) how large should the basic income be?; (3) how much would various options cost and what existing programs might a UBI replace?; and (4) should the basic income amount phase out as market income rises?

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<sup>171</sup> Moreover, a UBI addresses one flaw in the current system: benefits tied to work, such as the EITC, currently provide less aid to individuals during general recessionary times when employers cut jobs and hours. See Kerry A. Ryan, *EITC as Income (In)Stability?*, 15 FLA. TAX REV. 583 (2014). And it is precisely when employers make such cuts that low-income workers need more assistance.

<sup>172</sup> ROBERT A. LEVINE ET AL., *A Retrospective on the Negative Income Tax Experiments* 99, in THE ETHICS AND ECONOMICS OF THE BASIC INCOME GUARANTEE (2005).

A. *Who Should Receive a Basic Income?*

The “who” question has many components, two of which we focus on here. First, should the basic income extend to children? Second, should the basic income extend to noncitizens? While we offer tentative answers to both questions, our broader aim is to illustrate how the theoretical foundations for a basic income might illuminate questions of this sort.

1. *Children*

Several prominent proponents of a UBI explicitly exclude children from their proposed basic income schemes. Their reasons for doing so are diverse. For example, former labor leader Andy Stern argues that extending a UBI to children would introduce administrative complications into an otherwise simple system: “just think about all the issues that come up when you try to get your mind around giving [a basic income] to a ten-year-old,” he writes.<sup>173</sup> Charles Murray argues that extending a UBI to children would encourage low-income parents to have more children (a result that he implies is undesirable).<sup>174</sup>

We find these arguments for excluding children from a UBI to be unpersuasive. The administrative complications of extending a UBI to children seem minimal: we could allow parents to claim the UBI on behalf of their children, just as we now allow parents to collect SNAP benefits and claim tax credits on behalf of their children. Many European countries have distributed cash benefits on a per-child basis for years. As for the childbirth incentives, we see little evidence that the implementation of a UBI would have a first-order effect on fertility rates. Note that the existing system of tax and transfers already encourages low-income individuals to have more children—for example, a single individual earning \$10,000 a year receives an additional \$4,000 through the EITC and child tax credit if he or she has a child, plus potentially more through SNAP. Studies by Stephen Bronars, Jeff Grogger,<sup>175</sup> and Melissa Schettini Kearney<sup>176</sup> find that the incentives embedded in the existing welfare state yield only a modest effect on fertility. And depending on the size of a UBI, a child-inclusive basic income scheme might enhance the financial reward for having more children only marginally, if at all.

Yet even if the arguments against extending a UBI to children are unpersuasive, how strong are the affirmative arguments *for* including children in a UBI? The answer, we believe, depends critically on the theoretical foundations upon which a basic income might rest.

First, consider a UBI that is justified as a mechanism for absolutizing private property rights, along the lines suggested in Section II.A. On this view, the argument for extending a UBI to children seems quite strong. According to Eric Mack’s argument, private property rights are nonabsolute as against individuals in positions analogous to the “Freezing Incapable Hiker”—

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<sup>173</sup> STERN WITH KRAVITZ, *supra* note 20.

<sup>174</sup> See MURRAY, *supra* note 4.

<sup>175</sup> Jeff Grogger & Stephen G. Bronars, *The Effect of Welfare Payments on the Marriage and Fertility Behavior of Unwed Mothers: Results from a Twins Experiment*, 109 J. POL. ECON. 529 (2001).

<sup>176</sup> Melissa Schettini Kearney, *Is There an Effect of Incremental Welfare Benefits on Fertility Behavior? A Look at the Family Cap*, 39 J. HUMAN. RES. 295 (2004).

i.e., individuals who, through no fault of their own, find themselves unable to survive unless they trespass on the property of others. The minor child of a very low-income parent would seem to meet the just-mentioned criterion: it is hard to argue that a child born into extreme poverty is “at fault” for that fact.

A more sensitive question is whether the very low-income parent of a minor child is also “faultless.” The answer may depend on why the parent has failed to earn a subsistence-level income and—perhaps—whether society should hold the parent responsible for having a child in the first place. (The latter question will quickly ensnare us in discussions of reproductive rights that lie well beyond the scope of this Article.) For present purposes, we think the following claim will strike most (though not all) readers as sound: Private property rights are nonabsolute as against an individual who is incapable of earning a subsistence-level income in the market and who must trespass on the private property of others in order to provide basic necessities for his minor child. If this is the case, then private property rights cannot be “absolutized” simply by guaranteeing a subsistence-level income for all adults, because an income that allows one adult to survive at a subsistence level will not necessarily allow one adult and one or more children to survive at a subsistence level. This would suggest a need to increase the allowance for adults with children, at least if the objective is to render private property rights truly absolute.

If a UBI is justified on classical liberal premises, however, the question of whether children should be included becomes more complicated. In Section II.B, we suggested that a UBI might be justified under classical liberalism as a public good, or as a mechanism for procuring the (hypothetical) consent of low-endowment contracting parties, or as a method of distributing the revenues from a Pigouvian tax. A UBI could be a public good insofar as redistribution reduces crime or insofar as poverty exerts an aesthetic diseconomy on other members of society. As for the crime rationale: Presumably children are less likely to commit crimes than adults, and so the argument that a UBI limited to the non-incarcerated raises the price of crime carries less force in the context of children. On the other hand, the desperate circumstances of their children might lead parents to petty crime in extreme cases,<sup>177</sup> which might counsel in favor of extending the UBI to children (and/or increasing the amount for families). Note, though, that the larger a UBI, the larger the tax necessary to fund it, and so the more that the tax raises the after-tax return to illicit activities relative to licit activities (assuming, again, that illicit activities go untaxed). Extending the UBI to children raises the cost, and thus the necessary tax on legal market income, and thus the incentive to earn income through illicit activity.

While justifying the extension of a UBI to children is difficult if one proceeds on a crime-reduction premise, it is considerably easier if we adopt the aesthetic diseconomy argument suggested by Friedman. Recall again Friedman’s assertion that he is “distressed by the sight of poverty” and thereby “benefited by its alleviation.”<sup>178</sup> Presumably individuals who are distressed by the sight of poverty are particularly distressed by the sight of child poverty. The public-goods argument for alleviating adult poverty becomes even stronger then.

The alternative classical liberal route to a UBI discussed in Section II.B hinged on the

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<sup>177</sup> See, e.g., VICTOR HUGO, *LES MISÉRABLES* (Isabel F. Hapgood ed., Thomas Y. Crowell Co., 1887).

<sup>178</sup> See *supra* note 103 and accompanying text.



claim that a UBI allows the state to procure the hypothetical consent of low-endowment contracting parties. Whether such a UBI ought to include children would seem to depend on whether children are parties to a social contract. Hilde Bojer has argued that libertarianism “is a theory applicable to adults only.” She writes:

“Libertarians claim that . . . [t]he rights of the individual to pursue his own life and to retain the fruits of his labor are sacrosanct.” Substitute “child” for “individual” in the above . . . and it reads: “The rights of the child to pursue his own life and to retain the fruits of his labor are sacrosanct,” which is plainly impossible.<sup>179</sup>

Others have argued that children do have a role to play in libertarian theory. Edward Feser writes that “the mainstream (and surely sane) libertarian view is something like this: Children are self-owners, but . . . they are, in effect, ‘held in trust’ by their parents, who act as *stewards* of the children’s property (i.e., themselves) until such time as their children reach maturity.”<sup>180</sup> The “trust” model suggests that the offer to children under the social contract must be enough such that parents, as fiduciaries, act in their children’s best interests by accepting. This might suggest a lower UBI for children than for adults, insofar as a fiduciary acting in someone else’s best interests would not reject a low-ball offer in the Ultimatum Game.

The case for including children in a UBI is especially strong if a UBI is the flipside of a Pigouvian tax and the goal is to compensate pollution victims. Children presumably bear the costs of pollution to the same extent (if not a greater extent) than adults. Again, the UBI might flow immediately to the children’s parents or guardians, consistent with the fiduciary model discussed above.

Our treatment of the children question is not (and not meant to be) exhaustive. The broader point is that whether a UBI ought to include children depends on why one thinks we ought to have a UBI in the first place. Different strands of libertarian theory generate different justifications for a UBI and, not surprisingly, different recommendations regarding a UBI’s design details.

## 2. *Noncitizens*

In our discussion so far we have considered interpersonal and intergenerational obligations, but not international obligations. The case for a UBI becomes somewhat more complicated in a multi-state world. It seems implausible that a UBI would be implemented in the foreseeable future at a supranational level. We will restrict our analysis to a UBI implemented by a single state—focusing here on the United States—while also acknowledging that some arguments for a UBI might imply that any such basic income should be implemented on a global scale.

Even under a single-state version of a UBI, however, the question arises: What about

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<sup>179</sup> Hilde Bojer, *Children and Theories of Social Justice*, 6 FEMINIST ECON. 23, 29 (2000) (quoting SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 74 (1989)).

<sup>180</sup> Edward Feser, *Self-Ownership, Abortion, and the Rights of Children: Toward a More Conservative Libertarianism*, 18 J. LIBERTARIAN STUD. 91, 94 (2004).

noncitizens? Insofar as a UBI is justified as a means of absolutizing private property rights, the answer seems to us straightforward: Mack’s freezing incapable hiker has as much of a justification to trespass if she is a foreign traveler as if she is a neighbor out for an evening constitutional. That is, an individual who must trespass on the property of others in order to survive has a justification to do so regardless of her nationality. Accordingly, a basic income would seem to achieve its absolutization function only if extended to citizens and noncitizen residents alike.

Would this not lead millions to cross the border from Mexico in order to set up residence in the United States and claim their UBI? The answer depends, of course, on the size of a potential UBI—a subject we address in Section IV.B. We can, however, imagine a UBI limited to citizens and lawful permanent residents that would not raise such concerns. Beyond that, one might argue that a nation-state has the same right to exclude as a private property owner (a right—per Mack—that justifies locking the door but not using force against the helpless). The United States might be justified in taking certain protective measures to keep illegal immigrants out, although the absolutization of private property rights might still require a UBI to extend to some who are here illegally (especially, illegally and involuntarily—e.g., “Dreamers”).

A classical liberal might have more success in arguing that a UBI should be limited to citizens. Insofar as a UBI is justified as a public good, the argument might take two paths. First, the classical liberal might say that a UBI extended to citizens as well as noncitizens is something like an attractive nuisance bringing immigrants into the country. The classical liberal might argue, even on non-xenophobic grounds, that a mass migration triggered by a truly unconditional UBI might have disruptive consequences that make it more of a public bad than a public good (for example, a large population influx may increase school class sizes to an unmanageable level). Second, the classical liberal who justifies a UBI based on the aesthetic diseconomies from poverty might say that a UBI attracting more low-income individuals to the country increases rather than decreases those diseconomies. This, of course, raises the question of whether the aesthetic diseconomies of poverty can be addressed by hiding poverty abroad rather than solving poverty here. We might hope that the answer is “no,” but insofar as the aesthetic diseconomies argument depends upon the actual preferences of individuals, we fear that the answer might indeed be “yes.”

A classical liberal also might make a contractarian case for limiting the UBI to citizens. The argument would proceed along the following lines: First, an international system of nation-states with control over their own borders is justifiable on classical liberal premises. With fully open borders, the best functioning state would be overrun by immigrants until it could no longer function much better than the others. Unbridled migration would serve to level down. We can imagine the Peace of Westphalia as a sort of meta-social contract: each nation-state in the Westphalian system achieves legitimacy so long as it can procure the (hypothetical) consent of its members, and the Westphalian system as a whole is legitimate as long as it can procure the (hypothetical) consent of all member-states. On this view, the state’s only concern is to ensure that none of its own members can reasonably reject the forced exchange; there is no need to procure the consent of nonmembers.

### *B. How Large Should the Basic Income Be?*

Basic income proposals vary not only in scope but in size. For example, Stern's basic income would be \$1,000 per adult per month;<sup>181</sup> Murray's would be only modestly larger (\$13,000 per adult per year, \$3,000 of which would be set aside for health care);<sup>182</sup> Brian Barry's would be quite a bit larger than that (50 percent of average income, which would mean a basic income of more than \$27,000 per person in the United States).<sup>183</sup>

The “how much” question (like the “to whom” question) depends on the theoretical foundations upon which a UBI might rest. Insofar as a UBI exists to absolutize private property rights, a basic income need only be large enough such that no individual who receives the basic income would have a legitimate entitlement to infringe upon the private property of others. Presumably this would be the amount required to satisfy basic needs (food, clothing, shelter), and perhaps to purchase basic healthcare as well.<sup>184</sup> Since the cost of health insurance rises with age (and especially so if the insurance market is deregulated), the basic income amount might rise with age as well.

Translating these qualitative standards into quantitative ones is difficult. Allocating \$2 a day for food,<sup>185</sup> \$200 a month for rent, and \$200 a year for clothing brings one to \$3,330, and that is without any expenditure on health care. An unsubsidized bronze-level health insurance plan might cost somewhere in the range from \$2,500 to \$7,500 per year, depending on age.<sup>186</sup> This back-of-the-envelope calculation suggests that a basic income of \$6,000 to \$11,000 per year might meet a sufficientarian threshold that minimal state libertarianism likely requires. We recognize that this amount is quite meager and allows for nothing but the bare minimum necessary for survival, but emphasize that this threshold is, by definition, sufficientarian.

Answering the “how much” question from a classical liberal perspective is more difficult, and the resulting amount might be quite a bit higher. For the classical liberal concerned about crime reduction, the size of the ideal basic income would depend on the balancing of two considerations: (1) the larger the UBI, the higher the price of crime (assuming, as above, that the UBI is limited to the non-incarcerated); (2) the larger the UBI, the higher the tax needs to be to fund a UBI, and so the higher the return from crime relative to licit activity. For the classical liberal concerned about the aesthetic diseconomies of poverty, the question would be whether a critical mass is distressed by the sight of individuals and families living on the sufficientarian

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<sup>181</sup> See STERN WITH KRAVITZ, *supra* note 20.

<sup>182</sup> See MURRAY, *supra* note 4.

<sup>183</sup> See BRIAN BARRY, *Social Exclusion, Social Isolation and the Distribution of Income* 22 (Ctr. for Analysis of Social Exclusion, Paper No. 12, Aug. 1998).

<sup>184</sup> Alternatively, one might imagine a UBI layered on top of a system such as Medicaid through which the government provides basic health care for the poor, or perhaps a UBI existing alongside a system in which individuals receive vouchers to purchase health care on the private market. We set aside the question of how the ideal libertarian state would deal with health care, although we expect that libertarians generally will prefer more market-based solutions.

<sup>185</sup> See Kathleen Elkins, *I Took the ‘Elon Musk Challenge’ and Spent Only \$2 a Day on Food for a Month—and It Was Easier Than I Expected*, BUSINESS INSIDER (Feb. 3, 2016), <http://www.businessinsider.com/elon-musk-challenge-food-budget-2016-2/#i-set-aside-exactly-62-the-evening-of-december-31-and-established-a-few-guidelines-for-the-month-long-challenge-1>.

<sup>186</sup> Figures are for non-smokers in the Chicago metropolitan area. See *Health Insurance Calculator*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/interactive/subsidy-calculator> (last visited Mar. 16, 2017).

bare minimum, or whether the amount necessary to satisfy the minimal state libertarians ameliorates the distress of our hypothetical *Friedmans* above.

For the classical liberal who justifies a UBI on contractarian terms, the relevant question is somewhat different: What size basic income is necessary for all individuals to have reason to consent to a system of private property rights? To put it in Epstein's framework, how much of the surplus generated by the state must be allocated to the low-endowment individual such that the low-endowment individual cannot reasonably reject the offer. (Recall that this is not necessarily the same as the amount that makes the classical liberal state Pareto-superior relative to the state of nature, unless we dismiss the behavior of individuals in the Ultimatum Game as unreasonable.) This might be larger than the sufficientarian UBI outlined above, but once it becomes too large, individuals at the upper end may start withholding their consent.<sup>187</sup>

### *C. How Much Would a UBI Cost and What Existing Programs Would It Replace?*

Discussions of size naturally lead to questions of cost. Because the libertarian case for a UBI assumes that it will replace existing welfare programs, its cost will depend on what it replaces. Although we emphasize that this Article's goal is theoretical and that we are not proffering our own UBI proposal, we recognize that many readers are curious about the types of programs that a UBI might replace and what sizes of UBI are feasible at various tax costs. The following discussion illustrates the interaction between repealing existing programs, various sizes of UBI, and taxes.

Assuming a UBI replaces, and not supplements, existing welfare programs, what might such programs be? The House Budget Committee offers one potential starting point in a recent report on the War on Poverty.<sup>188</sup> That report identifies 95 federal programs across eight broad areas as targeting poverty, costing a total of \$799 billion annually. Although one may quibble as to whether all 95 programs should count as poverty relief, most are plausible candidates. If we cabin discussion of health care and remove the cost of Medicaid (\$250 billion) and CHIP (\$9 billion) from these figures, we arrive at approximately \$540 billion annually. As of this writing, the Census Bureau estimated the U.S. population at approximately 325 million.<sup>189</sup> Dividing \$540 billion by 325 million yields a UBI of roughly \$1,662 per person. Adding Medicaid and CHIP back in (which is to say, contemplating their elimination) raises the figure to \$2,458.

The House Budget Committee report does not count the cost of Old Age, Survivor, and Disability Insurance ("OASDI," or social security) or unemployment compensation. The federal government spent \$910 billion on OASDI in fiscal year 2016 and \$33 billion on unemployment compensation.<sup>190</sup> Eliminating those two programs and using the funds for a UBI would raise the per capita amount by \$2,902, to \$5,360. To be sure, individuals who have paid into OASDI and the unemployment compensation system over their working lives might object on the grounds

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<sup>187</sup> For the classical liberal who justifies a UBI as a method of distributing revenues from a Pigouvian tax, the size of the UBI would presumably follow from the amount of revenues raised by the Pigouvian tax.

<sup>188</sup> HOUSE BUDGET COMMITTEE, THE WAR ON POVERTY: 50 YEARS LATER (2014), <http://budget.house.gov/waropoverty>.

<sup>189</sup> *Population*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population.html> (last visited Mar. 22, 2017).

<sup>190</sup> CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2017-2027 tbl.1-2 (2017), <https://www.cbo.gov/publication/52370>.

that they thought they were buying insurance, and now the federal government is changing the terms of the deal ex post. This objection is a serious one, and some libertarians might consider it persuasive. Our argument here is not that OASDI and unemployment insurance ought to be eliminated in order to pay for a UBI. Our goal is simply to illustrate the monetary consequences of doing so.

One might add to this some of the so-called “tax expenditures” identified and estimated by the Treasury Department each year; these are provisions of the Internal Revenue Code that, at least arguably, function as subsidies channeled through the tax system.<sup>191</sup> These include the exclusion of employer contributions for medical insurance and medical care (\$216 billion for fiscal year 2016, according to Treasury’s estimate), the preferential treatment of defined contribution and defined benefit plans (\$129 billion), the deduction for state and local personal income, sales, and property taxes (\$87 billion), the deduction for home mortgage interest (\$75 billion), and the deduction for charitable contributions (\$58 billion).<sup>192</sup> The tax expenditure estimates, which roughly approximate revenue losses,<sup>193</sup> associated with those five items total to \$565 billion for fiscal year 2016, or approximately \$1,738 per person. Adding this to the earlier figure gives us a UBI of approximately \$7,098 per person.

These figures assume that all citizens, regardless of other income, receive the UBI. As a practical matter, the middle- and upper-classes “repay” their UBIs whenever their tax burden from earned income exceeds the amount of the UBI. As discussed below, one could design a UBI to phase out with income; however, such phaseouts are little different from marginal tax increases except in name. The figure here should be viewed as the size of a UBI that could be funded without an implicit or explicit increase in marginal rates (though eliminating the tax expenditures above would cause some individuals to move into higher federal income tax brackets, and in that respect their rates would indeed rise).

That said, funding a UBI of \$10,000 per person – as many proposals suggest – would likely require a net increase in marginal tax rates, although such increase is likely to be lower than one might first assume if a UBI is coupled with the elimination of some existing programs and tax expenditures. One way of thinking about the requisite rate increases is as follows: adjusted gross income on all individual income tax returns for tax year 2014 was, according to IRS statistics, \$9.103 trillion.<sup>194</sup> The figure for 2016 will presumably be higher, but going off of the 2014 number: If we multiply the population (325 million) by \$1,000 and divide by \$9.103 trillion, we arrive at approximately 3.6 percent. So a 3.6 percent across-the-board tax increase applied to adjusted gross income would yield an additional \$1,000 of UBI. Eliminating all of the above-mentioned programs and providing a UBI of \$10,000 would require an across-the-board rate increase of 10 to 11 percent.<sup>195</sup> And recall that eliminating means-tested programs will also

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<sup>191</sup> See STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985).

<sup>192</sup> U.S. DEP’T OF THE TREASURY, OFFICE OF TAX ANALYSIS, *TAX EXPENDITURES* 40 tbl.3 (2016).

<sup>193</sup> See Yair Listokin, *Tax Expenditure Estimates Approximate Revenue Estimates*, 145 *TAX NOTES* 701 (2014).

<sup>194</sup> INTERNAL REVENUE SERV., *STATISTICS OF INCOME (SOI) TAX STATS—INDIVIDUAL INCOME TAX RETURNS PUBLICATION 1304* tbl. 1.1 (2016), <https://www.irs.gov/uac/soi-tax-stats-individual-income-tax-returns-publication-1304-complete-report>.

<sup>195</sup> As just discussed, a UBI of approximately \$7,000 per person could be funded simply by aggressively eliminating existing programs. The tax increase is necessary to fund the additional \$3,000 necessary to bring the per person UBI up to \$10,000.

have the effect of reducing implicit marginal rates for some individuals in phaseout regions, partially or fully offsetting the work disincentive effect of an explicit rate hike.

We acknowledge that any such tax increase across the board might create its own set of economic distortions. Such distortions, however, do not in and of themselves answer the question whether some redistribution is normatively justified. Instead, they are but one factor to be considered when determining the ideal size of that redistribution. Moreover, these distortions are not unique to a UBI but arise whenever taxes are increased for redistributive purposes, regardless of the form of that redistribution.

#### *D . Should the Basic Income Phase Out?*

Our cost calculations above all assume that a basic income would not phase out and that marginal rates would not increase to recapture one's UBI. In other words, we assume that a basic income would be universal. Some have suggested coupling a basic income with a "phaseout" or "payback": the amount of the grant would begin to decline once an individual's market income exceeded a certain threshold. Murray, for instance, has proposed a phaseout beginning at \$30,000: for every \$1 above that amount an individual earns, her grant would decline by 10 cents, with the entire \$10,000 grant going away once an individual's market income reaches \$130,000.<sup>196</sup>

Does libertarianism have anything to say about whether a basic income scheme should include a phaseout? We think that it does, and that – contrary to what one might initially assume – it counsels against a phaseout provision. Whether or not libertarians think that all taxes are theft, they surely think that *hidden* taxes are suspect. A phaseout of the basic income is a hidden tax. Libertarians should want the funding of a UBI to be more transparent.

To illustrate: Imagine a system with a basic income of \$10,000 and a flat tax of 30 percent on market income. Assume, moreover, that we add Murray's phaseout to this simple scheme, such that each \$1 of income over \$30,000 leads to a 10 cent reduction in the basic income amount. To illustrate, consider *Milton*, *Nancy*, and *Oprah*. *Milton* earns exactly \$30,000, pays \$9,000 in taxes, and receives the full basic income of \$10,000 with no phaseout. *Nancy* earns \$40,000, pays \$12,000 in taxes, and receives a basic income of \$9,000 (i.e., \$1,000 phases out)<sup>197</sup>. *Oprah* earns \$130,000, pays \$39,000 in taxes, and receives no basic income.<sup>198</sup>

Now, consider what happens if *Milton* increases his market income to \$40,000. His taxes will increase by \$3,000 and his basic income will decrease by \$1,000, meaning that his extra \$10,000 in income yields him only \$6,000 more on net. At the end of the day, \$4,000 of his extra \$10,000 goes to the government, either in the form of taxes or a basic income payback. And that is the very definition of a 40 percent marginal tax. The same result holds if *Nancy* increases her market income from \$40,000 to \$50,000. But if *Oprah's* earnings rise by \$10,000, the only result is that she owes an additional \$3,000 in tax, since her UBI has already full phased-out. Our imaginary system is thus equivalent to a system in which everyone receives a \$10,000 basic

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<sup>196</sup> See MURRAY, *supra* note 4, at 53-54.

<sup>197</sup> Because her income exceeds \$30,000 by \$10,000, *Nancy's* UBI is reduced by  $(\$10,000)(.10)$ , or \$1,000.

<sup>198</sup> Because *Oprah's* income exceeds \$30,000 by \$100,000, her UBI is reduced by  $(\$100,000)(.10)$ , or \$10,000.

income and the tax system has three brackets: a 30 percent bracket for income up to \$30,000, a 40 percent bracket for income between \$30,000 and \$130,000, and a 30 percent bracket for income above \$130,000.

Our current tax code is riddled with hidden taxes like our hypothetical UBI that begins to phase out when earned income equals \$30,000. The phaseout of the earned income tax credit effectively imposes an additional marginal tax of 21.06 percentage points on a head of household with two children and income between \$18,340 and \$45,007.<sup>199</sup> The phaseout of the child tax credit imposes an additional marginal tax of 5 percentage points on a head of household with two children and income between \$75,000 and \$115,000.<sup>200</sup> The personal exemption phaseout imposes an additional marginal tax of approximately 3.2 percentage points on a head of household with two children and income between \$287,650 and \$412,650.<sup>201</sup> And so on.

Implementing a basic income requires revenue from taxation. We have argued above that minimal state libertarians and classical liberals alike should accept some amount of redistributive taxation for a number of reasons rooted in libertarian theory. But acceptance of taxation need not equate with obfuscation. Phaseouts hide the ball.

We anticipate two potential counterarguments from phaseout defenders. The first is that even though phaseouts hide the ball, a basic income without a phaseout does so as well. The former obscures the fact that phaseouts act as a tax; the latter obscures the fact that some taxpayers essentially repay their basic incomes through taxes. The logic of this counterargument goes as follows: Imagine that we implement a universal basic income that does not explicitly phase out with income (unlike the above example) and the three-bracket scheme described above, with a 30 percent tax on income up to \$30,000, a 40 percent tax from \$30,000 to \$130,000, and a 30 percent tax after that. *Oprah*, who earns \$130,000, receives a basic income of \$10,000 and pays a tax of \$49,000.<sup>202</sup> But the basic income is illusory: all that is really going on is a net tax payment of \$39,000, just as in the example with a flat tax but a UBI that phases out. Instead of a hidden tax, we have a transfer that occurs in plain sight: a potentially salient but economically meaningless “basic income” that is fully offset (and more) by an even larger transfer from the individual to the government. If the individual earning \$130,000 thinks that she has received a basic income, then she has been deceived by an accounting trick.

We acknowledge the counterargument but ultimately find it unpersuasive. Our hypothetical individual who pays \$49,000 and receives \$10,000 back in the form of a UBI can

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<sup>199</sup> See 26 U.S.C. § 32(b); Kyle Pomerleau, *2017 Tax Brackets*, TAX FOUND. (Nov. 10, 2016), <https://taxfoundation.org/2017-tax-brackets>.

<sup>200</sup> See 26 U.S.C. § 24.

<sup>201</sup> See 26 U.S.C. § 151(d)(3); Pomerleau, *supra* note 199. The 3.2 percentage point figure is calculated as follows: For every \$2,500 of income, the taxpayer loses 2 percent of his deduction for personal exemptions. The personal exemption in 2017 is \$4,050, and the hypothetical head of household in text could claim three exemptions. A head of household with income in the relevant range would most likely fall in the 33 percent bracket. The calculation is thus:

$$(2\% \times (3 \times \$4,050) \times 33\%) / \$2,500 \approx 3.2\%.$$

<sup>202</sup> Her first \$30,000 of income generates tax of \$9,000 (at 30 percent) and her next \$100,000 of income generates tax of \$40,000 (at 40 percent), for a total of \$49,000.

see what is going on without a calculator or a spreadsheet. Hidden taxes are harder to track, especially when they are cumulative. Yet this observation gives rise to a second counterargument that phaseout defenders might make: precisely *because* hidden taxes are hidden, there is something to like about them. In the context of commodity taxation, for example, Jacob Goldin has shown that less-than-fully-salient taxes can be welfare-enhancing;<sup>203</sup> a similar argument applies in the context of income taxation. The idea is that income taxes distort taxpayers' choices between labor and leisure, and so lead to deadweight loss. But if individuals are not fully cognizant of the tax rate they face, then the less-than-fully-salient income tax discourages labor less than an income tax of which individuals are entirely aware.

Libertarians might respond that encouraging labor through hidden taxes is like tricking people into working more. And that response is correct—or at least close to correct. More precisely, it is like tricking people into not working less, when a rational individual with full information might well decide to do just that. Once a tax has been justified on libertarian grounds, it should be transparent so that individuals can decide for themselves how to respond. Libertarians are likely to conclude that low-salience taxes clash with their commitment to individual autonomy, even though such taxes might enhance welfare according to utilitarian metrics. Moreover, making the amount of taxation transparent better enables individuals to monitor the amount of taxation (and coercion) to which they are subject. This helps citizens ensure that the government is not engaging in activities that cannot be justified on libertarian or classical liberal grounds.<sup>204</sup>

## V. POLITICAL ECONOMY QUESTIONS

While our analysis so far has considered both theoretical and practical aspects of a UBI, some readers might react that the entire analytical endeavor overlooks the utter impracticality of a UBI given current political conditions. Whether or not grounded in libertarian principles, isn't talk of a UBI still pie in the sky? Section V.A acknowledges and addresses the political challenges facing a UBI. Section V.B considers the converse claim, advanced by Charles Murray and others, that a UBI is the only politically practical way of transitioning from a high-redistribution "nanny state" to a low- or no-distribution system more compatible with libertarian principles.

### A. *The Political Economy of a Universal Basic Income*

We have noted above that a proposal for a UBI failed spectacularly in a nationwide referendum in Switzerland in June 2016, with nearly 77 percent of voters opposing the plan.<sup>205</sup> It is, however, difficult to know whether the resounding failure of the Swiss proposal was a result of deep-seated opposition to a UBI in principle, or whether it was a response to the particulars of the plan in question, which would have guaranteed all adults a monthly income of 2,500 Swiss francs. (The Swiss franc-to-U.S. dollar ratio is approximately 1-to-1.) One might also question the external validity of the Swiss result: the fact that a UBI proposal failed in a landlocked

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<sup>203</sup> See Jacob Goldin, *Optimal Tax Salience*, 131 J. PUB. ECON. 115 (2015).

<sup>204</sup> Libertarians often criticize the withholding of taxes from worker's paychecks for this very reason.

<sup>205</sup> See *Switzerland's Voters Reject Basic Income*, BBC NEWS (June 5, 2016), <http://www.bbc.com/news/world-europe-36454060>.



mountain republic of 8 million people does not dictate its fate in the United States (although it is certainly not a good sign). Moreover, several surveys in other countries show much stronger backing for a basic income, with more than half of respondents supporting the idea of a UBI in pan-European and Canadian polls.<sup>206</sup>

Indeed, less than a half century ago, President Nixon's Family Assistance Plan passed the House of Representatives by a 243-155 margin, with roughly proportionate support from each party. In an alternate universe not that many million light-years from our own, the United States might have a UBI. The failure of the Family Assistance Plan was historically contingent: but for Watergate, President Nixon might well have had the political capital to make the plan a reality.<sup>207</sup> To say that a UBI is impossible is, in our view, to over-interpret a sequence of quasi-random events.

There are, to be sure, significant (though not necessarily insuperable) political hurdles facing a UBI. Perhaps most importantly, the UBI's efficiency might be its political Achilles' heel. Durable transfer programs create their own constituencies. Tax preparers such as H&R Block, Jackson Hewitt, and Liberty Tax profit from the Earned Income Tax Credit.<sup>208</sup> Large financial institutions such as Wells Fargo are major players in the Low Income Housing Tax Credit market.<sup>209</sup> Hospital industry groups lobby hard for expansion of Medicaid.<sup>210</sup> Redistribution is easier to accomplish when well-organized interest groups can be enlisted as supporters. The political problem facing a UBI is that there are few rents to be had. The more direct the transfer, the less likely it is that any interest group other than the transferees themselves will benefit from the transfer program. And an unconditional cash grant is the most direct transfer there is.

Perhaps the lesson to be learned is that supporters of a UBI should add a measure of complexity to the scheme so that recipients need the help of H&R Block in order to claim their basic income—and so that H&R Block therefore has an incentive to lobby in favor of a UBI. We are not quite cynical enough to suggest that as a serious proposal though. “Low-rent” redistributive programs may be politically difficult to implement and maintain, but they are not impossible. Social Security is probably the best example of a transfer program that does not

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<sup>206</sup> Several polls in other countries show stronger support for a UBI. See Stanislas Jourdan, *Europe: 64% of People in Favour of Basic Income, Poll Finds*, BASIC INCOME NEWS (May 22, 2016), <http://basicincome.org/news/2016/05/europe-eu-poll-basic-income-support>; Kate McFarland, *Canada: Majority Support Guaranteed Income in Angus Reid Poll*, BASIC INCOME NEWS (Aug. 16, 2016), <http://basicincome.org/news/2016/08/canada-majority-support-guaranteed-income-angus-reid-poll>. We discuss these polls at greater length in Section V.A.

<sup>207</sup> See text surrounding notes 13-21.

<sup>208</sup> See Benjamin Elgin, *A Boom for Tax Prep*, BLOOMBERG (Apr. 2, 2009), <https://www.bloomberg.com/news/articles/2009-04-01/a-boom-for-tax-prep>.

<sup>209</sup> See Donna Kimura, *Wells Fargo Named Top Affordable Housing Investor*, AFFORDABLE HOUS. FIN. (Mar. 2, 2017), [http://www.housingfinance.com/finance/wells-fargo-named-top-affordable-housing-investor\\_o](http://www.housingfinance.com/finance/wells-fargo-named-top-affordable-housing-investor_o).

<sup>210</sup> See Michael Ollove, *Hospitals Lobby Hard for Medicaid Expansion*, STATELINE (Apr. 17, 2013), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/04/17/hospitals-lobby-hard-for-medicaid-expansion>.

redound to the benefit of any obvious interest group except the intended transferees, and Social Security is the largest transfer program we have.<sup>211</sup>

Moreover, while the pieces of a winning UBI coalition are not yet in place, it is still possible to imagine how the pieces might be assembled. On the left end of the coalition is the Bernie Sanders wing of the Democratic Party, which sees a UBI as a redistributive transfer scheme that can bring an end to extreme poverty in the United States.<sup>212</sup> Closer to the ideological center are technocratic think-tankers in the Daniel Patrick Moynihan mold who see a UBI as an efficient and empirically validated policy innovation.<sup>213</sup> Our argument here is that right-libertarians should be part of that coalition too. We are not so presumptuous as to believe that our analysis here will make that so. But our analysis does lead us to think that individuals committed to libertarian principles will find that those principles point them toward supporting some amount of redistribution that comes in cash, without conditions, and periodically.

### *B. Universal Basic Income as a Concession to Political Economy*

The previous section considered whether a UBI is politically possible; we suggested that the political path to a UBI is not easy but the barriers are not insuperable. In this respect, our analysis contrasts with the arguments of libertarian UBI supporters such as Charles Murray who endorse a UBI precisely *because* they think that it is politically possible. Murray states the case succinctly: “The libertarian solution is to prevent the government from redistributing in the first place. . . . But that is a solution that upward of 90 percent of the population will dismiss.” To Murray and others in the second-best camp, a UBI is the least-worst form of redistribution in a world in which redistribution is inevitable.<sup>214</sup>

We think that Murray’s pragmatic libertarian case for a UBI is vulnerable to two major criticisms. The first, emphasized above, is that the “libertarian solution” does not necessarily entail a flat-out prohibition on redistribution. The second is that the existence of a UBI may affect not only the form but also the quantity of redistribution. If Murray is right (and we are wrong) that the libertarian first-best involves no redistribution, then presumably libertarians should prefer less redistribution to more. But redistribution through a UBI may be stickier than redistribution through other mechanisms, in which case a UBI may be most-worst rather than least-worst from a libertarian point of view.

Murray’s pragmatic case for a UBI seems to assume that society first decides on the amount of redistribution and then chooses the form. Of course, there is no reason why decisions must be made in that order. A democratic polity reevaluates policy choices continuously. Whether it increases or reduces the amount of redistribution will depend on the popularity of

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<sup>211</sup> See Jeffrey B. Liebman, *Redistribution in the Current U.S. Social Security System*, in *THE DISTRIBUTIONAL ASPECTS OF SOCIAL SECURITY AND SOCIAL SECURITY REFORM* 11, 11 (Martin Felstein & Jeffrey B. Liebman, eds., 2002).

<sup>212</sup> See Ezra Klein, *Bernie Sanders: The Vox Conversation*, VOX (July 28, 2015), <http://www.vox.com/2015/7/28/9014491/bernie-sanders-vox-conversation> (quoting Sanders as saying he is “absolutely sympathetic” to a UBI).

<sup>213</sup> See DANIEL PATRICK MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN* (1973).

<sup>214</sup> MURRAY, *supra* note 4, at 3.

redistribution, which in turn will depend on the form that redistribution takes. And herein lies the problem for Murray. We agree that a UBI is likely to be more efficient than the existing system of means-tested in-kind transfers. That in itself might make redistribution more popular. So too, the universality of a UBI means that everyone can feel like a beneficiary (even if they are net transferors rather than net transferees). This is the story of Social Security: in one recent survey, nearly three-quarters of Americans agreed with the statement: “I don’t mind paying Social Security taxes because I know that I will be receiving benefits when I retire.”<sup>215</sup> We might anticipate similar attitudes toward a UBI if all Americans receive a check.

If one thinks that some amount of redistribution is desirable, then the potential popularity of redistribution through a UBI is of little concern. If one aspires to future in which there is no redistribution, then the calculus is more complicated. Murray is probably right that a zero-redistribution scenario is implausible, but a reduced-redistribution scenario is not. The amount of redistribution in the United States ebbs and flows—falling in the 1990s with welfare reform, rising in the early 2010s with the Affordable Care Act. Even if most Americans will support redistribution regardless of whether we have a UBI, how much redistribution they will support is not set in stone.

To be sure, our premise that redistribution would be stickier under a UBI is speculative. The counterargument—which might follow from our analysis in the previous section—is that the UBI’s efficiency make it unstable politically: since there are few rents to be had, there will not be a well-organized interest group fighting tooth and nail to preserve the program. Moreover, Murray might concede the point that a UBI will make redistribution stickier while also arguing that the advantages of a UBI over the status quo overwhelm the quantity effect. Our point here is simply that Murray’s pragmatic case for a UBI—that it is the least-worst form of redistribution—remains uneasy as long as one maintains that zero redistribution is the ideal. In this respect, our libertarian case for redistribution is in some ways complementary to Murray’s pragmatic case for a UBI. If indeed libertarianism can countenance some amount of redistribution, then the fact that a UBI might make redistribution stickier is no longer a problem.

## VI. CONCLUSION

We have thus far argued that some amount of redistribution is consistent with (and perhaps required by) minimal state libertarianism and classical liberalism. We have also sought to explain why such redistribution should (probably) be unconditional, in cash rather than in kind, and periodic rather than lump sum. We have also tried to translate these theoretical arguments into specific claims about the sort of universal basic income a libertarian might support. Yet not all readers (and indeed, not all of the authors of this Article) are libertarians through and through. What can and should non-libertarians take away from the analysis above?

We hope, at the very least, that our discussion of libertarianism and redistribution, in addition to making some libertarian readers more amenable to redistributionist claims, leaves non-libertarian readers with a richer understanding of the range of attitudes toward redistribution in libertarian quarters. Moreover, our arguments for the superiority of cash transfers on

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<sup>215</sup> ELISA WALKER, VIRGINIA P. RENO & THOMAS N. BETHELL, NAT’L ACADEMY OF SOCIAL INSURANCE, AMERICANS MAKE HARD CHOICES ON SOCIAL SECURITY 8 tbl.2 (2014).

efficiency and autonomy grounds (and our acknowledgment of the strongest arguments for transfers in kind) should resonate with non-libertarian as well as libertarian ears. Our concern that conditional cash transfers will screen out precisely the sorts of people who need those transfers the most is, we anticipate, a concern that libertarians and non-libertarians will share. And our novel analysis of periodic payments versus lump sum grants is not specific to libertarianism. While we have highlighted the reasons why libertarians should support periodic payments, we expect that some non-libertarians who favor redistribution from the long-lived to the short-lived will read our treatment of the subject and conclude that lump sum transfers are preferable on the same luck egalitarian grounds that libertarians generally reject.

Furthermore, the common objections that we canvas—that recipients will waste cash grants, that a UBI will discourage work, and that a UBI will cost too much—are all objections that many non-libertarians will harbor. And the design details we discuss—the inclusion of children and noncitizens, the size of the grant, the elimination of other programs, and the possible phaseout of benefits—are details that any UBI must face up to, regardless of whether it is justified on libertarian or non-libertarian grounds. Finally, our discussion of the political economy challenges facing UBI supporters applies to everyone seeking a fundamental transformation of the existing welfare state.

Our analysis of the libertarian foundations for a basic income has left us less perplexed by the UBI's popularity among libertarian thinkers—and more convinced that a UBI can be a libertarian destination rather than a waystation. But for that to happen, and for a UBI to become a reality, many political mountains must be moved. Ultimately, any successful pro-UBI coalition will need to encompass individuals with diverse philosophical commitments. We believe that committed libertarians ought to be part of that coalition, and non-libertarians ought to embrace them with open arms.