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TAXING GREED

Genevieve Tokić∗

Appeals to greed in support of various tax proposals are often seen in response to populist moods in politics. Such appeals may be used to garner political support for a policy or proposal. However, there has been little academic consideration of the role of greed (or attitudes towards greed) in the law, and in tax law in particular. This Article seeks to fill that gap by taking a close look at the concept of greed. In doing so, the Article first surveys the history of greed and its meaning, and draws on political philosophy and economic literature to provide a working definition of greed. The Article then investigates the role of greed in tax law, focusing on the issue of executive compensation, in order to consider whether "greed" is merely political rhetoric, or if it can provide a framework or analytical tool that is useful for crafting tax rules aimed at correcting or remedying excess. The Article ultimately concludes that, while "greed" is indeed a powerful rhetorical tool, its application in tax law and policy should be limited to situations where greed manifests as the appropriation of money, wealth or goods for personal gain, accompanied by illegality, a breach of fiduciary duty or contract, or indicators of market failure or manipulation. In such scenarios, carefully considering the meaning of greed and thinking about our reactions to it in crafting tax law and policy may help tailor rules to target the negative aspects of the behavior in question. The goal of this "taxing greed" paradigm is thus to reduce unfairness and correct distortions created by greedy behavior. In the realm of executive compensation, the analytical framework around greed developed in this Article indicates that executive compensation may be a proper target for higher rates of tax.

∗ Assistant Professor, Northern Illinois University College of Law; the author wishes to thank participants in the 19th Annual Critical Tax Conference at Tulane University Law School for helpful feedback, as well as participants and organizers of the Tax Policy Colloquium at Loyola Law School, Los Angeles, and in particular Professors Jennifer Kowal and Katie Pratt for their comments on an earlier draft. All errors and omissions are the author's own.

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I. INTRODUCTION

"My whole life I've been greedy, greedy, greedy. I've grabbed all the money I could get. I'm so greedy. But now I want to be greedy for the United States. I want to grab all that money. I'm going to be greedy for the United States."[1]*—Donald Trump, January 28, 2016.*

"To those on Wall Street who may be listening today, let me be very clear. Greed is not good. In fact, the greed of Wall Street and corporate America is destroying the fabric of our nation."[2]*—Bernie Sanders, January 5, 2016.*

Greed is at least as old as human civilization, and it has been condemned as a vice for just as long. Over time, however, the meaning of greed has become increasingly complex, sometimes conflated with the concept of wealth-maximizing self-interest.[3] The idea of greed tends to excite strong reactions. Human beings typically are quick to condemn what they view as unfair greedy behavior,[4] yet at other times, greed is admired and emulated.[5] In an era of rising inequality and expanding populist political movements, there is a resurgence of the term "greed" in political rhetoric. This makes it an opportune time to review our thinking on greed and its relationship with the tax laws, one of the most powerful distributional and regulatory tools of the federal government.

Greed, as the term is used in common parlance, is malleable, subjective, and, to some extent, instinctive—many people take an "I know it when I see it" attitude towards greed. This makes it difficult to define or incorporate greed into any discussion of policy or law. However, a careful evaluation of political and economic philosophy, together with literature from behavioral economics and psychology,

1. *Presidential Candidate Donald Trump Rally in Des Moines, Iowa*, C-SPAN (Jan. 28, 2016), http://www.c-span.org/video/?403832-1/presidential-candidate-donald-trump-rally-des-moines-iowa.

2. *See* Dan Roberts, *Bernie Sanders Outlines Plan to End Wall Street's 'Greed, Fraud and Arrogance'*, GUARDIAN (Jan. 5, 2016), https://www.theguardian.com/us-news/2016/jan/05/bernie-sanders-wall-street-reform-plan-hillary-clinton.

3. As Judge Easterbrook has said, "greed is the foundation of much economic activity." Kumpf v. Steinhaus, 779 F.2d 1323, 1326 (7th Cir. 1985).

4. *See, e.g.*, STEVEN M. SHEFFRIN, TAX FAIRNESS AND FOLK JUSTICE 39, 44 (2013) (discussing evidence of an ingrained sense of fairness from experiments such as the ultimatum game, discussed further in Part II.C. *infra*, as well as public outrage aroused by events of public "greed," such as the Bernie Madoff scandal).

5. This shifting conception of greed is discussed further in Part II *infra*.

reveals that there are certain identifiable features of what can be labeled fair and unfair behavior, of acceptable self-interest and a morally reprehensible pursuit of material gain at the cost of all else. This approach can assist in developing a framework for greed that makes it a useful analytical tool for evaluating tax policy: because greed by its nature violates deep-seated notions of fairness and moral mandates, it adds to the usual tax policy tools by illustrating scenarios in which the tax law may be able to correct for injustices that undermine public faith in the overall fairness of the tax system.

Greed is rarely an explicit target of the federal income tax laws. However, societal attitudes toward greed are implicit in many laws and regulations, including tax law. One such area is in the realm of executive compensation. However, while greed is explicitly mentioned from time to time in political rhetoric around executive compensation, an analysis of greed and the tax law, including the tax rules regarding executive compensation, has never been carried out. This Article fills this gap, by exploring the role of greed in tax policy-making, with a focus on the issue of executive compensation.

In doing so, the paper will first explore the relevance of greed to tax policy. Part II will examine the relationship between greed, fairness, virtue ethics, and economics, as well as the historical evolution of the concept of greed and how it actually manifests in human and economic behavior. Part III will then develop a definition of greed through an examination of the theoretical and philosophical underpinnings of law, economics, and morality, and an exploration of the concept of "folk justice."[6] Part IV then applies the concept of greed developed in Part III to the problem of executive compensation, developing a mechanism for taxing executive "greed," and focusing on what "greed" as an analytical tool can add to the discussion of tax policy related to executive compensation.

This Article ultimately concludes that, while "greed" is a powerful rhetorical tool for justifying or garnering support for a rule, its application in tax law and policy should be limited to situations where greed manifests as the appropriation of money, wealth or goods for personal gain, accompanied by agency costs, market failure, or manipulation. In such scenarios, a careful consideration of the

6. The discussion of folk justice is drawn from the work of Steven M. Sheffrin in his book TAX FAIRNESS AND FOLK JUSTICE (2013).

meaning of greed and our reactions to it adds to the tax policy discussion of fairness and justice because it inherently coopts folk justice concepts of desert and moral outrage into its analysis. Thus, the goal of this "taxing greed" paradigm is to reduce unfairness and correct distortions created by greedy behavior in order to improve the tax system in ways that resonate with public perceptions of justice. In the realm of executive compensation, the analytical framework around greed developed in this Article indicates that executive compensation may be a proper target for higher rates of tax. An approach focused on remedying the impacts of greedy behavior aids in designing a tax response to the problem of excessive executive compensation.

II. WHAT'S WRONG WITH GREED?

"Greed." The term is used in political rhetoric, popular culture, and even in legal proceedings.[7] Examples of greed are cited everywhere, but their portrayals reveal the complexity of the concept. Ebenezer Scrooge, the greedy miser, is the focal character of Charles Dickens's enduring story A CHRISTMAS CAROL, which details Scrooge's reform from a cold-hearted money-hoarder to a kinder, happier and more generous individual. The character Gordon Gekko, widely renowned for his "greed is good" speech in the 1987 film WALL STREET, has been both hailed as a folk hero by real-life Wall Streeters, and reviled as a villain by others.[8]

What makes a person greedy? Money certainly has something to do with it, but that alone is far from sufficient—few people begrudge Warren Buffet for his fortune, for example. In one of the opening quotations to this Article, Bernie Sanders refers to the greed of Wall Street, but closer inspection reveals that this blanket characterization is inaccurate, and few people in America probably believe that "Wall Street" as an institution, or that all the people who work in high finance, are actually greedy. Donald Trump called himself greedy in the other epigraph above, but the meaning of the term as he used it appears to refer to general acquisitiveness or materialism—in other

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7. For a discussion of the treatment of "greed" in caselaw, see Part 0 *infra*; *see also* Eric A. Posner, *The Jurisprudence of Greed*, 151 U. PA. L. REV. 1097, 1105–06 (2003).

8. *See* Jake Zamansky, *The New Gordon Gekko: Greed is Bad*, FORBES (Feb. 29, 2012), http://www.forbes.com/sites/jakezamansky/2012/02/29/the-new-gordon-gekko-greed-is-bad/#250b3e361b70.

words, profit-maximizing self-interest—and not necessarily the pernicious greed typically thought of as a vice in modern-day society.

When "greed" is levied as a criticism, it is not always without controversy, but there are fictional caricatures (Ebenezer Scrooge, probably Gordon Gekko) as well as real-life archetypes of greedy behavior that most people can agree upon. When the wealthy "hotel queen" Leona Helmsley was convicted of tax evasion in the late 1980s, reportedly having stated that "only the little people pay taxes," she was widely reviled as greedy and deserving of the prison term she received. More recently, in March 2009 when the insurance company American International Group ("AIG") announced bonuses in excess of $200 million for employees in its financial services division, months after accepting a bailout from the United States Treasury totaling an estimated $180 billion[9] and posting the largest fourth-quarter loss in American corporate history, it was met with outrage.[10] The House of Representatives overwhelmingly passed a bill levying a near-total tax on the bonuses of bailout recipients, though the bill did not make it through the Senate.[11] Other less extreme measures were taken to restrict such bonuses.[12]

These examples illustrate how the law currently deals with greed: in extreme examples there may be criminal penalties, for example when greed results in tax evasion or illegal insider trading. In other scenarios, the law has yet to come to terms with greedy behavior and how to restrict or prohibit it, as illustrated by the AIG bonus scandal. The remainder of this Section will explore why a careful analysis and

9. *See* Jesse Nankin & Krista Kjellman Schmidt, *History of U.S. Gov't Bailouts*, PROPUBLICA (Apr. 15, 2009), https://www.propublica.org/special/government-bailouts.

10. As will be discussed in Part III.B.1, *infra*, this sense of outrage is described in the behavioral economics and psychology literature as moral outrage triggered by moral mandates—self-expressive moral positions or stances—which are an aspect of how people inherently perceive justice. *See* Linda J. Skitka & David A. Houston, *When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 SOC. JUST. RES. 305 (2001). This sense of moral outrage and its origins are not adequately described by traditional theories of justice, and the analysis of greed contained herein thus adds to the consideration of justice and fairness in tax policy because it inherently coopts the moral mandates theory into its analysis.

11. A Bill to Impose an Additional Tax on Bonuses Received from Certain TARP Recipients, H.R. 1586, 111th Cong. § 1 (1st Sess. 2009); *see also* Carl Hulse & David M. Herszenhorn, *House Approves 90% Tax on Bonuses After Bailouts*, N.Y. TIMES (Mar. 19, 2009), http://www.nytimes.com/2009/03/20/business/20bailout.html?mcubz=3.

12. *See* Tracy A. Thomas, *Bailouts, Bonuses, and the Return of Unjust Gains*, 87 WASH. U. L. REV. 437, 438–39 (2009).

understanding of greed and greedy behavior are important in the law generally and tax policy more specifically.

A. Greed, Justice, Economics, and Tax Policy

Greed is a complex concept, bound up with religion and morals, economics, politics, and human relationships. Early on, thinkers such as Plato and Socrates recognized the link between greed and justice. For example, Plato's summary of Socrates's dialogues in *The Republic* suggested that greed drives individuals to act immorally and unjustly.[13] Similarly, Aristotle believed that greed was the vice that caused people to break the rules of law and fairness and to seek more at the expense of communal canons of distributive justice.[14] Later philosophers such as David Hume also described greed as a universal vice "directly destructive of human society."[15] However, Hume also acknowledged that while greed is potentially destructive, profit-maximizing self-interest has the positive aspect of motivating commerce.[16] Hume did not go on to draw a line between commercial self-interest and morally objectionable greed. Adam Smith and later economists and philosophers also focused on this "positive" aspect of self-interested behavior in their writings. Thus, while greed is harmful from a perspective of fairness and community welfare, self-interest may be a positive force, at least to an extent, with respect to capitalist market economics.[17]

Accordingly, even in the early economic literature, it was recognized that self-interested behavior is valuable to a free market economy, but some types of extreme self-interest may actually be destructive or cause inefficiencies. But this Article will argue that greed goes beyond the economist's consideration of inefficiencies or

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13. Long Wang & J. Keith Murnighan, *On the Duality of Greed*, 4 (Kellogg School of Management, Working Paper No. 378, 2008 (citing RYAN K. BALOT, GREED AND INJUSTICE IN CLASSICAL ATHENS (2001)).

14. RYAN K. BALOT, GREED AND INJUSTICE IN CLASSICAL ATHENS, 33 (2001).

15. Wang & Murnighan, *supra* note 13, at 5 (citing DAVID HUME, *Of Avarice*, *in* ESSAYS, MORAL, POLITICAL, AND LITERARY (Eugene F. Miller ed., Liberty Fund, Inc. 1986) (1987)).

16. *Id.*

17. As discussed in Parts III and IV of this Article, use of greed in tax policy should be limited to situations where greed is harmful, and rules should be carefully tailored to avoid limiting the ability of what people may think of as "greed" to "do good". As expressed in one article in the popular press, "[w]e believe that greed can do good, not that it *is* good." John Paul Rollert, *Greed Is Good: A 300-Year History of a Dangerous Idea*, ATLANTIC (Apr. 7, 2014), https://www.theatlantic.com/business/archive/2014/04/greed-is-good-a-300-year-history-of-a-dangerous-idea/360265.

costly externalities, in its relationship to tax policy. Taxation undergirds the social contract that any government or political order rests on, and that political order incorporates rules relating to justice, fairness, and the proper distribution of resources, all of which are potentially violated by greedy behavior. Because of greed's relationship to strong moral positions regarding fairness and justice, consideration of greed in tax policy can help to ensure that the tax system resonates with the public's moral stance.

In the law generally, greed has been referenced in court cases relating to contract disputes and torts, especially in cases with allegations of fraud.[18] Curbing greed is often cited as a goal of legislative attempts to regulate accounting and the financial sector in the wake of scandals and financial fraud.[19] Additionally, as Professor Posner and others have observed, greed, or at least an "aversion to too much money making," was the impetus behind the adoption of U.S. antitrust law.[20] Unlike in these areas of the law, explicit references to greed in the tax law are rare.[21] Nonetheless, attitudes toward greed may be implicit in certain tax rules.[22] It has also been made more explicit in certain limited areas, such as in the context of executive compensation.[23]

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18. *See* Posner, *supra* note 7, at 1105–06.

19. *See, e.g.*, S. REP. NO. 107–146, pt. 1 at 2 (2002) ("This bill would play a crucial role in restoring trust in the financial markets by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted. While greed cannot be legislated against, the federal government must do its utmost to ensure that such greed does not succeed."); *see also* 148 CONG. REC., 107th Cong., 2nd Sess. 14500 (daily ed. July 25, 2002) (statement of Rep. Miller) (supporting the measure in response to the "relentless greed" that "has led to financial ruin" for employees and investors in companies such as Enron and WorldCom which went bankrupt in the wake of massive financial frauds).

20. *See* Posner, *supra* note 7, at 1106.; *see also* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT ch. 13 (1914) (describing "combinations" or mergers of railroad companies as motivated by greed or personal ambition in an essay on the "Curse of Bigness"). This raises a fundamental, definitional question with respect to greed: what is "too much"?

21. For example, greed has been cited as a justification for enhanced penalties for tax avoidance. *See Roben v. Comm'r*, 51 T.C.M. (CCH) 407 (1986). One reason for the paucity of references towards greed in the tax law is that motive or intent is only occasionally relevant to questions of taxation. Another reason is because of the emphasis in tax policy on efficiency—that tax rules should not distort the economic choices that taxpayers would otherwise make, regardless of the morality of those choices. *See* MICHAEL J. GRAETZ & DEBORAH H. SCHENCK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 29 (6th ed. 2009).

22. *See generally* Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119, 167 (1994).

23. *See infra* Part IV.

The role of tax policy in the economic life of a country and the issues surrounding the allocation of the tax burden raise complex questions that strike to the heart of the country's moral, political, and economic traditions and views on wealth and greed. Greed has been described as the impetus for a compulsory tax system: the payment of taxes must be compelled by any government in order to sustain itself, since systems of voluntary payment fall victim to the human tendency toward free-riding.[24]

So what, then, is the point of looking at greed with respect to tax policy? In the epigraphs at the beginning of this Article, two politicians make very distinct statements about greed. In one, which is characteristic of left-leaning populist attitudes, greed is explicitly linked to insufficient taxation. The other epigraph exemplifies a different popular view, that "greed" (but more accurately referring to self-interest) may in fact be good. This perspective is also common among libertarian groups that tend to take a skeptical view of taxation. Both cases illustrate the rhetorical strength of greed as a concept touching upon very deep-seated beliefs and values. Greed is potentially a powerful political and rhetorical tool. Tax policy makers should consider greed in formulating tax policy that resonates with the public, as "greed" can signal moral outrage about a distribution or behavior that violates norms of fairness and justice. Analytical rigor is necessary, however, to avoid limiting the scenarios where self-interested behavior can be a positive force, as in the case of an entrepreneur driven by material self-interest to create social wealth.[25]

Before defining greed, however, it is necessary to survey the historical evolution of the varying conceptions of greed, and explore how greed works in practice. The following sections will address each of these in turn.

B. The Historical Evolution of the Concept of Greed

Greed is ubiquitous in human history. From ancient religious texts to the Greek philosophers, greed is discussed and, generally,

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24. *See* Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671, 680 (2006) ("The law must compel the payment of taxes because most people, due to the human tendency towards greed, would never pay their share voluntarily.").

25. Entrepreneurship and wealth creation may be motivated by what is colloquially referred to as greed, but profit-motivated self-interest is not always the sole or primary driver of innovation or wealth creation. *See, e.g.*, ERIC VON HIPPEL, FREE INNOVATION 145 (2016) (discussing a range of motivators for innovation, including creativity, fun, altruism, and learning).

condemned. Per one commentator, "[i]n every era, there have been people who had an excessive desire to accumulate money, power, and prestige."[26] In the Judeo-Christian tradition, greed is considered one of the seven deadly sins,[27] with warnings against avarice and an excessive emphasis on worldly possession appearing throughout the Bible.[28] In Buddhism, greed is considered one of the "Three Poisons," one of the unwholesome motivations that contributes to human suffering.[29] Generally speaking, in religious and moral teachings, greed is something which must be reined in, controlled, or subverted.[30] King Midas was blinded by his greed and turned everything he loved into gold, thus losing it forever.[31] More recently, "unbridled greed" has been condemned as the cause of corporate scandals.[32]

In Western culture, the early Christian and Biblical teachings on greed persisted through the Middle Ages.[33] With the growth of a larger merchant class, however, universal condemnation of greed became increasingly problematic—how can one eschew material wealth, when more and more people are benefiting from activities that generate material wealth? This problem is reflected in the evolution of thinking on money and wealth over time: from the early Christian writings praising asceticism and condemning greed, popular and scholarly thought became significantly more nuanced. For example, Shakespeare's well-known sixteenth century play *The Merchant of*

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26. Linda Stern, *Economy: The Human History of Greed*, NEWSWEEK (Mar. 25, 2009), http://www.newsweek.com/economy-human-history-greed-76435 (quoting RYAN K. BALOT, GREED AND INJUSTICE IN CLASSICAL ATHENS 2001) (internal quotation marks omitted).

27. *See* ANGELA TILBY, THE SEVEN DEADLY SINS: THEIR ORIGIN IN THE SPIRITUAL TEACHING OF EVGARIUS THE HERMIT (2009).

28. *See, e.g.*, *Ecclesiastes* 5:9 ("The covetous man is never satisfied with money, and the lover of wealth reaps no fruit from it."); *Luke* 12:15 (New American Bible Revised Edition) ("Then he said to the crowd, 'Take care to guard against all greed, for though one may be rich, one's life does not consist of possessions.'").

29. *See* DAVID R. LOY, *The Three Poisons, Institutionalized*, *in* SPIRITUALITY AND CORPORATE SOCIAL RESPONSIBILITY: INTERPENETRATING WORLDS (David Bubna-Litic ed., 2009).

30. *See, e.g.*, SALLY MCFAGUE, *God's Household: Christianity, Economics, and Planetary Living*, *in* SUBVERTING GREED: RELIGIOUS PERSPECTIVES ON THE GLOBAL ECONOMY 119 (Paul F. Knitter & Chandra Muzaffar, eds., 2002).

31. Anna Baldwin, *Midas*, ENCYCLOPEDIA MYTHICA, (Mar. 3, 1997), http://www.pantheon.org/articles/m/midas.html.

32. *See, e.g.*, Opinion, *Unbridled Greed*, N.Y. TIMES (Feb. 24, 2003), http://www.nytimes.com/2003/03/25/opinion/unbridled-greed.html?mcubz=0; *see also* Wang & Murnighan, *supra* note 13.

33. *See* E. K. HUNT, PROPERTY AND PROPHETS: THE EVOLUTION OF ECONOMIC INSTITUTIONS AND IDEOLOGIES 11 (7th ed. 2003).

Venice seems to reflect this dual thinking on making money: merchants are not inherently bad people—one can make money and still be a good, humble, and loyal person (as in the form of the character Antonio), but where money is valued too much, it is a vice (as in the character Shylock, the usurer).[34] By the mid-eighteenth century, thinkers of the Scottish Enlightenment, such as, David Hume and Adam Smith, defended the value of protecting private property and proclaimed that self-interested behavior promotes societal good through the promotion of trade and industry.[35] These views distinguished morally objectionable greed from the self-interested, materialistic preferences of the modern economic man now heralded as a model citizen.

These Scottish Enlightenment views were imported into the American political, economic and moral tradition of what Professor Kornhauser calls "moral economic individualism"—rooted in the Protestant religious and moral teachings, the idea that every Christian had two "callings": first and generally, to lead a godly life, and more specifically, that each person through his vocation would serve God by serving the common good.[36] As Kornhauser has explained:

> According to [the socialist and philosopher Max] Weber, the Calvinist doctrines of election and predestination provided the impetus to work and the "spirit" of capitalism: under these doctrines only some people were chosen for salvation, and the decision as to who would be saved was predetermined by God. Because doubting whether a person was chosen was considered to be a lack of faith, one was duty-bound to act as if she were one of the elect. This occurred through one's special calling—by working hard and accumulating wealth for the glory of God . . . Thus, wealth became a sign of grace: God created man to work, and

34. *See* Posner, *supra* note 7, at 1097–98. Even Shakespeare's perspective seems to reflect some ambivalence: Antonio may be a wealthy merchant and a sympathetic character, but one does not envy him, as his wealth and position clearly have not made him happy. Shylock's attachment to money may derive in some way from his persecution as a Jew and mistreatment by the wealthy Christians of Venice: the pleasures of material wealth are his only antidote to the injustices to which he feels subjected.

35. *See, e.g.*, ADAM SMITH, THE WEALTH OF NATIONS IV.ii.9 456 (Liberty Classics 1981) (1776).

36. *See* Kornhauser, *supra* note 22, at 125.

through work, rather than leisure or idleness, man glorified God.[37]

Nonetheless, Kornhauser acknowledges that in the American tradition, pursuit of wealth for its own sake, or for consumption's sake, is morally suspect.[38] Only wealth attained as a byproduct of hard work and dedication to one's calling is morally sound. Therein lies the tension: wealth is encouraged as the fruit of performance of duty, but ethically bad as a temptation to idleness or sinful enjoyment of life, or where not properly "earned."[39] Thus, in the American Protestant tradition, the critical connotations of "greed" must relate only to the desire to accumulate wealth for wealth's own sake, or for the sake of consumption or attainment of other worldly benefits, divorced from the communitarianism of the culture, wherein individual industry and the pursuit of wealth is viewed as benefiting the common good. These views on wealth accumulation under the Protestant tradition are also tempered in American moral economic individualism by Republicanism, which sought to establish a nation governed by independent citizens rather than a system of monarchy or aristocracy.[40] Under this ideology, widespread ownership of property is necessary, but the accumulation of wealth in the hands of few is dangerous to the very basis of the Republic.[41]

Moral economic individualism continues to play a role in the American political psyche and creates an inherent tension and complexity in American attitudes toward greed. As political and economic cycles come and go, popular and political sentiments fluctuate, and at different times in history, the prevailing attitudes toward greed may color political discourse and policy-making. For example, in the late 1800s, the rise of the great industrial trusts and other social changes inspired the Progressive and Populist political

37. *Id.* (citing MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 2d ed. 1976) (internal citations omitted)).

38. *Id.* at 126.

39. This concept that wealth should be "earned" has a corollary in equity theory in psychology, that people tend to view an output fairly if it has some correlation with the inputs that resulted in the output in question. Thus, where wealth is proper compensation for an input, be that labor, capital, risk, or a combination of inputs, that wealth will be viewed as "fair" and morally acceptable. *See, e.g.*, Sheffrin, *supra* note 4, at 39.

40. Kornhauser, *supra* note 22, at 127.

41. *Id.* (citing GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 233–34 (1992)).

movements of the period.[42] In a Senate debate on legislation aimed at curtailing the growth of trusts, Democratic Senator James Jones of Arkansas stated that the success of the trusts was "an example of evil that has excited the greed and conscienceless rapacity of commercial sharks."[43] More recently, popular discussion and the media have taunted and condemned the "greedy" behavior of fraudsters such as Bernie Madoff.[44]

While those who commit financial fraud may be easy targets for the label "greedy," there does not appear to be a universally agreed-upon line between morally reprehensible greed and wealth-maximizing self-interest. This paradox reflects the dual conception of greed as something that is at once a vice and also merely an extreme form of self-interested behavior that nearly all humans exhibit. An analysis of how people behave in economic situations in practice helps explore this paradox and may assist in drawing the line between greedy excess and acceptable (even desirable) economic self-interest. Part C below provides this analysis.

C. Greed in Practice

1. Are People Inherently Greedy?

In *The Wealth of Nations*, Adam Smith tells us that the individual working in his own economic self-interest is "led by an invisible hand to promote an end which was no part of his intention," and that this end, ultimately, is the public good.[45] And yet, Smith acknowledged that people were also influenced by impulses other than their own economic well-being: "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him, in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it."[46] Thus, in addition to selfish impulses, people are also driven by a propensity to sympathize with their fellow humans, as well as by what

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42. *Id.* at 136.

43. 20 CONG. REC. 1457, 1458 (1899).

44. *See, e.g.*, *American Greed: Madoff Behind Bars* (CNBC broadcast Aug. 25, 2010); Susannah Cahalan, *A Look Inside the Heartless, Miserable, Greedy, Vain World of the Madoffs*, N.Y. POST (Oct. 30, 2011), http://nypost.com/2011/10/30/a-look-inside-the-heartless-miserable-greedy-vain-world-of-the-madoffs/.

45. *See* ADAM SMITH, THE WEALTH OF NATIONS 572 (Bantam Classics 2003) (1776).

46. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 13 (Enhanced Media Publishing 2016) (1759).

Smith refers to as the conscience.[47] This is similar to David Hume's view of human nature, which he described as made up of "ambition, avarice, self-love, vanity, friendship, generosity, public spirit; these passions, mixed in various degrees, and distributed through society . . . ."[48] Nonetheless, there is a view that Smith (and probably Hume, as well) had a "pretty low opinion of mankind, in general."[49] But Smith also firmly believed that the less agreeable qualities of man, such as avarice or self-interest, could be productive of good, since, for example, self-interest promoted industry.[50]

Smith's views of human nature were embraced and elaborated upon by later economists, with increasing acceptance of the view that market participants are primarily motivated by self-interest.[51] Neoclassical economic theory assumes that market participants are rational profit maximizers.[52] Some proponents of the law and economics school of thought have incorporated this model into their thinking on the role of intent in the law, and essentially take the view that because greed motivates all market participants, spurs competition, and promotes overall wellbeing, it has no role in legal inquiry.[53] This view, however conflates wealth-maximizing self-interest with greed, and does not distinguish between the two.

Even rephrasing Judge Easterbrook's and Judge Posner's "greed" as self-interest, the dogma of the free market and self-interested actors does not necessarily comport with reality. Economic historian Karl Polanyi argued that

> Nineteenth-century thinkers assumed that in his economic activity man strove for profit, that his materialistic propensities would induce him to choose the lesser instead of the greater effort and to expect payment for his labor . . . . Actually, as we now know, the behavior of man both in his

47. *See* R. H. Coase, *Adam Smith's View of Man*, 19 J. L. & ECON. 529, 529–32 (1976).

48. *Id.* at 540 (citing DAVID HUME, *Human Uniformity and Predictability*, *in* THE SCOTTISH MORALISTS ON HUMAN NATURE AND SOCIETY 44 (Louis Schneider ed., 1967)).

49. *Id.* at 543 (citing Arthur H. Cole, *Puzzles of the "Wealth of Nations"*, 24 CANADIAN J. ECON. & POL. SCI. 1, 5 (1958)).

50. *Id.*

51. *See* Maurice E. Stucke, *Is Intent Relevant?*, 8 J. L., ECON. & POL'Y 801, 818 (2012) (citing Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 931 (1979)).

52. *Id.* at 818–19.

53. *Id.* at 820 (citing Wilkow v. Forbes, Inc., 241 F.3d 552, 557 (7th Cir. 2001); Kumpf v. Steinhaus, 779 F.2d 1323, 1326 (7th Cir. 1985)).

> primitive state and right through the course of history has been almost the opposite from that implied in this view.[54]

Qualitative experiments have backed up this view. For example, some economists have shown that profit-maximizing self-interest may in fact be a primary motivator only in a minority of cases.[55] Recent work by behavioral economists, using controlled laboratory and field experiments, has demonstrated that people are sufficiently motivated by considerations other than their own profit that they often behave in ways quite contrary to the traditional rational wealth-maximizing model.[56] The evidence suggests that people care about fairness, and that the impulsion toward reciprocity in human behavior is so strong that they tend to act cooperatively rather than selfishly most of the time.[57]

Two classic economic experiments illustrate these findings. The first is the "ultimatum game" in which individuals are randomly and anonymously assigned into pairs and asked to divide up a sum of money.[58] One individual, the "proposer," must offer a particular division of the money to the "responder," who may then accept the offer, in which case each player gets the agreed-upon sum, or reject it, in which case neither player receives anything. Economic analysis based on the model of the self-interested rational actor would suggest that the responder will accept any proposal, since receiving something is always better than nothing. However, across hundreds of ultimatum game experiments, it was found that responders routinely reject offers of less than 20% of the available funds.[59] Further, the probability of rejection decreased as the sum offered by the proposer increased.[60]

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54. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 257–58 (2d ed. 2001); *see, e.g.*, FRED BLOCK & MARGARET R. SOMERS, *Beyond the Economistic Fallacy: The Holistic Social Science of Karl Polanyi*, *in* VISION AND METHOD IN HISTORICAL SOCIOLOGY 63 (Theda Skocpol ed., 1984) ("Only in the nineteenth-century self-regulating market did economic self-interest become the dominant principle of social life . . . .").

55. Stucke, *supra* note 51, at 822 ("Most people, however, are not predictably greedy.").

56. *Id.* at 822–23.

57. *Id.* at 823; *see also* Yochai Benkler, *The Unselfish Gene*, 89 HARV. BUS. REV., July–Aug. 2011, at 79 ("In no society examined under controlled conditions have the majority of people consistently behaved selfishly.").

58. *See* Werner Guth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 370 (1982).

59. *See* Ernst Fehr & Urs Fischbacher, *Why Social Preferences Matter-The Impact of Non-Selfish Motives on Competition, Cooperation and Incentives*, 112 ECON. J. C1, C5 (2002).

60. *Id.*

The second experiment is the so-called "dictator game." It is similar to the ultimatum game in that it involves two randomly assigned players who are given a sum of money to divide.[61] In the dictator game, however, the proposer has full control; in other words, the proposer is a dictator.[62] The other player must accept whatever is offered by the dictator.[63] Economic analysis would suggest that the dictator would offer nothing or next to nothing.[64] However, that was not the result.[65] Instead, over a range of experiments, usually more than sixty percent of dictators would offer a positive amount of money to the other player, and the mean transfer was roughly twenty percent of the funds available.[66] While there are varying interpretations of the results of dictator game experiments, it is generally agreed that the experiment shows people do not always seek to maximize payoffs.[67]

A comparison of the ultimatum and dictator games shows that actors tend to anticipate their counterparties' reactions to offers that may be perceived as unfair. Where the second player has the option to reject the offer in the ultimatum game, initial offers tend to be significantly higher than in the dictator game.[68] This may reflect some self-interested behavior on the part of the proposer, who anticipates that if the responder does not view the offer as fair, there is a greater risk of rejection. However, the dictator game shows that it is not pure profit maximization that drives positive offers in the ultimatum game, and there seems to be some element of an inherent sense of fairness or altruism evidenced by the dictator game. One explanation for this is the theory of inequity aversion, which posits that individuals have an inherent dislike of inequitable outcomes.[69] However, there is also some evidence that concepts of fairness are impacted by the context in

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61. *See id.*

62. *Id.* ("In a Dictator Game the responder's option to reject is removed–the responder must accept any proposal.").

63. *Id.*

64. *See* Robert Forsythe et al., *Fairness in Simple Bargaining Experiments*, 6 GAMES & ECON. BEHAV. 347, 348 (1994).

65. John A. List, *On the Interpretation of Giving in Dictator Games*, 115 J. POL. ECON. 482, 483 (2007).

66. *Id.*

67. *See id.* at 483–84.

68. Fehr & Fischbacher, *supra* note 59, at C5.

69. Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q. J. ECON. 817, 819 (1999).

which the interaction occurs, and also have societal and cultural components.[70] This will be discussed further in the next part.

In sum, the ultimatum and dictator games show that humans are not universally motivated by the self-interested desire for wealth, profit or material gains, and have deep-seated notions of fairness and acceptable social and economic behavior. Certainly, self-interested profit motives may be important in driving behavior that benefits society by incentivizing wealth maximization that improves overall welfare (the idea suggested above that greed can "do good").[71] But when selfish materialism comes at the expense of others or is somehow excessive or contrary to societal norms, it can actually work against self-interest: people are willing to punish others for unfair behavior.[72] This reaffirms that greed is not equivalent to self-interest and involves the violation of certain societal norms of justice and fairness.[73] It also indicates that people may approve of using tax policy either to punish or correct greedy behavior, as will be explored further below.

2. A Note on the Malleability of Greed

As noted in some of the work on the ultimatum and dictator games, there is significant evidence that cooperative and "fair" behavior has a learned or emotional component, and that attitudes towards greed, as well as fairness, are malleable and can be cultivated.[74] Education, religion, and political institutions can incentivize or acculturate greedy behavior, or promote and reward cooperation and fairness.[75] Cross-cultural studies using the ultimatum game have shown that greater "market integration" and higher profits from cooperation tend to be associated with more cooperation in the

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70. *See* STEVEN M. SHEFFRIN, TAX FAIRNESS AND FOLK JUSTICE 41 (2013); *see also* List, *supra* note 65, at 490.

71. *See* Rollert, *supra* note 17

72. Maurice E. Stucke, *Is Intent Relevant?*, 8 J. L. ECON. & POL'Y 801, 823 (2012) ("This 'strong reciprocity' in human behavior entails a 'predisposition to cooperate with others and to punish those who violate the norms of cooperation, at personal cost, even when it is implausible to expect that these costs will be repaid either by others or at a later date.'").

73. This will be explored further in Part 0, *infra*.

74. *See* Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 J. ECON. PERSP. 159, 161 (1993); *see also* Benkler, *supra* note 57.

75. *See* Frank et al., *supra* note 74 (discussing studies showing that education in the field of economics can change attitudes towards greed). Certainly, religious teachings have almost universally sought to contain or limit greedy tendencies. *See supra* Part 0.

experimental games, or in other words, with a sense of fairness that requires more sharing.[76]

In contrast, many have noted that the institutions of capitalism—and the free market economy in particular—tend to cultivate and reinforce impulses toward greed.[77] Evidence from the cross-cultural ultimatum game may in part explain this: whereas capitalism is often attended by market integration and cooperation through trade that would be expected to heighten senses of fairness, the size and anonymity of large markets may reduce this impulse. This is not to say that global capitalism is doomed to reward the greedy. Work in the field of behavioral economics, as well as work in ethical management and other areas,[78] are making the case that "we can build efficient systems by relying on our better selves rather than optimizing for our worst."[79] This should inform tax policy, as well: tax rules that tend to reward and promote fairness and cooperation can reinforce public perceptions of fairness in the tax system.

In addition to remedying injustice caused by greedy behavior, tax policy may have a role in acculturating fair behavior in society, by condemning unfair, greedy behavior. Of course, this should be done cautiously, especially in light of the power of greed as a rhetorical tool. As the experimental evidence shows, what is considered "fair" can vary situationally, so it is important to keep such nuances in mind in crafting tax policy. As Sheffrin, John List, and others have noted, results in the ultimatum and dictator games and similar experiments emphasize the importance of context. In the anonymous construct of the basic ultimatum game, the proposer may be motivated by a combination of self-interest, the desire to ensure that the responder accepts the offer, inherent inequality aversion, and perhaps a sense of being responsible for someone who did not receive the power and

76. Joseph Henrich et al., *In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies*, 91 AM. ECON. REV. 73, 73–74 (2001).

77. *See, e.g.*, Lisa G. Lerman, *Greed Among American Lawyers*, 30 OKLA. CITY U. L. REV. 611, 616 (2005) (citing David P. Levine, *The Attachment of Greed to Self-Interest*, 2 PSYCHOANALYTIC STUD. 131, 139 (2000)).

78. Professor Lynn Stout and others have also done significant work incorporating the work of behavioral economists and revitalized concepts of business ethics into the fields of corporate governance, law and economics, securities regulation, and corporate finance, among others. *See, e.g.*, Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. OF CORP. L. 635 (2003); Lynn A. Stout, *The Corporation As Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015).

79. Benkler, *supra* note 57, at 80.

money allocated to the proposer at random.[80] Modifications to the dictator game, however, for example in which there was some aspect of the dictator having "earned" the income in question, significantly reduced the sharing that had been seen to occur in the pure dictator game studies.[81] Thus, tax policy aimed at limiting greedy behavior must be carefully crafted so as not to offend notions of fairness depending on the context in which the rules apply.[82]

D. Greed as a Rhetorical and Analytical Device in Tax Policy

As one expert has stated, "A tax system is not simply a device for redistributing goods and services with the least social pain. It is also a system in which individuals express their values. Tax reforms that reflect these values are more likely to endure."[83] Tax policy is at the core of the system of government in American liberal democracy. It is thus a reflection of, as well as at times a challenge to, the value system of American society.[84] Concepts of justice and fairness, including attitudes toward greed, are reflected in current tax policy. And yet, there has been very little explicit analysis of such concepts in normative tax policy discussions.

In pluralistic democracy, there is no uniform set of values to which everyone adheres. There are general principles that drive our constitutional political system, but there is deep disagreement on numerous aspects of political philosophy, the role of government, and ideal tax policy. Nonetheless, recent work in the fields of economics and psychology indicates that there may be unifying trends in human thought and behavior: as a review of the ultimatum and dictator game literature shows, people seem to have an innate sense of fairness, a willingness to punish those who breach social norms, and at least some measure of concern for others that refutes classical depictions of *homo*

80. *See, e.g.*, List, *supra* note 65, at 491 (discussing his conclusions that the anonymous and random pairings in the dictator game may be analogous to random incidents in the real world where we are put in a position of responsibility vis-à-vis a stranger, for example, helping an old lady cross the street, in which our behavior would accord with the social norms evident in the dictator game context, but noting that his modifications to the dictator game, which introduced components of earning and taking into the experimental setting, altered the results dramatically, generally resulting in less sharing).

81. *See* Sheffrin, *supra* note 4, at 41–42.

82. *See infra* Part 0 (discussing the idea of "earned" outcomes, and the relationship between greed and concepts of fairness).

83. Sheffrin, *supra* note 4, at 225.

84. *See generally* Kornhauser, *supra* note 22 (discussing how the income tax system reflects American values and society's sometimes conflicting attitudes towards wealth and money).

economicus as a purely profit-maximizing creature.[85] These findings have important lessons for tax policy, and will also aid in the development of a definition of greed, as will be discussed in Part III, below.

As noted above, greed is a powerful rhetorical tool, often invoked in politics to garner public outrage against some event or favoritism for a certain policy.[86] Rhetoric can be used to argue for or against a particular proposal, but it also can frame the way people think about an issue going forward. Framing certain behavior using the rhetoric of greed may influence how people view the issue.[87] Mental and rhetorical framing of an issue to drum up support for or opposition to a policy or rule may be problematic, in that it can result in a law or policy that is politically expedient rather than effective.[88] Nonetheless, it may be beneficial to use rhetorical and framing devices to achieve tax policies that are effective and fair. Limiting or regulating greed, as the term is defined in Part III below, through the tax laws may, in fact, be efficient from an administrative perspective, as it does not require any new administrative vehicle for regulation.[89] Of course, this must be done carefully in order to ensure that the focus on administrative efficiency does not disguise other problems with a rule or law, such as the creation of unexpected and costly externalities, when a different

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85. One psychologist makes the case that in fact, *homo economicus* is just one of three competing conceptions of human motivation, together with *homo socialis*, which is concerned with human relationships and social goals such as status and standing, as well as *homo moralis*, which focuses on people's core conceptions of right and wrong. Linda J. Skitka et al., *Knitting Together an Elephant: An Integrative Approach to Understanding the Psychology of Justice Reasoning*, *in* 11 THE PSYCHOLOGY OF JUSTICE AND LEGITIMACY: THE ONTARIO SYMPOSIUM 1, 2 (D.R. Bobocel et al. eds., 2009). All three of these motivate human behavior at different times and in different contexts. *Id.*

86. *See, e.g.*, LAWRENCE W. REED, EXCUSE ME PROFESSOR: CHALLENGING THE MYTHS OF PROGRESSIVISM 23–24 (Lawrence W. Reed ed. 2015) (referring to charges of greed with respect to the 2008 financial crisis as "little more than a rhetorical device").

87. David I. Walker has discussed the use of mental and rhetorical framing of business deductions as subsidies as an effective but potentially misleading tool to shape the debate around Internal Revenue Code provisions that deny deductions in various contexts. *See, e.g.*, David I. Walker, *Suitable for Framing: Business Deductions in a Net Income Tax System*, 52 WM. & MARY L. REV. 1247 (2011).

88. Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1905–16 (1994) (stating that "Framing" refers to the well-documented phenomenon under which individuals react to the purely formal way in which a question is presented or "framed," and discussing numerous examples of how framing is used in the Tax Code).

89. *See* David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 958 (2012) (remarking on the administrative advantages of using the Tax Code to regulate corporate governance and similar behavior, and to minimize deadweight loss).

approach could have avoided such unintended effects.[90] The limited approach to taxing greed discussed in Part IV, *infra*, attempts to achieve this.

III. WHAT IS GREED?

In order to make rules relating to greed, one must first define it. This Article will engage in an inquiry to delineate a conception of greed that is capable of broad acceptance. In a democratic society, any rule relating to greed should be one that is acceptable to, and presumably desired by, a majority of the people. Few rules, including tax laws, have unanimous support in a pluralistic democracy, but sufficient consensus must exist for a rule to become law.[91] Furthermore, in order to make lasting and workable policy, rules must be acceptable to a broad enough coalition to avoid attack, avoidance, and prompt repeal as political fortunes wax and wane.[92]

The American Heritage Dictionary defines "greed" as "an excessive desire to acquire or possess more than what one needs or deserves, especially with respect to material wealth."[93] This definition, with its reference to "what one needs or deserves," highlights the fact that greed is bound up with concepts of morality, fairness, and economics. It also emphasizes the importance of the concept of desert, and the idea that greed constitutes seeking to obtain or feeling entitled to material gain that is not earned—where the inputs do not justify the outputs. Thus, an exploration of the philosophical underpinnings of morality, fairness, and economics, with a focus on the concept of "excess" and the distinction between earned and unearned, is necessary. This section will address these points.

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90. *See generally* Walker, *supra* note 87 (discussing the difficulties created by using denial of tax deductions to achieve certain corporate governance and similar regulatory goals).

91. *See* JOHN RAWLS, POLITICAL LIBERALISM xvi (Columbia Univ. Press 1993) ("Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime."). In light of this plurality of reasonable yet incompatible doctrines, it is necessary to find an "overlapping consensus" in order to coexist in society. *Id.* at xix.

92. A discussion of the political, moral and philosophical foundations and realities of lawmaking in our constitutional democracy is beyond the scope of this paper. Nonetheless, the author expects that the foregoing statements are more or less unobjectionable to most readers of this Article. *See also* Sheffrin, *supra* note 4, at 53–58 (discussing the role of popular notions of fairness and justice in normative tax policy).

93. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2015).

A. Philosophical Underpinnings of Greed

Greed, as a concept with a close relationship to economic behavior, and with social and moral aspects rooted in religious and philosophical teachings, may be viewed differently, or even defined differently, depending on one's philosophical, political, and moral perspective. Thus, a survey of the various philosophical traditions and how they view greed follows. This Article will then attempt to derive a definition of greed that should satisfy the majority of these traditions.

The various philosophical traditions may best be viewed as falling along a spectrum: at one extreme, "greed", however defined, is morally valid and need not be sanctioned. In a philosophical tradition that essentially says every person has the right to whatever he or she wants, anything that he or she is able to take becomes his or hers by right. This might describe the anarchic state of nature set forth in Thomas Hobbes's *Leviathan*;[94] thus, a view that the state of nature was "good" or "just" might not see any behavior as greedy or consider greed as "bad".[95] Nearly all philosophical traditions reject this view, but it nonetheless marks one extreme on the spectrum of attitudes towards greed. On the opposite end of the spectrum, one might view the only just society as one in which every person has equal rights to all the goods and benefits in the world. Thus, any attempt to take more than one's fair share, or in other words, to gain or acquire more than the next person, would be viewed as greedy. I will refer to this view as "pure outcome egalitarianism," where each person can be no better off economically than the next person without offending pure outcome egalitarianism. Between these two extremes lie numerous other perspectives that each may define greed differently.

1. Rawls's Qualified Outcome Egalitarianism

Down the spectrum from pure outcome egalitarianism is the Rawlsian tradition, an egalitarian tradition based on the liberal philosophy of John Rawls, which does not advocate full equality of outcomes, but rather promotes a qualified view of equal outcomes, or

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94. THOMAS HOBBES, LEVIATHAN (Pac. Publ'g Studio 2011) (1651).

95. It is worth noting that Hobbes would not have ascribed to such a view; he viewed the state of nature as so bad that it justified a monarchic system of government based on a social contract. THOMAS HOBBES, LEVIATHAN ch. XVII.

what I will refer to as qualified outcome egalitarianism.[96] In Rawls's conception of justice, as set forth in his foundational book *A Theory of Justice*, inequalities must benefit all.[97] Whether social and economic equalities benefit all is determined by the difference principle: remove inequalities in society up to the point where any more removal would harm the least advantaged.[98] Rawls not only rejects what he calls legal inequality (i.e., inequality imposed by the legal regime, for example, a rule that only people from a certain neighborhood could obtain certain advantaged positions in society or the economy), but he also calls for a system that would eliminate what may be termed birth inequality and insists that any remaining social inequalities benefit the least advantaged.[99]

Rawls's theory is premised on the assumption that individuals in a hypothetical "original position," in choosing a system of justice, will first pick maximum equal political liberty.[100] Second, while in the original position, individuals cannot know *ex ante* where they will fall in the distribution of income, so they will choose the distribution in which the poorest are better off than in any other position (the "maxi-min" principle).[101] This "veil of ignorance" in the original position neutralizes self-interest, causing the rational individual to select as just a distribution in which inequality was acceptable, but only insofar as it did not disadvantage the least well-off.[102] Thus, a Rawlsian conception of greed would involve violation of the maxi-min principle: a greedy act might involve acquiring or holding something while knowing that such acquisition or holding fails to maximize (in other words, disadvantages) the least well-off. This is a fairly abstract conception of greed, but we will return to it in Part IV.

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96. Some have referred to this as factor-based or factor-selective equality of outcomes. *See, e.g.*, Marc Fleurbay, *Equal Opportunity or Equal Social Outcome?*, 11 ECON. & PHIL. 25, 25–26 (1995).

97. JOHN RAWLS, A THEORY OF JUSTICE 65 (1971) (hereinafter, RAWLS, JUSTICE).

98. Utilitarians and some libertarians in contrast might choose the pareto efficiency principle: remove inequalities only up to the point that they create inefficiencies.

99. As will be discussed below, libertarians would view this as an intolerable infringement on liberty.

100. *See* RAWLS, JUSTICE, *supra* note 97, at 123–24 (ranking the principles of justice).

101. JOHN RAWLS, POLITICAL LIBERALISM 5–6 (1993).

102. RAWLS, JUSTICE, *supra* note 97, at 303.

2. A Nozickian/Libertarian Conception of Greed

Moving towards the center of the spectrum from the hypothetical extreme in which nothing is considered greedy, falls what I term the Nozickian or libertarian conception of greed. The libertarian view of justice, as most famously articulated by Robert Nozick in *Anarchy, State and Utopia,* essentially holds that the outcome of any lawful transaction is just.[103] This conception of libertarianism does not allow the state to interfere in the private market unless the state's action serves to correct a past injustice.[104] Accordingly, Nozick views any compulsory tax system as suspect, since the role of the state is limited and revenue needs are minimal—a voluntary or benefits-based tax may arguably be acceptable.[105] In this conception, greed is acceptable so long as it does not motivate or cause illegal behavior. Thus, any conception of greed that could be sanctioned by the tax system, in the libertarian view, would require illegality. No "tax" on greed would be just except insofar as it transfers illegally-gotten gains to those who were harmed by a prior illegal transaction.

3. Utilitarianism, Wealth Maximization, and the Middle Ground

A whole range of viewpoints on greed could fall on the scale between Rawlsian and Nozickian conceptions of greed. One of the most prominent theories of justice and taxation over the past several hundred years is utilitarianism. Utilitarianism, first promoted by Jeremy Bentham and John Stuart Mill, generally holds that the moral worth of an action (or of a practice, institution, law, etc.) is to be judged by its effect in promoting happiness—"the surplus of pleasure over pain"—aggregated across all of the inhabitants of a society.[106] In terms of tax justice, in his book *Principles of Political Economy*, John Stuart Mill argued for equality of sacrifice as a guiding principle:

> If any one bears less than his fair share of the burthen, some other person must suffer more than his share, and the alleviation to the one is not, *cæteris paribus*, so great a good to him, as the increased pressure upon the other is an evil.

103. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 151 (Blackwell 1999) (1974).

104. *Id.* at 151–52; *see also* Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991, 2001 (2004).

105. *See* NOZICK, *supra* note 103, at 169 (comparing taxation of earnings to forced labor).

106. *See* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 104 (1979).

> Equality of taxation, therefore, as a maxim of politics, means equality of sacrifice.[107]

Of course, this requires ascertaining what constitutes a person's fair share. Nonetheless, it tells us that a utilitarian conception of greed in the Millsian tradition might begin with a statement to the effect that a greedy person is one who knowingly seeks to carry less than his fair share of the burden.

What might constitute a "fair share?" Taking a closer look at the principle of equal sacrifice, Mill's premise seems to have been that "government ought to make no distinction of persons or classes in the strength of their claims on it . . .", such that any required sacrifice "should be made to bear as nearly as possible with the same pressure upon all, which . . . is the mode by which the least sacrifice is occasioned on the whole."[108] Following Mill, Thomas Carver later argued that Mill had erred in his utilitarian analysis.[109] According to Carver, Mill's articulation of the equal sacrifice principle did not yield the "least sacrifice" overall, because of the theory of "marginal utility."[110] Marginal utility holds that a dollar is worth less to the high income earner than the low income earner, and thus, the high income earner can afford to give up more than the low income earner. However, later utilitarian thinkers have been unable to agree on how to measure equal sacrifice, with some approaches using marginal equal sacrifice and others preferring absolute equal sacrifice, or even equal proportional sacrifice.[111]

Thus, while Mills seems to have assumed that each person in a society is accorded equal weight, and thus individual variation in utility or welfare is discounted, other utilitarian theories take into account the concept of declining marginal utility. Utilitarian positions, thus, may fall on a spectrum themselves. Among the least egalitarian would be the utilitarian theory in which each individual's utility is accorded equal weight and so distribution is unimportant as long as overall social welfare (the sum of each individual's welfare) is

107. JOHN S. MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 804 (W.J. Ashley ed., Longmans, Green, and Co. 1909) (1848).

108. *Id.*

109. Jeffrey Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for the Unequal Taxation of Individuals*, 12 AM. J. TAX POL'Y 221, 237 (1995) (citing Thomas Carver, *The Minimum Sacrifice Theory of Taxation*, 19 POL. SCI. Q. 66, 75 (1904)).

110. Thomas Carver, *The Minimum Sacrifice Theory of Taxation*, 19 POL. SCI. Q. 66, 73 (1904).

111. Schoenblum, *supra* note 109, at 239.

maximized.[112] A weighted utilitarian theory, or one employing a steep demand curve for marginal utility, may take a slightly more egalitarian position.[113] Thus, different variations of utilitarian theory may take different views on what constitutes greed, depending on how one measures Mill's concept of equal sacrifice and whether one follows the theory of the declining marginal utility of the dollar.[114]

Because utilitarianism is consequentialist, greedy behavior would have to be defined as something that frustrated the outcomes sought by utilitarianism in order to be condemned by it. Thus, intentionally reducing the greater good in order to improve one's own selfish position could constitute greed. An example of this is provided by "promissory" insider trading—where an insider trades in securities based on material nonpublic information, and has promised (explicitly or implicitly) not to engage in such trading.[115] The harms caused by this include potential harm to the company if it has reasons to prevent insider trading, potential increased cost of capital, and harm to the institution of promise-making generally (undermining confidence).[116] The benefits would be to the person who engaged in the insider trade, and possibly to other market participants due to "smoothing" of the market price for the stock in question due to the insider trade.[117] Because the benefits are likely outweighed by the social harms, this scenario of insider trading, which involves an element of misappropriation and generates externalities, could be considered greedy.[118]

112. *See* Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1949 (1987). In spite of some indications in his writing that Mills would give equal weight to the utility of each person, thus not making distinctions among individuals, it is unclear whether Mills would agree with this characterization of his theory. Some statements in Mills's writing, such as his reference to the "evil" of a person failing to bear his share of equal sacrifice, indicate that his view on welfare and utility was somewhat more nuanced.

113. *See id.*

114. The accuracy and usefulness of the theory of the declining marginal utility of the dollar has been criticized and questioned. *See, e.g.*, Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904 (2011).

115. John P. Anderson, *Greed, Envy and the Criminalization of Insider Trading*, 2014 UTAH L. REV. 1, 42 (2014) (arguing that utilitarianism would condemn promissory insider trading, even if the practice were not illegal).

116. *Id.* at 47.

117. *Id.*

118. *Id.* Anderson separately addresses what he calls "misappropriation" trading, which involves non-insider trading on the basis of misappropriated nonpublic information, and similarly argues that utilitarianism would condemn this type of trading for the same reasons that promissory insider trading would violate the norms of utilitarianism. *See id.* at 31, 48.

4. A Plurality of Views on Greed

The foregoing investigation into the philosophical underpinnings of greed reveals that across the political spectrum and depending on one's view of justice, what constitutes greedy behavior will vary along a similar spectrum. If there is no unified definition of greed, is it nonetheless possible to develop a definition that could be agreed upon by a majority of lawmakers, politicians, and citizens? In the first place, one could select a narrow definition of greed. Defining greedy behavior in the Nozickian tradition, as an act or acts motivated by economic self-interest that in fact violates established law, would not sanction any behavior that is not considered greedy by those at the other end of the spectrum. Thus, labeling a person who engages in outright theft for material gain as greedy would likely be uncontroversial. For example, no one defended Bernard Madoff from charges of greed when it was revealed that he carried out a massive Ponzi scheme. On the other hand, arguing that a wealthy CEO is greedy because he takes home a large salary and seeks to pay the minimum amount of taxes allowed by law might garner agreement from a Rawlsian egalitarian; but a Nozickian libertarian would surely disagree, as might a middle-of-the-road utilitarian.[119]

Thus, a very narrow definition of greed would find common ground among nearly all members of a pluralistic democracy, including one as heterogeneous as the United States. However, a broader definition of greed could be politically tenable, in that it would satisfy enough of the relevant stakeholders to pass political muster. Determining what such a definition would be requires turning for a moment from the great political and economic philosophical traditions to a consideration of commonly held notions of fairness and desert.

B. Greed as a Breach of Fairness

Because greed is generally described as a desire or feeling, it has an emotional and psychological component. Psychologist Harvey A. Kaplan defined greed as "the selfish desire to acquire for the sake of acquisition without regard for others."[120] The fact that greed is typically described as a desire or feeling makes it a subjective concept.

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119. *See infra* Part IV.A (discussing greed and executive pay).

120. David Farrugia, *Selfishness, Greed, and Counseling*, 46 COUNSELING & VALUES 118, 119 (2002) (citing Harvey A. Kaplan, *Greed: A Psychoanalytical Perspective*, 78 PSYCHOANALYTICAL REV. 505 (1991)).

While profit-maximizing self-interests is a natural impulse inherent in all people, greed is an excessive variation that takes the profit-maximizing urge to an extreme. As Sigmund Freud once said:

> Culture has to call up every possible reinforcement in order to erect barriers against the aggressive instincts of men . . . its ideal command to love one's neighbour as oneself . . . is really justified by the fact that nothing is so completely at variance with original human nature as this.[121]

Greed is thus viewed as a human failing, a vice—a failure to control a natural impulse or feeling. It is the moral judgment of greed to which the philosophical traditions can speak, to some extent, in trying to ascertain what is or is not moral. But there is also a more visceral or instinctive component of greed. As discussed in the prior section, there is a broad range of views among "experts" regarding justice and morality, and thus it is impossible to come up with a unified "expert" definition of greed. Similarly, any two non-experts, if asked, might describe different behavior or actions as greedy. However, there appear to be some natural tendencies or commonalities in our views on what constitutes fair, as opposed to greedy, behavior. In his book *Tax Fairness and Folk Justice*, the economist Steven Sheffrin catalogs these "folk" or popular views on fairness, explains how they relate to "expert" views on morality and political and economic philosophy, and provides a framework for consideration of these views in policy-making.[122]

This Article incorporates Sheffrin's discussion about folk justice into its framework for analyzing the role of greed in tax policy. Everyday attitudes toward fairness and justice are particularly important for tax policy because tax policy must take into account the often strong feelings and preconceptions of politicians, and their constituents, about tax rules.[123] In addition, Sheffrin's work is helpful in thinking about greed specifically because of what it tells us about perceptions of fairness and what are likely to constitute deviations from that standard of acceptable behavior.

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121. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 40–41 (Stanley Appelbaum & Thomas Crofts eds., Joan Riviere trans., Dover Publications, Inv. 1994) (1930).

122. SHEFFRIN, *supra* note 4.

123. *See id*. at 10 (noting that "tax policy considerations typically are discussed with the views of individuals and politicians in mind and not just left to the experts").

1. Folk Justice and Greed

Folk justice is defined in Sheffrin's book as "the full constellation of attitudes that individuals hold in their daily lives about all dimensions of justice."[124] Folk justice is relevant in considering tax fairness, according to Sheffrin, because it sheds light on the frequent disconnect between the policies advocated by "experts" and those that have political salience with the populace.[125] In defining greed, it is important to consider these "folk" views on fairness as well as expert views about justice, to ensure that any policies resonate with the populace and achieve legitimacy in a democratic system of government. As Sheffrin notes, unless a theory "is close enough to folk ideas to resonate with individuals in their everyday lives," any rules or institutions built on those theories will not be easily incorporated into social practice.[126] Similarly, institutions will, to some degree, embody the beliefs and practices of individuals, building on their ideas of folk justice; therefore, effective reform of such institutions must account for existing social practices and prevailing attitudes toward justice and fairness.[127]

Sheffrin proposes five foundations of folk justice: (1) procedural justice, (2) equity and social exchange theory, (3) qualified perceptions of fairness, (4) moral mandates, and (5) system justification theory.[128] Each of these foundational concepts are relevant to explaining varying attitudes towards greed, and thus are important to developing the definition of greed below.

The first of the five foundations discussed by Sheffrin is procedural justice, which addresses the process by which rules and laws are made, or carried out.[129] Sheffrin surveys a variety of literature from social psychology, legal scholarship, and compliance research about the importance of process and procedure to social outcomes.[130] This body of work emphasizes the need for fair and open decision-making processes, and the opportunity to be heard.[131] Procedural

124. *Id.* at 3.
125. *Id.* at 10.
126. *Id.* at 8.
127. This also relates to the discussion in Part 0 above, regarding the political legitimacy of a particular rule or law based on a particular philosophical tradition.
128. SHEFFRIN, *supra* note 4, at 28.
129. *Id.* at 30.
130. *See id.*
131. *Id.* at 31.

justice may be relevant to the issue of taxing greed, because greedy behavior is often hidden or disguised—for example, in the context of financial fraud. Thus, procedural justice tells us that people will be more inclined to view as greedy any behavior that involves an element of deception or fraud—in other words, where the greedy person engages in behavior that interferes with another's decision-making processes.[132]

Secondly, Sheffrin discusses the importance of equity and social exchange theory.[133] Equity theory, an extension of social exchange theory, is based on evidence from psychological studies that people are more satisfied when they feel that the rewards and returns they receive are related to the inputs or efforts they make.[134] Thus, fairness requires some kind of fundamental balance between inputs and outputs.[135] This is an extension of social exchange theory, a sociological theory that views social behavior as an exchange of goods, both tangible items and intangible goods that may include symbols of approval and prestige.[136] According to equity theory, in addition to seeking to maximize their net gains from social interactions (as in social exchange theory), individuals can form groups that maximize collective outcomes by evolving systems for equitable apportionment of resources, and to enforce norms to reward and punish equitable and inequitable behavior.[137]

Equity theory is important to the concept of greed, because it speaks directly to the nature of greed, which constitutes some form of fundamental unfairness in social or economic exchange. Equity theory also requires some type of balance between outputs and efforts.[138] Greed is an affront to this, as it implies some element of getting out more than what was put in. This will be discussed further below in the discussion of the concept of desert.

132. An example would be in the context of certain types of insider trading—an insider trading on misappropriated information or information that he or she has promised not to trade on is seen as interfering with the fairness of the markets and also possibly harming the company in whose stock he or she trades by interfering with its process of governance. *See* Anderson, *supra* note 115, at 45–48.

133. SHEFFRIN, *supra* note 4, at 34.

134. *See id.*

135. *Id.* at 38.

136. *Id.* at 35 (citing George C. Homans, *Social Behavior as Exchange*, 63 AM. J. SOC. 597, 606 (1958)). Equity theory moderates social exchange theory by emphasizing the role of fairness in social exchange. *Id.* at 36.

137. *Id.*

138. *Id.* at 37.

In addition to equity and social exchange theory, Sheffrin explores how norms of fairness seem to be societally and situationally dependent, and how such norms may lead to seemingly altruistic behavior rather than the expected "profit"-maximizing exchange.[139] He refers to this as qualified perceptions of fairness, noting that "fairness reflexes are not as hardwired and simplistic," but nonetheless play an important role in perceptions of justice.[140] As evidence, he cites numerous economic studies showing that people may have an aversion to inequity, and may also seek some kind of reciprocity in exchanges.[141] However, ideas of fairness are affected by societal and situational factors.[142] Studies have found differences across cultures in conceptions of justice and how people behave towards one another.[143]

Individuals often hold strong moral positions—what Sheffrin calls moral mandates[144]—that may further influence what is viewed as fair or just, and which may trump normal economic concerns. To some extent, moral outrage may be triggered by violations of the fairness principles identified by equity theory—for example, where the outputs are not commensurate with the inputs. However, psychological studies have indicated that there is something special about moral outrage, and that moralization "is a psychological state that can be turned off and on like a switch."[145] This is part of why charges of greed carry such rhetorical weight, because most people are still socially and culturally conditioned, to some extent, to understand greed as a sin or a vice. The theory of moral mandates posits that individuals hold deep moral convictions across a series of broad moral categories, which are "experienced as psychologically nonnegotiable and as a fundamental truth about right and wrong," whether rational or not.[146] They evoke a deep sense of outrage, disruption, and disorientation when they are violated.[147]

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139. *See id.* at 39–42.

140. *Id.*

141. *Id.* at 39–40. Some of the evidence Sheffrin cites includes work on the ultimatum and dictator games discussed in Part 0, *supra*.

142. *See, e.g.*, *id.* at 41.

143. *Id.* at 41; *see also* Henrich, *supra* note 76.

144. SHEFFRIN, *supra* note 4, at 45.

145. *Id.* at 44 (citing Stephen Pinker, *The Moral Instinct*, N.Y. TIMES MAG. (Jan. 13, 2008), http://www.nytimes.com/2008/01/13/magazine/13Psychology-t.html).

146. SHEFFRIN, *supra* note 4, at 45 (citing Linda J. Skitka & Elizabeth Mullen, *Understanding Judgments of Fairness ina Real-World Political Context: A Test of the Value Protection Model of Justice Reasoning*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1419, 1420 (2002).

147. *Id.*

The concept of moral mandates is also important to describing greed because it implies that what is considered greedy may vary depending on a person's moral mandates. For example, while one may not have strong feelings about executive pay generally, when American International Group (AIG), in the wake of the 2008 financial crisis and a subsequent government bailout, paid its executives extraordinarily high salaries, public outrage soared.[148] In that case, equity theory and the concept of desert explain some of the sense of unfairness generated by the episode, but the moral outrage occasioned went far beyond what one would expect from the usual disgust over high executive bonuses.[149] This underscores the importance of context; high bonuses that may be a source of generalized disapproval under normal circumstances when appearing to disproportionately reward the recipients are suddenly beyond the pale when they are viewed as being paid out of funds belonging to others.[150] In other words, the bonuses were not earned.

Moral mandates, together with procedural justice, equity theory, and qualified perceptions of fairness, all focus primarily on individual conceptions of justice and fairness. Sheffrin's fifth foundational principle focuses on how individual views about fairness and justice may be adapted to broader social settings.[151] System justification theory addresses this by explaining how individuals tend to defend the social status quo, even when they are disadvantaged by it.[152] This is related to cognitive dissonance theory, which suggests that people experience psychological tensions when they hold conflicting beliefs, views, or thoughts simultaneously.[153] In order to relieve this tension, people will either change their beliefs or behaviors, or find ways to justify or rationalize them.[154] For example, a study on system justification theory indicated a tendency to prefer the "other" over one's own group, where the "other" is from a group that is perceived as more advantaged.[155] Additionally, individuals may shift their

148. *Id.* at 44.

149. *See id.*

150. In this case, the funds were viewed as taxpayer money because the recent government bailout. *See also infra* Part 0.

151. SHEFFRIN, *supra* note 4, at 49.

152. *Id.* at 50. *See also* Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1119 (2006).

153. *See* SHEFFRIN, *supra* note 4, at 49.

154. *Id.* at 49.

155. *Id.* at 51.

perceptions and stereotypes as a result of a perceived "system threat."[156] Stereotypes may be useful in enforcing a social hierarchy. When a threat to that hierarchy is perceived, people may increasingly turn to stereotypes to reinforce the status quo.[157]

It is thus important to keep system justification theory in mind with respect to developing a conception of greed, because it tells us that people will be more likely to label behavior as "greedy" when it appears to threaten the status quo, and may be reluctant to condemn ostensibly greedy behavior that is part of the status quo. However, using system justification theory as a constraint on a norm or standard is also dangerous, as it describes a psychological tendency to justify the status quo, and it has been found that this tendency is often strongest among those most harmed by the status quo.[158] In that vein, it may at times be important to develop norms and standards that offend certain notions of folk justice in order to avoid rationalizing a status quo that is clearly unjust to certain factions or members of a society. For example, Blasi and Jost have argued that creative framing may be helpful in addressing the status-quo-rationalizing aspects of system justification theory in legal advocacy.[159]

2. Just Deserts[160] and Greed

Each of the foundations of folk justice discussed above underscores the importance of the concept of desert, and the instinctive acceptance of or desire for outputs that correspond in some way with the inputs. Greed has a close relationship to desert. Because greed can be conceived of as the act of wanting more than one is entitled to,[161] our sense of what a person "deserves" can delineate whether one is greedy or not. As Sheffrin points out, desert is linked to the concept from equity theory of the correlation between inputs and outputs.[162] It also relates to procedural justice, in that procedural

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156. *Id.*

157. Blasi & Jost, *supra* note 152, at 1122.

158. *See* John T. Jost, M. R. Banaji, & B. A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 909 (2004).

159. Blasi & Jost, *supra* note 152, at 1183–84.

160. As described by economist N. Gregory Mankiw, the concept of "just deserts" simply refers to the principle that "people should get what they deserve." N. Gregory Mankiw, *Spreading the Wealth Around: Reflections Inspired by Joe the Plumber*, 36 E. ECON. J. 285, 295 (2010)

161. A.F. ROBERTSON, GREED: GUT FEELINGS, GROWTH, AND HISTORY 27 (2001).

162. SHEFFRIN, *supra* note 4, at 191.

justice may reflect the mechanisms through which people assure themselves of the correlation between outputs and inputs—transparency and voice help to ensure that no one is manipulating the process to gain disproportionate or undeserved outputs.[163]

However, desert is more complex than the mere correlation of inputs and outputs. Some believe that only inputs resulting from intentional action (i.e., effort) can be viewed as fairly "deserving" of the outputs they receive.[164] In this tradition, outputs resulting from luck, even including genetic factors, may not truly be deserved.[165] Sheffrin calls this "luck egalitarianism."[166] Experimental evidence shows that the public generally supports a concept of deserts that goes beyond luck egalitarianism.[167] In Sheffrin's words, the public "accepts rewards for achievement as legitimate even in the presence of genetic factors."[168] In fact, as long as autonomous and intentional actions are significant in generating the output in question, the recipient is usually viewed as deserving of the outcome, even if luck is involved.[169]

An important area of inquiry with respect to the concept of desert, especially in evaluating the role of greed in the financial arena, is whether market outcomes can fairly be viewed as deserved. There are several critiques of the fairness of market outcomes relating to desert. First, from an institutional perspective, the fairness of any market outcome (i.e., whether a person deserves the output they get from the market in response to their input) depends on the underlying market institutions and system of property rights. Some commentators have argued that market outcomes cannot be fair unless the underlying distribution of property ownership is fair, which may be a questionable

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163. *Id.* at 33–34.

164. *Id.* at 198–99 ("Another prominent strand of recent philosophical thinking—luck egalitarianism—maintains with Rawls that individuals do not deserve material or natural advantages. But it departs from Rawls by permitting the recognition and rewarding of individual effort.").

165. *Id.*

166. *Id.* Note that Rawls would go even further, saying that there is no such thing as pre-institutional desert, because even things like character, which enable us to put forth effort, are essentially matters of luck, depending on when and where a person was born, and into what society. In Rawls's view, the concept of "desert" is limited to institutional desert, or the idea that one can only deserve an outcome if it is what is ordained by the laws of the land.

167. *Id.* at 202.

168. *Id.*

169. This explains why people such as Warren Buffett and Bill Gates are not typically considered greedy—they have input both effort and capital to obtain the rewards they received, even if some luck or circumstance was involved in generating their significant wealth.

assumption.[170] However, this view is not widely shared across philosophical traditions and does not seem to comport with the concepts of folk justice.[171] It may also run afoul of system justification theory.[172]

Another critique of market fairness from a desert perspective raises the concept of proportionality: that market outcomes have a tendency to be out of proportion to the inputs used to generate them. For example, is the manual laborer who works very hard for long hours but earns a modest salary receiving what he "deserves" from the market, as compared to the idle millionaire who spends a few hours here and there investing his wealth (or paying someone else to do it) and earns many multiples of the laborer's salary? These may be market deserts—the market values the capital of the millionaire more highly than the hours worked by the unskilled laborer—but some people feel that this violates notions of fairness. On the other hand, people do not seem to resent market "superstars" such as successful athletes, entertainers and musicians (e.g., Michael Jackson, Michael Jordan), even though they are able to receive rewards from the market that are many times those of other similar persons who are only slightly less talented, or slightly less lucky, who may achieve modest success but not superstar status.[173]

The economist Jonathan Weinstein has theorized that this superstar problem of apparent inequality in market outcomes can be accounted for by scalability: "Anyone whose output is easily scalable, including inventors, entertainers, and financiers, is able to create value in proportion to the size of the economy."[174] Thus, small differences can lead to vastly different outcomes, and some types of people are in a better position to take advantage of scalability, especially in the wake

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170. *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (Oxford Univ. Press 2002).

171. See SHEFFRIN, *supra* note 4, at 203 (arguing that Murphy's and Nagel's claim "goes too far").

172. In other words, an approach that questions the "status quo" of existing institutions and systems of property rights will have difficulty winning popular support. Nonetheless, the Rawlsian tradition would support this view and question whether market outcomes can ever truly be "deserved."

173. SHEFFRIN, *supra* note 4, at 205. *See also*, Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All-Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1 (1998) (describing the entertainment and sports industries as winner-take-all markets, and discussing the implications of winner-take-all markets for tax policy).

174. Jonathan Weinstein, *Fairness and Tax Policy: A Response to Mankiw's Proposed "Just Deserts"*, 37 E. ECON. J. 313, 314 (2011).

of globalization, which has expanded the potential market. Weinstein goes on to argue, "[f]airness would seem to dictate that they owe a greater proportion of their income to the upkeep of society than those in non-scalable professions such as a hairdresser, teacher, etc."[175]

Sheffrin, however, argues that folk justice does not seem to be overly concerned with proportionality in this regard.[176] First, he points out that the "superstar" phenomenon may actually be good for other market actors.[177] For example, salaries in the National Football League may be widely divergent, but in spite of a few superstar players who make far more than the average, average salaries across the league have risen over time, perhaps at least in part due to the popularity for the sport generated by a handful of superstars.[178] Additionally, Sheffrin argues that folk justice embraces the maxim, "the harder you work the luckier you get."[179] Most people recognize this and understand that it is often hard to distinguish luck from the outcome resulting directly from hard work and a person's own talents.[180] Thus, some output corresponding to the input is acceptable, even if there is an element of luck determining the size of the reward.

How does just desert theory factor into taxation? The economist N. Gregory Mankiw, a proponent of just desert theory, has argued that in a market-based economy, Pigovian taxes to offset externalities may be acceptable as compatible with just desert theory.[181] Mankiw also recommends that, while just desert theory rules out redistributive taxation for its own sake, taxes to pay for public goods and to assist the least well-off on the basis of altruism would be advisable.[182] Sheffrin also argues that just desert theory could justify taxing windfalls owing to luck at higher rates.[183] Such approaches would be acceptable even in the absence of greed.

Furthermore, there seems to be room in the context of just desert theory for some redistribution, via the tax system or otherwise, in the

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175. *Id.* These may be arguments in favor of a progressive tax system, but do not have relevance to greed, per se.

176. *See* SHEFFRIN, *supra* note 4, at 206.

177. *Id.*

178. *Id.*

179. *Id.* at 202. Sheffrin attributes the quote to the golfer Gary Player.

180. *See id.* at 206.

181. *Id.* at 207. *See also* Mankiw, supra note 160, at 296.

182. Mankiw, *supra* note 160, at 296.

183. SHEFFRIN, *supra* note 4, at 208. Others have made similar suggestions. *See, e.g.*, Peter A. Prescott, *Taxing Luck*, 83 MISS. L.J. 117 (2014).

case of market failure.[184] In that scenario, the market outcome would clearly not be "deserved" because there is some institutional or other failure that disconnects the input with the output. Mankiw himself raises this possibility in the context of executive compensation, via the example of the CEO who "pads the corporate board with his cronies."[185] Mankiw refers to this as manipulating the system[186]: corporate cronyism defeats the free market with respect to executive salaries, and thus disconnects the outcome with the input.[187] This is market failure generated by greed. Similarly, notes Mankiw, the banker whose firm survives as a result of a government bailout would not seem to deserve his large bonus, and claims to the contrary would constitute greed.[188] Sheffrin would agree that these statements comport with widely held popular notions of fairness,[189] and Mankiw argues that his just deserts theory would be acceptable to Robert Nozick, Milton Friedman, and other advocates of free market economics.[190] Prescriptions relating to these kinds of market failures are thus unlikely to be objectionable to a large segment of the population.

In sum, concepts from folk justice are vital in considering what is fair and unfair to the general public, but they also inform the way that many experts consider fairness and justice. "Greed" must invoke behavior that is in some way unfair in order to meet the definition of greed that we are seeking to outline: acting upon the desire for *more than what one deserves*. As we have discussed, the law generally, and tax law more specifically, are loath to criticize actions driven by economic self-interest that fit within a framework of fairness and desert, including actions taken in a free and fair market.[191] But where there is market failure or manipulation, greedy behavior should be curtailed.

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184. *See infra* Part 0 (exploring an instance of market failure that may justify special tax treatment).

185. Mankiw, *supra* note 160, at 295.

186. *Id.*

187. *See id.*

188. *Id.*

189. See SHEFFRIN, *supra* note 4, at 208.

190. Mankiw, *supra* note 160, at 295.

191. This is in part explained by system justification theory, outlined in Part III, Section B.1 above. Because the free market is part of the status quo, people tend to want to defend it; when there is a threat to the free market, i.e., in the case of market failure or manipulation, it will be more politically palatable to adopt a rule or law to defend the institution.

C. A Definition of Greed

As outlined in Part III.A. above, a definition of greed as an act or acts involving a misappropriation of money, wealth or other resources through self-interested behavior, would likely satisfy a majority of political views. Such an act would not need to be illegal in a criminal or regulatory sense, but could involve misappropriation, agency cost problems, or the generation of costly externalities. Concepts of folk justice are helpful in further delineating this. Where a self-interested actor misappropriates funds through manipulation of institutions, for example the stock market, this would violate norms of procedural justice and would result in undeserved gains, and could be deemed greedy. Mankiw's just desert theory further aids in drawing the line between outputs that are deserved and those that are "greedy" gains—those achieved through misappropriation and unfair behavior. In these scenarios, or where there is market failure, for example, in the case of Mankiw's CEO who manipulated the structures of corporate governance to pad his compensation, we can label the behavior as greedy.

Thus, greed requires (a) an appropriation of wealth, money or resources for personal gain (b) either through a breach of fiduciary duty or contract, manipulation of institutions, market failure, or a combination of these. In these narrow cases, greed can be assumed as the motive for the act of appropriation, and need not be verified or proven. This is because the act itself, under the circumstances set forth above, is circumstantial evidence of the greedy motive. Further, the act is sufficiently harmful that some sanction or consequence is warranted—even where the appropriation is not wholly intentional but results from a structure that allows a few to inflict small harms on others, as in the case of a situation of market failure, the injustice caused should be rectified. Additionally, this definition should only be applied to individuals; corporations and other institutional actors cannot be greedy in their own right, because the benefits of the appropriation ultimately accrue to natural persons, not the entity itself, and in such cases the entity is merely the vehicle for the appropriation.[192]

192. In some cases, shareholders may benefit from what is often loosely termed "corporate greed," but more often it is actors with short-term incentives to cause the appropriation who benefit, such as managers seeking to pad a corporation's earnings report for bonus purposes. *See also* Joy S. Mullane, *Incidence and Accidents: Regulation of Executive Compensation Through the Tax*

This approach, defining greed objectively as an act carried out in specified circumstances, addresses the problem of the subjectivity of greed. It also addresses the problem of excess as used in the dictionary definitions of greed: excess constitutes the component that was not deserved. In other words, excess is the portion of a return that arises because of the breach, manipulation or market failure. Pure market gains, however large, would not be considered greedy, so long as they are obtained without fraud, deception, or manipulation, and the market is properly functioning.

Applying this definition of greed to a few paradigm examples is illustrative. For example, Gordon Gekko of WALL STREET clearly indulged in acts of greed: he used ill-gotten insider information to profit at the expense of others.[193] He may have believed he was engaging in an act for the greater good,[194] but regardless of his true subjective feelings, the film makes clear that he engaged in financial behavior to knowingly enrich himself at the expense of others, and he did so through, at the very least, misappropriation of information that he did not have a right to. In the film, Gekko was ultimately arrested for insider trading,[195] but this would also constitute greed under the definition outlined above. Similarly, Ebenezer Scrooge from A CHRISTMAS CAROL, the quintessential greedy miser, became rich while paying his employee barely enough to live on and refusing to give to the poor (and intimating they would be better off dead), and he apparently profited off lending money to the poor on hard terms.[196] Here again, Scrooge's wealth derives in part from the starvation wages he pays his employee and, presumably, the terms on which he lends money. Today, there might be laws preventing the type of behavior exhibited by Scrooge (e.g., labor laws and anti-usury or other consumer protection rules). Even in the absence of such laws, it appears Scrooge is manipulating his power as an employer and lender

Code, 13 LEWIS & CLARK L. REV. 485, 493 (2009) (discussing generally the issue of natural persons bearing the incidence of corporate costs, including corporate taxation).

193. *See* WALL STREET (American Entertainment Partners 1987).

194. *See id.* In his famous speech from the film, the character urges that "greed . . . will not only save Teldar Paper," but also the USA. It is unclear whether Gekko believes these words or if he is using them to manipulate his audience into doing what he wants.

195. *Id.*

196. *See* CHARLES DICKENS, A CHRISTMAS CAROL (POCKET BOOKS, 2007) (1843).

to harm those who are less well-off. His behavior would likely fall under the definition of greed outlined above.[197]

Of course, this definition of greed is limited, and policy may go beyond it in some ways. For example, the Tax Code currently contains an incentive to encourage charitable giving in the form of a tax deduction.[198] This indicates the willingness of policy-makers to encourage non-greedy behavior (in this case, charitable giving) through the Tax Code. As the next section will illustrate, however, where the question is whether there should be some kind of tax sanction on greed, a limited approach seems prudent.

IV. HOW TO TAX GREED: THE CASE OF EXECUTIVE COMPENSATION

Now that we have developed a working definition of greed, how should it be used in tax policy? Not all greedy behavior needs to be addressed by the tax law since, in many cases, regulatory and other areas of the law already address the problem. For example, antifraud rules in federal securities law and state law target some greedy behavior. Similarly, the antitrust laws contain harsh penalties for anticompetitive behavior. In tax law, tax evasion is met with severe civil and possibly criminal penalties.[199] But are there areas where greed is insufficiently regulated or punished by existing law? One such area may be executive compensation. This Section will explore how "taxing greed" may help address the problem of executive pay. It will also explore mechanisms for taxing greed. The paradigm for taxing greed set forth herein may have application beyond executive compensation, but analysis of all the potential applications is beyond the scope of this paper.

197. Of course, this definition of greed is limited, and policy may go beyond it in some ways. For example, the Tax Code currently contains an incentive to encourage charitable giving in the form of a tax deduction. *See generally* I.R.C. § 170 (2018) and the following note. Failure to be charitable with his relative riches (in other words, miserliness) was another fault of Scrooge's character criticized by Dickens.

198. I.R.C. § 170 (2018). There are various understandings of the policy goals of these provisions, but it seems clear that they indicate Congressional interest in encouraging charity. *See* David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 537 (2006) (discussing initial enactment of the charitable deduction in 1917, amid fears that new tax rules would chill philanthropic giving). This indicates the willingness of policy-makers to encourage non-greedy behavior (in this case, charitable giving) through the Tax Code. As the next Section will illustrate, however, where the question is some kind of tax sanction on greed, a limited approach seems prudent.

199. *See, e.g.*, I.R.C. § 7201 (2018).

A. Greed and the Executive Pay Problem

The tax law already makes implicit judgments about greed in the realm of executive compensation. Executive compensation in the United States is high in both relative and absolute terms, and enactment of new tax rules aimed at limiting "excess" compensation,[200] as well as other regulatory attempts[201] to limit such compensation, have proven ineffective thus far.[202] A report issued in 2012 showed that the median value of 2011 CEO compensation at 300 large U.S. public companies was $10.3 million, approximately a 14% increase over the temporarily reduced levels of pay during the apex of the financial crisis.[203] The increase in executive pay over the last several decades, as well as its increase relative to the pay of the average worker, is well documented:

> Public company CEO pay has increased in *real terms* by 500% or more over the last 30 years . . . In 1980 the ratio of average CEO pay to average rank-and-file worker pay was 42 to 1. By the early 1990s, that ratio had increased to 100 to 1. At the peak of the dot-com bubble in 2000, the ratio exceeded 400 to 1. The ratio declined as executive pay moderated during the financial crisis, but even in 2009 it continued to exceed 200 to 1.[204]

Executive pay in general is considered to be economically significant. One prominent study found that executive pay constituted 6.6% of the aggregate earnings of the public companies included in the study (companies in the S&P 1500 as well as U.S. public

200. As discussed below, several provision exist in the tax law currently that are aimed at curtailing excess compensation, including § 162(m) and § 280G. I.R.C. § 162(m) (2018); I.R.C. § 280G(b) (2018).

201. *See, e.g.*, Dodd Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78n-1(a) (requiring shareholder advisory votes on executive compensation at public companies).

202. *See* David I. Walker, *A Tax Response to the Executive Pay Problem*, 93 B.U. L. REV. 325, 375–83 (2013) (discussing the shortcomings of various regulatory responses to the executive pay problem); *cf.* Jenny Li Zhang, et al., *Say on Pay Votes and Compensation Practices*, 2014 Canadian Academic Accounting Association (CAAA) Annual Conference (2014), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377093* (finding that say-on-pay provisions have had some limiting effect on executive compensation in firms with higher levels of shareholder dissent, at least in relative terms).

203. HAY GROUP, PAY FOR PERFORMANCE: EXECUTIVE PAY IN 2011, THE WALL ST. J./ HAY GROUP 2011 COMPENSATION STUDY 1 (May 2012), http://www.haygroup.com/downloads/us/wsj%20hay%20group%202011%20ceo%20compensation%20study%20web.pdf; *see also* Walker, *supra* note 202, at 329 (discussing the Hay Group study).

204. Walker, *supra* note 202, at 329–30 (internal citations omitted).

companies with market capitalization in excess of $50 million), during the period 1993–2003, and while 6.6% was the average over the two decades, the percentage increased over time.[205] Dissemination of this kind of information to the public has led to popular outrage about executive compensation.[206]

The problem of executive compensation is not new. For example, in the wake of the stock market crash of 1929, much attention was focused on the high compensation of certain executives. For example, Eugene Grace, the president of Bethlehem Steel, was the subject of outrage when it became known that he had received, in addition to his base salary of $12,000, a bonus of more than $1.6 million, which would amount to more than a $160,000 salary with a bonus in excess of $21 million in 2016.[207] In 1933, Congress demanded the disclosure of salaries for top executives, with the goal of "shaming" companies into limiting compensation.[208] The release of the information in the initial disclosures was met by wide condemnation.[209] "For the captains of industry to be drawing down large salaries is unconscionable and unpatriotic," declared Senator Burton Wheeler, a Montana democrat.[210] Several unsuccessful proposals were made to impose high rates of tax on compensation over certain amounts. The newly implemented disclosure regulations, however, remained in place and became increasingly demanding over time.[211] The impact of this form of indirect regulation on executive pay has proven difficult to measure, in part because of efforts to "camouflage" the true levels of compensation.[212]

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205. Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 OXFORD REV. ECON. POL'Y 283, 296–97 (2005).

206. *E.g.*, Heather Landy, *Growing Sense of Outrage Over Executive Pay*, WASH. POST (Nov. 15, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/11/14/AR2008111403789_pf.html; *see also* Camelia M. Kuhnen & Alexandra Niessen, *Public Opinion and Executive Compensation*, 58 MGMT. SCI. 1249, 1249 (2012) (finding that public outrage has not impacted overall executive compensation).

207. Thomas F. Cooley, *The Spirit of Capitalism: The Role of Executive Compensation in the Financial Crisis*, (MAX WEBER PROGRAMME LECTURE SERIES Ser. No. 5, 2009), http://pages.stern.nyu.edu/~tcooley/docs/Cooley_Max_Weber_Lecture.pdf.

208. Steven A. Bank et al., *Executive Pay: What Worked?*, 42 J. CORP. L. 59, 90 (2016).

209. Cooley, *supra* note 207.

210. *Id.*

211. Bank et al., *supra* note 208, at 90.

212. For a general discussion of camouflaging, see LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 68–69 (2004).

In the early 1980s, Congress again became concerned by what it viewed as "excessive" payments to corporate executives of public companies, especially in the context of job changes arising from mergers and takeovers. The prevailing sentiment in Congress, and even among some of the business community, was that there was a climate of excess on Wall Street, of which so-called golden parachute payments in connection with mergers and takeovers was a pervasive symptom.[213] In particular, "Congress believed that corporate decision making in takeover situations should not be critically influenced by executives' concern for their own personal benefit."[214] The result was the adoption of § 280G and § 4999 of the tax code. Section 280G denies the employer a deduction for so-called golden parachute payments: compensation to certain employees, contingent on a "change in control" transaction occurring, where the payment equals or exceeds three times the individual's base amount (typically the average compensation paid for the past five years).[215] Section 4999 imposes a twenty percent excise tax on the recipient of the parachute payment on any amounts received in excess of the base amount.[216]

An additional provision, added to the tax code in 1993, limits the deductibility of salaries by public corporations in excess of $1 million unless the compensation is part of a performance-based plan meeting certain requirements.[217] Section 162(m), entitled "certain excessive

213. *See, e.g.*, Felix Rohatyn, *On a Buyout Binge and a Takeover Tear*, WALL ST. J., May 18, 1984, at 2–3; *Takeover Tactics and Public Policy: Hearing on H.R. 2371, H.R. 5250, H.R. 5693, H.R.5694, H.R. 5695, and H.R. 5696 Before the Subcomm. on Telecomm., Consumer Prot., and Fin. of the H. Comm. on Energy and Commerce*, 98th Cong. 316–17 (1984) (statement of Felix G. Rohatyn, Lazard Freres Investment Banking) (commenting that the "present environment is more reminiscent of the type of speculative excesses and corporate behavior of the late 1920s" and arguing for limitations on the ability of corporations to grant "golden parachute" contracts); *Takeover Tactics and Public Policy: Hearing on H.R. 2371 et al. Before the Subcomm. on Telecomms, Consumer Prot., and Fin. of the H. Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 384 (May 22, 1984) (statement of Charles T. Munger, Vice Chairman, Board of Berkshire Hathaway) (referring to the current "economic scene" as causing revulsion and being full of God-awful excess").

214. Ryan Miske, Note, *Can't Cap Corporate Greed: Unintended Consequences of Trying to Control Executive Compensation Through the Tax Code*, 88 MINN. L. REV. 1673, 1678 (2004) (citing GERALD A. KAFKA, TAX MANAGEMENT PORTFOLIOS: REASONABLE COMPENSATION, A-37 (3d ed. 2003)).

215. *See* I.R.C. § 280G(b) (2017).

216. *See* I.R.C. § 280G(b) (2017); I.R.C § 162(m) (2006); *see also* Kevin Murphy, Executive Compensation: Where We Are, and How We Got There 66 (Aug. 12, 2012) (Handbook of the Economics of Finance, Working Paper), http://www.laef.ucsb.edu/pages/conferences/aae13/papers/murphy.pdf (discussing the adoption of §§ 280G and § 4999).

217. *See* I.R.C. § 162(m) (2018).

employee remuneration," was enacted amidst populist outrage over high executive compensation following the 1992 presidential election.[218] Congress apparently believed that the rule would reduce "excessive compensation."[219]

Later, executive compensation again entered the limelight in the wake of the 2008 financial crisis when the government stepped in to provide emergency funding for certain financial institutions on the brink of bankruptcy and whose failure could jeopardize the entire U.S. financial system. In the wake of the government bailout and establishment of the Troubled Asset Relief Program ("TARP"), Congress amended the Emergency Economic Stabilization Act ("EESA," the law establishing TARP) to include certain restrictions on executive pay for companies in the program.[220] However, the EESA restrictions were found insufficient to curb what was widely viewed as excessive executive pay for TARP recipients.[221] As discussed above, AIG (among other firms) later announced significant bonus payments to executives, ostensibly paid out under contracts pre-existing TARP and which the company claimed it was legally obligated to make.[222] This was met with populist outrage by the public and lawmakers. The House Judiciary Committee, for example, responded with the "End GREED" Act, using "GREED" as a clever acronym for Government Reimbursement of Excessive Executive Disbursements.[223] The Act, which was modeled on bankruptcy law and fraudulent transfer cases, was defeated in Congress, but this was not the end of the issue.[224]

In each of the instances discussed above, the legislative and political history reflects a Puritan disgust at excess,[225] as well as a

218. Miske, *supra* note 214, at 1686.

219. *Id.* (citing Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13,211, 107 Stat. 312, 469-71 (1993)).

220. *See Executive Pay Restrictions for TARP Recipients: An Assessment*, 111th Cong. 49 (2010) (statement of Kevin J. Murphy, Kenneth L. Trefftz Chair in Finance, University of Southern California, Marshall School of Business).

221. *Id.*

222. Edmund L. Andrews & Peter Baker, *A.I.G. Planning Huge Bonuses After $170 Billion Bailout*, N.Y. TIMES (Mar. 14, 2009) http://www.nytimes.com/2009/03/15/business/15AIG.html.

223. *See* Thomas, *supra* note 12, at 440.

224. *Id.; see also* Murphy, *supra* note 216, at 47–51 (discussing other legislative actions aimed at limiting executive pay for TARP recipients).

225. *See* SKIP WORDEN, GODLINESS AND GREED: SHIFTING CHRISTIAN THOUGHT ON PROFIT AND WEALTH 118–19 (2010) (characterizing the Protestant Reformation as a reaction against a pro-wealth Christian paradigm that emerged during the Renaissance, and thus a rejection of a "love

sense that something unfair or underhanded was occurring. Often politicians and legislators expressed sentiments that reflect findings from Sheffrin's work on folk justice. For example, at a Congressional hearing to discuss executive pay at firms participating in TARP, Congressman Welch stated:

> One of the things that we have learned in this entire catastrophe of the financial meltdown is that most of the things that were done that are truly outrageous and harmful to taxpayers and our economy were all legal. Legal but not fair and not right.[226]

Sheffrin himself referred to the AIG bonus scandal as an example of moral mandates as well as a violation of just desert theory.[227] Also explicit in the legislative history was Congress's view that compensation over a reasonable[228] amount in certain contexts is an abuse of corporate funds, which may be regulated through the tax law or through other mechanisms (i.e., corporate law on fiduciary duty, which is generally a matter of state law). This reflects the understanding that excessive compensation can be a breach of fiduciary duty, or otherwise caused by some form of market failure.

Numerous experts have argued that there is a failure in the market for executive labor.[229] One explanation of this market failure is the "managerial power" problem: the opportunism and influence of managers over a captive board of directors charged with setting the managers' pay.[230] Because the CEO exercises significant influence over the board, the board of directors is not an effective stand-in for independent shareholders interested in maximizing their own profits, negotiating at arm's length with the executive regarding the employment contract.[231] Essentially, according to this theory,

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of gain excess," and describing the Calvinist Puritan position specifically as rejecting greed and immoderate gain).

226. *Executive Compensation: How Much is Too Much?: Before the Comm. on Oversight and Gov't Reform H.R., 111th Cong. 181 (2009)* (remarks of Rep. Welch following testimony of Kenneth R. Feinberg, Special Master for TARP Executive Compensation).

227. Sheffrin, *supra* note 4, at 44, 48.

228. Reasonableness is the standard for deductibility of compensation under the general rule of I.R.C. § 162, and is a term of art. Here, the term is used more colloquially.

229. Walker, *supra* note 202, at 332.

230. *See* Lucian A. Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 754 (2002).

231. This type of negotiation is generally referred to in the literature as part of optimal contracting. *Id.* at 755. Bebchuk and Fried identify a number of ways in which CEOs exert influence over the board of directors, including: CEOs can influence whether a board member is nominated

executives are able to set their own compensation, constrained only by an "outrage" factor, which recognizes the potential limiting power of public reaction to extremely high CEO pay.[232] There is also evidence that complex option compensation schemes and other tools are implemented to "camouflage" the true level of CEO pay from public scrutiny.[233]

In addition, there are some who have argued that "excessive" pay raises fiduciary concerns, and in some instances, may represent a breach of fiduciary duty.[234] This argument builds off the "managerial power" and principal-agent problem identified by other scholars, noting that compensation committees and boards of directors may be paying out compensation far in excess of the value provided to the firm by the executives, and thus failing to act on behalf of a firm's shareholders. This fiduciary argument could be expanded to all taxpayers in scenarios where firms receiving government bailouts continue to pay excessive compensation.

The tax rules and other laws enacted so far to limit excessive compensation do not appear to have solved the market failure and agency problems. In spite of Congress's clear intention to limit "excessive" compensation, the result of § 162(m) was ultimately to encourage implementation of a $1 million base salary for executives as a kind of standard, and a move towards greater stock option compensation for executives.[235] The stock option compensation is

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and re-elected to his or her seat on the board; directors and CEOs may have business dealings outside of the particular company—directors are often involved with other companies to which the CEO may direct business, for example; additionally, CEOs may be able to direct a company's charitable contributions to charities favored by board members; and CEOs may be able to help directors obtain additional lucrative directorships. They also discuss social constraints arising from the way board members interact with each other and with company management. *See generally* BEBCHUK & FRIED, *supra* note 212.

232. Bebchuk, et al., *supra* note 230, at 756. The discussion of "outrage" constraints identify public opinion as a limiting factor on executive compensation; how exactly this operates to constrain executive pay is not entirely clear. Michael S. Weisbach, *Optimal Executive Compensation versus Managerial Power: A Review of Lucian Bebchuk and Jesse Fried's 'Pay without Performance: The Unfulfilled Promise of Executive Compensation'*, 45 J. ECON. LITERATURE 419, 423 (2007). However, the "costs" of such outrage may relate to higher risk of shareholder lawsuits, reputational costs for the directors of the firm, or other factors. The outrage is also potentially explained by Sheffrin's "folk justice": the public may have a negative reaction to high executive pay because it is not viewed as deserved, in contrast to the extremely high pay of a superstar athlete or entertainer. There may also be an element of moral mandates involved.

233. Bebchuk et al., *supra* note 230, at 789.

234. *See* Austin Frerick, *Executive Pay Excess Raises Fiduciary Concerns*, 153 TAX NOTES 85 (2016).

235. Miske, *supra* note 214, at 1687.

designed to meet the "pay for performance" constraint of § 162(m), but can generally be designed as a de facto guarantee.[236] In addition, firms frequently pay out nondeductible compensation in excess of the § 162(m) limitation.[237] One study indicated that such nondeductible compensation increased significantly over the period of 2005–2013.[238]

Both the market failure and fiduciary duty issues raised by executive compensation indicate that payment/receipt of excessive compensation should be considered greed: it meets the definition of an appropriation of money in one of the specified circumstances. It is also supportable under just desert theory, in which some amount of compensation is of course warranted, but an "excess" portion is beyond what was deserved.[239] In addition, there may be externalities caused by executive compensation practices that would warrant a remedy under Sheffrin's theory of tax fairness, drawing on Mankiw's just desert argument as outlined above.[240] Building on this, the following section will address how, using the theory of greed, we might be able to implement tax rules to remedy the executive pay problem.

B. Taxing Executive Greed

It has been widely recognized that "fixing" executive compensation is a difficult task.[241] Some commentators have criticized the approach of using tax laws to limit executive compensation in general.[242] Still, others have argued that executive compensation does not in fact need to be "fixed," since pay and performance are generally correlated (implying that the executives have "earned" their high

236. Frerick, *supra* note 234, at 86–87.

237. *See id.* at 87.

238. *Id.*

239. *See* text accompanying notes 184–190.

240. *See* Guidance on Sound Incentive Compensation Policies, Fed. Reg. 36395 (June 25, 2010) (stating that "[f]lawed incentive compensation practices in the financial industry were one of many factors contributing to the financial crisis that began in 2007").

241. *See generally* Kevin Murphy, *Executive Compensation: Where We Are, and How We Got There*, 66 (Aug. 12, 2012) (Handbook of the Economics and Finance, Working Paper), http://www.laef.ucsb.edu/pages/conferences/aae13/papers/murphy.pdf*; see also* Weisbach, *supra* note 232, at 428. (noting that the problem of "market failure" with respect to executive compensation seems to be an enduring feature of corporate governance, and it is unclear how regulating it will "make things better").

242. *See, e.g.*, Joy S. Mullane, *Incidence and Accidents: Regulation of Executive Compensation Through the Tax Code*, 13 LEWIS & CLARK L. REV. 485 (2009); Susan J. Stabile, *Is There a Role for Tax Law in Policing Executive Compensation*, 72 ST. JOHN'S L. REV. 81, 94–100 (1998).

salaries, at least in most cases).[243] However, even proponents of this perspective tend to admit that executives are often overcompensated, but argue that political responses to the problem do not get to the root of the issue and often exacerbate it through unintended consequences. For example, political responses to the executive pay problem in the early 1990s favored the use of stock compensation, which has contributed significantly to the growth in overall executive compensation over the past few decades.[244]

The greed paradigm may be useful in resolving the debate of whether and how government intervention in executive compensation makes sense. The problems with executive pay outlined above illustrate an appropriation: executive compensation removes money from the firm, and thus its incidence must ultimately be borne either by the owners of the firm or by its employees, consumers, or possibly, creditors. Of course, where the compensation is properly "deserved," there should be no problem—in a properly functioning market, it does not reduce salaries for other employees, raise costs for consumers, or result in unpaid creditors. Fully informed shareholders would be willing to make the payments which would compensate CEOs for their services to the firm and value created. But there is almost unanimous agreement that this is not the case with the market for executive compensation. While the growth in executive salaries over time has some correlation with increases in firm value, it is not proportionate,[245] and it is also out of line with increases in average employee compensation.[246] There is no empirical evidence indicating that executives provide value in any way in proportion to their salaries, and there is much to indicate that something is wrong.[247] Whether characterized as a market failure or an issue of fiduciary breach for

243. *See, e.g.*, Kevin J. Murphy, *Top Executives Are Worth Every Nickel They Get*, HARV. BUS. REV., March-April 1986, at 125. Murphy does acknowledge, however, that there may be room for improvement in correlating pay and performance, but takes issue with most political responses to the "problem." *See* Murphy, *supra* note 216, at 156.

244. Murphy, *supra* note 216, at 153.

245. *See* Melanie Cao & Rong Wang, *Optimal CEO Compensation with Search: Theory and Empirical Evidence*, 68 J. FIN. 2001, 2002 (2013) ("From 1994 to 2009, median incentive pay increased by 244% in real terms, compared with a 40% increase in median firm value, and its share of total pay increased from 41% to 78.8%.").

246. *See* Walker, *supra* note 202, at 330.

247. *See supra* text accompanying notes 229–233.

which the courts are unwilling to step in,[248] excessive executive salaries are a problem that can be characterized as greed-driven.

The problem of greed, as detailed above, is the problem of obtaining something not deserved or earned: greed may be a natural impulse, but if regulated by self-control, it is a purely personal struggle. It is only when greed drives a person to act for his or her own personal gain at the cost of others that it becomes a political or societal problem. This returns us to the definition of greed outlined above: an appropriation that occurs as a result of market failure or manipulation, or in the context of a breach of fiduciary duty, contract, and so on. The goal of a tax on greed, then, should be to deter the greedy behavior, and, where it occurs, to compensate those harmed. This is a much more limited approach to executive compensation than direct regulation, which has been characterized as "the last available cure for executive paychecks."[249]

The problem with the executive compensation laws and rules enacted thus far is that they do not penalize the greedy or compensate those harmed. For example, in the wake of the enactment of § 280G and § 4999, gross-ups and other contractual avoidances of the limitations were implemented, thus passing on the cost to the firm.[250] Similarly, the § 162(m) provision denying deductions for compensation in excess of a certain amount has resulted in companies paying larger nondeductible amounts to their executives.[251] To the extent implemented, direct regulation has not proven effective and is generally thought to be an inappropriate approach.[252] So a tax on greed would need to address the problem of gross-ups and other tactics that merely shift the burden to the corporation and its shareholders (and possibly other stakeholders).[253]

Generally, the paradigm of taxing greed offers several possible approaches. If the appropriated money or goods belong to the public at large, and thus constitute public goods, a 100% tax on the value of

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248. *See* Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 779 (2002) (discussing the failure of judicial review to operate as a check on executive compensation).

249. DEREK BOK, THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA, 45, 116 (1993).

250. Walker, *supra* note 202, at 355.

251. Frerick, *supra* note 234, at 87.

252. Bank, *supra* note 208, at 89.

253. *See* Mullane, *supra* note 242, at 493.

the money or goods in excess of what was deserved may be warranted to correct the misappropriation.[254] Drawing the line between what was truly deserved and what was misappropriated may caution against a 100% tax; a cautious approach might thus impose a tax significantly in excess of the usual rate of tax that might apply, perhaps in the range of 70–80 percent.[255] Even more conservatively, a lower rate could be set to serve as a deterrent or partial corrective device, while still providing padding for administrative error. If, on the other hand, the appropriated money or other goods belonged to a particular person or group, perhaps a surtax and a commensurate transfer to the injured party would be appropriate.

At least one commentator has made a proposal for a surtax on excessive executive compensation, potentially accompanied by a compensatory transfer to shareholders, that would meet the criteria of the proposed approach to taxing greed. David I. Walker's proposed *Tax Response to the Executive Pay Problem* outlines a surtax on excessive compensation and recommends coupling this tax with investor tax relief to compensate shareholders for the harm caused by the excessive compensation.[256] In Walker's words, the surtax would operate to "reduce the after-tax income of executives, which responds to the unfairness of executives receiving excessive compensation and to the distortion in the executive labor market created by the existence of these rents."[257] This is precisely the goal of the taxing greed paradigm: to reduce unfairness and correct distortions. If the proposal actually exerted downward pressure on compensation, that would be beneficial, but it need not do so in order to achieve its goal of extracting or reallocating at least a portion of "unearned" income.[258] Additionally, the surtax might help reassert norms of acceptable behavior and "reasonable" compensation.[259] This norm-setting effect

254. *See supra* text accompanying notes 181–190 (discussing tax responses to the problem of taking or acquiring something that is not deserved).

255. This range has been identified in the economic literature as a possible optimal rate of tax to impose on labor income of the highest earners, as the limit for revenue raising without discouraging the labor that creates income. *See* Thomas Piketty et al., *Optimal Taxation of Top Labor Incomes: A Tale of Three Elasticities*, 6 AM. ECON. J. 230, 233 (Feb. 2014) (identifying 83% as the socially optimal tax rate for top labor incomes).

256. *See* Walker, *supra* note 202, at 328.

257. *Id.* at 346.

258. Walker states that he does not expect the surtax to result in lower before-tax salaries. *Id.* at 348.

259. *Id.* at 385.

of the surtax could be amplified through careful framing of the surtax proposal as a tax on greed, making use of the "folk justice" conceptions of greed and fairness set forth in Part III above.[260]

Walker's proposed surtax would piggyback on existing executive pay rules: thus, anything that is currently subject to the normal income tax would be subject to the surtax in excess of a certain threshold, including salary, annual bonus, long-term incentive plan payouts, the vesting of restricted stock, the exercise of non-qualified stock options, and the receipt of various taxable perks such as personal use of corporate jets.[261] Implementation of the surtax would be accompanied by repeal of existing tax rules aimed at limiting compensation.[262] Additionally, like the existing surtax under § 4999, there is a possibility that the incidence of this surtax could, at least in part, be passed on to the firm. A prohibition on explicit gross-ups for the surtax could help, but would not address larger compensation packages that implicitly shift the incidence of the surtax from the executive to the firm. However, Walker posits that a surtax on all elements of executive pay would be less likely than a surtax based on section 4999 to result in gross-up efforts, because it does not raise the behavior-distorting concerns of the section 4999 golden parachute provision.[263] Further, under the managerial power view of executive compensation, additional pre-tax compensation to account for the post-tax impact of the surtax could be limited by the outrage constraint.[264] Thus, there is reason to believe that if the tax is properly formulated, executives should not be able to shift the incidence of the surtax to their employers.[265]

A strict surtax does raise another issue: avoidance. As Walker notes, there are limited avoidance opportunities with his proposed surtax in terms of compensation structure.[266] While it may increase incentives to use forms of compensation not subject to the surtax, such as untaxed perks and other fringe benefits, the ability of firms to use

260. Some experts have argued that cultural norms were one of the most significant factors limiting executive compensation in earlier eras. *See* Bank, *supra* note 208, at 63.

261. Walker, *supra* note 202, at 347.

262. *Id.* at 350.

263. *Id.* at 355–56.

264. *Id.* at 356–57.

265. *See id.* at 359.

266. *See id.* at 362.

these is quite limited.[267] A more potentially pernicious form of avoidance would relate to firm structure.[268] Walker argues that limiting the surtax to executives of public companies would only increase the cost of becoming public, offering yet another incentive for companies to stay or go private.[269] This would also impose the surtax on what may in fact be a minority of highly compensated executives.[270] Thus, it would make sense to extend the surtax to executives of privately held firms as well. The impact of this, however, may be to incentivize privately held firms to use a pass-through organizational form where partnership profits can be used as compensation. To avoid or mitigate this distortion, Walker suggests consideration of a lower surtax on private company executives, perhaps set at half that of the surtax imposed on public company executives.[271]

Walker sets neither a numerical value for the surtax, nor a threshold above which it should apply. He suggests, as a possibility, a surtax of ten percent, thus raising the marginal combined federal and state rates on the income to fifty-five percent or more.[272] Such an increase, while not insignificant, should not have significant labor-stifling effects.[273] However, there are other possibilities: for example, the surtax could be graduated to increase as the excess compensation increases.[274] Further, he suggests retaining the $1 million threshold of § 162(m).[275] One reason is that when the $1 million "cap" was set through enactment of § 162(m), the cap actually created a focal point for setting executive compensation and resulted in increases to $1 million for executives whose salaries were below the limit.[276] Walker argues that this weighs in favor of setting a low initial threshold, with the surtax rate increasing gradually with the amount of income in excess of the threshold.[277] The taxing greed paradigm seems well-

267. *Id.* at 364–65.
268. *See id.* at 365.
269. *Id.* at 366.
270. *Id.* (citing Jon Bakija et al., *Jobs and Income Growth of Top Earners and the Causes of Changing Income Inequality: Evidence from U.S. Tax Return Data* (April 2012) (Williams College, Working Paper)).
271. *Id.* at 367.
272. *Id.* at 351.
273. *Id.* at 351; *see also* Piketty et al., *supra* note 255.
274. Walker, *supra* note 202, at 347.
275. *See id.* at 383.
276. *Id.* at 361.
277. *See id.* at 362.

suited to a graduated-rate surtax: the greedier you are, the more tax you pay. In the interest of caution and avoiding distortions, and in light of the existing literature on elasticity of top labor incomes, the surtax might start at ten percent and increase to an upper rate resulting in a top marginal rate of around eighty percent.[278]

Does this properly address excess, as defined in terms of compensation beyond what was properly "earned"? Defining the excess in the market for executive labor is complex, since compensation levels will vary across industries and among executives and firms. Walker suggests the possibility of customizing the surtax to account for firm size and risk.[279] Another approach would involve setting the surtax on the basis of intrafirm pay ratios: for example, the surtax could apply to any compensation in excess of twenty times the compensation of the average worker at the firm.[280] Information on pay ratios is already available to some extent as a result of disclosure rules in the Dodd-Frank Act,[281] but there are problems with this approach, since there is no uniform mechanism for calculating average worker compensation. While such a metric could be considered, it may be overly complex.

Walker's proposal of a relatively low threshold combined with a graduated surtax, starting low, may be the simplest way to approximate excess, even if it is a second-best approach that may leave some excess untaxed. It may also result in taxing compensation that is not in fact excessive. As noted above, just desert theory and notions of fairness generally accept so-called superstar salaries. And there may be some superstar CEOs whose talents, reputation, and charisma, among other traits, may actually result in their "deserving" the compensation they receive. For example, few have argued that Bill Gates or Steve Jobs did not deserve their compensation.

However, as one study notes, so-called superstar CEOs are often crowned by the media, and so their lauded talents and reputation may

278. *See* Piketty et al., *supra* note 255, at 233.

279. Walker, *supra* note 202, at 347.

280. Twenty percent as a threshold has received some general support over the years. *See, e.g.*, GRAEF S. CRYSTAL, IN SEARCH OF EXCESS: THE OVERCOMPENSATION OF AMERICAN EXECUTIVES 24 (1992). However, there is little empirical support available for what would be a proper amount.

281. Dodd Frank, Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78n-1(a) (2012).

not have anything to do with the value they create for their firms.[282] The same study, using a data set of CEOs who won prominent nationwide awards offered only to CEOs, compares award-winning and other CEOs in terms of their compensation and firm performance.[283] The results of the study suggest that increased CEO status decreases subsequent firm performance.[284] CEO superstars may actually be able to extract even higher rents from their firms in the managerial power paradigm. However, the study acknowledges some inconsistencies with the conclusion that superstar CEOs may not in fact be deserving of their compensation: first, firm performance did not significantly decrease in firms with strong shareholder governance, indicating that the problem may be remediable.[285] Second, it is possible that the *ex post* value destruction following receipt of an award is an expected slump after *ex ante* value creation achieved in seeking the received recognition.[286]

The result of this evidence is that it is unclear whether superstar CEOs might deserve compensation that, while high in strict numerical terms, is not excessive in terms of the taxing greed paradigm. This may caution in favor of using a more tailored approach to establishing a surtax, rather than the blunt instrument of a low monetary threshold and graduated surtax rates. Using the metrics of firm size and risk identified by Walker and others may be the better approach to avoid taxing non-greedy compensation.[287]

The second component of a tax on greedy executive compensation, investor tax relief, is intended to "offset the distortionary effects of excessive compensation on investment. If we think of excessive executive pay as being an economic tax on investment, reducing actual investment taxes should mitigate the adverse effect."[288] It would also help to ensure that investors were not harmed by any shifting of the new surtax to the firm through increased compensation.[289] The investor tax relief could take several forms, but

282. Ulrike Malmendier & Geoffrey Tate, *Superstar CEOs*, 124 Q. J. ECON. 1593 (2009).
283. *Id.* at 1599.
284. *Id.* at 1634.
285. *Id.*
286. *Id.*
287. Walker, *supra* note 202, at 347 (citing Carola Frydman & Dirk Jenter, *CEO Compensation*, 2 ANN. REV. FIN. ECON. 75, 77–80 (2010)).
288. *Id.* at 368.
289. *Id.*

Walker advocates for either dividend tax relief or a reduction in general corporate tax rates commensurate with the amount of the surtax.[290] Both approaches have pros and cons in terms of their effectiveness, salience, and distortionary effects. However, either approach would generally be in keeping with the taxing greed paradigm.

V. CONCLUSION

Greed has been invoked in political rhetoric to argue for populist political policies, to condemn behavior popularly viewed as unfair, and even to support progressive tax policy. This Article engages in an analytically rigorous consideration of greed in an effort to evaluate whether "greed" can be more than merely a rhetorical tool. This effort indicates that greed should have a very limited place in the various overarching policy debates on inequality, distribution of the tax burden, and progressivity, but it may nonetheless have its place in the box of tax policy tools.

Taking into account lessons from political and economic philosophy as well as empirical economic literature, this Article illustrates that greed can and should be narrowly defined to focus on behavior that involves some breach of social and economic norms: an appropriation for personal gain that either intentionally causes harm through illegality, breach of duty or contract, or as a result of market failure or manipulation. Thus, cautiously defined, it should be possible to develop a political consensus around taxing greed: imposing a higher rate of tax on the undeserved gains that can be used at least in part to offset those who were harmed by the greedy behavior. Focusing on the realm of executive compensation, this framework provides support for a surtax or other mechanism for imposing a higher rate of tax on compensation above a certain threshold, ideally accompanied by a mechanism for returning some of the undeserved income to shareholders.

290. *Id.* at 374.