PIKETTY REVISITED: THE MEANING OF *CAPITAL IN THE TWENTY-FIRST CENTURY*[*]

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INTRODUCTION

A. A Paradox

Thomas Piketty had himself a moment. It did not come easily or quickly. When the academic economist first published his massive text, *Capital in the Twenty-First Century*, in French in 2013, summarizing over a decade of his and others' work on capital and its unequal ownership across time and cultures, he encountered a friendly

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* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY vii, 685 (Arthur Goldhammer trans., Belknap Press of Harvard Univ. Press 2017) (2013).

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but muted reception on the continent.[1] No bother: Prophets are typically without honor in their own native land. Piketty's time came in the following year, the spring of 2014, when the English translation of his magnum opus appeared.[2] Spurred on by favorable reviews from the likes of Nobel Laureate Paul Krugman ("*Capital in the Twenty-First Century* . . . is a bona fide phenomenon," Krugman declared in the *New York Times*), the nearly seven hundred page economics book made surprising and sustained appearances on all forms of best-seller lists.[3] Overnight, Piketty became the unlikeliest of oxymorons: a "Rock-Star Economist," and a wealthy one at that.[4] It might have seemed that, in the millennia-long battle to get the rich to pay their fair share of a just society's burdens, a glimmer of hope had sprung forth.

Years later, what has become of that hope? Academics have debated Piketty's work, as academics do.[5] Critics have criticized and defenders have defended Piketty's sense of the facts of capital (it is held unequally, and inequality is getting worse); the normative ramifications of those facts (Piketty thinks they are bad); and what, if anything, to do about them (Piketty says tax the rich).[6] Piketty himself has followed up with a sequel, *Capital and Ideology*, weighing in at over 1000 pages, roughly half again longer than *Capital in the Twenty-First Century*.[7]

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1. *See* STEPHAN KAUFMANN & INGO STÜTZLE, THOMAS PIKETTY'S *CAPITAL IN THE TWENTY-FIRST CENTURY* 2 (Alexander Locascio trans., Verso 2017) (2015). *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Belknap Press Harvard Univ. Press 2017) (2013).

2. *See generally* PIKETTY, *supra* note 1.

3. *See* Paul Krugman, *The Piketty Panic*, N.Y. TIMES (Apr. 24, 2014), https://www.nytimes.com/2014/04/25/opinion/krugman-the-piketty-panic.html [https://perma.cc/TK3B-GPTF]; Jia Lynn Yang, *Here's an Unlikely Bestseller: A 700-Page Book on 21st Century Economics*, WASH. POST (Apr. 22, 2014, 12:35 PM), https://www.washingtonpost.com/news/wonk/wp/2014/04/22/heres-an-unlikely-bestseller-a-700-page-book-on-21st-century-economics/ [https://perma.cc/RN3A-5SG8].

4. *See* Gillian Tett, *Lessons from a Rock-Star Economist*, FIN. TIMES MAG. (Apr. 25, 2014), https://www.ft.com/content/0421d04e-cb42-11e3-ba95-00144feabdc0 [https://perma.cc/R7Y7-NBLN].

5. For representative samples, see the essays in PRESIDENT & FELLOWS HARVARD COLL., AFTER PIKETTY: THE AGENDA FOR ECONOMICS AND INEQUALITY (Heather Boushey et al. eds., Harvard Univ. Press 2017). *See generally* David Gordon, *Anti-Piketty: Capital for the 21st Century*, 20 Q.J. AUSTRIAN ECON. 394 (2017) (reviewing PIKETTY, *supra* note 1).

6. *See generally* PIKETTY, *supra* note 1.

7. *See generally* THOMAS PIKETTY, CAPITAL AND IDEOLOGY (Arthur Goldhammer trans., Harvard Univ. Press 2020).

But the bloom seems to have faded from the rose. Krugman, whose support of the earlier work had been highly influential, found the sequel "something of a letdown."[8] Politically, after the usual lull, aspects of real-world tax reform proposals have begun to emerge, spurred on by Piketty's students and junior colleagues turned University of California at Berkeley economists, Emmanuel Saez and Gabriel Zucman.[9] But the intervening period also featured the election of Donald J. Trump in 2016 and the subsequent enactment of the Tax Cut and Jobs Act of 2017 (TCJA).[10] The TCJA was Trump's major legislative achievement, and it slashed the corporate income tax and nearly killed the already near-dead gift and estate or so-called death tax.[11] The TCJA further moved the federal tax system toward a flattened wage tax, precisely the *opposite* of Piketty's preferred proposals.[12] Meanwhile, Saez and Zucman have been writing, together and with Piketty; advising the presidential campaign of the progressive Senator Elizabeth Warren of Massachusetts; and inspiring legislative initiatives in California and New York, among other places.[13] In the hands of the progressive, independent Senator Bernie Sanders of Vermont, whose political ambitions Piketty has supported, the principal Piketty-inspired proposal turns on a wealth tax whose stated aim is to eliminate billionaires, a twenty-first century version of the seventeenth century English Levelers.[14]

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8. *See* Paul Krugman, *Thomas Piketty Turns Marx on His Head*, N.Y. TIMES (Mar. 8, 2020), https://www.nytimes.com/2020/03/08/books/review/capital-and-ideology-thomas-piketty.html [https://perma.cc/658J-YDEZ] ("The bottom line: I really wanted to like 'Capital and Ideology,' but have to acknowledge that it's something of a letdown. There are interesting ideas and analyses scattered through the book, but they get lost in the sheer volume of dubiously related material. In the end, I'm not even sure what the book's message is. That can't be a good thing.").

9. *See* Jim Tankersley & Ben Casselman, *The Liberal Economists Behind the Wealth Tax Debate*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/us/politics/the-liberal-economists-behind-the-wealth-tax-debate.html?auth=login-email&login=email [https://perma.cc/E53P-AUAE].

10. *See* Edward J. McCaffery, *The Death of the Income Tax (or, the Rise of America's Universal Wage Tax)*, 95 IND. L.J. 1233, 1235 (2000) [hereinafter *The Death of the Income Tax*].

11. *See id.* at 1254, 1256.

12. *See id.* at 1235.

13. *See* Tankersley & Casselman, *supra* note 9.

14. *See* Thomas Piketty, *Bernie Sanders Is Trying to Rescue America's Frail Democracy*, JACOBIN (Mar. 19, 2020), https://jacobinmag.com/2020/03/thomas-piketty-bernie-sanders-voting-democracy [https://perma.cc/U7TN-2KBJ]; *Tax on Extreme Wealth*, BERNIE SANDERS, https://berniesanders.com/issues/tax-extreme-wealth/ [https://perma.cc/D7CX-MNHZ] (last visited Feb. 1, 2021); *Leveler*,

Alas, as often happens in such matters, nothing real has happened. Even as Saez, Zucman, Warren, and Sanders have been touting wealth taxes, France—Piketty's native land—has repealed its own.[15] There are constitutional and other objections to a wealth tax in America that would take years, at best, to overcome.[16] Notably, the progressive third-term Governor of New York, Andrew Cuomo, has refused to support wealth taxes even in a time of pandemic and severe recession.[17] In fact, redistributive wealth taxation has never been widely popular in America, as a history of the mainly symbolic gift-and-estate or wealth transfer tax shows.[18] Advocacy of wealth taxes did not much help the candidacies of Senators Sanders or Warren. President Joe Biden, the ultimate Democratic nominee, has foreshadowed a much more centrist approach to taxation, in the spirit of former President Barack Obama.[19] We are back to waiting for Godot to arrive along with some real, meaningful means of taxing America's rich.

BRITANNICA, https://www.britannica.com/event/Leveler-English-history (last visited Feb. 1, 2021).

15. *See* Joseph Zeballos-Roig, *Here's Why Europe Has Mostly Ditched Wealth Taxes over the Last 25 Years – Even as Elizabeth Warren and Bernie Sanders Seek Them for the US*, BUS. INSIDER (Nov. 17, 2019, 10:45 AM), https://www.businessinsider.com/what-happened-when-the-wealth-tax-was-implemented-in-europe-2019-10 [https://perma.cc/96YV-JLEG]; Michel Rose, *Macron Fights 'President of the Rich' Tag After Ending Wealth Tax*, REUTERS (Oct. 3, 2017, 2:38 PM), https://www.reuters.com/article/us-france-tax/macron-fights-president-of-the-rich-tag-after-ending-wealth-tax-idUSKCN1C82CZ [https://perma.cc/TPA8-DYV8]. Saez and Zucman have responded that it can indeed happen here. *See* Gabriel Zucman & Emmanuel Saez, *Wealth Taxes Often Failed in Europe. They Wouldn't Here.*, WASH. POST (Oct. 25, 2019, 10:09 AM), https://www.washingtonpost.com/outlook/wealth-taxes-often-failed-in-europe-they-wouldnt-here/2019/10/25/23a59cb0-f4ff-11e9-829d-87b12c2f85dd_story.html [https://perma.cc/J9ZL-45N5].

16. *See* Daniel Hemel & Rebecca Kysar, *The Big Problem with Wealth Taxes*, N.Y. TIMES (Nov. 7, 2019), https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html [https://perma.cc/P52L-ZUJJ].

17. *See* Luis Ferré-Sadurní & Jesse McKinley, *Tax the Ultrarich? Cuomo Resists, Even with a $14 Billion Budget Gap*, N.Y. TIMES (Sept. 7, 2020), https://www.nytimes.com/2020/09/07/nyregion/wealth-tax-budget-billionaires.html [https://perma.cc/7VQ6-U2KP].

18. *See* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS 20–21 (3d prtg., Princeton Univ. Press ed. 2006); *The Death of the Income Tax*, *supra* note 10, at 1239, 1285.

19. *See* Matthew Yglesias, *Joe Biden's Plan to Raise Taxes on Corporations and the Rich, Explained*, VOX (Dec. 5, 2019, 9:00 AM), https://www.vox.com/policy-and-politics/2019/12/5/20995225/joe-biden-tax-plan.

Thus, we are left with the paradox of a gap between the moments of rock-star recognition and millennia of inertia, with tax policy moving consistently away from Piketty's prescriptions. This Article goes back to the past to point the way toward a different future to try and escape the dilemma.

B. A New Path Forward

One of the most striking things about Piketty's facts, beautifully illustrated and presented in his prose, is how obvious they seem: Anyone with access to today's media no doubt shares the sense that the rich are winning while the rest of us are not. Indeed, the gap between Wall Street—which seems to do well even in the face of terrible human suffering—and Main Street has become part of the common understanding of Americans.[20] Piketty's dynamics in explaining how we got here and where we are headed —absent a change—are a worrisome analysis of why things are likely to get far worse before they get any better. Many people are willing to hear this truth, and it, too, resonates with our modern common sense.[21] It certainly feels as if the rich are getting richer, and if they are, what is there to stop them from continuing on?

Piketty's message is thus solidly in tune with its times. But as with the prophets of old, Piketty has had a harder time getting anyone to listen to his prescriptions, what to do about the damned, persistent facts. After a remove, it seems like we are back where we started, in a Groundhog Day's pattern of getting outraged by evidence of increasing inequality, proposing radical solutions that boil down to taking money away from the rich, and then forgetting about the whole thing until the cycle resumes or social catastrophes arise to wipe the slate clean.

This Article argues that we are stuck in this intellectual rut in part because our imaginations are too limited. We can get off the treadmill of noticing-then-ignoring economic inequality, and we can come up with new solutions that can offer hope to ancient and persistent problems. Capital is indeed unequally held, and this fact is

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20. *See* Matt Phillips, *Repeat After Me: The Markets Are Not the Economy*, N.Y. TIMES (May 10, 2020), https://www.nytimes.com/2020/05/10/business/stock-market-economy-coronavirus.html [https://perma.cc/AC3H-5U9N].

21. After all, "'common sense' consists of the description of things for . . . that [which] strikes at [the] heart." *See* Krešimir Šimić, *Clifford Geertz's Critique of Common Sense and the Faith*, 30 PHIL. & THEOLOGY 405, 407 (2018).

indeed getting worse.[22] But this seems long to have been the case, across times and cultures.[23] And simply taxing the rich—an obvious idea, after all—has never worked through the millennia. Suppose, then, that instead of trying to change the *facts* of capital by taking it away from those we deem to have "too much" of it, we accept the reality and change the *meaning* of capital by eliminating the ability of private individuals to harm the social whole by their use of "their" capital? Piketty points the way to the urgency of exploring just such a novel approach.[24] This Article pursues this approach after first setting out Piketty's seminal work.

I. PIKETTY'S MOMENT

America is on a path toward a level of both wealth and income inequality unparalleled in recorded history. Piketty, a distinguished Professor of Economics at the Paris School of Economics, produced an impressive, monumental book laying out the facts.[25] *Capital in the Twenty-First Century* (*21st Century Capital*), which, as noted, first appeared in English in the spring of 2014, summarizes and conveys the decades-long work of Piketty and many coauthors, looking at the structure of income and wealth inequality across many nations and centuries.[26]

The book's main lesson is that both income and wealth are unequal and that inequality is getting worse.[27] The situation in America and other advanced democracies in the twenty-first century is approaching the extreme levels of early twentieth century *Belle Époque* France.[28] The great wars of the twentieth century wiped out vast stocks of capital and hence equalized matters to an extent.[29] Inequality began increasing again after World War II during a "catch up" phase of economic growth and has spiked up considerably,

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22. *See generally* PIKETTY, *supra* note 1.
23. *See* Yang, *supra* note 3.
24. *See generally* PIKETTY, *supra* note 1.
25. *See id.*
26. *See id.*
27. *See* PIKETTY, *supra* note 1, at 19.
28. The Belle Époque (French for "Beautiful Age") is conventionally dated from 1871, the end of the Franco-Prussian War, to 1914, the dawn of World War I, a time period roughly convergent with the "Gilded Age" (a term coined by Mark Twain) in America. *See* Robert Wilde, *Belle Époque or the "Beautiful Age" in France*, THOUGHTCO., http://europeanhistory.about.com/od/france/a/belleepoque.htm [https://perma.cc/KV22-W5YS] (last visited Feb. 1, 2021).
29. *See* PIKETTY, *supra* note 1, at 293–94.

especially in the United States since around 1980, the year that Ronald Reagan was first elected president.[30] Piketty, like an Old Testament prophet, is here to warn us of this trajectory and to get us to repent and reform our ways before it is too late.

So much, so good. A simple way to summarize Piketty's voluminous data—which, in fact, overflows beyond the nearly 700 pages of the book into technical online appendixes and scores of related scholarly publications—is that there will be poor always, and there will be rich always.[31] The question for a normative social and political theory is what to do about these damn facts. Karl Marx, whose *Capital* is in many ways an important precursor to Piketty, thought that capitalism would lead to its own demise.[32] The communist revolutions that followed in Marx's wake addressed the problem of unequal private wealth by purporting to take all wealth into the public sphere: "From each according to his ability, to each according to his needs!," in the standard Marxist slogan.[33] That utopian plan did not turn out so well. Piketty, being a thoroughly modern sort of scholar, advocates what he takes as a thoroughly modern solution: Tax the rich.[34] Piketty repeatedly calls for—though he also notes the difficulties of ever obtaining—a global tax on capital, and he also supports a far more steeply progressive income tax than America has today.[35]

Unfortunately, Piketty's proposals turn out not to be the best answers to the best understanding of Piketty's own sense of the problems. I aim to build on Piketty's ambitions as well as his data in order to put forth a better solution: one that accepts and even embraces the *facts* of unequal ownership of capital, but importantly changes the social *meaning* of those facts to avoid the social harms that follow

30. *See id.*

31. *See* THOMAS PIKETTY, TECHNICAL APPENDIX OF THE BOOK: CAPITAL IN THE TWENTY-FIRST CENTURY 1–4 (Arthur Goldhammer trans., Harvard Univ. Press 2014); Thomas Piketty, *About "Capital in the Twenty-First Century,"* 105 AM. ECON. REV. 48, 48 (2015).

32. *See generally* KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, VOLUME 1 (Friedrich Engels ed., Samuel Moore & Edward Aveling trans., 1887) (1867).

33. Letter from Karl Marx to W. Bracke (May 5, 1875), *in* MARX/ENGELS SELECTED WORKS, VOLUME THREE 11–12 (Progress Publishers 1970).

34. *See generally* PIKETTY, *supra* note 1.

35. *See id.* at 663 (explaining that "[t]he ideal tool would be a progressive global tax on capital").

from unfettered private party capitalism, as we now know it.[36] We begin with Piketty's facts.

II. PIKETTY'S FACTS

21st Century Capital is itself a composite of scholarly work that Piketty, alone and with many coauthors, has produced over many years.[37] The book at its core is a detailed presentation of statistics regarding income, capital, holdings, and concentrations of wealth across many countries and vast periods of time.[38] The longest-running data comes from England and France, where Piketty is able to go back to 1700, or even earlier; by the twentieth century, data from America, Germany, Japan, various Nordic countries, China, and others begin to appear.[39] The basic story, with important variations, is that wealth and income are both unequally distributed.[40] Inequality by many measures peaked around 1900—the *Belle Époque* period in France—then declined dramatically in the first half of the twentieth century, and has been on the rise ever after, especially since roughly 1980.[41] Extending trend lines paints a worrisome picture of what lies ahead.[42]

This quick summary leaves out a vast amount of detail and color. *21st Century Capital* is a dense, rich book, notwithstanding that Piketty (and his translator) write beautifully—it is a clear presentation of complex data and ideas, with plenty of interesting asides on life, law, literature, contemporary and historical events, and more. Here, I give but a quick tour of this intricate whole.

The book is divided into four main parts. There is first a brief "Introduction," which Piketty opens with a quotation from the 1789 Declaration of the Rights of Man: "Social distinctions can be based only on [the] common utility."[43] Piketty goes on to stress, as he often does, the importance of detailed statistical analysis, across cultures and long stretches of time, in order to better understand the nature of capital, wealth, income, and ownership.[44] Piketty also introduces some of his theoretical apparatus, including the "Fundamental Force for

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36. *See infra* Part VII.
37. *See* PIKETTY, *supra* note 1, at vii–viii.
38. *See generally id.*
39. *See, e.g.*, *id.* at 145–46, 217, 220.
40. *See id.*
41. *See id.* at 144–49.
42. *See id.* at 746–47.
43. *Id.* at 1 (quoting Déclaration des droits de l'homme et du citoyen [Declaration of the Rights of Man and the Citizen], art. 1 (1789) (Fr.)).
44. *See id.* at 1–8.

Divergence," which obtains when **r**, the rate of return on capital, exceeds **g**, the growth rate, or

$$\mathbf{r} > \mathbf{g}$$

in simple form.[45]

Next comes Part One, "Income and Capital."[46] This Part, comprising two chapters and some seventy pages of text, sets out key definitions.[47] Piketty emphasizes the important concept that growth, **g** in the book's shorthand algebra, cannot be very high in equilibrium.[48] Growth consists of two components, a demographic one (growth in population), and a productivity one (growth in per capita output).[49] Combined, the two explain **g**: the growth of the total national income, which we commonly refer to as GDP (gross domestic product).[50] GDP grows both because there are more people, or "capita," to contribute to it, and because each person, or "caput," on average, becomes more productive.[51] Piketty shows that, for most of world history—from 0 to 1700 A.D., to be precise—**g** was a mere 0.1%, due almost solely to an equivalent level of modest population growth (i.e., productivity growth was essentially 0).[52] From 1913 to 2012, in contrast, **g** has been 3.0%, consisting of 1.4% population growth and 1.6% productivity growth.[53] Piketty shows that the low growth of the first seventeen centuries of the Christian era is the norm, and more or less a necessity—due to the miracle of compounding, in essence, even very small growth rates would lead to extreme overpopulation (and unrealistic productivity gains) over long stretches of time.[54] Thus Piketty expects population growth to slow, to near 0 later in the twenty-first century, and for productivity growth (which Piketty calls

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45. *See id.* at 33–36.
46. *See id.* at v.
47. *See id.*
48. *See id.* at 92.
49. *See id.*
50. Piketty's "national income" is slightly different from the more commonly used (in the U.S., at least) GDP, but the difference is not material for this essay. *See id.* at 55–57.
51. *See* Chad Stone, *Economic Growth: Causes, Benefits, and Current Limits,* CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 27, 2017), https://www.cbpp.org/research/economy/economic-growth-causes-benefits-and-current-limits#:~:text=Either%20can%20increase%20the%20overall,per%20capita%20GDP%20and%20income [https://perma.cc/AQ8R-J5DR].
52. *See* PIKETTY, *supra* note 1, at 93–94.
53. *Id.* at 94 tbl.2.1.
54. *See id.* at 74–77.

"growth in per capita output") to revert to historical means: "The key point is that there is no historical example of a country at the world technological frontier whose growth in per capita output exceeded 1.5 percent over a lengthy period of time."[55]

These seemingly dry details are important for many reasons. During a time of high growth, inequality is muted as the store of capital is spread over a growing population base, and as labor output becomes more productive, and hence wages ought to rise.[56] Citizens everywhere are pleased with their rising material well-being: Workers are getting raises.[57] When growth slows, in contrast, so does this overall rise and sense of dynamism.[58] At the same time, *old* money becomes more important and entrenched—heirs can live off dynastic fortunes while doing little, creating the conditions for a "patrimonial capitalism" that Piketty fears.[59] It is easier for **r > g** to obtain when **g** is low after all; low **g** means that the working classes struggle to hold steady while the high **r** means that the capitalist or propertied classes get richer without having to exert much effort to do so.[60]

Part Two, "The Dynamics of the Capital/Income Ratio," weighs in at four chapters and just over one hundred thirty pages of text.[61] Once more, there is a vast amount of detail. Piketty's primary focus here is **β**, the Greek letter beta, which he uses for the national capital level, and which he presents as a multiplier of national income.[62] Drawing once more on impressive data sets from Britain and France in particular, Piketty can go back to 1700 and tell a tale of Europe.[63] With some minor variations, **β** stayed at 700%—seven times national income—in both Britain and France, from 1700 until roughly 1914, the dawn of World War I.[64] Capital then crashed, with the capital stock falling by more than half, to less than 300% of national income by the mid-1900s.[65] From then, and especially after 1970, the capital stock

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55. *Id.* at 93. Piketty goes on to assume, with some reluctance, a productivity growth rate of 1.2% going forward, after noting that economists such as Robert Gordon assume a lower one, of 0.5%. *See id.* at 94–95.

56. *See id.* at 400.

57. *See id.*

58. The multiplier effect asserts that an initial injection of extra income leads to more spending, which creates more income, and so on and so forth. *See id.* at 25.

59. *See id.* at 191, 297.

60. *See id.* at 26.

61. *See id.* at v.

62. *See id.* at 52.

63. *See id.* at 116–17.

64. *See id.*

65. *See id.*

has been ascending back to its *Belle Époque* levels, now approaching 600%.[66] Germany shows a roughly parallel trajectory.[67] America, which was still emerging as a world power during the *Belle Époque* and which has had a higher demographic growth rate throughout this period—and, importantly, which was far less devastated by the great wars of the twentieth century—shows both a lower overall **β** and a suppressed bottom to its "U-shaped curve."[68] Still, the United States peaked with a **β** of 500% just before the Great Depression hit, after which the level fell to under 400% and has been trending up since the end of World War II.[69]

There are many other interesting observations in Part Two. Most capital (some 95%) is private—"To a first approximation, public assets and liabilities, and a fortiori the difference between the two, have generally represented very limited amounts compared with the enormous mass of private wealth"—in almost all states.[70] Most capital is also domestic—foreign holdings *in* a country tend to roughly equal foreign holdings *from* a country (in-bound investments roughly equal out-bound ones).[71] Piketty also describes the metamorphosis of capital away from land and toward financial assets; interestingly, a sea-change in the composition of capital has had little effect on the broad facts of its ownership, distribution, and control.[72]

Finally, Part Two turns to the capital–labor split, looking to the share of national income paid over to capital.[73] This follows from the "first fundamental law of capitalism:"

$$\boldsymbol{\alpha} = \boldsymbol{r} \times \boldsymbol{\beta},$$

where **α**, the Greek letter alpha, is the share of national income paid over to capital, ***r*** is (again) the rate of return on capital, and **β** is (again) the capital stock.[74] For those readers getting a bit dizzy with the

66. *See id.*
67. *See id.* at 140–41, 179.
68. *See id.* at 150–51, 154.
69. *See id.* at 165.
70. *Id.* at 126.
71. *See id.* at 238–39.
72. *See id.* at 118.
73. *See id.* at 199.
74. *Id.* at 52. For those keeping score at home, Piketty's "[s]econd [f]undamental [l]aw of [c]apitalism," namely that $\boldsymbol{\beta} = \boldsymbol{s/g}$, where ***s*** is the savings rate. *See id.* at 166. This means that the capital stock is equal to the savings rate divided by the growth rate. *See id.* Unlike the "first fundamental law" discussed in the text, however, the second fundamental law is not a simple accounting identity—it depends

algebra (which this Article will review more slowly in the next Part), note that this "fundamental law" is, as Piketty himself knows and states full well, merely an accounting identity, a matter of definition.[75] Recall that **β**, the capital stock, is itself a function of national income: A **β** of 600% means total national savings are six times national income; ***r*** is the real rate of return (taking out inflation), on average.[76] This formula then leaves **α**, which is the share of national income that has to be paid over to capital.[77] If ***r*** is 5%, as it often is, then the capital stock, which is 600% of (or six times) national income, must—by definition—be paid 5% x 600%, or 30%, *of the national income each year*.[78] This conclusion is, again, because the 600% means "600% of national income;" taking 5% of "600% of national income" leads to "30% of national income."[79] And, since the sum must be 100%, and capital and labor are the two great factors of production, a capital share, **α**, of 30% means—again by definition—a labor share of 70%.[80] Of all the dollars earned in a country in any given year, under the above facts, 30% gets paid out to capitalists for the use of their capital, and 70% gets paid over to workers for their labor.[81]

Once more, Piketty gives a large amount of detail about capital's share of national income, cross-culturally and historically; once again, the story is that this metric has bottomed out and is on the rise.[82] Thus, the capital share exceeded 40% in both Britain and France in the nineteenth century, initially fell in the twentieth century to where it was "between 15 percent and 25 percent of national income in rich countries in 1970," and has been on the uptick ever since to where it is now "between 25 percent and 30 percent."[83]

All this sets the stage for Part Three, the heart of the book, weighing in at six chapters and two hundred thirty pages of text, "The

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on some assumptions being made. In any event, this second law is far less important to ours (or Piketty's) analysis; the main point to be made is that the capital stock can increase, possibly quite dramatically, with a constant savings rate and a low growth rate; the fundamental force for divergence, **r** > **g**, is also helped by a low growth rate, **g**, and the two factors interact, because any savings out of the "excess" **r**, where **r** > **g**, counts for savings that is driving up **β**. *See id.* at 167.

75. *See id.* at 52.
76. *See id.*
77. *See id.*
78. *See id.*
79. *See id.*
80. *See id.* at 199.
81. *See id.*
82. *See id.* at 200.
83. *Id.* at 200–01, 222.

Structure of Inequality."[84] This section is the Part of the book that has drawn the most attention from popular commentators, for it clearly communicates some startling trends and statistics.

At the start, Piketty sets out three tables showing inequality of labor, capital, and total income, respectively, "across time and space."[85] He heads his columns "Low," "Medium," "High," and "Very [H]igh" inequality.[86] For labor income, these columns mean Scandinavia in the 1970s–80s, Europe in 2010, the United States in 2010, and, with a question mark, the United States in 2030, respectively.[87] Tellingly, for "[l]ow inequality" of capital ownership, Piketty must posit a "never observed . . . ideal society," as even Scandinavia in the 1970s–80s featured a top 10% owning 50% of the nation's capital.[88] In part to normalize across currencies and other national variations, Piketty presents his data most commonly in the form of deciles and centiles—what does the top 10% own? Top 1%?[89] These figures, for labor and capital, and low/medium/high/very high levels of inequality, are reflected in the table below:

	Low Inequality Sweden in 1970s/Nowhere		**Medium Inequality** Scandinavia 1970s–80s		**High Inequality** U.S. 2010		**Very High Inequality** *Belle Époque* Europe/US 2030?	
	Labor	Capital	Labor	Capital	Labor	Capital	Labor	Capital
Top 1%	5	10	7	20	12	35	17	50
Top 10%	20	30	25	50	35	70	45	90

Table One: Labor and Capital Shares of Top 1% and 10% of Populations[90]

84. *See id.* at v.
85. *Id.* at 309–11 tbls.7.1–7.3.
86. *Id.*
87. *See id.* at 310.
88. *Id.* at 310 tbl.7.2.
89. *See id.* at 309–10.
90. *Id.* at 309–11.

In words, a "low" inequality state would have a top 10% earning 20% of the labor income (2x its weighted average) and 30% of the national capital (3x).[91] America in 2010 had a top 10% that earned 35% of labor income (3.5x) and owned 70% of the wealth (7x).[92] Trend lines according to Piketty suggest that, by 2030, the top 10% of American earners will earn 45% of the nation's labor income (4.5x) and own 90% of the wealth (9x).[93] Looking at the "top 1%," as we often do, this centile gets 12% (12x) of the labor income in the U.S. today and owns 35% (35x) of the national wealth; by 2030, Piketty predicts, without changes, these levels will rise to 17% (17x) and 50% (50x).[94] To round things out, the lowest 50% of the capital-owning distribution owns about 5% of any nation's wealth (a 0.10 weighted average), just about anywhere, anytime.[95]

The vast bulk of Part Three plays out these gory facts, with many literary references to Balzac, Jane Austin, and others thrown in for illustrative color.[96] Historically, Piketty shows how we moved from the very unequal *Belle Époque* period, where the high concentrations of capital ownership enabled a class of rentiers to live off of capital, inherited or otherwise, and conditions made it difficult for mere laborers to enter this capitalist Garden of Eden.[97] The great wars and other shocks levelled capital, and so facilitated a rebuilding and rethinking of capitalism: post War, a stronger (bigger) social state emerged, and a prolonged "catch up" phase supported demographic and productivity growth.[98] Meanwhile, the fall in capital meant that labor had a bigger share of a growing pie; an era of "managers" dawned, the working classes earned greater rewards.[99] Yet starting sometime around 1970, and certainly by 1980, things changed, most dramatically in the United States but in other developed countries as well.[100] "Super-salaries" started to be observed; inequality of labor incomes spiked up.[101] Piketty is more than willing to go on an extended aside debunking neo-classical economics theory here, making the case that the outsized incomes afforded to the "winners" have little to do

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *See, e.g.*, *id.* at 671.
97. *See id.* at 273–74.
98. *See id.* at 275.
99. *See id.* at 276–77.
100. *See id.* at 332–33.
101. *See id.* at 330, 332.

with their marginal productivity.[102] At the same time, capital stocks are returning to *Belle Époque* levels, and are unequally held—fueling both great inequality and a return to a rentier class.[103] We are in a new era of "patrimonial capitalism," and Piketty does not like it.[104]

Part Four, "Regulating Capital in the Twenty-First Century," completes the book, but for a very brief conclusion.[105] This Part feels like a descent from the mountaintop, coming in at four chapters and just under one hundred pages of text.[106] Here, Piketty looks for solutions to the problems intimated by his extensive data.[107] The chapter titles more or less tell the story: Chapter 13, "A Social State for the Twenty-First Century," Chapter 14, "Rethinking the Progressive Income Tax," Chapter 15, "A Global Tax on Capital," and Chapter 16, "The Question of Public Debt."[108]

Piketty is a thoroughly modern sort of scholar and man. He likes the social state that emerged in the midst of the twentieth century, and he sees it as a general force for good and for taking the edge off some of the harsher aspects of unfettered capitalism.[109] Then there is necessarily the question of how to pay for it—and hence the question of national debts of various sorts ripples throughout this Part.[110] With cameo appearances of ideas such as simply renouncing the debt, or using inflation—printing money—as a tool for both paying down debt and redistributing wealth,[111] Piketty then turns to what he clearly sees as the best ideas.[112] First is shoring up the progressive income tax, which Piketty lauds as a great American invention that helped make the twentieth century more kind and gentle, when it comes to income and wealth distribution at least, than its immediate neighboring centuries.[113] But Piketty is naïve in lauding the U.S. income tax of the immediate post-War era, as we shall see, and he might as well take a

102. *See id.* at 330–33 (describing "The Illusion of Marginal Productivity").
103. *See id.* at 339–43.
104. *See id.*
105. *See id.* at v.
106. *See id.*
107. *See id.* at 471.
108. *See id.* at v.
109. *See, e.g.*, *id.* at 471.
110. *See id.* at 472.
111. Inflation, or at least unanticipated inflation, helps borrowers and hurts lenders, at least initially.
112. *See id.* at 472–73.
113. *See id.* at 497.

seat waiting for Godot as he awaits a return to the kind of steeply progressive rates for which he yearns.[114]

Next comes the showpiece recommendation, the global tax on capital, which Piketty praises and anticipates throughout *21st Century Capital*, although he often simply states its unrealism.[115] Here, at the end of the day, Piketty presses the case for his pet proposal further, realism be damned, with some good thoughts on partial-implementation strategies.[116] A few words on the public debt—Piketty thinks we should just tax private capital, perhaps with a one-time hit, to pay the public debt down—round out the volume.[117] We are left to ponder our collective fate, especially if we cannot quite pull the trigger on any of Piketty's proposals.

III. PIKETTY'S DYNAMICS

A little bit of economics theory goes a long way, and Piketty has been highly praised for keeping his theory delightfully readable and relevant.[118] This Article set out most of the main points in Part II.[119] This Part underscores the basic economics ideas and their relevance to the central normative tasks at hand. There are two key principles: what Piketty calls the "first fundamental law of capitalism" and "the [f]undamental [f]orce for [d]ivergence."[120]

The first fundamental law of capitalism, as stated above, is:

$$\boldsymbol{\alpha = r \times \beta},$$

where $\boldsymbol{\alpha}$ is the share of national income going to pay for capital, leaving the rest to pay for labor.[121] This share is increasing in both $\mathbf{r}$,

114. *See* Edward J. McCaffery & James R. Hines, Jr., *The Last Best Hope for Progressivity in Tax*, 83 S. CAL. L. REV. 1031, 1036–37 (2010).

115. PIKETTY, *supra* note 1, at 515 ("A global tax on capital is a utopian idea. It is hard to imagine the nations of the world agreeing on any such thing anytime soon.").

116. *See id.*

117. *See id.* at 541.

118. *See, e.g.*, Heidi Moore, *Why Is Thomas Piketty's 700-Page Book a Bestseller?*, GUARDIAN (Sept. 21, 2014, 12:00 PM), https://www.theguardian.com/money/2014/sep/21/-sp-thomas-piketty-bestseller-why [https://perma.cc/6Z7A-8ZNV].

119. *See supra* Part II.

120. *See* PIKETTY, *supra* note 1, at 25, 52. I have discussed the "second fundamental of capitalism," which I take as less central to the analysis here (and less of a law), in footnote 74.

121. *Id.* at 52.

the real rate of return (net of inflation), and **β**, the national capital stock.[122]

Just as Piketty spends some time debunking the naïve belief that wages always reflect the marginal productivity of labor (such that wages, however high or unequal, are always "fair" or "earned" in some sense, reflecting the impersonal, neutral valuations of market processes), he also discusses and dismisses another lazy theory, or assumption, of much modern neoclassical economics: the "Cobb-Douglas production function."[123] A "production function" states how readily the two great factors of production, labor and capital, may substitute for each other.[124] Cobb-Douglas simply states that this substitutability ratio is 1:1. What this would mean, for Piketty's first fundamental law, is that **α** would be constant—when **β** increases, **r** falls in perfect lockstep, so that the product **r x β** holds constant.[125] This theory is a happy theory, consistent with the Marxist idea that "too much capital kills the return on capital."[126] Cobb-Douglas would mean that Piketty's problem—of too much capital, too unevenly held—would cure itself, over time, or at least not systematically worsen.[127]

Alas, we get no such luck. Here is one of the many and highly significant benefits of Piketty's astonishingly thorough empiricism: Cobb-Douglas does not hold.[128] Over time and across nations, **α** (capital's share of income) has varied significantly, from a high of over 40% in the *Belle Époque*, to a low of 20% or less in the mid-twentieth century.[129] Since 1975 or so, the capital share has been on the rise, approaching 30% in developed countries.[130] This is all wildly inconsistent with the simple Cobb-Douglas story, which posits that the capital share should remain constant over time. Piketty argues, persuasively, that looking forward and over time, the elasticity of substitution between capital and labor is likely to be greater than one, meaning that an increasing **β** will lead to a higher **α**, and less to be paid over to labor.[131]

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122. *See id.*
123. *See id.* at 217–23.
124. *See id.* at 216–20.
125. *See id.* at 52.
126. *Id.* at 215.
127. *See id.*
128. *See id.* at 217–23.
129. *See id.* at 200–01.
130. *See id.* at 278.
131. *See id.* at 220–23.

This conclusion leads to some important real-world points. One, the simple Marxist story, that "[t]he [p]rinciple of [i]nfinite [a]ccumulation" will lead to a falling rate of return and ultimately the death of capitalism, will not obtain.[132] Two, if **α**, the share of national income paid over to capital, is *the* problem, or a major part of the problem, then strategies that tax capital, **β**, *even if they do little more than reduce* ***β*** *without producing significant revenues for the state*, can make sense.[133] As Piketty puts it: "The primary purpose of the capital tax is not to finance the social state but to regulate capitalism. The goal is first to stop the indefinite increase of inequality of wealth, and second to impose effective regulation on the financial and banking system in order to avoid crises."[134] This point is discussed below.

Second, the key relationship to which Piketty frequently draws attention is that between the rate of return on capital, **r**, and the growth rate, **g**.[135] This relationship is the "[f]undamental [f]orce for [d]ivergence."[136] By "divergence," Piketty means a growing apart, a higher degree of inequality, here of capital holdings vis-à-vis labor's share of the social pie, over time.[137] As noted above, growth has both a demographic component and a productive one.[138] When populations are increasing, such as in America during the nineteenth century, **g** is high, and **g** is also high with productivity gains, which were also obtained during the industrial revolution of the nineteenth century and throughout the twentieth century.[139] In a stable, advanced economy, however, both components of **g** level out.[140] Population growth slows to close to 0, and productivity gains also diminish.[141] One of the many benefits of the long sweep of time in play in *21st Century Capital* is that matters that might seem surprising, even inaccurate, over short periods of time become obvious and even necessary over time. High growth is simply not sustainable.[142]

Then there is **r**, the rate of return on capital.[143] Piketty is especially and recurrently concerned with the situation that obtains

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132. *See id.* at 7.
133. *See id.* at 52.
134. *Id.* at 518.
135. *Id.* at 25.
136. *See id.*
137. *See id.* at 22–24.
138. *See id.* at 42.
139. *See id.* at 94.
140. *See id.* at 25, 94.
141. *See* Stone, *supra* note 51.
142. *See, e.g.*, PIKETTY, *supra* note 1, at 14–15.
143. *See id.* at 25.

when **r > g**, that is, when the rate of return on capital exceeds the rate of growth.[144] This is, in short, a situation that favors "old" money or wealth over "new." Piketty never breaks out a separate, systematic discussion of what exactly is wrong with this state of patrimonial capitalism in political, philosophical, economic, or moral theoretic terms.[145] Instead, Piketty uses literature, most extensively Vautrin's lecture to Rastignac in *Pere Goriot*, to make the point that a society where **r > g** obtains over long periods has a host of problems, beginning with perverse incentive and demoralization effects.[146] In *Pere Goriot*, Vautrin explains to Rastignac that going to law school (of all things) is an economically foolish decision, and that he would do much better by marrying well, that is, into the capitalist class.[147] Piketty also uses Jane Austen to make the same point—marrying for money is the only ticket out of a life of limited possibilities and constant stress.[148]

Piketty seems mainly concerned with the appearances and impropriety of a "rentier class" that can live off capital without working by the sweat of their brows.[149] This obtains because, with **r > g**, wealth is building up faster than the overall economy is growing (by definition), and wealth-holders can maintain their standard of living, and their capital stock, without ever working: By simply reinvesting **g**, the wealth-holder's capital stays constant against growth, and he or she can spend the excess **r**. This situation can go on indefinitely. With an increasing **β**, the capital stock, and the failure of Cobb-Douglas to hold, the share of national income that is going to capital is increasing, and the share that is going to labor is decreasing, even as low **g** itself is dampening wage growth. In sum, capital is taking over, eating up value that would otherwise be going to labor, which is shrinking in its share of the pie. This phenomenon is "patrimonial capitalism," as Piketty calls it, in contrast, say, to entrepreneurial capitalism (or "old" money as opposed to "new" money).[150] In the world of patrimonial capitalism, where **r > g**, wealth seems perpetual and dynastic, and inheritance looms large.[151] **β** is increasing in this age of capital, leading

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144. *See id.* at 25–27.
145. *See generally id.*
146. *See id.* at 379–87.
147. *See id.* at 238–40 (discussing HONORE DE BALZAC, LE PERE GORIOT (Revue de Paris 1835)).
148. *See id.* at 2, 53, 413–17.
149. *See id.* at 276, 422.
150. *See id.* at 191, 297.
151. *See id.* at 25–27.

to a greater share of national income being paid over to capital—even as capital ownership is becoming more unequal. This scenario is all evident in Table One.[152] The bottom-line story is we are reentering a *Belle-Époque*-like period, in which a comparative handful of capitalists can live very well, indeed, without ever troubling to actually work, and the rest of us, dependent on labor income, are left to fight it out over an ever-shrinking pie.

This reality is where we are with capital in the twenty-first century.

IV. PIKETTY'S PROBLEM?

Enough of the math and Greek letters. What is the reality of Piketty's story?

Piketty's world of capital in the twenty-first century—our world—is a world where the rich get explosively richer without doing much of anything at all. Large financial accounts grow larger each year, increasing beyond all reasonable spending needs. Labor's share of the social pie is, by logical necessity, shrinking, even as growth is slowing.[153] Work is hard and does not yield the benefits of simply, or passively, owning capital. Raises are low. Soon, there will not be much point in going to law school. This future is where Piketty sees things heading, to an unhappy place where we all plot to marry well and work little, and we wait around for some great war or other social cataclysm to reset the dynamics and bring back hope. In sum, for most of us, life is pretty far from *belle*.

For all of Piketty's understandable pride in producing a detailed, comprehensive picture of capital and income in many countries today, and over vast stretches of time, the casual reader might think that not much is new here. A few minutes spent watching social media, trying to keep up with the Kardashians or trying to understand contemporary business or politics, brings home the reality that the few today have much, and the rest of us do not. The question—*before* we get to the question of what to do about it—is what, exactly, is wrong with this situation?

There is much to be said for laying out normative premises first and, in the tradition of Hume, starting with a normative conception of

152. *See supra* Table One.

153. *See, e.g.*, Jan Mischke, Hans-Helmut Kotz & Jacques Bughin, *The Declining Labour Share of Income: Accounting for the Main Factors from a Meso Perspective*, VOX EU CEPR (July 26, 2019), https://voxeu.org/article/declining-labour-share-income-accounting-main-factors [https://perma.cc/WQ2Q-QKJU].

the self.[154] Piketty's view of human nature is not fully stipulated. This view turns out to matter. To Piketty, the problem seems to be the *fact* of unequal wealth and income.[155] Pushing a bit harder, and spending time with Balzac and Austen, we can see that Piketty is bothered by rentiers—individuals making money from economic rents, that is, off capital, with little or no work effort.[156] Piketty distinguishes rentiers from those who "earn" income, although he is not happy with outsized salaries, either—which he suggests are not fully "earned," certainly not in the neo-classical economic sense of being rewards for the marginal productivity of labor. Here is where we get to the rub: The "social distinctions" afforded to the rentier class cannot be justified by the "common utility."[157] Balzac and Austin show the various problems that befall a society of patrimonial capitalism, of incentives (why try honest labor?), demoralization, and more.[158] In a society dominated by capital, it seems pointless to work. Rather than ending with capital eating its own profits, as Marx would have it, Piketty's world ends with labor simply quitting and everyone trying to marry someone in the top 1%, which will eventually have all the wealth.[159] That is what happens with Piketty's data and dynamics, unchecked. We are left waiting for some great war or other social conflagration to whack down the stock of capital. That is a strange and sad Godot on which to pin our human hopes.

But with Piketty's facts and his sense of the problem, waiting for a war is indeed a perfectly logical solution. Recall that Piketty finds that Cobb-Douglas does not hold, as a fact of the matter, across time and cultures.[160] This finding means that, under the first fundamental law, $\boldsymbol{\alpha} = \mathbf{r} \times \boldsymbol{\beta}$, the share of income paid over to capital, $\boldsymbol{\alpha}$, will fall with a falling capital stock, $\boldsymbol{\beta}$. The rate of return, $\mathbf{r}$, will increase, but not by enough to offset the fall in capital. This *necessarily* means that simply destroying capital—by wars, taxes, or any other port in the storm—will increase the share of national income going to labor, and hence, relatively, promote equality, dynamism, and hope: Rastignac can go to law school, after all. Piketty does not stress this logic, but he

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154. *See generally* DAVID HUME, A TREATISE OF HUMAN NATURE (London, John Noon 1739).

155. *See* PIKETTY, *supra* note 1, at 696.

156. *See id.* at 304.

157. *Id.* at 1 (quoting THE DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. I (1789)).

158. *See id.* at 299–300.

159. *See id.* at 478.

160. *See id.* at 274.

is aware of it, and it explains why he does not much rely on his pet recommendation for a global tax on capital to do what most people think taxes are supposed to do—raise revenue. If Piketty's tax "simply" reduced the stock of capital, Piketty's main concerns over a rentier class and patrimonial capitalism would be addressed. Interestingly, there would still be unequal ownership of wealth or capital—a perhaps universal social fact—but the magnitude of such capital will have diminished. So, one idea is to tax capital and simply throw the money away, as preferable to having to wait for a war: tax policy as peace initiative, in short. Bernie Sanders, with his plan for a wealth tax to "eliminate billionaires," is following Piketty's script.[161]

Well, we can say, good luck with that. Aside from other, seemingly insurmountable problems with getting a global tax on capital up and running, the logic of destroying capital to better the world runs deeply counterintuitive to the American mind, such that the people might actually opt to wait for the wars to come instead of agreeing to a new tax on capital.[162] America, after all, was founded on a war waged in part against tax increases. Time will tell, but the smart money would bet against any form of levelling wealth taxes taking hold in America any time anywhere near soon.

There is, however, a way out of this seeming political dead-end. It starts with thinking through the "problem" with Piketty's facts more thoroughly. Return to the human side of the facts. Piketty's data shows clearly what we all know at some level: Some people and families have large amounts of capital while most have none. We can put aside the centuries-long debate about whether this state of affairs is "earned" or not, just as we have gotten beyond "fault" in much of our analysis of tort law.[163] Instead let us try simply to understand the facts of the matter. This focus allows us to see another critical aspect of reality.

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161. *See Tax on Extreme Wealth*, *supra* note 14; Chris Cillizza, *Bernie Sanders Wants to Get Rid of Billionaires. All of Them.*, CNN, https://www.cnn.com/2019/09/24/politics/bernie-sanders-ultra-wealth-tax-billionaires [https://perma.cc/D3NA-QREH] (Sept. 24, 2019). Sanders later qualified that his wealth tax proposal "does not eliminate billionaires, but it eliminates a lot of the wealth that billionaires have." *See* Chris Riotta, *Bernie Sanders Proposes a New Wealth Tax: 'I Don't Think That Billionaires Should Exist,'* (Sept. 24, 2019), https://www.independent.co.uk/news/world/americas/us-politics/bernie-sanders-wealth-tax-billionaires-2020-election-warren-biden-a9118381.html [https://perma.cc/Q9VV-EJSY].

162. *See infra* Part V.

163. *See generally* Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031 (2003) (describing the move away from fault-based analysis, towards a theory of enterprise liability).

Some people become rich. And *some* of these rich people maintain their wealth and ultimately pass on their wealth to their heirs. People who bequeath wealth have done more than merely having earned or gotten lucky in obtaining capital. They have done more than simply invested their wealth well. They have also *not* spent "their" capital. They are frugal capitalists rather than spendthrift aristocrats, in language borrowed from John Rawls.[164] This habit turns out to make a major difference. We are not all equal when it comes to our savings propensities. People are heterogeneous. Some of us are spenders. Others are savers. It takes saving, across generations, and—what is, necessarily, the same thing—forbearance from consumption, to create the capital stock.

Is there a way to make the "social distinctions" that come from owning capital work to the "common utility"? There is. We can redesign the tax system not to take capital away from its individual owners, but to change what it is that these private owners can do with their wealth. In this way, we would change the *meaning* of capital, allowing the wealthy to keep their cake while limiting their ability to eat it too. But before we can get to tax as cure, we must confront an embarrassing reality: The U.S. tax system, as is, is a significant *cause* of Piketty's problems.

V. LABOR, CAPITAL, AND TAX PLANNING 101

Piketty lauds America's progressive income tax policies of the 1970s: "It is also important to note the rise of progressive taxes in the twentieth century, that is, of taxes that imposed higher rates on top incomes and especially top capital incomes (at least until 1970-1980), along with estate taxes on the largest estates."[165] Piketty is wrong. The facts are that even in the 1970s, high income-earners were rather easily able to avoid high marginal tax rates.[166] The situation obtained until the Ronald Reagan reforms of the 1980s, when rates came down and the base was broadened—as primarily a labor tax.[167]

In fact, the United States has long used the *appearance* of high marginal tax rates on the rich to mask the reality of burdensome labor

164. *See* i*nfra* Part VIII.

165. PIKETTY, *supra* note 1, at 472.

166. *See* Edward J. McCaffery, *Taxing Wealth Seriously*, 70 TAX L. REV. 305, 334–35 (2017) [hereinafter *Taxing Wealth Seriously*].

167. *See id.*

taxes on the not-rich.[168] When Franklin Roosevelt helped institute a 79% bracket in 1936, for example, only John D. Rockefeller was in it.[169] The 2020 payroll tax, which applies to the first dollar of labor earnings and falls off precipitously around $143,000, has risen to being a close second to the income tax as a source of federal revenue.[170] Taxes on capital income have been easily avoidable for the entire century of modern income taxation in America, as we shall explore below.[171] The estate tax has always been a "voluntary" tax, all the more so now.[172] To give a quick and contemporary example, the late casino magnate Sheldon Adelson transferred $7.9 *billion* to his heirs, altogether tax-free, under the current "progressive" estate tax.[173]

Piketty's lack of familiarity with the real world of contemporary tax planning makes his celebration of past tax policy hollow and his recommendations for the future doomed. Even a quick consideration of the U.S. tax system shows that it is, in essence, a highly burdensome

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168. *See id.* at 336 (noting that politicians—even progressive ones—used the appearance of high marginal tax rates to make income taxation of the masses of Americans more acceptable).

169. *See id.* at 337 (noting that John D. Rockefeller was the only taxpayer who qualified under this tax bracket for the first three years after its inception).

170. *See Contribution and Benefit Base*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/cola/cbb.html [https://perma.cc/UQ44-A82U] (last visited Feb. 24, 2021); *The Death of the Income Tax*, *supra* note 10, at 1251 (noting that while the income tax accounted for 47.3% of federal tax revenue in 2016, the payroll tax accounted for 34.1%). The Medicare tax, however, continues uncapped at 2.9%. *See* Team PaycheckCity, *What Is FICA? 3 Things You Need to Know*, PAYCHECKCITY (Oct. 13, 2014), https://www.paycheckcity.com/insights/what-is-fica [https://perma.cc/S8DR-PJ2E].

171. *See The Death of the Income Tax*, *supra* note 10, at 1265 ("It is a simple fact that billionaires in America can live extraordinarily well and completely tax-free off their wealth.").

172. *See generally* George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161 (1977) (describing techniques of estate and gift tax avoidance and possible reforms to limit such techniques); Edward J. McCaffery, *A Voluntary Tax? Revisited*, 93 PROC. ANN. CONF. ON TAX'N & MINUTES ANN. MEETING NAT'L TAX ASS'N 268 (2000) (arguing that the estate tax proponents' goals might best be achieved in a taxation system without an estate tax); Edward J. McCaffery, *Distracted from Distraction by Distraction: Reimagining Estate Tax Reform*, 40 PEPP. L. REV. 1235 (2013) (arguing against the estate tax and instead for increased taxation of capital wealth).

173. *See* Zachary R. Mider, *Accidental Tax Break Saves Wealthiest Americans $100 Billion*, BLOOMBERG (Dec. 17, 2013, 12:01 AM), http://www.bloomberg.com/news/articles/2013-12-17/accidental-tax-break-saves-wealthiest-americans-100-billion.

wage tax that leaves capital essentially off the social hook.[174] This consideration means that the U.S. tax system, throughout the entire twentieth century and beyond, has been *adding* to, not subtracting from, the benefits of capital and the burdens of labor.[175] Not only is labor getting a shrinking piece of a more-slowly growing pie, but it is also seeing its tax burdens increase, while capital continues to be able to lower, defer, and even altogether avoid taxes.[176] In sum, tax gives Rastignac even more reason to drop out of law school to try and marry well.[177] I have developed this theme elsewhere, including at book length, so I will do so only quickly here, leaving the vast amount of details aside.[178] Fortunately, if curiously, one can explain this critical point quickly and simply enough.

Three features built deeply into the fabric of the U.S. income tax—and rarely seriously questioned by legislators—conspire to make the tax into a virtual wage tax, where any taxation on capital is largely voluntary.[179] These features are outlined as the following three steps, what I have called Tax Planning 101:

- Buy
- Borrow
- Die[180]

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174. *See Taxing Wealth Seriously*, *supra* note 166, at 306, 344 (noting the ease at which those with capital can avoid all income taxation while wage earners are stuck paying more under income and payroll taxes).

175. *See id.* (noting that the U.S. tax system is a significant cause, not cure, of these problems).

176. *See The Death of the Income Tax*, *supra* note 10, at 1243, 1252, 1265, 1287.

177. *See* Michael Simkovic, *The Knowledge Tax*, 82 U. CHI. L. REV. 1981, 1982–83 (2015) (arguing that the unfavorable tax treatment of higher education, through higher tax rates compared to other investments, could lead to fewer educated workers). *See generally Taxing Wealth Seriously*, *supra* note 166.

178. *See generally* EDWARD J. MCCAFFERY, FAIR NOT FLAT: HOW TO MAKE THE TAX SYSTEM BETTER AND SIMPLER (2002) [hereinafter FAIR NOT FLAT] (advocating for a progressive consumption tax); Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807 (2005) [hereinafter *A New Understanding of Tax*] (explaining how a progressive postpaid consumption tax is the fairest and least arbitrary of tax systems); EDWARD J. MCCAFFERY, INCOME TAX LAW: EXPLORING THE CAPITAL-LABOR DIVIDE (2012) (describing how the current income tax in the United States has increasingly become a wage tax).

179. *See The Death of the Income Tax*, *supra* note 10, at 1261–62.

180. *See id.* at 1261.

Step One's "Buy" derives from the realization requirement from, among other sources, the celebrated 1920 U.S. Supreme Court case of *Eisner v. Macomber*, which held that the change in value of an existing asset is not income until and unless the gain is realized through a sale or other disposition.[181] By buying assets that rise in value without triggering taxable gains—real estate works pretty well here, as do non-dividend paying stocks—one gets to grow wealthy without taxation.[182]

How does one spend the kind of unrealized appreciation that following Step One generates? Borrow.[183] When you borrow, you do not have "income" because there is no change in your net worth: The cash borrowed is offset by the liability to repay the debt.[184] Under today's income tax, you can even borrow against your unrealized appreciation from an asset and spend away, tax-free.[185] This phenomenon gets us to a major aspect of the deep problem that Tax Planning 101 poses today: The rentier class can spend away without facing any tax.[186]

The final step in Tax Planning 101, as in life, is to die.[187] The built-in gain, or the difference between the fair market value of an asset and its tax basis, which had been allowed to grow untaxed under the realization requirement of Step One, disappears on death, Step Three.[188] If Jane bought stock for $1,000, she would have basis in the stock of $1,000.[189] As the stock rose in value, to say $5,000, Jane's basis would stay at $1,000.[190] The difference between the fair market value, $5,000, and Jane's basis, $1,000—that is, $4,000—would not be taxable under the realization requirement until and unless Jane sold or otherwise disposed of the stock.[191] Jane would be holding the stock

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181. *See* 252 U.S. 189, 219 (1920); *The Death of the Income Tax*, *supra* note 10, at 1262.

182. *See The Death of the Income Tax*, *supra* note 10, at 1262–63 (noting that "buy and hold" investors pay no current tax).

183. *See id.* at 1263.

184. *See id.* at 1263–64.

185. *See id.* at 1264; Adam Barone, *Home Equity Loans: What You Need to Know*, INVESTOPEDIA, http://www.investopedia.com/articles/pf/05/041305.asp [https://perma.cc/23ZJ-HCWD] (last visited Feb. 9, 2021) (discussing the benefits and pitfalls of home equity loans); *see also* Woodsam Assocs., Inc. v. Comm'r, 198 F.2d 357, 359 (2d Cir. 1952), for an application of this principle.

186. *See Taxing Wealth Seriously*, *supra* note 166, at 331.

187. *See id.* at 319–20.

188. *See id.*

189. *See* I.R.C. § 1011 (2018).

190. *See id.*

191. *See* I.R.C. § 1001 (2018).

with a built-in gain of $4,000.[192] The point of Step Three, die, is that this built-in gain goes away on death.[193] The heirs take an asset with a "stepped-up" basis equal to its fair market value; Jane's children would get stock worth $5,000 with a basis of $5,000.[194] This provision has been called the "angel of death" benefit.[195] The kids can inherit the asset, sell it, and pay off their mother's debts—all tax-free.[196] The circle is complete.[197]

That is it. By buying capital assets that appreciate without producing taxable dividends, borrowing to finance present consumption, and continuing the game straight onto death, the rich can avoid taxes.[198] Warren Buffet, Bill Gates, and countless others among the rich and famous have figured this system out, perfectly well.[199] Tax Planning 101 avoids all federal taxes.[200] It avoids the income tax because of the three doctrines just noted.[201] It avoids the increasingly important social security or payroll tax system by the simple expedient of never actually working.[202] It avoids the estate tax because that tax

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192. *See Taxing Wealth Seriously*, *supra* note 166, at 316.

193. *See id.*

194. *See* I.R.C. § 1014 (2018).

195. *See* Michael Kinsley, *Eight Reasons Not to Cut the Capital-Gains Tax*, SLATE (Feb. 23, 1997, 3:30 AM), http://www.slate.com/articles/briefing/articles/1997/02/eight_reasons_not_to_cut_the_capitalgains_tax.html [https://perma.cc/2MJ6-SU6S].

196. *See id.*

197. Under the strange political tale of the gift and estate tax, there was, briefly, no estate tax and a carryover basis regime in place for the single year, 2010. The carryover basis component of this law was especially unpopular. When Congress and President Obama finally decided to clarify the situation for at least the two years 2011–2012, they gave taxpayers an option, retroactively, to use stepped-up basis for 2010. *See* John D. McKinnon, *Obama Aims to Raise Taxes on Inheritances*, WALL ST. J. (Jan. 26, 2015 2:29 PM), https://www.wsj.com/articles/obama-targets-major-loophole-in-income-tax-code-1422300573 [https://perma.cc/YJL2-8426]. This parallels a story from Jimmy Carter's presidency in the 1970s. Congress voted to replace stepped-up basis with carryover basis on death, but the law never took effect, and was retroactively repealed under President Reagan. *See Highlights of the Tax Law Signed by President Carter*, N.Y. TIMES, Nov. 9, 1978, at D16, https://www.nytimes.com/1978/11/09/archives/highlights-of-the-tax-law-signed-by-president-carter-individual.html [https://perma.cc/GC8G-H8TF]. Stepped-up basis on death, like the other planks in Tax Planning 101—and like the home mortgage interest and other personal deductions discussed—appears to have attained the status of a "sacred cow" in tax.

198. *See Taxing Wealth Seriously*, *supra* note 166, at 320–21.

199. *See id.* at 307, 330.

200. *See id.* at 316.

201. *See id.*

202. *See id.* at 320–21.

is a net tax on assets minus liabilities held at death.[203] If Tax Planning 101 is taken to its limits, there is no net estate.[204] Tax Planning 101 means no taxes, notwithstanding a comfortable lifestyle for those with the assets in hand to play it.[205] Those, that is, who live off of capital: rentiers.[206]

Tax Planning 101 turns on a simple buy-and-hold strategy that many capitalists follow in any event, and which Piketty's dynamics suggest is a perfectly fine way to get rich and richer.[207] By using debt, Tax Planning 101 can become a roadmap to a life of tax-free, luxurious living.[208] At the same time, for those capitalists not bent on spending all their wealth and dying broke, wealth can be transferred easily enough—recall Adelson's $7.9 billion tax-free transfer—such that later generations can start life with a healthy spoonful of capital, which can easily be held and invested in a low- or no-tax manner.[209] This is what is occurring with the hundreds of billions of dollars in "Dynasty Trusts" now roaming the American landscape, in places like South Dakota, free even from any worry about hoary doctrines such as the Rule Against Perpetuities.[210] In sum, tax provides a roadmap for, not a hindrance to, the rentiers' *belle* life.[211]

Tax Planning 101 is not a glib witticism, let alone a joke. It is the key to capital's bearing little or no tax. There is plenty of evidence that the wealthy follow its principles.[212] Warren Buffet certainly does.[213] If large numbers of wealthy Americans do not, by and large, follow Tax Planning 101, something is dangerously wrong with the principal assumptions of rational choice social theory. Why would any wealthy capitalist or rentier willingly pay excessive taxes? Why would

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203. *See id.* at 321.

204. *See id.* at 320.

205. *See id.*

206. *See Rentier*, MARRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/rentiers [https://perma.cc/RF42-FUSZ] (last visited Feb. 1, 2021).

207. *See supra* Part IV.

208. *See Taxing Wealth Seriously*, *supra* note 166, at 319.

209. *See* Mider, *supra* note 173.

210. *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 360–61 (2005).

211. *See* Edward J. McCaffery, THE PROPERTY-TAX BUNDLE OF RIGHTS 43–45 (2020) [hereinafter PROPERTY-TAX BUNDLE].

212. *See, e.g.*, Edward J. McCaffery, *The Buffet Rule Is Going Nowhere*, CNN (Apr. 16, 2012, 2:47 PM), http://www.cnn.com/2012/04/16/opinion/mccaffery-buffett-rule/ [https://perma.cc/UDT5-ZVSX] [hereinafter *The Buffet Rule Is Going Nowhere*]; *Taxing Wealth Seriously*, *supra* note 166, at 307–08.

213. *See The Buffet Rule Is Going Nowhere*, *supra* note 212.

various advisors and financial intermediaries not crop up to give the advice, for a fee? Certainly, financial products such as cash value life insurance follow the blueprint.[214] Americans borrowing against their home equity, or taking out margin loans on stock accounts, do too.

The mere existence of Tax Planning 101 constrains major aspects of the tax system, especially the capital gains rate. *Macomber*'s realization requirement creates a "lock-in" effect, whereby wealthy capitalists have an incentive to hold onto their assets with their built-in gains until death, given the "Angel of Death" benefit that lies right at the gravesite.[215] If rates on realization events got too high, far fewer sales would transpire.[216] This would hurt the entire economy, which wants assets to flow to their highest and best use and users. Given that capital can avoid *all* taxes easily enough, the taxes that do apply to capital must be kept modest. And so they are, and have been, for a century and counting.[217]

All these factors conspire to generate little tax revenue from capital, at precisely a time when capital is growing more powerful, as Piketty shows.[218] At the same time, governments keep needing ever more revenues. As governments at all levels keep spending, with or without cash in hand, tax reform transpires under conditions of fiscal crises, leading to the quickest, easiest solutions to the revenue need.[219] Wage taxes, which are technically easy to raise and collect, ride in at the eleventh hour to keep the lights on in government buildings.[220] Labor, carrying a heavy burden around its neck, finds it hard to cross over onto the capital side of life. When wage-earners do save, as in "tax-favored" pension plans and individual retirement accounts (IRAs), the tax laws make sure that taxes still get paid at ordinary income rates: Instead of the "Angel of Death" visiting wage-earners who die with pension plans in tow, the tax collector comes, citing the "income in respect of a decedent" provision of the Internal Revenue Code.[221] Meanwhile, the capital side can perpetuate itself, not only

214. *See* Julia Kagan, *Cash Value Life Insurance*, INVESTOPEDIA, http://www.investopedia.com/terms/c/cash-value-life-insurance.asp [https://perma.cc/N5KW-Y58H] (last visited Feb. 1, 2021).

215. *Taxing Wealth Seriously*, *supra* note 166, at 316, 333.

216. *See id.* at 333.

217. *See id.* at 335–36.

218. *See* PIKETTY, *supra* note 1, at 477.

219. *See Taxing Wealth Seriously*, *supra* note 166, at 342–43.

220. *See id.* at 346.

221. *See* I.R.C. §§ 401, 408, 691 (2018).

because **r > g**, but also because capital bears little if any tax, even on the deathbed.[222]

The point of understanding these basic facts from tax runs deeper than critiquing Piketty for not knowing more about American tax law. By not understanding how simple it is for capitalists in America to avoid tax, and for celebrating the progressive U.S. income tax, Piketty simply misses the deeper point that the way things are in America—see Table One—is, in part, a direct result of consciously chosen tax policies.[223] "If democracy is someday to regain control of capitalism, it must start by recognizing that the concrete institutions in which democracy and capitalism are embodied need to be reinvented again and again," Piketty tells us.[224] There is no more important "concrete institution" embodying capitalism today than the tax system. But tax as it is in America today is part of the problem, not of the solution. We must reinvent tax to redefine capital, not simply reimpose failed tax policies from the past.

VI. PROBLEMS WITH PIKETTY'S PROPOSALS

Piketty sees the need for change, of course, but his particular efforts at reinventing tax fall far short of any actionable mark. It is a frequent theme of the reviews of *21st Century Capital* that Piketty's two major taxing recommendations, for a steeper progressive income tax and a global tax on capital, are not going to happen.[225] The phenomenon is overdetermined, as hinted at above. This Part briefly considers a few of the reasons why Piketty's proposals are unlikely to be the real-world answer to any pressing question.

For one, history is not on Piketty's side. Although America has had the *appearance* of progressive income taxes, the reality has never lived up to its promise.[226] Tax Planning 101 has been in existence for nearly a century, unchecked. The United States has never been serious about taxing wealth directly, and it would be hard to change the deeply ingrained habits now. So too with a meaningful estate tax: We have never had one, and the trends have been moving against getting one

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222. *See Taxing Wealth Seriously*, *supra* note 166, at 316.

223. *See generally* David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014) (discussing the strengths and weaknesses of Piketty's research).

224. PIKETTY, *supra* note 1, at 745.

225. *See* Grewal, *supra* note 223, at 664; *see also* James Kwak, *Reducing Inequality with a Retrospective Tax on Capital*, 25 CORNELL J.L. & PUB. POL'Y 191, 198 (2015).

226. *See supra* note 168 and accompanying text.

for decades.[227] When George Cooper, a law professor at Columbia University, first published his study of tax planning under the "voluntary" estate tax in 1972, a time of low exemption levels and high marginal rates under the tax, he used the DuPont family as an example of tax-free wealth transfer.[228] Today, when the tax only applies to the top 0.3% of wealth-holders, we have Adelson and his $7.9 billion transfer to suggest it remains voluntary even at the apex of capital.[229] Rentiers abound, and they are not accustomed to paying tax.

Second, Piketty's ideas are not practical. The global tax on capital is unrealistic absent global coordination, as Piketty himself notes, and it is hard to see a solution to this problem anytime soon: An inability to coordinate internationally has badly weakened the U.S. corporate income tax, a far smaller effort than a direct tax on all capital would be.[230] Even if there was a way to get the world's nations together on a common project, taxing static piles of capital is problematic. Where is the property? Who is the "owner"? What are the values? These problems have haunted capital taxation for centuries.

As for progressive income taxes, the high marginal tax rates of the post-World War II period produced massive complexity but little real taxation of wealth.[231] As with his case for a global tax on capital, Piketty and others sometimes suggest that a progressive income tax could serve goals *other than* to raise revenue, as by checking "greed."[232] But raising revenue is the most pressing practical need of any government, such that designing complicated taxes that do not add dollars to the fisc seems like a nonstarter in today's political climate: Who has the time for the task? It is practically easy to tax wages, where employers report the earnings on forms sent into the government, W-2s, in contrast to attempting to tax the mere possession of capital.

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227. *See* GRAETZ & SHAPIRO, *supra* note 18, at 20–21.

228. *See* Cooper, *supra* note 172, at 212 (beginning the discussion on the DuPont family example of a tax-free wealth transfer).

229. *See* Zachary R. Mider, *Accidental Tax Break Saves Wealthiest Americans $100 Billion*, BLOOMBERG (Dec. 17, 2013, 12:01 AM), https://www.bloomberg.com/news/articles/2013-12-17/accidental-tax-break-saves-wealthiest-americans-100-billion [https://perma.cc/V2LX-P5ZC].

230. *See* Grewal, *supra* note 223, at 664; *see also* Kwak, *supra* note 225, at 198; Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 700 (2011).

231. *See generally* Edward J. McCaffery, *Taking Wealth Seriously*, 70 TAX L. REV. 305 (2017).

232. *See* PIKETTY, *supra* note 1, at 345. *See generally* Thomas Piketty & Emmanual Saez, *How Progressive Is the U.S. Federal Tax System? A Historical and International Perspective*, 21 J. ECON. PERSPS. 3 (2007).

America raises taxes only in times of crisis, when it must. But in a time of crisis, there is no time but for the quick fix. Labor, not capital, provides the easy target.

Third, Piketty's proposals are economically unwise. The theory of optimal income taxation, developed by the British Nobel Laureate James Mirrlees in the 1970s, lays out the efficiency case for declining, not increasing, marginal tax rates on upper incomes.[233] The idea is that high tax rates at the "top" of the income distribution raise little revenue because there are so few taxpayers there and yet these high marginal tax rates could lead upper-income wage-earners to quit working or at least to work harder to shelter their incomes from the government.[234] It is "optimal" instead to raise tax rates *infra*-marginally, on the middle class, of whom there are many, and who have fewer options not to work or to recharacterize their earnings; the rich pay these taxes, too, but not on their margin for decision-making. The economics case for lower rates on the high earners was popularized by Martin Feldstein, Arthur Laffer, and others. It has become a fixture of American tax policy since the Reagan years: a strategy of lowering rates and broadening the base as a wage tax.[235]

The global tax on capital fares no better as a matter of economics theory. Attacking the capital stock could lead to various forms of capital flight, less capital, and a higher **r**, which will benefit the "super wealthy," perhaps at the cost of the "wealthy," and likely will do little to help the poor.[236] Piketty is naïve in thinking that a one-time tax on capital can pay off public debts—a more realistic political economy suggests that democratic governments are inclined toward deficits, enacting salient spending programs, never cutting them, and avoiding

233. *See* McCaffery & Hines, *supra* note 114, at 1053–54. *See also generally* J. A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175 (2008).

234. *See generally* Emmanuel Saez, Joel B. Slemrod & Seth H. Giertz, *The Elasticity of Taxable Income with Respect to Marginal Tax Rates: A Critical Review*, 50 J. ECON. LITERATURE 3 (2012).

235. *See* Martin Feldstein, *The Effect of Marginal Tax Rates on Taxable Income: A Panel Study of the 1986 Tax Reform Act*, 103 J. POL. ECON. 551, 567 (1995) (arguing that legislation increasing tax rates on wealthier individual's is not likely to raise additional tax revenue); *see also* Arthur Laffer, *The Laffer Curve: Past, Present, and Future*, HERITAGE (June 1, 2004), http://www.heritage.org/research/reports/2004/06/the-laffer-curve-past-present-and-future [https://perma.cc/2F96-YKXR] (arguing against high tax rates, which disincentivize participation in taxable activity and reduce the taxable base in turn).

236. *See* Laffer, *supra* note 235 (explaining that higher tax rates could cause capital flight by disincentivizing participation in taxable activities).

salient taxes.[237] A government would be sorely tempted to repeat its one-time tax on capital, having created the apparatus to do so.[238] Capital might well treat the one-time, "modest" wealth tax with skepticism, viewing it as but a first step on a path toward confiscation. This understandable fear would trigger flight if not revolt.

Fourth, and in part because the aforementioned reasons work together in constant feedback loops, there is no political gain to be had from Piketty's proposals. The ideas will not raise much revenue, as Piketty himself concedes, yet they will offend a capitalist class whom American politicians, in constant thirst for campaign funds, desperately need for support. The people do not understand tax well enough to support a grassroots movement to effect the technical changes needed to bring about the reforms.[239] Politicians can appease the people's thirst to do something about taxing the rich, such as it is, with modest and mainly meaningless proposals.[240] The pattern of pairing symbolic taxes on the rich with real taxes on labor traces back at least to Franklin Roosevelt.[241] Even Bernie Sanders has fallen prey to its spell.[242]

Finally, there might still be reason to push ahead with Piketty's proposals if there is no better option than waiting for the wars to come. But there is indeed a better way: the progressive spending tax, as anticipated above and explained next.

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237. *See* PIKETTY, *supra* note 1, at 542 ("A much more satisfactory way of reducing the public debt is to levy an exceptional tax on private capital. . . . [A] flat tax of 15 percent on private wealth would yield nearly a year's worth of national income and thus allow for immediate reimbursement of all outstanding public debt."); Edward J. McCaffery & Jonathon Baron, *Thinking About Tax*, 12 PSYCH., PUB. POL'Y, & L. 106, 111 (2006) (explaining that citizens are uneducated about the social consequences of taxes, so democratic politicians have an interest in avoiding salient taxes but continuing on with salient spending programs).

238. *See* McCaffery & Baron, *supra* note 237, at 111.

239. *See id.* (explaining that democratic politicians avoid salient taxes because of low voter information with regard to social effect of taxes).

240. *See Taxing Wealth Seriously*, *supra* note 166, at 308.

241. *See id.* at 336–37.

242. *See* Bernie Sanders, *Issue Position: Making the Wealthy, Wall Street, and Large Corporations Pay Their Fair Share*, VOTE SMART (Jan. 1, 2018), https://justfacts.votesmart.org/public-statement/1271684/issue-position-making-the-wealthy-wall-street-and-large-corporations-pay-their-fair-share/ (detailing Senator Sanders's plans to raise tax rates on the laboring class while not getting at capital very effectively).

VII. A BETTER ANSWER TO A BETTER SENSE OF THE PROBLEM

Once we have a better sense of Piketty's problem, we can consider better answers to it. It is not the unequal ownership of capital, alone, that is what is wrong with the state of capital in the twenty-first century.[243] Unequal wealth emerges from Piketty's reams of data as a universal fact, across time and cultures.[244] It is rather the real or possible *uses* for the unequal capital holdings that pose risks to the wider society.[245] Spending by the rentier class creates the demoralization effects felt by Rastignac and the multitudes of wage-earners. The change in focus from looking at the facts of wealth or its sources to looking at its uses effects a Copernican shift in our thinking about tax. It leads to a recommendation for a progressive spending tax, one that falls on the private act of consumption and not the mixed private/public act of accumulation.

Piketty discusses the idea of a progressive spending tax rather quickly, with a citation to the usual suspect, Nicolas Kaldor, a prominent British economist in the post-World War II period.[246] Kaldor himself unfortunately backed off the idea.[247] It was picked up in an American law and tax policy context by the Harvard Professor William D. Andrews.[248] The idea of a progressive spending tax has been featured in several policy proposals. Most prominently, it was one of two options considered in an influential U.S. Treasury publication from 1977, *Blueprints for Basic Tax Reform*, largely authored by the late David Bradford.[249] *Blueprints* provided many of the details for the great Reagan reforms of the 1980s, which chose the *other* path forward, that of shoring up the income tax as a wage tax, broadening its base, and lowering its rates.[250] A progressive spending

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243. *See* William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1130 (1974) (analyzing the negative consequences of tax breaks for capital gains that are not realized).

244. *See generally* PIKETTY, *supra* note 1 (presenting troves of data relating to inequality of wealth in various countries).

245. *See* Andrews, *supra* note 243, at 1131 (discussing the negative impact of capital gains provisions, which allow for gains to be held for a period of time to receive a tax rate of no more than half the regular rate).

246. *See* PIKETTY, *supra* note 1, at 634 n.1, 638 n.35 (citing NICHOLAS KALDOR, AN EXPENDITURE TAX (Allen & Unwin 1955)).

247. *See generally* Nicholas Kaldor, *Commentary on William D. Andrews*, *in* WHAT SHOULD BE TAXED, INCOME OR EXPENDITURE? (Joseph A. Pechman ed., 1980).

248. *See* Andrews, *supra* note 243, at 1113.

249. *See* U.S. DEP'T TREASURY, BLUEPRINTS FOR BASIC TAX REFORM 9 (1977).

250. *See The Death of the Income Tax*, *supra* note 10, at 1269–71.

tax was even put on the floor of the U.S. Congress, in the Nunn-Domenici USA (for "Unlimited Savings Allowance") Tax of the 1990s.[251] Alas, the concept of a progressive spending tax has languished in a sea of misunderstandings, including the incorrect ideas that consumption taxes exempt the yield to capital, are regressive, cannot be progressive, and are impractical.[252]

Piketty's powerful book gives reason to rethink all this. A progressive spending tax responds to the problems of capital in the twenty-first century, not by simply taking capital away from the wealthy individuals who now, largely, own it, but by changing the meaning of "private" capital. These points follow from a rather simple statement of the basic idea.

The concept of a progressive spending tax can be understood with another basic accounting identity, the Haig-Simons definition, which holds that Income equals Consumption plus Savings, or

$$\mathbf{I = C + S}.$$ [253]

This equation is, like Piketty's first fundamental law of capital, a matter of definitions. The Haig-Simons definition maintains, quite simply, that sources equal uses, inputs equal outputs, or that all wealth (Income) is either spent (Consumption) or not (Savings). But as with Piketty's dynamic principles, profound truths can emerge from simple relations. Thus, most to the point, a consistent consumption or spending tax can be had by a simple rearrangement:

$$\mathbf{C = I - S}.$$

In other words, a "consumed income" or spending tax can be had by toting up all sources of income, just as we do now, and systematically subtracting all savings. A progressive spending tax does not operate like a sales tax, levied at the cash register: there will be annual tax returns reporting the overall level of spending, and tax rates will be

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251. *See* LAURENCE S. SEIDMAN, THE USA TAX: A PROGRESSIVE CONSUMPTION TAX 1 (1997).

252. *See* FAIR NOT FLAT, *supra* note 178, at 5; *see also A New Understanding of Tax*, *supra* note 178, at 934–36.

253. *See* EDWARD J. MCCAFFERY, INCOME TAX LAW 7 (2012).

based on that level, with rates potentially going far higher than they are today under the income tax.[254]

A progressive spending tax must pick up debt or borrowing as an input: Otherwise, taxpayers could "save" with one hand and borrow with the other.[255] Debt that is used to save or invest would be a wash: the inclusion of debt offset by the deduction for savings. Debt that is used to finance consumption, however, will be taxed under the progressive rate system. It may sound strange to tax debt, but taxing debt is what all spending taxes do: When you pay for a good using a credit card, you still must pay the sales tax, which you do not pay again when you pay off the card's balance.

Not only is a progressive spending tax a feasible, attractive idea for tax reform, but it also captures a good deal of how the "income" tax works in the United States. Think of traditional IRAs or other forms of retirement savings.[256] Amounts placed into these accounts lead to deductions, and so are not taxed currently.[257] Nor is the rise in value of the accounts taxed.[258] Only when sums are withdrawn to be spent is the tax levied.[259] In the case of a consistent progressive spending tax, this mechanism can work straight through death: The tax-favored accounts can be passed on, tax free, to heirs, who will be taxed when *they* spend, at rate levels calibrated to *their* spending levels.[260] The progressive spending tax shuts down Tax Planning 101 by attacking the "borrow" step; citizens can hold their wealth, but their attempts to use it, directly or indirectly (via debt), will be taxed.[261]

We can call the unlimited savings accounts at the core of the progressive spending tax model Trust Accounts to help make some wider points. Imagine that Rastignac has managed to work and earn enough to start saving. He puts money into his Trust Account, presently tax free. The sums invested grow, at **r**, unreduced by present taxation. Rastignac can make prudent investment decisions, and buy and sell particular assets, all without fear of tax. He pays tax only when, if, and as he withdraws from his Trust Account to spend, or

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254. *See* McCaffery & Hines, *supra* note 114, at 1044. Note also that "luxury taxes" in major league sports work this way. *See* Edward J. McCaffery, *What Sports Can Teach Us: Lessons from the Luxury Tax*, 135 TAX NOTES 1646, 1646 (2012).

255. *See generally* SEIDMAN, *supra* note 251.

256. *See* I.R.C. § 408(a)–(c) (2018).

257. *See A New Understanding of Tax*, *supra* note 178, at 824.

258. *See id.* at 824–25.

259. *See id.*

260. *See id.* at 890.

261. *See id.*

borrows against it.[262] Imagine that Rastignac's Trust Account grew to $10 million, a level just above the net worth of the top 1% of American wealth-holders, on average.[263] Rastignac can continue to manage these funds. He can pass them on to others. But if he goes to spend any of his wealth, he will face progressive tax rates.

Suppose, to sharpen the understanding, the tax rate schedule was set such that a 90% bracket, as America had for decades starting with World War II, took effect after $1 million of spending.[264] Rastignac has already spent $1 million living the rentier life. He now wants to take a $1 million trip. He can do so, but only at the cost of withdrawing his entire $10 million: $9 million would go to the government, under the progressive spending tax (90% of $10 million), leaving him with $1 million to party.

A progressive spending tax can be implemented using third-party reporting and withholding from the financial intermediaries serving to manage the Trust Accounts. Special provisions could allow for lower rates on certain forms of spending, as for medical, educational, or philanthropic purposes. These details can be left aside here, for "democratic deliberation," as Piketty often invokes, to fill in. The point for now is that a progressive spending tax is a promising reinvention of a concrete institution of capitalism, one that reacts to Piketty's facts in a different and perhaps counterintuitive way, but one that also holds out hope of checking the rentier class before the wars come.[265]

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262. Imagine that Rastignac has $10 million in his Trust Account. He wants to spend $1 million. Whether he withdraws $1 million from the Account directly, or borrows $1 million and spends it all instead, his net worth will be at $9 million.

263. *See* Joseph Hines, *It Takes Nearly $8 Million to Join the Wealthiest One Percent*, DEMOS (Sept. 19, 2014), http://www.demos.org/blog/9/19/14/it-takes-nearly-8-million-join-wealthiest-one-percent [https://perma.cc/B6UM-DDPJ]; *The Top 1% Net Worth Amounts by Age*, FIN. SAMURAI (Mar. 13, 2020), http://www.financialsamurai.com/top-one-percent-net-worth-amounts-by-age/ [https://perma.cc/4LZS-HCKQ] (the number has fluctuated around $8 million in recent years); *see also Taxing Wealth Seriously*, *supra* note 166, at 305.

264. *See Taxing Wealth Seriously*, *supra* note 166, at 334. *See generally* Edward J. McCaffery, *A Better Hope for Campaign Finance Reform*, 52 ARIZ. ST. L.J. 445 (2020) [hereinafter *A Better Hope*].

265. *See A Better Hope*, *supra* note 264, at 450–51; Edward J. McCaffery, *Mike Bloomberg's Presidential Run Could Cost Taxpayers Billions*, CNN (Feb. 28, 2020, 11:59 AM), https://www.cnn.com/2020/02/28/opinions/bloomberg-presidential-run-could-cost-taxpayers-billions-mccaffery/index.html [https://perma.cc/C428-84LE].

VIII. A NOTE ON REALISM

Time for a pause. It might seem as if this Article has led to a battle of utopias, a bait-and-switch rhetorical trick. Piketty sees a growing problem with the radical maldistribution of income and wealth.[266] This Article agrees. Piketty's solution is to tax, which seems logical enough. This Article agrees. But then this Article argues that Piketty's precise tax proposals, for a more steeply progressive income tax and for a brand-new global tax on capital, are unrealistic and ill advised. In their stead, this Article rolls out an alternative tax proposal for a progressive spending tax, which also seems unrealistic and perhaps ill advised to many readers. What's up with that, some readers may be fairly asking.

There are compelling answers, on both the practical and theoretical levels, to this perfectly good question.

One, a progressive spending tax is far more realistic than Piketty's proposals. It turns on cash flows, which can be measured and traced, as opposed to static piles of wealth, which can be hidden and disguised.[267] The lower rate-bracket levels of a progressive spending tax can be met with a simple sales or value-added tax, such that only high spenders need fill out forms.[268] A progressive spending tax is not economically unwise in the way that a progressive income tax is because a spending tax does not directly deter the productive activities of work or savings, attacking rather the private-regarding act of luxury spending.[269] A progressive spending tax could raise revenue: The tax base, which would shrink from the unlimited deduction for savings (much of which is out of the base, today, in any event), would increase with the inclusion of debt-financed consumption and the repeal of any capital gains preference. (A capital gains break is not needed under a progressive spending tax, as there is no "lock-in" effect inside the Trust Accounts.[270]) The main practical difficulty in implementing a progressive spending tax is including borrowing within the tax base,[271] and there is no point denying that this will be a challenge. But it seems far easier to tax resources as they are being used and converted into

266. *See generally* PIKETTY, *supra* note 1.

267. *See A New Understanding of Tax*, *supra* note 178, at 931.

268. *See* FAIR NOT FLAT, *supra* note 178, at 100–02; Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261, 282 (2002).

269. *See* McCaffery & Hines, *supra* note 114, at 1031.

270. *See A New Understanding of Tax*, *supra* note 178, at 896.

271. *See* McCaffery & Hines, *supra* note 114, at 1079.

cash for spending, rather than attempting to tax unspent wealth.[272] A progressive spending tax would simplify vast stretches of tax, including all of the rules about basis, realization and capital gains, and the estate tax.[273]

Two, and perhaps more important, at a theoretical level, a progressive spending tax comports with a realistic normative conception of human nature, and so swims with the tides, not against them.[274] Machiavelli told us that "[w]herefore it has been said that as poverty and hunger are needed to make men industrious, so laws are needed to make them good;" the task of Adam Smith was to take the avarice of the "butcher, the brewer, or the baker" and turn them into forces for good.[275] Piketty's data helps to demonstrate that at least some people want to save for intergenerational reasons. This is what they do in dynasty trusts among other devices.[276] Under Piketty's view of the problem, dynasty trusts are bad, providing largely tax-free fruits to nourish rentiers.[277] But under the light of our new understanding, dynasty trusts actually form a model of what the state should do. These trusts are set up to preserve stores of capital, for a long time, *without excessive private use*.[278] Professional trustees must manage the wealth. Withdrawals are taxed. Luxurious spending is deterred.

This is what the progressive spending tax does for all of capital. Private wealth cannot be used for private luxuries without incurring a hefty social toll. Thus, a progressive spending tax does not necessarily push against the personal preferences of the wealthy. The very existence of dynasty trusts shows that many wealthy people are motivated not to spend all of their wealth on themselves but to leave unconsumed capital for their heirs. They want this capital to be managed and used prudently.[279] Thus, for example, common "spendthrift" clauses prevent beneficiaries from alienating and using the full value of their interests.[280] The Trust Accounts under the

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272. *See id.* at 1042.

273. *See id.* at 1032.

274. *See id.* at 1093.

275. *See* NICOLO MACHIAVELLI, 1 DISCOURSES ON LIVY 16 (1776).

276. *See A New Understanding of Tax*, *supra* note 178, at 872.

277. *See* Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 B.C. L. REV. 145, 148–49 (2019).

278. *See A New Understanding of Tax*, *supra* note 178, at 872.

279. *See* Andrew Bullard, *Understanding Potential Pros and Cons of Using Dynasty Trusts*, JD SUPRA (July 15, 2019), https://www.jdsupra.com/legalnews/understanding-potential-pros-and-cons-86808/ [https://perma.cc/DAY5-M4YL].

280. *See* N. Dean Hawkins, *Trusts: Protecting Beneficiaries with Spendthrift Clauses*, ATT'Y EDUC. CTR, https://www.jameseducationcenter.com/articles/

progressive spending tax work just this way, as a matter of law, of the "concrete institution" of tax,[281] across all wealth, whether first or later generation. Rastignac can have "his" wealth to manage and control, but he cannot use it on his personal pleasures without paying a hefty tax for the privilege. He can pass the wealth on to his descendants, limited in just the same way—the heirs also cannot spend profligately, or the government will get the bulk of the wealth. Just as Adam Smith's genius lay in allowing the "butcher, brewer, or the baker" to do what they want to do anyway, a progressive spending tax can allow the rich to build and pass on dynastic fortunes.[282] But no individual will be able to live large without paying large taxes. The social distinction of owning capital will be tethered to the common utility. A progressive spending tax is a far more attractive idea, in practice and in theory, than a progressive income tax, an idea which we have never truly observed in over a century of pretending.

CONCLUSION

Something is wrong in America and other advanced capitalist states today. There is a great deal of capital, highly unequally held.[283] Piketty's monumental *Capital in the Twenty-First Century* shows us that we are in a dynamic where all this is getting worse.[284] The rich are getting richer. Workers are not. Piketty uses a wide sweep of history to suggest that this situation cannot persist, and keep growing worse, indefinitely. Wars of some sort will come to whack down the capital stock if we do not get ahead of the curve and do something to prevent the apocalypse.

Piketty leaves his problems on the doorstep of tax, which he finds to have provided some light to help address them in the twentieth century.[285] But the U.S. tax system, for its entire history, has only added to the problems. America has a burdensome wage tax, with little or no tax on capital.[286] This tax adds to the *belle* life of the rentier class,

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protecting-beneficiaries-spendthrift/ [https://perma.cc/NF7T-U2MN] (last visited Apr. 15, 2021).

281. PIKETTY, *supra* note 1, at 745.

282. *See* SMITH, *supra* note 275, at 16.

283. *See* Thomas Piketty, *Property, Inequality, and Taxation: Reflections on Capital in the Twenty-First Century*, 68 TAX L. REV. 631, 632 (2015).

284. *See id.* at 631–32.

285. *See id.* at 638.

286. *See* McCaffery & Hines, *supra* note 114, at 1038.

while keeping workers in a decidedly non-*belle* state of having to constantly work to avoid falling even farther behind.[287]

It is past time to reinvent the concrete institution of tax. A progressive spending tax does not simply take capital away from the wealthy.[288] It redefines what it means to own capital. A progressive spending tax allows the rich to keep and manage their wealth, as they have shown the ability and temperament to do,[289] but it curtails their ability to spend their capital on themselves and their luxurious wants.[290] The social distinctions of holding wealth can continue, but they must work to the common utility. The progressive spending tax assures this result.

In sum, faced with the relentless *facts* of capital, persistent into the twenty-first century, as Thomas Piketty has abundantly well shown us, we should be thinking about changing the *meaning* of capital before events far out of our control solve the problems of wealth inequality for us.

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287. *See* PROPERTY-TAX BUNDLE, *supra* note 211, at 39.
288. *See* McCaffery & Hines, *supra* note 114, at 1039.
289. *See id.*
290. *See id.* at 1038.

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