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WEALTH INEQUALITY AS EXPLAINED BY QUANTITATIVE EASING AND LAW'S INERTIA

John J. Chung*

Wealth inequality is gaining recognition as a serious issue, along with it is a growing concern that it holds the potential for societal disruption. The inequality seems to be increasing, and there seems to be no sign it will of reversal, or even slow down. Rallies and outcries against the top 1% have become common in parts of popular culture. The old adage, the "rich get richer and the poor get poorer" seems to hold more truth than ever, and, in fact, that is what has happened. Reports and studies show that the polar ends of the wealth spectrum are moving away from each other.

Admittedly, wealth inequality has always been part of history. In the United States, the Gilded Age, and the rise of the "Robber Barons" in the late 19th century was a time of stark inequality. Inequality may have been worse at that time. John D. Rockefeller, J.P. Morgan, and other built their fortunes during the same time child labor was commonly used in factories. The difference between then and now, however, is that in the late 1800's America's emergence as the economic superpower was still decades in the future, and the plight of the poor would improve with changes in economic conditions, technology, and law. Today, many believe it is unlikely America's prospects for growth match the prospects of the past. Therefore, rising wealth inequality today is occurring when the "economic pie" is growing more slowly or even shrinking. Thus, as the most fortunate accrue more wealth, the prospects for those below are actually getting worse. It is important to ask how much worse will it get, when will it stop, and to wonder about the consequences if the situation does not change.

The recognition of this situation has been grasped by a few, while others have a vague awareness of it. Despite the already observed consequences, and the ones yet to occur, it seems that many do not understand the magnitude of the situation and what it may mean for the future.

Published observations on the issue have started to sharpen public understanding of the scale of the problem. In terms of global wealth, the wealth of the poorest 50% has decreased since 2009, but the wealth at the top has doubled.[1] As of early 2015, 80 billionaires controlled the same amount of wealth as 3.5 billion people.[2] These are startling numbers. Eighty people are as rich as 3.5 billion people. If those numbers are anywhere close to being accurate, it reflects the obvious lopsidedness of inequality. Joseph Stiglitz, a Noble Prize winner in Economics, addressed the issue in blunt, stark terms.

"It's no use pretending that what has obviously happened has not in fact happened." The upper 1 percent of Americans now take in nearly a quarter of the

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[1] *See* Simone Pathe, *The Wealthiest are Getting Wealthier, and Lobbying Has a Lot to Do With it*, PBS NEWSHOUR (Jan. 19, 2015, 11:58 AM), http://www.pbs.org/newshour/making-sense/wealthiest-getting-wealthier-lobbying-lot/.

[2] *See id.*

nation's income every year. In terms of wealth rather than income, the top 1 percent control 40 percent. Their lot in life has improved considerably. Twenty-five years ago, the corresponding figures were 12 percent and 33 percent. One response might be to celebrate the ingenuity and drive that brought good fortune to these people, and to contend that a rising tide lifts all boats. That response would be misguided. While the top 1 percent have seen their incomes rise 18 percent over the past decade, those in the middle have actually seen their incomes fall. For men with only high-school degrees, the decline has been precipitous—12 percent in the last quarter-century alone. All the growth in recent decades—and more—has gone to those at the top.[3]

Significant changes like this usually do not happen by a random series of events. Many are concerned or even outraged by the growing inequality, but few seem to understand the causes. Understanding the causes is important because problems cannot be fixed unless one knows what caused the problems. The "Occupy" protests from a few years ago railed against inequality, but did the protestors actually know what they were protesting against? They protested inequality and were generally correct by focusing their protests against "Wall Street," but it is likely that few would be able to explain just exactly what Wall Street did. So, a basic explanation is necessary before getting to the more complicated facts. The root causes are the result of unconventional monetary policies implemented in the United States and around the world in response to the economic crisis of 2007-2009.[4] Perceptions of growing inequality are not imaginary, and the assorted "Occupy" movements of recent years had some basis in fact underlying the protests. To fully understand the situation, however, the unprecedented changes in economic policies in the recent past must be understood to fully understand the current wealth inequality.

So, has inequality increased in the past few years? The short answer is "Yes." Why has this increase happened in the past few years? Why did it not occur earlier? What occurred to trigger it? The answer starts with the financial crisis of 2007-2009. The crisis almost resulted in the collapse of the banking system. This is a statement of fact, not one of exaggeration. The Governor of the Bank of England (Great Britain's central bank) called it the "biggest global

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[3] *See* Joseph E. Stiglitz, *Of the 1%, By the 1%, For the 1%*, VANITY FAIR (Mar. 31, 2011, 12:00 AM), http://www.vanityfair.com/news/2011/05/top-one-percent-201105. Professor Stiglitz was the recipient of the Nobel Prize in Economics in 2001.

[4] *See id.* Stiglitz characterized it this way:

> Much of today's inequality is due to manipulation of the financial system, enabled by changes in the rules that have been bought and paid for by the financial industry itself—one of its best investments ever. The government lent money to financial institutions at close to 0 percent interest and provided generous bailouts on favorable terms when all else failed. Regulators turned a blind eye to a lack of transparency and to conflicts of interest.

Id.

financial crisis in history."[5] In order to prevent collapse, the Federal Reserve (America's central bank, known as "the Fed") and other central banks around the world engaged in unconventional monetary policies to response to the crisis.[6] One of them, and perhaps the most important one, was the implementation of quantitative easing ("QE").

In oversimplified terms, quantitative easing is the injection of new money into the economy. Where does the new money come from? The Fed created it, and it created trillions of dollars to inject into the economy. That money had to go somewhere. It did not go to lower income people, and it did not go the middle class. The data shows it went to those at the top of the financial pyramid. As a result, the fortunes of billionaires exploded while everyone else saw stagnant or declining financial conditions. This is the underlying story behind the wealth inequality existing today. It did not result from unidentified or mysterious reasons, or from hidden or unknowable causes. Deliberate economic policies implemented by the Fed and other central banks around the world created this situation. Wealth inequality may (or may not) have been an unintended consequence of QE, but QE, itself, was a deliberate policy response to the financial crisis.

If it is agreed that growing wealth inequality is a serious problem, then how will it be solved? When societal pressures reach levels causing widespread concern, it is natural to turn to the law as a means of relieving that pressure. After all, the reason why laws exist is to provide social order. Will the law and its institutions rise to the challenge of growing inequality? The most likely answer is if the law provides a solution, it will do so only under strong pressure from those who have not been traditionally the ones in control of making law. I say this because the law is, and always has been, an inherently conservative institution. That is why the law will be slow to address issues of wealth inequality—slow, until a critical mass of popular concern forces it to address the issue. Law will move slowly until that critical mass is attained because, from its origins to today, it exists to serve the interests of ruling powers. Some may read the last sentence as a declaration of a radical, anti-establishment view. However, it is not meant that way at all. It is merely a statement of the obvious.

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[5] MERVYN KING, THE END OF ALCHEMY 37 (2016). King was the Governor of the Bank of England from 2003 to 2013. "The largest banks in the biggest financial centres in the advanced world failed, triggering a worldwide collapse of confidence and bringing about the deepest recession since the 1930's." *Id.*

[6] Central banks are government agencies that are responsible for the monetary policies of their respective countries or regions. *See* BEN S. BERNANKE, THE FEDERAL RESERVE AND THE FINANCIAL CRISIS, 2-4 (2013). Bernanke was the Chairman of the Board of Governors of the Federal Reserve System from February 2006 through January 2014. The mission of a central bank is to maintain macroeconomic and financial stability. *Id.* The tools for achieving these goals include the control of interest rates and the provision of liquidity (especially in times of crisis, acting as the "lender of last resort"). *Id.* In short, central banks control short-term interest rates and the supply of money (or at least try to). The Fed commenced its operations in 1914. The Federal Reserve system includes the central bank in Washington, D.C., and twelve Federal Reserve banks in twelve Federal Reserve districts located in major cities across America. *Id.* at 15.

To illustrate, Property is a first year course at most law schools. A significant part of class is devoted to the ways in which one may hold an interest in real property and the ways one may convey that property to the next generation. These legal principles are directly traced to English law, going back to the medieval period—the original principles forming the basis of feudal law, which protected feudal interests. During the centuries of feudal society and post-feudal society into the modern era, only a small percentage of the population owned land; the population consisted overwhelmingly of people with no landholdings. The modern-day Property course studies law that was developed to address the needs of a small few who were the ruling powers (landowners). Property law was not developed to serve the needs of serfs and peasants—they had no real property. Because land ownership is so prevalent in modern society, it seems that few pause to note America's real property laws descend from legal principles originally developed to serve and protect the needs of a small number of fortunate people (the "1%" of medieval and post-medieval times).[7] As discussed later in this paper, the law's central role in the perpetuation of power of the ruling elites has remained a constant fixture through the centuries and still exists today.[8]

Until the full magnitude of wealth inequality is understood, the law's conservative inertia will likely resist material measures to address it. If more people genuinely understood the problem, it seems more would push for changes in the law to soften the consequences. Changes could take the form of increasing marginal tax rates for high earners, or (more radically) a tax on the wealth itself, not just income. This paper does not advocate any particular change, and is not meant to support radical responses. However, a simple increase in awareness would provoke thoughtful responses to the situation.

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[7] *See* Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385, 387 (2006). The perpetuation of wealth and status was the foundation of English property law. "English law reflected a society in which political and social authority was vested in a landed class that perpetuated itself through long-term ownership of real property." *Id.* Blackstone's Commentaries of the late eighteenth century described 'the principal object of the laws of real property in England' as the law of inheritance.

[8] King described the role of law in a more balanced way:

> The West has built the institutions to support a capitalist system – the rule of law to enforce private contracts and protect property rights, intellectual freedom to innovate and publish new ideas, anti-trust regulation to promote competition and break-up monopolies, and collectively financed services and networks, such as education, water, electricity, and telecommunications, which provide the infrastructure to support a thriving market economy.

KING, *supra* note 5, at 17. I would invite any law student reading this paper to reflect upon the fundamental and deep policies and purposes of every first year class. For whose protection were those doctrinal areas developed? Whose rights and which interests are protected by those first year subjects? Why did those bodies of law develop the way they did?

Part I of this article examines the nature and scope of wealth inequality today. Much of the focus is placed on the "1%," but this focus obscures the reality of the situation and masks the true scope of the issue. Yes, the top 1% is rich, but the true scale of inequality is unappreciated until the focus turns to the top 1/10th of the one percent. In fact, the fortunes of those in the 99.0% to the 99.8% have remained relatively steady. The explosive growth in wealth has, for the most part, occurred in the top 1/10th of the 1%, so it is actually inaccurate to describe the problem of wealth inequality as a problem manifested by the 1%. This casts too broad a net, as hard as that may be to believe. While the top of the financial pyramid experiences increased gains in wealth and income, the American middle class is shrinking. The consequences of these facts are concerning because a large and vibrant middle class is the foundation of any liberal democracy. Part I also discusses the student loan debt problem and its symptomatic role in widening wealth inequality.

The explosion of money in the world has not settled evenly among population segments. One obvious fact is the vast majority of law students (a group I care about) has not benefited. So is there an identifiable cause of this growing wealth inequality? Part II identifies and discusses one of the key, root causes of wealth inequality. Part II attempts to answer the question, how did we get here? The short answer is that the Federal Reserve's unprecedented programs of "quantitative easing" are largely responsible. This part explains what quantitative easing is, and how it super-charged the wealth accumulation by the top 1/10th of the 1%. It is not a coincidence that the increasing rate of wealth inequality occurred during the quantitative easing programs implemented by the Fed and other central banks around the world. There is a direct causal relationship between the two, and Part II will examine that relationship.

Part III discusses the societal harms posed by unrestrained inequality and why more attention should be devoted to it. As the fortunes at the top increase, the middle class is shrinking. This fact should be a source of concern for everyone, and expert commentators are addressing the potential consequences. Any kind of policy harming and reducing the middle class, while billionaires grow richer requires hard examination. Despite the fact that social commentators and politicians of all stripes identify wealth inequality as a problem, the law and its institutions seem to be largely absent from the discussions and possible solutions. Issues of such wide societal concern are what the law and its legal institutions are presumably designed to address. Yet, there has been little in the way of proposed legal solutions to answer the problem. Why? Part IV attempts to explain why the law has been slow to address much less, alleviate wealth inequality. The law and its institutions are inherently conservative institutions, weighed down by substantial inertial mass, which serves to perpetuate the existing power of ruling elites. This inertia poses a high barrier to the law's ability to provide solutions. This contention is supported by addressing three notorious Supreme Court cases (*Dred Scott, Lochner*, and *Citizens United*) from an angle focusing on their significance as examples of the law's role in perpetuation of power. Part V concludes this article.

I. THE TOP 1% AND WEALTH INEQUALITY IN GENERAL

Even though there is some concern about wealth inequality, it seems that many, if not most, of those concerned do not understand the true scope of the problem. Perhaps the true scale of the problem is, for the most part, unrecognized because most people have never encountered one of the super rich, who exemplify the scale of wealth inequality today. To be sure, many people probably know a successful doctor, automobile dealer, or law professor at an elite school, but these are not the kind of people who demonstrate the scale of inequality. Thomas Piketty made this point by observing that for half of the population, "the very notions of wealth and capital are relatively abstract."[9]

> For millions of people, 'wealth' amounts to little more than a few weeks' wages in a checking account or low-interest savings account, a car, and a few pieces of furniture. The inescapable reality is this: wealth is so concentrated that a large segment of society is virtually unaware of its existence, so that some people imagine that it belongs to surreal or mysterious entities.[10]

Thus, there is a broad understanding of the existence of a problem, but the true scope of wealth inequality is beyond the grasp of most people because there is no personal observation of its scope, and no personal reference points to gauge it. Few people actually know someone who is super-rich and have never witnessed the grand scale of their wealth and lifestyle. This is probably the reason why the popular discourse is dominated by outcries against the top "1%".[11] The "1%" is merely a readily available short-hand for "someone who is really, really rich." However, focusing on the top "1%" actually hides the true scale of the problem. In order to understand the true scale, focus must be put on the top 1/10th of the 1%. This is where the seriousness of the problem is shockingly revealed.

It is helpful to start with the data pertaining to the top 1%. Based on data available in May 2014, a household is in the 1 percent of earners if it made more than about $360,000 in a year; the same data shows the top 1 percent in terms of wealth had more than roughly $8.4 million.[12] That is a lot of money especially

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[9] THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 259 (2014).

[10] *Id.*

[11] Even Nobel Prize winners loosely use the "1%" as the reference point for discussion (perhaps because the concept fits more neatly into the popular view of the problem). *See* Stiglitz, *supra* note 3.

[12] *See* Krissy Clark & David Gura, *The Nuances of the '1 Percent'*, MARKETPLACE (May 8, 2014, 6:33 PM), http://www.marketplace.org/topics/wealth-poverty/nuances-1-percent. This paper focuses on "wealth" inequality, as opposed to "income" inequality. However, income equality will be discussed at various times because it is illustrative in highlighting inequality issues at large.

The distinction between the two is that wealth is one's assets minus liabilities, while income is about how much one makes. The two are not synonymous. One person may make compared to the average median household income of $52,250 in 2013.[13] Those numbers show some level of inequality, but that is only the beginning of the story.

At this point, I will rely on these income figures and break them down to show how much people earn per day over a 365-day period to show the disparity among people. Based on the median household income amount of $52,250, that income earner made approximately $143.15 per day.[14] A person who barely made it into the top 1% made approximately $986.30 per day. To someone unfamiliar with the actual scale of inequality, those numbers might be proof of unfair inequality. However, the gap between $143 and $986 per day is barely noticeable when compared to those at the top of the financial pyramid. The true scale of inequality is revealed by comparing the median earner at $143 a day to someone who made $9.6 million per day (or $3.5 billion in one year).[15] Do such people exist? Yes, that is how much the top earning hedge fund manager made in 2013. The top hedge fund manager made more in one day than most people make in a lifetime. The median American household lives on $143.15 per day, while others make almost $10 million per day. Returning to the hedge fund managers, in 2013, the top earning hedge fund manager made $3.5 billion; others followed with annual incomes of $2.3 billion, $1.9 billion, $1.7 billion, and so on.[16]

$1,000,000 a year (after tax), but spend $1,000,000 a year with nothing owned at the end of the year. That person has a high income, but no wealth. Another person may own assets with a value of $1,000,000 a year with no liabilities, but only has income of $30,000 a year from social security payments. That person has high wealth but low income.

[13] *See* Amanda Noss, *Household Income: 2013*, U.S. CENSUS BUREAU 1, 1 (Sept. 2014), https://www.census.gov/content/dam/Census/library/publications/2014/acs/acsbr13-02.pdf.

[14] It is important to note that this amount is based on "household income," which means that a household may consist of one income earner who makes $30,000 a year and another who makes $22,250 a year to total the amount of $52,250. However, this paper will assume a household with one earner making that amount.

[15] *See* Nathan Vardi, *The 25 Highest-Earning Hedge Fund Managers & Traders*, FORBES (Feb. 24, 2016), http://www.forbes.com/hedge-fund-managers/.

2015 was a much tougher year because the top earner made only $1.7 billion. The rest of the top five hedge fund managers that year made $1.7 billion, $1.65 billion, $1.55 billion, $1.2 billion, and $700 million. *See id.* The wealth and earnings of the top hedge fund managers are so immense that the state of New Jersey may face a budget crisis because one of the top managers changed his residence from New Jersey to Florida in late 2015. As a result, New Jersey is losing hundreds of millions of dollars in future state tax revenue. *See* Robert Frank, *One Top Taxpayer Moved, and New Jersey Shuddered*, N.Y. TIMES (April 30, 2016), http://www.nytimes.com/2016/05/01/business/one-top-taxpayer-moved-and-new-jersey-shuddered.html?_r=0.

[16] *See* Vardi, *supra* note 15. Of course, it is not just hedge fund managers who have gotten rich. The retirement savings of the 100 largest chief executive retirement funds (with an average of approximately $49.3 million per executive) are equal to the entire accounts of 41% of American families (or more than 116 million people). *See* Jesse Drucker et al., *Top 100 CEO Retirement Savings Equals 41% of U.S. Families*, BLOOMBERG (Oct. 27, 2015, 11:01 PM), http://www.bloomberg.com/news/articles/2015-10-28/top-100-ceo-retirement-savings-equals-41-of-u-s-families.

On a macro level, similarly astonishing statistics abound. Another media source reported that in 2012, the top 400 earners reported an average income of $335.7 million, or a 53 percent jump from the previous year.[17] Not only are the super-rich really rich, their income increased by 53% in one year alone. The importance of this fact shows that wealth inequality is not a static situation; it is dynamic and the forces in motion have served to increase the fortunes of the already rich. Returning to the top 1% in general, Oxfam concluded in 2015 the world's wealthiest 1% will likely control over 50% of global wealth in 2016.[18] If nothing else, these numbers illustrate the scale of inequality that exists today.

A. Those at the Bottom

In sharp and disturbing contrast to the 1% is the plight of those at the bottom. According to the United States Census Bureau, the poverty rate in America in 2014 was 14.8 percent, meaning there were 46.7 million people living in poverty.[19] The 2014 poverty rate was 2.3% higher than in 2007, the year before the financial crisis.[20] Among different age groups, the Census

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In contrast to the retirement prospects of these CEOs is a developing situation regarding the ability of older women to retire.

> Since the start of the most recent recession in December 2007, the share of older working women has grown while the percentage of every other category of U.S. worker—by gender and age—has declined or is flat.
>
> In 1992, one in 12 women worked past age 65. That number is now around one in seven. By 2024, it will grow to almost one in five, or about 6.3 million workers, according to Labor Department projections.
>
> 'It's really one of the most stunning developments that we've seen in the labor market over the last 50 years,' said Richard Johnson, director of the Urban Institute's program on retirement policy.
>
> While many Americans continue working late in life because they find their jobs rewarding, others, including Ms. Blanchette, find themselves approaching old age with more debt, less savings and with fewer of them receiving pensions than workers of previous generations.
>
> 'People are going to live longer and they're worried about outliving their savings,' said Paul Magnus, director of workforce development for Mature Services, a nonprofit in Akron, Ohio, which helps older workers find jobs.

Nick Timiraos, *How Older Women Are Reshaping U.S. Job Market*, WALL STREET J. (Feb. 22, 2016, 8:55 PM), http://www.wsj.com/article_email/older-women-reshape-u-s-job-market-1456192536-lMyQjAxMTA2NTI2OTYyMjk5Wj.

[17] *See* Aimee Picchi, *How America's 400 Highest Earners are Doing*, CBS (Apr. 10, 2015, 5:45 AM), http://www.cbsnews.com/news/the-400-highest-earning-americans-very-very-good-year/.

[18] *See* Pathe, *supra* note 1.

[19] *See Poverty*, U.S. CENSUS BUREAU, https://www.census.gov/hhes/www/poverty/about/overview/ (last visited Oct. 24, 2016).

[20] *See id.*

Bureau reports the poverty rate in 2014 for children under age 18 was 21.1%, 13.5% for people aged 18 to 64, and 10% for people aged 65 and older.[21] So what does it mean to live in poverty? For one person, the poverty threshold in 2015 was an annual income of $12,331.[22] So a 25 year old with an annual income of $12,332 is not impoverished according to the federal government. The poverty threshold for two parents with two children was an annual income of $24,036.[23] Based on these numbers, a single adult under 65 at the poverty threshold lives on $33.78 a day. A family of four at the threshold lives on $16.46 a day per person. These people live in a society where some make $10 million a day. The people who make $10 million per day make more than 294,000 times the amount of money as someone who is at the top of the poverty threshold for a single adult.

More anecdotal evidence of wealth inequality is seen in other forms. In America in 2014, 48.1 million people lived in food-insecure households.[24] Another point of reference is seen in bankruptcy statistics. The number one cause that forces individuals into bankruptcy is the inability to pay medical bills, affecting roughly 2 million people.[25] So multi-billionaires (figuratively) live side-by-side with 2 million people forced into bankruptcy (in one year alone) because they cannot afford healthcare and 48.1 million who do not know if they will eat.

B. The Top 1/10 of 1%

The plight of the impoverished provides a stark contrast on the segment of the population whose fortunes are both breath taking and exploding. So far, I have focused on the top 1% to help frame the discussion in a rough manner, and because it is an easy phrase to reference wealth inequality. However, the top 1% is not really rich compared to those at the absolute peak. This statement may sound a bit absurd and spark incredulity, but it is true.

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[21] *See id.*

[22] *See Poverty Thresholds*, U.S. CENSUS BUREAU, http://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html (last visited Feb. 21, 2016).

[23] *Id.*

[24] *See Key Statistics & Graphs*, U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx#verylow (last visited Oct. 24, 2016). The USDA defines "food-insecure" to mean "[a]t times during the year, these households were uncertain of having, or unable to acquire, enough food to meet the needs of all their members because they had insufficient money or other resources for food. Food-insecure households include those with *low food security* and *very low food security*."

[25] *See* Dan Mangan, *Medical Bills Are the Biggest Cause of US Bankruptcies: Study*, CNBC (June 25, 2013, 2:20 PM), http://www.cnbc.com/id/100840148 "Even outside of bankruptcy, about 56 million adults—more than 20 percent of the population between the ages of 19 and 64—will still struggle with health-care-related bills this year, according to NerdWallet Health." *Id*

> The rallying cry of the Occupy Movement was that the richest 1 percent of Americans is getting richer while the rest of us struggle to get by. That's not quite right, though. The bottom nine-tenths of the 1 Percent club have about the same slice of the national wealth pie that they had a generation ago. The gains have accrued almost exclusively to the top tenth of 1 Percenters. The richest 0.1 percent of the American population has rebuilt its share of wealth back to where it was in the Roaring Twenties. And the richest 0.01 percent's share has grown even more rapidly, quadrupling since the eve of the Reagan Revolution.[26]

As hard as it may be to believe, those in the 1% are relative paupers compared to the top 1/10th of the 1%. The relative fortunes of the 1% can only be understood by breaking down the numbers by increments of .10%. Someone in the top 1% is, of course, rich, but someone who is "only" richer than 99.1 of the population "lives in a state of relative poverty" compared to someone who is richer than 99.9% of everyone else.[27] There is, in fact, an astonishing wealth gap within the top 1%.

Having millions of dollars is the definition of rich to many people, and this privileged group is in the top 1%.[28] As hard as it may be to believe, ordinary millionaires are neither responsible for, nor the beneficiaries of increasing wealth inequality. Wealth inequality can only be seen in its true light by comparing the circumstances of millionaires (the merely rich) to the super rich.[29] As incredible as it may seem, the most dramatic evidence of growing wealth inequality lies in the difference between ordinary millionaires and billionaires, between those making $300,000 a year and those making millions of dollars each day.[30] Both are lumped together by politicians, the media, and even economists as "the rich" or "the 1 percent," who are gaining at the expense of everyone else.[31] However, this lumping together of someone who makes "only" $300,000 a year with billionaires does not illustrate the true nature of wealth inequality, and actually

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[26] Peter Coy, *The Richest Rich Are in a Class by Themselves*, BLOOMBERG (Apr. 3, 2014, 9:29 PM), http://www.bloomberg.com/bw/articles/2014-04-03/top-tenth-of-1-percenters-reaps-all-the-riches.

[27] *See* Derek Thompson, *The Rise (and Rise and Rise) of the 0.01 Percent in America*, THE ATLANTIC (Feb. 13, 2014), http://www.theatlantic.com/business/archive/2014/02/the-rise-and-rise-and-rise-of-the-001-percent-in-america/283793/.

[28] Actually, a net worth of $1 million is not enough to put someone in the top 1%. In 2012, one needed more than $8 million of wealth to be in the 1%. *See* Robert Gebeloff & Shaila Dewan, *Measuring the Top 1% by Wealth, Not Income*, N.Y. TIMES (Jan. 17, 2012, 3:51 PM), http://economix.blogs.nytimes.com/2012/01/17/measuring-the-top-1-by-wealth-not-income/.

[29] *See* Robert Frank, *The Other Wealth Gap—the 1% vs the 0.01%*, CNBC (Mar. 31, 2014, 2:11 PM) (emphasis supplied), http://www.cnbc.com/2014/03/31/the-other-wealth-gapthe-1-vs-the-001.html.

[30] *See id.*

[31] *Id.*

obscures the situation because it hides the true causes and effects. The top 1% can be divided in to two separate groups.[32]

> First, there are those at the bottom of the 1 percent. Those are folks who are worth single-digit millions, around $7 million or so as of the latest Fed survey. The people between the top 1 to 0.5 percent have seen their share of national wealth remain flat for the past 20 years. Their share of the wealth pie is essentially the same as it was in 1995. Even those between the top 0.5 percent to the top 0.1 percent have barely seen any increase in their share of wealth. *The big winners are those in the top 0.01 percent. These folks, who have a net worth of more than $100 million, have seen their share of wealth more than double since 1995, from around 5 percent to just under 12 percent. Over the past half century, they have nearly quadrupled their share of wealth.* In other words, the 0.01 percent is leaving the 1 percent in the dust.[33]

This fact is remarkable. The fortunes of everyone from the top 99.9% down have, for the most part, experienced a relatively flat or steady state. A kind view would be that at least they are not gaining at anyone else's expense. There have always been rich people, and there have always been poor people. So, there is nothing particularly remarkable about the top 99.9%. That type of wealth inequality has always been present, and most societies seem to have tolerated it. The problems arise when one group gains at a rapid pace, while others experience no growth, or even deterioration in their situation.

The Economist newspaper also noted the remarkable rise of the top 1/10th. The 16,000 families making up the richest 0.01%, have an average net worth of $371 million, and now control 11.2% of the total wealth— numbers that were last seen in 1916 share the highest on record.[34] The top 0.1% (consisting of 160,000 families worth $73 million on average) hold 22% of America's wealth, just shy of the 1929 peak.[35] Furthermore, the top 0.1% holds the same amount of wealth as the bottom 90% of the population.[36] As a demonstration of how the explosion of wealth has accrued to the top 0.1%, the share of wealth held by families from the 90th to the 99th percentile has actually fallen over the last decade.[37] The sharp increase in wealth at the top means a billionaire is no longer

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32 *See id.*
33 *Id.* (emphasis added).
34 *See Forget the 1%*, THE ECONOMIST (Nov. 8, 2014), http://www.economist.com/news/finance-and-economics/21631129-it-001-who-are-really-getting-ahead-america-forget-1 (The Economist refers to itself as a newspaper rather than a magazine.).
35 *See id.*
36 *See id.*
37 *See id.*

a rarity. Forbes magazine has been keeping track of the richest 400 Americans every year since the 1980's. A comparison of the Forbes 400 list over the years reflects the explosion of wealth at the top. In 2015, a person needed a minimum net worth of $1.7 billion for inclusion on the list, the highest minimum amount in the 34 years Forbes has tracked American wealth.[38] There are so many billionaires now that 145 American billionaires failed to make the cut for the Forbes 400.[39] By comparison, in 1985, the richest person on the Forbes 400 list was worth $2.8 billion, while the 400th person was worth $150 million.[40]

The fact that some are vastly richer than others is not surprising, and would ordinarily not be viewed as a social problem (at least, not in America). However, this fact must now be coupled with the reality that the financial situation for ordinary people, the great middle class, is growing worse. Social inequalities are tolerable when a rising tide lifts all boats. It is a problem, however, when a few are a experiencing an explosive growth in their wealth while the vast majority is part of a shrinking and poorer middle class.

C. The Shrinking Middle Class

The American Dream is based on the belief in boundless opportunity, the chance to improve one's lot in life through determination and hard work. The great middle class was built on this dream. If the middle class were growing, and people believed the middle class was thriving, then perhaps there would be more indifference to, or tolerance of, wealth inequality.[41] After all, America has been relatively unique in that people in the middle or lower rungs of the economic ladder have generally not been resentful of, or hostile to, those above. Resentment and hostility have largely been absent due to the belief that the system is fair and provides the opportunity to rise above one's origins and join those above one day.[42] Vast wealth inequality takes on a different shade, however, if people believe their opportunities are shrinking, and when facts indicate the middle class is actually shrinking as the super-rich grow richer. Recent studies report that the middle class is, in fact, growing smaller in

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[38] *See* Kerry A. Dolan & Luisa Kroll, *Inside The 2015 Forbes 400: Facts And Figures About America's Wealthiest*, FORBES (Sept. 29, 2015, 8:30 AM), http://www.forbes.com/sites/luisakroll/2015/09/29/inside-the-2015-forbes-400-facts-and-figures-about-americas-wealthiest/#3e2c637f28f8.

[39] *See id.*

[40] *See The Forbes 400: Walton Tops List of Richest Americans*, L.A. TIMES (Oct. 15, 1985), http://articles.latimes.com/1985-10-15/business/fi-16339_1_billionaires.

[41] There already seems to be widespread tolerance because it does not seem to be one of the burning issues of the day. However, the "Occupy" movements in recent years, coupled with the issues in the presidential primaries of 2016 suggest that may be changing.

[42] This social compact distinguishes America from Europe (to speak broadly). France, for example, is known as a country where many of the less fortunate are openly hostile to the more fortunate, and this hostility at times is expressed in violent forms. Some may view a statement like this as stereotyping unsupported by any evidence. Those with such a view might adopt a different perspective if they were to live in France for an amount appreciable time.

America. The middle class, the pillar of the economy and social foundation of the country, has shrunk to the point where it is no longer the majority of the adult population, according to a report issued by the Pew Research Center in late 2015.[43] Many analysts and policymakers view this decline in the middle class as a worrisome development for economic and social stability, and symptomatic of the disturbing trend of exploding financial gains among the super rich.[44] In 1971, 61% of the population was middle class.[45] That number has since declined and now the middle class represents less than 50% of the population.[46] This is an astonishing situation. The middle class no longer comprises the majority of Americans.

A common feature of many Third World countries is the existence of a few fortunate people in the middle, and most of everyone else in poverty. To be sure, America is nowhere near that situation. However, if the Pew study is correct, the trend is in that direction. It is fanciful to think America will ever approach anything resembling Third World status. Nonetheless, trends and direction are important, and a shrinking middle class means things are headed in the wrong direction.

The Pew Research Center found that the nation's aggregate household income has substantially shifted from middle-income to upper-income households with more rapid gains in income at the top.[47] In 2014, the median income of middle-income households was 4% less than the amount in 2000, and their median wealth (assets minus debts) fell by 28% from 2001 to 2013 due to the financial crisis.[48] The middle class is making less and has less than before, while the situation is the opposite at the top. Although these numbers do not address the issues surrounding the top 1% or 1/10th of the 1%, the general trends are consistent with the facts occurring at the top. The different segments of the population are experiencing financial changes at vastly different rates.

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[43] *See* Don Lee, *Middle-class Families, Pillar of the American Dream, Are No Longer in the Majority, Study Finds*, L.A. TIMES (Dec. 9, 2015, 7:28 PM), http://www.latimes.com/nation/la-fi-middle-class-erosion-20151209-story.html.

[44] *See id.*

[45] *See id.* "Pew defined middle class as households earning two-thirds to twice the overall median income, after adjusting for household size. A family of three, for example, would be considered middle income if its total annual income ranged from about $42,000 to $126,000. Pew analyzed data from the Census Bureau and the Labor Department, as well as the Federal Reserve." *Id.*

[46] *See id.*

[47] *The American Middle Class Is Losing Ground*, PEW RESEARCH CTR. (Dec. 9, 2015), http://www.pewsocialtrends.org/2015/12/09/the-american-middle-class-is-losing-ground/. In 1983, upper-income families had three times as much wealth as middle-income families, but by 2013, they had seven times as much wealth as middle-income families. *See id.* The median income of upper-income households increased from $118,617 in 1970 to $174,625 in 2014, (or by 47%), while the median income for middle-income households rose from $54,682 to $73,392 (or 34%). *See id.* The median income for lower-income households increased by only 28% over this period. *See id.*

[48] *See id.*

Unknowable, at this time, is when this decline of the middle class will stop, if at all.

The Pew report then turned to the changes in wealth between the middle-income and upper income households. Before the financial crisis of 2007 to 2009, the median wealth of middle-income families increased from $95,879 in 1983 to $161,050 in 2007, a gain of 68%, but the financial crisis eliminated that gain almost entirely.[49] By 2010, the median wealth of middle-income families fell to about $98,000, where it still stood in 2013.[50] In contrast, upper-income families more than doubled their wealth from 1983 to 2007—from $323,402 to $729,980.[51] Upper-income households experienced a slight decrease in wealth due to the financial crisis, but these families recovered somewhat since 2010 and had a median wealth of $650,074 in 2013, about double their wealth in 1983.[52] Even with the financial crisis, "upper-income families, which had three times as much wealth as middle-income families in 1983, had seven times as much in 2013."[53]

The fortunes at the top provide a stark contrast to the vast majority of people. Those outside of the top 10% have little wealth compared to the top. When focusing on the bottom 90%, the bottom 50% of all families generally has no wealth, no net worth.[54] Whatever wealth existing in the bottom 90% is among those in the 50th to the 90th percentile.[55] This group is an effective measure of "middle class" wealth.[56] In the late 1920s, the bottom 90% held 16% of America's wealth, while those in the top 0.1% controlled a quarter of total wealth just before the crash of 1929.[57] From the beginning of the Great Depression until the end of the World War II, the middle class's share of total wealth rose steadily, largely due to shrinking wealth among richer households during the Depression.[58] After the end of the war, however, middle class wealth grew along with national wealth thanks to broader equity ownership, middle-class income growth and rising rates of home-ownership.[59] Middle class wealth continued to grow until the early 1980s, when the share of household wealth held by the middle class rose to 36%—roughly four times the share controlled by the top 0.1%.[60] The trend of increasing middle class wealth reversed in the early 1980s.[61]

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[49] *See id.*
[50] *See id.*
[51] *See id.*
[52] *See id.* Of note, these numbers apply to the broad category of upper-income households. These numbers are not about the top 1% or 1/10th of the 1%.
[53] *Id.*
[54] *See Forget the 1%, supra* note 34.
[55] *See id.*
[56] *See id.*
[57] *See id.*
[58] *See id.*
[59] *See id.*
[60] *See id.*
[61] *See id.*

These reports confirm the worries of those concerned by wealth inequality. Those at the top are experiencing even more prosperity, while the financial situation of those in the middle is worsening. Middle class prosperity is becoming more difficult to maintain, while the fortunes of billionaires grow at explosive rates. The sense of a shared qualitative experience of life among members of society is eroding, along with the sense that "we're all in this together."[62]

D. The Student Loan Debt Crisis

Wealth inequality is also manifested by the student loan debt crisis. As billionaires became multi-billionaires, recent college and post-graduate students became undeniably poorer than their predecessors. In fact, just about anyone with student loans is probably insolvent—in other words, has a negative net worth.[63] As the wealth of billionaires explodes today's millennials are financially worth less than zero.

A study prepared under the authority of the Federal Reserve concluded the approximate total of outstanding student loan debt as of March 2015 was $1.27 trillion.[64] I am personally aware that it is not uncommon for many law students to graduate from law school with $150,000 to $200,000 of student loan debt (both college and law school). One report issued in January 2016 estimates the amount of student loan debt is increasing at the rate of $2,726.27 every second.[65] Some observers believe this debt burden is causing young adults to postpone marriage, childbearing, home buying, as well as stifling new business creation.[66] The student loan crisis also aggravates wealth inequality, according to some.

> *The high levels of student debt are also serving to perpetuate and even worsen economic inequality*, undercutting the opportunity and social mobility that higher education has long

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[62] At the time I write this paper, Bernie Sanders and Donald Trump are experiencing strong support in the presidential primaries, and it is widely acknowledged that their popularity is fueled by discontent directed at a system perceived to be unfair and stacked in favor of elites at the top of the political and financial pyramid.

[63] A person is "insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation." *See* Unif. Voidable Transactions Act §2(a) (Nat'l Conference of Comm'rs on Unif. State Laws) (2014).

[64] *See* Jesse Bricker et al., *How Much Student Debt is Out There?*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (Aug. 7, 2015), http://www.federalreserve.gov/econresdata/notes/feds-notes/2015/how-much-student-debt-is-out-there-20150807.html.

[65] *See* Jillian Berman, *Watch America's Student-loan Debt Grow $2,726 Every Second*, MARKETWATCH (Jan. 30, 2016, 7:36 AM), http://www.marketwatch.com/story/every-second-americans-get-buried-under-another-3055-in-student-loan-debt-2015-06-10.

[66] *See* Kelley Holland, *The High Economic and Social Costs of Student Loan Debt*, CNBC (June 15, 2015, 10:39 AM), http://www.cnbc.com/2015/06/15/the-high-economic-and-social-costs-of-student-loan-debt.html.

> promised. Americans almost universally believe that a college degree is the key to success and getting ahead—and the data shows that, generally speaking, college graduates still fare far better financially than those with just a high school diploma.
>
> But for those who are saddled with massive student debt, even getting by can be a challenge, much less getting ahead.
>
> 'You wind up disadvantaged just as you begin. It has reduced the ability of our educational system to be a force for upward mobility, and for an equitable chance at upward mobility,' said Melinda Lewis, associate professor of the practice at the University of Kansas School of Social Welfare. 'It is still true that you are better positioned if you go to college, but you are not as much better positioned if you have to go to college with debt.'[67]

As the super-rich have become even richer, the youngest adults have become poorer to a frightening degree. Also, as every student borrower knows, student loans are extremely difficult to discharge in bankruptcy proceedings.[68] Section 523(a)(8) of the Bankruptcy Code provides an exception to nondischargeability of student loan debt if it "will impose an undue hardship on the debtor and debtor's dependents." "Undue hardship" is not a defined phrase, so Congress left it to the courts to define. The bottom line, however, is that it is extremely difficult to discharge student loan debt, and the odds are highly stacked against the borrower.[69] Thus, unlike many other debt burdens, student loan debt is a life-long burden.

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[67] *Id.* (emphasis added).
[68] *See* 11 U.S.C. § 523(a)(8) (2012).
[69] *See generally* DANIEL J. BUSSEL & DAVID A. SKEEL, JR., BANKRUPTCY 135-140 (10th ed. 2015). This treatment of student loan debt runs counter to one of the fundamental premises of American bankruptcy law.

> A debtor who is an individual normally will be discharged of personal liability on all or most pre-bankruptcy debts. The ability of an individual to obtain a discharge of prebankruptcy debts is one of the most important characteristics of modern bankruptcy law. The overextended debtor can get a 'fresh start' by having personal liability on prebankruptcy debts wiped out while being allowed to retain all exempt property.

Id. at 19. This concept of a "fresh start" is a distinctive and foundational feature of American bankruptcy law. Yet, it is, for the most part, denied to students.

E. Overview

So, the problem is not simply that the top 1/10th of 1% has grown richer while the rest remain the same or experience slow erosion. The top has seen its wealth explode while the middle and bottom are plumbing new depths of financial loss and/or insolvency. The extremes of the economic spectrum are being pulled away from each other at a rapid pace. This is, perhaps, what makes today's inequality worse than previous eras, such as the Gilded Age of the late 19th century. At that time, there were a small number of the super-rich at the top of the economic pyramid and millions of people were at the bottom. However, it is doubtful that the bottom or the middle was experiencing a worsening of conditions. In fact, history shows that the bottom and the middle saw an improvement in their conditions over time (if for no other reason, than the fact that indoor plumbing and electricity became near universal). Today, however, facts show that the poor are getting poorer and the middle class is shrinking while the wealth of the top 1/10th of one percent explodes.[70]

What is perplexing is why more people are not concerned with this current state of events. Perhaps I am more aware of it because I can compare the situation of law students from 30 years to their situation today. I see students incurring more than $100,000 of debt for the opportunity to scramble for middle income jobs where income growth is almost non-existent in a world where billion dollar fortunes are exploding. Moreover, why is this happening? If so much money is flowing to those at the top, why is some of that money not trickling down to those below? The amounts of money are so large at the top that it would

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[70] Public discourse about wealth inequality seems to overlook the factor of race. It seems that concerns about wealth inequality are based on an unspoken understanding that the discussion is limited to the plight of White Americans. This is, no doubt, a controversial statement (every statement about race seems to fall into that category). Nonetheless, it seems to be an unspoken assumption. Perhaps it is because some groups such as Native Americans and the descendants of slaves have been at the bottom of the economic pyramid, so the situation might be that their plight is not getting worse because it has always been bad. However, when the facts show that the middle class (which is mostly White) is actually shrinking that would predictably draw attention to wealth inequality.

Indeed, much of the dynamics of the 2016 presidential primaries seems to be driven by an angry White middle class. Noam Chomsky contends that the support for Donald Trump is based on "deep feelings of anger, fear, frustration, hopelessness" among White men. *See* Matt Ferner, *Donald Trump Is Winning Because White America Is Dying*, THE HUFFINGTON POST (Feb. 25, 2016, 7:17 PM), http://www.huffingtonpost.com/entry/donald-trump-noam-chomsky-white-mortality_us_56cf8618e4b0bf0dab31838f. Anecdotal support for the racial divide on the issue of wealth inequality is provided by the results of South Carolina presidential primary. Bernie Sanders, the most outspoken opponent of wealth inequality, lost by a large margin in South Carolina, where Hilary Clinton won 85% of the African-American vote. *See also* Chris Megerian, *Hillary Clinton Aces Test of Her Support from Minorities, and Other Takeaways from South Carolina*, L.A. TIMES (Feb. 27, 2016, 7:09 PM), http://www.latimes.com/nation/la-na-south-carolina-democrats-takeaways-20160227-htmlstory.html. One conclusion is that a campaign against wealth inequality is not resonating among African-American voters, and that Sanders' campaign against wealth inequality is a message that appeals to a mostly White audience.

seem almost inevitable that some of it would flow down as seepage or overflow. However, this is not happening.

II. THE CONTEMPORARY CAUSES OF WEALTH INEQUALITY

So why have the past few years of this century seen such an explosion in wealth at the top? Why did it not occur during the 1980's or 1990's? Why has it occurred at all? In an answer that is both fiendishly simple and complicated, there is simply more money in the world. If that is true, where did it come from and why did it happen? There are, undoubtedly, many causes for the current situation, but I contend the primary reason why there is more money in the world today stems (counterintuitively) from the economic crisis of 2007-2009. At that time, the global economy and banking system were on the verge of collapse (this is a statement of fact, not dramatic exaggeration).

The crisis of 2007 to 2009 was the worst economic crisis since the Great Depression.[71] The American financial system was on the verge of complete collapse, and the financial shock to the system was actually worse than the one leading to the Great Depression.[72] More than $15 trillion in American household wealth disappeared.[73] The economy lost 750,000 jobs a month, and the economy contracted at an annual rate of 3.8% in the fourth quarter of 2008.[74] Almost 9 million workers lost their jobs, and 5 million homeowners lost their homes.[75] Former Treasury Secretary Geithner described these numbers as "depression numbers."[76] The crisis erupted and continued with the failures of some of the largest financial institutions in the country.[77] Geithner feared the entire global financial system would collapse, and that billions of people worldwide would suffer as a result.[78]

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[71] *See* TIMOTHY F. GEITHNER, STRESS TEST, REFLECTIONS ON FINANCIAL CRISES 16 (2014). Geithner was the President of the Federal Reserve Bank of New York and then the Secretary of the Treasury during this period.

[72] *See id.* at 199.

[73] *See id.* at 16.

[74] *See id.* at 277.

[75] *See id.* at 16.

[76] *See* id. at 277.

[77] In March 2008, the investment bank called Bear Stearns collapsed, and the Fed responded immediately over one weekend that month by approving a $30 billion credit line to JP Morgan Chase to enable it to acquire the remnants of Bear Stearns. *See* John J. Chung, *Money as Simulacrum: The Legal Nature and Reality of Money*, 5 Hastings Bus. L.J. 109, 163 (2009). Later that year, the Bear Stearns collapse was followed by federal regulators seizing Fannie Mae and Freddie Mac (quasi-governmental entities that supported the housing mortgage markets), the largest bankruptcy in U.S. history when Lehman Brothers (another investment bank) filed a bankruptcy petition, Merrill Lynch's 'shotgun marriage' to Bank of America, the government takeover of American International Group (one of the world's largest insurers), and the largest bank failure in American history (Washington Mutual). *See id.* at 164. These events formed the most serious economic crisis in American history since the Great Depression. *See generally* BERNANKE, *supra* note 6, at 71-74.

[78] *See* GEITHNER, *supra* note 71, at 199.

Desperate times called for desperate measures, and the central banks around the world responded to this crisis by engaging in an unconventional monetary policy called quantitative easing. The Federal Reserve (America's central bank, commonly referred to as the Fed) led the way.[79] This paper contends that QE is a primary, if not the most important, cause of wealth inequality. A few may disagree, but it seems widely accepted that QE is one of the direct causes of the explosion of wealth at the top. So what is quantitative easing? In crudely simple terms, it is the pumping of money into an economy by a nation's central bank.

> To carry out QE central banks create money by buying securities, such as government bonds, from banks, with electronic cash that did not exist before. The new money swells the size of bank reserves in the economy by the quantity of assets purchased—hence 'quantitative' easing. Like lowering interest rates, QE is supposed to stimulate the economy by encouraging banks to make more loans. The idea is that banks take the new money and buy assets to replace the ones they have sold to the central bank. That raises stock prices and lowers interest rates, which in turn boosts investment. Today, interest rates on everything from government bonds to mortgages to corporate debt are probably lower than they would have been without QE. If QE convinces markets that the central bank is serious about fighting deflation or high unemployment, then it can also boost economic activity by raising confidence. Several rounds of QE in America have increased the size of the Federal Reserve's balance sheet—the value of the assets it holds—from less than $1 trillion in 2007 to more than $4 trillion now.[80]

In short, the purpose of QE is to inject money into the financial system to provide liquidity to banks and to lower interest rates. The hope is the combination of more money in the system, and lower interest rates will spur

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[79] *See* BERNANKE, *supra* note 6, at 102-06.

[80] R.A., *What is Quantitative Easing?*, THE ECONOMIST (Mar. 9, 2015, 3:00 PM), http://www.economist.com/blogs/economist-explains/2015/03/economist-explains-5. The Bank of England (the United Kingdom's central bank) succinctly states: "Quantitative easing (QE) is an unconventional form of monetary policy where a Central Bank creates new money electronically to buy financial assets, like government bonds. This process aims to directly increase private sector spending in the economy and return inflation to target." *What is Quantitative Easing?*, BANK OF ENGLAND, http://www.bankofengland.co.uk/monetarypolicy/pages/qe/default.aspx (last visited Feb. 22, 2016).

The Fed has engaged in three rounds of QE, called QE1, QE2 and QE3 from 2008 to 2012. *See* Trefis Team, *Quantitative Easing In Focus: The U.S. Experience*, FORBES (Nov. 16, 2015, 8:34 AM), http://www.forbes.com/sites/greatspeculations/2015/11/16/quantitative-easing-in-focus-the-u-s-experience/#1b6b59aa3013.

economic activity across all sectors, and lead to the expansion of businesses, more jobs, more spending, and stronger financial positions for businesses and individuals to deal with debt.[81]

This increase in the Fed's balance sheet from less than $1 trillion to more than $4 trillion means it injected approximately $3 trillion into the economy—new money that was not in the economy before.[82] It, and central banks around the world, implemented QE in an attempt to revive their respective economic systems in the wake of the financial crisis that came sharply into focus in 2008. Quantitative easing (especially its scale) was an unconventional and extraordinary response by central bankers around the world to unprecedented financial crises (the Great Depression, though more serious, presented different problems). The central banks engaged in QE to provide liquidity to banks (a measure to prevent bank failures) and hoped that the injections of money would boost economic activity in the non-banking world. However, the benefits of QE did not fall equally among the various segments of the economy. Clearly, some benefitted more than others. So who benefited from QE?

By far, the biggest beneficiaries were the elite financial firms and financiers. The big beneficiaries included approximately 20 big banks who qualified as "primary dealers," which are banks that can borrow directly from the Fed, Wall Street's investment banks, hedge funds, and private equity firms.[83]

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[81] *See* KING, *supra* note 5, at 47. Richard Fisher (the former President of Federal Reserve Bank of Dallas from 2005 to 2015) made this observation about QE:

> When we buy a Treasury note or bond or an MBS, we pay for it with reserves we create. This injects liquidity into the economy. This liquidity can be used by financial intermediaries to lend to businesses to invest in job-creating capital expansion or by investors to finance the repairing of balance sheets at cheaper cost or on better terms, or for myriad other uses, including feeding speculative flows into financial markets.

Richard W. Fisher, President and CEO of Federal Reserve Bank of Dallas, Monetary Policy: Debate, Dissent and Discussion with Richard Fisher, University of Southern California, Los Angeles (July 16, 2014), http://www.dallasfed.org/news/speeches/fisher/2014/fs140716.cfm.

[82] The Fed was joined by other central banks with their own QE programs. The Bank of England engaged in QE and created $550 billion of new money between 2009 and 2012. *See What is Quantitative Easing?*, BBC NEWS (Aug. 4, 2016), http://www.bbc.com/news/business-15198789. The European Central Bank is in the midst of its own QE program designed to inject more than $1 trillion into Europe's economies. *See also* Jana Randow, *Europe's QE Quandary: Battles Over Bond Buying*, BLOOMBERG (updated Oct. 20, 2016), http://www.bloombergview.com/quicktake/europes-qe-quandary. The Bank of Japan is injecting $660 billion into its economy through QE. *See Japan Adjusts its Quantitative-easing Programme*, THE ECONOMIST (Dec. 18, 2015), http://www.economist.com/news/finance-economics/21684516-central-bank-joins-effort-get-japanese-companies-spend-their-cash.

In the United States, there were three rounds of QE, known as QE1, QE2 and QE3. QE3 included the sustained purchase of $85 billion per month of longer-term U.S. Treasury bonds and mortgage-backed securities (MBS). *See* Fisher, *supra* note 81. When QE3 was launched, the Fed's balance sheet had already expanded from $900 billion to $2 trillion. *See id.*

[83] *See* Cohan, *infra* note 101.

Simply put, the Fed injected trillions of dollars of new money into the economy through QE. That money had to go somewhere. Much of it went to the top 1/10th of the 1%, as evidenced by the annual incomes of hedge fund and private equity managers in the billions of dollars.[84] In a surprisingly candid statement, Richard Fisher described QE as a "massive gift" to the elite of the financial world.[85] Central bankers knew that QE would directly benefit the financial sector and those who hold financial assets (i.e., rich people). QE injected money into institutional portfolios, and this new money poured into financial assets such as stocks, bonds, and foreign investment.[86] The money flowed into such assets, in part, because QE forced down interest rates to the point where investment managers had to seek higher yields in non-cash financial assets. The purchases of such financial assets, driven by QE, led to higher values of such assets, which led to greater wealth for those who owned such assets.[87]

In a speech known in some circles as the "Beer Goggles" speech, Fisher elaborated on the perverse effects of QE.[88] Fisher described QE as "a hyper-accommodative monetary policy in order to lift the economy out of the doldrums and counteract a possible deflationary spiral," with the goal of making money costless and abundantly available by increasing the Fed's balance sheet to $4.5 trillion through QE1, QE2, and QE3.[89] He then analogized QE to "beer goggles."

> But with low interest rates and abundant availability of credit in the nondepository market, the bond markets and other trading markets have spawned an abundance of speculative activity. There is no greater gift to a financial market operator—or anyone, for that matter—than free and abundant money. It reduces the cost of taking risk. But it also burns a hole in the proverbial pocket. It enhances the appeal of things that might not otherwise look so comely. I have likened the effect to that of strapping on what students here at USC and campuses elsewhere call 'beer goggles.' This phenomenon occurs when alcohol renders alluring what might otherwise appear less clever or attractive. And this is, indeed, what has happened to stocks and bonds and other financial investments as a result of the free-

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[84] The effect of QE has also manifested itself in the price of apartments in Manhattan, where the average price is now over $2 million. *See* Martha C. White, *Manhattan Average Apartment Price Passes $2 Million*, NBC NEWS (Apr. 1, 2016, 3:50 PM), http://www.nbcnews.com/business/real-estate/manhattan-average-apartment-price-passes-2-million-n549336.

[85] *See* Phalguni Soni, *Why Richard Fisher Says Quantitative Easing has Enabled the Rich*, YAHOO (Apr. 7, 2014), http://finance.yahoo.com/news/why-richard-fisher-says-quantitative-170012847.html.

[86] *See* KING, *supra* note 5, at 183.

[87] *See id.*

[88] *See* Fisher, *supra* note 81.

[89] *See id.*

> flowing liquidity we at the Fed have poured down the throat of the economy.[90]

This massive injection of money into the financial system led to a boom in numerous types of assets from stocks and bonds, office towers, and to Iowa farmland.[91] These assets reached lofty valuations due to the low "risk-free" interest rate engineered by the Fed that supported all financial asset valuations.[92] Fisher called this the "Everything Boom" and stated: "I believe the root cause is the hyper-accommodative monetary policy of the Federal Reserve and other central banks."[93]

Many credit QE for saving the global economy from complete collapse.[94] However, many also question whether QE accomplished what it set out to do.

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[90] *Id.*

[91] *See id.*

[92] *See id.*

[93] *Id.*

[94] Professor Alan Blinder of Princeton University and former Vice Chairman of the Fed's Board of Governors praised the Fed's response.

> Once Lehman crashed and burned, and the far- reaching and frightening consequences started to become clear, the Fed's performance improved markedly and admirably. But the Fed did not win a lot of public accolades or support. . . .
>
> True, but the Fed's strong actions probably kept a terrible situation from mushrooming into an all- out catastrophe. Like the Troubled Asset Relief Program (TARP), to which Ben Bernanke lent his personal and the Fed's institutional power and prestige, many of the Fed's emergency actions were bold, intelligent, and imaginative. When things started crashing all around him, there was no playbook sitting on Fed Chairman Ben Bernanke's bookshelf. The Fed (and the Treasury) had to improvise on the fly. I shudder to think about what might have happened had the Federal Reserve behaved in 2008–2009 as it did in 1930–1931. Fortunately, so did Bernanke.
>
> After Lehman, the Fed intervened in unprecedented ways, first to save and then to resuscitate dying (or dead) markets for commercial paper (CP) and mortgage- backed securities (MBS). The CP rescue program resulted in a temporary bulge in the central bank's balance sheet, the acceptance of some (though not much) credit risk, and a tacit foray into credit allocation. It was a portent of things to come. The MBS purchase program, which is still in progress, led to a huge and long- lasting expansion of the Fed's balance sheet, the acceptance of even more credit risk, and a quite explicit effort to allocate more credit to mortgage finance. In each respect, the Fed stuck its neck out, and critics brayed that it was going astray. In each respect, in my view, the Fed deserves kudos for being right.
>
> Bernanke also made an intellectual break with previous episodes of quantitative easing (QE), as practiced mainly in Japan. (He tried to change the name, too— to "credit easing." But "QE" stuck.) In Japan, the focus of QE was on the liabilities side of the Bank of Japan's balance sheet. The central idea was to

The massive injection of money into the global financial system since 2008 is "the biggest monetary policy stimulus in the history of the world."[95] Despite the massive scale of QE, economies around the world have barely recovered, or seen no recovery at all since 2008.[96] There has been no sustainable recovery anywhere in the advanced economies, and extraordinary monetary policies are still necessary to maintain the anemic *status quo*.[97]

At the time this paper is written, the European Central Bank, the Bank of Japan, and the central banks of Denmark, Sweden and Switzerland have implemented negative interest rates policies, an extremely rare occurrence and one which indicates a global economy in danger.[98] If QE cured the economic ills

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> throw massive amounts of excess reserves into the banks on the hope that they would put some of them to work. As practiced by the Fed, however, the focus of QE was on the assets side of the central bank's balance sheet—what the Fed bought. Bernanke emphasized imperfect substitutability and "portfolio balance" effects that would lower interest rates (even on assets the Fed was not buying), raise stock prices, and probably—though the Fed never emphasized this—lower the dollar exchange rate. Hence the Fed's official term for QE: large-scale asset purchases
> (LSAPs).

Alan S. Blinder, *Federal Reserve Policy Before, During, and After the Fall*, STAN. U. 89, 94-95 (2014), http://www.hoover.org/sites/default/files/across-the-great-divide-ch5.pdf.

Understandably, former Secretary Geithner also asserts that QE, along with other economic stimuli, saved the economy.

> They put a floor under home prices, equity markets, and the economy, breaking the vicious cycle of housing losses, financial losses, and economic losses chasing one another down the drain. They helped restore confidence so families and businesses could begin to spend again, so it no longer seemed necessary and rational to hunker down in preparation for the apocalypse.

GEITHNER, *supra* note 71, at 369.

[95] KING, *supra* note 5, at 291. "Official interest rates across the industrialized world were cut to their lowest rates ever – first to zero and then in 2015 to negative levels in many European countries – and programmes of asset purchases by central banks expanded the monetary base several fold, an extraordinary and unprecedented increase." *Id.*

[96] *See id.* "When interest rates were cut to almost zero at the height of the crisis, no one expected that they would still be at those emergency levels more than six years later. A long period of zero interest rates is unprecedented." *Id.* at 335. The unprecedented nature of this low interest rate environment is demonstrated by the fact that the Bank of England from 1694 (the year of its founding) to 2009 had never set an interest rate below 2%. *Id.*

[97] *See id.* at 43-50.

[98] *See* KING, *supra* note 5, at 335; *see also* Sara Zervos, *What Negative Interest Rates Mean For Savers & Investors*, FORBES (Feb. 22, 2016. 8:00 AM), http://www.forbes.com/sites/sarazervos/2016/02/22/negative-interest-rates-coming-soon-to-a-bank-near-you/#564c2b8b3318.

A negative interest policy means that banks are charged money for depositing money with their central banks, as opposed to earning a positive return through the payment of interest. *See Negative Interest Rate*, INVESTOPEDIA, http://www.investopedia.com/terms/n/negative-interest-rate.asp (last visited Oct. 25, 2016). Negative interest rates are highly unorthodox policy tools designed to encourage banks to inject money into the economy to spur activity, instead of leaving it idle at a loss due to the negative rate. *See id.*

stemming from the 2007-2009 financial crisis, central banks would not need to follow up QE with yet another highly unconventional policy in the form of negative interest rates. Central banks have implemented negative interest rates because QE did not result in the goals set by the central bankers.[99] QE worked in some ways (preventing collapse), but it did not work in other ways (failing to ignite self-sustaining economic growth). One thing is certain though. QE was and is a prime cause of today's wealth inequality. This is not a view confined to scruffy Occupy Wall Street protestors. The Washington Post editorial board agrees.

> The Federal Reserve deserves credit for helping stem an epic financial panic in 2008 and, subsequently, mitigating the worst downturn since the Great Depression. To do this, the central bank necessarily resorted to new and unconventional methods — principally zero interest rates and the asset-purchasing program known as quantitative easing, or QE. The jury is still out, though, about the program's full effects, intended and unintended, short-term and long-term. *In particular, the Fed stands accused of exacerbating economic inequality.* The argument is that quantitative easing boosts the price of financial assets, disproportionately benefiting holders of such assets — disproportionately the wealthy.
>
> This claim seems indisputable, at least as a description of the practice's immediate effects. Indeed, Fed officials from former chair Ben S. Bernanke on down said quantitative easing's "wealth effect" would stimulate the broader economy because the owners of more valuable portfolios feel like spending more. Additionally, much of this extra wealth could remain in the upper reaches of the distributional hierarchy even after the program ends, permanently affecting wealth distribution, because the rich have more capacity to take on risk and better access to market information. Exponents of this view include Mr. Bernanke's former Fed colleague Kevin Warsh and, in a paper published Thursday by the National Bureau of Economic Research, Nobel laureate Joseph Stiglitz.[100]

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[99] *See* Robin Wigglesworth et al., *Central Banks: Negative Thinking*, FINANCIAL TIMES (Feb. 17, 2016),http://www.ft.com/intl/cms/s/2/7333e92a-d4a2-11e5-829b-8564e7528e54.html#axzz41UDaKDwC.

[100] *The Federal Reserve and Inequality*, WASHINGTON POST (June 4, 2015), https://www.washingtonpost.com/opinions/the-federal-reserve-and-inequality/2015/06/04/cef652d4-0955-11e5-95fd-d580f1c5d44e_story.html (emphasis added).

So, QE injected trillions of dollars into the economy, but the money did not fall evenly across the population (even though, in theory, some of that money should have trickled down past the 1/10th of the 1%). To the contrary, data indicates only a few at the top reaped the benefits of QE. The benefit went to bankers, hedge fund managers, and other finance professionals. The benefit did not go to the middle or lower class. The link between QE and wealth inequality has been recognized and accepted by many (though others may disagree). A New York Times column blamed QE for aggravating inequality "by making the rich richer and the poor poorer" as a result of its goal to drive down interest rates to low levels, which, in turn, allowed the financial elite to access cheap money on a regular basis to benefit in extraordinary ways.[101]

Another columnist also pointed to the link between QE and growing wealth inequality, observing that QE boosted the value of stocks, real estate, and other assets—the types of assets that the rich own.[102]

The Fed, alone, injected more than $3 trillion into the economy through QE, and this amount of money does not include the QE programs of the central banks of other countries.[103] Where did this money go? It did not go to the middle class. Middle class incomes have been stagnant, at best, and the number

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[101] *See* William D. Cohan, *How Quantitative Easing Contributed to the Nation's Inequality Problem*, N.Y. TIMES (Oct. 22, 2014, 1:56 PM), http://dealbook.nytimes.com/2014/10/22/how-quantitative-easing-contributed-to-the-nations-inequality-problem/?_r=0.

[102] Mike Dolan, *Calling Time on Zero Rates and QE*, REUTERS (June 10, 2015, 2:06 AM), http://www.reuters.com/article/us-investment-monetary-qe-analysis-idUSKBN0OQ0GC20150610.

> But it's the unease about how zero rates and QE have aggravated rising wealth gaps that have caused most public debate and heaped on political pressure for a reversal.
>
> Many fear that while easy money supported workers initially by stabilizing and boosting employment, the outsize and persistent lift to stock, bond and real estate prices – owned mainly by the richest – has exaggerated an already extreme wealth skew, especially at a time of public spending cutbacks.
>
> What's more, Nobel laureate Joseph Stiglitz latest work on rising inequality said QE supercharged the wealth of the elite as they tend to hold more equity and property than middle classes, whose savings are mainly in pension-related fixed income and bonds that were shorn of returns and yield by QE.
>
> Since 2012, for example, total returns on stocks have risen 50 percent while bonds are flat. And surveys of millionaire investors, including one by Morgan Stanley this year, show they hold about a half to two-thirds in equities, real estate or alternatives and less than 30 percent in cash and bonds.

Id.

[103] How much is $1 trillion? A stack of one trillion $1 bills would be 68,000 miles high, or about a third of the way from the Earth to the moon. *See* Christine Romans, *Numb and number: Is Trillion the New Billion?*, CNN (Feb. 4, 2009, 3:46 PM), http://www.cnn.com/2009/LIVING/02/04/trillion.dollars/. If a person spent $1 million a day every day since Jesus was born, she still would not have spent $1 trillion. *Id.*

of middle class households has declined. The money did not go to those at the bottom. Their situation has not improved either. The answer is obvious. The money went to those in the top 1/10th of the 1%. How else to explain the strange situation of wealth explosion at the top of the financial pyramid, while all those below see no material improvement?[104] Ben Bernanke, former Chairman of the Fed (who implemented QE), admitted that one of the goals of QE was for the injection of money to trickle down to the entire economy and revive the global economy. This apparently has not occurred. It is not a coincidence, or a random result, that wealth inequality exploded in the past ten years or so, and it is naïve to think that growing inequality just happened to coincide during the times of numerous QE programs around the world. A well-worn phrase in academic circles is that correlation is not causation. In this situation, however, there is a direct causal relationship between QE and growing wealth inequality.

III. THE PROBLEMS POSED BY UNRESTRAINED WEALTH INEQUALITY

Perhaps the greatest danger posed by vast and increasing wealth inequality is the erosion in a common belief that the system is fair. America was built on the concept of a level playing field where even those who start at the bottom could overcome their circumstances. In such a system where equal opportunity exists, the shared view would be that the winners won fair and square. However, what happens when a society ceases to believe the playing field is level, and believes equal opportunity is a myth? What happens to the necessary social cohesion making it bearable to live in a society with a wide range of wealth? America has succeeded as a country with a large gap between rich and poor. There has been no widespread outcry to become like a Scandinavian country. This has been historically true, but can it remain so with a widening gap between rich and poor, and a shrinking middle class?

One commentator expressed concern that growing wealth inequality was giving rise to a popular view that the "system is rigged."[105] It even may be the

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[104] One way to think about the trillions of dollars of QE is to wonder what if the money had been spread evenly. This may be an impertinent way to analyze the situation, but it generates interesting results. Assuming $3 trillion of QE and 300 million people in the U.S., an even per capita distribution of that money would result in each person receiving $10,000. The Fed or the Treasury Department could have mailed a $10,000 check to each person. That amount may be large for many people, but perhaps the Fed implicitly decided that the economic impact would be greater by focusing $3 trillion on the financial sector rather than individuals.

[105] *See* Nicholas Kristof, *America's Stacked Deck*, N.Y. TIMES (Feb. 18, 2016), http://www.nytimes.com/2016/02/18/opinion/americas-stacked-deck.html?rref=collection%2Fcolumn%2Fnicholas-kristof&action=click&contentCollection=opinion&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection&_r=0.

> America's political system *is* rigged. The deck *is* stacked against ordinary people. That's the frustration that has fueled, in very different ways, the anti-

case that Americans are starting to pine for Scandinavian-like equality. In a study conducted by two business school professors, participants were shown charts of the distribution of wealth in egalitarian Sweden and in highly unequal America and were asked which kind of society they would prefer to live in, without identifying the countries—over 90% of Americans chose Sweden's distribution.[106]

Professor Stiglitz highlighted his concern over the loss of belief in the fairness of the economic system, and what it might mean.

> Of all the costs imposed on our society by the top 1 percent, perhaps the greatest is this: the erosion of our sense of identity, in which fair play, equality of opportunity, and a sense of community are so important. America has long prided itself on being a fair society, where everyone has an equal chance of getting ahead, but the statistics suggest otherwise: the chances of a poor citizen, or even a middle-class citizen, making it to the top

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> establishment campaigns of Donald Trump, Ted Cruz and Bernie Sanders in particular, and that is leading other candidates, like Hillary Clinton, to grab their pitchforks as well.
>
> 'Yes, the economy is rigged in favor of those at the top,' Clinton declared in the Democratic debate last week.
>
> One glimpse of the structural unfairness in America is this: A dumb rich kid is now more likely to graduate from college than a smart poor kid, according to Robert Putnam of Harvard University.
>
> Another: The 20 wealthiest Americans, a group that would fit comfortably inside a luxury private jet bound for a private Caribbean island, are worth more than the poorer half of the American population, according to a recent report from the Institute for Policy Studies. Forbes's wealthiest 100 are worth as much as all 42 million African-Americans, the report says.
>
> 'Correctly, we suspect that the system is rigged, our government has become coin-operated and that we've been sidelined,' Wendell Potter and Nick Penniman write in their eye-opening new book about money in politics, 'Nation on the Take.' They call for a 'profound course correction,' like those the United States has periodically undertaken before.

Id.

[106] *Id.* I contend that those who yearn for a Scandinavian system do not understand the deep differences between the United States and those countries, and that envy for Scandinavia is based on a naïve understanding of societies. Relative equality is much easier to achieve in countries with small populations of 5 to 10 million, and in which over 90% of the population is racially and ethnically homogenous. In such societies, consensus is easier to reach, and shared roots (going back millennia) would tend to lead to a belief that no one should be left behind. Contrast that with a country with over 300 million people of all races, religious backgrounds and ethnicities, who arrived in America at different times over a period of almost 400 years (this, of course, excludes Native Americans who have been here for thousands of years). The exceptional success of America is that one country was built upon such a diverse population.

> in America are smaller than in many countries of Europe. The cards are stacked against them. It is this sense of an unjust system without opportunity that has given rise to the conflagrations in the Middle East: rising food prices and growing and persistent youth unemployment simply served as kindling. With youth unemployment in America at around 20 percent (and in some locations, and among some socio-demographic groups, at twice that); with one out of six Americans desiring a full-time job not able to get one; with one out of seven Americans on food stamps (and about the same number suffering from 'food insecurity')—given all this, there is ample evidence that something has blocked the vaunted 'trickling down' from the top 1 percent to everyone else.[107]

In addition to the threat posed to social cohesion, Piketty advanced the view that wealth inequality actually causes financial instability and crisis.[108] He contends that one consequence of increasing inequality is stagnation of the purchasing power of the lower and middle classes in the United States, which leads to such modest households taking on more debt.[109] More debt increases financial instability. One may support Piketty's view based on the fact the financial crisis of 2007-2009 originated from the collapse of sub-prime mortgages in the United States, a problem caused by people in weak financial conditions signing up for mortgages they could not repay (with the encouragement of those involved in mortgage lending).

It follows that growing wealth inequality is the result of quantitative easing, which itself was implemented in response to the financial crisis of 2007-2009, and Piketty contends that wealth inequality is also a cause of financial instability. There is also support for the view that growing wealth inequality is a symptom of large and unresolved economic problems. It is an open issue whether QE did anything more than benefit the world of finance. Injecting trillions of dollars seems to have done little more than to increase the wealth of the top $1/10^{th}$. If QE were the cure to economic problems, surely it would have done more than increase the wealth of billionaires. If that is one of the main results of QE, then it is a symptom that large problems have not been addressed. For example, central banks do not adopt such a highly unconventional policy as negative interest rates unless there is great trouble lurking in the economy. "Negative interest rates are a sign of desperation, a signal that traditional policy options have proved ineffective and new limits need to be explored."[110] Thus,

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[107] *See* Stiglitz, *supra* note 3.

[108] PIKETTY, *supra* note 9, at 297.

[109] *See id.*

[110] Jana Randow & Simon Kennedy, *Negative Interest Rates*, BLOOMBERG (Jan. 29, 2016, 9:08 AM), http://www.bloombergview.com/quicktake/negative-interest-rates. "Negative interest rates are an ultramodern phenomenon; the product of a global financial system still struggling to

trillions of dollars flowed to the top of the financial pyramid, with little going to those in the middle or at the bottom. This injection of money was intended to solve a variety of global economic problems. It appears it did not work; the fact that two of the largest central banks in the world have implemented a negative interest rate policy proves the point. What rational policy-maker would design a system where trillions of dollars go to a tiny number of billionaires and centimillionaires while the fortunes of the middle and lower classes grow worse, and while not solving the problems that the vast money injections were designed to fix.

Vast wealth inequality holds the potential for societal disruption and a rupture in social cohesion. It may also play a part in creating financial crises. It seems that the type of inequality seen today may lead to unwanted and harmful outcomes. There are influential proponents of this view, but there are undoubtedly others who disagree. However, for those who disagree, simple questions linger: do good things come from a situation where there is explosive increase in wealth for the top 1/10th of the 1% while the middle and lower classes are losing ground? Would any rational policy-maker, starting from a blank slate, design and seek such a situation?

IV. THE LAW'S INERTIA

The definition of inertia is well known. A body at rest, or moving at a constant speed in a straight line, will remain at rest or keep moving in a straight line at constant speed unless a force acts upon it.[111] The shorthand description is that a body at rest tends to stay at rest, and a body in motion tends to stay in motion. If the law and its legal institutions are susceptible to an analogy based on the principles of mechanical physics, it is more like a body at rest than a body moving in a straight line at constant speed. Of course, the law is an ever-changing, dynamic system that responds to social needs. Nonetheless, it is a deeply conservative institution that mostly changes in increments. This is evidenced by the nature of common law itself. The common law evolves through the process of *stare decisis*, which means "to stand by things decided."[112] This process is designed to avoid revolutionary change; it places the emphasis on what

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reinvigorate economic growth in the wake of the global financial crisis." *Id. See also* Joseph Adinolfi, *This Map Shows All the Central Banks with Negative Interest Rates*, MARKETWATCH (Jan. 29, 2016, 1:02 PM), http://www.marketwatch.com/story/this-map-shows-all-the-central-banks-with-negative-interest-rates-2016-01-29 (negative interest rates adopted by central banks of Denmark, Japan, Sweden, Switzerland and the European Central Bank). According to one economist, the Bank of Japan implemented negative interest rates "not because it's effective, but because markets are collapsing and it feels it has no other option." *See* Leika Kihara, *BOJ Stuns Markets with Surprise Move to Negative Interest Rates*, REUTERS (Jan. 29, 2016, 9:38 AM), http://www.reuters.com/article/us-japan-economy-boj-decision-idUSKCN0V70A7.

[111] *See Newton's Laws of Motion*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/science/Newtons-laws-of-motion#ref12764 (last visited Oct. 25, 2016).

[112] *See Stare Decisis*, CORNELL U. L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis (last visited Oct. 25, 2016).

has already been done. It means courts presumptively defer to prior decisions even if the merits of the prior decisions are questionable.[113] It permits courts to avoid continuous re-evaluations of prior decisions and accepted doctrines, and thus provides predictability.[114] However, it also "encumbers the legal system's ability to quickly adapt to change."[115] The law is, therefore, like a body at rest tending to stay at rest.

Law is not physics, obviously. It is a creation of human activity. The reason why the law moves in increments is because it is designed to avoid upsetting the expectations and privileges of those who control the law. The law of Property is a prime example of how law was developed to protect the interests of the ruling elites. Even though there have been progressive movements in law that furthered the interests of those not in power (the Civil Rights movement comes to mind), the general nature of law is to protect those in power. Indeed, some of the most notorious Supreme Court decisions over the years were decisions to benefit the powerful ruling interests.

Perhaps the most notorious example was the *Dred Scott* decision.[116] That decision was quite explicit in identifying the persons and interests being served.

> It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.[117]

And the decision was rendered to protect the rights of property owners.

> And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.[118]

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[113] *See id.*
[114] *See id.*
[115] *Id.*
[116] *See generally* Dred Scott v. Sandford, 60 U.S. 393 (1857) (slaves of African descent are not citizens of the United States).
[117] *Id.* at 417.
[118] *Id.* at 451.

Dred Scott is a perfect example of the traditional role of law—protection of the interests of ruling elites.

The same theme appeared in another notorious case, *Lochner v. New York*.[119] In essence, Lochner was about the respective rights of employees and employers (framed as an issue of freedom of contract between the two). On a grander scale, it was about the tension between labor (the bakers) and capital (those who owned the bakeries). *Lochner* is another example of the Supreme Court unambiguously siding with the more powerful interest.

> There is no reasonable ground, on the score of health, for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker . . . .
>
> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.
>
> It is a question of which of two powers or rights shall prevail – the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes . . . .[120]

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[119] *See generally* Lochner v. New York, 198 U.S. 45 (1905) (no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract).
[120] *Id.* at 51, 57-58.

The opinion makes clear that the Court was concerned or fearful of attempts to increase the power of labor. It noted: "This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase."[121] It then goes on to question the motives behind laws designed to protect workers, and even seems to imply a sinister element.

> It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law.[122]

In sum, *Lochner* was a policy choice made to favor the more powerful interest. The fact the Court alluded to "other motives" without identifying them is ironic in that the Court itself was arguably acting with other (unidentified) motives itself. *Lochner* was clearly a victory for the powerful over the weak, and for those with superior (one-sided) bargaining power in contract.

To be sure, *Dred Scott* and *Lochner* belong to the past, but the law's protection and promotion of powerful interests is alive and well. *Citizens United* proves this point.[123] The fundamental issue centered on the legitimacy of the

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[121] *Id.* at 63.

[122] *Id.* at 64.

[123] *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (corporations and unions have the same political speech rights as individuals under the First Amendment, and no compelling government interest for prohibiting corporations and unions from using their general treasury funds to make election-related independent expenditures). Former Senator Feingold said this about the decision in 2012:

> As we draw closer to the November election, it becomes clearer that this year's contest, thanks to the Supreme Court's 2010 Citizens United decision, will be financially dominated by big money, including, whether directly or indirectly, big money from the treasuries of corporations of all kinds. Without a significant change in how our campaign finance system regulates the influence of corporations, the American election process, and even the Supreme Court itself, face a more durable, long-term crisis of legitimacy.
>
> For years, our political process was governed by an underlying principle: large organizations, primarily corporations, were not allowed to buy their way into elections. For 100 years, our laws reflected this principle.

Russ Feingold, *The Money Crisis*, STAN. L. REV. (June 2012), http://www.stanfordlawreview.org/online/money-crisis. U.S. News & World Report describes the impact of Citizens United in this way:

antidistortion rationale, which focuses on the ability of those with large amounts of money to spend on political speech to drown out or distort those with a lesser ability. The rationale aims to prevent corporations from obtaining "'an unfair advantage in the political marketplace' by using 'resources amassed in the economic marketplace.'"[124] Proponents of relaxed spending restrictions objected to the argument that the government has an interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections."[125] The majority in *Citizens United* agreed with the proponents of relaxed restrictions and loosened campaign finance restrictions. The majority opinion decided the First Amendment's protections do not depend on, and should not be restricted by, the wealth of a speaker's "financial ability to engage in public discussion."[126]

Justice Stevens' concurrence and dissent highlighted the ramifications of the majority opinion:

> Five years ago Wednesday, the Supreme Court handed down a decision that dramatically reshaped the business of politics in the U.S.
>
> In its Citizens United v. Federal Election Commission decision, the court opened the campaign spending floodgates. The justices' ruling said political spending is protected under the First Amendment, meaning corporations and unions could spend unlimited amounts of money on political activities, as long as it was done independently of a party or candidate.
>
> The result has been a deluge of cash poured into so-called super PACs – particularly single-candidate PACs, or political action committees – which are only nominally independent from the candidates they support. What's more, the legal protections for corporations mean much of this spending, known as "dark money," never has to be publicly disclosed.
>
> . . .
>
> As a result, a small group of wealthy donors has gained even more influence on elections, and are able to maintain that influence once candidates take office.
>
> *Of the $1 billion spent in federal elections by super PACs since 2010, nearly 60 percent of the money came from just 195 individuals and their spouses, according to the Brennan Center report.* Thanks to Citizens United, supporters can make the maximum $5,200 donation directly to a candidate, then make unlimited contributions to single-candidate super PACs.
>
> Campaign reform advocates say the amount of money spent is not inherently a problem; rather, it's the fact that a tiny number of extraordinarily wealthy individuals are bankrolling the majority of that spending.

Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS & WORLD REPORT (Jan. 21, 2015, 12:26 PM), http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics (emphasis added).

[124] *Citizens United*, 558 U.S. at 350.

[125] *Id.*

[126] *Id.*

> Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court's ruling thus dramatically enhances the role of corporations and unions—and the narrow interests they represent—vis-a-vis the role of political parties—and the broad coalitions they represent—in determining who will hold public office.[127]

In a time of vast wealth inequality, perhaps it is not surprising that the climate would be favorable for a decision like *Citizens United.*

V. CONCLUSION

In conclusion, the country is experiencing explosive wealth accumulation at the top 1/10th of the wealthiest 1%, while the middle class is shrinking, and middle to lower incomes are either stagnating or declining. Society seems to be turning into a "winner takes all" contest with a few winners who take most of the financial prize, and leaving a vast majority of those holding paltry amounts in comparison.[128] Is this the course the country wants to take? Is this situation sustainable for continued social cohesion? Perhaps current wealth inequality is not on the list of concerns for most people. This would be understandable even for those in financial distress. Even if someone else is worth billions of dollars and even if that is unfair on a societal level, objecting to it, or railing against it will not improve any one particular person's circumstances. Perhaps, then, the rational response is to adopt an attitude of: "Why should I care about wealth inequality? Caring about it will not solve any of my financial problems." Nonetheless, the two poles of the wealth spectrum are pulling apart in opposite directions. What happens if a widespread belief takes hold that financial gain or even stability belongs almost exclusively to a fortunate few, or if the base of a strong middle class continues to erode? Added to this is the problem of students with six-figure debts competing for jobs that will barely cover living expenses and loan repayments.

To repeat a question previously posed, would any rational policy-maker (starting from a blank slate) deliberately set out to create the situation that exists

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[127] *Id.* at 412.

[128] A "winner take all" situation has already taken a rough shape in the market for new lawyer salaries. Many law students are probably familiar with the bi-modal distribution of starting salaries for new lawyers, with a small number starting at annual salaries of $160,000 or more and a majority with staring salaries in the $50,000 range. The remarkable fact is that it is almost an "either or" situation, with few new lawyers making a salary somewhere between those two bi-modal points. *See Class of 2013 Bimodal Salary Curve*, NAT'L ASS'N FOR LAW PLACEMENT (July 2013), http://www.nalp.org/class_of_2013_bimodal_salary_curve.

today? I think most people would agree that no one would try to create the present situation from scratch. Yet, here we are. If there is general agreement that growing wealth inequality is undesirable, then what will alleviate the situation? One way to approach this question is to ask what reduced the wealth inequality from the Gilded Age. It seems that inequality was reduced through a combination of several factors. One factor took the form of changes in the law. Child labor laws were implemented and Jim Crow laws were abolished. However, it is more likely the law was not the most significant factor. It seems that much more significant factors were political, technological, and geopolitical changes. For example, political changes were exemplified by various New Deal policies, such as the creation of Social Security. This change enabled most of the elderly to avoid ruinous poverty. Technological changes included the almost universal availability of electricity and indoor plumbing. Geopolitical change appeared in the form of America's emergence as a relatively unscathed superpower after World War II, and the rapid expansion of the country's economy in the post-war years, which led to the rise of the American middle class.

Thus, I would argue the law played a relatively minor role to the other changes in alleviating the wealth inequality of the Gilded Age. Again, I contend that the law did not take the leading role because of its inherently conservative nature, and its role in protecting the status of those with wealth and power. So what, if anything, will alleviate the current wealth inequality? Does anyone foresee a post-World War II type of economic growth for the United States? That seems unlikely, so wealth inequality will likely not be alleviated by a repeat of that kind of growth. But I do not rule out (and remain hopeful) that future economic growth may be achieved by advances in technology. Perhaps technology will change the situation. Perhaps technology will come up with ways to treat life-threatening diseases and conditions. Perhaps it will come up with forms of cheap, sustainable, universally available energy. Such changes would certainly improve all lives, not just those at the top. As for geopolitical changes, the biggest change seems to be the rise of China, but I make no effort to guess at the possible outcomes. It is too difficult to predict how wealth inequality will be affected by America's future in the world, because that future is too unpredictable.

Therefore, my view is that the law will be a lagging response to wealth inequality (assuming that concerns about such inequality reach a level of widespread popular concern). But if it is ever to provide a response, it will only do so upon exertion of an extraordinarily large external force to move its inert mass toward alleviation of wealth inequality. The creation of such a force is difficult, but certainly not impossible. The Civil Rights movement is an example of great force imposed by those without power to achieve changes in the law. Nonetheless, the lessons from that era show that such changes will require time, growing popular support, and sustained commitment to achieve changes. That is what is required if the law and its institutions are to address wealth inequality.[129]

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[129] On a final note, I wish to make clear that this paper is in no way meant to be an expression of support for anyone running for President. Even though this paper is written in the midst of the 2016 presidential primaries, it is not about any candidate. I write this paper because I care about fairness and equal opportunity, and I view growing wealth inequality as a threat to both.