

# “THE ABILITY TO PAY” IN TAX LAW: CLARIFYING THE CONCEPT’S EGALITARIAN AND UTILITARIAN JUSTIFICATIONS AND THE INTERACTIONS BETWEEN THE TWO

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*A vast amount of tax literature appeals to the premise that a system of taxation should assign tax burdens according to taxpayers’ “ability to pay.” Despite the broad-based assent to the importance of “ability to pay,” however, there has been far from a consensus on why it is important, or even on what the term means. These confusions are frequently overlooked, though, because many of the characterizations of and justifications for “ability to pay” come out the same way on various issues—thus masking the differences among the viewpoints. In this Article, I attempt to unpack and shed much-needed light on the term “ability to pay.”*

*It turns out that the notion of “ability to pay” is employed for two main reasons: Distributing the tax burden according to people’s ability to pay furthers both egalitarian and utilitarian ideals. In this Article, I begin by teasing these goals apart and by explaining how they are furthered by distributing the tax burden according to people’s “ability to pay.” I then proceed to explore in greater depth how successful the notion of “ability to pay” is at furthering each of these two goals, and I consider different ways of assigning the tax burden (and different collection methods) that could perhaps better further egalitarian and utilitarian goals. While many accounts further both goals somewhat well, and while many of these same accounts further one goal extremely well, it is difficult to identify an account that furthers both goals extremely well.*

*Ultimately, I zero in on an account that, in my view, best satisfies the egalitarian goal and best satisfies the utilitarian goal. Further, because it best satisfies both individual goals, I argue that it is also the account that best satisfies the underlying ambition of an “ability to pay” tax system to further both goals. The account that I offer is a version of a utility tax—a version both according to which the tax is collected in terms of utility, and according to which the tax burden is determined in terms of utility.*

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*The account I offer, in various ways, could be described as an “ability to pay” tax in terms of utility. Thus, although I begin the Article by exploring the notion of an “ability to pay” tax and I then argue that an “ability to pay” tax, as it currently exists, is not the account that best furthers egalitarianism and efficiency, the account I defend does incorporate some key features of an “ability to pay” tax (despite being very different in other ways). Further, it is only in virtue of unpacking the notion of “ability to pay,” and exploring the rationales and justifications that underlie it, that I will be able to identify the account I defend, recognizing its unique ability to simultaneously further egalitarian and utilitarian goals.*

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## INTRODUCTION

A vast amount of tax literature appeals to the premise that a system of taxation should assign tax burdens according to taxpayers' "ability to pay." Despite the broad-based assent to the importance of "ability to pay," however, there has been far from a consensus on why it is important, or even on what the term means. These confusions are frequently overlooked, though, because many of the characterizations of and justifications for "ability to pay" come out the same way on various issues—thus masking the differences among the viewpoints. In this Article, I attempt to unpack and shed much-needed light on the term "ability to pay."

It turns out that the notion of "ability to pay" is employed for two main reasons: Distributing the tax burden according to people's ability to pay furthers both egalitarian and utilitarian ideals. In this Article, I begin by teasing these goals apart and by explaining how they are furthered by distributing the tax burden according to people's "ability

to pay.” I then proceed to explore in greater depth how successful the notion of “ability to pay” is at furthering each of these two goals, and I consider and address different ways of assigning the tax burden (and different collection methods) that could perhaps better further egalitarian and utilitarian goals. While many accounts further both goals somewhat well, and while many of these same accounts further one of the goals extremely well, it is difficult to identify an account that furthers both goals extremely well.

Ultimately, I zero in on an account that, in my view, best satisfies the egalitarian goal and best satisfies the utilitarian goal. Further, because it best satisfies both individual goals, I argue that it is also the account that best satisfies the underlying ambition of an “ability to pay” tax system to further both goals. The account that I offer is a version of a utility tax—a version both according to which the tax is collected in terms of utility, and according to which the tax burden is determined in terms of utility. In its determination of the assignment of the tax burden, the account incorporates Frances Y. Edgeworth’s principles of an efficient tax<sup>1</sup> while simultaneously pursuing egalitarian redistribution. In my view, as I argue, the appropriate “equalisandum” (i.e., the “thing to be equalized”) for the egalitarian to seek to redistribute is utility (i.e., happiness). Further, as I argue, the egalitarian should seek redistribution either to a full extent or to the extent that the equalisandum is possessed due to luck and not choice. My proposal will satisfy these two aspects of the egalitarian position while simultaneously furthering utilitarian principles.

The account I offer could, in various ways, be described as an “ability to pay” tax in terms of utility. Thus, although I begin the Article by exploring the notion of an “ability to pay” tax and I then argue that an “ability to pay” tax, as it currently exists, is not the account that best furthers egalitarianism and efficiency, the account I defend does incorporate some key features of an “ability to pay” tax (despite being very different in other ways). It is only in virtue of unpacking the notion of “ability to pay,” and exploring the rationales and justifications that underlie it, that I am able to identify the account I defend, recognizing its unique ability to simultaneously further egalitarian and utilitarian goals.

As will become evident, the contributions of this Article will be both theoretical and practical.

As for the theoretical contribution: The theoretical contribution, as I have already described, is to bring clarity to an area of the law that

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1. See Section II.A, *infra*, for a discussion of this topic.

is in much need of it. I explore the notion of "ability to pay" and unpack it, extracting the underlying goals. I then explore the various ways of furthering these goals independently and then, importantly, I explore the ways of jointly furthering these goals and I offer a proposal that successfully does so.

As for the practical contribution: Although much of the Article is carried out in theoretical terms, the practical applications and implications of the theoretical debates and analysis are significant. As I discuss, there are a number of specific current tax policy questions that are greatly affected by the debates and analysis in this Article. Among the practical questions that are affected by the analysis in this Article, just to name a few, are (1) whether we should have deductions for educational expenditures, (2) whether there should be separate rate schedules for married couples who file jointly, (3) to what extent fringe benefits should be taxable, and (4) whether personal consumption should include or exclude outlays for medical expenses. Thus, this article can provide greater clarity to policymakers about how to proceed with regard to the wide variety of tax policy questions and decisions that are at stake in these theoretical debates.

I begin in Part I by describing the prevalence of the vague term "ability to pay" and by discussing its roots in the thought of John Stuart Mill. I then explain and emphasize the importance of teasing apart its utilitarian and egalitarian justifications. Next, in Part II, I argue that the term "equal sacrifice"—frequently used to describe the appropriate tax burden on taxpayers according to the ability to pay—is neither useful nor relevant for either utilitarianism or egalitarianism. The focus on defining "equal sacrifice" is both futile and, more importantly, misplaced. I suggest that focusing on the end state of affairs, rather than the sacrifice, is what is relevant.

Having made this key point that it is the end state, and not the sacrifice, that is relevant, I then turn, in Parts III and IV, to an analysis of what the appropriate end states are from the perspective of utilitarianism and egalitarianism. I will have already outlined the utilitarian account of the ideal end state, though, in Part II, when explaining why equal sacrifice is not relevant for the utilitarian. Thus, Parts III and IV focus primarily on the question of what the appropriate end state is for a "pure" egalitarian (someone whose only guiding principle is egalitarianism).

In Part III, I begin by discussing Daniel Markovits's understanding of the goal of egalitarianism, which, from his perspective, is preventing the subordination of persons. I then discuss his description of the two aspects of the egalitarian project: (1) determining an appro-

priate “equalisandum,” which is an item that should be subject to redistribution, and (2) determining the appropriate extent of redistribution of the equalisandum.<sup>2</sup> In exploring these two aspects of the egalitarian project, I first determine whether the two questions indeed are completely distinct questions. I explain why, despite prima facie appearances to the contrary, the two questions are indeed two distinct questions that rightfully can be addressed separately. I then proceed to discuss the two questions in turn. I conclude that the appropriate equalisandum for the egalitarian is utility, and then I explain why it seems that the pure egalitarian seemingly should espouse only full, and not partial, redistribution. Then, however, I consider the view of so-called “luck egalitarians,” according to whom the equalisandum should be subject to redistribution to the extent it is possessed due to luck but not to the extent that it is possessed due to choice. I conclude that, despite this amounting to a form of partial redistribution, this account of the extent of redistribution is in fact a viable position for the pure egalitarian to hold. I argue that a pure egalitarian need not adopt this position, however, and thus the options for a pure egalitarian in determining the extent of redistribution are either full redistribution or partial redistribution if the partial redistribution is redistribution according to the luck/choice distinction.

Next, in Part IV, I consider ways in which tax law might be able to implement the views of the pure egalitarian and, in particular, the pure egalitarian’s possible views with respect to the luck/choice distinction. To this end, I discuss the recent literature on the so-called “endowment tax.” I consider whether the endowment tax could satisfy egalitarian goals, and I conclude that although the endowment tax itself could not, a variant of the endowment tax could. I then consider and address a host of possible objections that can be raised against the endowment tax and the variant of the endowment tax.

By this point, I will have sketched out what an ideal system would look like from the perspective of a pure egalitarian and from the perspective of a utilitarian, but these inquiries will have, for the most part, been carried out separately and in parallel. Given that most individuals, and certainly society as a whole, values both principles at least to some degree, the question that arises is whether, and if so how, a tax system can further both principles. I grapple with this question in Part V. It is not immediately obvious how to simultaneously satisfy both principles, but, in Part V, I offer a proposal that I think does

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2. Daniel Markovits, *How Much Redistribution Should There Be?*, 112 *YALE L.J.* 2291, 2292 (2003).

simultaneously satisfy both principles. The account I offer is one that bears some resemblance to an "ability to pay tax," but which operates completely in terms of utility: It both determines the distribution of the tax burden in terms of utility and it also collects tax payments in the form of utility. These payments in the form of utility will sometimes be in the form of monetary transfers, but not always, and the percentage of the utility transfers that are in the form of monetary transfers in my account will be much smaller than the percentage of utility transfers that are in the form of monetary transfers in our current system.

Next, in Part VI, I canvas the various theoretical implications and practical applications of my analysis. The theoretical implications will be addressed in Part VI only briefly, because they will be fairly evident from the Article's previous discussions. The practical applications section, however, will point to and discuss the specific tax policy questions—some of which were mentioned above—that are affected by the debates and analysis in this Article. Lastly, I close the Article with a brief conclusion.

One final clarification is in order before continuing. In this Article, I explore two of the main goals of the tax system's assignment of the tax burden: fairness and efficiency. With respect to fairness, my exploration, more specifically, is into the egalitarian notion of fairness. Thus, the Article's primary inquiries are into egalitarianism and into efficiency (utilitarianism). It is important to note, however, that fairness and efficiency are not the only possible goals of a tax system, and that egalitarianism is not the only possible notion of fairness that one might employ when seeking to further the goal of fairness in the tax system.

Another possible principle of fairness that one might espouse and seek to further, for example, would be libertarianism.<sup>3</sup> Someone whose only guiding principle is libertarianism (i.e., someone whom I might refer to as a "pure libertarian") would likely not be in favor of "ability to pay" taxation. Pure libertarians likely would not think that greater income should necessitate a payment of a larger sum of money to the government in taxes.<sup>4</sup>

Importantly, as a result of the fact that there are different possible conceptions of fairness that a person might think should be furthered by the tax system, and different conceptions of what else, in addition to efficiency and fairness, should be furthered by the tax system, the tax system can be seen as a compromise: a compromise between the

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3. See ROBERT NOZICK, *ANARCHY STATE AND UTOPIA* (1974).

4. *Id.* at 26–53, 88–119.

different ideals espoused by different individuals, and even as a compromise among the different ideals that, in most cases, are simultaneously held by any single individual. As a result of these various competing values, the tax system does not and should not necessarily be an implementation of any single pure view (i.e., a view according to which there is just one thing of value to be pursued).<sup>5</sup> Thus, it is important to be clear that the tax system is and should be a system that is an implementation of a more convoluted and hybrid set of principles, rather than an implementation of any pure principle (e.g., pure utilitarianism or pure egalitarianism), or even an implementation of merely two principles (such as the implementation of utilitarianism and egalitarianism).<sup>6</sup>

Notwithstanding these key points, however, this Article's inquiry into, and focus on, (pure) utilitarianism and (pure) egalitarianism is both an appropriate and fruitful narrowing of inquiry and focus. This is because utilitarianism and egalitarianism have historically been, and still are, thought to be the two main principles that should and do underlie our determination of how to distribute the tax burden.<sup>7</sup> Further, while it is true that utilitarianism and egalitarianism are two of the main principles thought to underlie our determination of how to distribute the tax burden, it is the case *even more so* that these two principles dominate the landscape of principles justifying the theory of taxation according to which the tax burden should be distributed according to people's ability to pay. Furthermore, it is this specific theory of taxation—"ability to pay" taxation—that is the focus of this Article.

In light of these considerations, how one understands the conclusions of this Article will, in part, be a function of one's views: It could be that one thinks that the theories and principles discussed in this Article constitute the full picture, and, if so, then my conclusions are conclusions about what the tax system should look like "full-stop." At the very least, however, the theories and principles discussed in this Article constitute key components of the full picture. Thus, even if one thinks that there are additional considerations that we must take into account when we determine tax law and policy, the considerations and conclusions in this Article should, at the very least, play a prominent role in guiding our determinations and decisions.

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5. See, e.g., Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1 (2006); Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343 (1989).

6. See Avi-Yonah, *supra* note 5.

7. See Griffith, *supra* note 5, at 345.

## I.

## "THE ABILITY TO PAY"

A. *An Introduction to the Concept of "the Ability to Pay" and Its Two Underlying Justifications*

Despite the pervasiveness of the usage of the term "ability to pay" in determining tax burdens, it is not immediately clear that a tax *must* be financed according to ability to pay, and some believe that it should not be.<sup>8</sup> An alternative system of allocating the tax burden is for governmental expenditures to be financed by a benefits tax.<sup>9</sup> Under a benefits tax, people pay the government according to the benefits they receive from tax expenditures. Note that a benefits tax could take the form of either regressive, flat (i.e., proportional), or progressive tax schemes, depending on how one defines and calculates the value of benefits received by taxpayers. For example, a benefits tax would result in a progressive taxation scheme if we believe that the rich are receiving greater benefits from the government, due, for example, to greater use of the government's enforcement of contracts and property rights.<sup>10</sup>

"Ability to pay" theories, however, are, at their core, conceptually opposed to benefit taxation, because according to the "ability to pay" tradition, the allocation of tax burden among the populace is *unrelated* to the benefits conferred by the government on the taxpayer.<sup>11</sup> The same tax structures could be prescribed by a benefits tax theory and an "ability to pay" theory, but if this were the case, it would be an extremely improbable coincidence.

A benefits tax and an "ability to pay" tax, however, are both methods for collecting tax revenue—or for characterizing the collection of revenue. So, what is the difference? A benefits tax is simply a means for charging citizens for the governmental services they use. An "ability to pay" system can be seen as a system that includes this goal of the benefits tax, but which, in addition, has a component of wealth redistribution.<sup>12</sup> Thus, the tax burden on any particular citizen can be seen as the sum of (1) the cost of governmental services that benefit him and (2) a redistribution of wealth cost (which among a

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8. See, e.g., RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 137–38 (1995).

9. Stephen Utz, *Ability to Pay*, 23 *WHITTIER L. REV.* 867, 889 (2002).

10. See, e.g., RICHARD A. MUSGRAVE, *TAX PROGRESSIVITY AND INCOME INEQUALITY* 341 (Joel Siemrod ed., 1989); NOZICK, *supra* note 3, at 26–53, 88–119.

11. NOZICK, *supra* note 3, at 26–53, 88–119.

12. See, e.g., MUSGRAVE, *supra* note 10, at 341; NOZICK, *supra* note 3, at 26–53, 88–119.

large part of the population will be negative). Thus, an “ability to pay” tax system necessarily redistributes wealth. A question that arises, though, is why do we want to redistribute wealth? And, in a similar vein, how much should we redistribute wealth? Thus, how do we determine a person’s “ability to pay”?

The concept of ability to pay goes at least as far back as John Stuart Mill.<sup>13</sup> According to Mill, the burdens on taxpayers should be designed so that each taxpayer contributes an equal sacrifice, and while he said vaguely that this sacrifice should be in terms of “means,” he did not give many specifics about how to perform the calculus.<sup>14</sup> As Stephen Utz posits, though, Mill’s “comments were naturally understood to assume a utilitarian analysis of sacrifice: The sacrifice an individual makes by paying a given tax is the net cost in utility of paying the tax.”<sup>15</sup> From this point on, scholars have adopted Mill’s language of “equal sacrifice.”<sup>16</sup> Although Mill was more specific about the importance of the imposition of equal sacrifices on taxpayers, Mill and his followers also thought that it was similarly important to reduce as much as possible the burden on the society of taxpayers on the whole.<sup>17</sup> It was a “happy coincidence” for Mill that both of these goals seemingly could be achieved by creating a tax according to the single condition that we have people contribute equal sacrifices.<sup>18</sup> Although Mill seemingly killed both of these birds with one stone, as I show below, it is not always the case that this is possible. I begin, though, by describing how each of these goals respectively seemingly is achieved by implementing an equal sacrifice.

Mill made the common assumption that the utility of money decreases as one’s income increases—that there is diminishing marginal utility of money.<sup>19</sup> According to Mill, having higher earners pay some

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13. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* 804 (W. J. Ashley ed., Longmans, Green & Co. 1909).

14. *Id.* at 805.

15. Utz, *supra* note 9, at 887.

16. *See, e.g.*, HENRY SIDGWICK, *THE PRINCIPLES OF POLITICAL ECONOMY* 563 (3d ed., Macmillan & Co., Ltd. 1901) (arguing “there is an important constitutional ground for maintaining equal diffusion of the burden of taxation”); Jeffrey H. Kahn, *Personal Deductions—A Tax “Ideal” or Just Another “Deal”?*, 1 MICH. ST. L. REV. 1, 21–23 (2002) (describing the equal sacrifice theory and finding that it “provides the most compelling argument for progressivity”); James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129, 1130 (2008) (noting that concerns about equity of taxes date back to John Stuart Mill, among others).

17. MILL, *supra* note 13, at 804.

18. Utz, *supra* note 9, at 889.

19. MILL, *supra* note 13, at 804.

amount of money more than lower earners, if calibrated correctly, would bring about an equal sacrifice of utility.<sup>20</sup> While the rich would pay more money, a properly-calibrated system would take into account the diminishing marginal utility of money and institute a tax structure that would spit out values that would result in all taxpayers sacrificing the same amount of utility to the government.

Mill also thought that the system of taxation that would bring about equal sacrifice—and thus tax equity—would simultaneously minimize the burden on society in general.<sup>21</sup> Mill thought that taking more money from the rich than from the poor would be more efficient than taking the same amount of money from everyone, because, due to the diminishing marginal utility of money, taking more money from the rich would impose less of a decrease in utility for the rich person than it would for the poorer person who has a greater need for the money.

Thus, Mill thought that by having the tax system determine tax burdens according to people's ability to pay (and, more specifically, by having all people be charged an amount that would bring about an equal sacrifice), we as a society would bring about a result that simultaneously (1) is equitable among taxpayers, and (2) minimizes the overall burden on society as a whole, thus maximizing efficiency.

*B. The Two Justifications Underlying "Ability to Pay" Taxation, and the Importance of Distinguishing Between Them*

I will shortly return to discuss problems with the term "equal sacrifice" both in regards to tax equity and societal welfare, but, before doing so, I will discuss the importance of distinguishing between these two different justifications for a tax premised on the ability to pay.

As Thomas Griffith notes, debates in tax policy often appeal to the concept of "ability to pay," yet fail to distinguish between its two primary justifications—utilitarianism and egalitarianism.<sup>22</sup> According to Griffith, equivocation between these justifications undermines many arguments about tax policy, and the conclusion of Griffith's *Theories of Personal Deductions in the Income Tax* is that "a satisfactory tax policy must make its underlying ethical assumptions and dis-

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20. While Mill seemed to be a proponent of a consumption tax, see Utz, *supra* note 9, at 891, the details of Mill's choice among an income tax, consumption tax, a different option, or a hybrid of more than one is not relevant to this discussion.

21. MILL, *supra* note 13, at 804.

22. Griffith, *supra* note 5, at 345.

tributional goals explicit.”<sup>23</sup> Griffith focuses on the debate among William Andrews, Mark Kelman, and others, about the appropriate role of personal deductions in an income tax.<sup>24</sup> I will focus on the equivocation that Griffith finds in Andrews’s position, and in particular with respect to the medical expense deduction.

Unlike Kelman, who thinks that net income is the ideal tax base and thus thinks that medical and charitable deductions are inappropriate, Andrews believes that the ideal tax base is “personal consumption and accumulation of real goods and services,” and not net income.<sup>25</sup> Andrews then defines personal consumption so as to exclude outlays for medical expenses. As Griffith says:

An examination of Andrews’ argument in favor of taxation according to material well-being reveals two distinct and essentially inconsistent underlying normative principles. The first principle holds that the tax burden should be apportioned according to a taxpayer’s *overall* level of well-being so that an individual with a higher level of overall welfare will bear a greater tax burden, even if the difference is due to nonmonetary factors. This principle of taxation is egalitarian. The second principle holds that the tax burden should be allocated to maximize the *marginal well-being created by income*. The principle would require that the tax burden be apportioned to reduce the aggregate welfare loss from taxation and thus maximize utility. This principle is utilitarian.<sup>26</sup>

As Mill recognized, there is a “happy coincidence,” because these two principles frequently are satisfied by the same policy or rule. While Griffith boldly says that the two principles are “essentially inconsistent,”<sup>27</sup> a better statement of his view seems to be that while there are many situations where the two principles yield the same result, it is important to note that there are various situations in which the two principles are inconsistent with one another.

For example, Andrews argues that it is appropriate that settlements for personal injury claims are excludable from an individual’s taxable income. He defends this statement by appealing to the egalitarian prong of “ability to pay” theory—that taxation should be according to overall well-being.<sup>28</sup> Andrews says:

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23. *Id.*

24. William Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972); Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an ‘Ideal’ Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831 (1979).

25. Andrews, *supra* note 24, at 313; Kelman, *supra* note 24, at 833–35.

26. Griffith, *supra* note 5, at 370 (citation omitted).

27. *Id.*

28. Andrews, *supra* note 24, at 334.

It would seem strange to call the provision of medical services in such a case a windfall since it only serves as a remedy for the injury. The taxpayer is no better off after the whole transaction than before he incurred his injury, and it would be unnatural to view the provision of medical service in isolation from the injury as producing a taxable gain.<sup>29</sup>

Andrews then suggests that if this is true, then, by the same analysis, medical care for diseases should not be included in the tax base. The crux of Andrews's intuition is that you should not be taxed on something if it does not make you any better off. Under this theory—i.e., under egalitarian principles—"the allocation of additional income to less well-off individuals can be justified even if those individuals do not have greater economic needs so long as the allocation reduces inequality of overall well-being."<sup>30</sup> Utilitarianism, however, is concerned with the "marginal burden of taxation,"<sup>31</sup> and would not be in favor of excluding personal injury settlements if it were the case that an injured party did not have an increased economic need as a result of the injury. Thus, in a situation where the person's injury payments are spent on medical care, the two principles would yield the same result, but if the payment left the injured party with less of a need for money, then it should be included in the tax base.

While Andrews appeals to the egalitarian justification—and not the utilitarian justification—for the ability to pay in the above situation, there are times when Andrews does just the opposite. Andrews argues that the medical expense deduction (as opposed to the personal injury recovery exclusion) is appropriate because (assuming two parties with identical income and identical non-medical expenses) the person who spends a third of his income on medical expenses will be that much poorer and have that much less disposable income.<sup>32</sup> His economic need (and thus the marginal utility of his dollars earned) will be greater because the money spent on medical attention is not, in any meaningful sense, being consumed. Andrews is in favor of this deduction even though, in some situations, the overall well-being of the two people will be the same despite the fact that one person will have spent more money on medicine. In other words, even if the medical expenditures bring Person 1 as much overall utility as does Person 2's different use of the last one-third of his salary does for Person 2, Andrews thinks that there should be a deduction. Thus, in this situa-

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29. *Id.*

30. Griffith, *supra* note 5, at 372.

31. *Id.* at 373.

32. Andrews, *supra* note 24, at 334.

tion, Andrews defends his theory of ability to pay by appealing to utilitarianism and by abandoning the egalitarian justification.<sup>33</sup>

As Mill said, both egalitarianism and utilitarianism are generally in favor of redistributive taxation.<sup>34</sup> Griffith, however, makes clear that they support “equal sacrifice” for different reasons. As Griffith says:

The egalitarian supports redistributive taxation because it will improve the welfare of the less well-off. The utilitarian, on the other hand, supports redistributive taxation because income is worth more to poorer individuals. The egalitarian, unlike the utilitarian, will continue to support redistribution to the less well-off even if, due to incentive effects or other factors, the improvement in the welfare of the less well-off is smaller than the reduction in the welfare to the better-off.<sup>35</sup>

Thus, it is important to realize that the concept of ability to pay is actually a concept that embodies two separate—and at times, inconsistent—principles. One embodies an egalitarian notion of tax equity and the other is utilitarian.

## II.

### EQUAL SACRIFICE

Up until now I have dealt with the question of *why* we might want to perform the redistribution that we are doing by subscribing to an “ability to pay” tax as opposed to a benefits tax: utilitarianism and egalitarianism. The next questions, though, are: (1) How much redistribution should there be? and (2) What should be redistributed? With regard to both egalitarian and utilitarian principles, the “ability to pay” literature answers these questions by referring to the vague term “equal sacrifice.”<sup>36</sup> The problem, however, is that this just pushes the question up one level: What is an “equal sacrifice”? I argue that, contra Mill and the other scholars who use the term, “equal sacrifice” is not relevant or useful to get at what is important to a utilitarian or to an egalitarian. When espousing the use of the term, Mill thought that tax equity was the main goal,<sup>37</sup> and that the utilitarian societal goal was secondary (but, as discussed above, he thought that their overlap was a “happy coincidence”<sup>38</sup>). As such, I focus primarily on the

33. Griffith, *supra* note 5, at 374.

34. MILL, *supra* note 13.

35. Griffith, *supra* note 5, at 375.

36. MILL, *supra* note 13, at 804.

37. *Id.*

38. See *supra* note 18 and accompanying text.

problems with using the term "equal sacrifice" to achieve tax equity. I discuss the problem of the difficulty of defining the term, and I then raise a deeper concern: whether "equal sacrifice" is of any moral significance even if it can be successfully defined. First, however, I discuss why "equal sacrifice" is not useful for utilitarian purposes.

#### A. *Equal Sacrifice and Utilitarianism*

According to Mill, taxing people in accordance with the principle of equal sacrifice brings about the efficient result for society.<sup>39</sup> Mill had argued that an equal sacrifice in terms of quantity of utility per person would lead to the least sacrifice in society on the whole. F. Y. Edgeworth, however, famously put forth a different argument in *The Pure Theory of Taxation*.<sup>40</sup> According to Edgeworth, assuming that taxpayers do not change their behavior in response to the new regime of taxation, the most efficient system will be to confiscate "the highest incomes and then the next highest incomes until the required yield is achieved."<sup>41</sup> The rationale here is that, assuming people have identical utility schedules, and assuming the truth of diminishing marginal utility of money, the cost in utility of taking money from the richest person will be cheaper than taking from any other taxpayer until the richest man's remaining salary is equal to the salary of the second richest taxpayer. This proposition is different from Mill's because under Edgeworth's theory of the most efficient tax, a large portion of society will not make an "equal sacrifice," but rather, will pay nothing at all.<sup>42</sup> As Utz writes, "equal sacrifice can be understood to require each taxpayer to give up that portion of his or her money income that will produce the least aggregate sacrifice,"<sup>43</sup> but while we could define "equal sacrifice" as being what goes on in Edgeworth's optimal tax structure, this would be a contrived definition of "equal sacrifice." There is nothing that the sacrifices of the taxpayers have in common other than conforming to Edgeworth's theory of efficiency.

This utilitarian account of the optimal tax for society, however, does not take into account the effect that such a tax would have, in reality, on the incentives of high earners to work. Edgeworth thus concedes that the most efficient tax in practice would actually need to take the incentive effect into account, and thus might not involve tax

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39. MILL, *supra* note 13, at 804.

40. Frances Y. Edgeworth, *The Pure Theory of Taxation*, 7 *ECON. J.* 46 (1987).

41. Utz, *supra* note 9, at 896.

42. Edgeworth, *supra* note 40, at 52.

43. Utz, *supra* note 9, at 892.

rates even close to those described in his pure theory.<sup>44</sup> There is no reason to assume, though, that the actual efficient rates would coincide with our understanding of “equal sacrifice”—whatever it in fact is.<sup>45</sup> Thus, referring to the term “equal sacrifice” is not relevant for the project of coming up with an optimally efficient tax structure.

### B. *Equal Sacrifice and Egalitarianism*

As I have stated, the two rationales for taxing according to people’s ability to pay are efficiency and fairness. Further, while there are various possible accounts of fairness, the account of fairness employed as a rationale for “ability to pay” taxation is egalitarianism.<sup>46</sup> Thus, in this section, I explore egalitarianism and how taxing according to equal sacrifice allegedly promotes egalitarianism.

Egalitarianism, however, just like the notion of fairness, has many sub-camps and many different definitions. While I explore the definition of egalitarianism in depth at a later point,<sup>47</sup> the preliminary understanding that I use is that a society is just if a particular morally-relevant equalisandum (i.e., item to be redistributed) is possessed equally by all individuals, so that persons are not subordinated to one another. As Markovits says, “[e]galitarianism insists that all people’s lives are equally important and, accordingly, that no person’s fortune may be subordinated to anyone else’s.”<sup>48</sup> One might object that there is no person who is a pure egalitarian (i.e., that no one thinks that equality is the only important criterion of a good society, at the exclusion of other concerns—such as absolute welfare levels), but, as I have stated, even if this were true, it would still be crucial to understand the intuitions behind egalitarianism if it is a principle that we want to implement at all in our policies—even if it is never the only relevant value.

The focus on “equal sacrifice” in the “ability to pay” literature in order to appeal to our egalitarian concerns and intuitions, however, is misplaced. For one, “equal sacrifice” seems to be a meaningless and empty term because of the intractability of the problem of defining it. Further, even if we could define “equal sacrifice,” it is not morally significant and it is not what egalitarianism is after. Related to this second point, it is not clear whether partial redistribution is a viable option for an egalitarian.

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44. Edgeworth, *supra* note 40, at 52.

45. *See infra* Section II.B.

46. *See supra* Part I.

47. *See infra* Part III.

48. Markovits, *supra* note 2, at 2291.

While there has been much agreement in the "ability to pay" literature that taxpayers should make "equal sacrifices," there has not been agreement on what this means.<sup>49</sup> In fact it seems as though coming to agreement on what constitutes an "equal sacrifice" may be an unattainable goal. Mill thought that an equal sacrifice meant an equal sacrifice in terms of units of utility, and one in which individuals were sacrificing the same *number of units* of utility.<sup>50</sup> This is what Utz terms "absolute equal sacrifice."<sup>51</sup> Another option is to define equal sacrifice as an "equal proportional sacrifice."<sup>52</sup> With equal proportional sacrifice, taxpayers will each sacrifice the same *percent* of their total utility. For example, consider two taxpayers: Person 1 has an income which gives him 500 units of welfare and Person 2 has an income which gives him 200 units of welfare. Under absolute equal sacrifice, they may each be required to pay fifty units of welfare, reducing their welfare, respectively, to 450 units and 150 units. Under equal proportional sacrifice, they may each be required to sacrifice twenty percent of their welfare, leaving Person 1 with 400 units and Person 2 with 160.<sup>53</sup> Over the years there have been proponents of each of these systems, respectively. For example, Arnold Jacob Cohen-Stuart believed that equal proportional sacrifice was most fair,<sup>54</sup> while Henry Sidgwick and Alfred Marshall thought that equal absolute sacrifice was the only "equal" treatment.<sup>55</sup>

These two options are far from the only two possible understandings of "equal sacrifice." First of all, it is not clear that utility is necessarily the correct object of this sacrifice. Perhaps income in terms of units of money, and not utility, is the appropriate unit of measurement. In fact, Henry Simons "explicitly rejects justifications for redistribution that are based on differences in the value of income to the rich and the poor . . . ."<sup>56</sup> Using the concepts of equal absolute and equal proportional sacrifice, but applying them to money, we could then

49. See, e.g., SIDGWICK, *supra* note 16, at 561–64; Kahn, *supra* note 16 at 21–23; Repetti, *supra* note 16 at 1139–40.

50. MILL, *supra* note 13, at 804.

51. Utz, *supra* note 9, at 891.

52. *Id.*

53. See Section II.D for a discussion of whether interpersonal comparisons of utility are well-founded.

54. A. J. Cohen Stuart, *Progressive Taxation in Holland*, 8 Econ. J. 325, 326 (1898).

55. ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 15 (8th ed. 1920); SIDGWICK, *supra* note 16.

56. Griffith, *supra* note 5, at 364–65; see also HENRY SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* at 8 (1938). I will discuss this question further in Section IV.B.

have two more options: (1) an equal absolute sacrifice in terms of number of dollars and (2) an equal proportional sacrifice in terms of number of dollars—i.e., sacrificing the same percent of one's income. Taking as stipulated the assumption that individuals have a declining marginal utility associated with money, it is important to note that a particular tax structure might be simultaneously described as one that involves an equal proportional sacrifice of money and an equal absolute sacrifice of utility. Equal absolute sacrifice in terms of utility (as well as equal proportional sacrifice in terms of money) can be seen, in a sense, as being the derivative of the function of equal absolute sacrifice of money. Similarly, equal proportional sacrifice of utility can be seen as being a derivative function of the curve representing equal absolute sacrifice of utility (as well as equal proportional sacrifice in terms of money)—and thus the second derivative function of the equal absolute sacrifice of money curve.

It is unclear how to make a knock-down argument for any of these definitions of equality. While many might agree that equality should have some connection to utility or welfare and not to resources—which are important only derivatively due to their effect on welfare—it seems intractable to compare equal absolute sacrifice of utility and equal proportional sacrifice of utility. The argument for equal proportional utility may rest on the theory that utility itself has a diminishing value to individuals on some higher-level metric. But is utility the primary unit of welfare, or does there exist some further metric that is in fact primary? Utility seems to be tautologically defined as being the end-all and be-all of welfare, but it is unclear if this must be the case.<sup>57</sup> Alternatively, the argument for equal proportional sacrifice of utility may not necessarily have to be that some further primary quality is equal under that tax structure, but rather, it could be that an “equal sacrifice” of something need not necessarily refer to an equal nominal value of that object. In light of the difficulty in justifying any of these particular concepts of equal sacrifice as being the true measure of equality, it seems as though there is no reason why we should give “equal nominal value” and “equal percentage” a privileged status. Seemingly just as compelling an argument could be given

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57. It is interesting to consider what would be the rationale (if there could be one) in choosing one of the following: (1) A day where in each hour one experiences a utility of ten, and (2) a day where in every other hour one feels a utility of five and in every other hour one feels a utility of fifteen. They will sum to the same total units of utility after a day, but it is not clear that one could say that one would prefer the one without the highs and lows because of diminishing marginal utility, because it is stipulated what the utility is. It is unclear whether it is possible to prefer one to the other, and what this even would mean.

for the true instantiation of equality being yielded using a metric of "equal square root of utility" or "equal value of one-third of the total utility plus ten units." While it is possible to choose some metric of equal sacrifice and defend it as the true measure of equality and a true measure of a taxpayer's ability to pay, it seems as though various other measures could have justifications with equally logically- and psychologically-arbitrary steps in reasoning. It is not an inconsistent position to choose a definition of "equal sacrifice" and defend it, but defending one definition over others would be an arduous task, and it is not clear what an argument of this type would look like.

There is a more serious problem with the literature on "equal sacrifice," however. The question of "what is an equal sacrifice?" is not even the correct question to be asking for the purpose of ascertaining tax equity. While, at first glance, this problem and the problem of how to satisfactorily define "equal sacrifice" appear to be separate problems, on further reflection it is clear that they are connected. In short, what makes defining "equal sacrifice" an empty question with an indeterminate answer appears to be the fact that it is neither the correct nor relevant inquiry in the first place.

The problem with the idea of "equal sacrifice" is that it focuses on what the taxpayer is giving up as opposed to focusing on where the taxpayer is left after the sacrifice. The difference between an "ability to pay" tax and a benefits tax, as discussed earlier in this paper, is that an "ability to pay" tax involves redistribution between taxpayers whereas a benefits tax involves simply paying the government for the benefits received. Under a benefits tax we would only want a sacrifice if we believed that each taxpayer was getting something of the same value. Each taxpayer, though, is not necessarily getting the same value from the government; some might argue that the rich gain more from government services and some may argue that the poor gain more. Regardless of this, though, if we were suggesting that there should be an equal sacrifice because of the equal return from the government, this would be a benefits tax, not an "ability to pay" tax. The goal of having an "ability to pay" tax, and not a benefits tax, though, is to have redistribution.<sup>58</sup> But what does an equal sacrifice have to do with redistribution? Redistribution seems to be about having *non-equal* sacrifices. Thus, the idea of equal sacrifice seems to be more related to a benefits tax than it is to an "ability to pay" tax.<sup>59</sup>

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58. See, e.g., MUSGRAVE, *supra* note 10, at 341; NOZICK, *supra* note 3, at 27.

59. *Id.*

This intuition must be further fleshed out, though. Imagine, for example, that two boys each are given sums of money from their mother. The mother gives one boy, Rich, \$100 and the other boy, Poor, \$40. The two boys then go to a store and stuff their respective bags with candy. Rich's bag has \$15 worth of candy and Poor's bag has \$25 worth of candy in it. When they approach the register, the cashier (who knows how much money each boy possesses) tells them that, while they will collectively be charged \$40, they will not be charged according to the cost of their respective bags, but rather according to egalitarian principles. Suppose the cashier estimates that there will be an equal loss in welfare if Rich is charged \$30 and Poor is charged \$10. Is this the egalitarian thing to do? This will result in the net worth (i.e., the sum of (1) the value of the money they have, and (2) the value of the candy they have) of the boys going from 100 and 40 respectively to 85 and 55. Alternatively, the cashier could charge Poor \$0 and Rich \$40. This would result in the net worth of the boys going from 100 and 40 respectively to 75 and 65. Is this the egalitarian thing to do?

Assuming, as stipulated, that the payment to the cashier is not a payment that correlates with the benefit gained from the candy received, it seems that no egalitarian rationale would favor the payment of an uneven nominal value of dollars yet not be in favor of Rich paying the full \$40. Further, it also seems as though there is no good reason for the payment to be of an equal dollar sum: While it is true that Rich's and Poor's payments can both be considered payments for a similar product, by no means are they receiving the same product. One might argue that two taxpayers are buying the product of a civilized society, but even such a characterization constitutes a benefits tax. Not only does the sacrifice itself seem irrelevant, but it seems as though the rationale for the "equal sacrifice" is redistribution, and if we are in favor of redistribution, why not redistribute to a greater extent? There seems to be no egalitarian reason for why their sacrifice in terms of welfare should be identical.<sup>60</sup>

Thus, what seems to be important to the egalitarian is what the taxpayer ends up having after paying taxes, not what the taxpayer pays

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60. Note that it is not crucial to the hypothetical that Poor is receiving the twenty-five-dollar candy and that Rich is receiving the fifteen-dollar candy. If it were in reverse, then under the first payment plan the net worths would go from 100 and 40, respectively, to 95 and 45. Under the second payment plan the net worth would become 85 and 55 respectively. It also doesn't seem as though the intuition would be any different if the "equal sacrifice" payments were similar—e.g., twenty-one dollars by Rich and nineteen dollars by Poor—and Rich were getting the more valuable bag of candy.

to the government. To the egalitarian with no concerns other than egalitarianism, the question of what an equal sacrifice entails is unnecessary because, if we are in favor of redistribution, there should be as much redistribution as possible. In other words, the tax structure should match the structure endorsed by Edgeworth as (in its pure theoretical form) leading to the most efficient society. In this structure, though, unlike the "equal sacrifice" tax structure, tax is only paid by those with the highest incomes until they no longer are the ones with the highest incomes. Note that the egalitarian would not think that this redistribution should cease when the current government budget is financed. Rather, he would want the budget to be increased, with the extra governmental funds used as payments to the worst off, until each individual has the same amount of whatever the relevant unit is—be it money or utility.

### C. *Equal Sacrifice: A Summary*

In determining how to implement a tax that assesses the tax burden according to ability to pay, we must answer two questions: (1) How much redistribution should there be? and (2) What should be redistributed? With regard to both egalitarian and utilitarian principles, though, the "ability to pay" literature answers these questions by referring to the vague term "equal sacrifice."<sup>61</sup> I have argued, contra Mill and the other scholars who use the term "equal sacrifice," that "equal sacrifice" is not relevant or useful to get at what is important to either a utilitarian or to an egalitarian.

For a utilitarian, "equal sacrifice" is not the metric used to bring about an efficient society (despite Mill's original side-argument that it did). Edgeworth showed that the most efficient tax structure—absent incentive effects—would be one in which the tax was levied from the highest earnings before taxing lower earnings at all. While it is true that taking into account incentive effects will yield a very different looking tax structure, there is no reason to believe that this optimal tax will coincide with a tax that employs any of the possible accounts of "equal sacrifice."

For an egalitarian, there are two problems with the term "equal sacrifice." First, it is extremely difficult to come to any consensus on what would constitute an "equal sacrifice." Second, "equal sacrifice" is not the relevant project in which the egalitarian should be engaging. These two problems, though different, are related. If the equality that matters is the equality of the end state (i.e., the second problem I men-

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61. MILL, *supra* note 13, at 804.

tioned), then it does not make sense to refer to the sacrifice as equal, because no matter what the sacrifice is, the partial redistribution will not bring about an equal state, according to the egalitarian. Thus, it is difficult to define “equal sacrifice,” largely because of the looming problem that, no matter what we decide is an “equal sacrifice,” more redistribution will be required to reach a relevant state of equality.

In sum, although the “ability to pay” literature employs the vague term “equal sacrifice” in attempting to explain how to assess tax burdens, the notion of “equal sacrifice” turns out to not be relevant or useful in furthering either of the two justifications of an “ability to pay” tax—utilitarianism and egalitarianism.

The foregoing points are the key points for the purposes of exploring the relevance and usefulness of “equal sacrifice” in furthering utilitarian and egalitarian principles, but other related questions do arise. I have argued that “equal sacrifice” is not useful for furthering egalitarian principles, but could “equal sacrifice” have import for a different theory of fairness? Libertarianism certainly would not seem to appeal to equal sacrifice. A libertarian most likely would not believe that possession of more of something than another would bring about a duty to redistribute.<sup>62</sup> Perhaps there is a different theory of fairness that would hold that “equal sacrifice” is what is relevant, but it is unclear what would ground such a theory. Of course, that is not to say that someone would necessarily be inconsistent if he were to stipulate that fairness means “equal sacrifice,” but it is not clear what the argument for the moral importance of sacrifice would be. Additionally, as argued above, it is not clear that an argument for a particular definition of equal sacrifice would be persuasive.

Does the fact that no theory of the good—be it a welfarist theory or a theory of fairness—seems to argue for “equal sacrifice” mean that it is an absolutely useless term? Not necessarily. Many people are not pure welfarists, pure egalitarians, or pure libertarians; many people believe that the best society would simultaneously try to work toward more than one of these goals, despite the fact that working in these different directions will likely detract at least somewhat from achieving any one of the goals to the fullest. For example, many so-called egalitarians would also care about efficiency. That is, many would not prefer a society where everyone is equal along the relevant metric but in which there is an extremely low standard of living to one where the standard of living of the worst-off citizen is considerably higher but where the citizens’ welfare—however defined—varies drastically.

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62. See Nozick, *supra* note 3.

Thus, for many people, something that can be defined loosely as "equal sacrifice" might satisfy their conceptions of a correct tax structure, even though no particular theory of theirs would argue for this. Similarly, not all people in our society share the same conceptions of a correct tax structure, and it could be that something that could be referred to as an "equal sacrifice" theory is a middle ground struck between the views of various taxpayers. However, if either of these two possible explanations for the relevance of "equal sacrifice" is correct, this is an ad hoc justification for employing the notion "equal sacrifice." Even if either of these explanations is correct, we should stop employing the notion of "equal sacrifice" and stop suggesting that it plays a justificatory or explanatory role. Instead, we should recognize that, in determining how the tax burden should be distributed among taxpayers, we are just coming somewhat by chance to something that might resemble what some could describe as being an "equal sacrifice."

*D. An Aside: Assumptions Important to "Ability to Pay" Analysis*

Before continuing, it is worth briefly mentioning a contested premise on which "ability to pay" analysis and, more generally, all of welfare economics, rests.<sup>63</sup> This is the premise that we can make interpersonal utility comparisons, and further, that we can assume that people have identical utility schedules. If there were no justification in making these comparisons, it seems as though "ability to pay" analysis would collapse because there would be no meaningful way in which one could say that the welfare of two individuals is equal and there would be no meaningful way to make a utilitarian calculus that sums over the welfare values of different individuals.

Lionel Robbins famously argued that we have no way to compare utilities between individuals. According to him, "we have no interpersonal standard of comparison, no yardstick, against which to measure utilities on the basis of the information individuals are able to give us about their desires and preferences."<sup>64</sup> This is an important attack on welfare economics because the field relies on the comparisons and aggregations of the utilities of different individuals.<sup>65</sup>

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63. This analysis of this contested premise is relevant both to utilitarian and egalitarian projects.

64. Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 *ECON. J.* 635, 637–40 (1938).

65. For more on Robbins's argument, and on the state of welfare economics in light of Robbins's argument, see Tibor Scitovsky, *The State of Welfare Economics*, 41 *AM. ECON. REV.* 303, 303–315 (1951).

John Harsanyi, however, argues that, contra Robbins, we are entitled to make assumptions about the similarity of different individuals' utility schedules.<sup>66</sup> According to Harsanyi, "[i]f two objects or human beings show similar behavior in *all* their relevant aspects open to observation, the assumption of some unobservable hidden difference between them must be regarded as a completely gratuitous hypothesis and one contrary to sound scientific method."<sup>67</sup> Whether one agrees with Harsanyi's first point, it is powerfully supported by his second point, namely that we are no less justified in making these assumptions than we are in assuming that others have conscious minds. As he says, "it is on the basis of this principle [(the principle he just described)] that we ascribe mental states to other human beings at all: the denial of this principle would at once lead us to solipsism."<sup>68</sup> As Harsanyi correctly seems to suggest, it is unclear how to compare these two leaps of faith—first, the assumption of similar utility schedules, and second, the assumption that other beings are conscious. It is not clear how to determine whether one is justified over the other, and while it seems as though one could plausibly avoid solipsism while not being willing to make assumptions about interpersonal utility comparisons, Harsanyi makes a fair point.

Additionally, it is not clear that we are any more justified in making *intrapersonal* utility comparisons than we are in making *interpersonal* utility comparisons. Robbins seems to suggest that intrapersonal utility comparisons aren't under question, but why shouldn't they be? In his article, *Quining Qualia*, Daniel Dennett uses various ingenious "intuition pumps" to show why skepticism similar to that of Robbins's is appropriate when considering what has occurred in one's own past experience.<sup>69</sup> While Dennett goes on to argue that subjective experience is nothing like what we think it is, his intuition pumps are relevant to the current discussion. One of these intuition pumps shows that, if at  $t_1$  a person dislikes the taste of a wine and at  $t_2$  the same person likes the taste of the same wine, it is not possible to say for sure what the subjective experience—or utility—was like at  $t_1$ . There are various explanations, but two are relevant here: (1) Perhaps the person is misremembering the fact that he liked the wine, or (2) perhaps he did in fact like it. We can never be sure, and thus when

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66. John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309, 309–21 (1955).

67. *Id.* at 317.

68. *Id.*

69. Daniel Dennett, *Quining Qualia*, in CONSCIOUSNESS IN CONTEMPORARY SCIENCE 42, 44 (A.J. Marcel and E. Bisiach, eds., 1992).

we make intrapersonal comparisons of utility, we are subject to the same skepticism that Robbins introduces. The point here is that Robbins is correct that we can be skeptics about interpersonal comparisons of utility, and there is no way to actually compare, but, along the lines of Harsanyi's point, if we are to cast doubt on the possibility of interpersonal utility comparisons, many other assumptions should be thrown out at the same time. It seems arbitrary that Robbins contests interpersonal utility comparisons but seemingly maintains his belief in the consciousness of others and the validity of intrapersonal utility comparisons.<sup>70</sup>

These are just some of many attacks on welfare economics,<sup>71</sup> but it seems as though welfare economics still stands strong. While there is doubt along many lines, if we are to yield to these skeptical arguments, it seems as though it would be arbitrary to ignore the many other areas of life in which we make similarly unverifiable assumptions.

### III.

#### EQUALIZING THE END-STATE: CHOOSING AN EQUALISANDUM AND AN EXTENT OF REDISTRIBUTION

In the previous Part, when I showed that "equal sacrifice" was not a useful term for utilitarian purposes, I briefly explained Edgeworth's hypothesis and what was relevant to the utilitarian agenda. Despite attacking the relevance of "equal sacrifice" for egalitarianism, though, I did not elaborate much on what a purely egalitarian tax structure would look like. It is this that I wish to do now.

As I described in Part II, *supra*, what should be relevant to egalitarianism is not the sacrifice an individual makes, but rather the end state in which an individual is left. The debate about what this end state should look like seems to break into two main questions: First,

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70. Additionally, there have been various attacks on the idea that we can assign utility values at all, and whether utility is a useful concept. For a discussion of this literature, see, e.g., AMARTYA SEN, ON ETHICS AND ECONOMICS 29–56 (1987); J. A. Mirrlees, *The Economic Uses of Utilitarianism*, in UTILITARIANISM AND BEYOND (Amartya Sen and Bernard Williams eds., 1982). Further, doubt has been shed on the correlation between income and happiness. See generally TIBOR SCITOVSKY, THE JOYLESS ECONOMY: THE PSYCHOLOGY OF SATISFACTION (rev. ed.1992). According to Scitovsky, there is evidence that utility is largely a function of one's wealth compared to one's previous self's wealth and compared to the wealth of others. *Id.* at 140. This last point doesn't shed doubt on comparisons of utility, but rather just on the usefulness of the comparisons of money as a proxy for utility.

71. Utz, *supra* note 9, at 932.

what should be redistributed? And second, to what extent should this object of redistribution be redistributed? Thus, the debate does not and should not address “equal sacrifice.” In Part II, though, I argued not only that “equal sacrifice” seems to be morally irrelevant, but also (relatedly, but in a distinctly different vein) that espousing partial redistribution (as opposed to full redistribution) is not a tenable position. While the following debate does not address the equal sacrifice question, it does address partial redistribution.

I should note that, while perhaps some of the authors involved in the following debate take for granted the irrelevance of “equal sacrifice,” and thus implicitly reject it, discussion of “equal sacrifice” still pervades the “ability to pay” literature, and it by no means appears to be a mistake of the past. Thus, I think that it is of no small importance that I have cast doubt on the relevance of this term.

A. *Two Questions: What Should Be the Equalisandum? and What Should Be the Extent of Redistribution of the Equalisandum?*

If attaining an “equal sacrifice” by each taxpayer is not the goal of an egalitarian tax policy, what does a tax structure implementing only egalitarian ideals look like? Daniel Markovits has the following to say about egalitarian goals:

Egalitarianism ties people’s fortunes together. It takes the good and bad things in people’s lives—their blessings and their afflictions—and shares them out, or redistributes them, among their fellows. Where egalitarianism operates, each person’s fortunes and misfortunes cease to be just her own and become, to the extent egalitarianism recommends, a part of communal fortunes and misfortunes, shared in by all those who come under egalitarianism’s purview. . . . Egalitarianism insists that all people’s lives are equally important and, accordingly, that no person’s fortune may be subordinated to anyone else’s.<sup>72</sup>

This question of redistribution boils down to two subsidiary questions. The first question, as G.A. Cohen says, is the question of what to redistribute: “What aspect(s) of a person’s condition should count in a fundamental way for egalitarians . . . ?”<sup>73</sup> As Markovits says, “[i]t suggests that egalitarians search, as Cohen put it, for an equalisandum, a thing whose equal distribution secures non-subordination.”<sup>74</sup>

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72. Markovits, *supra* note 2, at 2291.

73. G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906, 906 (1999).

74. Markovits, *supra* note 2, at 2292–93.

Throughout the above discussion of "equal sacrifice," I was agnostic as to what this equalisandum is or should be. Ultimately, in Section III.C, below, I argue that utility is the appropriate equalisandum.

The second question that Markovits focuses on in his paper (and which, in fact, is the title of his paper) is "how much redistribution should there be?"<sup>75</sup> In other words, to what extent should the equalisandum be redistributed? According to Markovits, the question of what the equalisandum should be has been fiercely debated over the years, whereas the question of the appropriate extent of redistribution has been largely subject to a consensus.<sup>76</sup> In Section III.D, I address this point and mention what the consensus is and, more generally, explore this second question—the question about what the appropriate extent of redistribution is for the egalitarian.

As I said, Section III.C argues that utility is the appropriate equalisandum for the egalitarian. Despite this, however, when I explore the relationship between the two egalitarian questions (in Section III.B) and when I explore the second question (in Section III.D), my exploration into these questions will be distinct from, and it will not in any way hinge on, my position that utility is what the egalitarian should espouse as the equalisandum (i.e., the answer to the first question). I will still at times refer, in Sections III.B and III.D, to utility as being the equalisandum, but I will be doing so primarily as a way to make it easier to present ideas and to explain Markovits's view. Thus, although I will assume, for the purpose of these explanations, that utility is the appropriate equalisandum, the choice of utility as an equalisandum is not necessarily Markovits's view. In fact, although his paper is ostensibly about the appropriate extent of redistribution of the equalisandum, and agnostic as to what the equalisandum is, his choice of equalisandum seems implicitly to be some form of money or resources, and not utility.<sup>77</sup>

*B. Whether the Two Questions Are Indeed Distinct Questions, or Whether They Are Intertwined*

Before addressing Markovits's arguments, I consider whether or not his two separate questions are in fact separate. In other words, perhaps it is sometimes (or, perhaps, always) possible to redefine an equalisandum to take into account the fact that we might want to redistribute the original equalisandum to a certain extent—thus resulting

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75. *Id.*

76. *Id.* at 2293.

77. *Id.*

in a new equalisandum that we would only want to redistribute to the full extent. Further, it may be the case that *all* equalisandums redistributed fully can be alternatively described as having utility be the equalisandum and allowing partial redistribution. I now consider a few possible equalisandums—money, primary goods, and utility—and I explore whether they can be recharacterized.

Suppose we want a full redistribution of money. This generally will be equivalent to a redistribution of utility; however it will likely not be a full redistribution of utility. This is because money is simply one of many things that may affect one's utility. Two people of equal net worth are unlikely to be equally happy; one may be lonely and not enjoy his job whereas the other may have a great family and love his job. Thus, if we are in favor of money being an equalisandum and having it be redistributed to the full extent, then it seems as though we would be in favor of a redistribution of utility, but we would think it is alright to redistribute utility to only a partial extent.

Similarly, we may think that primary goods—perhaps food and lodging—should be the equalisandum and that there should be redistribution to the full extent. As with the redistribution of money, though, this could be described as a partial redistribution of utility—namely one that seeks to make sure that each individual is over a threshold limit of utility.

Thus, the truth of Markovits's suggestion that the questions of what to redistribute and what extent to redistribute are separate questions is in doubt. It seems as though people's answer to the question of extent could vary based on how they define their equalisandum.

Upon further reflection, though, it is not completely clear that this manipulation is possible. This is because not just anything can be termed an "equalisandum." As Markovits says:

[I]t is critical that egalitarianism calls for the non-subordination of persons, and the equalisandum must be chosen bearing this in mind. The proposal, for example, that everyone should be given an equally long name fails as a conception of egalitarianism because the length of someone's name does not capture what is important about her person, so that equality among name lengths is entirely consistent with subordination among persons.<sup>78</sup>

Thus, it seems that the above manipulation does not work, after all, because regardless of what one believes is the appropriate equalisandum, one will then not believe that the other possible equalisandums are appropriate equalisandums. Therefore, it would not be

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78. *Id.*

possible to recharacterize a situation with partial redistribution of a particular equalisandum as being a full redistribution of a different equalisandum. For example, if one believes that, say, utility is the appropriate equalisandum, then one does not believe that the other potential equalisandums are appropriate equalisandums. Or, if one believes that money is the appropriate equalisandum, then one does not believe that other potential equalisandums are appropriate equalisandums. As a result, if a situation involves partial redistribution of what one believes is the appropriate equalisandum, one will not be able to characterize this situation as a full redistribution of a different equalisandum. To repeat, this is because it is not the case that anything can be called an equalisandum; rather, for something to be an equalisandum, it must be the thing the equalization of which a person believes will avoid subordination of persons.

Thus, because of the requirement of the relevancy of the equalisandum to the goal of egalitarianism, people are forced to take a stand on how much redistribution of the equalisandum there should be. It seems as though once a person defines an equalisandum a particular way, he will not be able to manipulate the characterization because he will not believe that the equalisandum in the recharacterization is in fact an equalisandum. This is the case regardless of whether one espouses utility as an equalisandum, or whether one instead thinks that an equalisandum other than utility is appropriate.<sup>79</sup>

Thus, it seems that the questions of what the appropriate equalisandum is and what the appropriate extent of redistribution of the equalisandum is are questions that indeed do remain distinct. In light of this, I address these two questions separately. In Section III.C, I address the question of what is the appropriate equalisandum. Then, in Section III.D, I address the question of what the appropriate extent of redistribution of the equalisandum is.

### C. *Utility as the Appropriate Equalisandum*

Given Markovits's explanation of how an equalisandum can only be something the equalization of which a person believes will avoid subordination of persons, it seems as though only utility can fit the bill. It does not appear that money or primary goods (or anything else) could reasonably be thought to be the appropriate equalisandum.

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79. For example, among the authors espousing an equalisandum other than utility are Dworkin and Rawls. Dworkin argued for equality of resources, *see generally* Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981), and Rawls argued for primary goods, *see generally* JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

Neither money nor primary goods “capture what is important about [one’s] person.”<sup>80</sup> Rather, money and primary goods are important merely for instrumental purposes—what they do for us—and are valuable only in so far as they affect our welfare.

As a practical matter, in most areas of the law, we are generally speaking in economic terms. For example, in private law remedies, when we talk about putting a party back into the position that he was in before he incurred the harm, we typically refer to the financial position that he would have been in. Further, not only do we label the position that the person was at in terms of finances, but we also use money as a remedy and thus determine the amount of the remedy in terms of money. Money is the currency of our legal system. If someone owes a transfer to a party that he harmed, we generally require the party that has done the harming to make the aggrieved party whole by paying money to the aggrieved party. Furthermore, this is the case even if the harm done to a person is not only (or at all) financial—as perhaps is the case in torts where there is a claim for pain and suffering or non-economic damages of this sort.

Notwithstanding these practical facts about how the legal system operates, it is clear that money (or, similarly, primary goods) are a mere proxy (albeit perhaps an effective proxy) for what we actually care about: happiness. Even law and economics theorists will in almost all cases agree to this.<sup>81</sup> After all, money does not have intrinsic

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80. Markovits, *supra* note 2.

81. Even Richard Posner—whose original view was that tort law’s goal is to maximize wealth, as opposed to happiness or something else that has clear value—has changed his view over the years. Instead of espousing a view of tort law according to which tort law seeks to maximize economic efficiency (i.e., maximize wealth), he now espouses a view according to which tort law seeks to maximize happiness. See Richard Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 99 (David G. Owen ed., 1997). In switching to this view, Posner adopted the typical view shared by members of the law and economics movement both then and today. Of course, the fact that Posner previously endorsed a view according to which the goal of tort law is the maximization of wealth does not necessarily speak to what he viewed as being of intrinsic value and what he viewed as being of merely instrumental value. After all, one could think that the goal of tort law is to maximize wealth even if one views wealth (i.e., money) as merely of instrumental value. The fact that one seeks to maximize something in the domain of tort law does not mean that it is what one seeks to maximize overall, summing over all domains of society and life. Notwithstanding this, however, the change in Posner’s view about the purpose of tort law is notable.

As for what constitutes the general position of economists about the value of money, it seems fair to say that it is a consensus view, even among economists, that money does not have intrinsic value, but, rather, that it merely has instrumental value. See Michael Pressman, *The Compatibility of Forward-Looking and Backward-Looking Accounts of Tort Law*, 15 U.N.H. L. REV. 45, 52–53 (2016).

value. It merely has instrumental value because of the goods it enables a person to buy. Goods, in turn, are valuable because of how they affect a person's life. More specifically, these goods are valuable because of how they affect a person's conscious experiences—how a person's happiness is affected. While there might be some who do not believe that everything of value boils down to happiness (perhaps instead maintaining that things such as health or friendships or things of this nature have intrinsic value), even people in this camp will still probably at least agree that money is merely of instrumental value, and that money is not one of the things that has intrinsic value.

Thus, at this point, it seems fair to conclude that the appropriate equalisandum is happiness (i.e., utility).

Daniel Shaviro, also an advocate of utility as an equalisandum, defends the concept of "psychic utility" against Professor Dodge's rejection of it on the grounds that it cannot be measured.<sup>82</sup> As Shaviro says, we use "objective data, such as cost and fair market value [to determine tax burdens]. Yet our uses of such data should be, and often are, based on what seem the most reasonable assumptions about underlying mental states: for example, that people enjoy the things they choose to buy, or that business meals convey some consumption value . . . ."<sup>83</sup> Thus, and as Shaviro argues, the fact that there are some difficulties associated with measuring utility is not a sufficient reason to reject the position that utility is the appropriate equalisandum.

Having addressed the question of what is the most plausible equalisandum, I now turn to the second of Markovits's two questions, the answers to which will define what a purely egalitarian system would look like. This second question is: What is the appropriate extent of distribution of the equalisandum?

#### *D. What Is the Appropriate Extent of Distribution of the Equalisandum?*

Is it tenable for a pure egalitarian to believe in partial redistribution? The examples of equally distributing money or primary goods, as discussed above, seem to be trying to achieve a maxi-min-type<sup>84</sup>

82. Joseph M. Dodge, *Zarin v. Commissioner: Musings About Debt Cancellations and "Consumption" in an Income Tax Base*, 45 TAX L. REV. 677, 690–91 (1990).

83. Daniel N. Shaviro, *Psychic Income Revisited: Response to Professors Johnson and Dodge*, 45 TAX L. REV. 707, 710 (1990).

84. "Maxi-min," a term made famous by John Rawls, refers to a principle used to compare the goodness of different possible distributions of resources in a population. According to the "maxi-min" principle, we compare the plight of the worst-off person in each possible population or state of affairs, and conclude that the population or state of affairs in which the worst-off person of that population is the best off is the

society in terms of utility, and trying to achieve a maxi-min-type society constitutes a redistribution that is partial, not full. It is not clear that someone with purely egalitarian views could plausibly support partial redistribution, though. Why settle for a society with any inequality when we could redistribute more and generate full equality of one's equalisandum of choice (for example, in terms of utility)? It seems as though someone who espouses a maxi-min society of this sort is doing so, at least in part, because of principles apart from egalitarianism that he holds. Perhaps one believes in libertarianism once everyone is over a certain threshold of resources, or perhaps one thinks that maxi-min is a good compromise between egalitarian and welfarist concerns. If limited to egalitarianism, though, it seems (at least *prima facie*) that there is no explanation for why one might stop at partial redistribution instead of proceeding all the way to full redistribution. Thus, it seems as though there might be no tenable purely egalitarian account of partial redistribution.

A possible exception exists, however. A camp of egalitarians, known as "luck egalitarians," have argued for the position that the equalisandum should be redistributed to the extent that it is possessed due to luck, but not redistributed to the extent that it is possessed due to choice. This position, known as "luck egalitarianism," appears to be espousing a version of partial redistribution. After all, if the equalisandum possessed by a person is possessed in part due to luck and in part due to choice, luck egalitarianism calls for a portion of the person's equalisandum (though not the person's whole store of the equalisandum) to be subject to redistribution. This seemingly is a partial redistribution. Nevertheless, because it seems to be a special version of partial redistribution (or, in other words, because, unlike other versions of partial redistribution, it is based on a principle that seemingly is non-arbitrary), I consider whether an egalitarian could plausibly espouse the form of partial redistribution that is called for by luck egalitarianism. I show that, unlike other attempts to bring about a partial redistribution of the equalisandum, luck egalitarianism does constitute an account of partial redistribution that is tenable.

### *1. Luck Egalitarianism: Differing Treatments of Luck and Choice*

While I have argued that utility should be the equalisandum, many scholars who argue for equalisandums other than utility still be-

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best population or state of affairs. Thus, the maxi-min principle's goal is to maximize a society's minimum resource level (or welfare level). See generally RAWLS, *supra* note 79.

lieve that their respective equalisandums should be redistributed only to the extent that the equalisandum is possessed by an individual as a result of luck and not choice.<sup>85</sup> This position these scholars hold is called luck egalitarianism.<sup>86</sup> Before discussing whether or not the luck/choice distinction is plausible, it is important to understand the intuitions behind the distinction that lies at the core of luck egalitarianism, or what Markovits calls "responsibility-tracking egalitarianism."<sup>87</sup> Markovits says:

The responsibility-tracking view begins from the observation that choice and luck jointly determine a person's fortunes. Her fortunes improve or decline as she chooses well or badly and as her luck is good or bad. The crucial distinction between these two influences is that whereas a person is responsible for her choices, she is not responsible for her luck.<sup>88</sup>

Accordingly, he says, it would subordinate a person to be worse off than another person due to luck, and it would also subordinate a person to equalize the welfare that they achieve as a result of choices. Markovits separates these two components of welfare, suggesting that people's welfare with regard to their capacities as "agents" and their welfare with regard to their capacities as "patients" are separate matters.<sup>89</sup> To restate my explanation in Markovits's terms, "if people are to be treated equally as agents, then their choices must distinguish them, but if people are to be treated equally as patients, then their luck may not distinguish them."<sup>90</sup> We do not think it is egalitarian to subsidize choices, but we do think it is egalitarian to subsidize luck. We should only be responsible and accountable for things over which we have control, and luck—in its many manifestations—is not one of these things.

Various scholars have signed on to this view. According to Markovits, Dworkin has argued that "egalitarianism should track the distinction between people's persons and their circumstances,"<sup>91</sup> and G.A. Cohen has said that egalitarianism's "purpose" is "to eliminate involuntary disadvantage"—"disadvantage for which the sufferer cannot be held responsible"—because it does not "appropriately reflect"

85. Markovits, *supra* note 2, at 2293–94.

86. See Barbara Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123, 124 (2003).

87. Markovits, *supra* note 2, at 2294.

88. *Id.* at 2294–95.

89. *Id.* at 2297.

90. *Id.*

91. *Id.* at 2296.

his choices.<sup>92</sup> Similarly, John Roemer has said that “society should indemnify people against poor outcomes that are the consequences of causes that are beyond their control, but not against outcomes that are the consequences of causes that are within their control, and therefore for which they are personally responsible.”<sup>93</sup> Even though these scholars have differences in their conceptions of the correct equalisandum, they agree that the extent of redistribution should be in line with this responsibility-tracking view.<sup>94</sup>

This responsibility-tracking view is attractive because, while we want to redistribute, it does seem as though we want to maintain a safe harbor of non-redistribution that contains the fruits and suffering caused by our own agency.

## 2. *Potential Problems with the Luck/Choice Distinction*

There are, however, two potential problems with the luck/choice distinction—one which is purely theoretical, and another which is primarily practical.

As for the first potential problem, the distinction between luck and choice clearly relies on a belief that we do in a meaningful sense make choices in life. However, determinists argue that we do not ever have choices, or that, if we do, they are not in any morally-relevant sense attributable to ourselves.<sup>95</sup> Rather, they are attributable to external (or internal but non-agential) events, which should fall into the same moral category as brute luck. While I find the determinist viewpoint compelling, most areas of law are in fact based on individuals being able to make choices, so taking the determinist viewpoint would undermine much of our legal system.<sup>96</sup> Despite my sympathy for this viewpoint, however, we can ignore this problem for now, because the problem boils down to a philosophical problem that is inconclusive at the least, and it is not *unreasonable* to believe that we are agents in a meaningful sense.

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92. Cohen, *supra* note 73, at 916; Markovits, *supra* note 2, at 2296.

93. John E. Roemer, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, 22 PHIL. & PUB. AFF. 146, 147 (1993).

94. Markovits, *supra* note 2, at 2297.

95. For discussions about the determinist position (and about non-determinist positions), see, e.g., DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* (new ed. 2015); Peter van Inwagen, *The Incompatibility of Free Will and Determinism*, 27 PHIL. STUD. 185 (1975).

96. Almost all areas of law are premised on the fact that people are capable of making free choices, and thus, if it turned out that people were not capable of making free choices, many doctrines would be undermined. Certain torts and crimes, for example, require that a defendant's actions be freely chosen, and if it turned out that people were not capable of free choices, these doctrines would have to be rethought.

Even if we did abandon our understanding of agency and instead espoused full redistribution of utility—no matter whether a result of a choice or brute luck—there would be difficult and interesting practical problems to address. If people know that their choices will be subsidized by others and in no way attributable to their own agency, it seems as though there will be a large moral hazard problem. However, on this viewpoint, there is no free choice to be made in response to the tax system, so it is not clear that people could in fact abuse the system. Alternatively, though, it might be argued that there could still be abuse because, while there will not be free choices in response to this new system, people will have the knowledge of the new system available to them and it will affect their choices (even if not free choices)—or, on a more neutral conception, the knowledge of the new system will affect the output of their body or their behavior. Perhaps if there is full redistribution of our equalisandum of choice, the government should attempt somehow to hide from the population that this full redistribution is being carried out.<sup>97</sup>

The second potential problem, which is primarily a practical problem, is that it is unclear how to separate utility that is a result of luck from utility that is a result of choice. There are various components of this problem. First of all, when a choice is made, in order to determine how much of the resulting welfare should be attributed to the choice, it is necessary to determine what the results would have been of other potential choices that could have been made. It seems as though the part attributable to choice should only account for this difference, and the rest should be attributable to the luck of being in a situation where these were the potential choices to make. Then we must try to determine what welfare value would have resulted in the counterfactual world with the different choice. This is a very complex operation that involves a lot of prediction and uncertainty, but that is no different from complaints about utilitarianism in general.<sup>98</sup> And as is the case for this common attack on utilitarianism, the response is that yes, we cannot be precise or necessarily predict accurately, but we make our best estimate and this is the best we can do.

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97. This relates to issues around how some believe that a utilitarian society should not openly be utilitarian, but that it should pretend to espouse a deontological ethic because this will bring about the greatest utility—greater utility (for various reasons, including miscalculations) than if society openly used a utilitarian calculus. See generally J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973). Some might argue that rule utilitarianism approximates a result of this sort and that this is in fact how our society works.

98. See generally, SMART & WILLIAMS, *supra* note 97; James Lenman, *Consequentialism and Cluelessness*, 29 PHIL. & PUB. AFF. 342–70 (2000).

A second component of this practical problem with the luck/choice distinction is the fact that the situation you are in when you are making a decision is not brought about merely by luck, but rather by a combination of luck and choice going backwards in time. This, too, is more of a computational problem, though, as previous luck/choice attributions will always have an impact on the calculus in future choices.

Third, what are we to count as a choice? Should we include conscious choices? Unconscious choices? Choices in the middle ground? This issue relates to the free-will problem to some extent, insofar as there are things we do that clearly are not choices (such as breathing—though breathing can be voluntary as well), and it is difficult to determine at what point we become agents.

A fourth component is that the result of every choice seems as though it is not merely attributable to a choice. For example, I may make the choice to marry a particular woman because she seems to be the most likely to make me happy. However, even if this were a good choice at the time, I may have—even then—recognized that there was, say, a fifteen percent chance that we would grow apart. Thus, any choice we make is in some sense a gamble. If I see a puddle to my right and thus step to my left, it is possible that I made this good choice, but that there was a 0.001% chance that I was misremembering where I saw the puddle, and I therefore end up stepping in the puddle. Thus, it seems as though even within any choice, there must be some sort of a calculus about what the odds of a particular event happening are.<sup>99</sup>

Interestingly, the need to do all of these calculations and determinations of luck/choice ratios, and especially the analysis of counterfactual worlds where particular choices are not made, makes it almost seem as though we are approaching the world from a somewhat deterministic angle. This is particularly the case when considering what choices people would have made under different circumstances. Ironi-

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99. Barbara Fried has written an interesting piece on this issue—in particular, discussing whether the chance to buy insurance before making a risky decision means that individuals are waiving the claim for redistribution of good or bad luck that occurs as a result of the risky decision. Surveying part of the literature, she mentions:

Dworkin and subsequent writers have observed as well the mediating role insurance plays . . . turning option luck [(which shouldn't be compensated for)] into brute luck [(which should be compensated for)]. To the extent a risk was unavoidable because uninsurable, and bundled in with other choices it would have been prudent to make even at the cost of unwanted risk, the absence of insurance converts what would otherwise have been option luck into brute luck.

Fried, *supra* note 86, at 134.

cally, the whole point of the luck/choice distinction is that that choice is free and authored by the agent himself or herself.

Despite these various concerns I am including under the umbrella of the second concern, what these sub-concerns have in common is that they seem to amount to problems of calculation—i.e., how to make the calculations that separate the amount of utility that is a result of luck from the amount of utility that is a result of choice. While the first of the two overall problems (the free will problem) suggests that there is a theoretical problem with the luck/choice distinction, the second problem (the problem of how to separate utility that is a result of luck from utility that is a result of choice) suggests merely that the practical calculation or application of the distinction is exceedingly complex. There are definitional issues—such as what constitutes a choice—and there is a big problem about how much of a choice to attribute to the luck of how things unfolded *ex post*, but, at its core, this second problem about the luck/choice distinction seems to be a practical problem of making determinations.

I conclude this section not necessarily by espousing the luck/choice distinction, but by suggesting that it has great intuitive appeal, and by suggesting that unless we are determinists, the difficulty with the distinction appears to be largely a problem of measurement. Additionally, despite the difficulties untangling the questions of equalisandum and extent of redistribution, it seems as though it is tenable for an egalitarian to espouse partial-extent redistribution—insofar as the extent is defined by the luck/choice distinction.

### 3. *Summary and Further Thoughts Regarding the Luck/Choice Distinction*

In sum, it seems as though a pure egalitarian would, as a general matter, have to espouse full redistribution and reject partial redistribution. This is because, to the extent that the egalitarian values redistribution, more redistribution is better than less redistribution; so, for a pure egalitarian, we should not stop at partial redistribution. There does, however, appear to be an exception: It does seem as though the luck egalitarian position—i.e., having the portion of the equalisandum possessed due to luck subject to redistribution while having the portion of the equalisandum possessed due to choice not subject to redistribution—is a tenable one. Despite the fact that the amount of redistribution espoused by a luck egalitarian would typically amount to merely a partial—and not full—redistribution, it still seems that this is a tenable position for the pure egalitarian to hold, and thus an ex-

ception to my general conclusion that a pure egalitarian must espouse full—and not partial—redistribution.<sup>100</sup>

However, even though the pure egalitarian can *plausibly* maintain that partial redistribution is acceptable when carried out according to luck egalitarian principles, a pure egalitarian does not necessarily have to subscribe to the luck egalitarian's account of the extent of redistribution. Rather, a pure egalitarian could also reasonably maintain that even the luck egalitarian's account of partial redistribution is not appealing or plausible, and that an egalitarian indeed must espouse only complete redistribution after all. If one is in this latter camp of pure egalitarians who might reject luck egalitarianism and espouse only full redistribution, there are a few sub-camps that one might be in. The first camp completely rejects the relevance of the luck/choice distinction. The second camp maintains that the distinction is of no intrinsic importance, but that it does, at least potentially, have some instrumental importance. I briefly elaborate on the tenets of these two sub-camps in what follows.

First, as discussed, one might be a determinist and think that we do not, at least in a sense relevant to moral questions, make any choices at all. Or, even if not a determinist, one might still think that, for moral purposes, the results of our choices are not different in any relevant sense from the results of brute luck. To the extent that there is no relevant difference between luck and choice, there seemingly is no reason to (or even a way to) have a carve-out for the results of "choice," and thus all of a person's results will be subject to full redistribution.<sup>101</sup>

To be precise, both sub-camps will share at least some version of the view articulated in the previous paragraph. Both camps think that the luck/choice distinction does not have intrinsic importance. Where

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100. Thus, since partial redistribution can be a tenable position for a pure egalitarian at least in some ways, it is not the case that partial redistribution is always inconsistent with a pure egalitarian's position. In light of this, and to refer to the subject matter of Part II, *supra*, the problem with the notion of "equal sacrifice" was that it focused on sacrifice, and not that it involved partial redistribution. Back in Part II, I had referred to both of these things as being problems afflicting our espousing and employing the notion of "equal sacrifice." I can now clarify, though, that the primary problem with espousing and employing the notion "equal sacrifice" is that it is based on a person's sacrifice and not the person's end-state.

101. Another option that one could consistently espouse if one rejects the luck/choice distinction would be to maintain that there should be no redistribution at all, but this is not the route that the pure egalitarian would take. The pure egalitarian, if he rejects the luck/choice distinction, will simply conclude that there thus no longer is a carve-out that immunizes from redistribution the results due to choice, and thus the pure egalitarian will conclude that all results would be subject to full redistribution.

the camps differ, however, is in whether the distinction might have *instrumental* importance: the first sub-camp thinks that the answer to this is no, the second sub-camp thinks that the answer is yes.

Specifically, the second sub-camp's view is the following: It might be that one thinks that the luck/choice distinction ultimately is a tool for providing full redistribution of the equalisandum (perhaps utility). For example, one might think that someone who experiences a benefit that is a result of his choice perhaps should not have to have this benefit be subject to redistribution because it is possible that the benefits experienced were a result of foregoing benefits in the past. For example, suppose that a person does well on a test in school and thus experiences happiness. It could be that having this benefit be subject to redistribution to someone who, say, chose not to study and thus experienced unhappiness after getting a bad grade on the test would be a mistake because it would only reflect some of the facts. It could be that no redistribution would be in order (or at least, less would be) if one took a broader temporal perspective and thus included in one's data the disutility (perhaps) experienced during the previous days by the student who studied and the utility incurred by the student who did not study during that time period when he was relaxing. Thus, it might be that one thinks that the luck/choice distinction is something that, in and of itself, is not a viable rationale for seeking only partial redistribution, but that it works as a decent tool to help bring about accurate estimates of how to fully redistribute utility if one is mistakenly focusing only on experiences at certain periods of time and not on the full temporal spectrum of a person's life.

For someone in this camp, the luck/choice distinction could be helpful when a mere snapshot is used to assess utility, but it would not be helpful if all of the data of a person's lifetime were used. Either way, however, a person in this sub-camp will not think that the luck/choice distinction is a relevant one in and of itself when determining the amount of redistribution. A person in the first sub-camp, however, while similarly maintaining that the luck/choice distinction does not have intrinsic importance, will believe that the distinction does not even have instrumental importance. Further, a person in the first sub-camp might think that the luck/choice distinction does not even exist (though he does not need to hold this view in order to be a member of this sub-camp).

Thus, in sum, it seems that (1) partial redistribution, as a general matter, is not something that a pure egalitarian would espouse, (2) an exception does exist for partial redistribution in accordance with the luck egalitarian distinction between luck and choice, which in many

ways is a distinction that is intuitively plausible and has great appeal, and (3) a pure egalitarian could espouse the luck egalitarian account, but could also reject the luck egalitarian account and maintain that no exceptions exist to the principle that the pure egalitarian should espouse only full redistribution. Thus, I do not conclude one way or the other about whether a pure egalitarian should espouse full redistribution or redistribution in accordance with the luck/choice distinction. I will continue to keep both of these possible pure egalitarian sub-views on the table as I continue to explore the pure egalitarian position.

#### IV.

#### THE ENDOWMENT TAX: A POSSIBLE TAX SYSTEM TO IMPLEMENT EGALITARIAN INTUITIONS REGARDING THE LUCK/CHOICE DISTINCTION

In the previous Part, I argued that the luck/choice distinction is tenable and that it has intuitive plausibility and great appeal. In light of this, the current Part will explore how tax law could implement our egalitarian intuitions regarding the luck/choice distinction. I begin by exploring the “endowment tax” (ET), which is a candidate for a tax system that could implement our intuitions regarding the luck/choice distinction. I then consider and address objections to ET, and I then address further issues that arise. I conclude that both ET and a utility-based variant of it would indeed further egalitarian principles. I then explain what the problems associated with these systems would be for someone who is sympathetic to egalitarian principles but who also values other principles (i.e., one who thus is not a pure egalitarian). These conclusions and explanations will set the stage for my attempt, in Part V, to articulate a system that simultaneously would satisfy both pure egalitarians as well as egalitarians who value one or more other principles as well.

#### A. *The Endowment Tax*

Recently, the intuition about the important distinction between luck and choice has made a large impact on the tax literature—in the form of discussions about (and the very conceiving of) ET. There has been lively debate between proponents<sup>102</sup> and opponents<sup>103</sup> of ET. The equalisandum in ET is not utility (unfortunately), but rather, it is

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102. See, e.g., Kirk J. Stark, *Enslaving the Beachcomber: Some Thoughts on the Liberty Objections to Endowment Taxation*, 18 CAN. J.L. & JURISPRUDENCE 47 (2005) (defending endowment taxation from common critiques and defending its value to theoretical inquiry); Lawrence Zelenak, *Taxing Endowment*, 55 DUKE L.J. 1145

money or resources. ET, however, tries to make *potential* resources—and not *actual* resources—the determinative factor in allocating the tax burden. In this way, ET attempts to redistribute resources possessed due to luck rather than choice. Kirk Stark describes how ET implements the intuitions about choice:

Under an income tax, for example, two taxpayers with identical endowments could end up paying vastly different amounts in tax simply because one likes to work and spend while the other prefers leisure. Yet there is no obvious reason, sounding in principles of distributive justice, for favoring with lower taxes the life choices of the latter over those of the former. An endowment tax does not suffer from this problem because, by definition, it would allocate tax burdens not according to choices that individuals make but rather based on the choices individuals could have made.<sup>104</sup>

The idea is that the amount of redistribution performed in society should not be affected by an individual's choice between work and leisure. Rather, the distribution should be based on brute luck. As David Hasen, describing ET, says: "Taxation according to personal endowments would impose tax burdens based on an individual's native ability to command resources. . . . I speak of endowment taxation as the taxation of an individual's income-earning potential, or wage-rate . . . ." <sup>105</sup> Thus, according to ET, if two people have the same earning potential—however this is determined—regardless of what their actual earnings are, they should be taxed the same amount. A typical example given in the ET literature is that of the corporate CEO who decides to become a beachcomber—forgoing his huge salary—because he prefers a quiet life.<sup>106</sup> The intuition is that this person chose the change in salary and thus should be responsible for it. A hidden intuition behind ET, though, seems to be one in which utility or welfare is the equalisandum: The CEO clearly voluntarily chose to change his lifestyle, so he must have done this to increase his utility, and thus he should not pay less tax as a result of a doing something that he prefers. Instead, he should either pay the same amount of tax or, perhaps, more.

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(2005) (concluding that tax policy analyses could be informed by endowment tax principles).

103. See, e.g., David Hasen, *Liberalism and Ability Taxation*, 85 TEX. L. REV. 1057 (2007) (presenting the liberal case against endowment taxation and rejecting both the liberal and consequentialist cases for it).

104. Stark, *supra* note 102, at 47–48.

105. Hasen, *supra* note 103, at 1063–64.

106. Stark, *supra* note 102, at 47.

*B. The Talent Slavery Objection to the Endowment Tax*

Despite some of the attractions of the ET account, there has been a wide range of attacks leveled against it—not only the obvious practical objections, but also theoretical ones. The primary objection to ET is that of “talent slavery.”<sup>107</sup> The concern is that a beachcomber who has high earning-power will be coerced into taking up his old job—or at least a job that pays comparably—simply to pay taxes. This is of particular concern to many liberal philosophers who believe that this violates autonomous self-determination.<sup>108</sup> There is an interesting debate, though, about whether this type of coercion is any more coercive, problematic, or slavery-like than the requirement to pay taxes in general. Daniel Shaviro<sup>109</sup> and Robert Nozick<sup>110</sup> believe that it is not.

In response to the concern about talent slavery, though, there have been various attempts to tweak the original theory of ET to circumvent this objection. Louis Kaplow, for example, says that “an ability tax [i.e., an *ET*, not an *ability to pay* tax] with an upper limit of 90 percent of wages or income actually earned would almost completely achieve the ability tax result without literally violating the forced-labor constraint.”<sup>111</sup> The problem with hybrid proposals such as that of Kaplow, though, is that, while it may decrease the effect of talent slavery, it will also lose many of the benefits of the endowment tax that were originally sought.<sup>112</sup> Thus, hybrids of this sort may often lose in

107. See, e.g., Hasen, *supra* note 103.

108. Among those who think that we should not be coerced into the work force in this sense are Mark Kelman and David Hasen. See Hasen, *supra* note 103; Kelman, *supra* note 24.

109. Shaviro writes:

As for the willfully idle beachcomber without cash to pay the tax, the real argument against imposing liability, obscured by the ad hoc and a priori liberty value, is that requiring a payment here would be more psychologically costly and disruptive than in the case of a wage earner. Relying on the liberty value does not set everything right; it responds to the dilemma resulting from our inability to impose the same real burden on the beachcomber, and treats her better than the wage earner since the only practical alternative is to treat her worse. Moreover, why limit the liberty value to beachcombers? If I need \$200 and can earn \$10 per hour, but have to work for 30 hours, rather than 20, because the government imposes a 33% tax, I might reasonably view myself, during the extra 10 hours, as no less a “slave” than the beachcomber who is forced to work to pay her tax.

Shaviro, *supra* note 83, at 712 n.22.

110. Nozick, *supra* note 3.

111. Louis Kaplow, *Human Capital Under an Ideal Income Tax*, 80 VA. L. REV. 1477, 1506 n.71 (1994).

112. For example, even if a theory like Kaplow’s would have the benefit of avoiding a certain amount of talent slavery, in so doing, it would likely fail to redistribute luck-based goods to the full extent that the original ET theory would. Thus, from the per-

appeal as much as they gain in appeal—if not more. And it is not clear that Kaplow's proposal would give us the best of both worlds. Thus, it seems that we must directly grapple with ET and assess and weigh the points in favor of and against it. With this in mind, I continue to address ET itself and the talent slavery objection.

According to Markovits, it is the problem of talent slavery that leads him to the conclusion that the "dual ambitions" of the non-subordination of people as agents and the non-subordination of people as patients are not both simultaneously attainable.<sup>113</sup> Markovits concludes that while we can attain one, doing so makes the other unattainable, and thus we must choose which (or both) to abandon.<sup>114</sup> His argument goes by way of a thought experiment where individuals are in a position similar to Rawls's original position.<sup>115</sup> While in this position, they know what the distribution of wage rates in their society is, but not their own particular rate. As Zelenak says, describing Markovits's idea,

In this imagined original position people might plausibly agree to a tax-and-transfer system as a form of insurance against having been unlucky in the talent lottery. If a low wage rate is the risk to be insured against, the obvious policy tool would be an endowment tax—a tax on the highly talented to finance cash transfers to the less talented. The question then becomes how much insurance people would agree to in the imagined original position.<sup>116</sup>

The crux of Markovits's argument is that people in the original position would not agree to pay insurance high enough to bring about the endowment tax because people would fear talent slavery, and they would be willing to risk some subordination as patients in order to avoid talent slavery.

Markovits's conclusion, however, is not well-founded. Having resources due to luck be subject to redistribution would prevent the subordination of people both as agents and patients (assuming you agree with his choice of equalisandum). The potential wage-rate—which would be due to luck—would be subject to redistribution (i.e., it would be taxed), whereas the actual wage-rate would not be relevant, because the difference between the potential and actual wage-rates would be due to choice, and this correctly is not subject to redistribution. Thus, the dual ambitions *can* be simultaneously attained.

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spective of a proponent of redistributing luck-based goods, some of the benefits of ET would be lost if we adopted Kaplow's account.

113. Markovits, *supra* note 2, at 2294.

114. *Id.*

115. RAWLS, *supra* note 79.

116. Zelenak, *supra* note 102, at 1160.

The correct conclusion from Markovits's hypothetical seems to be that he holds other values in addition to egalitarianism. Perhaps he values overall welfare. This would explain his dislike for talent slavery because talent slavery seems to make people do one thing when they would prefer to do a different thing. Alternatively, Markovits's dislike for talent slavery could stem from the value he puts on autonomy and self-determination.

In sum, it does not appear that the talent slavery objection to ET is exactly an attack on ET for a failure to be *egalitarian*. Rather, the talent slavery objection suggests that the alleged coercion into the work force or forced labor (and the corresponding violation of autonomy) makes ET undesirable *on the whole*—even if the equalisandum (money) is being redistributed in so far as it is possessed due to brute luck and not choice. Thus, if one were to believe that resources or money is the appropriate equalisandum (as opposed to utility<sup>117</sup>), then it seems that one could very well believe that ET is a system of taxation that successfully implements the ideals of a pure egalitarian.

*C. The Possibility of an ET-Like System that Employs Utility as the Equalisandum*

*1. The Talent Slavery Objection to ET Provides Further Support for My Position That Utility—and Not Money or Resources—Is the Appropriate Equalisandum*

As I have argued earlier in this Article and as Professor Richard Musgrave points out, utility seems to be a more appropriate equalisandum than money.<sup>118</sup> Thus, the fact that ET employs money, and not utility, as the equalisandum seems to be a big problem with ET. This is not a problem for the pure egalitarian who espouses ET because, as I discussed above, ET seems to fully satisfy egalitarian principles. The problem with ET, however, is for someone who is not a pure egalitarian, and who thus also cares about other things, such as (perhaps) utility.

It seems ET punishes unhappy, but rich, CEOs. The big flaw is that money is of only instrumental value to human beings, whereas

117. *See supra* Section III.C.

118. Richard Musgrave, *Maximin, Uncertainty, and the Leisure Trade-Off*, 88 Q.J. ECON. 625, 632 (1974). While some proponents of endowment taxation might, for merely practical reasons, favor a tax where money is the equalisandum over a tax where utility is the equalisandum, it seems as though most do not. For one, it is not even clear that endowment taxation more closely approximates the results of a tax with utility as the equalisandum than does a regular monetary income tax on actual earnings.

utility is of intrinsic value. The CEO's luck with regard to wage-potential is high, but this does not mean that he has the same value of disutility of labor that a poor worker might have. To take an example, suppose the CEO makes \$100,000 per year but that the disutility of this labor for the CEO is equivalent to \$60,000. The CEO would thus rather work at a \$50,000 job if the disutility of the labor were less than \$10,000, and he would also rather have leisure if that were worth over \$40,000 to him. The net utility that one gets from work seems to be what is morally relevant and primary. Thus, saying that the potential wage determines the tax owed seems to be missing the point. An interesting, but empirical, question is whether a regular income tax or ET would more closely approach the results of a utility tax to the extent of the luck/choice distinction. My guess would be that a regular income tax would be a better approximation because the disutility of labor would be internalized. There are, however, other confounding factors that make the analysis complicated.

Not only does choosing resources over utility as an equalisandum not take the disutility of labor into account, but it privileges economic transactions over non-economic transactions, and it is not clear why economic transactions should be the only transactions subject to redistribution. As Utz says, "economic behavior . . . provides a weak reflection, or no reflection at all, of what matters most to people's lives . . ." <sup>119</sup> He continues: "The principle flaw of . . . welfare analysis . . . is that [it] cannot accommodate the larger perspective that matters most." <sup>120</sup> Having luck with regard to utility not only subsumes luck with regard to money, but also, the portion of utility due to non-monetary factors can potentially be a much weightier part of the calculus than the portion of utility due to money. <sup>121</sup> Some of the non-monetary factors that contribute to overall utility and with respect to which one would like to be lucky include: parents whose home one is born into, general disposition/clinical depression, good friends, etc.

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119. Utz, *supra* note 9, at 948.

120. *Id.*

121. This of course is an empirical question, and it seems likely that for those who are extremely impoverished, the utility or disutility due to money may make the largest contribution to the utility analysis. Nevertheless, aside from those who are exceedingly poor, it seems as though non-monetary factors would generally have a larger impact on overall utility than monetary factors would.

2. *Although Having an ET-Like System Adopt Utility as the Equalisandum Would Be an Improvement, This Would Not Solve the Talent Slavery Problem*

As I have argued above, a pure egalitarian who believes that resources are the equalisandum and luck is the correct extent of redistribution should not have a problem with ET—or with talent slavery, for that matter. But, leaving behind a pure egalitarian view for a few moments, it is worth considering how we might avoid the problem of talent slavery. As I expressed above, utility should be our equalisandum. Would making utility due to luck subject to redistribution solve the problem of talent slavery? It seems as though, in addition to thinking that utility is the proper equalisandum, Musgrave thought that having utility as the equalisandum would avoid the problem of talent slavery.<sup>122</sup> However, while having the more appropriate equalisandum as the equalisandum would be better and would better achieve our goals of the non-subordination of persons as agents and patients, it does not seem as though it would avoid talent slavery.

The amount of utility due to luck would be determined and then a monetary tax would be imposed on individuals. Just as with ET, many people with high levels of luck but with low income will be forced to work—and will potentially be forced to work extremely large amounts depending on the calculus. This “happiness slavery” could be devastating and potentially much more so than “talent slavery” because (of course depending on how we define terms like “potential wage-rate”) it seems likely that there would be a much greater disparity between utility and salary than there would be between potential salary and salary. While, again, deciding which would be more devastating is an empirical question, a definitional question, and a slope-of-curve question,<sup>123</sup> it seems, at least at first glance, that people likely tend to work somewhere near their potential wage-rate.<sup>124</sup> Also of interest would be how long accounting cycles are, because it is likely that picking up a job to pay the utility tax would greatly lower the individual’s utility. How the tax worked would depend a lot on how quickly this feedback would occur.

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122. Musgrave, *supra* note 118, at 632.

123. A slope-of-the-curve question presumably is typically a type of “empirical question.”

124. Whether people do indeed tend to work somewhere near (and if so, how near) their potential wage-rate is an open question, but it seems likely, at the very least, that there is greater correlation between potential wage-rate and actual wage-rate than there is between utility and actual wage-rate.

Again, a pure egalitarian who believes in utility as the equalisandum, and the requisite extent of redistribution as the utility due to luck, would not have a problem with the talent slavery (which I here call "happiness slavery") that would exist. However, there would be worries with other values such as autonomy and overall welfare.

In sum, although having an ET-like system adopt utility as the equalisandum would be an improvement, this would not solve the talent slavery problem (here, the "happiness slavery" problem). Despite this, however, the fact that the talent slavery (or "happiness slavery") problem is not solved by having utility be the equalisandum is not a problem for the egalitarian. Depending on one's choice of equalisandum, either ET or an ET-like system with utility as the equalisandum will further egalitarian goals. The question I have been addressing in this subsection, however, was the broader question about the attractiveness of the system as a whole for someone who cares to further not only egalitarian principles, but also one or more other principles as well.

## V.

### A PROPOSAL FOR MAXIMIZING WELFARE IN AN EGALITARIAN SOCIETY

In the previous Part, I argued that we can indeed construct a tax system that furthers the principles of the pure egalitarian. Depending on whether one believes that resources (i.e., money) or utility is the appropriate equalisandum, the system that furthers the principles of the pure egalitarian will either be ET or a variant of ET according to which the equalisandum is utility. As I have shown, though, both of these two possible accounts, while furthering pure egalitarian principles, have various features that will be unattractive to people who are not pure egalitarians. More specifically, these two possible accounts seemingly would result in significantly suboptimal results from the perspective of someone who cares (even just somewhat) about any values other than egalitarian values—including, for example, the value of promoting people's welfare (i.e., happiness). Thus, the question that I address here is whether there is a system that can simultaneously satisfy the pure egalitarian and the person who values welfare. In this Part, I offer a proposal. The proposal is that we implement a tax that is a utility tax in two ways: (1) it determines the distribution of the tax burden according to utility calculations, and (2) it makes it the case that people pay the tax in terms of utility.

A. *Preliminary Considerations Underlying My  
Utility Tax Proposal*

The question confronting us is: How can we keep a system that satisfies someone who is a pure egalitarian, yet, at the same time, avoid talent (or happiness) slavery? The problem, as we saw in Part IV, is not that the equalisandum is resources.<sup>125</sup> Rather, it turns out that the problem, instead, is that the tax in all of these examples has been one that operates by collecting money.

In the most recent example in which utility was the equalisandum, utility not only was what determined how much to tax, but it also was what was being redistributed. However, although utility was being redistributed, it was being redistributed solely in the form of money: Money was what was collected by the tax, and the amount of money that was collected from an individual was chosen in order to bring about a redistribution of a particular amount of utility. If instead, however, the tax were somehow paid in utility and, importantly, not *necessarily* in utility in the form of money, then it seems as though we might be able to avoid talent slavery (i.e. happiness slavery). This is because an individual would not be forced to bring in a certain amount of money with which to pay a tax.

I will return shortly both to what burdens a tax in the form of utility might impose and to what such a tax would look like, but it seems as though it might avoid the talent slavery objection. The reason for this is slightly deeper than simply that no sum of money must be obtained. The reason is that utility (unlike money) is of value in and of itself. Even if a certain amount of utility must be obtained in order to pay a utility tax, it will not distort behavior because utility is what we seek to maximize anyway. In other words, the tax will not change what an individual will do. The need to obtain a sum of money may be distortionary, however, because making the most money is not always what a person will want to do. Money is only instrumentally valuable, and other activities might yield more utility.

Tax academics are constantly debating the relative efficiencies of using various forms of taxation—such as an income tax, consumption tax, and a lump sum tax, to name a few.<sup>126</sup> A utility tax (i.e., paying a tax in units of utility), however, seemingly would be the most efficient

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125. Although it might have seemed at first as though this was the problem, I showed that talent (or happiness) slavery was still a problem even when we switched from ET to a variant of ET according to which utility was the equalisandum. See *supra* Part IV.

126. See, e.g., Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax*, 58 STAN. L. REV. 1413 (2006).

type of tax—more efficient than any type of tax that requires payment exclusively in money. As Terrence Chorvat has said:

In general, the less a tax affects behavior, the more efficient it is thought to be. The standard example of a non-distorting tax is a lump sum tax, which does not change with the behavior of the taxpayer. However . . . behavioral distortions can and do arise from a change in even a lump-sum tax. The only truly non-distortionary tax would be one based on utility itself. Utility, which has been used as a norm for distributional analysis, is also the ideal base for efficiency analysis. In fact, any reasonable attempt to describe a minimally distortive basis of taxation will significantly resemble the notion of a tax on utility.<sup>127</sup>

Therefore, as described above, even a lump sum tax can lead to distortion because it is, in effect, a tax on leisure. Lump sum taxes “distort relative prices between monetary and non-monetary goods, due to [their] requirement that [they] be paid in money. Therefore, even a lump-sum tax has deadweight loss.”<sup>128</sup>

Given this important observation that a tax paid in terms of utility would be the least distortive tax, it is of prime importance to work out further details about (1) how to implement a tax of this sort, and (2) how a tax of this sort could be made to simultaneously satisfy the principles of the pure egalitarian. To the extent that we can simultaneously implement a tax of this sort and also satisfy the principles of the pure egalitarian, we would have the best of both worlds.

### B. *Details of a Utility Tax*

Two important questions arise: First, how are we to determine how much utility a person has, and thus, how much tax he owes? In the section below, I will offer some preliminary thoughts on this issue. Second, and more importantly for the purpose of this Article, I address the question of what a collection of a tax paid in utility would look like.

#### 1. *Assigning the Tax Burden*

Determining how much utility a person has (and then determining what portion of this is due to luck) is a complex problem. However, much like the problem of distinguishing welfare due to luck from welfare due to choice, it remains a practical problem. It is interesting, though, to raise a few of the many difficult questions that

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127. Terrence Chorvat, *Taxing Utility*, 35 J. SOCIO-ECON. 1 (2006).

128. *Id.* at 6.

spring out of the consideration of how to apply a utility tax. These questions are difficult because our understanding of utility (and how to define it) is neither clear nor settled. Utility *could* be defined theoretically in a workable way (despite the seeming difficulty), but the practical calculation problems in individual cases would remain difficult.

First, would we want the utility tax to structurally resemble a (monetary) consumption tax? Or would we want it to structurally resemble a (monetary) income tax? Or would we want it to structurally resemble a (monetary) wealth tax? Is there even a difference between the consumption and income of utility? Is there a wealth of utility that is possessed like a stack of dollar bills in one's room that one saves for a rainy day? If it does not make sense to talk about a wealth tax on utility, because one does not "possess" or save utility, then maybe it is not possible to distinguish between an income tax and a consumption tax on utility. Money clearly brings utility to people, and welfare economics relies on the understanding that money brings utility to people. How exactly does this work, though? Is all of the utility felt when one receives one's paycheck, or is it felt gradually as the money is spent? One way to look at it would be to say that no utility (or little utility) is felt when a paycheck is received, and, rather, that utility is just (or is primarily) the happiness that comes in each moment when the money of the paycheck is spent. Another way to think of the situation, though, might be to consider all of the utility brought about by a paycheck to be received at the time that the paycheck is received. On this account, when I buy, say, a steak meal the day after receiving my paycheck, I am not gaining the utility of the meal at the time of the meal, but, rather, at the time of the meal, I am trading away the utility of money to gain the utility of the meal—with these two values being equal. A problem with this account, though, is that at the time I receive my paycheck, I might not know how I will spend my money, so it is not clear how we could assign utility to the money. Another interesting issue relating to these points would involve the potential deferral of utility to the future, and this would involve a concept we could call "potential utility."

While the various problems discussed above, and the various other problems associated with quantifying utility, might seem intractable, it seems that we could define utility in a particular way, and then do our best, through various proxies, to determine this value.

## 2. *Paying the Utility Tax*

Perhaps the more important (and more interesting) theoretical questions confronting us are about how the utility would be paid in the utility tax and whether this really would avoid the problem of talent slavery (i.e., happiness slavery) for the non-pure egalitarian (i.e. the egalitarian who has other competing values in his mind, such as efficiency or non-egalitarian conceptions of fairness). Again, before continuing, it is crucial to recognize that the pure egalitarian should be content as long as utility is the equalisandum to be redistributed (and either redistributed to a full extent or potentially redistributed to the extent it is possessed due to brute luck). The pure egalitarian should not be bothered by the problem of happiness slavery that would occur if the tax were forced to be paid in money.

Various questions, issues, and problems come to mind in the process of articulating an account of how a tax would be paid in terms of utility.

First, if we are redistributing by collecting utility and not money, then the government seemingly will have no revenue. The pure egalitarian would not object to this, because utility would be equalized and, for him, that is what's important. We do get considerable welfare out of having a functioning government, however, so the so-called egalitarian who also cares about absolute welfare would be interested in collecting revenue. In light of the fact that we want to redistribute with utility transfers, we might be able to decrease the government's budget—and thus the amount of tax dollars that would need to be collected. What we could do would be to strip out all redistributive-type spending from the budget, since redistribution will be achieved through the utility transfer. In other words, we might eliminate things like welfare or governmental medical support to the poor.<sup>129</sup> Eliminating these monetary transfers, however, would greatly lower the required tax revenue. The remaining monetary tax burden could be determined in various ways, potentially according to what is deemed to be the Edgeworth-esque optimal tax<sup>130</sup>—at any rate, a tax based on

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129. Obviously, definitional issues would abound about whether something should be characterized as a "redistributive governmental program."

130. Recall that an Edgeworth-esque optimal tax would be one in which the tax system confiscates "the highest incomes and then the next highest incomes until the required yield is achieved." Utz, *supra* note 9, at 896; *see generally* Edgeworth, *supra* note 40. In the context I am considering here, however, this Edgeworth-esque optimal tax would only be applied to finance the greatly reduced monetary tax burden. This monetary tax burden would be significantly lower than the monetary tax burden that we currently have because a very large portion of the current tax burden is used to finance programs that could be described as redistributive monetary transfers.

actual income (and not, like ET, based on potential income), and thus a tax geared to avoid talent slavery.

The question, then, is how to bring about the egalitarian transfers of utility themselves. One option would be simply to inflict pain on, and thus reduce the utility of, all members of society except for the worst off (as a result of luck) until all members share the same utility (due to luck). This would be fine with the pure egalitarian, but it seems as though the egalitarian distribution of utility due to luck could be achieved while maintaining higher absolute welfare in society. The way to do this would be to effect some sort of a transfer so as to raise the utility of the least fortunate members of society. One way to do this has been pondered by scholars Kyle Logue and Ronen Avraham.<sup>131</sup> According to Logue and Avraham, economists like Louis Kaplow and Steven Shavell are wrong to say that the most efficient form of redistribution—be it a redistribution of resources or utility—is always the tax and transfer system.<sup>132</sup> Rather, they argue that the institution with the “comparative advantage”<sup>133</sup> in performing the particular type of redistribution should do so and, as they say, “with respect to non-income sources of inequality (or non-income proxies for well-being) . . . the tax-and-transfer system no longer has the clear comparative advantage.”<sup>134</sup> An institution has a comparative advantage if it is either the better observer of the inequality, the “more efficient” redistributor, or both.<sup>135</sup> According to Logue and Avraham, there are many situations where the legal system (but not the tax-and-transfer system) should play the redistributive role because of its comparative advantage. One such example is genetically-determined diseases. Logue and Avraham first give the example of having the legal rule prevent discrimination in the underwriting of insurance for those with genetically-determined diseases.<sup>136</sup> While this legal rule seems to boil down to a redistribution of utility via a distribution of money, it does not seem as though this needs to be the case. A legal rule, for example could prevent discrimination in various other ways that would increase the utility of the worst-off through non-monetary channels: Perhaps this could be done by requiring there to be ramps up to sidewalks on

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131. Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157 (2003).

132. Compare *id.* at 166–67 with Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEG. STUD. 667, 667 (1994).

133. Logue & Avraham, *supra* note 131, at 166.

134. *Id.* at 167.

135. *Id.*

136. *Id.* at 168.

street corners, thus preventing those in wheelchairs from feeling humiliated and alienated from society (potentially a large contributor to the lower welfare imposed on them by their disease). This way to change welfare would be primarily a gain in welfare to the worst off but would not really effect much of a loss to the better off (with the loss to the better off just being the money they have paid for the construction of the ramps).

Thus, so far we see that we can inflict negative utility on the best off, but alternatively we can bring about an increase in utility to the worst off. Another option is to effect more of zero-sum transfer. One small example of this in action (which could be elaborated upon and extended more broadly) would be to open up various stores in a city that are only open to "registered unhappy folks." Another example would be to allow only the registered unhappy folks to buy tickets to concerts or sporting events in the first week they go on sale so that they are rarely confronted with the problem of there being a sold-out event. These examples seem (and are) trivial, but the intuition can be extended to weightier transfers of utility. Will these transfers exert as much of a negative on society as talent slavery or happiness slavery, though?

From the stand-point of those who were opposed to talent slavery because of its infringement on autonomy, these transfers appear to be much less of an affront on autonomy. Of course, I only discussed small examples, and it is conceivable that in order to bring about enough of a transfer of utility, there would have to be serious interference in autonomy. This is conceivable, but it seems more likely that transfers would not rise to the high ground that many scholars give to the choice of whether or not to enter the labor force.<sup>137</sup>

The same analysis applies to utilitarian considerations. It is an empirical question, but it seems more likely that transfers could be made intelligently in such a way as to do better than talent slavery. This, however, is less clear than it is that we can avoid violating autonomy. It is less clear because it seems as though those who care about autonomy have a certain threshold dividing what is important and not important and, if we pack violations just barely under the threshold, we will come out better off. Utilitarianism is directly aggregative, though, so while it still seems likely that the system could be manipulated so as to bring about societal gains, this is less clear than it is in the context of autonomy.

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137. See Kelman, *supra* note 24.

### C. *Summary and Outlook*

In sum, it does seem that we can simultaneously satisfy both the pure egalitarian and the person who values welfare (i.e., happiness). As explained in this Part, we can do so by implementing a tax that is a utility tax in two ways: (1) it determines the distribution of the tax burden according to utility calculations, and (2) it makes it the case that people pay the tax in terms of utility.

Further, not only does the proposal discussed in this Part satisfy both the pure egalitarian and the non-pure egalitarian who values welfare, but it also satisfies the pure utilitarian. In the proposal's determination of the tax burden, which is done according to utility, the account incorporates Edgeworth's principles of an efficient tax.<sup>138</sup> In other words, to the extent that we do need money to be collected (and, thus, to the extent that part of the utility transfer does occur in the form of a monetary transfer), the account calls for money being taken from those who have the lowest marginal utility of money. In most cases, this will amount to the money being collected primarily from those who have more money, because it is these individuals who will typically have the lowest marginal utility of money.

One might point out, however, that an optimally efficient system, as described by Edgeworth, requires more than merely a tax that collects the required money as efficiently as possible. In other words, while it is true that, if confronted with a certain amount of tax money that needs to be collected, Edgeworth would say that we should collect each dollar from whomever, at that point, has the lowest marginal utility of money, it is also the case that an optimal system, according to Edgeworth, would call for an increase in the amount of money to be collected. Increasing the amount of money to be collected would thus enable there to be enough tax payments to be made that all people in the population would end up with an equal marginal utility of money. This, according to Edgeworth would be the optimal result. While collecting a particular amount of tax money according to his principle of having the dollars paid by those with the lowest marginal utility of money would be the most efficient way to collect the tax, we would get an even more efficient result if we increased the amount of money that we seek to collect via taxation.

Thus, one might object that, although my proposal conforms to Edgeworth's "efficient tax," it fails to expand the amount of money sought to be collected via taxation, and thus my proposal actually falls short of an account that would satisfy a pure utilitarian. This objection,

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138. *See supra* Part II.

however, fails to take into account the fact that large inefficiencies would result if Edgeworth's "optimal result" were brought into effect by sufficiently increasing the amount of money to be collected by a tax system. This is because of the fact that incentives to work and earn income would be removed, and this would occur to a great extent—an extent that would be highly inefficient. Thus, Edgeworth's "optimal result" is not something that a utilitarian would endorse. Therefore, this objection fails.

Given this answer regarding why we should not seek Edgeworth's "optimal result," however, one might then wonder why we should seek Edgeworth's more circumscribed account of how to optimally collect a tax, taking as given the amount of tax money to be collected. After all, couldn't collecting this sum of money according to his directive (i.e., to collect money from those with the lowest marginal utility of money) also confront similar inefficiencies due to the removal of incentives to work? In short, while it could, I think that this is unlikely to be a problem that plagues my proposal. This is because my proposal calls for a vastly lower amount of money to be collected via taxation than currently is the case, and I don't think that collecting these amounts of money from those with the lowest marginal utility of money would have destructive effects on incentives. In order for the destructive effects to occur, I think that the amounts to be collected via taxation would have to be significantly higher. They would not, of course, need to be as high as the amount needed to be collected to bring about Edgeworth's "optimal result," and indeed destructive effects would occur with much lower amounts of money to be collected as well. However, I think that the amounts of taxation to be collected according to my account would be well below the threshold where these destructive effects would occur. Further, to the extent that destructive effects were to arise, we could make some tweaks to avoid these destructive effects while, at the same time, continuing to implement the thrust of the proposal that I have been offering. Thus, even if some changes would need to be made, I do not think that this would be sufficient reason to rethink my general proposal.

## VI.

### THEORETICAL IMPLICATIONS AND PRACTICAL APPLICATIONS

#### A. *Theoretical Implications*

What has been the result of this theoretical investigation that began by exploring and unpacking the concept of "ability to pay?" I do

not by any means think that “ability to pay” is no longer an important concept. Rather, it is a term that extremely broadly appeals to egalitarianism and utilitarianism, and which must carefully be examined and defined in order for it to take on any meaning. While the utilitarian component of “ability to pay” is in no way simple, I chose to focus more extensively on the egalitarian component because there was much more confusion there.<sup>139</sup>

One might object, though, that there are no pure egalitarians out there—egalitarians who care only for redistribution of the equalisandum and for whom absolute levels of welfare are of no concern. While this may be true, my point throughout has been that it is still crucial to understand the intuitions of this hypothetical person. Only when we understand these intuitions are we in a position to discuss the tradeoffs between people’s welfare and people’s equality. To borrow the term that Markovits uses to refer to two goals of egalitarianism, it is only after coming to better understand what is required by egalitarianism and utilitarianism that we can begin our pursuit of attaining the “dual ambition of the ability to pay.”

Thus, “ability to pay” can still be a term used to describe our goals in designing a tax structure, but it should not be given much argumentative force. Rather, it is our description of the components of the term, the definitions of these components, and the way in which we make tradeoffs between or among the components, that should be given the ultimate argumentative force. This is what I have hoped to shed light on, and I thus hope to have brought greater clarity to an area of the law that is in much need of it.

Having explored the notion of “ability to pay” and extracted from it our underlying goals, I explored the various ways of furthering these goals independently, and then, importantly, I explored the ways of jointly furthering these goals. I then offered a proposal that, in my view, is able to jointly further these goals. Many authors have attempted to make progress on the various issues that I address, but, to my knowledge, these authors only address these issues individually and not how they all fit together. Thus, even if I thought that these authors all correctly analyze the issues that they address, my discussions in this Article would still constitute a contribution, because I address how the various issues fit together. Further, though, I think that many of the discussions of other authors are either mistaken, incomplete, or both. Thus, this Article has also made a number of smaller contributions that not only are important because of how they

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139. *See supra* Section II.B; Parts III–IV.

contribute to my overall conclusion, but also are important in their own right.

### B. *Practical Applications*

It is true that this paper has focused primarily on theoretical issues, but this does not mean that there are not important practical issues at stake for current tax policy that can be informed by the theoretical debate. One question that depends on the status of the endowment tax as an ideal, according to David Hasen, is whether we should have deductions for educational expenditures. As he says,

A number of scholars have asked whether [educational expenditures] should be amortizable, on the ground that the cost of education is not different in principle from any other cost for capital that has a finite, reasonably determinable life. As a general matter, under the income tax such costs are capitalized and then amortized over the life of the asset, but most educational expenses under the actual income tax are neither deductible nor amortizable. One of the central questions in this debate is the impact of endowment. If endowment is a form of income, then the failure to tax it at birth may offset the denial of cost recovery for most education expenses, in which case the existing rules represent a reasonably good approximation of the tax ideal. If endowment is not income, or should not in any case be taxed, then the failure to provide cost recovery for educational expenses remains a problem for the tax system.<sup>140</sup>

Another example of an area of tax policy that might be affected by the question of endowment taxation, according to Hasen, is whether or not there should be separate rate schedules for married couples who file jointly.<sup>141</sup> As he says, though, the areas that are affected by opinions of the import of endowment are quite broad:

More generally, a proponent of the endowment ideal might favor forms of taxation that reach complements to leisure as a kind of second-best version of the endowment ideal. Such an approach would supplement the income tax with a potentially extensive array of commodity taxes, the effect of which would be to steer individuals into income-producing activity to the extent that the income tax creates incentives to "consume" more leisure. Such a development would constitute a sweeping reform to the federal tax system.<sup>142</sup>

While the equalisandum at issue in the discussion of the endowment tax is resources or money, the crux of the problem—the distinc-

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140. Hasen, *supra* note 103, at 1073.

141. *Id.*

142. *Id.* at 1060–61.

tion between luck and choice, and the question of partial distribution along this metric—can be extended to discussions where other equalisandums, such as utility, are assumed.<sup>143</sup> Views on whether there should be partial distribution according to the luck/choice distinction, and if so, what should be considered a choice, have a huge influence on various areas of tax policy.

As for another implication of this Article's analysis for tax policy: As discussed early on in this Article, and as Griffith points out, it is also important to recognize the difference between the utilitarian and egalitarian justifications for personal deductions and exclusions.<sup>144</sup> Our theoretical views on the relative importance of these two aspects of "ability to pay" will and do inform our arguments for the appropriate tax base in this regard.

Also, whether we think of the equalisandum as being utility or resources can have a large effect on policy. Clearly in many situations, even if utility is our equalisandum, money or market value will be the best proxy for utility, but in situations where there is evidence that subjective value differs for some reason, then the question of equalisandum is of great importance. In *Benaglia v. Commissioner*, the court discounted the market value of the fringe benefit of the hotel employee to what appeared to be its subjective value to him.<sup>145</sup> However, it seems as though in other situations we do not treat subjective value as an equalisandum. Although justifications for policies are complex, and it is often difficult to tell whether a particular policy is in place for theoretical or practical reasons, it seems that the non-taxation of imputed income may be an example of a situation in which our system reflects the belief that subjective value is not the proper equalisandum.<sup>146</sup>

Also, if we do believe that we would like to redistribute with respect to utility, it seems as though we must seriously take into account the importance of Chorvat's and Logue and Avraham's analyses. Chorvat discusses the efficiency of having people pay tax in the

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143. See *supra* Sections IV.B–C.

144. See Griffith, *supra* note 5, at 345.

145. 36 B.T.A. 838, 839–40 (1937).

146. "Imputed income" is "the benefit one receives from the use of one's own property, the performance of one's own services, or the consumption of self-produced goods and services." *Imputed Income*, BLACK'S LAW DICTIONARY (7th ed. 1999). The non-taxation of imputed income seemingly reflects a belief that subjective value is not a proper equalisandum and that money is. This is because the imputed income constitutes income in terms of happiness, but it does not constitute income in terms of dollars, and the non-taxation of the benefit thus tracks the equalisandum for which there is no income: money.

currency of utility.<sup>147</sup> Logue and Avraham argue that sometimes the tax-and-transfer system is the most efficient way to redistribute, but sometimes other systems (such as legal rules) have a comparative advantage.<sup>148</sup> This, they say, is often the case when what we want to redistribute is non-monetary. Thus, it seems as though if utility is our equalisandum, then we must invest serious effort into redistributing utility through avenues other than differential payments of money to the government.

It is important to note that our tax system is a hybrid according to many metrics<sup>149</sup>: We care about efficiency and about equity; we have some aspects of a consumption tax and some aspects of a pure income tax; and similarly, in addition to having monetary utility transfers, we also already do have non-monetary utility transfers. With respect to the latter hybridity, there are all sorts of examples of our having non-monetary utility transfers—one being the example, discussed in Section V.B, about anti-discrimination laws (including the requirement that there be ramps in places such as sidewalk corners). Thus, even if we do not realize it, the idea of giving the worst off a boost in utility in non-monetary avenues is not a concept that is foreign to us. As we move forward, though, there are many further ways in which we can bring about a larger number of non-monetary utility boosts or transfers—and many further ways in which we can also bring about weightier utility boosts or transfers—to the worse off.

Thus, describing the components of ability to pay, defining these components, and deciding how we want to make tradeoffs among these components is of great theoretical importance and interest, but these theoretical decisions also have an enormous impact on the outcomes of current—and pressing—tax policy decisions.

#### CONCLUSION

In this Article, I explored two of the main goals of the tax system's assignment of the tax burden—fairness and efficiency—and I ultimately offered a proposal that I think is the best candidate for simultaneously furthering these two goals. The account I have offered is a version of a utility tax.

As I explained, a vast amount of tax literature appeals to the premise that a system of taxation should assign tax burdens according to taxpayers' "ability to pay." Despite the broad-based assent to the im-

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147. See generally Chorvat, *supra* note 127.

148. Logue & Avraham, *supra* note 131, at 166–67.

149. With respect to the tax system's hybridity in the context of efficiency and equity, see generally Griffith, *supra* note 5.

portance of “ability to pay,” however, there has been far from a consensus on what the term means. This confusion is frequently overlooked, though, because many of the characterizations of and justifications for “ability to pay” come out the same way on various issues—thus masking the differences of the viewpoints. In this Article, I have attempted to unpack and shed much-needed light on the term “ability to pay.”

It turns out that the notion of “ability to pay” is a notion that is employed for two main reasons: Distributing the tax burden according to people’s ability to pay furthers both egalitarian and utilitarian ideals. In this Article, I began by teasing these goals apart and by explaining how they are furthered by distributing the tax burden according to people’s “ability to pay.” I then proceeded to explore in greater depth how good of a job the notion of “ability to pay” does at furthering each of these two goals, and I considered and addressed various different ways of assigning the tax burden (and different ways of collecting the tax) that could perhaps better further egalitarian and utilitarian goals. While many accounts further one goal well, it is difficult to identify an account that furthers both goals well.

Ultimately, I zeroed in on an account that, in my view, best satisfies the egalitarian goal and the utilitarian goal, and, further, since it best satisfies both goals, it, in my view, also is the account that best satisfies our ambition to further both goals. The account that I offered was a version of a utility tax, with it being the case both that the tax is collected in terms of utility, and that the tax burden is determined in terms of utility. Further, in its determination of the assignment of the tax burden, the account incorporates Edgeworth’s principles of an efficient tax while simultaneously pursuing egalitarian redistribution of utility (the equalisandum) to either a full extent, or to the extent that it is possessed due to luck and not choice.

This account, in various ways, could be described as an “ability to pay” tax in terms of utility. Thus, although I began the Article by exploring the notion of an “ability to pay” tax and I then argued that an “ability to pay” tax, as it currently exists, is not the account that best furthers egalitarianism and efficiency, the account I defend does incorporate some key features of an “ability to pay” tax (despite being very different in other ways). Further, it is only in virtue of unpacking the notion of “ability to pay,” and exploring the rationales and justifications that underlie it, that I have been able to identify the account I defend, recognizing its unique ability to simultaneously further egalitarian and utilitarian goals.

Although this Article explored two of the main goals of the tax system's assignment of the tax burden—efficiency and fairness (and, in particular, the egalitarian theory of fairness)—it is important to note that efficiency and fairness are not the only possible goals of the tax system, and that egalitarianism is not the only possible notion of fairness that one might employ when seeking to further the goal of fairness in the tax system. Notwithstanding this, I did, however, explain why the Article's focus on utilitarianism (efficiency) and egalitarianism was both appropriate and fruitful: This is because utilitarianism and egalitarianism have historically been, and still are, thought to be the two main principles that should and do underlie our determination of how to distribute the tax burden. Further, while it is true that utilitarianism and egalitarianism are two of the main principles thought to underlie our determination of how to distribute the tax burden, it is the case *even more so* that these two principles dominate the landscape of principles justifying the theory of taxation according to which the tax burden should be distributed according to people's ability to pay. Furthermore, it is this specific theory of taxation—"ability to pay" taxation—that is the focus of this Article.

In light of these considerations, how one understands the conclusions of this Article will, in part, be a function of one's views: It could be that one will think that the theories and principles discussed in this Article constitute the full picture, and, if so, then my conclusions are conclusions about what the tax system should look like "full-stop." At the very least, however, the theories and principles discussed in this Article constitute key components of the full picture. Thus, even if one thinks that there are additional considerations that we must take into account when we determine tax law and policy, the considerations and conclusions in this Article should, at the very least, play a prominent role in guiding our determinations and decisions.