

JUSTICE IN TAXATION

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“[I]t is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits”¹

—Aristotle

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1. ARISTOTLE, NICOMACHEAN ETHICS, Book I 3 (W. D. Ross trans. 350 B.C.E).

INTRODUCTION

In Charles Dickens's *Great Expectations*, Pip says, "there is nothing so finely perceived and so finely felt, as injustice."² In context, Pip was talking about the world of children, but a deep longing for justice is equally ubiquitous in the world of adults.³ As N. T. Wright conveys it, "[a] sense of justice comes with the kit of being human. We know about it, as we say, in our bones."⁴ Besides being the object of profound and universal yearning, justice is also the chief purpose of the state.⁵ "Justice," observed James Madison, "is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained"⁶

Taxation and economic regulation, as subsidiary features of government generally, also aim first and foremost at justice. Nevertheless, economic justice eludes us. Not always perhaps, but too often, our social and economic systems arbitrarily distribute wealth, power, comfort, and status. Private interests of the powerful prevail over general interests. Our societies honor the unscrupulous while reviling the virtuous. Despite the long history of our less-than-just institutions and policies, "[n]ature still obstinately refuses to co-operate by making the rich people innately superior to the poor people."⁷

Although there is no single reason for the persistence of economic injustice in the world, a primary factor is tax and fiscal policy.⁸ Yet, notwithstanding the political centrality of fiscal policy and economic justice, deep disagreement about taxes persists around the world. Discourse about taxes continues to produce disappointing economic policies that do not improve economic fairness or happiness.⁹

2. CHARLES DICKENS, *GREAT EXPECTATIONS* 57 (Margaret Cardwell ed., 2008) (1861).

3. AMARTYA SEN, *THE IDEA OF JUSTICE*, AT vii (2009).

4. N.T. WRIGHT, *SIMPLY CHRISTIAN: WHY CHRISTIANITY MAKES SENSE* 4 (2006).

5. See JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971) ("Justice is the first virtue of social institutions").

6. THE FEDERALIST NO. 51, at 340 (Alexander Hamilton or James Madison) (Sesquicentennial ed. 1937).

7. SIDNEY WEBB & BEATRICE WEBB, *THE DECAY OF CAPITALIST CIVILISATION* 39 (3d ed. 1923).

8. See THOMAS PIKETTY, *THE ECONOMICS OF INEQUALITY* 100 (Arthur Goldhammer trans., 2015) ("The primary tool for pure redistribution is fiscal redistribution, which makes it possible to correct inequality due to unequal initial endowments and market forces while preserving as much as possible of the allocative role of the price system.")

9. See generally Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 *FORDHAM URB. L.J.* 607, 607-08 (1995) (discussing tax policy discourse in the U.S. in relation to American notions of distributive justice).

A. Discourse in Taxation

There are a handful of possible reasons tax discourse often fails to build consensus around fiscal solutions to injustice. First, the structure of our discourse may be dysfunctional. Our discourse about fiscal policies takes place within a historical and theoretical scaffolding. John Maynard Keynes said:

[T]he ideas of economists and . . . philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist . . . [and] soon or late, it is ideas, not vested interests, which are dangerous for good or evil.¹⁰

Our discourse, the medium by which we develop ideas affecting justice, is deeply rooted in a historical context.¹¹ Injustice may persist because it is difficult to break out of the framework of ideas we have inherited.¹² In some cases, our inherited framework may render competing ideas about taxes incommensurable or otherwise less amenable to resolution. In addition, our approach to discussing questions and problems in taxation may be less than optimal for achieving consensus and truth. The scientific method is more effective in uncovering truth than less analytic methods.¹³ For example, a controlled experiment isolating variables provides more certainty than an uncontrolled experiment.¹⁴ Similarly, the procedures according to which we discuss taxation and establish tax policies may be flawed. Without an optimal method for discourse about justice and taxation, injustice and poor tax policies will persist.

Second, economic injustice persists because our discourse has not yet led to the required solutions. Even if the quality of discourse is good, the social accumulation of knowledge and consensus building are slow, hard processes. In some cases, discourse touching on justice and taxation is less

10. JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT AND MONEY* 383–84 (1936).

11. See Ruth Wodak, *What CDA is About – A Summary of its History, Important Concepts and its Development*, in *METHODS OF CRITICAL DISCOURSE ANALYSIS* 1, 2–3 (Ruth Wodak & Michael Meyer eds., 2001) (describing language and discourse as the medium through which social inequality is expressed and legitimized).

12. See *id.* at 3 (explaining that the historical context of every discourse has a stabilizing and naturalizing force, which appears to make opposing discourse break convention).

13. Tom Flanagan, *The Scientific Method and Why It Matters*, *C2C JOURNAL* (Jan. 21, 2013), <http://www.c2cjournal.ca/2013/01/the-scientific-method-and-why-it-matters>.

14. *Id.*

frequent than what it ought to be. Yet, in other cases, the quality and quantity of discourse is just right, but our only course of action is to wait. We wait with the expectation that, eventually, we will achieve greater truth and justice. Patience may be our only recourse.

Third, some economic injustice persists regardless of the quality, quantity, or duration of our discourse. Justice sometimes fails because of weaknesses in human nature or the destructive whims of Mother Nature. Our human tools for pursuing economic justice are modest. Philosophy and social scientific research are tentative and imperfect.¹⁵ Though philosophy and science may uncover truth relevant to economic justice, there will nonetheless, be room for reasonable disagreement. Without consensus as to what economic justice requires, there will always be vacillating competition between opposing ideas.

In this Article, I examine the first reason for economic injustice: the quality and structure of our tax discourse in the media, public, academia, and professional practice. This Article's purpose is to demonstrate how different fields of study—philosophy, law, accountancy, economics, history, psychology, sociology, and the hard sciences—can more efficiently bring about economic justice through taxation policy and practice. Let me admit upfront that my discussion in this Article itself is imperfect. Like the bad shot who is dignified for accepting a dual, I felt impelled to take on the ambitious topic of this Article because I think it important and necessary. I decided to write this Article because I perceive that our imperfect discursive practice in taxation is among the significant impediments to achieving economic justice. I am unaware of any previous effort to encapsulate how different fields of study and how experts and lay citizens do and ought to work together to advance knowledge and justice in taxation.

B. Complexity and Taxation

As a domain of theoretical inquiry, taxation has proven remarkably difficult to reason about effectively. Albert Einstein, whose name has become synonymous with genius, reportedly told his tax advisor that taxes are “[t]he hardest thing in the world to understand.”¹⁶ Although considerable intellectual resources are poured into its study, taxation

15. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 3 (Arthur Goldhammer trans., Harvard University Press 2014) (2013) (“Social scientific research is and always will be tentative and imperfect. It does not claim to transform economics, sociology, and history into exact sciences. But . . . [i]t can help to redefine terms of debate, unmask certain preconceived or fraudulent notions, and subject all positions to constant critical scrutiny.”).

16. Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 *DUKE L.J.* 1897, 1907 (2014).

nevertheless lacks systematic theories that provide general guidance as to how taxation does, can, and should function in society. Instead, normative reasoning in taxation tends to proceed from fragmented maxims about equity, efficiency, and administrability.¹⁷

People like simplicity. It purveys a sense of comfort and control. Unfortunately, the truth about most things—especially important things—is rarely simple. Taxation is no exception; its technical complexity makes it difficult. Taxation is so intricate that, as the late economist David F. Bradford wrote, it “can be understood (if at all) by only a tiny priesthood of lawyers and accountants.”¹⁸ In the United States, as in many other nations, the sheer magnitude of laws dealing with taxation is enormous. There are thousands upon thousands of jargon-filled pages of statutes, regulations, cases, and administrative rulings on federal and state income taxes, employment taxes, sales taxes, property taxes, fees, penalties, and excise taxes.¹⁹ In 1946, when the United States tax laws were less complicated, Judge Learned Hand described tax law as a “meaningless procession” of “cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of”²⁰ In many countries, it takes years of devoted study to become familiar with a range of tax laws. Moreover, knowing tax law means staying abreast of the frequent legislation, administrative pronouncements, judicial opinions, and scholarly writings.

Another reason taxation is complex is the interdisciplinary nature of the subject. Tax theory is broadly informed by philosophy, economics, history, psychology, sociology, political science, and the natural sciences. Few experts, if any, can be fully literate in all of the specialisms in tax policy. While division of labor is intrinsic to the study of taxation, it renders taxation susceptible to the silo effect, i.e., inadequate cross-specialty collaboration.²¹ Lee Shepherd, a passionate tax commentator, concisely described the problem of overspecialization in taxation: “if you don’t have generalists, you don’t have perspective.”²²

17. DAVID F. BRADFORD, *UNTANGLING THE INCOME TAX* 266 (1986).

18. *Id.*

19. See generally Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX. REV. 645, 647–85 (2003) (discussing the complexity of the U.S. tax system).

20. *Welder v. United States*, 329 F. Supp. 739, 741 (S.D. Tex. 1971) (quoting Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947)).

21. See generally Steven Poole, *The Silo Effect by Gillian Tett Review – A Subversive Manifesto*, GUARDIAN (Oct. 17, 2015, 4:30 PM), <https://www.theguardian.com/books/2015/oct/17/the-silo-effect-why-putting-everything-in-its-place-isnt-such-a-bright-idea-gillian-tett-review> (explaining that the “silo effect” is a result of specialized business units not adequately communicating).

22. Lynnley Browning, *A Designer Handbag Amid the Briefcases on the Tax Beat*, N.Y. TIMES (Aug. 31, 2007), <http://www.nytimes.com/2007/08/31/business/31tax.html>.

Although complexity and specialisms in taxation cannot be eliminated, a shared theoretical framework could keep the boundaries between the involved specialties permeable. A common framework could keep all of the specialists speaking the same basic language. While many domains of inquiry play a role in the study of taxation, moral ideas about justice and human welfare shape tax theory at the most basic level.²³ Since moral philosophy is at the foundation of justice, it should serve as the foundation of taxation discourse.

Philosophy-free tax theory or practice does not exist; there is only tax theory and practice conducted with insufficient attention to underlying philosophical assumptions.²⁴ Moral philosophy fixes the ends to which taxation properly aims. Moral philosophy is the intellectual field most promising for uniting the disparate schools of thought in taxation. We might expect, then, that moral philosophy would have played an important role in the development of tax theory and law.²⁵ Yet our public and scholarly discourse about taxation has “generated less sophisticated discussion, from a moral point of view, than other public questions that have a moral dimension.”²⁶

In essence, tax theory is a higher-level application of moral philosophy; it requires empirical and theoretical inputs from economics and the sciences to come to useful conclusions. Questions of what fiscal policies *actually* do and what proposed policies *will* do are inexorably intertwined with questions of what justice demands of taxation, i.e., what fiscal policies *should* do.²⁷ Thus, while philosophy should serve as the structural skeleton of good taxation theory, the social and natural sciences are the flesh and blood. In taxation, philosophy is dead without science just as science is dead without philosophy. Philosophy, economics, or any other single field of study cannot have a monopoly on useful contributions to tax theory. A living, meaningful tax theory requires uniting philosophy and science.

Philosophers and the general public are divided about “the good life,” morality, and economic justice. While we all have an innate sense of justice, defining its particular contours has been the subject of perpetual

23. LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 3 (2002).

24. See DANIEL C. DENNETT, *INTUITION PUMPS AND OTHER TOOLS FOR THINKING* 20 (2013) (stating that, “[t]here is no such thing as philosophy-free science, just science that has been conducted without any consideration of its underlying philosophical assumptions.”)

25. Daniel Halliday, *Justice and Taxation*, 8 *PHIL. COMPASS* 1111, 1111 (2013).

26. MURPHY & NAGEL, *supra* note 23, at 3–4.

27. See *id.* at 4 (describing the disconnect between philosophy, ethics, and public policy).

debate since the beginning of recorded history.²⁸ As justice in taxation rests on conceptions of moral philosophy, which is itself profoundly fractured, a single theory of taxation is not possible until we achieve consensus on normative morality. Discourse has and can build moral consensus. Moral philosophy has produced a number of cogent and plausible moral theories that are well-defined and pave the way for more precise dialogue.²⁹

Although taxation theory cannot be more unified than the moral theory and scientific evidence on which it is ultimately grounded, taxation theory can be more organized than it is now. There cannot yet be *one* systematic theory of taxation, but there can be systematic, well-defined, and competing *theories* of taxation. And, if discourse in taxation transparently proceeds from philosophical assumptions about morality, then cross-theory and cross-specialty discourse in taxation can be more productive and justice more attainable.

In addition, this Article will demonstrate how we can ground technical arguments about specific features of our current tax laws in moral theory. It will do so by showing how findings of science and reasoning operate within the discursive structure of moral philosophy. Before getting to the central contributions of this Article, I begin with a brief primer on contemporary discourse in taxation.

I. CONTEMPORARY DISCOURSE IN TAXATION

The analytical search for justice in taxation has gone on for centuries, but modern tax theory can be traced back to Adam Smith and the European Age of Enlightenment.³⁰ In his groundbreaking work, *Wealth of Nations*, Adam Smith advances four maxims of prudent taxation that remain relevant in tax theory today.³¹

First, Smith asserts, “[t]he subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state.”³² Second, Smith says that taxes “ought to be certain, and not arbitrary,” and that, “[t]he time of payment, the manner of payment, the quantity to be paid, ought all to be

28. See generally Wayne P. Pomerleau, *Western Theories of Justice*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/justwest/> (last visited May 7, 2017) (noting that philosophers have been defining justice throughout time).

29. See *infra* Part II (discussing the most developed moral philosophies of justice).

30. See Beverly I. Moran, *Capitalism and the Tax System: A Search for Social Justice*, 61 SMU L. REV. 337, 342 n.11 (2008) (discussing Adam Smith’s views on taxation).

31. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, in GREAT BOOKS OF THE WESTERN WORLD 361–62 (Robert Maynard Hutchins ed., 1952).

32. *Id.* at 361.

clear and plain to the contributor, and to every other person.”³³ Third among Smith’s maxims is that “[e]very tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it.”³⁴ Lastly, Adam Smith maintains that taxation should be as efficient as possible. In his words, taxes “ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state.”³⁵

A. Contemporary Criteria of Tax Justice

In evaluating taxes today, we continue to apply Adam Smith’s maxims—equity, certainty, convenience, and efficiency—along with a few additional principles developed since the publication of *Wealth of Nations*.³⁶ Today, justice in taxation is often discussed in terms of so-called horizontal and vertical equity.³⁷ Horizontal equity requires that like cases be treated alike in taxation.³⁸ For instance, if two citizens of the same taxing jurisdiction have the same income and make similar relevant choices, they should pay the same income tax. Or, if they consume the same amount of the same goods, they should pay the same consumption taxes.

Vertical equity, on the other hand, requires that taxpayers who are situated differently be treated differently to an appropriate degree.³⁹ Although horizontal and vertical equity are two sides of the same coin,

33. *Id.* at 362.

34. *Id.*

35. *Id.*

36. See, e.g., JANE FRECKNALL-HUGHES, THE THEORY, PRINCIPLES AND MANAGEMENT OF TAXATION: AN INTRODUCTION 25, 33 (2015) (discussing neutrality, correction, flexibility, simplicity, fairness, accountability, and acceptable behavior as examples of additional principles developed in tax theory); RICHARD MURPHY, A CODE OF CONDUCT FOR TAXATION 8 (2007), <http://visar.csustan.edu/aaba/CODE%20OF%20CONDUCT%20FOR%20TAXATION.pdf> (discussing new principles to replace Smith’s initial maxims in the *Wealth of Nations*); MURPHY & NAGEL, *supra* note 23, at 12–39 (evaluating the underpinnings of modern tax policy); AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, GUIDING PRINCIPLES OF GOOD TAX POLICY: A FRAMEWORK FOR EVALUATING TAX PROPOSALS 14 n.1 (2001), http://www.aicpa.org/InterestAreas/Tax/Resources/TaxLegislationPolicy/Advocacy/DownloadableDocuments/Tax_Policy_Concept_Statement_No.1.doc (discussing the ten principles used to review tax policy, specifically mentioning the influence of Adam Smith’s four maxims as the foundation for the first four principles); SIMON MCKIE, TAX COMPETITION: LIBERATION OR FLAMING LIBERTY? 50–51 (2000), http://www.mckieandco.com/Publications/Articles/Tax_Competition_-_Liberation_or_a_Flaming_Liberty.pdf (advocating for the European Union to embrace tax competition, and describing characteristics of effective tax competition and the harm resulting from restricting competition).

37. Renée Judith Sobel, *United States Taxation of Its Citizens Abroad: Incentive or Equity?*, 38 VAND. L. REV. 101, 103 (1985).

38. Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399, 401 (2005).

39. *Id.*

vertical equity tends to be more contentious. There is broad disagreement about what counts as relevant differences in how a person ought to be taxed.⁴⁰ In addition, people disagree as to what different treatment is appropriate when there is a difference between taxpayers.⁴¹ Adam Smith, in his first maxim, touched on the two differences considered relevant for the purposes of vertical equity today: (1) benefit received, and (2) ability to pay.⁴²

B. Critique of Contemporary Criteria of Tax Justice

Liam Murphy and Thomas Nagel wrote a rather stinging critique of contemporary criteria of tax justice in their book, *The Myth of Ownership*.⁴³ Professors Murphy and Nagel point out two important concerns with the benefit principle. The modern benefit principle generally likens taxation and public expenditures to exchanges in a marketplace: the more a taxpayer gets from the government, the more the taxpayer should pay in taxes.⁴⁴ Measuring the benefit a person receives from the government, however, is not without difficulty.

First, Professors Murphy and Nagel write, “[t]o come up with a measure . . . of benefit (or burden) we need to ask, ‘Relative to what?’—we need to settle on a baseline.”⁴⁵ It makes little sense to use pretax welfare as a baseline for measuring benefit because welfare before taxes is nonetheless dependent on the government.⁴⁶ The government, funded by taxes, affects market outcomes.⁴⁷ Whether a person makes a lot of money (in a “free” market or otherwise) depends on policies and institutions. Rather, the baseline from which to measure benefit received from government would have to be some pre-government, Hobbesian state of nature.⁴⁸ That state of nature can be hard to imagine, but presumably, it would have lower and

40. See Sobel, *supra* note 37, at 109 (noting that vertical equity does not always take costs of living into account, but that “wealthier” individuals must pay a larger share of their earnings as taxes under vertical equity).

41. John Buck, *The Equity of a Tax System*, ECON. PERSPS. (Dec. 8, 2008), <http://econperspectives.blogspot.com/2008/12/equity-of-tax-system.html>.

42. Smith, *supra* note 31, at 361–62.

43. MURPHY & NAGEL, *supra* note 23, 12 (lambasting traditional tax policy theorists for neglecting to account for social values).

44. See *id.* at 16.

45. *Id.*

46. See *id.* at 16–17 (proposing a standard baseline measure without government benefits included).

47. *Id.*

48. *Id.* at 16.

roughly equal welfare.⁴⁹ Nevertheless, people often use pretax market outcomes as the baseline to measure the benefit a person receives to determine that person's proper tax liability.⁵⁰

Second, the benefit principle provides guidance on public expenditures.⁵¹ Even if we could perfectly measure the benefit each taxpayer received from the government, it would not put to rest all of the questions of justice in taxation. Measuring benefit does not indicate how much revenue should be raised or how to spend the revenue. Does justice require that revenue be raised for protecting the environment? For assisting people with mental or physical disabilities?⁵² These and other questions about public expenditures, regardless of the amount of benefit received by each taxpayer, involve questions of justice left untouched by the benefit principle.⁵³

Arguably, the "quasi-exchange" take on tax justice "cannot apply with any reasonable precision, because the beneficiaries of government activities are often indirect and diffuse," and because "some government programs produce 'negative' transfers that harm everybody or some individuals or groups relative to others."⁵⁴ Some proponents of the benefit principle attempt to avoid the difficulty of measuring welfare by "postulating that the measure of a person's benefit from government is none other than his or her financial (as opposed to psychic) well-being."⁵⁵ Yet, this formulation of the benefit principle is vulnerable to the criticism that monetary advantage is an unsatisfactory proxy for the true benefit received from the government. Cash flows or wealth, after all, are only factors in overall well-being.⁵⁶

In addition to the benefit principle, another difference relevant to vertical equity is taxpayers' relative ability to pay.⁵⁷ The ability-to-pay principle asserts that the level of taxation ought to correspond to the ability

49. *See id.* at 17 (recognizing current human unsustainability without government programs and direction).

50. *See id.* at 19 (assuming the pretax baseline is one of the market outcomes untouched by government).

51. *Id.* at 18.

52. *Id.*

53. *See* Dodge, *supra* note 38, at 432–33 (arguing that, because the poor benefit from government expenditures, "it would be difficult for new benefit principle proponents convincingly to derive a progressive tax system from the principle itself").

54. *Id.* at 405.

55. *Id.* at 406.

56. *See* DEREK BOK, THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE RESEARCH ON WELL-BEING 139 (2010) (noting that growth in gross domestic product (GDP) has not resulted in happier Americans); JOSEPH E. STIGLITZ ET AL., MISMEASURING OUR LIVES: WHY GDP DOESN'T ADD UP 56, 61 (2010) (noting that the "[q]uality of life is a broader concept than economic production and living standards. It includes a full range of factors that influences what we value in living, reaching beyond its material side.").

57. Stephen Utz, *Ability to Pay*, 23 WHITTIER L. REV. 867, 867–69 (2002).

of each taxpayer to contribute to state revenue.⁵⁸ What, however, is meant by “ability to pay”? Some tax experts view the ability-to-pay principle as requiring taxation based on endowment, or native potential to command resources, rather than wealth, income, or cash flow.⁵⁹ An endowment tax, were it practicable, would tax a highly capable person who decided to teach in primary school at a higher rate than a less capable person who also teaches in primary school.⁶⁰ The highly capable person could have become a wealthy surgeon had he or she so wished. The idea of endowment taxation may be unworkable because of the difficulty in observing the potential ability to command resources. However, many understand that taxation ought to conform to endowment taxation as closely as possible given the administrative limitations.⁶¹ In these second-best ability-to-pay theories, wealth, income, or cash flow are frequently used as proxies for natural endowment.⁶² However, income is a result of both ability and effort. Thus, income taxes distort taxpayer decisions regarding effort.

As with the benefit principle, Professors Murphy and Nagel criticize the ability-to-pay principle for ignoring public expenditures and government structures.⁶³ The ability-to-pay approach views taxation as a “common disaster” from an *a priori* just situation.⁶⁴ The disaster should be shared according to principles of “equal-sacrifice” or “from each according to his ability, to each according to his needs.”⁶⁵ Unless we presume that the present economic market works perfectly, and that all market outcomes are therefore inherently just, it does not make sense to evaluate taxes without considering the present market distribution of resources and power.⁶⁶ People viscerally hate taxes. What they rationally hate, however, is the present combination of taxes and public expenditures—not just taxes. Taxes and government work together; they work either towards or away from justice and human welfare.

Professors Murphy and Nagel argue that the traditional criteria of tax justice are inadequate because they are alienated from holistic theories of justice.⁶⁷ Justice in taxation cannot be logically divided from justice generally. Tax theory has to look beyond tax to achieve the proper moral

58. *Id.*

59. See, e.g., David Hasen, *Liberalism and Ability Taxation*, 85 TEX. L. REV. 1057, 1059 (2007) (explaining endowment tax); MURPHY & NAGEL, *supra* note 23, at 20 (defining endowment tax).

60. MURPHY & NAGEL, *supra* note 23, at 21–22.

61. *Id.* at 20.

62. *Id.* at 20–21.

63. *Id.* at 23–26.

64. *Id.*

65. *Id.* at 23–24.

66. See *id.* at 27–28 (arguing that few believe market outcomes are presumptively just).

67. *Id.*

ends. The tax questions having the biggest impact on justice and human welfare frequently involve conflicts between the benefit-received principle, the ability-to-pay principle, certainty, convenience, consistency, and efficiency. How are these conflicts to be rationally settled? How do we determine the right combination of tradeoffs to maximize justice? Without a tax theory situated in moral theory, many arguments proceeding from traditional criteria of good tax policy are incommensurable and interminable. The traditional criteria are inappropriate proxies for the true ends of justice. Rather than using shorthand substitutes for what justice demands of taxation, justice requires a more sophisticated tax dialogue.

II. THE MORAL GROUNDS OF POLITICS

Moral philosophy is concerned with the nature of right and wrong, good and bad, justice and injustice.⁶⁸ Normative moral theory seeks a comprehensive standard to judge conduct and institutions.⁶⁹ In brief, this section will provide a high-level overview of the two most developed moral theories:⁷⁰ deontological and consequentialist theories. Each theory is often defined in opposition to the other. Deontological theories are duty-based, holding that a certain moral act is intrinsically good or bad regardless of the consequences of such act.⁷¹ Consequentialist theories, on the other hand, understand acts to be good or bad based on their outcomes or consequences.⁷² For consequentialists generally, the only intrinsically good thing is some form of happiness, flourishing, satisfaction, or pleasure.⁷³

A. Deontological Theories of Justice

In the West, divine command theory undergirded politics for centuries.⁷⁴ Behavior, laws, and policies were just and legitimate to the

68. Judith F. Daar, *Selective Reduction of Multiple Pregnancy: Lifeboat Ethics in the Womb*, 25 U.C. DAVIS L. REV. 773, 823 (1992).

69. Matthias Kettner, *Discourse Ethics and Health Care Ethics Committees*, in 4 ANNUAL REVIEW OF LAW AND ETHICS 249, 259 n.24 (B. Sharon Byrd et al. eds., 1996).

70. Other prominent schools of moral thought include virtue ethics and care ethics. Not all theories fit nicely into these categories and there is a good deal of work that tries to reconcile the differences between the categories. See Erin Talati, *When a Spoonful of Sugar Doesn't Help the Medicine Go Down: Informed Consent, Mental Illness, and Moral Agency*, 6 IND. HEALTH L. REV. 171, 197–98 (2009) (discussing moral theories beyond deontology and utilitarianism, e.g., communitarian ethics and the feminist ethic of care theory).

71. Douglas W. Vick, *Deontological Dicta*, 65 MOD. L. REV. 279, 284 (2002).

72. Chad J. Doellinger, *A New Theory of Trademarks*, 111 PENN STATE L. REV. 823, 836 n.73 (2007).

73. Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21, 22 (1978).

74. Michael W. Austin, *Divine Command Theory*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/divine-c/> (last visited May 7, 2017).

extent that they aligned with God's will.⁷⁵ On this theory, a ruler's legitimacy rested on the idea that God had elected him or her to be a ruler through birthright.⁷⁶ In 1689, John Locke published *Two Treatises of Government* to refute this theory of the divine right of kings on religious and philosophical grounds.⁷⁷ Locke proposed a deontological theory of legitimate government based on the concept of a social contract.⁷⁸

For John Locke, "all men are *naturally* in" a state of perfect freedom and "also a state of equality."⁷⁹ He wrote:

[B]ecause we are all equal and independent, no-one ought to harm anyone else in his life, health, liberty, or possessions. This is because we are all the work of one omnipotent and infinitely wise maker . . . we are all the property of him who made us . . . we have the same abilities, and share in one common nature, so there can't be any rank-ordering that would authorize some of us to destroy others, as if we were made to be used by one another, as the lower kinds of creatures are made to be used by us.⁸⁰

Consequently, political legitimacy comes not from any divine patriarchy of kings, but through the voluntary consent of equal and free individuals. In Locke's account of justice, any coercive taking of life, liberty, or possessions, without at least tacit consent of the governed, is illegitimate and immoral because it infringes upon the natural state of equality and freedom ordained by God.⁸¹ Consent is central to Locke's theory of economic justice.

Applying his theory to taxes in particular, Locke said:

It is true that governments need a great deal of money for their support, and it is appropriate that each person who enjoys his share of the protection should pay his proportion of the cost. But it must be with his consent, i.e. the consent of the majority, given either directly by themselves or through representatives they have chosen; for if anyone claims a power to impose taxes on the people by his own authority and without such consent of the

75. *Id.*

76. *Id.*

77. *Id.*

78. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶ 5 (Jonathan Bennett ed., 2008).

79. *Id.* ¶ 4.

80. *Id.* at ¶ 6 (emphasis omitted).

81. *Id.*

people, he is invading the fundamental law of property and subverting the purpose of government⁸²

Just as God has property rights in the universe because it is of His workmanship, so too humans, who are made in His image, obtain rights over property they come to own through their workmanship.⁸³ In Locke's workmanship model of property rights, a person gains dominion over property by mixing his or her labor with it.⁸⁴ Our freedom as apprentice Gods is subject to the constraints put upon us by God, who made and has dominion over us.⁸⁵ Under this view, taxes must be levied in accordance to the social contract to be just, even if they do provide benefits to citizens.

Locke's theory is comprehensive and, at first blush, intuitive. Many of us like to think that we have absolute rights and liberties. We like to believe that we deserve to do with our property as we choose because, dang it, we worked hard for it.

Despite its virtues, John Locke's theory is anchored in a specific reading of Christian theology, which does not appeal to everyone. In large part, other duty-based theories such as Marxism, libertarianism, and liberal egalitarianism attempt to salvage parts of Locke's theory apart from its theological moorings.

Marxism's central idea is the abolition of private control of productive resources.⁸⁶ Marxism criticizes capitalists for coercing more value from workers than what they pay in wages.⁸⁷ According to Marxism, the owners of the means of production in capitalist economies exploit workers by pocketing a portion of their workmanship.⁸⁸ As Ian Shapiro points out: "It is a Lockean idea of individual rights, rooted in workmanship and violated under capitalism, that gives the Marxian critique its moral force."⁸⁹ Yet, Marxism does not appeal to religion to justify the workmanship model of property rights.⁹⁰ Marxists apparently advance no justification for workers'

82. *Id.* ¶ 140.

83. *Id.* ¶ 26–27.

84. *Id.*

85. *Id.* ¶ 25.

86. See, e.g., KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO 14–15, 24 (Frederick Engels ed., 3d ed. 1954); G.A. COHEN, HISTORY, LABOUR, AND FREEDOM: THEMES FROM MARX 298 (1988).

87. WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 177 (2d ed. 2002).

88. MARX & ENGELS, *supra* note 86, at 14–15.

89. IAN SHAPIRO, THE MORAL FOUNDATIONS OF POLITICS 104 (2012).

90. In fact, Karl Marx described religion as "the opium of the people." KARL MARX, CRITIQUE OF HEGEL'S 'PHILOSOPHY OF RIGHT' 131 (Joseph O'Malley ed., Annette Jolin & Joseph O'Malley trans., 1970).

rights to all property produced by their labor.⁹¹ Instead, “the Marxian idea of exploitation takes the workmanship ideal, and with it the idea of self-ownership, for granted.”⁹²

Alternatively, and along the lines of John Locke, libertarians support a strong deontological right to private property. In *Anarchy, State, and Utopia*, Robert Nozick provided perhaps the most prominent justification of libertarian justice.⁹³ Drawing from Immanuel Kant’s moral philosophy, Nozick bases his theory on the egalitarian idea that “individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends *without their consent*.”⁹⁴ As a result, Nozick reasons, people have a moral right to any resources that they acquire through consensual, market exchanges.⁹⁵ Libertarianism thus adopts a version of the workmanship model of property rights: we have a right to validly earned pretax income or wealth. Consequently, government redistribution of resources, by taxes or otherwise, represents an unjust taking. The taking is unjust, except when the government protects against and compensates for crimes and breaches of contract, e.g., violations of consent. In stark contrast to Marx, Nozick believes that exchanges are consensual even if “facts of nature,” like poverty, disability, or other disadvantages, severely limit a person’s options.⁹⁶ This philosophy of libertarianism finds no inherent injustice in a society where people born poor and disadvantaged have to work for people born wealthy and advantaged in exchange for meager wages. This is true even if the poor and disadvantaged work harder and are more talented than the wealthy and advantaged.

It is unclear whether liberal egalitarian theories, which are also founded on Kantian moral ideas and social contract, are more consistent with moral ends of equality and liberty than are libertarian conceptions of justice.⁹⁷ John Rawls puts forth the most prominent liberal egalitarian moral theory. Instead of using a historical social contract like Locke, Rawls bases his theory of justice on a hypothetical social contract.⁹⁸ For Rawls, an institution, law, or policy is just if it *would* be agreed to by hypothetically reasonable persons behind a hypothetical veil of ignorance. That veil of

91. Certain neo-Marxists do ground their theories of exploitation in egalitarian views of distributive fairness; but this approach leaves behind “all that was distinctive about the original Marxist approach to exploitation.” KYMLICKA, *supra* note 87, at 183–84.

92. SHAPIRO, *supra* note 89, at 104.

93. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 149 (1974).

94. *Id.* at 31 (emphasis added).

95. *Id.* at 262.

96. *Id.*

97. See MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 138–39 (2010) (describing Kant’s ideals of justice and social contract).

98. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 16–17 (Erin Kelly ed., 2001).

ignorance prevents them from knowing anything about their own preferences, commitments, status, “race and ethnic group, sex, or various native endowments such as strength and intelligence.”⁹⁹ The purpose of this thought experiment is to ensure free and equal participants make logical and impartial moral decisions.¹⁰⁰

In this “original position” behind a veil of ignorance, Rawls argues that participants would choose a political constitution that embodies two principles of justice, which he states in order of priority:¹⁰¹

[First,] [e]ach person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all . . . [Second, any] [s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).¹⁰²

Unlike Marxism or libertarianism, Rawlsian liberalism does not embrace a workmanship model of property rights.¹⁰³ In application, Rawls’s theory is highly egalitarian, treating preferences, talents, opportunities, and resources as morally irrelevant to fairly distribute resources.¹⁰⁴ According to the difference principle, only inequalities that benefit the worst-off person in society are legitimate.¹⁰⁵

Despite his disagreements with Rawls, Nozick praised Rawls’s theory as a “systematic work in political and moral philosophy which has not seen its like since the writings of John Stuart Mill”¹⁰⁶ He goes on to say that, “it is impossible to finish [Rawls’s] book without a new and inspiring vision of what a moral theory may attempt to do and unite; of how *beautiful* a whole theory can be.”¹⁰⁷ Nevertheless, Rawls’s theory has been roundly

99. *Id.* at 15. See also RAWLS, *supra* note 5, at 118 (introducing the original position and the veil of ignorance).

100. RAWLS, *supra* note 98, at 41.

101. *Id.* at 42.

102. *Id.* at 42–43.

103. *Id.* at 135–36.

104. Henry Richardson, *John Rawls (1920-2002)*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/rawls/> (last visited May 7, 2017).

105. RAWLS, *supra* note 98, at 42–43.

106. NOZICK, *supra* note 93, at 183.

107. *Id.*

criticized.¹⁰⁸ Even if we accept the usefulness of Rawls's original position, it is doubtful that Rawls's rational actors in the original position would actually choose Rawls's political system. John Harsanyi, for example, argues that Rawls's difference principle is irrationally risk-averse.¹⁰⁹ According to Harsanyi, actors in an original position would likely select some form of utilitarianism over the difference principle. Utilitarianism maximizes overall or average well-being, whereas the difference principle allows inequalities only when the worst-off person benefits.¹¹⁰

All of these deontological theories of justice are based on an assumption of moral equality among individuals. Locke and Rawls, in their contract-based theories of justice, make explicit claims about the basis for moral equality.¹¹¹ Locke relies on theology to explain equality. Rawls holds that people's equality is based on the minimum moral powers of having a basic conception of good and a sense of justice.¹¹² But is this assumption of moral equality correct? Do all people share any morally relevant feature that would justify treating everyone as moral equals? Perhaps our moral statuses are not equal or static. Perhaps our moral and political systems should account for moral inequality, moral progression, and moral regression, as does the philosophy of Aristotle. If, on average, we have roughly equal moral capacities, that may justify a *procedural* presumption—a burden of proof—in favor of equality. However, it might not justify a *substantive* basis for moral equality.

B. Consequentialist Theories of Justice

The other major category of moral theories is consequentialism, which holds that behaviors, laws, and policies are either right or wrong; just or unjust; or better or worse, solely on the basis of their consequences.¹¹³ The

108. See MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 15–19 (1982) (explaining why the primacy of justice claim is “intuitively appealing” yet simultaneously “problematic”).

109. John Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory*, 69 AM. POL. SCI. REV. 594, 595–96 (1975).

110. See *id.* at 596 (arguing that the maximin principle leads to highly irrational decisions in everyday life and comparing the maximin principle with utilitarian ethics).

111. See Samuel Freeman, *Frontiers of Justice: The Capabilities Approach vs. Contractarianism*, 85 TEX. L. REV. 385, 400 (2006) (reviewing MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITIES, NATIONALITY, SPECIES MEMBERSHIP* (2006)) (showing that Rawls's ideal of moral equality comes in the shape of a well-ordered society); Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KY. L.J. 1197, 1201 (1996) (citing the Lockean belief that each person has the right to have “as much as good” as any other).

112. RAWLS, *supra* note 98, at 20.

113. STEVE MCCARTNEY & RICK PARENT, *ETHICS IN LAW ENFORCEMENT* 13 (2015), <http://opentextbc.ca/ethicsinlawenforcement> (last visited May 7, 2017).

most prevalent version of consequentialism is utilitarianism, which holds that some form of utility (happiness or pleasure) is the only good in itself, and, conversely, that some form of disutility (unhappiness or displeasure) is the only bad in itself.¹¹⁴

The first analytical utilitarian, Jeremy Bentham, propounded a hedonistic view of utility, claiming that, as a matter of scientific law, people always pursue pleasure and avoid pain.¹¹⁵ For Bentham, the sort of happiness people maximize is a contemporaneous sensation of gratification.¹¹⁶ Bentham devised the beginnings of a “felicific calculus” to quantify utility and determine the morality of a given act.¹¹⁷ His algorithm for utility considered the intensity, duration, certainty, remoteness, purity, fecundity, and the extent of a given act’s effect on other people. An alternative take on utilitarianism includes within the definition of utility mental states other than a contemporaneous sensation of pleasure, like a sense of meaning or a sense of achievement.¹¹⁸

Another version of utilitarianism aims to maximize the satisfaction of preferences or hypothetical preferences that a person would have were he or she perfectly rational and informed.¹¹⁹ Yet, this view provides no mechanism for aggregating utility.¹²⁰ Whereas Bentham’s felicific calculus could, in theory, distinguish between good, better, and best courses of action, preference-satisfaction utilitarianism cannot arbitrate between preferences—even if utility is limited to informed and rational preferences. As Will Kymlicka puts it, “How do we weigh career accomplishment against romantic love, if there is no single overarching value like happiness to measure them by?”¹²¹ Utilitarianism is most often criticized because it could lead to results that are intuitively repugnant to many.¹²² For example, a utilitarian would theoretically condone murder, theft, or slavery if it could

114. See Jonathan Glover, *Introduction to UTILITARIANISM AND ITS CRITICS* 1, 1–3 (Jonathan Glover & Helen McInnis eds., 1990) (explaining the appeal of utilitarianism).

115. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 11–12 (J.H. Burns & H.L.A. Hart eds., 1982).

116. Wesley C. Mitchell, *Bentham’s Felicific Calculus*, 33 *POL. SCI. Q.* 161, 163–64 (1918).

117. *Id.* at 164–65.

118. KYMLICKA, *supra* note 87, at 14.

119. *Id.*

120. *Id.* at 17.

121. *Id.*

122. See Peter J. Hammond, *The Economics of Justice and the Criterion of Wealth Maximization*, 91 *YALE L.J.* 1493, 1495 (1982) (reviewing RICHARD POSNER, *THE ECONOMICS OF JUSTICE* (1981)) (stating that, “wealth maximization often leads to conclusions that many of us would regard as totally unethical”).

be conclusively shown that such murder, theft, or slavery increased overall utility.¹²³

A number of other important moral theories exist, including virtue-based, care-based, role-based, situational, and religious theories of ethics.¹²⁴ Each normative theory of morality proposes a different view of justice and the good life. As a result, each theory has different implications for the structure of institutions, politics, and laws. Since arguments about taxation implicitly or explicitly start with moral philosophy, the strength or applicability of an argument varies with how well moral philosophy justifies it.

Next, this Article examines the specific relationship between moral theory and taxation, and how that relationship should inform discourse on taxation.

III. MORALITY AND TAXATION

Normative debate in taxation is only productive if intellectual rivals argue from a shared belief about the proper ends of taxation. Without a lowest common denominator as to the just ends of taxation, debates over important taxation topics are mismatched from the get-go. The opposing sides may present evidence, but the evidence will not be responsive to the moral underpinnings of the other side's position and will, therefore, be unpersuasive.

Ultimately, moral philosophy provides the outermost limits of what taxation may legitimately aim to do. Policymakers draft tax rules to achieve various purposes. As Professors Murphy and Nagel point out, the tax system "is among the conditions that create a set of property holdings, whose legitimacy can be assessed only by evaluating the justice of the

123. See *id.* (identifying one of the criticisms of the utilitarian happiness-maximizing principle as "the indeterminacy of any measure of utility and the consequent vagueness of its ethical recommendations").

124. See e.g., Joseph Grcic, *Virtue Theory, Relativism and Survival*, 3 INT'L J. SOC. SCI. & HUMAN. 416, 416 (2013) (grounding moral values in personality structures and intentions); Lawrence A. Blum, Gilligan & Kohlberg: *Implications for Moral Theory*, 98 ETHICS 472, 473 (1988) (describing care and responsibility within interpersonal relationships as a separate element of morality); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 65 (1980) (confining the moral universe of a decision to the range of practical considerations appropriate for an individual's role); Marinus H. van IJzendoorn et al., *In Defence of Situational Morality: Genetic, Dispositional and Situational Determinants of Children's Donating to Charity*, 39 J. MORAL EDUC. 1, 17 (2010) (showing that cognitive moral judgments take place in situation-specific settings); Paul Ramsey, *Kant's Moral Theory or A Religious Ethics?*, in THE ROOTS OF ETHICS: SCIENCE, RELIGION, & VALUES 139, 154 (Daniel Callahan & H. Tristram Englehardt, Jr. eds., 1981) (separating religious ethics from theories of natural morality).

whole system, taxes included.”¹²⁵ Understanding theories of justice and the good life allows us to evaluate taxation holistically as it is situated in the whole social and economic system.

The primary purposes of taxes are to: (1) raise revenue; (2) redistribute resources; and (3) influence behavior.¹²⁶ Although other economic and social factors are at play, moral reasoning dictates whether these purposes of taxation are legitimate in a given situation. Moral reasoning also provides guidance as to how conflicts between these purposes of taxation ought to be resolved.

A. Raising Revenue

Levying taxes to raise revenue for public expenditures is the least controversial aim of taxation.¹²⁷ However, beyond the minimum of using taxes to fund national defense, courts, police, and emergency services, there is much disagreement.¹²⁸ Disagreement exists over how much ought to be spent. Not only that, but policymakers disagree broadly over whether and how much government should spend on healthcare, education, transportation, environmental protection, commercial regulation, poverty relief, disability assistance, foreign diplomacy, scientific research, and support of humanities and the arts. Determining the right level of public expenditure is important because public expenditures affect what sorts of lives people live.¹²⁹ Governments can raise revenue through different kinds of taxes as well as fees, penalties, borrowing, and investments.¹³⁰ Moral theories not only govern the permissible levels of expenditure, but also provide a framework for how to pay for such expenditures.

Of the main moral theories, libertarianism—with its particular workmanship model of property rights—is the most hostile to raising revenue for government expenditures through taxes.¹³¹ Nonetheless, even libertarians generally approve of using taxes to maintain institutions that enforce and protect individuals’ property and contractual rights.¹³² Public goods, such as national defense, necessarily benefit everyone, and free riders cannot be practically excluded.¹³³ Yet, whether a good is public or

125. MURPHY & NAGEL, *supra* note 23, at 37 (emphasis omitted).

126. Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3 (2006).

127. MURPHY & NAGEL, *supra* note 23, at 5, 46.

128. *Id.* at 5.

129. *Id.* at 41.

130. *Id.* at 6.

131. See Edward Feser, *Taxation, Forced Labor, and Theft*, 5 INDEP. REV. 219, 220 (2000) (defending Robert Nozick’s claim that only the “minimal state” can be morally justified).

132. *Id.*

133. MURPHY & NAGEL, *supra* note 23, at 5, 46.

not is irrelevant to liberal egalitarians and utilitarians, who reject the workmanship model of property rights altogether.¹³⁴ In determining whether a government expenditure and its related tax are desirable, a Rawlsian liberal, for example, will first ask whether the tax (combined with correlating government expenditures) benefits the worst-off person in society.¹³⁵ Whereas a utilitarian would ask whether the tax and associated expenditures improve overall well-being.¹³⁶

B. Redistribution of Wealth

The second common purpose of taxation is to redistribute wealth—and concomitantly, power.¹³⁷ Libertarian theories generally oppose the redistribution of wealth or power through taxes because they believe market outcomes are (or can be) presumptively just.¹³⁸ However, libertarians may support redistribution to compensate a person for past infringement of his or her property or contract rights.¹³⁹ Liberal egalitarians, on the other hand, generally support broad redistribution consistent with their view of human equality—regardless of talent or effort.¹⁴⁰ Utilitarians will support redistribution of wealth and power, so long as it increases overall well-being.¹⁴¹ According to the economic principle of diminishing marginal utility, the gain of one dollar may improve a poor person’s well-being in terms of happiness and freedom more than the loss of the same dollar would decrease a wealthy person’s happiness and freedom.¹⁴² A utilitarian would also support redistribution, if greater economic equality would eventually result in a more stable economy or social environment conducive to well-being.¹⁴³

134. BENTHAM, *supra* note 115, at 12.

135. *See, e.g.*, MURPHY & NAGEL, *supra* note 23, at 54 (discussing Rawls’s difference principle); RAWLS, *supra* note 98, at 64 (accepting only those inequalities in wealth and income which are harnessed to benefit the “least advantaged”).

136. *See* MURPHY & NAGEL, *supra* note 23, at 23 (outlining moral utilitarianism’s concern with aggregate welfare).

137. Avi-Yonah, *supra* note 126, at 3.

138. Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates*, 19 U. PA. J. INT’L ECON. L. 391, 417 n.109 (1998).

139. *See id.* at 419 (stating that, “a libertarian might limit a state’s duty . . . to attempts to encourage policies . . . that favor individual rights and the protection of private property”).

140. *Id.* at 402 n.49.

141. Jan G. Laitos, *The New Retroactivity Causation Standard*, 51 ALA. L. REV. 1123, 1134–35 (2000).

142. Mark S. Stein, *Diminishing Marginal Utility of Income and Progressive Taxation: A Critique of The Uneasy Case*, 12 N. ILL. U. L. REV. 373, 374 (1992).

143. *See* JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 134 (2013) (stating that, “redistribution could both reduce inequality and increase efficiency”).

The government can achieve a more equal distribution of resources through taxes as well as through other means, such as rent control, public education, or public healthcare.¹⁴⁴ For moral theories that accept the validity of economic redistribution, using progressive taxes rather than other methods of redistribution makes sense if taxes better achieve a moral theory's ideal of justice when compared to such other methods.

C. Influencing Behavior

The third and perhaps most controversial purpose of taxation is to influence taxpayer behavior. People often change their behavior to minimize their tax liability whether or not a tax is designed to influence behavior.¹⁴⁵ However, sometimes governments impose taxes with the express purpose of either encouraging socially beneficial behavior or discouraging socially harmful behavior.¹⁴⁶ For example, Berkeley, California, recently introduced a tax of one cent per ounce of specified sugary drinks to discourage behavior that causes obesity, tooth decay, diabetes, and other health problems.¹⁴⁷ On its face, a tax may provide monetary incentives for collectively beneficial behavior. However, taxes may also define, for better or worse, the purpose and function of public institutions by shaping social psychology. As with wealth redistribution, government can influence behavior through taxes, as well as through statutes, institutions, and policies.¹⁴⁸

Philosophical libertarians, who tend to favor the absence of obstacles to choices over the affirmative capacity to make choices, may disapprove of all or much of government paternalism.¹⁴⁹ On the other hand, liberals'

144. See Ilan Benshalom, *How to Redistribute? A Critical Examination of Mechanisms to Promote Global Wealth Redistribution*, 64 UNIV. TORONTO L.J. 317, 326–29 (2014) (proposing to apply a redistributive tax system internationally); Louis Kaplow, *Taxation and Redistribution: Some Clarifications*, 60 TAX L. REV. 57, 71 (2007) (discussing the redistributive impact of publicly financed goods and services); Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 327 (2006) (analyzing private law redistribution systems with behavioral mechanisms).

145. BERNARD SALANIÉ, *THE ECONOMICS OF TAXATION* 13 (2d ed. 2011).

146. See Allison Aubrey, *How Did Berkeley Pass a Soda Tax? Bloomberg's Cash Didn't Hurt*, NPR (Nov. 5, 2014, 5:50 PM), http://www.npr.org/sections/thesalt/2014/11/05/361793296/how-did-berkeley-pass-a-soda-tax-bloombergs-cash-didnt-hurt?utm_medium=RSS&utm_campaign=us (an example of a tax used to encourage socially beneficial behavior).

147. See *id.* (providing an example of a tax with the purpose of influencing behavior to improve public health).

148. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 83–102 (Penguin Books rev. ed. 2009) (discussing different mechanisms that influence individual decision-making).

149. Professors Thaler and Sunstein propose a theory called “Libertarian Paternalism,” in which people generally “should be free to do what they like—and to opt out of undesirable arrangements if

expansive view of freedom embraces not only the lack of obstacles to making choices, but also the availability of choices in the first place. As a result, Rawlsian liberals will likely have no principled objection to using some taxes to influence some behavior, so long as it is, in practice, consistent with the liberal's egalitarian views. Utilitarians, likewise, have no problem, from a moral perspective, with the use of taxes to influence behavior, so long as it improves utility in actuality.

D. Discourse and the Purposes of Taxation

The purposes of taxation, whether to raise revenue, redistribute wealth, or influence behavior, are often relevant to disputes within tax policy and practice. Some tax experts prefer to see themselves as objective “numbers people,” who stick to the hard data and who transcend the intellectual messiness of philosophy. While moral philosophy and reasoning are important for tax policy, addressing these concerns often proves impractical or unnecessary. Two such situations come immediately to mind.

First, there may be moral consensus about what role taxation should play in a given context. Even with moral consensus, factual disagreement often prevents headway in tax policy or tax interpretation. Assume, for example, that the citizens of Lilliput agreed that justice demanded some redistribution of wealth to the working poor. The citizens of Lilliput may nonetheless disagree as to how well different tax and economic proposals would accomplish that purpose. The Little-Endian party may argue that an earned income tax credit is the best way to redistribute income to the working poor because it puts money directly into their pockets—the benefit is one-to-one. The opposing Big-Endian party may disagree because they believe that the earned income tax credit would decrease demand for labor and allow companies to reap the benefit of the tax credit by lowering wages. In this case, the Little-Endians and the Big-Endians share a view of economic justice, but disagree on the tax incidence of an earned income tax credit. The disagreement is a factual one about who benefits from an earned income tax credit.

A second reason for overlooking the moral grounds of a tax argument arises in tax controversies. For example, an attorney may strategically

they want to do so,” while government is nonetheless permitted “to influence choices in a way that will make choosers better off, *as judged by themselves.*” *Id.* at 5. When it comes to behavior-influencing taxes, uncertainty is often an issue because it is difficult to predict and measure the effectiveness of such taxes. The more behavior-influencing taxes there are, the less salient each tax is in the minds of taxpayers, which may weaken the impact of all behavior-influencing taxes. See Gary M. Lucas, Jr., *Paternalism and Psychic Taxes: The Government's Use of Negative Emotions to Save Us from Ourselves*, 22 S. CAL. INTERDISC. L.J. 227, 266 (2013) (providing that a “change in perspective may be due to a change in the salience of relevant aspects of the decision”).

sidestep a tax policy's underlying moral considerations because the considerations contradict his or her clients' interests. Still, disregarding moral considerations in tax litigation may expose a weak argument since the legitimacy of taxation ultimately depends on morality. Though there are other reasons to downplay moral considerations in tax arguments, we better serve truth and justice by uncovering the moral foundations of taxation to make moral assumptions and underpinnings obvious. To what extent reasoning can achieve truth or consensus about justice is controversial.¹⁵⁰ Morality, justice, and human well-being are rather confusing concepts. Consider this illustration from Amartya Sen: imagine you have to decide which of three children—Anne, Bob, and Carla—should get a particular flute. Anne claims the flute because she is the only one who can play it.¹⁵¹ Bob argues that he deserves the flute because he is poor and he has nothing to his name, while the other children are rather wealthy.¹⁵² Lastly, Carla argues that she deserves the flute because she made the flute herself.¹⁵³ Professor Sen rightly concludes: “Theorists of different persuasions . . . may each take the view that there is a straightforward just resolution staring at us here, and there is no difficulty in spotting it. But almost certainly they would respectively see totally different resolutions as being obviously right.”¹⁵⁴

Nevertheless, moral philosophy and reasoning may be our only recourse. Perhaps, with time and quality discourse, we could arrive at some consensus as to who should get the flute—or, at least, who should not get the flute. The same notion applies to taxation. Often, arguments about taxation are essentially moral arguments. For example, a libertarian and a liberal egalitarian may disagree about tax rates regardless of the effect of tax rates on labor participation, international competitiveness, business efficiency, government efficiency, or economic equality.

Even very detailed and narrow tax disputes often rest on reasoning about morality. For example, the question of whether a sale by a foreign person of an interest in a partnership with a business in the United States ought to be taxable by the United States is currently in litigation before the United States Tax Court.¹⁵⁵ Practitioners reach different conclusions on this

150. SEN, *supra* note 3, at xvii.

151. *Id.* at 13.

152. *Id.*

153. *Id.*

154. *Id.*

155. See, e.g., Jim Fuller & David Forst, *US Inbound: Sale of Partnership Interest*, INTERNAT'L TAX REV. (Oct. 29, 2015), <http://www.internationaltaxreview.com/Article/3501686/US-Inbound-Sale-of-partnership-interest.html> (discussing the subject of litigation in *Grecian Magnesite Mining, Industrial & Shipping Co. SA v. Commissioner*, T.C. No. 19215-12, a case pending before the U.S. Tax Court); Rev. Rul. 91-32, 1991-1 C.B. 107, *2 (1991) (stating that a nonresident alien's income derived from an

issue: the language of relevant tax law and foreign tax law of partnership interests lead to one conclusion, while the United States' general tax policy preventing asset appreciation from escaping taxation leads to another conclusion. Without other evidence of legislative intent, a judge may assume Congress intended whichever policy is more favorable. Presently, it is often taboo for a technical memorandum, judicial opinion, or tax authority ruling to deal with issues of justice. Yet, if these practitioners' conception of the issue as a tug-of-war between internal coherency of the income tax, on the one hand, and, certainty of taxpayers as to their tax liability, on the other, is correct, then the only way of prioritizing the two values—coherency and certainty—may be to dig down into the moral foundations of taxation. Commonly, the only way to arbitrate between competing canons of good tax policy is by resorting to moral philosophy about justice, the good life, and the good society. This is especially true of the most consequential tax questions.

Reasoning about justice generally—and taxation specifically—takes the form of analyzing shared, but incomplete, information with the goal of growing the currently limited consensus about the truth in taxation.¹⁵⁶ But neither laypersons nor tax experts should leave it to professional philosophers to decide the pressing questions in taxation. Certainly, philosophers contribute to vetting, elucidating, and proposing moral and political ideals. However, philosophers have proven largely unwilling or unable to bridge the gap between moral ideals and real-world tax policy and law.¹⁵⁷ Since accountants, lawyers, and economists understand the complex tax system best, they have an important role in defining practical tax applications of normative theories concerning proper conduct and the good life. In order to promote justice and human well-being, tax experts need to become morally sophisticated.

interest in a partnership with a United States trade or business “will be sourced in the United States”); DEP'T OF TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 26–27 (2015), <https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf> (suggesting a change in foreign tax credit limitation rules in order to prevent double taxation on dual capacity taxpayers in regards to foreign levies); N.Y. STATE BAR ASS'N, TAX SECTION, REPORT ON GUIDANCE IMPLEMENTING REVENUE RULING 91-32, at 1 (2014) (responding “to a request from the Department of the Treasury . . . for comments relating to the current project at Treasury and the Internal Revenue Service . . . to issue guidance under Section 864 implementing Revenue Ruling 91-32”) (footnote omitted).

156. See Lee Smolin, *Science and Democracy*, TED (Feb. 2003), https://www.ted.com/talks/lee_smolin_on_science_and_democracy?language=en (describing the scientific method as an argumentative, consensus-building ethic).

157. See *supra* Part III.A–III.C (discussing moral differences between philosophies regarding elements of taxation).

IV. SCIENCE AND TAXATION

Moral theories generally cannot provide useful conclusions about specific tax policies without input from the social and natural sciences. Although morality may justify the good purposes of taxation, the method to achieve the purposes requires analysis of context, facts, and circumstances. As new information in economics, psychology, sociology, and law becomes available, the normative conclusions about taxation generated by moral theories may change or become more precise.

A. Economics

Of all the scientific fields with findings relevant to the application of moral theories to taxation, inputs from economics are perhaps the most significant. Economics has put forth significant intellectual resources into studying taxation, so much so that tax theory is sometimes thought of—mistakenly, I think—as entirely a subfield of economics.¹⁵⁸ Still, economics provides indispensable insight into how taxes (and other social arrangements) affect the size and division of the economic pie. Among the specialisms in public economics, two of the most important for tax theory are optimal taxation theory and tax incidence.¹⁵⁹ Optimal taxation theory analyzes how taxes affect the size of the economic pie.¹⁶⁰ Tax incidence, on the other hand, studies the effect of taxes on the way the economic pie is divided.¹⁶¹

1. Optimal Taxation Theory

For each of the important theories of justice, having a bigger economic pie is generally preferable to having a smaller one, all other things being equal. Efficiency is conventionally the purview of economics, and optimal tax theory studies the efficiency implications of tax systems. Taxes may cause deadweight losses in taxpayer well-being by distorting their economic decisions. For example, in 1696, England enacted a “window tax,” which taxed people on the basis of how many windows they had on their homes.¹⁶² Some people reacted by bricking up their windows to pay

158. See FRECKNALL-HUGHES, *supra* note 36, at 2 (describing taxation as an interdisciplinary field studied under accounting, law, or economics).

159. STEPHEN SMITH, *TAXATION: A VERY SHORT INTRODUCTION* 32, 57 (2015).

160. See *id.* at 57 (describing the focus of optimal taxation on achieving a balance between revenue-raising and fairness in tax burdens).

161. See *id.* at 32 (defining incidence as who is liable to pay or bears the burden of paying taxes).

162. *Id.* at 51.

lower taxes.¹⁶³ These people would have preferred windows, but the tax artificially distorted their decisions.¹⁶⁴ Similarly, taxes on labor disincentivize labor, while consumption taxes disincentivize consumption.

Normatively, optimal taxation theory addresses the question of “how best to raise revenues in a distorted economy.”¹⁶⁵ Optimal tax theory deals with efficiency rather than equity. Further, optimal tax theory asserts that tax policies should seek to minimize deadweight loss subject to certain constraints, such as considerations of justice.¹⁶⁶ Optimal tax theory would recommend a lump-sum tax in a perfectly competitive market without equity constraints.¹⁶⁷ A lump-sum tax is the most efficient tax because it distorts taxpayers’ choices the least.¹⁶⁸

Unfortunately, applying optimal tax theory is more difficult than simply adopting a lump-sum tax. The real-world market contains imperfections, including justice and equity constraints.

In a 2009 article, Gregory Mankiw, Matthew Weinzierl, and Danny Yagan summarized eight high-level conclusions of optimal tax theory:

- 1) Optimal marginal tax rate schedules depend on the distribution of ability;
- 2) The optimal marginal tax schedule could decline at high incomes;
- 3) A flat tax, with a universal lump-sum transfer, could be close to optimal;
- 4) The optimal extent of redistribution rises with wage inequality;
- 5) Taxes should depend on personal characteristics as well as income;
- 6) Only final goods ought to be taxed, and typically they ought to be taxed uniformly;
- 7) Capital income ought to be untaxed, at least in expectation; and
- 8) In

163. *Id.*

164. *Id.*

165. ROBIN BOADWAY, FROM OPTIMAL TAX THEORY TO TAX POLICY: RETROSPECTIVE AND PROSPECTIVE VIEWS 7 (2012).

166. N. Gregory Mankiw et al., *Optimal Taxation in Theory and Practice*, 23 J. ECON. PERSPS. 147, 148 (2009).

167. *Id.* at 149. A lump-sum tax is a uniform tax of a fixed amount. If, for example, a country imposed a tax of \$1,000 on every person once every other year, that would be a lump-sum tax. *See id.* (stating that, “this tax falls equally on the rich and poor”).

168. That a lump-sum tax maximizes utility in a perfectly competitive market rests on the assumption that a perfectly competitive market is maximally efficient. Given a number of stated assumptions, the First Fundamental Theorem of Welfare Economics posits that a perfectly competitive market results in the maximum amount of economic output possible. *See* Kenneth J. Arrow, *An Extension of the Basic Theorems of Classical Welfare Economics*, in PROCEEDINGS OF THE SECOND BERKELEY SYMPOSIUM ON MATHEMATICAL STATISTICS AND PROBABILITY 507, 507–10 (Jerzy Neyman ed., 1951). *See also* Mankiw et al., *supra* note 166, at 149, 158 (demonstrating that lump-sum tax schedules produce near optimal results while least distorting buyer and worker incentives). In essence, the theorem is a mathematical confirmation of Adam Smith’s “invisible hand” hypothesis. MASSIMO FLORIO, APPLIED WELFARE ECONOMICS: COST-BENEFIT ANALYSIS OF PROJECTS AND POLICIES 40 (2014).

stochastic, dynamic economies, optimal tax policy requires increased sophistication.¹⁶⁹

The ability-to-pay principle underpins many of the lessons in optimal tax theory. Taxes on ability-to-pay do not distort taxpayer decisions, and thus do not cause economic deadweight loss.¹⁷⁰ Yet, the ability-to-pay principle does not square with every theory of justice. For instance, it fails to account for the effect of public expenditures, and may rest on cursory estimates of human psychology. Each of these limitations poses a hurdle to optimal taxation theory's ability to provide specific policy predictions and recommendations.

2. Tax Incidence

Scholarly work on tax incidence is concerned with measuring and predicting the *unseen* distributional effects of taxes.¹⁷¹ Taxes cause not one, but a series of economic effects. While the first distributional effect of a tax is the most obvious—taxpayers lose money—the subsequent and more inscrutable effects may be equally or more consequential. According to the classical French economist, Frédéric Bastiat, “Here is the whole difference between a good and bad economist: the latter only minds the *visible* effect, while the former accounts for both the effect that *can be seen* and those that must be predicted.”¹⁷² The taxpayers on whom tax law imposes liability may ultimately not be burdened by the tax. Economic forces may ensure that a given taxpayer can pass on some or all of the cost of the tax to others.¹⁷³

With regard to tax justice, *statutory* incidence is often unhelpful.¹⁷⁴ While a statute may require one person to pay a tax, its ultimate effect of the tax on absolute wealth, relative wealth, or well-being may not be apparent on the face of the tax statute. Ideally, measures of tax incidence would measure the effect of taxes on *each* individual's wealth or utility. A person-by-person measure of tax incidence would provide the most

169. Mankiw et al., *supra* note 166, at 147 (emphasis omitted).

170. *See id.* (noting that taxes do not implicate individual choices and do not distort incentives).

171. SMITH, *supra* note 159, at 41.

172. SALANIÉ, *supra* note 145, at 41.

173. SMITH, *supra* note 159, at 32.

174. *See* Gilbert E. Metcalf, *Paying for Greenhouse Gas Reductions: What Role for Fairness?*, 15 LEWIS & CLARK L. REV. 393, 399 (2011) (arguing the economic burden of a tax is “determined by the economic laws of supply and demand”). In cases of “sin taxes,” however, it may be the case that statutory incidence has the psychological effect of dissuading people from engaging in some socially harmful conduct, even if the economic incidence is not fully borne by the sinner. Rachel E. Morse, Note, *Resisting the Path of Least Resistance: Why the Texas “Pole Tax” and the New Class of Modern Sin Taxes Are Bad Policy*, 29 B.C. THIRD WORLD L.J. 189, 191–92 (2009).

accurate input for applying theories of justice to taxation. However, empirically measuring tax incidence person-by-person is an overwhelming task.

To simplify empirical studies of tax incidence, economists gauge the effects of a tax on large groups, such as employers and employees; sellers and buyers; residents and foreigners; or rich and poor.¹⁷⁵ Economists typically demonstrate tax incidence using a partial equilibrium model, which sections off a portion of the economy and measures the distributional effects of taxes within that portion.¹⁷⁶ A partial equilibrium model for tax incidence may, for example, feature a single tax and two goods, measuring the distributional effect of the tax on one good relative to the other.¹⁷⁷ Measuring tax incidence with a general equilibrium model (i.e., the entire economy) is more difficult. There is no control group because the model tests the entire economy for change.¹⁷⁸ When conditions are right, we can draw rather reliable conclusions from these models about a tax's distributional effect. However, the partial equilibrium models may be unable to provide reliable results in certain situations.

In large part, the economic incidence of a tax depends on price elasticity of supply and price elasticity of demand, rather than who is required to pay the tax.¹⁷⁹ Generally, groups that respond the least to price changes bear the larger burden of a tax. For example, when demand is inelastic relative to supply, the tax incidence of an ad valorem tax will fall more on buyers; but when the demand is elastic relative to supply, then sellers will bear the larger share of the tax burden. The incidence of income taxes or payroll taxes will depend, in large part, on the elasticity of the supply and demand curves for labor.

While experts agree on the importance of price elasticity in analyzing tax incidence, they disagree about the incidence of specific taxes, such as property taxes, capital gains taxes, and corporate taxes.¹⁸⁰ Tax incidence study must account for various difficult-to-gauge factors, resulting in empirical uncertainty. Economic models may make problematic

175. See Presentation, Raj Chetty & Gregory A. Bruich, Harvard University Public Economics Lectures, Part 2: Incidence of Taxation 7 (Fall 2012), http://rajchetty.com/chettyfiles/public_economics_lectures.pdf (stating that tax incidence studies analyze the tax change effects on aggregate groups).

176. See *id.* at 8–12 (discussing the setup for a partial equilibrium model that focuses on two goods).

177. *Id.* at 9.

178. See *id.* at 89 (stating that the general equilibrium model analyzes all prices to identify the full incidence of taxes).

179. See *id.* at 17 (providing a formula for tax incidence that relies on price elasticity).

180. STEPHEN ENTIN, HERITAGE CTR. FOR DATA ANALYSIS, TAX INCIDENCE, TAX BURDEN, AND TAX SHIFTING: WHO REALLY PAYS THE TAX? 4–5, 22–23 (Nov. 5, 2004), <http://www.heritage.org/taxes/report/tax-incidence-tax-burden-and-tax-shifting-who-really-pays-the-tax>.

assumptions, leading to disagreement—not on moral grounds—but on the input being plugged into a given moral theory. For example, many models of tax incidence assume that taxpayers rationally consider taxes as if they were prices.¹⁸¹ However, people may pay less attention to taxes than they do prices—taxes may be less salient than prices.¹⁸² People may disagree on moral grounds about the importance of tax salience in evaluating a tax, even if they agree on how salient a tax actually is. Conversely, people who agree on the moral importance of tax salience may disagree about the salience of a given tax on empirical grounds.

3. On Economic Models and Taxes

Economists' tools of the trade are stylized mathematical models.¹⁸³ In order to make predictions and explain social phenomena, economists make new models or use existing models in conjunction with new information.¹⁸⁴ The usefulness of a model is highly dependent on context. Economic models “do not have a particular ideological bent,” although politicians, talking heads, and economists may use them out of context for ideological ends.¹⁸⁵ When the evidence embedded in models is not overstated for persuasive effect, models can be very useful in “show[ing] how specific mechanisms work by isolating them from other, confounding effects,” and showing how particular causes “work their effects through [a] system.”¹⁸⁶ Economic models can be powerful tools for normatively assessing tax policy. However, this is true only when their underlying assumptions and contextual contingencies are adequately communicated in order to ensure a quality discourse. Additionally, economic models provide important data to support moral theories when policymakers create tax policies, even though the data may continually evolve as new models or new information become available to economists.

181. Raj Chetty et al., *Saliency and Taxation: Theory and Evidence*, 99 AMER. ECON. REV. 1145, 1145 (2009).

182. *See id.* at 1165 (explaining why consumers care more about prices than taxes related to saliency).

183. DANI RODRIK, *ECONOMICS RULES: THE RIGHTS AND WRONGS OF THE DISMAL SCIENCE* 9 (2015).

184. *Id.* at 10.

185. *Id.* at 6.

186. *Id.* at 12. Mathematics in economics serves two primary purposes. “First, math ensures that the elements of a model—the assumptions, behavioral mechanisms, and main results—are stated clearly and are transparent.” *Id.* at 31. “The second virtue of mathematics is that it ensures the internal consistency of a model—simply put, that the conclusions follow from the assumptions.” *Id.* at 32.

B. Psychology

In many cases, the accuracy of economic models of taxation depends on the accuracy of the models' assumptions about the nature of human well-being, motivation, decision-making, and agency. Psychology and cognitive science continue to advance our knowledge about the workings of the mind: how we make decisions;¹⁸⁷ how we are systematically biased;¹⁸⁸ how we develop virtues and overcome vices;¹⁸⁹ and what are the causes of happiness.¹⁹⁰

In tax theory, utilitarians value insights from psychology and cognitive science because their policy choices in taxation aim precisely at maximizing some sort of happiness or well-being.¹⁹¹ For a utilitarian, social justice is social well-being.¹⁹² To the extent consistent with their respective theories of rights, liberal egalitarian and libertarian theories also support maximizing well-being. Psychology and cognitive science play important roles in predicting and measuring taxes that aim to influence behavior; they provide guidance on how taxes affect people, and can help counteract irrational choices.

C. Sociology

“Sociology is the [scientific] study of social life, social change, and the social causes and consequences of human behavior.”¹⁹³ It focuses on social organization, institutions, and behavior.¹⁹⁴ Many moral theories, especially liberal egalitarian ones, are concerned with economic inequalities drawn

187. See, e.g., BEN R. NEWELL ET AL., *STRAIGHT CHOICES: THE PSYCHOLOGY OF DECISION MAKING* 13, 15–16 (2d ed. 2015) (arguing that the way information is provided can influence decisions); BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* 48–51 (2004) (explaining how experienced utility, expected utility, and remembered utility shape an individual's choices).

188. See DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 3–5 (2011) (describing systematic errors as predictably recurring biases).

189. See CHRISTIAN B. MILLER, *CHARACTER AND MORAL PSYCHOLOGY*, at xi–xii (2014) (discussing the theory of “Mixed Traits” and how robust character traits can give rise to morally relevant thoughts).

190. See MARTIN E.P. SELIGMAN, *FLOURISH: A VISIONARY NEW UNDERSTANDING OF HAPPINESS AND WELL-BEING* 13–15 (2011) (discussing the inadequacies of authentic happiness theory and emphasizing the construct of well-being as the focal topic of positive psychology).

191. See MURPHY & NAGEL, *supra* note 23, at 51–52 (recognizing utilitarianism's need for a metric for comparing the total good of policy outcomes).

192. See *id.* at 51 (defining the utilitarian theory of social justice).

193. JEANNE H. BALLANTINE & KEITH A. ROBERTS, *OUR SOCIAL WORLD: INTRODUCTION TO SOCIOLOGY* 6 (3d ed. 2011).

194. *Id.*

along demographic lines—which are morally irrelevant.¹⁹⁵ In Rawlsian liberalism, for example, everyone deserves equal resources, except to the extent that policies resulting in unequal resources benefit the worst-off person in society.¹⁹⁶ Liberal egalitarianism, along with other theories of justice, are suspicious of differences in wealth and opportunity among persons, except as they serve “the general good.”¹⁹⁷ In this school of thought, only effort and, maybe, talent are the factors that can justify unequal wealth or opportunity. For utilitarians, any characteristic aside from one’s capacity for well-being is generally irrelevant.¹⁹⁸

In addition to discerning taxation’s effect on economic equality, sociology also has theoretical tools for measuring taxes’ influences on social institutions, norms, and expectations.¹⁹⁹ For example, an excise tax not only raises the cost for engaging in some behavior, but also communicates collective disapproval of the behavior, the awareness of which might influence an individual’s decision-making process.²⁰⁰ Sociology helps to understand the true negative or positive externalities of behavior, and how taxes do or can affect such externalities. In other words, sociology has tools for isolating the effects of taxes on social behavior and organization to help policymakers understand the actual effectiveness of their taxes in achieving their intended purposes.²⁰¹

D. Political Science and Political Economics

In most countries, taxes are the product of competitive electoral politics, whereby social decisions are made according to individual voting preferences.²⁰² Democratic systems differ in the kinds of information that they use and the kinds of information that they ignore. For example, a

195. RAWLS, *supra* note 98, at 64 (defining personal liberty and the principle of reciprocity as the only relevant moral concerns).

196. MURPHY & NAGEL, *supra* note 23, at 54.

197. *See id.* (explaining Rawls’s view that arbitrary inequalities between individuals are unjust unless they can be made to serve some non-arbitrary purpose). DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN, ART. I, ASSEMBLÉE NATIONALE CONSTITUANTE 26-08-1789 (Fr.), translated at The Avalon Proj., *Declaration of the Rights of Man*, YALE L. SCH. (2008), http://Avalon.law.yale.edu/18th_century/rightsof.asp.

198. MURPHY & NAGEL, *supra* note 23, at 23.

199. Elizabeth R. Carter, *New Life for the Death Tax Debate*, 90 DENV. U. L. REV. 175, 181, 189 (2012).

200. *Excise Tax*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/excise-tax> (last updated July 19, 2006). *See* JOHN. R. SEARLE, MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION 5 (2010) (discussing the philosophy of society and institutions).

201. Carter, *supra* note 199, at 182.

202. *See* Amartya Sen, *Arrow and the Impossibility Theorem*, in THE ARROW IMPOSSIBILITY THEOREM 21, 21 (Eric Maskin & Amartya Sen eds., 2014) (relating public decisions to individual preferences).

majority-rule democratic system, without restrictions on campaign finance, pays attention to voters' preferences and wealth. But, the system also ignores other factors, such as experience, intelligence, character, or intensity of preferences.²⁰³ Not only do different democratic systems have different informational biases, but also democratic decision-making processes inherently have difficulty ordering policy alternatives rationally. Moreover, we live in an era where taxpayers are global, but tax authorities are not. In crafting tax policy, we have to account not only for political dynamics within our respective borders, but also international pressures from competition for foreign-owned capital.²⁰⁴

Over six decades ago, Kenneth Arrow advanced the impossibility theorem in his doctoral dissertation.²⁰⁵ In essence, the theorem states that when voters have a choice between three or more policy alternatives, no system of voting can aggregate the preferences of the voters into a rational collective ranking of alternatives from most to least preferable.²⁰⁶ The theorem challenges the idea that majority rule prevents arbitrary outcomes or domination by a strategically placed minority.²⁰⁷ Social choice theory and democratic theory analyze collective decision-making processes, and how such decision-making can result in collective choices better derived from truth and reason.²⁰⁸ Developments in social choice theory and democratic theory should factor into tax theory because taxes are a product of collective decision-making. Tax policy changes only as fast and in ways that can prevail within the political structure.²⁰⁹

United States President Ulysses S. Grant predicted: “[A]t some future day, the nations of the earth will agree upon some sort of congress, which will take cognizance of international questions of difficulty, and whose decisions will be as binding as the decision of our Supreme Court is binding on us.”²¹⁰ As of yet, however, there is no such global authority in the arena of taxation. Within the scope of its sovereignty, each country is free to

203. *Id.* at 47.

204. See generally Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576 (2000) (discussing problems international tax competition forces onto welfare state systems).

205. Sen, *supra* note 202, at 21 n.3.

206. See also KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 98–100 (1951). See also Sen, *supra* note 202, at 23–24 (explaining the General Possibility Theorem).

207. See Sen, *supra* note 202, at 24 (discussing the results of the social welfare function).

208. Amartya Sen, *The Informational Basis of Social Choice*, in THE ARROW IMPOSSIBILITY THEOREM 47, 47 (Eric Maskin & Amartya Sen eds., 2014).

209. Game theory may help to formulate a winning strategy in tax policymaking.

210. Ulysses S. Grant, Speech to the Members of the Midland International Arbitration Union (Oct. 16, 1877), in 28 THE PAPERS OF ULYSSES S. GRANT, 1876–1878, at 290–91 (John Y. Simon ed., 2005).

enact whatever taxes it wishes.²¹¹ As long as there is disharmony between the taxation systems of countries, there will always be international opportunities for tax planning and tax evasion. The pressures of international tax competition constrain countries' abilities to reform taxes to match their moral theories of justice and the best information available from science and reasoning. One role of game theory in taxation would be to help understand what a winning strategy would be in the game of international tax competition or, alternatively, to overcome international tax competition.

CONCLUSION

Specialisms in taxation are, for the foreseeable future, probably both good and unavoidable. Nonetheless, taxation is inherently interdisciplinary and economic justice "is too important an issue to be left to economists, sociologists, historians, and philosophers."²¹² In this Article, I have attempted to map out in broad strokes the value of effectual collaboration between experts and the lay public, and between various specialisms in taxation discourse. Then, in an effort to demonstrate how the various specialisms in tax could be reconciled with the interdisciplinary perspective, I attempted to summarize how specialisms fit within the framework of moral philosophy.

If we can agree that the chief ends of government are justice and the good life, then the innermost framework of taxation theory must be moral philosophy. Taxation is a feature of government and, as such, also aims first and foremost at justice and the good life. Moral philosophy is best situated to analyze the legitimacy of the purposes behind tax policy. After all, if tax discourse develops solely within the field of economics, the underlying moral assumptions of tax policy may be at odds with those of the public. Greater moral transparency in public arguments will likely effectively improve tax discourse. At a minimum, moral transparency requires some awareness of: (1) one's own moral system; (2) the potential range of plausible or prevalent moral systems of one's audience; and (3) how to evaluate the relevant tax issue from the perspective of those various moral systems.

211. Arguably, however, the growing global network of tax treaties, most of which conform closely to the model conventions promulgated by the OECD, is approaching a supranational norm. Yariv Brauner, *What the BEPS?*, 16 FLA. TAX. REV. 55, 61–62 (2014). See generally REUVEN S. AVI-YONAH, *INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME 3* (2007) (arguing that international tax law is part of international law even if it differs in some respects from generally applicable international law).

212. PIKETTY, *supra* note 15, at 2.

As moral considerations fix the legitimate purposes of taxation, evaluating a tax question or proposal through the lens of morality generally requires inputs from the social and natural sciences. Yet, whose role is it to bridge the gaps between moral philosophy, science, and the practice of tax law and policymaking? And whose role is it to bridge the gap between experts and the public? No single field has or can have a unique claim to these roles. Even though the invitation to gain broad perspective in taxation must extend to everyone, the onus falls especially on scholars and practitioners to communicate learned consensus and arguments in ways that are accessible to experts in other fields and to the public.

Perhaps the humanities also have a role to play here. Although this Article focuses on abstract discourse about taxation, literature and art help to keep us, individually and collectively, properly concerned with injustice.²¹³ The suffering produced by injustice is visible on a daily basis. Yet, paradoxically, such suffering seems all too easy to neglect or ignore. Arbitrary and perverse inequality are often central themes in works of literature and art, which may help us to confront the emotional and intellectual challenges injustice poses for each and all of us. I find Gwendolyn Brooks' "The Kitchenette Building," particularly moving:

We are things of dry hours and the involuntary plan,
 Grayed in, and gray. "Dream" makes a giddy sound, not strong
 Like "rent," "feeding a wife," "satisfying a man."
 But could a dream send up through onion fumes
 Its white and violet, fight with fried potatoes
 And yesterday's garbage ripening in the hall,
 Flutter, or sing an aria down these rooms
 Even if we were willing to let it in,
 Had time to warm it, keep it very clean,
 Anticipate a message, let it begin?
 We wonder. But not well! not for a minute!
 Since Number Five is out of the bathroom now,
 We think of lukewarm water, hope to get in it.²¹⁴

In these few words, the abstract idea or memory of poverty becomes somewhat more concrete. Perhaps some other work of literature, theatre,

213. See Julianne Chiaet, *Novel Finding: Reading Literary Fiction Improves Empathy*, SCI. AM. (Oct. 4, 2013), <https://www.scientificamerican.com/article/novel-finding-reading-literary-fiction-improves-empathy/> (discussing research into the value of literary fiction, which expands the capacity for an individual to empathize).

214. Gwendolyn Brooks, *Kitchenette Building*, POETRY FOUNDATION, <https://www.poetryfoundation.org/resources/learning/core-poems/detail/43308> (last visited May 7, 2017). Aria means an elaborate song for one voice with orchestral accompaniment, appearing most often in opera ("aria" means "air" in Italian). *Aria*, AM. HERITAGE DICTIONARY (3d ed. 1992).

painting, dance, sculpture, film, music, or photography, has evoked stirring emotions in you—making the ephemeral concerns of injustice tangible and motivating. If we have in the past felt moved to address injustice, can we feel so again? In the face of others' injustice can we, like Walt Whitman, say in empathy, "I am the man, I suffer'd, I was there."²¹⁵ This Article has attempted to demonstrate that precision in our general discourse on taxation can improve our ability to approach justice. We should shift from organizing our tax discourse around disconnected maxims of tax justice and toward a tax discourse more rooted in moral philosophy. After all, justice and the good life—the chief subjects of moral philosophy—are the principal ends of taxation.

215. Walt Whitman, *Song of Myself*, POETRY FOUNDATION (1892), <https://www.poetryfoundation.org/poems-and-poets/poems/detail/45477> (last visited May 7, 2017).