
Utilitarianism and Wealth Transfer Taxation

Jennifer Bird-Pollan*

This article is the third in a series examining the continued relevance and philosophical legitimacy of the United States wealth transfer tax system from within a particular philosophical perspective. The article examines the utilitarianism of John Stuart Mill and his philosophical progeny and distinguishes the philosophical approach of utilitarianism from contemporary welfare economics, primarily on the basis of the concept of “utility” in each approach. After explicating the utilitarian criteria for ethical action, the article goes on to think through what Mill’s utilitarianism says about the taxation of wealth and wealth transfers, the United States federal wealth transfer tax system as it stands today, and what structural changes might improve the system under a utilitarian framework.

I. INTRODUCTION

A nation’s tax laws can be seen as its manifested distributive justice ideals. While it is clear that the United States’ Tax Code contains a variety of provisions aimed at particular non-distributive justice goals,¹ underneath the political

* James and Mary Lassiter Associate Professor of Law, University of Kentucky College of Law. Thanks for useful comments on the project go to participants in the National Tax Association meeting, the Loyola Los Angeles Law School Tax Colloquium, the Tax Roundtable at the Vienna University of Economics and Business Institute for Austrian and International Tax Law, and the University of Kentucky College of Law Brown Bag Workshop, as well as Professors Albertina Antognini, Richard Ausness, Stefan Bird-Pollan, Zach Bray, Jake Brooks, Miranda Perry Fleischer, Brian Frye, Brian Galle, Michael Healy, Kathy Moore, Katherine Pratt, Ted Seto, and Andrew Woods. Thank you also to K.B. Alex Nguyen and other members of the Arkansas Law Review for careful and thoughtful editing.

1. These goals range from the basic goals of revenue raising and the funding of government projects to incentive goals encouraging such things as the purchase of business equipment, the provision of employee health insurance by employers, or the installation of solar panels in residential homes. 26 U.S.C. §§ 25D, 106, 179 (2012).

rhetoric and backroom deals, our tax and transfer systems embody (or should embody) the model of distributive justice that we as a nation have endorsed.² Unfortunately, these ideals often get lost or smothered under political debates. Even if it were possible to understand a nation's fundamental distributive justice goals, pushing those goals through the political sausage-making machine makes it difficult to identify the foundational beliefs in the resulting legislation.³ One of the problems of seeing tax law as a manifestation of distributive justice is that in a nation as large as the United States, it is difficult to argue that the nation as a whole has one coherent set of distributive justice beliefs.⁴ Indeed, it would be absurd to make such a claim in 2016, when the country appears more politically divided than it has ever been.⁵

Because of the political differences among the contemporary American citizenry, lawmakers ought to consider any tax policy proposals (indeed, policy proposals of any kind) from the perspectives of the major political views endorsed by the citizenry. In an attempt to contribute to this discussion, this article is the third in a series that examines the United States' federal wealth transfer taxes from the perspective of a particular set of beliefs about distributive justice.⁶ Distributive justice asks

2. Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 *FORDHAM URB. L.J.* 607, 608 (1996).

3. There is much written about the complexity of the Code and about the structural reasons our legislative process often results in such messy rules. One cynical interpretation of this is that "[i]f Congress were to bind itself to make no major changes in tax law during the next congressional session—or ever again—the contributions would start to dry up, these members' lunch and dinner invitations would taper off, and so on." JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES* 171 (4th ed. 2008).

4. Even when the review of arguments for distributive justice is limited to academic theories, it remains difficult to articulate a coherent view of the "right" distributive justice outcome. It is the lack of intellectual coherence on equity questions that results in the view that equity is less important than efficiency. James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 *VAND. L. REV.* 1129, 1131 (2008).

5. See PEW RESEARCH CTR., *POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTIPATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE* 6-7 (2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/GC45-4JSA>].

6. See Jennifer Bird-Pollan, *Unseating Privilege: Rawls, Equality of Opportunity, and Wealth Transfer Taxation*, 59 *WAYNE L. REV.* 713, 713 (2014) (proposing that an

whether any particular distribution of wealth within a society is more just than another, or whether justice demands a redistribution of the current state of wealth distribution.⁷ Thinking about the American citizenry's views of distributive justice can inform tax policy decisions and help legislators draft tax rules that most accurately reflect the wishes of the population they represent. Democracy, of course, is meant to elicit the views of a majority of the citizens, and then enact those views as a series of laws.⁸ However, even if we believed our democracy did that effectively, it would still mean that, potentially, a sizable minority of citizens would not necessarily have their political beliefs reflected in the nation's laws.

Because the United States is not comprised entirely of people who share one set of philosophical beliefs,⁹ in this series of articles I consider some of the most commonly endorsed philosophical belief systems, and then examine one important element of the federal tax system—the wealth transfer taxes—through the lens of that belief system. My work uses wealth transfer taxes rather than the income tax to consider the consequences of those belief systems, both because wealth transfer taxation is more purely the site of redistribution in the Code and because the U.S. federal income tax does significant work beyond redistribution.¹⁰ This combination of factors

inheritance or accessions tax best fits the Rawlsian philosophy of equality of opportunity, which is at the heart of much American thought) [hereinafter Bird-Pollan, *Unseating Privilege*]; Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 ME. L. REV. 1, 1 (2013) (exploring the estate tax from the perspective of Robert Nozick's libertarian philosophical viewpoint) [hereinafter Bird-Pollan, *Death, Taxes, and Property*].

7. See Bird-Pollan, *Death, Taxes, and Property*, *supra* note 6, at 22.

8. See, e.g., *Democracy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

9. Indeed, if one examines recent elections within the United States, one might conclude that philosophical (and political) beliefs are more diametrically opposed than they have ever been. See PEW RESEARCH CTR., *supra* note 5, at 6.

10. The U.S. federal income tax is the location of significant policy-making in this country, in addition to being the source of satisfaction of most revenue-raising goals. Gerald Prante & Scott Hodge, *The Distribution of Tax and Spending Policies in the United States*, TAX FOUND., <http://taxfoundation.org/sites/taxfoundation.org/files/docs/SR211.pdf> [<https://perma.cc/BVZ4-6N2T>]. Through the use of tax expenditure programs (so-called "government spending"), the Code creates incentives for particular behavior. STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* 1, 3 (1985). Furthermore, the income tax generates the vast majority of federal revenues. CONG. BUDGET OFFICE, *THE 2016 LONG-TERM BUDGET OUTLOOK* 53 (2016).

makes the United States federal wealth transfer tax system a uniquely interesting place to examine the way in which particular distributive justice ideals, which seem to be endorsed by the American populace, are (or are not) manifested in law. A loose form of utilitarianism (the judgment that the best action is the one that maximizes overall “utility” to the greatest degree) is an extremely popular view in contemporary American politics.¹¹ Individuals on both sides of the political aisle make utilitarian arguments in support of their views.¹² In particular the language of “increasing the pie” appears in discussions of tax reform and debates about social welfare programs, regardless of the speakers’ belief about how that newly expanded pie should be allocated.¹³ While discussions of this growing pie are often Rawlsian in nature,¹⁴ there is a distinctly utilitarian bent to such discussions as well, since more pie means more utility, making choices that produce more value for more people the appropriate choices under a utilitarian model.¹⁵ This utilitarian language,

<https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51580-LTBO-2.pdf> (providing a long-term budget outlook up to 2046) [<https://perma.cc/GM8F-89FZ>]. For these reasons, among others, discussion of the wealth transfer taxes, rather than the income tax, provides space for a more explicit examination of the philosophical reasons for taxation. For a more robust discussion of why this project focuses on wealth transfer taxes rather than on income taxes, see Bird-Pollan, *Death, Taxes, and Property*, *supra* note 6, especially Part II.

11. See generally Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363, 406 (2002) (noting that many political conflicts in the United States arise in part due to “the utility maximizing preferences of a majority of the population.”).

12. See Russell Hardin, *The Utilitarian Logic of Liberalism*, 97 ETHICS 47, 48-49 (1986) (arguing “morally defensible rights” are grounded in utilitarian concepts); John Lawrence Hill, *A Theory of Merit*, 1 GEO. J.L. & PUB. POL’Y 15, 30 (2002) (asserting that “contemporary thinking on the right is broadly utilitarian in its commitments”); Michael D. Stark, *Millian Republicans v. Benthamian Democrats* (November 12, 2012), <https://michaeldstark.wordpress.com/2012/11/12/millian-republicans-v-benthamian-democrats/> [<https://perma.cc/6NAZ-5YDL>].

13. In an editorial discussion of tax reform, former FDIC chairwoman Sheila Bair (a self-proclaimed conservative Republican) described the Republicans as “a party that prides itself on increasing the pie, not redividing it.” Sheila C. Blair, *Grand Old Parity*, N.Y. TIMES, Feb. 27, 2013, at A25.

14. Jason Brennan, *Rawl’s Distributive Justice*, <https://www.libertarianism.org/guides/lectures/rawlss-distributive-justice> [<https://perma.cc/4YTA-9ZXL>] (last visited Nov. 15, 2016).

15. See, e.g., Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 1363, 1366 (2004) (assuming that “improving aggregate social welfare, as measured

manifested primarily in twenty-first century debates as the language of economics, exercises significant authority in contemporary political discussions.¹⁶ In this article, I take up classical utilitarianism, in particular as articulated by John Stuart Mill, and apply it to an analysis of the United States' wealth transfer tax regime.

Utilitarianism has been adopted and transformed in contemporary political theory into welfare economics.¹⁷ In this article, I will demonstrate why a consideration of classical utilitarianism, in its most philosophically rigorous manifestation, can offer something beyond the traditional welfare economics arguments. Further, I will show that Mill's utilitarianism is consistent with a robust, heavily redistributive, wealth transfer tax system. This article should not be taken as an endorsement of the utilitarian position. Rather, I explicate classical utilitarianism and then adopt it for purposes of the article in order to apply its precepts to an examination of the taxation of wealth transfers.

The structure of the article proceeds as follows: Part I introduces the problem and the structure of the article. Part II explains the history and current state of wealth transfer taxation in the United States. Part III articulates the classical utilitarian ethical theory, its adaptation into the theory of welfare economics, and the important distinctions between the two approaches. Part IV applies classical utilitarianism to an evaluation of the taxation of wealth transfers. Part V concludes.

II. THE UNITED STATES FEDERAL WEALTH TRANSFER TAX SYSTEM

A. History of the System

The United States wealth transfer tax system has three elements: the estate tax, the gift tax, and the generation-skipping

by the individual utility levels or happiness of the population, remains one important goal of tax policy.”).

16. See Miranda Perry Fleischer, *Charitable Giving and Utilitarianism: Problems and Priorities*, 89 IND. L.J. 1485, 1487 n.8 (2014).

17. For a further discussion of this claim, see *infra* note 60.

transfer (GST) tax.¹⁸ In place since 1916, the estate tax is the central component of the system and imposes an excise tax on the transfer of wealth at death.¹⁹ The federal gift tax serves as a backstop to the estate tax, ensuring that wealth transferred during the donor's lifetime, rather than held until death, will also be subjected to the imposition of the tax.²⁰ The GST tax imposes another layer of tax on gratuitous transfers (either during lifetime or after death) made to recipients more than one generation removed from the donor.²¹

The year 2016 marks the 100th anniversary of the estate tax. Tracing the history of the tax demonstrates a remarkable shrinking of the tax over time.²² Throughout their history, the

18. Joint Committee on Taxation, *History, Present Law, and Analysis of the Federal Wealth Transfer System* (March 18, 2015), <https://www.jct.gov/publications.html?func=startdown&id=4744>, at 1-3 [<https://perma.cc/U5V6-LJLR>]. The federal estate tax (a tax on transfers made to surviving heirs at the death of the donor) was first enacted in the United States in 1916. *Id.* at 5. The first estate tax was enacted without an accompanying gift tax. *Id.* at 6. As a result, the tax could easily be avoided if the donor transferred the majority of her assets tax-free during her lifetime, rather than waiting until death to pass on her wealth. *Id.* at 5. Congress realized that the estate tax was nearly powerless without a gift tax, and, as a result, the first gift tax (a tax on gratuitous transfers made during the donor's lifetime) was enacted in 1924 but repealed in 1926. *Id.* at 6. The modern gift tax was enacted in 1932, and the United States has had both gift and estate taxes since then, with the exception of the one-year repeal of the estate tax in 2010. *Id.* at 6, 10. The GST tax, imposed to ensure that wealth transfer taxation cannot be avoided by making a transfer to an heir who is not an immediate descendant of the transferor, was first enacted in 1976 and has been in place in its current form since 1986. Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, 118, 118-24 (2007), <http://www.irs.gov/pub/irs-soi/ninetyestate.pdf> [<https://perma.cc/36HR-E2WE>].

19. *Id.* at 118. The estate tax is imposed at a current rate of forty percent on amounts in excess of the 2014 unified credit exemption equivalent amount of \$5,340,000. 26 U.S.C. §§ 2001, 2010 (2012); Joint Committee on Taxation, *supra* note 18, at 12.

20. 26 U.S.C. § 2501 (2012). The Code imposes an excise tax on the gratuitous transfer of wealth during the donor's lifetime if the transfer exceeds the lifetime unified credit exemption equivalent amount of \$5,340,000. Joint Committee on Taxation, *supra* note 18, at 12. The gift tax is statutorily linked to the estate tax, so the tax is imposed at the rate of forty percent in 2014. 26 U.S.C. § 2001.

21. The Code imposes a tax (in addition to taxes imposed under § 2001 and § 2501) on direct transfers or distributions from a trust to a "skip person." 26 U.S.C. § 2601 (2012). In addition to the unified credit against estate and gift taxes available under § 2010, there is a lifetime credit against the GST tax equivalent to an exemption amount, in 2014, of \$5,340,000. 26 U.S.C. § 2631 (2012) (referencing § 2010); Joint Committee on Taxation, *supra* note 18, at 12. Transfers in excess of the exemption equivalent amount are taxed at forty percent in 2014. 26 U.S.C. § 2602 (2012) (referencing § 2001).

22. See Jacobson, Raub & Johnson, *supra* note 18, at 121-28.

wealth transfer taxes have been assessed against varying percentages of the population. At their peak in 1976, eight percent of adult deaths resulted in estates that were subject to the estate tax.²³ In 2011 an estimated 0.13% of adult deaths resulted in estates that were subject to the tax.²⁴ In terms of total tax revenues collected through the wealth transfer taxes, the taxes were at their peak in 1972, when 2.6% of total tax revenues came from the estate and gift taxes.²⁵ By contrast, in 2013 estate tax revenues represented only 0.6% of total United States federal tax revenues.²⁶

B. Mechanics of the United States Wealth Transfer Taxes

The modern estate tax is an excise tax on the transfer of wealth.²⁷ Many (although perhaps not all) of the fundamental goals of wealth transfer taxation could be achieved through the imposition of a direct tax on the wealth of an individual.²⁸ Such a tax, operating like the relatively common property taxes in place in many local tax jurisdictions, could levy a tax on the current value of an individual's assets. A federal wealth tax could be assessed annually or more or less frequently; it could be either flat or graduated; it could be a tax on all holdings or only those above a certain exemption amount; and it could be uniform across households or vary based on age or family size. While the many options for imposing a wealth tax might make it seem an attractive option, a constitutional prohibition on direct

23. *Id.* at 125.

24. In 2011, only 0.13% of adult deaths resulted in estates that were subject to the estate tax. *Historical Returns as Percentage of Deaths*, TAX POL'Y CTR., <http://www.taxpolicycenter.org/statistics/historical-returns-percentage-deaths> [<https://perma.cc/8G5L-B3K3>].

25. Jacobson, Raub & Johnson, *supra* note 18, at 125.

26. CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: WHERE DO FEDERAL REVENUES COME FROM? 2 (2015), http://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics_WhereDoFederalTaxRevsComeFrom_08-20-12.pdf [<https://perma.cc/8JYR-BBVY>].

27. "A tax is hereby imposed on the *transfer* of the taxable estate of every decedent who is a citizen or resident of the United States." 26 U.S.C. § 2001(a) (2012) (emphasis added).

28. Beverly Moran, *Wealth Redistribution and the Income Tax*, 53 HOW. L.J. 319, 330 (2010).

taxes that are not proportional makes a wealth tax impossible without a constitutional amendment in the United States.²⁹ However, the structure of the estate tax, as an indirect tax on the act of transferring wealth, rather than a direct tax on the holding of wealth, is permitted under the United States' constitutional regime.³⁰ Current law unifies the estate and gift tax so that tax is also imposed on so-called "lifetime transfers." Wealth transfers are taxed in the same way whether they occur before or after the death of the transferor.³¹ In practice, the estate, gift, and GST taxes are all imposed at a flat rate of forty percent, although the statute imposing the tax actually includes a graduated rate structure.³² Because of the lifetime exemption equivalent credit, no transfers are taxed at any rate under the highest forty percent rate. All transfers within the lower brackets are exempted from

29. *Id.* at 330. For a discussion of the possibility of a wealth tax, and specifically exploring the use of a wealth tax as a means of funding reparations, see, e.g., *id.* at 330-35; David Shakow & Reed Shuldiner, *A Comprehensive Wealth Tax*, 53 TAX L. REV. 499 (2000) (proposing a wealth tax system).

30. "The framing of the tax has constitutional significance: While Congress may impose excise taxes subject only to the uniformity requirement, any direct tax on property must be apportioned among the States. See U.S. CONST. art. I, §8, cl. 1 & § 9, cl. 4. By imposing the tax on the value of the taxable estate that is transferred by reason of the decedent's death (as opposed to the value of the property in the decedent's hands just prior to his death), the estate tax falls comfortably within the excise category." BRANT J. HELLWIG & ROBERT T. DANFORTH, *ESTATE AND GIFT TAXATION* 1 (2d ed. 2013).

31. While the structure of the gift tax and the estate tax is the same, there is, in fact, still a benefit to transferring assets during one's lifetime, due to the tax-exclusive nature of the gift tax. The estate tax is assessed on the value of the assets held by the decedent at death. 26 U.S.C. § 2001 (2012). By its very nature, then, the estate tax is "tax-inclusive," meaning that the amount paid in tax will, itself, be subject to the tax. By contrast, the gift tax is a tax on the amount transferred by gift. 26 U.S.C. § 2501 (2012). Therefore, the amount subject to the gift tax does not include the amount of the tax. For example, assume a unified estate and gift tax rate of fifty percent. Making a post-tax transfer of \$100,000 will require \$200,000 of assets if the amount is transferred after death (\$200,000 of assets x fifty percent tax rate results in \$100,000 tax liability, leaving \$100,000 of assets for the heir), while making an *inter vivos* transfer of \$100,000 requires only \$150,000 of assets (\$100,000 gift transfer x fifty percent tax on transfer incurs \$50,000 tax liability – total amount required to make the transfer is \$150,000). In that sense, *inter vivos* gifts are "cheaper" to make than post-death transfers.

32. 26 U.S.C. § 2001 (2012) begins with a tax rate 18% on the first \$10,000 transferred, and gradually climbs to the current maximum rate of 40%. However, as the current exemption equivalent credit of \$5.45 million well exceeds the bottom of the 40% bracket (currently the 40% bracket affects transfers in excess of \$1,000,000), no transfers are subject to the tax rates in the lower brackets.

the tax.³³ Under 2016 law, a taxpayer can transfer a total of \$5.45 million tax-free during her lifetime.³⁴ The current lifetime credit can also be shared between spouses, meaning that all married couples are entitled to a total amount of \$10.9 million of tax-free transfers.³⁵

The current form of the wealth transfer tax (with a \$5.45 million lifetime exemption, indexed for inflation, and a forty-percent tax rate on transfers over that amount) arose as the result of a political compromise in the first days of 2013.³⁶ Legislation passed under President George W. Bush in 2001 phased out the estate tax with a full repeal scheduled for 2010.³⁷ Because the legislation did not garner the requisite number of votes in Congress to become permanent, all of the so-called “Bush tax cuts” were sunset provisions, meaning they would disappear

33. *Id.*

34. 26 U.S.C. § 2010 (2012); Rev. Proc. 2015-33, 2015-44 I.R.B. 615.

35. Rev. Proc. 2015-33, 2015-44 I.R.B. 615. Beginning with the 2011 tax year, the Code permitted unused portions of the lifetime credit to transfer to the surviving spouse upon the death of the first spouse. Joint Committee on Taxation, *supra* note 18, at 11. Before then, a significant amount of estate planning, in particular the use of so-called “QTIP trusts” centered on ensuring that the entirety of an individual’s unified credit was used up, rather than allowing a portion of it to expire while the surviving spouse held assets in excess of the unified credit amount. 26 U.S.C. § 2010 (2012). *See also* HELLWIG & DANFORTH, *supra* note 30, at 354-56, 374.

36. Congress and President Obama signed the American Taxpayer Relief Act (ATRA) to avoid going over the so-called “fiscal cliff.” CCH Tax Briefing, President Signs Eleventh-Hour Agreement to Avert Fiscal Cliff (January 3, 2013), <http://tax.cchgroup.com/downloads/files/pdfs/legislation/ATPR.pdf>. The agreement was reached in the final hours of 2012, and the bill was signed into law on January 2, 2013. Colleen Curtis, What You Need to Know about the Bipartisan Tax Agreement (January 2, 2013), <https://www.whitehouse.gov/blog/2013/01/01/what-you-need-know-about-bipartisan-tax-agreement> [<https://perma.cc/9RCM-9EET>]. The law sets the estate tax lifetime exemption-equivalent credit at \$5 million, adjusted annually for inflation (which brings it to \$5.34 million in 2014) and sets the tax rate at a flat forty percent for amounts in excess of that amount. 26 U.S.C. §§ 2001, 2010 (2012). The new law does not have a sunset date, and thus will not have to be extended by another Congressional vote.

37. Joint Committee on Taxation, *supra* note 18, at 10. Before President Bush and the 2001 Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the Code provided a lifetime credit against tax of \$675,000. 26 U.S.C. § 2010(b) (2012). Any transfers made, whether *inter vivos* or after death, that exceeded the credit amount were taxed at fifty-five percent. 26 U.S.C. § 2001 (2012). EGTRRA slowly increased the lifetime credit amount and simultaneously lowered the rate, culminating in a one-year repeal of the estate tax in 2010. *See* CONG. BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: FEDERAL ESTATE AND GIFT TAXES 1 (2009) [hereinafter GIFT TAXES].

from the Code on December 31, 2010 without further legislative action.³⁸ President Obama and the 2010 Congress enacted legislation on December 17, 2010; however, the legislation was merely a patch, and that legislation expired on December 31, 2012.³⁹ Finally, on January 2, 2013, the American Taxpayer Relief Act (ATRA) was enacted, making changes to the wealth transfer taxes permanent and resulting in the tax rate and exemption amount in place today.⁴⁰

In addition to amounts that are transferred as “gifts” within the definition of the Code,⁴¹ taxpayers can annually transfer up to a specific amount outside of the definition of gift, under the annual exclusion amount.⁴² In 2016, a taxpayer can transfer up to \$14,000 per recipient with no obligation to report the transfer on any tax return or pay gift tax on the transfer.⁴³ Such a

38. The peculiarities of EGTRRA resulted in a complete sunset of the law on December 31, 2010. 2 CONG. BUDGET OFFICE, BUDGET OPTIONS 239 (2009) [hereinafter BUDGET OPTIONS].

39. *Id.* Congress and President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the Tax Relief Act), a two-year extension of the EGTRRA provisions, including a reinstatement of the estate tax with a \$5 million lifetime credit (indexed for inflation) and a thirty-five percent rate on amounts transferred above the credit amount. Joint Committee on Taxation, *supra* note 18, at 10-11. That extension expired on December 31, 2012, at which point the estate and gift tax credit and rate were scheduled to revert to 2001 levels. BUDGET OPTIONS, *supra* note 38. The Congressional Budget Office estimated that extending the EGTRRA estate and gift tax provisions that lowered the transfer tax rate and increased the lifetime credit amount would have cost approximately \$402 billion over the period of 2010 to 2019, as compared with the revenue that would have been raised if EGTRRA had been allowed to expire. CONG. BUDGET OFFICE, AN UPDATE TO THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2012 TO 2022 34 (2012); BUDGET OPTIONS, *supra* note 38, at 239-40. Leaving the 2009 rates and exemption levels in place would have raised a total of \$420 billion (or 1.2% of total revenues) from 2010 to 2019. *See* GIFT TAXES, *supra* note 37, at 5.

40. HELLWIG & DANFORTH, *supra* note 30, at 17-18.

41. Importantly, and to the chagrin of law students everywhere, the term “gift” means something different in the gift tax regime than it does in the income tax regime. The income tax definition of gift, resulting in an increase in wealth to the recipient that is excluded from the recipient’s income under 26 U.S.C. § 102, comes from the famous Supreme Court case *Comm’r v. Duberstein*, 363 U.S. 278 (1960). The Supreme Court articulated the standard, still prevalent today, that a gift stems from “detached and disinterested generosity” on the part of the donor. *Id.* at 285. By contrast, the gift tax has a statutory definition of the term “gift” that does not investigate the donor’s motives. “Where property is transferred for less than an adequate and full consideration in money or money’s worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift . . .” 26 U.S.C. § 2512(b) (2012).

42. 26 U.S.C. § 2503(b)(1) (2012).

43. 26 U.S.C. § 2503(b)(2) (2012); Rev. Proc. 2015-53, 2015-44 I.R.B. 615.

transfer does not use up any of the individual's lifetime unified credit, since amounts under the annual exclusion fall outside of the Code's definition of "taxable gift."⁴⁴ In addition, transferors can pay the tuition and medical expenses of any individual without subjecting those payments to wealth transfer taxation, as long as the payments are made directly to the provider of the services.⁴⁵ The annual exclusion was originally intended as a simplifying mechanism, allowing "normal" family transfers (gifts on holidays and birthdays, vacations, even a teenager's first car) to pass outside of the transfer tax regime. However, aggressive estate planning has resulted in the use of the annual exclusion for significant cash transfers, including in the popular Crummey Trust context.⁴⁶ One suspects, however, that parents using Crummey Trusts and other planning techniques to transfer \$14,000 per year to each of their children are likely making those traditional "gifts" as well.⁴⁷ Transfers like these would violate both the intention and the letter of the law.⁴⁸ The combination of all of these provisions allows taxpayers to transfer a significant amount of wealth without paying any wealth transfer taxes, or using up any of the lifetime credit.⁴⁹

While the wealth transfer taxes are collecting less in revenue now than they did in prior years,⁵⁰ at least in part

44. 26 U.S.C. § 2503(a)-(b) (2012).

45. 26 U.S.C. § 2503(e) (2012). For a critique of the exclusion of transfers to pay for health care and education under § 2503, see Kerry A. Ryan, *Human Capital and Transfer Taxation*, 62 OKLA. L. REV. 223, 227-29 (2010).

46. Crummey trusts, named for the first taxpayer to successfully defend the use of this tax strategy in court, allow a contribution to a trust to qualify for the annual exclusion, as long as the transfer satisfies certain technical requirements, used to make the transfer more like a current transfer. For an explanation of the mechanics and uses of Crummey trusts, see Kent A. Mason, *An Analysis of Crummey and the Annual Exclusion*, 65 MARQ. L. REV. 573, 577-92 (1982).

47. *Id.* at 604; Rev. Proc. 2015-53, 2015-44 I.R.B. 615.

48. Mason, *supra* note 46, at 604.

49. A married taxpayer with two children could transfer to her children up to \$56,000 per year outside of the transfer tax regime, by transferring \$28,000 to each child and then making an election to have half of the amount treated as being transferred from the taxpayer's spouse. On top of that, daycare costs, private school tuition, university tuition and fees and all medical expenses can be paid without reporting any of these amounts on a gift tax return. *Frequently Asked Questions on Gift Taxes*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes> [<https://perma.cc/4GQN-VGZ9>].

50. CTR. ON BUDGET & POL'Y PRIORITIES, *supra* note 26.

because the tax rates on these transfers have been reduced⁵¹ and the exemption amount has been increased,⁵² the reduction in the collection of revenues can also be attributed, at least in part, to a non-statutory change. Aggressive estate planning strategies have reduced the base of the tax by reducing the value of wealth held by taxpayers.⁵³ Through the use of entities such as family limited partnerships, taxpayers reduce the value for estate tax purposes of the assets held in their estates, and since tax liability is a product of base times rate, the reduction in the value of the estate (the tax base) results in a reduction in overall tax liability.⁵⁴ The United States Tax Court has been relatively

51. In the year 2001, the estate tax was assessed at a flat rate of fifty-five percent. *Federal Estate and Gift Tax Rates, Exemptions, and Exclusions, 1916-2014*, TAX FOUND. (Feb. 4, 2014) [hereinafter *Federal Estate and Gift Tax Rates*], <http://taxfoundation.org/article/federal-estate-and-gift-tax-rates-exemptions-and-exclusions-1916-2014> [https://perma.cc/9AN4-ZL7Z]. In 2016, it is only forty percent. 26 U.S.C. § 2001(c) (2012).

52. In the year 2001, the unified credit provided an exemption equivalent amount of \$675,000. *Federal Estate and Gift Tax Rates*, *supra* note 51. In 2016, that amount is \$5.45 million. 26 U.S.C. § 2010 (2012); Rev. Proc. 2015-53, 2015-44 I.R.B. 615. This exponential increase in the size of the exemption amount has taken a significant number of estates out of the pool of estates subject to the estate tax. *Ten Facts You Should Know About the Federal Estate Tax*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 8, 2016), <http://www.cbpp.org/research/federal-tax/ten-facts-you-should-know-about-the-federal-estate-tax> [https://perma.cc/PG7E-NM6Q].

53. Brant J. Hellwig, *On Discounted Partnership Interests and Adequate Consideration*, 28 VA. TAX REV. 531, 536-37 (2009).

54. A Family Limited Partnership (FLP) works by reducing the valuation of the assets in an estate by placing those assets in a partnership and then imposing restrictions on the partnership interests. Hellwig, *supra* note 53, at 535. Typically, the owner of the assets creates a partnership, places the assets in question inside the trust, and then imposes restrictions on the voting rights or transferability of the interests in that partnership. *Id.* The creator of the partnership then transfers those partnership interests to family members either during the transferor's lifetime, or includes an estate plan that will transfer the partnership interests after the transferor's death. *Id.* Because of the restrictions placed on the partnership interests, the transferor claims that the value of the partnership interest should be less than the value of the proportionate share of the underlying assets. *Id.* at 577. In many instances the assets included in the FLP are readily marketable assets such as publicly traded securities. *Id.* at 543. However, since the assets are owned by a partnership and there are restrictions on the partnership interests, the discounted valuation is generally accepted by the I.R.S. Hellwig, *supra* note 53, at 533 n.2. "Because property is valued on an objective basis for estate and gift tax purposes, the contribution of property capable of ready valuation to a partnership followed by the transfer of beneficial interests in the entity serves to suppress transfer tax value on two independent grounds. First, the partnership interest may be discounted to reflect its lack of marketability Second, a transferee of a limited partnership interest is not entitled to participate in management

sympathetic to taxpayers using aggressive estate planning strategies, which has resulted in a dramatic decrease in estate tax revenue.⁵⁵

Given the significant evolution of the wealth transfer tax regime in the past fifteen years, it is at best unclear what the future of the taxation of wealth transfers in the United States will look like. While the current legislation will not expire without action by Congress, there is a vocal contingent of opponents to the estate tax who fight against its continued existence.⁵⁶ The rhetoric of the “death tax” and the misconception that the estate tax is the end of small business and family farms in the United States continues to make the estate tax unpopular, even among individuals who would never be subject to the tax.⁵⁷ Despite this opposition, some scholars (perhaps overly cynically) argue that, as a political matter, the estate tax will never be eliminated, as politicians who collect contributions from estate tax opponents are unwilling to sacrifice the issue completely.⁵⁸ However, there is little evidence that the estate tax is, in fact, inconsistent with the

decisions.” *Id.* at 535-36. Discounts can be significant, sometimes nearing thirty percent. *Id.* at 536.

55. *Id.* at 542-44.

56. For a robust analysis of the political campaign aimed at eliminating the estate tax completely, and potentially using the elimination of the estate tax as a first step towards the large-scale reduction of federal taxation generally, see generally MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2005) (presenting the saga of the fight over the death tax).

57. See Zachary Mider, *The Estate Tax: U.S. Rich Follow Rockefeller's Lead in Hunt for Loopholes*, BLOOMBERG, <https://www.bloomberg.com/quicktake/the-estate-tax> [<https://perma.cc/M7XS-WAKK>] (last updated Aug. 8, 2016); Paul Waldman, *The Oddly Unpopular Estate Tax*, THE AMERICAN PROSPECT (Dec. 16, 2010), <http://prospect.org/article/oddly-unpopular-estate-tax> [<https://perma.cc/S9WC-TEGW>].

58. “The secret is *not* that special interests give boatloads of money to politicians . . . The dirty little secret I come to lay bare is that *Congress likes it this way*. Congress *wants* there to be special interests, small groups with high stakes in what it does or does not do. These are necessary conditions for Congress to get what it needs: money, for itself and its campaigns . . . For the estate tax, there are two opposing sides [to the shakedown game]. The repeal of the tax would be a good outcome for the wealthy families in the tax’s target range and a bad outcome for the financiers and others who benefit, big time, from the very existence of the tax and the planning it pushes many wealthy people to do. No matter what Congress does, at least two sets of players – billionaire families on the one hand and their estate-planning advisers and financial institutions on the other – will always be willing to play because of the estate tax’s high stakes.” Edward J. McCaffery, *The Dirty Little Secret of (Estate) Tax Reform*, 65 STAN. L. REV. 21, 21, 23 (2012).

political and philosophical beliefs of most Americans. In reality, it seems the opposite is true.⁵⁹ Part of the work of this article and the others in this series is to demonstrate that the continued existence of wealth transfer taxation in some form is both philosophically important and consistent with the beliefs of most Americans.

III. WHAT IS UTILITARIANISM?

The language of welfare economics often dominates modern day tax policy discussions.⁶⁰ Stemming from the work of Adam Smith, through Ricardo and Musgrave, among others, and articulated in contemporary discussions by Louis Kaplow and others, welfare economics arguments have a distinctly utilitarian bent.⁶¹ Much has been written by welfare economists about the estate tax and wealth transfer taxes, as well as about tax policy more generally.⁶² If utilitarianism were nothing more than welfare economics, this article would not be adding

59. "Given how clearly the estate tax lines up with American notions of fairness, it should enjoy wider support. The beauty of a free-market system is the absence of a special elite that judges who gets what – consumers vote with their dollars for the goods and services that best fit their needs (at least in theory). Inherited wealth goes against this model: As Warren Buffet has said, 'The idea that you get a lifetime of privately funded food stamps based on coming out of the right womb strikes at my idea of fairness.' Indeed, it's surprising that many of the same people who oppose welfare on the grounds that its benefits are not tied to work can so stridently denounce estate taxes, thus endorsing a system that allows people to receive vast amounts of money without putting in any work." Stephen Martin, *America's Un-American Resistance to the Estate Tax*, THE ATLANTIC (Feb. 23, 2016), <http://www.theatlantic.com/business/archive/2016/02/resistance-estate-tax/470403/> [<https://perma.cc/77K3-RVHA>].

60. Jon Bakija, *Social Welfare, Income Inequality, and Tax Progressivity: A Primer on Modern Economic Theory and Evidence*, <http://web.williams.edu/Economics/bakija/BakijaSocialWelfareIncomeInequalityAndTaxProgressivity.pdf> (noting that optimal income taxation in the economic literature is focused on addressing the question of how to maximize social welfare) [<https://perma.cc/3LSP-UUH5>]. "The classical economists, especially the three most famous of them, Adam Smith, Malthus and Ricardo, were utilitarians." JOHN PLAMENATZ, THE ENGLISH UTILITARIANS 111 (1949).

61. Much of the discussion in contemporary tax policy begins from utilitarian premises, even when those premises go unacknowledged. See Fleischer, *supra* text accompanying note 16; Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 TAX L. REV. 229, 230 (2011).

62. See generally LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS (2008) (presenting a unified framework for evaluating and analyzing taxation).

significantly to the conversation. However, welfare economics has focused on a particular aspect of utilitarianism, and has left behind some of the unique elements of the theory that contributed to the evolution of the ethical debate in the nineteenth and twentieth centuries.⁶³ In this Part, I will explicate the original theory of utilitarianism as proposed first by Jeremy Bentham and then endorsed by John Stuart Mill, including in his treatise of the same name. I will then identify how utilitarianism is distinct from welfare economics, and how it has evolved in the nearly 150 years since Mill's book was published.

A. Classical Utilitarianism

Versions of the utilitarian ethical theory date as far back as Plato, Aristotle, and Epicurus.⁶⁴ The unifying characteristic of utilitarian theories is the idea that, rather than make *a priori* claims about the rightness or wrongness of any particular action, ethical evaluations should be consequentialist.⁶⁵ That is to say, for utilitarians, ethics is primarily a process of examining the outcomes (usually the expected outcomes, rather than the actual outcomes, since ethical decisions must be made in advance of knowing the *actual* outcome of the choice) of actions and determining whether those outcomes tend towards the goal of

63. See generally *The History of Utilitarianism*, STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/utilitarianism-history/> [https://perma.cc/RN6Y-46UC] (last updated Sept. 22, 2014) (providing a history of Utilitarianism, starting with Bentham and Mill to the modern day refinements of the philosophy).

64. "Though Bentham is usually cited as the founder of utilitarianism, the antecedents of utilitarian principles have a far older vintage in the philosophy of Plato, Aristotle, and Epicurus, and in early Christian thought. Other significant dimensions of the theory can be traced to the seventeenth-century writings of Hobbes, Locke, and Richard Cumberland." JAMES E. CRIMMINS, ON BENTHAM 2-3 (2004).

65. "Utilitarianism is often described as a *consequentialist* theory . . . A non-consequentialist theory, such as Kantian ethics, will claim that certain actions are just wrong *in themselves*, and not wrong because of their consequences for happiness or anything else. But consequentialist theories make the rightness of actions depend on their consequences. Kantian ethics may claim that murder is wrong in itself, while utilitarianism will claim that it is wrong only because of its consequences (the decrease in overall happiness brought about by the absence of the person killed, by the grief, distress, anxiety caused to others, and so on)." Roger Crisp, *Introduction to J.S. MILL, UTILITARIANISM* 14 (Roger Crisp ed., Oxford Univ. Press 1998) (1861).

the ethical theory.⁶⁶ On a consequentialist model, actions cannot be evaluated in the abstract, and actions should not be evaluated based on the motivations behind them.⁶⁷ Rather, what makes an action “right” for a consequentialist, as an ethical matter, is the degree to which that action achieves the desired ethical end.⁶⁸ The utilitarian version of consequentialism evaluates the rightness and wrongness of actions by the degree to which those actions increase utility.⁶⁹

1. *Jeremy Bentham*

In many ways, although John Stuart Mill is its most famous advocate, Jeremy Bentham is thought of as the father of utilitarianism.⁷⁰ And, at least at the beginning of his philosophical career, Mill saw himself as extending and building on the work of Jeremy Bentham, a friend of Mill’s father, and something of a mentor to Mill himself.⁷¹ A social revolutionary, Bentham believed that measuring the good in terms of human happiness was not only more scientifically accurate than references to idealist criteria, but also that appeals to happiness

66. Utilitarianism is not the only consequentialist theory, but it may be the best known. Other examples of consequentialism include pragmatism, hedonism, and egoism. *Consequentialism*, ETHICS GUIDE, http://www.bbc.co.uk/ethics/introduction/consequentialism_1.shtml; *Consequentialism*, STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/consequentialism/> [<https://perma.cc/2CLV-5GPK>] (last updated Oct. 22, 2015). There is some debate about how broadly or narrowly to define consequentialism, but there is at least general agreement about one central element of all consequentialist theories. “Any consequentialist theory must accept the claim that . . . certain normative properties depend only on consequences. If that claim is dropped, the theory ceases to be consequentialist.” *Id.*

67. *Id.*

68. *Id.*

69. At the heart of debates among those who hold utilitarian ethical beliefs is the definition of “utility.” *The History of Utilitarianism*, *supra* note 63. Section A of this Part of the article explores what Mill meant by utility. Section B examines the form “utility” takes in the language of welfare economists. Finally, Section C highlights the differences between these two approaches.

70. Kiran Bhardwaj, *Higher and Lower Pleasures and our Moral Psychology*, 1 RES COGITANS 126, 126 (2010).

71. “Mill saw himself as an advocate, and evangelist even, for utilitarianism, telling us later that he never gave up the greatest happiness principle . . . One of his first moves was to establish a group of fellow sympathizers, which met in a disused room at Bentham’s house.” ROGER CRISP, *MILL ON UTILITARIANISM* 4 (1997).

would democratize society.⁷² The targets of his philosophical critique included, to a certain extent, idealists like Immanuel Kant, but also, to a greater extent, the traditional values espoused by most religious thinkers.⁷³ In this regard, Bentham is the philosophical heir to David Hume's empiricism.⁷⁴ Like most consequentialist thinkers, Bentham believed that ethical analyses begin with facts about the world.⁷⁵ Actions have consequences in the empirical world, and it is to that world that we must look to determine whether or not an action is ethical.⁷⁶ Much of the ethical debate until this point had focused on an evaluation of motives and intentions, judging an action as good or bad on the basis of the thoughts behind it, rather than based on the results it produced.⁷⁷ Furthermore, ethics had focused on the good of the community, but Bentham objected that the good of the community could only mean the good of all of the individual members of the community.⁷⁸ This turned ethical calculations into a balancing act, totaling the consequences to each individual member of society when determining the most ethical action.⁷⁹ Rather than speaking in abstract terms about the good of "mankind" or "society," Bentham focused on real people and the way a particular action impacted the lives of those people.⁸⁰ Bentham insisted that ethics must focus on all

72. See ROSS ABBINNETT, *POLITICS OF HAPPINESS: CONNECTING THE PHILOSOPHICAL IDEAS OF HEGEL, NIETZSCHE AND DERRIDA TO THE POLITICAL IDEOLOGIES OF HAPPINESS* 22 (2013).

73. See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 18, 21, 25 (J.H. Burns & H.L.A. Hart eds., 1970).

74. Hume was one of the first philosophical empiricists, insisting that philosophy, like the other natural sciences, must begin all analysis with facts from the world, rather than with ideas. 1 DAVID HUME, *A TREATISE OF HUMAN NATURE* 7-8 (E.P. Dutton & Co., Inc. 1911) (1739).

75. See BENTHAM, *supra* note 73, at 74.

76. See *id.*

77. See IMMANUEL KANT, *THE MORAL LAW: GROUNDWORK OF THE METAPHYSIC OF MORALS* 64 (H.J. Paton trans., Routledge Classics 2005) (1948).

78. "The interest of the community is one of the most general expressions that can occur in the phraseology of morals: no wonder that the meaning of it is often lost. When it has a meaning, it is this. The community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is, what? – the sum of the interests of the several members who compose it." BENTHAM, *supra* note 73, at 12.

79. *Id.* at 12-13, 40.

80. See *id.* at 12.

the consequences of an action for people in the world.⁸¹ However, this emphasis does not yet clarify what makes an action good or bad.

The next step of Bentham's argument was to establish what it means to talk of the "good" of individuals.⁸² Again, Bentham disagreed with the arguments of traditional thinkers in this discussion of ethics. "A thing is said to promote the interest, or to be *for* the interest, of an individual, when it tends to add to the sum total of his pleasures: or, what comes to the same thing, to diminish the sum total of his pains."⁸³ For Bentham, the first philosopher to robustly articulate the ethics of utilitarianism, an action is deemed ethical if it promotes pleasure and diminishes pain.⁸⁴ Bentham ultimately equated utility with pleasure and claimed that ethical calculations should determine the amount of pleasure produced by an action.⁸⁵ When compared to the philosophers of his time, who made ethical arguments with appeals to reason, or God, or natural rights, Bentham's work looks radical. Grounded firmly in the world of experience, Bentham refuses to make non-empirical judgments about the "quality" of an interest, instead insisting that happiness and pleasure are all just matters of degree.⁸⁶ All pleasure is equally valuable, so more pleasure is just better.⁸⁷

In order to understand the way in which Mill's utilitarian calculus differs from Bentham's, one must first understand what Bentham means by saying an action increases pleasure. First of all, unlike Mill, Bentham endorsed a theoretically consistent

81. *See id.* at 40.

82. *See id.* at 12, 125.

83. BENTHAM, *supra* note 73, at 12.

84. *See id.* at 11-12.

85. *Id.*

86. Among even those who admire Bentham's work, there is a concern that he is fundamentally wrong about his position that all pleasure is the same. For instance, "He saw an analogy where there was none. *He also confused measurements of quantity with comparisons of effects.* When a man has to choose between two alternative pleasures, one of which is mild but lasting and the other intense but brief, he never can choose the greater, for the simple reason that neither is the greater. What he can do, however, is to choose the one he desires the more intensely." PLAMENATZ, *supra* note 60, at 74. However, this flaw is remedied in Mill's version of utilitarianism. *See* MILL, *supra* note 65, at 56.

87. *See* PLAMENATZ, *supra* note 60, at 73.

version of ethical hedonism.⁸⁸ Bentham argued that all pleasure was equal, and that ethics had nothing to say about the value of one form of pleasure over another.⁸⁹ Bentham's philosophical account included the explication of a utilitarian calculus, meant to analyze the rightness and wrongness of actions with reference to the extent to which the action tended to produce more pleasure.⁹⁰ Again, for Bentham, because all pleasures are of equal worth, the difference between more or less worthy actions is the degree to which the actions produce more or less pleasure, and the degree to which that pleasure is more or less intense.⁹¹ Bentham then argues that, in effect, ethics must perform a calculus with regard to all ethical decisions, totaling up the value (including the relative degrees of intensity) of all pleasures and pains produced by choosing one action and comparing the result to the pleasures and pains (again, including the intensity of those pleasures and pains) produced by an alternative action.⁹² Comparison of the results will then determine the correct ethical choice.⁹³

88. *Hedonism*, STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/hedonism/> [<https://perma.cc/CJ9E-9EEB>] (published April 20, 2004 and substantially revised October 17, 2013). Again, although he is consistent, Bentham may also be wrong. Treating all pleasure as inherently the same ignores real differences that seem to have effects on how that pleasure is experienced in the world. "The intensity of a pleasure cannot be measured against its duration, nor its duration against its certainty or uncertainty, nor this latter property against its propinquity or remoteness." PLAMENATZ, *supra* note 60, at 74.

89. Bentham refuses to categorize kinds of pleasure, and instead measures pleasure (and pain) by variations in degree. But pleasure as such is one kind of thing, capable only of differences in degree, not in kind. "By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered." BENTHAM, *supra* note 73, at 12.

90. "To a person considered *by himself*, the value of a pleasure or pain considered *by itself*, will be greater or less, according to the four following circumstances: 1. Its *intensity*. 2. Its *duration*. 3. Its *certainty or uncertainty*. 4. Its *propinquity or remoteness*." *Id.* at 38.

91. "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness." *Id.* at 11-12.

92. *Id.* at 40.

93. *Id.* at 11-12, 40.

2. John Stuart Mill

While Mill claims to be continuing Bentham's utilitarianism, Mill ultimately disagrees with Bentham's pure hedonism.⁹⁴ Some pleasures are more valuable than others, Mill argues, but the only arbiter of the value of two distinct pleasures, is someone who has experienced them both.⁹⁵ Mill goes on to conclude that the quality of the so-called "higher" pleasures is so much more intense as to make those pleasures incomparably better than the "lower" pleasures.⁹⁶ As he famously claims, "It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, is of a different opinion, it is because they only know their own side of the question."⁹⁷ Some have objected that this turn away from Bentham's pure hedonism demonstrates an inconsistency in Mill's theory.⁹⁸ However, the mere acknowledgement that pleasure admits of qualitative difference does not necessarily entail the conclusion that there is some measure, other than pleasure, that determines value.⁹⁹ Indeed, as Mill himself notes, those who criticize the theory of

94. "Like Bentham, Mill believes that pleasantness is the only 'good-making' property. But how valuable a pleasure is depends not only on its duration, but on its nature." MILL, *supra* note 65, at 12. "It is quite compatible with the principle of utility to recognize the fact, that some *kinds* of pleasure are more desirable and more valuable than others. It would be absurd that while, in estimating all other things, quality is considered as well as quantity, the estimation of pleasures should be supposed to depend on quantity alone." *Id.* at 56.

95. "Of two pleasures, if there be one to which all or almost all who have experience of both give a decided preference, irrespective of any feeling of moral obligation to prefer it, that is the more desirable pleasure. If one of the two is, by those who are competently acquainted with both, placed so far above the other that they prefer it, even though knowing it to be attended with a greater amount of discontent, and would not resign it for any quantity of the other pleasure which their nature is capable of, we are justified in ascribing to the preferred enjoyment a superiority in quality, so far outweighing quantity as to render it, in comparison, of small account." *Id.*

96. *Id.* at 57.

97. *Id.*

98. MILL, *supra* note 65, at 12.

99. "If a man were to say that nothing is beautiful except colour and then to place the colours in an order of beauty, it would not follow that he was admitting that anything but colour could be beautiful. The difference between one colour and another is not a difference of degree, nor yet is it a difference in respect of anything except colour. So, too, the higher and the lower pleasures, though different in kind, may yet differ only in respect of pleasure." *Id.* at 137.

utilitarianism for valuing pleasure and who claim that pleasure is nothing but a “base value” reveal more about their own understanding of pleasure, than they do about the coherence of utilitarianism.¹⁰⁰

At the center of Mill’s theory of utilitarianism, and the element that makes utilitarianism more than merely an ethics of self-interest, is that, when one calculates how any particular action will maximize happiness, one must not privilege one’s own happiness over that of any other person.¹⁰¹ All human beings have equal value when calculating how much happiness there is in the world.¹⁰² Therefore, even an action that threatens to impose pain on one individual or on a group of individuals might still be held to be ethical on a utilitarian calculus, as long as the totality of pleasure created by the action exceeds that pain.¹⁰³ It is this universal nature of the utilitarian calculus that makes taxation ethically possible, since the “pain” imposed by the government collecting the tax will be offset by the pleasure created by the services the government provides with the revenue.¹⁰⁴

100. Discussing the Epicureans response to those who alleged their belief system as a “doctrine worthy only of swine,” Mill points out, “Epicureans have always answered, that it is not they, but their accusers, who represent human nature in a degrading light; since the accusation supposes human beings to be capable of no pleasures except those of which swine are capable.” *Id.* at 55.

101. “[Impartiality] is involved in the very meaning of Utility, or the Greatest-Happiness Principle. That principle is a mere form of words without rational signification, unless one person’s happiness, supposed equal in degree (with the proper allowance made for kind), is counted for exactly as much as another’s.” *Id.* at 105.

102. “[T]he happiness which forms the utilitarian standard of what is right in conduct, is not the agent’s own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator.” *Id.* at 64.

103. Mill acknowledges that, in some instances, the good of others can only be achieved by the sacrifices of some. “Though it is only in a very imperfect state of the world’s arrangements that anyone can best serve the happiness of others by the absolute sacrifice of his own, yet so long as the world is in that imperfect state, I fully acknowledge that the readiness to make such a sacrifice is the highest virtue which can be found in man.” MILL, *supra* note 65, at 63.

104. *Consequentialism, supra* note 66. Mill discusses taxation towards the end of *Utilitarianism*, primarily by criticizing non-consequentialist analyses of the justice of taxation. MILL, *supra* note 65, at 102. Mill claims that the only way out of the debate about the appropriate way to tax is with the application of utilitarian principles. *Id.* Having pointed out that some theories of justice will demand equal taxation from all, and

Mill's emphasis that there are higher and lower pleasures, and that the higher pleasures are more ethically valuable than the lower ones, serves as the basis for thinking that Mill is concerned with more than just self-interest.¹⁰⁵ Mill goes on to explain that, for example, "justice" is nothing more than a higher pleasure that must be included in the utilitarian calculus.¹⁰⁶ Justice is a term used regularly in most discussion of ethics.¹⁰⁷ But Mill argues that justice has no meaning outside of the utilitarian calculus. Valuing "justice," even giving it absolute dominance over all other values, only demonstrates that what we call justice must be given great worth in the utilitarian calculus.¹⁰⁸ Justice is nothing but a surfeit of pleasure produced by certain actions.¹⁰⁹ Part of what often gets left out of discussions of the utilitarian calculus is Mill's belief that, if people are, in fact, highly moral, then they will get pleasure from helping others.¹¹⁰ A world that is just, by utilitarian measures, will tend towards equality, as those with means will experience happiness by sharing what they have with those who have less.¹¹¹

One consequence of Mill's theory of utilitarianism for theories of government and social justice generally is that the best forms of government will be those that align the well-being of individuals with that of society as a whole.¹¹² When the choices that produce the most happiness for individuals also lead to the most happiness for all members of society, then individuals need not engage in a difficult moral calculus in determining the best action.¹¹³ Instead, the choice of which

others will require graduated tax, Mill states "[f]rom these confusions there is no other mode of extrication than the utilitarian." *Id.*

105. MILL, *supra* note 65, at 57.

106. *See id.* at 106.

107. *Id.*

108. *Id.*

109. *See id.* at 93.

110. "[I]n a properly constituted world, the individual's happiness will be found in doing what is morally right." MILL, *supra* note 65, at 5.

111. "The utilitarian morality does recognise in human beings the power of sacrificing their own greatest good for the good of others. It only refuses to admit that the sacrifice is itself a good. A sacrifice which does not increase, or tend to increase, the sum total of happiness, it considers as wasted." *Id.* at 63-64.

112. *Id.* at 65-66.

113. *Id.* at 66.

action is most ethically appropriate will be obvious. Mill believes that the power to align these interests effectively lies with the government.¹¹⁴

[L]aws and social arrangements should place the happiness, or (as speaking practically it may be called) the interest, of every individual, as nearly as possible in harmony with the interest of the whole; and secondly, that education and opinion, which have so vast a power over human character, should so use that power as to establish in the mind of every individual an indissoluble association between his own happiness and the good of the whole; especially between his own happiness and the practice of such modes of conduct, negative and positive, as regard for the universal happiness prescribes: so that not only he may be unable to conceive the possibility of happiness to himself, consistently with conduct opposed to the general good, but also that a direct impulse to promote the general good may be in every individual one of the habitual motives of action, and the sentiments connected therewith may fill a large and prominent place in every human being's sentient existence.¹¹⁵

That is to say, it is the task of the government to arrange affairs so that individuals see their incentives as aligned with the good of the whole, rather than in conflict with that good. When members of a society understand that their utility is increased in concert with the utility of the rest of the world, then they are more likely to make choices that increase total utility, and are therefore moral choices, on utilitarian grounds.

Since the ethical discourse of his day focused primarily on the language of justice and fairness, Mill spends a fair amount of his text contemplating what utilitarianism implies for notions of justice. On Mill's account, a strict application of utilitarian principles, where each individual's happiness counts the same as any other's, and where the higher pleasures, including those produced by social equality and fairness are preferred over the

114. *Id.* at 64.

115. MILL, *supra* note 65, at 64.

lower pleasures, will necessarily lead to a just society.¹¹⁶ Towards the end of *Utilitarianism*, Mill makes a prescient comment about the nature of justice in society. Observing that social norms about acceptable differences in treatment evolve over time, Mill contemplates the evolution of the understanding of justice in society within the utilitarian framework.¹¹⁷ Because utilitarianism demands that each individual be able to seek the maximization of happiness in the world, including his own individual happiness, utilitarianism contemplates in everyone “an equal claim to all the means of happiness, except in so far as the inevitable conditions of human life, and the general interest in which that of every individual is included, sets limits to the maxim”¹¹⁸ Mill goes on to note that the evolution of justice in society reflects just this reality.¹¹⁹ People have been given the freedom to pursue their own happiness, unless and until that pursuit infringes on others. Society regularly imposes restrictions on the ability of certain groups or individuals to pursue their own happiness. As society evolves, those restrictions evolve as well, and we often identify as “unjust” what we previously saw as merely expedient.¹²⁰ Mill emphasizes that a focus on maximizing social utility might

116. *Id.* at 106.

117. *See id.*

118. *Id.*

119. *See id.* at 106-07.

120. MILL, *supra* note 65, at 106.

All persons are deemed to have a *right* to equality of treatment, except when some recognised social expediency requires the reverse. And hence all social inequalities which have ceased to be considered expedient, assume the character not of simple inexpediency, but of injustice, and appear so tyrannical, that people are apt to wonder how they ever could have been tolerated; forgetful that they themselves perhaps tolerate other inequalities under an equally mistaken notion of expediency, the correction of which would make that which they approve seem quite as monstrous as what they have at last learnt to condemn. The entire history of social improvement has been a series of transitions, by which one custom or institution after another, from being a supposed primary necessity of social existence, has passed into the rank of an universally stigmatized injustice and tyranny. So it has been with the distinctions of slaves and freemen, nobles and serfs, patricians and plebeians; and so it will be, and in part already is, with the aristocracies of colour, race, and sex.

Id.

allow us to avoid the kind of expediency that results in social norms we later identify as unjust.¹²¹ The utilitarian standard treats all individuals as equally valuable, and Mill thinks this treatment might avoid the kind of injustice that has evolved under other ethical theories.¹²²

Mill's theory of utilitarianism creates a set of ethical rules based on the measuring of pleasures and pains across a society. Mill ultimately holds that there are meaningful differences between the higher and lower pleasures, and that among the higher pleasures are those that tend towards equality and justice.¹²³ And since motives are irrelevant, from an ethical perspective, laws can and should create ethical behavior by mandating happiness-producing actions.¹²⁴

B. Welfare Economics

Just as in its intellectual forebear, "utility" is the fundamental measure of value in the welfare economic model.¹²⁵ While "utility" is the unified concept at the foundation of the economic calculus, welfare economists have also taken from Mill's utilitarianism the notion that not all "utility" is the same.¹²⁶ This view that not all happiness is equally valuable

121. *Id.*

122. *See id.*

123. *Id.* at 56.

124. MILL, *supra* note 65, at 64.

125. As Louis Kaplow explains it, "The welfare economic approach to social assessment . . . determines the effects of any policy under consideration on each individual's utility – also referred to as an individual's well-being or welfare. Thus . . . positive analysis entails identifying policies' consequences for each individual. Second, to form a social assessment, the information on everyone's utility is aggregated using a [social welfare function (SWF)], in particular an individualistic SWF, indicating that social welfare is a function (only) of individuals' utilities." KAPLOW, *supra* note 62, at 37.

126. *See generally* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001) (discussing the different perspectives of utility in welfare economics).

becomes manifest in the form of the theory of declining marginal utility.¹²⁷ Economists generally claim that it is impossible, in the abstract, to determine what provides utility to individual people.¹²⁸ We have no way to see inside the minds of members of society, and doing thorough empirical research on the happiness producing outcomes of all members of society is impossible. However, economics does not abandon the fundamental empiricism of the utilitarian theory.¹²⁹ We must make judgments about utility based only on the information available to us. Economics therefore focuses on the “expressed preferences” of members of society in order to determine utility.¹³⁰ Most economic theories endorse the view that the most easily calculable expression of preferences is the use of money.¹³¹ Therefore, welfare economic theorists conclude that it is reasonable to use money as a substitute for utility.¹³² While

127. Declining marginal utility is a fundamental premise of contemporary welfare economics, and, indeed, is considered so fundamental that is incorporated into introductory textbooks on the subject (although it is not a premise adopted by all economists). *See, e.g.*, N. GREGORY MANKIWI, *PRINCIPLES OF MICROECONOMICS* 447 (Joseph Sabatino et al. eds., 2012).

128. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 113-14 (1979).

129. *See id.* at 107.

130. *See generally* Bryan Norton, Robert Costanza, and Richard C. Bishop, *The Evolution of Preferences: Why “Sovereign” Preferences May Not Lead to Sustainable Policies and What to Do about It*, 24 *Ecological Econ.* 193, 201 (1998) (“[C]laims that people do not behave according to the dictates of utility theory are particularly troubling to economists, whose theories assume that people are rational in the sense of having preferences that are complete and transitive and in the sense that they choose what they most prefer.”) (internal quotations omitted).

131. “[W]e can determine what people care about by what they buy and do not buy.” Neil H. Buchanan, *The Role of Economics in Tax Scholarship*, in *BEYOND ECONOMIC EFFICIENCY IN UNITED STATES TAX LAW* 11, 21 (David A. Brennan et al. eds., 2013).

132. *See* KAPLOW, *supra* note 62, at 359.

It is familiar to economists that well-being or utility (the terms are used interchangeably throughout) is a broad, subjective notion, not one limited to material pleasures, hedonistic enjoyment, or any other a priori class of pleasures and pains. Resources, often measured in monetary units, are means to obtain goods and services; these, in turn, are means to generating utility, which may be derived directly from goods or indirectly and intangibly, such as through fulfillment, sympathetic feelings for family and friends, aesthetic enjoyment of art or the environment, and so forth.

KAPLOW, *supra* note 62, at 359.

examining the financial choices people make in an attempt to identify their utility preferences might give us some insight into their individual utilitarian calculus, even limiting utility to a monetary calculus does not allow those seeking to apply welfare economic analysis to an issue to get a clear universalizable result. Individuals have different preferences, even with regard to something as universal as money. Retrieving reliable empirical information about those differing preferences is difficult, so welfare economics makes simplifying assumptions about the preferences of individuals.¹³³ The primary simplifying assumption economists make is that everyone desires *more* money (utility).¹³⁴ Therefore the action that produces more money will typically be the better action, according to a welfare economic analysis.¹³⁵

However, welfare economists also recognize that not all money is equal to all people.¹³⁶ A dollar is worth much more to the person with only fifty dollars to her name than it is to Bill Gates. The idea that a dollar is worth more to someone with less overall is known as declining marginal utility.¹³⁷ “Marginal utility” is the usefulness of the last item, in comparison to the item immediately before it.¹³⁸ If one’s marginal utility declines, then the last item is *less* useful than the second to last item.¹³⁹ This theory of the declining marginal value of money, and its

[L]egal scholars have traditionally tried to avoid specifically defining what constitutes utility, happiness, or well-being. Instead, legal scholars use proxies such as liberty and money, which are thought to influence happiness or well-being, regardless of the precise way in which happiness or well-being is defined. To that end, utilitarianism as traditionally applied in tax policy uses income or wealth as a proxy for utility and assumes the declining marginal utility thereof . . .

Fleischer, *supra* note 16, at 1505 (footnotes omitted). “[I]t may not be possible to measure utility at all.” Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, 909 (2011).

133. See Lawsky, *supra* note 132, at 905.

134. See Posner, *supra* note 128, at 119.

135. *Id.*

136. MANKIW, *supra* note 127.

137. See Lawsky, *supra* note 132, at 915.

138. *Id.*

139. *Id.* “[D]eclining marginal utility of income means each dollar is worth less than the dollar before. (‘Marginal’ utility of income refers, of course, to the utility of the dollar ‘at the margin,’ that is, the last dollar.)” *Id.*

extension to a theory of declining marginal utility more broadly, is generally accepted by welfare economists.¹⁴⁰ Declining marginal utility allows economic theory to incorporate a social welfare component by arguing that the allocation of goods between higher and lower income members of society can include an estimation of the value of those goods to each potential recipient.¹⁴¹ If the theory of declining marginal utility indicates that a particular good will be less valuable to the higher income (or higher wealth) individual, then the utilitarian goal can be met by allocating that good to the lower income (or lower wealth) individual.¹⁴² This theory of declining marginal utility justifies progressive taxation, of both the income and wealth transfer variety.¹⁴³ Because the last dollar earned by the wealthier individual provides little value to her, the government can take that dollar, in the form of a tax, and transfer it to a less wealthy individual, usually in the form of services, but sometimes in the form of a direct financial transfer, as in the refundable income tax credits aimed at low income taxpayers.¹⁴⁴

C. Classical Utilitarianism Is Not Welfare Economics

As should now be clear, there are significant differences between classical utilitarianism and its modern-day interpretation in welfare economics. In an attempt to simplify the utilitarian calculus and make it useful in determining real-world policies, including tax policies, welfare economics has left behind Mill's view that higher pleasures, like the pleasures of justice and equality, must be valued more highly in determining

140. "The assumption of declining marginal utility of income – that the next dollar a person receives is "worth less" to a wealthy person than a poor person – has been crucial in tax scholarship over the last sixty or so years, as optimal tax theory and welfarism have become important ways that many in the legal academy evaluate tax policy." *Id.* at 904.

141. See MANKIWI, *supra* note 127.

142. See Lawsky, *supra* note 132, at 917.

143. See *id.*

144. For an explanation and discussion of the Earned Income Tax Credit, which is the largest direct transfer to low-income taxpayers through the Federal Income Tax, see generally Jennifer Bird-Pollan, *Who's Afraid of Redistribution? An Analysis of the Earned Income Tax Credit* 74 MO. L. REV. 251 (2009) (presenting the history of the EITC through its current form, reviewing its critics, and proposing adjustments).

the correct course of action.¹⁴⁵ While more sophisticated versions of welfare economics include a “social welfare function” that can incorporate the values of justice and equality as values a society holds,¹⁴⁶ most welfare economists do not endorse the view held by Mill that those values *are*, in fact, more valuable than other values.¹⁴⁷ This resistance to ranking preferences, outside of the ranking permitted by applying a theory of declining marginal utility, makes it harder to justify equality-producing laws on a welfare economic basis.¹⁴⁸

What makes Millian utilitarianism a more robust ethical theory than a simple “greatest good for the greatest number” arithmetic calculation is that Mill believed that the higher pleasures received additional weight in that ethical calculation.¹⁴⁹ Because not all pleasures are alike, determining the correct utilitarian outcome requires not just determining the raw number of pleasures produced by an action, nor even comparing the intensity and duration of those pleasures, as Bentham would claim.¹⁵⁰ Mill’s theory introduces the idea that pleasures of a higher order must be preferred above the lower pleasures.¹⁵¹ And included in those higher pleasures are the social goods we identify as justice and equality.¹⁵² Because these pleasures are of such a greater magnitude than the lower pleasure of satisfying self-interest, much social policy and law

145. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 979-80 (2001).

146. For an explanation of the role of the social welfare function, see KAPLOW, *supra* note 62.

147. See Guido Calabresi, *Of Tastes and Values*, 16 AM. L. & ECON. REV. 313, 316 (2014).

148. See Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 85, 88 (1985).

149. See MILL, *supra* note 65, at 56.

150. See *id.*; *Jeremy Bentham*, STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/bentham/> [<https://perma.cc/M83U-K4BJ>] (published March 17, 2015) (describing Bentham’s “felicific calculus,” which “[t]o an individual the value of a pain or pleasure will be more or less according to its intensity, duration, . . .”) (internal quotations omitted).

151. See MILL, *supra* note 65, at 59.

152. *Mill’s Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/mill-moral-political/> [<https://perma.cc/K4SR-XNTQ>] (published October 9, 2007 and substantially revised August 22, 2014) (“Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as a matter of right.”).

could be designed to achieve the higher pleasures of justice and equality. While the use of the social welfare function in welfare economics goes some way towards allowing the utilitarian calculus to prefer certain kinds of pleasure (or utility) over others, welfare economics does not go so far as to say that some forms of utility are by their very nature to be preferred over others.¹⁵³

Of course, one objection to Millian utilitarianism is that Mill claims that some pleasures are greater and more valuable than others without providing any criteria by which to determine which pleasures those are.¹⁵⁴ His elitist claim that Socrates and his ilk are better judges than the lowly pig of what true pleasure is gives us some insight into Mill's beliefs regarding the higher and lower pleasures, but very little information about how the utilitarian calculus ought to be applied in society.¹⁵⁵ Welfare economics responds by leaving this element of Mill's theory out of its take-up of utilitarianism,¹⁵⁶ but by leaving this element behind, welfare economics loses some of the ethical force of Mill's original theory. There may be legitimate objections to the argument that some pleasures are more meaningful and valuable than others, but abandoning that portion of the theory without replacing it with another element risks making the theory unintelligible.

IV. WHAT DOES UTILITARIANISM SAY ABOUT WEALTH TRANSFER TAXATION?

At the heart of Mill's ethical argument is a belief that the moral actor experiences pleasure, and therefore makes ethical choices, by performing the action that promotes the good of the entire community, rather than based solely on his own self-interest.¹⁵⁷ At first glance this might seem to indicate that a

153. See Kaplow & Shavell, *supra* note 145, at 979-80.

154. See *Mill's Moral and Political Philosophy*, *supra* note 152 (“[E]ven if we can distinguish higher and lower pleasures, according to their causes, it remains unclear how the hedonist is to explain how higher pleasures are inherently more pleasurable.”).

155. See MILL, *supra* note 65, at 57.

156. See Kaplow & Shavell, *supra* note 145, at 979-80.

157. MILL, *supra* note 65, at 64.

moral society does not need wealth transfer taxation, since individuals acting in accordance with utilitarian ethical theory will make choices about the distribution of their wealth that will tend towards an increase in the happiness of the entire society. The natural goals of all individuals to maximize their own utility will lead them to redistribute their own wealth, making direct transfers to those members of society who have less, until society becomes more or less equal. With this sort of self-motivated redistribution, one of the central functions of taxation would be eliminated.¹⁵⁸ However, Mill does not expect that all individuals will share the appropriate utilitarian motivation from the outset.¹⁵⁹ We are, as Mill notes, becoming more ethical, and since utilitarianism is an empirical approach, more information about the world results in more and more ethical behavior.¹⁶⁰ But until individuals become sufficiently aware of their own utility and how best to maximize happiness (by recognizing that a more equal society promotes the most happiness, says Mill), we may need laws that encourage us to act in a way that is most likely to produce that happiness. And importantly, Mill's consequentialist ethics is unconcerned with motives, counting as

[U]tility would enjoin, first, that laws and social arrangements should place the happiness, or (as speaking practically it may be called) the interest, of every individual, as nearly as possible in harmony with the interest of the whole; and secondly, that education and opinion, which have so vast a power over human character, should so use that power as to establish in the mind of every individual an indissoluble association between his own happiness and the good of the whole . . . so that not only he may be unable to conceive the possibility of happiness to himself, consistently with conduct opposed to the general good, but also that a direct impulse to promote the general good may be in every individual one of the habitual motives of action, and the sentiments connected therewith may fill a large and prominent place in every human being's sentient existence.

Id.

158. Federal tax performs several functions, many of which could not be achieved merely by relying on self-motivated redistribution, such as military spending, environmental and investment regulation, or foreign policy. However, one motivation for taxation, and especially for progressive taxation (including the estate tax) and spending programs aimed at the least well-off members of society, is the goal of having a more equitable distribution of wealth in society. See TAX PROGRESSIVITY AND INCOME INEQUALITY 2-3 (Joel Slemrod ed., 1994).

159. See MILL, *supra* note 65, at 70.

160. See *id.*

ethical an action that increases overall happiness, whether or not that action is motivated by a desire on the part of the actor to act ethically.¹⁶¹ Consequentialist ethical theories concern themselves only with the result of an action, such that “ethical intentions” count for little to nothing in consequentialist theories.¹⁶² Mill’s utilitarian ethics counts as ethical any action that does, in fact, increase utility/happiness, whether or not the *intention* of the actor is to increase utility/happiness.¹⁶³ Therefore, if it were demonstrated that any particular government plan would increase overall happiness, then analyzing that plan from the utilitarian perspective would lead to an endorsement of that plan. For purposes of this article, the question to be considered is whether or not adopting utilitarianism would lead to the endorsement of a system of wealth transfer taxation. If a heavily redistributive wealth transfer taxation did, in fact, increase overall happiness, then a utilitarian analysis would endorse that tax.

In determining whether or not utilitarianism leads to the conclusion that wealth transfer taxation is ethically justified, one must consider another essential element of Mill’s classical utilitarian calculus—the fact that not all pleasures are equally valuable. Classical utilitarianism is still primarily empirical, so performing a utilitarian calculus does, to a certain extent, depend upon empirical evidence of the utility provided in various scenarios. Empirical research on the effects of various wealth transfer tax schemes is outside of the scope of this project.

161. See MILL, *supra* note 65, at 65.

[Critics of utilitarianism] say it is exacting too much to require that people shall always act from the inducement of promoting the general interests of society. But this is to mistake the very meaning of a standard of morals, and to confound the rule of action with the motive of it. It is the business of ethics to tell us what are our duties, or by what test we may know them; but no system of ethics requires that the sole motive of all we do shall be a feeling of duty; on the contrary, ninety-nine hundredths of all our actions are done from other motives, and rightly so done, if the rule of duty does not condemn them. [T]he motive has nothing to do with the morality of the action

Id.

162. *Id.* at 14.

163. *Id.* at 65.

Despite that, there is evidence examining the general well-being of societies with more or less equitable distributions of wealth.¹⁶⁴ Sophisticated welfare economics research does include these insights in determining the utility of particular actions.¹⁶⁵ Utilitarianism would require this weighing of pleasures as well. Because some pleasures are higher than others, the utilitarian calculus must weight those particular sources of pleasure more heavily. Therefore, evaluations of wealth transfer taxation that consider only the utility of the decedent/donor or the heir, or evaluations that consider those utilities in comparison with the utility of a more equitable society, but give all those estimations of utility equal weight, will miss the point of classical utilitarianism. Mill claimed that the quality of higher pleasures like justice and equality were so intense as to make them *infinitely* more valuable than any other source of pleasure.¹⁶⁶ Since robust utilitarianism evaluates pleasures based not merely on their intensity or duration, but also on the *quality* of the pleasure, it does not go too far to say that utilitarianism is consistent with robust redistribution. While this redistribution could be achieved through other methods of taxation, using wealth transfer taxation to effect that redistribution targets the tax at combating the concentration of wealth in a way that income taxation does not.¹⁶⁷

While it seems evident that utilitarianism is consistent with and, indeed, might even demand heavily redistributive taxation, without more empirical evidence regarding the effect of different forms of taxation on the utility of those involved, it is difficult to say what form that redistributive taxation should take. There are reasons to believe that wealth transfer taxation does more in a more direct way to combat unequal wealth distributions than do other forms of tax, such as income or consumption taxes. However, even within the category of

164. Mill himself, writing 150 years ago, believed society was poised to wipe out poverty and the suffering it caused. "Poverty, in any sense implying suffering, may be completely extinguished by the wisdom of society, combined with the good sense and providence of individuals." *Id.* at 62.

165. See James R. Repetti, *Should We Tax the Gratuitous Transfer of Wealth? An Introduction*, 57 B.C. L. REV. 815, 817-18 (2016).

166. See MILL, *supra* note 65, at 98.

167. See Moran, *supra* note 28, at 329.

wealth transfer taxation there are many possible options for organizing the tax. An inheritance or accessions tax would impose a tax on the recipient of the transfer, which is likely the best way to achieve more equality of outcome, especially if the revenue raised from the tax is then used to increase opportunities available to the least well-off members of society.¹⁶⁸ However, even an estate and gift tax system like the one currently in place in the United States—if the exemption levels were reduced, if the rates were increased, and if the valuations were more robustly enforced—could increase utility and happiness by decreasing the concentration of wealth and increasing social justice. Achieving this utilitarian ethical result would depend on using the revenue raised through the estate and gift taxes to achieve a more equitable society, which would balance the cost of any pain produced by the imposition of the tax.¹⁶⁹

V. CONCLUSION

This article has examined the current state of wealth transfer taxation in the United States and applied the utilitarianism of John Stuart Mill to an analysis of wealth

168. For a discussion of the role of inheritance taxation in increasing equality of opportunity, see Bird-Pollan, *supra* text accompanying note 6. For a discussion of the use of an accessions tax to combat the intergenerational transfer of political power, see generally Fleischer, *Divide and Conquer: Using an Accessions Tax to Combat Dynastic Wealth Transfers*, 57 B.C. L. REV. 913 (2016), proposing that an accessions tax is superior to other options for taxing wealth transfers in achieving the goal of minimizing dynastic wealth transfers.

169. A utilitarian may be especially drawn to the use of an estate tax to achieve these redistributive goals, since the tax is only collected after the death of the taxpayer. Therefore, the pain suffered by that taxpayer is only the pain of the *anticipation* of paying the tax, rather than the actual pain or unhappiness experienced by paying the tax. Of course, the heir to the wealth may feel some unhappiness knowing that her inheritance is smaller, due to the burden of the tax, but that pain might also be mitigated by the knowledge that the legal system allows the inheritance to proceed, thereby enriching the heir with the wealth of the decedent. See generally Jennifer Bird-Pollan, *Why Tax Wealth Transfers: A Philosophical Analysis*, 57 B.C. L. REV. 859 (2016) (applying philosophical analysis to the question of wealth transfer taxation and proposing that “a robust system of wealth transfer taxation is best suited to combat . . . inequality in the twenty-first century” and that “wealth transfer taxation is consistent with most philosophical belief systems”).

transfer taxation more broadly. This utilitarian analysis is an important step in the tax policy debate, as many U.S. taxpayer/voters, as well as numerous tax policy scholars, embrace utilitarianism as a philosophical approach. A utilitarian analysis that demonstrates that robust wealth transfer taxation is endorsed by a theoretically consistent utilitarian philosophy moves the conversation about the future of the estate tax forward. Much political debate about the estate and gift tax system is mired in convoluted and confused versions of poor philosophical argumentation. This article clarifies the utilitarian view, and carefully applies that view to the arguments around wealth transfer taxation.

Because the utilitarian calculus espoused by Mill permits a ranking of pleasures, valuing “higher” pleasures more than “lower” pleasures, and because equality and justice are higher pleasures on Mill’s analysis, taxation that redistributes wealth in order to create a more equal society will be judged ethical under Mill’s utilitarianism. While this redistribution need not necessarily come in the form of wealth transfer taxation, under the current system of taxation in the United States, the taxation of wealth transfers is the most heavily redistributive tax, collecting tax only from the wealthiest members of society, and, primarily, only after they have died. While a utilitarian evaluation of the current federal wealth transfer taxes must consider the loss of utility felt by the individual subject to the tax, and by any heir who receives a smaller inheritance as a result of the tax, those will be lower pains, insufficient to offset the higher pleasure of increased social equality.