The Mapmaker's Dilemma in Evaluating High-End Inequality

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The last thirty years have witnessed rising income and wealth concentration among the top 0.1% of the population, leading to intense political debate regarding how, if at all, policymakers should respond. Often, this debate emphasizes the tools of public economics, and in particular optimal income taxation. However, while these tools can help us in evaluating the issues raised by high-end inequality, their extreme reductionism—which, in other settings, often offers significant analytic payoffs—here proves to have serious drawbacks. This Article addresses what we do and don't learn from the optimal income tax literature regarding high-end inequality, and what other inputs might be needed to help one evaluate the relevant issues.

INTRODUCTION

"According to an old joke, a statistician whose head was on fire, while his feet were encased in a block of ice, reported that, on average, he was very comfortable."[1] This mythical individual brings to mind the Italian statistician Corrado Gini, who devised the famous

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[1] Daniel Shaviro, *Book Review*, 68 Nat'l Tax J. 681, 681 (2015) [hereinafter Shaviro, *Book Review*] (reviewing Edward D. Kleinbard, WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY (2014)).

Gini coefficient,[2] measuring statistical divergence from a perfectly equal distribution of, say, wealth or income.[3] Gini not only created the measure that bears his name, but also urged that it be used to express numerically the extent of a given society's material inequality.[4]

The two cases admittedly differ in an important respect. As I have noted elsewhere:

> [T]he problem Gini missed relates to interpretation, rather than measurement. Under Gini's coefficient, extreme inequality at both the top and the bottom of the social scale will not statistically offset each other, [yield]ing [] a false reading of zero aggregate inequality, along the lines of the fire-and-ice example. Instead, each will raise the quantum of inequality that the measure detects. [Yet], the coefficient still has the defect of amalgamating two normatively distinct phenomena in a single [numerical expression]."[5]

By wholly amalgamating low-end inequality and high-end inequality, the Gini coefficient risks creating as much confusion, or at least conflation between distinct issues, as it does enlightenment. Consider first low-end inequality, or poverty as measured relative to the median in a given society. It matters because, if some people are worse off than the rest of us, basic human beneficence supports trying to help them.[6] Now, *how* we can best do this is controversial.[7] And, to those of a sufficiently libertarian bent—who emphasize personal responsibility in terms of moral desert, even when the poor could be aided without significant adverse behavioral effects—the question of *whether* we should help them may seem less clear than it does to me.[8] But the fact that addressing low-end inequality, if it

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[2] *Id.*

[3] *See* Alan J. Auerbach & Kevin A. Hassett, *Tax Policy and Horizontal Equity*, *in* INEQUALITY AND TAX POLICY 44, 47 (2013).

[4] *Id.*

[5] Shaviro, *Book Review*, *supra* note 1, at 681.

[6] *Id.*

[7] *See generally* Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q. J. ECON. 519 (2016).

[8] *See id.*

can be done right, involves helping people who are worse off than the rest of us makes it a relatively easy project to embrace.[9]

High-end inequality, or that pertaining to the super-rich, is different.[10] Would the idea, in addressing it, be just to make very rich people worse off, even if no one else gains as a result? From the standpoint of beneficence, why would we want to do that? Thus, the view that we should seek to reduce high-end inequality is easiest to embrace if it has harmful effects on people below the highest material level.[11]

In evaluating whether and why this might be so, we should keep in mind what high-end inequality in the United States and peer societies actually looks like at present.[12] Over the last thirty years, wealth and income concentration at the very top have been dramatically increasing, and have already reached levels unknown since before World War I.[13] However, this has been almost entirely due to the rise of people in the top 0.1% in the wealth distribution, who held only 7% of the U.S. national total in 1978, but by 2012 held 22%.[14]

Given this degree of high-end wealth concentration, the common practice of speaking about the "1 percent" versus the "99 percent" actually misses the point.[15] The 0.1% have even been pulling away from the 1%—and, for that matter, the 0.01% have been pulling away from the 0.1%, and the 0.001% from the 0.01%, in a process that economists call "fractal inequality."[16] Just as one finds "the

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[9]   Shaviro, *Book Review*, *supra* note 1, at 681.

[10]   *See id.*

[11]   *See* Scott Winship, *Wait a Second, We Are the 99.9999%*, BROOKINGS (Apr. 10, 2012), https://www.brookings.edu/opinions/wait-a-second-we-are-the-99-9999/.

[12]   *See* Drew Desilver, *5 Facts About Economic Inequality*, PEW RES. CTR. (Jan. 7, 2014), http://www.pewresearch.org/fact-tank/2014/01/07/5-facts-about-economic-inequality/.

[13]   *See* Saez & Zucman, *supra* note 7, at 519.

[14]   *See id.*

[15]   *See* Derek Thompson, *How You, I, and Everyone Got the Top 1 Percent All Wrong*, THE ATLANTIC (Mar. 30, 2014), http://www.theatlantic.com/business /archive/2014/03/how-you-i-and-everyone-got-the-top-1-percent-all-wrong/359862/.

[16]   Annie Lowrey, *Even Among the Richest of the Rich, Fortunes Diverge*, N.Y. TIMES (Feb. 10, 2014), http://www.nytimes.com/2014/02/11/your-money/e ven-among-the-richest-of-the-rich-fortunes-diverge.html.

same amount of 'jaggedness' or 'unevenness' at every scale" in a fractal,[17] such as a snowflake, so, too, in data covering the last few decades, "one sees the pattern of growing inequality among the population as a whole replicated within any subgroup of that population . . . ."[18]

There are a number of different grounds on which high-end inequality, when so sharply concentrated at the very top of the distribution, may be bad for everyone else.[19] For example, it may lead to plutocratic capture of the political system by the super-rich, enabling them to extract rents and greatly reduce the system's responsiveness to all others' interests.[20] Extreme high-end income and wealth concentration may also reduce economic stability, output, and growth.[21] Claims to this effect call for conventional "hard" social science research,[22] which has indeed been ongoing, albeit well short of reaching consensus.[23]

However, the rise of the 0.1% also raises a set of subtler, more intangible issues that require different modes of assessment.[24] We are an intensely social species, and often a rivalrous one, prone to

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[17]   William Easterly, *Beautiful fractals and ugly inequality*, AIDWATCH BLOG (Sep. 8, 2010), http://aidwatchers.com/2010/09/beautiful-fractals-and-ugly-in-eq uality.

[18]   PAUL KRUGMAN, PEDDLING PROSPERITY: ECONOMIC SENSE AND NONSENSE IN THE AGE OF DIMINISHED EXPECTATIONS 133 (1994).

[19]   *See generally* T.M. Scanlon, *The 4 biggest reasons why inequality is bad for society*, TED IDEAS (Jun. 3, 2014). http://ideas.ted.com/the-4-biggest-reasons-why-inequality-is-bad-for-society/ (discussing four reasons why high-end inequality may be bad for society).

[20]   *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 257, 259–60 (2010); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 234 (2012).

[21]   *See* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 106 (2013).

[22]   "Hard" social science research, such as that in economics and related disciplines, can be defined as that which relies on "theory, mathematics, rigorous methods, falsifiability, and replicability" in emulation of the physical sciences. Loren Graham & Jean-Michel Kantor, *"Soft" Area Studies versus "Hard" Social Science: A False Opposition*, 66 SLAVIC REV., no. 1, Spring 2007, at 1.

[23]   *Id.*

[24]   *See* Josh Bivens, *Debating the Rise of the Top 1 Percent*, ECON. POL'Y INST. (Jun. 20, 2013, 2:18 PM), http://www.epi.org/blog/debating-rise-top-1-per cent-incomes/.

measuring ourselves in terms of others, and often directly against others. People thus "have deep-seated psychological responses to inequality and social hierarchy," creating the potential for extreme wealth differences to "invoke[] feelings of superiority and inferiority, dominance and subordination" that powerfully "affect[] the way we relate to and treat each other."[25]

In one view, this causes extreme inequality to be akin to pollution.[26] According to recent research by British social scientists Richard Wilkinson and Kate Pickett, high-end wealth concentration does not just reduce happiness for all groups—the rich as well as the poor[27]—but even has measurable adverse effects on social trust, economic mobility, life expectancy, infant mortality, children's educational performance, teenage births, homicides and other violence, imprisonment rates, mental illness, drug and alcohol addiction, and obesity.[28] While these claims likewise fall within the hard social science realm, at present they remain fiercely disputed.[29]

However that debate proceeds, it cannot entirely resolve the psychological and moral issues that inequality raises. How deeply and widely felt are the sentiments of superiority and inferiority, or dominance and subordination? How unhappy do they make people, and is the pain at the bottom greater than the pleasure (if such it is) at the top? Are unequal power relationships morally objectionable for their own sake, even if people grow accustomed to and even comfortable

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[25]   Richard Wilkinson & Kate Pickett, *The Spirit Level authors: why society is more unequal than ever*, THE GUARDIAN (Mar. 9, 2014), https://www.theguardian.com/commentisfree/2014/mar/09/society-unequal-the-spirit-level (discussing RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER (2010) [hereinafter WILKINSON & PICKETT, *The Spirit Level*]).

[26]   *See* S.V. Subramanian & Ichiro Kawachi, *Whose Health is Affected by Income Inequality? A Multilevel Interaction Analysis of Contemporaneous and Lagged Effects of State Income Inequality on Individual Self-Rated Health in the United States*, 12 HEALTH & PLACE 141, 149 (2006).

[27]   *See* WILKINSON & PICKETT, THE SPIRIT LEVEL, *supra* note 25 ("The effects of inequality are not confined to the poor. A growing body of research shows that inequality damages the social fabric of the whole society.").

[28]   *See* WILKINSON & PICKETT, THE SPIRIT LEVEL, *supra* note 25, at 19.

[29]   *See, e.g.*, CHRISTOPHER SNOWDON, THE SPIRIT LEVEL DELUSION: FACT-CHECKING THE LEFT'S NEW THEORY OF EVERYTHING 9–12 (2010) (critiquing WILKINSON & PICKETT, THE SPIRIT LEVEL, *supra* note 25).

with them? And if people in the 99.9% feel diminished by the economic gulf between themselves and those at the top, is this just a matter of socially destructive "bitterness" and "begrudg[ing] others [of] their prosperity"[30] that policymakers ought to ignore? Or does it offer legitimate and important grounds for seeking to reduce high-end inequality?

In order to evaluate such issues, one needs to go outside the boundaries of conventional hard social science research—and in particular those of public economics. The problem in those realms is not, in the main, one of ideological bias in any particular direction. Public economics methodologies can be—and have been—deployed on both sides of the debate regarding whether we should energetically address high-end inequality.[31] The problem, rather, is that methodological tunnel vision—while adopted by economists for good reasons, and yielding high intellectual payoffs in many settings—has negative payoffs, unless duly supplemented, in this setting.

This article therefore seeks to advance understanding of the following questions:

> 1. What do we learn, or fail to learn, from the public economics literature regarding high-end income and wealth inequality?

> 2. Why do even such seemingly technical issues as the income tax rate structure at the top depend on issues that are not entirely illuminated by standard economic analysis?

> 3. What features of public economics as a discipline have produced both its triumphs and the limits to its usefulness?

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[30] Arthur C. Brooks, *The Downside of Inciting Envy*, N.Y. TIMES (Mar. 1, 2014), http://www.nytimes.com/2014/03/02/opinion/sunday/the-downside-of-inciting-envy.html?partner=rssnyt&emc=rss&_r=1.

[31] *See* Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, 25 J. ECON. PERSP. 165, 184 (2011) (describing different public economic methodologies); N. Gregory Mankiw, Matthew Weinzierl, & Danny Yagan, *Optimal Taxation in Theory and Practice*, 23 J. ECON. PERSP. 147, 147–48 (2009).

Section I sets forth what I call the "Mapmaker's Dilemma," which helps explain why modern economic analysis has achieved such wide-ranging intellectual triumphs, yet will prove inadequate as an all-in-one touchstone for analyzing high-end inequality. Section II discusses the crucial role of a very simple and indeed simplistic notion of "utility" in standard economic analysis. Section III discusses optimal income taxation, the main tool offered by modern public economics for the analysis of high-end—as well as low-end—inequality, and then offers a brief conclusion.

I. THE MAPMAKER'S DILEMMA

Economists and other social scientists, like mapmakers, aim to provide models of some part or aspect of the world.[32] These models must combine being reasonably accurate with being sufficiently usable and useful.[33] Unfortunately, these two objectives are often in direct conflict.[34] Hence, economists who are studying real world social or economic phenomena, such as high-end inequality, face a version of what I call the "Mapmaker's Dilemma."[35] That is, they must choose between how much accuracy, as opposed to how much usability, they are willing to sacrifice.[36]

Leave it to Lewis Carroll to have identified one very clear and clean response to the Mapmaker's Dilemma.[37] In *Sylvie and Bruno Concluded*—the second volume of a kind of follow-up to the *Alice* books that strews gleaming, beautiful diamonds of Carroll's delightfully hyperlogical nonsense amid gobs of gooey, indigestible sentiment—a mysterious visitor from a foreign land or world, known only as Mein Herr, asks the narrator:

> "What do you consider the *largest* map that would be really useful?"

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[32] *See generally* Kevin D. Williamson, *The Mapmakers' Dilemma*, NAT'L REV. (May 1, 2014, 4:00 AM), http://www.nationalreview.com/article/376946/mapmakers-dilemma-kevin-d-williamson.

[33] *See id.*

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See* LEWIS CARROLL, SYLVIE AND BRUNO CONCLUDED 169 (1893).

"About six inches to the mile."

"Only *six inches*!" exclaimed Mein Herr. "We very soon got to six *yards* to the mile. Then we tried a *hundred* yards to the mile. And then came the grandest idea of all! We actually made a map of the country, on the scale of *a mile to the mile*!"

"Have you used it much?" I enquired.

"It has never been spread out, yet," said Mein Herr: "the farmers objected: they said it would cover the whole country, and shut out the sunlight! So we now use the country itself, as its own map, and I assure you it does nearly as well."[38]

Jorge Luis Borges apparently liked this passage enough to use it as the inspiration for a one-paragraph short story, fittingly named "On Exactitude in Science."[39] There, he carries the narrative a step further. In a great empire somewhere, "the Cartographers Guilds struck a Map of the Empire whose size was that of the Empire, and which coincided point for point with it."[40] Succeeding generations, however, found this map so "cumbersome" that, "not without irreverence," they "abandoned it to the Rigours of sun and Rain. In the western deserts, tattered fragments of the Map are still to be found, sheltering an occasional Beast or beggar; in the whole Nation, no other relic is left of the Discipline of Geography."[41]

The Mapmaker's Dilemma has two distinct elements. First, miniaturization inevitably means loss of local detail.[42] Second, usable maps must generally be flat, but the Earth is spheroid.[43] While this hardly matters when the scale is sufficiently small, for maps of the

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[38] CARROLL, *supra* note 37, at 169 (emphasis in original).

[39] *See* JORGE LUIS BORGES, *On Exactitude in Science*, *in* COLLECTED FICTIONS 325, 325 (Andrew Hurley trans.) (1998).

[40] *Id.*

[41] *Id.*

[42] *See* Williamson, *supra* note 32.

[43] *See* Jerry Brotton, *A History of the World in Twelve Maps*, TIME (Nov. 15, 2013), http://ideas.time.com/2013/11/21/a-history-of-the-world-in-twelve-maps /slide/gerard-mercator-world-map-1569.

entire world it leads to significant distortion.[44] Different regions' shapes or relative sizes must be misrepresented, for the same reason that one cannot simply flatten out the skin of an orange.[45] This offers considerable scope to choose the distortions that one finds personally most amenable, and then perhaps to forget that they are distortions.[46] Perhaps it is not entirely coincidental that North Americans and Europeans still commonly use the Mercator projection method,[47] dating back to 1569, which—while offering accurate shapes for the world's large landmasses—greatly exaggerates the northern continents' sizes relative to those of Africa and South America.[48]

Economists, like real world mapmakers and unlike Mein Herr's countrymen or Borges' Cartographers Guild, have leaned towards usability—albeit inevitably at the expense of perfect accuracy.[49] This has served the field well.[50] The rise of modern economics to the top of the academic pecking order reflects its many great triumphs in showing just how much one can explain by using very simple behavioral models that employ crudely reductive assumptions regarding human motivation.[51] Just as with maps, however, this comes at the dual cost of losing detail and flattening the underlying reality.[52] Moreover, just as with maps, the flattening—in the

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[44]   *See* Ellie Zolfagharifard, *Why every world map you're looking at is WRONG: Africa, China and India are distorted despite access to accurate satellite data*, DAILY MAIL (Apr. 4, 2014), http://www.dailymail.co.uk/sciencetech/article-2596783/Why-world-map-youre-looking-WRONG-Africa-China-Mexico-distorted-despite-access-accurate-satellite-data.html.

[45]   *See* Zolfagharifard, *supra* note 44.

[46]   *See id.*

[47]   *See* Brotton, *supra* note 43.

[48]   *Id.*

[49]   *See* Sam Ouliaris, *Economic Models: Simulations of Reality*, INT'L MONETARY FUND (Mar. 28, 2012), http://www.imf.org/external/pubs/ft/fandd/basics/models.htm ("An economic model is a simplified description of reality, designed to yield hypotheses about economic behavior that can be tested."). *See also* BORGES, *supra* note 39, at 325; CARROLL, *supra* note 37, at 169.

[50]   *See* Ouliaris, *supra* note 49.

[51]   *See generally* ALFRED MARSHALL, PRINCIPLES OF ECONOMICS: AN INTRODUCTORY VOLUME 92 (8th ed. 1920).

[52]   *See generally* David H. Freedman, *Why Economic Models Are Always Wrong*, SCIENTIFIC AMERICAN (Oct. 26, 2011), http://www.scientificamerican.com/article/finance-why-economic-models-are-always-wrong/ (explaining that economic models are often wrong due to inaccuracies in the calibration models).

sense of actually distorting important motivational inputs to behavior, not just simplifying them—matters more for a large-scale issue, such as the social evaluation of high-end inequality, than it does for a small one, such as understanding how equilibrium emerges in the market for vanilla beans or canola oil.[53]

The intellectual progress that economists have made by pursuing very simple models speaks for itself as validation of their choice in responding to the Mapmaker's Dilemma.[54] The danger, however, is that immersion in such models can lead one to forget the distortions and inaccuracy in cases where these are highly relevant.[55] Still, the upshot is not that conventional economic analysis of high-end inequality should be abandoned, like geography in Borges' fictional empire by reason of its more extreme and opposite response to the Mapmaker's Dilemma.[56] Rather, the point is that we should remember to supplement the standard economic model, addressing its most important omissions and rounding it out as needed.

II. The Role in Economic Models of "Utility"

A. *An Underlying Ambiguity*

In evaluating how policymakers might respond to high-end inequality, the most pertinent economic literature is that found in optimal income taxation, straddling public economics and welfare economics.[57] However, before explaining the basics of how this literature approaches the issue, I will set the stage a bit by delineating and critiquing some of its key underlying methodological and normative assumptions.

Economists like micro-foundations.[58] For example, since a society consists of individuals, economists generally prefer to start their analyses of market and other social interactions by building up from

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[53]   *See* Daniel M. Hausman, *Philosophy of Economics*, Stan. Encyclopedia of Phil. (Edward N. Zalta ed., Sept. 12, 2003), http://plato.stanford.edu/entries/economics/ (section 4.4 considering the scrutiny economics has undergone throughout history).

[54]   *See* Williamson, *supra* note 32.

[55]   *See* Freedman, *supra* note 52.

[56]   *See* Borges, *supra* note 39, at 325.

[57]   *See generally, e.g.*, Mankiw et al., *supra* note 31, at 147–48.

[58]   Jérémie Cohen-Setton, *Microfoundations in Macroeconomics*, Bruegel (Mar. 9, 2012), http://bruegel.org/2012/03/microfoundations-in-macroeconomics/.

a model of individual behavior.[59] This involves making assumptions regarding not just how, but to a certain extent *why*, a given individual makes the choices that shape her actions.[60]

In the basic model that underlies not just public economics and welfare economics, but also price theory, which explores how markets operate, each individual has a utility function that we do not try to explain.[61] It is just there. A utility function is a "mathematical function representing an individual's set of preferences, which translates her well-being from different consumption bundles into units that can be compared in order to determine choice."[62]

Just what and how much is being assumed or claimed by using utility functions is both contested and slippery.[63] Moreover, just how much one needs to claim varies with the context.[64] For example, we will see that when using optimal income taxation to evaluate high-end inequality, one needs to make more capacious claims about utility than when using price theory to model how the price of canola oil is set in a perfectly competitive market.[65]

The core ambiguity can be seen in the definition that I quoted above, which mentions both "well-being" and "choice."[66] Of these two terms, choice is much easier to observe. Other people may see what I do, but they can only try to infer how I feel. But psychic well-being—however one ends up defining it—has more obvious normative significance. If I care about my own well-being and extend this concern to others—either from beneficence, or intellectual acceptance of their similarity and moral equivalence to me—then I will also care about others' well-being, but not necessarily about

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[59]   *See* JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY G-11 (4th ed. 2013).

[60]   *See* MARSHALL, *supra* note 51, at 92.

[61]   *See generally* Puneet Prakash, *Risk Attitudes: Expected Utility Theory and Demand for Hedging*, *in* ENTERPRISE AND INDIVIDUAL RISK MANAGEMENT 96–99 (2012).

[62]   GRUBER, *supra* note 59.

[63]   *See generally* Geoffrey M. Hodgson, *On the Limits of Rational Choice Theory*, 1 ECON. THOUGHT 94 (2012).

[64]   *Id.*

[65]   *See* J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175, 175 (1971).

[66]   GRUBER, *supra* note 59.

their choices, other than as instrumental to achieving their well-being.[67]

The dichotomy between well-being and choice has been well understood in economics for a long time.[68] For example, Alfred Marshall noted that, while "[u]tility is taken to be correlative to Desire or Want . . . desires cannot be measured directly, but only indirectly by the outward phenomena to which they give rise . . . ."[69] Thus, he took comfort in the fact that, "in those cases with which economics is chiefly concerned the measure is found in the price which a person is willing to pay for the fulfillment or satisfaction of his desire."[70]

Since Marshall's time, however, economics has been on a wide-ranging imperialist binge.[71] It now looks far beyond the study of commodity markets and international trade to explore, for example, racial discrimination, drug addiction, marriage markets, dating strategies, and the right to privacy.[72] Even by Marshall's time, welfare economics had emerged, purporting to offer tools for the evaluation of aggregate social welfare.[73] This commonly involves defining social welfare as a positive function of the psychic welfare that the members of a society would experience under different circumstances, such as the adoption of alternative government policies.[74]

Marshall's way out of the maze, which was to focus on "the price which a person is willing to pay for the fulfillment or satisfaction of his desire,"[75] was later expanded and formalized by Paul Samuelson

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[67]   One can, of course, adopt if one likes an ethical framework that posits caring about choice for its own sake, and not about wellbeing. This, however, is not the predominant methodological approach in economics (nor does it jibe with my personal views).

[68]   *See, e.g.*, Sandeep Gautam, *Choice and Well-being*, PSYCHOL. TODAY (Nov. 6, 2012), https://www.psychologytoday.com/blog/the-fundamental-four/201211/choice-and-well-being.

[69]   MARSHALL, *supra* note 51, at 92.

[70]   *Id.*

[71]   *See* Edward P. Lazear, *Economic Imperialism*, 115 Q.J. ECON. 99, 103 (2000).

[72]   *See id.*

[73]   *See Welfare Economics*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/topic/welfare-economics.

[74]   *See id.*

[75]   MARSHALL, *supra* note 51, at 92.

via the theory of revealed preference.[76] Samuelson argued that consumer models could be "freed from any vestigial traces of the utility concept"[77] by relying on "the amounts of *n* economic goods which will be purchased per unit time by an individual faced with the prices of these goods and with a given total expenditure."[78] In other words, consumer choices, which at least in principle could be directly observed, were generally sufficient for economic analysis without there being any need to worry about psychic underpinnings that could neither be directly observed nor compared to each other.[79]

What perils were Marshall and Samuelson so understandably eager to avoid? One way to show this is by setting forth a maximally capacious version of the concepts of utility and utility functions.[80] A "mapmaker" in economics whose inclinations were opposite to those of Mein Herr's countrymen and Borges' Cartographers Guild—opting for maximum usability, rather than accuracy—might be tempted to posit the following: Given your underlying preferences, your mental state under any particular circumstances will always have a quantifiable hedonic utility score in terms of the sensations that you experience of happiness, contentment, pleasure, absence of distress, and so forth.[81] The higher your score—that is, the more "utiles," or units of utility, you feel—the happier or better-off you are.[82]

In short, rather than assuming a can-opener, as per the old joke about the economist on a desert island who wants to open a can of

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[76] *See* STANLEY WONG, FOUNDATIONS OF PAUL SAMUELSON'S REVEALED PREFERENCE THEORY 17 (rev. ed. 2006); *see generally* P.A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour*, 5 ECONOMICA 61 (1938).

[77] Samuelson, *supra* note 76, at 71.

[78] *Id.* at 62.

[79] *See id.* at 61–62.

[80] *See generally, e.g.*, DAVID J. CHALMERS, THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY 293–97 (1997).

[81] *See Legal Theory Lexicon 060: Efficiency, Pareto, and Kaldor-Hicks*, LEGAL THEORY LEXICON (Oct. 9, 2006), http://lsolum.typepad.com/legal_theory_lexicon/law_and_economics/ [hereinafter *Legal Theory Lexicon 060*] (last rev. Aug. 30, 2015). Obviously, the difficulty of saying just what this utility *is* testifies eloquently to the underlying problem. *See id.*

[82] *See id.*

food with no implements,[83] the maximally capacious approach involves assuming a utilometer. This might be defined as a determinate quantitative gauge controlling the individual's behavior, and perhaps that she can even read.[84]

A utilometer would certainly be a most convenient thing to have in practice, at least if it was sufficiently cheap and easy to operate. But despite its absurdity when described bluntly, the state of affairs that it posits is not completely ridiculous—just partially so. If you had an internal utilometer that you could read, along with enough information about the world, it would empower you to rank all of your choices—concerning, say, how much to work, where to live, and what consumer items to buy. What is more, you would be able to rank them not just ordinally, or from best to worst, but also cardinally, or in terms of your degrees of relative preference.[85] In actuality, we can often do at least a rough small bit of this.[86] For example, you may know not just that you prefer pizza to pork chops, and pork chops to going to the dentist, but also that you regard the first of these two choices as presenting a much closer call than the second one.

While the internal or introspective objections to positing utilometers are bad enough, economists have tended to worry more about the external or evidentiary set of problems.[87] This worry reflects the fact that, while we all have at least some direct experiential access to our own mental states, other people's feelings—and utility, insofar as there is such a thing—can only be indirectly inferred.[88]

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[83]   *On a Desert Island, with Soup*, HARV. U. PRESS BLOG (Apr. 6, 2012), http://harvardpress.typepad.com/hup_publicity/2012/04/on-a-desert-island-with-soup-schlefer-assumptions-economists-make.html.

[84]   Lewis Sage, *At Last a Utilometer?*, BALDWIN WALLACE U. DEPT. ECON. BLOG (Jan. 4, 2012), http://bwecon.blogspot.com/2012/01/at-last-utilometer.html.

[85]   J. Singh, *Consumer's Behaviour: Cardinal Utility Analysis (Explained With Diagram)*, ECON. DISCUSSION http://www.economicsdiscussion.net/cardinal-utility-analysis/consumers-behaviour-cardinal-utility-analysis-explained-with-diagram/1111 (last visited Aug. 22, 2016).

[86]   *Id.*

[87]   Singh, *supra* note 85.

[88]   *See* David Brink, *Mill's Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 9, 2007), http://plato.stanford.edu/entries/mill-moral-political/ (last rev. Aug. 22, 2014); Singh, *supra* note 85.

Hence, even if one does not worry too much about the "zombie problem" in moral philosophy—involving the possibility that, while I (the observer) know that I actually feel things such as pleasure and pain, other seemingly sentient beings may merely *look* as if they do[89]—we face the apparent impossibility of making interpersonal utility comparisons.[90] Who can say, for example, how great my subjective enjoyment of pizza or pork chops actually is, or my distress from going to the dentist, as compared to that of my neighbor, even if, in the same circumstances, we make exactly the same choices and even express ourselves identically?

This is where revealed preferences were thought to come to the rescue.[91] If both you and I would pay up to $20 for a pizza, and up to $15 for a pork chop, why not treat that as effectively the measure of the utility we each would derive from each item? "Desire or Want," then, if invoked at all, might simply be placeholders for the unknown and irrelevant underlying processes, conscious or not, that presumably generated the visible exercise of choice.[92] Under such a view, it might simply be linguistically convenient to say, as shorthand, that the pizza's utility to each of us equaled $20.

Unfortunately for the use of revealed preferences, much evidence now shows that people often do not make consistent choices

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[89]   *See, e.g.*, Robert Kirk, *Zombies*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 9, 2006), http://plato.stanford.edu/archives/sum2009/entries/zombies ("Zombies are exactly like us in all physical respects but have no conscious experiences: by definition there is 'nothing it is like' to be a zombie. Yet zombies behave like us, and some even spend a lot of time discussing consciousness. This disconcerting fantasy helps to make the problem of phenomenal consciousness vivid, especially as a problem for physicalism.").

[90]   *See* David Henderson, *Tyler Cowen on Interpersonal Utility Comparisons*, LIBR. ECON. & LIBERTY (May 20, 2015) http://econlog.econlib.org/archives/2015/05/tyler_cowen_on_14.html.

[91]   *See* B. Douglas Bernheim & Antonio Rangel, *Behavioral Public Economics: Welfare and Policy Analysis with Non-Standard Decision Makers* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 11518, 2005).

[92]   *See, e.g.*, MARSHALL, *supra* note 51, at 92. Analogously, when discussing biological evolution, it may be convenient to use teleological language as shorthand, without one's meaning to suggest that anything beyond blind processes is at work. An example would be saying that the "reason" our ancestors became bipeds is that it freed up their hands for other uses. One who said this might simply mean that positive natural selection for bipedalism was driven predominantly by the advantages associated with having free hands.

as expressed in terms of price.[93] But even if people invariably expressed consistent valuations, the effort to substitute choice for utility would fare better with respect to some types of economic inquiry than others.

Thus, suppose one is observing a computer simulation of a marketplace with buyers and sellers, featuring interactions between "characters" that follow complicated algorithms but are no more sensate than a thermostat. For price theory, this would be good enough to generate testable empirical propositions.[94] One could even use it, in this setting, to detect "inefficiency" in the simulated market's operations. Thus, suppose that one of the characters was "willing" to pay up to $20 for an item that another was "willing" to sell for as little as $18, but that the transaction did not take place because the simulation required payment of a $5 "tax." This is a classic example of tax-induced deadweight loss.[95] Defined in terms of the characters' price points, the transaction would have generated $2 of surplus, if only it could have taken place.[96] That is, but for the tax, the buyer would have gotten something it "valued" at $20, and that the seller "disvalued" at only $18.[97] What is more, there would not, in this instance, have been any "tax revenue" generated.[98]

Yet, there would be no reason for us to care whether the characters in the computer simulation were getting the things that they (acted as if they) "wanted." If we operate from a principle of beneficence[99]—generalizing from our own feelings to ascribe feelings that have similar moral importance to other, apparently comparably

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[93]   *See, e.g.*, Bernheim & Rangel, *supra* note 91, at 20–21.

[94]   *See, e.g.*, MARSHALL, *supra* note 51, at 92.

[95]   *See generally* Martin Feldstein, *Tax Avoidance and the Deadweight Loss of the Income Tax*, 81 REV. ECON. & STAT. 674–75 (1999).

[96]   *See, e.g.*, *id.*

[97]   *See, e.g.*, Feldstein, *supra* note 95, at 674–75.

[98]   *See, e.g.*, *id.*

[99]   *See* Tom Beauchamp, *The Principle of Beneficence in Applied Ethics*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 2, 2008), http://plato.stanford.edu/entries/principle-beneficence/ (last rev. Oct. 3, 2013).

sensate beings[100]—then actually caring about the characters' "frustration" would seem to rest on bringing "Desire or Want" back into the picture. Hence, actually objecting to the inefficiencies detected by price theory, no less than basing policy judgments on the use of welfare economics with its explicitly utility-based framework, requires defining utility in terms of internal sentiments that are actually felt by someone, albeit unobserved—at least as a matter of direct experience—by everyone else.

Is the main problem raised by using utility to connote psychic well-being the fact that we cannot make interpersonal utility comparisons, at least without engaging in unverifiable speculation? This was indeed, for many decades—though not as much today—the main concern that made economists eager to stick with revealed preferences insofar as they could.[101] My own view, however, is that, just as one can safely ignore the "zombie problem" in all of the daily social interactions that fill one's life—by simply assuming that others' capacity to feel things is generally comparable to one's own—so too can we generally ignore this problem in making social welfare judgments. Operating under the assumption that people are basically the same, in terms of the relationship between their revealed preferences and the true intensity of underlying mental states, seems not only polite and respectful, but also the best way of minimizing the potential size of one's errors in social welfare judgment. Suppose that I cannot really know who the relative "utility monster"[102] is— that is, the person with stronger felt pleasures and pains, as between you and me.[103] Even if we do in fact differ in this regard, albeit unknowably, a random guess would make the expected social cost of

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[100]   *See id.* ("The . . . *rule* of beneficence refers to a normative statement of a moral obligation to act for the others' benefit, helping them to further their important and legitimate interests, often by preventing or removing possible harms.")

[101]   HUGH STRETTON, ECONOMICS: A NEW INTRODUCTION 262 (rev. ed. 2000) ("Economists theorizing in academic journals may stick to 'revealed preferences'. But economists working for operators in the marketplace . . . know much more about current tastes than the theory requires, and apply what they know in commonsense ways.").

[102]   ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 41 (1974) (A "utility monster" is a person "who get[s] enormously greater gains in utility from any sacrifice of others than these others lose.").

[103]   *Id.*

the error, given the 50% chance that I would get it backwards, greater than it would have been had I assumed psychic equality.[104]

Accordingly, in my view, the more serious problem with a utility framework that frankly avows its reliance on "Desire or Want," conceptualized as if we had internal utilometers, lies on the introspective/commensurability side, rather than on the interpersonal comparability side. This will turn out to matter a lot, with respect to the use of welfare economics—including optimal income taxation—to assess high-end inequality, when such use fails to reflect appreciation of the Mapmaker's Dilemma, and thus of the need to address oversimplification and distortion. But before turning to what that framework both captures and misses, it is worth turning to how it typically models people's utility functions.

B. *Main Characteristics of the Commonly Posited Utility Function*

The standard economic model of people's utility functions follows two main principles. The first is non-satiation.[105] That is, more of any item is always preferable to less of it, all else equal.[106] In effect, there's always room for Jell-O (as a rather revolting advertising campaign once put it), and indeed for all other goods as well.[107] Under the second assumption, known as declining marginal utility, the extra utility that one derives from each extra unit of a given item, including the enjoyment of leisure, is always less than that produced by the preceding unit.[108] The first slice of pizza yields more utility than the second, which yields more utility than the third, and so on

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[104]   Abba Lerner showed that, under complete ignorance regarding who has which utility function, the optimal distribution of income—ignoring incentive effects—is completely equal. Among his key assumptions is that each individual's utility function features declining marginal utility for income, as discussed below. *See* ABBA P. LERNER, THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS 10–14 (1949).

[105]   Jonathan Levin & Paul Milgrom, *Introduction to Choice Theory*, STAN. U. 1, 14 (2014), https://web.stanford.edu/~jdlevin/Econ%20202/Choice%20Theory .pdf.

[106]   *See id.*

[107]   If one can save current resources for future use, the principle of non-satiation becomes more intuitively plausible than it is in a one-period world featuring just food.

[108]   Charles I. Jones, *Consumption*, STAN. U. GRADUATE SCH. BUS. 1, 4 (2009).

ad infinitum, even though one is presumed never quite to reach zero marginal utility given the principle of non-satiation.[109]

Suppose Adam and Beth are each choosing how much pizza and beer to buy with the $20 that each has brought to the neighborhood Joe's. Adam might happen to prefer more pizza and less beer, while Beth might prefer less pizza and more beer. However, if pizza and beer provision is perfectly continuous—that is, if one can fine-tune how much of each one buys by fractions of an ounce or less—then each individual's choices will equalize the marginal utility that he or she derives from (a) the last unit of pizza consumed, and (b) the last unit of beer consumed. Otherwise—say, if Adam faced the prospect of deriving slightly more marginal utility from his last pizza unit than beer unit—he would be able to increase his total utility, while still spending the same $20 overall, by instead purchasing slightly less pizza and slightly more beer.

An assumption that frequently attracts adverse comment is that of consistent rational choice.[110] Adam and Beth each seek to maximize utility, and thus are presumed to make the choices that, so far as they can tell from the information that is available to them, will have this effect. Moreover, how one formally presents the choices—for example, whether one starts with more pizza or more beer, where the two can readily be swapped with each other—is presumed to have no effect.[111]

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[109]   *See, e.g.*, *id.*

[110]   *See* Jonathon W. Moses & Torbjørn L. Knutsen, Ways of Knowing: Competing Methodologies in Social and Political Research 282 (2007).

[111]   Robin West has memorably expressed the absurdity of this view, if taken as a literal representation of reality:

[E]conomic man invariably knows what is best for himself, and he inevitably is motivated to seek it. He knows his own subjective welfare perfectly and pursues it relentlessly. He is the infallible judge, for example, of whether he "would prefer" pushpin to poetry, alcohol to nutrition, or heroin to shelter. He knows best not only whether a Coke or a Pepsi would yield him greater pleasure, but also whether a liberal education or an apprenticeship would better prepare him for life. His preferences perfectly mirror his subjective welfare, and his choices perfectly mirror his preferences. Thus, he relentlessly chooses what he prefers, prefers what he wants, wants what he desires, and desires what will maximize his subjective well-being.

Robin West, *Economic Man and Literary Woman: One Contrast*, 39 Mercer L. Rev. 867, 868 (1988) (internal citations omitted).

By now, however, it is not widely disputed—even within economics—that as Alfred North Whitehead put it, the assumption of perfect rationality is "palpably false: [people] are only intermittently rational—merely liable to rationality."[112] Indeed, the burgeoning field of behavioral economics explores how people's choices may systematically depart from those one would expect from rational utility-maximizers.[113] Thus, hyperbolic discounters—like the Grasshopper in the parable of the Grasshopper and the Ant—fail to make adequate provision for the future, such as by saving for retirement.[114] And an addiction to heroin or cigarettes need not be rational, as the economists Gary Becker and Kevin Murphy posited despite its potentially terrible back-end effects, arguing that these merely reflected that the benefits were front-loaded.[115]

Even those among us who can rationally rein in their own irrational proclivities, in the manner of Odysseus having himself tied to the mast before the Sirens were within earshot,[116] may be subject to manipulation via "choice architecture."[117] For example, suppose that gasoline costs $2.50 per gallon if you pay with cash, and $2.60 per gallon if you use a credit card. Rational consumers who were operating in accordance with the standard model would decide how to pay based simply on whether the convenience of using a credit

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[112] ALFRED NORTH WHITEHEAD, PROCESS AND REALITY: AN ESSAY IN COSMOLOGY 79 (David Ray Griffin & Donald W. Sherburne eds., corrected ed. 1978).

[113] Colin F. Camerer & George Lowenstein, *Behavioral Economics: Past, Present, Future*, *in* ADVANCES IN BEHAVIORAL ECONOMICS 3, 3 (Colin F. Camerer, George Lowenstein, & Matthew Rabin eds., 2004) ("At the core of behavioral economics is the conviction that increasing the realism of the psychological underpinnings of economic analysis will improve the field of economics *on its own terms . . . .*").

[114] *See* JERRY PINKNEY, THE GRASSHOPPER & THE ANTS (2015).

[115] *See* Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675, 675–76 (1988) ("Addictions would seem to be the antithesis of rational behavior. . . . Yet,. . . we claim that addictions, even strong ones, are usually rational in the sense of involving forward-looking maximization with stable preferences.").

[116] HOMER, THE ODYSSEY 272–73 (Robert Fagles trans., 1996).

[117] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 3–4 (rev. ed. 2009).

card was worth the extra cost.[118] But real world people tend to hate "penalties" more than they like "bonuses."[119] Hence, it has been shown empirically that they will tend to use cash more and credit cards less if $2.50 is the posted price but there is a 10 cent per gallon penalty for using a credit card, than if $2.60 is the posted price but there is a 10 cent per gallon bonus for using cash.[120] This violates consistent rational choice, unless one makes the model uselessly tautological by positing exactly the degrees of utility from receiving bonuses, and disutility from incurring penalties, that would serve *ex post* to "explain" (i.e., be consistent with) the behavior.[121]

One question that economists are still wrestling with is to what degree such rational choice problems can be domesticated—that is, treated as merely special exceptions to the standard model to be dealt with on a targeted or ad hoc basis without requiring fundamental rethinking.[122] An example of an ad hoc correction would be using behavioral "nudges" to increase retirement saving, if one believes that many people would otherwise save too little, as judged from the standpoint of their "true" preferences or welfare.[123]

Going down this path raises the question of exactly where to stop. It also suggests more modestly reformulating continued reliance on a revealed preferences framework on merely institutional grounds.[124] Even granting the pervasiveness of rationality problems, an individual may generally have both the strongest incentive of anyone to act in her own self-interest and the best particularized "local" knowledge of anyone—other than, perhaps, intimates—regarding her actual preferences and circumstances. However, even if these considerations strongly support a social or political rule of

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[118]   *See* Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 45 (1980).

[119]   Edward J. McCaffery, *Behavioral Economics and the Law: Tax*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 609 (Eyal Zamir & Doron Teichman eds., 2014).

[120]   *See* Thaler, *supra* note 118, at 45.

[121]   *See* MOSES & KNUTSEN, *supra* note 110, at 282.

[122]   *See, e.g.*, Daniel Shaviro, *Multiple Myopias, Multiple Selves, and the Under-Saving Problem*, 47 CONN. L. REV. 1215, 1217, 1231–33 (2015).

[123]   *See, e.g.*, *id.*

[124]   *See id.* at 1232–33.

thumb favoring reliance on revealed preferences as evidence of underlying utility, that is not the same as fully resurrecting the rational choice framework.

As it happens, for purposes of analyzing high-end inequality, problems with the rationality assumption are less consequential than those pertaining to the basic concept of utility. Again, utilometers would make it easy to judge people's subjective welfare under varying circumstances, and thus to decide when they are best off. Nature has not, however, so equipped us. In the absence of utilometers, the concept of utility has both descriptive and normative problems that, at least in some settings, can challenge its usefulness as an analytic framework.[125] While the literature on these issues is vast, certain aspects of particular relevance to assessing high-end inequality bear noting here.

C. *Descriptive Problems With "Utility"*

Given the potential convenience of utilometers, why do we not have them? Part of the reason may be that the brain is a very calorically costly organ to operate. So a "cheaper" design would have evolutionary advantages.

Our experiencing positive and negative mental states is probably best explained as instrumental towards our making choices that will tend to favor survival and gene transmission.[126] A genuinely useful utilometer would have to do more than just tote up current sensations, which might alone be costly.[127] It also would have to project the future sensations that one's model of the world—and of oneself—predicted would follow from making one choice or another.[128] Making adequate decisions promptly and cheaply, using rough rules

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[125] *See* Amos Tversky, *A Critique of Expected Utility Theory: Descriptive and Normative Considerations*, 2 ERKENNTNIS 163, 163 (1975).

[126] *See* Dacher Keltner & James J. Gross, *Functional Accounts of Emotions*, 13 COGNITION & EMOTION 467, 472 (1999). I do not address here why people have consciousness, rather than operating zombie-style without it—a longstanding riddle that might be explained either in terms of its evolutionary benefits or as a naturally emergent property or byproduct of the requisite brain complexity. *See id.* at 472–74.

[127] *See id.*

[128] *See id.*

of thumb, may often be better than aiming to make really good decisions slowly and at a high cost.[129] Hence, evolution should not have been expected to select for such egregious over-design—and indeed mal-design—as equipping us with utilometers, even assuming that our primordial ape brains could have gotten there through gradual modification, one step at a time.[130]

Our lacking utilometers is nonetheless bad news—or, one might alternatively say, liberating—from the standpoint both of describing crisply how people decide, and of evaluating what actually makes them better-off, rather than worse off. This provides crucial background for how both economists and those most critical of conventional economics have approached the challenges of explaining behavior and evaluating people's welfare in practice.

1. COMPRESSION OF THE INPUTS TO UTILITY IN ECONOMIC MODELS

Given how empirically messy, at best, the utility concept becomes as an attempted description of reality once we acknowledge that people lack utiles and utilometers, economists have unsurprisingly chosen to use models that employ radical simplification.[131] Again, recall the basic price theory model in which utility, under fixed preferences, results solely from consuming market goods plus leisure, and is subject to non-satiation and declining marginal utility.[132] Nothing else matters in the basic model.[133]

Taken as a literal representation of reality, this model is so reductionist as to be absurd. Obviously, there is so much more that affects how we feel about ourselves and about our lives. For example, we are intensely social creatures who care about status and relative position.[134] What is more, our preferences clearly are changeable, whether it be habituating to a different-sized house, developing

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[129]   *See id.*

[130]   *See id.*

[131]   *See, e.g.*, MARSHALL, *supra* note 51, at 92.

[132]   *Id.*

[133]   *See id.*

[134]   *See* ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 1 (1985) [hereinafter FRANK, CHOOSING THE RIGHT POND].

a taste for expensive wines, or gaining/losing tolerance for harsh winters.[135]

Yet, there are three main reasons why the basic model may often be useful in practice—going beyond the fact that it is simple and tractable, which would not alone justify using it if it bore no discernible relationship to our actual behavior and internal experiences. First, it is plausible regarding the inputs that it considers.[136] Even non-satiation, while clearly false when considering pizza slices at dinner, stands on strong ground in a cash economy where saving is feasible.[137] How many of us would turn down a higher salary, all else being equal?

Second, in such classic settings for economic analysis as predicting how price and quantity will equilibrate in commodity markets, the basic model may offer all that one really needs. For example, if one wants to understand how taxing coal would affect coal use and overall carbon emission, the model offers a powerful tool both for framing the theoretical analysis, and for setting an agenda for concrete empirical research.[138] The trick, of course, is not to forget that, in answering some other types of questions, a fuller and more realistic model of behavior and welfare might be needed.

Third, once one opens the door to a broader analysis, the entire framework becomes substantially more open-ended and indeterminate. Thus, consider the evidence cited by economist Robert Frank to the effect that, because people care enormously about relative status, their well-being depends not just on their own absolute consumption levels, but also on relative consumption levels for "positional goods," such as housing and cars.[139] This leads to arm's races

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[135]   Singh, *supra* note 85.

[136]   *See* MARSHALL, *supra* note 51, at 92.

[137]   *See* Levin & Milgrom, *supra* note 105, at 14.

[138]   *See generally* Peter Hoeller & Markku Wallin, *Energy Prices, Taxes and Carbon Dioxide Emissions*, 17 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD] ECONOMIC STUDIES 92, 92 (1991), https://www.oecd.org/eco/greeneco/34258255.pdf.

[139]   *See* FRANK, CHOOSING THE RIGHT POND, *supra* note 134, at 7; ROBERT H. FRANK, FALLING BEHIND: HOW RISING INEQUALITY HARMS THE MIDDLE CLASS 2–5 (2013 ed. 2013) [hereinafter FRANK, FALLING BEHIND]; ROBERT H. FRANK, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS 8–11 (1999) [hereinafter FRANK, LUXURY FEVER]; ROBERT H. FRANK & PHILIP J.

in relative consumption, such as house size, funded by all of the participants having to work harder just to stay in (relative) place.[140] Frank argues that concern about the resulting negative "positional externalities" supports imposing pollution-style taxation on high-end (or all) consumption.[141] He further argues that high-end inequality greatly worsens these negative externalities, by triggering costly "expenditure cascades" as people at the top set ever-higher standards for the assessment of relative deprivation, making it ever harder and costlier for those at lower wealth levels to keep up.[142]

Frank's arguments are clearly important to the assessment of high-end inequality. However, once one adds them to the basic model, one may also need to consider such ripostes as the following:

> (1) How many people actually care, and how much do they care, about the relative status effects of competitive consumption? In the words of a Frank-skeptic at the Cato Institute, "I [do not] doubt that some people are that way. My own solution is not to have such people as friends. But . . . [would] the proper thing [not] be to persuade people not to care about others' income . . . ?"[143]

> (2) Should "other-regarding" preferences of this sort be rejected, even if not ameliorable? Suppose one explains the phenomenon that Frank describes as mainly reflecting envy—although he views it largely in terms of the importance of social "context," leading to an unconscious adjustment of one's consumption norms based on what one sees other people doing.[144] Many would agree that, if racists enjoy causing the members of disfavored groups to suffer, we

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COOK, THE WINNER-TAKE-ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US 41 (1995).

[140]   *See* FRANK, FALLING BEHIND, *supra* note 139, at xv, 2–5.

[141]   *See* FRANK, LUXURY FEVER, *supra* note 139, at 100–102.

[142]   Robert H. Frank, Adam Seth Levine & Oege Dijk, *Expenditure Cascades*, 1 REV. OF BEHAV. ECON. 55, 56–57 (2014) [hereinafter Frank et al., *Expenditure Cascades*].

[143]   David R. Henderson, *Robert Frank's Strange Case for Taxing "The Rich"*, 29 CATO POLI'Y REP., no. 6, Nov./Dec. 2007, at 1, 15.

[144]   *See* FRANK, FALLING BEHIND, *supra* note 139, at ix–xi, 29–42.

should disregard this ugly and hateful preference. But "[t]o say that racism should not count, but envy should," seemingly requires further support.[145]

(3) What about positive externalities that might result from high-end inequality and luxury spending? Suppose we believe that "spending on today's luxuries lead[s] to innovation and higher standards of living for all income groups . . . . The wealthy pay extra to enjoy the benefits of new goods, which . . . will later become inexpensive and widely adopted."[146] How can we tell whether this is more or less important than the negative externalities that may result from high-end inequality and resulting expenditure cascades?

The difficulties of the broader issues thereby raised, once we begin considering expansion of the basic economic model to reflect that humans are a highly social species, can properly support either—and indeed both—of two opposite responses. A practicing economist might reasonably say: The uncertainty and controversiality of these issues suggests that I can reasonably ignore them in my work. At least by sticking to the basic model, I hope to illuminate *its* implications for understanding broader policy issues. These are of interest not just analytically—in an art-for-art's-sake way—but also because they genuinely are relevant inputs to an overall assessment. For example, if one is considering proposals to tax the rich, does it not matter who would bear the economic burden of the tax, and to what extent it would affect economic output? These are clearly issues that the basic model can help to illuminate.

A seemingly opposite response, but equally correct in its place, applies to the actual or hypothetical policymaker—that is, anyone who is trying to determine her overall bottom-line views regarding high-end inequality—whether or not she is actually empowered to implement them. Here, it would be reasonable to note that these

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[145] Thomas C. Leonard, *Robert H. Frank, Falling Behind: How Rising Inequality Harms the Middle Class*, 19 CONST. POL. ECON. 158, 164 (2008) (book review).

[146] Andrew Kashdan & Daniel B. Klein, *Assume the Positional: Comment on Robert Frank*, 3 ECON. J. WATCH 412, 422–23 (2006).

broader issues *cannot* be ignored, just because they are difficult and uncertain. After all, they are potentially very important—perhaps, as we will see, dramatically changing the ultimate conclusions that one would reach via the standard economic analysis standing alone.

If the end result is to reduce somewhat the relative policy significance of conventional economic analysis with respect to analyzing high-end wealth inequality, as compared to the input of sociologists, psychologists, and happiness researchers, then so be it. There is still plenty of need for economic analysis of these issues. The point is simply that economists must share the spotlight, more than they have perhaps grown accustomed to doing in this era of their preeminence.[147]

2. INCOMMENSURABILITY AND ITS BROADER SIGNIFICANCE

A further, and indeed deeper, set of issues raised by our lacking utiles and utilometers pertains to what is sometimes called the incommensurability problem.[148] Even though we do not entirely lack ordinal and cardinal insight into our own preferences, our mental experiences often cannot be placed on a single common metric that runs continuously from best to worst.[149] For example, would I rather have a good bottle of wine, feel I did my job well today, find that a mild skin irritation has eased, or hear from an old friend? Or, if I am thinking more macroscopically and down the road, should I prefer the type of life I would have in twenty years, and the type of person I would have become, if I undertook a career as a psychologist, a popular novelist, a lawyer, or an investment banker?

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[147]   *See* Justin Wolfers, *How Economists Came to Dominate the Conversation*, N.Y. TIMES (Jan. 27, 2015), http://www.nytimes.com/2015/01/24/upshot/how-economists-came-to-dominate-the-conversation.html?_r=0&abt=0002&abg=0.

[148]   *See* David Wiggins, *Weakness of Will Commensurability, and the Objects of Deliberation and Desire*, 79 PROCEEDINGS OF THE ARISTOTELIAN SOC'Y 251, 272 (1998) (describing the incommensurability problem as "the terms on which anything will trade off against anything else with respect to utility contribution. The commensurability that results is non-reductive . . . .").

[149]   *See id.*

In a pure revealed-preferences framework, incommensurability is not a problem.[150] If I must choose, presumably I will, thus tautologically establishing within that framework what apparently was best.[151] Suppose, however, one agrees that subjective mental experience is what matters, and that choice has merely instrumental value—which is, however, imperfect—towards optimizing that.[152] Then the fact that different experiences can feel so thoroughly incommensurate further widens the already open door for arguing that some types of experiences are actually better than others for the individual herself. What is more, especially in cases where alternative experiences are not simultaneously accessible—for example, because they would require that one change or develop who one is over time—there is extra room for the assertion that some types of experiences are in some sense objectively "better" than others.[153]

A thorough subjectivist might distrust such assertions, unless supported by hard research evidence of some kind, or at least by introspection that one believed was generalizable rather than idiosyncratic.[154] In practice, such claims are often intermingled with normative claims that take the standpoint of an outside observer who would consider some sources of subjective well-being morally preferable to others, even if all of them could be measured in terms of interchangeable utiles.[155] Indeed, often the subjective claim clearly seems to be offered as backup for the normative claim—unless it is the other way around.

A good example from fiction is Aldous Huxley's *Brave New World*.[156] Huxley plainly agrees on ethical grounds with the Savage,

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[150]   *See* Samuelson, *supra* note 76, at 63 ("[C]onfronted with a given set of prices and with a given income, our idealised individual will always choose the same set of goods.").

[151]   *Id.*

[152]   *See* OECD, OECD GUIDELINES ON MEASURING SUBJECTIVE WELL-BEING 29 (OECD Publishing, 2013).

[153]   *See id.* at 31.

[154]   *See* Edward P. Stringham *Economic Value and Costs Are Subjective* 2 (Munich Pers. RePEc Archive, Paper No. 25384, 2010), https://mpra.ub.uni-muenchen.de/25384/1/MPRA_paper_25384.pdf.

[155]   *See* Neera K. Badhwar, *Objectivity and Subjectivity in Theories of Well-being*, 32 PHIL. & PUB. POL'Y Q. 23, 24 (2014).

[156]   *See* ALDOUS HUXLEY, BRAVE NEW WORLD (1st ed. 1932).

who rejects the highly medicated ease, comfort, and life of superficial pleasures that a future society purports to offer, saying: "I don't want comfort. I want God, I want poetry, I want real danger, I want freedom, I want goodness. I want sin. . . . I'm claiming the right to be unhappy."[157] But Huxley also suggests that the society's endlessly repeated mantra, "Everybody's happy now," is not really true, other than at a very superficial level, as many of the elite Alphas, at least, are desperately thirsting for something more.[158] *Brave New World* would have been more interestingly ambiguous had Huxley been willing to contemplate the scenario where soma and simulated thrills actually could "work" for everyone.[159]

Even if we had utilometers that gave each mental experience a comprehensive hedonic utility score, there would still be possible grounds for normatively preferring some types of experiences over others.[160] But the subjective claim that some types of mental experiences are inherently better than others, for the individual herself, would be harder to support in that scenario.[161] Hence, incommensurability plays an important role in creating space for debate about the relative subjective value of different types of experiences and lives.[162]

Surely the most famous example of argumentation drawing on the intuitions made plausible by incommensurability is John Stuart Mill's assertion, in his classic work *Utilitarianism*, of two closely related points.[163] The first is that beings with "higher faculties" are subjectively better-off than those without such faculties, even though they "require[] more to . . . [be] happy" and are "capable

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[157] *Id.* at 288 (internal quotation marks removed).

[158] *See generally* HUXLEY, *supra* note 156.

[159] *See generally id.*

[160] *See* Badhwar, *supra* note 155, at 27–28.

[161] *See id.*

[162] *See* Daniel Fujiwara & Ross Campbell, *Valuation Techniques for Social Cost-Benefit Analysis: Stated Preference, Revealed Preference and Subjective Well-Being Approaches*, DEP'T FOR WORK & PENSIONS 7, 7 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209107/green-book_valuationtechniques.pdf.

[163] *See generally* JOHN STUART MILL, UTILITARIANISM (1861), *reprinted in* UTILITARIANISM AND ON LIBERTY 181 (Mary Warnock ed., Blackwell Publ'g Ltd. 2003).

probably of more acute suffering."[164] Yet, despite these concerns, Mill argues that:

> [i]t 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. The other party to the comparison knows both sides.[165]

The proof Mill offers of this proposition is self-evidently false. First, people neither know how pigs feel, nor is there any reason to think that Socrates truly knows what it is like to be a particular "fool."[166] Yet the intuition that one would rather be wise than foolish—even absent a hedonic payoff—is a powerful one, although it may partly reflect a mere "sense of dignity"—as Mill admits—and egoistic self-identification.[167]

Second, and relatedly, Mill distinguishes between the "higher"—or intellectual pleasures—and "lower"—or animal ones.[168] Unlike Jeremy Bentham, whom Mill elsewhere quotes as saying that the "quantity of pleasure being equal, push-pin is as good as poetry,"[169] Mill emphatically asserts that the higher pleasures are qualitatively better.[170] Once again, Mill relies on the ostensibly close to universal verdict "of those who are qualified by knowledge of both" to come to this determination.[171]

Here, Mill's proof might initially seem sound, as people capable of experiencing "higher" pleasures will surely often know the other

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[164]   *Id.* at 188.

[165]   *Id.*

[166]   MILL, *supra* note 163, at 188.

[167]   *Id.*

[168]   *Id.* at 186–87 ("[N]o known Epicurean theory of life which does not assign to the pleasures of the intellect . . . a much higher value as pleasures than to those of mere sensation . . . .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.").

[169]   JOHN STUART MILL, BENTHAM, *in* 1 DISSERTATIONS AND DISCUSSIONS (1859), *reprinted in* UTILITARIANISM AND ON LIBERTY 52, 85 (Mary Warnock ed., Blackwell Publ'g Ltd. 2003) (internal quotation marks removed).

[170]   *See* MILL, *supra* note 163, at 188.

[171]   *Id.* at 189.

kind as well.[172] Yet he once again undermines the persuasiveness of his argument by denying the relevance of counter-examples.[173] Those who know both and prefer the "lower" pleasures may suffer from "infirmity of character," or have lost their "[c]apacity for the nobler feelings," or may "addict themselves to inferior pleasures" despite not preferring them.[174] Hence, "[i]t may be questioned whether any one who has remained equally susceptible to both classes of pleasures, ever knowingly and calmly preferred the lower . . . ."[175]

The previous proposition is, of course, tautologically correct if no possible counter-example would count. But a proof so circular and automatically self-validating is no proof at all. Still, the fact that different types of experiences may feel so incommensurate can make this type of argumentation not only non-falsifiable, but even—albeit as a matter of personal taste—intuitively plausible.[176] Then again, some people today might reverse Mill's hierarchy and—taking a dim view of the psychological process that Freud called "sublimation"[177]—insist that the strongest animal pleasures, whether or not extending to push-pin, are actually more authentic, more important to welfare, and/or more intensely satisfying than the intellectual ones.[178]

Mill's distinction, if accepted, appears likely to weigh in favor of supporting greater high-end inequality.[179] After all, under his view, why not deny the "pigs" among us some of their shallow, animal-like, lower pleasures, if the tradeoff is that society can offer more "higher" pleasures to the elite who are capable of appreciating

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[172]   *See id.* at 188–89.

[173]   *See id.* at 188.

[174]   *See id.* at 188–89.

[175]   *Id.* at 189.

[176]   OECD, *supra* note 152, at 29.

[177]   *See* SIGMUND FREUD, ON THE HISTORY OF THE PSYCHO-ANALYTIC MOVEMENT (1914), *reprinted in* 14 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 7, 94 (James Strachey ed., 1914–1916 ed. 1957) (defining sublimation as "a process that concerns object-libido and consists in the instinct's directing itself towards an aim other than, and remote from, that of sexual satisfaction; in this process the accent falls upon deflection from sexuality.").

[178]   MILL, *supra* note 169, at 85.

[179]   *See id.*

them? Thus, consider a poor society in which only substantial high-end inequality would permit the existence of a wealthy patron class that could support the arts.

Incommensurability can also, however, be deployed in opposition to high-end inequality.[180] Thus, consider the view that personal dignity, autonomy, and self-respect are indispensable to leading a good life,[181] and hence are more subjectively, not just morally, valuable than merely satisfying as many of one's consumption preferences as possible.[182] Dignity and autonomy may be viewed as undermined not just by low-end inequality, which may compromise poor people's ability to achieve the good life, but also by high-end inequality, which may promote objectionable—as well as unpleasant—hierarchy and subordination.[183]

Similarly, consider John Rawls' normative focus on "primary goods," which he defines as "things that every rational man is presumed to want," reflecting their importance to pursuing a "rational plan of life."[184] Rawls includes basic health as a natural primary good, and affords self-respect a "central place."[185] Given the importance Rawls ascribes to primary goods' universal availability, they might weigh against tolerating high-end inequality, even without regard to his "difference principle," which requires all real world social inequalities to work to the advantage of the worst-off individual.[186]

3. HABITUATION AND OTHER SOURCES OF CHANGE IN PREFERENCE OR UTILITY FUNCTION

With readable utilometers and enough research opportunities, there would be no need for the standard assumption in price theory that people's preferences are fixed.[187] One would be able to measure whether an individual's utility was, or could be, greater once her

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[180]   *See generally, e.g.*, RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011).
[181]   *See id.* at 195–99.
[182]   *See id.* at 198–99.
[183]   *See generally id.* at 198–99.
[184]   JOHN RAWLS, A THEORY OF JUSTICE 62 (1971).
[185]   *See id.*
[186]   *See id.* at 75, 78.
[187]   Sage, *supra* note 84.

preferences had changed, even if she had no opportunity to choose her preferences at any time.[188]

Things are more ambiguous, however, in a world without utilometers. Suppose there are two alternative states of the world, and in each state, people would have distinct utility functions. In each state, people would rationally optimize given their preferences and budget constraints. The standard model offers no way of determining whether a person's true happiness or satisfaction or welfare, however conceptualized, is greater in one state than in another.[189] That determination would require a person to choose between the two states of the world, based on knowledge about the utility he or she would experience in each.[190]

Once we allow for the possibility that people's preferences will vary depending on the state of the world, conventional economic tools cannot be deployed to analyze the welfare effects of significant societal changes, such as in the degree of high-end inequality.[191] Suppose, for example, that Robert Frank is correct in asserting that high-end inequality yields substantial negative positional externalities by generating heightened expenditure cascades.[192] Then, tax or other policy measures aimed at addressing these cascades by reducing wealth concentration at the top, might improve welfare even if they looked highly inefficient within the standard framework.[193] Likewise, if people are happier, all else equal, when they live in more egalitarian—or alternatively, in more hierarchical—societies, the standard model would not reflect that preference.[194]

Habituation, to both good and bad circumstances, raises further complications.[195] Surveys of self-reported happiness, in a range of countries and at different times, consistently reveal that there is a large, positive psychic payoff when economic advancement reduces preexisting dangers of starvation, lack of shelter or medical care,

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[188]   *Id.*

[189]   *See* MARSHALL, *supra* note 51, at 92.

[190]   JAMES B. RAMSEY, THE ELEMENTS OF STATISTICS: WITH APPLICATIONS TO ECONOMICS AND THE SOCIAL SCIENCES 393 (Cengage Learning, 1st ed. 2001).

[191]   *See* Frank et al., *Expenditure Cascades*, *supra* note 142, at 56–60, 71–72.

[192]   *See generally id.* at 56–57.

[193]   *See, e.g.*, Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C.L. REV. 1363 (2004).

[194]   *See id.*

[195]   *See id.* at 1368–71.

exposure to violence, and so forth.[196] However, the increased satisfaction from, say, a bigger house and higher-end consumption choices appears to be considerably more fleeting.[197] People may initially report great satisfaction from improved circumstances; however, once they have habituated to the "new normal," they end up reporting about the same levels of happiness as before.[198]

Then there is habituation to the horrible.[199] For example, people who have been subordinated may learn to function better by lowering their expectations and finding a way to get along.[200] If subordinated from birth, they may be worse-equipped to function in a more benign environment than they would have been if exposed to it earlier.[201] A proper comparison of steady states may require looking down the road, and trying to evaluate how much better or worse off people might be once their expectations have changed.[202]

The costs of transition to a society that is either more equal or less so than the current one, while relevant to the overall merits of a change, should not be confused with steady state issues.[203] In addition, when gauging how bad (or not) high-end inequality is, one should distinguish between transitional and steady-state causes of discontent.[204] A number of the literary works that I examine in a

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[196] *See* Griffith*, supra* note 193, at 1368–79, 1373–74 ("The finding that additional income has a greater impact in poor nations stands in line with the discoveries of other researchers. This result does not come as a surprise. Most citizens of poor nations will use extra income to satisfy basic needs; in wealth countries, those needs already are met for most citizens.").

[197] *See id.* at 1373.

[198] *See id.* at 1368–1371. One could rationalize such habituation, in evolutionary terms, as setting them up for further striving that might yield further payoffs, and as avoiding the "waste" of self-administered psychic rewards on the payoff to choices that lie in the past.

[199] *See* SONJA LYUBOMIRSKY, THE OXFORD HANDBOOK OF STRESS, HEALTH, AND COPING 201, 202 (Susan Folkman ed., 2011).

[200] *See id.* at 206–207, 212.

[201] *Cf.* THE URBAN CHILD INST., THE STATE OF CHILDREN IN MEMPHIS AND SHELBY COUNTY: DATA BOOK 45 (2012).

[202] Ben Spencer, *The secret of happiness? LOWER your expectations: A good day is when things are going better than expected*, DAILY MAIL (Aug. 4, 2014, 2:02 PM), http://www.dailymail.co.uk/sciencetech/article-2715853/The-secret-happiness-LOWER-expectations-A-good-day-things-going-better-expected.html (last revised Aug. 6, 2014, 4:54 AM).

[203] *See* Griffith, *supra* note 193, at 1379–84.

[204] *See* Griffith, *supra* note 193, at 1392–95.

forthcoming book suggest that changes in inequality—in either direction—may themselves cause anxiety and social strain.[205] Once again, evaluating the significance of this may place us outside the realm where hard social science, and in particular economic, approaches can most straightforwardly be used.

D. *Normative Problems With "Utility"*

Should all utility and disutility, without regard to its source, cause, or character, count in the same way? Such questions are common fare in debates concerning utilitarianism and other variants of welfare economics.[206] Nozick's "utility monster" is one example of a hypothetical that may evoke intuitive unease about counting all utility the same, and thereby treating people, in effect, as merely utility generators whose separate identity lacks first-order moral significance.[207] Other hypotheticals may evoke intuitions that relate to incommensurability, rather than to interpersonal utility issues.

A classic example involves the torturer and the victim.[208] Suppose a torturer's sadistic impulses are so well-developed that he actually enjoys inflicting pain and humiliation more intensely than the victim dislikes having them inflicted.[209] This may seem unlikely, suggesting that, if positive and negative utiles existed, we might be confident that the sum total would be negative.[210] Suppose, however, that enough people with sadistic or vindictive preferences were watching the torture to ensure that the overall utile count would be positive.[211] One still might be reluctant to conclude that this meant the act of torture was good on balance—even if one would reach this conclusion in a "ticking bomb" scenario where it was indispensable to saving lives.[212]

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[205]   DANIEL SHAVIRO, ENVIERS, RENTIERS, AND THE TOP 0.1 PERCENT: WHAT LITERATURE CAN TELL US ABOUT HIGH-END INEQUALITY (work-in-progress).

[206]   *See generally Legal Theory Lexicon 068: Welfare, Well-Being, and Happiness*, LEGAL THEORY LEXICON (May 31, 2009), http://lsolum.typepad.com/legal_theory_lexicon/law_and_economics/ (last rev. Oct. 18, 2015).

[207]   *See* NOZICK, *supra* note 102, at 41.

[208]   *See* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Va. L. Rev. 1425, 1430 (2005).

[209]   *See, e.g.*, *id.* at 1428, 1431–33.

[210]   *See, e.g.*, *id.*

[211]   *See, e.g.*, Luban, *supra* note 208, at 1428, 1431–33.

[212]   *See id*. at 1440–45.

A common intuitive response to the conundrum rests on arguing that the enjoyment of torture is an illegitimate or unworthy pleasure, hence not to be counted as if it were no different than savoring ice cream.[213] In addition, if preferences are malleable, one might argue that the sum total of human happiness can be greater when people enjoy ice cream than when they enjoy watching torture.[214] By discouraging links between one person's utility and another's disutility, we can hope to create circumstances where the sum total of utility is higher.[215]

To further illustrate the intuition, while lowering the thermostat just a hair from its level in torture debates, consider racism. If the members of one group enjoy subordinating and oppressing the members of another group, we might find it psychologically plausible that, at least on a per-person basis, the pain imposed exceeds the pleasure derived. In addition, however, one may have a moral intuition classifying the dominant racists' enjoyment of subordination as illegitimate and unworthy.[216] We also know that racist sentiments are neither entirely universal nor irremediable, and it may be clear that, in the absence of such sentiments, society as a whole can get to a better place.[217] Hence, there are multiple reasons for declining to value the dominant racists' enjoyment of subjugating others, even in the mythical scenario where we are otherwise totaling up all the utiles.[218]

In the debate over high-end inequality, each side can try to invoke the racism analogy in its favor. For those who are anti-inequality, extreme wealth concentration at the top may be viewed as yielding relationships of dominance and subordination that are not wholly unlike racial injustice.[219] And even if the poisonous sentiments on both sides would not yield to exhortation, counseling, or medication, they presumably can be mitigated by reducing the extent of the inequality that gives rise to these relationships.[220]

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[213]   *See id.* at 1428.
[214]   *See, e.g., id.* at 1430–33.
[215]   *See* F.Y. Edgeworth, *The Pure Theory of Taxation*, 7 ECON. J. 550, 552–53 (1897).
[216]   *See* West, *supra* note 111, at 873.
[217]   *See id.* at 874–75.
[218]   *See id.*
[219]   *See* Scanlon, *supra* note 19.
[220]   *See id.*

For those who are "anti-anti-inequality," whether or not affirmatively pro-inequality, the issue is one of envy—that is, gratuitous and invidious resentment of the rich by the poor.[221] Suppose that someone who was below the top 0.1% would feel good about bringing the richest individuals down a few notches, even if it did nothing for her directly.[222] Even though her animus comes from "below," rather than from a higher social position, as in the case of a racist subjugator, she similarly attaches positive utility to someone else's disutility.[223] This might potentially support a similar critique of the sentiment's unworthiness, remediability, and socially destructive character.[224]

Before more closely examining these rival claims about the normative assessment of responses to inequality, it is worth noting one thing that both claims clearly get right. Each involves position-related utility, or the dependence of one's subjective welfare on one's vertical placement relative to other people.[225] Only a true naïf—one unable to grasp how most people actually think about social interactions—could believe that it is literally true that utility comes only from own consumption, rather than also being affected by people's relative positions.[226] *Of course* we have position-related utility, whatever the empirical and normative weight—or non-weight—that one ends up assigning to it.[227] So the question, other than such sentiments' degree of importance in the big picture, is whether any grounds would justify differential weighting of particular types of position-related utility.

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[221]   *See, e.g.*, Greg Sargent, *Romney: Questions about Wall Street and inequality are driven by `envy'*, WASH. POST (Jan. 11, 2012), https://www.washingtonpost.com/blogs/plum-line/post/romney-questions-about-wall-street-and-inequality-are-driven-by-envy/2012/01/11/gIQAJ6L2qP_blog.html.

[222]   *See generally* Brooks, *supra* note 30.

[223]   *See* John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434, 435 (1953).

[224]   *Id.*

[225]   *See* Griffith, *supra* note 193, at 1381–84.

[226]   *See, e.g.*, Thomas Piketty & Emmanuel Saez, *A Theory of Optimal Capital Taxation* 14 (Nat'l Bureau of Econ. Research, Working Paper No. 17989, 2012) [*hereinafter* Piketty & Saez, *Optimal Capital Taxation*].

[227]   *See* Griffith, *supra* note 193, at 1381–84.

1. BATTLE OF THE FRAMEWORKS, PART I: ENVY, DOMINANCE VERSUS SUBORDINATION, OR SOMETHING ELSE ENTIRELY?

The anti-anti-inequality position is best-known as the credo of Mitt Romney during his 2012 presidential campaign when he asserted that all public political debate concerning high-end inequality should be viewed as inappropriate, as it was just "about envy . . . [and] class warfare."[228] When asked whether *any* fair questions can be asked about wealth distribution, without them being just envy, Romney conceded that it was "fine to talk about those things in quiet rooms and discussions about tax policy and the like," but not, however, in a presidential campaign.[229]

How might one who wanted to justify, not just woodenly assert, the case for dismissing envy's normative relevance go about doing so? Arthur Brooks, president of the American Enterprise Institute, offers as illustration a comment once made by the pop singer Bono, explaining a difference he had observed between the United States and his native Ireland:

> In the United States . . . you look at the guy that lives in the mansion on the hill, and you think, you know, one day, if I work really hard, I could live in that mansion. In Ireland, people look up at the guy in the mansion on the hill and go, one day, I'm going to get that bastard.[230]

Brooks then adds: "[P]sychologists have found that envy pushes down life satisfaction and depresses well-being. [It] is positively correlated with depression and neuroticism, and the hostility it breeds may actually make us sick."[231] The solution, he argues, is twofold.[232] First, increasing mobility for the bottom of the income scale will induce people to think like Bono's American, rather than like his Irishman.[233] Second, everyone should agree to avoid "fo-

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[228] Sargent, *supra* note 221.

[229] *Id.*

[230] Brooks, *supra* note 30 (internal quotation marks omitted).

[231] *Id.*

[232] *See id.*

[233] *See id.* Brooks does not address whether high-end inequality might inherently tend to reduce upward mobility. *Id.*

menting bitterness over income differences[, which] may be power-ful politics, but [] injures our nation."[234] So, Romney ostensibly was right about the "quiet rooms" after all.[235]

In his envy diagnosis, Brooks offers all three of the crucial ele-ments for devaluing the sentiment that he describes: it is morally unworthy, remediable, and socially destructive—not to mention psychically self-destructive.[236] Yet Brooks' focus is strikingly one-sided. All we hear about is the person who is staring up from be-low.[237] We do not hear anything about the perspective or the actions of "the guy that lives in the mansion on the hill."[238]

What if the Irish grandee does things that earn his downhill neighbors' hostility? Even in the absence of conflictual political or economic interactions, suppose he likes to impress them with his own social superiority and their inferiority. This would undermine all three elements of Brooks' case.[239] We may now feel that the neighbors' hostility is more justified, even if we do not want them to actually "get" the grandee. Their side of the dispute may now seem less remediable, other than by addressing high-end inequality itself. And one could argue that what destroys social concord is the high-end wealth gap itself, not just one side's supposedly gratuitous reaction to a two-sided fight over status and power.

In the United States today, there can be little question that "class warfare" sentiments, if one wants to call them that, emanate from both sides of the divide between the top 0.1% and everyone else.[240] Consider the ludicrous comments made by Silicon Valley venture capitalist and billionaire Tom Perkins, who infamously wrote to the Wall Street Journal so he could ungrammatically "call attention to the parallels of fascist Nazi Germany to [sic] its war on its 'one per-cent,' namely its Jews, to the progressive war on the American one

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[234]   *Id.*

[235]   *See* Sargent, *supra* note 221.

[236]   *See Brooks*, supra note 30.

[237]   *See id.*

[238]   *See id.*

[239]   *See id.*

[240]   *See, e.g.*, Chrystia Freeland, *Super-Rich Irony: Why do billionaires feel victimized by Obama?*, NEW YORKER (Oct. 8, 2012), http://www.newyorker.com /magazine/2012/10/08/super-rich-irony.

percent, namely the 'rich.'"[241] To Perkins, apparently, expressing even mild criticism of our society's most powerful group is closely comparable to one of the greatest campaigns of organized mass murder in human history.[242]

When one considers that, in the contemporary United States, the "extremely wealthy are objectively far wealthier, far more politically powerful and find a far more indulgent political class than at any time in almost a century . . . [,] [Perkins'] claim manages simultaneously to be so logically ridiculous and morally hideous that Perkins deserves every bit of abuse" that he got.[243] Yet Perkins does not stand alone, even in having "his self-censor and/or editor fail[] him so miserably."[244] For example, not long before, billionaire investor Stephen Schwarzman called proposals to tax hedge fund managers at the ordinary income rate faced by millions of Americans, rather than at special capital gains rates, an act of "war" that was "like when Hitler invaded Poland in 1939."[245] The ranks of billionaires comparing even mild criticism of the super-rich to the rise of Hitler also includes Home Depot founder Ken Langone.[246]

While even three such anecdotes do not by themselves prove the existence of a broader trend, the contemporaneous rise of similar, if not always so extreme, anger and fear among members of the top

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[241]   Tom Perkins, *Progressive Kristallnacht Coming?*, WALL ST. J. (Jan. 24, 2014, 4:49 PM), http://www.wsj.com/articles/SB10001424052702304549504579316913982034286.

[242]   *See id.*

[243]   Josh Marshall, *The Brittle Grip, Part 2*, TALKING POINTS MEMO: EDITOR'S BLOG (Jan. 25, 2014, 6:38 PM) [hereinafter Marshall, *The Brittle Grip*], http://talkingpointsmemo.com/edblog/the-brittle-grip-part-2.

[244]   *Id.*

[245]   Neil Brooks & Linda McQuaig, *How Billionaires Destroy Democracy*, SALON (Apr. 1, 2012, 5:00 PM), http://www.salon.com/2012/04/01/how_billionaires_destroy_democracy.

[246]   *See* Victor Ocasio, *Kenneth Langone, Home Depot co-founder, decries income inequality*, NEWSDAY (Apr. 23, 2015, 8:16 PM), http://www.newsday.com/business/kenneth-langone-home-depot-co-founder-speaks-at-adelphi-1.10316148. In fairness to Langone, while he is evidently made uneasy by challenges to high-end inequality, he has recently emphasized the importance of addressing low-end inequality, arguing that, "if we don't do something about helping these people on the lower end of the pay scale, I think we're setting ourselves up for serious problems." *Id.*

0.1% has been widely noted.[247] This has led to a wave of recent articles asking such questions as why billionaires are so angry at the rest of us,[248] why they are so "whiny,"[249] and why they feel so "victimized" by political criticism that, as a historical matter, is on par for the course or even relatively mild.[250]

Josh Marshall argues that political "insecurity, a sense of the brittleness of one's hold on wealth, power, privileges, combined with the reality of great wealth and power . . . breeds a mix of aggressiveness and perceived embattlement."[251] He thus views Tom Perkins' feelings, if not his gross lack of tact and proportion in expressing them, as "pervasive" among the super-rich.[252] Accustomed to extreme deference in their daily business and consumer lives, the super-rich find it humiliating and intolerable that they might need to "run to the political class hat in hand"—albeit waving large checkbooks—in quest of protection and reassurance.[253]

In Marshall's view, the "sheer scale of the difference" in people's daily experiences and circumstances means that the super-rich:

> live what is simply a qualitatively different kind of existence. That gulf creates estrangement and alienation, and one of a particular sort in a democracy where such a minuscule sliver of the population can't hope to protect itself alone at the ballot box . . . .The disconnect between perception and reality, among such a powerful segment of the population, is in itself dangerous. And it's led to . . . a significant radicalization of the politics of extreme wealth.[254]

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[247]   *See infra* notes 253–55.

[248]   *See* James Surowiecki, *Moaning Moguls*, New Yorker (July 7, 2014), http://www.newyorker.com/magazine/2014/07/07/moaning-moguls.

[249]   *See* Les Leopold, *Poverty Rises as Wall Street Billionaires Whine*, Huffington Post: The Blog (Sept. 17, 2010, 9:01 AM), http://www.huffington post.com/les-leopold/poverty-rises-as-wall-str_b_720719.html (last updated May 25, 2011).

[250]   *See* Freeland, *supra* note 240.

[251]   Marshall, *The Brittle Grip*, *supra* note 243.

[252]   *See id.*

[253]   *See* Marshall, *The Brittle Grip*, *supra* note 243.

[254]   *Id.*

This critique of high-end wealth inequality relies on concern about lost social capital and cohesion—a concern that goes back, in the social science literature, at least to the work of Emile Durkheim[255]—rather than on the narrative of dominance and subordination that may be favored by commentators to Marshall's political left.[256] However, both critiques support viewing the "envy" frame as unduly one-sided, in the sense of applying armchair psychology just to the 99.9%, but not to the 0.1%, and as if in a social vacuum.[257] Wherever one eventually comes out in deciding what normative weight, if any, to give position-related utility, it surely requires looking in depth at the entire picture.[258]

2. BATTLES OF THE FRAMEWORKS, PART 2: ENVY OR CONTEXT?

The "envy" debate also matters with respect to Robert Frank's point regarding positional goods.[259] The critique that the solution is to "persuade people not to care about others' income" is part and parcel of the "anti-anti-inequality" dismissal of concern about position-related utility.[260]

Frank himself, recognizing that "[t]here are good reasons to limit envy and other corrosive emotions,"[261] responds that the ill effects of costly expenditure cascades rest on the universal relevance of "context" to people's utility and broader assessments.[262] Even our evaluations of temperature rest on the applicable frame of reference. A sixty-degree day seems cold in Miami in November, but warm in Montreal in February.[263] So a person who sees other people's large houses may come to want a larger one for herself, not just out of rivalry but due to her evolving perception of surrounding norms. "If you respect people's preferences and they experience psychological

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[255]   *See generally* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 411–35 (George Simpson trans., The Free Press ed., 3d prtg. 1949) (1893).

[256]   *See* Marshall, *The Brittle Grip*, *supra* note 243.

[257]   DURKHEIM, *supra* note 255, at 411.

[258]   *Id.*

[259]   *See* FRANK, CHOOSING THE RIGHT POND, *supra* note 134, at 7–9.

[260]   Henderson, *supra* note 143.

[261]   FRANK, FALLING BEHIND, *supra* note 139, at 42.

[262]   *See generally id.* at 29–42.

[263]   *See id.* at 30–31.

costs from relative disadvantage, why shouldn't those costs be taken into account in a welfare analysis?"[264]

Whether or not one accepts Frank's analysis of expenditure cascades and their link to high-end inequality,[265] it helps to indicate a need for broadening both the descriptive and the normative analysis beyond the range of standard economic models.[266] After all, at a minimum, relative consumption *might* be genuinely subjectively important, and Frank is hardly the first to bring this point to broad public attention.[267] In 1899, economist and sociologist Thorstein Veblen published *The Theory of the Leisure Class*,[268] which set forth the theory of "conspicuous consumption"[269] and—though less remembered today—"conspicuous leisure."[270]

Veblen defines "conspicuous consumption" in light of competition for status, as distinct from the Arthur Brooks model of envy on one side and supposed obliviousness on the other.[271] Veblen argues, for example:

> In order to gain and to hold the esteem of men it is not sufficient merely to possess wealth or power. The wealth or power must be put in evidence, for esteem is awarded only on evidence. And not only does the evidence of wealth serve to impress one's importance on others and to keep their sense of his importance alive and alert, but it is scarcely less use in building up and preserving one's self-complacency.[272]

The key prerequisite for achieving the desired reputational effects, according to Veblen, is "conspicuous waste,"[273] since the main

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[264]	FRANK, FALLING BEHIND, *supra* note 139, at 41.

[265]	*See generally* Frank et al., *Expenditure Cascades*, *supra* note 142.

[266]	*See* DURKHEIM, *supra* note 255, at 411.

[267]	*See, e.g.*, THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS 49–69 (Oxford Univ. Press ed., reprt. 2007) (1899).

[268]	*See generally* VEBLEN, *supra* note 267.

[269]	*See id.* at 49–69.

[270]	*See id.* at 28–48.

[271]	*Compare Brooks*, *supra* note 30, *with* VEBLEN, *supra* note 267, at 49–69.

[272]	VEBLEN, *supra* note 267, at 29.

[273]	VEBLEN, *supra* note 267, at 63.

point is to show one can afford it. There is good reason to think that this rationale still applies. For example, another anti-anti-inequality proponent from the Cato Institute, Will Wilkinson, offers a classic Veblenesque example—without realizing it—in the course of explaining how U.S. consumption inequality has changed since Veblen's era:

> At the turn of the 20th century, only the mega-rich had refrigerators or cars. But refrigerators are now all but universal in the United States, even while refrigerator inequality continues to grow. The Sub-Zero PRO 48, which the manufacturer calls "a monument to food preservation," costs about $11,000, compared with a paltry $350 for the Ikea Energisk B18 W. The lived difference, however, is rather smaller than that between having fresh meat and milk and having none. The IKEA model will keep your beer just as cold as the Sub-Zero model.[274]

As Timothy Noah notes in response, "if getting rich is only a matter of spending more money on the same stuff you'd buy if you were poor, why bother to climb the greasy pole at all?"[275] Is the owner of the Sub-Zero being stupid, or rather "[d]oes he know something Wilkinson doesn't?"[276] Surely Veblen's explanation is partly responsible, even if the Sub-Zero also has practical or aesthetic advantages over the Ikea model that a super-rich consumer would appreciate even if he or she were the last person on Earth.

One important thing that *does* seem to have changed since Veblen's era is the role of what he calls "conspicuous leisure,"[277] involving not just exotic vacations that yield showy souvenirs, but also conspicuous wasting of time to show that one need not work.[278] Veblen wrote *The Theory of the Leisure Class* in an era when "wealth acquired passively by transmission from ancestors . . .

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[274]	Will Wilkinson, *Thinking Clearly About Economic Inequality* at 6 (Cato Inst., Pol'y Analysis No. 640, 2009).

[275]	TIMOTHY NOAH, THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT 170 (2012).

[276]	*Id.*

[277]	*See generally* VEBLEN, *supra* note 267, at 28–48.

[278]	*Id.* at 63–64.

[was] more honorific than wealth acquired by the possessor's own effort."[279] Hence his use of the label "leisure class," which adopts an identifying feature that would not figure as prominently in similar analyses today.[280]

The Theory of the Leisure Class predated the era of putatively heroic "job-creators" and superman CEOs, who ostensibly do "tremendous" things "advanc[ing] the public good."[281] And it likewise predates today's scions of famous parents, such as Tagg Romney and Chelsea Clinton, who like to pretend that the generous paydays that fall into their laps reflect their own talents and efforts, rather than the inherited benefit of having famous parents.[282] Today, whatever remains of conspicuous leisure is closely intertwined—perhaps even more so than in Veblen's day—with high-end market consumption, as in the case of a St. Moritz ski vacation.[283]

In short, "it is no longer even apt to talk of a leisure class . . . conceived of . . . [as] in hasty flight from anything tainted by work . . . ," when "our moguls of the moment are workaholics."[284] Yet conspicuous leisure's replacement by conspicuous economic success in no way rebuts Veblen's model of peacock's tail-style social competition through one's interactions with the market economy. Instead, it further exemplifies the model's continued relevance, even—or perhaps especially—in a post-rentier era.

The Veblenesque process of competitive display may help to explain why the social impact of the top 0.1% has been so great—as evidenced by recent years' intense focus and debate on questions of high-end inequality—even though the super-rich often cloister

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[279]   *Id.* at 24.

[280]   *Id.* at 7.

[281]   N. Gregory Mankiw, *Yes, the Wealthy Can Be Deserving*, N.Y. Times (Feb. 15, 2014), http://www.nytimes.com/2014/02/16/business/yes-the-wealthy-can-be-deserving.html?_r=0.

[282]   *See, e.g.*, Noam Scheiber, *Growing Up Romney*, New Republic (Oct. 19, 2012), https://newrepublic.com/article/108815/tagg-romney-myth-self-reliance; Josh Moorcroft, *Donald Trump Jr Net Worth and Chelsea Clinton's Salary: How Much are the Children of the Presidential Candidates Worth?*, Inquisitr (Aug. 5, 2016), http://www.inquisitr.com/3386099/donald-trump-jr-net-worth-chelsea-clinton-salary-children-presidential-candidates-worth/.

[283]   *See generally* Veblen, *supra* note 267.

[284]   Steve Fraser, The Age of Acquiescence: The Life and Death of American Resistance to Organized Wealth and Power 295 (2015).

themselves far out of view of the rest of us.[285] Consider the experience of airline travel, which has perceptibly grown ever more hierarchical.[286] Airlines now regularly offer not just first class and business class seating, but also premium coach seating categories, such as United's Economy Plus,[287] along with as many as five distinct boarding groups,[288] and multiple categories for security clearance.[289]

Obviously, part of the motivation for all this, on the demand side, is to purchase tangible benefits. To the seasoned airline traveler, it is good for one's own sake to have more legroom on a long-haul flight, and to get first crack at the overhead bins.[290] Yet extra status seems so clearly to be a part of what travelers with deeper pockets—whether their own or someone else's—are purchasing such that the rise of multiple gradations—and of spatial inequality in the skies—seems closely related to contemporaneous trends in high-end inequality.[291]

But is this inference refuted by the fact that people at the very top of the income and wealth hierarchies commonly fly their own private and company jets, rather than needing to line up even in Group 1? Not necessarily if those in Group 1 know about these people, and if that in turn is enough to transmit social messages all the way down to Group 5, and beyond Group 5 to people who never go to the airport or fly. This is the process that Robert Frank has in mind when he discusses expenditure cascades.[292] Of course, it does not rebut the possibility that the general social impact of high-end inequality would be vastly magnified beyond current experience if the

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[285]   *Id.*

[286]   *See* Elizabeth Popp Berman, *inequality in the skies*, ORGTHEORY.NET (Nov. 24, 2014, 1:30 PM), http://orgtheory.wordpress.com/2014/11/24/inequality-in-the-skies.

[287]   Harriet Baskas, *United Airlines adds bundled perks packages to Economy Plus*, USA TODAY (Jan. 4, 2016, 11:47 AM), http://www.usatoday.com/story/travel/flights/todayinthesky/2016/01/04/united-economy-plus-perks/78255058/.

[288]   *See* UNITED, *Boarding process*, https://www.united.com/web/en-US/content/travel/airport/boarding-process.aspx (last visited Oct. 18, 2016).

[289]   *See, e.g.*, TRANSPORTATION SECURITY ADMINISTRATION, *TSA Pre*, https://www.tsa.gov/precheck (last visited Oct. 18, 2016); CLEAR ME, https://www.clearme.com/ (last visited Oct. 18, 2016).

[290]   *See* Berman, *supra* note 286.

[291]   *See id.*

[292]   *See* Frank et al., *Expenditure Cascades*, *supra* note 142, at 56–57.

super-rich were not as cloistered and sequestered as so often they are.

3. THE EXISTENCE OF BIMODAL SOCIAL NORMS

One last point worth discussing concerns the question of what empirical and normative priors one should bring to a broader analysis. In a world without utilometers, one cannot simply observe and record the "facts" regarding high-end inequality's welfare effects. One's underlying assumptions about people and society inevitably will play a role, and one should at least try to be conscious about this.

Since we live in what is still a formally egalitarian age, we may all too complacently nod our heads at the famous words in the U.S. Declaration of Independence, holding the "truth to be self-evident, that all men are created equal."[293] No less might we take to be obvious the words of the French Revolution's Declaration of the Rights of Man that "[m]en are born and remain free and equal in rights,"[294] although many in the United States might reject the French Declaration's further claim that "[s]ocial distinctions may be founded only upon the general good."[295] Yet history tells us that, however fervently one may accept the case for equality, in whatever one deems the relevant sense, given the question "equality of what?", it has not,

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[293] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Of course, this did not prevent the United States from retaining slavery for almost ninety years after the issue date of the Declaration of Independence. Yet, Americans were often highly conscious of its irreconcilability with the Declaration's principles. On the one side, not just abolitionists but much softer critics of slavery, such as Abraham Lincoln, emphasized the broader implications of egalitarianism. *See* MICHAEL BURLINGAME, THE INNER WORLD OF ABRAHAM LINCOLN 20 (1997). On the other side, antebellum Southerners, such as the writer George Fitzhugh, responded by lauding slavery on the grounds both that most people—of all races—were naturally slaves, and that it was better for workers than a market system under which they were on their own. *See* GEORGE FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS 25–26 (1857).

[294] THE DECLARATION OF THE RIGHTS OF MAN art. 1 (Fr. 1789). This reference to formal legal equality presumably reflects the fact that revolutionary France had only recently abolished aristocrats' legal privileges. PETER JONES, REFORM AND REVOLUTION IN FRANCE: THE POLITICAL TRANSITION, 1774–1791 191 (1995).

[295] THE DECLARATION OF THE RIGHTS OF MAN art. 1 (Fr. 1789).

at all places and all times, been considered even true on the whole, much less "self-evident."[296]

As Wilkinson and Pickett note, "[h]uman beings have lived in every kind of society, from the most egalitarian prehistoric hunting and gathering societies, to the most plutocratic dictatorships."[297] If one looks at the history of civilization, "[i]nequality appeared as soon as society was born."[298] Ever since that time, marked inequality has been common, often accompanied by social ideals that compared society to a family that is ruled by the father, and that lauded the scenario where each individual accepted his or her proper station.[299]

Yet suppose one looks even further back into the past, rather than stopping at the dawn of agriculture and civilization. Prior to recorded human history, and for an estimated 90% of the history of our particular human species, "people lived in groups in which equality was quasi absolute."[300] Go back even further, and for at least 2 million years our ancestors "lived in remarkably egalitarian hunting and gathering—or foraging—groups. Modern inequality arose and spread [only] with the development of agriculture."[301] Thus, "[d]espite the modern impression of the permanence and universality of inequality, in the time-scale of human history and prehistory, it is the current highly unequal societies which are exceptional."[302]

In short, while broadening one's gaze may contradict the two Declarations' seemingly serene confidence that equality is a universal and indisputable human value, it may in the end support a more limited claim.[303] Substantial social and economic equality has been the prevailing condition for most of our evolutionary history, and

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[296]   THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[297]   WILKINSON & PICKETT, THE SPIRIT LEVEL, *supra* note 25, at 26.

[298]   BRANKO MILANOVIC, THE HAVES AND THE HAVE-NOTS: A BRIEF AND IDIOSYNCRATIC HISTORY OF GLOBAL INEQUALITY, at ix (2011).

[299]   *See id.*

[300]   *Id.* at 217; *see also* Ken Binmore, *The Origins of Fair Play*, *in* PAPERS ON ECONOMICS AND EVOLUTION 6, (Evolutionary Econ. Grp. ed., 2006), https://papers.econ.mpg.de/evo/discussionpapers/2006-14.pdf.

[301]   WILKINSON & PICKETT, THE SPIRIT LEVEL, *supra* note 25, at 208.

[302]   *Id.* at 207.

[303]   *Id.* at 207–208.

thus presumably is a condition to which we became—and may remain—well-adapted.[304] However, it also appears to be the case that we adapted quite readily to hierarchy once the material conditions arose to make it feasible.[305] Thus, Wilkinson and Pickett—despite their strong egalitarian sympathies—agree that "human beings have had to develop different mental tool-kits which equip them to operate both in dominance hierarchies and in egalitarian societies."[306] And the strategies that we deploy to function effectively in a hierarchical setting "are almost certainly pre-human in origin."[307]

Why might all this matter for present analytical purposes? One point is simply that we should be modest about the universality of our own particular social values—even if, in the end, viewing the alternatives that have prevailed at other times and places should end up strengthening, rather than weakening, one's attachment to these values.[308]

A second point is that, if we value an egalitarian vision of society despite recognizing its historical contingency, even as an ideal, we should not complacently assume that its place is secure.[309] Other visions could potentially supplant this vision, as they have before. In particular, rising high-end inequality sits ill with the egalitarian vision, beyond even just endangering political democracy.[310]

I myself do not expect the imminent return of medieval Europe's rationalization of pervasive hierarchy via the Great Chain of Being, progressing by degrees from God to angels to kings to nobles to commoners to animals.[311] There may, however, be a more modern expression of the view that we are fundamentally unequal.[312] In particular, market triumphalism, extreme meritocratic values, and revivified Social Darwinism already can be seen at times to promote

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[304]   *Id.* at 208.

[305]   WILKINSON & PICKETT, THE SPIRIT LEVEL, *supra* note 25, at 203.

[306]   *Id.* at 206.

[307]   *Id.* at 207.

[308]   *See id.* at 206.

[309]   *See id*. at 206–8.

[310]   *Id.* at 264.

[311]   *See generally* ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA 183, 195 (2nd prtg. 1942) (explaining the "cosmic hierarchy" of the Great Chain of Being).

[312]   Shaviro, *Book Review*, *supra* note 1, at 684.

the view that "winners" deserve everything, "losers" deserve nothing, and that the former should be celebrated while the latter be despised and mocked.[313]

A third, more speculative point relates to the social science research that Wilkinson and Pickett argue supports viewing high levels of inequality as bad for everyone in all sorts of ways.[314] As noted above, they argue that high levels of inequality have measurable adverse effects on social trust, economic mobility, life expectancy, infant mortality, children's educational performance, teenage births, homicides and other violence, imprisonment rates, mental illness, drug and alcohol addiction, and obesity.[315]

This contested research needs to be confirmed, refuted, or modified on its own terms—a process that one hopes is underway. Speculation about how it might relate to our long evolutionary prehistory will not settle anything in this debate. Yet the fact that high levels of inequality emerged only with the relatively recent rise of agricultural civilization could provide a plausible intuitive explanation for Wilkinson's and Pickett's results,[316] if they end up being confirmed.

By analogy, consider people's generally keen taste for fats and sweets.[317] This was a highly adaptive trait during the countless millennia when food was often scarce and famine a continual risk.[318] It is considerably less adaptive today for people who can access unlimited fats and sweets entirely at will, and when market forces reward the effort to stimulate our liking for them.[319] So we live today amid pervasive health problems that are in principle wholly avoidable, but that reflect our being evolutionarily maladapted, in some respects, for present circumstances.[320]

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[313]   *See* Shaviro, *Book Review*, *supra* note 1, at 684.

[314]   WILKINSON & PICKETT, THE SPIRIT LEVEL, *supra* note 25, at 212 ("Many of the problems which we have seen to be related to inequality involve adult responses to status competition. But we have also found that a number of problems affecting children are related to inequality.").

[315]   *See id.* at 19.

[316]   *See id.* at 208.

[317]   Daniel E. Lieberman, *Evolution's Sweet Tooth*, N.Y. TIMES (June 5, 2012), http://www.nytimes.com/2012/06/06/opinion/evolutions-sweet-tooth.html?_r=0.

[318]   *See id.*

[319]   *See id.*

[320]   *See* Lieberman, *supra* note 317.

Might the pervasive ill effects that Wilkinson and Pickett claim are associated with high levels of social inequality,[321] if verified, reflect a similar adaptive mismatch between our internal wiring and our present circumstances? Here the claim would not be that doing what you like leads directly to a bad health result, but rather that competitive social drivers lead to greater psychic stress in a highly unequal society than in the type that prevailed during most of our evolutionary history, even if one has the tools to adapt and cope in either society.[322] While any such view remains speculative, it offers a more credible evolutionary perspective than positing so keenly that a socially competitive species as our own evolved to derive utility solely—or even principally once the basics are met—from our own consumption of market goods and leisure.[323]

III. OPTIMAL INCOME TAXATION: THE DOMINANT ECONOMIC FRAMEWORK FOR RESPONDING TO HIGH-END INEQUALITY

A. *Overview*

With all this as background, we now can turn to the question of how contemporary economics assesses issues of inequality. In the economics literature assessing what, if anything, policymakers should do about inequality, there is broad agreement that taxes—along with transfers to address low-end inequality—should be at center stage.[324] For this purpose, the term "taxes" generally refers to such means-related instruments as income taxes, consumption taxes,

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[321]   *See* WILKINSON & PICKETT, THE SPIRIT LEVEL, *supra* note 25, at 19.

[322]   *See id.* at 206–07.

[323]   *See id.*

[324]   Indeed, a vigorous debate in law and economics concerns whether distributional issues should be addressed *solely* through the tax and transfer system, based on measures such as income, or whether there is also a significant role to be played by "legal rules," such as those concerning tort liability, enforcement of contracts, corporate governance, rent control, the minimum wage, and so forth. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002); A.B. Atkinson & J.E. Stiglitz, *The Design of Tax Structure: Direct Versus Indirect Taxation*, 6 J. PUB. ECON. 55 (1976); Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2016); Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 798 (2000).

wealth taxes, and estate or inheritance taxes that are deliberately de-signed such that a wealthy individual would generally be expected to pay more than a poor individual, even if the rate structure is flat rather than progressive.[325]

The leading economic framework for evaluating the use of taxes and transfers to address both high-end and low-end inequality comes from the literature on optimal income taxation ("OIT"), founded by James Mirrlees, who later won the Nobel Prize in Economics for his work.[326] Three main points regarding this literature are worth em-phasizing here. First, it exemplifies the Mapmaker's Dilemma by embracing a narrow framework where only individual consumption and leisure matter—making its analysis more tractable, but less complete and satisfying, not to mention highly vulnerable to chal-lenge on intuitive grounds.[327] Second, while in some ways OIT is quite radical in theory, in practice it has long been thought to support only a surprisingly limited policy response to high-end inequality.[328] Third, several leading economists have recently challenged those policy verdicts, and argued that OIT actually supports a far more aggressive response to inequality.[329] However, because this critique retains the OIT literature's narrow focus on just individual con-sumption, it fails to incorporate what might be the most significant objections to high-end inequality, other than perhaps indirectly and by proxy.[330]

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[325] *See generally* Daniel Shaviro, *The Economics of Tax Law*, 1, 3 (N.Y.U. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 14-04, 2014).

[326] *See generally* Mirrlees, *supra* note 65, at 175.

[327] *See id.* at 207.

[328] Peter A. Diamond, *Optimal Income Taxation: An Example with a U-Shaped Pattern of Optimal Marginal Tax Rates*, 88 AM. ECON. REV. 83, 83 (1998).

[329] *See infra* note 441.

[330] Shaviro, *Book Review*, *supra* note 1, at 681.

B. *Optimal Income Taxation's Narrow Framework, and Its Consequences*

Voltaire famously remarked that the Holy Roman Empire was neither holy, nor Roman, nor an empire.[331] OIT does somewhat better than this at living up to its own name. While generally not about "income" as we most commonly use this term, it is admittedly about "taxes."[332] As for "optimal," OIT involves constrained optimization, or being as optimal as one can, all things considered, when the first-best solution that it identifies is unavailable.[333] In this sense, OIT is actually about optimizing among suboptimal choices, given the true optimum's unavailability.[334] It thus addresses the effort to achieve "optimality" in one semantic sense of the word, but not in another.[335]

While the OIT literature has burgeoned over time in multiple directions, its starting point in Mirrlees' work goes something like this. Suppose that people derive utility just from market consumption and leisure, each of which has declining marginal utility. Since Mirrlees employs a one-period model in which there are no savings or wealth, other than fully formed human capital, market consumption is funded purely through earnings from work.[336] Indeed, market consumption and earnings are necessarily equivalent since there is no next period for which one might want to save.[337]

In Mirrlees' model, all of the people in a given society have identical utility functions, and only differ in ability or wage rate, which is defined as the amount that one can earn per unit of time or effort.[338] However, these inputs are not directly observable. Ability is innate and unalterable, but it too cannot directly be observed.[339] By contrast, earnings, which are the joint product of ability and time or

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[331] *See* BRUNI AGUILERA-BARCHET, A HISTORY OF WESTERN PUBLIC LAW: BETWEEN NATION AND STATE 133 n.30 (Springer Int'l Publ'g trans., 2015) (2011).

[332] *See* Mirrlees, *supra* note 65, at 175

[333] *See id.*

[334] *See id.* at 175–76 (articulating assumptions required for simplification of the optimal income tax analysis).

[335] *See id.*

[336] *See id.* at 175.

[337] *See id.*

[338] *See id.* at 176.

[339] *See id.* at 177.

effort, can be observed.[340] Each individual chooses the work level, and thus the earnings given her wage rate, that maximizes her utility from market consumption plus leisure.[341]

We have, therefore, an almost maximally restrictive model, so far as the things that actually might matter from the standpoint of personal welfare in a complex and unequal society are involved.[342] Nothing beyond own consumption in a vacuum, implicitly in a world with utilometers, makes its way into the model.[343] This turns out to have genuine payoffs in terms of offering non-obvious insights regarding crucial parameters for the design of a real-world tax system, but it also eventually proves to be a straitjacket.[344]

The model's analytic purpose is to inform a social planner, who not only can observe people's earnings,[345] but also can tax them to fund a uniform cash grant.[346] Mirrlees' social planner is a welfarist, or one for whom "social welfare is postulated to be an increasing function of individuals' well-being and to depend on no other factors."[347] He might either be a pure utilitarian, who weighs each individual's welfare equally, or either of two varieties of a weighted welfarist—that is, one who assigns greater social weight to the welfare or utility of worse off than of better-off individuals.[348] At the limit, a weighted welfarist might embrace what is sometimes called a "Rawlsian maximin," under which increasing the welfare of the worst-off individual in the society by just one utile would be worth any quantum of welfare loss whatsoever to better-off individuals.[349] This is called "Rawlsian" because it resembles John Rawls' famous "difference principle," under which inequality is permitted only if it

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[340]   *See id.* at 176–77.
[341]   *See id.* at 177.
[342]   *See id.*
[343]   *See id.*
[344]   Mankiw et al., *supra* note 31, at 150.
[345]   *Id.* at 150, 155–56.
[346]   *Id.* at 149, 156 ("A lump-sum tax accomplishes exactly what the social planner wants.").
[347]   KAPLOW & SHAVELL, *supra* note 324, at 24.
[348]   *See id.* at 24–25.
[349]   RAWLS, *supra* note 184, at 152–53.

works to the advantage of the worst-off;[350] however, it is not in fact identical since Rawls was not a welfarist.[351]

Even under the utilitarian approach to OIT-style social welfare—which values greater material equality due solely to its aggregate welfare effects given declining marginal utility, rather than as good in itself[352]—Mirrlees' set-up could support imposing a 100% earnings tax, with all of the proceeds being distributed pro rata, but for the fact that this would have disastrous effects on labor supply.[353] In light of that concern, one must trade off the utility gain from redistributing resources from high-earners to low-earners against the utility losses that result from the tax's inefficiently discouraging work.[354]

In general, the OIT literature finds that optimal tax rates, and the resulting size of the redistributive cash grant, are negatively correlated with people's labor supply elasticity.[355] The higher this is, the greater the efficiency costs of a given tax rate.[356] By contrast, optimal tax rates—and the resulting size of the grant—are positively correlated with the slope of declining marginal utility as the representative consumer's budget line rises.[357] Tax rates and grant levels are also positively correlated with the degree of dispersion in ability, since the payoff to redistribution is greater if people are further apart

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[350] *Id.* at 78.

[351] One key difference between Rawls and a welfarist was his normative focus on primary goods, rather than on utility. For example, civil and political rights, as primary goods, could not rightly be sacrificed even if this were to make people hedonically happier. *See generally* Richard J. Arneson, *Rawls Versus Utilitarianism in Light of Political Liberalism, in* THE IDEA OF POLITICAL LIBERALISM: ESSAYS ON RAWLS 231 (1st ed. 2000).

[352] Mirrlees, *supra* note 65, at 206.

[353] *Id.* at 177. Indeed, labor supply, and thus everyone's market consumption, would be zero under the model given that the only reason for working is to fund market consumption at the expense of leisure. *See id.* The nineteenth century utilitarian writer F. Y. Edgeworth noted that declining marginal utility supports expropriating all wealth and distributing it pro rata, if one ignores incentive issues and indeed all other considerations. Edgeworth, *supra* note 215, at 553.

[354] Mirrlees, *supra* note 65, at 207. The specific efficiency problem caused by the tax is that people treat their own tax liabilities as a cost, whereas socially taxes paid are treated as a transfer. *See id.*

[355] *See id.* at 208.

[356] *See id.* at 206.

[357] *See id.* at 205.

to begin with.[358] And they are positively correlated with the degree, if any, of pro-egalitarian weighting in one's social welfare function.[359]

Returning to the question of what the word "optimal" actually means here, the use of "income" (i.e., earnings) in Mirrlees' model[360] is concededly suboptimal, or more precisely part of a tradeoff, given its effect on work incentives.[361] The ideal solution would be to base the tax directly on ability, if only it could be observed.[362] And the only reason in the model for taxing earnings—other than that they can be observed—is that they are a signal or tag, indicating or generally correlating with high ability.[363] Worse still, once we alter the model to allow for more variation between individuals, so that two people with the same ability might choose different earnings, and two with the same earnings might have different abilities, earnings' value as a signal of ability is degraded somewhat.[364]

In principle, under the model, any other signal or tag that also is statistically correlated with ability might be just as good to use as earnings.[365] Indeed, best of all might be tags that combine positive correlation of ability with incapacity to be altered, thereby eliminating substitution responses if they were taxed.[366] Thus, suppose that blondes—but only undyed "real" blondes—have more fun, and that this is solely due to their having, on average, greater earning ability than brunettes, gingers, and all the rest.[367] Then we should tax true

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[358]   *See id.* at 206.

[359]   *See id.*

[360]   *Id.* at 175.

[361]   *Id.*

[362]   *See* Mankiw et al., *supra* note 31, at 150 (articulating that although "the planner can[not] observe [] ability . . . [t]he planner would like to tax those of high ability and give transfers to those of low ability . . . .").

[363]   *See* Mirrlees, *supra* note 65, at 175.

[364]   *See id.*

[365]   *See id.* at 207–208.

[366]   *See, e.g.*, N. Gregory Mankiw & Matthew Weinzierl, *The Optimal Taxation of Height: A Case Study of Utilitarian Income Redistribution,* 2 AM. ECON. J.: ECON. POL'Y 155, 156 (2010) (using a person's height to drive their inquiry, which "is supported by two legs: one theoretical and one empirical.").

[367]   *See, e.g., id.* at 156 (referencing empirical data regard height and earnings).

blondes, if we have some capacity to identify them, while subsidizing people who were born with less fortunate natural hues.[368] This might then be combined with the earnings tax, if it could not do the entire job by itself.[369] However, since the hair color-based tax would lessen inequality without discouraging labor supply, it would likely reduce the level of the optimal tax with respect to earnings.[370]

One well-known intuitive conundrum that emerges from thinking about Mirrlees' model is the so-called beachcomber problem.[371] An OIT approach suggests that, "if we cannot make any constructive use of taste differences, the beachcomber who could have been a Wall Street lawyer is ideally grouped (for purposes of measuring inequality) with the individual who actually *is* a Wall Street lawyer, not the one for whom beachcombing is the only option."[372] Might they both therefore properly be taxed the same, but for the difficulty of telling the two types of beachcombers apart? This concern has led to a subgenre in the tax policy literature evaluating whether OIT endorses, in principle, an unjust "slavery of the talented."[373]

While this question is unlikely to arise in practical policy terms any time soon, it does indeed indicate that bedrock OIT, by relying solely on declining marginal utility from own consumption as the reason for concern about inequality, risks backing itself into a corner.[374] Its reductiveness invites deploying against it any and all intuitions that are hostile to the model's logical implications, whereas any possible downside of inequality that might have intuitive force, other than from the impact of declining marginal utility, has been

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[368]   *See, e.g.*, *id.* (suggesting that "a person's tax liability should be a function of his height.").

[369]   *See, e.g.*, *id.*

[370]   *See id.*

[371]   *See* Kirk J. Stark, *Enslaving the Beachcomber: Some Thoughts on the Liberty Objections to Endowment Taxation* 50 (UCLA Sch. of Law, Law & Econ. Research Papers Series, Research Paper No. 05-6, 2005).

[372]   Daniel Shaviro, *Endowment and Inequality*, *in* TAX JUSTICE: THE ONGOING DEBATE 123, 132 (Joseph J. Thorndike & Dennis J. Ventry Jr. eds., 2002).

[373]   Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 311–12 (1981).

[374]   *See* Mankiw et al., *supra* note 31, at 150.

excluded from the analysis.[375] Given that the full range of our possible intuitions, including all that lie within the reach of a cleverly designed hypothetical, are unlikely to cohere into a single, systematic and internally consistent framework, this can have unfortunate effects on the inequality debate within economics, as OIT's post-Mirrlees intellectual history helps to show.[376]

In a widely noted recent illustration of OIT's tension with popular intuitions, Gregory Mankiw and Matthew Weinzierl note data suggesting that taller people, on average, earn more than shorter ones.[377] What is more, the statistical correlation probably suggests that height is positively correlated with greater earnings potential, rather than just reflecting height-associated differences in taste for market consumption as compared to leisure.[378] This, of course, is a real-world example of the "blondes have more fun" example, except that it actually appears to be true, and that height is more observable than natural hair color.[379] Mankiw and Weinzierl offer a specific OIT model in which a substantial height tax therefore is optimal.[380] Under the height tax that they describe, "a tall person with income of $50,000 pays about $4,500 more in taxes than a short person of the same income"—all in the service of mitigating inequality at a lower efficiency cost than if one only taxed earnings.[381]

A height tax clearly is administratively feasible, and OIT reasoning does indeed suggest that it would be a good thing.[382] After all, it would reduce inequality at a very low efficiency cost, thereby permitting society to achieve less inequality and/or less inefficiency

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[375] *See* Mirrlees, *supra* note 65, at 207.

[376] *See infra* note 441.

[377] *See* Mankiw & Weinzierl, *supra* note 366, at 162.

[378] *See id.* at 156.

[379] *See generally id.* In the words of a famous (or perhaps infamous) mid-1950s commercial for Clairol hair products, "Does she . . . or doesn't she? . . . Hair color so natural only her hairdresser knows for sure . . . ." *See generally* Robert McG. Thomas Jr., *Shirley Polykoff, 90, Ad Writer Whose Query Colored a Nation*, N.Y. TIMES (June 8, 1998) http://www.nytimes.com/1998/06/08/nyregion/shirley-polykoff-90-ad-writer-whose-query-colored-a-nation.html?_r=0.

[380] Mankiw & Weinzierl, *supra* note 366, at 157–61.

[381] *See id.* at 170.

[382] *See id.* at 156.

overall.[383] Yet, not only do we fail to observe any contemporary political prospect for adoption of a height tax—the fate of many good policy ideas—but also, this appears to reflect more than just standard political dysfunction, such as that arising from interest group power and public inattention.[384] Mankiw and Weinzierl note the "intuitive discomfort"[385] that many or most people would likely feel towards the height tax if it came to their attention as a policy option.

As Mankiw and Weinzierl concede, one reason for "intuitive discomfort"[386] with the height tax might simply be a prudential concern that policymakers would invidiously misuse discretion to base taxes on seemingly arbitrary factors that they could claim were correlated with ability.[387] However, the intuition might survive even if one had more confidence in the political system. It reflects the intuitive appeal of horizontal equity, a principle holding that people who are relevantly alike ought to be treated the same.[388] The height tax violates horizontal equity if one believes that height, unlike income, is irrelevant to how people should be treated by the tax system.[389] Yet, as Kaplow notes, a welfarist framework offers no direct reason for caring about horizontal equity.[390]

Mankiw argues that intuitive unease with the height tax reflects broader intuitions than just horizontal equity.[391] He discerns broader public support for what he calls "just deserts theory," which rests on the view that one "who contributes more to society deserves a higher income that reflects those greater contributions. Society permits him that higher income not just to incentivize him, as it does according

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[383]   *See id.* at 174–75.

[384]   *Id.* at 155.

[385]   *See id.* at 173.

[386]   *See id.*

[387]   *Id.* at 174.

[388]   *See id.*

[389]   *See id.* at 175 (considering the reconstitution of the theory of optimal taxation through a strictly Libertarian perspective).

[390]   Louis Kaplow, Commentary, *Tax Policy and Horizontal Equity*, *in* INEQUALITY AND TAX POLICY 75 (Kevin A. Hassett & R. Glenn Hubbard eds., 2001) ("When one carefully examines the concept of horizontal equity and what its pursuit entails, one discovers no normative basis for its importance, and in fact it conflicts with the basic foundations of welfare economics.").

[391]   *See* N. Gregory Mankiw, *Spreading the Wealth Around: Reflections Inspired by Joe the Plumber*, 36 E. Econ. J. 285, 293 (2010) [hereinafter Mankiw, *Spreading the Wealth Around*].

to utilitarian theory, but because that income is rightfully his."[392] This deserved reward ostensibly is exactly equal to what one would earn in a perfectly competitive market economy.[393] Hence, only departures from market efficiency, as in the case of a "CEO who pads the corporate board with his cronies,"[394] along with the need to fund public goods such as national defense,[395] can justify taxing the wealthy more than others insofar as one subscribes to the just deserts theory.[396]

At least in the United States, but perhaps more generally, Mankiw is surely correct that the just deserts theory has intuitive resonance.[397] People may commonly feel that they deserve everything that they earn—which is not to rule out their feeling that they also deserve more, or that others deserve less.[398] Just deserts theory, no less than horizontal equity, might be viewed as partly serving a prudential function, here in the sense of weighing against the adoption of policies that would mistakenly pay too little heed to incentives.[399] But its intuitive force may also reflect its compatibility with heartfelt assertion and argumentation in favor of one's own self-interest in keeping what one has.[400] There is no reason to assume that dispelling the prudential concern, in a given political setting, would fully dispel the intuition.[401]

One further point to keep in mind, however, is that not all intuitions need to point in the same direction. Thus, even if one finds the

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[392]   *Id.* at 295.

[393]   *See id.*

[394]   *See id.*

[395]   *See id.* at 296.

[396]   In connection with preserving market efficiency, Mankiw also supports Pigovian taxes and subsidies, such as pollution taxes. *Id.* He supports taxing the wealthy more than others for the cost of public goods on the ground that their benefit, in the sense of hypothetical willingness to pay for it, may be higher than that of poorer individuals. *Id.* at 295–96. As for transfer payments to the poor, they serve a public goods function insofar as people who would like to alleviate poverty also "would prefer to have someone else pick up the tab . . . . [Thus, g]overnment-run antipoverty programs solve the free-rider problem among the altruistic well-to-do." *Id.* at 296.

[397]   *See id.* at 295.

[398]   *See id.*

[399]   *See id.*

[400]   *See id.* at 296.

[401]   *See id.*

just deserts theory intuitively compelling, one may also have intuitions that, though not reflected in the OIT framework, lean in favor of addressing inequality.[402] Mankiw argues that "the government provides for the poor not simply because their marginal utility is high but because we have interdependent utility functions. Put differently, we would all like to alleviate poverty."[403] He offers no evidence against the proposition that this may reflect a broader egalitarian concern, extending not just downwards but also upwards.[404] Nor does he show that any such pro-egalitarian intuition, if it extends upwards as well as downwards, is limited to addressing departures from perfect market efficiency.[405]

C. *Optimal Income Taxation's Combination of Conceptual Radicalism with Apparent Support for Only Modestly Addressing High-End Inequality*

As Mankiw rightly discerns, OIT's focus purely on the marginal utility derived from consumption and leisure, as well as its consequent complete dismissal of property rights and entitlement to the fruits of one's labor—other than on prudential grounds relating to incentive effects—is startlingly radical.[406] It therefore stands at some distance, not just from various intuitions that its critics can identify, but also from other branches of contemporary economics, which sometimes may appear to emphasize incentives to the exclusion of everything else.[407] Neoliberalism and the "Washington consensus" of the 1990s, blamed by many for encouraging the adoption of pro-market policies that exacerbated inequality based on the view that it just did not matter or else would naturally take care of itself, are logically associated by many people with economists' rising political and intellectual influence in recent decades.[408]

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[402]   *See id.* at 296–97.

[403]   *Id.* at 296.

[404]   *See id.* at 296–97.

[405]   *See id.*

[406]   *See id.* at 296.

[407]   *See* Mankiw et al., *supra* note 31, at 148.

[408]   *See generally* Alfredo Saad-Filho, *Growth, Poverty and Inequality: From Washington Consensus to Inclusive Growth* 3-8 (Dep't Econ. Soc. Affairs, Working Paper No. 100, 2010).

OIT potentially leans the other way. Yet in practice, even insofar as it had any significant influence on either beliefs or political outcomes, this does not appear to have been its main effect, at least until recently.[409] Instead, if anything, OIT appears to have encouraged a trend in recent decades towards adopting lower and flatter tax rates that may have contributed to the rise of high-end inequality.[410]

This apparent political effect (if one believes it was at all relevant) reflects a key finding accepted for many decades in the OIT literature, although more recently challenged,[411] to the effect that tax rates should be relatively flat.[412] The reasoning that supports flattish rates is akin to, but less obvious than, that for generally supporting lower rates by reason of taxation's adverse incentive effects.[413]

Suppose that, in the absence of incentive effects, we would agree under OIT reasoning that income above the mean—or equivalently *all* income, if uniform cash grants were used to get to the same place—should face a 100% rate. Why might concern about incentive effects support, not just lower rates, but also relatively flat rates?

The reasoning goes as follows. Suppose we are asking what tax rate should apply at $30,000 of income, which is roughly the 50th percentile in the United States, as opposed to at $150,000, which is roughly the 95th percentile. If incentive effects have exactly the same import at both levels, then should the marginal rate at $150,000 not be much higher than at $30,000, given the assumption of declining marginal utility? While this argument might seem to make sense on its face, the problem is that incentive effects may not have the same overall import at both levels.

To illustrate the possible difference, suppose that people who are earning at least $40,000, placing them in the 60th percentile or above, are in most cases certain to keep right on earning more than $30,000. That is, suppose they are not considering—and do not face the risk of—having their earnings decline by that much. If we were to raise the marginal tax rate on earnings in the range below where

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[409]   *See* Mankiw et al., *supra* note 31, at 147–48.

[410]   *See id.* at 158.

[411]   *See generally* Joel Slemrod, *Optimal Taxation and Optimal Tax Systems*, 4 J. ECON. PERSP. 157 (1990) (arguing that, "in its current state optimal tax theory is incomplete as a guide to action . . . .").

[412]   *See id.* at 147.

[413]   *See id.* at 159.

they sit—say, by 10% for earnings between $25,000 to $30,000—this would raise $500[414] from each of those higher-income people, without having any effect on their marginal incentives.

It is not that they would not notice. After all, each of them would be $500 poorer, disregarding what the government did with the money. But their marginal incentives, regarding how much they would get to keep out of the last dollar they earned or the next one they might earn, would be wholly unaffected by this tax increase. Accordingly, a marginal rate increase for earnings in the range from $25,000 to $30,000 would be "free money" in efficiency terms—though not, of course in distributional terms—so far as all of these people were concerned.[415]

Now suppose instead that we are considering raising the marginal tax rate at around $150,000 of income. Just as in the case where we do it at around $30,000, (1) some people are wholly unaffected because their earnings are certain to be lower, (2) others have their marginal incentives unaffected because their earnings are certain to be higher, and (3) still others are right at the range where it affects their marginal incentives. Only because we are looking at the 90th percentile, rather than the 50th percentile, the members of Group 2 out of the above three, which provides "free money" in efficiency terms, is far smaller. Accordingly, the tax rate increase at $150,000 may likely provide far less "free money," relative to the marginal distortionary effects, than the tax rate increase at $30,000.

For convenience, since I will be referring to this point again, let us call it the "relative margins" argument. As described here, it pushes against marginal rate graduation, just as declining marginal utility pushes in favor of such graduation.[416] The exact effect on a given OIT analysis depends on, among other things, exactly how people are distributed across the range of actual and anticipated potential earnings.[417] However, the net result, in many OIT analyses,

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[414]   This is 10% of the $5,000 income range from $25,000 to $30,000.

[415]   Indeed, the income effect of inducing them to work more, so that they could replace the lost $500, would have a positive spillover effect insofar as it generated additional tax revenues that they ignored when deciding how much to work.

[416]   Lawrence Zelenak & Kemper Moreland, *Can the Graduated Income Tax Survive Optimal Tax Analysis?*, 53 TAX L. REV. 51, 55 (1999).

[417]   Mirrlees, *supra* note 65, at 186.

has been to suggest that the overall rate structure should be roughly—even if not precisely—flat.[418]

Lest this not already sound neoliberal enough, despite OIT's seemingly radical starting point, there is more. As Joel Slemrod notes, "raising the marginal tax at the [very] top [to] above zero [percent] distorts the labor supply decision of the highest earner [to his or her detriment] but raises no revenue."[419] Accordingly, it has long been an accepted consequence of OIT reasoning that, at least "precisely at the top," the marginal tax rate should actually be zero.[420] Indeed, this conclusion is logically irrefutable if one is a strict welfarist who views utility as depending solely on one's own consumption, and who assumes that high-end inequality does not yield any negative externalities.[421] After all, under these assumptions any positive rate at the very top of the distribution—assuming that the individual who sits there can fine-tune his work-versus-leisure tradeoff to the very last penny—would reduce the highest earner's utility without having any positive effect on anyone else, since zero revenue is raised.[422]

This is not, however, the only respect in which OIT and related contemporary literatures have at least arguably weighed against adopting policies that would involve aggressively addressing high-end inequality.[423] The optimal tax literature more generally—which, unlike OIT, actually does look at taxing income generally, rather than just earnings—has been widely viewed as suggesting that returns to saving generally should not be taxed.[424] Instead, for a while there appeared to be an emergent consensus not limited to more con-

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[418]   *See* Mankiw et al., *supra* note 31, at 158.

[419]   Slemrod, *supra* note 411, at 164.

[420]   *See id.*

[421]   *See id.*

[422]   *See id.* To be sure, as Slemrod notes, given the difficulty of precisely locating the very top of the potential income distribution, it is plausible that the result suggesting a zero rate at that point "should not be taken seriously as a practical guide to tax policy." *Id.*

[423]   *See id.* at 164.

[424]   *See generally* Joseph Bankman & David A. Weisbach, *Consumption Taxation Is Still Superior to Income Taxation* 4–6 (John M. Olin Program in Law & Econ., Working Paper No. 358, 2007).

servative or anti-anti-inequality writers, to the effect that only consumption should be taxed, as opposed to capital income or wealth or inheritance.[425]

The consumption taxes that this literature contemplated would impose progressive rates, set at the individual level, that were based on one's overall consumption for the year or some longer period.[426] Thus, they would not have the built-in, stand-alone regressivity of existing retail sales and value-added taxes, which cannot reasonably have their rates vary depending on who the purchaser is.[427] This design feature supports the possibility that a progressive consumption tax might actually, in practice, end up doing more to address high-end inequality than does the existing income tax, which of course has notorious gaps.[428] But the seemingly emerging quasi-consensus of ten years ago did indeed involve rejecting, at a minimum, the theoretical merits of tax instruments that, by addressing capital income or wealth or inheritance, would appear to be especially directed against high-end inequality.[429]

There were several rationales for this quasi-consensus. One was the notion that taxing savings—the source of capital income and wealth—arbitrarily disfavors people who happen to have a taste for consuming later in life, rather than earlier, or else for leaving money to their children.[430] In addition, economic models commonly assumed that "individuals make consistent rational decisions . . . across very long horizons," and that "rational intertemporal decision making not only holds for entire lifetimes, but extends across dynasties."[431] These assumptions yielded the conclusion that taxing savings in any way would yield very high levels of distortion over time

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[425]   *See* Daniel Shaviro, *Beyond the Pro-Consumption Tax Consensus*, 60 STAN. L. REV. 745, 745 (2007) [hereinafter Shaviro, *Beyond the Pro-Consumption Tax Consensus*].

[426]   *See* Daniel Shaviro, *Replacing the Income Tax with a Progressive Consumption Tax*, 103 TAX NOTES, Apr. 5, 2004, at 91, 92–93 (2004) [hereinafter Shaviro, *Replacing the Income Tax*].

[427]   *See id.* at 112.

[428]   *See id.*

[429]   *See, e.g.*, Shaviro, *Book Review*, *supra* note 1, at 686.

[430]   *See, e.g.*, Shaviro, *Beyond the Pro-Consumption Tax Consensus*, *supra* note 425, at 784–85.

[431]   Diamond & Saez, *supra* note 31, at 178. As I discuss above, Diamond and Saez state this common view in the economics literature in order to challenge it,

that seemed pointless if differences in ability were the central distributional concern, and if savings decisions were unrelated to addressing this.[432]

Suppose one is a welfarist who believes that high-end inequality truly is undesirable, but that its only relevant harm relates to declining marginal utility as one's budget line rises. Then the conclusion that, under a properly conducted OIT analysis, there is neither a good case for high marginal rates at the top, nor one for using any tax instruments that directly address savings, wealth, or inheritance, would, while perhaps disappointing, have to be accepted.[433] After all, one cannot always do all the things that one would like, at a cost that one considers worth bearing. So one who held these views might purse her lips sadly at the thought of all the lost utility from wealth-holding's being heavily skewed towards the top, and yet still conclude that relatively little could or should be done about it.

D. *OIT's Arguable Consistency with Significantly More Pro-Egalitarian Policy Outcomes*

It is fair to say that the above quasi-consensus, even insofar as it ever held true, no longer does. For example, in recent years, three prominent and indeed "A-list" economists—Nobelist Peter Diamond, possible future Nobelist Emmanuel Saez, and Thomas Piketty—have written a series of articles arguing two main points about the real-world implications of OIT—and optimal tax models more generally—for addressing high-end inequality.[434] The first is

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rather than because they are endorsing it. *See* Diamond & Saez, *supra* note 31. They note several leading articles that appear to support the common view. *See generally, e.g.*, Atkinson & Stiglitz, *supra* note 324; Christophe Chamley, *Optimal Taxation of Capital Income in General Equilibrium with Infinite Lives*, 54 ECONOMETRICA 607 (1986); Kenneth L. Judd, *Optimal Taxation and Spending in General Competitive Growth Models*, 71 J. PUB. ECON. 1 (1999).

[432] *See* Shaviro, *Beyond the Pro-Consumption Tax Consensus*, *supra* note 425, at 786–88.

[433] *See* Mirrlees, *supra* note 65, at 207–08.

[434] *See generally* Diamond & Saez, *supra* note 31, at 171–75, 177–83; Piketty & Saez, *Optimal Capital Taxation*, *supra* note 226; Thomas Piketty & Emmanuel Saez, *A Theory of Optimal Inheritance Taxation,* 81 ECONOMETRICA 1851 (2013) [hereinafter Piketty & Saez, *Optimal Inheritance Taxation*]; Thomas Piketty, Emmanuel Saez, & Stefanie Stantcheva, *Optimal Taxation of Top Labor Incomes: A Tale of Three Elasticities* 6 AM. ECON. J. 230 [hereinafter Piketty et al., *Optimal Taxation*]. There are several important earlier work by the same authors, pointing

that marginal tax rates should be steeply graduated, and indeed should probably exceed 70% at the top of the U.S. income distribution.[435] The second is that capital income and inheritances should be taxed, with optimal high-end tax rates in a well-designed estate tax possibly exceeding 50%.[436] Let us review the main issues in dispute between this work and prior literature in economics, before turning to some general conclusions about where it leaves the debate concerning high-end inequality.

1. IS THE "RELATIVE MARGINS" ARGUMENT STATISTICALLY CORRECT?

Peter Diamond and Emmanuel Saez dismiss the real world relevance of the "relative margins" argument for the flattish rates described above.[437] The issue is a purely quantitative one.[438] The view that the ratio between revenue potential and marginal economic distortion continues to worsen as one moves up the scale from middle to higher income is most likely to be correct if, within this range, people's potential incomes—those they would earn if not dissuaded by the incentive effects of the tax—follow a normal distribution, similar to that on the right-hand side of a Bell curve.[439] Diamond and Saez argue, however, that there is in fact an extreme concentration of earning ability at the very top.[440] This means that, even if tax rates at the top have marginal incentive effects on most of the income that, if earned, would be subject to them—in contrast to its

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towards similar conclusions. *See generally* Emmanuel Saez, *Using Elasticities to Derive Optimal Income Tax Rates*, 68 REV. ECON. STUD. 205 (2001); Diamond, *supra* note 328, at 83.

[435]   *See* Shaviro, *Book Review*, *supra* note 1, at 685.

[436]   *See* Piketty & Saez, *Optimal Inheritance Taxation*, *supra* note 434, at 1851.

[437]   Diamond & Saez, *supra* note 31, at 168–70.

[438]   *See id.*

[439]   *See id.*

[440]   *See id.* The statistical term for such a top-loaded distribution of income is a "Pareto distribution." *See id.*; Mankiw et al., *supra* note 31, at 160. This reflects its derivation from work by the famous Italian economist and philosopher Vilfredo Pareto that is wholly distinct from his more famous discussion of what are now called "Pareto-superior" changes, or those from which someone wins and no one loses. *See* PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 155–56 (2014) (discussing Pareto-superior "move[s]" in terms of transactions, stating that they "cannot occur unless they make at least one of the parties better off and none worse off.").

"free money" efficiency character on income at lower ranges—this is offset by the fact that the revenue stakes at the top are so huge.[441] One can actually now do a lot, through higher rates at the top, to fund government spending that benefits everyone else.[442] The generally accepted effect on an OIT model, if Diamond and Saez are right about the concentration of earning ability at the top, would be to push it back towards exhibiting the degree of rate graduation that would have followed from looking just at declining marginal utility.[443]

However, their empirical claim about the distribution of earning ability—unlike their analysis of how it would affect the application of the model—is disputed. Mankiw, Weinzierl, and Yagan note that others disagree about the degree to which potential earning power is concentrated at the top of the distribution.[444] Because the dispute concerns potential income—and even the distribution of actual income is somewhat disputed—they argue that, as a matter of sound econometrics, it is very hard to determine who is right and that "[e]stimating the distribution of ability is a task fraught with perils."[445]

2. Assumed Goal of Revenue Maximization with Respect to High-Income Taxpayers

Diamond and Saez assert that the sole "goal of the marginal rates on very high incomes is to get revenue in order to hold down taxes on lower earners."[446] This increases social welfare, all else equal, due to differences between the two groups in the marginal utility of own consumption.[447] Given the lack of any other asserted reasons for addressing high-end inequality, such as the view that it results in imposing negative externalities on the bottom 99.9%, Diamond and Saez believe that one should never deliberately impose a higher-

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[441] *See* Diamond, *supra* note 328, at 85.

[442] *See* Piketty & Saez, *Optimal Taxation*, *supra* note 434, at 21 n.34.

[443] *See* Diamond & Saez, *supra* note 31, at 171–73.

[444] *See* Mankiw et al., *supra* note 31, at 152.

[445] *See id.*

[446] Diamond & Saez, *supra* note 31, at 170.

[447] *See id.*

than-revenue-maximizing rate, or one that is on the wrong (i.e., right-hand) side of a properly drawn Laffer curve.[448]

In a standard OIT model, the marginal utility gain that is made possible by extracting tax revenues from the people at the very top must be traded off against the utility loss to those individuals themselves.[449] Diamond and Saez agree with this approach in principle, but argue that it is irrelevant in practice.[450] "Because the government values redistribution, the social marginal value of consumption for top-bracket tax filers is small relative to that of the average person in the economy, . . . and as a first approximation can be ignored."[451]

Note the carefully chosen words, "social marginal value," as distinct from "personal marginal value."[452] As is further made clear by the reference to the government's valuing redistribution, Diamond and Saez leave room for accepting their conclusion based at least in part on weighted welfarism.[453] However, they also assert that the adverse marginal utility effects at the top are so small that "as a first approximation [they] can be ignored" even if one is engaged in a purely utilitarian analysis, under which everyone's utility counts the same.[454] They support this claim by noting that, under "commonly used specification[s] in optimal tax models," the marginal utility of consumption for people at the average income level for the top 1%—which was $1.364 million in 2007—is so close to zero that one could pretty much treat it as such.[455]

Is this how people earning income at that level actually think about their own marginal utility of a dollar? One suspects not. Forbes journalist Rich Karlgaard notes that even people with a net

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[448]   *See id.* Piketty, Saez, and Stantcheva suggest a possible exception to this rule. *See* Piketty et al., *Optimal Taxation*, *supra* note 434. They present a model in which CEOs are able to bargain for wages that exceed their economic value to the shareholders. *See id.* at 258–66, 268–69. Under the model, raising the applicable tax rate reduces how high they push their wages. *See id.* The model offers support for tax rates at the top that are higher than those that would otherwise be optimal. *See id.*

[449]   *See* Diamond & Saez, *supra* note 31, at 168.

[450]   *See id.*

[451]   *Id.*

[452]   *See id.*

[453]   *See id.* at 169.

[454]   *See id.* at 168.

[455]   Diamond & Saez, *supra* note 31, at 168–69.

worth of, say, $100 million—which, at a 5% interest rate would yield almost four times the median income level that Diamond and Saez identify—often travel in circles that may cause this wealth level to feel subjectively as if it is not quite enough:

> $100 million is really a 'tweener number: You can be Richie Rich among your upper-middle-class friends or a hanger-on in the superrich crowd. Choose the latter and prepare to have your ego smashed. You'd surely have to give up the Aspen and Maui homes or replace the Citation X [all affordable, along with a New York home, at the $500 million level] with a fractional jet-ownership.[456]

Easy though it may be to mock this, or to assign such preferences a low social valuation, I see no reason to doubt its subjective reality in the minds of people who live in those rarefied circles.

There is also something paradoxical about assuming that the reason we can take money from the super-rich is that they do not actually care more than minimally. If it were true that they do not much care, one might expect that they would not object strongly, in the political process or otherwise, to proposed large increases in their marginal tax rates.[457] After all, even insofar as they like high pre-tax incomes in order to keep score—in a "keeping-up-with-the-Joneses" sense[458]—in their status competitions with each other, subjecting all of them to the same set of high tax rates would leave the rank order among them unchanged.[459] For example, my $50 million salary is greater than your $40 million salary, if we are using them to keep score, whether our tax rates are very low or very high.[460]

Diamond and Saez, following standard practice, define how much the super-rich would care about high taxes purely in terms of

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[456]   Rich Karlgaard, *What Is Wealth in America?*, FORBES MAG., Oct. 10, 2011, at 56, 56.

[457]   *See, e.g.*, notes 248–50.

[458]   *See* Thomas Aronsson & Olof Johansson-Stenman, *Keeping Up with the Joneses, the Smiths, and the Tanakas: On International Tax Coordination and Social Comparisons*, 131 J. PUB. ECON. 71, 72 (2015) (describing the idea of "keeping-up-with-the-Joneses" as "prefer[ing] to consume more (and hence use less leisure) when individuals in the leader country consume more. . . .").

[459]   *See* Karlgaard, *supra* note 456, at 56.

[460]   *See id.*

the marginal utility of lost consumption.[461] Yet, given that marginal utility cannot be observed—and that full-blown utiles literally do not exist—it is hard to dismiss outright other evidence that they do care—and indeed, as we saw above, in some cases care enough to start throwing around Hitler analogies.[462]

A natural explanation for the apparent disconnect between how little the super-rich arguably "should" care, and how much they apparently do care, might focus on the issue of position-related utility as between them and everyone else who sits below. Yet this explanation, whatever its overall effect on the case for high tax rates at the top, clearly undermines the view that we can get at what really matters to people by focusing exclusively on utility from own consumption.[463]

Even if we look just at utility from own consumption, it is hard to be as confident as Diamond and Saez regarding where a utilitarian analysis would actually lead. For example, even if a poor person thinks that a million dollars would be an amazing fortune, a person whose income is at that level may experience having to forgo things that he or she wants but feels unable to afford—say, business class seating on all non-reimbursed transcontinental flights.[464] The cost of satisfying one's subjective wants may rise with one's wallet.[465]

In addition, as Mankiw, Weinzierl, and Yagan point out, a number of studies suggest that the case for very high rates at the top tends to be undermined by "interpersonal heterogeneity along dimensions other than ability, such as preferences for consumption and leisure."[466] Insofar as people in the top 0.1% generally like market consumption more, and leisure less, than the people who would benefit financially if these individuals paid more taxes, the analysis of relative utility may change significantly.[467]

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[461] *See* Diamond & Saez, *supra* note 31, at 168.

[462] *See supra* notes 241, 245–46 and accompanying text.

[463] *See, e.g.*, Kaplow, *supra* note 390, at 161.

[464] *See* Berman, *supra* note 286.

[465] *See* Karlgaard, *supra* note 456.

[466] Mankiw et al., *supra* note 31, at 154.

[467] Diamond and Saez address interpersonal heterogeneity in several instances where it favors their views, but not in this instance where it might go the other way. *See* Diamond & Saez, *supra* note 31.

3. SEVENTY PERCENT (OR SO) TOP RATE AS REVENUE-MAXIMIZING

Since the only purpose served by high tax rates at the top, according to Diamond and Saez, is to maximize the revenue raised for everyone else's benefit,[468] the recommended 70% rate would decline significantly if it turned out to be well past the peak of the Laffer curve.[469] By contrast, while tax elasticity at the top should matter under any sensible analysis, this implication is not so clear if one also is seeking to address negative externalities from high-end wealth concentration.[470] Consider pollution taxes, which unambiguously respond to externalities.[471] They may properly be set above the revenue-maximizing level if that is what the harm measure indicates, given the relevance of reducing the harm caused by polluters.[472]

Diamond and Saez argue that there is a strong case for so high a revenue-maximizing rate as 70%,[473] even though this may significantly exceed the peak of the Laffer curve under present law.[474] Diamond and Saez note the ample opportunities that wealthy taxpayers now have to engage in legal tax avoidance or even illegal evasion.[475] Substantial base-broadening in the income tax, plus tougher anti-tax planning rules and better enforcement could change things so that labor supply—rather than tax planning—was the chief available margin for significantly reducing one's tax liability.[476] The best current evidence concerning labor supply elasticity suggests that it is actually rather low, and thus plausibly in line with their 70% estimate of the revenue peak.[477]

They concede that this evidence mainly pertains to short-term labor supply responses, as in the case where Congress changes the

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[468] *See id.* at 170.

[469] *See* Piketty & Saez, *Optimal Capital Taxation*, *supra* note 226, at 19–22.

[470] *See* Diamond & Saez, *supra* note 31, at 173.

[471] *See Legal Theory Lexicon 060*, *supra* note 81.

[472] *See id.*

[473] *See* Diamond & Saez, *supra* note 31, at 171–72.

[474] *See* Piketty & Saez, *Optimal Capital Taxation*, *supra* note 226, at 19–22.

[475] *See* Diamond & Saez, *supra* note 31, at 172–73.

[476] *See id.* at 173.

[477] *See id.* at 171–75.

tax rate applying to millions of people who are already in mid-career, and thus on relatively fixed paths.[478] Even if I do not, say, choose to start earning much less in my ongoing career as a CEO, brain surgeon, or law firm partner, if the tax rate goes up a bit, this does little to tell us about tax rates' impact over a long time frame on "long-run responses through education and career choices . . . .[We] unfortunately have little compelling empirical evidence to assess whether taxes affect earnings through those long-run channels."[479]

Fair-minded though this concession is, it helps to show how little we still know about the OIT model's actual long-term implications for addressing high-end inequality. Uncertainty about the long-term labor supply effects of high tax rates therefore lends support to the conclusion by Mankiw, Weinzierl, and Yagan that, even just within the narrow contours of OIT, much still remains "open to debate."[480]

4. THE CASE FOR TAXING CAPITAL INCOME IN GENERAL, AND INHERITANCE IN PARTICULAR

Diamond and Saez stand on considerably firmer ground in challenging the quasi-consensus in prior optimal tax literature to the effect that neither capital income nor wealth nor inheritances should be taxed.[481] As they mention, there is a great deal of empirical evidence contradicting the standard claim that "individuals make consistent rational decisions . . . across very long horizons."[482] They also note that high savings might be positively correlated with ability,[483] which might make it useful as a tag, possibly without arousing the same intuitive objections as a height tax.[484] Moreover, there is

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[478]   *See id.* at 175.

[479]   *Id.* at 175.

[480]   Mankiw et al., *supra* note 31, at 154.

[481]   *See* Diamond & Saez, *supra* note 31, at 166–67.

[482]   *See id.* at 178.

[483]   *See id.* at 180.

[484]   *See id.* at 181. Diamond and Saez also make a mistaken argument for taxing capital income based on the concern that "it is often difficult to distinguish between capital and labor incomes." Diamond & Saez, *supra* note 31, at 181. While this is true under present law, they fail to understand that leading progressive consumption tax models often do *not* require such distinguishing. Suppose, for example, that one converts a comprehensive personal income tax into a progressive consumption tax by simply permitting all capital outlays to be expensed, rather than being capitalized and recovered more slowly. In economic terms, this

no dispute in the literature that some bequest motives, such as leaving behind "accidental bequests" by reason of precautionary saving that one turned out not to need, provides efficiency grounds for taxing bequests,[485] even wholly setting aside any possible concern about persistent high-end wealth inequality and/or the rise of a rentier society.[486]

E. *Placing OIT in a Broader Context*

Diamond and Saez are to be commended for enriching the economics literature by convincingly showing that OIT *might* support doing far more to address high-end inequality than had previously been widely assumed.[487] From a broader perspective, however, their contribution offers a classic example of the Mapmaker's Dilemma at work.[488] On the one hand, it made perfect sense for them to stay within the literature's standard parameters, where their expertise lies, rather than trying to identify everything under the sun that might be relevant—or even crucial—to assessing what policymakers should do with respect to high-end inequality.[489] Perhaps, in follow-up work, they or someone else could take a further stab at incorporating broader considerations into the analysis. This, however, would be a separate project, and the one they pursued in their 2011 article has substantial intellectual value even standing alone.

On the other hand, if we as a society are trying to decide how to respond to rising high-end inequality, it would be foolish to feel bound by their self-imposed restrictions.[490] A model in which *only* the marginal utility derived by the super-rich and others from own

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would be a consumption tax, yet it does not require distinguishing between capital income and labor income. *See, e.g.*, Shaviro, *Replacing the Income Tax*, *supra* note 426, at 93–94.

485   *See* Diamond & Saez, *supra* note 31, at 179.

486   Piketty and Saez use an optimal tax model to support estate tax rates that might exceed 60% at the top. *See generally* Piketty & Saez, *Optimal Inheritance Taxation*, *supra* note 434. They note that the optimal rate might be higher if the social welfare function reflects meritocratic preferences, and thus assigns higher weight to the welfare of people who receive little by way of inheritance. *See id.*

487   *See* Diamond & Saez, *supra* note 31, at 184.

488   *See* Williamson, *supra* note 32.

489   *See* Diamond & Saez, *supra* note 31, at 166–67.

490   *See id.* at 166 (describing the general limitations of a model as "a limited picture of reality.").

consumption is deemed relevant, and in which position-related util-
ity is disregarded—even though, without it, the intensity of today's
political wars over taxing the rich would make no sense—cannot
reasonably be viewed as offering the final word.[491] One needs to
supplement it with other inputs, both empirical and normative.[492]

The idea that own consumption is all that really matters in as-
sessing high-end inequality would be a lot more compelling if each
individual lived on a separate planet, consuming available resources
but neither seeing nor interacting socially with anyone else. In that
type of a science fiction scenario, a benevolent social planner might
have little to think about, beyond the question of where the resources
that she could fit onto her spaceship—assuming it could hold cargo,
but not passengers—would create the greatest amount of happiness.
But for human beings living in densely packed and heterogeneous
societies on the planet Earth, this is an amazingly blinkered, reduc-
tive, and incomplete way of defining the relevant considerations.

Suppose that adding position-related utility to the analysis would
indeed support doing more to reduce high-end inequality than seems
appropriate in the separate-planets scenario, where people only care
about utility from own consumption. Then favoring weighted wel-
farism, in lieu of utilitarianism, might be viewed as a very rough
proxy for all that has been left out.[493] After all, if one lucked out in
deciding just how much extra weighting at the bottom to apply, one
might succeed in approximating the end point that one would have

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[491]   *See id.*

[492]   *See id.*

[493]   Leaving any such considerations aside, there is something paradoxical
about assigning extra weight, within a welfarist social welfare function, to utility
enjoyed by the worst-off individuals. In effect, this treats utility as if it could itself
be subject to declining marginal utility. Rawls famously argued that applying in-
finite risk aversion from behind the veil might support giving absolute priority to
the relevant interests of the worst-off individual. *See* RAWLS, *supra* note 184;
LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS 372 (2008).
But a rational choice framework would more logically support maximizing ex-
pected utility from behind the veil, and applying risk aversion only as an applica-
tion of this metric for items that have declining marginal utility. *See generally*
KAPLOW, *supra* note 493, at 370–72; Harsanyi, *supra* note 223; John C. Harsanyi,
*Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Util-
ity*, 63 J. POL. ECON. 309 (1955).

reached by counting everything that matters, without differential weighting.[494]

Yet, this cannot fully compensate for directly taking proper account of everything that matters. For example, whereas weighted welfarism, in a framework based purely on utility from own consumption, would never counsel adopting high-end tax rates that lie above the peak of the Laffer curve,[495] high negative externalities might get one there.[496] In addition, using differential weighting, in lieu of directly considering everything that matters, tends to focus analysis and debate on the wrong variable. If we care about position-related utility, surely we ought to think about it directly, rather than employing an arbitrary weighting convention instead.

OIT's incompleteness in addressing everything that matters about high-end inequality makes clear the need for other inputs to one's analysis.[497]Some of these issues may lie within the reach of hard social science literatures outside public economics—for example, in political science studies regarding policymakers' responsiveness to the interests and concerns of the bottom 99.9%.[498] Yet we also must consider "soft" information that sheds further light on how societies with greater or lesser degrees of high-end inequality might feel on the ground—as well as on one's own underlying moral sentiments.

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[494] *See, e.g.*, Piketty & Saez, *Optimal Taxation*, *supra* note 434, at 70.

[495] However, in a standard OIT framework where one has incomplete information about potential revenue yields, one might adopt high-end tax rates that have a chance of being too high. *See* Diamond & Saez, *supra* note 31, at 182–83.

[496] *See generally* Griffith, *supra* note 193, at 1387–88.

[497] *See* Diamond & Saez, *supra* note 31, at 166.

[498] *See, e.g.*, Fennell & McAdams, *supra* note 324, at 1085 n.101.