

connection between the defendant's involvement in a particular crime and the claim that the defendant would anyway have committed a crime of that type. The claim that certain government activities are in themselves improper should, I believe, be addressed as a separate issue — perhaps as a violation of due process.

However it is addressed, the issue of abhorrent government conduct is problematic. At what point does government conduct go beyond the pale? Does it vary with the kind of offense? Some objectivists argue that it becomes unacceptable when it is of a kind that would be sufficient to induce the average, normally law-abiding citizen to commit a crime. But this may be to pitch the limits too low — especially if it can be argued that more can be demanded of those in positions of great trust and responsibility than can be expected of the average, law-abiding citizen. A reasonable flexibility may be needed, not only to take account of the differing expectations we have of people, but also to avoid a situation in which the only criminals caught are inexperienced.

Gerald Dworkin offers a plausible test for determining when the government has overreached itself. The criminal law, he argues, is not a pricing system, which is indifferent to the choices made by citizens — whether they obey or choose instead to disobey and pay the penalty. It is meant to be obeyed. Government goes too

far when its actions have the effect of saying not "Do not do X," but "Do x." When it does the latter, it not only violates the *telos* of the criminal law, but also deals unfairly with citizens. It becomes a tester of virtue rather than a detector of crime.

In any case, my point is not to deny that in entrapment the government may be left with the stain of crime on its hands, but to deny that this is what makes entrapment a proper defense. What makes it a proper defense is its evidential bankruptcy. Entrapment is an inappropriate investigative technique, not only or primarily because it traps the innocent or manifests substandard behavior on the part of governmental agents, but because it leaves us without adequate grounds for establishing the guilt of those whom it succeeds in ensnaring. Those who are held guilty of crimes ought to possess the relevant dispositions, and they ought to have been placed to give those dispositions effect. Entrapment removes our basis for knowing whether both these conditions obtained.

— John Kleinig

John Kleinig is a professor at the John Jay College of Criminal Justice. This article was condensed and adapted from his lecture materials on police ethics. His reflections on entrapment were greatly stimulated by Andrew Altman and Steven Lee, "Legal Entrapment," *Philosophy & Public Affairs*, vol. 12 (1983).

Fairness in Taxation

When Ben Franklin said that the only two certainties are death and taxes, he could not have been speaking of income taxes, which were all but unheard of in his day. A few city states in Italy had experimented with an income tax in medieval times, and Britain adopted a temporary income tax during the Napoleonic wars. But the income tax did not come into widespread use until the mid to late nineteenth century. Great Britain adopted an income tax in 1842, Japan in 1887, and Germany in 1891.

In 1894, the Congress established an income tax in the United States, only to have the Supreme Court overturn it a year later, on the grounds that Article I of the Constitution prohibits any taxation that is not linked directly to political representation. The Constitution states: "Representatives and direct taxes shall be apportioned among the several states according to their respective numbers." A "head" tax or a poll tax would be acceptable on this criterion; a tax levied on income would not. If people have an equal vote, they should

pay the same amount in taxes, or so the high court said.

The Sixteenth Amendment to the Constitution, ratified in 1913, cleared the way for the income tax. That Amendment reads: "The congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Debate about income tax policy usually centers on the question of fairness, that is, who ought to pay how much and why. Simple as this question may seem, attempts to translate fairness into practical policy raise a host of further questions. What should be taxed? earned income? total income? wealth? consumption? If we tax income, how much and what kinds of income should be exempt from taxation? We might want to exclude at least as much income as people require to meet their subsistence needs, or, perhaps, to maintain a "decent" standard of living. Present law also excludes from taxes income directed toward certain socially

legitimate or desirable ends, such as medical expenses, mortgage interest, and contributions to charities. The question that evokes the most controversy, however, concerns fairness in the way that taxation is distributed across income brackets. How much of the burden should fall upon the poor and on the middle class; how much of the burden should we expect the rich to bear?

The Principle of Equal Sacrifice

As income taxation became increasingly widespread, a lively debate developed among economists as to the form that the tax schedule should take. One of the more peculiar proposals came from the eminent economist Gustav Cassel, who took the view that subsistence needs, and hence the personal exemption, should increase with income. Cassel wrote: "It is simply impossible for a professional man to live as cheaply as a common miner. He has outlays for books, paper and correspondence, and if he has a family he cannot live and work in only one room. He cannot, in one word, discharge his function in society, and, economically speaking, continue to exist as the same person, if he is reduced to a standard that can be considered as a fair minimum for a common labourer." Accordingly, tax policy should take into account the larger "subsistence" needs of the well-to-do.

A more sensible criterion was put forward by John Stuart Mill in his *Principles of Political Economy* (1848). Mill argued that a fixed amount should be exempted from taxation to cover subsistence needs, and on the remaining income, the tax should be distributed so that it "bears as nearly as possible with the same pressure upon all." But this does not mean that everyone should pay the same amount in taxes. A person with an annual taxable income of \$15,000 would probably find a tax of \$1,000 quite onerous, while a person with an income of \$500,000 would scarcely feel it at all. In assessing the equity of a tax distribution, it is the loss of well-being that matters, not the sum of money itself. Mill stated the principle as follows: "Equality of taxation, as a maxim of politics, means equality of sacrifice. It means apportioning the contribution of each person toward the expenses of government so that he shall feel neither more nor less inconvenience from his share of the payment than every other person experiences from his. This standard, like other standards of perfection, cannot be completely realized; but the first object in any practical discussion should be to know what perfection is."

The general implication of Mill's principle is that a rich person should pay more in taxes than a poor person. But precisely how much more? To translate equal sacrifice into a specific tax distribution requires making assumptions of a psychological nature, such as how the utility, or well-being, derived from each additional dollar of income diminishes as the level of income rises. In recent years, economists and psychologists have attempted to estimate the utility that the "typical" individual derives from additional income by observing the choices that people make under uncertainty,

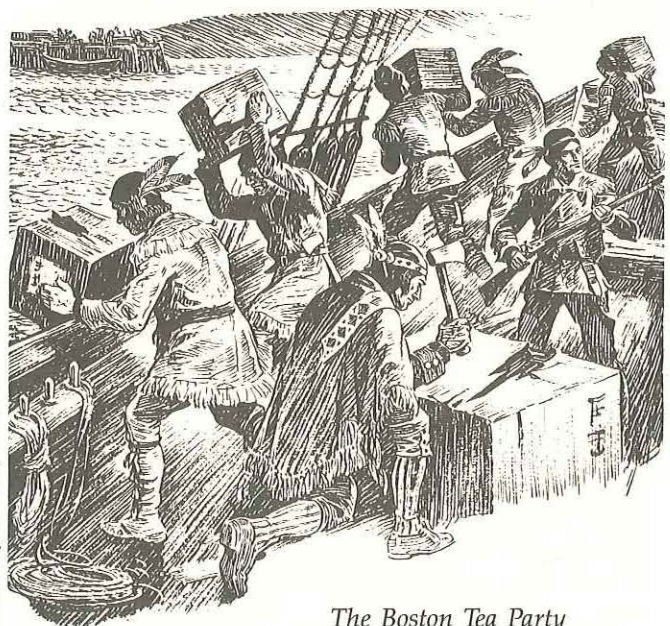
including their investment behavior. The details are too technical to go into here, but the general finding from these empirical studies is that the marginal utility of income decreases at higher income levels, and it does so at a fairly rapid rate.

In principle, of course, equal sacrifice should take into account the differences between people in their utility for income. But this seems impossible in practice, and even if it were possible, it would require an invasion of individual privacy that seems unwarranted. A more practicable approach is to estimate the utility of an "average" person, and to treat everyone as if he were average. Accordingly, everyone is judged by the same standard, a kind of "social" utility of income.

Three Interpretations of "Equal Sacrifice"

Mill made a quite simple assumption along these lines, namely, that each 1 percent decrease in disposable income implies roughly the same loss in utility at every income level. Accordingly, the equal sacrifice principle implies that after deducting a fixed amount for subsistence, the tax on the remaining income should be a fixed percentage. This is known as a "linear tax."

In 1889, the Dutch economist A. J. Cohen Stuart gave the idea of equal sacrifice a slightly different twist. He argued that the tax should be distributed so that everyone gives up the same percentage of his utility, that is, the happiness of everyone should be reduced in the same proportion. If we assume that a rich man has more total utility than a poor one, the former would have to sacrifice more utility in absolute terms to make his sacrifice comparable to that of the latter. Not surprisingly, the result is a more progressive tax than Mill's linear tax. If utility decreases by a fixed amount for each



The Boston Tea Party

Drawing by W. N. Wilson, from *Free Men Must Stand*,
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1 percent paid in tax (as Mill assumed), then Cohen Stuart's scheme implies a steeply progressive tax in which the marginal tax rate approaches 100 percent for the rich.

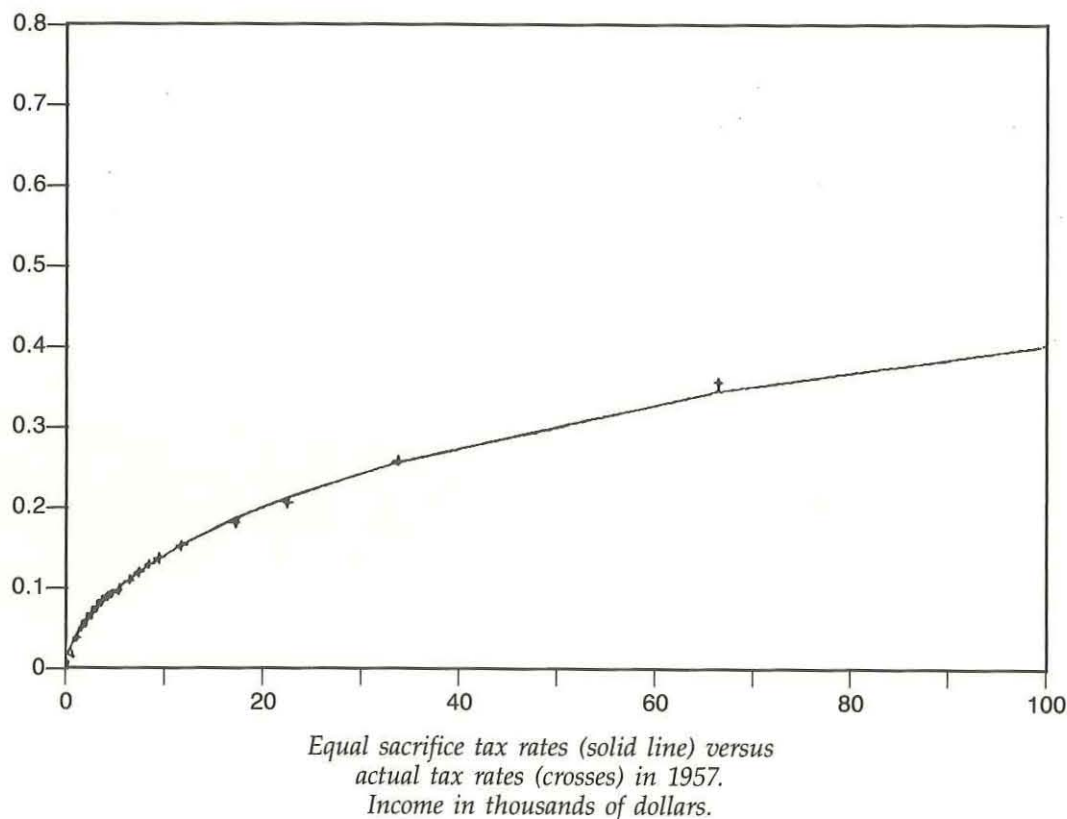
An even more radical interpretation of the equal sacrifice prescription was entertained, at least briefly, by the economist F. Y. Edgeworth. In 1897, Edgeworth, who believed that total utility should be maximized, argued that the tax burden should be distributed so as to minimize *aggregate* sacrifice. In other words, the total loss of utility due to taxation, summed over the entire taxpaying population, should be as small as possible. Assuming that the marginal utility of income decreases the larger one's income is, it follows that the next dollar of tax revenue should always come from the person with the most money. Accordingly, everyone with income above a certain threshold would be taxed at a marginal rate of 100 percent and everyone below the threshold would be subsidized. In the end, everyone would be left on a level field with exactly the same after-tax income. However, this visionary proposal runs afoul of another empirical observation, that people need the incentive of extra income to work harder. Taxing the wealthy at 100 percent to subsidize the income of the poor might result in a perfectly equitable society, but a remarkably poor one. The marginal gains to the utility of the poor of each added dollar might be greater than the loss per dollar to the rich, but this net gain might be more than offset by the total loss of wealth resulting from the loss of incentive to produce more.

Progressivity in Practice

Whether because of, or in spite of, these arguments, the settled policy of the United States, and indeed of most industrial countries, is to tax income progressively, but not so progressively as to choke off all incentive for people to earn more. It must be recognized, of course, that progressivity is not nearly as great as the published tax schedule would suggest. The true measure of progressivity is the effective tax rate, that is, tax paid as a percentage of full personal income (not allowing any exclusions or deductions). According to this measure, the U.S. federal income tax is only mildly progressive and has been getting less so over the past decade. And when we factor in other levies, such as sales taxes, property taxes, and corporate taxes passed on to individuals, the effective tax rate is about constant across income classes.

It remains true, however, that the federal individual income tax is mildly progressive. And in the past, even up through the 1960s, it was quite markedly progressive. Why do we continue to believe that some progressivity is appropriate? Is it possible that the progressive distribution of the federal tax burden is motivated by our feeling that the rich should pay more because they feel the bite less?

To examine this possibility, we analyzed the distribution of taxes by income class from the 1950s to the present. The data that we used were taxes paid as a percentage of Adjusted Gross Income, which is the closest measure that we have of the true effective tax



rate. We then asked how closely this distribution conforms with the idea that people sacrifice about the same amount of utility at each level of income. That is, we asked how closely we could fit the observed distribution of tax rates to the tax rates that would be implied by Mill's equal sacrifice model, assuming that marginal utility decreases in accordance with empirical estimates of "typical" utility functions.

We found that the actual distribution of tax rates in the 1950s, 60s, and 70s conformed very closely to an equal sacrifice distribution except at the upper and lower extremes of the income distribution (see the accompanying graph). The Tax Reform Act of 1986 represents a major departure from this pattern, however. The number of distinct tax brackets has been reduced to just three (actually four: 15 percent, 28 percent, 33 percent, then 28 percent). This small number of brackets, with an unsightly bulge for the upper-middle class, results in a choppy pattern of effective tax rates that does not fit the equal sacrifice model nearly as well as a gradually rising series of brackets.

Although we cannot draw definitive conclusions from such a limited set of data, it appears that equal sacrifice provides a reasonably accurate picture of how the U.S. federal tax burden has been distributed among

middle- and upper-middle-income taxpayers in much of the postwar period. A similar pattern has prevailed in other industrialized countries, including, for example, Italy, West Germany, and Japan.

Of course, obtaining a reasonably good fit does not prove causation. Nor do we have any direct evidence that legislators actually invoked equal sacrifice arguments in proposing the rate structures that we observe. It is conceivable, however, that intuitive notions of "relative sacrifice" and "ability to pay" are a factor in the way that legislators evaluate the fairness of tax proposals. And it does not seem too far-fetched to suppose that the aggregate of these intuitions, as expressed in a majority vote, might come close to an equal sacrifice tax. We suggest, then, that equal sacrifice may play a significant role in the way that people think about taxation, and that it needs to be taken more seriously as the "maxim of politics" that Mill claimed it to be.

— Peyton Young

Peyton Young is a professor of public policy in the school of public affairs at the University of Maryland and currently a guest scholar at the Brookings Institution. This article was adapted and condensed from "Equal Sacrifice and Progressive Taxation," which is forthcoming in the *American Economic Review*. The author is indebted to Joseph A. Pechman for helpful comments.

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