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Enslaving the Beachcomber:
Some Thoughts on the Liberty Objections to Endowment Taxation

Kirk J. Stark

I. Introduction

In the 1960s TV series, *The Beachcomber*, executive John Lackland seemed to have it all—money, security, social status—but as the show's premise explained, Lackland "was unable to enjoy his hectic jetset life. Feeling hemmed in by city life and the stress of his job, John threw it all away to move to the tiny South Pacific island of Amura, where he lived the life of a beachcomber, and became involved in the lives and problems of others."[1]

The Beachcomber series lasted only one season, but Lackland and his ilk have been the subject of ongoing debates among philosophers and tax theorists regarding so-called "endowment" taxation, i.e., taxing people on what they *could* earn rather than what they actually do earn. Under an endowment tax scheme, Lackland would be taxed the same as a beachcomber as he was during his years as a corporate executive. Since Lackland had the opportunity to earn millions as an executive but turned it down, the argument goes, the beachcomber lifestyle must be worth at least that much to him.

The case for taxing endowment is rooted in the principle that those who are better off should bear greater tax burdens. The question is, which tax base offers the best metric for determining who is "better off"? Most commentators dismiss head taxes (viz., per capita charges) as inadequately discriminating, reasoning that a multimillionaire should pay more in taxes than a homeless person. At the same time, however, tax bases such as income, wealth, or consumption can be unreliable indicators of well-being because those figures may simply reflect different tastes for labor versus leisure, saving versus spending, etc. …[2] Under an income tax, for

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1. *The Beachcomber* (1962), online: The Beachcomber Episode Guide, Version 2.0 (October 2004) http://www.geocities.com/TelevisionCity/Stage/2950/Adventure/Beachcomber.htm.

2. Put differently, these taxes are not "choice-sensitive." See Dan Shaviro, "Endowment and Inequality" in Joseph J. Thorndike & Dennis J. Ventry Jr., eds., *Tax Justice: The Ongoing Debate* (Washington, D.C.: Urban Institute Press, 2002) at 141 (describing the liberal egalitarian "choices thesis" and quoting Liam Murphy, "Liberty, Equality, Well-Being: Rakowski on Wealth Transfer Taxation" (1996) 51 Tax L. Rev. 473 at 474: "the distinction between wealth or income people have acquired through their own 'effort or voluntary choices' and wealth or income obtained 'purely by chance' is of foundational importance to distributive justice."). See also Seana Shiffrin, "Egalitarianism, Choice-Sensitivity and Accommodation" in P. Pettit et al., eds., *Reason and Value: Themes from the Work of Joseph Raz* (Oxford: Oxford University Press, 2004) ("[T]here is a surprising degree of consensus that a fair distribution of resources would require individuals to internalize the costs of their voluntary choices.").

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

Perhaps not surprisingly, the idea of taxing endowment has not gained widespread support. Practical questions abound. How exactly should we go about measuring endowment? Would the dollar value of one's endowment be adjusted from year to year to reflect changes in overall social and market conditions? Wouldn't people conceal their talents to minimize their tax bills? And what about liquidity? Where is John Lackland going to get the money to pay the tax since he's out searching for tribal masks instead of bringing in a weekly paycheck?[3]

But the more common objection to endowment taxation focuses not on these practical issues but rather on the concern that taxing people according to their potential would constitute an unacceptable intrusion on basic human liberties. In effect, the argument goes, taxing people on their earnings capacity would force them into a type of slavery—in order to pay the tax, people would have to accept jobs commensurate with their identified levels of endowment. The most succinct formulation of this argument comes from no less a figure than the late John Rawls, who argued that an endowment tax "would force the more able into those occupations in which earnings were high enough for them to pay off the tax in the required period of time; it would interfere with their liberty to conduct their life within the scope of the principles of justice.…"[4]

Rawls's depiction of endowment taxes as "forcing" the well-endowed into high-paying labor may have a familiar ring to students of taxation and distributive justice. Writing in 1974, libertarian theorist Robert Nozick argued that the taxation of earnings is "on a par with forced labor" because it has the effect of "forcing the person to work *n* hours for another's purpose."[5] The implication of Nozick's argument is clear: unless one is willing to endorse slavery, one should reject the taxation of earnings. The only legitimate taxes in Nozick's framework are those needed to support "a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on…."[6]

Contemporary liberal egalitarians have been reluctant to equate Rawls's argument against endowment taxes with Nozick's argument against the taxation of earnings. In their recent book, *The Myth of Ownership*, Liam Murphy and Thomas Nagel hint at the possibility that "the difference can be only one of degree," and not of kind; yet they go on to argue that endowment taxes would involve "an *extreme* interference with autonomy" while the taxation of earnings presumably

3. Episode 2 (February 27, 1962) of *The Beachcomber, The Shark Affair*, *supra* note 1.
4. John Rawls, *Justice as Fairness* (Cambridge, MA: Harvard University Press, 2001) at 158.
5. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 169.
6. *Ibid.* at ix.

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involves only a minimal interference.[7] Rawls himself rejected the parallel between his and Nozick's arguments. While opposing endowment taxes because of liberty concerns, Rawls nonetheless endorsed conventional market-based taxes, concluding that "the better endowed may improve their situations [e.g., exchange their labor for wages] only on terms that help others."[8]

My primary aim in this article is to question whether Rawls and other opponents of endowment taxation can distinguish their liberty objections from Nozick's claim that taxation of earnings is on a par with forced labor. In pursuing this line of inquiry, I also register some skepticism regarding the Murphy/Nagel conclusion that endowment taxes and wage taxes involve different degrees of interference with personal autonomy. My principal claim is that unless one assigns greater moral value to non-market activities than to market activities (a position arguably in tension with the liberal principle of neutrality as between alternative visions of the good life), there is no difference in kind or in degree between the interference with liberty occasioned by the two types of taxes. It follows from this analysis that if one accepts Rawls's argument regarding endowment taxes, one must also accept Nozick's argument regarding wage taxes.

If correct, this conclusion presents the liberal egalitarian with a dilemma: she must either (1) embrace endowment taxes as a moral ideal, rejecting the liberty concerns expressed above, or (2) join Nozick in renouncing the ordinary taxation of earnings, a move that would substantially weaken her (viz., the liberal egalitarian's) commitment to egalitarian outcomes. While my sympathies lie with option (1), it is not my intention to offer any particular resolution of this dilemma in this article. Rather, my aim is to expose some of the tensions inherent in the liberal egalitarian framework and to suggest that consideration of these tensions is necessary to the development of a more satisfactory liberal egalitarian position on questions of taxation and distributive justice.

The article proceeds as follows. Part II offers a brief synopsis of "endowment taxation" and reviews the arguments for and against endowment taxes from the perspective of two leading theories of distributive justice, viz., utilitarianism and liberal egalitarianism. I will suggest that a strong prima facie case can be made for endowment taxes under both of these theories. Part III describes the liberty objections to endowment taxes offered by Rawls and others, and also examines some of the arguments that have been offered in response to these objections in the existing literature. Here the focus is on arguments for "free choice of occupation" that seem to underwrite the liberty objections to endowment taxes. Part IV then uses a hypothetical developed by Murphy and Nagel to interrogate the claim

7. Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002) at 123 (emphasis added).

8. John Rawls, "Some Reasons for the Maximin Criterion" (1974) 64 Am. Econ. Rev. 141 at 145. Rawls's exact preferences for the tax system are the subject of some debate. He did not write extensively on the subject, but in various passages he did express certain preferences. See Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999) at 246-47 in which he endorses a flat-rate consumption tax. For a discussion of Rawls's views on taxation, see Ed McCaffery, "The Uneasy Case for Wealth Transfer Taxation" (1994) 104 Yale L.J. 283 at 291-93 and Linda Sugin, "What Rawls Demands of Tax Systems" (2004) 72 Fordham L. Rev. 1991.

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that these liberty objections can be distinguished from the libertarian argument that the taxation of earnings is on a par with forced labor. It is argued that the objections cannot be distinguished unless one engages in an explicit moral ranking of alternative visions of the good life, assigning low marks to those activities that involve the use of markets and higher marks to those that do not. Part V offers some brief comments on the value of endowment taxation as a subject of theoretical inquiry.

II. Personal Endowment as the "True" Object of Taxation

Before proceeding, it bears emphasizing that an "endowment tax" is a theoretical concept. Pure taxes on earnings capacity do not exist anywhere in the world. It is tempting to think of early American "faculty" taxes as an example of a type of endowment tax, at least insofar as these were "levied on the 'faculty' or earning capacity of persons following certain trades or having certain skills."[9] Despite the apparent similarity, however, these taxes were quite different from the sort of levy that endowment tax commentators seem to have in mind.[10] Aside from their marginal role in the fiscal structure of colonial governments, faculty taxes typically varied depending upon one's *actual* income and chosen profession.[11] By contrast, the endowment tax envisioned by most contemporary theorists is a tax on an individual's human capital, as measured by her earnings *potential*, or wage-rate.

The "beachcomber" is the archetypal subject of endowment taxes.[12] He has substantial earnings capacity (indeed, most commentators posit hypotheticals involving lawyers and corporate executives, suggesting a very substantial earnings capacity) yet he spends his days roaming the beach. The effect of endowment taxes is thus presented in its starkest form: earnings potential is presumably in the millions, while actual earnings are at subsistence levels or lower. Under an endowment tax scheme, the millionaire-turned-beachcomber would owe taxes based on what he could earn rather than what he does earn, with the likely result that he would have to give up some of his leisure to pay the tax.[13]

What normative rationale might be offered in support of such a tax? The most wide-ranging analysis of the theoretical foundations of endowment taxation appears

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9. See Glenn W. Fisher, *The worst tax?: a history of the property tax in America* (Lawrence: University Press of Kansas, 1996) at 13.

10. Edwin R. A. Seligman, "Progressive Taxation in Theory and Practice" (Paper presented to the 20th American Economic Association Meeting, 1907) (Princeton, NJ: American Economic Association, 1908) at 205. For a discussion of faculty taxes as a precursor to state income taxes, see Steven A. Bank, "Origins of a Flat Tax" (1996) 73 Den. U. L. Rev. 329 at 341-42.

11. H.A. Millis, "Business and Professional Taxes as Sources of Local Revenue" (1908)16 J. Pol. Econ. 76 at 83-85. See also Alvin Rabushka, "The Colonial Roots of American Taxation, 1607-1700" (2002) 114 Policy Rev. 61 at 69 ("The text of the Massachusetts law stipulates that artificers who were paid 18*d*. per day in the summer should pay 3*s*. 4*d*. a year in faculty tax…").

12. Dan Shaviro, "Inequality, Wealth and Endowment" (2000) 53 Tax L. Rev. 397; see Shaviro, *supra* note 2. David Hasen, "Political Theories of Personal Endowment Taxation" (2003) [unpublished paper on file with author].

13. Presumably those who exercise their endowment would not be taxed again on their wages. Thus, an endowment tax may be viewed as consisting of two separate taxes: a tax on wages (i.e., "realized" endowment) and a tax on "unrealized" or "untapped" endowment. Taxes on wages and other forms of realized endowment are of course familiar and uncontroversial. It is the tax on *unrealized* endowment that commentators typically find objectionable.

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in a pair of essays published by Dan Shaviro.[14] Like all commentators in this area, Shaviro is careful to note that the endowment tax concept is beset with practical problems relating to liquidity and measurement.[15] Nonetheless, he seems to be favorably disposed toward the idea of endowment taxation as an "orienting principle for the distributional component of tax-transfer policy."[16]

Shaviro's primary focus is the role of inequality in choosing a tax base. Beginning with the widespread belief that those who are "better off" should bear greater tax burdens, Shaviro considers the question of what metric should be used to determine relative levels of well-being. Traditional tax bases, such as income, consumption, wealth, and so on, are the most obvious candidates, yet as Alvin Warren once observed, arguments in support of these taxes often, "reduce to statements that society should appropriately tax what it should appropriately tax."[17] Thus, a consumption tax should be preferred because it "ultimately imposes a more uniform burden on consumption."[18] Similarly, "the personal income tax follows from, and is justified by, a societal judgment as to the appropriate distribution of … personal income."[19] But of course these arguments lack a punch line. As Shaviro explains, "[i]f we want to redistribute 'income,' then of course it *is* the right thing to tax—although why it is the thing we want to redistribute remains unclear."[20]

The lack of an independent rationale for tax bases such as income, consumption or wealth suggests that they must be crude proxies for something else, some underlying quality or trait that represents "the very thing we want to tax."[21] That "very thing," Shaviro argues, is a taxpayer's "endowment," "ability," or "wage rate."[22] The chief advantage of an endowment tax is that it would allocate tax burdens without regard to outcomes resulting from personal choices that have no obvious relevance to distributional policy.[23] To make this point, Shaviro asks us to consider

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14. Shaviro's first essay, *supra* note 12, published in 2000, is actually a reply to Eric Rakowski's lengthy article on wealth taxes (see Eric Rakowski, "Can Wealth Taxes Be Justified?" (2000) 53 Tax L. Rev. 263. The second article (2002) is a revised version of the first and appears as a chapter in the book *Tax Justice: An Ongoing Debate*, *supra* note 2. For ease of exposition, I will refer only to the article published in 2002.

15. Shaviro (2002), *supra* note 2 at 135.

16. *Ibid.* at 136.

17. Alvin Warren, "Would a Consumption Tax be Fairer than an Income Tax?" (1980) 89 Yale L.J. 1081 at 1092.

18. William Andrews, "A Consumption-Type or Cash-Flow Personal Income Tax" (1974) 87 Harv. L. Rev. 1113 at 1167.

19. *Ibid.* Warren goes on to explain the basis for society's interest in the distribution of income. He suggests that producers of income may not have a "controlling moral claim" to that income if they come into it through "fortuity" or "interrelationships of contemporary society." However, these factors only suggest that the pre-tax distribution of income should not be considered presumptively legitimate; they say nothing about what the distribution of income should be.

20. Shaviro (2002), *supra* note 2 at 123.

21. *Ibid.* See also Richard Arneson, "Egalitarianism and the Undeserving Poor" (1997) 5 J. Pol. Phil. 327 at 345 ("If well-being to a first-approximation is flourishing in a way of life that is choice-worthy in the sense that it could withstand informed deliberative scrutiny, then income is at best only a very rough proxy of well-being.").

22. *Ibid.* at 125.

23. Or, to use Dworkin's terminology, an endowment tax is both "ambition-sensitive" and "endowment-insensitive." Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000) at 89. That is, an endowment tax permits "those who choose to invest rather than consume, or to consume less expensively rather than

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two examples originally developed by economist David Bradford.[24] In *Example 1*, two individuals differ only in their consumption preferences: one prefers nice clothing, the other high-quality food. In *Example 2*, two individuals differ only in their taste for work versus leisure: one works more so she can consume more goods, while the other works less and accepts fewer goods.[25]

The point of these examples is to demonstrate that the decision to forgo labor in favor of leisure (or, more broadly, in favor of any non-market activity) is just another type of "commodity choice." In the same way that some consumers prefer blue cars to red cars, apples over oranges or nice clothing instead of fine food, it is also the case that some folks like to work long hours in order to be able to live a lavish lifestyle, while others are willing to live more modestly so that they don't have to work such long hours. Taking the commodity choice characterization even further, we might even say that the beachcomber "purchases" leisure by incurring the opportunity cost of his forgone wages.

What rides on thinking of the labor-leisure decision as "just another commodity choice"? Most people would probably agree that there is no reason—or at least no reason sounding in principles of distributive justice—to structure the tax system to favor some commodity choices over others, e.g., to favor apples over oranges.[26] So if the labor-leisure decision is just another example of commodity choice, it follows that the tax system should be as neutral between working and not working as it is between apples and oranges. Practicalities aside, unless there is some alternative rationale for taxing labor but not leisure, such as an argument that wage labor has negative externalities and thus should be discouraged by the tax system, there is no obvious reason why a corporate lawyer should bear a greater tax burden than a beachcomber with comparable endowment.[27]

At this point in the analysis, one might fairly object that income represents not only the fruits of one's labor but is also a signal (indeed, the best signal available) of the very thing we want to tax, viz., endowment. The reliability of that signal has no doubt shaped our intuitions for how to think about the choice of tax base. If apple consumption had the same potential for revealing valuable information about endowment, then chances are we wouldn't instinctively prefer neutrality between apples and oranges; we'd want to tax apples and exempt oranges. In effect, by citing these examples Shaviro is asking us to disregard the potentially valuable

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more, or to work in more rather than less profitable ways … to retain the gains that flow from these decisions." At the same time, however, an endowment tax works to minimize the influence on the distribution of resources of "differences in ability of the sort that produce income differences in a laissez-faire economy among people with the same ambitions." *Ibid.*

24. David Bradford, *Untangling the Income Tax* (Cambridge, MA: Harvard University Press,1986) at 155.

25. *Ibid.*

26. *Ibid.* at 155-56.

27. One might argue that consumption—or at least excessive consumption—has negative externalities insofar as it encourages others to consume more than they would otherwise choose to consume. This argument has been suggested by economist Robert Frank. See Robert H. Frank, *Luxury Fever: why money fails to satisfy in an era of excess* (New York: Free Press, 1999). See also Edward J. McCaffery, "The Tyranny of Money" (2000) 98 Mich. L. Rev. 2126.

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information that an income figure reveals. After all, in *Example 2* the *only* difference between the two taxpayers is their different preference for work over leisure. In all other respects—life opportunities, earnings capacity, etc.—they are identical. By stipulation, therefore, the "endowment revealing" function of income has been disabled. Choice and choice alone accounts for the difference in earnings.

Working from Bradford's *Example 2*, let us now consider the distributive consequences of alternative tax bases, this time using two identical twins, Dora and Zora. Like the taxpayers in *Example 2*, Dora and Zora have the same life chances and opportunities (i.e., the same "endowment") but different preferences for consumption versus leisure. Dora works full-time in a high-paying job so that she can live a lavish lifestyle, while Zora works only part-time and enjoys a simple life of leisure. Under an income or consumption tax, Zora the leisure-lover will come out looking worse-off than Dora the hard worker. From the standpoint of income and consumption taxes, Dora is the 'better-off' sister. This is because Dora's income (consumption) is included in the base of an income tax (consumption tax), while Zora's untapped endowment, which takes the form of leisure time, is completely excluded from both tax bases.[28] A similar criticism can be made of wealth taxes.[29] Since Zora's tastes don't run to acquiring valuable assets, she is unlikely ever to appear on any wealth tax radar screen.[30] Thus, under any of the conventional tax bases, Zora will be the beneficiary of redistribution from her hard-working sister. By contrast, an endowment tax would treat the two sisters exactly the same and there would be no redistribution between them.[31] Which approach, income taxation or endowment taxation, results in a more just distribution of resources?

The answer to that question turns on one's theory of distributive justice. Under a utilitarian or welfarist approach, taxing endowment may or may not be preferable to taxing income, consumption or wealth.[32] The utilitarian's fundamental commitment is to maximizing aggregate social welfare, which is understood simply as the sum of all individual utilities. Under this framework, a progressive redistribution of resources is typically justified on an assumption of declining marginal

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28. Put differently, conventional tax bases fail to account for the benefits of not making full use of one's earning capacity. For example, someone who works part-time, for example, will enjoy more leisure (or more time with family, savings on household help, etc. …) than someone who works full-time. Similarly, an individual who accepts a job paying only a portion of her wage-rate may experience more enjoyment or fulfillment from that position than someone who takes a position at 100% of his wage-rate.

29. Eric Rakowski argues against wealth taxes insofar as wealth differences "originat[e] in people's choices to labor and save at different times and in different ways." See Rakowski, *supra* note 14 at 285.

30. Indeed, John Lackland himself provides evidence for this proposition. See Episode 1 of *The Beachcomber* ("According to Amura's stuffy commissioner Andrew Crippen, a visitor must maintain a bank balance of 150 pounds. This puts Lackland in an embarrassing position—his balance is almost nil.").

31. Of course it is still possible that tax revenues may be spent in a manner that results in redistribution between the two taxpayers. That issue is set aside. We can assume, for example, that tax revenues are to be spent on some pure public good with respect to which each taxpayer-citizen benefits equally. The point here is simply that a properly structured endowment tax would not itself redistribute among individuals with equal levels of endowment.

32. See discussion in Shaviro (2002), *supra* note 2 at 136-40.

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utility of income, balanced against the potential work disincentives of high marginal tax rates.[33]

When endowment taxation is introduced as a feasible tax instrument, the utilitarian calculus changes in two important respects. First, because endowment taxes are based on immutable characteristics rather than market decisions, the incentives problem inherent in taxing earnings is no longer present.[34] Second, in order to extend the rationale of declining marginal utility from income taxes to endowment taxes, we must be able to conclude that low-endowment individuals will enjoy greater utility from money income than do high-endowment individuals. Most utilitarians, especially those who subscribe to a "weighted welfarist" approach to questions of distributive justice, seem to agree that low-*income* individuals value a dollar more highly than high-income individuals.[35] The question for endowment taxation is whether the same assessment can be made for low-*endowment* individuals. Assuming, as Shaviro does, that a higher wage-rate implies greater earnings, then a welfarist approach would also seem to support redistribution from high-endowment to low-endowment individuals.

Importantly, however, this result may change if we take into account individual differences in the taste for labor versus leisure.[36] More specifically, the beachcomber may have a stronger distaste for work than does the individual with the same wage-rate who chooses to work. He is, after all, a beachcomber. Treating them the same, therefore, would impose a more severe utility cost on the beachcomber who has very little interest in working, whether to increase his consumption or to pay taxes.[37] In effect, an endowment tax favors those individuals with the ex ante preference for work over leisure because, at the end of the day, all taxes must be paid in cash.[38] In summary, then, a welfarist approach to distributive justice would generally seem to favor redistributive endowment taxes (due to their lack of a substitution effect and declining marginal utility), with the caveat that this conclusion might change

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33. This is the basic starting point of the optimal income tax literature. See generally, J. A. Mirrlees, "An Exploration in the Theory of Optimum Income Taxation" (1971) 38 Rev. Econ. Stud. 175. For a useful overview, see Harvey Rosen, "Income Tax Progressivity: A Century-Old Debate" (Jan/Feb, 1990) Business Rev. 3.

34. There would still be an "income effect" from the tax but no "substitution" effect. Note, however, that if the endowment tax is based on earnings capacity as determined by one's level of education, then there will be a substitution effect insofar as individuals pursue less education.

35. See, e.g., Joseph Bankman & Thomas Griffith, "Social Welfare and the Rate Structure: A New Look at Progressive Taxation" (1987) 75 Cal. L. Rev. 1905.

36. Shaviro (2002), *supra* note 2 at 137-38. Note that to do this one must make interpersonal comparisons of utility.

37. The problem is exacerbated once we introduce "lumpy" labor market conditions, in which entering the workforce takes place on an "all or nothing" basis. For a discussion of this effect in the context of labor market decisions of secondary earners, see Edward J. McCaffery, "Taxation and the Family: A Fresh Look at Behavioral Gender Bias in the Code" (1993) 40 UCLA L. Rev. 983 at 1019.

38. Note, however, that if endowment taxes could somehow be paid in the form of "endowment" (i.e., by somehow transferring talent or ability from one individual to another), then the beachcomber could satisfy his tax liability without implicating his distaste for labor. Relatedly, Shaviro asks us to consider a hypothetical world in which corporate lawyers are paid in yogurt that will spoil within five minutes unless eaten, while the endowment of beachcombers is easily transferable from one person to another. The point here is to emphasize that our reluctance to embrace endowment taxes may be attributable to "mere" technology. *Ibid.* at 134.

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if individual tastes are taken into account.[39]

Under a liberal egalitarian approach to distributive justice, the case for endowment taxes initially seems to be even stronger than it is for welfarists.[40] Consider, for example, how a liberal theorist like John Rawls might approach the issue of endowment taxes. Rawls argues that a just society is one that satisfies the following two principles. First, each person has an equal right to the most extensive basic liberties compatible with equal liberties for all. Second, social and economic inequalities should be (i) arranged so as to generate the greatest benefit of the least advantaged, and (ii) attached to offices and positions open to all under conditions of fair opportunity.[41] At the same time, most liberals, including Rawls, are committed to a principle of neutrality regarding the choices that individuals make in order to pursue their own vision of a good life.[42] As Alexander and Schwarzschild explain, "[m]odern liberal political theories, for all their differences, share a common fundamental principle: the state and its laws must be 'neutral' with respect to the varying conceptions of the Good held by individuals."[43] In other words, neutrality is a central normative commitment of contemporary liberalism.[44]

At first blush, the endowment tax concept seems broadly consistent with the main objectives of liberal egalitarian political theory. In addition to promoting equality of opportunity, endowment taxes should earn high neutrality marks because they don't favor labor over leisure or vice versa. Thus, Shaviro seems to be on solid ground when he concludes, "[i]f endowment were measurable, liberal egalitarians might be more committed than welfarists to basing tax burdens on it."[45] As we shall see, however, most liberal egalitarians reject out of hand the idea of taxing endowment on the basis that doing so would constitute an unacceptable interference with personal liberty. It is to this argument that I now turn.

III. Liberty Objections to Taxing Personal Endowment

As the foregoing analysis suggests, if the practical obstacles could be overcome,

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39. For an extension and critique of the welfarist view on endowment taxes, see Dominik Skelenar, "Horizontal Equity in Taxation" (2003) [unpublished paper on file with author].

40. See discussion in Shaviro (2002), *supra* note 2 at 140-43.

41. Note that in addition, Principle 1 (the liberty principle) has "lexical priority" over Principle 2, with the result that liberty can only be restricted for the sake of liberty (and not for any other value). See discussion *infra* note 47.

42. For a useful overview of liberal egalitarian theories of justice, see Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Clarendon Press, 1990) at 50-94.

43. Larry Alexander & Maimon Schwarzschild, "Liberalism, Neutrality, and Equality of Welfare vs. Equality of Resources" (1987) 16 Phil. & Pub. Affairs 85. According to Will Kymlicka, Rawls endorses "a state which does not justify its actions on the basis of the intrinsic superiority or inferiority of conceptions of the good life, and which does not deliberately attempt to influence people's judgments of the value of these different conceptions." See also Will Kymlicka, *supra* note 42 at 205.

44. But see Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986). For a useful summary of Raz's views on liberal neutrality, see Will Kymlicka, "Liberal Individualism and Liberal Neutrality" (1989) 99 Ethics 883.

45. Shaviro (2002), *supra* note 2 at 142. See also Louis Kaplow, "Human Capital under an Ideal Income Tax" (1994) 80 Va. L. Rev. 1477 at 1506 n. 71 (noting that "an ability tax, if feasible, follows from … Rawlsian or other starting points that are concerned substantially with individual welfare.").

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a strong case could be made for taxing endowment under both welfarist and liberal egalitarian theories of distributive justice. For the welfarist, endowment taxes are attractive because of the lack of a substitution effect and because of the declining marginal utility of income. For the liberal egalitarian, endowment taxes satisfy the dual criteria of respecting individual choice while promoting equality of opportunity. Yet despite these advantages, endowment taxes are often flatly dismissed, not because of any practical difficulties in measuring endowment, but rather because of concerns about the interference with human liberty and autonomy occasioned by a tax on earnings potential.

The most prominent advocate of this view is John Rawls, who argued that an endowment tax "would violate the priority of liberty. It would force the more able into those occupations in which earnings were high enough for them to pay off the tax in the required period of time; it would interfere with their liberty to conduct their life within the scope of the principles of justice…."[46]

Here we see an application of Rawls's rule of "lexical priority." Recall that under the Rawlsian framework, a society is just if it satisfies *both* of the following principles of justice:

> 1. Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.
>
> 2. Social and economic inequalities are to satisfy two conditions. First, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).[47]

Rawls does not dispute that taxing individuals on their native endowments would be consistent with his second principle; rather, he rejects endowment taxes because of their inconsistency with the liberty principle, which has lexical priority over the second principle.[48]

Rawls's concern with the liberty cost of endowment taxes is echoed in the scholarship of several prominent legal philosophers.[49] For example, Eric Rakowski has written that endowment taxes "would effectively enslave the able, by forcing them to put their highly taxed talents to their most lucrative employ, on pain of sitting in debtors' prison, however unpalatable the person found richly compensated work."[50] In a similar vein, Mark Kelman has argued that "there is a fundamental flaw in any capacity tax: The tax system ought not to force people into the market."[51] He continues:

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46. See Rawls, *supra* note 4 at 158.
47. *Ibid.* at 42-43.
48. *Ibid.* at 43.
49. See, e.g., Murphy & Nagel, *supra* note 7 at 122 ("endowment taxation would effectively force work on those who could otherwise survive without wage earnings and likewise force many people who would prefer a lower-paying position into careers that they have no interest in.").
50. Rakowski, *supra* note 14 at 267n.10.
51. Mark G. Kelman, 'Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World' (1979) 31 Stan. L. Rev. 831 at 842.

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> To force the beachcomber to work as a doctor, to force people to work 5 days a week when they only want to work 3 days, or to force people to work in a location they dislike in order to earn the prevailing market wage so they can pay taxes—all this would violate the simple libertarian principle that the state should not require people, directly or indirectly, to engage in particular activities.[52]

What these passages share, in addition to an unmistakable hostility toward endowment taxes, is a striking parallel to Robert Nozick's famous argument that the taxation of earnings is "on a par with forced labor."[53] In developing a libertarian account of distributive justice, Nozick contends that taxing wages is equivalent to slavery because it has the effect of "forcing the person to work *n* hours for another's purpose."[54] As he later explains:

> Seizing the results of someone's labor is equivalent to seizing hours from him and directing him to carry on various activities. If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you.[55]

While the passage above expresses concerns similar to those raised by Rawls and others in the context of endowment taxation, Nozick's concern with taxation's interference with liberty is ultimately much more sweeping. For Nozick, the only legitimate taxes are those needed to support a "minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on…."[56]

While certainly not without detractors, Nozick's views on distributive justice have generated a considerable following in the past three decades. Various other libertarian theorists have embraced Nozick's "forced labor" analogy in commenting on the justice of taxation.[57] Perhaps more importantly, arguments like Nozick's have figured prominently in the "everyday libertarianism" that animates tax politics in the United States and elsewhere.[58]

Of course, none of the liberal egalitarian commentators who object to endowment taxes on liberty grounds would endorse Nozick's "forced labor" analogy or

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52. *Ibid.*
53. See Robert Nozick, *supra* note 5 at 169.
54. *Ibid.*
55. *Ibid.* at 172.
56. *Ibid.* at ix.
57. See, e.g., Edward Feser, "Taxation, Forced Labor and Theft" (2000) 5 The Independent Rev. 219 (concluding that Nozick's argument shows "taxation as such to be fundamentally morally illegitimate"); see also Richard Epstein, "Taxation, Regulation and Confiscation" (1982) 20 Osgoode Hall L.J. 433 at 453 ("it is quite clear that … all forms of … taxation are subtle forms of the taking of private property."). But see J.R. Kearl, "Do Entitlements Imply that Taxation is Theft?" (1977) 7 Phil. & Pub. Affairs 74; Elliott M. Abramson, "Philosophization Against Taxation: Why Nozick's Challenge Fails" (1981) 23 Arizona L. Rev. 753.
58. For example, consider the DC-based Tax Foundation's celebration of so-called "Tax Freedom Day", i.e., the day on which, if the government took one hundred percent of your paycheck starting on January 1, you'd stop paying taxes and keep your earnings to yourself. See Kirk J. Stark, "The Right to Vote on Taxes" (2001) 96 Nw. U. L. Rev. 191 at 212.

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accept his conclusions regarding the proper scope of government. In fact, Nozick's libertarian advocacy for a minimal state is in direct opposition to the sort of redistributive tax and transfers schemes envisioned by liberal egalitarians such as Rawls, Rakowski and Kelman. While the libertarian sees redistributive taxation as presumptively illegitimate, the liberal egalitarian sees redistribution as a primary function of taxation. The similarities in their arguments, thus, raises a puzzle: *what distinguishes the liberty objections to endowment taxes from the libertarian's opposition to taxes more generally?*[59]

IV. What Distinguishes the Liberal Case Against Endowment Taxation from Nozick's "Forced Labor" Argument?

In their book *The Myth of Ownership*, Murphy and Nagel address this question directly.[60] Initially, their analysis seems to be open to the possibility that there is no distinction between the two different lines of argument. In response to the question "what distinguishes [Nozick's argument] from the argument against endowment taxation?" Murphy and Nagel answer that "[t]he difference can only be one of degree."[61] Yet rather than emphasizing the negative implication of this conclusion, viz., that there is no difference *in kind* between Nozick's argument and arguments against endowment taxation, Murphy and Nagel instead simply assert that taxing endowment would involve "an *extreme* interference with autonomy," while the taxation of earnings presumably involves only a minimal interference.[62] They continue:

> [W]hile no person can be a sculptor without some source of income, and taxation of earnings increases the amount of work (cleaning houses, perhaps) required, a trained corporate lawyer taxed according to $500,000 in potential annual earnings will find that the time for sculpture is reduced almost to zero. So we can say that endowment taxation can be a far greater hindrance to a chosen career than ordinary taxation of earnings. But what seems most objectionable about such a case is that the lawyer may be condemned by his training to only one feasible line of work—corporate lawyering. If this is right, the problem is not so much that endowment taxation

59. To date this question seems to have received only limited attention in the literature. For example, Shaviro offers a partial reply to the liberty-based objections to endowment taxation, but he neither develops the argument in full nor explores its relationship to Nozick's claim. In response to Kelman's argument that endowment taxes should be rejected on "simple libertarian principles," Shaviro simply asks rhetorically, "what motivates this particular use of the "simple libertarian principle?" Noting that Kelman does not normally endorse libertarian positions, Shaviro asks "Why use it in one place and not in the other? Shaviro (2002), *supra* note 2 at 133. Similarly, in a lengthy footnote that touches on this issue, Louis Kaplow simply notes that the liberty objections to endowment taxes "are much less plausible than many commentators suggest" and that "there is no clear justification for the view that individuals are entitled to 100% of the fruits of their time when they use it outside the marketplace…." Kaplow (1994), *supra* note 45 at 1506-07 n. 71. Finally, Richard Musgrave expresses a similar skepticism in his assessment of Rawls's argument that endowment taxes would unduly interfere with liberty. See Richard Musgrave, "Maximin, Uncertainty, and the Leisure Trade-Off" (1974) 88 Q. J. Econ. 625 at 632.

60. Murphy & Nagel, *supra* note 7 at 122-23.

61. *Ibid.*

62. *Ibid.* (emphasis added).

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> forces people to do what they would prefer not to do, but that it may leave people with literally one option in life.[63]

But if the foregoing passage is meant as support for the proposition that endowment taxation involves a more extreme interference with liberty than the ordinary taxation of earnings, then the Murphy/Nagel analysis falls short. What is missing from the analysis is a discussion of taxation's effect on the individual who exercises her full earnings capacity in order to maximize her consumption and a comparison of that person to the sculptor.

Working from the Murphy/Nagel hypothetical, consider the effect of an endowment tax and an earnings tax on a sculptor and a corporate lawyer, each with an annual earnings capacity of $500,000. The sculptor's preferred consumption bundle involves no market consumption; rather, he simply wants enough leisure time to sculpt on his own for no compensation. The corporate lawyer's preferred consumption bundle is a $500,000 painting that he wants to buy and display in his home.

The introduction of taxes into this picture disrupts the life plans of both the sculptor and the lawyer. First consider the fate of the sculptor. Murphy and Nagel are right that an endowment tax would force the sculptor to work in order to pay the tax. Assuming an endowment tax imposed at a rate of 20% and an earnings potential of $500,000, the sculptor would have to work enough to come up with the $100,000 he owes in taxes. In other words, the sculptor is forced to surrender 20% of his preferred consumption bundle (i.e., free time to sculpt) in order to satisfy his tax obligation.[64]

But the same is true for the corporate lawyer under an income tax. With actual earnings of $500,000, the lawyer would have to pay $100,000 in taxes, assuming an income tax imposed at a flat rate of 20%. So just like the sculptor, the lawyer will have to give up 20% of his preferred consumption bundle; he will have to settle for a $400,000 painting rather than the $500,000 painting he had originally hoped for. Thus, if the equivalence between the lawyer and the sculptor is accepted, there is no difference in kind or in degree between the interference with liberty occasioned by the two types of taxes.

Indeed, if anything, the endowment tax should be preferred because the liberty cost of the tax (as measured by the aggregate interference with each person's ability to achieve their preferred consumption bundle) can be spread more broadly. That is, because an endowment tax necessarily reaches a broader tax base (i.e., realized *and* unrealized endowment), for any given level of revenue, tax rates will be lower

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63. *Ibid.* at 123. One might question Murphy and Nagel's use of a "trained corporate lawyer" in their hypothetical. A pure endowment tax should arguably be concerned only with differences in native endowments—talents and abilities that individuals came into by arbitrary luck, such as being born into a successful family—and not endowments developed through one's own efforts.

64. It is assumed here that the sculptor can earn the same wage-rate when working at only 20% of his capacity. If labor markets are "lumpy" and a particular wage rate can only be achieved by working full-time, then the analysis may be different. The existence of lumpy labor markets suggests that individuals may have multiple wage rates depending on the extent of their involvement in the labor market. If it were feasible to measure personal endowment, one might imagine an endowment tax based on "part-time wage rates" rather than "full-time wage rates" as a means of addressing the lumpy labor markets problem.

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under an endowment tax than they would need to be under an earnings tax. Assuming that the lawyer and sculptor are the only two members of society, the endowment tax can raise $100,000 at a tax rate of 10%, while an earnings tax must be set at 20% to raise the same amount of revenue since it applies only to the lawyer. In other words, protecting the sculptor's liberty interest doubles the liberty cost to the lawyer.

How might the liberal egalitarian distinguish the case of the corporate lawyer from that of the sculptor?[65] The question can be viewed from two alternative perspectives. Under the first approach, the liberal egalitarian might concede that the lawyer and sculptor have the same liberty interest at stake (we might label this liberty interest "the freedom to pursue one's own conception of the good life") but argue that the lawyer's actions make his interest somehow less deserving of protection. That is, the liberal egalitarian might argue that what distinguishes the two cases is that the lawyer does something that the sculptor does not do: he enters the markets for labor and goods in order to pursue his conception of the good. This affirmative act of involvement in the market, the argument goes, puts the lawyer in a qualitatively different situation from the sculptor.

There is some evidence in the writing of Rawls and others for this type of argument. Recall that in opposing endowment taxes on liberty grounds, Rawls argued that "the better endowed may *improve* their situations only on terms that help others."[66] Here Rawls seems to be suggesting that those who rely on markets to pursue their conceptions of the good are reaping a benefit (i.e., monetizing their human capital) and that by making that voluntary choice to exploit the benefits of social cooperation, they open themselves up to the legitimate fiscal claims of the state. It is as though individuals have a defeasible liberty interest in their human capital. So long as one does not deploy her human capital in a market transaction, that liberty interest is absolute. But the moment one enters the market for labor, that liberty interest is extinguished and the fiscal claim of the state takes priority.

Kelman makes the same argument but in more explicit terms. He argues that untapped endowment is off-limits, shielded by our commitment to basic human liberties, but "once the taxpayer has decided to enter the market, the tax system can certainly disregard how he chooses to use his money."[67] In other words, unlike

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65. One way to distinguish the two cases is to argue that non-market activity is somehow more "noble" or "praiseworthy" than market activities. None of the commentators who object to endowment taxation on liberty grounds have made precisely this argument. Kelman comes the closest to this view when he cites the beachcomber's preference not to enter the labor market as evidence of a "desirable anticapitalist strain in a market-obsessed culture." Kelman, *supra* note 51 at 880. Shaviro asks in reply: "Why should we think that people who eschew trades are somehow nobler, happier, or, for that matter, less-calculating optimizers than those who decide that a trade has something to offer them?" See Shaviro (2002), *supra* note 2 at 133.

66. John Rawls (1974), *supra* note 8 at 145 (emphasis added).

67. Kelman, *supra* note 51 at 842. See also Edward J. McCaffery, "Must We Have a Right to Waste?" in Stephen R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) at 24 ('[O]nce an individual has exercised her talents in a social market, and has received money or some other carrier of social value in recompense, it is within the legitimate powers of society to determine what it is she can or cannot do with her property or, equivalently, what of the material is "her" property in the first instance.').

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the beachcomber, those who "deliberately exercise their earning power in the market" surrender any liberty claim they might have otherwise had.[68] As a result, taxes on earnings are legitimate (as they are imposed only on those who "voluntarily enter the market") while endowment taxes are illegitimate.[69]

What justifies this difference in treatment between those who "deliberately exercise their earning power in the market" and those who pursue life plans that involve little or no reliance on markets? One possible justification is grounded in a theory of consent. Here the idea would be that those who enter the labor market have given their tacit consent to the taxation of their earnings, while those who opt for beachcombing have not consented to any fiscal claims of the state. But the argument that legitimate taxation requires the "consent of the taxed" is difficult to square with liberal egalitarian principles. In fact, the view that taxes require consent arises from very different quarters, most notably from libertarian theorists such as Nozick and Gauthier.[70] Perhaps more importantly, under the Rawlsian framework the relevant moment for gauging consent is in the "original position" when all members of society are under a "veil of ignorance" regarding their position in society.[71] The notion that consent to be taxed could be granted or withheld at some later point, when one is choosing between the life of a lawyer or a beachcomber, seems inconsistent with this broader Rawlsian framework.

Another possible justification for the difference in treatment between those who choose labor and those who choose leisure is grounded in a "benefits" theory of taxation.[72] Here the idea would be that laborers (or consumers under a consumption tax) are enjoying benefits that beachcombers and sculptors have chosen to do without. Those benefits might include, for example, the legal and economic institutions that allow for the execution and enforcement of contracts, the protection of labor standards, the maintenance of roads to get to and from work, etc….

Here again, however, the argument seems misplaced. Surely the sculptor and beachcomber enjoy *some* level of public benefits, e.g., a "civilized society". Under a benefits approach they should pay for their proportionate share of those benefits. More fundamentally, the benefits theory of taxation, typically associated with philosophers such as Thomas Hobbes and Frederick Hayek, implies little or no

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68. Kelman, *supra* note 51 at 880 ("I believe that once people deliberately exercise their earning power in the market, the tax system should measure their relative positions as a prelude to redistribution.").

69. See also Alvin Warren, *supra* note 17 at 1120 ("As compared with a tax on personal earning capacity, both the consumption tax and income taxes are concerned with what an individual chooses to do, rather than with what he might do. Accordingly, it can be argued that both are preferable to a tax levied on capacity because they interfere less with personal choice and liberty.").

70. For a summary of arguments typically offered in support of the libertarian principle of "taxpayer consent," see Stark, *supra* note 58 at 210-16.

71. Frank Lovett, "Can Justice Be Based on Consent?" (2004) 12 J. Pol. Phil. 79 at 88 (noting that '[f]or Rawls, the appropriate conditions for securing consent are given in the specification of the "original position."').

72. Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960); David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986); Thomas Hobbes, *Leviathan* (1651) (New York: Cambridge University Press, 1991); see also Harold M. Groves, *Tax Philosophers: Two Hundred Years of Thought in Great Britain and the United States* (Madison: University of Wisconsin Press, 1974) at 29; Murphy & Nagel, *supra* note 7 at 16-19.

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redistribution. Instead, tax burdens should be set to correlate with benefits received. The result is a payment that looks more like a market price than a redistributive transfer. As with private markets, you get what you pay for—no more and no less.[73] Thus, it is not surprising that the benefits theory of taxation is not customarily deployed in support of liberal egalitarian arguments. As with the consent argument discussed above, one might again ask, why would a benefits framework be relevant here but otherwise not relevant to the broader liberal egalitarian project?

The second approach a liberal egalitarian might take to distinguish the sculptor and the lawyer involves redefining the liberty interest that is at stake. Here the argument would be that the sculptor's liberty interest is actually quite different from that of the lawyer. In the description of the example above, I portrayed each individual as having a "preferred consumption bundle": the lawyer wished to purchase a painting, while the sculptor wanted simply to have enough time to sculpt. This characterization, obviously related to the view that the labor-leisure decision is "just another commodity choice," allowed us to say that the liberty interest that is at stake in each case is the same, i.e., the freedom to pursue one's own conception of the good life. However, the liberal egalitarian might object that, unlike the lawyer, the sculptor has an interest in preserving something much more fundamental, viz., his "free choice of occupation."

The idea that all human beings should enjoy "free choice of occupation" is a subject of recurring concern in Rawls's writings. As one commentator described it, "[f]ree choice of occupation implies that people should not have to work in any job that they would not freely choose and further that they should be free to change jobs if they so wish."[74] Where does this idea fit within Rawls's theory of justice? In addition to including it in his list of "primary goods,"[75] Rawls seems to consider free choice of occupation as one of the "basic rights and liberties", i.e., a "constitutional essential" that everyone should enjoy.[76] Whatever the technical placement of the concept within the Rawlsian framework, it seems clear that the freedom to decide how (or even whether) to work enjoys a favored status in Rawls's writings, with the potential of trumping other interests when they come into conflict. Indeed, to the extent that the free choice of occupation is considered an element of Rawls's first principle of justice (the liberty principle) then it would have lexical priority in the Rawlsian scheme as described above.

With this framework in mind, let us now consider the liberal egalitarian's "free choice of occupation" objection to endowment taxes. At first blush, it might seem that the risk of violating the sculptor's free choice of occupation does indeed

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73. See Richard Musgrave & Peggy Musgrave, *Public Finance in Theory and Practice*, 5th ed. (New York: McGraw-Hill Book Co., 1989) at 220 ("Under a strict regime of benefit taxation, each taxpayer would be taxed in line with his or her demand for public services.").

74. Steven E. Byrne, "A Rawlsian Argument for Basic Income" (M.A. thesis, University College, Dublin, 1993) [unpublished paper on file with author].

75. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 181 (listing primary goods to include "*free choice of occupation* against a background of diverse opportunities"). See also Rawls, *ibid.* at 308 (explaining that "these opportunities allow the pursuit of diverse final ends and give effect to a decision to revise and change them, if we so desire.").

76. *Ibid.* at 228.

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distinguish his case from that of the lawyer. After all, since the lawyer has already chosen his occupation, it cannot be said that his free choice of occupation is in any way threatened by a tax on earnings. He is free to engage in as much or as little lawyering as he wants. The only caveat is that he must relinquish a share of his wages to the state, a much less severe intrusion on his personal autonomy, so the argument goes, since how he spends his time is still up to him. Upon closer inspection, however, the argument loses some of its steam. Three objections come to mind.

First, it is not clear that an endowment tax would necessarily violate one's "free choice of occupation." As noted above, Murphy and Nagel make much of the fact that the sculptor in their example would be "condemned by his training to only one feasible line of work" and thus left "with literally one option in life."[77] Given that endowment taxes are a purely theoretical concept, it is difficult to assess the merits of this conclusion. Still, it must be remembered that an endowment tax, like any tax, requires only that a payment of some amount be made to the government. How the individual taxpayer chooses to generate the funds necessary to satisfy his tax obligation is entirely up to him. This is not to suggest that endowment taxes are therefore a good idea; we still face the (likely insurmountable) practical problems of measuring endowment. Rather, I mean only to question the Murphy/Nagel assertion that endowment taxes would leave high-endowment individuals "with literally one option in life."

Moreover, if the various practical difficulties associated with measuring endowment could somehow be overcome, there is reason to believe that an endowment tax could be designed to avoid the problem of "forcing" people to take on particular occupations. One possibility suggested by Louis Kaplow would be to impose the tax at a given rate (say 20%) but then specify that in no event will the taxpayer's total tax liability exceed 90% of *actual* wages.[78] The idea is analogous to the "circuit-breaker" feature of many local property tax systems, under which a taxpayer's property tax liability is limited by some percentage of her income.[79] The availability of design features such as this suggests that it may be misleading to think of the choice of tax base as an either-or proposition. By adopting a hybrid approach, the problem of forcing people to work against their will is mitigated. In effect, Kaplow's approach takes the wind out of the liberty objections. Unless the liberal egalitarian is willing to accept Nozick's "forced labor" argument in the context of a 90% earnings tax, then he must concede that this hybrid income-endowment tax approach steers clear of any liberty objections.

Second, it is not self-evident that one's "choice of occupation" deserves greater protection as a fundamental liberty interest than various other choices that individuals make in the course of pursuing their conception of the good life.[80] For example, consider the choices that individuals make in deciding how to spend money.

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77. Murphy & Nagel, *supra* note 7 at 123.
78. Kaplow, *supra* note 59 at 1506-07 n.71.
79. For an explanation, see "Property Tax Circuit Breakers, Institute on Taxation and Economic Policy", Policy Brief #10 (May 2004), online: Institute on Taxation and Economic Policy http://www.itepnet.org/pb10cb.pdf.
80. Rawls himself offers virtually no guidance on this point, perhaps because he simply takes the idea to be self-evident.

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According to Kelman, "once the taxpayer has decided to enter the market, the tax system can certainly disregard how he chooses to use his money."[81] But what justifies this statement? Isn't it possible that consumption choices could be important, even central, to the development of an individual's sense of self-worth in the same way that one's choice of occupation is? One needn't be a free-market fetishist to make this claim; not all market consumption is of the *Lifestyles of the Rich & Famous* variety. The cultivation of musical talent, for example, might require the expenditure of substantial resources that can only be derived from market labor. Taxes on income and consumption frustrate the would-be musician's pursuit of her vision of the good life. Why should the beachcomber's choice of lifestyle, which requires little or no money and thus no need to generate income, be more deserving of protection than alternative lifestyles that require the production of income?

Finally, even if it is conceded that freedom of occupation enjoys trump status in the scheme of basic liberties, one might ask why occupations that require little or no use of private markets, e.g., beachcombing, deserve special protection as compared to occupations that require the use of markets.[82] To illustrate, consider the case of Hillary, an individual with native talents and abilities identical to the lawyer and sculptor above, but whose sole desire in life is to climb Mt. Everest five times each year. Unfortunately, climbing Mt. Everest costs $100,000 per trip for a total of $500,000 per year. Though she absolutely hates working as a corporate lawyer, Hillary is prepared to go to work in order to pursue her preferred occupation of mountain climbing. Let us assume that she plans to work for a year, then spend the next year climbing, and so on.

Under an earnings tax, Hillary will have to work more than one year in order to net the $500,000 she needs to pursue her desired occupation. Recall Kelman's comment that "to force people to work 5 days a week when they only want to work 3 days … would violate the simple libertarian principle that they state should not require people, directly or indirectly, to engage in particular activities."[83] It is hard to see how Hillary's "free choice of occupation" is compromised any less by an earnings tax than the beachcomber's freedom is compromised by an endowment tax. Both taxpayers must spend more time lawyering than they would choose to in the absence of a tax so that they can satisfy their tax liabilities. One might question whether climbing Mt. Everest should be considered an "occupation" of the sort protected by the Rawlsian principle of "free choice of occupation." But of course one might make the same objection about sculpting, or beachcombing, or corporate lawyering for that matter.

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81. Kelman, *supra* note 51 at 842.

82. The argument here has some parallels to the problem of "expensive tastes" familiar in the literature on egalitarian theories of distributive justice. Expensive tastes are a problem for so-called "welfare egalitarians"—i.e., those who believe that the currency of distributive justice should be welfare. The question is whether individuals with expensive tastes should be entitled to a larger share of resources in order to compensate them for those tastes. For a discussion of the "expensive tastes" problem, see Dworkin, *Sovereign Virtue*, *supra* note 23 at 48-59. See also G. A. Cohen, "On the Currency of Egalitarian Justice" (1989) 99 Ethics 906; Simon Keller, "Expensive Tastes and Distributive Justice" (2002) 28 Soc. Theory & Practice 529.

83. Kelman, *supra* note 51 at 842.

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The mountain climbing example illustrates once again the inherent tension between the liberal egalitarian's objection to endowment taxes and her commitment to neutrality regarding alternative visions of the good life. In effect, by offering greater liberty protection to some activities than to others, the liberal egalitarian is assigning greater moral worth to those activities. What the liberal egalitarian view on endowment taxes boils down to, therefore, is an explicit moral ranking of alternative visions of the good life. Any life plan not involving the use of markets, such as beachcombing or sculpting, enjoys a special preferred status in the liberal egalitarian framework. By contrast, any vision of the good life that involves trading in the markets is assigned inferior status and is thus thought not to implicate fundamental liberties.

V. Endowment Taxes and Distributive Justice

If the analysis above is correct, the liberal egalitarian seems to face a dilemma on the question of endowment taxes. She must either (1) reject the argument that endowment taxes constitute an unacceptable infringement on basic human liberties, or (2) extend her liberty objections beyond endowment taxes, joining Nozick in renouncing the ordinary taxation of earnings. It is not my intention to offer any particular resolution of this dilemma here. Rather, my aim has been to expose some of the tensions inherent in the liberal egalitarian framework regarding questions of taxation and distributive justice. As I have tried to demonstrate, that tension arises primarily from the liberal commitment to neutrality among alternative visions of the good life.

Still, the reader with pragmatic sensibilities may be prompted to ask, why should I care? What concrete implications might follow from the analysis above? After all, one might object, since personal endowment is fundamentally unknowable, the idea of taxing people on that basis seems fanciful, if not just plain silly. While I am sensitive to these criticisms—perhaps even sympathetic—I nevertheless want to offer in this final part a brief defense of endowment taxation as a subject of theoretical inquiry. In addition, I want to spell out what I view to be the implications of the analysis above relating to the liberty objections to endowment taxation. Three points deserve mention.

A. Endowment as a Missing Piece in the Distributive Justice Puzzle

First, as Dan Shaviro has emphasized in his writing on the subject, an understanding of endowment taxation reveals the fundamentally second best nature of conventional tax bases. Thinking about endowment taxes highlights the fact that conventional tax bases miss a large and significant piece of the distributive justice puzzle: non-market activity. By allocating tax burdens according to levels of income, consumption or wealth, we necessarily exclude from the tax system the rich and varied non-market benefits that individuals actively pursue in life. It is well established among tax scholars that the exclusion of non-market benefits from the tax system can distort individual behavior, leading those who are otherwise indifferent to

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choose untaxed non-market benefits, e.g., leisure, over taxed market benefits, e.g., wages.[84] The labor-leisure decision of the secondary earner in a married couple is perhaps the cleanest example.[85] The differential tax treatment of market labor versus non-market housework distorts individual behavior, generating economic inefficiencies.

Less widely recognized, or at least written about, is the fact that excluding non-market activity from the tax base severely limits the scope and effectiveness of egalitarian tax policies. In effect, by ruling personal endowment off limits, the liberal egalitarian has embraced the mother of all tax loopholes: specifically, that the high endowment individual need only opt for leisure in order to shed any obligation he might have otherwise had to ensure a just distribution of resources in society. Given the significance of this decision, it would seem important to know precisely *why* personal endowment is off limits. Once one accepts that the liberty objections to endowment taxation have equal force when applied to income, consumption or wealth taxes, the only remaining justification for not taxing endowment is the practical difficulty of doing so. This insight would suggest that liberal egalitarians should be willing to embrace endowment taxation where it is feasible. Where it is not feasible, liberal egalitarians must simply accept the limits of using the tax system as a vehicle for addressing questions of distributive justice.

B. Leisure and Rawlsian Distributive Justice

Second, probing the question of whether endowment taxes are objectionable on liberty grounds prompts a more sustained consideration of how leisure fits within liberal egalitarian theories of distributive justice, with "leisure" here understood to mean any non-market benefit or activity that escapes taxation under any of the conventional tax bases. On this question, there is one especially troubling problem that deserves mention. Under any tax system that ignores non-market benefits, high endowment individuals pursuing a life of leisure will not only escape taxation, but indeed may be entitled to redistribution from low endowment individuals who have chosen a life of labor and consumption. This possibility, which Richard Arneson has called the problem of the "non-needy bohemian,"[86] highlights the unreliability of traditional economic markers as indicators of well-being.[87]

Recognizing this problem, Rawls eventually conceded that leisure should perhaps be included as a "primary good" in his scheme. The result would be that those who enjoy large amounts of leisure would not be beneficiaries of redistribution of other primary goods (such as income and wealth). As Rawls put it, "[s]urfers must somehow support themselves."[88] In offering this concession, Rawls shows

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84. See Harvey S. Rosen, *Public Finance*, 6th ed. (Homewood, IL: R. D. Irwin, 2002) at 374-77.
85. Shaviro (2002), *supra* note 12. See also Ed McCaffery, *Taxing Women* (Chicago: University of Chicago Press 1997).
86. Arneson, *supra* note 21 at 345-47.
87. As Arneson notes, a "talented mendicant friar may report a small income, but be leading exactly the life that he most wishes to lead…." *Ibid.* at 345.
88. Rawls, *supra* note 4 at 179.

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a willingness to treat income and leisure as equivalent for some purposes, i.e., having an abundance of either can disqualify one from the benefits of redistribution. But it is perhaps not so clear that this is the sole consequence of accounting for leisure as a primary good. Under Rawls's difference principle, inequalities in the distribution of primary goods are legitimate only to the extent that such inequalities benefit the least advantaged. Thus, just as a particular distribution of income or wealth might be illegitimate under the difference principle, suggesting the need for an income or wealth tax, it would seem perhaps that leisure too should be subject to taxation.

Of course the idea of a "leisure tax" sounds peculiar and foreign to our experience. But it is worth noting that that in some ways the current US tax system already "taxes" leisure. Take the case of the "earned income tax credit" (EITC), for example. For taxpayers with earned income up to roughly $35,000, the EITC provides a subsidy of up to 40% of wages.[89] For example, Tom and Tina Taxpayer, who are married with two kids and have earned income of $10,000, would be entitled to a credit of $4,000.[90] Let us assume that Tom has been working overtime and that he and Tina have decided that he needs to spend more time at home with the kids. Or just assume that Tom is sick of working so hard and that he wants a bit more leisure time. If he decides to cut back his hours so that the family is only bringing in $9,000 of earned income instead of $10,000, his EITC subsidy will be reduced from $4,000 to $3,600. In other words, for taxpayers in the EITC phase-in range, every "purchase" of leisure time (which is "paid for" by forgone wages) is taxed at a rate of 40%.

It is rarely regarded as objectionable that the EITC has the effect of taxing leisure. Indeed, just the opposite is true. The political durability of the EITC as an antipoverty program is due in large part to bipartisan enthusiasm for the idea that its beneficiaries must work in order to receive benefits.[91] But there is a fine line (perhaps even no line at all) between denying benefits to those who opt for non-market activity versus taxing leisure directly. The liberal egalitarian must either defend this distinction or reject the idea that taxing leisure interferes unduly with personal liberty.

C. Personal Liberty as an Inescapable Cost of Taxation

Finally, a critical examination of the liberty objections to endowment taxation causes us to reflect on the liberty restraints involved in *all* types of taxation. Interference with liberty is an inescapable feature of tax. *All* taxes, whether on income, consumption, wealth, endowment or other tax bases, interfere with individuals' pursuit of the good life. As I have argued above, there is no difference in degree or in kind between the interference with liberty occasioned by endowment

89. *Internal Revenue Code* I.R.C. § 32 (2004).
90. U.S., Department of the Treasury Internal Revenue Service, *Earned Income Tax Credit* (Publication 596) (2004) at 44 (tables).
91. For a discussion, see Dennis J. Ventry, Jr., "The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969-1999" (2000) 53 Nat'l Tax J. 983 at 1026.

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taxes and other types of taxes. Where does this insight leave us? Murphy and Nagel conclude that the aim of tax policy should be to choose among the various tax institutions available to us those policies with the least amount of interference with personal liberty.[92] It is hard to disagree with this statement as a general principle of tax policy design. After all, all else equal, who would prefer a tax system that results in a *greater* interference with human freedom?

Nonetheless, I would like to suggest that such an assessment is wrought with complexities not brought to light in the Murphy/Nagel analysis. In many cases, the recognition and protection of a liberty interest in one type of activity will simply increase the liberty costs associated with unprotected activities. This is not to suggest that a concern for personal autonomy should not inform our choice of tax institutions, but rather that the question may ultimately be one of distribution. That is, in fashioning a tax system, how best can we allocate the benefit of being free from taxation's inevitable interference with personal autonomy? For the liberal egalitarian, who rejects endowment taxes on liberty grounds, the answer is clear. Those who opt for non-market activity take the whole pot. Perhaps this is a necessary result, given the technology of taxation, but I would submit that as a matter of ideal theory it need not be the only answer.

92. Murphy & Nagel, *supra* note 7 at 123 ("the value of autonomy should lead us to prefer a set of institutions that limits the range of choices as little as possible, by comparison to other feasible sets of *actual* institutions.").