ACTEC Law Journal

Volume 40 | Number 1 Article 5

3-1-2014

Book Review: Robespierre Meets The Foreign Tax Credit: Reflections on Piketty's "Capital in the Twenty-First Century" and the Contemporary Tax Policy Debate

Michael A. Livingston

Book Review

Robespierre Meets The Foreign Tax Credit: Reflections on Piketty's "Capital in the Twenty-First Century" and the Contemporary Tax Policy Debate

*By Michael A. Livingston**

There is a scene in *Citizens*, Simon Schama's book on the French Revolution, in which an aristocrat disguises himself as a *sans culotte* and orders breakfast at a working-class tavern during the Reign of Terror. The aristocrat orders an *omelette.* "How many eggs?" asks the chef, already somewhat suspicious. (The average working-class *omelette* contained perhaps two or three eggs.) The aristocrat thinks for a moment and names an amount that seems normal from his own experience. A dozen eggs, he says. Within seconds he is identified as an enemy of the revolution and makes a one-way trip to the guillotine.[1]

Inequality is, inevitably, a matter of perspective: it will always seem more obvious to those who have less than to those who have more. Yet inequality is notoriously difficult to quantify. Should it be measured on the basis of income, or should it also reflect wealth? What about intangibles, like educational advantages or personal connections? And what should be the role of redistribution – i.e., the reduction of inequality – in framing tax and other public policy debates? Do poor people really care about inequality, or is it (as Schama himself suggests of the French Revolution[2]) frequently an argument by which one elite attempts to displace another?

For a generation or more, public policy has been dominated by efficiency concerns, and fairness or "vertical equity" has taken a back seat. But there are signs of change all around. President Obama has paid at least verbal homage to the need to reduce inequality,[3] while local politi-

---

* Professor of Law, Rutgers Law School. A.B. 1977 Cornell; J.D. 1981 Yale. Thanks to Phil Harvey and Dan Shaviro for comments and encouragement on this project.

1 SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 856 (1989).

2 *See*, *e.g.*, *id.* at 727-28.

3 THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 310 (Arthur Goldhammer, trans., 2014).

cians, notably the mayor of New York City, have been still more aggressive.[4] The Occupy Wall Street movement, though politically feeble, has proven rhetorically powerful: its favored slogan, pitting an alleged ninety-nine percent of the population against a small number of fat cats, has been especially resilient. Even the Tea Party, while conservative on social issues, has adopted an anti-elitist tone, complaining of corporate bailouts and demanding more attention to the average voter.[5] Populist presidents like Woodrow Wilson and Theodore Roosevelt have been the subjects of best-selling biographies, and the parallel to the Progressive Era has been noted by numerous observers.

It was probably inevitable that someone would write a book that served as the Bible of this new progressive movement, and now someone has. Thomas Piketty's *Capital in the Twenty-First Century*, a 577-page work supported by lengthy footnotes and an extensive online appendix, has risen to the top of the bestseller lists and provoked unprecedented attention in newspapers, magazines, and the broader culture. That Piketty is a somewhat obscure French professor who peppers his book with abstract economic equations and quotes the *Declaration of the Rights of Man and the Citizen* appears to have enhanced, rather than reduced, his popularity. A series of attacks on his conclusions and methodology, which were somewhat forced in nature and which Piketty has rather easily fended off, have contributed further to his celebrity.[6] It is as if Thomas Paine, or perhaps Karl Marx, were suddenly reborn and began appearing in radio and television interviews: you could like him or dislike him, but nobody could pretend he wasn't there.

---

[4] *See* Michael M. Grynbaum, *Taking Office, de Blasio Vows to Fix Inequity*, N.Y. Times (Jan. 1, 2014), http://www.nytimes.com/2014/01/02/nyregion/bill-de-blasio-inauguration.html.

[5] *See generally* Eric Jackson, *Part III of Interview with Chrystia Freeland on the Global Elites,* Forbes (Mar. 28, 2014), http://www.forbes.com/sites/ericjackson/2011/04/28/part-iii-of-interview-with-chrystia-freeland-on-the-global-elites/.

[6] *See*, *e.g.*, Neil Irwin, *Thomas Piketty Responds to Criticisms of His Data,* N.Y. Times (May 29, 2014), http://www.nytimes.com/2014/05/30/upshot/thomas-piketty-responds-to-criticism-of-his-data.html?_r=0&abt=0002&abg=1; Neil Irwin, *Did Thomas Piketty Get His Math Wrong?,* N.Y. Times (May 23, 2014), http://www.nytimes.com/2014/05/24/upshot/did-piketty-get-his-math-wrong.html?abt=0002&abg=1. For more nuanced critiques of the book, see Paul Krugman, *Why We're in a New Gilded Age*, N. Y. Rev. of Books (May 8, 2014), http://www.nybooks.com/articles/archives/2014/may/08/thomas-piketty-new-gilded-age/ (generally sympathetic but finding Piketty's treatment of wages less convincing than that of capital); Lawrence H. Summers, *The Inequality Puzzle*, Democracy: J. of Ideas (Summer 2014), at 91, *available at* http://www.democracyjournal.org/pdf/33/the_inequality_puzzle.pdf (crediting Piketty with raising important issues but skeptical of his broader theoretical conclusions). For a tax law perspective, see Leigh Osofsky, *The IRS as a Tax Law Nonenforcer,* JOTWELL (Dec. 17, 2014), http://tax.jotwell.com/the-irs-as-tax-law-nonenforcer/.

Piketty's arguments regarding the increasing concentration of wealth and income, and the likelihood that that concentration will accelerate further in the coming decades, are clearly stated and (in my view) by and large convincing. By contrast, his policy proposals are tentative and somewhat unsophisticated in nature. His principal suggestion, a global progressive tax on capital accumulations, is by his own admission utopian.[7] Domestic tax changes tend to be incremental in nature, and are relatively easy for those in the top income brackets to avoid. Indeed, because taxes tend to reach earned income more effectively than accumulated capital, they might actually make things worse. There is, moreover, a sense that Piketty, while a master of economic argument, is less comfortable with the moral variety: although he discusses meritocracy and the "moral hierarchy of wealth,"[8] these are peripheral to his main argument, and his political and cultural assumptions are, not surprisingly, European rather than American in orientation.

This book review considers Piketty's argument in the context of the existing public policy debate and, more specifically, the debate over tax fairness and progressivity in the United States and other countries.[9] It is less a review of Piketty's book – there will be no shortage of these – than a reflection on the current state of the tax policy discussion and what Piketty might, or might not, contribute to it. I will range freely between the book and previous scholarship, asking how Piketty might respond to hypothetical facts and arguments and how other scholars, living or dead, might respond to him. My definition of "tax policy" will be a broad one, including popular opinion and political movements as well as the work of law and economics professors. At times, I will move outside taxation altogether to consider education, health care, or other social policy arenas that are relevant to the inequality problem. But the focus – for me as it is for Piketty – will remain on the tax problem.

A book review is too short to require an executive summary. Suffice it to say that, while I am generally convinced by Piketty's argument about inequality, I am somewhat more skeptical regarding the ability of tax policy, on its own, to correct it. In particular, I am skeptical that taxation can correct the profound social, cultural, and other noneconomic inequality that currently exists in the United States and other countries; these inequalities correlate to a degree with economic injustice but are to a significant degree independent of it. I am likewise concerned that progressive taxation is, or is becoming, a convenient way for the socially and culturally privileged – including many in the educa-

---

7 *See* PIKETTY, *supra* note 3, at 515. *See also* Paul L. Caron, *Thomas Piketty and Inequality: Legal Causes and Tax Solutions*, 64 EMORY L.J. ONLINE 2073 (2015).

8 *See id.* at 443-47.

9 *See infra* Part II.

tional establishment – to avoid taking responsibility for their own not inconsiderable advantages. This does not mean that Piketty's proposals are wrong, but it does counsel a healthy degree of caution, a caution that will be a prevailing theme of this essay.

Part I of the essay summarizes Piketty's principal arguments and his main tax proposals. Part II discusses the current state of the progressivity debate and Piketty's possible contribution to it. Part III considers the limitations of a tax approach and what a broader, more comprehensive assault on inequality might look like.

I

While his documentation is extensive, Piketty's argument is fairly simple. For most of history, he argues, returns to capital have exceeded the growth rate of the economy, so that (over time) both income and wealth tend to become concentrated in a smaller and smaller number of people.[10] Because of an unprecedented series of political and economic shocks – two World Wars, the Great Depression, the Cold War and associated threat of communism – this momentum was somewhat reversed in the middle of the twentieth century, with the result that inequality modestly declined and earned income, rather than return on investments, became a more important part of the economic equation.[11]

Since approximately 1980, a combination of conservative economic policies, reduced population growth, and the inherent logic of capitalism has caused the older dynamic to return so that inequality is again on the increase, and economic success is becoming ever more dependent on inheritance than inherent talent.[12] To people who grew up during and after World War II, this situation seems anomalous, and there is an expectation that more balanced growth and greater equality will sooner or later return, perhaps once the benefits of computers and other new technologies have spread more evenly across the population.[13] In fact, argues Piketty, it is the "baby boom" experience that is historically exceptional, and the current pattern will likely continue or even accelerate in coming decades unless corrective action is taken.[14]

---

10 *See* PIKETTY, *supra* note 3, at 1, 336.

11 *See id.* at 41, 237, 275, 397.

12 *See id.* at 42, 294-95.

13 *See id.* at 380-81.

14 *See id.* This has been but a brief summary of a sophisticated, nuanced, and (even in English translation) beautifully written argument, so much so that the reader is occasionally fearful of being swept up in assumptions and conclusions that he might or might not agree with if less cogently presented. To Piketty's credit, he provides all of his raw data in the form of a massive electronic appendix, so that – even if one does ultimately reject his arguments – the facts are there for others to re-interpret them. This appendix is

Piketty is French, and the patterns he identifies are particularly strong in a European (and especially a French) context. In particular, the economic shocks caused by the two world wars were somewhat muffled in the United States, which was never defeated and occupied and did not suffer the loss of overseas empire on the Anglo-French model. Yet inequality in the United States – historically less dramatic than Europe – is now significantly worse, and public policy is if anything less inclined to reverse it. There is a difference in kinds of inequality, the American version tending to result as much from excessively high incomes as from returns on capital (the so-called *rentier* phenomenon).[15] But this is at best a mixed blessing: high incomes bring with them a sense of moral superiority that makes people less likely to accept redistributive measures, and high earners themselves turn into investors within one or two generations, so that the problem merely recreates itself on another level.[16] In this respect – and given the heightened ability of capital to cross borders and avoid taxation – the situation may actually be worse than it was a century ago.

What should be done to correct this situation? Piketty's first choice is a global tax on capital (effectively property) accumulations, something like the property taxes currently imposed by American local governments, except that it would be progressive in nature and include all types of property (businesses, financial assets, etc.) rather than being limited to real estate or other specified assets.[17] He suggests initial rates of 0% on the first €1 million of assets, 1% on the next €1 million to €5 million, and 2% thereafter – rather a heavy hit, since (unlike an estate or gift tax) the tax would be imposed every year – although he seems to recognize that this is improbable under current conditions.[18] As a fallback, he suggests that a capital tax might be imposed within the European Union, or perhaps at a more nominal rate, which would raise less revenue but still serve an information-gathering function.[19] In this and other matters he is influenced by the French Revolution, in the aftermath of which France imposed a series of low-rate taxes that – while accomplishing relatively little redistribution – gathered a vast amount of

available at http://piketty.pse.ens.fr/files/capital21c/en/Piketty2014FiguresTablesLinks.pdf.

15 *See id.* at 439-43.

16 *See id.* Somewhat wickedly, Piketty cites the paradigm of American meritocracy, Microsoft's Bill Gates, and L'Oreal heiress Liliane Bettencourt as examples of this phenomenon. Piketty notes that Gates's fortune increased from $4 billion to $50 billion between 1990 and 2010, and that the fortune of Bettencourt, "who never worked a day in her life," grew at the same rate. *Id.*

17 *See id.* at 515-18.

18 *See id.* at 515-18, 528.

19 *See id.* at 528.

data that helped build the case for further legislation and indeed forms the basis for much of Piketty's own study.[20]

Although emphasizing his proposed capital tax, Piketty is not shy about expressing opinions on other issues. Not surprisingly, he favors progressive income taxation, although he is skeptical of its ability to deal with the concentration of wealth and capital in an increasingly globalized world.[21] (This is one of the reasons that he supports a capital tax.) He is likewise a supporter of the European-style social welfare state, although he recognizes that public spending cannot continue to grow at the rate it has in the past; the trick is to use existing money more effectively rather than to gather more of it.[22] Like Paul Krugman of the *New York Times*, Piketty reserves a particular scorn for austerity programs, especially in a European context: his description of the Cyprus financial crisis, which was exacerbated by external intervention, is alone worth the price of admission.[23]

Reaction to the book has been more or less predictable. Liberals have hailed it as something approaching a revelation, although some (including Krugman) have found aspects of it incomplete.[24] An early attack on its methodology, largely in the pages of financial magazines, seems to have done little permanent damage.[25] A more significant disagreement concerns Piketty's theoretical conclusions, specifically his suggestion that returns on capital inevitably, or almost inevitably, exceed the rate of economic growth ($r > g$).[26] Much of this disagreement concerns assumptions about capital markets and the relationship of labor and capital that are only partially susceptible to empirical proof. As the book is digested by the economic community, there will be additional criticisms, although the analytic core of the book – specifically the conclusion of rising inequality – seems likely to stand the test of time.

II

If popular response to Piketty has been "Wow!" the response of tax scholars is likely to be, "What else is new?" Declining progressivity and increasing inequality – of which declining progressivity is both cause and (to some degree) effect – have indeed been the starting point of the tax

---

20 *See id.* at 28-30, 532.

21 *See id.* at 515-16.

22 *See id.* at 481-83.

23 *See id.* at 519, 553-56.

24 *See* Daniel Shaviro, *The Return of Capital*, JOTWELL (July 8, 2014), http://tax.jotwell.com/?wptouch_view=normal&wptouch_redirect_nonce. . .&wptouch_redirect=%2Fshould-we-tax-the-rich-or-leave-them-alone%2F; *see* Krugman, *supra* note 6.

25 *See* sources cited *supra* note 6 and accompanying text.

26 *See* Krugman, *supra* note 6.

debate for some time now. Yet how to address this problem is a difficult question, rather more so than Piketty's book would suggest.

To understand the tax debate, one must go back two generations. The classic American work on the subject, Blum and Kalven's *The Uneasy Case for Progressive Taxation*, was written in the 1950s.[27] In their article (later book[28]), Blum and Kalven identify three principal arguments for tax progressivity. The first, which has become known as the declining marginal utility of money (DMUM) argument, states that people with high incomes derive less benefit (utility) from their last dollar of income than those with low or moderate incomes.[29] Taxing them at a higher rate may thus raise additional money without significantly reducing the overall welfare of society. The second, the redistribution argument, suggests that progressive taxation is necessary to reduce concentrations of wealth and improve the lives of those less talented or simply less fortunate than those at the top of the economic pyramid.[30] This argument is more emotionally appealing than DMUM, but also more controversial, so that progressivity advocates (including Blum and Kalven themselves) tend to be somewhat uncomfortable making it.

A third argument, known as the benefit theory, suggests that rich people should pay more taxes because they benefit more from the services taxes provide.[31] This argument has traditionally foundered on the difficulty of proving who benefits from governmental activities, and most scholars no longer give it much credence.

Together with the arguments for progressivity, Blum and Kalven list a number of arguments against it. The most potent of these states that individuals have the right to the fruits of their own labor and Government should not take them away from them.[32] A related argument – what a later author called "the ideology of barriers and deterrents" – suggests that higher taxes will reduce the overall productivity of society so that everyone will wind up poorer than they were before.[33] Reviewing all of these arguments, Blum and Kalven conclude that the case for

27 Walter Blum & Harry Kalven Jr., *The Uneasy Case for Progressive Taxation*, 19 U. Chi. L. Rev. 417 (1952). Though many of Blum and Kalven's arguments had been made by earlier authors, their presentation is unsurpassed. *See*, *e.g.*, Edwin R.A. Seligman, Progressive Taxation in Theory and Practice (1908); Louis Suret, Theorie de L'impot Progressif (1910).

28 Walter J. Blum & Harry Kalven, Jr., Uneasy Case for Progressive Taxation (1979).

29 Blum & Kalven, Jr., *supra* note 28, at 456-57.

30 *See id.* at 492-94.

31 *See id.* at 451-52.

32 *See id.* at 496 n.197a.

33 *See id.* at 437-38; Louis Eisenstein, The Ideologies of Taxation 57-58 (1961).

progressivity is "stubborn but uneasy," suggesting that the debate is likely to continue without clear resolution for the foreseeable future.[34]

If the case for progressivity was uneasy in the 1950s, it has become even more so in the intervening years.[35] In part, this results from political trends, the reduction of taxes having become a conservative article of faith since at least the presidency of Ronald Reagan (1981-89).[36] In part, it results from the globalization of economic life, and the fear that high taxes will drive upper-income businesses and individuals to other taxing jurisdictions.[37] Since capital is (as a general rule) more mobile than labor, globalization provides an incentive to tax the former less and the latter more – pretty much the opposite of what Blum and Kalven-style progressivity would suggest.[38] This is an especially important factor for corporate taxes, which raise less money than the individual income tax, but are an important part of the progressivity equation.[39]

In recent years a number of tax scholars have considered the fate of progressive taxation in an increasingly globalized and (until recently) increasingly conservative world. Not surprisingly, a growing proportion of this debate concerns international issues. The work of Daniel Shaviro, a domestic tax scholar who more recently turned to international matters, is an important case in point. In his book *Fixing U.S. International Taxation*, Shaviro attempts to introduce (or more accurately, to reintroduce) distributive concerns into the international tax debate, where they have historically played a rather limited role.[40] The current political debate on corporate "inversions" and other international tax reduction strategies is a further case in point.[41]

A second strand of scholarship concerns tax history and its implications for the current debate. Reaching backward rather than outward, Ajay Mehrotra has considered the early history of progressive income

---

34 *See* Blum & Kalven Jr., *supra* note 28, at 519-20.

35 *See generally*, Michael A. Livingston, *Blum and Kalven at 50: Progressive Taxation, "Globalization," and the New Millennium*, 4 FLA. TAX. REV. 731 (2000) (discussing political and economic globalization events that have made progressivity even more difficult than it was in the 1950s).

36 *See id.* at 731, 746.

37 *See id.* at 742.

38 *See id.*

39 *See generally id.* (summarizing some of the reasons for the defensive posture of progressivity advocated – at least until the past few years).

40 *See* DANIEL N. SHAVIRO, FIXING U.S. INTERNATIONAL TAXATION 1-4 (2014); *see also* Reuven S. Avi-Yonah, *No Country is an Island: Is a Radical Rethinking of International Taxation Needed?*, (U. Mich. Pub. Law Research Paper, Paper No. 380, 2014) (reviewing SHAVIRO, *supra*) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389979.

41 *See*, *e.g.*, James Mann, *Corporate Inversions:A Symptom of a Larger Problem, The Corporate Income Tax*, 78 S. CAL. L. REV. 521, 521-22 (2004-2005).

taxation and its relationship to broader historical trends.[42] In his book, *Making the Modern American Fiscal State*, Mehrotra traces the intersection of economic, political, social, and cultural considerations – including, but not limited to, the "Social Gospel" of the mainline Protestant churches – that made the income tax possible.[43] While noting the anti-progressive tax reaction of the postwar era, Mehrotra suggests that progressive taxation has demonstrated remarkable resilience and that even today's antitax advocates make their arguments in an intellectual and political context established by the earlier reformers.[44]

Related to, but distinct from, the above point is the ongoing scholarship concerning the propriety and significance of estate and inheritance taxation. While opposition to the estate tax is frequently thought of as a conservative cause, liberals too have been divided, weighing the estate tax's effect on families and individual liberty as well as its role in reducing income concentrations.[45] The somewhat ambivalent nature of the debate is reflected in public policy: Congress has repeatedly renewed the estate tax while reducing its rates, increasing exemption amounts, and revealing a studied indifference to a bevy of old and new evasion techniques.[46]

The new directions above – internationalization, historicization, and a renewed interest in the estate tax – supplement a continuing stream of work on more traditional progressivity concerns, which has slowed but never completely stopped. The relationship of tax progressivity to nontax concerns, including the work of nontax legal philosophers (Rawls, Dworkin, etc.) and the effect of taxes on women,

---

42 *See generally* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS AND THE RISE OF PROGRESSIVE TAXATION 1877-1929 (2013).

43 *Id.* at 77, 99.

44 *Id.* at 254. For a survey of American attitudes on progressive taxation, including both pro- and anti-progressive views, see Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax,* 70 IND. L.J. 119 (1994). Mehrotra and Kornhauser are loosely associated with a group of scholars who have attempted to inject, or re-inject, a political and social consciousness into what is at times a rather dry, economics-dominated field, a movement that has at times been associated with critical tax scholarship but has recently taken on the more academic sounding name of fiscal sociology.

45 *See*, *e.g.*, Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 290, 313, 323, 364-65 (1994); Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Reply to Professor McCaffery*, 51 TAX L. REV. 363, 368, 378, 383 (1996). *Cf.* BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 81-84 (1999) (proposing that all Americans be granted an $80,000 stake in early adulthood to be financed by an annual wealth tax and an additional death payment for those able to afford it).

46 *See* McCaffery, *supra* note 45, at 304, 332; *see also* Alstott, *supra* note 45, at 397-98.

minorities, and other economically disadvantaged groups, are two important themes.[47]

To some extent, Piketty's book serves as a reinforcement of the traditional arguments in favor of tax progressivity. Yet it also suggests some of the limitations of these arguments – or, at the very least, the likelihood of their achieving practical success within the existing political framework. This is true in at least three different ways.

First, the book suggests that it will be difficult to achieve meaningful reduction of inequality by income taxation alone. If capital grows faster than income – and if today's high earners will quickly become tomorrow's capital owners – an income tax can at best slow down, but never truly reverse, the accumulation of capital that is at the heart of the inequality problem.[48] This is, of course, the reason that Piketty proposes a global tax on capital in the first place.[49] Some of the same effect could presumably be achieved by a more robust estate tax – really a once-in-a-lifetime property tax – or by more effective income taxation of interest, dividends, and capital gains, both of which Piketty would surely support. But these are precisely the taxes that tend to be leakiest in nature, and Congress (not to say the American public) has shown little inclination to make them less so.

Second, Piketty suggests that meaningful tax reform must take place at the international rather than the domestic level.[50] This is especially true of taxes on the top one percent – more likely, the top tenth or even hundredth of that percent – who are the most able to move income and capital between taxing jurisdictions.[51] To be sure, Piketty is not the first to recognize this problem: it is implicit in Shaviro's work and (indeed) in all serious international tax scholarship during the last few decades.[52] But Shaviro is talking about incremental changes, whereas Piketty is talking about a small earthquake. The gap between them and their ideas is a vast one.

Finally, there is the enormous political leap of faith that would be required to make Piketty's proposals a reality. Outside of Europe – and perhaps even in Europe – there barely exists a language to discuss the kinds of changes Piketty is envisioning, let alone the political will to

47 *See*, *e.g.*, Donna M. Byrne, *Progressive Taxation Revisited,* 37 ARIZ. L. REV. 739, 774-82 (1995) (discussing nontax philosophers); Dorothy A. Brown, *Race, Class, and the Obama Tax Plan,* 86 DENV. U. L. REV. 575, 575-76, 582 (2009) (discussing racial implications).

48 *See* PIKETTY, *supra* note 3, at 439, 515-18.

49 *Id.*

50 *Id.* at 430-39.

51 *See*, *e.g.*, *id.* at 521-24 (discussing how transparency can prevent the use of tax havens).

52 *See* SHAVIRO, *supra* note 40, at 19, 46.

make them a reality. This is no less true of traditional progressivity advocates, who have been trained to think in incremental and primarily national terms, than of their conservative opponents. None of this means that Piketty is wrong to make his proposals or is somehow wasting his time. There is always a time lag between the publication of seminal works and their impact on the political process (think of *Uncle Tom's Cabin* or *Silent Spring*, and more recently of climate change). But there are powerful political and ideological forces conspiring against Piketty's proposals – forces that the concentration of wealth and power he documents ironically make stronger – and the success of his approach, even among those most inclined to be sympathetic, is by no means a foregone conclusion.

III

If Piketty faces difficulty convincing liberals as well as conservatives to embrace his more radical proposals, it may be because they have more of a stake in the existing system than many of them would prefer to admit. One has to be careful of this analysis, because it can easily degenerate into a "so's your old man" argument that avoids the issues altogether. (Some of the journalist critiques of Piketty as an "academic elitist" have a bit of this flavor.) Yet there is some truth to the analysis, one which Piketty's own book recognizes at several key junctures. To understand this point, it is worth a brief detour regarding the nature of contemporary inequality and the difficulty tax systems have faced, so far, in confronting it.

In 1988 John Langbein, an expert in trust and estate law, published a relatively obscure article entitled *The Twentieth-Century Revolution in Family Wealth Transmission*.[53] Langbein argued that, before the twentieth century, family wealth typically consisted of land and financial assets that were passed to children at the time of one's death.[54] In the twentieth century, by contrast, the most important assets consisted of human capital, including education and (to a lesser extent) cultural and other benefits that were typically consumed during the parents' lifetime and not easily susceptible to monetary valuation.[55] Even when the parents had substantial financial assets, these were increasingly consumed during their own lifetimes, either by direct consumption or by means of pensions and similar arrangements.[56] Although these factors were less significant for the poor and working class (who did not hold significant

53 John Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988).

54 *See id.* at 725-26.

55 *See id.* at 736-38, 743-46.

56 *See id.* at 739-40.

assets of any kind) and for the very rich (who continued to possess both kind of assets), for those in the upper middle class – roughly, the top one-third of the population – they were increasingly predominant.[57]

Langbein was primarily concerned with the decline of the estates and trusts bar rather than with tax issues.[58] But the implications of his argument for estate (and by extension property) taxation are clear. If inequality results primarily from inheritance, and if the principal form of inheritance is not (or is not easily) subject to tax, taxation is likely to be an ineffective means of combating inequality. In fairness, Piketty's proposed tax would be imposed annually rather than on a once-in-a-lifetime basis, and would be aimed primarily at the top one percent of taxpayers, whom Langbein at least partially excludes from his theory. Piketty's tax would also be global in nature and (presumably) more leak-proof than the existing estate and gift levy.[59] Yet even for the top one percent, intangible advantages would appear to be as or more important than the tangible variety, and Piketty's tax would have little or no effect on them.

In an effort to bring Piketty's arguments down to earth, I considered the likely effect of his proposals on a typical upper middle class family, namely my own. My wife and I each work in the nonprofit sector and we have a combined income (earned and unearned) of around $400,000, which as best as I can tell places us just outside the top one percent of U.S. incomes. We have substantial pensions and other financial and nonfinancial assets, including a modest suburban home, which for the sake of simplicity we will value at an aggregate of $2 million. Our children attended a mix of public and private secondary and post-secondary institutions (the younger of the two is now entering college) and appear, so far, to be in reasonably decent shape. We have no pets, and I will leave the house immediately if we get one.

Piketty's preferred suggestion is a tax of 0% on the first $1 million of assets, 1% on the second million (which is in the $1-5 million range), and so forth.[60] Under this proposal – and assuming no exemption for pension or other retirement plans – we would pay a tax of approxi-

---

57 *See id.* at 747-51. Piketty mentions the human capital problem, arguing that the increased role of education does not mean that society has become more meritocratic, but does not really address whether human capital is more or less important than tangible assets, a question that is probably impossible to resolve definitively in any event. *See* PIKETTY, *supra* note 3, at 419-20.

58 Langbein, *supra* note 53, at 722.

59 *See generally* PIKETTY, *supra* note 3, at 515-30.

60 *Id.* at 528. For the sake of convenience, I have assumed that dollars and euros have an equivalent value. The actual conversion rate is approximately 1.10 dollars per euro but the rate has fluctuated significantly in recent years and is likely to do so in the future.

mately $10,000 per year (1% on the second million), on a more or less indefinite basis. This would be in addition to our existing income, property, and other taxes, again assuming that there was no reduction in these taxes and that none of the taxes were deductible against the others (all questionable assumptions, but let us permit this to pass for the moment).

What effect would this new tax have upon us? No doubt it would be frustrating and, depending upon the performance of our assets, might significantly slow down or even reverse the growth in our retirement portfolio. Perhaps it would encourage us to spend more money before it was taxed. But would it meaningfully change our lifestyle, or the advantages that we and our children have over others less fortunate than us? Not very much.

I say this not because I don't think we are privileged, but because I think the nature of that privilege consists far more of intangible, human advantages than financial or other taxable assets. When one of our children had a medical problem, we were able to use our knowledge and connections to place him in the best hospital and secure him the best treatment, a difference that might easily have saved his life. When our other child was not placed in a "gifted" program, we were able to argue that he was indeed gifted and the school had simply misapplied the criteria. When it came time to choosing a college, we were able to sort through the maze of misleading statistics and figure out which school, if not the best for us, was still best for them. The aggregate effect of these interventions, over the course of years and decades, constitutes the difference between success and failure or, at very least, between disastrous failure and failure one can still overcome. Their significance cannot be overstated, and few if any of them are subject to tax.

To be sure, many of these advantages correlate with money, and some may be caused by it. For example, money (or access to health insurance) obviously increases one's medical choices, as well as the range of available colleges and preparatory schools. Even here, the advantages are so deep-seated and structural in nature that it is hard to see how anything less than a massive redistribution of wealth and income would do much to change them. Certainly, a 1%, or even a 10%, tax would have little immediate effect.

One can argue, of course, that Piketty's tax proposals would not come in a vacuum. Money raised by his tax would presumably be used to pay for better education, housing, and health care, especially for those who now receive less of them. And the people who support higher taxes would likely also argue for better treatment of women, a more forceful response to climate change, and other progressive causes.

The problem is that each of these issues is primarily local in character, and involves social, cultural, and religious values that are only partially, if at all, determined by income levels. Many of the people who support higher taxes would, I suspect, be aghast at the abolition of "gifted classes," or if they were denied a role in choosing their children's colleges or summer camps. Yet these are precisely the areas in which structural inequality lies.

One of the most entertaining parts of *Capital in the Twenty-First Century* is its treatment of educational institutions. Many academics, including Piketty himself, support social justice and redistribution of income. But their actual behavior is rather different. Thus, academic institutions follow aggressive investment strategies including extractive industries, hedge funds, and other investments that contribute little, if anything, to net global welfare (Harvard appears to have been particularly invested in hedge funds) and enable them to receive returns well above those available to the average investor.[61] The most prestigious universities also accept "legacy" applicants (i.e., those whose parents or grandparents attended the same institution) at rates three or four times the rate of ordinary applicants, a sort of academic frequent flyer program that is driven almost exclusively by its fund-raising potential. This is before one even reaches the enormous tax subsidy received by educational institutions or the extraordinary salaries paid to university officials, matters less central to Piketty's argument but which are accessible to any reader of a daily newspaper. The University of Pennsylvania (Penn), the predominant university in Philadelphia, pays its President a salary of more than $2 million,[62] and I have seen Penn Police patrolling the streets of West Philadelphia as if the university were a separate city, which I suppose, in a sense, it is.

That universities preach social justice while maintaining an essentially feudal internal structure does not, of course, mean that they are wrong or even especially hypocritical in doing so. (The medieval church did more or less the same thing). Yet it is hard to escape that one reason academics favor higher taxes is that they know, deep down, that such taxes will not hurt and may even help them, by knocking off (or at least knocking down) potential competitors without really touching the deeper, noneconomic advantages that they and their class possess.[63] At

---

61 *Id*. at 447-52.

62 Seth Zweifler, *Gutmann Salary Passes $2 Million Mark*, THE DAILY PENNSYLVANIAN (Aug. 29, 2003), http://www.thedp.com/article/2013/08/gutmann-compensation.

63 The suspicion that academics favor redistribution of income from self-interest rather than ideology is an old one: a famous Yale professor is supposed to have teased his students on this point on the first day of classes. Even if we disregard self-interest, there is an inevitable tendency to downplay fears of concentrated political power, which is by

the very least, their proposals would be more convincing if accompanied by broader proposals for social and political equality: something many academics do endorse, but all too many are silent about.

Which brings us back where we, and Piketty, started: to the French Revolution and its implications for today's world. The Revolution began with a tax crisis, when Louis XVI could not balance his budget and called the Estates General to try to iron things out. The Estates General, which had traditionally voted separately by estate (clergy, nobles, and everyone else), unexpectedly transformed itself into a National Assembly in which all voted together and the Third Estate, that is, ninety-nine (or ninety-eight) percent of the population, eventually came to dominate.[64] People stopped bowing to the king and the king attached a revolutionary cockade to this clothing. The rest – the fall of the Bastille, the Reign of Terror, Napoleon, and so forth – is, as they say, history.[65]

As Piketty notes, the revolutionaries never completely resolved the tax crisis, and the distribution of income remained more or less the same as it was before the Revolution.[66] What changed was the nature of society and the allocation of political power. Even after the Bourbons were restored in 1815, they never really succeeded in repealing the *Declaration of the Rights of Man*, or in redividing society into formal estates that had little or nothing to do with each other.[67] As Simon Schama notes in his eponymous book, the word citizen (*citoyen*) came into use for the first time: first in France, then everywhere else.[68] When France turned, after World War II, to a more systematic attack on inequality, it was to this conception of equality that it referred.

No one is (yet) calling for the king to be guillotined, and I haven't heard anyone propose a new tax on salt. Yet the lesson of 1789 remains clear: everything is not economics, or at very least, economics cannot be separated from underlying political and social arrangements. That

---

its nature difficult to quantify, as compared to concentrated economic power, which is at least theoretically subject to measurement. Piketty's proposals, which would tend to reduce concentrations of economic power but increase the political variety, are consistent with this tradition. The experience of the European Union (EU), on which Piketty has, to a significant degree, modeled his proposals, is a case in point. *See generally* JAMES HEARTFIELD, THE EUROPEAN UNION AND THE END OF POLITICS (2013) (arguing that the EU has resulted in government by bureaucrats and a widespread decline in political participation); *see also* PIKETTY, *supra* note 3, at 571-77.

64 *See* PIKETTY, *supra* note 3, at 129.

65 For a more in-depth analysis of the French Revolution see generally SCHAMA, *supra* note 1.

66 *See* PIKETTY, *supra* note 3, at 342.

67 *See id.*; SCHAMA, *supra* note 1, at 7-12.

68 *See* SCHAMA, *supra* note 1, at xv ("[A] patriotic culture of citizenship was created in the decades after the Seven Years' War" which was "a cause rather than a product of the French Revolution.").

doesn't mean that taxes don't matter or that Piketty's proposal is not useful, at least as a starting point. (One of the revolutionaries' first moves was to repeal the tithe, a particularly hated tax that went to support a hated clerical bureaucracy.[69]). But it does mean that they are unlikely to be enough.

What I am arguing is not that Piketty is too radical, but that he is perhaps not radical enough: that a genuine assault on inequality requires a change in philosophy that cannot be captured by charts and graphs, however stylish they are. Inequality is first and foremost a state of mind, on the part of those at the top and frequently those at the bottom. The expressions of inequality, from the rise of the Gini coefficient to separate bathrooms for first class passengers, are manifestations of that mindset rather than its essence. Those who believe it can be corrected by raising taxes on someone else, while maintaining their own exemptions and privileges, are like the ministers in Louis XVI's government who thought they could resolve the financial crisis while maintaining the existing social structure. They may write the first chapter, but they are unlikely to finish the story. "*J'avais reve' d'une republique que tout le monde eut adoree'*," wrote Camille Desmoulins before his execution, "I dreamed of a republic that the whole world would love."[70] He was talking about more than taxes.

---

[69] *See id.* at 316.

[70] SCHAMA, *supra* note 1, at vii (frontispiece) (quoting a letter from Camille Desmoulins to his wife from April 4, 1974). The quotation finds an odd resonance in the famous song from the musical *Les Miserables*, although it is doubtful that audiences (and perhaps the writers) were aware of this, particularly given that the English translation makes it appear that the singer (Fantine) is upset because she has been betrayed by her boyfriend rather than by God or by the Revolution, which in any case took place several decades earlier. "*J'avais reve'* [I dreamed a dream]."