

Student Scholarship

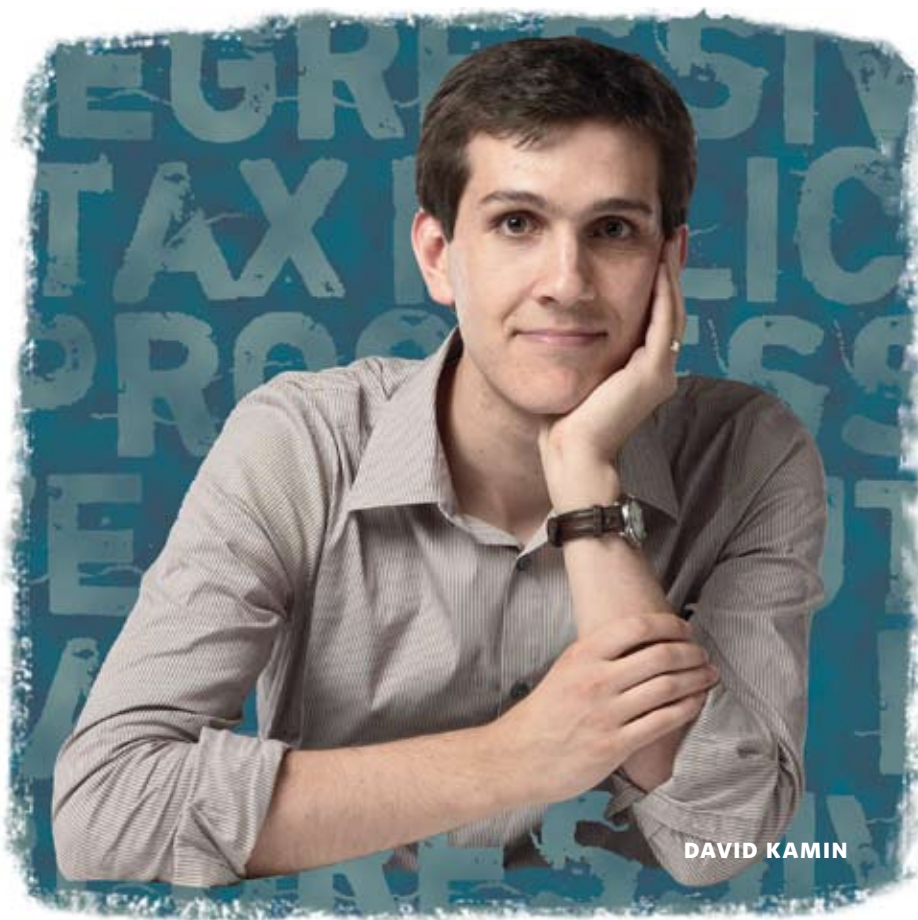
“President Bush’s tax cuts have made the tax code more progressive.”

—White House press release, July 11, 2006

“[The] Bush tax cuts reduced the progressivity of the federal income tax and the federal tax system in general.”

—Report from Democratic staff of the House Ways and Means Committee, April 12, 2005

What Is a Progressive Tax Change?



DAVID KAMIN

Before entering NYU Law, David Kamin worked at the Center on Budget and Policy Priorities, a think tank devoted to analyzing how tax and transfer policy affects low- and middle-income Americans. There, while analyzing and writing about the distributional effects of major tax legislation, he sensed that there was something lacking in the debate about progressivity measures—even as these measures were affecting the course of policy debates. Kamin’s note “represents my attempt to push forward the discussion and to better define exactly what we mean when we call a tax change ‘progressive’ or ‘regressive.’”

The following is an abridged version of an April 2008 New York University Law Review note, “What Is a Progressive Tax Change?: Unmasking Hidden Values in Distributional Debates.” Kamin graduated Phi Beta Kappa and with highest honors from Swarthmore College in 2002 with a B.A. in economics and political science. He is a Furman Scholar with a full-tuition merit scholarship and is an articles editor of the NYU Law Review. After his expected January 2009 graduation, Kamin will become the special assistant to the director of the Congressional Budget Office in Washington, D.C.

THESE TWO QUOTES ARE CHARACTERISTIC of a fierce debate about tax equity that has persisted in Washington since the enactment of the first Bush tax cuts in 2001. Tax cuts have been the centerpiece of the Bush Administration’s domestic economic policy, and over the last seven years, number crunchers have “followed the money,” producing a myriad of distributional analyses showing the effects of the tax law changes by income category. Nonetheless, controversy continues to swirl around whether the Bush tax cuts are, in fact, progressive, shifting the tax system in favor of lower-income Americans, or, instead, regressive, shifting the system in favor of higher-income Americans. Policymakers and Washington analysts, often looking at numbers that are fully consistent with one another, have arrived at opposite conclusions, with opinions tending to fall along party lines. Thus, despite extensive economic analysis, there remains stark disagreement regarding a fundamental question: Are the Bush tax cuts distributionally “progressive,” “regressive,” or “neutral”?

This controversy is indicative of a more general confusion, both in Washington and in the academic literature, about how to measure the progressivity of a tax change. The confusion is particularly vexing because policymakers and analysts often rely on progressivity as a guidepost when constructing and analyzing policy, but do little to explain or justify the particular progressivity measures they employ. Progressivity measures—which can differ considerably from one another—tend to be haphazardly chosen based on arguments that have rhetorical flair but lack normative substance. Thus, important policies are being developed and evaluated based on distributional measures that may not be meaningful and may, in fact, be misleading.

The academic literature is replete with arguments regarding which measure is best for assessing the progressivity of tax changes, but this debate has largely devolved into empty rhetorical assertions. The

literature fails to explain why any particular progressivity measure is necessarily a better gauge of a tax change's effect on equity.

This note takes an alternative approach. It argues that, if progressivity measures are to accurately gauge how a tax change affects the fairness of the tax system, they must be rooted in a theory of distributive justice that motivates our concern for how the tax system distributes resources. This means that a measure should indicate that a tax change is progressive if the tax change, according to the relevant theory of distributive justice, has meaningfully shifted the tax system in favor of low-income Americans. Where a regressive change is indicated, the opposite should be true, and a neutral tax change, by distributing its benefits or burdens equally across all income levels, should leave the fairness of the tax system unchanged.

THE MEASURES AND HOW THEY DIFFER

A handful of progressivity measures serve as the fodder for Washington tax debates and are used widely throughout the tax literature. The table below uses a simple example to illustrate how five prominent progressivity measures can diverge. These five measures—or ones closely related to them—dominate the debate about tax fairness in Washington and the discourse among many academics.

For the purposes of this example, assume that there are two taxpayers in society: “High” and “Low,” with High earning \$100 and Low earning \$50. Prior to the tax change, High pays \$30 in taxes and Low pays \$10. The tax change involves cutting High's taxes by \$2 and Low's taxes by \$1, reducing revenues by a total of \$3.

Under these circumstances, the five measures do not agree as to whether the tax change is progressive, regressive, or neutral. (Note that the table labels the measures “Measure A,” “Measure B,” and so forth.

These labels are also used later in this note.) On the one hand, Low has seen her tax liability cut by a greater percent than High (Measure A) and, as a result, Low's share of total taxes paid has dropped, while High's share has increased (Measure B). Both these measures indicate that the tax change is progressive. (In fact, Measures A and B are very closely related—always agreeing as to whether a tax change is progressive or regressive.) On the other hand, High's after-tax income has seen a somewhat greater percent increase than Low's after-tax income (Measure D), and High has also received a larger tax cut in dollars (Measure E). Seen through these measures, the tax cut is regressive. And, finally, in terms of percentage point change in average tax rate, the tax cut is perfectly neutral, with both taxpayers having their average tax rates fall by two percentage points (Measure C).

So, how to choose? The literature is split as to which measure is best—and arguments for a given measure have largely failed to probe the normative underpinnings of the concern for progressivity. This note proposes that the answer to this question lies in one's choice of a particular theory of distributive justice.

MEASURES OF PROGRESSIVITY AND THEORIES OF DISTRIBUTIVE JUSTICE

The question of how resources should be fairly or optimally distributed and, in turn, how government should allocate the tax burden among the citizenry has elicited a vast body of literature. The discussion below briefly summarizes how three dominant theories of distributive justice relate to the measures of progressivity that have been introduced here.

EQUALITY OF RESOURCES

Those who concern themselves with equality of resources believe that a reduction in resource inequality is “an end in itself.” If

resource inequality is the scale upon which tax fairness is judged, then a progressive tax change should be one that shifts the tax system more in favor of those with lower incomes by closing the gap between the highest earners and those below them.

Two of the progressivity measures stand out as good measures of a tax change's effect on resource inequality. These measures are percent change in after-tax income (Measure D) and tax change in dollars (Measure E). Percent change in after-tax income (Measure D) defines the extent to which relative income differences shift due to a tax change, while tax change in dollars (Measure E) indicates how a tax change affects the absolute differences in income between different economic classes. But, whether inequality is best measured in relative or absolute terms is a difficult question which can only be answered by a deeper probing of why resource inequality is harmful.

EQUAL SACRIFICE

The equal sacrifice doctrine does not concern itself with the fair distribution of resources but, instead, the fair distribution of tax burdens. This theory posits that fair taxation would require equal sacrifice from all, leaving the distribution of welfare generated by the market unchanged. Three of the measures of progressivity discussed here, percent change in taxes paid (Measure A), percentage point change in share of taxes paid (Measure B), and percent change in after-tax income (Measure D), are plausible measures of progressivity under this theory of fairness. Measures A and B (which, as noted before, are closely related) indicate how a tax change affects relative differences in tax sacrifice, while Measure D serves as a good proxy for changes in the absolute level of sacrifice, assuming that the marginal utility of income descends at a plausible rate as income rises.

A Hypothetical Tax Cut MEASURES OF PROGRESSIVITY DIVERGE				MEASURES OF PROGRESSIVITY				
HYPOTHETICAL INCOME AND TAX LIABILITY				A	B	C	D	E
Income Level	Pre-Tax Income	Tax Liability Before Tax Cut	Tax Liability After Tax Cut	Percent Change in Taxes Paid	Percentage Point Change in Share of Taxes Paid	Percentage Point Change in Average Tax Rate	Percent Change in After-Tax Income	Tax Change in Dollars
Low	\$50	\$10	\$9	-10.0%	-0.7%	-2.0%	2.5%	-\$1
High	\$100	\$30	\$28	-6.7%	0.7%	-2.0%	2.9%	-\$2
				PROGRESSIVE	PROGRESSIVE	NEUTRAL	REGRESSIVE	REGRESSIVE

UTILITARIANISM

The utilitarian principle requires that society be organized so as to maximize social welfare as calculated by summing the utility of all members of society. From the utilitarian perspective, the entire progressivity framework, irrespective of the measure employed, should be rejected because it focuses on the wrong issue—namely, which income classes have done better than others, as opposed to whether aggregate utility has been maximized. This does not mean that distributional tables are irrelevant to utilitarianism; in fact, they are quite important for evaluating the optimality of a tax change, since a dollar in the hands of those with lower incomes would be expected to generate more utility than a dollar in the hands of those with higher incomes. But, in employing tax distributional tables, the utilitarian would not be concerned with which income groups have done better than others (or trying to discern what it means to do better)—the sine qua non of progressivity. Instead, the utilitarian would be focused solely on maximizing aggregate utility, which is an entirely different issue.

CONCLUSION

This note does not arrive at a determinative conclusion as to which progressivity measure is “best,” instead finding that “it depends.” But, in outlining exactly what this decision depends on, this note moves the discussion forward in a number of ways. First, this note provides a mapping of theories of distributive justice onto progressivity measures, allowing a person to choose which measure of progressivity to use depending on how that person conceives of tax justice. Second, this analysis cautions that the progressivity framework is not necessarily consistent with all theories of distributive justice. In fact, according to one dominant theory of justice—utilitarianism—the progressivity framework is a flawed one. This point highlights the importance of analyzing progressivity measures with a theory of distributive justice in mind and warns against adopting a progressivity framework without understanding how it connects to one’s conception of tax justice. Finally, this note’s approach pushes the debate beyond bald assertions of which progressivity measure is superior. There will still be disagreements about progressivity measures, but these disagreements should be framed in terms of theories of justice. This allows for a richer debate that addresses substantive issues about how fairness should be conceived and offers greater potential for moral progress. □

Student Tax Notes Win Prizes

NYU TAX SCHOLARS HAD PROFITABLE returns in 2007. David Kamin '09 and Michelle Christenson '08 won second place and honorable mention, respectively, in the 2007 Tannenwald Writing Competition, cosponsored by the Tannenwald Foundation for Excellence in Tax Scholarship and by the American College of Tax Counsel. The judges received 50 papers from full- and part-time law school students from around the nation who wrote on any federal or state tax topic. Kamin’s paper (excerpted at left, beginning on page 84), “What’s a Progressive Tax Change? Unmasking Hidden Value of Distributional Debates,” earned him a \$2,500 cash prize.

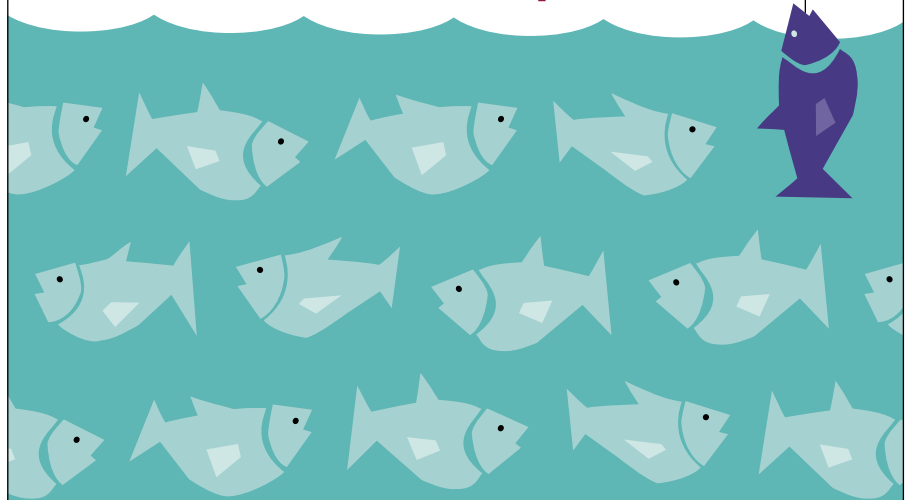
Christenson’s paper, “Optimal Property Taxation: An Endowment Tax on Land Value,” proposes a land value tax as the op-

timal tax base for land holdings; it is more equitable than a property tax, she argues, since it ignores improvements and better reflects what landowners can pay and receive as benefits. Christenson also explores whether a land value tax should be weighted, with a higher tax rate for low-value land use. “It was really useful to discuss—as well as defend—my paper with a group of other students and professors versed in law and economics,” says Christenson.

Kamin is gratified for the opportunity to bring the issue of accurately measuring tax progressivity to a wider audience: “I consider how to measure the progressivity of a tax change to be an important issue. I was very happy to see that I convinced readers that I am proposing a credible approach to this problem.” □



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A Remedy for Victims of Abuse by U.N. Peacekeepers



CATHERINE SWEETSER

Catherine Sweetser '08 wrote two theses on peacekeeping when she was at Yale, where she graduated magna cum laude in 2005 with a B.A. in political science and international studies. Since coming to NYU, she has become fascinated by global administrative law, in particular by how international institutions are accountable to the people they serve and to the governments that create them. This excerpt is from "Ensuring Accountability of Peacekeeping Personnel for Human Rights Violations," which was presented at the 2007 Emerging Human Rights Scholarship Conference. It will be published in the NYU Law Review in November. Sweetser was a Furman Scholar and an articles editor of the NYU Law Review. She is an Institute for International Law and Justice Scholar. She expects to earn a 2009 LL.M. in international legal studies and ultimately plans to teach international and administrative law.

DESPITE AN OFFICIAL "ZERO tolerance" policy and a commitment to international humanitarian law and international human rights, stories of exploitation by United Nations peacekeeping troops and personnel continue to surface. From 2004 to 2006, the U.N. investigated 319 individual peacekeepers for sexual abuse and disciplined 179 soldiers, civilians and police officers. Most recently, BBC investigators uncovered allegations of an assault on a 15-year-old girl in Liberia and of a number of assaults in Haiti. The U.N. has made a genuine effort to reform policy around peacekeeping but has not yet provided compensation to victims. The perceived lack of recourse for victims undercuts the legitimacy of the U.N., thereby weakening peacekeeping efforts, and has distinct ramifications for the immunity

the U.N. currently enjoys as an intergovernmental organization.

The question of legitimacy becomes one of efficacy for the U.N. in situations where missions are attempting to rebuild post-conflict societies and depend on the support of donors as well as of the local population. U.N. officials recognize that individual criminal acts have an effect on the ability of the U.N. to carry out its missions. The Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, stated that "[t]he United Nations will [lose]... its moral force if it fails to respond when those within the United Nations system violate human rights."

In this note, I focus on the same group of people that the General Assembly's Group of Legal Experts' recent report targets: peacekeeping personnel. The term "peacekeeping personnel" encompasses officials of the United Nations—both staff and volunteers—and experts performing missions, including United Nations police, military observers, military advisers, military liaison officers and consultants. Troops are often subject to very little if any control by the U.N., raising difficult questions for the responsibility of the U.N. toward violators, but peacekeeping personnel operate as employees of the U.N. and are subject to both functional immunities under the privileges and immunities convention and broader immunities under specific agreements with host states. As such, their behavior reflects most strongly on the organization.

CURRENT PRACTICE AND RESPONSE

The U.N. has responded to problems with peacekeeping personnel through ex ante measures: specifically, encouraging decision making that focuses on women's rights and the disparate impact of measures on women and including "gender units" with teams of troops. It has also taken ex post measures on an ad hoc basis, setting up investigations by the Office of Internal Oversight Services into scandals in the Congo, Liberia, and Haiti, creating Boards of Inquiry under transitional administrations and setting up specific hotlines and complaint procedures for missions. Recent cases have implied that the organizational immunity provided the U.N. is contingent on provision of alternate remedies for people injured. Where there is a gap in the provision of compensation and remedies to victims, the U.N. must fill that gap.

The U.N. has given financial compensation to states and, in cases of arbitrary detention, to individuals in the past, thus potentially recognizing some form of

liability when peacekeeping personnel commit illegal acts. Where a claim is brought against a country or against the U.N. during a military operation, a claims review board may be formed. These ad hoc mechanisms are slow and costly but show that the U.N. already has experience in compensating for claims against peacekeeping personnel.

Such compensation by the U.N. for unlawful acts by U.N. personnel has come on a case-by-case basis and seems largely contingent on international pressure or litigation by the victim's state. It thus does not systematically establish confidence in the U.N. system. It also privileges those victims who have the resources to bring their own lawsuits or who live in a state that has the functional capacity and political will to act on their behalf. The U.N. response will fail to provide an adequate remedy for abuse by employees unless it deploys more systematic ex post mechanisms to ensure financial compensation and civil liability, such as a blanket waiver of civil immunity or a compensation commission.

THE LIABILITY GAP

In order to ensure legitimacy, the U.N. system must be poised to engage with each incident, whether or not the incident rises to the level of an international crime. Although criminal acts by peacekeeping personnel may arguably be said to violate international human rights law through violating an individual's right to life or right to bodily integrity, international law does not provide universal jurisdiction for civil suits in these situations. Individual sexual abuses by peacekeepers are not considered crimes violating peremptory norms, and peacekeepers are currently protected by status-of-forces agreements giving them significant immunities within the country of the mission.

Rape and sexual abuse are increasingly recognized as war crimes and crimes against humanity by international criminal tribunals but the recognition generally requires that the act be part of a widespread or systematic attack against a population, rather than an isolated incident. In crafting a general system that corresponds to all sexual abuse by peacekeepers, U.N. officials cannot assume that all such crimes will fall into the category of crimes against humanity.

Despite the absence of peremptory or international criminal norms against such conduct, peacekeepers may still be violating the human rights of their victims, if non-state actors can be said to be violators of human rights. Commentators have derived a right to bodily integrity from the right to "life, liberty, and security of person" in the

Universal Declaration of Human Rights and the right to life under the International Covenant on Civil and Political Rights. The fact that such a violation does not rise to the level of jus cogens norms generating universal jurisdiction, and probably will not fall under the rubric of international criminal law, means that the U.N. must take positive steps to ensure that victims have a forum in which to file complaints and bring claims.

The current structure of immunities creates gaps in liability and adds to the climate of impunity. Although international human rights law often relies on domestic legal systems for enforcement, functional immunities attach to U.N. personnel while on mission. Even when alleged violations fall outside a peacekeeper's given function, domestic courts on the ground may require a waiver of immunity before a suit can be brought. The International Court of Justice has held that the Secretary-General has a pivotal role to play in determining whether immunity attaches. The power of the Secretary-General to refuse to waive immunity in the face of a serious crime thus hinges on the question of whether a human rights violation can constitute an official act of the U.N. or whether the protection of a violator can be functionally necessary for the operation of the U.N.

Part of the power of the Secretary-General to refuse to waive immunity comes from countervailing human rights considerations of due process for alleged perpetrators. Due process protections are much stronger in the civil context; during a subsequent enforcement action, the courts of the peacekeepers' home nation can examine the fairness of the original action in the host country. Nonetheless, for practical reasons, a waiver of immunity may not fill the liability gap: Many individuals will not have the resources to pay judgments against them; most victims will not have the resources to bring complicated suits and subsequent enforcement proceedings; and in a country undergoing or in the aftermath of serious armed conflict, the courts may not yet be equipped to hear claims.

FILLING THE GAP

The U.N. is currently taking action to fill in the enforcement gap left in criminal law, but there is no system in place to fill in the gap in civil law. The General Assembly's Group of Legal Experts has created a draft convention to ensure that states exercise criminal jurisdiction over their own nationals, but it has purposely avoided altering the structure of immunities. A referral "to medical and psychosocial services available in the host

country, with costs to be covered from existing mission budgets," is the only current remedy available to victims. This remedy clearly falls far short of true compensation, particularly because medical and psychosocial services may simply not be widely available in post-conflict situations.

The U.N. should implement a default policy of waiving civil immunity for serious crimes and gross human rights violations. However, there are practical reasons such a waiver may not be sufficient. In some cases, a waiver might impair the efficacy of the mission; in others, victims may not be able to bring suits. Thus, where immunity applies, the U.N. should also create an alternative forum, such as a compensation commission, for victims to file complaints.

The trust fund of the International Criminal Court (ICC), which will soon be formed and administered, provides a good potential model for a compensation mechanism in the peacekeeping context. The U.N. should follow the model of the ICC and create a trust fund from which to compensate victims and should tie it to existing complaint and investigatory mechanisms. This fund should also be part of the peacekeeping budget since voluntary funds such as the U.N. Voluntary Fund for Victims of Torture have struggled for funding.

CONCLUSION

Although financial compensation cannot truly restore a survivor of abuse to his or her former state, it can make a crucial difference. A 2005 report by Prince Zeid, special adviser to the Secretary-General, proposing a voluntary fund, points out that "[m]any victims, especially those who have 'peacekeeper babies' and who have been abandoned by the fathers, are in a desperate financial situation." In addition to child support, compensation can be important for those who have contracted HIV/AIDS and who will need long-term health care. A compensation commission or mechanism would not only provide a useful alternative forum for victims, thus enabling a principled denial of waiver of immunity in domestic courts should due process concerns arise, but could also ensure recognition of and concern for victims by the U.N. itself, restoring legitimacy to the organization in the eyes of the public. The steps taken thus far by the U.N. to provide for criminal jurisdiction in the country of nationality and to strengthen complaints and investigatory procedures will prove crucial; yet in the course of reform, the U.N. should not forget to provide compensation to victims who have no access to a civil suit. □