THE CURRENCY OF TAXATION

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INTRODUCTION

In its canonical rendition, income taxation aspires to achieve the sometimes-conflicting goals of maximizing social welfare and promoting distributive justice. We do not usually think about tax law as participating in the formation of our identities, shaping the ways in which we perceive ourselves, or influencing how we interact with others. I argue, however, that income tax is a powerful social instrument that plays an important role in the construction of our identities and interactions with one another. Income tax law, I claim, simultaneously reflects and shapes our identities, self-perceptions, and social interactions in various contexts, including within our families and communities, as well as our sense of social solidarity and participation in political institutions.

There are many ways in which tax law participates in identity formation, as demonstrated in the articles in this symposium. In this Article, however, I focus on a systemic phenomenon that impacts us significantly, what I term "the currency of taxation." This phenomenon is not limited to a specific group of taxpayers or specific area of income taxation (e.g., domestic or international taxation), nor to a particular tax mechanism (e.g., deductions, exemptions, or credits). Rather it affects, in varying ways and degrees, any area that income taxation touches on. The currency of taxation is related to the very basic mechanism of income taxation: in order to achieve its alleged goal to equitably and efficiently distribute the costs of government, income taxation has to assess taxpayers' liability and determine the efficient and equitable share each must bear. This inevitably entails: comparisons of people and their behavior; the assessment of individual attributes; interpersonal interactions and social institutions; and the translation of all of these into the currency of taxation. Accordingly, the currency of taxation necessarily sorts through attributes and actions and measures and arranges them along the income tax scale. I argue that this process of classifying, comparing, and measuring has certain features that challenge and, at times,

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even reconstruct, the reality it is intended to measure, thereby shaping our identities in a number of ways.

Measuring income requires a point of reference against which to compare people: Which capabilities (favorable or unfavorable) should be considered when comparing people for income tax purposes? A person's economic resources are an obvious consideration (and, therefore, changes in wealth should definitely be included in the equation), but what about her talents, disabilities, or place of residence? Are these relevant factors for income tax purposes? Or are they merely part of who that person is and thus should be disregarded for tax purposes? In other words, what counts as income, and what should be allowed as a deduction? To put it more generally, what is to be considered part of the domain of tax, and what lies beyond its perimeters?

Once the normative baseline has been set as to what counts for tax purposes, a conversion mechanism must then be applied: converting life into the currency of taxation requires not only determining *whether* an item should be assessed on the tax scale but also *how much* it measures in tax terms. This results in a mechanism that translates reality into a continuous linear (lexical) function, with a distinctive starting point (zero liability) along a steady monetary scale. The elements of this mechanism—its starting point, units, and monistic, lexical order—are not simply components of the technical apparatus of the income tax system, but are normative choices. Like any baseline, the currency of taxation sets, reflects, and reinforces norms; like any scale, it highlights certain aspects of our lives and overrides others; like any conversion mechanism, it purports to represent the true worth of items on the scale, but often something gets lost in the translation; and like any lexical order, it treats items as commensurable and their "values" on the scale as comparable.

In determining what does and does not count for tax purposes, the currency of taxation takes a stand about who we are (and who we should be). In determining the answers to these questions, the currency of taxation frames what we consider a "normative taxpayer," thereby also impacting what we consider normal and what we consider unique. Even more significantly, however, and as will be explained and demonstrated below, income tax creates material incentives for certain resources, behaviors, and relationships, which are constitutive of human identity and thus actively support those features. But even beyond the decision that a given attribute or component of our lives should be included in the register of items that are relevant for tax purposes, *the conversion of reality into the currency of taxation* may, in itself, raise identity-related issues. Two aspects of this process stand out in particular. The first is *the commodifying nature* of the currency of taxation. The second is *the involvement of the government in the process*: the fact that not only does the currency of taxation translate reality into money, it also determines and reports to the government people's fair share in financing state-supplied public goods.

This Article illustrates these identity-related aspects of the currency of taxation through four test cases: (1) the deduction of commuting expenses;

(2) the distinction made between gifts and barters; (3) the Israeli *kibbutz* communities; and (4) personal-based international taxation. These four contexts represent different aspects of a person's identity. The case of commuting expenses spotlights the underlying assumptions regarding "normal" aspects of an individual's identity; the gift/barter distinction draws attention to tax's role in shaping interpersonal interactions; the *kibbutz* exemplifies the interaction between tax and our constitutive communities; and international taxation demonstrates tax's effect on the political institutions to which we belong. Each context is illustrative of different tax mechanisms: commuting expenses highlight deductions; the gift/barter distinction focuses on income-inclusion; the *kibbutz* demonstrates the taxation of incorporations; and international taxation relates to the scope of tax's jurisdiction. For each of the four test cases, this Article explores the implications of the choices made by our tax system for taxpayers' identities, underscoring the importance of considering these effects when designing tax policy.

This Article proceeds as follows: Part I expands on the identity-related implications of the currency of taxation. Part II analyzes the four test cases. Part II.A illustrates, using the example of community expenses, the process of baseline setting and determining which attributes are to be converted into the currency of taxation. Part II.B and II.C discuss taxation's commodifying effect in two nonmarket contexts: the interpersonal context of gifts (as opposed to barters) and the community context of the *kibbutz*, respectively. Lastly, Part II.D turns to the implications of state-membership in the process as exemplified by personal-based international taxation.

I. THE CURRENCY OF TAXATION

The canonical understanding of income taxation construes tax as an instrument for achieving the (at times conflicting) objectives of maximizing social welfare and promoting distributive justice. Accordingly, taxpayers' share in financing the public fisc should be determined based on some function of *distributive justice*. Income taxation is considered a key tool (the optimal tool, some claim[1]) for income redistribution. A good tax policy, moreover, also will promote *efficiency* so as to maximize the social welfare pie given (a distributively just) taxation. The importance of these classic considerations for income tax policy cannot be overstated. However, they do not exhaust the normative underpinnings of tax. In what follows, I argue that the seemingly technical ways in which tax operates have some crucial effects on taxpayers' identities, our communities, and political institutions.

Indeed, to achieve its goal of equitably and efficiently distributing the costs of the public fisc, income taxation inevitably engages these fundamental features of our personal and social identities. To determine

1. *See* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

each taxpayer's liability and fair share, tax law must compare people and their behavior, assess interpersonal interactions and social institutions, and convert all these factors into the currency of taxation.

The currency of taxation measures attributes and actions and arranges them along the income tax scale. This process requires a *baseline* against which a person's worth in income tax terms is measured and a decision regarding which attributes (should) matter. What, in other words, counts for tax purposes? Are, for example, an individual's talents, gender, physical capabilities, and family status relevant factors for income tax purposes, and should they, accordingly, increase or decrease her tax liability? Or are they merely components of who she is? Should a credit or deduction be allowed, or income perhaps imputed, due to a person's favorable or unfavorable attributes or the unique costs she is forced to incur in order to take part in the income-producing process? Or should income taxation treat such attributes as irrelevant and ignore them when comparing taxpayers' resources, incomes, and deductions?

The evaluation process does not stop once the baseline has been set. Measuring a taxpayer's yearly income requires an ongoing *conversion* of life into the currency of taxation: the currency of taxation identifies valuable items (resources, attributes, and interactions) in a person's life and translates them into tax liability, which is then paid to the government in cash. Thus, the currency of taxation must measure attributes and actions and arrange them along the income tax scale. To do so, a mechanism must be applied that sorts the relevant items from the irrelevant ones and converts them into an *increasing monetary scale* that determines how much the government should be paid via income tax for any set of additional resources and interactions.

I argue that this process of comparing and measuring—both its expressive dimension and in the incentives it provides—may, in itself, shape the reality it is intended to measure and, consequently, our identities as well. Various aspects of people's identities, I assert, are affected by the categorization of relevant and irrelevant attributes for measuring taxable income, their portrayal as "items" on a scale of valuation, their conversion into monetary terms that entail real-life consequences, and their official reporting to the government, which makes the government a partner in these attributes. The expressive and material bearings of this process shape peoples' self-perceptions, how they function within their families and communities, and possibly their sense of social solidarity and participation in political institutions.

Importantly, tax has an impact that goes *beyond the expressive dimension*—in affecting taxpayers' incentives, it has real-life consequences. It can thus shape not only taxpayers' perceptions of themselves and of others, but also their choices and modes of action. Assuming a sufficient number of taxpayers change their choices, social meanings—as well as social norms—may change too. The inclusion of an item (e.g., imputed income) in the tax base increases liability (and provides disincentives for self-provision of services); allowing an item (e.g., the costs of childcare) as a deduction reduces liability (and increases incentives to hire childcare). The way certain incorporations (e.g., nonprofit) are taxed impacts their desirability by either increasing or decreasing the incentive for charitable associations and contributions. With increased incentives, more people may select to outsource services, place their children in childcare, or get involved in charities, thereby affecting social norms and, again, identities.

The components of the currency of taxation are not neutral, technical mechanisms; rather, they involve normative policy choices. These (sometimes hidden) normative choices have a unique effect on both our personal and collective identities in a number of ways. The following paragraphs explain the identity-related effects entailed in the two stages of translating reality into the currency of taxation: baseline setting and the conversion mechanism.

Consider baseline setting first: the very decision whether or not to convert a certain attribute, resource, or interaction into the currency of taxation involves normative considerations. In sorting through such attributes, resources, and interactions, acknowledging some and ignoring others, tax determines what is considered a "normative" taxpayer. In so doing, it draws on and simultaneously endorses some image of an archetypical individual taxpayer.[2] If we assume the archetypical taxpayer to be healthy, married, childless, or living near her workplace, we exclude the individual who is disabled, single, has children, or lives at a distance from her workplace. These assumptions regarding personal capabilities are relevant across the board in many areas of tax law: Should a deduction be allowed for childcare expenses? Should some of the income earned by people with disabilities be exempt? Should imputed income be included in one's endowments? Should higher tax rates be imposed on married couples or on cohabitants? Should a person's worldwide income be taxed or only her domestically produced income?

All these choices regarding taxable income, allowable deductions, exemptions, tax rates, and international tax jurisdiction are normative choices. They all make assumptions and pass judgment as to what is "normal" and what is not; they all de facto decide what is to be considered part of who we are (and therefore not to be infringed on by taxation) and what should be shared with others (and therefore relevant for tax purposes). Ignoring endowments and disabilities for tax purposes signals both as components of the individual's identity. Disallowing expenses as personal signals the boundaries between what is personal and what is market related. And treating income produced domestically differently from income produced overseas signals what "belongs" to a national community. This indicates and fosters a sense of entitlement among those with superior talents or physical abilities—the healthy, the childless, and those producing income abroad: all are considered and consider themselves "naturally" entitled to the full benefits of these capabilities or choices. Excluding fringe benefits and allowing deductible business lunches and overseas travel

2. *See generally* Tsilly Dagan, *Commuting*, 26 VA. TAX REV. 185 (2006).

expenses creates a similar sense of entitlement—for this is the "normal" way of doing business.

Second, when policymakers decide to include an item or attribute in the inventory of taxable items, the *conversion of reality into the currency of taxation* may have identity-related effects. Two aspects of the currency of taxation in particular may raise identity issues: first is its *commodifying* nature; second is *the involvement of the government*, for the currency of taxation determines and reports people's fair share of financing state-provided public goods to the government.

Let us consider first the *commodifying* dimension of the currency of taxation. As noted, the currency of taxation is not a neutral conversion mechanism. It impacts—at times even transforms—the resources, attributes, and interactions it touches on. Because tax is paid with money, the currency of taxation must convert reality into the monetary terms of taxable income. Along the way, tax inevitably attaches price tags to human resources, behaviors, and interactions. Putting a price on a market resource (e.g., inventory, securities, or legal services) is not inherently problematic, but when nonmarket attributes and interactions are at stake (e.g., endowments, imputed income, gifts, or intra-community activities), imposing the currency of taxation could have commodifying consequences. *Inserting the cash nexus* into personal traits and human interactions depersonalizes them and imposes the harsh and reductive logic of the marketplace on preexisting identity-related attributes and social relations, thereby equating them—on the monetary scale—with anonymous market transactions. In imposing a market-based scale of valuation on some (particularly nonmarket) spheres of individual life, the currency of taxation alters the meaning of these spheres and thus can undermine how they are (and how they should be) properly valuated. Personal attributes or relationships can change in meaning and then impact human behavior when they are infiltrated by the cash nexus (when a price tag is attached) or even only by the market logic if tax assumes a "quid pro quo" transaction.[3] The logic of the market regards such attributes as commodities or "things," thereby treating them as commensurable with economic resources that are traded on the market.

Thus, the currency of taxation not only puts a price tag on the items it touches, but also sets them on par with other economic commodities. As a result, taxpayers, faced with income tax liabilities, are forced to compare (the liability costs of) personal attributes (e.g., becoming a parent, living in a certain community, getting married, or expatriating) with other economic resources (e.g., getting a job, paying for business expenses, or simply having more after-tax income). This coerced comparison reduces many nonmarket characteristics and interactions to market commodities and exchanges. In this way, the currency of taxation reflects (and drives taxpayers to adopt) a highly instrumental vision of individuals that is tied to income production. It conceives—and drives taxpayers to conceive—of

3. *See, e.g.*, DAN ARIELY, PREDICTABLY IRRATIONAL 67–87 (2008).

people, resources, and human interactions (perhaps solely) in terms of their use value, identifying for tax purposes only a thin sliver of taxpayers' human existence (production of income) with who they are. But beyond its expressive effect, the currency of taxation also induces people to compare their nonmarket and market goods and interactions according to the currency of taxation scale, which are otherwise incommensurable choices. Moreover, as noted above, if tax actually does impact people's choices, given the economic incentives it creates, it might also alter social practices and, accordingly, social norms, thereby impacting the meaning people attach to certain traits, attributes, and interactions.

It is important to note, however, that this transformation is not necessarily bad. Like the market, it could empower individuals in making their free choices and promote efficient decision making.[4] This could be the case when the market attaches greater value to certain goods and services (such as housewife work) than they are accorded in the nonmarket context. Yet regardless, the process of converting reality into the currency of taxation and, in particular, of imposing a monetary scale of valuation, with all the accompanying economic consequences of characterizing attributes as "tax items," reflects and shapes a narrow (commodified) version of people's behavior and interactions and a very limited expression of their identities.

The fact that the conversion into monetary terms is *carried out by the government* rather than the market compounds the identity effects of the currency of taxation. When individuals put items, even personal ones, on the market, they are (at least presumably) exercising their personal liberty[5]: their freedom to choose whether or not to sell an item. When the government imposes the scale of valuation (the currency of taxation), it is infringing on this liberty. If the government decides to tax, for example, some item of imputed income, it is considering that item in monetary terms, even though the taxpayer chose to opt out of the market and do the work herself.

In addition, in imposing the currency of taxation, not only does the government equate nonmarket resources and human interactions with market commodities, it also becomes a partner in these resources and interactions by claiming its "fair share" of them. Taxation thus makes the government a partner in our personal and daily affairs, giving it an interest and claim in our personal resources and social interactions. Partnering with the government in business endeavors is commonly understood as a necessary part of doing business or of living in a civilized society. Some argue that the government's claim to its share of these enterprises is

4. For a general discussion of the benefits of the market, see Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90 (2011).

5. *But see* MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? (2009) (criticizing the coerciveness of the market).

justified by the public goods that it provides[6] and/or by our own sense of solidarity with the political community we belong to.[7] But although having the government as a partner in our business or public endeavors seems reasonable, the same cannot be said about personal attributes or private interactions, as this infringes on individual autonomy. There is (or at least should be) a distinction between material resources, which a person should be obligated to share in some part with the members of her community, and attributes that are constitutive of herself which, if shared, will undermine the individual's personhood. Some parts of one's life should be kept for oneself.[8] Sharing them—particularly with the government by coercion—undermines their personal nature and curtails people's self-determination.

Moreover, just as the market can alter the nature of attributes and relationships that are traded, government involvement in personal attributes may change their nature as well even if actual price tagging is not entailed.[9] Government participation in our personal attributes and affairs not only exposes our relationships, attributes, beliefs, and information to bureaucratic scrutiny, but also sorts people, attributes, and relationships into legal and bureaucratic categories. The meanings of emotional, social, and psychological attributes or social interactions, such as love, friendship, and generosity, are transformed when they are associated with the official, public, bureaucratic realm of government. Thus, when the government participates in identity-forming aspects of human lives, those aspects cease to function and be construed solely in the subjective and intimate manner that characterizes the private sphere; they are instead filtered through the formal perspective of the public eye. The introduction of regulatory logic into interactions and resources depersonalizes them, and individuals and personal relationships become, to the public, faceless data.[10] This public,

6. *See, e.g.*, Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 275–76 (1983) (justifying taxing the rich on the dependency of income-generating activities on a variety of government-provided services, such as the rule of law, protection of private property, infrastructure, and education, as well as factors beyond the control of individuals, such as demand, social resources, and general societal conditions).

7. Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391, 1402 (2002) ("A society is a community with a shared culture and shared interests that transcend the interests of its individual members and extend back to its historical roots and forward into its future. Thus, it is necessary to look for affirmative reasons for taxing the rich that are rooted in a broader social and historical understanding of the vital function of taxation in maintaining such a community over time.").

8. *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP 73 (2002) (asking, with regard to taxation in general, "What kind of concern do we owe our fellow citizens, and what in our lives should remain free of collective control?").

9. For a general discussion of the parallels between the market and state spheres, see Tsilly Dagan & Talia Fisher, *The State and the Market—A Parable: On the State's Commodiying Effects*, 3 PUB. REASON 44 (2011).

10. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1326–27 (1984); *see also* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 166 (1993) ("The realization of some forms of freedom, autonomy, and welfare demands that certain goods be produced, exchanged, and enjoyed outside of market relations or in accordance with non-market norms.").

formal, and compartmentalized depiction transforms how such individuals and interactions are perceived by the public.

Taxation—like other types of regulation—constitutes a form of governmental regulation that pigeonholes attributes and relationships into existing patterns and forms. The menu of possible categories under tax law is limited. Once a relationship has been classified for tax purposes, it is transformed into an item or transaction with economic ramifications. This classification may alter the way we think about relationships (e.g., our understanding of domestic partners versus our view of an officially married couple) and about attributes (e.g., a resident versus nonresident alien). Are we, for example, a group of friends who help each other out in times of need, or are we a group of individuals who trade services? When we volunteer, are we rolling up our sleeves to aid the needy, or are we in fact "providing services" for virtual pay and making a "charitable contribution?"

The classification for income tax purposes also has obvious real-life consequences: a married couple is taxed more heavily than an unmarried couple; a nonresident alien is not entitled to the same tax benefits as a resident; and individuals bartering services are taxed while friendly gestures are ignored for tax purposes. Besides the greater incentives of being classified as an unmarried, resident, helpful friend, part of individual liberty is being free of the need to define certain actions and relations as constitutive of any given institution. Tax requires classifications, which are often reduced to binary definitions. Keeping items or relationships out of the tax realm means protecting them from such classification. The process of classification is a necessary part of income taxation (as it is of many other areas of regulation). And yet, it is important to note that classification matters—the categories are significant and may have an effect on reality. Thus, categories should be carefully selected and special attention should be given to their relevance, their legitimacy, and the ways in which they may affect reality.

The reductive effect of taxation is further exacerbated by the fact that the government's intervention through the tax system rests on taxpayers' duty to report to the IRS. With certain interactions and attributes, the very need to reveal things that one considers private—let alone make them public record—is in itself a burden, and the need to argue one's case before a public official could take an even greater toll. While these burdens may not be particularly troublesome in the regular course of business, they are certainly so in the personal sphere.

Setting the baseline and converting human behavior, resources, and interactions into the currency of taxation can affect both personal and collective identities.[11] They can impact how taxpayers function within their families and communities, their sense of social solidarity, and participation

11. For the ways in which the technical aspects of income taxation reflected and shaped social and cultural categories throughout history, see Assaf Likhovski, *A Map of Society: Defining Income in British, British-Colonial and American Tax Legislation*, 2005 BRITISH TAX REV. 158.

in political institutions. The conversion process is neither neutral nor technical in nature; rather, it involves considerable normative choices. Therefore, in addition to tax's traditional efficiency and equity goals, policymakers must take into account the effects it may have on our personal and collective identities.

II. FOUR EXAMPLES OF THE CURRENCY OF TAXATION

This part presents four examples of the operation of the currency of taxation in order to demonstrate how various mechanisms of income tax may entail identity-related issues. Each example touches on a different aspect of the technicalities of income taxation: deductions, income inclusion, incorporations, and international taxation. Each example further highlights different angles of the personal and social identity issues that the currency of taxation entails. Part II.A focuses on baseline setting through the example of commuting expenses. This example demonstrates how a seemingly innocuous issue—disallowing commuting expenses—entails, in fact, serious normative choices. The selection among various attributes of a "normative taxpayer" forms and involves both expressive dimensions and material ramifications.

Part II.B touches upon the tax treatment of mutual gifts and, through them, features the potential commodificatory aspects of the currency of taxation. It highlights the meaning-changing role of the currency of taxation in price tagging human interaction. It stresses the emphasis of taxation on use-value of resources and interactions[12] and the fact that it commensurates social interactions with market transactions. In addition to its identity-forming effects, the currency of taxation also can impact the design and meaning of social institutions. To demonstrate this, Part II.C discusses the unique example of the Israeli *kibbutz*—a community whose reciprocal cooperation among its members transcends the market structure—arguing that if strictly applied, the commodifying currency of taxation would be incapable of expressing the *kibbutz* ideology. Finally, Part II.D discusses the fundamental implications of the sorting mechanisms

12. For an explanation of "use-value," see ANDERSON, *supra* note 10, at 144. Anderson explains use-value this way:

> We can understand the nature of economic goods by investigating the ways we value commodities, the social relations within which we produce, distribute, and enjoy them, and the ideals these relations are supposed to embody. I call the mode of valuation appropriate to pure commodities "use." Use is a lower, impersonal, and exclusive mode of valuation. It is contrasted with higher modes of valuation, such as respect. To merely use something is to subordinate it to one's own ends, without regard for its intrinsic value. When owners of David Smith sculptures stripped the sculptures' paint to enhance their market value, they treated them as mere use-values, disregarding their intrinsic aesthetic worth in favor of their usefulness for independently defined ends. The impersonality of use is contrasted with valuing something for its personal attachments to oneself, as when one cherishes an heirloom. Mere use-values are fungible and are traded with equanimity for any other commodity at some price. But a cherished item is valued as unique and irreplaceable. It is often sold only under duress, and its loss is felt personally.

of the currency of taxation, as well as the implications of using the currency of taxation to attach tax price tags to national affiliation.

It is important to stress, however, that these implications of the currency of taxation are only a few of many that should be taken into account in the making of tax policies. Thus, although this Article focuses on the specific ramifications of the base setting and conversion mechanisms of the currency of taxation, it is not meant to suggest that these are the only, or even the most important, considerations in any tax policy. The purpose of this Article is to draw attention to these considerations so as to have them weighed along with other considerations such as efficiency and distributive justice.

A. Normative Taxpayer: Commuting Expenses

In order to measure taxable income, tax laws need first to determine which factors should (and which should not) be converted into the currency of taxation. There are ample candidates: health, leisure, family status, and place of residence; support received from or provided to family, friends, and the communities one belongs to; personal talents; and, of course, property, wages, and proceeds. People diverge in many of these aspects, and tax laws determine whether the distinctions are relevant to computing a taxpayer's "fair share" of the burden of financing the public good. In sorting through these factors, income tax rules set a normative baseline against which to measure an individual's ability to pay. Setting this baseline entails a normative determination as to what achieves equality between people. Should healthy people (or endowed individuals or those with children) pay more tax than others? Or should divergences in taxpayers' health, endowments, family status, etcetera simply be assumed to be part of who they are and hence, should not be measured for tax purposes? Whatever the eventual normative decision, the powerful tool of income taxation transmits this vision of what constitutes identity, shaping our self-perceptions and how we function within our families, communities, and workplaces.[13]

The case of commuting expenses is illustrative of this effect; in particular, it highlights the dichotomy between what is regarded as part of a taxpayer's personal realm and what is regarded as income producing. By classifying commuting expenses as purely a matter of personal preference, current tax law accords a dominant role to taxpayers' employment and deems other parts of their lives—those that are labeled personal—mere preferences and, hence, irrelevant for income tax purposes. Under this

13. As mentioned earlier, the power of tax is not solely in its expressive function. Tax can (and does) affect people's relative well-being and alter their incentives and, accordingly, their choices. It can therefore make a real difference in determining the attributes that (should) matter. Not only can tax declare the significance of certain attributes, but it also can allow a reduced tax for people with such attributes (e.g., people with disabilities). Similarly, it can give incentives for certain behavior (e.g., realizing talent) and encourage or discourage certain relationships and communities, thereby changing realities, not only for those taxpayers affected by the incentives, but also potentially for society as a whole.

approach, the workplace is assumed to be a constant for taxpayers, whereas their choice of residence is considered a variable entirely contingent on their preferences. If—to take the other extreme—tax law were to consider place of residence a component of taxpayer identity, and workplace a variable feature, I suspect the costs of commuting would be treated like a cost of producing one's labor income rather than a personal consumption choice and, accordingly, a tax-deductible expense.[14]

The marginalization of nonemployment features of the taxpayer's identity flattens it, characterizing taxpayers as, first and foremost, employees, income-producing entities, and mere cogs in the factory wheel. As such, taxpayers are expected to live close to their workplaces, and the cost of commuting between home and work becomes a matter of personal consumption. These (implicit) choices of tax law are troublesome. Many other spheres of people's lives impact their residential choices and are then impacted by that choice. This includes family and friendship bonds, sentimental ties,[15] and the sense of identity associated with place of residence.[16] The partial perception of people's identity as workers not only overlooks other components of their identities, but also shapes the very reality it (inaccurately) reflects and constructs a particular taxpayer identity.[17]

To be sure, limiting the law to regulate only certain spheres of our lives would not necessarily be a bad thing as a general matter. Indeed, there are a variety of spheres that we tend to expect the law not to interfere in. Matters such as love, religion, and friendship rightly are considered, in most cases, beyond the reach of legal regulation and legal institutions. Typically, the rationale for why the law should not interfere in these spheres is to enable people to choose freely between alternatives and thereby foster human pluralism. Commuting expenses, however, are an exception to this rule, for ignoring them for tax purposes does not achieve the desired result. Rather than facilitating a multiplicity of available choices, making every residence

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14. For a more detailed discussion, see Dagan, *supra* note 2, at 199–201.

15. *See, e.g.*, Clara H. Mulder, *Housing Choice: Assumptions and Approaches*, 11 NETH. J. HOUSING & BUILT ENV'T 209, 213 (1996) ("A second mechanism preventing people from wanting to move consists of *local ties*, also denoted as *location-specific capital*. Local ties are the factors binding a person to a place. Local ties may be connected with the dwelling itself (e.g., non-transferable improvements in the dwelling, or a sentimental value attached to it) or its location within the household members' daily activity spaces—the distance to work, family, friends, cultural facilities, and the like . . . . [T]he hypothesis that the presence of children in the household and the presence of a second earner constrain mobility has also received empirical support.").

16. Mulder elaborates on this as follows:

> There is also a more fundamental reason why people probably consider it wise not to move too often. In Western societies, place of residence is one of people's sources of identity. The home is the setting through which basic patterns of social relations are constituted and reproduced. It provides "ontological security" (defined as "confidence or trust that the natural and social worlds are as they appear to be, including the basic essential parameters of self and social identity"). And it is the base where other people and institutions expect to contact a person.

Id. (citations omitted).

17. Tsilly Dagan, *Itemizing Personhood*, 29 VA. TAX REV. 93, 127 (2009).

choice personal, and hence irrelevant for tax purposes, creates a disincentive to live at a distance from work. Thus, characterizing commuting expenses as always personal (and therefore disallowing them) marginalizes other choices, making them less salient and more costly, and reinforces the perception of taxpayers as employees first and foremost.

In classifying the choice of place of residence as a personal matter, tax law attaches priority—indeed, exclusivity—to the employee dimension of the taxpayer's identity in relation to other aspects of her life. This employment-dominated conception of the taxpayer's identity is certainly not the only possible one. We easily can imagine a multifaceted taxpayer who is part of a family and a member of a community or religion—that is to say, a person who lives in a certain place not because of where she works but because of who she is. Taking into account aspects of the taxpayer's life that are not a standard part of the income-producing mechanism allows for a richer conception of who that taxpayer is as well as of her identity.

In arguing that place of residence should be considered a component of the taxpayer's identity, I do not mean to suggest that there is not a significant element of choice regarding where one lives. What I do claim, however, is that choice-based decisions should not be irrelevant to our income tax project.[18] Surely personal preferences play a considerable role in the choices people make regarding place of residence. Just as place of residence is often a product of who people are—their race, gender, or family roots—it is also a product of what they prefer—temperate weather, an urban environment, or ocean view—and who they prefer to be—a sophisticated cosmopolitan, suburban homemaker, or bohemian urbanite. In any case, regardless of whether one's residence is an attribute, preference, or both, it should be taken into account in our income tax project given its identity-related ramifications.

If we accept that place of residence is a significant element of a person's self-perception, then expecting her to relocate and move closer to her workplace imposes a heavy cost on her: an alteration of that self-perception. The mere expectation that a person lives close to her place of work runs counter to the notion of respecting an individual's freedom to choose where to live, in that it subjects that very choice to an unjustified, stipulated prioritization of the workplace over other aspects of her life. Treating taxpayers as, first and foremost, employees and their choice of place of residence as irrelevant to income tax both reflects and reinforces a narrow perception of taxpayer identity.

18. Choice alone does not preclude an item from being deductible as a business expense when the expense is allocable to a business. Thus, for example, a deduction for entertainment expenses is not disallowed "merely because it involves first class accommodations or services," Rev. Rul. 63-144, 1963-2 C.B. 129, 136–37; a CEO's private airplane expenses for traveling on company business are deductible, Noyce v. Comm'r, 97 T.C. 670 (1991); and a chauffeured Cadillac is considered an ordinary and necessary expenditure, Densions v. Comm'r, 36 T.C.M. (CCH) 1759 (1977). However, terming a taxpayer's residence as a personal matter and viewing commuting expenses as meeting a personal need mandate the disallowance of any expenses involved.

If we value taxpayers' choices, seek to empower them to create their own roles in life, and respect their complex and multifaceted identities, we must adopt a richer account of the taxpayer: a person who is not only an employee but also a family member and a community member; a person with religious or ideological affinities; and a person with wishes, preferences, and aspirations that are not necessarily connected to the way in which she produces income. Allowing a deduction for commuting expenses would give the taxpayer an incentive—or, rather, prevent the creation of a disincentive—to live where all of these aspects of her identity are accommodated without jeopardizing her role as a worker. By calculating a taxpayer's income *after* she gets to work, allowing a deduction for commuting expenses treats place of residence as an attribute that is relevant for tax purposes. A taxpayer's choice of residence is thus treated not as a mere whim or a consumption trend, but as an important component of who she is—important enough to constitute a distinction that is recognized by the tax system. Moreover, allowing the deduction of commuting expenses reduces the conflict for taxpayers between a better job and living where they want to.

I do not claim that curtailing a person's autonomy or even impacting her identity is always wrong. Laws in general, and tax laws in particular, often do just that (for example, the very decision to tax work and not leisure),[19] and there are a variety of justifications for restricting autonomy and not taking identity issues into account. But if my analysis in this section is persuasive enough, then the case for further entrenching our identities as workers and erasing other components is singularly weak. Given that work is already such a constitutive component of our lives, I strongly question whether a baseline focused exclusively on taxpayers' employment is the best option.

However, regardless of what we deem to be the appropriate tax treatment of commuting expenses, I seek to show here that the currency of taxation makes a difference for the way in which a particular human behavior is labeled for tax purposes: both in how that behavior is perceived and in the incentives created for one ("normal") way as opposed to another way. In the case of commuting expenses, disallowing them signals that residing near one's workplace is a reasonable expectation and creates an incentive for making that choice. This undermines other identity-related considerations in deciding on place of residence.

B. The Interpersonal Aspects of the Currency of Taxation: Gifts Versus Barters

As explained above, converting reality into the currency of taxation can have identity-related ramifications, particularly in its commodifying effects

19. *See* MURPHY & NAGEL, *supra* note 8, at 122–23 (claiming the goal is not to excessively undermine autonomy); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 169–74 (1974) (describing involuntary state taxation of work as a form of slavery).

and the involvement of the government. The distinction between gifts and barters exemplifies these effects.

Services provided by one person to another for no consideration are not taxed. Services provided in return for goods or other services, however, are considered taxable income. Thus, for example, when a babysitter cares for a housepainter's child and the housepainter then paints the babysitter's house in return, they have engaged in a simple barter transaction with income provided in kind.[20] These services have quite a different meaning, however, when grandparents babysit their grandchildren while the parents paint the grandparents' house. For tax purposes, the latter type of interaction tends not to be considered a barter transaction, and rightly so.[21]

What makes some services income and others not depends on whether they arise within or outside the ordinary processes of the market.[22] If an interaction is classified as a (commodified) barter transaction, it is taxed; if it seen as part of a social interaction, it goes untaxed. This distinction operates as an incentive for nonmarket interactions, encouraging the provision of services within families, social networks, and even communities. It thus supports social interaction and the maintenance of a nonmarket network of interpersonal support. But more than providing an incentive for certain interactions and a disincentive for others, this distinction entails specific social meanings.

Think, for example, of what would be the result of taxing intra-family or friendly interactions. For one thing, the incentive to engage in them would dwindle. Moreover, such a tax would depict these nonmarket interactions as market transactions and attach a price tag to them. But why should it trouble us, we might ask, if the currency of taxation requires converting such goods and services into monetary terms? After all, family members do reap some material benefit from the interaction. Attaching a price tag to such attributes is troubling, however, because "[v]aluation in terms of dollars implies that all commodities are fungible and commensurable—capable of being reduced to money without changing in value[] and completely interchangeable with every other commodity in terms of

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20. *See, e.g.*, Donald B. Marsh, *The Taxation of Imputed Income*, 58 POL. SCI. Q. 514 (1943).

21. Thus, in *Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330 (1984), the Court held that it is not uncommon for parents to provide their adult children with things such as the use of a car or a vacation cottage, purely on the basis of the family relationship. For a critique of this policy, see Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837, 1881–82 (1998):

> For instance, looking at activities that are not deemed to produce taxable value (income) reveals what the prevailing social paradigm considers *valuable*. Waged or salaried labor—that which is contracted for pecuniary compensation in the market—is subject to taxation, but household labor performed by a woman for her family (perhaps to the benefit of a wage-earning husband who does not have to perform such tasks) is not taxed because it is not "work." This judgment at first blush may seem benign and even "reasonable" to many, but it confers a discernible tax advantage to politically favored groups, particularly the traditional married heterosexual couple, composed of a "working" husband and a stay-at-home wife.

22. Marsh, *supra* note 20, at 1.

exchange value."[23] This process of commensuration frames the services provided as sheerly instrumental: one of a wide set of instrumental goods and services. It thereby reduces them to the one-dimensional scale of the market. In cases in which we would prefer to keep some goods, services, and interactions outside the market and preserve them in a separate sphere of valuation, price tagging is an obstacle. Making the benefits of these interactions subject to tax both disincentivizes people to pursue them and stresses their monetary value. For the currency of taxation does not use just any random unit to assess taxable income: it uses the market price tag. Using the market price to value human interactions can crowd out other scales of valuation and legitimize the market price as the *sole* method of valuation in income taxation.[24]

Dan Ariely has explained that it is not only the sale of items for money but the very mention of money and price that transforms interactions, by pushing out social norms in favor of market norms.[25] For example, if we replace a friendly dinner invitation with the offer of a meal provided by others in return for their future hospitality, we are stripping this interaction of its unique qualities. In other words, noncommodified interactions are not merely more or less than commodified interactions; they are inherently different. Hence, detaching an interaction's market value from its nonmarket value is no simple surgical procedure but, rather, requires the valuation of the entire interaction according to two different and often incommensurable scales. Framing such interactions in monetary terms undermines their meaning for both the provider and recipient. A family dinner cooked by one's mother cannot be reduced to the price of the same meal at even the best restaurant, but not because this dinner does not include the value of a "meal," but because describing it as "just" a meal is demeaning. An act of love cannot be described as "a service" plus emotion, because services and emotions are not two units on the same scale of valuation. Thus, converting an act of love into any given number of units on the currency of taxation scale does not correctly valuate that interaction. Moreover, converting this act into monetary terms and imposing a tax on these so-called "services" undermines the essence of the interaction. Translating interpersonal relations into monetary terms certainly has an expressive effect, but taxing them as market transactions forces the

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23. MARGARET JANE RADIN, CONTESTED COMMODITIES 3 (1996); *see also* Linda Sugin, *Let the Beachcomber Drown: Why Taxing Endowment Is Unjust* (Fordham Legal Studies Research, Paper No. 959710, 2008), http://ssrn.com/abstract=1102370 [https://perma.cc/AY7A-EKDT].

24. Sugin, *supra* note 23, at 21 (emphasizing this point in the context of endowment tax).

25. Although it is true that the context of tax payments has not been studied directly by psychologists, it seems plausible to assume that the evaluation in monetary terms via the tax system should not differ much from what emerges in the context of mentioning the price of a gift provided for taking part in an experiment (Ariely describes a crowding-out effect when the price of a Snickers bar is mentioned to participants in an experiment), or noting the prices on a restaurant menu, or reading a money-related text prior to an interaction. *See generally* ARIELY, *supra* note 3, at 75–102.

participants to weigh whether they are worth the money they must pay in tax for engaging in them.

An additional problem with taxing mutual benefits exchanged between family members or friends is their construction as quid pro quo market transactions. Construing these relationships as transactions frames the receipt of the benefits as a "bargain" rather than the product of good will, and taxing them as a transaction constructs them as self-interested and calculated income-producing acts rather than thoughtful acts of assistance. Characterizing certain relationships as transactions can corrupt the relationships. Treating an exchange of gifts, for example, as a quid pro quo transaction undermines the nature of the relationship. Describing the services as reciprocal consideration is a distorted depiction of what they really are. As Elizabeth Anderson has noted:

> The goods exchanged and jointly realized in friendship are not merely used but cherished and appreciated for they are expressions of shared understandings, affections, and commitments. The goods proper to the personal sphere can be fully realized only through gift exchange. They cannot be procured by paying others to produce them, because the worth of these goods depends upon the motives people have in providing them. Among these goods are trust, loyalty, sympathy, affection and companionship.[26]

Thus, when the motivation for an action or the meaning of an attribute for its owner is not their income-producing properties, taxing them as income or income producing could devalue them. Consider personal services (say, grocery shopping) that someone provides for a close friend. Let's say the friend returns the favor by picking up some dry-cleaning. Wouldn't the construction of this interaction as an exchange of services that generates income for both friends transform the actual meaning of the transaction? Construing a noncommodified act of friendship or generosity as one of self-interest infuses it with new social meaning, and the social perception of people's actions is powerful. Thus, when society frames an act as a transaction, this could impact the value people attribute to that act and their motivation for engaging in it. My claim is not that gifts, favors, and other noncommodified activities lack economic value, but rather that their social meaning may differ from that of similar interactions that are of solely economic value. Again, the fact that the social meaning may be different is not the only consideration to be taken into account when deciding whether to tax such an interaction. Other considerations—and particularly those of distribution and efficiency—must be weighed. And where not taxing an interaction may significantly harm distributive justice or curtail efficiency, there is good reason to prefer justice and distribution over identity considerations.

The currency of taxation focuses on the use-value of resources and interactions and does so in market terms. To convert them to the currency of taxation, resources and interactions are equated with goods and services

26. ANDERSON, *supra* note 10, at 151.

that are bought and sold on the market. This stresses the use-value of these resources, thereby undercutting other scales of valuation, and constructs the interactions as quid pro quo market transactions. The currency of taxation therefore reflects only a narrow segment of reality. Certain dimensions of our lives simply cannot be converted into the currency of taxation without transforming their essence (or at least how that essence is perceived) in the process. Again, this conversion has expressive ramifications, for the tax authorities' treatment of these interactions as identical to market interactions could affect how people perceive them, and it has a material effect for those who are involved in the interactions and actually have to pay (tax) for them. Accordingly, this forces people to compare these resources and interactions with other paid-for commodities and interactions. Through its coercive power, income tax forces this limited scale of valuation onto the social interactions that fall within its purview, thereby throwing them into the public-regulatory spotlight and stripping them of their personal, intimate nature.

The conversion of personal attributes and interactions into the currency of taxation is not necessarily detrimental. To begin with, it constricts the incentive to provide services outside the market and thus presumably promotes efficiency. It also might facilitate fairer distribution and empower certain taxpayers. Either way, however, its effect on individuals' identities and on social norms should be taken into account in policymaking.

C. Design and Meaning of Social Institutions; The Kibbutz

In addition to its identity-forming effects, the currency of taxation can also impact the design and meaning of social institutions. If "we conceive of community as crucially founded on human interdependence, as a network of processes and relations that expresses and creates value and significance not normatively reducible to an aggregate of self-contained individuals,"[27] we may want our tax system to express and support this commitment.

Communities are vital to human flourishing. Historically, traditional communities—which were based on personal acquaintanceship, shared beliefs, and feelings—were understood as a source of solidarity, companionship, and sense of belonging.[28] In modern times, with the rise of urbanization, industrialization, increased mobility, and mass communication, there was a shift away from these traditional conceptions about community. This led some to declare (and mourn) the demise of community, whereas others optimistically asserted its reinvention or even liberation, focusing on the changing character of communities and the interpersonal relations within them.[29]

27. RADIN, *supra* note 23, at 113.

28. *See generally* ROBERT E. PARK ET AL., THE CITY 6–15 (1967); Louis Wirth, *Urbanism As a Way of Life*, 44 AM. J. SOC. 1 (1938).

29. *See generally* GRAHAM DAY, COMMUNITY AND EVERYDAY LIFE (2006).

Although some communities may prosper in a market-based environment, many of the goods provided by and through communities thrive particularly in nonmarket settings. Nonmarket behaviors and relationships—for example, those that are based on care, altruism, or selflessness—enrich communities with collective goods that the market cannot provide. As Michael Walzer explains, "The act of giving is good in itself; it builds a sense of solidarity and communal competence."[30] The more commodified realms of personhood become, the fewer venues remain for noncommodified interaction. The implications of the currency of taxation for the functioning of communities are well-illustrated by the taxation regime applied to the Israeli *kibbutz*.

The *kibbutz* is (or at least used to be[31]) a commune. The traditional *kibbutz* is structured on a community of people who hold and manage all property jointly and distribute its benefits equally, without any direct link between the work an individual performs or any other contribution she or he makes to communal life and the distributed benefits she or he receives. At the same time, all the needs of the *kibbutz* members (such as food, housing, education, and health) are collectively provided for (either by other members or by collective means of production and consumption), constituting what is referred to as the "mutual guarantee" among all members. In this way, the *kibbutz* follows the Marxist maxim "from each according to his faculties, to everyone according to his needs." As a community, the *kibbutz* espouses ideals of equality, fraternity, and mutual assistance.

The material realm is not absent in the *kibbutz*. From its inception, the *kibbutz* constituted the main economic framework through which the material needs of its members were met. It was a community committed to the welfare of its individual members and expected their best efforts in return. These were reciprocal duties, although no itemized accounting was conducted. Thus, what may have been interpreted in any other context as a series of quid pro quo barter transactions among the *kibbutz* members were nonmarket interactions from the perspective of the *kibbutz* ideology. However, none of the recognized tax categories are applicable to the *kibbutz* as an entity. A commercial depiction of the traditional *kibbutz* as buying and selling services from its members is obviously inaccurate, for the primary purpose of the relationship between the *kibbutz* and its members has never been profit making but, rather, the collective provision of a decent

30. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 94 (1983).

31. In recent years, many *kibbutzim* have undergone a transformation and become "renewing *kibbutzim*," which apply a differential wages system. This system links members' economic contribution to the *kibbutz*'s common coffer to the remuneration they receive from the *kibbutz*. This is supplemented by what is known as a "community tax," whereby *kibbutz* members who earn relatively higher wages contribute a portion of their salary to the funding of (primarily) communal services and the *kibbutz*'s mutual aid obligations. For a discussion of the tax implications of this intermediate form of community, see Tsilly Dagan & Avital Margalit, *Tax, State, and Utopia*, 33 VA. TAX REV. 549 (2014). In the present Article, I refer only to the traditional *kibbutz*, prior to transformation.

quality of life to the members. This quality of life refers not only to material aspects, but also to cooperative nonmarket community life as a good in and of itself, as well as collective cultural and educational benefits.

Like the relationship between the *kibbutz* and its members, the interactions among the members themselves cannot be depicted as simple "give-and-take" transactions where the *kibbutz* functions as no more than a clearinghouse. The traditional *kibbutz* does not keep account of each individual's level of consumption or (the market value of) her or his contribution to the community. Therefore, it is hard to refer to the interactions between the members as barters. A more fitting depiction would be a cooperative sharing of goods and services based on joint ownership of resources. This framework diverges considerably from the underlying basis of the taxation of other corporate entities, for it is not profit-making transactions that are at the focus of the interaction, but a fundamentally different type of relationship. Therefore, were it to be imposed on every aspect of *kibbutz* life, the currency of taxation would not properly reflect the nuances of this community and could even undermine them.

Elsewhere, I have argued with Avital Margalit that the fact that the *kibbutz* supplies its members with goods and services without direct remuneration is in itself valuable not only in the eyes of the *kibbutz* members but also in the eyes of society at large.[32] Like the family unit and charitable associations, the *kibbutz*, driven by its ideology, promotes (and produces) a unique value that the market is unable to produce and which could be thwarted by introducing the currency of taxation if applied indiscriminately: a community whose reciprocal cooperation among its members transcends the market structure. If strictly applied, the currency of taxation would be incapable of expressing the *kibbutz* ideology and might treat its members as though motivated purely by economic interest.

Recognizing this uniqueness, the Israeli tax system has accorded special treatment to the traditional *kibbutz*: it taxes *kibbutz* business activities (e.g., agriculture, industrial enterprises, and tourism), but not services provided by members to other members at either the *kibbutz* level or individual-member level. In fact, *kibbutz* members are not taxed at all. The *kibbutz* is the only entity taxed, although its liability is determined according to its individual members' tax rates.

Under this system, there are two stages to calculating the *kibbutz*-level tax. The first stage involves the calculation of the *kibbutz*'s income, as an independent entity, from all branches of its business activities, including the income of members who work outside the *kibbutz*. At the second stage, the (theoretical) tax liability of members for their allocated income is calculated by attributing to them equal shares of the *kibbutz*'s taxable income, while also taking into account their credits, personal deductions, and other individual member benefits. Members, however, do not bear this tax liability personally, but, rather, the *kibbutz* pays the aggregate of taxes

32. *Id.*

calculated for its members. Thus, the *kibbutz* is essentially taxed as an upside-down, flow-through entity, where the entity, rather than its members, is taxed.[33]

Three features of this taxation system stand out in particular: (1) the *kibbutz* is treated as a unique type of incorporation; (2) economic interactions within the *kibbutz* are not classified as (taxable) transactions; and (3) there is equal attribution of the *kibbutz*'s income among its members. All of these features both acknowledge and facilitate the exceptional nature of the traditional *kibbutz*.

This taxation regime strikes an interesting balance. First, instead of imposing the prevailing market structure and logic on the *kibbutz* and its members, the market/nonmarket distinction is preserved without disrupting—and perhaps even encouraging—the realization of the *kibbutz*'s nonmarket ideology. Second, rather than subjecting the *kibbutz* to the state's ideology, its general distributive scheme, and way of life, this arrangement allows the *kibbutz* community a certain extent of autonomy to sustain its unique ideology and way of life and to decide on the level of redistribution among its members. This particularized mechanism manages to keep the unique features of the community intact. But the key point for our purposes is that, had the currency of taxation strictly been imposed on the *kibbutz*, its unique meaning as a community—as well as the incentives—would have been altered to establish and sustain such a communal way of life in general.

D. The State Membership Aspects of Taxation; International Taxation

Not only social communities, but also political communities, are affected by taxation. As the key source of finance for government, as well as one of the key issues of concern for voters everywhere, tax is also one of the most prominent manifestations of participation in democratic societies. As the famous "no taxation without representation" phrase implies, there are (at least perceived) strong links between the duty to pay taxes and having a voice in the political process.[34] Belonging to the state usually imposes a duty to pay taxes,[35] and the duty to pay taxes is often an indication of

33. Income Tax Ordinance, 5721–1961, §§ 54–58 (Isr.); *Traditional Kibbutzim Taxation*, INCOME TAX CIRCULAR, § 2 (June 2003); *see also* David Gliksberg, *Taxation, Economic Growth, and the Kibbutzim Movement*, 21 TAXES A-30 (2007).

34. *See* Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 101, 121–24 (2015) (reviewing and criticizing the link between the right of nonresident U.S. citizens to vote in American elections and their duty to pay taxes to the United States). For a comprehensive analysis of tax policy, democracy, accountability, and legitimacy in the international tax context, see Diane M. Ring, *What's at Stake in the Sovereignty Debate? International Tax and the Nation-State*, 49 VA. J. INT'L L. 155 (2008). For examples of the intricate links between taxation and democratic participation, see Mary Condon & Lisa Philipps, *Connecting Economy, Gender, and Citizenship*, *in* LAW AND CITIZENSHIP 176 (Law Comm'n of Can. ed., 2006); Saul Levmore, *Taxes As Ballots*, 65 U. CHI. L. REV. 387 (1998); Nancy C. Staudt, *Taxation Without Representation*, 55 N.Y.U. TAX L. REV. 554 (2002).

35. AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929, at 114 (2013) (explaining

taxpayers' membership in the national polity.[36] Because of the centrality of tax in facilitating state operations, taxpaying became, in the eyes of many, a pillar of compliance with one's civic duties.[37] Though there are certainly other ways to participate, taxpaying has come to symbolize civic participation.[38]

Moreover, taxes also can be an expression of social responsibility and solidarity among comembers of a political community. In particular, a tax system that targets inequality endorses a concept of citizenship which seeks to cultivate a moral bond with the community and a sense of obligation for one's fellow citizens.[39] Paying taxes is, accordingly, a signifier of

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that the new school economists (Ely, Adams, and Seligman) viewed taxation as something people pay because they are citizens—members of an organized society—and not as payment for what they receive from the government).

36. Likhovski, *supra* note 11, at 178 (noting the strong link between the history of income taxation and notions of political rights and of citizenship.). Likovstki further notes that

> [c]ontrary perhaps to intuition, being taxed can sometimes be seen as a privilege rather than a burden, because of the access it confers to political rights. This link between taxation and political rights can sometimes be found in taxation debates. One example is nineteenth century Prussia. Another example is nineteenth century American judicial discussions of taxation and citizenship, or congressional debates over federal income taxation and political participation.

Id.; *see also* Mason, *supra* note 34, at 121–22 (describing payment of taxes by illegal immigrants as a prerequisite for gaining citizenship status through amnesty procedures, but indicating that *the right to vote* alone is no justification for paying taxes). Stoudt, for her part, describes the many cases in which taxpayers are granted a unique position in democratic processes due to their perception as stakeholders in society, but she criticizes this as contradicting the Twenty-Fourth Amendment:

> Despite the existence of the Twenty-Fourth Amendment and various Supreme Court cases, taxpayers continue to obtain political preferences by virtue of their taxpaying status . . . . Congress and the courts should take one of two steps: (1) eliminate the political benefits tied to taxpayer status altogether or (2) maintain the existing political benefits but expand them to ensure that all individuals, and not just taxpayers, can express political viewpoints if they so choose.

Stoudt, *supra* note 34, at 599–600.

37. Ajay K. Mehrotra, *Reviving Fiscal Citizenship*, 113 MICH. L. REV. 943, 944 (2015).

38. *See, e.g.*, LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 4 (2013).

39. *See* MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 119–20 (2012) (discussing the role played by inequality in damaging the sense of common life shared by members of a political community). Sandel says:

> The republican tradition teaches that severe inequality undermines freedom by corrupting the character of both rich and poor and destroying the commonality necessary to self-government . . . . [T]he argument from corruption directs our attention to the civic consequences of the gap between rich and poor so pronounced in our time. From the standpoint of the republican conception of citizenship, the danger is this: The new inequality does not simply prevent the poor from sharing in the fruits of consumption and choosing their ends for themselves; it also leads rich and poor to live increasingly separate ways of life.

Id. Murphy and Nagel add:

> The framework for the entire discussion is the question of the appropriate relation of the individual to the collectivity, through the institutions of the state. A state has a near-monopoly of force within its territory, and it has the authority to coerce individuals to comply with decisions arrived at by some nonunanimous collective choice procedure. What are the legitimate aims for which such power may be

belonging to the political community in a couple of ways: first, in the compliance with the state-imposed duties that finance the public goods and services provided by the state; and second, in the sense of solidarity and mutual dependence generated among the state's constituents, which stretch beyond their duties to others (i.e., constituents of other states).

In the international income tax setting, the distinction between the different concepts of taxation is particularly conspicuous: domestic taxpayers, unlike their foreign counterparts, pay taxes according to ability to pay (often, as in the United States, paying also on their worldwide income), irrespective of the benefits they derive from public goods and services in their state. This highlights the membership basis of income taxation.[40] Consequently, there is an additional identity-related effect to the currency of taxation: tax delineates the boundaries of political membership, determining who is subject to the duty to pay taxes, in what capacity, and how much, if any, should be paid. If paying taxes is a symbol of participation, then tax criteria that determine who should pay taxes are both an indicator of and a gateway to such participation. In many contexts, tax distinguishes between "us" and "them": between our own "residents" as opposed to others—those fondly termed "nonresident aliens."[41]

Members of the "us" group tend—at least in the absence of tax competition—to be taxed on a worldwide basis, a duty that reflects (at least ideally) a sense of solidarity and responsibility for financing the fiscal needs of comembers based on ability to pay and irrespective of the geographical source of the income.[42] Nonmembers, in contrast, though often subject to income taxation in the host country, usually are taxed on a territorial basis, namely, on the portion of their income that was produced within the host country. This roughly reflects either the host country's right or its power to tax nonmembers for their use of its public goods and services. To distinguish between the two types of taxpayers, the tax system must define

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> used, and what, if anything, limits the way it may legitimately be exercised over individuals?
>
> These are questions about what we may be said to owe to our fellow citizens, and what kind of sovereignty we should retain over ourselves, free from the authority of the state, even when we are members of it and subject to its control in certain respects. Those questions define the issue of political legitimacy.

MURPHY & NAGEL, *supra* note 8, at 41.

40. For a detailed account of the efforts of American tax theorists—such as Ely, Adams, and Seligman—to expose the anachronistic social theory that underpinned the benefit principle and the shift towards ability to pay, see MEHROTRA, *supra* note 35**,** at 111–18.

41. Mehrotra notes as follows:

> Taxes not only formalize our obligations to each other as members of an "imagined community" or as a product of "the political imaginary" but they also signify who is a member of such a community. They help us determine how wide we draw the circle of "we." And, in the process, taxes define the economic duties and obligations that come with citizenship.

Id. at 949.

42. Tax competition has undermined (even) these commitments of income taxation. For further elaboration, see TSILLY DAGAN, INTERNATIONAL TAX POLICY, BETWEEN COMPETITION AND COOPERATION ch. 1 (forthcoming 2016) (manuscript on file with author).

who belongs to "us," which then signals and delineates membership in this group: who is part of who we are and who is not.

As in other contexts, by setting criteria for the inclusion and exclusion of individuals as members of the group of "us," the currency of taxation has both an expressive and material impact on identity. Take citizenship, for example: in the United States, unlike in other countries, citizenship (alongside residency) is the basis for personal taxation. Citizenship obviously has an expressive effect; becoming a citizen (or renouncing citizenship) is a significant statement regarding one's national allegiances. When citizenship serves as an indication for tax liability (as in the U.S. case), tax attaches it with a price tag and thus entails costs on the expressive as well as material fronts where it affects people's choices regarding both renouncing and (likely) applying for U.S. citizenship.[43] Tax liabilities provide an incentive to renounce citizenship. Renouncing citizenship entails identity-related costs,[44] and renouncing it for tax reasons attaches a price tag to such national identities. It pushes individuals to translate their national identity into hard currency and balance between these two—inherently incommensurable—realms. The decision of Eduardo Savarin, Facebook's cofounder, to renounce his U.S. citizenship and move to Singapore for tax reasons[45] is perhaps the most famous instance of this, but certainly is not unique.[46]

Not only the price tag that the currency of taxation attaches to acquiring or renouncing citizenship impacts identity, but also the regulatory criteria it

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43. *See* Mason, *supra* note 34, at 6, 103, 107 ("Current law motivates taxpayers to renounce their citizenship because the United States is the only country that taxes its citizens on their worldwide income." Moreover, citizenship taxation also discourages naturalization. "By subjecting green-card holders and naturalized U.S. citizens to life-long worldwide taxation . . . citizenship taxation may discourage both initial migration to the United States as well as the decision by migrants to become permanent legal residents or citizens.").

44. "Americans who renounced their citizenship . . . in order to escape tax (or tax compliance) obligations described the process as 'emotional,' 'hard,' 'super stressful' and 'extremely troubling.'" *Id.* at 124 (citing Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1, 65 (2012)); *see also* Alice G. Abreu, *Taxing Exits*, 29 U.C. DAVIS L. REV. 1087, 1136 (1996); Mason, *supra* note 34, at 126–27 (adding that "[the] commodification of U.S. citizenship has adverse consequences. For example, it has led to citizenship renunciations by people who cannot afford to retain their citizenship, including people who would have preferred to remain U.S. citizens, still feel themselves to be American, and have suffered emotional harm from renunciation").

45. Danielle Kucera et al., *Facebook Co-Founder Saverin Gives Up U.S. Citizenship*, BLOOMBERG (May 11, 2012), http://www.bloomberg.com/news/articles/2012-05-11/facebook-co-founder-saverin-gives-up-u-s-citizenship-before-ipo [https://perma.cc/8DHD-3646].

46. *See* NINA E. OLSON, TAXPAYER ADVOC. SERV., 2013 ANNUAL REPORT TO CONGRESS 206 (2013) (describing how since 1999, the number of U.S. citizens living abroad has increased 85 percent while the number of annual expatriations has skyrocketed nearly 500 percent). Perhaps because renouncing citizenship "may be easier than staying in compliance with U.S. tax laws that can be onerous for citizens of other countries," expatriations are expected to continue to increase, with an expected 2013 level at least 33 percent more than the previous high in 2011. *See id.* The number of U.S. citizens choosing to leave has risen in recent years, reaching a record high of 3415 in 2014. *See* Vanessa Houlder, *US Expatriates' Taxing Questions*, FIN. TIMES (Apr. 8, 2015), http://www.ft.com/cms/s/0/7c45e5e8-d707-11e4-97c3-00144feab7de.html#axzz3xUL7Agn5 [https://perma.cc/W4UF-Z3M2].

sets for establishing residency.[47] In setting criteria for determining membership status, the currency of taxation imposes a certain external scale of valuation on people's identities—in this case, their national identities. The currency of taxation, like any regulatory process, breaks down the regulated behavior and attributes into components or "items" on a bureaucratic spreadsheet. It sorts the entire domain of human behavior into preexisting pigeonhole categories. To be considered a resident, an individual must meet the particular list of criteria (e.g., number of days spent in the country, ownership of a house, membership in professional associations, holding a bank account, and place of residence of other members of one's family).[48] Items not included on this list are pushed into the background. For example, listing as a criterion time spent in the country might disregard the intensity, involvement, or sense of solidarity or commitment involved in a person's stay in the country. This turns the criterion of residency on the list into the definitive characteristic of one's status; the currency of taxation thereby sets a single, official scale for determining residency (and thus membership in the political community).[49] This regulatory framework serves as the prism through which human beings, subject to its jurisdiction, grasp their commitment to the state and to their fellow members.[50] This conversion of commitments and attributes

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47. For more on these market-like effects of regulation, see Dagan & Fisher, *supra* note 9.

48. See, for example, the definition of "resident" in Article 4 of the Organisation for Economic Co-operation and Development's Model Tax Convention:

> Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
>
> a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
>
> b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
>
> c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
>
> d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELIOPMENT, MODEL TAX CONVENTION (2014), http://www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf [https://perma.cc/XH25-YQH9].

49. Assaf Likhovski, *"Training in Citizenship": Tax Compliance and Modernity*, 32 L. & SOC. INQUIRY 665 (2007) (describing the attempts of modern states to create a culture of tax compliance and linking it to critical descriptions of modernity that focus on techniques employed by the state to simplify and homogenize the resources and population under their control, with the aim of better managing and manipulating it—what Likhovski terms the dark side of modernizing techniques and of compliance).

50. Anna-Maria Marshall, *Communities and Culture: Enriching Legal Consciousness and Legal Culture*, 31 L. & SOC. INQUIRY 229, 237 (2006). To borrow Robert Cover's terms, regulation functions in a "jurispathic" manner, destroying competing social meanings in the interest of social control. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L.

into regulatory currency has a reductive effect.[51] Being part of "us" and, accordingly, responsible toward the other members of one's national community are reduced to a technical list of criteria. A certain number of days spent in a country, for example, is construed as a big step toward commitment to the other residents of that country. Step inside for that amount of time and you will be subject to taxation on your worldwide income. Stay out and you will pay tax only on the income you produce in the country in which you are an "alien."

The bottom line is that the currency of taxation—which is either the price tag attached to membership in a national community or the list of criteria establishing one's residency—sets the value of existing and potential membership in the community. It forces members to weigh their national commitments against tax liabilities and translates belonging to the political community of the state into a set of technical criteria that determine residency. National identities thus either become commensurate through the currency of taxation with market goods or are reduced to technical criteria of residency. In other words, the currency of taxation dilutes the idea of political community into a quite narrow and strict set of benchmarks, while forcing taxpayers to make a hard choice: to belong (and pay taxes) or to exit (and avoid taxes).

CONCLUSION

The currency of taxation impacts reality, touching on our lives in a variety of ways and in many circumstances. It infiltrates and molds relationships and choices, converting lives and identities into the currency of taxation. This process is not a neutral one. It highlights certain attributes and obfuscates others. It values some features and reduces others. In other

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REV. 4, 40 (1983). According to Cover, the legal process allows a choice between conflicting normative commitments, suppressing some while crowning others as hierarchically superior. *Id.* In his words, "It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution." *Id.*

51. *See* Dagan & Fisher, *supra* note 9. James C. Scott makes a similar claim:

> Officials of the modern state . . . observe and assess the life of their society by a series of typifications that are always some distance from the full reality these abstractions are meant to capture. . . . The functionary of any large organization actually "sees" the human activity of interest to him largely through the simplified approximations of documents and statistics: for example, tax proceeds, lists of taxpayers, land records, average income, unemployment numbers, mortality rates, trade and productivity figures, the cases of cholera in a certain district. These typifications are indispensable to statecraft as well as being potentially valuable. State simplifications such as maps, censuses, cadastral lists, and standard units of measurement represent techniques for grasping a large and complex reality that must be reduced to schematic categories of some kind to allow officials to comprehend aspects of the ensemble. There is no other way of accomplishing this end than to reduce an infinite array of detail to a set of categories that will facilitate summary descriptions, comparisons and aggregation.

James C. Scott, *State Simplifications: Nature, Space and People*, 3 J. POLITICIAN PHIL. 191, 228 (1995); *see also* Likhovski, *supra* note 49, at 691–93 (describing a "darker side" to the modern state's efforts to prevent tax avoidance).

words, it plays a crucial role in the shape that personal, family, community, and political realities take. In this Article, I have argued that, given its extensive impact, the currency of taxation should become an explicit element of tax policy decision making. Alongside efficiency and justice considerations, it is vital that policymakers weigh how the various alternatives they consider in their tax-policy choices affect taxpayers' personhood, family relationships, community affiliations, and political allegiances.