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The Perpetual Pursuit of Sharing and Caring: Thomas Kleven's Equitable Sharing as a Guide for Legal Actors Chasing Meaningful Democracy

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The Perpetual Pursuit of Sharing and Caring: Thomas Kleven's Equitable Sharing as a Guide for Legal Actors Chasing Meaningful Democracy

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The Perpetual Pursuit of Sharing and Caring: Thomas Kleven's Equitable Sharing as a Guide for Legal Actors Chasing Meaningful Democracy

Sas Ansari

Abstract:

Equitable Sharing presents a strong argument for the pursuit, development, and dynamic maintenance of cooperative and complementary regulatory and governance systems (including taxation) that all have the same aim: promoting equitable sharing and countering the concentration, entrenchment, and propagation of power and privilege. We are asked to look at the reasons why societies form, the ideologies justifying and supporting social formation and cooperation by all of society's members, the manner in which they function, and the very necessary relations that form the core of social existence and operation. We are then asked to develop systems that order society and distribute the resultant desirable and burdensome outputs/outcomes in light of this. Like Plato in the Republic, Kleven is pursuing the design of an ideal society. Unlike Plato, however, Kleven seeks to find the ideal in equality (not class stratification), in truth and reality (not virtuous lies), and in dynamic responses to necessarily/naturally changing social needs/growth (not in stable enclaves that prevent change or growth).

Keywords:

Equality, democracy, united stated constitution, equity, just distribution, taxation, social regulation, disadvantage, affirmative action

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The Perpetual Pursuit of Sharing and Caring: Thomas Kleven’s *Equitable Sharing* as a Guide for Legal Actors Chasing Meaningful Democracy

Sas Ansari*

A Review of: Thomas Kleven, *Equitable Sharing: Distributing the Benefits and Detriments of Democratic Society* (Lexington Books, 2014)¹

Abstract

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¹ *Equitable Sharing*.

1. Introduction

American writer Daniel Keys Morgan stated: “The universe is not fair and it is never going to be fair”.² The reality is that humans are not equal but vary in a number of natural and artificial – “natural, financial, sociological, historical, and so on”.³ Thus, in addition to the unfair and inequitable results of the “ovarian lottery”,⁴ societal rules tend to favour the haves over the have-nots both in the short and the long-term. Examples of inequality include:

- Individuals with greater financial resources are more likely to run, and run successfully, for public office and to have greater access to government representatives and elected officials.⁵
- Persons in developing nations are, in some cases, subject to forced displacement and resettlement so as to allow mining companies access scarce natural resources for the benefit of (mainly) developed nation consumption.⁶ Others are massacred, starved, and enslaved to allow for energy resource exploration and exploitation.⁷
- Individuals in some countries lack access to sufficient, clean drinking water, while individuals in other countries overuse or waste potable water.⁸
- Low socio-economic persons, in developing and developed nations, fail to receive the same kind and quality of government assistance in emergency situations.⁹
- Persons residing in older rental housing, usually marginalized and poor individuals, are at risk of being priced out of their neighbourhoods and having their communities disrupted/destroyed.¹⁰

² Daniel Keys Moran. BrainyQuote.com. Retrieved November 16, 2014, available online at <http://www.brainyquote.com/quotes/quotes/d/danielkeys230935.html>

³ Trevor Farrow, *Civil Justice, Privatization, and Democracy* (University of Toronto Press: Toronto, ON, 2014) at p 38.

⁴ See W Neil Brooks and Linda McQuaid, *The Trouble with Billionaires* (Penguin Canada: Toronto, ON, 2010) [“*Billionaires*”], where the authors use the phrase “ovarian lottery” to refer to the chance distribution of natural, physical, social, and temporal benefits doled out to individuals.

⁵ See for example Daniel Weeks, “Democracy in Poverty: A View from Below” (16 May 2013). Edmond J. Safra Working Papers, No. 10, available online at <http://ssrn.com/abstract=2264877> or <http://dx.doi.org/10.2139/ssrn.2264877>. See also Michele E Gilman, “A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality” (2014) Utah L Rev 389, available online at <http://ssrn.com/abstract=2425296>; and Gerald Wright and Elizabeth Rigby, “Income Inequality, Party Polarization, and Representation in the State Legislatures” (2010). APSA 2010 Annual Meeting Paper, available online at <http://ssrn.com/abstract=1643148>.

⁶ See for example, Bogumil Terminski, “Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue (A Global Perspective)” (August 10, 2012), available online at <http://ssrn.com/abstract=2028490> or <http://dx.doi.org/10.2139/ssrn.2028490>. See also Bogumil Terminski, “Development-Induced Displacement and Resettlement: Social Problem and Human Rights Issue” (May 20, 2013) University of Geneva Research Paper No. 9, available online at <http://ssrn.com/abstract=2026410>.

⁷ See for example, Hannibal Travis, “Genocide in Sudan: The Role of Oil Exploration and the Entitlement of the Victims to Reparations” (2008) 25:1 Arizona Journal of International and Comparative Law, available online at <http://ssrn.com/abstract=1285781>.

⁸ See for example Leticia M Diaz and Barry Dubner, “The Necessity of Preventing Unilateral Responses to Water Scarcity - The Next Major Threat against Mankind this Century” (2001) 9:1 Cardozo Journal of International and Comparative Law, available online at <http://ssrn.com/abstract=2164951>. See also David Zetland, “Water Rights and Human Rights: The Poor Will Not Need our Charity if We Need their Water” (August 11, 2011), available online at <http://ssrn.com/abstract=1549570>.

⁹ See for example, Ira P Robbins, “Lessons from Hurricane Katrina: Prison Emergency Preparedness as a Constitutional Imperative” (2008) 42:1 University of Michigan Journal of Law Reform, available online at <http://ssrn.com/abstract=1300971>.

- Children in low-income and low-value neighbourhoods have lower educational outcomes¹¹ and fewer educational resources.¹²
- Access to quality education varies significantly within and among countries – among gender, racial, cultural, or socioeconomic lines - preventing many from accessing better income and life opportunities or benefiting from increased globalization.¹³
- Richer persons have access to better healthcare and health insurance,¹⁴ thereby living longer and higher quality lives than poor persons.¹⁵
- The Rich have better access to legal resources and institutions than the poor, and thereby the rich are better served by the law while the poor suffer law’s wrath more.¹⁶
- Persons of different sexual orientations have differential access to government-provided benefits, legal rights, and legal protections.¹⁷
- Younger persons are more likely to be unemployed or, when employed, earn less than older persons.¹⁸

¹⁰ See for example, Jed Kolko, “The Determinants of Gentrification” (December 2007) Public Policy Institute of California, available online at <http://ssrn.com/abstract=985714> . See also Jan K Brueckner, “Gentrification and Neighborhood Housing Cycles: Will America’s Future Downtowns be Rich?” (October 2005) *CESifo Working Paper Series No. 1579*, available online at <http://ssrn.com/abstract=852525>; and Rachel D Godsil, “The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing” (2013) 78:2 *Brooklyn Law Review*, Seton Hall Public Law Research Paper No. 2271670, available online at <http://ssrn.com/abstract=2271670> .

¹¹ See for example Stephen P Jenkins and Christian Schluter, “The Effect of Family Income During Childhood on Later-Life Attainment: Evidence from Germany” (October 2002) IZA Discussion Paper No. 604, available online at <http://ssrn.com/abstract=343340> .

¹² See for example, Lisa R Pruitt, “Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place” (2010) 71:1 *Montana Law Review*, available online at <http://ssrn.com/abstract=1465112> .

¹³ See for example Vinod Thomas, Yan Wang, and Xibo Fan, “Measuring Education Inequality: Gini Coefficients of Education” (January 2001) World Bank Policy Research Working Paper No. 2525, available online at <http://ssrn.com/abstract=258182> . See also Matthew Gaertner and Melissa Hart, “Considering Class: College Access and Diversity” (27 August 2012) U of Colorado Law Legal Studies Research Paper No. 12-18, available online at <http://ssrn.com/abstract=2137126>; and Deon Filmer, “The Structure of Social Disparities in Education: Gender and Wealth” (January 2000) World Bank Policy Research Working Paper No. 2268, available online at <http://ssrn.com/abstract=629118> .

¹⁴ See for example Jennifer Prah Ruger, “The Moral Foundations of Health Insurance” (January 2007) 100:1 *Quarterly Journal of Medicine* 53 at 54, available online at <http://ssrn.com/abstract=957971> . See also Jennifer Prah Ruger, “Rethinking Equal Access: Agency, Quality, and Norms” (2007) 1:2 *Global Public Health* 78, available online at <http://ssrn.com/abstract=957973> .

¹⁵ See for example Alison L Booth and Nick Carroll, “The Health Status of Indigenous and Non-Indigenous Australians” (March 2005) IZA Discussion Paper No. 1534, available online at <http://ssrn.com/abstract=690150> .

¹⁶ See for example Rodney J Uphoff, “Convicting the Innocent: Aberration or Systemic Problem?” (27 June 2006) U of Missouri-Columbia School of Law Legal Studies Research Paper No. 2006-20, available online at <http://ssrn.com/abstract=912310> . See also Omri Ben-Shahar, “The Uneasy Case for Equal Access Law” (1 January 2013). University of Chicago Institute for Law & Economics Olin Research Paper No. 628, available online at <http://ssrn.com/abstract=2197013> or <http://dx.doi.org/10.2139/ssrn.2197013> ; and Tamar R Birkhead, “Delinquent by Reason of Poverty” (2012) 38 *Washington University Journal of Law and Policy*; (28 August 2011) UNC Legal Studies Research Paper No. 1918331, available online at <http://ssrn.com/abstract=1918331> .

¹⁷ See for example Cass R Sunstein, “The Right to Marry” (11 October 2004) University of Chicago, Public Law Working Paper No 67, available online at <http://ssrn.com/abstract=612471> . See also David L Chambers, “What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples” (1996) 95 *Mich L Rev* 447.

¹⁸ See for example Ella Bedard, “Vital Signs Report paints a stark picture of youth unemployment across Canada” (8 October 2014) *Rabble News*, available online at <http://rabble.ca/news/2014/10/vital-signs-reports-paint-stark-picture-youth-unemployment-across-canada> .

- Developed and Western nations consume more of the world's ecological resources than their nations can (sustainably) provide, often because of they appropriate the resources of developing and Southern nations.¹⁹

In contrast to the reality of natural human inequality exists the moral/legal²⁰ principle of the equal moral worth of all individuals.²¹ Given this (apparent) conflict between reality and morality/Law: What is the responsibility and the role of law and legal institutions? To what extent and in what ways should or must governments regulate to, eliminate, reduce or otherwise ameliorate natural and artificial inequality among individuals within their territorial boundaries? What are the responsibilities of states, as part of a global community, when faced with unequal distribution or burdens and benefits among themselves and their nationals? When and to what extent is inequality acceptable or justified? These are the kinds of questions Thomas Kleven seeks to answer in *Equitable Sharing*.

2. Overview

Equitable Sharing is a timely book that grows out of Professor Kleven's long-standing commitment to justice, particularly distributive justice among members of United States society. Although Kleven roots equitable sharing in the foundational documents, history, and practice of the United States, Kleven's arguments are equally informative for persons researching the unequal distribution of benefits and burdens within and among nations. *Equitable Sharing* argues against social distributions described by Louise Eisenstein's over 40 years ago:²²

In every community, those who feel the burdens of [society] are naturally prone to relieve themselves [from their discomfort]. One class struggles to throw the burdens off its shoulders. If they succeed, of course, it must fall on others. They also, in their turn labour to get rid of it, and finally the load falls upon those who will not, or cannot, make a

¹⁹ See for example "National Ecological Footprint and Biocapacity for 2007" National Footprint Accounts, The Footprint Network, available online at http://www.footprintnetwork.org/images/uploads/NFA_2010_Results.xls , accessed on 16 November 2014. See also "Ecological Footprint Atlas 2010" (15 October 2010) Global Footprint Network, available online at http://www.footprintnetwork.org/en/index.php/GFN/page/ecological_footprint_atlas_2010 .

²⁰ The author does not wish to distinguish between law and morality for purposes of the introduction of this review. The author recognizes that there is a distinction between moral and legal principles and that there is a long-standing debate as to the relationship between law and morality. See for example: Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence" (1941-42) 55 Harvard Law Review 44; H L A Hart, "Positivism and the Separation of Law and Morals" (1957) 71 Harvard Law Review 593; and Lon L Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1957) 71 Harvard Law Review 630.

²¹ See for example The United States *Declaration of Independence*, which reads:

We hold these truths to be self-evident, that all men are created equal [...]

See also the preamble, "Universal Declaration of Human Rights," adopted December 10, 1948 by the United Nations General Assembly "UN Online," <http://www.un.org/Overview/rights.html>, which reads:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [...]

See further, *Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982*, 1982, c 11 (UK), subsection 15(1), which reads:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination [...]

²² Louise Eisenstein, *Ideologies of Taxation* (The Ronald Press Company, New York: 1961).

successful effort for relief. [The] struggle [is] a one-sided [affair] in which the rich only engage [and] in which the poor always go to the wall.²³

Eisenstein was commenting on the struggles over the benefits and burdens of taxation. However, his description is also apt when considering other struggles over dividing the social product and assigning the social cost - struggles where vested interests tend to triumph. Kleven summarizes his position at the end of this book in this way:

Ultimately, if we are to progress towards equitable sharing through the existing political system, perhaps we all, even the vested interests, must heed the words of the French aristocrat Montesquieu writing some few years before the French revolution: “The state ... owes to every citizen a certain subsistence, a proper nourishment, convenient clothing, and a kind of life not incompatible with health ... whether it be to prevent the sufferings of the people, or to avoid rebellion.” Or, I would add, whether it be the right thing to do in a society aspiring to democracy and committed to equitable sharing.

In reading *Equitable Sharing*, one cannot but recognize the sentiments of other contemporary writers concerned with the problems of inequity in various areas of human life and endeavor. The ideas in this book are equally applicable to the difficult and contested problem of sharing benefits and burdens among all individuals irrespective of nation-state separations, between natural and artificial persons, and among nation-states as members of an international community.²⁴ Kleven’s arguments have something to say to those authors focused on the national and global distribution of income and wealth such as Thomas Piketty,²⁵ W Neil Brooks and Linda McQuaid²⁶, Chrystia Freeland,²⁷ or Guy Standing.²⁸ Kleven’s arguments also resonate with authors focused on climate change²⁹ or developing world exploitation.³⁰ *Equitable Sharing* is, although perhaps unconsciously, engaged in this global conversation and, because of the focus on practical solutions within one nation, can contribute greatly to the wider conversation.

²³ *Ibid*, p 4.

²⁴ For an analysis of nations’ part of an international community based on a social contract from the taxation perspective see Allison Christians, “Sovereignty, Taxation, and Social Contract” (August 2008) University of Wisconsin Law School, Legal Studies Research Paper Series, Paper No 1063, available online at <http://ssrn.com/abstract=1259975>.

²⁵ Thomas Piketty, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press: Cambridge, MA, 2014) [“*Capital*”].

²⁶ *Billionaires*, *supra* note 4.

²⁷ Chrystia Freeland, *Plutocrats: The Rise of the New Global Super-Rich and the Fall of Everyone Else* (Penguin Books: New York, NY, 2012).

²⁸ Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic: London, UK, 2011).

²⁹ See for example, Thomas Cottier, et al, “The Principle of Common Concern and Climate Change” (June 2014) NCCR Trade Regulation, Working Paper No 2014/18, available online at http://www.wti.org/fileadmin/user_upload/nccr-trade.ch/wp5/publications/Cottier_et_al_Common_Concern_and_Climate_Change_Archiv_final_0514.pdf ; See also International Panel on Climate Change, *Climate Change 2014, Synthesis Report* (United Nations Environmental Panel: Switzerland, 2014) available online at http://ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_LONGERREPORT.pdf .

³⁰ See for example, Magdalena Sepulveda Carmona, “Report of the Special Rapporteur on extreme poverty and human rights” (22 May 2014) United Nation General Assembly, A/HRC/26/28 (United Nations: 2014) available online at <http://www.ohchr.org/EN/Issues/Poverty/Pages/AnnualReports.aspx> .

However, before examining *Equitable Sharing* in more detail, this paper explores Professor Kleven's personal context in Part 3. After setting the stage, the paper reviews the book in Part 4, attempts to quickly apply equitable sharing to income taxation in Part 5, and then concludes in Part 6.

3. Thomas Kleven in (and as) Context³¹

One cannot understand a person's work without understanding something about the person. Professor Kleven is currently a Professor of Law at Thurgood Marshall School of Law at Texas Southern University. He had an upper-middle class upbringing and obtained the best and most exclusive education at Andover³² and Yale³³. His legal education came at the height of the United States' Civil Rights era and the start of the 1960's anti-war movement. A younger Mr. Kleven practiced at a traditional law firm in Boston, Massachusetts,³⁴ and became involved with the Boston Model Cities Program,³⁵ before starting a teaching career at Thurgood Marshall School of Law.³⁶

As Kleven's personal context demonstrates, his writing is rooted in, and informed by, a lived experience/memory of social struggle for equal recognition and peace, and a social flavour of non-conformism and anti-establishment- as is evident in his previous scholarship.³⁷ A theme prominent in Kleven's context and palpable in *Equitable Sharing* is the sacrifice of the interests of the few and relatively powerless by the many and relatively powerful.³⁸

³¹ Professor Thomas Kleven kindly provided the author with greater personal information than was able in the public domain, and also provided unpublished articles that have informed the author's understanding.

³² He attended Phillips Academy, an independent residential secondary school established in 1778.

³³ He received his Bachelor of Arts, majoring in Political Science, and his law degree from Yale University.

³⁴ He practiced at Goulston and Storrs mostly in corporate, real estate, and estate planning work.

³⁵ Professor Kleven worked as an administrator on one of the Model City's projects, one of 150 Model City programs part of a federal initiative to improve livelihoods in American cities by channeling federal funding into the most blighted neighborhoods of select cities. For more information on the Boston Program see <https://archive.org/details/bostonmodelciti00bost>.

For an analysis of the effectiveness of the Model City program see Jody H Schechter, *An Empirical Evaluation of the Model Cities Program* (11 March 2011) Thesis in partial fulfillment of the degree of Bachelor of Science in Economics at the University of Michigan, available online at <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/85326/schec.pdf?sequence=1>.

³⁶ Thurgood Marshall School of Law is a "mission-driven institution dedicated to expanding opportunities for the underserved in the legal profession, preparing a diverse group of students for leadership roles in the legal profession, business, and government, and offering leadership in teaching, research, and service" (Texas Southern University website, accessed 4 April 2014, <http://www.tsulaw.edu/about.html>). The law school, named after Justice Thurgood Marshall, is an outgrowth of the pre-Brown segregated law school for African-Americans in Texas, and was the school at issue in the case of *Sweatt v. Painter (No 44)* (1950), 339 US 629, available online at <http://www.law.cornell.edu/supremecourt/text/339/629>.

³⁷ See for example: "Brown's Lesson: To Integrate or Separate Is Not the Question, But How to Achieve a Non-Racist Society" (2005) 5 U MD L J RACE, RELIGION, GENDER & CLASS 43, available online at <http://ssrn.com/abstract=574202>; "Private Property and Democratic Socialism" (1997) 21 LEGAL STUD F 1; "Ideology as Moral Discourse or Struggle for Power" (1993) SOCIAL PHILOSOPHY TODAY, 8:37; and "The Public Private Distinction: Does It Promote Democracy or Serve the Ruling Class?" (1991) Nature, Society, and Thought, 4:393, available online at <http://homepages.spa.umn.edu/~marquit/nst043.pdf> For more of Professor Kleven's works please see his SSRN Author page at <http://ssrn.com/author=276073>.

³⁸ I refer to the anti-draft movement during the Vietnam War, being both a protest aimed at the immoral conduct of the war and at the great discretion given to the Selective Services Systems office (also known as the Draft Board) in determining whom to draft and whom to exempt. This discretionary draft system was found to favour white, middle-class men with the result that a disproportionate number of young, lower-class, African-American men were

4. Equitable Sharing

Equitable Sharing is animated by the central idea of “equitable sharing” – that “the benefits and detriments of social life must be fairly distributed among all members of society”.³⁹ This book draws and expands on Professor Kleven’s previous work, and demonstrates a long-standing and thoughtful engagement with the intersections of economic power, political power, distributional justice, democracy, judicial review, and the American ideal.⁴⁰ For Kleven, the concept of equitable sharing is fundamental to democratic societies generally, and implicit in the U.S.’s founding documents specifically. He properly admits that the concept of equitable sharing is inherently vague but states that this does not render it meaningless. Kleven does not advocate for any particular version of equitable sharing and recognizes that the implementation of any one interpretation will have to contend with alternate iterations. He argues that what is required of a democratic society is a commitment of continuous, active engagement with the particulars of sharing benefits and burdens over time, in light of advancing states of knowledge, and in response to changing societal circumstances. Thus, like other principles of moral philosophy, the vague concept of equitable sharing is a guide informing the continuous societal debate as to its implementation. Starting from the belief in the inherent equal worth of every person, equitable sharing is useful in setting the outer bounds of acceptable conduct and for focusing the debate on reasoned, logical, and evidence-based conduct in pursuit of greater equity.

The book is particularly focused on the increasingly inequitable distribution of wealth and income in society, and asks the reader to accept as a pressing problem the need to have more equitable distributions of the social product. Like Piketty⁴¹ and Books and McQuaid,⁴² Kleven identifies the growing divide of existing and accumulating economic power as one of the greatest challenges of social organization of our time. However, unlike those authors, Kleven does not look solely at taxation as a solution to inequitable access, benefit, and accumulation of the social product. *Equitable Sharing* examines the structural elements that contribute to and/or maintain inequity. Kleven insists that all government institutions need to play an active role in achieving equitable sharing among members of society. He examines a number of specific regulatory measures that can achieve a more equitable distribution of specific benefits and burdens. Despite this additional focus on other regulatory solutions, the legislative power to tax and spend appears as a prominent and necessary tool in achieving the goals of equitable sharing.

The first half of the book builds the philosophical and legal foundation for the principle of equitable sharing, connects the principle of equitable sharing to duties and obligations, and identifies the complementary role that the legislative and judicial branches of government must play in the continual pursuit of equitable sharing spurred by continually changing social circumstances.

drafted to die for President and Country (see Herman Graham III, *The Brothers' Vietnam War: Black Power, Manhood, and the Military Experience* (University of Florida Press: Gainesville, 2003) at pp 16-17).

Professor Kleven wrote about the Draft in Thomas Kleven, “The Moral Implications of the Draft” (1985) 10 T MARSHALL L REV 57.

³⁹ *Equitable Sharing*, supra note 1 at 1.

⁴⁰ See for example: Thomas Kleven, “Equitable Sharing and the American Ideal” (2012) available online at <http://ssrn.com/abstract=2039837>; Thomas Kleven, “Equitable Sharing and Democratic Theory” (2012) available online at <http://ssrn.com/abstract=2039822> Thomas Kleven, “The Public/Private Distinction: Does it Promote Democracy or Serve the Ruling Class” (1991) 4:4 *Nature, Society, Thought* 393; Thomas Kleven, “A Critique of Libertarianism” (paper on file with the author) and Thomas Kleven, “Equitable Sharing and the Supreme Court” (paper on file with the author).

⁴¹ *Capital*, supra note 25.

⁴² *Billionaires*, supra note 4.

Kleven seeks to build his argument - that equitable sharing is fundamental to democratic societies - on solid ground by looking back at the political philosophies that inform ideas of modern democracies and specifically underpin the politico-legal history of the United States. Kleven builds this foundation in Chapter 1 by examining the political philosophies of three theorists whose ideas are used to justify and legitimize modern ideas behind society formation: John Locke (and his libertarianism), John Stewart Mill (and his utilitarianism), and John Rawls (and his egalitarianism).⁴³ Kleven's examination demonstrates that the ideas of each of these theorists contains a principle of equitable sharing, that each of their principles functions to achieve similar outcomes, and that each of the theorists agrees that the principle is fundamental to democratic societies. Moving from this general foundation to the specific case of the United States, Chapter 2 examines the ideas of the Declaration of Independence and the US Constitution. He looks to identify the ideas and principles that link the works of Locke, Mill, and Rawls to those contained in those two documents. Kleven identifies the elements that bridge the works of the philosophers and the works of the statesmen, arguing that this connection evinces equitable sharing's import as a fundamental principle of US democracy.

In Chapter 3, Kleven proposes specific reforms needed in the United States so as to move closer to equitable sharing. He begins by identifying the ways in which the US falls short of the principle of equitable sharing and extends this analysis to the US as part of an interdependent world legal order. After sketching out some reforms necessary to move us closer to the ideal, he identifies the need for mass movements and repositioning of legislators' perspectives so as to achieve meaningful and lasting change. However, Kleven does not lay the duty to pursue equitable sharing solely at the foot of elected representatives exercising legislative power. In Chapter 4 he asks that the judiciary play their proper role and identifies the duties of the judiciary as an integral part of democratic governance. The courts have to play a meaningful role by sanctioning laws that promote, and striking down laws that violate, the principle of equitable sharing. The court's role is described as one of prodding the legislative branch and focusing its attention on issues that demonstrate the legislature's failure to take equitable sharing seriously,⁴⁴ and also play a role of public educator. Through their decisions and reasons, Kleven suggests, the courts can and should contribute to the public dialogue surrounding various equity issues.

The second half of the book applies the ideas developed in the first half to specific contemporary problem areas. Kleven does so in order to examine the implication(s) that the principle of equitable sharing has when applied to these particular issues facing US society. Chapter 5 begins this second part with its examination of same-sex marriage. Kleven argues that the principle of equitable sharing requires that same-sex marriage be recognized. Equitable sharing also requires that courts act to strike down laws that criminalize same-sex marriage or disadvantage same-sex partners as compared to opposite-sex marriage. Chapter 6 follows the analysis of same-sex marriage by examining the use of race as a means of assigning students to schools for the purpose of promoting integration. Kleven argues that the principle of equitable sharing, when applied to this scenario, supports recourse to designed integration plans for the purpose of promoting equal educational opportunities for all races. Where the legislative branch is engaged in a good-faith effort to promote appropriate integration in pursuit of equitable sharing of educational

⁴³ A reader will surely remark that many political theorists are not examined and that the theories of those examined are not uncontested. It appears that Kleven has purposefully chosen the theorists for the US context and has, as is necessary in any book, limited the selection to exemplary and necessary theorists.

⁴⁴ Therefore, courts are the place where problems come to the fore. The courts must deal with the problems by rendering decisions that accord with the principle of equitable sharing and, where the legislature disagrees with the court's solutions, the legislature modifies or amends the law so as to get the proper equitable balance. This is quite similar to Peter Hogg's theory of dialogue between the legislative and judicial branches of government in pursuit of democratic and constitutional balance. See for example Leighton McDonald, "Right, 'Dialogue' and Democratic Objections to Judicial Review" (2004) 23 Federal Law Review 1, available online at <http://flr.anulaw.anu.edu.au/sites/flr.anulaw.anu.edu.au/files/flr/McDonald.pdf>.

opportunities, judicial interference with such good-faith efforts is judged by Kleven to be inappropriate. However, Kleven does not suggest that there is no role for the judiciary. On the contrary, he argues that the role of the courts is to scrutinize such efforts to ensure that the plans do not act as a disguise for discrimination and that the implementation does not have the effect of denying equal educational opportunities for all students. Chapter 7 examines the electoral process by looking at the unsuccessful legislative attempts to limit corporate expenditures and the efforts to shift candidates' campaigns from private onto public funding. The application of equitable sharing to regulating the electoral process supports limitations on campaign contributions and campaign expenditures. Equitable sharing, Kleven argues, also supports programs designed to provide public funds to candidates so as to equalize economic resources expended in the electoral contest. The aim of these programs, when properly designed, is to equalize economic power and political power. As with racial integration efforts, the courts' role is to scrutinize such legislative efforts so as to ensure that they, in fact, result in equality and not advantage incumbents or the two major parties. The final specific issue dealt with by Kleven, in Chapter 8, is the conflict between states' rights and the power of Congress in relation to the *Voting Rights Act* and *Affordable Care Act*. He argues that equitable sharing supports states' rights, on the basis of a form of freedom of association, but that in the circumstances the principle would require courts to substantially defer to the balance struck by Congress (on the basis that it is better suited to balance the competing interests and because states' rights are adequately protected in the political process).

5. Potential Income Tax Implications of Equitable Sharing

Kleven is concerned with both procedural and substantive aspects of designing and monitoring democratic societies.⁴⁵ He conceptualizes democratic society as a joint venture by and for the benefit of all its members and provides a definition of democracy that puts equitable sharing front-and-center:

A democracy is a society where, based on a belief in the inherent equality of all, all society's members are entitled individually and collectively to determine their own destinies, subject to a principle of equitable sharing that requires all the benefits and detriments of social life to be fairly distributed among society's members.⁴⁶

To be democratic, in process and substance, a society must engage in a continual process of self-examination, challenge, and re-examination. However, one may also envision a systemic design that, within parameters accepted as defining an equitable range of outcomes, self-adjusts to maintain a pre-

⁴⁵ Kleven's arguments of systemically created inequality – inequality by design not because of merit – align with the comments of Joseph William Singer, “Titles of Nobility: Poverty, Immigration, and Property in a Free and Democratic Society” (August 2014) 1:1 *Journal of Law, Property, and Society*, available online at <http://www.alps.syr.edu/journal/2014/08/JLPS-2014-08-Singer.pdf>, where he states at page 12:

Jeremy Waldron has argued we should support the institution of private property because it promotes liberty. But because we also believe in equality, we must enable every person to become an owner so every person can be free. Poverty is, in principle, incompatible with democracy. And we will not solve poverty simply by redistributing money from the rich to the poor. The poor do not need charity; what they need is equality. What they need is what the United States and the state of New Jersey did for my family; they let us in. We tend to naturalize the results of the market economy, contrasting the free market and government regulation. But markets do not exist in nature; they are established and defined by law. Poverty results not from natural market forces but from the way we have shaped corporate law, labor law, employment law, trade law, education law, and also property law. Poverty is neither a natural disaster nor an act of God. It is a preventable disease. The question is not whether we can do anything about it; the question is whether we want to. [footnotes omitted]

⁴⁶ *Equitable Sharing*, supra note 1 at p 10.

determined equilibrium balance.⁴⁷ Such a homeostatic regulatory system,⁴⁸ to borrow a term from biology, would allow for and maintain a defensible and rational range of distribution of benefits and burdens. A range necessarily implies a floor and a ceiling and redistribution (within such a system), would not aim at ‘taking’ from the richer to give to the poorer, but would aim at correcting the market’s failure to align value creation and remuneration.⁴⁹ In other words, redistribution would take from the rich what they illegitimately appropriate because of failures in systemic design and give back to the poor what was unjustly⁵⁰ taken.⁵¹

How such a homeostatic regulatory system may look and function will depend on the specific area of law/regulation. Given the author’s focus on taxation, this paper will sketch out what such a system may look like following the principle of equitable sharing.⁵² In doing so, a number of assumptions are made: that private property ownership and appropriation of national income⁵³ are only justifiable when they

⁴⁷ An equilibrium balance may seek to preserve and re-create a particular outcome or keep a system within a range of acceptable or preferred outcomes.

⁴⁸ The *Oxford English Dictionary*, 2d ed (Clarendon Press of Oxford University Press: Northamptonshire UK), defines “homeostasis” as “the tendency towards a relatively stable equilibrium between interdependent elements, especially as maintained by physiological processes”. It, therefore, describes the property of a system that regulates variables in such a way that internal conditions remain both stable and relatively constant.

The term was originally applied to biological control systems, such as internal pH control systems of cells of the systemic control of glucose levels in human blood, and was first coined by Walter Bradford Cannon (W B Cannon, “Physiological regulation of normal states: some tentative postulates concerning biological homeostatics”, in *ses amis, ses collègues, ses élèves*, A Pettit, Ed (Éditions Médicales: Paris, France, 1926).

In general, in order for homeostatic systems to exist and function, we need (1) a sensor that is capable of detecting changes in the conditions we wish to regulate, and (2) mechanisms that effect changes in that conditions; and (3) a negative feedback connection between the sensor and the effector mechanisms. Negative feedback mechanisms are processes that influence the operation of the process itself in such a way that reduces specific changes in conditions. They function by relating the measurement of a condition to a required value for that conditions, and then react to changes to the condition away from the required value by decreasing the changing value. They are used in biological systems and have a long history of use in artificial system design.

⁴⁹ The purpose would be, and the reason for it not being a ‘taking’, is to correct erroneous market distributions of income *ex post* without affecting the market’s capital allocation and decision making system *ex ante*.

⁵⁰ To define unjust-taking, requires a philosophy of justice – one that Kleven provides. I note that his definition is capable of justifying redistribution on the basis of value creation to even those who are not employed.

⁵¹ This sentiment is reflected in Barbara Ehrenreich, *Nickle and Dimed: On (Not) Getting By In America* (2001), where at p 221 she writes:

We should feel ‘shame’ at our dependence ... on the underpaid labour of others. When someone works for less pay than she can live on - when, for example, she goes hungry so that you can eat more cheaply and conveniently – then she has made a great sacrifice for you, she has made a gift of some part of her abilities, her health, and her life. The “working poor”, as they are approvingly termed, are in fact the major philanthropists of our society. They neglect their own children so that the children of others will be cared for; they live in substandard housing so that other houses will be shiny and perfect; they endure privation so that inflation will be low and stock prices high. To be a member of the working poor is to be an anonymous donor, a nameless benefactor, to everyone else.

⁵² I examined a similar self-adjusting income tax system, reflective of the ecological cost and benefits of individual housing choice in Sas Ansari, “Income Tax, Household Composition, and Housing Choice: An Environmental Approach” (20 December 2011) UBC Faculty of Law, unpublished manuscript on file with the author.

⁵³ For this purpose I will adopt the definition of “national income” used by Thomas Piketty in *Capital*, supra note 25 at p 45, where he states that “National Income = domestic output + net income from abroad”.

represent a person's relative contribution of value to society;⁵⁴ that before tax income⁵⁵ is the market's distribution of economic power that includes amounts representing both value contribution and value appropriation; and that after-tax income is an acceptable measure of a person's value contribution.⁵⁶ Also, this paper will ignore the various income and tax deductions, tax credits, exemptions, and exclusions that affect after-tax income, and assume that the system will design these aspects of the income tax system in line with the principle of equitable sharing.

Following equitable sharing, one may conclude that income tax design must have a justifiable ceiling, a core, and floor income.⁵⁷ The floor could be set with reference to a level of after-tax income necessary to meet physically and socially necessities of life within a particular jurisdiction.⁵⁸ The floor would be met, where other regulations (such as minimum-wage laws) fail to do so, through cash payments to those below this cut-off.⁵⁹ The ceiling would be a little bit more difficult to define.⁶⁰ However, if we rely on the principles informing equitable sharing and the assumption that income distribution ought to match merit in the form of value added to society, we are able to design a way out of the problem. No matter what metric is used, the reality is that every person's contribution is limited and is dependent on social structures (including accumulated knowledge, developed skills, existing infrastructure, and established institutions). No matter how productive, smart, capable, or gifted a person is, their contribution of value is going to be some limited multiple of the value contributed by the average person in that society. Given this, one may well conclude that a fair ceiling is established by pegging the income-ceiling to a reasonable multiple of average or mean income within that society. Such a system would ensure that everyone's basic needs are met, that greater value contribution is rewarded more greatly, that economic incentive is provided for individual effort, and that the economy can grow and expand. At the same time, such a

⁵⁴ For some more thought on the value-alignment approach to income taxation see the penultimate section of Sas Ansari, "Globalisation and Legal Scholarship: William Twining's Call for Revolutionary Jurisprudence" (2013) 4:4 *Transnational Legal Theory* 660 at 674, available online at <http://ssrn.com/abstract=2408856>.

⁵⁵ There are different ways of defining income as the tax base. See for example the definition of gross income in Canada's *Income Tax Act*, RSC 1985 c1 (5th Supp), which differs (and is narrower than) that used in the US's *Internal Revenue Code*, 26 USC, both of which are narrower than a comprehensive definition of income as reflected in the Haig-Simmons definition (See Robert M Haig, "The Concept of Income – Economic and Legal Aspects", in *The Federal Income Tax*, Robert Murray Haig, Ed (Columbia University Press: New York, NY, 1921)). A justificatory explanation for these differences is provided in Alice G Abreu and Richard K Greenstein, "It's Not a Rule: A better Way to Understand the Definition of Income" (2012) 13 *Florida Tax Review*, available online at <http://ssrn.com/abstract=2132534>.

⁵⁶ There are a number of embedded assumptions that need not be expressed for the purposes of this paper.

⁵⁷ The use of Floor and ceiling around mean was inspired in part by the use of "floor, core, and ceiling" by Professor Ben Davey, as part of the FLOOR project looking at social security and human rights in communities. See <http://www.floorgroup.raumplanung.tu-dortmund.de/joomla/>

⁵⁸ This is similar to the various minimum living wage proposals. See for example Living Wage Canada, online at <http://livingwagecanada.ca>.

⁵⁹ This is similar to the various basic income proposals. See for example the Basic Income Canada Network, online at <http://biencanada.ca>.

⁶⁰ This paper will not delve into the problem of attributing value creation as between capital and labour. It will assume that all value is attributable to current, as opposed to accumulated labour (as part of capital generally). The estimate of the value contribution is difficult (see for example Piketty's analysis of pure land value in *Capital*, supra note 25 at p 197). However, the design of a homeostatic tax system does not depend on an exact attribution of value creation as between capital and labour, but only a relative attribution of value on the basis of the purpose and role of (and alternative iterations) of capital.

system would limit the distribution of income and wealth as between the low, average, and top of the spectrum to something that is defensible and fair.⁶¹

6. Conclusion

Kleven's *Equitable Sharing* is well written and well thought out. The book brings to the fore the continual struggle to balance various competing factors and interest, including: individual interests, community/societal interests, power, privilege, unequal endowment, equal worth, merit, and fortune. He is responding to the growing divide of wealth and income within society, but does not limit himself to looking only at income and wealth. Just as Piketty does, he considers the importance of the in-kind benefits – public goods and services – as well as the role that governance and regulation must play.

Equitable Sharing presents a strong argument for the pursuit, development, and dynamic maintenance of cooperative and complementary regulatory and governance systems (including taxation) that all have the same aim: promoting equitable sharing and countering the concentration, entrenchment, and propagation of power and privilege. We are asked to look at the reasons why societies form, the ideologies justifying and supporting social formation and cooperation by all of society's members, the manner in which they function, and the very necessary relations that form the core of social existence and operation. We are then asked to develop systems that order society and distribute the resultant desirable and burdensome outputs/outcomes in light of this. Like Plato in the *Republic* Kleven is pursuing the design of an ideal society. Unlike Plato, however, Kleven seeks to find the ideal in equality (not class stratification), in truth and reality (not virtuous lies), and in dynamic responses to necessarily/naturally changing social needs/growth (not in stable enclaves that prevent change or growth).

Equitable Sharing is a book that deserves a careful read by anyone interested in the local and global equality and equity debates.

⁶¹ There are many issues that need to be addressed in order to develop a full model of such a tax system, including the definition of the tax base and compliance/administrative costs, none of which are insurmountable.