



TAXES, PROPERTY, JUSTICE

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The distribution of pretax income has no moral significance; therefore the distribution of burdens on pretax income can have no moral significance, either. So traditional doctrines of vertical and horizontal equity in taxation, which are the main focus of the “fairness” branch of taxation policy, are fundamentally misguided. To say that a just tax is a flat tax or, for that matter, a progressive tax, is to offer an answer to a meaningless question. Further, justice in taxation is not an independent moral issue. A tax scheme will be just if it finds its place in a just set of economic and legal institutions. Economic and legal institutions, as a system, will be just depending on how well they secure certain values—values such as liberty, welfare, opportunity, and personal responsibility. Different political theories assign different weights to these values, and they interpret them in different ways, so abandoning the traditional way of thinking about tax justice leaves open a full range of views, from left to right, if you like, on what a just overall economic system, taxation included, will look like. In particular, it leaves open what the rate structure of the best tax scheme will be.

But don't we have a property right to our pretax income? I believe that the morality of property should be understood in the way Hume understood it: property rules are conventional, first in the form of social mores, then later in the form of law. We evaluate those rules—for us, these are legal rules—by asking whether they have a place in an overall economic system that is beneficial, fair, etc. Hume's case in favor of having a system of private property rights is, by now, banal, but that doesn't mean that it's not correct. I think it is correct, and, of course, Hume wasn't the first person to make the argument in favor of private property; Aristotle made most of the main points a few years earlier.

And we can go further than Hume's welfarist argument and say, following Hegel, that a legal property scheme is not just a good idea because of its effects on

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social welfare, but something each of us has a positive right to, at least in favorable circumstances, and at least as far as personal property is concerned, and we have that positive right because of the role of private property in human freedom. I think we should go further with Hegel, so count me as strongly in favor of private property.

But none of the considerations I have mentioned provides any support whatsoever for the idea that there are moral property rights antecedent to the conventional property rules, rights to which a just set of those rules must conform. Like Hume, I don't believe that there are any such antecedent property rights. But now the argument that pretax income can have no moral significance and should play no role in discussions of tax justice actually does not depend upon taking Hume's view about the morality of property. For, whatever the truth about the morality of property, we couldn't possibly have a right to the whole of our pretax income.

Here's why. Suppose we could make sense of some theory of natural property rights. Good government would then respect the property rights that people have according to that theory. If those property rights were absolute, then compulsory taxation would always be wrong. That's what Nozick argued in *Anarchy, State, and Utopia*. But suppose we favor a modified libertarianism, according to which those property rights are not absolute. Compulsory taxation, so long as its burdens are fairly distributed, is legitimate for the sake of protecting individual rights and securing certain basic public goods. On this view, we should assess tax justice by looking at the distribution of burdens against a baseline of people's rightful property. But at this point, the view leaps into incoherence by assuming that people's rightful property includes the whole of their pretax income. We couldn't have a natural property right to all our pretax income, because our pretax income is determined by government economic policy and the entire legal apparatus of the state that makes any stability of holdings possible. Since that entire set of institutions requires taxation for its existence, we can't possibly have property rights in our pretax income.

The argument here is not that without the state, our property rights wouldn't be protected, and so it follows that we don't have any property rights at all—though certain reviewers of a book I wrote with Thomas Nagel, *The Myth of Ownership*,¹ have said that that was our argument, in order to say that we couldn't believe in liberty rights either.² That's not the argument. The point is that pretax income depends on the state, which depends on taxes, so we can't have a right to all our pretax income. This particular point does not itself entail that the idea of moral property rights is incoherent, it just establishes that we can't have a property right in our pretax income.

¹ LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002).

² See, e.g., Richard Epstein, *Myth-Making on Taxes*, NAT'L REV., July 1, 2002, at 49.

The result is that, when it comes to tax policy, it doesn't really matter whether we believe in moral property rights or not. The myth of ownership that ruins tax policy debate is the myth of ownership of the whole of our pretax income. Still, this result isn't that great for the moralist of property, because it becomes rather unclear at this point just what it is that we do own, morally speaking, on the view that there are moral natural property rights.

There's another line of thought that might seem to support the idea that we're entitled to our pretax income, one that doesn't turn on attachment to natural property rights. Some people believe that the ideal society is one that maximizes freedom, and, since we know that free people will trade, an ideally free market ends up being our political ideal. This view reminds me of Marxist utopianism, both in its utopianism and in its elevation of the value of freedom above all others, such as human welfare, for example. But I don't want to discuss the plausibility of the ideal. It doesn't matter, since even if that were the right ideal, it still wouldn't follow that we should attach moral significance to the distribution of pretax income, since that income is earned in a world that does not match the ideal.

Suppose we did live in a society that came at least very close to achieving that ideal, in the sense that there was no welfare system, no public education, no public healthcare, no agricultural subsidies, etc. Surely that's close enough, and wouldn't that justify using pretax income as the baseline for assessing just taxation? Couldn't we say that the distribution of pretax income is the result of a just process, and therefore a distribution we can depart from only with justification and only in a fair way? No. Even in such a world, to treat pretax income as a morally preferred distribution is incoherent in just the same way that the argument that turned on property rights was incoherent. Unless we live in the state of nature, pretax incomes are, in fact, post-tax incomes, that is, incomes earned under a legal and economic system supported by taxation. We can't use the outputs of a system that includes taxes to set the parameters of what just taxation would be. Rather, it's the other way around. We have to assess the justice of post-tax incomes by assessing the overall economic system, taxes included, that produces them.

Let me end with a few words about the flat tax to illustrate some of these ideas. The flat tax may be on the agenda again. It's conceivable that on the best theory of social justice together with the best economic theory, it would turn out that the best tax of all is flat—that is, a single rate. But that would be a great coincidence. The only thing going for a single-rate scheme is simplicity and that, while it's extremely important, is not the only thing that matters. But those who argue for a single-rate scheme disagree with me about what's in its favor. They believe that considerations of fundamental fairness support a flat tax. A fair tax is one that taxes everyone the same, and that's what the flat tax does. It's astonishing how much ideology, in the sense that implies falseness, lies behind this idea. Let's count the ways.

First, fairness in the distribution of tax burdens, measured against pretax income, is an empty issue, as I have explained. Second, genuinely taxing everyone at the same rate is something almost no one supports. Every flat tax plan that has been presented to Congress calls for a sizable personal exemption or tax-free amount. The result is that the average rate of taxation under a single-rate scheme is progressive for all those who pay tax, so people are not taxed the same. Third, even if all people did pay tax at the same rate, so that we started at one dollar of income, they wouldn't be paying the same tax, they'd be paying more tax the more they earned. So if fairness did require everyone to pay the same tax, that would mean we should embrace a head tax, or else a tax that imposes the same sacrifice in real, rather than monetary terms. I offer this just as an illustration of the damage that's being done to debates about justice in taxation by presenting this as an issue of fairness in the distribution of tax burdens.