

As a critical review of a book that has appeared more than ten years ago, this paper is at the moment unpublishable. At some time in the future I hope to be able to rework it into an independent systematic discussion of this issue that is still strangely neglected in non-libertarian political philosophy.

The Reality of Ownership

Are there any principles of fiscal justice?

A critical review of Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice*. Oxford: Oxford University Press 2002.¹

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If one searches the *Philosopher's Index* with the combined subject terms "taxation" and "justice", one will only find two entries since 1992. At the same time fiscal policies belong to the core issues of actual political debate in every country, and the positions taken in that debate reflect strongly diverging views of distributive justice and of the tasks of government in that area. Therefore the book on fiscal justice recently published by Liam Murphy and Thomas Nagel is a welcome pioneering work. It contains a highly useful survey of moral issues in fiscal law: should the tax base be income or consumption (or endowment), should we allow deductions for charity (or prefer flat rate tax credits), how to avoid undesirable incentive effects while maintaining justice, should tax rates be flat, progressive or declining, should fiscal instrumentalism (the use of tax expenditures as an instrument of policy) be condemned as "tax discrimination", are there any good reasons for abolishing the estate tax? Their

¹ I have profited from valuable comments by •.

discussion is strongly organized around one basic argument, but it is enriched with many other relevant and interesting considerations. It deserves to be the starting-point of a new philosophical interest in the subject.

However there is also a danger that in the very process of discovering the subject it will be lost again.² For this one basic thesis for which the book argues is that there is no separate issue of fiscal justice at all: fiscal policies should only be evaluated in terms of their overall effects, including their effects on patterns of distribution. Understandably, this view immediately provoked hostile reactions from the right wing of the political spectrum, in particular from libertarians, so much so that they hardly took the trouble to engage with the arguments for the view. My own political sympathies are much closer to those of the authors. In particular I fully agree that a decent society as rich as the Northern American and Western European ones should provide a generous social minimum to those of its citizens who are genuinely unable to provide it for themselves.³ But I believe that such views do not require one to deny that fiscal law should, at least in large part, be designed as an implementation of separate principles of fiscal justice. My aim therefore in this review is to assess the arguments Murphy & Nagel provide for this denial.

1. Good-bye to ability-to-pay?

² As Blum & Kalven in their classical discussion of progressivity in terms of principles of just taxation confessed -in my view unnecessarily- to losing their topic in addressing the issue of economic inequality, quoted MN, p. 132.

³ I also agree that the basic policy problem in this area is to design a system of provision which has the least undesirable side-effects, see MN, p. 182.

Of course Murphy & Nagel are not the first authors to make such arguments. In 1946, for example, the Dutch fiscalist H.J. Hofstra published his book "Socialist Taxation Policy". In this book Hofstra, who would later be a minister of finance in a cabinet dominated by the Labour party⁴, attacked a whole tradition of fiscal philosophy. Authors of handbooks on Dutch fiscal law up to 1946 used to start their work by discussing the question of the legitimacy of taxation as such. Why should even a democratic state be justified to require its citizens to pay for the execution of its schemes? The answers proposed usually led those authors to insist that the state can only be justified in levying taxes if it does so in accordance with some basic principles of fiscal justice, in particular the principle "from each in accordance with his ability to pay". Fiscal justice, as defined by those principles, was taken to be a separate sphere of justice, isolated from other spheres.⁵ As one author expressed the point: even if the distribution of income would be radically crooked, taxation should still follow the principle "leave them as you find them", and fiscal law will then still be an island of justice in a sea of injustice.⁶ This approach can be called isolationism.

Isolationist authors presuppose, always tacitly, that the citizen has an initial property right to his pre-tax income. It is true, from his assets he still may have to meet legitimate claims on him from others, including claims from the political community. The community may require him to contribute to the efforts it makes to promote the common good. But then it should take care that its requirements satisfy criteria of fair distribution, in particular the

⁴ For ten years he was the obvious choice for this post, but his appointment was blocked by the Christian-democrats because he was the author of "that book".

⁵ To use the terminology of Michael Walzer, *Spheres of Justice*, Oxford: Martin Robertson 1983, without implying that Walzer would subscribe to the application of "complex equality" to fiscal justice.

⁶ H.W.C. Bordewijk, *De Theorie der belastingen en het Nederlandsch belastingwezen*, Zwolle: Tjeenk Willink 1939 (2), 335.

ability-to-pay principle. This principle can be interpreted in many ways, but on almost any plausible interpretation its application essentially requires starting from the distribution of pre-tax income and wealth as a baseline for measuring just fiscal burdens.⁷

In this review I will not defend isolationism. The ability-to-pay principle is best seen as a specific application of the principle of fairness, which applies to both the benefits and the burdens of government, interdependently. But I will defend the assumption that information concerning the pre-tax income distribution (PID) is relevant for determining just fiscal burdens.

Hofstra argued that this assumption is fundamentally wrong. It presupposes that the PID is independent of government policy. However, it is only due to the government that citizens may expect security of possessions, the availability of an adequate infrastructure, schooling, social security etc. etc. If these provisions were lacking people would invest their earning capacities in totally different ways, resulting in a totally different PID pattern. And they would be extremely poor to begin with. As David Hume argued, no farmer will take the trouble to sow his land if he expects others to come and take the rising grain from the fields.

Hofstra developed this insight in the following way.⁸ It is only because of the efforts of the political community that people are able to earn any substantial income. Hence this income should initially be considered the property of the community. Individual property-rights are politically created, by the collective will of the community deciding upon the use of its own rightful property. Hence the individual is not the owner of his pre-tax income, he only temporarily, for administrative reasons, holds it in trust for the political community. It is only when the community has decided to allocate some money to him that he can start to exercise the powers of ownership, which he fully derives from the collective will. Hence the

⁷ An exception is the interpretation of ability-to-pay in terms of earning capacity rather than actual earnings.

⁸ Recognizing a debt to L.T. Hobhouse, *The elements of social justice*, London 1922.

community is not obligated to justify itself to the individual tax-payers for the way it collects the means which they temporarily held in trust, nor for the way it uses those means. (Of course, it *is* answerable to those same people in their role of citizens of a democratic society.)

Put this way the argument surely rests on a fallacy of composition. It reminds one of a famous argument of John Locke, even if this had an almost opposite conclusion from Hofstra's. The argument is part of Locke's discussion of the emergence of individual property rights. It could be objected against Locke's thesis that you acquire a property right in a thing by 'mixing your labour' with it, that, if the value the thing acquires as a result of your labour is due to both its natural properties and your cultivating efforts, it is unfair that you should acquire a property-right to the whole of the final product, excluding the original rights of mankind to the uncultivated thing. If you put your sugar into someone else's coffee, why should you acquire a right to the coffee, rather than lose your right to the sugar?⁹

Locke replied that the uncultivated thing normally has almost no value at all: 90, 99, even 99.9 % of the value of the final thing is due to labour.¹⁰ But, of course, all this labour would be vainly spend, if the uncultivated thing would not have had the appropriate natural properties. Even if raw material has no value without labour, surely labour has no value either without raw material. (This insight led Thomas Paine a century later to argue for everyone's right to what is now called a "basic income".) But if raw material and labour are both equally necessary to produce a good, you cannot claim 100 % of the final value for either the owner of

⁹ Cf. Robert Nozick, *Anarchy, State, and Utopia*, Oxford: Basil Blackwell 1974, p. 175.

¹⁰ John Locke, *Second Treatise of Government*: if labour originally added only "something" to nature (§ 28), after "the invention of money" this becomes 9, 99 or even 999% (§ 40, 43).

the labour or the owner of the raw material.¹¹ Similarly if individual efforts will not succeed in producing anything valuable outside of the social arrangements created by the political community, it does not follow that the community has an initial right to the whole of the product. For these arrangements in their turn need the productive efforts of individuals to produce any good.

Should we then decide to recognize equal claims of the productive individuals on the one hand, and the political community which creates the necessary framework for their efforts to be productive, on the other? That would involve a second fallacy of composition. For the political community is not a separate agent, to be considered on a par with the individuals: it is identical to the sum of those individuals, organizing their efforts in a way which creates a surplus of cooperation. Because the organization has its costs, they surely have moral reasons to internalize a proper part of those costs. But recognizing that fact is not the same as denying their initial property rights.

Hofstra's argumentation, even if fallacious, had an enormous impact. Within a few years in the Netherlands discussion of the principles of just taxation came to an almost complete end. Of course, the notion of "ability-to-pay" went on having a rhetorical value in political speech, but gradually its meaning got completely foggy, it could cover any tax policy proposed, showing only its proposer's concern for "justice". A representative example is provided by the ambitious tax reform proposals of 1997. In the memorandum containing these proposals the minister of finance invoked the notion of justice in one revealing passage only: "The new system will have to satisfy fundamental principles of justice. It should be continuous with society's norms and values. That will increase the social acceptability of taxation." So in the end it is not justice the minister is interested in, but only support. And

¹¹ On Locke's view mankind should not be seen as the collective owner of raw materials: they rather are unowned until appropriated. Still, he needs an argument for excluding other people's access to the goods.

even this instrumental appeal to justice is only an empty gesture, for nowhere in the memorandum is any attempt being made to check whether the proposals satisfy those "fundamental principles of justice" referred to in the passage. The stated aim of the reform is only to secure a sufficient flow of state revenue in an environment of increasing fiscal competition between states and a growing ease of exporting capital (and capital-owners). Characteristic for the post-Hofstra era in Dutch fiscal law is also the completely uninhibited instrumentalism: the use of fiscal means, in particular fiscal subsidies, for promoting any government end whatsoever, from the stimulation of the use of bicycles to the flourishing of a national motion-picture industry. This rampant instrumentalism caused even Hofstra to have second thoughts about the constraining value of principles of fiscal justice.¹²

In other countries the break between an "isolationist" and an "integrationist" view of justice in taxation may not have been as dramatic and datable as in the Netherlands, but surely the actual development has been similar: the idea of principled constraints on the distribution of tax burdens has been universally subject to erosion. On the other hand, that people's pre-tax income has no moral meaning whatsoever as a baseline to measure the distribution of tax burdens against is still a well-kept secret of the economists. Almost any citizen who feels he has a moral obligation to fulfil his legal duties of tax-payment conceives of this payment as a contribution to the state's useful activities from his own pockets. Given this disparity between the moral basis of actual policies and the common beliefs of conscientious citizens it is still an important question whether the assumption Hofstra attacked is true or false.

2. Murphy and Nagel: the arguments against the moral relevance of the PID

¹² H.J. Hofstra, *Inleiding tot het Nederlandse Belastingrecht*. Deventer: Kluwer 1986, §§ 6-8.

It is a question which until recently has hardly been addressed within political philosophy. That is why Murphy & Nagel's discussion of it is so important. The position they take is Hofstra's, and their arguments resemble his to some extent. Actually their libertarian critics tend to understand these arguments as identical to his: that the state or the political community "owns" the social product until it distributes part of it among the citizens in the form of post-tax income. But that is not what they actually say.¹³ Their actual arguments are much more sophisticated, and hence much harder to criticise. As a matter of fact, these arguments tend to overlap and to cluster, making it somewhat difficult to separate the different strands of the reasoning from each other.¹⁴

Murphy & Nagel start by pointing out that, if the PID is "presumptively just", the fiscal schemes usually defended by appeal to specific principles of fiscal justice, either the benefit or the ability-to-pay principle, do not really respect it. For they all start by recognizing a non-taxable part of all income, in order to give exemption from tax-payment to the lowest income-group. But this amounts in effect to a redistribution from higher to lower incomes. If ability-to-pay is conceived of as requiring a flat rate, the personal exemption is set at \$ 5.000.- and the tax-rate at 50 %, people earning resp. \$ 5.000, 10.000 and 50.000 actually resp. pay 0%, 25% and 45%, which surely is not a flat rate.¹⁵

¹³ For that would still presuppose a "natural right" understanding of property in stead of a conventional one. In § 10 I will argue that there is a small kernel of truth in this libertarian reading after all.

¹⁴ Some of their formulations cover more than one of these strands, or are ambiguous between them. For example, by saying that the government "defines" property rights, they can mean that the law defines what it means to have a property right, which bundle of rights and powers it consists in, but also that the government determines the actual distribution of people's holdings. I will interpret the statement in the first way.

¹⁵ MN, pp 100, 131.

A second criticism focuses on the isolationism implied, as they see it, in almost all appeals to special principles of fiscal justice. Most of the state's activities create differential benefits for different groups of people. This is not only true for the fiscal law as a whole, with its rates, exemptions, subsidies etc., but also for many other state activities, such as the provision of in-kind benefits like schools, roads, prisons, and the promotion of economic growth. It is therefore a form of myopia to consider in isolation the way in which fiscal burdens are distributed. A decrease in fiscal duties is simply equivalent to a benefit provided by the government in other ways, so it is arbitrary to consider the justice of the decrease without taking the benefit into account.¹⁶ You should not treat the collection of taxes as if the money collected is immediately thrown into the sea.¹⁷

Suppose that a group of people decide to cooperate in maintaining a museum, and agree that, because the museum is equally valuable to each of them, each will pay for the upkeep in proportion to his net-income (or, if these people live in a libertarian world, to their income *sec*). That may make sense. But now consider the following scenario: what they collectively finance is not a museum but a school of adult education, each of them attends the school, and this schooling has a strongly differential effect on their earning capacities. One of them is a contractor, and he succeeds in making a profitable contract with the school for building a new school-house. The new school-house destroys the wide view over the countryside one of the others used to enjoy. Etcetera. Does it still make sense to require payment in proportion to income?

This is myopic, even if the financing of the school at its start is a one-time affair. According to Murphy & Nagel, however, it is actually incoherent if periodic payments are required. For in that case the distribution of income, of which the distribution of the individual

¹⁶ A point also stressed by Hofstra.

¹⁷ As Blum & Kalven expressed the point, quoted MN, p. 25.

contributions is a function, is itself co-determined by the way these contributions have been used before. This is the argument most stressed by Murphy & Nagel. If we sanctify the PID, we presuppose this distribution to be the result of legitimate interaction between people in a state of nature which is not itself influenced by the effects of government policy, prominently including government expenditure, which is paid for out of the tax yield. Call this the no-loop assumption. And this assumption is obviously false. People do not live in a libertarian social and economic world, paying for their government as a leisure interest. By paying for the government they participate in shaping their social and economic world, and the PID is only part of that shape.

At many places Murphy & Nagel seem to appeal to yet another argument. They insist that the actual system of property-rights which yields the PID is not a matter of basic moral right but of convention. Change the conventions and the distribution will be a different one. So why should we attribute any moral meaning to this particular distribution? The force of this argument increases as soon as we realize that the relevant conventions are largely legal creations. Large sections, not only of property law in the narrow sense, but also of contract law, tort law and even family law, are relevant for deciding whether a particular use of a person's property is a legitimate one. So why not include fiscal law in this list? If we would attribute any significance to the pre-tax distribution of property rights, it would still be the government which would "define" those property rights.

It will be clear that in this stronger form (the government itself "defines" property rights) the appeal to the conventional character of property rights is a variant or specification of the argument from the no-loop assumption. Market interaction does not take place in a state of nature, but in a context created by the government, which includes, besides legal rules "defining" property, anti-trust legislation, control on interest rates, and policies aimed at the

internalization of negative externalities. But the weaker or general form of the argument (why be so deferential to a mere convention?) deserves to be considered in its own right.

3. A hidden libertarian assumption

People's feeling that the government spends "their" money is called by Murphy & Nagel "everyday libertarianism". According to them it is an incoherent view. For if it is "their" money indeed, the government has no right at all to enforce payment of taxes, it should live by voluntary contributions.¹⁸

But this point is only well taken if an important presupposition of "everyday libertarianism" is granted: ownership is incompatible with positive duty. If you are the owner of an object, you are fully free to do with it whatever you like, within a fixed framework of negative duties only. As soon as you have any positive duty, the cost which you will need to spend in order to meet the duty should already be detracted from the balance of your properties. However, on this view there could be no payment except voluntary payment: as soon as you "pay" in order to fulfil a duty to someone, that is no payment at all, for he already "owned" the money. That doesn't seem right: it makes sense to say that you own a thing, even if your ownership is entailed with some duties. In accepting a piece of land left to you you may also accept a duty to contribute to the upkeep of the dykes surrounding the polder within which this land is situated. That does not mean that you do not own the land, but only that part of its value which will remain after paying your contribution. Your duties may not be fully specifiable in advance, you may still have a range of options concerning the exact way of

¹⁸ MN, p. 35. Many people suppose this to be the obviously right way to organize a collective scheme for collecting postmortal organs for transplantation. The need involved is not of lesser urgency, so why is it treated so differently from the needs taken care of by the state?

meeting them, including the option of awaiting enforcement of the duty. No one can simply dispose of part of your possessions, only because he has a valid claim on you to an equivalent amount.

Consider now Murphy & Nagel's argument concerning tax-exemptions. Suppose each of us has an enforceable duty to assist the needy and one of the tasks which we entrust our government with is to organize the way in which we collectively meet this duty.¹⁹ Then for each of us our property-right to our pre-tax income will be burdened by this duty. It follows that we should not require people whose income is insufficient to meet their own needs to pay taxes at all. But it also follows that for each of us our income up to the threshold of need should be exempt from taxation. As Cohen Stuart, one of the pioneers of fiscal economy, classically put it: in order for a bridge to be able to carry anything, albeit it horse or man, it should first be able to carry itself.²⁰ (Cohen Stuart was an engineer in hydraulics.) It does not follow that we already have stopped taking the PID as our base-line.²¹

Similarly, it is not inconsistent to accept a tax-exemption under the benefit principle. If a person's benefit consists in the fact that he is barely able to survive, surely it is impossible to tax him "in proportion" to his benefit: as soon as he is taxed, he doesn't benefit any more. So it is not unreasonable to understand the fiscal principle "to each according to his benefit" to mean: to his benefit beyond the subsistence level. To quote Cohen Stuart again, "no one will be required to eat his left arm as long as there are any provisions within the fortress".

¹⁹ Or perhaps the duty is only an imperfect one to begin with, but becomes an enforceable one, once both contribution and allocation have been organized.

²⁰ The Dutch word for ability-to-pay is "draagkracht", "carrying ability".

²¹ It is true that with progressive tax rates the value of the tax-exemption is different for different income-levels.

Whether this is consistent with a fiscal principle depends on the principle. At any rate, the problem can be avoided by substituting tax credits for tax exemptions, as MN (for other reasons) advocate.

I discuss this particular argument first because it is so revealing. It depends on accepting the "everyday libertarian" view that property rights cannot be entailed with [???] duties. I do not claim that Murphy & Nagel actually hold this view, only that this particular argument does not succeed unless it is accepted. But there is no compelling reason why the adherents of special principles of fiscal justice should require provisions for giving a decent life to severely handicapped people to be paid from alms rather than taxes.

It may be true that there are people who subscribe to everyday libertarianism without noticing its incoherence. And this may well explain the rhetorical force of political speech claiming "to give back to the people what is theirs". My point is that you do not need to subscribe to this nonsense in order to take the PID as a baseline for measuring just taxation against.

4. A hidden egalitarian assumption

The argument from myopia also turns out to rest on a hidden assumption, at least in the way it is used by Murphy & Nagel. In its simplest and weakest form this argument provides a compelling refutation of isolationism. If on the true theory of distributive justice the actual PID is unjust, there can be no reason at all to respect it as being "presumptively just". In particular the application of principles of taxation which aim at "preserving" any pattern of distribution realised in the PID will obviously only preserve its injustice. So we cannot consider the distribution of the burdens of government in isolation of the distribution of its benefits. Fiscal law cannot be an island of justice in a sea of injustice.

But now consider the way Murphy & Nagel elaborate this argument in order to refute, for example, the benefit-principle. They believe that in the absence of a state (perhaps one should say: of some form of political organization) people would have no earning power at all,

hence we can use their full actual income as a measure of their benefit.²² However, by applying the benefit-principle to the distributions of the costs of government, we abstract from the distribution of the benefits, and this surely is a form of myopia. "It seems clear that a tax burden that is matched by an equivalent transfer is not, in the relevant sense, a burden at all."²³ So it only remains to consider the distribution of net benefits.

According to Murphy & Nagel there is only one theory which can at the same time recognize specific principles of fiscal justice and escape the charge of myopia. This is the theory which on the one hand requires the government only to create conditions for honest market interactions, without interfering in any way in their outcome, and on the other hand distributes the burdens of government according to Mill's principle of equal sacrifice. (Sacrifice being measured in terms of welfare.) Only this theory would succeed in the aim to "respect" the pre-tax distribution as the presumptively just one. All other principles fail to achieve that aim. The benefit principle, for example, fails because it requires redistribution from the rich to the poor (in terms of welfare). The same is true of Cohen Stuart's proportional sacrifice principle.

These arguments presuppose that there really is only one plausible way of relating the patterns of the distribution of the costs and of the benefits of political organization, or of cooperation generally: by simply aggregating them.

If this assumption is not made, it would be odd to accuse the benefit principle, of all things, of myopia, for the principle consists in deriving burdens from benefits. If A and B receive pre-tax benefits beyond the social minimum of 100 and 80 units respectively, and we accept Murphy & Nagel's view that all benefits are benefits from government, the principle

²² The premiss of this argument may be an overstatement, but even if it is granted, the argument commits Hofstra's fallacy, discussed in § 1.

²³ MN, p. 14.

prescribes that they distribute a total cost of government of, say, 36 units, in the proportion 20:16. Under the principle A's tax burden obviously cannot be considered to be equivalent to his receiving 80 units of advantage and not being taxed at all. But that does not mean that the principle "abstracts" from the distribution of benefits.

Similarly, the fact that the proportional sacrifice principle has redistributive effects does not mean that the principle does not "respect" the PID as a presumptively just distribution whenever that presumption is warranted. Certainly it does not aim to "correct" a perceived injustice of the PID in order to arrive at some after-tax distribution which can be identified as the just one independently of the PID. Rather, the principle requires preserving the relative positions people have acquired in a PID supposed to be just. If the value of the pre-tax income of a rich and a poor person (above the social minimum) would stand to each other in a proportion of 4:1, that should also be true of the value of their net-income. So the principle really satisfies the axiom which Murphy & Nagel suppose to be basic to the whole idea of special principles of fiscal justice: leave them as you find them. It only interprets this axiom in terms of relative positions.

In a footnote on Cohen Stuart's principle of equal proportional sacrifice Murphy & Nagel recognize that this principle exemplifies precisely this way of relating pre- and post-tax distributions.²⁴ They assess it as the oddest of all claims ever made in the name of fiscal justice, even though they observe themselves that it is equivalent to the benefit-principle, given the assumption that all benefit is benefit from the government. My present concern is not with the plausibility of any of these principles. My point is only that they cannot be

²⁴ MN, pp. 195-196, note 33. They interpret the principle as presupposing that the pattern of relative positions realised by market interaction is uniquely just and hence deserves to be maintained by taxation. But on a more modest reading it only proposes an interpretation of the notion of a "fair burden" conditional on the PID satisfying some minimum requirements of justice.

accused of myopia. The benefit-principle and the ability-to-pay principle in most of its interpretations (including equal sacrifice and proportional sacrifice) recommend themselves as principles of the fair distribution of costs, and as such they require as a necessary condition of their application the fulfilment of relevant principles of the fair distribution of benefits (and vice versa). In that sense they are non-myopic.

The reason why Murphy & Nagel are unwilling to recognize them as such, with the only exception of Mill's "equal sacrifice"-, is that they insist on defining the absence of myopia in terms of the aggregation of benefits and burdens. Of course this presupposition is essential to their own approach to justice in taxation, in which the only thing which counts is the after-tax distribution. But assuming its truth in the assessment of other theories comes close to begging the question.²⁵

One could object that aggregation recommends itself as an independently plausible requirement of consequentialist rationality. But it is doubtful whether some of the common ways which people use to share the burdens of cooperation, can be condemned as irrational that easily.²⁶ It is impossible for any taxation scheme to check its aggregated outcome for any particular individual. If we don't want to be myopic, we should consider the effects of combinations of taxes and expenditures, but it is arbitrary to link any particular tax to any particular expenditure. In addition to this problem, it is at least practically and perhaps even conceptually impossible to identify both the "real" incidence of any tax, and the "added" value of any government service. (Added to what?) Hence there is nothing irrational about principles which do not even try to take aggregative considerations into account.

²⁵ It only "comes close" because it is not logically impossible to reject the approach and maintain the presupposition, as adherents of the equal sacrifice principle might do.

²⁶ Cf. David Miller, *Principles of social justice*, Cambridge Mass: Harvard University Press 1999, p. 64.

5. The no-loop requirement

Let us go on to the main argument: the argument based on the no-loop requirement. We cannot take, Murphy & Nagel allege, the PID as a baseline because this distribution does not come about as a result of economic interaction in a state of nature: it is itself largely dependent on the impact of government activity financed from taxes. Why exactly should this indisputable fact exclude attributing any significance to the PID? In § 2 I tried to illuminate this by using an analogy (maintaining a museum or a school), but we need to spell it out. As a matter of fact this requires us to go considerably beyond the explanations Murphy & Nagel provide themselves. I believe that the argument can be interpreted in two ways, both intimated by Murphy & Nagel at different places. Combining the interpretations we can reconstruct the full argument in the form of a dilemma.

It is inconsistent, Murphy & Nagel suggest, to require respect for a baseline which one recognizes to be co-determined by legitimate government activity. But is it? It may seem to depend on the aim of the activity. If the government by implementing its (non-fiscal) policies intentionally interferes in the distribution of income, in order to deviate from the outcome which otherwise would have resulted from the economic interaction of individuals, then, it seems, it can have no possible reason to "respect" a pattern it has intentionally created itself. If it allows itself to determine a distribution by non-fiscal means, why should it not do so by fiscal means if these are at least equally efficient? This is the first horn of the dilemma.

The argument in this form may seem to involve a petitio principii. It presupposes that it is a legitimate task of the government to determine, by whatever means, the distribution of income. But isn't this something which people who defend the significance of pre-tax distributions are committed to deny? They accept, one might suggest, the alleged inconsistency, but want to argue the other way around: if the PID is a legitimate baseline, it

follows that the state should not aim to substitute it by any pattern of distribution it considers "really" just, neither by fiscal nor by non-fiscal means.

Both the original argument and its reversal should, however, be resisted.²⁷ As I already argued in § 3, attributing any moral meaning to the pre-tax distribution does not imply the view that its distributive pattern should be kept fully intact. It only implies that this distribution provides relevant "input"-information for deciding, by the use of whatever principles of just taxation found to be appropriate, on a just scheme of taxation. This does not even rule out using fiscal means for correcting unjust elements of the pre-tax distribution. Suppose that we come to the conclusion that it is unfair that every citizen by his contributing to a national health insurance scheme, pays for the costs of treating lung-cancer patients who have become ill as a result of smoking. One way to correct this would be to pay for these treatments from a fund filled from excise-duties on cigarettes and cigars. Surely that would not be inconsistent with considering citizens' pre-tax incomes as being their rightful property. The duty would only be part of the burdens attached to the property.

It may be a desideratum of fiscal policy to take care that the impact of such corrections remains transparent to the tax-payer. (In the example this requirement is met by using the instrument of an excise-duty.) But that does not imply that they cannot be allowed.

The fact that they can, forces us to be more precise about the alleged inconsistency. Suppose that our theory of justice consists of two principles, a prohibition of exploitation and free-riding and a requirement to meet everyone's pressing needs. Then it could be the case that the PID satisfies the first principle, but will have to be "corrected" by fiscal means in order to meet the second one. For the principle of need I have already argued that there is nothing inconsistent about that procedure, and I think that this result can be generalized: if the first

²⁷ But it is true that it should be argued, not only why we should accept the legitimacy of redistributive aims, but also why we should trust governments to be the most effective agents for pursuing them.

principle is not fully satisfied either, fiscal means can also be used to implement a second correction. But if it can be allowed to correct the PID by fiscal means, surely any non-fiscal government policy can also be allowed which aims at making the PID itself already compatible with the requirements of the theory, and hence any fiscal correction redundant. Neither policy is inconsistent with referring to the actual PID in determining the proper tax base. Even if we do not identify the two, we arrive at the proper tax base by starting from the actual PID.

This procedure only makes sense if the necessary corrections are limited ones. The corrected PID should be a clearly recognizable descendant of the actual PID. This means that the correct theory of justice which allows for fiscal and non-fiscal distributive government activities should at the same time allow the actual PID to a significant extent to be the unplanned outcome of the actions and decisions of individual agents (including firms etc.). The theory, in other words, should not be a fully patterned one, it should not pretend to be able, for each different pair of patterns of actual distribution, and looking only at the patterns, to decide which one is the more just of the two.²⁸ (Egalitarianism is a clear example of a fully patterned theory.) If it is the legitimate task of the government to see to the implementation of a fully patterned conception of justice, it cannot have any reason at all to attribute any significance to the PID. In order to understand that, no appeal to a no-loop requirement needs to be made.

But if one wants to claim that this is a legitimate task of the government, it is not sufficient to refute libertarianism. Far from filling all the conceptual space left by libertarianism, as Murphy & Nagel implicitly claim, fully patterned theories are very specific ones indeed, however much they have absorbed the attention of political philosophers.

²⁸ To be a bit more precise: a fully patterned theory can recognize two patterns to be equally just, but in that case the smallest change in one of the distributions will make one pattern more just than the other.

For any theory of justice which is not fully patterned it is possible at the same time to recognize the PID as fixing ownership rights, and to conceive of the requirements of the theory as resulting in duties which may still be attached to those rights if those requirements have not been fulfilled before. Whether the government sees to their fulfilment before the PID is fixed or by fiscal means afterwards, is immaterial. Therefore, government policies which aim at fulfilling these requirements do not undermine the possible significance of the PID for determining fiscal burdens.

6. Moralizing the market?

Let us now consider the second horn of the dilemma. It is obvious that by executing its non-fiscal policies the government strongly interferes in the distribution of pre-tax incomes, even if those effects are nothing but unintended side-effects of those policies. If that is the case, it seems that the resulting pattern is "arbitrary from a moral point of view", a matter of luck rather than of justice. Why should one attribute any moral significance to such patterns?

The same question is invited by the observation that property rights are matters of convention, whether or not these conventions are created by the legislating activity of the government itself. (If the legislation has distributive aims, we are back at the first horn of the dilemma discussed in the last section.) Change the inheritance laws, and in some cases it will be other people who benefit from someone's death.

In order to resist this argument, two possible strategies present themselves. The first is to deny that it is impossible for the PID to implement relevant principles of justice, even if it incorporates unintended side-effects of government activity. The second is to concede that the PID is a matter of luck and convention, but to maintain that this fact does not disqualify it

from being relevant for identifying a just taxation policy. I will inspect the merits of the first strategy in the present section, leaving the second one to the sections which follow.

The effects of government policies on economic interaction can be divided into two categories. The first category consists of those activities which aim at preventing and correcting market failures: force and fraud, negative external effects, monopoly and oligopoly, perhaps different forms of rent. It is clear that such activities do not discredit the resulting outcomes of economic interaction; on the contrary, if the PID has any "moral meaning", such activities are essential for securing it. The second category consists of the activities of the government as a participant in economic interaction. If the government goes about its legitimate business, taking care of the production of public goods, the maintenance of the common heritage for future generations, the provision of basic needs and so on, it will in doing so enter into the market, e.g. by contracting for the building of firehouses, dykes, court rooms, schools, museums or roads. As long as it follows fair procedures in deciding who is to do the building, e.g. open tender, again such activities do not discredit the resulting outcomes of the total system of economic interaction, they are only an integral part of it.

It is true that most goods paid for by public expenditure are most, or even only useful to some citizens rather than others. However, this is much less obviously the case for the whole package of all those goods. At least this package may be considered to create a substantial net benefit for everyone.²⁹ Besides, normal market activity has all kinds of positive external effects which we do not require the beneficiaries to internalize. The productive activities of the state may occasionally create windfalls, but that is true of all market interaction.

²⁹ • If any people are net losers, in comparison with a state of nature, it may be the rich and powerful. Of course, if income can be used as an index of benefit, as Murphy and Nagel maintain, any remaining inequality of benefit is taken into account by the benefit principle.

Even if this argument is successful on its own terms, it seems to be only relevant if we first accept one presupposition: that the outcomes of market interactions as such have "moral significance", at least roughly. Either one sees the market as a cooperative venture within which an invisible hand can be trusted to adjust benefits enjoyed to burdens taken. Or one holds that in market interaction which is properly protected against market failures, every participant approximately "deserves" his share.

The morality of the market is a large and complex issue, and if I intended to rest my case on the moral-significance thesis, I would have to face the issue fully and squarely. But I have no such intention at all, and therefore I will restrict myself to pointing out some of the problems involved in upholding the thesis.

(1) If we want to insist that the market gives each participant his "just desert", we should be able to show that the market-price for goods and services is a fair measure of their social value. This depends on a conception of value, at least for the purposes of a theory of just distribution, formulated in terms of actual subjective preferences. The problems of such theories are well-known: would we really want to take into account malevolent preferences, altruistic preferences, adaptive preferences, preferences based on false beliefs etc?³⁰ One additional problem is that this theory of value is inconsistent with the point of view of the people going about the satisfaction of their subjective preferences themselves, for in their view preference normally tracks value, and not the other way around.

(2) Even if we start from actual subjective preferences, the social value of a good should be interpreted as the sum of the reservation prices of all actual buyers: what they would have been prepared to pay for it. For many of them the equilibrium price will be lower than the reservation price, and moreover, there will not be a constant ratio between reservation and

³⁰ On "external preferences", see Ronald Dworkin, *Taking Rights Seriously*, London: Duckworth 1977, 234ff; on "adaptive preferences", Jon Elster, *Sour Grapes*, Cambridge: Cambridge University Press 1983, ch. III.

equilibrium price. Hence we cannot consider actual prices paid to be a proper measure of social value, not even in a comparative sense.³¹

(3) One problem which deserves special attention is the importance of false or incomplete information. Even if we start from subjective preferences, the token goods and services which people actually buy only represent their best judgment as to what would satisfy their preferences for relevant types, and those preferences again are similarly specifications of more basic preferences which are equally liable to every possible defect in judgment. People have only limited time to spend on investigating and experimenting and they follow clues (like mark-reputation) which are highly unreliable and manipulable. So we cannot say that their buying behaviour even "approximately" tracks their actual preferences.

We should distrust every attempt to moralize the market. On this point I fully agree with Murphy & Nagel.

7. Creating room for autonomy

Up to this point my argument has been purely defensive: I have only shown that some objections against taking the pre-tax distribution as a baseline do not stand up to scrutiny, in particular the myopia objection and the argument from the no-loop assumption. However, I have not given any positive argument why we should attribute such significance to this distribution. On the contrary, in the last section I have conceded that the PID does not exemplify any morally privileged pattern. This also means that Murphy & Nagel's final objection still stands: there is no reason to be particularly respectful of ownership relations, if the "ownership" involved is conventionally defined. This is an objection which cannot be defused by any purely defensive strategy.

³¹ This point undercuts David Miller's argument for the thesis that ideal markets reward merit, Miller o.c., ch. 9.

In this section I will therefore present two closely related arguments, focussing on autonomy and responsibility respectively, for accepting the PID as a baseline to measure just fiscal burdens against. In § 9 I will develop a third argument, presented, remarkably, by Murphy & Nagel themselves, about the way to identify the proper level of the production of public goods. And in the final section I will offer a fourth argument which will concern the nature of market and citizenship relations.

We appreciate living in a society in which people involved in economic activity do not have their tasks assigned to them, like slaves or serfs or workers in most of the socialist economies we have known, but are able to choose from at least a minimum range of significant options sufficient to give them the status of autonomous agents.³² Each of these options involves a certain kind of activity, and surely part of the interest we have in being offered these options concerns the nature of the activity itself, and the different ways in which it can be specified. But another part of the interest is not in the process but in the product of the activity, and this part of the interest, like the other, is largely agent-relative. The agent is interested, by his activity, to change his own condition, or the condition of other people she cares about, in specific ways. This is obviously true for entrepreneurs and all other economic agents who don't depend on wages, but it is also true for wage-earners who have the option by their performance to earn additional money or to improve their chances of promotion to better-paid jobs (or to take a different job, or to stop working at all). Of course it is also true for people who save, invest, gamble, make gifts and bequeathals etc. An interest of this kind is only possible if people's net income is not fully determined by a scheme of distribution the

³² This formulation reflects a threshold conception of autonomy as defended by Joseph Raz, *The Morality of Freedom*, Oxford: Clarendon Press, 1986, ch. 14, but nothing in my argument depends on accepting such a conception.

government realizes by fiscal means, but is determined in a recognizable way by their own market activities. A fiscal system which is fully focussed on realizing a pattern of net-income distribution disconnects for the economic agents the link between their activity and a large part of its interest.³³ Hence in the periodic trajectory leading from people's post-tax financial position in, let's say, one year to their post-tax financial position in the next, we should be able to identify a pre-tax baseline, reflecting their activities during that year, and at least partly determining their fiscal burdens at the end of it. Sufficient space for autonomous choice can only be created by rejecting fully patterned principles, and, as we have seen, only fully patterned principles force us to reject the significance of the PID.

A standard reply of people who want to defend some fully patterned principle of justice is that the actual implementation of their favourite principle cannot fail to leave sufficient space for autonomous choices influencing the actual pattern of division. To give one prominent example: John Rawls proposes to apply his difference principle to deciles of the income distribution profile or similar large groups, not to individuals, and argues, in reply to Nozick's criticism, that this leaves all the space people could possibly wish for making significant decisions concerning their own future. On account of this he even claims to be entitled to call his theory a form of procedural justice.³⁴ A second standard move in this connection is to argue that any conceivable trade-off between efficiency and justice would create the space we want. And of course, fully breaking the nexus between people's choices

³³ This argument is identical to Robert Nozick's famous Wilt Chamberlain argument in its strongest interpretation, Nozick o.c., pp. 160-164. That argument succeeds in refuting the claims of fully "patterned" theories of justice, but not of any patterned theory. •

³⁴ John Rawls, "The Basic Structure as Subject", in: A.I. Goldman & J. Kim eds., *Values and Morals*, Dordrecht: Reidel 1978, reprinted with amendments in John Rawls, *Political Liberalism*, New York: Columbia University Press 1993, lecture VII.

and their financial returns would be highly inefficient, because it would undermine their motivation to work to a substantial extent. The problem of both these replies and similar ones is that they give you the right result for the wrong reason. A theory cannot allow itself to make space for an important value only by the necessary imperfections of its implementation. And even if breaking the link between work and financial reward is bad because it puts a brake on productivity and growth, it is also bad because it encroaches on people's autonomy.

This is not only bad for intrinsic reasons, but also because a free space for autonomous choices is a requisite for the proper operation of the market. One of its functions is to make people's economic behaviour sensitive to the burdens and opportunities they create for others. I may love caviar, but because my interest is shared by so many richer people (and because of the rate of depletion of the Volga), it is simply beyond my means. A fiscal system which is not informed by the distribution pattern created by the totality of people's "free" economic choices, disturbs or even destroys this allocational efficiency of the market, and thereby allows some people to exploit other people's efforts.³⁵

The market is able to function in this way only because people entering the market are motivated in specific ways. Economists usually assume that buyers try to buy as cheaply as possible and sellers to sell for the highest prices they can get, but we need not even accept that assumption. It is sufficient to assume that market parties take their decisions partly in view of the effects of those decisions on their future buying power. But this means that if their net income is only a function of state allocation decisions, they will not be able to develop the

³⁵ I do not claim (as Ronald Dworkin does, *Sovereign Virtue*, Cambridge Mass: Harvard University Press, pp. 149-152) that at least an ideal market would make people's choices sensitive to the true opportunity costs they create for others. For reasons which will become clearer in the next section I do not believe that any sense can be given to that idea: there is no uniquely privileged ("endowment-insensitive") distribution of resources in which

appropriate motives at all: they will not be interested in the prices of goods. In order to maintain that interest, it is necessary for net income to be a recognizable function of the pre-tax outcomes of market interaction.

It could be objected that this is already ensured by the very fact of choosing taxation as one's instrument for realising a just distribution of net income. For taxation as such requires three necessary elements: a taxpayer, a tax base and a rate structure. But my point is that we need taxation precisely because it has this structure.³⁶ We could not allow all income to flow to state funds directly, in order to be partly used by the government, and partly distributed. That is an impossible arrangement because it would destroy the market for all goods, including labour.

This argument shows that the identification of tax burdens should start from the PID (or its recognizable descendant), not only unavoidably, but also rightly, in order to preserve important elements of agency. It does not show why the rate structure should implement any specific principles of fiscal justice. We need other arguments to show this. I will present them in §§ 9 and 10.

8. Ambition-sensitivity

The necessity to respect the effects of agency is fully recognized by one influential strand of present-day theorizing about justice: liberal egalitarianism, or equal libertarianism as Murphy & Nagel prefer to call it. According to these theorists we should, for any given distribution as a result of market interaction during a certain period, determine to what extent

such costs could be identified by a market. If I accepted the idea of "true" opportunity costs I would have to retract the second argument against the moral status of market outcomes which I made in § 6.

³⁶ Otherwise this objection would again give you the right result for the wrong reason.

it is the result of factors under people's control, in the final instance their own autonomous choices, and to what extent it is the result of factors outside their control, in particular differences in natural endowment and so-called brute (and uninsurable) luck. A distribution should be both "ambition-sensitive" and "endowment-insensitive".³⁷

Murphy & Nagel do not believe that this distinction can be made, and I agree.³⁸ This is not only true for practical reasons, which may be more damaging to the proposal than philosophers usually accept, but also for conceptual ones. I cannot enter into a full discussion of this issue, but in order to convey a flavour of the nature of the problems involved, I will point out two of them.

Whether the distinction can be maintained depends on the possibility of distinguishing between "brute luck" and "option luck". As Ronald Dworkin introduced the distinction, we have a case of option luck if the agent is confronted with at least two lotteries and chooses a relatively risky one, in full awareness of the probabilities involved. If he wins, he is entitled to his gain. But if he loses, he cannot complain, for the outcome is to be attributed to his own choice.³⁹

³⁷ Wil Kymlicka, *Contemporary Political Philosophy: an Introduction*. Oxford: Oxford University Press, second ed. 2002, 75. Liberal egalitarianism can be seen as the egalitarian's reply to Nozick's Wilt Chamberlain Argument, see note 32.

³⁸ "Since we have no meter for natural talent..." MN, p. 133.

³⁹ Important as it is, if only because of its enormous influence on present-day theorizing, Dworkin's distinction has only recently been subjected to closer scrutiny: Elisabeth Anderson, "What is the point of equality?", *Ethics* 109 (1999), 287-337; Marc Fleurbaey, "Egalitarian opportunities", *Law and Philosophy* 20 (2001), 499-530; Timothy Hinton, "Choice and Luck in recent egalitarian thought", *Philosophical Papers* 31 (2002), 145-167; Kasper Lippert-Rasmussen, "Egalitarianism, Option Luck, and Responsibility", *Ethics* 111 (2001), 548-579; Michael Otsuka, "Luck, Insurance and Equality", *Ethics* 113 (2002), 40-54; Peter Vallentyne, "Brute luck, option

Sure, he cannot complain about his loss. But it may be the case that he can complain about the choice he was given: maybe other people have been offered lotteries with higher values. For example: if the two lotteries you have to choose from are only slightly different from each other, both the values and the probabilities of the relevant outcomes lying very close to each other, that can hardly be a reason to declare any outcome of the riskier choice, however disastrous, a matter of “option luck” fully and completely. But how do we decide which part of that outcome should be seen as option luck?⁴⁰ How, in other words, do we decide about the value of the lotteries we are presented with as a matter of brute luck? Auction them? Identify the right insurance premium against losses in an “original position”?

This problem is aggravated by the following consideration. To some extent it may be under your control which lotteries you are presented with. Some people are able to manoeuvre better than others in similar environments, in particular because they recognize possibilities of manoeuvring which others don’t recognize. The options you have in any given environment are to some extent determined by your own inventiveness and creativity. A clear case of this are the “holes in the market” discovered by entrepreneurial wit.

ⁱThe conclusion from this, however, is surely not, not even for such cases, that it is fully the agent's own responsibility which options he will have. That would be committing the Locke/Hofstra fallacy all over again.⁴¹ It is true, if you had not had this brain wave, you would not have realized having this opportunity for gain. But neither would you have had it, if the world had not been as it is. The point is that we cannot factor out the responsibility for

luck, and equality of initial opportunities”, *Ethics* 112 (2002), 529-557; Peter Vallentyne, “Brute luck equality and desert”, in: Serena Olsaretti ed., *Desert and Justice*. Oxford: Clarendon Press 2003.

⁴⁰ Vallentyne, “Brute luck, option luck, and equality of initial opportunities”.

⁴¹ As libertarians tend to do, e.g. Israel M. Kirzner, *Discovery, Capitalism and Distributive Justice*, Oxford: Basil Blackwell, 1989.

your having this choice between nature and invention. A second relevant point is that you cannot *ex ante* know the results of creativity. So even to the extent that the lotteries are nature-made, you can never determine their value in advance by any auction or insurance scheme.

Another problem about the distinction between brute luck and option luck is that it is difficult to make it in such a way as to square it with basic moral intuitions. If you always stay at home, you will never become the victim of a traffic accident. But it seems unacceptable to conclude from this that people should be held fully responsible for the injuries they suffer as a result of traffic accidents. It is unreasonable to expect people always to stay at home. It seems that we should not take the outcome of a lottery which no-one could reasonably refuse to accept as being “option luck”.

But what does “reasonable” mean in this context? We cannot take its meaning to be fixed by the standard theory of rationality as “whatever maximizes your expected utility, taking into account your preferences concerning risk”. Suppose you are offered a golden opportunity for gain: a choice of two lotteries, one of which has both the highest value and the lowest risk. Surely it would be unreasonable to refuse it, but that does not seem to be a reason at all for compensating you if you lose. We do not compensate people who lose in shrewd gambles.

Liberal egalitarians believe they can demarcate the area of responsibility for the outcomes of autonomous choices in a normatively neutral way. But my objections suggest that any attribution of “responsibility” is itself a normative decision.

For this and similar reasons, I agree with Murphy & Nagel that we cannot identify the extent to which any given distribution is determined by autonomous choice. But let us suppose we could. In that case we still would need to be able to identify a pre-tax distribution reflecting those autonomous choices, which should be respected in some way by the distribution of the tax burden. It would, to be sure, only be a hypothetical baseline, different, perhaps very

different, from any actual PID, which may be determined to any extent by differences in endowment and brute luck. Still the actual PID would have to be used in the information-basis of fiscal activity. Starting from this, the distribution of the fiscal burdens would have to be a two-step affair: first, compensate for the differential effects of out-of-control factors, next apply the correct principles of the fair distribution of burdens in a way which does not introduce further distortions, hence "leaves them as you find them".

Interestingly, this point is conceded by Murphy & Nagel, even if somewhat grudgingly.⁴² Liberal egalitarians, they agree, have to recognize the importance of an ideal pre-tax baseline. For if people's relative positions vis-à-vis each other on entering the market are just, any change in those positions which cannot be traced to their own choices will improve the position of some at the expense of the position of others, and hence distort the responsiveness of the market to the total ensemble of people's preference rankings. On their view the only principle which achieves this, as we have seen, is Mill's principle of equal sacrifice.

For their own part, they reject liberal egalitarianism, and, as I have indicated, for good reasons. But that does not mean that they can reject the significance of any kind of pre-tax baseline as well. For they seem to agree with the liberal egalitarians on the importance of both considerations I identified in the last section. They agree that the value of autonomy has some relevance to the economic sphere, and this relevance seems to include that people should have a choice of activities with differential financial returns for themselves.⁴³ And they surely agree that it is one function of the market to establish prices which reflect people's actual preferences and opportunities without favouritism.⁴⁴ However, this means that, on the one

⁴² MN, p. 107.

⁴³ MN, pp. 63-67, 123.

⁴⁴ MN, p. 68, 181.

hand, they have to recognize the need for a pre-tax baseline, in order to preserve both autonomy and responsibility (in short: agency). But on the other hand, they cannot insist, as the liberal egalitarians do, on the identification of an "ideal" baseline, because in their view no such thing exists. They can only insist on some necessary conditions for the post-tax distribution of income being morally acceptable. But if we agree that we need a pre-tax baseline, to be conventionally determined within certain constraints of justice and fairness, we should hold on to the two-step procedure of the liberal egalitarians: we should start from the actual PID, and, before applying relevant principles of fair taxation, implement, either by non-fiscal or by fiscal means, the corrections necessary in order to make sure that the PID satisfies the constraints we identified.

9. Identifying the proper level of public expenditure

Murphy & Nagel, we saw, are committed to concede the relevance of at least a corrected pre-tax baseline for securing the right responsiveness of people's economic behaviour to the sacrifices and opportunities they thereby produce for others. But they accept, and this time explicitly and without any reservation, a second argument to a similar conclusion.

This argument concerns the problem of identifying the desirable level of public expenditure, in particular of expenditure for public goods. The basic idea is that we should stop producing any public good at the moment that the costs of production can be distributed in such a way that every citizen is indifferent about paying his marginal euro as a contribution or spending it on private consumption. (We may, if we wish, "idealize" the subject of those preferences, by requiring him to have all relevant information at his command, to be ideally rational etc. Or perhaps, which might come to the same thing, in stead of saying that "every

citizen is indifferent" we should rather stipulate that every citizen should be indifferent, given the objective values, including agent-relative values, of the relevant goods.)

We have to establish whether a certain level of expenditure for public goods is compatible with equalizing for each citizen the marginal utility of the next euro spend on public or on private aims. This, Murphy & Nagel observe, can only be done against the background of some particular distribution of income and wealth considered to be just. So we need to refer to this "notional" or "ideal" distribution in order both to identify the proper level of expenditure on public goods and the distribution of the burdens it involves.

Should we not object to any such idea on the basis of the no-loop assumption? At this point Murphy & Nagel have no such scruples anymore, and rightly so. It is undeniable that any just distribution we might ever arrive at, as well as the level of the total wealth of a society available for distribution at that time, would be very much the result of the activities of the state, prominently including its activities in producing public goods, not the least important of which are the making and the maintaining of laws of property. But that does not in the least hinder a government in using this distribution as a background against which to determine the desirable levels of public expenditure for the future. In designing its annual budget the government could decide on adjustments on appropriate levels in this way each year. That procedure does not involve any circularity.

It is only a notional PID which we need for this purpose. It has to be defined by the correct theory of justice, whether this is libertarian, (semi-)egalitarian, prioritarian or whatever. Because this theory cannot be a fully patterned one, "the" ideal PID will as a matter of fact rather be a limited set of allowable PID's. If the actual PID is a member of this set, there is nothing wrong with taking it as our baseline, and there is no possible reason at all to take another. We do not normally allow people to argue that, although actual market conditions are not unfair, other hypothetical market conditions, giving them higher returns,

would not have been unfair either, hence they can properly claim these higher returns. If the actual PID lies outside the boundaries of the ideal set, we should first identify the minimum corrections needed to bring it within the set, and these corrections can be translated into duties attached to people's pre-tax property rights in the way I discussed before.

The idea of “equalizing the marginal utility of public and private expenditure for each citizen” depends on a rather specific notion of the utility of public expenditure. The production of public goods is mostly an n-persons Prisoner’s Dilemma game, in which defection is the dominant strategy. In deciding on his preference for public or private spending at any point a citizen should not focus on the value of what he gets as a result of his own contribution (which even in a small state will normally be a benefit so small as to be imperceptible), but on the value of what he gets as a result of everyone making the same contribution. But we can only identify contributions as being “the same” by reference to a principle. This line of reasoning therefore does not only establish the relevance of a PID, albeit a notional one, for deciding on fiscal burdens, but also of a fiscal principle which takes this notional PID as its baseline.

And as a matter of fact Murphy & Nagel do, indeed, not only provide a positive rationale for attributing this kind of significance to a notional PID, but they go on to identify the proper fiscal principle to be used against that background. They argue as follows. For any public good, let's say national defense, there will be levels of public provision which are "too high", because for each possible distribution of the accompanying tax-burdens at least some people will have to pay more than their reservation price. And there will be levels of provision which are "too low", because, for each distribution of the burdens involved which requires no-one to go beyond his reservation price, there will be some people who would have (rationally) preferred to get more, and pay for it, rather than spending the same amount on private consumption. But there will be many levels of public provision which are neither too high nor too low. When the government chooses one of these levels of provision, considerations of

efficiency alone will require an unequal distribution of the burdens involved. Otherwise the poor will be required to pay more than their reservation price and the rich far less than theirs. This line of thinking suggests that the most plausible principle for distributing the burdens involved will be the benefit principle, relevant benefits being measured by reference to reservation prices.

It should be noted that the “notional” or “ideal” PID which Murphy & Nagel recognize to be required as a background idea for establishing the proper level of public expenditure does not by itself give us either that level or the proper distribution of the costs involved in providing that level. It only sets the outer limits of the range of efficient combinations of levels and distributions within which the right combination has to be identified by additional considerations of fairness. It is not economic logic which compels Murphy & Nagel to recognize the plausibility of the benefit-principle as a principle of just taxation in this context. It is rather the intuitive force of considerations of fairness. If we have identified a cooperative enterprise for mutual advantage, and have established that people enter into the enterprise with endowments satisfying all relevant requirements of justice, the conclusion that we should distribute the burdens of the enterprise according to a principle of fair distribution, to be applied by reference to that original distribution of endowments, has an almost inescapable moral force, to which Murphy & Nagel's argument eloquently testifies. But then we can argue the other way around: if we should apply such principles, it cannot be true that we can determine the just distribution of income and wealth at any particular moment fully by reference to a fully patterned theory, without any reference to “a” PID, whether actual or ideal.

Having recognized that their argument amounts to a rehabilitation of the benefit-principle which they criticized before, Murphy & Nagel point out that the rehabilitation is only

a partial one, concerning a "restricted context".⁴⁵ But if the proper amount of public spending is anything similar to the actual one, this restricted context is a very extended one indeed, and if liberal-democratic societies as a matter of fact are tending towards a state of private wealth and public poverty, as there is reason to think they are, it is even more extended.

Moreover when we move on to the other task of the government which Murphy & Nagel want to recognize as a legitimate one, the task of redistribution, we cannot simply set aside the outcome of our considerations about the first task, the production of public goods. For that would mean changing the background of the notional distribution which we used for identifying the proper level of public expenditure and the proper pricing of its products. We have at least to check, after having decided on any programme of redistribution, whether the combination of level of expenditure and prices which we established is still an efficient one.

Having discussed expenditure for public goods, Murphy & Nagel note that the proper task of government extends beyond the production of public goods to the fulfilment of public duties. That does not create new problems, they suggest: "(t)he problem of financing the fulfilment of public duties falls into the same structure as the problem of public goods."⁴⁶ As relevant public duties they consider a duty to bring relief in the case of major disasters, and, perhaps, a duty to preserve the artistic heritage. Such duties they all consider to be ones which transcend national (or intragenerational?) boundaries. This seems to me an unnecessary restriction on the concept. We also have duties to fulfil the basic needs of people, e.g. the

⁴⁵ In §4 I argued that the argument from myopia against the significance of the PID made the unwarranted assumption that the benefits and costs of cooperation should simply be balanced against each other. That assumption led Murphy & Nagel to reject the benefit principle. It now turns out that as for the restricted context in which they are prepared to rehabilitate the principle, they reject that assumption themselves. That, surely, does not make them vulnerable to an objection of myopia?

⁴⁶ MN, p. 94

severely mentally handicapped, who will never be in a position to contribute in return to any form of cooperation for mutual advantage, and because the fulfilment of these duties requires coordination, it is a proper function of the state to see to it that these duties are properly met. Other needy people will be able, or may be able in the future, to contribute in some ways, but we do not make our duties to fulfil their needs dependent on this reciprocation. As Murphy & Nagel note, often there is a public good aspect to this enterprise: desperate people are a danger to society, hence by benefiting the poor we benefit the rich as well. But we do not define the extent of our aid by reference to the indirect benefits to the rich, but by reference to the direct benefits to the poor, hence in aiding the poor we recognize public duties, even if they overlap to some unknown extent with obligations of fairness to contribute to a public good. Actually, even if these public duties start their life as duties to help the needy, as soon as the help is organized as a cooperative enterprise it attracts considerations of fairness as well: by not doing our part we would not only let the needy down, but also exploit our fellow contributing citizens. Lastly, if the correct theory of justice requires any redistribution beyond a threshold of need, doing what is necessary to implement the theory should also be considered a public duty, at least as long as the theory is not a fully patterned one.

By extending the domain of public duty in such ways, and accepting the thesis that financing the fulfilment of public duties falls into the same structure as the production of public goods, we actually lift the restrictions on the "restricted context" of application of the benefit-principle. If the government has the two aims Murphy & Nagel recognize as legitimate ones, producing public goods and redistribution, doing one's share in meeting the cost of realizing the first aim is an obligation of fairness, doing one's share in realizing the second aim a public duty, as well as an obligation of fairness.

But, of course, in this extended context the relevant principle of fairness cannot be the benefit-principle, for the basis of the claim on our means is no longer our own benefit but

another person's need. If, as I tentatively suggested in § 4, within the context of its application the benefit-principle is equivalent to the principle of proportional sacrifice, the proper way to cover the unrestricted context would seem to be to let it be governed by this last principle.

10. What does it mean to "contribute"?

In order to introduce my last positive argument let me remind you of the argumentative strategy pursued by Murphy & Nagel. It only makes sense, they want to tell us, to attribute any significance to the PID if you are a libertarian. But you are not a libertarian, almost no-one really is when he gives the matter a moment's thought, not only in the Low Countries. (As the Dutch philosopher Arent van Haersolte once remarked, libertarianism is not a political creed which can appeal to people living below sea-level.) Almost everyone believes that there are at least some legitimate state tasks which can only be executed if the government gets some revenue from taxation.⁴⁷ I have argued that the first premiss of this reasoning is false: you need not be a libertarian to accept the relevance of the PID as a baseline for measuring just fiscal burdens. But if this is true, we can use Murphy & Nagel's argumentative strategy against them. For almost nobody believes that his pre-tax holdings are not really his property,

⁴⁷ Libertarians like Murray Rothbard, David Friedman and Jan Narveson have proposed sophisticated ways of non-state provision of essential public goods. I agree with George Klosko, *Political Obligations*, Oxford: Oxford University Press 2005, ch. 2, that all these schemes, however ingenious, are probably flawed in one way or the other. Moreover, even if the state is a historical contingency, it is there, and it is a mistake to think that the mere possibility of an alternative political world relieves you of your duties in the actual one, even if the alternative would be morally superior.

that it is only unowned money flowing through his purse for administrative reasons.⁴⁸ Social psychologists have consistently found that most people interpret their fiscal burdens as a "contribution" they make to the common effort of maintaining the state.⁴⁹

Obviously you can only contribute from what is yours. Even the minority-view that the state "takes what is mine" at gun-point shares that assumption. Hence the view that the state neither takes nor receives, but only decides upon shares, is not shared by (and even unknown to) the overwhelming majority of citizens, with the exception of only a few economists.

As Murphy & Nagel argued and I conceded, the rules of acquiring legitimate property are not rules of natural justice; they are largely conventional. This means that if people mutually believe something to be legitimate property, it is, at least as long as there is no basic moral objection to be made to their holding it. (E.g. the objection that inequalities arising from brute luck are unjust, if that objection could be sustained.)

This self-understanding of tax-payers is not an epiphenomenal aspect of taxation which could be changed leaving everything else as it is. It is essential to the system.⁵⁰ On the

⁴⁸ The phrase is Hofstra's, *Socialistische belastingpolitiek*, p. 113, though on his view the money is communally owned. Cf. Murphy & Nagel, 36: "There is no reality, except as a book-keeping figure, to the pretax income that each of us initially "has"..."

⁴⁹ Following B. Strümpel, "The contributions of survey research to public finance", in: A.T. Peacock ed., *Quantitative analysis in public finance*, New York: Praeger 1969. Using Strümpel's questionnaire D.J. Hessing found in 1987 that 66% of Dutch citizens thought they "contributed something" through the tax system, "Belastingweerstand en dubbele moraal", in: F.H.M. Grapperhaus e.a., *Fiscale Ethiek*, Rotterdam 1987. Leo Stevens, *Fiscus, ik ben je vriendje niet*, Deventer: Kluwer 1997, found a similar percentage (63.4%) for Dutch parliamentarians and fiscalists. But only 14,5% of them ascribed this same attitude to the general population! This suggests that the major problem about compliance to the tax laws is not a lack of willingness to contribute, but of assurance about the proper contributions of others. And one might speculate that this lack of assurance is partly due to the fact that the fiscal system is not seen as implementing principles of fair contribution.

standard economic understanding the extent of tax evasion depends on the probability of being caught and the size of the punishment if caught. In most countries the actual figures for these parameters are such that, given people's actual risk aversion, on this assumption it would require much higher levels of deterrence to make the system work, if, given the costs involved in such levels of deterrence, it could be made to work at all. As a matter of fact it turns out that the size of the punishment is only slightly relevant for explaining people's actual behavior, and to the (equally slight) extent to which tax evasion is influenced by the probability of detection, it actually increases rather than decreases with higher probability: people seem to play the game as the tax authorities define it. Actual behavior can only be fully explained in terms of tax morale. Tax payers conceive of themselves as being bound by an implicit contract. They interpret the actions of fiscal officials as respecting or violating this contract, and respond accordingly. As long as externally motivating interventions (sanctions) are seen as supporting the contract, they raise intrinsic motivation. This will be the case if they can be seen as only aiming at people who are lacking in civic virtue, and hence providing the necessary assurance to the others that they will not be exploited. But if these external interventions are seen as supplanting the contract for a system of general coercion, they will crowd out tax morale.

It has been shown that respectful treatment of taxpayers by the tax authority reduces tax evasion because it bolsters tax morale. Unfortunately as far as I know no research has yet been done concerning the relation between compliance with fiscal law and its perceived justice. But what is known by now about the attitudes and behavior of taxpayers is already sufficient to

⁵⁰ Bruno S. Frey, *The role of deterrence and tax morale in taxation in the European Union*, Jelle Zijlstra Lecture NIAS, Wassenaar 2003, with references; cf. Benno Torgler, *Tax compliance and tax morale: a theoretical and empirical analysis*, Cheltenham: Edward Elgar, forthcoming.

show that they see themselves as citizens who are required to take on the burdens of citizenship by contributing to the state's activities from what is theirs.

Conventionally pretax-income is individual property, even if this is a kind of property burdened with duties. My basic point, however, is not only that this is the convention. The point is that the self-understanding of citizens of which this convention is an integral part belongs to a "contractual" interpretation of the nature of political community which is valuable as such. According to this interpretation political society is a cooperative venture between citizens who fairly distribute its benefits and burdens between each other. I do not say that it is a cooperative venture for mutual advantage, for, as we saw in the last section, part of the point of the venture is to meet collective duties. The fact that they are active participants makes them citizens rather than clients, and is the basis of their civil self-respect.⁵¹

Political society should be distinguished from civil society, and in particular from the economic interaction between individual economic agents (including state agencies). Civil society is the unending cumulative series of individual exchanges between people acting within the space created by their rights and duties, including positive duties. It is not a cooperative venture.

According to Murphy & Nagel society as a whole, including market interaction, should be seen as a cooperative venture. My arguments in sections 7 and 8 suggest that this undermines market interaction. The present point is a related one, it concerns the nature of the "contribution" each participant in this cooperative activity is supposed to make. It cannot be made from his property, for he has no pre-tax property. Hence, it can only consist in his

⁵¹ Shouldering fiscal burdens is not the only way to contribute. Hence my view does not imply that people with insufficient ability-to-pay to be taxed at all cannot properly see themselves as participants in this cooperative venture. But there is no denying that paying taxes makes a difference to civil self-respect. If this is unacceptable to some egalitarians, theirs must be a levelling-down egalitarianism.

productive efforts. As we saw in § 8, these efforts cannot be motivated by any effect they have on the producer's own economic fate. If they are to be spontaneously motivated, they can only be motivated by the wish to make a fair contribution to the collective good, to be individually allocated by political decisions. If they are not spontaneously motivated, they will have to be enforced. But even if they are spontaneously motivated, the state will have the task to determine everyone's fair contribution, and this can only be done in terms of everyone's ability to contribute, given one's native talents and the possibilities to develop them. Hence the state also has the task of monitoring individual abilities.

Again, I am turning the tables on Murphy & Nagel. They argue that you can only attribute any significance to the PID if you subscribe to libertarianism. My argument amounts to claiming that in the end you can only deny any significance to the PID if you (as Hofstra did, but they do not!) ascribe to a form of socialism, characterised by "from everyone according to his abilities", and "to everyone according to some fully patterned principle of justice" (e.g. equality of welfare). My claim is, first, that this is not our society, nor any possible developmental stage of it (characterised by some form of market behaviour and the accompanying forms of motivation). And, secondly, that it is not an attractive society either.
