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# Myth of Ownership / Myth of Government

Jeffrey Schoenblum

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BOOK REVIEW

MYTH OF OWNERSHIP/MYTH OF GOVERNMENT

The Myth of Ownership: Taxes and Justice. By Liam Murphy & Thomas Nagel. Oxford University Press: 2002.

Reviewed by Jeffrey A. Schoenblum\*

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Indisputably, the lives of all individuals, now and throughout history, have not been commensurate in every respect. No individual has the most of everything at all times – net worth, love, happiness, security, companionship, fame, food, land, grandchildren, or whatever else he or she values.<sup>1</sup> Nevertheless, a utopian strain in intellectual thought, emanating as the Enlightenment afterglow,<sup>2</sup> continues to place its faith in the public construction of an ersatz equality that has never existed naturally.<sup>3</sup> *The Myth of Ownership*, a recent book by two New York University law/philosophy professors, Liam Murphy and Thomas Nagel, is a striking exemplar of this dogged faith in the government's ability to eradicate inequality.

### I. THE AUTHORS' ARGUMENT

The authors correctly recognize that, in modern society in which very few – if any – inhabitants could survive and flourish without complex social and economic interactions, some regulation of those interactions is inevitable. Of course, the degree and spheres of regulation are the central debate of modern political and legal philosophy.<sup>4</sup> In addition to regulation, many commentators, including the authors, contend that interdependence means that those who thrive owe their well-being to the collectivity. Thus, they must submit to the collectivity, not merely as a matter of aggregate efficiency or

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<sup>1</sup> Even proponents of welfare economics recognize that welfare means more than material well-being. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 968 (2001) (“The welfare economic conception of individuals’ well-being is a comprehensive one. It recognizes not only individuals’ levels of material comfort, but also their degree of aesthetic fulfillment, their feelings for others, and anything else that they might value, however intangible.”).

<sup>2</sup> The actual origins of Western intellectual proclivities toward egalitarian utopianism go back farther. See RICHARD PIPES, PROPERTY AND FREEDOM 19-25 (1999); see also GILBERT CHINARD, L’AMÉRIQUE ET LE RÊVE EXOTIQUE 431 (1934).

<sup>3</sup> This is true, for example, of postmodern philosophers, who otherwise wish to dispose of the patrimony of the Enlightenment. See, e.g., Douglas Litowitz, *In Defense of Postmodernism*, 4 GREEN BAG 39, 47-48 (2000) (“Postmodernism includes the desire to question law’s foundations, to imagine a better system that is less wedded to Enlightenment conceptions of property, freedom, employment, liability, and crime, yet without abandoning the Enlightenment commitment to justice and equality.”). See also WILLIAM A. GALSTON, JUSTICE AND THE HUMAN GOOD 15 (1980), for a critique of social justice theorists as utopians.

<sup>4</sup> See, e.g., Friedrich Kessler, *Introduction: Contract as a Principle of Order to CONTRACTS* (Friedrich Kessler et al. eds., 3d ed. 1986), reprinted in A CONTRACTS ANTHOLOGY 32 (Peter Linzer ed., 2d ed. 1995); see also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

self-interest, but because they lack an individual claim to what might appear superficially to be theirs.<sup>5</sup> The “government”<sup>6</sup> is the true owner of material wealth and may reach it for those members of the collectivity who are the least advantaged.<sup>7</sup>

The principal tool for funding this redistribution, according to the authors and their intellectual cohorts, is taxation. Two considerations primarily determine the gross amount of taxation: (1) the cost of “public goods”<sup>8</sup> afforded by government directly and (2) the extent of redistribution of private wealth from certain private wealth-holders to others. “Experts” will make decisions regarding the optimal allocation of the tax burden among taxpayers so as to pay for these “investments.”<sup>9</sup> As Murphy and Nagel reiterate repeatedly in this

<sup>5</sup> The actual argument that property is a social construct and, thus, is entitled to be regulated by the state without meaningful restriction has been voiced many times before, although not necessarily with a focus on taxation. See, e.g., KENT GREENAWALT, *DISCRIMINATION AND REVERSE DISCRIMINATION* 34 (1983).

<sup>6</sup> For further discussion of the rationalist tendency in law to regard the “government” as a distinct being or entity, see George Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problems of Collective Guilt*, 111 *YALE L.J.* 1499, 1511-12 (2002).

<sup>7</sup> No effort is made by Murphy and Nagel to define who are the least advantaged. This would entail agreeing on a meaning for both “least” and “advantage.” See generally *infra* text accompanying note 63.

<sup>8</sup> The authors fail to define the meaning of this term, although they offer some of the usual suspects, including the arts and public television. How one defines the term, however, reveals subjective preferences as well as one’s essential political philosophy. One author has defined a “public good” as “one that must be supplied jointly and from the enjoyment of which it is impossible or impractical to exclude people.” John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 *CAL. L. REV.* 485, 510 n.110 (2002) (citing DENNIS C. MUELLER, *PUBLIC CHOICE II* 11 (1989)); see also RUSSELL HARDIN, *COLLECTIVE ACTION* 17 (1982); ELINOR OSTROM ET AL., *RULES, GAMES AND COMMON-POOL RESOURCES* 7 (1994); Joseph Raz, *Right-Based Moralities, in THEORIES OF RIGHTS* 182, 187 (Jeremy Waldron ed., 1984) (referencing only nonexcludability).

<sup>9</sup> However, unlike Weberian “experts,” faithful to rules and rationality, these “experts” will take into account “the social morality of rulemaking.” Jerry L. Mashaw, *Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 33 (2001). For an endorsement of this approach, see generally Mashaw, *supra*. For the Weberian viewpoint and that of its adherents, see MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 217-26, 956-1003 (Guenther Roth & Claus Wittich eds., 1968). See also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23-24 (1938); Max Weber, *Bureaucracy, in CLASSICS OF PUBLIC ADMINISTRATION* 23 (Jay M. Shafritz & Albert C. Hyde eds., 1978); Edward L. Rubin, *Getting Past Democracy*, 149 *U. PA. L. REV.* 711, 720 (2001); David B. Spence, *A Public Choice Progressivism, Continued*, 87

relatively brief work, government can only achieve its essential goals – to provide a decent standard of living for the least advantaged and to undo random inequality – by delivering a deathblow to the “libertarian principle” of private ownership that pervades society.

Leading tax scholars have accepted, without careful or critical analysis, the premise that the government has relatively unrestrained authority to allocate unequal tax burdens.<sup>10</sup> The focus of such scholars has been how to produce the most efficient and equitable system for raising revenue.<sup>11</sup> Typical concerns are horizontal<sup>12</sup> and vertical equity,<sup>13</sup> as well as related matters of inefficient burdens on income earned from capital and distinctions in the taxation of “debt” and “equity.”<sup>14</sup>

Missing from the existing tax scholarship is sustained consideration and debate regarding original entitlement, redistribution, and their moral and philosophical underpinnings. In *The Myth of Ownership*, Liam Murphy and Thomas Nagel address these all-important matters.<sup>15</sup> While not the first to do so, their book

CORNELL L. REV. 397, 405 (2002); Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 210 (1887). See generally SAMUEL HABER, *EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA 1890-1920* (1964).

<sup>10</sup> See, e.g., William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1165 (1974) (“The primary, intended, real effect of any general revenue-raising tax is to curtail some part of the private consumption of economic resources that would otherwise occur, in order to free those resources for public use, including redistribution to the poor.”).

<sup>11</sup> *Id.*; see also PHILIP D. OLIVER & FRED W. PEEL, JR., *TAX POLICY* 1-3 (1996); Jeffrey A. Maine, *Linking Limited Liability and Entity Taxation: A Critique of the ALI Reporters’ Study on the Taxation of Private Business Enterprises*, 62 U. PITT. L. REV. 223, 240 n.87 (2000).

<sup>12</sup> See generally Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT’L TAX J. 139 (1989); Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT’L TAX J. 113 (1990); Stephen Utz, *Ability to Pay*, 23 WHITTIER L. REV. 867, 921-22 (2002) (analyzing Musgrave’s review of the utilitarian doctrine of ability to pay).

<sup>13</sup> See, e.g., William A. Klein, *Income Taxation and Legal Entities*, 20 UCLA L. REV. 13, 57-61 (1972) (urging the importance of “uniformity in the tax treatment of seemingly similar organizations”). See generally Paul R. McDaniel & James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 FLA. TAX REV. 607 (1993); Utz, *supra* note 12.

<sup>14</sup> See, e.g., Louis Kaplow & Alvin C. Warren, Jr., *An Income Tax by Any Other Name – A Reply to Professor Strnad*, 38 STAN. L. REV. 399 (1986); Jeff Strnad, *Taxation of Income from Capital: A Theoretical Reappraisal*, 37 STAN. L. REV. 1023 (1985).

<sup>15</sup> By way of contrast, another recent collection of essays, *DOES ATLAS SHRUG?: THE ECONOMIC CONSEQUENCES OF TAXING THE RICH* (Joel B. Slemrod ed., 2000), is

is extremely valuable for focusing on first principles. *The Myth of Ownership* reveals taxation for what it is – a malleable instrument for achieving political and social goals and not a science, the application of which yields a coherent, value-neutral tax regime.

*The Myth of Ownership* establishes how, notwithstanding the widespread endorsement of progressivity by many tax scholars and policymakers, “libertarianism” infects and limits their approach to taxation. Specifically, two views of justice associated with libertarianism restrain the extent of acceptable redistribution. First, the principle of desert<sup>16</sup> delimits thinking about property ownership, notably how much the government *ought* to be able to take from those who have “earned” income and give to those who have not “earned” it.<sup>17</sup> Second, the principle of contractarianism makes all nonprivate transfers or exchanges of wealth highly suspect. The market *is* moral, and unrestrained government intrusion into what otherwise is the allocation of wealth via a free market, private property, and voluntary exchange system of equally situated and rational individuals or legal persons is unacceptable.<sup>18</sup> *The Myth of Ownership* argues that the failure of those who believe in the justice of governmental redistribution to take on fundamental libertarian premises, which to date have been largely undisputed in the tax literature, has stymied the attainment of socioeconomic equality.<sup>19</sup>

The authors of *The Myth of Ownership* show no similar reluctance to confront libertarian premises. They argue that all

concerned with the more commonplace efficiency question generated by progressive taxation. See also Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391 (2002) (reviewing DOES ATLAS SHRUG?: THE ECONOMIC CONSEQUENCES OF TAXING THE RICH, *supra*).

<sup>16</sup> For conflicting views on desert as a standard justifying the unequal distribution of property, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 228 (1974); JOHN RAWLS, A THEORY OF JUSTICE 101-04 (1971); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 71-77 (2d ed. 1998).

<sup>17</sup> Assuming desert is a valid criterion, it might well support confiscatory inheritance taxes. On the other hand, desert could be viewed as entitling the owner to gratuitously transfer his or her wealth. Incentive concerns might also justify maintenance of the system of inheritance. See generally Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994). Murphy and Nagel are critical of the current structure of wealth transfer taxation but do not propose its total abolition. See LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP 142-61 (2002) [hereinafter THE MYTH OF OWNERSHIP].

<sup>18</sup> See THE MYTH OF OWNERSHIP, *supra* note 17, at 15.

<sup>19</sup> This conclusion seems highly dubious. For example, consider the rich, albeit highly disputable, communitarian literature. See, e.g., SANDEL, *supra* note 16.

individual wealth and income is dependent on the government and the laws it enforces.<sup>20</sup> Without the government, no market or property would exist. Acceptance of this “reality” inevitably leads away from the standard form of tax policy question – how much income of a particular person should be taxed, that is, a “fair share” supply side question. Rather, it leads to a very different demand side question – how much should be redistributed from those who have to those who have less to achieve social and economic justice. Instead of concern about what is a fair tax, the concern is with what is a fair distribution of wealth in society. Since the taxpayer is not “entitled” to *anything*, there are no constraints on how much the government can take. Even persons with similar amounts of income or levels of welfare may have to surrender different amounts in tax if doing so facilitates achievement of the goal – socioeconomic justice.<sup>21</sup>

In summary, the authors argue: we *ought* to start with the goal of socioeconomic justice and work backwards to arrive at a tax system that can facilitate the accomplishment of that goal. We will be free to do so only when we recognize that no individual has a moral claim to “his or her” property, first, because it takes a collectivity to create and preserve it. Second, since most individual attributes are random, the desert theory simply does not afford a persuasive moral basis on which to rest private entitlement to property. Accordingly, “the idea of a prima facie property right in one’s pretax income – an income that could not exist without a tax-supported government – is meaningless.”<sup>22</sup> The authors’ proposed tax regime would not be especially sensitive to due process or other considerations of

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<sup>20</sup> This is a familiar assertion. See, e.g., Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 275-76 (1983); Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081, 1091 (1980).

[The claim on an individual’s output] can be justified on the theory that a producer does not have a controlling moral claim over the product of his capital and labor, given the fortuity in income distribution and the dependence of producers on consumers and other producers to create value in our society – factors that create a general moral claim on all private product on behalf of the entire society.

*Id.*; see also Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 362 (2000).

<sup>21</sup> See THE MYTH OF OWNERSHIP, *supra* note 17, at 38 (“Tax justice must be part of an overall theory of social justice and of the legitimate aims of government. Since that is so, there can be no blanket rule that persons with the same pretax income or level of welfare must pay the same tax.”).

<sup>22</sup> *Id.* at 36.

procedural fairness. Indeed, certain constitutional obstacles to the proposal would exist.<sup>23</sup> Nevertheless, the authors' purpose is to present the ideal and not, as they readily acknowledge, the attainable or constitutionally permissible.<sup>24</sup>

## II. THE ARGUMENT CRITIQUED

Murphy and Nagel simply do not present a logically compelling case in support of their proposal for socioeconomic justice through the elimination of private property and its redistribution as necessary to the least advantaged. One considerable flaw is the failure to justify the claim of the collectivity to all wealth in a convincing fashion. Moreover, the authors' argument that the randomness of existence deprives individuals of a transcendent entitlement to private property is unpersuasive. The entitlement of the ill-defined class, the "least advantaged," similarly remains unexplored. Aside from these central shortcomings, the authors never delineate the exact meaning of socioeconomic justice. To the extent this concept can be given meaning, there is still the unexplored question of why it should be favored over other possible social or economic values, theories of justice, or for that matter, other metrics of and modalities for achieving socioeconomic justice. Finally, inasmuch as the theory presented is consequential, rather than ontological or deontological, the accomplishment of the ends ought to be attainable. These advocates, however, neither explain in precise terms their plan of action nor proffer evidence of the likelihood of success.<sup>25</sup>

The remainder of this essay evaluates each of the flaws raised above in greater detail. As the discussion establishes, the authors have simply not made their case. Their singular and exceptional

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<sup>23</sup> The authors are typical of those who, as James Buchanan has noted, "have been unwilling to accept the final distributional results largely because they remain unwilling to restrict their domain of evaluation to postconstitutional contract." 7 JAMES M. BUCHANAN, *The Limits of Liberty: Between Anarchy and Leviathan*, in THE COLLECTED WORKS OF JAMES M. BUCHANAN 1, 68 (2000).

<sup>24</sup> See, e.g., THE MYTH OF OWNERSHIP, *supra* note 17, at 182-84 (expressing doubts as to the political feasibility of a proposed direct income subsidy). As for any constitutional constraints, the authors ignore them completely.

<sup>25</sup> By way of contrast, they devote a great deal of the book to the delineation of existing tax laws and propose specific changes. This seems an odd concern, since they also argue that consistency in tax policy is not required, as long as the desired outcome of socioeconomic justice is achieved. Thus, the focus might have been better placed on the design of programs to achieve the stated goal rather than why existing tax policies do not fit their conception of socioeconomic justice.



contribution is to reveal tax policy for what it is – a byproduct of the prevalent political philosophy and governing structure. Nevertheless, beyond this barely acknowledged but important revelation, they offer little else that is novel or persuasive. In particular, they fail to establish that their own professed philosophy of socioeconomic justice should receive regard over other contending belief systems.

### A. *The Overarching Claim of the Collectivity*

The authors present the collectivity argument, which posits that the government has a claim to all wealth, because individuals do not have any a priori entitlement to private property,<sup>26</sup> without any effort to explore its deficiencies. The argument that the production of wealth is not an exclusively solitary endeavor and is dependent on legal regulation and enforcement does not, however, lead inevitably or logically to the authors' conclusion that the government has an unrestricted entitlement to it all or at least to a very substantial part of it.<sup>27</sup> Nevertheless, the authors present the following flawed logic: (a) the collectivity creates conditions, especially through law, enabling the production and preservation of wealth; (b) the government *is* the collectivity; and (c) the government, therefore, is entitled to control *all* of the wealth that exists and is created.

#### 1. There is No Single Claimant

Conceding claim (a) above, claim (b) proves quite problematic. Note that the authors simply assume that the “government” is a unitary entity, synonymous with the collectivity. As the next subsection seeks to establish, this anthropomorphic persona ascribed to the government is disputable and deserves greater attention. But even granting this persona, the reasoning outlined above is no less problematic because of claim (c) above. One problem with claim (c) is that it overvalues at 100% the government's contribution to wealth production and maintenance. Without individual contribution, there would be nothing for law to protect.<sup>28</sup> Thus, the authors appear to

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<sup>26</sup> Others have previously made this argument. See, e.g., Graetz, *supra* note 20, at 275-76.

<sup>27</sup> Another author who fails to recognize this point is Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 51 TAX L. REV. 363, 380 (1996) (“[E]conomic returns to work or to investment often arise from morally arbitrary sources as well as from the different choices of equally-endowed individuals.”).

<sup>28</sup> The authors refer to the individual, essentially because this is their focus; HeinOnline -- 22 Va. Tax Rev. 562 2002-2003

undervalue grossly individual contributions, while greatly inflating the government's contribution. Further, the implications of the authors' reasoning extend far beyond private property rights. If, in fact, the government can claim 100% of all wealth because it makes private property possible, then it can also circumscribe or deny all civil rights that it also makes possible through the enforcement of law.

A more balanced and less dogmatic view than the authors' might regard the government and individuals as engaged in a cooperative venture, a partnership of individual wealth creators and governmental enabler.<sup>29</sup> The partnership contract that links them in a collaborative effort arises through a negotiation, known as the political process, and is delimited by a constitution, statute, and regulation.<sup>30</sup> The constituents of the collectivity adjust the agreement, like other relational contracts, over time.<sup>31</sup> Within this private-party/government-collectivity framework, the market, as well as other informal norms, prescribe the interaction among the private partners *inter se*.

The partnership paradigm rejects the reductionist, zero-sum analysis of the authors. Even if there is a net positive contribution by the collectivity that is measurably distinct from the individual contributions of market participants, the partnership account of a particular, private participant may also be a net positive. In other words, some partners make the collectivity better off by their efforts. These persons actually contribute more wealth to the commonwealth than they withdraw.<sup>32</sup> Under a pure desert regime, or one that gives at least some credit to that basis for entitlement, a net producer might actually deserve a redistribution for the surplus social welfare

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however, legally recognized associations of individuals and other private persons are also contributors.

<sup>29</sup> Others have suggested this partnership concept. See Avi-Yonah, *supra* note 15, at 1404-05. While accepting the model as the most appropriate description of the government-individual relationship, Avi-Yonah does so grudgingly, since it limits the government's claim. Murphy and Nagel seek to transcend the limits that models such as the partnership one impose.

<sup>30</sup> Certain commentators recognize this as a drawback of the partnership model – that is, despite its seeming validity, it might not result in sufficiently harsh taxation of the rich. See *id.*

<sup>31</sup> For the classic evaluation in the context of contract law, see, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

<sup>32</sup> As Posner has stated: "Productive people put more into society than they take out of it." Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 128-29 (1979).

produced, thereby evening out the partnership accounts. In contrast, the partnership accounts of those who choose sloth, or for other reasons are not satisfactory producers, might be in debt.<sup>33</sup> Essentially, they are net free riders, benefiting from the labor or capital of others.<sup>34</sup>

The overvaluation the authors accord to the government's contribution is further revealed by their unwillingness to address the contribution of those beyond the government's sovereign jurisdiction. That is, their focus is limited to the political collectivity, even though social welfare is impacted upon as much or more by the global economic "collectivity." It is not only the domestic law enforcer that contributes to the welfare of all. In a global economy, contribution to our national collectivity's welfare, and, thus, entitlement, does not stop at the water's edge. The cheap foreign labor that enables even the least advantaged in the United States to thrive on a comparative basis ought to be taken into account. Perhaps foreign governments that facilitate low-cost productivity have a claim to tax revenues as well. Moreover, the truly least advantaged in these countries arguably deserve the greatest attention if the goal is "socioeconomic justice." Despite the sordid conditions these laborers endure for our benefit, including that of our own least advantaged, the authors, with a single footnote, suspend consideration of the issue for another day.<sup>35</sup> The authors' parochial domestic focus is difficult to square with a deep commitment to socioeconomic justice.<sup>36</sup>

## 2. The Government is Not the Collectivity

The lack of consonance between the political and economic collectivities discussed above<sup>37</sup> is just one instance in which the authors mistakenly invoke a synonymy of government and "collectivity." Any number of diverse means of defining the

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<sup>33</sup> As Posner has stated: "The lazy person substitutes leisure – which does not produce any consumer surplus for the rest of society to enjoy – for work, which does." *Id.* at 132 n.86. Of course, some persons are unable to contribute for reasons beyond their control. Such partners may be entitled to special concessionary accounting apart from the desert regime.

<sup>34</sup> Note that no right automatically arises out of contribution. Absent some concept of desert, there is no obvious link between that which one contributes and that to which one is entitled.

<sup>35</sup> See THE MYTH OF OWNERSHIP, *supra* note 17, at 41.

<sup>36</sup> See, e.g., Hillel Steiner, *Just Taxation and International Redistribution*, in GLOBAL JUSTICE: NOMOS XLI 171 (Ian Shapiro & Lea Brilmayer eds., 1999).

<sup>37</sup> See *supra* notes 28-36 and accompanying text.

“collectivity” exist. Assuming, however, that we limit the discussion to the political collectivity known as the United States, there is still much to fault in the equation of government and collectivity. For example, the federal structure and the political philosophy that underpins that structure cannot sustain a characterization of the “government” as a unitary actor, contrary to the authors’ assumptions. Competition horizontally among branches and vertically at the federal, state, and local levels among governments, to a substantial degree, is a historical fact, a deliberate constitutional creation devised to assure multiple and competing “governments.” These governments have distinctive constituencies, that is, “collectivities,” which compete among themselves in many instances.

Government also may be regarded as an agent of the collectivity or at least of certain influential segments.<sup>38</sup> As such, the government has no claim as the collectivity, but only as an agent acting on its behalf.<sup>39</sup> Private persons agree through political processes how much private wealth is available for redistribution. The government as agent simply effectuates those transfers but lacks any claim beyond compensation for costs and services provided. Government’s authority to act is derivative.

Another perspective might model the government as a self-interested actor, a competitor with private sector participants, which no less rapaciously seeks a share of the aggregate wealth to which it may obtain access. Thus, the government will predictably favor those policies, including redistribution and the demystification of private property, that are most likely to enhance its influence and to facilitate its own accretions. Likewise, it will favor those policies that undermine the status of its competitors’ claims.<sup>40</sup>

Government may also be viewed as a potential adversary or usurper of the collectivity’s best interests, rather than its embodiment. Indeed, the Bill of Rights exemplifies this conception to the extent that it protects “inalienable” rights from government circumvention.<sup>41</sup>

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<sup>38</sup> See, e.g., 7 BUCHANAN, *supra* note 23, at 88.

<sup>39</sup> The government may act in both a protective capacity and in a productive capacity when essential for efficiency. See *id.* at 121.

<sup>40</sup> A long-term view of the negative economic consequences of too great a resource allocation to the public sector might be expected to chasten the government. In fact, the time horizon of those politicians – and even bureaucrats – who constitute the government, however, argues against serious consideration of the long-term interests of the collectivity and the government itself.

<sup>41</sup> See William K. Frankena, *Natural and Inalienable Rights*, 64 PHIL. REV. 212, 229-30 (1955).

If this depiction of the government is correct, then the authors' proposals would facilitate the destruction, rather than enhancement, of the collectivity's interests.

Finally, the "government" is arguably no more than an aggregation of actors, who at various times and often in contradictory fashion exercise authority vested indirectly in them by the collectivity. Since individuals inside "government," as well as outside, act in self-interest, any effort to personalize or reify government and to assert a claim on "its" behalf is misguided and disingenuous.

Clearly, various ways to model the public-private interaction exist, and diverse implications flow from any one model. There may be a persuasive "story" of government that justifies support of redistribution to society's least advantaged; however, the authors simply fail to provide compelling argumentation in favor of their own particular "totalitarian" construct.

The foregoing discussion assumes, as do the authors, that there is a "collectivity" in the first place. We should not, however, too readily accept this foundational premise. Although persons participate in a political system and have their activities and relationships regulated by the same laws, there may be quite varying degrees of association and sense of connectedness. The image of an organism, each of the parts of which are devoted to the same ends as well as means, ought not be accepted uncritically. Uncritical reliance on terminology like "collectivity" and "community" tends to obscure difficult issues, including whether there is a shared understanding of "collectivity" and "community," who are its constituents, and what obligations are owed by the whole to the parts, the parts to the whole, and in what manner and relative amounts.

### *B. The Randomness of Existence*

The facile logic of the collectivity syllogism parallels the equally flawed argumentation regarding randomness. Here, the authors essentially argue: (a) many factors beyond an individual's control contribute to his or her material well-being or deprivation; (b) therefore, any claim to entitlement based on desert is unjustified; and (c) since individual claims of entitlement are groundless, the government/collectivity exercises ultimate dominion and may utilize all worth for purposes of socioeconomic justice. Again, even conceding claim (a), the authors err by regarding a certain degree of randomness as proof that there can be *no* just desert claim to *any* product of one's own labor or capital. Randomness, however,

contributes in varying portions to overall outcomes of different persons; at different times in life, the contribution – especially when weighed with other outcome-contributing factors – may be different. For example, sifting out ambition from endowment at any one moment with respect to each individual and then associating it with gains that are the product of activities over time spans and influences of varying lengths' duration is simply beyond human calculation.

Carried to its logical conclusion, the authors' argument is self-defeating, in addition to being quite ominous. Assuming human beings are not accountable for their station in life, high or low, then even the status of such human beings as "individuals" deserving our utmost concern is doubtful.<sup>42</sup> No effort on behalf of the least advantaged would seem justified since the very arbitrariness of outcomes would make the "success" of efforts by the government for social justice uncertain of attainment at best. Indeed, destructive, unintended consequences could result. The authors inform the reader that existence, whether chaotic or determined, is beyond individual control; yet, they give no explanation of why or how this "reality" will alter as a result of government intervention. Randomness, in its innumerable configurations, would persist, supplemented by new government actors and regulations, which would only contribute to arbitrary outcomes and unintended consequences.

The authors' default rule assumes pervasive arbitrariness, commencing with endowment at birth. It is skeptical of accomplishment and leaves open whether, even if undisputed, it should yield deservedness. This viewpoint diminishes the individual. It challenges the very authenticity of each person. Assuming little potential for self-creation, the default rule not only puts the individual's entitlement to property in doubt, but also calls into question his or her liberty, freedom, and very existence itself. If the individual has no unique self-created worth,<sup>43</sup> there seems to be no

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<sup>42</sup> See William K. Frankena, *The Concept of Social Justice*, in SOCIAL JUSTICE 1, 14 (Richard B. Brandt ed., 1962).

<sup>43</sup> See PIPES, *supra* note 2, at xiii; see also 6 THE WRITINGS OF JAMES MADISON 101-03 (Gaillard Hunt ed., 1906). From the perspective of personality theory, "in every case [of the loss of property] there remains . . . a sense of the shrinkage of our personality, a partial conversion of ourselves to nothingness." 14 WILLIAM JAMES, *Psychology: Briefer Course*, in THE WORKS OF WILLIAM JAMES 1, 161 (Frederick H. Burkhardt et al. eds., 1984). This is not to deny some value to the communitarian viewpoint that individuals are "situated" and "embedded in a history which locates me among others, and implicates my good in the good of the communities whose stories I share." LIBERALISM AND ITS CRITICS 9 (Michael J. Sandel ed., 1984) (commenting on the writings of Alasdair MacIntyre).

persuasive basis for denying a government's claim of authority over existence itself. After all, existence is arguably as arbitrary and random as is material well-being.

It is historically incontestable that a society can only survive with some difference and inequality.<sup>44</sup> Role differentiation and role stratification are both necessary in societal functioning and evolution.<sup>45</sup> The issue that remains insufficiently explored in *The Myth of Ownership* is the tricky one of which inequalities (and how much of them) are desirable, necessary, or at least tolerable, be they arbitrary or earned.<sup>46</sup>

The authors link randomness of attributes to what seems an iron rule of immutability. They assume a static social structure without advantaged persons who have overcome randomly assigned detriments,<sup>47</sup> an assumption that does not comport with empirical data.<sup>48</sup> The authors also falsely assume that there are no

<sup>44</sup> See, e.g., Wilbert E. Moore, *But Some Are More Equal Than Others*, 28 AM. SOC. REV. 13, 16 (1963); Melvin Tumin, *On Inequality*, 28 AM. SOC. REV. 19, 19 (1963).

<sup>45</sup> See Hugo Adam Bedau, *Egalitarianism and the Idea of Equality*, in EQUALITY: NOMOS IX 3, 20-21 (J. Roland Pennock & John W. Chapman eds., 1967). Sociologists would argue that it is the very basis for social evolution. See, e.g., *id.*; D. G. RITCHIE, STUDIES IN POLITICAL AND SOCIAL ETHICS 31 (1902).

<sup>46</sup> Even egalitarians defend inequality that ultimately fosters equality. See, e.g., HAROLD J. LASKI, *A Plea for Equality*, in THE DANGERS OF OBEDIENCE & OTHER ESSAYS 207, 232 (1930) ("Equality does not mean that the differences of men are to be neglected; it means only that those differences are to be selected for emphasis which are deliberately relevant to the common good."). Of course, inequalities may be entirely defensible as just on the basis of first principles such as desert or promise. See MATT CAVANAGH, AGAINST EQUALITY OF OPPORTUNITY 24 (2002).

Many people disagree with egalitarianism only in that they think equality isn't the *only* thing that is important. . . . My position is much stronger than this: I argue . . . that equality just isn't something we should be pursuing *at all* in this area, either on its own or in combination with other values.

*Id.*

<sup>47</sup> The authors also assume a static model in which those who have personal attributes favoring acquisition have relinquished their acquisitive behavioral traits. Nevertheless, no explanation is offered as to why, even if government programs in the short term succeeded in the elimination of gross inequalities, they would not quickly re-emerge. See DAVID HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 194 (L. A. Selby-Bigge ed., 2d ed. 1902) ("Render possessions ever so equal, men's different degrees of art, care, and industry will immediately break that equality.").

<sup>48</sup> There is considerable dispute over how much mobility is in the society, but it is undisputed that mobility occurs. See R. Glenn Hubbard, *Measure Tax-Cut* HeinOnline -- 22 Va. Tax Rev. 568 2002-2003

disadvantaged persons who find themselves in that state because they have squandered their endowments. In the authors' universe, *all* advantaged persons largely rely on inherited<sup>49</sup> or other random attributes, while all less-advantaged persons find themselves incapable of overcoming the detrimental effects of congenital and/or chronic bad fortune. This conceit, the very soul of the authors' project, may engender sympathetic responses from certain politically or ideologically kindred souls but can hardly withstand logical analysis or the empirical evidence.

Curiously, the authors fail to offer an adequate explanation in support of claim (c). That is, why does the government or the collectivity, however conceived, have a greater entitlement, despite randomness, than the individual does? The "government" would seem no less subject to the workings of the same randomness that besets the individual. Both the individual and government, in fact, overcome the arbitrariness and chaos inherent in existence and social organizations to produce outcomes. Neither has a *prima facie* totalitarian entitlement.

### C. *Defining and Prioritizing Socioeconomic Justice*

Having denuded the individual of any moral claim to private

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*"Fairness" Over a Lifetime*, WALL ST. J., Jan. 8, 2003, at A14. See generally ALBERTO ALESINA ET AL., *INEQUALITY AND HAPPINESS: ARE EUROPEANS AND AMERICANS DIFFERENT?* (Nat'l Bureau Econ. Res., Working Paper No. W8198, 2001), at <http://papers.nber.org/papers/w8198> (ascribing fewer negative effects to inequality in the United States due to greater social mobility). With respect to one facet affecting economic mobility – inheritance – compare William G. Gale & John Karl Scholz, *Intergenerational Transfers and the Accumulation of Wealth*, 8 J. ECON. PERSP., 145, 156-57 (1994) (concluding that inheritance accounts for fifty-one percent of net worth accumulation) with Franco Modigliani, *The Role of Intergenerational Transfers and Life Cycle Saving in the Accumulation of Wealth*, 2 J. ECON. PERSP. 15, 18-19 (1988) (referring to studies indicating that inherited wealth is less than twenty percent of individuals' total wealth).

<sup>49</sup> The question of inherited wealth is far more troublesome than other inherited attributes. Unlike many of these, the inheritance of wealth can be eliminated or equalized with far less difficulty. While there may be adverse economic consequences to its elimination (*see, e.g.,* McCaffery, *supra* note 17), any believer in the free will and autonomy of the individual, or of desert as a principle of justice, must be troubled by the persistence of inheritance. The authors are as concerned about this as this reviewer, but for obviously different reasons: the denial of the government's access to this capital so as to ameliorate the gap between the rich and others, thereby yielding a more equal wealth distribution in society. See THE MYTH OF OWNERSHIP, *supra* note 17, at 142-61.



property, the authors proceed to consider the “ideal” means for raising revenue through taxation. They argue that an unwillingness to challenge the private property dominion of progressive taxation unnecessarily constrains proponents. Thus, the proponents have sheepishly focused on “tax justice” rather than socioeconomic justice. According to the authors,

[t]he real question of fairness should be about after-tax results, not about their relation to the pretax situation. We want to know what tax schedule will raise enough money to pay for the costs of government and public sources while at the same time promoting socioeconomic justice and fostering or at least not hindering a dynamic economy.<sup>50</sup>

Deconstructed, the above passage is rampant with internal contradictions and questionable macroeconomic assumptions. First, we cannot know the costs of government and public sources *until* we answer the question of what the goals of government ought to be. Second, the argument that public policy must achieve socioeconomic justice presupposes that government can effectively promote social justice. Third, it assumes that we all agree on what socioeconomic justice is. Fourth, the goal of attaining socioeconomic justice while “fostering or at least not hindering a dynamic economy” presumes that, at any level, governmental support of social justice will not impair the goal of a dynamic economy. Fifth, the authors assume no qualitative distinction between “fostering” and “not hindering” a “dynamic economy,” yet each could involve distinct policies and very different degrees of intrusion in the economy. Sixth, the authors assume, incorrectly, that reliable means exist to establish whether governmental intrusion achieved the goal of “fostering” or “not hindering” a “dynamic economy.” In fact, there is presently no reliable, undisputed metric for determining this.

Deconstruction of the term “socioeconomic justice” itself is also possible. What do Murphy and Nagel mean by “socioeconomic?”<sup>51</sup>

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<sup>50</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 164.

<sup>51</sup> Any concept of *social* justice ought to be distinguished from the *moral* obligation to help the needy. The latter would support a private *obligation* to be charitable. Social justice, on the other hand, is concerned with the obligation of society as a whole. Cf. D. D. RAPHAEL, CONCEPTS OF JUSTICE 236, 238 (2001) (discussing the linkage of justice to fairness, fairness to social equality, and social equality to higher taxes on the rich). The authors give no explanation as to whether social justice means that the least advantaged actually have a “right” to assistance. Any “right” would be difficult to rationalize if we assume that all individuals are

What do they mean by “justice?” The authors never present a compelling analytical statement of what they intend by any of these intensely disputed terms. Further, there is no explanation why “socioeconomic justice” should command our primary allegiance. For example, the authors state: “Our own sympathies lie with those conceptions of justice that require a society to aim at providing at least a decent minimum level of welfare and access to opportunity for everyone.”<sup>52</sup>

This version of justice has certain echoes of John Rawls’ difference principle. The difference principle allows for differences in wealth as long as the system does at least as well for the least advantaged as any alternative, more equalizing system. The authors regard this maximin principle as morally superior to utilitarian justice, which tolerates gross inequalities among individuals as long as aggregate welfare is maximized.<sup>53</sup> The authors, like Rawls, argue that there is a need to respond to the perceived randomness of many of the inequalities experienced by individuals in society. A just society ought to seek to overcome arbitrariness so that each person has an equal chance in life.<sup>54</sup>

The authors also share Rawls’ view that social justice is redistributionist in nature, but with a subtle difference. Rawls’ ideal is a consensus of self-interested individuals expressing themselves through the political process. The justice in Rawls’ version hinges primarily on self-interest. Murphy’s and Nagel’s conception of justice, on the other hand, appears to have an external moral base. For example, it is “bad” for an individual to live a life that is often humiliating.<sup>55</sup> The authors differ dramatically from Rawls in another respect. In a very critical passage, they declare:

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equals. See CAVANAGH, *supra* note 46, at 13 (positing that “[t]he only way of justifying redistributive taxation would be to say, first, that we all have a positive duty towards the poor,” though the author actually supports redistributive taxation).

<sup>52</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 140. *But cf.* Kaplow & Shavell, *supra* note 1. The notion of “welfare” is a much disputed concept with respect to content, as well as measurement, and the authors do not clarify their own stance in this debate, other than by stating they are not referring to aggregate utilitarian welfare. Likewise, their reference to a “decent minimum level” suffers from the same shortcomings. “[A]ccess to opportunity” is also left undefined, though we are informed that it is more than the “specious” opportunity argued for by opponents of aggressive forms of preferences.

<sup>53</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 54.

<sup>54</sup> *Id.* at 54-55.

<sup>55</sup> See *infra* text accompanying note 60.

We are persuaded that a society's institutions should promote the welfare of the worst off well beyond what most people would count as the required minimum – at the expense, if necessary, not only of the welfare of the best off but also of total welfare, the total size of the pie.<sup>56</sup>

Unlike Rawls, the authors posit that the least advantaged must reach an explicit level, a standard of living, which is “well beyond what most people would count as the required minimum.” This standard is as ill-defined as “socioeconomic justice” and its component parts. More significantly, the authors seem prepared to sacrifice the overall welfare of the collectivity, even that of the *less* well-off, for the goal of individual minimum welfare of the least well-off.<sup>57</sup>

The authors' response to the following question further reveals their position. If a private property system increases the wealth of the “least advantaged” above “poverty,” and where it might otherwise be under any other system, but palpable inequalities of wealth persist, should the private property system nevertheless be rejected? The authors state:

We are uncertain about this question. There is something palpably unfair about a society in which a small minority are vastly richer than their compatriots, or in which successive generations are born into these positions of wealth, even if no one in the society is very badly off in absolute terms.<sup>58</sup>

This response reveals the hidden egalitarian agenda that the authors seek to perpetuate throughout this work. It supports the conclusion that the authors' real concern is not the achievement of a standard of living for all that is “well beyond what most people would count as the required minimum,” but rather an “equal standard of living.”

Even if a “decent standard of living,” as opposed to an “equal

<sup>56</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 140-41.

<sup>57</sup> This statement also seemingly contradicts an earlier statement about not hindering the dynamic growth of the economy. See *supra* note 50 and accompanying text. This assumes government intervention inevitably impacts negatively on market efficiency. See *infra* note 101 and accompanying text.

<sup>58</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 186-87. Why is it “unfair?” They never explain. Moreover, if all persons have equal opportunity, see *supra* note 52 and accompanying text, but (a) are endowed with different, unequal attributes and (b) experience different fates along the way, then before long, wide gaps in well-being will re-emerge, notwithstanding stringent efforts to close the gap between the least advantaged and other members of the society.

standard of living,” is the authors’ prime preoccupation, the reader searches in vain for a compelling reason why it ought to be the collectivity’s number one priority, if not obligation.<sup>59</sup> The authors offer a single passage attempting to explain their preoccupation:

Poverty is bad from all these points of view. The lives of the poor are hard, often humiliating; children born poor have fewer opportunities and lower expectations. However you slice it, an increase in the resources of poor people will do a lot of good, per dollar – more good than a comparable increase in the resources of those who have more, or much more. That is the most general and straightforward basis for redistributive policies, and it holds in some degree for a wide range of views this side of libertarianism.<sup>60</sup>

A critical reading of this rationale raises many more questions than it answers. The authors do not address the definition of poverty, despite the fact that the attainment of their conception of socioeconomic justice inevitably implicates a baseline for measuring poverty.<sup>61</sup> Further, if “poverty” is the villain, why do the authors demand a minimum standard of living “well beyond what most people would count as the required minimum?”<sup>62</sup> They fail to explain the precise nature of the injustice suffered by those who are above poverty but

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<sup>59</sup> See *supra* note 51 as to the “right” of the least advantaged to obtain assistance.

<sup>60</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 135; see also Kalle Pihlainen, *The Liberalist ‘Esprit analytique’ as a Hindrance to Social Justice*, in LIBERALISM AND SOCIAL JUSTICE 100, 100 (Gideon Calder et al. eds., 2000); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 91-92 (1989). Pihlainen makes the point that rights-talk keeps the focus on legislation to provide equal opportunities and on issues of mediating conflicting claims of right. It shuts out talk of “humanness” and empathy with other human beings. For Rorty, “humiliation” has a more general and deeper meaning than the humiliation of the poor, which is described by Murphy and Nagel. In the Nietzschean sense, each person is a poet who creates a “final vocabulary” or identity for oneself. Rorty acknowledges that, according to the liberal ironist, humiliation comes when the public sphere or other individuals create a different identity for another using their own final vocabularies.

<sup>61</sup> One author overcomes this seemingly insoluble definitional problem by declaring: “Let’s immediately get rid of one standard obstacle to any further such discussion [of ‘need’] by supposing that we are in possession of a canonical conception of ‘need,’ along with a viable metric for identifying its unit-instances and for aggregating their incidence in a population.” Hillel Steiner, *The Ethics of Redistribution*, 68 ACTA PHILOSOPHICA FENNICA 37, 39 (2001).

<sup>62</sup> See *supra* note 56 and accompanying text.  
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below their minimum standard of living.

The foregoing is part and parcel of the authors' failure to flesh out their conception of socioeconomic justice and to grapple with the inevitable issues of implementation. Their routine practice of interchangeably referring to the "poor" and the "least advantaged" is typical of their analytical imprecision.<sup>63</sup>

Likewise, the term "least advantaged" suffers from ambiguity. "Least" can literally mean the very last person in terms of the quantum of advantage or a subset of persons, defined by certain parameters. "Advantage" also necessitates development as a concept. It can be a purely gross or, alternatively, net measurement. It can be computed on an individual or a family unit basis. It can take into account only financial factors or take into account as well other positive attributes and detriments.

Assuming for the moment the synonymy of "poor" and "least advantaged," one can concede as a normative matter that there is some low level of material existence, properly defined as "poverty," that "is bad," as the authors argue, and that "[t]he lives of the poor are hard," without conceding theirs are the only "hard" lives. While the lives of the poor are "often humiliating," others experience humiliation or suffer "hard," desperate lives in different ways.<sup>64</sup> Persons of all socioeconomic classes suffer from debilitating and incurable illnesses and disabilities. Moreover, even if all current ills could be cured, the cost might leave little for future generations. The authors apparently either assume that socioeconomic justice at this point in time is the sole concern, or that, once achieved, it will assure socioeconomic justice well into the future. If the first is the case, certain persons in being are simply being favored at the expense of those to come. If the latter is the case, there is no proof at all offered that socioeconomic justice will be sustainable.

The solution to any humiliations or sufferings involves real wealth

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<sup>63</sup> As noted previously, "poor" does not seem to include the "poorest," those who barely subsist in underdeveloped countries. See *supra* note 35 and accompanying text.

<sup>64</sup> The authors do not make clear what they mean by humiliation and how it would be measured. For example, a more sensitive person might more easily feel humiliated. Should the subjective sensitivities of each poor person be taken into account, or is some objective standard to be applied? If the latter, then whose shall it be, the reasonable well-off person, the reasonable poor person? Would different culturally-specific attitudes need to be taken into account? See *supra* note 60. They also fail to explain why we should care about hard lives and humiliation. *But see supra* note 60.

costs. Yet, if one is to cure or significantly ameliorate all hard lives, humiliations, sufferings, and environmental degradations now and into the future, cost may represent an insuperable constraint. Choices must be made. Proponents of the eradication of any particular humiliation or suffering are likely to make a rational defense for their concern being the principal concern of the collectivity<sup>65</sup> to be eliminated by redistribution.<sup>66</sup>

In this regard, the authors of *The Myth of Ownership* fail to provide an analytically satisfying argument that justifies priority being given to socioeconomic justice, the condition that concerns them most. Rather, they present their argument in an emotionally polemical fashion that may appeal to sympathetic readers, but not to those who may have a different primary concern in a world of limited resources. Even if we are willing to grant a powerful redistributionist role for government, Murphy and Nagel have not made the case for “socioeconomic justice” as the principal redistributionist objective.<sup>67</sup>

The authors write in terms of “[o]ur own sympathies,”<sup>68</sup> but the collectivity might choose to give higher priority now or later to values other than “socioeconomic justice” or even “justice” itself. For instance, the collectivity might conclude that private property, regardless of unequal distribution, is the first priority of society. It might define socioeconomic justice as the preservation of private property rights, or it might define justice per se in this way and assign

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<sup>65</sup> Of course, a rational approach that also comports with political imperatives might be one that was not singular in focus but rather ameliorated a wide assortment of concerns to differing degrees. This is what actually takes place.

<sup>66</sup> History, including the history of moral and political thought, reveals a wide range of redistributive views which variously endorse the attainment of D3 (entitlement according to social status), D4 (entitlement according to productive contribution), D5 (entitlement according to property owners’ choices), D6 (entitlement according to collective agreement), etc.

Steiner, *supra* note 61, at 38.

<sup>67</sup> See MARCEL WISSENBURG, IMPERFECTION AND IMPARTIALITY 22-25 (1999).

<sup>68</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 140. For a similar personalization, see, e.g., Avi-Yonah, *supra* note 15, at 1412, in which Professor Avi-Yonah, after suggesting several other bases for eliminating inequality through severe taxation of the rich, states:

In my view, however, the best argument in favor of taxing the rich is not that inequality may threaten growth, or even threaten revolution. Rather, it is the argument that underlay attempts to tax the rich from the beginnings of the American experiment: that there is something inherently undemocratic in extreme concentrations of wealth and power.

Avi-Yonah, *supra* note 15, at 1412.

“justice” a higher social value than any of the interests reflected in the authors’ use of the term “socioeconomic justice.” Indeed, the authors concede that there are many competing theories of justice.<sup>69</sup> The authors fail to convince that (a) justice is the preeminent concern of a

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<sup>69</sup> Many others have recognized the inability to agree upon a single concept of justice. See, e.g., HANS Kelsen, *What Is Justice?*, in *WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE* 1, 1, 4 (1957). Kelsen states:

No other question has been discussed so passionately; no other question has caused so much precious blood and so many bitter tears to be shed; no other question has been the object of so much intensive thinking by the most illustrious thinkers from Plato to Kant; and yet, this question is today as unanswered as it ever was.

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 [It relates to] which human interests are worthy of being satisfied and, especially, what is their proper order of rank? . . . The problem of values is in the first place the problem of conflicts of values, and this problem cannot be solved by means of rational cognition. The answer to these questions is a judgment of value, determined by emotional factors, and, therefore, subjective in character – valid only for the judging subject, and therefore relative only.

*Id.* at 1, 4; see also ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 1 (1988) (“[U]nderlying this wide diversity of judgments upon particular types of issue are a set of conflicting conceptions of justice, conceptions which are strikingly at odds with one another in a number of ways.”). A similar point is made by Knut Wicksell:

Each attempted solution of our problem will necessarily be coloured more or less by the general social and political philosophy of the writer, by his station in life, and by his personal sympathies and antipathies. . . . Justice from above to below always smacks of condescension or contempt. Justice from below to above has only too often been synonymous with revenge.

Knut Wicksell, *A New Principle of Just Taxation*, in *CLASSICS IN THE THEORY OF PUBLIC FINANCE* 72, 74 (Richard A. Musgrave & Alan T. Peacock eds., 1958). In the same vein, Aristotle states that:

Quarrels and accusations arise, then, when those who are equal possess or are given unequal parts or when those who are unequal possess or are given equal parts. Again, this is clear from what happens with respect to merit. All men agree that what is just in distribution should be according to merit of some sort, but not all men agree as to what that merit should be; those who advocate mob rule assert that this is freedom, oligarchs that it is wealth, others that it is high lineage, and aristocrats that it is virtue.

THE NICOMACHEAN ETHICS 83 (Hippocrates G. Apostle trans., 1975). Thus, a man is unjust when “he takes more than his share,” although the question of what is his share remains. See generally Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL’Y 221, 258 n.186 (1995).

society, (b) social justice is the first order of justice, and (c) their theory of social justice might command more of our respect than any other, even assuming the validity of (a) and (b).<sup>70</sup>

The authors assert: “The real issue of political morality is the extent to which social outcomes are just . . . .”<sup>71</sup> Even granting the primacy of social justice, this comment tells us nothing about which social outcomes are just. The authors’ assumption that social justice necessarily entails redistribution by the state does not necessarily follow a commitment to “social justice.”<sup>72</sup> For example, one may see social justice more as a question of process and impartiality than of defined outcomes.<sup>73</sup> It may involve a moral quality, such as reward based on at least an element of personal entitlement.<sup>74</sup>

Murphy and Nagel recognize that:

The question would become what values we want to uphold and reflect in our collectively enacted system of property rights – how much weight should be given to the alleviation of poverty and the provision of equal chances; how much to ensuring that people reap the rewards and penalties for their efforts or lack thereof; how much to leaving people free of interference in their voluntary interactions. It is not ruled out that the preferred system would be one that denied the state substantial responsibility for combating economic inequality; but that position could not rely on the support of pretax property rights.<sup>75</sup>

Assuming that we are considering a pre-Constitutional regime, the very last clause in the quotation is correct. The quantum of a person’s right to secure private property is a political question, not one that is objectively determined. William Galston has argued: “Justified belief, then, is opinion that has survived the most rigorous

<sup>70</sup> Cf. WISSENBURG, *supra* note 67, at 4-5.

<sup>71</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 131.

<sup>72</sup> See, e.g., the position of the Roman Catholic Church, as set forth in Leo XIII, *Rerum Novarum*, in PROCLAIMING JUSTICE AND PEACE: DOCUMENTS FROM JOHN XXIII TO JOHN PAUL II ¶¶ 43-58 (Michael Walsh & Brian Davies eds., 1991). Social justice may be one of several ways of conceptualizing the question of justice, often phrased as giving one his or her due. See DAVID MILLER, SOCIAL JUSTICE 26 (1976).

<sup>73</sup> See 2 BRIAN BARRY, A TREATISE ON SOCIAL JUSTICE: JUSTICE AS IMPARTIALITY 11 (1995).

<sup>74</sup> Cf. HENRY SIDGWICK, THE PRINCIPLES OF POLITICAL ECONOMY 502-06 (1883).

<sup>75</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 177.  
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process of dialectical testing in contestation with the available contrasting views.”<sup>76</sup> Murphy’s and Nagel’s lack of interest in engaging in serious contestation over the merits of the Constitutionally-protected private property regime versus their own proposal<sup>77</sup> may reflect the conclusion that positions are already too entrenched to make a dialogue worthwhile. Alternatively, their objective may be to enter the stage reserved for public intellectuals to rally the committed, to persuade those tax scholars who are “leaning” their way and may need a not-so-subtle push. While they demonstrate little confidence that a democratically arrived at choice would presently favor their position,<sup>78</sup> they may be inspired, nevertheless, by a desire to provide a philosophical argument that offers intellectual legitimacy for those who some day may lead the political charge against private property in the name of “socioeconomic justice.”

Meanwhile, the authors acknowledge that the current property regime is solidly entrenched<sup>79</sup> and that it is very likely to persist in the foreseeable future because of individual self-interest.<sup>80</sup> Their pessimism is so great that they are prepared to consider a mere expansion of the earned income credit as success for now, notwithstanding their otherwise revolutionary aspirations. At times, *The Myth of Ownership* seems more an auto-response to the authors’

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<sup>76</sup> WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 33 (1991).

<sup>77</sup> This work should be contrasted with their very careful, elegant argumentation over other issues that are insoluble. See, e.g., LIAM MURPHY, MORAL DEMANDS IN NONIDEAL THEORY (2000); THOMAS NAGEL, EQUALITY AND PARTIALITY (1991); THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM (1970).

<sup>78</sup> See, e.g., THE MYTH OF OWNERSHIP, *supra* note 17, at 182 (“On the other hand, while we are sympathetic to more robust egalitarian views that take social responsibility substantially beyond the level of minimal decency, their political prospects seem dim, at least in the short run.”); see also *id.* at 176-77.

<sup>79</sup> In part, they attribute this to a rather superficial, popular media notion of money in politics. See *id.* at 187. They also acknowledge new possibilities with the passage of campaign finance reform. See *id.* at 187-88. A more sophisticated approach to the political process and taxation would concede that more and more persons have been relieved of taxpaying obligations in an effort to buy off the majority. Thus, the situation is one of competing currents – money from the top counterpoised against votes from the bottom and lower-middle class. On the other hand, the authors reveal their complete naïveté in assuming that the campaign finance legislation that has passed will have any more success in drying up money in politics than prior “reform” legislation. The reality is that money in politics is like water – if one path is blocked, it will find another way around.

<sup>80</sup> See, e.g., *id.* at 178 (“Individuals in a capitalist economy pursue their economic self-interest in the market, both as buyers and as sellers of labor and other goods.”).

own overwrought feelings of pessimism, based on their perception of irremedial human proclivities toward “selfishness,” than a serious attempt to make the philosophical or moral case against private entitlement to property and in favor of totalitarian government control.

*D. Rejection of Marxism; Echoes of National Socialism/National Capitalism*

Is the authors’ prescription Marxist? The authors explicitly reject the Marxist concept of equality as having “played itself out, at enormous cost.”<sup>81</sup> The authors are clearly not Marxist themselves. For example, they do not present a historical and social account of the condition of the least-advantaged. They also oppose ownership of the means of production by the state. Nevertheless, they seem quite sympathetic to Hegelian theory, as opposed to Lockean, in their support of a minimum of property for each person to enable an expression of freedom, but without the Lockean opposition to state intervention.<sup>82</sup>

Remarkably, key elements of the authors’ conception are strikingly similar to economic aspects of national socialism/national capitalism of the 1930s, especially the concept of “conditional possession, under which the state, the owner of last resort, reserved to itself the right to interfere with and even confiscate assets which, in its judgment, were unsatisfactorily used.”<sup>83</sup> One need only consider the following statement of the authors: “The state does not own its citizens, nor do they own each other collectively. But individual citizens don’t own anything except through laws that are enacted and enforced by the state.”<sup>84</sup>

While *The Myth of Ownership* does not suggest that the authors are sympathetic to the social or racial goals commonly associated with

<sup>81</sup> *Id.* at 188. In any event, Marx likely would not be sympathetic to any liberal-style social justice theory. Other than one statement in the *Critique of the Gotha Program*, there is no evidence of a liberal conception of social justice. KARL MARX, *Critique of the Gotha Program*, in BASIC WRITINGS ON POLITICS AND PHILOSOPHY 112, 119 (Lewis S. Feuer ed., 1959) (“From each according to his ability, to each according to his needs!”). There could not be one in that there could be no consensus in the context of classes in conflict with no shared values. See generally William Leon McBride, *The Concept of Justice in Marx, Engels, and Others*, 85 ETHICS 204 (1975).

<sup>82</sup> See THE MYTH OF OWNERSHIP, *supra* note 17, at 44-45.

<sup>83</sup> PIPES, *supra* note 2, at 218.

<sup>84</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 176.  
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national socialist/national capitalist ideology,<sup>85</sup> their views on private property are remarkably similar. Thus, one German legal theoretician of the period, Ernst Huber, described the relationship of state and property as follows:

“Property is another essential stance of the national (*völkisch*) regimen. For Marxist and Bolshevik doctrine property was theft, for which reason it was to be eliminated by the ‘transfer of the means of production to society.’ German socialism, the basis of the new constitution, in contrast to Marxist-Bolshevik theory, acknowledges property as a necessary component of the national arrangement of the community. But it rejects no less sharply the corrupt liberal concept of private property. . . . For German socialism . . . all property is common property (*Gemeingut*).”<sup>86</sup>

Instead of acknowledging the totalitarian themes of their proposal, the authors temper their underlying agenda by emphasizing their commitment to the egalitarian social ideal in a way “not intrinsically incompatible with capitalist economic institutions.”<sup>87</sup> They do not reveal, however, precisely how their views in favor of the conditionality of all private property rights square with “capitalist economic institutions,”<sup>88</sup> the hallmark of which is genuine, stable, and enforceable private property entitlements. The authors claim to endorse the social democratic ideal of contemporary Europe and suggest “there is no reason why it should not become part of the everyday moral consensus of Western politics.”<sup>89</sup> Yet, the social democratic ideal of these countries starts with the same constitutional

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<sup>85</sup> In this regard, they are quite distinguishable from political philosophers like Carl Schmitt. See generally JOHN P. MCCORMICK, *CARL SCHMITT’S CRITIQUE OF LIBERALISM* (1997); CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., 1985) (1922).

<sup>86</sup> PIPES, *supra* note 2, at 222 (quoting ERNST HUBER, *VERFASSUNGSRECHT DES GROSSDEUTSCHEN REICHES* 372-73 (2d. ed. 1939)); see also AVRAHAM BARKAI, *NAZI ECONOMICS: IDEOLOGY, THEORY, AND POLICY* 37 (Ruth Hadass-Vashitz trans., 1990).

<sup>87</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 188-89.

<sup>88</sup> See *id.* Of course, the power to terminate private property rights does not precisely equate with their nonrecognition. It is also true that certain restrictions are currently experienced by private-property owners, albeit within a constitutional framework involving procedural and political due process, in which the burden is generally on those who seek to interfere with such rights. The authors’ project will have the effect of reversing that burden. See *supra* text accompanying notes 22-23.

<sup>89</sup> THE MYTH OF OWNERSHIP, *supra* note 17, at 189.

premise as the United States – the protection of private property rights.<sup>90</sup> Indeed, budding social democratic states in eastern and central Europe during the post-Soviet era have struggled to establish credible private property regimes and to assure foreign capitalists and nascent domestic enterprises that the state does not have a prior claim on all of the aggregate wealth within its borders.<sup>91</sup> They have exaggerated the space of the individual primarily as a reaction to and bulwark against a conception of the individual as merely a component of the collectivity.<sup>92</sup>

Of course, if all that the authors are offering is the European social democratic ideal, they are reworking already heavily ploughed ground. They may also be making assumptions about the success of that model that are highly questionable. Western European wealth production per person is only two-thirds that of the United States.<sup>93</sup> The viability of the system in terms of the deliverability of quality of service and its financial stability are in serious doubt. Many, including those who have been directly responsible for their administration, have called into question the very justice of these social welfare

<sup>90</sup> For an analysis of the significance of property under the United States Constitution, see, e.g., JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990). With respect to Germany, see GRUNDGESETZ [GG] [Constitution] art. 14 (F.R.G.). See also Tonya R. Draeger, Comment, *Property As a Fundamental Right in the United States and Germany: A Comparison of Takings Jurisprudence*, 14 *TRANSNAT'L LAW* 363, 400 (2001) (explaining that, although there is a social obligation associated with the fundamental right of private property in Germany, property generally cannot be taken without due process and just compensation). The right to private property is enshrined in France's Declaration of the Rights of Man and of the Citizen of 1789. The right to property is set forth in article 2 of that document. See Louis Henkin, *Rights: Here and There*, 81 *COLUM. L. REV.* 1582, 1590 & n.17 (1981). Article 17 prohibits taking except for "evident public necessity." *Id.* at 1590 & n.18. The Declaration was incorporated into the Constitution of 1958, which is currently in effect. *Id.* at 1594.

<sup>91</sup> See generally Lan Cao, *Chinese Privatization: Between Plan and Market*, 63 *LAW & CONTEMP. PROBS.* 13, 19-20 (2000) (describing the debate surrounding the transfer of property rights in Eastern Europe and Russia).

<sup>92</sup> In considering the deconstruction of the individual during socialism, one commentator has emphasized individuals as autonomous beings *and* as *property owners*. The two traits of autonomy and ownership are closely associated. See, e.g., Hana Havelková, *A Few Prefeminist Thoughts*, in *GENDER POLITICS AND POST-COMMUNISM: REFLECTIONS FROM EASTERN EUROPE AND THE FORMER SOVIET UNION* 62, 66-67 (Nanette Funk & Magda Mueller eds., 1993).

<sup>93</sup> Christian Baumgaertel, *Europe's Wage Costs Lead Companies to Fire at Home, Hire Abroad*, *BLOOMBERG NEWS*, June 18, 2002, LEXIS, Nexis Library, Bloomberg File ("Economic production per person in Europe is two-thirds the U.S. level, the widest gap since the 1960s, a report by the European Commission found.").

states.<sup>94</sup> Recent experience in Europe suggests that the model system has been conducive to the creation of huge gaps in economic well-being and expansive social stratification as immigrants provide cheap labor for the aging citizenry.<sup>95</sup> Social welfare policies only worked well when these societies were homogeneous and producing sufficient offspring to sustain an aging population.<sup>96</sup>

### E. *The Myth of the Government*

*The Myth of Ownership* ought more aptly have been entitled *The Myth of Government*, a comment on the authors' less-than-searching analysis of their own professed preferences. Indeed, the book contains rampant undefined abstractions, of which the "government" is perhaps the most striking example. To accomplish the proposed ends, the "government" is the supposed agent of change. The authors place unflinching faith in the "government," despite their conclusion that the political process, which composes the government, is currently the captive of monied interests.<sup>97</sup> "It" can do what its citizens, apparently out of greed and self-interest, cannot bring themselves to do; however, there is no evidence that the government is distinct from these constituencies and self-interested groups or any more capable of doing what individuals are unable themselves to do.<sup>98</sup> The authors literally do not devote a single sentence to explaining the mystery of how a morally pure, distinct being capable of determining

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<sup>94</sup> See, e.g., FRANK VANDENBROUCKE, *SOCIAL JUSTICE AND INDIVIDUAL ETHICS IN AN OPEN SOCIETY* vii (2001).

The experience of social democrats in the 1980s was that we had to argue and struggle from morning to night to maintain more-or-less just institutions, where they were in place. Admittedly, the European welfare states are far from just societies, but the notion of a virtuous circle [a la Rawls] of stability in societies with just formal institutions nevertheless sits uneasily with our political experience.

*Id.* The author served as Minister for Social Security and Pensions in the Belgian government. *Id.* at viii.

<sup>95</sup> See, e.g., *EU Launches Integration Program for Immigrants*, XINHUA GENERAL NEWS SERVICE, Sept. 10, 2002, at LEXIS, News and Business Library, Xinhua General News Service File; Lou Marano, *Talking Back to Europeans*, UPI, July 15, 2002, LEXIS, Nexis Library, UPI File.

<sup>96</sup> Conditions in the United States have long been comparable to the emerging situation in Europe, foreshadowing considerable conflict in Europe over spoils and no shared conception of social justice.

<sup>97</sup> See *supra* note 79.

<sup>98</sup> Cf. 2 BARRY, *supra* note 73, at 89.

and accomplishing the objective of “socioeconomic justice” can emerge from a democracy comprised of selfish and corrupt private actors.<sup>99</sup> On the other hand, if the government is a distinct being and, thus, not the same “it” that the aggregate of individuals is, then there would be no shared identity justifying a claim to the collectivity’s wealth.<sup>100</sup>

A consequentialist theory, such as the one that the authors propose, is only valuable if the ends are achievable. Yet, a plethora of data and theory demonstrate that “government” is not a reliable agent of change; “government” will not accomplish “its” objectives in the most efficient manner and may even introduce debilitating costs.<sup>101</sup> Few observers doubt that redistribution of worth intended for the “poor” often arrives elsewhere. If the “government” is a moral agent, it is an inept one, serving as the catalyst for problematic inefficiencies. The costs of governmental decisionmaking are inherent in a process that inevitably involves the absence of unanimity, personal loss

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<sup>99</sup> Indeed, the only hope from a nontransformational Madisonian standpoint is to structure the institutions of government and the spheres of society to assure that the passion generated by self-love does not become concentrated in any one fashion. Further, by involving a greater variety of parties and interests, “you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.” THE FEDERALIST NO. 10, at 51 (James Madison) (Clinton Rossiter ed., rev. ed. 1991). The Madisonian vision accepts human beings as they are both in and out of government. Thus, with respect to “[t]he diversity in the faculties of men, from which the rights of property originate, . . . [t]he protection of these faculties is the first object of government.” *Id.* at 46; *see also* J. JUDD OWEN, RELIGION AND THE DEMISE OF LIBERAL RATIONALISM 123-24 (2001).

<sup>100</sup> Even if the government and the collectivity are synonymous, the totalitarian claim of the government still lacks a solid foundation since it ignores the individual’s distinct contribution. *See, e.g., supra* notes 32-34 and accompanying text for an alternative view of the government and the individual in partnership.

<sup>101</sup> For an example, see the examination of the comparative efficiency of government and private responsible parties in Superfund cleanups in Katherine N. Probst, *Evaluating the Impact of Alternative Superfund Financing Schemes*, in ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW 145, 157 (Richard L. Revesz & Richard B. Stewart eds., 1995). Such inefficiencies have long been recognized in the economics literature. *See, e.g.,* W. Mark Crain & Lisa K. Oakley, *The Politics of Infrastructure*, 38 J. L. & ECON. 1 (1995). The consensus regarding inefficiency of government led to the creation of Vice President Al Gore’s Reinventing Government Program. *See generally* AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993). Gore’s program has been criticized on somewhat similar grounds. *See, e.g.,* A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. R. 543, 546-48 (1995); Ronald C. Moe, *The “Reinventing Government” Exercise: Misinterpreting the Problem, Misjudging the Consequences*, 54 PUB. ADMIN. REV. 112 (1994).

functions, inefficiencies of bureaucratic or “expert” decisionmaking, agency costs, and logrolling.<sup>102</sup>

The authors naively cite as one of their primary goals the need for enhancement of “public education” to help eliminate systemic inequalities among children and the subsequent descendants of the least advantaged. They never mention the furious public debate over the alleged widespread failure of public education even as the system receives more funds.<sup>103</sup> They seem startlingly unaware of the controversies swirling around public education, as if trapped in a 1960s “Great Society,”<sup>104</sup> “War on Poverty,”<sup>105</sup> time warp. Indeed, there is absolutely no critical inquiry into the institutional structure, bureaucratic tendencies, political inputs, or modalities relevant to the distribution of this public good by the government. For example, the authors state in a single sentence that “providing adequate public education for all” could reduce unequal advantages among children in terms of familial involvement and genetic inheritances.<sup>106</sup> They do not consider the possibility that, because of a variety of complex factors, the goal they proclaim is, in fact, unattainable.<sup>107</sup>

Although the authors regard the government as a reliable moral agent, they do recognize that government programs do not create the sense of self and opportunity that free choice does. Accordingly, they recommend the use of the tax system to raise revenue for direct cash payments to the least advantaged.<sup>108</sup> This aid could be in the form of

<sup>102</sup> See, e.g., 7 BUCHANAN, *supra* note 23, at 128-31, 186-204.

<sup>103</sup> There are various explanations for the pervasive diversion of funds in public programs funded with tax dollars. See, e.g., *id.* at 201-04.

<sup>104</sup> The Welfare State came into full blossom in the United States during the presidency of Lyndon Johnson, although the notion of de facto equality is traceable to Franklin Roosevelt. See, e.g., Richard A. Epstein, *Imitations of Libertarian Thought*, 15 SOC. PHIL. & POL’Y 412, 420 (1998). President Johnson stated: “[F]reedom is not enough. . . . We seek not just freedom but opportunity . . . not just equality as a right and a theory but equality as a fact and as a result.” HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA* 174 (1990).

<sup>105</sup> Despite the expenditure by all levels of government of more than \$5 trillion to eradicate poverty since the commencement of “The War on Poverty” in 1965, the poverty rate is actually higher today. See, e.g., MICHAEL TANNER, *THE END OF WELFARE: FIGHTING POVERTY IN THE CIVIL SOCIETY* 70 (1996). While the metrics can be disputed and may have even changed over time, the vast expenditure of funds cannot be disputed, nor can the persistence of some degree of poverty. The authors fail to explain how their governmental redistributions would be designed so as to be more effective.

<sup>106</sup> See generally *THE MYTH OF OWNERSHIP*, *supra* note 17, at 158-59.

<sup>107</sup> See *supra* text accompanying notes 101-03.

<sup>108</sup> See *THE MYTH OF OWNERSHIP*, *supra* note 17, at 182-83.

direct government subsidies or indirect ones through negative income taxes along the lines of the earned income credit.<sup>109</sup>

The authors show little concern that either the recipients' own randomly-assigned or acquired attributes or external, arbitrary influences may undermine their emergence from poverty. This lack of concern seems curiously at odds with their earlier preoccupation with the randomness of socioeconomic attributes in the first place and their portrayal of an arbitrary universe in *The Myth of Ownership*.<sup>110</sup>

Assuming the persistence of randomness, simply funneling resources from the better off to the worse off may not achieve the socioeconomic justice that the authors desire. The least advantaged, being the least informed, the most easily manipulated, having the least "success"-generating attributes, and greatest impulse to consume, will likely do so in an inefficient and even destructive manner. Their dependency may persist and even intensify. There is no evidence that they will be prepared to manage their newfound wealth in a fashion that will lead to material security or even higher self-esteem. As the state reduces the cost to individuals of pursuing socially and individually destructive practices, a fundamentally inescapable moral hazard problem arises.<sup>111</sup> Meanwhile, a completely unpredictable resource status will confront other members of society, thereby introducing dramatically higher transaction costs and inefficiencies that could undermine society's and each individual's wealth maximization potential.<sup>112</sup>

<sup>109</sup> The authors consider the earned income credit to have met with "some success." *Id.* at 183. They seem oblivious to the extensive criticism of the program and the exceptional degree of inefficiency associated with it. They also recommend universal health insurance, again giving it a one-line treatment as a necessary part of the "social safety net." *Id.* at 184. Few public policy prescriptions have received more criticism. The experience in Canada and Europe has not been a happy one, since, apart from inefficiencies in the delivery of services, skyrocketing costs have required rationing, or ever increasing individual "contributions."

<sup>110</sup> See *supra* Part II.B.

<sup>111</sup> The ethical dimensions of the dilemma for those favoring "maximally need-sensitive distribution" is examined in Steiner, *supra* note 61, at 40.

<sup>112</sup> See, e.g., Charles Cadwell, *Forward* to MANCUR OLSON, *POWER AND PROSPERITY* vii, vii-viii (2000) (describing Olson's identification of the conditions for economic success as inclusive of "secure and well-defined rights for all to private property and impartial enforcement of contracts"); see Cao, *supra* note 91, at 20 (commenting on the applicability of the Coase theorem to the Eastern European and Russian property-rights regimes). Instability and unpredictability also foster mistrust and lack of cooperation, thereby exacerbating transaction costs through self-interest and "antisocial" behavior. Cf. Karl Hinrichs, *The Impact of German Health Insurance Reforms on Redistribution and the Culture of Solidarity*, 20 J. HEALTH POL., POL'Y & HEINOnline -- 22 Va. Tax Rev. 585 2002-2003



The authors' linkage of material well-being and self-esteem in the case of the least advantaged and their failure to give consideration to this same linkage in universal terms exemplifies the inadequate nature of their analysis. Individuals of greater material means also suffer the loss of the esteem that the authors seem to believe is necessary to prevail over random circumstance.<sup>113</sup> Indeed, the sensitivity to risk, maintenance of status, and loss of esteem may be considerably more intense among those in the higher reaches of society.

Finally, the focus of actual policy prescriptions remains unclear. Will the poorest of the poor receive a direct subsidy first? Arguably, the most advantaged among the least advantaged<sup>114</sup> should receive less than the least advantaged of the least advantaged. On the other hand, if triage is a relevant consideration due to limited resources and demands of political accountability,<sup>115</sup> then it might be advisable to distribute what is available to those *less* least advantaged rather than to those *most* least advantaged, if, indeed, the former offer the greatest promise of success. Deservedness arguably is a factor in the calculus as well.<sup>116</sup> If government projects are also part of the package in addition to direct cash subsidies, then those distributing the cash subsidy to which each least advantaged person is entitled should consider the differential effects of such projects on particular members of the least advantaged class. All this would prove a far more daunting project than the authors admit.

### III. CONCLUSION

The authors of *The Myth of Ownership* are distinguished philosophers. In prior works they have crafted with great delicacy, elegance, and insight arguments in favor of beneficence and equality.<sup>117</sup> In those works, they have gone to great pains to confront head-on the shortcomings of their own arguments, as well as the appeal of contending viewpoints. *The Myth of Ownership* simply fails in these respects.

As Murphy and Nagel powerfully demonstrate, many of the

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L. 653, 656-57 (1995).

<sup>113</sup> See JAMES, *supra* note 43, at 161.

<sup>114</sup> This suggests the importance of criteria for defining the group.

<sup>115</sup> See generally Mikko A. Salo, *Triage in Social Policy*, 68 ACTA PHILOSOPHICA FENNICA 155, 165-67 (2001).

<sup>116</sup> See WISENBERG, *supra* note 67, at 13 (using the term "degrees of reciprocity" to describe morally relevant differences between putative recipients).

<sup>117</sup> See *supra* note 77.

dominant concerns of taxation, such as vertical and horizontal equity and the debate over income versus consumption tax, diminish in importance or even vanish when the focus turns to first principles. The proposed policy solutions, which are the result of so much intellectual effort and discourse, are in a sense beside the point. Thus, a high level of awareness that tax policy cannot and does not advance in a vacuum would serve tax scholars well. To the extent that *The Myth of Ownership* stimulates discussion of the underlying values taxation serves, it will prove a positive contribution, notwithstanding the authors' unfortunate failure to make the case for their own first principles.

The authors are unreconstructed radical egalitarian utopians no matter how many times they deny it. Yes, they really do want to "do good." Aware of the abiding self-interest of individuals, they introduce the reader to a secular savior, an altruistic "government" above the fray, one that can salvage the unfortunate victims of the necessary but harsh marketplace. Although experience has discredited this vision time and again, these authors, being true believers, resurrect it one more time. Uncritically, they present yet another version of the utopian's undaunted faith in the attainment of collective good through massive state interventionism, social engineering, and pervasive oversight – what may be best described as the Myth of Government. A sophisticated inquiry into the relationship between private property and public good, constitutional constraints and political ends, and individual authenticity and collective regulation, would have been a more challenging book to write, but it would have constituted a more valuable and lasting contribution to political philosophy, the debate over redistribution, and the role that taxation should play.

