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THE TAXMAN COMETH

Corwin R. Kruse[†]

The Myth of Ownership: Taxes and Justice. By Liam Murphy & Thomas Nagel. Oxford University Press, 2002. 272 pages. \$25.00.

If you drive a car, I'll tax the street,
If you try to sit, I'll tax your seat.
If you get too cold, I'll tax the heat,
If you take a walk, I'll tax your feet.

Don't ask me what I want it for
If you don't want to pay some more
'Cause I'm the taxman¹

- George Harrison

Nothing is certain, the old saying goes, except death and taxes. Both of these, however, may make their appearance in a variety of ways. As governments grapple with massive looming deficits,² debates rage over the “best” or “fairest” way to structure state³ and national⁴ tax systems.

The Myth of Ownership arose from a seminar on Justice and Tax

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1. THE BEATLES, *Taxman*, on REVOLVER (Capitol Records, 1966).

2. See, e.g., Patricia Lopez, *One Tough Balancing Act; Pawlenty Erases this Year's Deficit; \$4.2 Billion Shortfall Still Lies Ahead*, STAR-TRIBUNE (MINNEAPOLIS), Feb. 8, 2003, at A1.

3. See, e.g., Mark Brunswick, *Heat is on State Aid to Cities: State Auditor Calls for Hefty Cuts in Free Money*, STAR-TRIBUNE (MINNEAPOLIS), Feb. 11, 2003, at A1.

4. See, e.g., *An 'F' on Taxes: Top Economists Pan Bush's Plan*, STAR-TRIBUNE (MINNEAPOLIS), Feb. 16, 2003, at AA4; Sheryl Gay Stolberg, *As Bush Plans 2004 Budget, Parties Haggle over 2003's*, N.Y. TIMES, Jan. 23, 2003, at A17.

Policy given by the authors at NYU Law School in 1998.⁵ In this book Murphy and Nagel draw on a variety of legal, philosophical, and economic sources in an attempt to analyze and inform the arguments on various sides of the discussion over tax policy.

One of the primary criteria by which a tax code is judged is its perceived “fairness.”⁶ Fairness is, however, like beauty, in the eye of the beholder. Much depends on our political ideals, our personal financial situation, and the cultural conventions we take for granted.⁷ For many of us, one of the strongest conventions is the view that property rights are “natural” rather than social constructs. Murphy and Nagel point out that “private property is a legal convention, defined in part by the tax system.”⁸ As a result, any tax system cannot be assessed simply by looking at its *impact on* property rights, but must be evaluated as *part of* the system of property rights it helps to create. It is this theme that runs throughout the book.

The conventional nature of property is both perfectly obvious and remarkably easy to forget. We are all born into an elaborately structured legal system governing the acquisition, exchange, and transmission of property rights, and ownership comes to seem the most natural thing in the world. But the modern economy in which we earn our salaries, own our homes, bank accounts, retirement savings, and personal possessions, and in which we can use our resources to consume or invest would be impossible without the framework provided by government supported by taxes.⁹

Before one can assess the benefits and burdens of any tax system, one must have a baseline against which they can be judged. The tendency to fall into the trap of using pretax income as this baseline is an outcome of the conventional view of private property

5. LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE*, at v (Oxford University Press 2002) [hereinafter *MYTH OF OWNERSHIP*].

6. See, e.g., *Pawlenty Budget; the Pain isn't Widely Shared*, STAR-TRIBUNE (MINNEAPOLIS), Feb. 19, 2003, at A16 (opining that the governor's proposed budget, which hits hardest at the poor and those in central cities or rural areas, does not “square with Minnesota's standard of fairness”).

7. This is the hegemonic power of conventions; they become such an unquestioned part of daily life that we begin to see them as natural. See generally ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., International Publishers 1971).

8. *MYTH OF OWNERSHIP*, *supra* note 5, at 8.

9. *Id.*

as prior to the tax structure. When this occurs, people feel a sense of fundamental entitlement to their income. Thus “politicians can get away with describing tax increases . . . as taking from the people what belongs to them. It is then a short step to the thought that tax cuts give us back ‘our money.’”¹⁰

The fundamental theme underlying *The Myth of Ownership* is that such a view is inexorably flawed. It is based on an unreflective and naive “everyday libertarianism,” which assumes that the market, absent intrusion from government, produces a presumptively legitimate distribution of property rights.¹¹ This, of course, ignores the fact that such property rights are, in large measure, dependent upon government. “[W]e have to evaluate the legitimacy of after-tax income by reference to the legitimacy of the political and economic system that generates it.”¹²

How, then, should the tax burden be distributed. One of the primary elements in judging the legitimacy of a tax system is “equity.” “Everyone agrees that taxation should treat taxpayers equitably, but they don’t agree on what counts as equitable treatment.”¹³ At one end of the spectrum is a strongly progressive income tax system that is based on the notion of “equal sacrifice.”¹⁴ At the other end is a “head tax” in which all taxpayers pay the same amount regardless of income.¹⁵ In between are various forms of consumption taxes, wealth taxes, and “flat”¹⁶ income taxes.

10. *Id.* at 35. This view can be readily seen in letters to the editor. *See, e.g.*, Letter from Corrine Johnson, STAR-TRIBUNE (MINNEAPOLIS), Feb. 22, 2003, at A20 (opining that Local Government Aid “merely increases local government greed for taxpayer’s money”).

11. MYTH OF OWNERSHIP, *supra* note 5, at 15.

12. *Id.* at 33.

13. *Id.* at 13.

14. *Id.* at 24-28. This principle discriminates based upon income; those who earn more, pay more. The goal is to ensure that taxpayers experience the same loss of welfare. *Id.*

15. *Id.* at 13-14. As Murphy and Nagel point out, very few individuals would defend a head tax as the appropriate form of taxation. *Id.* at 14. Some individuals do come close, however. *See* Jason Lewis, *Who has Biggest Tax Burden? The Wealthy.*, STAR-TRIBUNE (MINNEAPOLIS), Mar. 9, 2003, at AA3. Lewis proposes that rather than measuring tax burden by the percent of income paid, “the best measure of the tax burden is the percent of total taxes paid.” *Id.* Lewis points to figures showing that the top ten percent of Minnesota households (as measured by income) pay 38 percent of the total state and local tax burden and implies that the fairest system would be one in which the tax burden was spread evenly across the population: in essence, a head tax. *Id.*

16. “Flat” is typically a misnomer as most flat tax systems contain some type of personal exemption, thus making them at least mildly progressive. MYTH OF

Murphy and Nagel assess the various bases for taxation in light of a theory of distributive justice and suggest that an appropriate metric should include wealth. Wealth contributes to welfare in many ways, including providing a safety net should disaster strike,¹⁷ granting “social standing,”¹⁸ intensifying political power,¹⁹ and enhancing opportunity.²⁰ It is this perspective that leads them to what is likely to be one of the most politically charged sections in their book: the discussion of inheritance.

The repeal of the estate tax²¹ has been a central goal of the Bush administration. The Economic Growth and Tax Relief Reconciliation Act of 2001²² gradually phases out the estate tax completely by 2010. The tax will return in 2011, however, unless additional legislation is passed making the repeal permanent.²³

As is often the case when discussing taxes, the public debate revolved around fairness. When asked why he was pushing for repeal, candidate Bush responded, “I just don’t think it’s fair to tax people’s assets twice regardless of your status. It’s a fairness issue. It’s an issue of principle, not politics.”²⁴ As Murphy and Nagel point out, however, multiple taxes often tax assets twice, “as when a sales tax is imposed on the expenditure of someone’s after-tax income, or a property tax is collected on an asset that was bought with income subject to tax.”²⁵ Furthermore, they assert that the real issue of fairness involves calculations of economic justice.

Accordingly, the call to eliminate the estate tax is rejected as “an egregious injustice.”²⁶ “It would mean that the person who works, gives up leisure, and contributes to economic life must share in society’s collective burdens, while the person who gains a windfall without doing anything need not.”²⁷ Even more

OWNERSHIP, *supra* note 5, at 100.

17. *Id.* at 114.

18. *Id.* at 115.

19. *Id.*

20. *Id.* at 120-21.

21. It is often disingenuously and misleadingly called the “death” tax by its opponents.

22. Pub. L. 107-16.

23. MYTH OF OWNERSHIP, *supra* note 5, at 142-43.

24. Presidential Debate, Washington University, St. Louis, Oct. 17, 2000, *quoted in* MYTH OF OWNERSHIP, *supra* note 5, at 143.

25. MYTH OF OWNERSHIP, *supra* note 5, at 143. They also note that there is no prohibition on “double jeopardy” in taxation. *Id.*

26. *Id.* at 159.

27. *Id.* at 147.

problematic, in their view, is the “stepping up” of the tax basis of bequeathed assets to current market value for purposes of the donee’s capital gains tax liability. “This results in complete tax forgiveness for any capital gains accrued during the decedent’s lifetime” and unrealized at death, a state of affairs they describe as an “outrage.”²⁸

There is a danger that such sentiments will lead those who feel differently to simply dismiss this book. This would be unfortunate. Murphy and Nagel are straightforward about their preferences. Nonetheless, they present a stimulating, well-reasoned, and generally even-handed treatment of various schools of thought.

The Myth of Ownership, while not perfect, should be read by all who wish to enter the discussion regarding taxes. Doing so might help raise the intellectual tenor of the debate. Readers may certainly take issue with some of the points made by Murphy and Nagel. They may argue over the optimal distribution of income, the appropriate metric(s) for the tax base, and the priorities of government. This is to be expected; intelligent people often disagree. In debating the tax system, however, one basic point raised by the authors should be kept in mind:

There is no market without government and no government without taxes; and what type of market there is depends on laws and policy decisions that government must make. In the absence of a legal system supported by taxes, there couldn’t be money, banks, corporations, stock exchanges, patents, or a modern market economy – none of the institutions that make possible the existence of almost all contemporary forms of income and wealth.²⁹

28. *Id.* at 159-60.

29. *Id.* at 32.