

# Author's Response to the Commentators

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I am grateful to the commentators for their criticisms and comments. It is particularly good to have the benefit of comments from distinguished representatives of the three disciplines with which *The Myth of Ownership* engages — economics, law, and philosophy.

## Reply to Geoffrey Brennan

At a couple of points, Geoffrey Brennan suggests that the argument against the moral relevance of pretax income and thus traditional criteria of vertical and horizontal equity is not just mistaken; if my coauthor and I wish to weaken the grip of libertarian thinking on tax policy, we have also made a tactical error in making such strong claims. Judging from the reaction from the right in the United States, Brennan is on to something here. Libertarians have received the book eagerly, happy to have the chance to say that they have been proven right, that here are a pair of liberal professors actually saying that none of us has any rights, to our property or anything else, and so the government can do whatever it likes.<sup>1</sup> Such distortions of the book's argument may have some traction, given the tenacious grip on all of us of the ideas we argue against. The last chapter of *The Myth of Ownership* is devoted to the question of what politically feasible results might be drawn from the argument of the book. As we there write:

Pure reflection on what would be just has its place in the discussion of public policy and is the main task of moral and political philosophy. But it is a long way from the description of such an ideal to its enactment or even influence; and if the ideal involves criticism of ingrained conceptions so unconscious that they seem natural, the obstacles are formidable.<sup>2</sup>

The central ambition of *The Myth of Ownership* is not, as Brennan takes it, to argue against the radical libertarian proposition that taxation is theft. Like Brennan, the book treats that as an extreme view with little

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<sup>1</sup> See, eg, Stephen Moore, 'In Their Own Words', *National Review Online*, 23 April 2002 <<http://www.nationalreview.com/moore/moore042302.asp>> at 9 April 2005; and Richard Epstein, 'Myth-Making on Taxes' (2002) 54(12) *National Review* 49.

<sup>2</sup> Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (2002) 173.

importance in contemporary politics. Rather, the ingrained conception we are concerned with is the everyday libertarian proposition that people are *prima facie* entitled to their pretax incomes and that, therefore, while taxation is not theft, just taxation must satisfy some criterion of fair distribution as measured against that baseline.

Brennan seems to be an everyday libertarian, and one of a more classical bent than we contemplate in the book, since he associates a claim to individual income with liberty. I am not sure what the basis of his commitment to this conception is, though some of what he writes seems to attribute normative significance to status quo arrangements. He also seems to think that philosophical discussion of distributive justice is somehow in tension with democracy. He writes that

individuals have two sets of claims — those embodied in their individual incomes; and those embodied jointly in the collective capacity to tax and spend through the fisc and the right to have a say in what level those taxes and spending arrangements should be.<sup>3</sup>

I have no argument at all with the second claim and am puzzled that Brennan finds it necessary to remind us in this context that most people would find it outrageous if they were deprived of their democratic right to a stake in collective decisions on fiscal matters. But the first claim seems to be just a denial of our main thesis, that pretax income has no relevance to the theory of economic justice, taxation included; the argument for this thesis is summarized in my Introduction.

It is not part of that argument that the convention (as the book assumes it to be) of property rights only makes sense if it is ‘protected by the power of the state’.<sup>4</sup> There can be, and are, conventional normative practices that are not protected by the power of the state; this is largely the case for etiquette, for example, and is also the case for property in societies that lack formal institutional structures backed by centralized coercive force. The argument, for societies in which there is a state, is that without the state, and therefore taxation, we wouldn’t have the pretax incomes we do, and so it makes no sense at all to use pretax income as the baseline for thinking about just taxation.

Brennan puts pressure on this position by paraphrasing it in this way: ‘What [an individual] can legitimately lay claim to is, well, whatever the law says she can lay claim to.’<sup>5</sup> This is right in one sense, since the book assumes that there are no moral property rights to which the legal rules of property ought to conform. But it is misleading insofar as it suggests that

<sup>3</sup> Geoffrey Brennan, ‘The Myth of Ownership’ (2005) 30 *Australian Journal of Legal Philosophy* 129, 130.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

there can be no moral ground for criticizing the way in which any particular legal system allocates claims, since the main burden of the book is to show the full range of values that bear on the moral evaluation of our major legal and economic institutions, taxation included. Nothing could be further from the spirit of the book than the idea that whatever the government does, through law, in the realm of property and economics, is by definition just.

It is also somewhat misleading to attribute to the book the idea that 'justice is entirely a matter of the distributional bottom line'.<sup>6</sup> This suggests that we assume that a just distribution of welfare can only be a matter of how well-off people are, absolutely and relatively. But this is not entailed by the rejection of the relevance of pretax income to justice in economic policy. The weight of values such as liberty and responsibility are appropriately part of the discussion of justice and though Thomas Nagel and I would not give the value of responsibility as much weight as some other philosophers, that is a disagreement that our arguments against everyday libertarianism do not touch. (I say more about this point in my response to Robert Young).

Brennan confronts the view presented in the book with an apparently absurd result: Nagel and I should have no complaint if the taxation administration switched our net salaries. Brennan uses this example to show that while public finance economists have, in his view, been too preoccupied with vertical and horizontal equity, that doesn't mean that there is nothing to these concerns. I am afraid I cannot take this example very seriously, since there are several reasons why this kind of individualized and abrupt resetting of after-tax incomes would obviously be a bad thing. There is the value of reasonable expectations; and the fact that since it is hard to see what the case for salary switching at the level of individuals could possibly be, the motive for it suspect and likely, if known, to show it to be unjustified. Brennan writes that 'arbitrary taxation even if well-motivated remains arbitrary.' I do not understand this claim, since if there is a good reason for the salary switch, it is not arbitrary. I think the main force of his example comes from the fact that it is so hard, in this case, to imagine a good reason for individualized adjustments of this kind.

All that being said, Brennan is right that in our view there is no significance at all to 'the relation between an individual's final level of well-being and the taxes imposed on her to secure that final level.'<sup>7</sup> It follows that there is no direct moral case against an ongoing legal-economic regime, which makes no use of proper names, but in which some people's relative standings in gross income are reversed in net income. (Some have argued that a ban on such inversions of relative standing is an implication of

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid 131.

the norm of horizontal equity). If that is the output of a well-designed (just and efficient) set of institutions, and no one's reasonable expectations have been interfered with during the introduction of the system, then there is absolutely nothing wrong with it.

## Reply to Miranda Stewart

I am grateful for the compelling way in which Miranda Stewart expresses her sympathy with our overall argument, and for her generous remarks about its importance in contemporary politics. And I think that she is right to sound a cautious note about the role of efficiency considerations in arguments about economic justice. I agree with her that once legal scholars get the economics bug, there is a tendency for apparently less 'scientific' considerations, *also* relevant to distributive justice, such as equity, liberty, responsibility, and opportunity, to get left by the wayside. The attack on the traditional approach to justice in taxation that we make has been made before, primarily by economists; one main aim of the book is to bring out the importance of the full range of political values relevant to justice in taxation once we give up on simplistic and incoherent criteria for the fair distribution of burdens. Nagel and I also agree that it is very important to distinguish between the claims made by economic theorists about incentives and the results of empirical studies; we focus on the latter in our discussion of the economics literature, and the results so far support Stewart's scepticism.

Stewart writes that we do give due recognition to the range of tax discrimination arguments that should be taken seriously. We had not read the work by Claire Young she cites that shows that (in Canada) 'women own fewer valuable investment assets and derive fewer and smaller capital gains than men.'<sup>8</sup> Assuming that this is so, and assuming also that there are no compensating inequalities in income earned (certainly so), this does mean that our discussion of the favourable tax treatment of capital gains is incomplete. It will remain true that there is nothing objectionable in the mere fact that one kind of income is taxed differently than another, and that what matters in an evaluation of this practice is the overall effect in terms of efficiency and the other political values relevant to economic justice. One such value is status equality. In our view, any degree of inequality, even purely financial inequality, along sexual or racial (etc) lines, is bad from the point of view of political morality. The value of sexual equality does not trump all other considerations, but it must always be taken into account in assessing the justice of an overall economic scheme. And so if abolishing

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<sup>8</sup> Miranda Stewart, 'Taxes and Justice in Context' (2005) 30 *Australian Journal of Legal Philosophy* 133, 138.

the favourable tax treatment of capital gains would reduce sexual inequality, that is a reason to do it.

Possibly Stewart is right that such systemic questions as the choice of tax base will raise issues of tax discrimination as well. But it does always have to be remembered (as Stewart does) that tax is just one part of the overall economic system. To stick with the example she uses, if it were the case that the favourable tax treatment of capital gains was sufficiently superior in efficiency terms that more could be done about sexual economic inequality by leaving that preference in place and using the resources thus freed up to promote sexual equality through other institutional means, it would be wrong to oppose such a scheme for the reason that the favourable tax treatment of capital gains is *in itself* discriminatory.

The only thing to cavil at in Stewart's discussion of tax discrimination is her suggestion that we give the notion of tax expenditures some special normative significance. We use that term merely as the accepted shorthand for the kind of targeted tax break discussed in the section she refers to. And we agree that 'tax expenditures too must be considered in light of the overall distribution of resources through governmental systems'<sup>9</sup> as our discussion of cigarette taxes and the favourable tax treatment of housing brings out.<sup>10</sup>

Stewart observes that many countries that she (and Nagel and I) would count as economically more just than the United States diverge from the specific tax policies we favour in the book. This is not surprising, given that imperfect ways of alleviating poverty are better than almost none at all. But Stewart's point is that different specific tax policies may have different effects, in ways relevant to distributive justice, in different social and economic contexts. As a general proposition, this is surely right, though some of our arguments do seem to have universal application. I will not here discuss each of the specific policies listed, but, to take one example, it does seem to follow from our argument for the inclusion of (large) gratuitous transfers in the income tax base of recipients that, all things being equal, any particular country would take a step towards greater distributive justice if it adopted this rule. This is just because the exclusion of gratuitous transfers from recipients' income means that the system as a whole underestimates the welfare of recipients. (We do not, incidentally, claim that an accessions tax is 'needed'. We argue against the claim there is a direct moral case, grounded in the value of equality of opportunity, for such a tax and conclude that its desirability should be assessed on efficiency grounds alone.)

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<sup>9</sup> Ibid 137.

<sup>10</sup> Murphy and Nagel, above n 2, 165–6.

Stewart's final comment raises important comparative institutional concerns that, I agree, show that in some contexts the design of the tax scheme, considered on its own (in isolation from other economic and legal institutions), will appropriately be the primary focus of reformers concerned about distributive justice. As a theoretical matter, this is, as we say, myopic and unjustified, but it may make practical sense in certain special circumstances, for the reasons Stewart gives. But she is wrong, I think, to say that this will give meaning to the notion of a *fair* tax in those contexts, since, as she herself appears to agree, the only thing that can be fair or unfair here are the outcomes of the economic system. To say that a progressive tax is fairer will always suggest that what's fair is that higher earners pay more, full stop. Which doesn't make any sense at all.

## Reply to Robert Young

Robert Young's penetrating critique of the argument of *The Myth of Ownership* as it relates to the issues of desert and responsibility reveals some unclarity in our exposition. For we do not contend that it is incoherent

to hold that, other things being equal, if A and B expend quite different amounts of effort on a productive task, and A produces more that is beneficial than B, that A deserves to have more of the property produced than does B.<sup>11</sup>

If we did, and did so on the basis of our argument against the traditional approach to tax policy and the everyday libertarianism that underlies it, Young would be right to complain. For it is clear that the rejection of the moral significance of pretax income does leave space for theories of economic justice that tie just distributions of post tax income and wealth to desert, choice, effort, contribution, and responsibility.

The insistence that justice in taxation is a matter of the justice of the effects, or outputs, of the overall economic system, and not of the distribution of tax burdens measured against pretax incomes, does not mean that all that can be relevant to distributive justice are absolute and relative levels of welfare. One important output of the overall legal and economic system could be, for example, the extent to which people who are more productive end up with more income and wealth.

(But doesn't the insistence on the moral irrelevance of pretax income in effect rule out this approach to distributive justice? For even if nobody can be entitled to *all* of her pretax income, aren't pretax incomes nonetheless precisely a ranking of people in terms of productive input? No,

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<sup>11</sup> Robert Young, 'Everyday Libertarianism, Consequentialism and Income Tax' (2005) 30 *Australian Journal of Legal Philosophy* 143, 144.

they are not, as Young clearly would agree, for the obvious reason that the market does not reward only productive effort, but also inherited capital, and other kinds of luck.)

The book has two main strands of argument: First, a negative argument against the traditional approach to tax justice, and second, once that is out of the way, a discussion on the merits of different theories of distributive justice and their application to issues in tax policy. Young's statement that we hold that it is *incoherent* for an economic system to tie rewards to effort must be due to his running together these two discussions.

For it is true that when we discuss theories of distributive justice, we express scepticism about granting a very significant role to considerations of desert and responsibility. We do not have the space to defend our positions on distributive justice at great length; rather, in chapter three, we outline the main possibilities and indicate in summary form some considerations that lead us in one direction or another (where we agree). Thus we write that giving a place to desert seems to moralize the theory of economic justice excessively. After all, if people deserve to do better because they try harder, why should they not also do better because they are morally more virtuous in other ways?

Responsibility is a different matter. It would be obnoxious for an economic system to entirely decouple economic outcomes from the choices people make. Not because choices indicate what people deserve, but because such a system would deny people an important source of control over their lives. We identify the underlying value here as that of individual liberty and self-determination.<sup>12</sup> That value can be given its proper weight in a system that does not make outcomes entirely each individual's responsibility, but rather recognizes that we all, also, have responsibility for each other. Young rightly notes that in chapter three we do not consider positions intermediate between our rather easy-going attitude, that demands *some* link between choice and outcome, and the extreme view that denies responsibility for each other. However we do discuss such an intermediate position — specifically, the view that inequalities in outcome are just if and only if they are due to factors over which individuals have control — when evaluating my late colleague David Bradford's argument for the consumption tax in chapter five. That discussion does not add much substantive moral defence for our more minimal approach. But it does elaborate some of the pragmatic problems with the 'luck egalitarian' kind of view, justifying Rawls's claim that it is very hard to see how a principle of justice that demands such discrimination could be put into effect. But overall, our discussion of desert or responsibility in distributive justice is deliberately brief, and certainly not offered as doing justice to the topic.

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<sup>12</sup> See Murphy and Nagel, above n 2, 62–3.

A final point. It is gratifying, given some of the things that have been written about *The Myth of Ownership*, to see Young complain that its upshot is rather conservative. He is certainly right that we care not at all about massive pretax differentials in income. But it is not quite right to say that we are 'prepared to accept massive post tax differentials as well (provided there is a decent social minimum safety net in place)'.<sup>13</sup> We do favourably discuss that minimally egalitarian view in chapter nine, but that is a chapter devoted to realistic political goals and in the current climate in the United States, even the social minimum view can seem Utopian. As a matter of ideals, both Nagel and I support positions more egalitarian than that, though our views are not the same.

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<sup>13</sup> Young, above n 11, 146.