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## COMMENTS: INDIVIDUAL VERSUS COLLECTIVE RESPONSIBILITY

*Thomas Nagel\**

Anne Alstott and Robert Cooter both address a question that is at the center of Rawls's concerns about moral and social theory—a topic that also arose prominently in the earlier panels on Gender and on Tort—the division between private and public responsibility in the design of a just social order. They raise the question in two different domains—child or dependent care and economic redistribution—and their responses tend in opposite directions. Alstott favors an increase in public responsibility for what is nevertheless an aspect of private life,<sup>1</sup> while Cooter favors an increase of personal responsibility for what Rawls thinks of as a demand on the design of economic institutions.<sup>2</sup>

Alstott's "Caretaker Resource Accounts" would have some redistributive effect, both because they would distribute from the childless to those with children, and because, though not allocated on basis of need, they would presumably be financed out of progressive taxes. But the aim of the program would not be distributive justice in the usual sense. As she says, the aim is to rectify to some extent the inequalities in autonomy that arise from the special obligations of caretakers.<sup>3</sup> While individuals incur these obligations by having children, they are in a sense also society's obligations, assigned to the individuals naturally placed to fulfill them.

Every society has an obligation, as well as reasons of collective self-interest, to provide a decent start in life for those born into it. The natural placement of the major burden of carrying out this obligation on private action by particular individuals creates a deep structural inequality of autonomy and opportunity in the society. From a liberal egalitarian point of view, such inequality must be ameliorated, but this cannot be done by turning child-care into a public institution. Caretaker Resource Accounts would attempt to lessen this inequality, while leaving the private institution of the family intact.

What is the relation of this proposal to the conception of social

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1. See Anne L. Alstott, *What Does a Fair Society Owe Children—And Their Parents?*, 72 *Fordham L. Rev.* 1941, 1963-65 (2004).

2. See Robert D. Cooter, *The Donation Registry*, 72 *Fordham L. Rev.* 1981, 1984-85 (2004).

3. Alstott, *supra* note 1, at 1976.

justice found in Rawls's writings? The answer is not straightforward, because Rawls always emphasizes that the main target of evaluation for his principles of justice is the basic structure of society, which determines the ex ante allocation of opportunities and expectations at birth.<sup>4</sup> If the basic structure is fair, then inequalities arising through the free exercise of their autonomy by individuals living out their lives inside that structure are not objectionable from the standpoint of justice.

It is therefore important, in interpreting Rawls's conception, to decide what is part of the basic structure and what is not. The delicacy of the distinction is particularly evident in relation to the family and its effects. Rawls holds that the prevailing structures of family life are part of the basic structure of society, and that the socio-economic class stratification that results from the transmission of material and cultural capital along family lines is one of the most important forms of inequality that has to be brought into conformity with principles of justice, through public policies.<sup>5</sup> But he does not believe that individual conduct against the background of those institutions is to be governed by the same egalitarian principles.<sup>6</sup>

The deep inequality that concerns Alstott regarding child or dependent care is not like the inequalities of class, which are present at birth.<sup>7</sup> Nor is it exactly like the inequalities of sex, also present at birth in every society in which the opportunities and expectations of women are systematically less than those of men.<sup>8</sup> While it is an inequality whose burden falls disproportionately on women, it appears, contingently, in the lives of persons of both sexes and in every class in virtue of their becoming the primary caretaker of a child.<sup>9</sup> In that sense it is part of the possibilities at birth for everyone.

If we nevertheless regard child and dependent care as the kind of burden that has to be ironed out on grounds of justice, I suggest this is for one or a combination of the following three reasons:

- (a) Child and dependent care falls as a matter of social fact disproportionately on women, and therefore casts its shadow back overwhelmingly on the ex ante life prospects of women from birth.
- (b) It is an uncompensated selective assignment to a subset of the citizenry of a public obligation, and therefore a violation of the presumption of equal liberty.

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4. John Rawls, *A Theory of Justice* 6-7 (rev. ed. 1999).

5. *Id.* at 62-64.

6. *Id.* at 277.

7. See Alstott, *supra* note 1.

8. See *id.* at 1978.

9. See *id.* at 1964.

- (c) Some inequalities that result from contingent choices or the accidents of life are just as much the concern of justice as inequalities in the basic structure of society.

I would opt for the first two reasons, but it may be that Alstott would appeal to the third as well. My inclination is to believe that since many inequalities that result from choice or accident are not matters of justice, the identification of those which are will end up taking us back to the first two reasons: Some choices are predominantly expected of women, and they thereby carry the lion's share of an autonomy-restricting burden that fulfills an obligation of the society as a whole.

At any rate, I think Alstott is right to propose the use of monetary transfers to counter deep inequalities of autonomy and expectations that are created by the customary patterns of sexual and family relations,<sup>10</sup> aspects of the basic structure that cannot realistically be reconstructed by publicly mandated institutional reform.

Robert Cooter's proposal to shift more of the work of redistribution into private hands through public encouragement and publicity seems to be intended as a partial alternative to Rawls's conception of distributive justice.<sup>11</sup> In Rawls's view, distributive justice should be realized as far as possible through the creation of property entitlements by the economic system, including taxes. Once that goal is achieved, what people have is theirs to spend as they wish, and they are not being unjust if they spend it in ways that reflect no distributive ideal.

Of course if the economic and fiscal system is not just, individuals who have benefited economically through it are in a different position, and probably have an obligation deriving from justice to engage in some compensatory charity. But I believe this is not the only point Cooter is making. He thinks, I take it, that a system which leaves a good deal of the redistributive job to free individual choice—with public encouragement—will be not only more efficient than one that works by the definition of property rights, but also morally superior.<sup>12</sup>

I am doubtful. There seems to me a big difference between charity that combats socio-economic injustice by helping the poor, and charity that supports special religious, social, cultural, or natural goods that individuals may care about though it is not required by justice. Of course in a society in which the state will not or cannot achieve justice, the first kind of charity is more important. But the second kind is much more appropriate as a project of private action. Ideally, public policy would ensure distributive justice and fair equality of

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10. See Alstott, *supra* note 1, at 1964.

11. Cooter, *supra* note 2.

12. *Id.* at 1988-89.

opportunity, and individual charity would be able to concentrate on special, optional goods, using the resources that individuals legitimately hold under a fair system of private property acquisition.

Justice should be a matter of entitlement, not charity, and securing justice through legal shaping of the mechanisms by which private property is created and transmitted should be our ideal. Cooter may be saying merely that this is utopian, as things are at present, and he may be right. But if so, then a second-best arrangement relying on private charity would probably have to do more to steer contributions toward the needy instead of toward the cultural and educational institutions, estimable though they are, that now receive so much support.

Encouraging contributions with a fixed-percentage tax credit rather than a tax deduction might lead to a rise in contributions by less affluent people, against the background of progressive marginal tax rates—and that might lead to support for more basic benefits. But I don't know whether there is any empirical reason to think this—perhaps it would just lead to more support for religion.

The sharp moral distinction between individual and collective responsibility is a notable and controversial feature of Rawls's liberal outlook. It is at the heart of his defense of a liberal egalitarian market system, in which individuals have free disposition over their private property, but the distribution of private property is strongly shaped and legally defined by the tax and transfer system. Such a view is always under pressure from opposite directions. Some critics think the property regime should be less affected by considerations of collective responsibility.<sup>13</sup> Others think individuals should bear more responsibility to serve the same ends of justice that are demanded of collective institutions.<sup>14</sup> Many people find the sharp distinction paradoxical, since it implies a division of public and private attitudes within each citizen.

The conventionality of property, a fundamental part of Rawls's outlook, is a premise of *The Myth of Ownership*.<sup>15</sup> Though rights of private property are a fundamental part of individual liberty, they are included in, but do not themselves determine, the procedural definition of property, which in turn determines what it is that each person has those rights to. That definition is itself based largely on standards of justice and the general welfare, rather than on pre-

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13. See generally Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

14. See, e.g., G.A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* (2000); see also Liam B. Murphy, *Institutions and the Demands of Justice*, 27 *Phil. & Pub. Aff.* 251-91 (1998).

15. Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (2002).

institutional rights.

This means, as Linda Sugin observes, that the justice of taxes, which are part of the definition of property, has to be determined not by deontological standards applied to the distribution of tax burdens taken in isolation, but by their contribution to the justice of the socio-economic system as a whole.<sup>16</sup> The evaluation of tax policy therefore depends on empirical estimates of its consequences.

We see the role of conflicting empirical predictions in the arguments over the Bush tax cuts. To argue against them even on egalitarian grounds it is not enough to point out that they are mostly going to the rich; one also has to contest the claims made for their superior indirect effects on prosperity and employment. But we can also use Rawls's way of thinking about property to attack bad non-empirical arguments for certain tax policies—for abolition of the estate tax and the tax on dividends, for example, on the ground that they constitute double taxation—or the general hostility to taxes on the ground that it's *your money* and the government is taking it away from you.

Sugin brings up one way that taxes might be judged by their immediate rather than their broader economic effect: the use of taxes to inhibit the formation of vast inequalities of wealth on the ground not of distributive justice, but of the destructive effect of economic power on political equality.<sup>17</sup> This is an important issue: Do we want to use tax policy to put a brake on large accumulations of wealth and their dynastic transmission—either to preserve political equality or to moderate the hereditary class structure? It was Rawls's view that great extremes of wealth as the social norm are essentially undemocratic. Even though some billionaires have democratic sympathies, I believe that the clearest case for a tax policy directly supported by Rawls's conception of justice is that the estate tax should not be eliminated.

The topic of our conference is Rawls and the Law, but the discussion we have had in this panel on Property, Taxation, and Distributive Justice shows how far the reality of law is from Rawls's ideals. The concern for social justice seems to have almost disappeared from the nation's political discourse, and instead we are facing a concerted attempt by the present administration to eliminate all fiscal barriers to the growth of economic inequality.

Rawls himself did not seek or expect to produce an immediate political impact through his work; he was content to hope that his ideas might have an indirect effect over the long term—the usual case

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16. See Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands From Tax Systems*, 72 *Fordham L. Rev.* 1991, 1992-93 (2004).

17. *Id.* at 2009-10.

with philosophy, if it has any effect at all. Still, when academics talk to one another about justice as we have on this occasion, it is sobering to think how utopian these philosophical ideals seem in comparison with the intellectual disgrace in the world around us.