Introduction

Tax needs help.

Taxation is a strangely undertheorized subject despite its social and economic importance. Taxes take up a third or more of the Gross Domestic Product (GDP) in all advanced democracies today, and have far-reaching effects on matters such as work, savings, education, charity, home-ownership, family structure, and more. Yet first principles of taxation are subjected to little by way of philosophical reflection, either in the popular political culture or inside the academy. Economists have developed an elaborate mathematical theory, of optimum income taxation (discussed in passing in Kirk Stark’s essay in this volume), but its principal result—to tax people in inverse relation to the elasticity of their labor supply—has not generally translated into a philosophy of tax. Meantime much of the jurisprudence of tax has been locked in a fierce but seemingly effete and perhaps archaic battle between libertarian opponents of all taxation, sometimes, or of all redistributive taxes, other times, and everyone else.

It is thus not surprising both that actual tax systems are a mishmash—we observe different and often conflicting taxes (income, payroll, sales, property, business, wealth, wealth transfer, excise, and on and on), resting on different and conflicting (if any) principles—and that the whole edifice seems to blow in the wind, constantly the talk of “fundamental overhaul”. We sit now in the United States, for example, yet again considering a round of “comprehensive tax reform” without a scholarly consensus, few generally accepted principles, or even any principle, to guide us. Taxation, in Dworkinian terms, seems to be a matter of base policy, not principle—or, perhaps better put, a matter of sausage, from the saying attributed to Bismarck.

All this is unfortunate, and it need not be so. It has not always been so. There once was a time when a tradition of political philosophy cum economics flourished, and great thinkers, in devoting themselves to the reasons for and structure of the appropriate or just state, added in fairly comprehensive discussions of tax, to boot. One can find reasonably thorough discussions of tax—of the reasons for it, and what these say about the structures instituting it—in the writings of Hobbes, Locke, Hume, Smith, and Mill. Of course such luminaries were writing in simpler times—and not only by way of standards for academic publication and tenure. Taxes were low in those days of yore, and the living, for a philosopher of tax, was easy: Mill and Smith were thinking of taxes at rates of five percent or so, the kind of thing at the time that revolutions could be made of. In the U.S.A., total federal government receipts were 4.2 percent of GDP as late as 1930, and that was money enough to finance a tidy budget surplus (Daniel Shaviro’s essay illustrates how far we have come, or fallen, in such regard). At the dawn of World War II, in 1940, the nascent payroll tax system, imposed at the flat rate of 2 percent of wages (employee plus employee “contributions” combined), was by far the largest federal tax, more than doubling the yield of the income tax.

Tempora mutantur. Federal taxes in America have gone up nearly fivefold, as a percent of GDP, since 1930; taxes at the sub-national level have grown even more rapidly, to where the total tax burden, as mentioned above, is nearly one-third of
annual economic output. Even so, the U.S. ranks towards the bottom of total tax burdens among the major capitalist economies today. In the post-War era, marginal tax rates under the U.S. personal income tax alone persisted at 90 percent for some time and even now, across certain ranges of income (often middle lower ranges, because of the phaseouts of benefits tied to income levels), cumulative tax rates can approach and even exceed 100 percent. If hard cases make for bad law, high taxes at best make for confusing tax policy.

Amidst all this expansion in the scope and scale of tax systems, where have all the philosophers gone? After all, distributive justice is about burdens too. Perhaps dazzled, dizzied, and dismayed by phenomena inconceivable to Hobbes and company, they have often checked out, leaving the details to devils. John Rawls offered only a smattering of observations about taxes in his major work, *A Theory of Justice* (Kirk Stark’s essay has helpful references to Rawls’s thoughts on tax). And the later *Political Liberalism* makes no mention of the subject at all. True story: I had the pleasure of meeting Rawls at a conference on the occasion of the 25th birthday of *A Theory of Justice*. Tim Scanlon, Rawls’s longtime colleague and a friend of mine, introduced me to the great thinker, noting that I was working out ideas of political philosophy and tax. On hearing the word “tax,” Rawls, a gentle and genteel man, recoiled, clutching his head in horror. “Taxes!,” he cried out, “I hate taxes. Give me a headache. I leave all that stuff to my wife.” Indeed.

The academic tax community thus welcomed the publication, a few years back, of *The Myth of Ownership: Taxes and Justice*, by the moral philosophers Liam Murphy and Thomas Nagel, a work that features prominently in the pages below. So, too, do the libertarian philosophies, of Locke and Nozick and others, whom the two authors take as their principal foil. From Murphy & Nagel and their respondents, to the very fact of this Special Issue of the *Canadian Journal of Law & Jurisprudence*, there is at long last some hope for better and deeper philosophical reflection about the great socio-economic institution of tax. It’s about time.

This issue begins with three contributions clustered around the libertarian theme. The first essay comes from the distinguished libertarian scholar Richard Epstein, here to remind us that he is not opposed to all taxation, and that his fellow libertarian travelers, most importantly Nozick, should not be, either. Epstein quite sensibly finds that libertarians cannot, or ought not, object to taxes that meet a benefits principle, improving the lot of all. Epstein even seems to open a door that longtime readers of his periodic forays into tax might well have thought closed, to him at least: he countenances the possibility of *progressive* taxation, which would not, after all, change rank orders (within its targeted base, at least). *Tempora mutantur*, and sometimes academics, too.

In the next essay, David Duff, after helpfully summarizing the libertarian views of taxation as found in Locke and Nozick in particular, takes aim at both the relevance of and the case for libertarian theories in tax. On all the pressing practical questions of tax, such as coming up with a base, a rate structure, and institutional mechanisms for effecting tax laws and reform, Duff finds libertarian theories under-determinative at best, unhelpful at worst. Further, libertarian theories against redistributive taxation are not that compelling in the first place. With Murphy & Nagel, Duff believes that tax policy ought to be situated in a wider theory of justice,
although he sees more of a role than they do for traditional principles of tax policy. Duff’s authoritative footnotes, by the way, are well worth the price of this Journal alone, and deserve attention from any serious student of tax policy.

Kirk Stark follows with an interesting twist. His essay considers an “endowment tax,” one levied on the mere potential to earn market wages. Such a tax would remove an inequity and inefficiency in all real-world comprehensive tax systems, whereby leisure, or non-market activity, is favored over labor or market activity. Setting aside the obvious practical difficulties with such an undertaking (the idea of endowment taxation has been discussed in prior work by Daniel Shaviro, among others), Stark instead asks a simple but profound question: How can liberal egalitarians such as Rawls reject both an endowment tax as an illegitimate intrusion on individual liberty and Nozick’s libertarian objections to wage taxation as “on a par with forced labor”? This well-formed question leads to a fascinating intellectual journey, one that ought to shake many readers free of first impressions.

Following this initial troika on libertarian themes, the next two essays turn more centrally to Murphy & Nagel’s now central book, both authors working in an analytic jurisprudential fashion. Andrei Marmor looks closely and deeply at two paragraphs, and arguments, in The Myth of Ownership. The book turns on a critique of “everyday libertarianism” (Murphy & Nagel’s term): the authors argue that “there are no property rights antecedent to the tax structure,” that “[p]retax income … has no independent moral significance,” and that “income gives rise to clear moral entitlement only if the system in which it is earned, including taxes, is fair.” Marmor, while finding the basic thrust of Murphy & Nagel “quite right,” argues that they do not need an argument that there is no “natural right to private property.” Even if there were such a right, Marmor argues, it does not follow that it would not change in a social setting. Thus, all Murphy & Nagel require is the second of their two arguments—namely that, in society, “private property” is part of a set of social institutions that include taxation, and the justice of the whole must be viewed as a whole.

James Penner paints on a wider canvass, and approaches The Myth of Ownership in a more critical light. Penner looks at the very concept of “property,” and wonders if it is doing any good in the mix at all. He finds that much “property” talk is too loose and ill-defined, leading to a bad conflation between “taxation” and “expropriation,” say. Turning squarely to Murphy & Nagel, he finds their strong argument against private property rights akin to “using a sledgehammer to crack a nut.” There are much easier ways to attack the “weak libertarian forward position [against all taxation]”—indeed, we come full circle, for Richard Epstein, of all people, had given such arguments in the opening essay. Penner’s essay is thus a nice—and nicely written—end to the initial run of tax jurisprudential reflections.

The final four essays leave the storied classics of Locke and Nozick and all that jazz, and take up instead the wondrous range of questions and disciplines that tax can raise. Marjorie Kornhauser’s essay draws our attention to the often unpleasant fact that taxes have to be paid, the knotty subject of compliance. (We had noticed they are a burden.) As she has elsewhere in her creative and important writings, Kornhauser shows a willingness to step beyond “wealth maximizing economic theories” of individuals and institutions, to consider “[n]on-economic factors such as social norms, senses of fairness, and moral constraints.” Her essay is an extended
look at the role that greater publicity—or, sometimes, equivalently, ‘transparency’—can play in administering tax systems. She includes four particular proposals that also illustrate the more general points, for a personal annual tax statement, more information about the overall tax system, forms from more people, and wider disclosure of statistics about filed tax returns.

Speaking of culture, Michael Livingston asks what tax scholars in any one jurisdiction, such as the United States, in his case, can learn from a look abroad. Not clear, is his refreshingly candid response. Scholars must take into account distinctive “tax cultures,” which exist on both macro and micro levels—the former because tax systems implicate and affect wide social values (home ownership, redistribution, and so on), the latter because tax systems can be, well, extremely microscopic. With his characteristic flair for the interesting stop or article along the way, Livingston concludes that there is some reason to look abroad, but that the comparativist should proceed with care. “What is certain is that globalization will require more and not less attention to national differences ….”

Daniel Shaviro asks the kind of question that he has distinguished himself by asking throughout his distinguished career, one that spans particular tax and spending systems to take a peek, at least, at the big picture: Can tax cuts increase the size of government? Of course they can increase governmental size is the helpfully counterintuitive response. Taking the current Bush Administration’s decisions to cut taxes now while leaving future social insurance liabilities (including Medicare) under-funded, Shaviro points out that such a fiscal policy will lead to tax increases and/or spending cuts later. Tax increases will of course have major allocative effects, while spending cuts will have a massive distributional impact, transferring resources from the old to the young. Since one or both of these effects are inevitable, the effects are already present today. Things are not always what they seem: While smaller in stated budgetary terms, the government’s impact on social life—what really matters—will have grown.

My own essay closes out the volume by trying to make clear an issue I have grappled with for years, one residing in the much tilled terrain of traditional tax policy, specifically the income versus consumption debate. Virtually all liberal egalitarian advocates of redistributive taxation support an income tax, believing that consumption taxes fail to reach capital and its yield. But this is not true under progressive rates. There are two forms of consumption tax, prepaid and postpaid. A consistent progressive postpaid consumption tax reaches the yield to capital in just those cases in which ordinary moral intuitions want it to be reached: when savings are used to finance a “better,” more expensive, lifestyle. Such a tax stands between an income tax, which double taxes all savings, come what may, and a prepaid consumption tax, which never taxes savings. Such a tax may be the best hope for more redistribution via tax.

I began with the observation that tax needs help. Let us hope that the essays in this volume, indeed, the very fact of this volume, and the thoughts generated by reading them, will be a start to better, deeper thinking about taxation. I thank the editors of this Journal, and, especially, the essayists, for reminding us all of the importance of trying so to think.

Edward J. McCaffery, Guest Editor