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Equality and Partiality

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EQUALITY AND PARTIALITY. By *Thomas Nagel*. New York: Oxford University Press. 1991. Pp. viii, 186. Cloth, \$17.95.

Justice in the polity, Plato argued, mirrors justice in the individual: in both cases, justice consists of a suitable division of labor among different motivating forces.¹ In *Equality and Partiality*, Thomas Nagel² recasts this argument in Kantian form. Nagel argues that *political legitimacy* — a state's rightful claim to exercise coercive power over its members — can arise only from proper integration, through institutional means, of the personal and impersonal standpoints within each individual.³

Nagel analyzes the concept of political legitimacy in strongly individualistic terms: "The pure ideal of political legitimacy is that the use of state power should be capable of being *authorized* by each citizen" (p. 8). This analysis, in effect, imposes a unanimity requirement on political legitimacy: a political system is legitimate if justifiable to every person who lives under it (p. 33). Importantly, the requirement attaches to the *system* — the "principles, institutions and procedures which determine how that power will be used" (p. 8) — rather than to particular, controversial decisions made within that controlling framework.⁴

Nagel formulates the unanimity requirement in familiar contractualist terms: a legitimate political system rests on principles that "no one could reasonably reject, given the aim of finding principles which could be the basis of general agreement among persons similarly motivated."⁵ According to Nagel, these principles do not merely represent a pragmatic bargain struck among self-interested agents pursuing their own interests⁶ but have independent normative and motivational

1. PLATO'S REPUBLIC 99, 107 (G.M.A. Grube trans., 1974).

2. Professor of Philosophy and Law, New York University.

3. The underlying idea of the "dual standpoint" is as follows: (1) each person views the world from the personal standpoint of her own particular capacities, beliefs, desires, and commitments; (2) at the same time, each person has the capacity to survey the world from an impersonal standpoint that abstracts from the particular, contingent features of her personal perspective. P. 10.

4. P. 33. In contrast, Professor Wolff applies the requirement of authorization directly to particular decisions and, not surprisingly, concludes that a requirement of individual consent is incompatible with legitimate political authority. ROBERT P. WOLFF, IN DEFENSE OF ANARCHISM 3-18 (1970).

5. P. 36. Nagel explicitly draws on Professor Scanlon's contractualist account of moral wrongness: "An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement." Thomas M. Scanlon, *Contractualism and Utilitarianism*, in UTILITARIANISM AND BEYOND 103, 110 (Amartya Sen & Bernard Williams eds., 1982).

6. Nagel's contractualism thus sharply differs from a Hobbesian, game-theoretic account of contractualist morality. See generally DAVID P. GAUTHIER, MORALS BY AGREEMENT (1986).

force. In particular, mere recognition of the fact that a system rests on principles no one could reasonably reject provides "reason to cooperate voluntarily in the maintenance of such a system and to respect its results" quite apart from any coercive force the system itself brings to bear.⁷

Whether Nagel's test of political legitimacy has any substantive content, of course, remains open to doubt. In the Anglo-American legal tradition, for lack of a better alternative, what the "reasonable" person believes is generally whatever twelve jurors on a particular day happen to say she believes. Such skepticism aside, Nagel himself derives an abstract guideline as to what reasonable people can agree to from his characterization of the dual standpoint within each individual:

Each of us has a primary attachment to his own personal interests, projects and commitments, but this is restrained by our occupation of the impersonal standpoint in two ways: first, by the recognition of the equal objective importance of what happens to everyone, and second, by the recognition of the special importance for each person of his own point of view [p. 38]

This characterization informs Nagel's general criterion of reasonable nonrejectability: a legitimate political system "reconciles the two universal principles of impartiality and reasonable partiality so that no one can object that his interests are not being accorded sufficient weight or that the demands on him [to satisfy the reasonable interests of others] are excessive" (p. 38).

Nagel gives few examples of actual institutional arrangements that appropriately strike such a balance. Rather, he articulates the general *form* of a solution. Nagel proposes a *moral division of labor* between individuals and social institutions: institutions realize the "impartial requirements of the impersonal standpoint" through a proper allocation of social resources, while simultaneously fostering sufficient "private differentiation" as to enable individuals to pursue personal interests (pp. 53, 85).

Social institutions, however, are not free-standing entities. Their existence depends on the support of the individuals they simultaneously shape. Hence, Nagel's proposal faces a crucial motivational problem, namely, whether individuals will both respect and provide continued support to the requisite social institutions. Interestingly, Nagel believes that capitalist society, which he generally praises as superior to any alternative sociopolitical regime, *thwarts* such motivational development. Democratic politics encourage individuals to treat the political process, and the public institutions subject to its con-

7. P. 37. Nagel is thus committed to a noninstrumental conception of practical rationality. For Nagel's own earliest effort at developing such a conception, see generally THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* (1970).

trol, as mere means of advancing private interests (p. 91). This result runs directly contrary to Nagel's conception of public institutions as "externalizing" the impartial concerns of agents who occupy both a personal and an impersonal standpoint. Meanwhile, capitalism, despite its economic prowess, also leads to "large and inheritable inequalities" that Nagel considers intolerable from an impartial perspective.⁸

Rather than call for a wholesale political transformation, however, Nagel speculates on the changes in individual motivation that would support the widely redistributive institutions he envisions.⁹ Nagel observes that the lines drawn around personal and societal responsibility typically rest on a distinction between what individuals and social institutions do, and what they merely allow to happen (p. 99). For example, we may feel a societal responsibility when the police arrest an innocent person, but not when they fail to arrest a dangerous person who subsequently commits a serious crime.¹⁰ In the latter case, responsibility is ascribed to the criminal alone. Although Nagel recognizes the vitality of such a distinction in some aspects of individual and social conduct, he argues for the

abandonment of the idea that there is a morally fundamental distinction, in regard to the socioeconomic framework which controls people's life prospects, between what the state does and what it merely allows. . . . [W]ith regard to income, wealth, and social position, health, education . . . it is essential that the society should be regarded by its members as responsible for how things are, if different feasible policies and institutions would result in their being different. [p. 100]

Nagel calls this the doctrine of negative responsibility.

Negative responsibility implies that decisions "not" to interfere with distributive arrangements require the same degree of justification as decisions "to interfere": "Every arrangement has to be justified by comparison with every other real possibility."¹¹ Hence, popular ac-

8. P. 93. Nagel does not object to inequalities in income and wealth per se. The issue, rather, is what inequalities pass the test of "reasonable non-rejectability." This test, of course, pertains to the socioeconomic system that determines distributive outcomes rather than to particular distributions themselves. Large and inheritable inequalities are intolerable, on this analysis, when they result from a distributive scheme that systematically (1) gives short shrift to the reasonable demands of the least well-off, by (2) providing benefits to the better-off to which the better-off cannot reasonably lay claim.

9. Nagel's arguments that a legitimate political system must overcome not only inequalities arising from differences in class, but also from differences in natural abilities, suggest their strongly redistributive nature. See pp. 106-16.

10. See, e.g., *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968) (municipality not liable in tort for police failure to protect one individual from another's attack); *Davidson v. City of Westminster*, 649 P.2d 894 (Cal. 1982).

11. P. 100. In the context of constitutional litigation, questions about negative responsibility have surfaced most noticeably in *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989). In that case, the Supreme Court rejected a due process claim against a social service agency based on negligent failure to protect a child from physical harm by his father. The Court reasoned that the Due Process Clause imposes on states only a negative duty not to de-

ceptance of this doctrine is the key to Nagelian egalitarianism, for it will induce the comparatively better off to see *social* policies, and not merely individual choices, implicated both in their own good economic fortune and the lesser economic fortune of others.

* * *

The brevity of *Equality and Partiality* is both its virtue and its vice. Nagel develops a clear, simple argument that lays out the basic institutional requirements and complementary political morality of Kantian liberalism. Nagel also deals pointedly, although much too succinctly, with two recurring criticisms of Kantian liberalism. At one extreme, hard-nosed consequentialists such as Professors Hare¹² and Scheffler¹³ argue, in effect, that a serious consideration of the impersonal standpoint undermines the Kantian notion that individuals may stand on their own moral inviolability to resist pursuit of aggregate social benefit. Nagel responds that Kantian impartiality instead demands pairwise, nonaggregative comparisons founded on "unanimity" or reasonable nonrejectability (pp. 56, 68, 142). At the other extreme, Professor Nozick¹⁴ has founded a libertarian regime of strong property rights, which block redistributive social policies,¹⁵ partly on Kant's dictum to act so as to "treat humanity . . . never simply as a means, but always at the same time as an end."¹⁶ Nagel rejects such a regime as not "justified in terms of its effects in the lives of those living under it" (p. 140). Thus, although Nagel repudiates wholesale consequentialism, he finds room within Kantian contractualism for some consequentialist thought as an element of reasonable nonrejectability.

Nagel unfortunately ignores criticism from two other corners. In evaluating alternative institutional arrangements, Nagel focuses almost exclusively on what may be called *external* goods — physical and institutional resources that may be given to, withheld from, and transferred between individual citizens. An alternative strand of political thought, however, connects the central questions of political theory to what may be called *internal* goods — aspects of human psychology that affect individuals' ability to realize their deepest purposes.¹⁷ The

prive persons of life, liberty, or property without due process, but no affirmative duty to provide services of any sort. 489 U.S. at 194-97.

12. R.M. Hare, *Ethical Theory and Utilitarianism*, in UTILITARIANISM AND BEYOND, *supra* note 5, at 23, 23-29.

13. SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM 84-107 (1982).

14. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

15. *Id.* at 149-82.

16. *Id.* at 32 (quoting IMMANUEL KANT, GROUNDWORK TO THE METAPHYSICS OF MORALS 96 (H.J. Paton trans., 3d ed. 1958)).

17. "Freedom . . . involves my being able to recogni[z]e adequately my more important purposes, and my being able to overcome or at least neutralize my motivational fetters, as well as my being free of any external obstacles." Charles Taylor, *What's Wrong with Negative Liberty*, in THE IDEA OF FREEDOM 175, 193 (Alan Ryan ed., 1979) [hereinafter Taylor, *Negative Liberty*]. Internal goods necessary for such freedom include self-discipline, self-esteem, self-understanding,

development of internal goods, furthermore, fundamentally implicates social relations, not merely institutional design; internal goods theorists stress that issues of class, race, and gender influence self-development as profoundly as the "external" resources an individual commands.¹⁸

Kantian programs also have raised longstanding concern about the viability of detaching the theory of the right from the theory of the good.¹⁹ Communitarian critiques, for example, argue that we must first determine what sort of people we would like to be before proceeding to the question of social institutional design.²⁰ Hence, communitarians reject Kantian deontology as incoherent, because it seeks to design social institutions without any serious consideration of the human motivations to which such institutions should respond.²¹ Nagel provides a perfect case in point, for he tries to derive a political institutional framework entirely from considerations of fairness and reasonability, without inquiry into the values and self-understandings of the body politic's constitutive members.

Nagel's obliviousness to such critiques is surprising, given their current prominence. Although *Equality and Partiality* astutely develops a particular strand of Kantian thought, it is ultimately unsatisfying. Nagel tells us how to approach political legitimacy if questions of abstract fairness predominate our political thought. Unfortunately, Nagel does not tell us why such questions should predominate in the face of contemporary anti-Kantian challenges.

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self-control, and discriminating capacities of evaluation and judgment. Charles Taylor, *What is Human Agency?*, in 1 HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS 15 (1985).

18. To take one example, Professor MacKinnon argues that the fundamental social inequality involves the maldistribution across gender lines not of resources, but *power*. In her view, power is the fundamental determinant of life prospects. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 3 (1987) ("social relation[s] between the sexes [are] so organized that men may dominate and women must submit").

19. See generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

20. See, e.g., Taylor, *Negative Liberty*, *supra* note 17, at 192-93.

21. See generally SANDEL, *supra* note 19.