

The Will to Tax Avoidance:  
Nietzsche and Libertarian Jurisprudence

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**Abstract:** The Will to Power is a fundamental aspect of Nietzschean thought. The Will to Power often manifests for Libertarians in the accumulation of money and the avoidance of taxation. The avoidance of income taxation involves a Will to Power against the state and over “lesser” wage-earning taxpayers. Libertarians also attempt to use money to “will” past physical death – to *overcome* death. In Nietzschean terms, this represents a psychological attempt to defeat Nihilism typically in the absence of a general belief in God or strong community values. Estate taxes in particular therefore represent permanent “death” since the Libertarian believes in the affirmation of “life” through tax avoidance. The idea of tax avoidance is therefore held as a *fundamental right*. The article describes the optimum design of tax systems as subject to a “minimum tax” threshold, thus preserving the Libertarian taxpayer an opportunity to affirm life through tax avoidance.

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## I. INTRODUCTION.

The current discourse on tax policy (i.e., a comparative analysis of the *fairness*<sup>1</sup> versus *efficiency*<sup>2</sup> versus *equality*<sup>3</sup> versus *simplicity*<sup>4</sup> of various proposed tax laws) is effectively a

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<sup>1</sup> Richard A. Epstein, *Taxation in a Lockean World*, 4:1 Soc. Phil. & Pol. 49 (1986); Richard A. Epstein, *Fairness in a Liberal Society*, New Zealand Business Roundtable (Astra Print, Ltd., Wellington 2005) (“We cannot examine the nature of rights that people have against other individuals solely at an abstract level; we have to consider the more concrete inquiry of what legal regime could be used to enforce and defend individual entitlements.”); Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 Am. J. Tax Pol’y 221, 223 (1995) (“The purpose of this Article is to challenge directly the notion that fairness requires that the burden of certain taxpayers be

dead-letter in Nietzschean terms. Nietzsche is more concerned with the exercise of *power*.<sup>5</sup> The accumulation of money is in this regard an exercise of power.<sup>6</sup> Such may represent also an alienation of man from his true essence, but Nietzsche does not judge as to how man *ought* to exercise his power. Nietzsche proposes more fundamentally the essence of man (as the human animal) is simply the exercise of power.<sup>7</sup> Therefore, Nietzsche does not comment on taxes as redistributive power over others in society. For example, from a Nietzschean perspective it is not insightful to complete the “money is power” syllogism as: Taxes reduce money. Therefore, taxes reduce power. Rather, it is the accumulation of money *as a human activity* that represents the exercise of power from a Nietzschean perspective, and particularly as an aspect of Libertarian ideology. From this fundamental distinction it follows that the Libertarian worldview centers on the Will to Power through tax avoidance. It is true that tax avoidance represents an aspect of money accumulation insofar as it may increase the total amount of dollar bills or other

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greater than that of other taxpayers, relatively or even absolutely. This Article confronts the widespread acceptance of progressive taxation as fair and as being compelled by fundamental considerations of justice.”).

<sup>2</sup> Geoffrey P. Miller, *Economic Efficiency and the Lockean Proviso*, 10 Harv. J.L. & Pub. Pol’y 401 (1987); Epstein (1986) at 56-7 (“A sound tax is designed to interfere as little as possible with the ordinary decisions that individuals would make in the investments and consumption of their capital and labor... The desirability of tax neutrality also follows from the more overtly economic view of the subject. In a well-functioning economy, every actor should have to face the full opportunity costs of his private decisions.... Tax neutrality represents one constraint on government policy that is designed to keep government activity as close as possible to the Pareto ideal.”).

<sup>3</sup> Schoenblum at 270-1 (“IV. Ethical Baseline: Fairness as Equal Taxation. The important point is that, despite certain difficulties in implementation, the philosophical premise is the correct one. All constituents are to be treated the same by the government; all are equal, largely autonomous members of the community. Nor should moral weight be given to decisions merely because they are reached by a transitory majority. Instead, it is necessary to have an ethical baseline grounded in equality. Even if equal taxation is unattainable, it should serve as a standard by which tax models are evaluated for their fairness. At present the designers of these models are failing to check the very foundation on which their elaborate structures are erected.”).

<sup>4</sup> See, Milton Friedman, *Capitalism and Freedom* (Univ. of Chicago Press, 1962) at Ch.2 (“The organization of economic activity through voluntary exchange presumes that we have provided, through government, for the maintenance of law and order to prevent coercion of one individual by another, the enforcement of contracts voluntarily entered into, the definition of the meaning of property rights, the interpretation and enforcement of such rights, and the provision of a monetary framework.”); Robert Nozick, *Anarchy, State & Utopia* (Blackwell Publishers, 1968).

<sup>5</sup> Nietzsche, *Will to Power* §§ 13, 259 (New York: Random House, 1967); see also, Philippe Nonet, *What is Positive Law?*, 100 Yale L.J. 667 (1990); Guyora Binder & Robert Weisberg, *The Critical Use of History: Cultural Criticism of Law*, 49 Stan. L. Rev. 1149, 1156 (1997).

<sup>6</sup> Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 Tex. L. Rev. 1673 (1998-9) (“Money is power. The identity is simple enough, even axiomatic.”).

<sup>7</sup> Nietzsche, *Beyond Good & Evil* at §13 (New York: Random House, 1967).

property accumulated throughout life, a point that Epstein (1986) makes directly.<sup>8</sup> Rather, to Libertarians the activity of tax avoidance represents a more fundamental Will to Power by the individual against the state, and also a display of power over other regular, wage-earning, perhaps “lesser” taxpayers. This then describes the Will to Power by the Libertarian over *income taxes* as a fundamental aspect of tax policy. But, there is an even more fundamental aspect of tax avoidance centered on the Libertarian view of life and death.

The individual Libertarian sets ought not only to exercise power over life, but to use money as a means to achieve eternal power – in Nietzschean terms to make oneself unto god.<sup>9</sup> In lay terms, Libertarians view money as passable at death, and therefore as a means to Will to Power over physical death. Perhaps notably, this Libertarian view arose only in a postmodern society with an absence of a general belief in God or strong community values. Estate taxes generally defeat the ability to pass money at death and thereby frustrate the attempted exercise of power over physical death. This then explains the strong Libertarian opposition to *estate taxes* as a fundamental aspect of tax policy.<sup>10</sup>

The final and perhaps the most fundamental aspect of Libertarian tax policy is a creative enthusiasm to devise new forms of taxes on regular, wage-earning “lesser” taxpayers, e.g., “flat tax”,<sup>11</sup> “consumption tax”,<sup>12</sup> or, a “cash flow tax”.<sup>13</sup> Although the justifications for aggressive taxation of the poor appear to be endless within the Libertarian mind, the fundamental view is that *regressive* taxation itself is the proper outcome for the lower classes.<sup>14</sup> The poor deserve to pay *more* because they are “lesser” beings.<sup>15</sup> Nietzsche would approve of such unequal result of tax policy:

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<sup>8</sup> Epstein (1986) at 70 (“Last, there is the problem of rent-seeking through the tax system.... As persons know their anticipated income with some degree of reliability, they can seek to impose the costs of government upon others while keeping the benefit for themselves.”)

<sup>9</sup> Nonet at 670 (“[T]he supremacy of positive law therefore signifies the rising of man to claim that position for man himself, that positivism thought in its most radical implications entails a kind of deification of human power, all this is quite apparent to Nietzsche.”)

<sup>10</sup> See generally, Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 *Maine L. Rev.* 1 (2013).

<sup>11</sup> David A. Weisbach, *Ironing Out the Flat Tax*, 52 *Stan. L. Rev.* 599 (2000).

<sup>12</sup> See generally, David A. Weisbach & Joseph Bankman, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 *Stan. L. Rev.* 1413, 1420 (2006) (“A consumption tax does not tax the return to savings. This means that savings are undistorted, and individuals choose the optimal amount to consume at each date. A consumption tax does, however, tax labor earnings, which means that decisions about how much to work are distorted.”)

<sup>13</sup> William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 *Harv. L. Rev.* 1113 (1974).

<sup>14</sup> *But see*, Reuven Avi-Yonah, *The Three Goals of Taxation*, 60 *Tax L. Rev.* 1 (2006); Edward J. McCaffery, *A New Understanding of Tax*, 103 *Mich. L. Rev.* 807, 938 (2005) (“The tax system is drifting, seemingly inexorably, towards a flat wage tax. All hope for effecting redistribution from rich to poor may soon be lost.”); Eric M. Zolt, *The Uneasy Case for Uniform Taxation*, 16 *VA. TAX REV.* 39 (1996) (“This article

You preachers of equality, the tyrannomania of impotence clamors thus out of you for equality: your most secret ambitions to be tyrants thus shroud themselves in words of virtue.... I do not wish to be mixed up and confused with these preachers of equality. For to *me* justice speaks thus: "Men are not equal." Nor shall they become equal! What would my love of the overman be if I spoke otherwise?<sup>16</sup>

In purely legal terms, Nonet (1990) sets the table for a discussion of tax laws in Nietzschean terms by rightly suggesting that Nietzschean philosophy generally demands *positive law* as opposed to *natural law*.<sup>17</sup> But, modern Libertarian tax theory is built directly on the philosophy of John Locke and *natural law*.<sup>18</sup> So we should ask: *Is tax law fundamentally the exercise of power through a modern positive law system – or is it the extension of natural law?* The Libertarian tax scholars Epstein (1985) and Nozick (1968) say *natural law*.<sup>19</sup> Epstein and Nozick carefully cite to Locke as if it were a religious text to draw weighted conclusions about *fairness* or even *equality* in tax policy by reference to *economic efficiency*.<sup>20</sup> Here we make the Nietzschean observation that to even discuss "*economic efficiency*" as a matter of tax policy presupposes the Will to Power to change the *natural law*.<sup>21</sup> As far as the tax law or policy is concerned – Locke's metaphysics as a source of binding *natural law* is thus dead. Indeed, Nietzsche famously announced he had killed all metaphysics and law.<sup>22</sup> Therefore, one cannot simply cite to the natural law of Locke and

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examines the case for uniform taxation on efficiency and equity grounds. It concludes that neither economic theory nor equity considerations require uniform treatment."); Michael J. Gratz, *Implementing a Progressive Consumption Tax*, Yale Faculty Scholarship Series. Paper 1634 available at [http://digitalcommon.law.yale.edu/fss\\_apers/1634](http://digitalcommon.law.yale.edu/fss_apers/1634).

<sup>15</sup> Nietzsche, *Beyond Good & Evil* at §203; Nonet at 674 ("[the] perfect herd animal, . . . the animalization of man into the dwarf animal of equal rights.").

<sup>16</sup> John Linarelli, *Nietzsche in Law's Cathedral: Beyond Reason and Postmodernism*, 53 Cath. U. L. Rev. 413, (2004) citing Nietzsche, *Thus Spoke Zarathustra*, On the Tarantulas, Part II, at 99-100.

<sup>17</sup> Nonet at 667 ("I. Positive Law as Will to Power. What is positive law? We may begin with the familiar account that the word "positive" suggests immediately: positive law (Nietzsche calls it Gesetz) is law that exists by virtue of being posited (gesetzt), laid down and set firmly, by a will empowered so to will.").

<sup>18</sup> John Locke, *Second Treatise of Government* (1690), ed. by C.B. Macpherson (Cambridge: Hackett Publishing Company, Inc., 1980).

<sup>19</sup> Nozick at 10 ("Individuals in Locke's state of nature are "in a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or dependency on the will of any man."); Epstein at 7 ("Hobbesian Man, Lockean World. It may seem odd to find in Hobbes the defender of absolute sovereign power, one of the fathers of our constitutional system.").

<sup>20</sup> Epstein (1986) at 49-58; Nozick at 3-48.

<sup>21</sup> Nonet at 671-2 ("When we criticize our laws, our legal system, or our lawmakers, we do so by way of evaluating them, by measuring them up to the values we have set for ourselves, and thus in the light of an assumed power to legislate.").

<sup>22</sup> Yovel at 638 citing Nietzsche, *The Gay Science*, Book III, § 125 ("I seek Law! I seek Law!" Whither is Law? I shall tell you: we have killed him--you and I. But how could we do this thing? Where are we moving

pretend to have rightfully derived a meaningful tax policy from the natural state of mankind. Nietzsche thus frees the tax policy discourse from both Nozick and Epstein's hierarchical references to a dead-letter theory of law.

We might imagine that Nietzsche would enthusiastically approve of the use of his framework to undermine the jurisprudential basis of Libertarian tax policy. Nietzsche says:

I know the pleasure in annihilating to a degree that fits my power to annihilate -- in both respects I obey my dionysian nature which cannot separate doing No from saying Yes. I am the first immoralist: thus I am the annihilator par excellence.<sup>23</sup>

But this is not the fundamental point. The philosophy of Nietzsche is to confront the abyss of Nihilism – to say God is dead, there is no meaning to life, and all of the prior metaphysics of religion and philosophy is a charade, history is a charade<sup>24</sup> – and ask, now how I ought to behave in the present? Therefore, the fundamental question posed by Nietzsche is how to approach life itself in the absence of historical values<sup>25</sup> – how to *exercise power* over life itself. This is the actualization of self-will. Nietzsche states, “A living thing seeks above all to discharge its strength – life itself is Will to Power.”<sup>26</sup> That is Nietzsche's fundamental point both as to the individual and to society in general.<sup>27</sup>

Now Nietzsche directly confronts the *individual Libertarian* ostensibly engaged in the self-design of tax policy. In the Libertarian ethos, taxes can only be cut.<sup>28</sup> A Libertarian in

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now? Are we not plunging continually, in all directions? Is there still any up or down? Do we smell nothing as yet of the legal decomposition? Law is dead, and we have killed it.”).

<sup>23</sup> Nonet at 697 *citing* Beyond Good & Evil §2.

<sup>24</sup> James M. Boland, *A Progressive Revolution: Man, Superman, and the Death of Constitutional Government*, 4 Charlotte L. Rev. 249, 276 (2013) (“For Nietzsche, historical interpretation based on the scientific method and absolute truth, leads to the danger of fiat veritas pereat vita (let there be truth and may life perish), (i.e., life is more important than truth). “The facts of history only have meaning within a framework of interpretation, a framework that the historian imposes upon it, and this is what Nietzsche means when he writes that the ‘fact is always stupid.’” Only those who are quite unconcerned about the past, but who have a creative concern for our lives in the present and the future, can legitimately interpret it. The concept that “the past is only accessible by means of our opening onto the future, amounts to, and in fact presupposes, the idea that the past is what it is only by means of the future.”).

<sup>25</sup> Linarelli at 434 (“Nietzsche explains the purpose of law in *On the Genealogy of Morals*: Finally, one only has to look at history: in which sphere has the entire administration of law hitherto been at home-also the need for law? In the sphere of reactive men, the weaker powers that stand under it.”).

<sup>26</sup> Beyond Good & Evil at §13.

<sup>27</sup> *Beyond Good & Evil* at §259 (“‘Exploitation’ does not belong to a depraved, or imperfect or primitive society it belongs to the nature of the living being as the primary organic function, it is a consequence to the intrinsic Will to Power, which is precisely the Will to Life...”).

<sup>28</sup> Milton Friedman: “I am in favor of cutting taxes under any circumstances and for any excuse, for any reason, whenever it's possible. ... because I believe the big problem is not taxes, the big problem is

favor of a tax increase exists only in the same dimension as the purple leprechaun. Accordingly, *Libertarianism always manifests itself as the relative prioritization of the individual to the state in tax matters*. Thus, it is correct to say that Libertarianism is fundamentally opposed to taxation for reasons ranging from *fairness* to *efficiency* to *simplicity*. But, one could posit to the contrary that it is not *always* the case that taxes should be cut, as on occasion taxes must be increased for the common good. Therefore, Libertarianism prioritizes the individual over the state as to the minimization of tax even where it may not always be in the common interest to do so – *Why?*

Nietzsche tells us why. Power is the Nietzschean goal of the human animal, and the exercise of will is the purpose of life.<sup>29</sup> All libertarians exercise the will to power to money. The Libertarian mind accepts both the accumulation of money as the Will to Power over physical death, and the accumulation of money as the primary essence of life. Thus, it follows directly the payment of taxes is equivalent to death.<sup>30</sup> Henry David Thoreau described the Libertarian view as follows: “When I meet a government which says to me ‘Your money or your life’, why should I be in haste to give it my money?”<sup>31</sup>

Chen (2012) makes a fairly compelling case that progressive taxation ought to be “restored” as a central idea of modern democratic capitalism.<sup>32</sup> Then, how does one construct taxing and spending policy in partnership with a Libertarian who would rather die than pay taxes? How does one convince a Libertarian that it makes sense to educate poor children even at great expense? In philosophical terms, how does one argue with Nietzsche himself? The goal of tax law in this regard can only be to overcome the capitalist Nietzsche in the guise of the modern Libertarian.

The author suggests there are three primary options. First, one could apply the philosophical tools the Libertarians want to apply to formulate a convincing normative

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spending. I believe our government is too large and intrusive, that we do not get our money's worth for the roughly 40 percent of our income that is spent by government ... How can we ever cut government down to size? I believe there is one and only one way: the way parents control spendthrift children, cutting their allowance. For government, that means cutting taxes.“ *quoted by* Richard A Viguerie, *Conservatives Betrayed: How George W. Bush and other big government Republicans hijacked the conservative cause* at 46 (2006).

<sup>29</sup> Note that Nietzsche refers to the exercise of power as the Will to Power and not power for the sake of power. *See*, Jonathan Yovel, *Gay Science as Law: An Outline for a Nietzschean Jurisprudence*, 24 CARDOZO L. REV. 635, 647 (2003) (“Grammatically, in the sentence “the will desires power” the use of the word “power” entails a representation of something that the will desires. This indeed is a mistaken reading generated by a linguistic blunder. It is not the will that wants power, but power that desires...”).

<sup>30</sup> Epstein euphemistically refers to “death” instead as “surrender”. *See*: Epstein (1986) at 53 (“Taxation is the form of surrender, and security is the good received in exchange.”).

<sup>31</sup> Henry David Thoreau, *Civil Disobedience* (1849) at 40 (New York: Signet’s Classics).

<sup>32</sup> Jim Chen, *Progressive Taxation: An Aesthetic and Moral Defense*, 50 U. Louisville L. Rev. 659 (2012) (“After decades of intense debate, progressive taxation deserves to be restored to its rightful place ‘as one of the central ideas of modern capitalism.’”) *citing* Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. Chi. L. Rev. 417, 417 (1952).

argument (i.e., one argues with the Libertarian about the proper interpretation of Locke, or natural law generally). An example would be to argue that it is *efficient* to educate even poor young people.<sup>33</sup> Second, one could use Nietzsche to undermine natural law generally in such a manner that Libertarians have no choice but to acknowledge that positive law is all that remains.<sup>34</sup> This will be done in Part II of this article. Third, one could engage Nietzsche on Nietzsche's terms. This would be to force the Libertarian to confront Nihilism specifically – and to acknowledge his or her own mortality and the inevitability of death. This is to say there is nothing special about tax avoidance and that it does not constitute creative human activity. The most potent manner to achieve this is to show the Libertarian that other people are able to achieve what Nietzsche termed an “Aesthetic” result without tax avoidance. This will be done in Part IV.

The ultimate goal is of course to prove that money accumulation itself is an indirect aspect of life and not participating in life. Various novels by Charles Dickens might indirectly accomplish the same goal in literary terms.<sup>35</sup> An aspect of this approach would be to further ask Nietzsche (or the Libertarian) to define “death”, or “nothing”, or the “will to nothing”, or the “will to *spend* money”.<sup>36</sup> As Nonet (1990) illustrates, the “will to nothing” is a problem for Nietzsche where “[t]he essence of nihilism is not that man neglects being, but that being abandons beings, so that man ceases to wonder at the wonder of being.”<sup>37</sup> As applied to the individual Libertarian engaged in the “hoarding” of money one might ask – do you Libertarian have any desire to travel? Do you Libertarian have any desire to see Machu Picchu during this life? As applied to the Libertarian policymaker one might ask – at what point will society have accumulated enough wealth that the nation could “afford” to educate the children of the poor? The outright rejection of the “hoarding” view of money leads to a metaphysic of Aesthetic “love” for the celebration of life by mankind.<sup>38</sup> Nietzsche says in this regard: “Without music, life would be a mistake.”<sup>39</sup> To this celebration of life and human creativity, Libertarian ideology appears as an anathema. The Libertarian anathema is the exercise of power without the celebration of human life and creativity.

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<sup>33</sup> See, e.g., Chen at 659 (“Progressive taxation is to distributive justice as competition is to economic efficiency. So that some parties may prosper, others must lose. Redistribution and the attendant destruction of entrenched wealth serve as society’s ultimate weapons of ‘creative destruction.’”).

<sup>34</sup> Nonet at 669 (“With Nietzsche, the relation between positive law (Gesetz) and higher law (Recht) is turned upside down. Recht is brought down from its eminent place as higher Law of the land, and reduced to the standing of a mere creature of Gesetz.”).

<sup>35</sup> Charles Dickens, *A Christmas Carol* (Chapman & Hall Pub. 1843).

<sup>36</sup> Nonet at 685.

<sup>37</sup> *Id.*

<sup>38</sup> *Infra* Note 89.

<sup>39</sup> Wolfert Von Rahden, *Individual Law: On Some Aspect of Nietzsche’s Juridical and Aesthetic Discourse*, 24 *Cardozo L. Rev.* 723, 777 (2003) *citing Thus Spoke Zarathustra* at fragment 16 [24].

## II. NIETZSCHE AND THE RISE OF NIHILIST TAX POLICY.

*“In general, over the last century, a variety of defenses has been offered to justify the state's lack of regard of private property and unequal treatment of its members in terms of progressive or proportional income taxation. None of these defenses, however, can withstand analysis from a fairness standpoint. No adequate ethical basis has been offered to date.”* – Schoenblum (1995)<sup>40</sup>

To Nietzsche, metaphysics and God are the same. Therefore, when Nietzsche pronounces that “God is dead”, or, that he “killed law” such is the same idea. Nietzsche is pronouncing the death of the *a priori* or historical basis for any prior philosophical claim to ethics or moral behavior. To secular philosophers the death of metaphysics implies “Nihilism” meaning the absence of any values by which to judge human action. Rahden (2003) describes the impact of Nietzsche to philosophy generally:

The “death of God” confronts human beings with a tremendous and terrible challenge in that they must henceforth create laws through their own power and thus establishing human legitimacy. Not only is their mere survival at stake, but rather, they are confronted with the chance of heightening and “enhancing” life.<sup>41</sup>

To religious philosophers the death of “God” likewise implies the rise of Nihilism in the absence of God. Accordingly, in the postmodern monotheistic tradition, religious thought is often associated with a basis for morality and not a pronouncement of it. For example, the postmodern might say I believe the Old Testament is a collection of stories I choose to live by and I do not accept these as fact. In other words, I believe in a god – *not the God* – that religion tells me to believe in.<sup>42</sup> In that case, the postmodern has simply defined himself or herself as the origin of moral behavior based on a loose collection of stories. This appears to reflect the postmodern Will to Power over morality generally.

The same process occurred with regard to tax policy. This was summarized nicely by Schoenblum (1995) as follows:

II. The Dictates of Fairness. Fairness, in the sense of a just result, is not an easy concept to define. The problem of reaching an agreed upon meaning for the term is that people simply cannot agree on its meaning. Those commentators who assume a shared concept of fairness are manipulating the argument and should not be permitted to bypass this primary analytical step. “Fairness”

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<sup>40</sup> Schoenblum at 225.

<sup>41</sup> Rahden at 725.

<sup>42</sup> See Nonet at 676 (“As long as the death of God is experienced as a loss, an absence, a lack, nihilism remains at once incomplete and destructive: incomplete, insofar as in the thought of a lack persists a belief in the necessity of a supernatural world to cure the defects of this world; destructive, because the lack makes life in this world seem senseless and worthless.”).

connotes in day-to-day parlance what is “just,” “good,” and “right.” But these terms do not further the issue any more than does “fairness”.<sup>43</sup>

Schoenblum (1995) expresses despair at the lack of a proper definition of “fairness” with regard to tax policy. Such despair represents a frustration that so many different theorists could each pronounce a different concept of fairness and claim this to be “truth” of tax policy. Accordingly, Schoenblum (1995) complains: “[P]eople simply cannot agree on its meaning.” This reflects the ongoing despair of the economist who having identified absolute “truth” in his own mind wants to apply a fixed “truth” to the tax laws. Nietzsche shares Schoenblum’s (1995) despair over metaphors as the presentation of truth in general terms. Rahden (2003) describes Nietzsche’s presumptive view of modern tax policymaking discourse as follows:

A mobile army of metaphors, metonymies, anthropomorphisms, in short a sum of human relations that have been poetically and rhetorically heightened, made figurative, ornamental, and which by long use have come to seem fixed, canonical and binding. Truths are illusions whose illusory nature has been forgotten, worn out metaphors powerless to affect the senses.<sup>44</sup>

Schoenblum (1995) therefore is quite correct that such metaphors cannot represent an exclusive claim to truth. Yet, the standard metaphors of tax policy: “fairness”, “efficiency”, “equality” and “simplicity” are each given as “truth”. Indeed, each of these truth metaphors has its leading advocates. For example, Judge Posner (1995) seeks to apply “efficiency”-economics to the law as absolute “truth”. Posner (1995) describes this in *Overcoming Law* where he says, “[m]odern economics can furnish the indispensable theoretical framework for the empirical research that the law so badly needs.”<sup>45</sup> In other words, Posner (1995) argues that all normative tax policy can be overcome if “we just knew the numbers”, then we could decide what would be “fair”, “equitable” and “just”.<sup>46</sup> But, perhaps the most famous Libertarian, Milton Friedman, expressly disagreed with Posner (1995). As a member of the Federal Reserve, Friedman said that taxes should *always be cut*.<sup>47</sup> The expanding use of linguistic and numerical metaphors to draw inapposite conclusions is representative of the general decline of the discipline of law and economics as applied to tax policy. Accordingly, Huigens (2003) identified law and economics as *Nihilism*. Huigens (2003) says:

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<sup>43</sup> Schoenblum at 259 (citations omitted).

<sup>44</sup> Rahden at 728.

<sup>45</sup> Richard A. Posner, *Overcoming Law* 2, 2-3, 19, 393 (Motilal Books, 1997).

<sup>46</sup> *But see*. Linarelli at 438-9 (“Law and economics assumes that people are rational, which means that people act in their own self-interest to maximize their own satisfaction. Behavioral economists and cognitive scientists are producing research that throws the rationality assumption into question. Using the idea of ‘bounded rationality,’ economists model the effects of uncertainty and imperfect information on human choice.”)

<sup>47</sup> See *infra* Note 4.

Nietzsche would have predicted a bad end for law and economics, because its commitment to an austere conception of truth that would lead to nihilism. And Nietzsche would have been right. While it might seem that law and economics has conquered the world, the truth is that in the last five years or so it has reached a point of exhaustion and contradiction...<sup>48</sup>

Furthermore, as to the tax policy debate, not only do the participants choose differing metaphors – tax policymakers choose different *numbers*.<sup>49</sup> As such, every significant publication in the field of public economics must begin with a section entitled “model” where numbers and metaphors are re-defined from the ordinary meaning. To the public economist *numbers are metaphors*. According to Flessas (2003), in Nietzschean terms this “drive” to know the truth about tax policy reflects an academic culture where the lack of tax knowledge has been institutionalized.<sup>50</sup> Far from settling the debates within tax policy, economists have made it far worse.<sup>51</sup>

**a. The Libertarian “Divine Laws”.**

Libertarians such as Milton Friedman go beyond an economic form of Nihilism as the source of truth. Rather, Libertarian theorists simply ignore moral values outside of *natural law* entirely. In this sense Libertarianism represents the adoption of a quasi-religion in establishing Locke’s metaphysics as *exclusive or divine law*. The metaphysical precept of the Libertarian philosopher always manifests as simply a citation to Hobbes or Locke to arrange property rights as the final analysis of right and wrong. Some Libertarians, including notably Epstein, appear to view the U.S. Constitution also as the *final* expression of positivist law.<sup>52</sup> Accordingly, it represents a form of blasphemy to interpret the Constitution as a living document.<sup>53</sup> In other words, it is blasphemy to

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<sup>48</sup> Kyron Huigens, *Nietzsche and Aretaic Legal Theory*, 24 Cardozo L. Rev. 563, 565-6 (2003).

<sup>49</sup> See: Nonet at 673-8 (“In place of the promise of salvation and the beatific vision, there moves now the promise of “progress” toward “Happiness” on this earth through the advance of science and democracy... triumph of the slave brings philosophy under the dominion of science and scholarship.”).

<sup>50</sup> Tatiana Flessas, *Cultural Property Defined, and Redefined as Nietzschean Aphorism*, 24 CARDOZO L. REV. 1067, 1087 (2003) (“The drive to know the truth about an object, according to Nietzsche, is “evidence of a culture in which lack of self-knowledge has been systematically institutionalized.”).

<sup>51</sup> *But see*, Linarelli at 442 (“Thus, humans are valuating, calculating agents similar in nature to the utility maximizing persons of utilitarianism and law and economics. Nietzsche's propositions about the origins of morals share similarities with theorizing economists on why and how people cooperate. These economists are looking for the incentives that assumedly rational or boundedly rational humans require in order to engage in contract or society.”).

<sup>52</sup> See, Richard A Epstein, *Taxation, Regulation and Confiscation*, 20.3 Osgoode Hall Law Journal 433 (1982) (“Unchecked confiscation, total or partial, is always inconsistent with the ideal of limited government.”).

<sup>53</sup> See, Boland at 277-8 (“Nietzsche dedicated his philosophical work to the concept that all cultural values change over time and are devoid of a permanent and stable interpretation of reality.”).

interpret the Constitution in any way except by reference to the intent of the founders as an expression of Locke's *natural law*.<sup>54</sup>

Nietzsche would view this as an extraordinary perversion and surrender of the human will.<sup>55</sup> Indeed, the U.S. Constitution includes a prohibition on the establishment of religion. Libertarian philosophy now requires an interpretation of the U.S. Constitution under its exclusive interpretation of Locke's *natural law*. As to the responsibility of the wealthy to the poor, Epstein refers to this simply as "imperfect obligations".<sup>56</sup> Accordingly, Epstein denies any legal responsibility of the state to the poor, suggesting instead the problem must be resolved within the dictates of the field of economic policy.<sup>57</sup> It does not occur to the Libertarian philosopher that anyone else might derive values from *other than* Hobbes or Locke. At minimum, it therefore follows: *An acceptance of pure Libertarianism indicates the rejection of God or any religious values.*

Furthermore, virtually no inherent similarity or common ground exists as between Libertarianism and religious thought or values.<sup>58</sup> Pure Libertarianism represents the express rejection of God as a source of moral values and in particular the rejection of any concern for the "lesser" poor as a matter of tax policy. To some individual Libertarians, the idea of the accumulation of money may be analogous to a self-financed indulgence where the money is given to charity at death. In the sixteenth century such idea was given as: "As soon as the coin in the coffer rings, the soul into heaven springs."<sup>59</sup>

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<sup>54</sup> See, Boland at 294 ("This is a perfect Nietzschean conundrum. This allows the evolving constitutional interpretive model to have equal legitimacy with the written Constitution. If nothing can be defined as legitimate, then there is no standard to evaluate any interpretive method as either legitimate or illegitimate. Power relations are all that remain. The laws of nature and nature's God are relegated to a dark and hoary past, and thus can be ignored, not based on any principled grounds, but on purely non-valueless, pragmatic ones.").

<sup>55</sup> Peter Berkowitz, *On the Laws Governing Free Spirits and Philosophers of the Future: A Response to Nonet's "What is Positive Law?"*, 100 Yale L.J. 701 (1990) ("The jealously guarded secret of positive law, according to Philippe Nonet, is that natural right and divine law are figments or products of the human imagination. From this it follows for Nonet that, not only laws, but the beliefs, principles, customs, mores, and manners which govern ordinary life, are without foundation or sanction.").

<sup>56</sup> Epstein (2005) at 6.

<sup>57</sup> *Id.* at 6 ("Imperfect obligations are enforced by conscience and social convention, not by legal rules. People can discriminate and pick the individuals or charity of their choice, but they must do something to remain in the good graces of their fellow citizens.").

<sup>58</sup> *Id.* at 14 ("The great question that I will leave unresolved is whether the theory of imperfect obligation is strong enough to handle systemic wealth differences, or whether some social mechanism of forced redistribution is called for in a civilized society to underwrite a certain minimum living standard.").

<sup>59</sup> Roland Bainton, *Here I Stand: a Life of Martin Luther* (New York: Penguin, 1995) citing Martin Luther, *The Ninety-Five Theses on the Power and Efficacy of Indulgences* (1517) ("27. They preach only human doctrines who say that as soon as the money clinks into the money chest, the soul flies out of purgatory.").

Indeed, no libertarian thinker as of yet – *not Friedman, Nozick, Epstein, nor Locke* – confronts the idea that “natural law” is itself a construct of the human will under the Nietzschean precepts. Therefore, in perhaps a major irony, it remains appropriate to cite the New Testament as a potential response to *natural law* theorists. For example, C.S. Lewis might be applied to respond to the Libertarian philosopher to imply charity and concern for the poor.<sup>60</sup> Furthermore, Martin Buber might be applied as an interpretation of the Old Testament to say the U.S. Constitution requires a construction of “I” and “Thou” meaning *not* strict individualism.<sup>61</sup> This flies in stark contrast to the self-obsession of Libertarian *natural law* theory.<sup>62</sup>

Finally, in the time of Martin Luther it was ostensibly the case that much of the population was illiterate, or at least not literate in Latin. But, now the population is literate, and Locke is not written in Latin. If we are to accept Hobbes or Locke directly as quasi-religious texts and the source of exclusive law, it also becomes quite appropriate to cite Luther in response to Epstein’s citations to such *natural law* and simply say: “I’ll read Locke myself and *tell you* what it says.”<sup>63</sup>

An approach of allowing the reader to interpret Locke on his or her own terms could easily result in splinter sects from Libertarianism. Some Libertarians presumably do not agree precisely with the secular prophets of Friedman, Epstein, and Nozick in each their own interpretation of the writings of Hobbes and Locke. One might observe the Tea Party and the political landscape within the United States and conclude such splintering has already occurred. All this leads to the inevitable conclusion that Libertarianism represents an illustration of the exercise of the Will to Power *exactly as* Nietzsche initially prescribed.

### III. TAX AVOIDANCE AS THE LIBERTARIAN WILL TO POWER.

*“The idea that taxes, particularly personal income and wealth transfer taxes, involve the confiscation of private property is widely held in popular thinking and scholarly writing.... Politically, the conviction*

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<sup>60</sup> C.S. Lewis, *Mere Christianity* (Macmillan Publishers, 1952) (“And out of that hopeless attempt has come nearly all that we call human history—money, poverty, ambition, war, prostitution, classes, empires, slavery—the long terrible story of man trying to find something other than God which will make him happy.”)

<sup>61</sup> Martin Buber, *I and Thou* (Charles Scribner & Sons, 1937) (When two people relate to each other authentically and humanly, God is the electricity that surges between them.”).

<sup>62</sup> Linarelli at 431 (“Finally, Nietzsche had no concern about the common good. Nietzsche's herd or slave morality is good for the group or collective but not for the individual; noble morality is about how to make the individual better off, regardless of what the community might need from the individual.”).

<sup>63</sup> *Supra* Note 61.

*that taxes deprive people of their money shapes both conservative arguments for tax cuts and liberal arguments that taxes are the price that must be paid for a civilized society.*” – David Duff (2005)<sup>64</sup>

Tax avoidance is the ultimate form of civil power. You pay and I don't. Stated in such Nietzschean terms, the Libertarian world view is not premised on economic “efficiency” or “fairness”. Instead, Libertarian doctrine represents the Will to Power over life and over society through the tax laws. The various “metaphors” and references to various *natural law* theorists are from a Nietzschean perspective are simply used by Libertarians to justify the exercise of power. Libertarian tax doctrine is now set forth as the rejection of a general welfare and is directed exclusively toward the fair treatment of the individual. Schoenblum (1995) describes the rejection of the welfare and benefit theories of progressive taxation as follows:

Both benefit and equal sacrifice theory are linked to individual benefit or utility. By way of contrast, welfare economists sought a total escape from all such limitations, by shifting the focus from the individual to the society's welfare as a whole. Rather than see the issue as what is fair to particular persons, the concern is one of maximizing total welfare, even though certain individuals may be treated relatively unfairly in the process. In large part, this vision is based on the assumption that the current distribution of wealth and income itself is unfair and was arrived at unjustly.<sup>65</sup>

The Libertarian doctrine on tax policy is comprised specifically of three distinct elements: (i) the avoidance of income taxes during life; (ii) the elimination of estate taxes as a psychological means to overcome physical death; and (iii) the causing of “lesser” persons to pay high wage taxes as an exercise of absolute power. Each of these specific elements are discussed herein in relation to the particular exercise of the Will to Power by the Libertarian.

#### **a. The Will to Power over the State.**

The ability of the Nietzschean aristocracy not to pay tax, notwithstanding all manner of laws requiring it to do so, represents an exercise of the Will to Power.<sup>66</sup> Epstein (1986) describes this as a reversal of the fundamental Nietzschean order, “where the citizen is made the servant instead of the master of the sovereign.”<sup>67</sup> Libertarians re-define the democratic state tax power generally as a deprivation of liberty, or “theft”.<sup>68</sup> In the

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<sup>64</sup> David Duff, *Private Property and Tax Policy in a Libertarian World: A Critical Review*, 18 Can J. L. & Juris. 23 (2005).

<sup>65</sup> Schoenblum at 247 (citations omitted); Nozick at 149-51.

<sup>66</sup> The term “aristocrat” or “aristocracy” is applied here as synonymous with Nietzsche’s “oberman” or societal “overlord”.

<sup>67</sup> Epstein (1986) at 49.

<sup>68</sup> Epstein (1986) at 49-50 (“Liberty and sovereignty are in conflict”); *Infra* Note 69, Rothbard (2006) at 37.

*Libertarian Manifesto*, the famous modern Libertarian Rothbard (2006) described the “attitude” of Libertarians toward the state as follows:

For Libertarians regard the state as the supreme, the eternal, the best organized aggressor against persons and property of the mass of the public... [I]f you wish to know how Libertarians regard the state and any of its acts, simply think of the State as a criminal band, and all of the Libertarian attitudes will fall into place.<sup>69</sup>

Here the Libertarian defines itself as in opposition to the democratic state in the exercise of the taxing power insofar as that represents the aggression of the state against the public. This is a general defiance against the rule of law, or stated differently, the culmination of Thoreau’s *Civil Disobedience* generally. Furthermore, in the opposition to the state, the Libertarian relishes in the *unreasonableness* of the act of *Civil Disobedience*, the “special power” to resist against an all-powerful state. Linarelli (2004) describes Nietzsche’s *unreasonable* man as follows:

Nietzsche is saying something similar to George Bernard Shaw's “[t]he reasonable man adapts himself to the world: the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man.” To Nietzsche, hardship, striving, unreasonableness – these are all attributes that are required for the enhancement of the human condition.<sup>70</sup>

Notably, no mention of “economics” or “efficiency” appears in this section of the *Libertarian Manifesto*. The approach is purely on Nietzsche’s terms in that the analysis is in the actualization of self without regard to the impact on others. The Libertarian wills himself to be the *unreasonable man* and perceives in it the advancement of mankind general in the defiance of the taxing power of the state.

#### **b. The Will to Power over Physical Death.**

The Libertarian attempt to overcome physical death arises in the context where the Libertarian feels empowered in civil society. That is, the Libertarian feels powerful in the civil laws and is not subject to a higher moral standard, such as with a traditional religion. This is the “bright side” of Nihilism, typically for the younger Libertarian. As Nonet (1990) says, “In this transposing and postponing of the ends of life to the afterlife begins the movement by which ‘the highest values devalue themselves,’ namely the destructive phase of nihilism.”<sup>71</sup> But, as the Libertarian ages a transition begins to the “dark side” of Nihilism – the beginning to question that the human will may not be powerful enough to

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<sup>69</sup> Murray Rothbard (2006), *For a New Liberty: The Libertarian Manifesto* at 56-7 (Ludwig von Mises Institute, Auburn, Alabama).

<sup>70</sup> Linarelli at 438 (citations omitted).

<sup>71</sup> Nonet at 673.

overcome death itself and that life may not continue forever. Therefore, the Libertarian begins to seek to exercise the Will to Power over physical death. The outcome is described by the Libertarian author Vance (2010):

To the libertarian, the arguments against the estate tax all come down to liberty and property.... The right of the deceased to dispose of his accumulated wealth – whether it is earned or “unearned” – is a natural and inviolable right.... [T]hat must be his decision, not the state’s. Every American should have the liberty to dispose of his property – in life or in death – as he sees fit.<sup>72</sup>

Here then is the complete expression of the Libertarian Will to Power over death. Vance (2010) explains precisely that the libertarian will dispose of wealth – *in physical death*. Such is a “natural right”. The Libertarian expressly denies that *death* is an aspect of man’s natural existence. To the contrary, *life* and *death* are the essence of the *natural order*. The Will to Power of the individual becomes simply the will to eternal life through property. This is the direct exercise of the Will to Power from the grave. Therefore, in the defiance of any estate tax the Libertarian continues to believe in eternal life and the ability to psychologically overcome physical death in Nietzschean terms.

### c. The Will to Power over “Lesser” Wage Taxpayers.

The final expression of the Libertarian Will to Power is the dominance over others. Such power is distinguishable from the defiance of the power of the state to the direct application of power against others within the construct of the tax laws. Berkowitz (2003) explains the Nietzschean view generally:

What Nietzsche stresses is not the specifics of any particular division of nature, but rather that nature – and with it life – demands distinctions among men. Life, understood as will to power, is the natural drive for man and all beings to assert themselves in their difference and superiority over others.<sup>73</sup>

Within the tax laws, therefore, it is not only necessary for the Libertarian not to pay taxes. This is simply the defiance of the power of the state. More is required. To fully exercise the Nietzschean Will to Power, the Libertarian must also cause someone else to pay. In modern tax parlance the “wage-worker” that actually pays tax is a “lesser” being in comparison to the Nietzschean aristocrat. This is practically necessary because the state needs some revenue to continue to provide basic services. But the practical outcome is a secondary concern to the Libertarian. The Libertarian does not so much care about any potential shortfall in government services caused by a lack of tax receipts.

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<sup>72</sup> Laurence M. Vance (2010). *A Libertarian View of the Estate Tax*. The Future of Freedom Institute *available at* <http://fff.org/explore-freedom/article/libertarian-view-estate-tax/>.

<sup>73</sup> Berkowitz at 1141.

Instead, the Libertarian is concerned with the exercise of power over the “lesser” beings that comprise society – that is to say the “lesser” beings must never take from the Nietzschean aristocracy. Such an outcome is the ultimate outrage in the mind of the Libertarian. This view is stated expressly by Rothbard (2006) as follows:

If the State is a group of plunderers, who then constitutes the State? Clearly, the ruling elite consists at any time of (a) the full-time apparatus—the kings, politicians, and bureaucrats who man and operate the State; and (b) the groups who have maneuvered to gain privileges, subsidies, and benefices from the State. The remainder of society constitutes the ruled. It was, again, John C. Calhoun who saw with crystal clarity that, no matter how small the power of government, no matter how low the tax burden or how equal its distribution, the very nature of government creates two unequal and inherently conflicting classes in society: those who, on net, pay the taxes (the “tax-payers”), and those who, on net, live off taxes (the tax-consumers’).<sup>74</sup>

The “lesser” beings must therefore contribute to society in the form of wage taxes – meaning the “lesser” beings must pay the aristocracy for the privilege of living in the state. This is the true Libertarian ideal. Here, Rothbard (2006) describes the status-quo in Nietzsche’s revolutionary terms, (i.e., the Libertarian “tax-payer” is dominated by the “tax-consumer” aristocrat). Of course, the opposite is true in modern society. Yet, the implication is an urging for the Libertarian to exercise the Will to Power against the “tax-consumer”. This is the rising up of the Libertarian against the moral standard comprised of the tax laws. However, as a jurisprudential matter, Epstein (1986) states the Libertarian call for a flat-tax based on a “tolerable match between the benefits and costs of government services.” This is referred to as a “proportional tax” most directly reflecting the Libertarian view of tax policy.<sup>75</sup> Schoenblum (1995) described this as based on the natural law views of Rawls, as follows:

Rawls endorses a proportional expenditure or consumption tax as superior to income taxation in that “it imposes a levy according to how much a person takes out of the common store of goods and not according to how much he contributes (assuming here that income is fairly earned).”<sup>76</sup>

In the current tax policy framework many different proposals are set forth reflecting the Libertarian view with unique incentives to tax the “lesser” beings. As the Libertarian worldview becomes more and more institutionalized within the tax code the Nihilism of the view becomes apparent and the Libertarian revolution thereby comes into

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<sup>74</sup> Rothbard (2006) at 41.

<sup>75</sup> *Supra* Notes 1 to 4; Joseph M. Dodge, Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles, 58 *Tax L. Rev.* 399 (2005).

<sup>76</sup> Schoenblum at 251-2.

contradiction to itself.<sup>77</sup> In practical terms this would occur by necessity where the “lesser” beings are “tapped-out” (i.e., when the Libertarians levy tax to the extent the disposable income is reduced to zero or below).

#### IV. WHAT IS THE ACCUMULATION OF MONEY?

*“The accounting questions that obsess welfare economists and theorists of justice, the debates over maximean, maximin and maximax, would no doubt have struck Nietzsche as symptoms of a shopkeeper’s morality.”* – Binder & Weisberg (1997)<sup>78</sup>

The “morality of the shopkeeper” reflects the use of money to induce economic behaviors in other people.<sup>79</sup> Therefore, the Will to Power could be merely the *will to money*. The shopkeeper exercises the Will to Money directly through the collection of money from others. The marketplace thus operates automatically to achieve “efficiency” and “fairness” in the eyes of the shopkeeper. This is the invisible hand.<sup>80</sup> Money is therefore the indirect control over others. In the accumulation of money the shopkeeper gains the ability to demand the control over others by spending the money. Perhaps then a few chosen shopkeepers *ought to* control society with a visible hand for the good of the many? Indeed, the accumulation of a great deal of money appears to me an unstated prerequisite for Libertarians to pursue public office in the United States. In that case, perhaps the shopkeeper that accumulates the most ought to automatically control society with a visible hand? Epstein (1985) derives such in regards to tax policy where he proposes that in a Lockean world “that the just tax should not alter the rank ordering by wealth of individuals within the society.”<sup>81</sup>

##### a. The Libertarian Ideal of “Rank by Money”.

In the Libertarian mind, money accumulation thus creates a “rank ordering” of persons by the amount of money or property accumulated. Therefore, progressive taxation could change the “rank”, thereby causing a person of lower “Rank by Money” status to be held in higher regard than otherwise deserved.<sup>82</sup> To the Libertarian this is a major problem. Unfortunately, such an idea is missing from Locke’s treatise and must therefore be inferred by Epstein in the construction of tax policy in the “Lockean world”. Therefore, Epstein determines progressive taxation to be immoral under *natural law* doctrine simply by a general description of Locke’s natural state of man. That is to say that somehow under the *natural law*, men are rank-ordered by the aggregate amount of money or

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<sup>77</sup> See, Richard A. Epstein, Taxation with Representation: Or, the Libertarian Dilemma, 18 Can. J. L. & Juris. 7 (2005).

<sup>78</sup> Binder & Weisberg at 1159.

<sup>79</sup> *Id.*

<sup>80</sup> Nozick at 18.

<sup>81</sup> Schoenblum at 245 *citing* Epstein (1986), *supra* Note 1.

<sup>82</sup> *Id.*

property accumulated. At the time of the drafting of the U.S. Constitution the relative wealth standings of the aristocrats was generally well known to all in land acreage or slave holdings because it was given as an absolute number. Here, the Libertarian would presumably enthusiastically use the power of the state to publish or enforce “Rank by Money” standings in order to recreate that ability to know exactly the relative wealth of others. This is implicit and fundamentally necessary to the Libertarian “Rank by Money” worldview. The unstated presumption is that the “Rank by Money” standings represent the right by the shopkeeper to exercise direct power (not indirect money power) over society without actually using the money.

“Rank by Money” is a very strange version of morality to say the least. In the first place, the shopkeeper trades labor for money. The shopkeeper then gains an indirect right under the *natural law* to demand labor or property from others with the money. It is not clear theoretically whether the “shop” or the “keeper” is the ultimate source of the money and should have the moral authority to dispense the proceeds. Nonetheless, the shopkeeper cannot actually use the money if he wants to maintain the “Rank by Money” order. To spend the money is to automatically lower his “Rank by Money” standing. Therefore, the shopkeeper can only spend the “liquid” portion of his assets that represent the differential between himself and the next on the “Rank by Money” order. Accordingly, the shopkeeper is cash poor because he possesses a lot of money but cannot actually spend it. In the eighteenth century world land and slave holdings automatically generated “spending money” for the nobility and there was no diminishment in wealth by the spending of these proceeds. In a fiat money world, spending does diminish wealth. This represents a major contradiction for Libertarians in applying the relative wealth standing value system of the eighteenth century to the modern state.

**b. “Rank by Money” and the Overcoming of Physical Death.**

The Will to Power by the Libertarian over physical death appears to require that the Libertarian achieve the highest “Rank by Money” status prior to death. The unstated idea is that the highest “Rank by Money” is the most likely to overcome physical death. In general, the question of how to deploy the money back to society at death is of secondary importance to most individual Libertarians, although Epstein mentions this in passing as “imperfect obligations”.<sup>83</sup> Similarly, the pharaoh of the ancient Egyptians would actually use wealth to construct pyramids and thereby overcome physical death via a more orderly transition to the afterlife. But the Egyptian view is different than the Libertarian view because the Egyptian pharaoh must actually translate money into the tangible construction of the pyramid *prior to death*, since the pyramid is part of the transition process to the afterlife. The Libertarian to the contrary operates on more

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<sup>83</sup> *Supra* Note 56.

abstract grounds and simply needs to hold fiat money in order to achieve the highest “Rank Money” possible prior to death.

**c. A Dialectic Response to the Libertarian Aesthetic of Tax Avoidance as the Overcoming of Death.**

Here then we engage the Libertarians on Nietzsche’s terms in the dialectic by challenging the basic presumptions of Libertarian thought on the basis of life and death generally. The logical proof is to disprove Nietzsche (or the Libertarian) by showing that the aristocrat is *not* the master. Accordingly, this is the third alternative in any response to a person seeking to exercise the Nietzschean Will to Power. The first option was to engage under the *natural law*, and the second was to disprove the application of *natural law* generally. The third response could take many forms but the author gives the following as perhaps a first attempt:

*Libertarian – Did you really think you could overcome death by avoiding taxes? You are not going to live forever! Money is not divine. When someday you acknowledge your own mortality, you should buy some art, possess it – but do you still think you can own art? Nay, you are already aesthetically dead. Look at all the people around you living and laughing. Are you jealous? If so, make them pay even more tax than! Wipe the smile off their young faces! Forget efficiency and act always as the embodiment of a defiant Scrooge. But, how is it possible such people pay exorbitant taxes on their wages while you pay nothing and yet they still laugh, while you cringe in fear of taxes and death! Who is the master?*

**V. NIETZSCHE’S “AESTHETIC” VERSUS THE LIBERTARIAN WILL TO TAX AVOIDANCE.**

*“The phenomenon ‘artist’ is the most transparent: - to see through it to the basic instincts of power, nature, etc.! Also those of religion and morality! An anti-metaphysical view of the world – yes, but an artistic one.” – Friedrich Nietzsche, Will to Power<sup>84</sup>*

A relatively new interpretation by Nehama (1985) suggested that Nietzsche posits life simply as the story of a literary text and life characters.<sup>85</sup> In lay terms, Nehama (1985) suggests life is a book and the individual writes the book (i.e. “Today represents a new chapter in my life.”). In philosophical terms, such an approach is referred to as pure “Aestheticism” representing the view of life as essentially an art (or literature) project. Although Nehama’s (1985) interpretation is properly rejected as a technical matter for various reasons, the philosophical observation that Nietzsche relates Aesthetics to life is fundamentally correct.<sup>86</sup> Nietzsche advocates the overcoming of Nihilism by the

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<sup>84</sup> Brian Leiter, *Nietzsche and Aestheticism*, 20 *Journal of the History of Philosophy* 275, 283 *citing* Nietzsche, *Will to Power* at 797, 1048.

<sup>85</sup> Alexander Nehama, *Nietzsche: Life as Literature* (Cambridge, MA: Harvard Univ. Press, 1985).

<sup>86</sup> Leiter at 280 (1992) (“[A]estheticism, I suggest, is actually *not* Nietzsche’s view... This is not to deny that Nietzsche thinks both art (though not particularly literature) and aesthetic value standards are

creativity of the human spirit. Yet, as Huigen (2003) explains, “If we abjure the certainties of transcendental reason and natural science but replace them with nothing, then we have done nothing more than hasten the slide toward nihilism that is implicit in the ascetic ideal.”<sup>87</sup>

Notably, perhaps because of the inherent controversy over his philosophy, Nietzsche’s proposal for the overcoming of Nihilism is often ignored. Yet, this is ostensibly the most important practical aspect of Nietzsche’s writings especially in the application to positive law. The more traditional interpretation of the overcoming of Nihilism by the human Aesthetic as presented in Nietzsche’s *Will to Power* is given by Leiter (1992) as follows:

[O]ne should evaluate the world aesthetically, that one should assess its value in broadly aesthetic terms.... [This assessment] fits Nietzsche’s rejection of ordinary moral categories as evaluative terms.... And second, it is compatible with the appealing suggestion that what Nietzsche values about the “higher men” (who are thwarted by morality) is best described aesthetically: that we do, as Philippa Foot has noted, “find patterns of reaction to exceptional men that would allow us to see here a valuing rather similar to valuing on aesthetic grounds.”<sup>88</sup>

Nietzsche also makes specific reference to Dionysis (the Greek and Roman God) as acceptance of the essence of that “god of love” (or pleasure, or wine). Ninet (1990) states as follows:

Nietzsche has found God in love, in the lack of godliness from which springs the longing for God: he "had to find a god who is all love, all capacity to love." Dionysus is "the great ambiguous one," the god who is the absence of God, godlessness, i.e., no God at all, "the god of seeking".<sup>89</sup>

From these descriptions, Nietzsche’s proposed resolution of the Nihilist paradox facing mankind after the destruction of all moral values is apparent. As Huigens (2003) says, “The good is that which pertains to this flourishing of human energy and activity.”<sup>90</sup> As such, the human overcoming of Nihilism is in the embrace of human activity generally. Even Nietzsche “the great annihilator” ultimately embraces humanity, even if after tearing apart its moral foundations.

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extremely important; it is to deny, however, that he holds the unusual view that the natural world and its occupants are best interpreted as though they shared the features of (indeterminate) literary texts and of literary characters.”).

<sup>87</sup> Huigen at 565.

<sup>88</sup> Leiter at 284.

<sup>89</sup> Nonet at 693-4 citing Nietzsche, *Beyond Good & Evil* at §269.

<sup>90</sup> Huigen at 564.

But, contrary to Nietzsche, the Libertarian does not embrace creative human activity. Tax avoidance is a creative nothing. Tax avoidance amounts to simply to an accounting entry that is reversed with the corresponding debit or credit.<sup>91</sup> It creates nothing *new*. It has been done before. Even the celebration of successful tax avoidance by the suicidal tax accountant is not creative. A great victory in tax avoidance is simply the celebration of absolute power over the herd in a democracy. That is, to make laws and then defy the very laws which one has created. But a victory over the herd in this manner is not worth celebrating. Nietzsche's aristocracy class defines itself as dominant over the serf classes. Neither is the accumulation of money generally a creative endeavor. The accumulation of money can never be the activity of Nietzsche's true aristocrat because money is only a secondary claim on the activity of others and not a direct creative action. This is nothing. Furthermore, the aristocracy already commands the herd!<sup>92</sup> Nothing more is required except to simply issue thy commands! Money as indirect power is quite redundant from a societal perspective. Linarelli (2004), explains as follows:

Noble morality is internal to the individual and has nothing to do with instrumental effects on others. In dealing with his famous distinction between herd or slave morality and noble morality, Nietzsche used the word "utility" to describe the usefulness of herd morality to the preservation of the herd.<sup>93</sup>

Even in the purported accumulation of money for the Will to Power over physical death the accumulation of fiat money is absolutely nothing. There is no tangible Aesthetic outcome – not even pyramids nor a collection of shiny gold to show for the effort. Death always wins. Indeed, the death of a great capital accumulator reverberates similarly to the death of a "hoarder" who dies in the collapse of a houseful of meaningless possessions. In Nietzschean terms, this represents a sad footnote to a wasted life. The celebration of tax avoidance by Libertarians therefore is an extraordinary aberration in the human endeavor. To put it most simply – nobody mourns the death of Scrooge. Scrooge denies life itself. To engage in a meaningful activity is to create something *new*. As Rahdert (2003) explains, [i]n order to create the new, [the artist] must transgress the old, breaking up its encrusted structures. In doing so, he reasserts life itself, for life is change and transformation--and laws must take its lead!<sup>94</sup>

Later generations may judge harshly the Libertarian Aesthetic of a primary goal in life to simply accumulate money. For example, it is impossible to explain why one should

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<sup>91</sup> Rahden at 732 ("Knowledge is the falsification of diversity and innumerability in that it renders them as identical, similar and countable.")

<sup>92</sup> Nonet at 677 ("The "history of morals" is the history of a slave rebellion against this imperative of life, the outcome of which is the degeneration of obedience into the "herd instinct," with the risk of a degeneration of man into a herd animal.")

<sup>93</sup> Linarelli at 436.

<sup>94</sup> Rahdert at 1143.

gather money and not buttons. The best answer might be given as “Locke told me to accumulate private property.” In that case, the “will” or “why” is simply received from Locke. To Nietzsche the apparent Libertarian confusion over the purpose of life may represent simply the becoming of mankind through trial and error; “Will to power is the struggle of humans over time to learn and develop norms of behavior through species preserving error.”<sup>95</sup> Nietzsche rejects all truth through insofar as, “knowledge is not rational, scientific, ahistorical or analytical.”<sup>96</sup> Mootz (2003) explains as follows:

[Any] theory must at least decide between itself and the many other interpretations available. The criteria for making such a decision, which Nietzsche cites again and again, are of a “physiological” nature: strength--weakness, health--sickness, as well as the related ideas of creativity--“ressentiment” and active-- reactive.<sup>97</sup>

Accordingly, if or when Libertarianism fails as a social movement this experiment will become part of the collective memory of mankind as to what is *not* true, or what *not* to do; “Likewise, to Nietzsche, logic originates in illogic.”<sup>98</sup>

## VI. THE DESIGN OF TAX LAWS.

*“The rational core of Nietzsche’s utopian vision reminds us that legislation must serve life, not stand in static opposition to it. Though it is equally true both of art and of law that they (should) stand ultimately in the service of life, we may still ask what life would be without art.”* – Wolfert von Rahden (2003)<sup>99</sup>

The combination of Nietzsche with the design of law itself is something of an anachronism. Accordingly, as Feldstein (1976) correctly says, we must design tax policy from where we are now, and not in reference to John Locke’s version of natural law.<sup>100</sup> Much of *Beyond Good & Evil* reflects Nietzsche’s disdain for law or rules generally. The danger is to see legal tradition as the becoming of a set of moral values to limit mankind in the future, which is similar to religion or moral values under Nietzsche’s conception. In other words, once the law is derived it then automatically operates as a limiting orthodoxy.<sup>101</sup> As explained by Nonet (1990):

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<sup>95</sup> Linarelli at 425.

<sup>96</sup> Linarelli at 439.

<sup>97</sup> Francis J. Mootz III, *Nietzschean Critique and Philosophical Hermeneutics*, 24 *Cardozo L. Rev.* 967, 1025 (2003).

<sup>98</sup> *Id.*

<sup>99</sup> Rahden at 737.

<sup>100</sup> Martin Feldstein, *On the Theory of Tax Reform*, 6 *J. Pub. Econ.* 77, 90-4 (1976).

<sup>101</sup> Nonet at 688 (“Here Nietzsche foresees that his writing has articulated thoughts that are about to become the unthought orthodoxy of generations to come: Positive law is destined to be the rule of a

From the beginning, Nietzsche conceives nihilism as an essentially destructive movement, the unfolding of a will to the nothing by way of a devaluation of values. In the completion or fulfillment of this destruction, however, Nietzsche envisions the possibility of a creative transformation: that the will may free itself to posit new values. Is positive law so conceived truly free of destructiveness, so that it may indeed be regarded as an overcoming of nihilism?<sup>102</sup>

The Libertarian philosophers take the U.S. Constitution as the enshrinement of Libertarian values and therefore the basis to command society.<sup>103</sup> To Epstein and Nozick, the U.S. Constitution “appear[s] as a beautiful semblance, one with the power to awe and to seduce man to its authority.”<sup>104</sup> As Nonet (1990) explains: “Positive law itself is man's creative affirmation of the full creative power of human thought. If thought is creation, beings – what thinking thinks – are creatures of thought.”<sup>105</sup> The U.S. Constitution as positive law thereby becomes something of a work of art or creative project. Positive law itself may be a creative project for mankind. As explained by Rahden (2003): “The artist, as the prototype of a totally and comprehensively creative individual, sets the paradigm for the legislator to come. He is productive, creative and innovative; he modifies the environment as well as himself.”<sup>106</sup>

But, the Libertarian stands in awe of the U.S. Constitution. The Will to Power as command requires the Libertarian aristocracy to tear down any law that limits the self-fulfillment of the Libertarian aristocrat through tax avoidance.<sup>107</sup> Any Libertarian tax system is thereby inherently self-destructive.<sup>108</sup> One is tempted to interpret Nietzsche into the tax law as requiring Jean-Baptiste Colbert’s “plucking the most feathers with the least amount of squawking.” One can imagine the “plucking” of the wage laborer as involving the least squawking. The Libertarian overlord will inevitably derive laws that prove the wage laborer ought to be plucked as a form of punishment by taxation for the

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godless humanity. Nietzsche's own art, which celebrated the supreme value of creative art, has itself only yielded a truth, that is, a dead thought, a thought held without question, uncreatively, thoughtlessly....”).

<sup>102</sup> Nonet at 680.

<sup>103</sup> Richard Weisberg, *It's a Positivist, It's a Pragmatist, It's a Codifier! Reflections on Nietzsche and Stendahl* 18 *Cardozo L. Rev.* 85, 92 (1996) (“The most decisive move, however, made by the higher power against the predominance of grudge and spite, is the establishment of the law, the imperial elucidation of what counts in [the codifier's] eyes as permitted, as just, and what counts as forbidden and unjust. . . . From then on, the eye will seek an increasingly impersonal evaluation of the deed, even the eye of the victim itself, although this will be the last to do so.”)

<sup>104</sup> Berkowitz at 1136.

<sup>105</sup> Nonet at 682.

<sup>106</sup> Rahden at 736.

<sup>107</sup> Nonet at 668 (“As the command of a will, positive law is the actuality (*Wirklichkeit*) and effectiveness (*Wirksamkeit*) of the commanding power of the will.”).

<sup>108</sup> See, Schoenblum at 271 (“The argument has been made here that no persuasive theory has been developed to date to justify substantially unequal taxation among persons in a liberal society. Taxation is a necessary, but coercive, act by the state.”).

failure to accumulate money in sufficient quantity.<sup>109</sup> But the aristocracy itself may find it necessary to contribute at least something to the common coffers either directly or indirectly. And it goes without saying that some Libertarians would be willing to destroy the U.S. Constitution in the furtherance of tax avoidance.<sup>110</sup> Accordingly, any tax assessment on the aristocrat is simply the embodiment of Nietzsche's Nihilist contradiction. As explained by Nonet (1990):

Positive law, the self-affirming power of the will to set values, already rules supreme in the understanding by which the collapse of the realm of spirit takes on the character of a devaluation of values. From within this understanding, the debasement of spirit accomplished by positive law cannot itself be recognized as nihilism. Thus positive law blinds itself to its own destructiveness, and falls under the illusion that it will overcome all nihilism.<sup>111</sup>

Therefore, tax laws stand in partial opposition to the U.S. Constitution itself in the conception of the Libertarian philosopher. Berkowitz (2003) explains:

The legislator, like the priest, must be an artist, skilled in artifice – the art of transforming semblance into truth. The “art of legislation” is the art of the Holy Lie, the creative act through which the legislator positively erects his will as the truth for a people. To say that priestly legislation is an art is to say that legislation is a means to the creation of truth.<sup>112</sup>

Yet progressive tax laws persist in spite of such implied resistance. Indeed, progressive tiered tax rate structures are part of U.S. income tax law.<sup>113</sup> Thus, as we look upon modern society one might expect to see in it a reflection of Libertarian values. One might expect to see tax laws that find some balance or compromise to the competing aims of Libertarianism and the revenue needs of the state. Accordingly, within U.S. tax law not only do we find tiered tax rate structures, but also the individual corporate and “alternative minimum tax” rules, along with the concept of accumulated earnings taxation.<sup>114</sup> Oh, how the Libertarian howls at the thought of a “minimum tax”! The very

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<sup>109</sup> Huigens at 581-2 (“These efforts on the part of the moral aristocracy turn punishment into the opposite of revenge—into an impersonal matter of retribution in which descriptions of “just” and “unjust” exist after the creation of a legal system, and not before it.”).

<sup>110</sup> See, Eric Rakowski, *Transferring Wealth Liberally*, 51 Tax L. Rev. 419 (1995) citing T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655 (1975) (“The fact that someone would be willing to forego a decent diet in order to build a monument to his god does not mean that his claim on others for aid in his project has the same strength as a claim for aid in obtaining enough to eat (even assuming that the sacrifice required of others would be the same).”).

<sup>111</sup> Nonet at 680.

<sup>112</sup> Berkowitz at 1136.

<sup>113</sup> 26 U.S.C. §1.

<sup>114</sup> 26 U.S.C. §55; §531, et. al.

thought of it stands against all that is good and holy. But, it is the inherent tax avoidance contradiction of Libertarianism itself that gives rise to the need for the “minimum tax”.

One primary thesis of this article is that the tax laws of the United States as derived from and through the democratic process reflect an accommodation to the Libertarian psychology. Contrary to the Libertarian howling, the tax laws are currently reflective of Libertarian values. But, Libertarian values are inherently contradictory.<sup>115</sup> The Will to Power through tax avoidance requires the existence of taxation and the means to avoid it through complex tax planning techniques, even though some revenue must be collected. Yet, the Libertarian is not self-conscious of the impact of his or her own ideology. As explained in Nietzschean terms by Binder & Weisberg (1996):

The point of this self-consciousness is to place in question not the truth of what we see, but the value of that way of seeing. If one comes to see one's own sensibility as impoverished or boorish, the appropriate response is to change the way one lives. Thus, philosophy is used not to escape the perspectival limits inherent in living, but to enhance our capacity to choose the limits within which we will live, and our responsibility for that choice. It is this self-shaping capacity that Nietzsche refers to as power.<sup>116</sup>

The lesson for the appropriate design of tax laws taking into account Libertarian ideology is that the “alternative minimum tax” itself represents an equitable resolution of the Libertarian Nihilist contradiction. Insofar as the Libertarian philosopher is not aware of the inherent contradictions this is to be expected. As explained by Nonet (1990):

Thus positive law here again seals itself from the possibility of recognizing its destructiveness. The same denial – that there is nothing outside the will – even enables positive law to proclaim itself the savior of being: since the being of beings is nothing but the actuality of the creative will, the self-affirmation of that will suffices to secure being from the destruction that a “will to the nothing” threatened to bring.<sup>117</sup>

The Libertarian must therefore accept the minimum tax or suffer the Nietzschean destruction of its own positivist law value system. In lay terms, the “alternative minimum tax” practically reaches the goal of taxing a Libertarian who would rather die than pay taxes.

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<sup>115</sup> Weisberg (1996) at 92 (“The most decisive move, however, made by the higher power against the predominance of grudge and spite, is the establishment of the law, the imperial elucidation of what counts in [the codifier's] eyes as permitted, as just, and what counts as forbidden and unjust. . . . From then on, the eye will seek an increasingly impersonal evaluation of the deed, even the eye of the victim itself, although this will be the last to do so.”).

<sup>116</sup> Binder & Weisberg at 1156-7.

<sup>117</sup> Nonet at 682.

## VII. CONCLUSION

*"Life must rise against morality and law wherever morality and law are opposed to life, for the law towers where life has turned to stone."* – Wolfert von Rahden (2003)<sup>118</sup>

The remainder of this article is directed toward the wage-earning “lesser” taxpayer as viewed in the eyes of the Libertarian who holds the whip. This is perhaps the most important segment of the article given the current sharp regressivity of the United States tax system.<sup>119</sup> We take for granted here that Libertarians view other taxpayers as “lesser” beings consistent with Nietzsche’s view of the lower castes in society.<sup>120</sup> We also take for granted that the tax avoidance motivations of the Libertarian are successfully translated into the power of the state at some level (as is currently the case). Nonet (1990) describes the rising of the Will to Power to command as follows:

Almost everything we call 'higher culture' rests upon the spiritualization and deepening of cruelty – this is my thesis; the 'savage animal' has not been mortified, it lives, it flourishes, it has only – deified itself.<sup>121</sup>

Nietzsche’s Will to Power is institutionalized within economics through “optimal tax” doctrines that generally conclude *only* wage-earners should pay taxes.<sup>122</sup> Accordingly, here we assume the government actualizes a quasi-caste system in the tax law consistent with Nietzschean and Libertarian ideology. This represents the rejection of the alternative view that taxpayers that work for a living and earn a wage make a co-equal contribution to society.<sup>123</sup> Libertarians will at every turn deny this is true and treat the “lesser” beings with contempt as “failed” accumulators. Therefore, the fundamental issue here is how to relate to Nietzsche or Libertarian as lawgiver.

The general attitude of the Libertarian toward the “lesser” taxpayer is reflected in an outright rejection of the “ability to pay” principle. In other words, the respective tax base ought not to be applied against a concept of income and should instead be a reflection of some other conception of *natural law* to be defined by the Libertarian lawgiver. Such a concept will inevitably result in a regressive form of taxation designed to punish the

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<sup>118</sup> Rahden at 735.

<sup>119</sup> Bret N. Bogenschneider, *The Effective Tax Rates of U.S. Persons by Income Level*, 145 TAX NOTES 117 (Oct. 6, 2014).

<sup>120</sup> Roger Berkowitz, Friedrich Nietzsche, *The Code of Manu, and the Art of Legislation*, 24 CARDOZO L. REV. 1131 (2003) (explaining that Nietzsche was certainly inspired by Manu ideas, perhaps as representative of the ideal hierarchical society).

<sup>121</sup> Nonet at 678.

<sup>122</sup> See, N. Gregory Mankiw, Matthew Weinzierl & Danny Yagan (2009), *Optimal Taxation in Theory and Practice*, 23:4 J. of Econ. Perspectives 147.

<sup>123</sup> See, Nozick at 246-50

“lesser” taxpayer whose income is derived primarily from wages. The precept to this Libertarian view was articulated by Schoenblum (1995) as follows:

Ability to pay is not an entirely distinct alternative to benefit theory. Any number of benefit theorists have justified differentials in taxation founded on benefit theory by reference to ability to pay. Underlying this notion seems to be the fallacious premise that those who are better able to pay must have received more benefit from the government. In this way a proportional or progressive rate of taxation is justified.<sup>124</sup>

If the tax laws are to be designed to punish the wage-earning taxpayer without progressivity in any form, then this may result in the overall suffering of a major segment of society who must bear the full weight of the tax system. But, that is not unique. The suffering of the wage laborer is a fundamental aspect of modern society. Nonet (1990) described the situation of the suffering within society from a Nietzschean perspective:

[M]an was surrounded by an enormous void -- he did not know how to justify, explain, affirm himself, he suffered from the problem of his sense. He also suffered otherwise, . . . but his problem was not suffering itself, but that there lacked an answer to the crying question "to what end do I suffer?"<sup>125</sup>

The conclusion of this paper must therefore be to provide some means for the “lesser” being to self-actualize while subject to the harsh and incessant Libertarian whip applied via a regressive tax system. We have in mind here the young professional members of society toiling with 80-100 hour weeks in law and accounting firms, the blue-color laborer asked to work for below living wage, the single-mother seeking to go to school while working part-time, each with effective tax rates far in excess of the Libertarian aristocrat.<sup>126</sup> For these persons it is impossible to satisfy the Libertarian Will to Power. One must therefore *become* Fleischman’s “whipping boy”.<sup>127</sup> As stated in philosophical terms by Linarelli:

To be incapable of taking one's enemies... seriously for very long--that is the sign of strong, full natures in whom there is an excess of the power to form, to mold, to recuperate and to forget .... Such a man shakes off with a single shrug many vermin that eat deep into others; here alone genuine “love of one's enemies” is possible--supposing it to be possible at all on earth. How much

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<sup>124</sup> Schoenblum at 233-4 (citations omitted).

<sup>125</sup> Nonet at 676 *citing* Nietzsche, *On the Genealogy of Morals*, Part III (New York: Random House, 1967).

<sup>126</sup> *Supra* Note 119.

<sup>127</sup> Sid Fleischman, *The Whipping Boy* (Greenwillow Books, 1986)

reverence has a noble man for his enemies—and such reverence is a bridge to love.<sup>128</sup>

Therefore, the devastating yet whimsical existential response to the *Libertarian*-Nietzsche is given simply as: "Ain't I already been whipped twice today? Gaw! What's the prince done now?"<sup>129</sup>

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<sup>128</sup> Linarelli at 429.

<sup>129</sup> Fleischman at 2; *see also*: John Finnis, *Retribution: Punishment's Formative Aim*, 44 Am. J. Juris. 91 (1999).