A Challenge to the Libertarian Challenge

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The "Libertarian Challenge" to redistributive taxation was given as the syllogism: (i) Property is justified; (ii) Taxation is inconsistent with property; (iii) Therefore, redistributive taxation is unjustifiable. In this article, a challenge to the Libertarian Challenge is proposed based on the rejection of such a Libertarian definition of money as effectively equivalent to property. The value of money is further shown to be *relative* based on the holder. For example, the wealthy accumulate money *for-exchange* while the poor apply money *for-use*. Thus, to the wealthy money yields a "positional preference" in terms of the total accumulated amount relative to other wealthy persons. Taxes of course stand in opposition to such accumulations just as stated in the "Libertarian Challenge". However, a form of redistributive taxation could be applied which would levy tax yet maintain such "positional preference" of the wealthy vis-à-vis one another in terms of total money accumulations. This approach defeats the "Libertarian Challenge" because the tax is paid proportionately out of money accumulations, but where relative property holdings are maintained between wealthy persons. Such approach also yields a Pareto optimal result where money is transferred to the poor but no wealthy person is made worse off on a relative basis.

INTRODUCTION

In the article, *Fragmenting Property*, Daniel Attas provided a definition of private property as inconsistent with redistributive taxation.[1] Attas termed such inconsistency the "Libertarian Challenge". The Libertarian Challenge is the following syllogism: (i) Property is justified; (ii) Taxation is inconsistent with property; therefore, (iii) Redistributive taxation is unjustifiable. This article represents a response (or perhaps more aptly, *challenge*) to the Libertarian Challenge.

The current challenge to the Libertarian Challenge relates to the Libertarian definition of private property. That is, to the Libertarian, "property" is given as *equivalent* to money. Attas actually describes a person as "owning" money.[2] Even if true in Libertarian terms, this description is ostensibly strange since *money* is generally used to acquire *property*. Money is more appropriately defined as a value placeholder in furtherance of the *exchange* into property. Thus, redistribution via taxation represents only an indirect transfer of "property" qua money where property is taken as readily convertible into and out-of money. The terminology of Libertarianism given by Attas no longer heeds any distinction between "money" and "property", and the payment of taxes in *money* is then given as the equivalence to the transfer of *property* itself.

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[1] Attas, D., "Fragmenting Property", *Law and Philosophy* (2006) 25: 119-149.

[2] *Ibid.* at 124 ("("[H]e now decides to purchase something with the money he owns").

But, this presumption of Libertarianism does not represent what the wealthy actually do with money. The wealthy save and accumulate money. In fact, that is the definition of the term "wealthy". If the wealthy spent the accumulated money and thereby convert it into consumer goods, then they would technically no longer be wealthy. In the modern era, the wealthy are able to accumulate hoards of money in an amount potentially beyond which can ever be converted into property, *even* gold or silver. Fiat money is much more conducive to hoarding than precious metals historically used as currency. The Libertarian theorist effectively requests as part of the Libertarian Challenge that tax jurisprudence proceed on the assumption that "property" is equivalent to "money" in order to arrive at the conclusion that redistributive taxation is not justified. This is not a viable explanation for two reasons explained further here: (i) where money serves to establish solely a positional preference between wealthy persons redistributive taxation could be designed which could maintain the relative position of the wealthy vis-à-vis each other and still redistribute to the poor; and (ii) the value of money is quantitatively different between persons so redistribution could yield a gain or loss when transferred between persons, such as from the dead to the living (who enjoy a use-value for the money).

THE CHALLENGE TO THE LIBERTARIAN CHALLENGE

The current challenge is accordingly to the definitional premise of the Libertarian Challenge in the idea of money as an absolute value placeholder for money.[3] The categorization of "money" is thus more aptly taken as *relative* to the holder. Mark Hsiao summarized a functional approach to money based on its "internal" versus "external" value as follows: "When money is treated as a form of property for its use or held for its own quality, it is held for its internal values."[4] A conception of the relative value of money was likewise given by Jeanne Schroeder as follows:

> Masculine money, which is money conceived as exchange value, is quantitative in nature. Feminine money, which is enjoyment or use value, is qualitative. Quantity as commensuration is the suppression of quality as differentiation, in the same sense that the masculine position is the denial of the feminine. [5]

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[3] *See*: Waldron, J., "The Right to Private Property" (Oxford University Press, 1988); *see also*: Breakey, H., "Who´s Afraid of Property Rights? Rights as Core Concepts, Coherent, Prima Facie, Situated and Specified", *Law and Philosophy* (2014) 33: 573-603.

[4] Hsiao, M., "A Shift in the Objective Measure of the Time Value of Money" [2015] 23 Restitution Law Review 92 citing Mann on the Legal Aspect of Money (Proctor, ed.) (6th ed.0 (Oxford Univ. Press, 2005), 9.

[5] Schroeder, J., "The Midas Touch: The Lethal Effect of Wealth Maximization", 1999 *Wisconsin Law Review* 687, 755 (1999).

The wealthy tend to accumulate money based on what Hsiao refers to as its "internal" value and the poor spend it based on its "external" value. Feminist theory similarly distinguishes between money *in-use* and money *in-exchange*.

The Libertarian Challenge can be re-interpreted along similar lines as the switching between an idea of money as held for its "internal" value. The strenuous Libertarian objections to taxation result from taxation as in a form of dialectical opposition to money accumulation. In the natural state man does not accumulate money; however, in a Libertarian society, man does so.[6] Taxation negates such accumulation. Thus, taxation interferes directly with the conception of money as intended to be accumulated and held for-exchange.

Nonetheless, property accumulation by the wealthy in the circumstance where the reasonable money in-use needs have been exceeded, serves principally to establish a positional preference over other wealthy persons. The purpose of money accumulation in that case is thus to obtain a "positional preference" versus other persons and not to acquire *property*. In economic terms a "positional preference" refers to the relative standing of wealth accumulation versus other wealthy persons (and, at least ostensibly also in relation to the poor with little or no property accumulations).[7] Indeed, the origin of Libertarian theory coincides with the Enlightenment era plantation society. The plantation classes established strict rank-ordering methods in the form of land holdings in acreage and slaves. This rank-ordering established the position of the plantation owner within society. That interference with rank-ordering by property holding is indeed the modern Libertarian point.[8] By comparison, the poor do not hold money with the purpose of demonstrating relative position to other persons, but rather intend to use the money to acquire goods for consumption. The behavior of the poor in the non-discretionary spending of money is *not* merely to obtain a positional preference.

The formal challenge to the Libertarian Challenge is according the following: A "redistributive" tax does not necessarily change the relative position of the wealthy versus other wealthy persons in terms of "property" accumulation. If taxation were designed to be proportionate (based on relative wealth) a tax system could be devised which is neutral to the payor from the perspective of a ranking of persons by money held in-exchange.[9] The redistributive function of the funds levied would accrue merely to the poor who spend the money. Such a levy of a redistributive tax on a wealth accumulator can be

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6 Locke, J., "Second Treatise of Government" (1690), ed. by C.B. Macpherson (Hackett Publishing, 1980); Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789) (Clarendon Press, 1907).
7 Frank, R., "The Darwin Economy" (Princeton University Press, 2012).
8 Epstein, R., "Taxation in a Lockean World", 4:1 *Journal of Social Philosophy and Policy* 49 (1986).
9 Any tax attorney or Libertarian theorist will be quick to point out some money accumulators (particularly family businesses) will be "cash poor" and unable to pay a tax in money without a forced disposition of property. Although this is true, the author finds this to be a relatively minor problem for society and easily overcome by borrowings or other means available to the wealthy. In any case, this very practical discussion between tax attorneys is beyond the scope of the current philosophic discourse.

justified within the existing definitional framework of property where there is a consumption increase to the poor that either increases overall utility[10] or increases the standing of the least well off.[11]

In economic terms, the effect of the redistributive tax could also be Pareto optimal (i.e., a situation where after-tax no person is worse off but someone is better off).[12] The Libertarian objective where societal status is obtained based exclusively on the rank-ordering of persons by accumulated wealth in society is thereby maintained and no person is made worse off from the tax on property. Any incremental consumption by the poor (i.e., money spent in-use) is funded by a proportionate tax on the wealthy (i.e., money held in-exchange) where the rank-ordering of persons by wealth is not changed. Such a Pareto-optimal approach to redistributive taxation defeats the Libertarian Challenge since the respective positional property rights are fully maintained.

QUANTITATIVE DIFFERENCES IN THE VALUATION OF MONEY

The purpose of this section is to show by logical means that the value of money is relative and that the difference is *not* merely qualitative, but *quantitative*. That is, money for-*exchange* can really be worth more or less than money for-*use*.[13] One primary example is that money for-*use* is more valuable for persons that need certain goods for survival (and not for trade), such as food or medicine. Money in-*exchange* has a different *quantitative* value than money in-*use*. As such, the net present value within the theory of finance and taxation represents a determination of the quantitative value of money where currency represents the objective statement of value. Only entities with an infinite lifespan, de-facto immortality, and an infinite exchange horizon (such as corporations) trade money with other persons purely as in-*exchange*. Thus, the difference in money as between *exchange*-value versus *use*-value is not merely qualitative. A person who values money in-*use* values money less once all of his or her needs are satisfied, where the demand for money in-*exchange* never reaches any limit.

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[10] *See*: Kaplow, L., *The Theory of Taxation and Public Economics* (Princeton Univ. Press, 2010).
[11] *See*: John Rawls, *A Theory of Justice* (Harvard Univ. Press 1971).
[12] Pareto, V., "Manual of Political Economy" (Kelley, tr.) (1961); Mathur, V., "How Well Do We Know Pareto Optimality?" *Journal of Economic Education* 22:2 (1991) 172–78.
[13] *Ibid* at 755 ("Market exchange requires a concept of masculine money understood as an objective metric of exchange value, then, as a tool that enables market participants to commensurate and connect different commodities. This is required precisely because the things to be exchanged are distinguishable by quality as well as by time and space. If all commodities were in fact interchangeable, one would not engage in exchange and would not need money as a universal metric of value.").

Figure 1. The Future Value of Money.

Future Value (FV) = Present Value (PV) x $(1+r)^N$

PV = Σ FV/$(1+r)^N$

Corporation

PV (r, N) = Σ FV/$(1+r)^N$ = (PV) x $(1+r)^1$ + (PV) x $(1+r)^2$ + (PV) x $(1+r)^3$… (PV) x $(1+r)^\infty$

Individual

PV (r, N) = Σ FV/$(1+r)^N$ = (PV) x $(1+r)^1$ + (PV) x $(1+r)^2$ + (PV) x $(1+r)^3$… (PV) x $(1+r)^{\text{Death}}$

	Year 1	Year 2	Year 3	Year 4	
Immortal	(PV) x $(1+r)^1$	(PV) x $(1+r)^2$	(PV) x $(1+r)^3$	(PV) x $(1+r)^4$	…
Mortal	(PV) x $(1+r)^1$	(PV) x $(1+r)^2$	(PV) x $(1+r)^3$	Death	

Notes: The rate of return (r) represents the ability to "exchange" (or trade) in a future period under the *exchange*-value of money.

Furthermore, only living persons have the potential for a use-value of money. Although individuals are ostensibly conscious of their own death to which the use-value of money will expire, yet when it comes to money, individuals often act in open defiance of their own mortality.[14] However, the a*ssumption of immortality* is automatically reversed in economic terms when the individual becomes *currently*-conscious of his or her own immediate or pending death. Upon the consciousness of death itself, *all* prior economic theory goes out the window, and even scrooge suddenly becomes a great humanitarian.

Thus, death, like taxes, also has the potential to negate efforts toward accumulation. The present value of money in-exchange depends on the remaining periods of exchange for finite beings.[15] This leads directly to the Libertarian conception of death insofar as cognition of death is an acceptance of limited remaining periods for money exchange. As

[14] Bogenschneider at 335 ("Vance 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…. 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.") (citations omitted).

[15] Fisher, I., "The Theory of Interest", NEW YORK 43 (1930); NPV (r, N) = Σ R/$(1+r)^N$.

such, the accumulator of wealth seeks out a means to overcome death itself as a barrier to further money accumulations.[16] The ongoing Libertarian frustration with taxation reflects also a misplaced frustration with death itself since the accumulation of money becomes a means toward the overcoming of death. In that sense, wealth accumulation is a type of will-to-power over death.[17] For this reason, an estate tax is particularly objectionable to the Libertarian because it frustrates the will of the accumulator to overcome death.

The Posnerian idea of wealth-maximization can also be understood as the rational outcome of a view of money as an end-in-itself.[18] From this premise, persons with substantial accumulated wealth may seeks to transfer at death an amount of money solely *commensurate with ability* to heirs of money in-*exchange*, *plus* an amount sufficient for money in-*use* even to the spendthrift heir. The remainder of the accumulated wealth must be converted from money in-*exchange* to money in-*use* prior to death (or upon death), and applied to a charitable project of some sort. This outcome is the *rationalization* of a lifetime spent in money trading upon the realization of the inevitability of death. This further represents the death-bed abandonment of an *absolute value* of money. That is, when confronted with death the Libertarian ideal of accumulating money in defiance of mortality such view is abandoned in favor of money valued in degree based on how it might be used.

For persons paid by the hour the idea of money as "congealed time" also seems apropos since money is received based on hourly increments of work.[19] However, the idea of money as "congealed time" only can be conceived of from within the paradigm of money in-*use*. That is, where the individual trades time for money, and then converts the money into goods, this appears to be a trade of time itself for goods. By extension, money appears to be the accumulation of all time of the workers within society. But, money itself is not "congealed time" for several reasons. First, money cannot in fact be used to purchase additional duration of life to the particular individual. Second, where the portion of money held as money in-*exchange* is taken into account on a national basis the money supply is variable as the Federal Reserve is free to add liquidity to the fiat money supply to foster *exchange*. The money supply itself represents a combination of the money valued in-*use* and money in-*exchange*. However, if all of the fiat money in the world were simultaneously converted from in-*exchange* to in-*use*, the aggregate amount would exceed

[16] Bogenschneider, B., "The Will to Tax Avoidance: Nietzsche and Libertarian Jurisprudence", [2014] The Journal Jurisprudence 320 ("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.").

[17] *Ibid.*

[18] Posner, R., "The Economics of Jurisprudence" (Cambridge, MA: Harvard University Press, 1981); Posner, R., "The Value of Wealth: A Comment on Dworkin and Kronman", 9 *Journal of Legal Studies* 243 (1980).

[19] Schroeder at 764 ("Money is, in this sense, congealed time. Money is both time and the negation of time.").

the amount of labor or consumer goods that could be purchased at any given time at a constant price.

IMPLICATIONS FOR PROGRESSIVE TAXATION

Progressive taxation is a corollary to redistributive taxation as contemplated by the Libertarian Challenge. From the Libertarian perspective both progressive and redistributive taxation represent interference with property rights. Progressive taxation implies the wealthy are relatively more heavily taxed with the proceeds spent on public goods, whereas redistributive taxation implies the wealthy are taxed with the proceeds re-distributed to the poor.

However, one particular problem for the Libertarian analysis is that the poor are presumed to be the beneficiary of public goods. Thus, the Libertarian Challenge is at its strongest where applied to redistributive taxation implying a direct taking and re-distribution of property from the rich to the poor. But, it is also the case that the wealthy (as the property-owning class) are also a beneficiary of public goods designed to enhance or defend property rights. Thus, if tax dollars are used in any particular society as a means to defend or enhance property rights, then the harm of taxation is really a matter of degree.

A more significant problem, however, can also arise under a progressive tax system with significant inequality. With inequality, a significant portion of the population may be presumed to neither own nor possesses much if any property (irrespective of the reasons therefore). In this situation, the lower class has nominal grounds to object to such societal expenditures for the public goods, particularly if the poor are required to pay wage, sales and other taxes in order to survive. In such a case, one purpose of progressive taxation is to cause the poor to acquiesce to governmental expenditures for public goods under the belief that the wealthy (i.e., the property classes) pay relatively more for the good to which they derive the benefit. For this reason, the lower classes *must* believe in the existence of progressive taxation for the overall system to function. Thus, even from within Libertarian theory progressive (or redistributive) taxation would represent a suboptimal moral policy, but nonetheless with substantial pragmatic justification thereby rendering such "justified, at least in part, by the authority´s ability to realize the rule of law" under the guise of progressive taxation.[20]

CONCLUSION

The overall tax system is not progressive merely because the statutory rates of income tax are progressive; in fact, when all of these forms of taxation are considered in addition to the income tax, including sales, gasoline or property tax and so forth, the overall *effective*

[20] *See*: Reeves, D., "Practical Reason and Legality: Instrumental Political Authority without Exclusion, 34 *Law and Philosophy* 257.

tax rates are *regressive*.[21] Regressive taxation implies a disproportionate tax levied on the poor for the provision of public goods. If these public goods are for the defense of property rights, then regressive taxation is also re-distributive taxation but from the poor to the rich. However, even this situation can oddly still be justified under the Libertarian framework as proposed by Attas where *only property rights count*.

The parallel literature from within the discipline of taxation generally accepts the *Libertarian Challenge*, but re-focuses on the conclusion of the syllogism.[22] This approach results in discourse over the potential *justifications* for redistributive taxation. In tax policy terms, this is referred to as the "welfare state".[23] The terminology is somewhat odd insofar as it presumes a progressive *statutory* tax rate will yield higher *effective* tax rates for the wealthy. Such a presumption is necessary in the formulation of a "redistribution" function of taxation as an aspect of fiscal policy.[24] But, the presumption is *not* assured as a tax technical matter since the taxes collected depend on both the *tax rate* and the *tax base*. The wealthy typically obtain many forms of "income" from capital which do not necessarily become part of the *tax base*, and are thus not subjected to progressive taxation at all. In tax terms, this is referred to as "unrealized income" (meaning un-taxed income) or income upon which taxation is deferred.[25] Therefore, it is difficult to say in practice whether even a tax system with progressive statutory rates is in fact a redistributive tax system where property is transferred from the wealthy to the poor and not vice-versa.

In conclusion, a "proportionate tax" could be devised *where the wealthy might agree to be taxed on a relative basis to one another* perhaps based on a standardized measure of income or wealth. The tax could be designed to approximate a Pareto optimal result where the relative wealth standings of the wealthy relative to each other do not change as a result of taxation. Also, upon death, a person loses the use-value of money and a quantifiable gain may thus accrue by the transfer of money to a living person with a use-value for the money. Each of these illustrations separately answer the Libertarian Challenge in various

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[21] *See*: Bogenschneider, B., "The Effective Tax Rate of U.S. Persons by Income Level", 145 *Tax Notes* 117 (Oct. 6, 2014) ("Effective Tax Rate, U.S. Persons by Income Level. Lowest Quintile to Highest Quintile: 27% 25% 24% 23% 9%").

[22] *See e.g.*: Miller, G., "Economic Efficiency and the Lockean Proviso", 10 *Harvard Journal of Law and Public Policy* 401 (1987).

[23] Avi-Yonah, R., Globalization, "Tax Competition, and the Fiscal Crisis of the Welfare State", 113 *Harvard Law Review* 7 (2000).

[24] Attas at 119 ("[R]edistributive theories of justice, in so far as they impose involuntary taxes, are inconsistent with property rights, and are therefore unjustifiable."). The specific argument given by Attas in reference to the Libertarian Challenge is that all taxes are infringements of private property but not all taxes are unjustifiable.

[25] *See*: Bogenschneider, B., "Income Inequality & Regressive Taxation in the United States", [2015] 4:3 *Interdisciplinary Journal of Economics & Business Law* 8 ("[T]he IRS tax return data compilations of Piketty & Saez reflect solely reported ´taxable income´ and not unrealized gains that are not currently taxable and therefore not reported to the IRS at all. However, the Federal Reserve does report such ´asset holdings gains´ in its annual reports. In tax nomenclature, these Fed holding gains constitute ´unrealized income´. Such unrealized income is a very real and substantial form of income").

contexts given the relative valuation of money and the potential for a Pareto optimal result of redistributive taxation.