

TAX JURISPRUDENCE WITH BENEVOLENCE AND LOVE

*Bret N. Bogenschneider**

A unique feature of tax jurisprudence is its origins in natural law. Tax jurisprudence is premised upon a description of human nature as individualistic and competitive as given by Thomas Hobbes. But, such a selfish description of human nature does not reflect the rich philosophy of natural law of the Scottish Enlightenment. This paper sets out to incorporate the natural law principles of “benevolence” and “love” and considerations of the “common good” as developed by Francis Hutcheson, David Hume, and the subsequent existential reinterpretation by Søren Kierkegaard, into a more comprehensive version of tax jurisprudence.

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* Vienna University of Economics and Business. Acknowledgements to Lance Factor, Michael Potacs, and the Austrian Science Fund.

I. INTRODUCTION

As tax jurists we often take the fundamental aspects of human nature as those chronicled by Libertarian philosophers beginning in the late Seventeenth Century.¹ The presumption of tax law as dependent upon principles of natural law relates back to some of the earliest jurisprudential publications in the field.² The approach of identification of the liberties and rights of individuals in secular society was adopted in Libertarian theory³ as applied to taxation and it is now traditional in tax law publications to cite to Robert Nozick⁴ and John Rawls with mention to egalitarianism liberalism.⁵ However, notwithstanding the underlying principles of liberal tax theory were ultimately refined by John Locke, and from which a conception of tax “justice” was eventually derived, it was indeed Thomas Hobbes who laid the philosophical foundations for this approach to tax jurisprudence. Hobbes famously wrote:

During the time men live without a common power to keep them all in awe, they are in that conditions called war; and such a war, as if of every man, against every man. To this war of every man against every man, this also in consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place . . . and the life of man, solitary, poor, nasty, brutish and short.⁶

A further point of jurisprudential inquiry is how it came to be that the Hobbesian or Lockean statement of “natural law” remains the basis for tax jurisprudence whereas general jurisprudence severed any link to “natural law” some time ago. One possible explanation is that tax jurisprudence has been

1. See generally THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME, AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* (Shapiro ed., Yale University Press 1651); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (Macpherson ed., Cambridge: Hackett Publishing 1690).

2. See e.g., Roger Paul Peters, *Tax Law and Natural Law*, 26 NOTRE DAME L. REV. 29 (1950) (“[N]atural law . . . is an essential foundation for the enactment of tax statutes, decisions of tax cases, and the operation of the tax system. Without it there would be no attempt at justice in the ever present necessity of distributing tax burdens, no justice in tax litigation, and perhaps, most important of all, no justice on the part of the taxpayer himself who would be induced to ‘get away with’ paying as little tax as possible.”).

3. See e.g., Richard A. Epstein, *Taxation in a Lockean World*, 4 SOC. PHIL. & POL. 49 (1986).

4. See e.g., Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 MAINE L. REV. 1 (2013); ROBERT NOZICK, *ANARCHY, STATE, & UTOPIA* (Blackwell Publishers 1968).

5. See e.g., Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991 (2004); Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695 (2013); JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT*, 162 (Erin Kelly ed., 2001).

6. HOBBS, *supra* note 1, at Ch. XIII: *Of the Natural Condition of Mankind as Concerning Their Felicity and Misery*; See, Zoe Prebble & John Prebble, *The Morality of Tax Avoidance*, 43 CREIGHTON L. REV. 693 (2010) (“In a pre-legal state of nature, such as envisaged by Thomas Hobbes, there would not be a “market” to yield “free-market outcomes” in anything like the sense that the everyday libertarian uses these terms . . . Thus property rights fundamentally depend on taxation. It is therefore “meaningless” to speak of a prima facie property right in one’s pre-tax income.”).

“displaced” by economic theory.⁷ And, since the classical and new classical versions of economic theory originated in the modern era, then tax jurisprudence must as well.⁸ In the wealth-maximization approach to economic theory as famously given by Richard Posner, we take money as the source of pleasure to the individual, and taxes to reduce that pleasure, then the payment of taxes directly *reduces* the pleasure of the individual.⁹ So, there is a presumed relation in utility effect in the payment of tax resulting in a direct decrease in pleasure utility.¹⁰ However, Posner’s approach has been challenged on multiple grounds, including in part from a Hegelian perspective,¹¹ on the lack of equivalency between money (wealth) accumulations and property,¹² and more simply in that wealth accumulation does not seem to be a market efficiency criterion.¹³ Perhaps a better approach for tax jurisprudence would be to proceed along the lines of legal jurisprudence with a disavowal of any link to “natural law” theory. But this would perhaps result in too rapid a policy change and is politically untenable.¹⁴

A more realistic approach to a modernization of tax jurisprudence might thus be to continue the adherence to “natural law,” but to apply a more comprehensive statement of “natural law” rather than just the Hobbesian and Lockean version.¹⁵ Perhaps mitigating greatly in favor of this approach, three

7. See Peter Goodrich, *Social Science and the Displacement of Law*, 32 L. & SOC’Y REV. 473 (1998); Donald McCloskey, *The Rhetoric of Economics*, 21 J. ECON. LIT. 513 (1983) (“[E]conomics has become imperialistic. There is now an economics of history, of sociology, of law, of anthropology, of politics, of political philosophy, of ethics. The flabby methodology of modernist economics simply makes this colonization more difficult, raising irrelevant methodological doubts in the minds of the colonized folk.”).

8. JOSEPH SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* (Elizabeth Schumpeter, ed., London, Allen & Unwin 1954); JOSEPH SCHUMPETER, *ECONOMIC DOCTRINE AND METHOD* (London, Routledge 1954).

9. See RICHARD A. POSNER, *OVERCOMING LAW* (Harvard Univ. Press 1995).

10. See Robin F. Grant, *Judge Richard Posner’s Wealth Maximization Principle: Another form of Utilitarianism?*, 10 CARDOZO L. REV. 815 (1989).

11. See generally David Gray Carlson, *The Hegelian Revival in American Legal Discourse*, 46 U. MIAMI L. REV. 1051, 1056 (1992); Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687 (1999).

12. Bret N. Bogenschneider, *A Challenge to the Libertarian Challenge*, 31 J. JURIS. (forthcoming 2016) (“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. Even if technically 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.”).

13. See, e.g., Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

14. See Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671 (2006) [hereinafter *Evaluation of Federal Tax Policy*]; Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1 (2002); Susan Pace Hamill, *A Moral Perspective on “Big Business” Fair Share of America’s Tax Burden*, 1 U. ST. THOMAS L.J. 857 (2004).

15. Robert Henle, *Principles of Legality: Qualities of Law Lon Fuller, St. Thomas Aquinas, St. Isidore of Seville*, 39 AM. J. JURIS. 47 (“[O]ne hopes that there will develop a little more

signers of the Declaration of Independence in the United States were adherents to the Scottish Enlightenment and as such aligned with a version of “natural law” as given by Francis Hutcheson.¹⁶ Indeed, Hutcheson focused on “benevolence” and respect for the “common good” as a moral standard of natural law apart from Libertarian-inspired “self-love” (i.e., individualism).¹⁷ A comprehensive understanding of “natural law” based on these aspects of human nature as applied to tax jurisprudence might have significant tax policy implications for the theoretical basis of progressive taxation, as an example.¹⁸

A more radical approach would be for tax jurisprudence to evolve directly into the postmodern period.¹⁹ This would presumably involve a break from economic theory and the adoption of a new theory of tax law apart from that of Hobbes and Locke or even Hutcheson. One potentially viable theory to replace Libertarian theory within tax jurisprudence is that of Søren Kierkegaard.²⁰ Kierkegaard is also widely understood to have formulated a first version of modern psychology based on an existential methodology.²¹ Kierkegaard indeed wrote in response to what he considered to be antiquated Enlightenment era (i.e., Libertarian) descriptions of human nature. Accordingly, the writings of Kierkegaard may represent a bridge to more modern thought with the potential

tolerance for, and interest in, the great tradition embodied in the literature of natural law. One will find in this literature much foolishness and much that is unacceptable to modern intellectual tastes; one will also find in it practical wisdom...”).

16. Susan Purviance, *Hutcheson's Aesthetic Realism and Moral Qualities*, 6 HIST. INTELL. CULTURE 1 (2006) (citing Archie Turnbull, *Scotland and America, in A HOTBED OF GENIUS, THE SCOTTISH ENLIGHTENMENT 1730-1790* at 140 (David Daiches, Peter Jones, and Jean Jones, eds., Edinburgh, Edinburgh Univ. Press 1986) (“One of [Hutcheson’s] students educated in Glasgow, Francis Alison, ‘drilled’ Hutcheson’s philosophy of consideration for others and concern for the common good into the men he taught. Three of these men became future signers of the Declaration of Independence, and another was a Secretary to the Continental Congress of 1774.”)).

17. FRANCIS HUTCHESON, *THE ORIGIN OF OUR IDEAS OF VIRTUE AND MORAL GOOD* 23 (Bennett, ed., 2011) (“All virtue is benevolent. If we examine all the actions that are regarded as amiable anywhere, and enquire into why they are approved, we shall find that the person who approves them always see them as benevolent-i.e., flowing from a love of others and a concern for their happiness-whether or not the approver is one of the beloved persons who are to profit from the action.”), available at <http://www.earlymoderntexts.com/assets/pdfs/hutcheson1725b.pdf>.

18. Jim Chen, *Progressive Taxation: An Aesthetic and Moral Defense*, 50 U. LOUISVILLE L. REV. 659, 681 (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)).

19. See generally Bret N. Bogenschneider, *Wittgenstein on Why Tax Law is Comprehensible*, 2 BRIT. TAX REV. 252 (2015).

20. See generally SOREN KIERKEGAARD, *WORKS OF LOVE* (Hong & Hong eds., Princeton Univ. Press 1985) [hereinafter *WORKS OF LOVE*]; SOREN KIERKEGAARD, *THE SICKNESS UNTO DEATH* (Hong & Hong eds., Princeton Univ. Press 1980) [hereinafter *THE SICKNESS UNTO DEATH*].

21. Brian Sharpless, *Kierkegaard's Conception of Psychology*, 33 J. THEORETICAL & PHIL. PSYCH., 90 (2013); Oxford English Dictionary defines “Existentialism” as follows: “A doctrine that concentrates on the existence of the individual, who, being free and responsible, is held to be what he makes himself by the self-development of his essence through acts of the will (which, in the Christian form of the theory, leads to God).”.

both for understandability and pragmatic effect within the current system of tax laws.

This article will proceed in the following fashion. First, the precepts of “natural law” of the Scottish Enlightenment are restated taking into account particularly the ideas of “benevolence” and “love.” Second, the modern version of tax jurisprudence as taken from the Libertarian perspective of John Locke is briefly summarized for comparative purposes. Third, the Kierkegaardian existential view of psychology with “love” and “optimism” toward our neighbors is applied to tax jurisprudence. Fourth, the New Testament parable of the Good Samaritan is distinguished from the Kierkegaardian approach of “love thy neighbor.” Finally, the general implications of a tax jurisprudence based on “benevolence,” “love” and “optimism” on tax policy are discussed in some detail.

II. NATURAL LAW OF THE SCOTTISH ENLIGHTENMENT: “BENEVOLENCE” AND “SELF-LOVE”

The Scottish Enlightenment (*circa* 1729-1796) refers generally to the philosophical works of Francis Hutcheson, David Hume, George Turnbull, and others.²² From the perspective of tax jurisprudence Hutcheson gave essentially the direct opposite view of human nature from that of Hobbes. This is the philosophical idea of “benevolence.” The Oxford dictionary definition of “benevolence” is: “Disposition to do good, desire to promote the happiness of others, kindness, generosity, charitable feeling (as a general state or disposition towards mankind at large).”²³ As explained by Nolan & Kirkpatrick:

Hutcheson argued for an inborn ‘faculty of perceiving moral excellence and its supreme objects.’ These ‘objects’ are primarily the affections of disinterested benevolence or a selfless concern for the welfare of others. Morality then becomes the carrying out of these affections.²⁴

To the contrary, Hobbesian theory is the rejection of benevolence. However, Hutcheson argues that benevolence is a fundamental aspect of human nature: “[B]enevolence is natural to mankind, and always operates when there’s no opposition of apparent interest.”²⁵ Accordingly, the natural state of mankind would be a form of peace or harmony barring any conflict of interest.²⁶ The

22. See Henry Home, *Our Attachment to Objects of Distress*, in *ESSAYS ON THE PRINCIPLES OF MORALITY AND NATURAL RELIGION* (Moran, ed., Indianapolis, Liberty Fund 2005) (“Moral Sense. Having made out that the nature of man is the foundation of the laws that ought to govern his actions, it will be necessary to trace out human nature, so far as regards the present subject. If we can happily accomplish this part of our undertaking, it will be easy, in the synthetical model, to deduce the laws that ought to regulate our conduct.”).

23. *Benevolence*, Oxford English Dictionary (Oxford, Oxford Univ. Press 2015).

24. RICHARD NOLAN & FRANK KIRKPATRICK, *LIVING ISSUES IN ETHICS* 64 (Oxford, Wadsworth 1982).

25. HUTCHESON, *supra* note 17, at 14.

26. *Id.* at 22 (“The only reason for the apparent lack of natural affection among collateral relations is that these natural inclinations are often overpowered by self-love in case where there’s

modern scholar Elizabeth Radcliffe described the alternative view of human nature as follows:

We have seen that we may desire any pleasures of the five types of senses for ourselves or for others; it is as much a fact about human nature that we care about other people as it is a fact that we care about ourselves.²⁷

A tax jurisprudence based on the principles of the Scottish Enlightenment would presumably look very different from that of Hobbes because persons might be expected to take into account the “common good” in matters of taxation rather than a purely selfish approach. Nonetheless, the modern tax jurist trained in economic theory will often immediately respond to any reference to such “old-fashioned” ideas of the Scottish Enlightenment that any conception of benevolence is actually impossible.²⁸ That is, a person may never act with true disinterest because the disinterest causes an *increase* in utility to the person that claims benevolent intent. Any action toward kindness, generosity, charity or the happiness of others is done to increase the utility of the purportedly benevolent actor. Thus, benevolence is a myth. All persons act merely to maximize their own utility. Of course, this is a simple restatement of the utilitarian philosophy of Jeremy Bentham, and in many economics and tax courses such is presented as if it were a comprehensive response to any prior statement of natural law.²⁹

However, Hutcheson responded in detail to this line of reasoning in his work: *The Origin of Our Ideas of Virtue and Moral Good*. Hutcheson proffers a series of responses to his “opponents” in reference to critics who held benevolence as myth.³⁰ Among these responses by Hutcheson the most significant is perhaps the following:

a conflict of interests.”).

27. Elizabeth S. Radcliffe, *Love and Benevolence in Hutcheson's and Hume's Theories of the Passions*, 12 BRIT. J. HIST. OF PHIL. 631, 636 (2004).

28. See e.g., Christian Maurer, *Two Approaches to Self-Love: Hutcheson and Butler*, 2 EUR. J. ANALYTIC PHIL. 81, 83 (2006) (“[Hobbes] was said to have claimed that self-love or self-interest are the only motives for human actions, and that virtue is reducible to self-love or interest.”).

29. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (Oxford, Clarendon Press 1789).

30. HUTCHESON, *supra* note 17, at 16–53 (“How does it come about then that at the approach of death we don't lose all concern for our families, friends, or country? According to my opponents, this has to be a case where we want something only as a means to our own private advantage...; If we had no sense of moral good in humanity, mercy, faithfulness, why wouldn't self-love and our sense of natural good always bring us in on the side of the winner and make us admire and love the successful tyrant or traitor?; Then, there's a more particular point, namely... that benevolence is not always accompanied by pleasure. Indeed, it often brings pain, when the object is in distress; When we do generous offices for others, we all often feel delight upon seeing them happy, but we didn't pursue their happiness in order to have this delight; Think about your neighbors... won't you be better pleased with their prosperity than with their misery and ruin?; The love of private pleasure is what ordinarily leads to vice; and when men have acquired any lively notions of virtue, they generally begin to be ashamed of everything that reveals selfishness, even in instances where it is innocent; If we had no moral sense, no happiness in benevolence, and if we acted from no other principle than self-love, there's no pleasure of the external senses that we couldn't enjoy alone, with less trouble and expense than in society. But what gives us such a liking for such pleasure is

Thus, the only way anyone – anyone – can secure for himself a perpetual serenity, satisfaction and self-approval is through a serious inquiry into the tendency of his actions, and a perpetual concern for universal good according to the soundest notions of it.³¹

This assertion is astounding given its similarity to the future existential writings of Kierkegaard. Here, Hutcheson avers that psychological well-being depends on an individualized conception of the good and that satisfaction will be achieved by seeking that good.³² The idea moves beyond a moral statement of how the individual may achieve “right” through some particular moral action which may conflict with utility maximization, and instead avers that satisfaction is achieved through the seeking of a universal good. And, that approach is quite different than Bentham’s view of morality as each individual maximizing pleasure.

A very similar argument to that of Hutcheson was given by Bishop Joseph Butler. Butler argues that love of self is not inconsistent with the public good. The general philosophical issue in the Scottish Enlightenment was to distinguish “self-love” from “benevolence.” Accordingly, Butler wrote:

First, there is a natural principle of benevolence in man, which is in some degree to society, what self-love is to individual. . . [T]hough benevolence and self-love are different; though the former tends most directly to public good, and the latter to private; yet they are perfectly coincident, that the greatest satisfaction to ourselves depend upon our having benevolence in due degree; and that self-love is one chief security of our right behavior towards society.³³

This responds to Bentham and Hobbes in a manner distinguishable from Hutcheson. According to Butler, one need not be concerned with selfishness because benevolence and selfishness are *consistent*.³⁴ However, Butler’s argument does not ostensibly apply very well to tax jurisprudence. Butler ultimately refers to the relation of “self-love” to the “public good” as a “matter of degree.”³⁵ The businessman is given license to pursue his own financial well-being as long as that is not *inconsistent* with the “public good” as set forth in the tax laws.³⁶ Of course, the “public good” is simply reflected in the tax law itself

the admixture of the moral pleasures... of love, of communicating pleasure to others...’); *see also* Hume, *infra* note 39 (“We often praise virtuous actions that were performed long ago and far away, where the utmost subtlety of imagination couldn’t discover any appearance of self-interest, or find any way of connecting our present happiness and security with events so widely separated from us.”).

31. HUTCHESON, *supra* note 17, at 59.

32. Maurer, *supra* note 28, at 84 (“It is Hutcheson’s declared aim to show that human beings are not only motivated by self-love or interest, but also by benevolence.”).

33. Joseph Butler, *Fifteen Sermons*, in THE WORKS OF BISHOP BUTLER, 6–7 (Bernard, ed., London, Macmillan 1900).

34. Maurer, *supra* note 28, at 86 (“Reasonable self-love, by means of seeking these pleasures, is thus in a position to psychologically support benevolence by recommending the same actions.”).

35. *Id.* at 93 (“It is most accurate to read Butler’s love of the self as a kind of caring about one’s ‘real’ nature, or one’s ‘real’ self and its cultivation, where self-love as a general affection governs the particular affections, passions, and appetites.”).

36. *Id.* at 83 (“Butler, on the other hand, conceives self-love as a kind of love for one’s self

and *not* the moral outcome to the needy as a matter of the general welfare. Butler thus gives the modern viewpoint of the religious and conscientious businessman of what his responsibilities are with regard to the payment of taxes. The rule is to follow the law and nothing more is *morally* required. Yet, this is different than Hutcheson who said the individual must conduct “serious inquiry into the tendency of one’s actions to the universal good.” Hutcheson gives potentially a higher standard where strict compliance with the tax law might not be enough for psychological well-being of the individual.

Perhaps the most well-known author of the Scottish Enlightenment is David Hume. The work of Hume is distinguishable from Hutcheson on several grounds (which Hume elucidated in detailed letters to Hutcheson).³⁷ Such distinctions is based principally on the empirical “experience” of life itself.³⁸ Hume wrote:

Self-love is a principle of human nature of such extensive energy, and the interest of each individual is, in general, so closely connected with that of the community, that those philosophers were excusable, who fancied, that all of our concern for the public might be resolved into a concern for our happiness and preservation.³⁹

Hume incorporates the experience of human emotions (or “passions”) as the origins of pleasure and pain.⁴⁰ The reference to emotion as an aspect of human behavior is an averment that reason alone cannot form the basis for morality.⁴¹ Accordingly, love is an emotion that can give rise to the experience of pleasure or pain.⁴² Hume then identifies sympathy or benevolence as “converting our ideas of others’ pleasures and discomforts into our own feelings.”⁴³ This distinguishes Hutcheson insofar as benevolence is not an *a priori* condition of mankind and Hume does not agree that love is solely caused

in terms of one’s real nature.”).

37. THE LETTERS OF DAVID HUME (Greig, ed., Oxford, Oxford Univ. Press 1932); *see also* S. BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY 263 (Oxford, Clarendon Press 1991).

38. Radcliffe, *supra* note 27, at 632 (“Hume regards love as a passion that itself does not motivate but is contingently or psychologically connected to one which does, benevolence.”).

39. David Hume, *Enquiry Concerning the Principles of Morals*, in THE PHILOSOPHICAL WORDS 48 (Green, Grose & Verlag eds., Aalen 1964).

40. Radcliffe, *supra* note 27, at 640 (“These passions, Hume says, produce pleasures and pain, rather than proceeding from them. Just as hunger originates with the person, so, too, benevolence originates in one’s nature; it is not learned or acquired, although it can be cultivated and nurtured or discouraged and stifled.”).

41. NOLAN & KIRKPATRICK, *supra* note 24, at 64 (“Hume held that reason alone cannot produce moral blame or praise. If we call something good it must be because we feel approval for it. We also know that what propels us into acting is not reason but emotion. Reason may help us determine matters of fact, but only passion (emotion) can make us take up an attitude toward matters of fact . . . Hume felt that most people share the same general moral sentiments, chief among which he, like Hutcheson, felt was benevolence toward others.”).

42. *Id.* at 650 (“Love is the pleasurable feeling that results when the thought of another’s qualities produces moral approval, and it is crucial that the passion produced in the admirer is caused by another person’s qualities.”).

43. Radcliffe, *supra* note 27, at 642.

by benevolence.⁴⁴ Nonetheless, Radcliffe concludes that Hume does see both “benevolence” and “love” as a fundamental aspect of human nature:

Hume does say that love and benevolence are conjoined “by the original constitution of the mind.” This indicates that, in the human constitution, the two passions do in fact occur together with such regularity that we regard their conjunction as indicative of human nature.⁴⁵

As such, the Scottish Enlightenment presented a much more optimistic view of human nature than Libertarian theory. Hutcheson avers that human nature is generally good while Hobbes avers that men are so vile that the relations will be in state of war in the natural state, and a Leviathan must be established to keep the peace.⁴⁶

III. LOCKE ON TAXATION

With John Locke a Hobbesian version of “natural law” became predominant in tax jurisprudence with a focus on property rights.⁴⁷ And, property rights are obviously relevant to tax jurisprudence. On the other hand, the statement of natural law from the Scottish Enlightenment gradually fell out of favor and thus never became part of tax jurisprudence. Locke links property rights to individual liberty with the idea that: “Naturally persons give up some of their individual liberty in order to get the benefits of society.”⁴⁸ Indeed, Locke refers directly to the role of taxation in society but in terms of its limitation on the rights of individuals rather than provision for the “common good.”⁴⁹ The Lockean theory was subsequently developed by Richard Epstein into a comprehensive Libertarian theory of taxation with the general idea that any taxation of property deprives the individual of “liberty.”⁵⁰ Milton Friedman and

44. *Id.* at 649 (“Likewise, Hume’s theory implies that love (admiration) could have been caused by anything – not just by another’s good character, but instead by another’s displeasing manner, careless attitudes or offensive behavior.”).

45. *Id.* at 647.

46. NOLAN & KIRKPATRICK, *supra* note 24, at 62 (“Perhaps the most controversial aspect of Hobbes’ position was his claim that persons have no natural affection for each other: that their passions have to be regulated by the rational power of restraint if they are to have amiable social relations.”).

47. See generally 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).

48. *Id.*

49. LOCKE, *supra* note 1, at § 140 (“It is true, governments cannot be supported without great charge, and it is fit everyone who enjoys his share of the protection, should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent, i.e. the consent of the majority, giving it either by themselves, or their representatives chosen by them: for if any one shall claim a power to lay and levy taxes on the people, by his own authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government: for what property have I in that, which another may by right take, when he pleases, to himself?”).

50. See e.g., Epstein *supra* note 3; Richard A. Epstein, *Fairness in a Liberal Society*, Lecture Before the Center for Independent Studies (Aug. 6, 2004), available at

others go even farther and expand a normative version of Libertarian theory beyond what Locke himself may have intended.⁵¹ Michael Livingston thus correctly observed that the normative framework of taxation is based on economic theory and its Libertarian underpinnings. Livingston wrote:

For tax scholars, the question of method has been answered largely by relying on economics to supply a normative framework. The principal themes of tax scholarship—fairness, efficiency, and the search for a comprehensive tax base—are essentially economic in nature, so that even “traditional” tax scholarship has something of a law-and-economics flavor.⁵²

Nonetheless, some difficulty arose for Libertarian theory on the tax treatment of labor in comparison to the taxation of property.⁵³ Robert Nozick pointed out that the right to freely engage in labor was also a form of “liberty” in Lockean theory and the excessive taxation of labor was also to deny “liberty.”⁵⁴ Notwithstanding this hiccup in the comparison of taxation of labor versus property as a matter of tax policy, Libertarian theory forms the basis of modern tax jurisprudence. The Libertarian aversion to taxation has further intensified in the new era of fiat money with an unlimited potential for property accumulation.⁵⁵ Taxation clearly stands in contrast to the accumulation of fiat money. The Libertarian logic proceeds along the following lines of argument. Natural man enters society contingent on the protection of property rights. Money is property. Taxes reduce money. Therefore, taxation is in inherent violation of the “social contract” that upholds society. In the violation of the “social contract” taxes are thus revealed as *immoral*. Martha Fineman gives an apt description of a Lockean “social contract” foundation for jurisprudence. The “social” foundation is perhaps the collective set of values chosen by a society and reflected in the laws. Fineman says as follows:

The ideas of individual autonomy and freedom to contract mandate that people be justly held to the bargains they have struck. The metaphor of contract in political theory operates on several levels. It may be used to talk about the imposition of coercive rules (law). In this regard, the social contract is articulated as a justification for considering individual citizens bound by established societal norms and conventions and for justifying state sanctioning of deviations.⁵⁶

http://nzinitiative.org.nz/site/nzinitiative/files/publications/publications-2005/epstein_fairness.pdf.

51. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (Univ. of Chicago Press 1962); Geoffrey P. Miller, *Economic Efficiency and the Lockean Proviso*, 10 HARV. J.L. & PUB. POL'Y 401 (1987).

52. Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 374 (1998).

53. Robert Nozick, *Anarchy, State & Utopia* (Blackwell Publishers 1968).

54. *Id.* at 246–50.

55. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (Oxford University Press 1988); Hugh Breakey, *Who's Afraid of Property Rights? Rights as Core Concepts, Coherent, Prima Facie, Situated and Specified*, 33 L. & PHIL. 573 (2014).

56. Martha Albertson Fineman, *The Social Foundations of Law*, 54 EMORY L.J. 201, 204 (2005).

And, the “welfare state” is also revealed as immoral because taxation for purposes of redistribution can never be justified in Libertarian terms.⁵⁷ Such an approach to jurisprudence follows from the dissection of Hutcheson’s views of the Scottish Enlightenment from the applicable “natural law” to be applied.⁵⁸ The ideas of “benevolence” or “love” are removed from the very definition of human nature. If “benevolence” were part of human nature then of course the “welfare state” and any incumbent redistribution of wealth via progressive tax policies might be both moral and desirable to society.

IV. KIERKEGAARD’S EXISTENTIAL OPTIMISM: “LOVE THY NEIGHBOR”

Similar to the foundations set by the “natural law” scholars of the Scottish Enlightenment, Kierkegaard described “love” as a psychological need of the individual human being. Kierkegaard wrote: “[I]n a human being love is a need, [love] is the expression of riches.”⁵⁹ The psychological perspective of Kierkegaard might be simplified as more fundamentally an “optimistic” view of others.⁶⁰ The positive psychological conditions of mankind may thus be given as “benevolence,” “love” and “optimism.”⁶¹ A view of optimism toward others is important because this generally lends to recognition of economic “potentials” within other persons in society.⁶² The negative psychological condition is also given as “despair.” Here, both Hutcheson and Kierkegaard are concerned with a mental state that does not correspond to an accumulation of a quantum of property or money presumed to increase utility.

With relation to taxation a relevant jurisprudential insight of Kierkegaard relates to the phenomena of “despair.” Of course, despair represents *the failure* of the individual to act with “benevolence” or “love” and corresponds to the

57. Daniel Attas, *Fragmenting Property*, 25 L. & PHIL. 119, 119 (2006) (“[R]edistributive theories of justice, in so far as they impose involuntary taxes, are inconsistent with property rights, and are therefore unjustifiable.”); *but see*: Bret N. Bogenschneider, *supra* note 12 (arguing that money is not equivalent to property and where money is used by the wealthy as solely a “positional preference” amongst themselves progressive taxation could be applied to maintain the position of the wealthy vis-à-vis one another and thereby result in a Pareto optimal outcome where the poor are better without the wealthy becoming worse off.”); *see also* Reuven Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000).

58. *See* Knud Haakonssen, *Protestant Natural Law Theory, A General Interpretation*, in *NEW ESSAYS ON THE HISTORY OF AUTONOMY: A COLLECTION HONORING J.B. SCHNEEWIND* (Brender & Krasnoff, eds., Cambridge Univ. Press 2004).

59. *WORKS OF LOVE*, *supra* note 20, at 78.

60. Whether Kierkegaard’s “optimism” is more parochial or secular is perhaps irrelevant, but is more fully discussed in the following parts of this article.

61. *See* SHARON KRISHEK, *KIERKEGAARD ON FAITH AND LOVE* (Cambridge Univ. Press 2009) (distinguishing non-preferential love (i.e., love thy neighbor) from preferential love (i.e., friendship)); *see also* JOHN LIPPITT, *KIERKEGAARD AND THE PROBLEM OF SELF-LOVE* (Cambridge Univ. Press 2013).

62. *See* HUTCHESON, *supra* note 17, at 65 (“We all know that general benevolence alone isn’t a strong enough motive for industry to get people to subject themselves to the burden and toil of it or to the many other aspects of it that our self-love makes us dislike.”).

natural state of mankind as given by Hobbes. In other words, Kierkegaard's "despair" is the corollary outcome to Hobbes' natural state of mankind as "nasty, brutish and short." But, it is the *wealthy* who may naturally find themselves in a state of *despair* without at least relating with love to *neighbors* as part of life. The Libertarian argument given in favor of the comprehensive protection of property rights against taxation is that it preserves the "social contract" of the natural man upon entry to society. Accordingly, tax jurisprudence must be concerned with the design of the tax system to allow for the psychological well-being of the wealthy who are perhaps the most likely to be in *despair*.

The Kierkegaardian approach renders an analysis of the Lockean "state of nature" irrelevant for several reasons. First, Kierkegaard premises the approach on the individual as a member of society rather than as an individual set up in opposition to society. Second, the accumulation of property (or wealth) is not given as an end in itself that will automatically lead to an increase in utility. And, third, the manner of living is not the outcome but the process of becoming toward individual fulfillment. That is, rather than a Hobbesian view of other persons as competition, Kierkegaard sees an equality between persons and benevolence toward others. Kierkegaard wrote:

"[E]veryone is one's neighbor. If it were not a duty to love, then there would be no concept of neighbor at all. But only when one loves his neighbor, only then is the selfishness of preferential love rooted out and the equality of the eternal preserved."⁶³

In philosophical terms, the use of the word "optimistic" does not refer to optimism as in glass-half-full as much as a belief in the *glass* itself with the possibility to put water in. In the language of postmodern philosophy, the self might also be described as engaged in the process of becoming toward an ability to love others as equals. Happiness (i.e., pleasure) or utility will not be achieved by the accumulation of a certain quantum of money but is a mental state of mind. As such, the idea of secular "optimism" is a derivation of "potentials" or "possibilities" where the self is not optimistic at achieving one particular outcome (i.e., winning the game) but optimistic at the existence of potentialities both in oneself and in others.⁶⁴ The recognition by the self of this *process* could (and did) give rise to a *reflective psychology*.⁶⁵ Kierkegaard describes the Love of neighbor in detail as follows:

One's neighbor is one's equal. One's neighbor is not the beloved, for whom you have passionate preference, nor your friend, for whom you have passionate preference. Nor is your neighbor, if you are well educated, the well-educated person with whom you have cultural equality-for with your neighbor you have before God the equality of humanity. Nor is your neighbor one who is of higher social status than you, that is, insofar as he is of higher social status he is not your

63. WORKS OF LOVE, *supra* note 20, at 58.

64. *Id.* at 95 ("Here we see only what role the individual plays and how he does it. It is like a play. But when the curtain falls, the one who played the King, and the one who played the beggar, and all the others – they are all quite alike, all one and the same: actors.")

65. See Sharpless, *supra* note 21.

neighbor, for to love him because he is of higher status than you can very easily be preference and to that extent self-love. Nor is your neighbor one who is inferior to you, that is, insofar as he is inferior he is not your neighbor, for to love one because he is inferior to you can very easily be partiality's condescension and to that extent self-love. No, to love one's neighbor means equality.⁶⁶

To Kierkegaard the recognition of others as equals (i.e., neighbors) gives rise to a fulfilled mental state. Of course, this means "love thy neighbor." To translate this into Libertarian terms, to view other persons as valuable neighbors gives rise to utility. And, this is the only means to acquire "real" utility and not the fiat utility described by Bentham. Thus, property accumulation alone cannot and does not give rise to "real" utility. But, money accumulation is just one means to reach an unfulfilled mental state. Kierkegaard uses the term "worldliness" to describe the lack of a spiritual self. Kierkegaard writes:

What is called worldliness is made up of just such men, who (if one may use the expression) pawn themselves to the world. They use their talents, accumulate money, carry on worldly affairs, calculate shrewdly, etc., etc., are perhaps mentioned in history, but themselves they are not; spiritually understood, they have no self, . . . however selfish they may be for all that.⁶⁷

Kierkegaard refers to this lack of spiritual self as "sickness." Hence the title of his work: *The Sickness Unto Death*. The failure to identify value in others gives rise to an unfulfilled psychological condition. The despair resulting from selfishness is thus a form of mental illness. One purpose of tax jurisprudence might be to address this form of mental illness. A characteristic of such "sickness" would be a desire for revenge against one's enemies or other forms of raw competition endemic in modern society.⁶⁸

An obvious follow-up question then is whether society itself gives rise to the "sickness unto death" or whether man in his "natural state" might avoid becoming ill by avoiding the entry to society in the first place. Kierkegaard wrote in that regard the following:

It would also be foolish to deny that in paganism lives have been led which were rich in aesthetic enjoyment, and that the natural man can lead such a life, utilizing every advantage offered with the most perfect good taste, even letting art and learning enhance, embellish, ennoble the enjoyment. . . . Every human existence which is not conscious of itself as spirit. . . every such existence, whatever it accomplishes, though it be the most amazing exploit, whatever it explains, though it

66. WORKS OF LOVE, *supra* note 20, at 74. The reader should note that here Kierkegaard uses the term "self-love" which is the terminology of the Scottish Enlightenment. However, Kierkegaard does not cite to Hutcheson or Butler. Nonetheless, the use of the same terminology indicates that Kierkegaard may have been influenced by these prior writings.

67. THE SICKNESS UNTO DEATH, *supra* note 20, at 75.

68. *Id.* at 79 ("Therefore he who in truth love his neighbor loves also his enemy. The distinction friend or enemy is a distinction in the object of love, but the object of love to one's neighbor is without distinction. One's neighbor is the absolutely unrecognizable distinction between man and man; it is eternal equality before God-enemies too, have this equality.").

were the whole of existence, however intensely it enjoys life aesthetically – every such existence is after all despair.⁶⁹

This passage is of potentially critical importance to any tax jurisprudence that sets out to be theoretically coherent because it responds to Nietzsche. A previous article applied Nietzsche in a critique against Libertarian-inspired tax jurisprudence that manifests as the Will-to-Power over taxes, death and lesser wage-earning taxpayers.⁷⁰ Indeed, any “moral” theory of tax jurisprudence must be able to survive a Nietzschean critique and averment to pure nihilism. The Kierkegaardian *existential* theory of morality appears to accomplish this here in denial of the Nietzschean aesthetic (where Libertarian theory so obviously failed). In Kierkegaard’s terms, the Libertarian is “unconscious” of even the potential for psychological despair arising from the failure to view oneself as part of society.⁷¹

Finally, Kierkegaard emphasizes the importance of education throughout each of his works. The role of “teacher” is perhaps the highest of the human condition to Kierkegaard and is analogous to the role of God in religious thought. Kierkegaard takes the education of society as a precondition of “love” itself. He says the following:

For otherwise his earlier existence must have been merely brutish, and the Teacher who gave him the Truth and with it the condition was the original creator of his human nature. . . . His love is a love of the learner, and his aim is to win him. For it is only in love that the unequal can be made equal, and it is only in equality or unity that an understanding can be effected.⁷²

From the perspective of love, the “highest” or enlightened condition of mankind is therefore that of “teacher.” As explained in detail below, education helps to avoid what Kierkegaard referred to as the “Despair of Necessity” within society.

V. THE PARABLE OF THE GOOD SAMARITAN

This section addresses the similarity between the natural law conception of “benevolence” and the New Testament parable of the Good Samaritan. The

69. *Id.* at 48–49.

70. Bret N. Bogenschneider, *The Will to Tax Avoidance: Nietzsche and Libertarian Jurisprudence* 24 J. JURIS. 313, 325 (2014) (citing FRIEDRICH NIETZSCHE, *BEYOND GOOD & EVIL* at §2 (New York, Random House 1967) (“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.”)); *but see* Leo Martinez, *Taxes, Morals, and Legitimacy*, 1994 B.Y.U. L. REV. 521.

71. THE SICKNESS UNTO DEATH, *supra* note 20, at 47 (“In unconsciousness of being in despair a man is furthest from being conscious of himself as spirit. But precisely the thing of not being conscious of oneself as spirit is despair, which is spiritlessness -- whether the condition be that of complete deadness, a merely vegetative life, or a life of higher potency the secret of which is nevertheless despair.”).

72. SÖREN KIERKEGAARD, *PHILOSOPHICAL FRAGMENTS* 6, 13 (Hong & Hong, eds., Princeton Univ. Press 1985) (noting Kierkegaard wrote under a pseudonym Johannes Climacus).

jurisprudential concern is to distinguish Kierkegaard's modern restatement of "love thy neighbor" from the New Testament theology found in the Gospel of Luke. *The New Testament, Luke 10:25-37*, provides as follows:

The Parable of the Good Samaritan: On one occasion an expert in the law stood up to test Jesus. "Teacher," he asked, "what must I do to inherit eternal life?" "What is written in the Law?" he replied. "How do you read it?" He answered, "'Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind'; and, 'Love your neighbor as yourself.'" "You have answered correctly," Jesus replied. "Do this and you will live."

But he wanted to justify himself, so he asked Jesus, "And who is my neighbor?" In reply Jesus said: "A man was going down from Jerusalem to Jericho, when he was attacked by robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he traveled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, brought him to an inn and took care of him. The next day he took out two denarii and gave them to the innkeeper. 'Look after him,' he said, 'and when I return, I will reimburse you for any extra expense you may have.'

Jesus said, "Which of these three do you think was a neighbor to the man who fell into the hands of robbers?" The expert in the law replied, "The one who had mercy on him." Jesus told him, "Go and do likewise."⁷³

The typical Christian interpretation of the Parable of the Good Samaritan is that Jesus refers to the proper behavior of the Christian when encountering a person in need. Various theorists concerned with tax policy thus argue that the parable supports "redistribution" of money via the tax system.⁷⁴ For example, the Good Samaritan *pays* the innkeeper on behalf of the man who was attacked by robbers. But, the simple tax policy import thereby misses the existential import of the Parable and takes a "redistribution" function as representing the inherent lesson.⁷⁵ The view is derived from the idea that God will come again

73. *Luke 10:25-37*.

74. Elisabeth Madin Swanson, *Moral Considerations of Tax Policy: The Past, Present, and Future Role of the Religious Right and Left*, 45 CONN. L. REV. 1919, 1948 (2013) ("While a Biblically informed view of tax policy does not require government to assume the responsibility of caring for the poor, it does oppose direct oppression or policies that actually drive people into poverty.").

75. See Ajay K. Mehrotra, "Render Unto Caesar..." *Religion/Ethics, Expertise, and the Historical Underpinnings of the Modern American Tax System*, 40 LOY. U. CHI. L.J. 321 (2009); Adam S. Chodorow, *Biblical Tax Systems and the Case for Progressive Taxation*, 23 J.L. & RELIGION 51 (2007); Kenneth H. Ryesky, *A Jewish Ethical Perspective to American Taxation*, 10 RUTGERS J.L. & RELIGION 16 (2009); Abdullahi Ahmed An-Na'im, *Globalization and*

to Judge the living and the dead. Thus, the implication is one ought to care for one's neighbors to avoid a negative eternal outcome. In other words, in order to achieve "eternal life" one must exhibit charity for the poor or those in need. Notably, Jesus says: "*Do this and you will live.*" Jesus does not say: "*Do this and you shall have eternal life.*" Jesus therefore explained to the "legal expert" *how to act*. One potential interpretation of the Parable is a direct assertion of "positive law" in the Ten Commandments. But, as written in the Gospel of Luke, Jesus replies to the "legal expert" with what the *divine law* itself says ought to be done. Jesus' response is furthermore in the form of a question, and challenges the "legal expert" to define what "neighbor" means in the given context. The translation from the Gospel of Luke therefore does not say whether Jesus merely referred the legal expert back to the Ten Commandments. Accordingly, this interpretation of the Gospel as a simple referral of the legal expert back to the Ten Commandments as the applicable *positive law* would presumably be the common interpretation.

However, Kierkegaard provided what purported to be the first existential interpretation of the Gospels generally. Kierkegaard says simply: "[O]nly love to one's neighbor truly leads to life."⁷⁶ Kierkegaard is concerned with how to think in this *currently existing* finite life and not any eternal life. Kierkegaard does not suggest by any means: "Love thy neighbor to avoid God judging you harshly upon your death." Accordingly, Kierkegaard does not describe a view of the vengeful God in Medieval terms. Instead, Kierkegaard is concerned with the *Samaritan* himself and how he ought to think about behavior toward his "neighbors" in daily life. Such represents an interpretation of the act of "love" that will result in an *optimistic* psychological result to the actor in the realization of *life* itself. Any atheistic objection to Kierkegaard as merely "Christian theology" is based on a misunderstanding of Christian thought as, in fact, Kierkegaard might be considered heretic.⁷⁷ Kierkegaard provides generally an explanation of *how to think* which is a version of modern psychology. This partly explains why Kierkegaard is often given as one of the originators of modern psychology.⁷⁸

Jurisprudence: An Islamic Law Perspective, 54 EMORY L.J. 25 (2005); Matthew J. Barrett, *The Theological Case for Progressive Taxation as Applied to Diocesan Taxes or Assessments under Canon Law in the United States*, 63 JURIST 312 (2003); Michael A. Livingston, *The Preferential Option, Solidarity, and the Virtue of Paying Taxes: Reflections on the Catholic Vision of a Just Tax System* (Jan. 22, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=958806>.

76. WORKS OF LOVE, *supra* note 20, at 74.

77. *But see* Paul K. Moser & Mark L. McCreary, *Kierkegaard's Conception of God*, 5 PHIL. COMPASS 127, 130 (2010) ("Kierkegaard makes various claims that lead many commentators to portray him as abandoning religious knowledge for the sake of mere, cognitively unrestrained faith. This is a mistaken portrayal, as we can see in Kierkegaard's second authorship.").

78. Sharpless, *supra* note 21, at 90.

VI. TAX POLICY WITH BENEVOLENCE & LOVE

A tax jurisprudence based on “benevolence” and “love” is ostensibly very different from a jurisprudence based on Libertarian principles. The implications of such a reinterpretation may reach to every aspect of tax policy in the modern state. But, perhaps the most profound implications to tax policy based on this more comprehensive approach to tax jurisprudence are threefold. First, the wealthy stand to gain the most by tax policies intended to reduce “despair” since the wealthy are more likely to be in a state of despair. Second, regressive taxation which reduces the potentials of the poor by depriving them of disposable income or capital would need to be addressed. Third, a provision for public education is fundamental to the morality and efficacy of any fiscal system including the tax system. If persons are not educated, their “potentials” are diminished resulting in a diminished version of society. Accordingly, it is clearly immoral to allow a significant portion of society to go uneducated and without the means to achieve “benevolence” and “love.” Along these lines, Hutcheson identified a clear link between “benevolence” and the “public good”:

Beneficent actions tend to the public good; it is therefore good and kind to give all possible additional motives to them, and to excite men who have some weak degrees of good affection to promote the public good more vigorously by motives of self-interest; or even to excite those who have no virtue at all to external acts of beneficence, and to restrain them from vice.⁷⁹

Accordingly, it is the prediction of Hutcheson that a tax policy based on benevolence would be more *efficient* than a tax policy based on Libertarian theory. The appeal of a *better* tax jurisprudence is that it could result in a *better* fiscal collections and fiscal expenditure system for society in general. Notably, the emerging consensus within the field of “economic psychology” is that taxpayer “morale,” or generally, the willingness of persons to pay taxes within a given society based on perceptions of the tax system, is the primary factor in the success or failure of tax administration.⁸⁰ The United States, for example, is often measured as the nation with the highest taxpayer “morale.”⁸¹ This, of course, reflects the preconditions of “benevolence” and “love” in society which ought to be leveraged as a matter of tax policy.

79. FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE 205 (Westmead, Gregg Int'l Publishers, 4th ed. 1969).

80. See Erich Kirchler et al., *Enforced versus Voluntary Tax Compliance: The “slippery slope” Framework*, 29 J. ECON. PSYCH. 210 (2008); Valerie Braithwaite, *Dancing with the Tax Authorities: Motivational Postures and Non-Compliant Actions*, in TAXING DEMOCRACY: UNDERSTANDING TAX AVOIDANCE AND EVASION 15 (V. Braithwaite ed., 2003); Valerie Braithwaite & John Braithwaite, *An Evolving Compliance Model for Tax Enforcement*, in CRIMES OF PRIVILEGE: READINGS IN WHITE-COLLAR CRIME 405, 406 (Shover & Wright, eds., 2001).

81. RONALD INGLEHART ET AL., CODEBOOK FOR WORLD VALUES SURVEY (Ann Arbor, MI, Institute for Social Research 2000); James Alm, & Benno Torgler, *Culture Differences and Tax Morale in the United States and in Europe*, 27 J. ECON. PSYCH. 224 (2006).

A. *A Reduction in the “Despair” of the Wealthy*

The reader may initially scoff at Kierkegaard’s mention of a description of the wealthy as in a state of “despair.” Kierkegaard noted in particular a distinction between the poor and mighty:

It does not say that it is the poor who shall lift themselves above earthly distinctions, while the mighty should perhaps come down from their elevation-ah, no, such talk is not equitable, and the likeness which is obtained by the mighty climbing down and the poor climbing up. . . .⁸²

Accordingly, Kierkegaard does not equate the accumulation of wealth with the utility level of the individual. On possible response is that Kierkegaard’s psychology may not apply to the wealthy who instead follow a psychology of the Will-to-Power and obtain fulfillment through the avoidance of taxation.⁸³ The scholar ought therefore to ask: What evidence is there to support the contention the wealthy are most likely to be in a state of psychological “despair”?

Here is the proof. The Congressional Budget Office Reports that in 2011 approximately \$300 billion was given to charity but just over half was actually deducted as a charitable contribution.⁸⁴ How can this be so?⁸⁵ Every wealthy person recognizes income and presumably files a tax return. If the wealthy are the source of charitable contribution and use the accumulated wealth for the betterment of society then surely such charitable contributions should be reflected in the tax statistics. Rather, in actual fact it is the working poor and not the wealthy who are the highest *relative* contributors to charity as a percentage of income.⁸⁶ These people receive little or no income tax benefit from the

82. WORKS OF LOVE, *supra* note 20, at 83.

83. Bogenschneider, *supra* note 70, at 321 (“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.”).

84. FRANK J. SAMMARTINO, CONG. BUDGET OFFICE, OPTIONS FOR CHANGING THE TAX TREATMENT OF CHARITABLE GIVING (2011), available at <https://www.cbo.gov/publication/42730>; see also Hsin-Yi Lin & Kuang-Ta Lo, *Tax Incentives and Charitable Contributions: The Evidence from Censored Quantile Regression*, 17 PAC. ECON. REV. 535 (2012) (“According to Giving USA 2010, the total amount of charitable contributions in the United States was approximately \$304bn in 2009, accounting for 2.1% of GDP.”).

85. Lin & Lo, *supra* note 84, at 537 (“Clotfelter argues that there are systemic differences in price sensitivity between big givers and small givers at any income level. Although he first proposed the notion where big givers and small givers might have different price elasticities, he did not provide empirical evidence.”) (citing Clotfelter, C.T., *The Effect of Tax Simplification on Educational and Charitable Organizations*, in ECONOMIC CONSEQUENCES OF TAX SIMPLIFICATION (Boston, Federal Reserve Bank of Boston 1986).

86. BUREAU OF LABOR STATISTICS, US CONSUMER EXPENDITURE SURVEY 2010-2013, at 9 (“Cash Contributions” by income quintile), available at <http://www.bls.gov/cex/csxam13.pdf>.

charitable contribution, and therefore do not claim it, thus resulting in the lack of charitable contributions as reported on the tax returns. Such persons make financials gift to charity solely on the grounds of “benevolence,” “compassion,” “education” and “love,” and not to obtain a tax deduction for the charitable contribution.⁸⁷

From Kierkegaard’s perspective it is these working poor persons who are “rich.” The purpose of the charitable tax deduction of section 170 of the Internal Revenue Code is to allow the wealthy members of society to emulate this selflessness and engender an ability to *act with compassion* even if they do not truly “love.” From the act of giving it is possible “love” will develop in the Libertarian heart. Kierkegaard refers to this process simply as “maturation.”⁸⁸ The charitable deduction serves as practice in the giving of “love” to others as a form of investment in another individual. This represents a psychological maturation of the wealthy person away from a state of unconscious “despair.”

B. The Elimination of Regressive Taxation

The Libertarian scholar (or tax jurist) familiar with the tax literature on the subject may be surprised to read that the tax system in the United States is *regressive*. We are told by the Congressional Budget Office the tax system is *progressive*.⁸⁹ In actual fact, income tax rates are nominally progressive but for two reasons this does not result in a progressive tax system. First, where the regressivity of all types of taxes are taken into account the overall system is regressive.⁹⁰ Second, not all forms of income from capital are immediately recognized as income and thus subjected to taxation as “taxable income” (at progressive rates) as reported on the tax return.⁹¹ When these unrealized forms of income are added to taxable income these reduces the overall rate of tax on

87. Lin & Lo, *supra* note 84, at 538 (“[C]haritable giving revolves around identification with the needs of others. According to Schervish, the key to the practice of philanthropy is how people link their destiny to the destiny of others. In other words, the cause of philanthropy is not the absence of self but the presence of self-identification with others.”) (citing Paul G. Schervish, *Major Donors, Major Motives: The People and Purposes behind Major Gifts*, 47 *New Directions for Philanthropic Fundraising* 59 (2005)).

88. WORKS OF LOVE, *supra* note 20, at 98 (“Maturity is to understand this you as addressed to oneself, even though it were not said to a single other person. You shall; you shall love your neighbor. O, my reader, it is not to you I speak. It is to me”).

89. CONGRESSIONAL BUDGET OFFICE, *THE DISTRIBUTION OF HOUSEHOLD INCOME AND FEDERAL TAXES*, 2010 (2013), available at <https://www.cbo.gov/publication/44604>.

90. Bret N. Bogenschneider, *The Effective Tax Rate of U.S. Persons by Income Level*, 145 *TAX NOTES* 117 (2014).

91. See Bret N. Bogenschneider, *Income Inequality & Regressive Taxation in the United States*, 4 *INTERDISC. J. ECON. & BUS. L.* 8 (2015) (“[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”).

the wealthy who acquire income from capital resulting in a very low *effective tax rate* on the wealthy.

Perhaps because of the alleged progressivity of the tax system in the United States much of the historical tax policy debate focused on the viability of a progressive tax system. Professor Hamill thus identified the following principle of progressivity as an aspect of moral tax policy:

By requiring adequate revenues supporting reasonable opportunity to be raised under a progressive model, Judeo-Christian guided tax policy demands significant financial sacrifices from those in the community at higher levels of income and wealth.⁹²

Perhaps worthy of note, the tax with the greatest regressive effect was recently calculated to be the Federal excise tax on gasoline.⁹³ The excise tax on gasoline is often thought to entail a positive reduction in environmental externality in omissions by making gasoline more expensive to the end user. However, a growing portion of refined petroleum products are exported to Latin America and Africa under a beneficial tax regime reflecting an excise tax exemption for refined petroleum exports under Federal law. Accordingly, the implementation of an excise tax on exported gasoline or a reduction in the excise tax on gasoline may counterintuitively entail a net environmental benefit on a global basis.⁹⁴

C. A Provision for Public Education

In general, fiscal policy should be distinguished as between the revenue side (i.e., taxation) and the spending side. Thus, the mention of public education in a tax policy analysis refers to a *spending* policy. However, education is a special category of expenditure and is therefore worthy of special note. Kierkegaard described a “despair of necessity” in the following terms:

92. *Id.* at 701; Martin J. McMahon Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 1101 (2004) (“Taxes are what we pay for a civilized society”—government, courts, police, national defense, schools, roads, and the like. Much of the philosophical opposition to taxes, particularly graduated progressive taxes on the rich, is based on the neoconservative philosophy, epitomized by Robert Nozick, that individuals are morally entitled to keep the fruits of their labor and have a claim superior to the societal claim. This argument flows from the Lockean position that the rights of the individual precede those of the state. Similar arguments have been advanced by Milton Friedman and Richard Epstein, among others, to support flat-rate taxation rather than graduated progressive taxation. These arguments have been thoroughly discussed elsewhere, and I will not review the details. They all are essentially grounded on a libertarian philosophy.”).

93. Bret N. Bogenschneider, *On the Federal Excise Tax Exemption for U.S. Gasoline Exports*, 5:1 CONTEMP. TAX J. 8 (2015).

94. *Id.* (“Gasoline taxes also fall disproportionately on the persons least able to pay. Within the discipline of tax policy this is referred to generally as a “regressive” form of taxation . . . As a matter of international tax policy, if either gasoline or crude oil is a commodity that can be exported to other nations, then the policymaker must consider both the domestic and international implications of a domestic excise tax on that commodity in the United States. This is especially true where the exports of gasoline are exempt from taxation, thereby creating a potential tax incentive to export gasoline (or diesel). As it turns out, U.S. refiners indeed exported at least 18% of total gasoline refined as of the year 2011.”).

The Despair of Necessity is Due to the Lack of Possibility. If one will compare the tendency to run wild in possibility with the efforts of a child to enunciate words, the lack of possibility is like being dumb When [possibility] is lacking, when a human existence is brought to the pass that it lacks possibility, it is in despair, and every instant it lacks possibility it is in despair.⁹⁵

Public education may be taken as fundamental to society from the Libertarian perspective as well. That is, the “social contract” entails an agreement by man to enter society on condition of being educated in the workings of that society. An uneducated person (e.g., an illiterate person) might be considered as apart or separated from society in this regard reflecting the limited potentials. A similar description was given by Hamill in reference to tax policy as follows:

Oppressive [tax] laws actively make a person’s already precarious situation worse, foster economic exploitation and injustice, or unreasonably stand in the way of a person’s progress towards reaching their potential.⁹⁶

From the existential perspective of Kierkegaard any individual without a basic education might have difficulty in identifying with neighbors within society. This is very similar to Hamill’s assertion that such persons might have difficulty reaching their full potential in society and viewing others with love.⁹⁷ The many practical difficulties such as incarceration or joblessness disproportionately faced by those without an education lend further support for public education as a moral requirement.⁹⁸

VII. CONCLUSION

A tax jurisprudence informed by Kierkegaard and the writers of the Scottish Enlightenment is distinguishable from a tax jurisprudence based on the Libertarian approach of Hobbes and Locke. The existence of any human society requires benevolence and love toward fellow man. Indeed, it is *selflessness* – not *selfishness* – that is the fundamental characteristic of human relations. This is the necessary precondition for modern society. Only without such *optimism* does society break down. Life *then* becomes nasty, brutish and short. Kierkegaard applied such psychology in the description of the “natural state” of mankind. Such is very different from the Libertarian *natural law* jurisprudence. In real life, money and property rights are derived only from and through the

95. THE SICKNESS UNTO DEATH, *supra* note 20, at 38–39.

96. Hamill, *supra* note 14, at 684–85.

97. *Id.* at 685–70 (“In addition to forbidding oppression, the Bible also requires that the community’s laws ensure that each individual enjoys a reasonable opportunity to reach his or her potential. The core of this ethical principle comes from creation theology: because each person is created in God’s image, with a unique potential to carry out God’s work on earth, all persons must have a meaningful chance to develop this divinely inspired potential as a matter of biblical justice.”).

98. See Rafael Alberto Madan, *The Sign and Seal of Justice*, 7 AVE MARIA L. REV. 123 (2008).

mutual prosperity and well-being of others. Therefore, money itself is merely a form of *optimism* or expectation about the future of society. A description of the origin of civil society insofar as derived from individual *selfishness* and property rights fails to take into account the “benevolence” and “love” that are fundamental to human nature. “[O]nly love to one’s neighbor truly leads to life.”⁹⁹ Kierkegaard’s assertion of such a natural law is fully consistent with the ideas of “benevolence” and “love” developed in the Scottish Enlightenment.¹⁰⁰

The opposite of *optimism* is Kierkegaard’s “*despair*.”¹⁰¹ *Despair* represents the *sickness* unto death. This is not the *natural state* of mankind. Both “liberty” and “freedom” are rendered worthless in the presence of despair. Indeed, psychological despair generally does not create wealth. It is correct to say that despair is inefficient in economic terms *even where* property rights are protected in the process. Locke’s illusion to the protection of property rights should not be used to celebrate or enhance *despair* in civil society, such as through regressive tax policies. Instead, Kierkegaard’s description of the natural psyche represents a description of the overcoming of *despair* on a collective level. A *real* potential danger of tax law is that the tax jurisprudence may actually cause *despair* in society through the collection of revenue. Tax law should be designed so as not to *cause* “despair.” Therefore, the objective of tax jurisprudence is that the tax system must reflect the pursuit of *optimism* under the natural law in general terms, and at the same time not undermine society by causing *despair* amongst the citizenry. An obvious and real means to cause *despair* via the tax system would be to apply an overall regressive tax system.

In modern society, the wealthy are often in a state of unconscious “despair.”¹⁰² For example, Libertarian ideology does not view the “potentials” or “possibilities” of other members of society as an appropriate focus of tax jurisprudence. But, the wealthy yearn to recognize such “potentials” of other members of society. Kierkegaard reminds us is the natural psyche of mankind. The psychology of the wealthy thus requires the diminishment of the “potentials” of others in order to maintain a form of sanity in the justification of Libertarian ideology. This leads to the appeal of modern political metaphors, including for example: “welfare state,” “lazy poor,” “union strike,” “nonworking single mothers,” and so on. These attacks are not so much a statement about the poor as the psychology of the person making the allegation. On a psychological level these ideas manifest as “pessimism” in society which is the true danger. Pessimism is the phenomenon of the wealthy (or the poor) devaluing others in an attempt to justify their own immoral behavior. This

99. WORKS OF LOVE, *supra* note 20, at 74.

100. See generally David Sherman, *Adorno and Kierkegaard*, in SARTRE AND ADORNO: THE DIALECTICS OF SUBJECTIVITY (SUNY Press 2007) (“According to Adorno, Heidegger erroneously reads the question of the ‘meaning of existence’... unlike Heidegger’s ‘fundamental ontology,’ which holds that there is a meaning to which existence must correspond, the meaning that Kierkegaard would find is generated entirely out of the domain of existence itself. Without a contribution from the subject, existence itself is meaningless.”).

101. THE SICKNESS UNTO DEATH, *supra* note 20, at 48.

102. *Id.* at 48.

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represents a form of psychological sickness and should not be regarded as a basis for tax jurisprudence. Such illness is what Kierkegaard referred to in the *Sickness Unto Death*.

