

Taxation of Wealth Transfers: A Philosophical Analysis

By

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To Stefan, Anna, and Lena.

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# CHAPTER 1: INTRODUCTION TO A PHILOSOPHICAL EVALUATION OF THE ESTATE TAX

## I. INTRODUCTION

Taxation plays varied (but important) roles in contemporary society. In the first instance, levying taxes raises the funds necessary to pay the costs of government.<sup>1</sup> However, ideally, a society's tax system should also be understood as the expression of that society's beliefs about distributive justice.<sup>2</sup> Almost all taxation involves some degree of redistribution.<sup>3</sup> Redistribution accomplished through the tax code should not be

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<sup>1</sup> Of course, this statement elides a great debate regarding the size of government, the majority of which is outside of the scope of this dissertation. This debate asks questions like, do governments raise taxes in order to pay for necessary costs, or are the costs determined by the amount of taxes raised? For a discussion of these matters, *see* Susannah Tahk, "Everything is Tax," 50 HARV. J. OF L. 67 (2013). In addition, some argue that taxation can itself be a form of spending. For instance, the establishment of a tax base includes some forms of income, and excludes others. When items are excluded from the tax base that amounts to a release by the government of its taxing power over that amount. This is no different from the situation where the government collects the tax, and then pays out that same amount in as part of a spending program. For a discussion of this issue, *see* Stanley S. Surrey, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. L. REV. 679 (1976). This is also a central theme in the work of Ed Kleinbard. "All of our technical knowledge on the economic side effects of taxation cannot resolve the fundamental fiscal issue that dominates contemporary political discourse, which is how much tax revenue our technical expertise should be harnessed to collect in the first place." Edward D. Kleinbard, *WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY*, OXFORD UNIVERSITY PRESS (2014), at XXI.

<sup>2</sup> "In a capitalist economy, taxes are not just a method of paying for government and public services: they are also the most important instrument by which the political system puts into practice a conception of economic or distributive justice." LIAM MURPHY AND THOMAS NAGEL, *THE MYTH OF OWNERSHIP*, OXFORD UNIVERSITY PRESS, 2002 at 3.

<sup>3</sup> By "redistribution" I mean reallocating money, or the benefits that money can buy, from one member of society to another. This could be upward redistribution (as in scenarios where tax is

haphazard or accidental. If a society believes redistribution is socially desirable, then it can use taxation (usually in concert with other tools<sup>4</sup>) to achieve that redistribution. If society believes redistribution is undesirable, then the tax system must be carefully structured to avoid, or at least minimize, such redistribution. The question of whether and to what extent the tax laws should aim to promote redistribution is primarily a philosophical question. Redistribution in the tax code should map the philosophical preferences of society regarding equality, justice, and moral desert. However, the creation and implementation of tax laws have historically responded primarily to the input of economic analyses, while paying little to no attention to the philosophical justifications for one model or another. While this attitude towards philosophical input into tax policy analysis has started to change<sup>5</sup>, the taxation of wealth transfers remains relatively undertheorized.<sup>6</sup>

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collected from all members of society, including the poor, to pay for roads or defense where the benefit is enjoyed by all members of society, including the rich; or in scenarios where tax is collected from all members of society to pay for benefits enjoyed primarily by the rich, such as securities regulation) or it could be downward redistribution (when taxes are levied more heavily on wealthier members of society to pay for welfare programs targeted at less well-off members of society).

<sup>4</sup> Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

<sup>5</sup> “[I]t turns out that all fiscal policy recommendations rest on a foundation of moral philosophy: the only question is whether we are conscious of that fact.” Edward D. Kleinbard, *supra* note 1, at XXII.

<sup>6</sup> Of course, there are numerous exceptions to this generalization. *See, e.g.*, Ed McCaffrey, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L. J. 283 (1994); Anne Alstott, *The Uneasy Case Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffrey*, 51 TAX L. REV. 364 (1995); Paul L. Caron and James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality*, 40 PEPPERDINE L. REV. 1255 (2013);



In this dissertation I examine the philosophical justifications for imposing tax on the transfer of wealth. Because taxation is the practical expression of a country's theory of distributive justice, my hope is that this work will help to clarify and inform the efforts of those who think about tax law making, both inside and outside of government.

In order to prepare for the philosophical work of this dissertation, I will also introduce relevant facts about the state of the taxation of wealth transfers and the basic issues and debates in contemporary tax policy. Taxing the transfer of wealth means levying a percentage tax on the gratuitous movement of wealth from one individual to another. In many (perhaps even most) instances this movement is from an older generation to a younger generation. Wealth transfers are distinct from other methods of acquisition, because they represent accessions to wealth motivated, in most instances, by no particular activity on the part of the recipient. The transferee receives the wealth transfer because of an accident of birth, or because of a relationship (often biological, and therefore outside of the control of the transferee), rather than by dint of hard work or effort. Looked at from this perspective, one might expect significant public support for the taxation of wealth transfers, however, this has not been the case in the United States in the past fifteen years. Instead, opposition to the taxation of wealth transfers has focused on the inviolable rights of property owners to dispose of their wealth how they see fit, including by gratuitous transfer to (possibly undeserving) relatives. Opponents

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Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 *FORDHAM L. REV.* 1991 (2004).

then claim that imposing tax on this transfer restricts the freedom of the property owner, and therefore taxation of wealth transfers should be eliminated.<sup>7</sup>

Over the last twelve years the estate tax has been eviscerated. Evolving from a tax at 55% on all estates over \$675,000 to a tax at only 35% on estates over \$5.45 million per person (\$10.9 million for a married couple), the estate tax now reaches only about 5,300 estates each year, as opposed to over 58,000 estates in 1999.<sup>8</sup> In the era of language

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<sup>7</sup> For an extensive discussion of the recent history of the battle over the United States wealth transfer tax system, see Michael J. Graetz and Ian Shapiro, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH*, PRINCETON UNIVERSITY PRESS (2006).

<sup>8</sup> The estate tax is levied by Internal Revenue Code Section 2001. Internal Revenue Code of 1986, as amended; hereafter “Code”. All citations to sections are citations to the Code. Before the passing of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the Code provided a lifetime credit against tax of \$675,000. §2010. Any transfers made, whether *inter vivos* or after death, that exceeded the credit amount were taxed at 55%. §2001. EGTRRA slowly increased the lifetime credit amount and simultaneously lowered the rate, culminating in a one year repeal of the estate tax in 2010. See Congressional Budget Office, “Economic and Budget Issue Brief: Estate and Gift Taxes, available at: [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update\\_One-Col.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf). The peculiarities of EGTRRA resulted in a complete sunset of the law on December 31, 2010. Congress and President Obama signed a two year extension of the EGTRRA provisions, including a reinstatement of the estate tax with a \$5 million lifetime credit (indexed for inflation) and a 35% rate on amounts transferred above the credit amount. That extension expired on December 31, 2012, at which point the estate and gift tax credit and rate were scheduled to revert to 2001 levels. *Id.* The Congressional Budget Office estimated that extending the EGTRRA estate and gift tax provisions that lowered the transfer tax rate and increased the lifetime credit amount would have cost approximately \$402 billion over the period of 2010 to 2019, as compared with the revenue that would have been raised if EGTRRA had been allowed to expire. Congressional Budget Office, “Budget Options, Volume 2,” p. 240, available at: <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/102xx/doc10294/08-06-budgetoptions.pdf>; Congressional Budget Office, “An Update to the Budget and Economic Outlook: Fiscal Years 2012 to 2022,” p. 64, available at: [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update\\_One-Col.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf). Leaving the 2009 rates and exemption levels in place would have raised a total of \$420 billion (or 1.2% of total revenues) from 2010 to 2019. Congressional Budget Office, “Economic and Budget Issue Brief: Estate and Gift Taxes, p. 5, available at:

decrying class warfare, why this abandonment of the project of the estate tax? Is it too late to save the tax? Are there reasons to save it? Why have an estate tax in the first place?

In the United States, the taxation of wealth transfers has become a political hot potato. While many economists and theorists write in support of the continued existence of the tax, many oppose it, often claiming to demonstrate the economic inefficiency of taxing wealth transfers.<sup>9</sup> However, as I will demonstrate over the course of this dissertation, the taxation of wealth transfers, as examined from the political philosophical systems most commonly accepted in contemporary American society, achieves desirable ends and should be included in any robust system of taxation.<sup>10</sup>

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[http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update\\_One-Col.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf). Instead of these options, Congress and the President reached an agreement to avoid going over the so-called “fiscal cliff.” The agreement was reached in the final hours of 2012, and the bill was signed into law on January 2, 2013. The law sets the estate tax lifetime exemption-equivalent credit at \$5 million, adjusted annually for inflation (which brings it to \$5.25 million in 2013; *see* §2010) and sets the tax rate at a flat 40% for amounts in excess of that (*see* §2001). The new tax law does not have a sunset date, and thus will not have to be extended by another Congressional vote.

<sup>9</sup> “...following significant estate tax rate increases, estate tax revenue as a share of GDP has been shown to decrease, and alternatively increase as a share of GDP when the estate tax rate is significantly lowered. The resultant loss of capital from the estate tax could be serving economically productive uses; but as it is, the loss translates into less wealth and reduced economic activity, thus leading to a smaller tax base for income tax.” Joint Economic Committee Republicans, *Staff Study: Cost and Consequences of the Federal Estate Tax*, July 25, 2012, at 16. Available at: [jec.senate.gov/republicans](http://jec.senate.gov/republicans).

<sup>10</sup> The direct taxation of wealth would, in many instances achieve many of the same goals as the taxation of wealth transfers (an indirect tax). However, direct taxation of wealth is often less politically palatable than wealth transfer taxation, especially for individuals who hold strong libertarian views about the inviolability of private property rights. Direct taxation of wealth, currently imposed on many Americans in the form of real property taxes, can also raise liquidity

Contemporary tax systems rely very little to not at all on the taxation of wealth transfers. In 2016, 44 countries in the world impose some sort of tax on wealth transfers, but this number is shrinking.<sup>11</sup> Indeed, thirteen countries have repealed their wealth transfer tax laws since the year 2000.<sup>12</sup> By contrast, almost every country in the world taxes the receipt of income. Why is the taxation of income so much more common than the taxation of wealth and wealth transfers? Is this form of taxation merely more familiar and more accepted, and therefore more politically palatable? Or does income taxation accord more directly with the distributive justice views held by the citizens (and voters) of countries with these tax systems? Over the course of this dissertation I will argue that, in fact, when we consider the most common views of distributive justice, we should see

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concerns, since holders of non-cash wealth, in the absence of any exceptions or exemptions, are often forced to sell the property in order to pay the tax. This can, of course, also happen in the case of taxation of non-cash wealth transfers (inheritance of real property, for instance), but such transactions seem more palatable to most people. In addition to this moral objection, in the United States, direct federal taxation of wealth is unconstitutional and would therefore require a constitutional amendment. *See, e.g.,* Beverly Moran, *Wealth Redistribution and the Income Tax*, 35 HOWARD L. J. 319 (2010).

<sup>11</sup> 44 OECD countries impose wealth transfer taxation. Many countries that do not tax wealth transfers did so in the recent past, and many that do currently tax wealth transfers may not do so for long, given current political discussions. Therefore, finding the correct number for this list is difficult. The Tax Foundation is, however, a reliable source for such statistics. The current list of countries that impose some form of wealth transfer taxation is: Japan, South Korea, France, United Kingdom, United States, Ecuador, Spain, Ireland, Belgium, Germany, Chile, Venezuela, Bermuda, Greece, Netherlands, Philippines, South Africa, Finland, Angola, Denmark, Lebanon, Malawi, Cameroon, Equatorial Guinea, Iceland, Puerto Rico, Taiwan, Turkey, Brazil, Poland, Switzerland, Aruba, Curacao, Guatemala, Sint Maarten, Botswana, Croatia, Zimbabwe, Italy, Guinea, Senegal, Mozambique, Jamaica, and Bulgaria. [http://taxfoundation.org/article/estate-and-inheritance-taxes-around-world#\\_ftn2](http://taxfoundation.org/article/estate-and-inheritance-taxes-around-world#_ftn2).

<sup>12</sup> Wealth transfer tax systems have been repealed in Macau (2001), Portugal (2004), Slovakia (2004), Sweden (2005), Russia (2005), Hong Kong (2006), Hungary (2006), Singapore (2008), Austria (2008), Liechtenstein (2011), Brunei (2013), Czech Republic (2014), Norway (2014). *Id.*

more taxation of wealth and wealth transfers, as those forms of taxation more closely track philosophical views held today.<sup>13</sup>

## II. FORMS OF WEALTH TRANSFER TAXATION

Before turning to the philosophical analysis of the taxation of wealth transfers, it is useful to understand just what I mean by “wealth transfer taxation”. To that end, in this section I will identify the current forms of wealth transfer taxation prevalent in the world today, focusing in particular on the current United States estate and gift tax system, providing a history of the tax and an explanation of its current status.

The two most common forms of wealth transfer taxation in the world today embody two distinct approaches to the taxation of wealth transfers. The first focuses on the amount held by the transferor, what I will call “estate taxation”, and the second focuses on the amounts received by the transferee, what I will call “inheritance

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<sup>13</sup> Indeed, wealth transfer taxation can more closely track philosophical goals than income taxation can. The income tax is used in most countries for the majority of revenue raising (in the United States the income tax raises about \$1.1 trillion annually, while the estate tax raises only about \$20 billion), and therefore policy goals must often be subsumed under revenue raising goals. At the same time, income taxation is often used to achieve particular incentive measures (encouraging charitable contributions, home ownership, or energy efficiency, for instance) and those particular incentive goals may be inconsistent with larger theoretical goals about redistribution or other philosophical beliefs. For these reasons, I find wealth transfer taxation to be a theoretically “purer” place than income taxation to talk about the philosophical justifications for tax policies.

taxation”.<sup>14</sup> Both taxes would likely, for the sake of coherent enforcement, incorporate the taxation of gifts in addition to the taxation of transfers at death. In this part I contemplate each of these forms of taxation in turn.

### **A. Estate Taxation**

An estate tax taxes the estate of a decedent, before transfers are made. Upon the death of an individual, the estate becomes a legal entity, made up entirely of assets held by the individual during her lifetime. The United States federal government currently assesses tax on wealth transfers in this way.<sup>15</sup> The U.S. estate tax determines the value of the estate either on the date of death, or on an “alternate valuation date” six months after the individual’s death.<sup>16</sup> The U.S. estate tax then allows a deduction against the estate valuation for all amounts transferred to charity, transferred to the spouse of the deceased, and for certain other small amounts.<sup>17</sup> Tax is then assessed on the value of the estate over a specific exemption amount.<sup>18</sup> The current U.S. estate tax is nominally a flat tax of 40%

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<sup>14</sup> I note that the system of wealth transfer taxation in place in the United Kingdom is referred to as an “inheritance tax”, although it more closely resembles what I refer to as an estate tax in this dissertation.

<sup>15</sup> The estate tax is imposed under 26 United States Code section 2001. Hereinafter all references to the “Code” will be references to title 26 of the United States Code.

<sup>16</sup> The default date of valuation of the estate is the date of death. §2013. However, by election, a representative of the estate may elect an alternate valuation date. §2032.

<sup>17</sup> Transfers to a surviving spouse are fully deductible without limit under §2056. Transfers from the estate to charity, as long as they satisfy the statutory requirements, are deductible under §2055. Finally, deductions are available for funeral and administrative expenses, indebtedness of the decedent, and for claims against the estate. §2053.

<sup>18</sup> The mechanical application of the rule actually works by permitting a credit against tax equal to an exemption of a certain amount. In 2016 the credit available against estate tax liability is

on all assets over \$5.45 million<sup>19</sup>, although that generality glosses over important nuances in the law.<sup>20</sup>

The most important characteristics of an estate tax are the focus of the tax on the assets of the decedent *after* her death, and the uniform assessment of the tax without regard to the heir-recipients of the transfers.<sup>21</sup> So, for example, an estate with a taxable value of \$10 million that is transferred entirely to one heir is subject to the same amount of tax as a \$10 million estate that is divided among 10 or even 100 heirs. In this way, estate taxation focuses on taxing *large* estates, regardless of whether they are divided up post-death, or transferred in their entirety to one heir. The focus of the assessment of tax is squarely on the decedent or the transferor of the wealth, rather than on the heir or recipient. In addition, because the receipt of a gratuitous transfer is exempted from income tax under the current U.S. system, the accession to wealth that comes in the form

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equivalent to an exemption of \$5.45 million per individual, \$10.9 million per married couple. §2010. In other words, married couples can transfer up to \$10.9 million to non-spouse heirs without paying a single dollar of estate tax.

<sup>19</sup> *See id.* The exemption equivalent credit is adjusted annually for cost of living and inflation.

<sup>20</sup> The existence of a large number of estate tax exemptions and deductions reduces the base of the tax, thereby lowering the effective tax rate. *See, e.g.*, §2032A (offering an alternate valuation for farm property), §2056 (deducting all amounts transferred to a surviving spouse), and §2055 (exempting amounts transferred to charity, including to a private foundation entirely controlled by the decedent's family). Because tax liability is always calculated as a product of the tax rate multiplied by the tax base, reducing either the tax rate or the tax base will reduce the total amount of the tax liability. Public political disputes often focus on the appropriate tax rate, while reductions in the tax base, through increases in available exemptions, exclusions, and deductions, often fly under the radar, but are just as effective in lowering the total amount of tax due.

<sup>21</sup> The exceptions to this in the United States' version of the estate tax are that, as mentioned above, transfers to surviving spouses and charities are deductible to the estate. §2056, 2055, *supra* note 17.

of a gratuitous transfer will never be taxed to the recipient.<sup>22</sup> This represents a significant exception to the general tax policy principle of “horizontal equity”, the general belief that similarly situated individuals should be taxed similarly.<sup>23</sup>

## **B. Inheritance Taxation**

An inheritance tax focuses on the recipient of a wealth transfer, rather than on the transferor of the wealth. The United States does not have a federal inheritance tax, but some of the U.S. states have state-level inheritance taxes.<sup>24</sup> By contrast with an estate tax,

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<sup>22</sup> §102 of the Internal Revenue Code exempts amounts received by gift transfer from the income of the recipient. “Gift” as a term does not have a statutory definition, but the term has been fleshed out in Supreme Court jurisprudence, beginning with *Commissioner v. Duberstein* 363 U.S. 278, which held that a transfer was made by gift if the transfer was motivated by “detached and disinterested generosity”.

<sup>23</sup> To illustrate this idea, consider the following. Mary lives in Kentucky and works as a radiologist, earning \$200,000 per year. Her salary receipts will be subject to income tax both by the state of Kentucky and by the United States federal government. Compare Mary with John, who also lives in the state of Kentucky, has no paying job, and receives \$200,000 per year in gifts from his mother. John’s receipt of the gifts will not be subject to tax by either the state of Kentucky or by the U.S. federal government. However, if instead of receiving gratuitous transfers, John found \$200,000 per year in coins on the sidewalk, those receipts *would* be subject to both state and federal income taxes. *See Cesarini v. United States*, F. Supp. 3 (N.D. Ohio 1969). The taxation of found money reflects the general principle of tax policy and tax statutory interpretation that holds that §61, which states that “gross income includes all income from any source derived”, must be interpreted broadly. By contrast, exemptions and exclusions from income are interpreted narrowly, and are only applied where there is specific statutory language commanding it. Lucky for John, §102 of the Code explicitly excludes from income the receipt of all gratuitous transfers.

<sup>24</sup> Inheritance taxes are assessed at the state level by Iowa, Kentucky, Nebraska and Pennsylvania. In addition, Maryland and New Jersey have wealth transfer tax laws with inheritance tax-like characteristics. Connecticut, Delaware, the District of Columbia, Illinois, Maine, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Tennessee, Vermont, Washington all impose state-level estate taxes.

[http://www.taxfoundation.org/sites/taxfoundation.org/files/docs/Estate%20and%20Inheritance%20taxes\\_0.png](http://www.taxfoundation.org/sites/taxfoundation.org/files/docs/Estate%20and%20Inheritance%20taxes_0.png).



an inheritance tax is assessed on the recipient of the wealth transfer. This can be done either by including the amount of the wealth transfer in the income of the recipient<sup>25</sup>, or by assessing a separate inheritance tax on the amounts received via wealth transfers.<sup>26</sup> An inheritance tax often includes a per-heir exemption amount. So, for instance, if an inheritance tax has a \$1 million per heir exemption, then a \$10 million estate that is distributed to ten different heirs would not be subject to any tax. However, a \$10 million estate distributed to one heir would be subject to tax on the \$9 million excess over the exemption amount. In this way, an inheritance tax encourages the breaking up of concentrations of wealth more than an estate tax does. An inheritance tax can be designed with either a per transfer or a per lifetime exemption amount. If the tax has a per transfer exemption, then an individual can receive several transfers during her lifetime, and, as long as each transfer is below the exemption amount, she will owe no

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<sup>25</sup> This form of taxation is specifically prohibited under current federal income tax law in the United States by §102. *See supra*, discussion in note 22.

<sup>26</sup> For instance, in Kentucky, the rate of tax assessed on the value of the inheritance is determined by reference to the relationship between the heir and the decedent. Kentucky Revised Statutes §140.070. In addition, the exemption amount also varies based on the relationship between the two parties. Spouses, direct ancestors, and direct decedents, as well as siblings, receive a 100% exemption from the inheritance tax under Kentucky law. Kentucky Revised Statutes §140.080. The effect of this robust exemption system is that almost no inheritance tax is collected in Kentucky. Indeed, until recent Supreme Court decisions, the only transfers regularly subjected to inheritance tax in the commonwealth of Kentucky were transfers between same-sex couples, whether or not they were married. Because same-sex marriage was not recognized in Kentucky, post-death gratuitous transfers from one spouse to another were treated no differently than transfers between strangers, thus subjecting the transfers to inheritance taxation. This result was eliminated by *United States v. Windsor* 570 U.S. \_\_\_ (2013) and *Obergefell v. Hodges* 576 U.S. \_\_\_ (2015), the combination of which required all U.S. states to recognize the right of same-sex couples to marry. Now same-sex married couples are eligible for the 100% spousal exemption to the Kentucky Inheritance Tax.

tax. However, a per lifetime exemption amount will allow only a total of that exemption amount to be transferred during the individual's lifetime before tax is due. Each of these tax design elements focuses on a different policy goal. A per lifetime exemption amount focuses on the total amount of wealth that can be accumulated by means of inheritance before taxes are assessed. A per transfer exemption amount focuses on breaking up estates by encouraging donors to transfer their wealth to several heirs, in order to minimize the tax due. This strategy emphasizes breaking up dynastic wealth, and pays little attention to the wealth status of the recipient of the transfer. Each tax system achieves a different goal, and the political or philosophical end to be achieved helps to determine which system best meets the needs of the society in question.

### **C. Gift Tax**

Both an inheritance tax and estate tax would likely be complemented by a gift tax. Without a gift tax, post-death wealth transfer taxation could be avoided altogether by making transfers during the transferor's lifetime. The current gift tax in the United States was enacted for just this reason.<sup>27</sup> It serves as a backstop to the estate tax, ensuring that

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<sup>27</sup> "The stated purpose of the proposed introduction of the gift tax in the House Committee report was "To assist in the collection of the income and estate taxes and prevent their avoidance through the splitting of estates during the lifetime of a taxpayer." See House of Representatives (1932, pp. 8)." David Joulfaian, *The Federal Gift Tax: History, Law, and Economics*, available at: <http://www.irs.gov/pub/irs-soi/11pwcompenaddgift.pdf>.

death bed transfers do not gut the estate tax by avoiding transfer taxation altogether.<sup>28</sup> As a tax-exclusive, rather than tax-inclusive, tax, the gift tax allows *inter vivos* transfers to occur less expensively than post death transfers<sup>29</sup>, but without the gift tax, the estate tax would be all too easy to avoid. An inheritance tax may have less need of a separate gift tax, as long as the rule was drafted to tax the receipt of all gratuitous transfers, not only those effected after the death of the transferor.<sup>30</sup>

#### **D. The Current U.S. Wealth Transfer Tax System**

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<sup>28</sup> Without a gift tax, estate planning to avoid wealth transfer taxation would be remarkably straight-forward. All individuals wishing to avoid paying the estate tax (and wouldn't that just be all of them?) would have a pre-prepared document identifying to whom all amounts should be transferred. In the last moments before death, the individual would sign the document, executing all of the transfers as "gifts" rather than as "inheritances", thereby avoiding the imposition of any tax. The only individuals who would be left paying wealth transfer tax would be those who had the misfortune to die unexpectedly in something like a car accident. Thereby, the wealth transfer tax becomes an insult added to the injury of unexpected death!

<sup>29</sup> Imagine a donor wants to transfer \$100,000 post tax to a donee. Assuming a 50% flat tax rate, assuming that the exemption equivalent credit has been fully used, and that the entire transfer is subject to tax, an analysis of the transfer before *death* and after death makes clear why *inter vivos* transfers are less expensive than post death transfers. If the transfer happens during the donor's lifetime, then the base of the tax is the transferred amount of \$100,000. Applying the 50% rate to that transfer results in a tax liability of \$50,000. By contrast, if the donor wants the donee to receive \$100,000 after the donor's death, there must be \$200,000 available to achieve that result. If the estate holds \$200,000, then the application of the 50% tax rate leaves \$100,000 to be transferred to the donee. Therefore, the same result (\$100,000 in the hands of the recipient) costs \$150,000 if the transfer occurs during the transferor's lifetime, but \$200,000 if it occurs after death.

<sup>30</sup> Since inheritance tax schemes focus on the receipt of wealth transfers, rather than on the act of transferring, there is no inherent difference between pre- and post-death transfers. Current state inheritance tax models, like the Kentucky version, limit the imposition of the tax to amounts received upon the death of the transferor. That means that *inter vivos* transfers, including death-bed transfers, go untaxed. A pure accessions tax, focused on the receipt of wealth by an individual, would make no distinction between amounts received from the living or from the dead.

The United States federal estate tax and its attendant component parts, the federal gift tax and the federal generation skipping transfer tax, were enacted in 1915. Originally adopted to raise revenues to support the war effort, while incidentally addressing wealth inequality in the United States, the wealth transfer tax system was originally relatively popular politically. In its hundred years of existence, it has evolved dramatically, and its popularity has waned. In particular, in the last fifteen years, largely in response to an anti-tax movement led by Grover Norquist, who successfully identified the estate tax as the “death tax” in the minds of many Americans, the wealth transfer tax system has experienced declining popular political support.

The United States wealth transfer tax system has three elements – the estate tax, the gift tax, and the generation-skipping tax (the “GST tax”).<sup>31</sup> In place since 1916, the estate tax is the central component of the system, and imposes an excise tax on the

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<sup>31</sup> The federal estate tax (a tax on transfers made to surviving heirs at the death of the donor) was first enacted in the United States in 1916. The first estate tax was enacted without an accompanying gift tax. As a result, the tax could easily be avoided if the donor transferred the majority of her assets tax-free during her lifetime, rather than waiting until death to pass on her wealth. Congress realized that the estate tax was nearly powerless without a gift tax, and, as a result, the first gift tax (a tax on gratuitous transfers made during the donor’s lifetime) was enacted in 1924, but repealed in 1926. The modern gift tax was enacted in 1932, and the United States has had both gift and estate taxes for all years since then, with the exception of the one-year repeal of the estate tax in 2010. The GST tax, imposed to ensure that wealth transfer taxation cannot be avoided by making a transfer to an heir who is not an immediate descendant of the transferor, was first enacted in 1976, and has been in place in its current form since 1986. For more on the history of wealth transfer taxes in the United States, see Darien B. Jacobson, Brian G. Raub, and Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, available at: <http://www.irs.gov/pub/irs-soi/ninetyestate.pdf>.

transfer of wealth at death.<sup>32</sup> The federal gift tax serves as a backstop to the estate tax, ensuring that wealth transferred during the donor's lifetime, rather than held until death, will also be subjected to the imposition of the tax.<sup>33</sup> The GST tax imposes another layer of tax on gratuitous transfers (either during lifetime or after death) made to recipients more than one generation removed from the donor.<sup>34</sup>

2016 marks the 100<sup>th</sup> anniversary of the estate tax, tracing the history of the tax demonstrates a remarkable shrinking of the tax over time. Throughout their history the wealth transfer taxes have been assessed against varying percentages of the population. At their peak, in 1976, 8% of adult deaths resulted in estates that were subject to the estate tax.<sup>35</sup> In 2013 an estimated .14% of adult deaths resulted in estates that were subject to the tax.<sup>36</sup> In terms of total tax revenues collected through the wealth transfer taxes, the taxes were at their peak in 1972, when 2.6% of total tax revenues came from

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<sup>32</sup> *Id.* The estate tax is imposed by §2001 at a current rate of 40% on amounts in excess of the 2014 unified credit exemption equivalent amount of \$5,340,000. §2010.

<sup>33</sup> §2501 imposes an excise tax on the gratuitous transfer of wealth during the donor's lifetime, if the transfer exceeds the lifetime unified credit exemption equivalent amount of \$5,340,000. The gift tax is statutorily linked to the estate tax, so the tax is imposed at the rate of 40% in 2014. §2001.

<sup>34</sup> §2601 imposes a tax (in addition to taxes imposed under §2001 and §2501) on direct transfers or distributions from a trust to a "skip person". In addition to the unified credit against estate and gift taxes available under §2010, there is a lifetime credit against the GST tax equivalent to an exemption amount, in 2016, of \$5,450,000. §2631 (referencing §2010). Transfers in excess of the exemption equivalent amount are taxed at 40% in 2016. §2602 (referencing §2001).

<sup>35</sup> Jacobson, Raub, and Johnson, *supra* note 3.

<sup>36</sup> Tax Policy Center Table T13-0019 "Estate Tax Returns and Liability Under Current Law and Various Reform Proposals, 2011-2022." Available at: <http://www.taxpolicycenter.org/numbers/displayatab.cfm?DocID=3775>.

the estate and gift taxes.<sup>37</sup> By contrast, in 2013 estate tax revenues represented only 0.6% of total United States federal tax revenues.<sup>38</sup>

The modern estate tax is an excise tax on the transfer of wealth.<sup>39</sup> Many (although perhaps not all) of the fundamental goals of wealth transfer taxation could be achieved through the imposition of a direct tax on the wealth of an individual. Such a tax, operating like the relatively common property taxes in place in many local tax jurisdictions, could levy a tax on the current value of an individual's assets. A federal wealth tax could be assessed annually or more or less frequently, it could be either flat or graduated, it could be a tax on all holdings or only those above a certain exemption amount, and it could be uniform across households or vary based on age or family size. While the many options for imposing a wealth tax might make it seem an attractive option, a constitutional prohibition on direct taxes that are not proportional makes a wealth tax impossible without a constitutional amendment in the United States.<sup>40</sup> However, the structure of the estate tax, as an indirect tax on the act of transferring wealth, rather than a direct tax on the holding of wealth, is permitted under the United

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<sup>37</sup> *Supra* note 3.

<sup>38</sup> "Policy Basics: Where Do Federal Revenues Come From?", Center on Budget and Policy Priorities, March 11, 2015. Available at: <http://www.cbpp.org/research/policy-basics-where-do-federal-tax-revenues-come-from>.

<sup>39</sup> "A tax is hereby imposed on the *transfer* of the taxable estate of every decedent who is a citizen or resident of the United States." §2001 (emphasis added).

<sup>40</sup> For a discussion of the possibility of imposing a wealth tax, *see, e.g.* David J. Shakow, Reed Shuldiner, *A Comprehensive Wealth Tax*, 53 TAX. L. REV. 499 (2000); Beverly Moran, *Wealth Redistribution and the Income Tax* 35 HOWARD L. J. 319 (2010) (discussing the possibility of a wealth tax, and specifically exploring the use of a wealth tax as a means of funding reparations).

States' constitutional regime.<sup>41</sup> Current law unifies the estate and gift tax, so that tax is also imposed on so-called "lifetime transfers." Wealth transfers are taxed in the same way, whether they occur before or after the death of the transferor.<sup>42</sup> In effect, the estate, gift, and GST taxes are imposed at a flat rate of 40%, although the statute imposing the tax actually includes a graduated rate structure.<sup>43</sup> Because of the lifetime exemption equivalent credit, no transfers are taxed at any rate under the highest 40% rate. All transfers within the lower brackets are exempted from the tax.<sup>44</sup> Under 2016 law, a taxpayer can transfer a total of \$5.45 million tax-free during her lifetime.<sup>45</sup> The current

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<sup>41</sup> "The framing of the tax has constitutional significance: While Congress may impose excise taxes subject only to the uniformity requirement, any direct tax on property must be apportioned among the States. See U.S. Const. art. I §8, cl. 1 & §9, cl.4. By imposing the tax on the value of the taxable estate that is transferred by reason of the decedent's death (as opposed to the value of the property in the decedent's hands just prior to his death), the estate tax falls comfortably within the excise category." Brant J. Hellwig and Robert T. Danforth, *ESTATE AND GIFT TAXATION*, SECOND EDITION, Lexis Nexis Publishers (2013), at 1.

<sup>42</sup> While the structure of the gift tax and the estate tax is the same, there is, in fact, still a benefit to transferring assets during one's lifetime, due to the tax-exclusive nature of the gift tax. The estate tax is assessed on the value of the assets held by the decedent at death. §2001. By its very nature, then, the estate tax is "tax-inclusive", meaning that the amount paid in tax will, itself, be subject to the tax. By contrast, the gift tax is a tax on the amount transferred by gift. §2501. Therefore the amount subject to the gift tax does not include the amount of the tax. For example, assume a unified estate and gift tax rate of 50%. Making a post-tax transfer of \$100,000 will require \$200,000 of assets if the amount is transferred after death (\$200,000 of assets x 50% tax rate results in \$100,000 tax liability, leaving \$100,000 of assets for the heir), while making an *inter vivos* transfer of \$100,000 requires only \$150,000 of assets (\$100,000 gift transfer x 50% tax on transfer incurs \$50,000 tax liability – total amount required to make the transfer is \$150,000). In that sense, *inter vivos* gifts are "cheaper" to make than post-death transfers.

<sup>43</sup> §2001 begins with a tax rate 18% on the first \$10,000 transferred, and gradually climbs to the current maximum rate of 40%. However, as the current exemption equivalent credit of \$5.45 million well exceeds the bottom of the 40% bracket (currently the 40% bracket affects transfers in excess of \$1,000,000), no transfers are subject to the tax rates in the lower brackets.

<sup>44</sup> *Id.*

<sup>45</sup> §2010.

lifetime credit can also be shared between spouses, meaning that all married couples are entitled to a total amount of \$10.9 million of tax-free transfers.<sup>46</sup>

The current form of the wealth transfer tax (with a \$5.45 million lifetime exemption, indexed for inflation, and a 40% tax rate on transfers over that amount) arose as the result of a political compromise in the first days of 2013.<sup>47</sup> Legislation passed under President George W. Bush in 2001 phased out the estate tax with a full repeal scheduled for 2010.<sup>48</sup> Because the legislation did not garner the requisite number of votes in Congress to become permanent, all of the so-called “Bush tax cuts” were sunset provisions, meaning they would disappear from the Code on December 31, 2010 without

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<sup>46</sup> Beginning in with the 2011 tax year, the Code permitted unused portions of the lifetime credit to transfer to the surviving spouse upon the death of the first spouse. Before then, a significant amount of estate planning, in particular the use of so-called “QTIP trusts” centered on ensuring that the entirety of an individual’s unified credit was used up, rather than allowing a portion of it to expire while the surviving spouse held assets in excess of the unified credit amount. §2010.

<sup>47</sup> Congress and President Obama signed the American Taxpayer Relief Act (the “ARTA”) to avoid going over the so-called “fiscal cliff.” The agreement was reached in the final hours of 2012, and the bill was signed into law on January 2, 2013. The law sets the estate tax lifetime exemption-equivalent credit at \$5 million, adjusted annually for inflation (which brings it to \$5.34 million in 2014; *see* §2010) and sets the tax rate at a flat 40% for amounts in excess of that (*see* §2001). The new law does not have a sunset date, and thus will not have to be extended by another Congressional vote.

<sup>48</sup> Before President Bush and the 2001 Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the Code provided a lifetime credit against tax of \$675,000. §2010. Any transfers made, whether *inter vivos* or after death, that exceeded the credit amount were taxed at 55%. §2001. EGTRRA slowly increased the lifetime credit amount and simultaneously lowered the rate, culminating in a one year repeal of the estate tax in 2010. *See* Congressional Budget Office, “Economic and Budget Issue Brief: Estate and Gift Taxes, available at: [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update\\_One-Col.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf).



further legislative action.<sup>49</sup> In an attempt to avoid the threatened “fiscal cliff”, Obama and the 2010 Congress enacted legislation on December 17, 2010 to extend the cuts. However, the legislation was merely a patch, and that legislation expired on December 31, 2012.<sup>50</sup> Finally, on January 2, 2013, the ARTA was enacted, making changes to the U.S. federal wealth transfer taxes permanent, and resulting in the tax rate and exemption amount in place today.<sup>51</sup>

In addition to amounts that are transferred as “gifts”, within the definition of the Code<sup>52</sup>, taxpayers can annually transfer up to a specific amount outside of the definition

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<sup>49</sup> The peculiarities of EGTRRA resulted in a complete sunset of the law on December 31, 2010.

<sup>50</sup> Congress and President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the “Tax Relief Act”), a two-year extension of the EGTRRA provisions, including a reinstatement of the estate tax with a \$5 million lifetime credit (indexed for inflation) and a 35% rate on amounts transferred above the credit amount. That extension expired on December 31, 2012, at which point the estate and gift tax credit and rate were scheduled to revert to 2001 levels. *Id.* The Congressional Budget Office estimated that extending the EGTRRA estate and gift tax provisions that lowered the transfer tax rate and increased the lifetime credit amount would have cost approximately \$402 billion over the period of 2010 to 2019, as compared with the revenue that would have been raised if EGTRRA had been allowed to expire. Congressional Budget Office, “Budget Options, Volume 2,” p. 240, *available at*: <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/102xx/doc10294/08-06-budgetoptions.pdf>; Congressional Budget Office, “An Update to the Budget and Economic Outlook: Fiscal Years 2012 to 2022,” p. 64, *available at*: [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update\\_One-Col.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf). Leaving the 2009 rates and exemption levels in place would have raised a total of \$420 billion (or 1.2% of total revenues) from 2010 to 2019. Congressional Budget Office, “Economic and Budget Issue Brief: Estate and Gift Taxes, p. 5, *available at*: [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update\\_One-Col.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf).

<sup>51</sup> *Supra* note 29.

<sup>52</sup> Importantly, and to the chagrin of law students everywhere, the term “gift” means something different in the gift tax regime than it does in the income tax regime. The income tax definition of gift, resulting in an increase in wealth to the recipient that is excluded from the recipient’s

of gift, under the annual exclusion amount.<sup>53</sup> In 2016 a taxpayer can transfer up to \$14,000 per recipient with no obligation to report the transfer on any tax return or pay gift tax on the transfer.<sup>54</sup> The transfer also does not use up an of the individual's lifetime unified credit, since the amounts under the annual exclusion fall outside of the Code's definition of "taxable gift."<sup>55</sup> In addition, transferors can pay the tuition and medical expenses of any individual without subjecting those payments to wealth transfer taxation, as long as the payments are made directly to the provider of the services.<sup>56</sup> The annual exclusion was originally intended as a simplifying mechanism, allowing "normal" family transfers (gifts on holidays and birthdays, vacations, even a teenager's first car) to pass outside of the transfer tax regime. However, aggressive estate planning has resulted in the use of the annual exclusion for significant cash transfers, including in the popular Crummey Trust context.<sup>57</sup> One suspects, however, that parents using Crummey Trusts

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income under §102, comes from the famous Supreme Court case *Commissioner v. Duberstein*. The Supreme Court articulated the standard, still prevalent today, that a gift stems from "detached and disinterested generosity" on the part of the donor. *Commissioner v. Duberstein* 363 U.S. 278 (1960). By contrast, the gift tax has a statutory definition of the term "gift" that does not investigate the donor's motives. "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift." §2512.

<sup>53</sup> §2503(b)(1).

<sup>54</sup> §2503(b)(2).

<sup>55</sup> §2503(a).

<sup>56</sup> §2503(e). For a critique of the exclusion of transfers to pay for health care and education under §2503, see Kerry A. Ryan, *Human Capital*, 62 OKLAHOMA L. REV. 223 (2010).

<sup>57</sup> Crummey trusts, named for the first taxpayer to successfully defend the use of this tax strategy in court, allow a contribution to a trust to qualify for the annual exclusion, as long as the transfer satisfies certain technical requirements, used to make the transfer more like a current transfer.

and other planning techniques to transfer \$14,000 per year to each of their children are likely making those traditional “gifts” as well. This would violate both the intention and the letter of the law. The combination of all of these provisions allows taxpayers to transfer a significant amount of wealth without paying any wealth transfer taxes, or using up any of the lifetime credit.<sup>58</sup>

While the wealth transfer taxes are collecting less in revenue now than they did in prior years<sup>59</sup>, at least in part because the tax rates on these transfers have been reduced<sup>60</sup> and the exemption amount has been increased<sup>61</sup>, the reduction in the collection of revenues can also be attributed, at least in part, to a non-statutory change. Aggressive estate planning strategies have reduced the base of the tax by reducing the value of wealth held by taxpayers. Through the use of entities such as family limited partnerships, taxpayers reduce the value for estate tax purposes of the assets held in their estates, and since tax liability is a product of base times rate, the reduction in the value of the estate

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For an explanation of the mechanics and uses of Crummey trusts, *see* Kent A. Mason, *An Analysis of Crummey and the Annual Exclusion*, 65 MARQUETTE L. REV. 573 (1982).

<sup>58</sup> A married taxpayer with two children could transfer to her children up to \$56,000 per year outside of the transfer tax regime, by transferring \$28,000 to each child and then making an election to have half of the amount treated as being transferred from the taxpayer’s spouse. On top of that, daycare costs, private school tuition, university tuition and fees and all medical expenses can be paid without reporting any of these amounts on a gift tax return.

<sup>59</sup> *Supra* note 15.

<sup>60</sup> In the year 2001 the estate tax was assessed at a flat rate of 55%. In 2016 it is only 40%. §2001.

<sup>61</sup> In the year 2001 the unified credit provided an exemption equivalent amount of \$675,000. In 2016 that amount is \$5.45 million. §2010. This exponential increase in the size of the exemption amount has taken a significant number of estates out of the pool of estates subject to the estate tax.

(the tax base) results in a reduction in overall tax liability.<sup>62</sup> The United States Tax Court has been relatively sympathetic to taxpayers using aggressive estate planning strategies, which has resulted in a dramatic decrease in estate tax revenue.<sup>63</sup>

Given the significant evolution of the wealth transfer tax regime in the past 15 years, it is at best unclear what the future of the taxation of wealth transfers in the United States will look like. While the current legislation will not expire without action by Congress, there is a vocal contingent of opponents to the estate tax who fight against its continued existence.<sup>64</sup> The rhetoric of the “death tax” and the misconception that the

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<sup>62</sup> Family Limited Partnerships (“FLPs”) work by reducing the valuation of the assets in an estate by placing those assets in a partnership and then imposing restrictions on the partnership interests. Typically the owner of the assets creates a partnership, places the assets in question inside the trust, and then imposes restrictions on the voting rights or transferability of the interests in that partnership. The creator of the partnership then transfers those partnership interests to family members either during the transferor’s lifetime, or includes an estate plan that will transfer the partnership interests after the transferor’s death. Because of the restrictions placed on the partnership interests, the transferor claims that the value of the partnership interest should be less than the value of the proportionate share of the underlying assets. In many instances the assets included in the FLP are readily marketable assets such as publicly traded securities. However, since the assets are owned by a partnership and there are restrictions on the partnership interests, the discounted valuation is generally accepted by the I.R.S. “Because property is valued on an objective basis for estate and gift tax purposes, the contribution of property capable of ready valuation to a partnership followed by the transfer of beneficial interests in the entity serves to suppress transfer tax value on two independent grounds. First, the partnership interest must be discounted to reflect its lack of marketability....Second, a transferee of a limited partnership interest is not entitled to participate in management decisions.” Brant Hellwig, *On Discounted Partnership Interests and Adequate Consideration*, 28 VA. TAX REV. 531 (2009) at 3. Discounts can be significant, sometimes nearing 30%. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> For a robust analysis of the political campaign aimed at eliminating the estate tax completely, and potentially using the elimination of the estate tax as a first step towards the large-scale reduction of federal taxation generally, see Michael J. Graetz and Ian Shapiro, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH*, PRINCETON UNIVERSITY PRESS (2006).

estate tax is the end of small business and family farms in the United States continues to make the estate tax unpopular, even among individuals who would never be subject to the tax. Despite this opposition, some scholars (perhaps overly cynically) argue that, as a political matter, the estate tax will never be eliminated, as politicians who collect contributions from estate tax opponents are unwilling to sacrifice the issue completely.<sup>65</sup> However, there is little evidence that the estate tax is, in fact, inconsistent with the political and philosophical beliefs of most Americans. In fact, it seems the opposite is true.<sup>66</sup> Part of the work of this dissertation is to demonstrate that the continued existence of wealth transfer taxation in some form is both philosophically important and consistent with the beliefs of most Americans.

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<sup>65</sup> “The secret is not that special interests give boatloads of money to politicians....The dirty little secret I come to lay bare is that *Congress likes it this way*. Congress *wants* there to be special interests, small groups with high stakes in what it does or does not do. These are necessary conditions for Congress to get what it needs: money, for itself and its campaigns...For the estate tax, there are two opposing sides [to the shakedown game]. The repeal of the tax would be a good outcome for the wealth families in the tax’s target range and a bad outcome for the financiers and others who benefit, big time, from the very existence of the tax and the planning it pushes many wealthy people to do. No matter what Congress does, at least two sets of players – billionaire families on the one hand and their estate-planning advisers and financial institutions on the other – will always be willing to play because of the estate tax’s high stakes.” Edward J. McCaffery, *The Dirty Little Secret of (Estate) Tax Reform*, 65 STAN. L. REV. ONLINE 21 (2012).

<sup>66</sup> “Given how clearly the estate tax lines up with American notions of fairness, it should enjoy wider support. The beauty of a free-market system is the absence of a special elite that judges who gets what – consumers vote with their dollars for the goods and services that best fit their needs (at least in theory). Inherited wealth goes against this model: As Warren Buffet has said, ‘The idea that you get a lifetime of privately funded food stamps based on coming out of the right womb strikes at my idea of fairness.’ Indeed, it’s surprising that many of the same people who oppose welfare on the grounds that its benefits are not tied to work can so stridently denounce estate taxes, thus endorsing a system that allows people to receive vast amounts of money without putting any work in.” Stephen Martin, *America’s Un-American Resistance to the Estate Tax*, The Atlantic, Feb. 23, 2016.

### III. WHY FOCUS ON THE ESTATE TAX AND NOT THE INCOME TAX?

In this dissertation I examine the estate tax through a variety of philosophical lenses. As a necessary corollary to a discussion of the estate tax, I also address issues related to the gift tax as part of the analyses.<sup>67</sup> However, in this dissertation, I do not evaluate views of the income tax from within the particular philosophical positions I address. Others have written on philosophy and the income tax.<sup>68</sup> Although the income tax is a larger component of the U.S. tax system than the estate tax is, in this dissertation I have chosen to focus on the estate tax. Because of the unique nature of wealth transfer taxation, an examination of wealth transfer taxes generally, and the U.S. estate and gift tax system in particular, can provide special insight into the role tax can play in manifesting a nation's philosophical preferences with regard to distributive justice. This part explains the reasons for my focus.

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<sup>67</sup> Because the estate tax can easily be avoided by the making of lifetime gifts, the estate and gift tax systems must, from a policy perspective, be contemplated together. *See supra* notes 26-28 and accompanying text.

<sup>68</sup> *See, e.g.*, Richard Epstein, *Taxation With Representation: Or, the Libertarian Dilemma*, 18 *Can. J. L. & Jurisprudence* 7 (2005); Barbara Fried, *The Puzzling Case for Proportionate Taxation*, 2 *Chap. L. Rev.* 157 (2001); JOHN ISBISTER, *CAPITALISM AND JUSTICE: ENVISIONING SOCIAL AND ECONOMIC FAIRNESS* (2001); Richard Bulmore, *Libertarianism without Self-Ownership: Why Owning Our Bodies Would Not Entitle Us to All of the Fruits of Our Labour*, 16 *UCL Juris. Rev.* 1 (2010); Bruce Chapman and John Quinn, *Efficiency, Liberty and Equality: Three Ethical Justifications for Regulatory Reform*, 20 *Osgoode Hall L. J.* 512 (1982); Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 *Tax L. Rev.* 399 (2004); JOSEPH CARENS, *EQUALITY, MORAL INCENTIVES AND THE MARKET* (1981); Richard Epstein, *Taxation in a Lockean World*, in *PHILOSOPHY AND LAW*, eds. Jules Coleman and Ellen Frankel Paul (1987); Thomas Pogge, *On the Site of Distributive Justice: Reflections on Cohen and Murphy*, 29 *Phil. and Pub. Affairs* 137 (2000);

## A. Incentives

A discussion of “incentives” is often a central piece of any tax policy argument. By “incentives”, I mean the use of tax law to motivate taxpayers to act in one way or another. Incentives are introduced into the tax law to create additional reasons for taxpayers to act in a way that increases the likelihood of achieving particular outcomes. Usually tax incentives aim at improving the larger economy in some way, often by encouraging taxpayers to engage in particular kinds of transactions that are seen as economically desirable. In the context of the income tax, most tax policy proposals attempt to balance fairness goals with concerns about the incentive effects of the income tax rules.<sup>69</sup> One important discussion of the incentives (or disincentives) created by high tax rates and various deductions was central to the tax policy discussions of the 2012 presidential election.<sup>70</sup> In the context of this discussion, those arguing against the imposition of high tax rates claim that if rates are too high, then taxpayers will no longer be motivated to work and earn additional income. In order to properly align taxpayers’ incentives with the well-being of the economy as a whole, so the argument goes, tax rates

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<sup>69</sup> See, e.g. Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 Cal. L. Rev. 1905 (1987); Eric M. Zolt, *The Uneasy Case for Uniform Taxation*, 16 Va. Tax Rev. 39, 86-98 (1996); Louis Kaplow, *Horizontal Equity: Measures in Search of Principle*, 42 Nat’l. Tax J. 113 (1990); JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES* (4th ed. 2008).

<sup>70</sup> See, e.g., Trip Gabriel and Helene Cooper, *Romney Redefines Message on Taxes and Abortion*, N.Y. Times, October 9, 2012; Victor Fleischer, *The Winners and Losers Under Romney’s Tax Plan*, N.Y. Times, October 31, 2012; Jackie Calmes, *Obama Goes on Offensive Over Taxes on Wealthy*, N.Y. Times, April 10, 2012.

must be low enough to allow taxpayers' labor to provide them with sufficient financial rewards. Another set of arguments around the necessity of tax incentives is found in discussions of tax deductions or exemptions. If a required economic boost depends on taxpayer spending, then tax incentives can be used to increase that spending. So, for instance, offering a tax credit or deduction for the purchase of a new personal car or residence, both of which were programs administered through the tax code in recent years, incentivizes taxpayers to spend money they might not have otherwise spent, by reducing that taxpayer's tax liability in proportion to the amount spent on the incentivized purchase. But incentive programs such as these do not make moral claims about the inherent goodness of the purchase of a car or a home. Rather, incentives are used because government economists believe there is a causal relationship between the use of the tax incentive and the status of the nation's economic health. The question of incentives is primarily an economic question, and debates about incentives often override questions of morality in contemporary tax policy discussions. Because of this, I have focused this dissertation on the estate tax, where tax incentives play a less prevalent role.

To be sure, there are incentive concerns in the estate tax, but they are much less significant than the purported incentives and disincentives found in the income tax arena. For instance, in discussions of the income tax, certain arguments claim that lowering tax rates increases job growth. Because this increase in job growth would result in a larger tax base, it is possible that lowering tax rates could still result in more tax revenue, since



the tax base would grow.<sup>71</sup> If this correlation were demonstrated, then there would be a strong reason to lower tax rates, based on the potential incentive effects the reduction in rates would create. In that case, the discussion of incentives would be central to any tax policy consideration of where to set the rates.

By contrast with the role of incentives in discussions of the income tax, the incentives and disincentives created by the estate tax are minor, and secondary to its primary function. When proposals to eliminate the estate tax are discussed, one incentive function of the tax that arises is the concern that the current estate tax incentivizes charitable contributions.<sup>72</sup> Because the current estate tax provides a 100% charitable deduction, eliminating or reducing the estate tax would arguably reduce charitable giving.<sup>73</sup> Because taxpayers prefer to give their estates to the charity of their choice,

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<sup>71</sup> The amount of tax revenue collected is equal to the tax rate times the tax base (Rate x Base = Tax). If the base increases enough, then lowering the rate would not necessarily lead to a decrease in tax collected. In fact, it may lead to an increase in total tax collected. This position, known as the “Laffer Curve” has been endorsed by many conservative politicians arguing for a reduction in tax rates. The term “Laffer Curve” was first used by Jude Winniski in describing the economist Arthur Laffer’s view of the relationship between economic growth and tax rates. See Jude Winniski, *Taxes, Revenue, and the ‘Laffer Curve’*, The Public Interest (1978). However, economists seem to overwhelmingly disagree with the assertions of the Laffer Curve. For instance, in a 2012 survey of 40 leading economists, the survey participants overwhelmingly believed that a reduction in tax rates would fail to increase annual tax revenues with a five-year period. See IGM Forum, Laffer curve, available at: [http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV\\_2irlrss5UC27Yxi](http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV_2irlrss5UC27Yxi).

<sup>72</sup> §2055 provides an unlimited deduction against the estate tax or the gift tax for amounts transferred to a charity (defined as a §501(c)(3) non-profit entity) after death. §2522 provides an unlimited deduction for amounts that are transferred as an *inter vivos* gift during the transferors lifetime. In addition, §170 provides a deduction against the income tax for the same contributions.

<sup>73</sup> Allowing a tax deduction for charitable contributions makes it “cheaper” for the donor to make the contribution. Assume an estate tax rate of 50% (the estate tax rate imposed by §2001 as of

rather than to the government, so the argument goes, the estate tax motivates charitable giving at death, since every dollar given to a charitable organization avoids tax. Transfers to non-charity heirs (children, for example) are subject to the tax. Without the estate tax, taxpayers would choose between leaving their estates to their family or other preferred heirs, or leaving the assets to charities. In this alternate world with no estate tax, the worry is that charities will not fair as well. Without the motivation provided by the tax, charitable giving would go down.

Importantly, though, the estate tax is not the only tax tool with which to motivate charitable giving. The current income tax model gives a deduction for charitable contributions as well.<sup>74</sup> Since any incentive concerns about the estate tax and charitable deductions can be addressed through the income tax as well, the incentive arguments with

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January 1, 2013 is actually 40%). If a taxpayer wishes to make a \$100,000 donation to a charity, with no deduction available, the taxpayer must have \$200,000 available at the time of her death. The tax on the \$200,000 would be 50%, leaving \$100,000 to be transferred to the charity. By contrast, with a 100% charitable deduction in place, it only “costs” the taxpayer \$100,000 to make that same \$100,000 charitable contribution. Or, with the same \$200,000 available (and no estate tax in place), the benefit to the charity can be doubled, giving to the charity the full financial benefit of the transfer. For a comparison of the deductibility of charitable contributions in the estate tax and income tax context, see Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 Tax. L. Rev. 263 (2007). For an explanation of the phenomenon of charitable deductions in the income tax context, see Lillian V. Faulhaber, *The Hidden Limits of the Charitable Deduction: An Introduction to Hypersalience*, 92 B.U. L. Rev. 1307 (2012).

<sup>74</sup> §170. Granted, the deduction for charitable contributions is an itemized deduction and is therefore unavailable to taxpayers taking the standard deduction, and, as a deduction, has the odd effect of offering a larger (and proportionately larger) benefit to higher income taxpayers than to lower income taxpayers. Despite that, all of the same arguments made about charitable contributions, incentives, and the estate tax can be made about the income tax as well. For a comprehensive discussion of the charitable contribution deduction and its incentive effects, see Faulhaber *supra* note 12.

regard to the estate tax are not as potent. Indeed, given the size of the current estate and gift tax exemption (\$5.45 million per individual in 2016), incentives for charitable giving that are manifested through the estate tax apply only to the very wealthiest Americans. However, the charitable deduction available to offset income tax liability provides incentives effects for a much broader swath of taxpayers, since it has an economic impact on all individuals who itemize deductions on their income tax return.<sup>75</sup> At a minimum, it seems clear that for most taxpayers, the incentive work done by the charitable estate tax deduction plays a very small incentive role, and could be replaced by changes to the charitable deduction in the income tax.

A second example of the potential role of incentives in policy discussions of the estate tax is the incentive the tax can provide to care for one's family members, by exempting from the tax certain transfers to surviving relatives. Because the estate tax provides an unlimited spousal deduction, in addition to a \$5.45 million exemption amount for all other transfers, which is currently portable between spouses, one might argue that the Code is creating incentives for a taxpayer to provide for her family

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<sup>75</sup> *Id.* The problems with itemized deductions as an incentive tool are well-documented. The interesting relationship between the incentive effects of itemized deductions and the non-deductibility of those costs for those who take the standard deduction have been discussed by many scholars. Some argue that it is time to rethink the role of the standard deduction, in light of the way its use has changed over the life of its existence. See John R. Brooks *Doing Too Much: The Standard Deduction and the Conflict Between Progressivity and Simplification*, 2 Colum. J. Tax L. 203 (2011).

members after her own death.<sup>76</sup> While the marital deduction may provide an incentive to leave assets to one's spouse in order to defer the tax until that spouse's death, the lifetime exemption-equivalent credit does not create particular incentives to provide for one's children.<sup>77</sup> Since the credit is available to offset taxes owed on up to \$5.45 million in assets, regardless of the identity of the heir, a taxpayer could get the benefit of the credit by leaving assets to a neighbor, a lover or a trust created to protect her dogs.<sup>78</sup> If policymakers wished to provide incentives through the federal estate tax to care for one's children after one's death, they could create a relationship-based exemption amount, such

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<sup>76</sup> §§2010, 2056. Assets are eligible, under §2056, for an unlimited deduction when the decedent passes the assets to the surviving spouse. This transfer does not use any of the lifetime credit available under §2010. Since 2011, §2010 has included a portability provision, allowing spouses to "use up" the unused portion of the first-to-die's lifetime credit. Therefore, estate planning now permits the first spouse to die to bequeath the entirety of her assets to her surviving spouse, at which point the surviving spouse will have, in 2013, \$10.24 million in wealth transfers sheltered by §2010 credit. In addition, certain states grant exemptions from wealth transfer tax if the inheritance is transferred to a surviving relative within a certain level of sanguinity of the decedent. *See, e.g.*, KRS 140.080 (providing a 100% exemption from the inheritance tax for inheritances received by a "Class A Beneficiary", where a Class A Beneficiary is defined as a surviving spouse, a parent, a child, a grandchild, or a sibling).

<sup>77</sup> There is no federal tax incentive to leave an inheritance to one's children, since there is no federal exemption or deduction for that transfer (outside of the lifetime exemption equivalent credit). By contrast, many states do provide tax incentives for making post-death transfers to children. *See supra* note 14 (discussing Kentucky's inheritance tax law and the tax preference granted to transfers to close relatives).

<sup>78</sup> §2010. There are no restrictions in the lifetime credit restricting the use of the funds transferred tax-free under this credit. If assets are transferred to the transferor's spouse, then they are exempt from transfer tax under §2056, and if assets are transferred to a §501(c)(3) non-profit organization, then the transfer is deductible under §2055. Otherwise, the first \$5.45 million in assets transferred during (or after) the transferor's lifetime are creditable under §2010.

as in the model currently found in a number of state inheritance laws.<sup>79</sup> Under a model that values sanguinity, transfers to close relatives (siblings, children, grandchildren) could escape transfer taxation altogether, while transfers to more distant relatives or unrelated parties would be subject to the tax.

While the current estate tax does not provide many incentives to care for one's family after death, as I have demonstrated, it would be possible to create a transfer tax system that *would* have those incentives. Does that mean that incentives to care for family are an important part of an estate tax system? Not necessarily, since we could institute those rules elsewhere – as we do currently. Many states have in place a series of laws that give priority to the rights of surviving spouses, over and above the rights of a testator to determine the distribution of her assets.<sup>80</sup> In addition, at least one state gives priority to the rights of surviving children, as well.<sup>81</sup> If there is a federal policy goal to encourage (or require) taxpayers to provide for their family members after the death of

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<sup>79</sup> *Supra* note 14. KRS 140.080 (providing preferential inheritance tax treatment to heirs with closer sanguinity relationships to the decedent).

<sup>80</sup> Many states have a “widow’s elective share,” which allows the surviving spouse to inherit a statutory amount of the decedent spouse’s assets, regardless of the wishes of the decedent, as memorialized in a will. *See, e.g.*, Florida ss. 732.201, Colorado §15-11-201, Alabama Code §43-8-70. For a discussion of the history and status of the elective share, and an argument in favor of abolishing it, *see* Terry L. Turnipseed, *Community Property v. the Elective Share*, 72 LSU L. Rev. 1 (2011).

<sup>81</sup> Louisiana has the equivalent of an elective share for children who are under the age of 23, are mentally infirm, or are disabled. La. Civ. Code Ann. art. 1493. For a discussion of this provision, *see* RAY D. MADOFF, CORNELIA R. TENNEY, MARTIN A. HALL, LISA N. MINGOLLA, PRACTICAL GUIDE TO ESTATE PLANNING (2009) at 6-15.

the taxpayer, then there are much clearer and more straightforward ways to ensure that result than by creating exemption amounts and incentive structures through the estate tax.

Finally, one might argue that estate tax policy must concern itself with the incentive effects the tax has on the lifetime earning power of the potential taxpayer, or with the negative effects that the absence of a tax would have on the potential heirs. If the estate tax is too high, an individual taxpayer (the future decedent whose estate would be subject to the tax) might have significantly less incentive to work, accumulate, and save over her lifetime, since she would know that, upon her death, a large portion of her wealth would be taken by the government. By contrast, with no estate tax in place, the potential *heir* has less of an incentive to work, accumulate, and save over her lifetime, as she expects to inherit a large sum (undiminished by tax) when her benefactor dies. In each case, the existence of an estate tax will play some role in changing the incentives felt by each of these individuals. However these incentives (or lack of incentives) are not the central aim of the estate tax, but are secondary elements that must be considered when crafting the actual rule (or when deciding not to have a rule at all). And since the incentive effects on the decedent and on the heir seem to counter one another, relying on arguments about incentives will not ultimately answer the question of whether or not to impose a wealth transfer tax. Instead, analysis of the philosophical justifications of the tax on the basis of views of distributive justice will play a much more important role.

## B. Property Rights

Another central theme in most discussions of income taxation, in particular when the discussion involves libertarian arguments, is the taxpayer's absolute property rights and the income tax's potential violation of those rights. On this argument, property rights are inviolate. Therefore, according to Nozick, "[t]axation of earnings from labor is on a par with forced labor."<sup>82</sup> The libertarian theory of property rights takes a number of forms, and I discuss those arguments later in this dissertation.<sup>83</sup> However, once one holds that strong property rights are an argument against taxation, then the discussion of the appropriate tax has to balance respect for that property right with the needs of the state or the cost of the services provided, in order to determine the appropriate level of the tax. In many instances of libertarian theory, the strength of the property rights will be found to trump any right the state might have had to impose an income tax.

However, strong theories of property rights become much more difficult to defend in the context of the estate tax, since the property in question can no longer properly be said to "belong" to the taxpayer. The taxpayer is dead. Certainly in many instances society does respect the property rights (and the wishes) of the deceased<sup>84</sup>, but in each case the law reserves to itself the ability to violate that property right if it determines that

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<sup>82</sup> Nozick, ANARCHY, STATE, AND UTOPIA at 169.

<sup>83</sup> *Infra* note 131 and accompanying text.

<sup>84</sup> For instance, state law typically strives to respect the wishes of a decedent who creates a foundation or trust, or who expresses wishes via a testamentary will her wishes regarding the dispersal of her assets.

doing so is in the best interest of the state.<sup>85</sup> The same libertarian-Lockean arguments about the moral authority of a property right in the owner who mixes her labor with the item in order to claim ownership is much harder to defend when that labor-mixer is no longer alive to claim the right herself.<sup>86</sup> In this way, a discussion of the estate tax, as opposed to the income tax, goes some way towards minimizing the property rights claims that invade discussions of the legitimacy of the government imposing tax on its citizens, at least with regard to libertarian arguments. Other philosophical theories value private property rights as well, of course, but none of them views the rights as quite as inviolable as is claimed by some libertarian theorists. Under these other philosophical claims, property rights will be respected under both income and wealth transfer tax systems, but those rights will be balanced against other important rights, for instance, under a Rawlsian framework, the right to an equal opportunity for financial well-being.<sup>87</sup>

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<sup>85</sup> Indeed, this set of laws seems to be honored in the breach, since most cases that arise are examples of the government or a third party exercising its right to violate the wishes of the decedent. *See, e.g.*, widow's elective share and children's elective share, discussed *supra* at note 18, 19 and accompanying text. In addition, the *cy pres* doctrine permits a state's Attorney General to violate the terms of a charitable trust when the AG determines that the charitable purpose of the trust cannot be satisfied within the restrictions of that trust. For a discussion of the *cy pres* doctrine and its effect on charitable giving and trusts *see* Alberto Lopez, *A Revaluation of Cy Pres Redux* 78 U. Cin. L. Rev. 1307 (2009-10); Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action* 46 Clev. St. L. Rev. 471 (1998); Edith Fisch, *Changing Concepts and Cy Pres*, 44 Cornell L. Q. 382 (1958-9).

<sup>86</sup> For a discussion of the Lockean argument regarding property rights, *see infra* note 131 and accompanying text. For a discussion of why Locke's argument regarding property rights no longer works after the death of the labor mixer, *see infra* note 192 and accompanying text.

<sup>87</sup> For a further discussion of the Rawlsian view of private property rights and the role of those rights in determining proper taxation, *see infra* note 268 and accompanying text.



### C. Revenue Raising

One central rationale for the existence of any tax regime is the satisfaction of the government's revenue needs. Currently, the United States government raises approximately \$3.36 trillion annually through the collection of all taxes.<sup>88</sup> The individual income tax raises approximately \$1.74 trillion annually.<sup>89</sup> By contrast, the estate tax is estimated to raise only about \$19 billion in 2016.<sup>90</sup> The amount raised by the estate tax has decreased dramatically in the past fifteen years, as the phased-in tax provisions enacted as part of EGGTRA (the so-called "Bush tax cuts") have taken effect.<sup>91</sup>

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<sup>88</sup> CBO, "An Update to the Budget and Economic Outlook: Fiscal Years 2016 to 2026", available at: [https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51384-MarchBaseline\\_OneCol.pdf](https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51384-MarchBaseline_OneCol.pdf)

<sup>89</sup> *Id.* Notably, the individual income tax revenues include the collection of taxes on all partnerships and sole proprietorships, since the United States income tax regime treats those entities as generating income that passes through to the individual partners of the entity, and therefore that income is reported on the returns of the individual taxpayers. This, of course, increases the total amount collected under the individual income tax, by adding to it amounts collected from entities organized as partnerships. Entities organized as corporations have taxes imposed (and revenue counted) by the corporate income tax.

<sup>90</sup> History, Present Law, and Analysis of the Federal Wealth Transfer Tax System, prepared by the Joint Committee on Taxation, 18 March 2015 at 28. (available at: <https://www.jct.gov/publications.html?func=startdown&id=4744>)

<sup>91</sup> EGTRRA was enacted in 2001, raising the exemption amount from \$675,000 to \$1million and lowering the rate from 55% to 50%. The original bill was scheduled to sunset on December 31, 2010, at which time the law would have rolled back to what it had been in 2001. During the final year of the statute's effectiveness, before the scheduled sunset of the bill, the estate tax was entirely repealed, allowing estates to transfer to heirs without the imposition of federal transfer tax. However, on December 16, 2010 Congress passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, which extended the tax cuts for another two years, until December 31, 2012. On January 2, 2013, President Obama signed into law the American Taxpayer Relief Act of 2012 (ATRA) (Pub.L. 112-240), which made many of the tax cuts permanent. With regard to the estate tax, the ATRA set the exemption equivalent amount at \$5million, with an annual inflation adjustment (leading to an exemption equivalent credit of \$5.25 million in 2013) and set the tax rate at 40%.

However, even back in 2000, before the enactment of the Bush tax cuts, the estate tax represented only about 3% of all revenues collected by the federal government.<sup>92</sup>

The individual income tax plays a central role in the United States' government's annual revenue raising. Given that there are minimum amounts the government needs to operate annually, there is only so much flexibility that Congress has to amend the income tax code. Changes to the revenue collection powers of the income tax are part of a larger discussion about government spending and the budgeting plans of the federal government.<sup>93</sup> Discussions about the appropriate levels for the income tax lead unfailingly to larger discussions about spending and government borrowing.<sup>94</sup> However, discussions of the estate tax are able to sidestep those issues, at least to some degree. Because revenues collected from the estate tax represent such a relatively small amount of total tax revenues, discussions of the policy behind the estate tax can happen without

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<sup>92</sup> CBO "Budget Options, Volume 2," *supra* note 49.

<sup>93</sup> Republicans typically argue that government spending must be cut so that taxes can be lowered (or remain the same), while Democrats typically argue that taxes must remain the same (or be increased) so that spending can be increased (or remain the same). For examples of these arguments in the most recent U.S. presidential election, *see* Transcript of the Third Presidential Debate, Oct. 22, 2012, *available at*: <http://www.nytimes.com/2012/10/22/us/politics/transcript-of-the-third-presidential-debate-in-boca-raton-fla.html?pagewanted=all>.

<sup>94</sup> Taxes are only one part of the calculation of the federal budget. Necessary tax revenues must be considered in the context of required spending levels and permitted debt levels. Tax rates, spending levels, and the debt ceiling are all set by laws created by Congress. With insufficient planning, the amounts of spending necessary to satisfy the needs of government programs cannot be met by the revenue raised through Congressionally approved taxes, nor satisfied by the amount of debt authorized under the debt ceiling. When the President finds himself in this constitutional "trilemma," what must he do? This question is considered in Michael C. Dorf and Neil H. Buchanan, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 Columbia L. Rev. 1175 (2012).

the concern that eliminating the tax would hamstring the entire operation of the government. Given the current size of the revenues collected via the individual income tax, it is entirely unfeasible to talk in terms of the elimination of the tax altogether, without simultaneously talking about radical shifts in the federal budget. However, one could make a legitimate argument in favor of eliminating the estate tax, without the concern that the budget as we have known it would fall entirely apart.<sup>95</sup>

It is noteworthy, however, that opponents and proponents of the estate tax view this issue of the relative size of the estate tax through very different lenses. Opponents of the tax argue that, given the miniscule amount of federal revenue raised annually through the estate tax, there is no coherent reason for maintaining the tax, and we could (and should) very easily eliminate it.<sup>96</sup> On the contrary, estate tax proponents argue that, given the importance of the estate tax as a philosophical political matter, and given its unique role in the tax code, we should maintain the tax, given that it affects so few people.<sup>97</sup> In either case, the size of the revenue generated by the estate tax is not entirely

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<sup>95</sup> Indeed, many do make such arguments, with greater and lesser effectiveness. For a discussion of these arguments, *see* Graetz and Shapiro, *Death by a Thousand Cuts*, *supra* note 7.

<sup>96</sup> This argument is regularly made in the context of arguments to reduce the size of government more generally, or reduce taxes more generally. It is sometimes part of a larger “starve the beast” approach to tax policy. But it is also an argument made by those who have other philosophical reasons for opposing the estate tax. If the estate tax is morally unpalatable (the argument goes) *and* it doesn’t raise very much revenue, then why in the world should we keep it around?

<sup>97</sup> Those who make this argument see it as the natural conclusion of an argument in favor of the estate tax on other grounds (that it serves a redistributive function, that it curtails the amassing of large estates based on inherited wealth, that it encourages the circulation of assets). Since the tax is so important, proponents argue, and since it is so unobtrusive in the lives of most U.S. taxpayers, we should clearly maintain the tax as part of the Code.

determinative of whether or not to maintain the tax, given that there is such widespread disagreement about what the size means.

As a side note, in a time of diminishing federal revenues coming from all forms of tax in the United States, it is important to proceed with caution when proposing to eliminate one source of that revenue. While the amounts raised through the estate tax are small, both in absolute and relative numbers,<sup>98</sup> they do represent dollars that help to fund the annual federal budget.<sup>99</sup>

#### **D. Redistribution**

At the heart of it, my interest in exploring the estate tax rather than the individual income tax in this Article stems from the primarily redistributive purposes of the wealth transfer tax system. While the individual income tax serves many different purposes (as discussed above the income tax is used to create incentives and raise revenue, among other things), as I have shown in this section, the estate tax does not primarily serve any of those roles. As an example of the federal government using the tax system as a tool for redistribution, there is nothing finer than the estate tax. At its heart, this tax serves the

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<sup>98</sup> Small, of course, is a relative term here. The \$19 billion raised annually by the estate tax is clearly not small compared to most taxpayers' annual salaries, or to the gross national product of a small nation.

<sup>99</sup> As an example, \$19 billion would, under President Obama's proposed 2017 budget, fund the entirety of the Supplemental Nutritional Assistance Program (or "SNAP") for the elderly, would cover most of the cost of providing Medicaid benefits to pregnant or post-partum beneficiaries, or would fund the budget to provide a centennial celebration for the National Park Service. For a discussion of these, and other, budget matters, *see* <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/tables.pdf>.

purpose (or, at least, is intended to serve the purpose) of breaking up large concentrations of intergenerational inherited wealth, and consequently using those funds (along with other funds) to support federal government programs, including welfare programs, such as the EITC, TANF and the federal food stamps program known as SNAP.<sup>100</sup> If one wishes to have a conversation about the merits of federally facilitated redistribution, there is no better example.

For all of the reasons articulated in this part, this dissertation is concerned with the estate tax. It may, in fact, be the case that many of the conclusions drawn throughout the course of the work will have broader consequences, including with regard to the individual income tax. However, in order to avoid the concerns identified in this part, the focus of this dissertation remains on the particular matter of redistribution in the context of the estate tax.<sup>101</sup>

#### **IV. POLITICAL PHILOSOPHICAL THEORIES**

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<sup>100</sup> The Earned Income Tax Credit (§32, awarding refundable tax credits to low-income working families, subsidizing salary in proportion to income-level and family size) Temporary Assistance to Needy Families (Social Security Act Title IV) and the Supplemental Nutrition Assistance Program (the Federal Food Stamp Act of 1964) are just three examples of ways the federal government offers financial support to the lowest income members of society.

<sup>101</sup> Discussions of the estate tax necessarily require consideration of the gift tax, since the imposition of estate tax can be avoided by disposing of one's assets during one's lifetime. As a result, this dissertation addresses the issue of the gift tax briefly, but only as it relates pragmatically to the issues raised and addressed with regard to the estate tax. *See infra* note 197 and accompanying text.

As a diverse field with a long history and deep and meaningful intra-discipline disagreements, philosophy does not have a unified response to taxation generally or wealth transfer taxation specifically. What philosophical inquiry can add to the discussion is an analysis of underlying goals and preferences in order to help determine which tax law best reflects the needs and beliefs of the society to which it applies. As a discipline with more than two thousand years of recorded history, there are obviously more philosophical perspectives than can fit into this dissertation. However, contemporary political philosophy arguably represents, at least generally, the philosophical beliefs and needs of most western societies, or at least of the majority of American taxpayers. Therefore, in this dissertation I will focus on three of the most prevalent theories in contemporary political philosophy: libertarianism, liberalism, and utilitarianism.<sup>102</sup> As I will demonstrate, examining wealth transfer taxation from the perspective of each of these theories results in the same central conclusion – the taxation of wealth transfers is justified and is an essential element of any robust contemporary tax system.<sup>103</sup> I will address each of these philosophical theories briefly here, and then each theory will be the subject of a chapter of the dissertation.

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<sup>102</sup> Each of these theories is, in fact, composed of many different threads, representing a variety of interpretations of the central claims. In each case I focus primarily on one foundational articulation of the view: Nozickian libertarianism, Rawlsian liberalism, and Millian utilitarianism.

<sup>103</sup> Throughout the course of the analysis I demonstrate the differences in the form of wealth transfer taxation most strongly endorsed by the particular philosophical theory in question. While we clearly cannot conclude that one particular form of wealth transfer taxation is unanimously endorsed by all philosophical views, I do claim that most major philosophical political theories

## **A. Libertarianism**

The first widely held view of political philosophy I will address in this dissertation is libertarianism. Libertarianism generally embraces freedom and liberty above other political goals, and evaluates political systems by their tendency towards the protection or infringement of individual freedoms. Twentieth Century proponents of libertarianism include Milton Friedman and Robert Nozick, both of whom argued for limited taxation. In general, libertarian analyses of taxation endorse only taxation as payment for services – a version of the benefit principle of taxation.<sup>104</sup> The central tenet of libertarianism is that the government cannot coerce action by its citizens. Only free consent to the law can result in just governance.

Another critical feature of libertarian thinking is a strong view of property rights. Libertarians generally believe property rights are naturally held, rather than created as a result of governmental grace. Because property rights pre-date social membership, the government cannot curtail or eliminate property rights, with the exception of instances of consent by the property holder. As a result, on the libertarian view, most taxation is seen as an unjust violation of property rights by the government. Wealth transfer taxation is generally subject to the same libertarian criticisms as all other forms of taxation, namely that the tax is immoral unless it is explicitly consented to by the property holder.

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endorse wealth transfer taxation as such. In my view this advances the conversation. If we debate what form the tax should take, rather than whether or not we should have such a tax at all, we have already made progress.

<sup>104</sup> Milton Friedman, *CAPITALISM AND FREEDOM* (1967).

However, the estate tax provides a unique opportunity for just taxation under the libertarian model. Because the entity subject to taxation (the estate) is not a person with natural rights, the normal libertarian arguments regarding unassailable property rights and the requirements of consent do not apply.

Some forms of tax have historically been accepted even by libertarians who view property rights as inviolable. Libertarians have historically disputed the level of consent required in order to legitimately tax property owners. Nozick's writings seem to indicate that explicit consent must be received from every individual who will be subject to the tax. More pragmatic authors have argued that remaining within a society or accepting government-provided benefits are sufficient forms of implicit consent to justify the imposition of tax.<sup>105</sup> Despite potentially significant differences regarding the necessary level of consent, libertarians have generally agreed that taxpayers' payment for services received from the government justifies a minimal amount of tax.<sup>106</sup> Such a tax, explained by the benefit principle of taxation, views the government as merely a provider of

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<sup>105</sup> Nozick is quite dismissive of the notion of implicit consent. He claims that "...everyone realizes that tacit consent isn't worth the paper it's not written on..." ANARCHY, STATE, AND UTOPIA, p. 287. Despite Nozick's disavowal of tacit consent, he does seem to permit a form of tacit consent in the form of the night watchmen state, when some receive protection at the expense of others, ostensibly in exchange for rights they have given up. *Id.* at 114. Barbara Fried is dismissive of the idea of consent in Nozick, arguing that his inconsistent views on consent result in an incoherent theory, and that "...in place of actual or implied consent, Nozick does away with consent entirely," Fried, *supra* note 67 at 235.

<sup>106</sup> Nozick argues that some individuals can be compelled to pay for protection in the moment that society shifts from individual protection to group protection. ANARCHY, STATE, AND UTOPIA at 110-118.



services, collecting payment for those services (in the form of taxes) as part of a freely engaged in transaction.<sup>107</sup> Taxpayers could legitimately argue that the government should limit the kinds of services it provides to those that *only* a government could provide, or to services where efficiency is increased or cost is reduced when the service is provided by a collective body. Such services might include the maintenance of roads and sewers or the provision of security (both local and national).<sup>108</sup> On a benefit theory of taxation, the government would be justified in collecting taxes for the payment of the provision of these services. In a more expansive state, services might include public education, the regulation of markets, or the provision of public healthcare. These more “intrusive” services might be unpalatable to a classical libertarian, but the essential feature of the legitimacy of any such payment for and provision of services will be the consent of the taxed.<sup>109</sup>

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<sup>107</sup> The benefit principle of taxation, which justifies taxation when that taxation serves as a form of payment from citizens to the government in exchange for services that were provided, is not unique to libertarianism. For more on the role of the benefit principle theory of taxation in contemporary tax policy debates, *see* Jon Bakija and Joel Slemrod, *TAXING OURSELVES* (Cambridge: MIT Press, 2008) at 86.

<sup>108</sup> Even Milton Friedman himself acknowledged that a government should provide certain services, and would then be entitled to collect payment from the citizenry in payment for the services provided. Friedman, *supra* note 51, at 65.

<sup>109</sup> The tradition of Left Libertarianism, which endorses the more expansive state identified here. Under a Left Libertarian view, the provision of public education, regulation of markets, and even potentially the provision of public healthcare would likely be endorsed. However, Left Libertarianism shares with Right Libertarianism a focus on consent in order to justify any government impingement on private property rights. For examples of Left Libertarianism, *see, e.g.,* Michael Otsuka, *LIBERTARIANISM WITHOUT INEQUALITY*. Oxford: Oxford University Press (2003); Peter Vallentyne and Hillel Steiner *THE ORIGINS OF LEFT-LIBERTARIANISM: AN ANTHOLOGY OF HISTORICAL WRITINGS*, London: MacMillan (2001).

Unfortunately for my theory, thinking of tax as merely a payment for services benefit principle model seems to fit most neatly with an income tax, rather than a wealth transfer tax. The services provided (such as maintenance of roads, national security, and garbage collection, for example) would be provided regularly, such that an annual accounting of the cost of the services, and the amount of that cost due from any particular taxpayer, would be administratively easier than a lifetime calculation done via the estate tax and “settled up” upon the death of the taxpayer. In addition to the ease of calculation, an income tax fits the payment for services model better than the estate tax, since it charges the taxpayer for the services in the general time period in which the services were received, rather than waiting until the end of the taxpayer’s life to calculate the amount due.<sup>110</sup> But this administrative ease does not mean that a society could not choose to administer a “payment for services” tax in the form of an estate tax. Such a tax would calculate the benefits enjoyed over a lifetime, and would assess tax to compensate the government for the benefits it had provided to the deceased. Of course, this might be a less than ideal strategy, especially if the decedent, having enjoyed a lifetime of government provided benefits, died a pauper.

Most libertarians approve of the use of a tax in order to collect payment for the provision of government provided benefits, although there is some debate about what

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<sup>110</sup> At a minimum, keeping track of an itemized list of costs incurred by any particular individual over his or her lifetime, and then attempting to collect payment for those costs (incurred in the form of services received by the individual) only upon the individual’s death, seems to increase the chances of error in the accounting.

constitutes “consent” to receive or pay for such benefits. Unsurprisingly, however, most libertarians, and certainly Nozick himself, would find a wealth transfer tax primarily organized to redistribute wealth across society, morally unpalatable.<sup>111</sup> Because it would likely violate the principle of taking from the taxpayer only with her (implicit or explicit) consent, government-facilitated redistribution through the tax code is immoral, on the libertarian view.<sup>112</sup> Importantly, there is no fundamental libertarian objection to the estate tax as such. It may be easiest to administer the kind of benefit principle taxation of which libertarians approve through an income tax, but that is not a moral claim. An estate tax would be permitted on libertarian grounds, as long as it were used only for the collection of payment for services consented to by the taxpayers and provided by the government. The Nozickian view of absolute property rights objects to taxation intended to redistribute when that redistribution has not been explicitly consented to. The form of the taxation (whether the tax is assessed as an income tax or as an estate tax) does not affect the analysis.

## **B. Liberalism**

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<sup>111</sup> G.A. COHEN, *SELF-OWNERSHIP, FREEDOM AND EQUALITY*, (Cambridge: Cambridge University Press, 1995) at 68.

<sup>112</sup> On the libertarian view, of course, even redistribution is permissible, as long as those whose wealth is redistributed consent to the redistribution. *‘Patriotic Millionaires’ Lobby Congress for Higher Taxes on Rich*, PBS Newshour, Nov. 16, 2011. Transcript available at: [http://www.pbs.org/newshour/bb/politics/july-dec11/millionaires\\_11-16.html](http://www.pbs.org/newshour/bb/politics/july-dec11/millionaires_11-16.html).

Political liberalism is perhaps the most prevalent theory in contemporary political philosophy. Most completely articulated by John Rawls, liberalism generally endorses political systems that guarantee equality of opportunity, while not seeking the equality of outcome preferred by Marxist socialism. Rawls famously proposes a so-called “veil of ignorance” in order to determine the most just political structures.<sup>113</sup> Possible political systems are evaluated from behind the veil, ensuring that the self-interest of those currently in power is not the determining element of political system design. Rawls’ argument is that, if one must choose a political system before knowing where in that system one will end up, then one will prefer a system that tends towards equality. When applied to questions of tax design, the veil of ignorance seems to lean towards relatively more redistributive taxation. When thinking about wealth transfer taxation from behind the veil of ignorance, it seems likely that most rational actors would endorse a system of wealth transfer taxation that breaks up concentrations of wealth, if it were demonstrated that such concentrations of wealth were generally bad for society at large, or if the concentrations of wealth were held primarily by an extremely small percentage of the population, often at the expense of the remaining members of society.

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<sup>113</sup> Rawls believed that political structures should be analyzed from the “original position”, which was only available to those who placed themselves behind the veil of ignorance. From such a position, wrote Rawls, “no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like.” John Rawls, *A THEORY OF JUSTICE: REVISED EDITION* (1999) at 118.

Most of those who write about Rawls and tax law agree that Rawlsian liberalism is consistent with heavy redistribution.<sup>114</sup> But most of those who have thought about Rawls and tax, specifically in the context of redistribution, have written about the income tax.<sup>115</sup> But the income tax alone could not achieve a Rawlsian equality of opportunity. Achieving true equality of opportunity requires finding some way to combat the early in life advantages experienced by those who inherit significant wealth. I argue in this chapter that the Rawlsian equality of opportunity is best achieved using the tools of wealth transfer taxation.<sup>116</sup>

Importantly, Rawls' theory of liberalism endorses equality of opportunity rather than strict equality. That is, Rawls focuses on the equality of members of society at the outset of their lives, rather than on whether or not assets are equally divided within society at any given moment.<sup>117</sup> This is an important distinction. A pure egalitarian might require a regular and ongoing redistribution of wealth in an attempt to achieve an equal distribution of goods among all, but such redistribution would not necessarily be required by applying

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<sup>114</sup> See, e.g., Anne Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARVARD L. REV. 469 (2007); Eric Rakowski, *Taxing Wealth Liberally*, 51 TAX L. REV. 419 (1996); Kerry Ryan, *Human Capital and Transfer Taxation*, 62 OKLA. L. REV. 223 (2010).

<sup>115</sup> See, e.g., Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 CHAP. L. REV. 157 (1999); Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991 (2004); Charles R. T. O'Kelley, *Rawls, Justice, and the Income Tax*, 16 GA. L. REV. 1 (1981). Notable exceptions include Alstott, *supra* note 113, and Ryan, *supra* note 113.

<sup>116</sup> "Equal opportunity . . . is widely understood to be the bedrock principle for wealth transfer taxation . . ." Alstott, *supra* note 113, at 542.

<sup>117</sup> As Linda Sugin wrote, "the benefits from individual effort appropriately produce inequalities in income and wealth, and should not require adjustment under the difference principle." Sugin, *supra* note 115, at 2004.

Rawls' equality of opportunity theory. Redistribution over time would not be required, as long as a sufficiently fair distribution of goods is available to allow all members of society an equal opportunity for success. Once equality of opportunity is assured, any later uneven distributions would arguably be attributable to differences in effort.<sup>118</sup> That later arising inequality of outcome would not, on an equality of opportunity theory, require reallocation, because the individual members of society all had the same opportunity for success. Of course, it is not entirely clear what it means for goods to be equally distributed to provide equality of opportunity. Specifically, an unequal distribution of natural abilities seems impossible to account for *ex ante*. Should those unequal talents be considered in determining whether we have achieved true equality of opportunity?<sup>119</sup> Even the ability and desire to work hard could be considered an asset creating an inequality of opportunity. However such thorny issues are resolved, the central concern of those seeking equality of opportunity is that distributions of material goods and economic assets must be evaluated with regard to whether or not they tend towards fairness.

Imposing taxes alone cannot achieve the kind of equality of opportunity that Rawlsian liberalism requires. The justice of any particular society must be evaluated through an examination of both the tax system and the transfer systems or expenditure programs that the tax system funds. In order to demonstrate the equality of opportunity contemplated

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<sup>118</sup> *Id.*

<sup>119</sup> *See, e.g.,* Alstott, *supra* note 113.

by Rawls, a society must ensure that education, health care, housing, and more are made available to all members of that society. The revenue required to provide for such programs is unlikely to be able to be raised only through wealth transfer taxation.<sup>120</sup> Achieving Rawlsian equality of opportunity may require a robust income tax in addition to a wealth transfer tax. But an income tax alone cannot address the concerns of equality of opportunity proponents, because the income tax, at least in its current form in the United States, does not address the particular advantages made available to the heirs of the wealthy.

The twentieth and twenty-first centuries have seen growing inequality in the western world, in particular in the United States.<sup>121</sup> This growing inequality does not in itself violate Rawls' theory, because Rawls is focused on equality of opportunity rather than equality of position or egalitarianism. If present inequalities arose only through differences in effort, then Rawlsian equality of opportunity might accept the current distribution of wealth as just. Those who endorse equality of opportunity theories do not necessarily believe that equality of condition results from such equality of opportunity.

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<sup>120</sup> Of course, this is really a historical accident of the size and structure of the U.S. wealth transfer tax system. There is nothing inherent in the tax itself requiring that it raise such little revenue. If the exemption equivalent credit were reduced (thereby increasing the tax base) and if the rate imposed by the tax were increased beyond its current historically low level, then the wealth transfer tax system could generate significantly more revenue. Past versions of the U.S. estate and gift tax system have raised significantly more revenue. *See* Internal Revenue Service, Statistics of Income, Historical Data Tables, *available at* <http://www.irs.gov/uac/SOI-Tax-Stats>.

<sup>121</sup> For an analysis of the current state of inequality in the world, *see* Thomas Piketty, *CAPITAL IN THE TWENTY-FIRST CENTURY*, trans. Arthur Goldhammer, Belknap Press (2014).

Inequality of condition can be consistent with a just society. Even with equal original opportunities, different members of a society can end up in different positions. Equality of opportunity does not necessarily view as unjust the uneven distribution of talents or ability to exert effort.<sup>122</sup> However, if an uneven distribution of talents and effort resulted in advantages to the *heirs* of the talented, that might violate the principles of Rawlsian equality of opportunity. If wealth is permitted to transfer unobstructed from one generation to another, it is easy to see how a society that began with an equality of opportunity could quickly morph into a society with very different opportunities available to the heirs of the first generation.

### **C. Utilitarianism**

Stemming from the 19<sup>th</sup> Century writings of John Stuart Mill, utilitarianism evaluates the morality of actions on the basis of the utility produced by those actions. The ethically correct action is that which maximizes utility the most overall, including in the utility calculus both the production of utility and the offsetting production of disutility. Utilitarianism has generally evolved into contemporary theories of welfare economics. In this model, the utilitarian calculus is done by determining the utility of particular outcomes based on the social preferences of the relevant society. Within utilitarianism, actions are not *a priori* moral or immoral. On the contrary, the rightness or

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<sup>122</sup> However, proponents of equality of opportunity might actually view the uneven distribution of talents as unfair.



wrongness of an action can only be determined by examining its consequences. In this sense, utilitarianism is deeply contextual, and utilitarian analyses would likely result in different moral outcomes in different social scenarios. In evaluating tax policies from a utilitarian theoretical perspective, one must determine what outcomes each policy will likely have. Here empirical economic research plays an important role, making predictions about the likely economic consequences of various tax policy actions. However, classical utilitarianism as articulated by Mill included objective utility values.

Mill's theory of utilitarianism cannot be reduced to a mere ethics of self-interest, because the theory requires that one refrain from privileging one's own happiness over that of any other person.<sup>123</sup> When determining how much happiness any particular action will produce, all potentially affected individuals must be counted equally.<sup>124</sup> Even actions that have the possibility of imposing pain on individuals might be held to be ethical, as long as the utilitarian calculus, objectively applied, determined that the result created more pleasure than pain. Because of this universal calculus, taxation is ethically

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<sup>123</sup> “[Impartiality] is involved in the very meaning of Utility, or the Greatest-Happiness Principle. That principle is a mere form of words without rational signification, unless one person's happiness, supposed equal in degree (with the proper allowance made for kind), is counted for exactly as much as another's.” John Stuart Mill, *UTILITARIANISM*, at 105.

<sup>124</sup> “...the happiness which forms the utilitarian standard of what is right in conduct, is not the agent's own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator.” *UTILITARIANISM* at 64.

permitted under utilitarianism, as the “pleasure” created by the actions of government funded through taxation exceeds the “pain” created by the action of taxation.<sup>125</sup>

Mill’s view that the general category of “pleasure” can be broken down into “higher” and “lower” pleasures, and his argument that the higher pleasures have more ethical value than the lower ones, motivates the claim that there is more to utilitarianism than mere self-interest. In Mill’s utilitarianism “justice” is a higher pleasure that must be included with its higher value in the utilitarian calculus. Mill argues that justice has meaning only inside of the utilitarian calculus. The fact that society values “justice”, even in some instances giving it absolute dominance over all other values, only demonstrates that what we call justice must be given great worth in the utilitarian calculus. A world that is just, by utilitarian measures, will tend towards equality, as those with means will experience happiness by sharing what they have with those who have less.

Mill ultimately holds that there are meaningful differences between the higher and lower pleasures, and that the higher pleasures are those that tend towards equality and justice. And since motives are irrelevant, from an ethical perspective, laws can and should create ethical behavior by mandating happiness-producing actions. Wealth

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<sup>125</sup> Mill discusses taxation towards the end of UTILITARIANISM, primarily by criticizing non-consequentialist analyzes of the justice of taxation. Mill claims that the only way out of the debate about the appropriate way to tax is with the application of utilitarian principles. Having pointed out that some theories of justice will demand equal taxation from all, and others will require graduated tax, Mill states “from these confusions there is no other mode of extrication than the utilitarian.” Mill, UTILITARIANISM at 102.

transfer taxes, by creating more justice and equality in society, will be judged worthy projects by a Millian utilitarian calculus.

## **V. CONCLUSION**

Good tax policy depends not only on empirical work and economic theories. While those inputs are important, and help us to determine how best to achieve the ends we set for ourselves, economics and empirics cannot tell us what those ends should be. Established and generally endorsed philosophical theories provide an ideal starting place for doing that tax policy work. When philosophy is applied to tax policy decisions, the result can be a more consistent, coherent, and justifiable set of rules. Despite its increasing political unpopularity in the United States, as I will demonstrate in the course of this dissertation, wealth transfer taxation is supported by three very different leading political philosophical theories.

The structure of this dissertation is organized as follows: Chapter 2 introduces and explains the central tenets of Nozickian libertarianism, as they relate to taxation generally. By demonstrating that libertarian private property arguments apply differently to the deceased than they do to the living, I then show that estate taxation is a uniquely well-suited form of taxation under the libertarian framework. Chapter 3 turns to John Rawls and theories of equality of opportunity. Unsurprisingly, Rawls' egalitarian theory lends great support to redistributive taxation in any form. In the course of the chapter I

show that wealth transfer taxation organized as an inheritance or accessions tax is the best means to achieve the goals identified in Rawls' writings. Finally, chapter 4 turns to Mill's utilitarianism, a philosophical theory that has largely been adopted in contemporary tax policy, taking the name "welfare economics". In this chapter I demonstrate that utilitarianism as Mill articulated it gave additional value to the goals of equality and fairness, and that therefore a redistributive tax system, whether or not it is organized as a wealth transfer tax, satisfies Mill's utilitarian goals. In chapter 5 I summarize the conclusions of the dissertation, and turn to an examination of what I believe the best wealth transfer tax system would be. Because I think the goals of equality of opportunity best map the political philosophical views of the majority of Americans, I believe a wealth transfer tax organized as an accessions or inheritance tax would be the best system. Because an accessions tax does not focus on taxing the decedent, like an estate tax does, we must once again contend with the private property claims of Nozickian libertarians, but I believe these concerns can be assuaged to some extent by a focus on the benefit theory of taxation, as I explain in chapter 5.

## CHAPTER 2: NOZICK, LIBERTARIANISM, AND THE ESTATE TAX

### I. INTRODUCTION

Libertarian arguments have become standard fare in the United States, in particular with regard to debates around tax policy.<sup>126</sup> However, the libertarian view is not always fully unpacked and often assumptions regarding particular outcomes seem to hinge more on expectations of the libertarian view rather than rigorous arguments about the topic at hand. Libertarian arguments about the estate tax claim that this particular tax is economically inefficient and violates moral claims stemming from individual property rights.<sup>127</sup> In this chapter, I will examine the estate tax through a libertarian lens, and explain why a hefty estate tax is consistent with the traditional libertarian position. I will begin by articulating Robert Nozick's libertarian views on property rights, in particular the account he provides in his seminal work *Anarchy, State and Utopia*. I will then

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<sup>126</sup> I use the term "libertarianism" to encompass many different versions of the political and philosophical position that values free markets and limited government. Examples of what I include in this definition of libertarianism include much of the work produced by the Heritage Foundation and the Cato Institute, and the writings of Milton Friedman, Friedrich Hayek, and, of course, Robert Nozick. For one useful definition of libertarianism that reflects the concept underlying this Chapter, see The Stanford Encyclopedia of Philosophy, *Libertarianism* by Peter Vallentyne. "Libertarianism, in the strict sense, is the moral view that agents initially fully own themselves and have certain moral powers to acquire property rights in external things. In a looser sense, libertarianism is any view that approximates the strict view." Available at: <http://plato.stanford.edu/entries/libertarianism/>

<sup>127</sup> See, e.g., Friedrich Hayek, THE CONSTITUTION OF LIBERTY; Alexander Tabarrok, "Equality and the Death Tax," 15 THE FREE MARKET: THE MISES INSTITUTE MONTHLY 9 (1997). Available at: [http://mises.org/freemarket\\_detail.aspx?control=121](http://mises.org/freemarket_detail.aspx?control=121); Laurence Vance, "A Libertarian View of the Estate Tax," FUTURE OF FREEDOM FOUNDATION (2010). Available at: <http://fff.org/explore-freedom/article/libertarian-view-estate-tax>.

defend two lines of argument against the notion that the libertarian view of property rights is violated by an estate tax. Finally, I will explain why a society can, unrestricted by moral constraints regarding the property rights of the deceased, set a default rule for post death property rights that reflects that society's values.

As a preliminary matter, I would like to stress that this chapter is *not* an attempt to respond to or critique libertarianism as a political philosophy. A central part of this project is to articulate Robert Nozick's version of the libertarian position, and I begin my exploration of the estate tax by adopting that view.<sup>128</sup> While I will argue that certain views that are traditionally taken to be libertarian views (such as the rejection of the estate tax) are not necessarily implied by the core tenets of libertarianism, this chapter is not intended to argue against libertarianism as such. In this chapter I will accept Nozick's libertarian political philosophical viewpoint, and explore the estate tax from within that perspective.

I also note that my primary purpose in this chapter is to dispute the moral claims to post-death property rights made by libertarians when they argue against the estate tax. As I will show later in this chapter, my argument does not necessarily entail enacting an

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<sup>128</sup> I also wholly accept that Nozick does not represent all of libertarianism, and that many mainstream libertarians disagree with Nozick's positions in *ANARCHY, STATE, AND UTOPIA*. Libertarianism is a broad concept that encompasses many different views, and I cannot articulate, nor can I respond to, all of those views in this chapter. Therefore, I have chosen Nozick (as, in many ways, a founder of modern libertarian thought) as the centerpiece of this chapter. Throughout this piece I will use the word "libertarian" in place of "Nozick", but I do not claim to be speaking for all libertarians when I do so.

estate tax, nor does not require a particular level of tax. I am merely trying to demonstrate that those who argue on libertarian grounds that the estate tax is an immoral violation of the private property rights of the deceased are mistaken. This is not to say that the estate of the deceased should necessarily pass to the government. It is just to say that we would need to determine as a society what rule to set, having no moral absolutes that would determine how we *must* set the rule.

My two central arguments against the unimpeded transfer of property rights at death are as follows: first, I argue that the libertarian view of the moral establishment of property rights through mixing one's labor with the world is inconsistent with establishing property rights in the children of those labor-mixers.<sup>129</sup> Further, Nozick's argument about the justice of particular distributions of wealth depends upon the consent of all involved to the original distribution from which the distribution in question descends. I argue that when we discuss the justice of uneven inheritances and the concerns of intergenerational justice, we cannot assume that generations further down the line have consented to the distribution agreed to by their parents or their parents' parents. Instead, libertarian values require determining the justice of the "original distribution" anew each time.<sup>130</sup> Secondly, I argue that the libertarian view of morally justified property rights does not entail the right to transfer assets after death.<sup>131</sup> Because, for

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<sup>129</sup> See *infra* Part V.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

libertarians, the moral justification for property ownership stems from mixing one's labor with the world, the holder of the moral right is that individual who has mixed her labor. Once she dies, her moral rights end. She no longer has a moral claim of ownership over the good in question, as she did have during her lifetime. As a result, without a law giving her a positive right to control the post-death transfer of assets she holds during her lifetime, the labor mixer cannot determine where the goods she owns in her lifetime will go when she dies. Because the moral claim has ended, society can now determine where to set the rule regarding distribution of post-death property without concern that such a rule would violate moral rights.

## **II. NOZICK (AND LOCKE) ON PRIVATE PROPERTY RIGHTS.**

One cannot discuss the philosophical, political, or moral legitimacy of taxation from a libertarian perspective without first discussing property rights. Because this chapter is concerned with a libertarian view of the estate tax, we must begin with the libertarian view of private property rights. In this chapter, I am primarily exploring Nozick's views on taxation as he articulates them in *Anarchy, State and Utopia*. However, Nozick's views on property rights are, at best, unclear.<sup>132</sup> Because he regularly

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<sup>132</sup> For an argument that Nozick's theory of property rights is, in fact, incoherent, see Barbara Fried, *Does Nozick Have a Theory of Property Rights*, in *THE CAMBRIDGE COMPANION TO NOZICK'S ANARCHY STATE, AND UTOPIA*. EDS. RALF M. BADER AND JOHN MEADOWCROFT, Cambridge University Press, Cambridge (2011). For an explanation of Fried's views, see note 186 and the accompanying text.



appeals to John Locke in his discussions of property rights, I will use both Locke and Nozick to lay out the libertarian view of property rights that I will adopt for purposes of this chapter.

In *Anarchy, State, and Utopia*, Nozick identifies his views on property rights in Chapter 7. In his argument, Nozick identifies three stages of property rights, and three forms of justice in relation to those rights: justice in acquisition, justice in holdings, and justice in transfer.<sup>133</sup> I will address each of these in turn.

#### **A. Justice in Acquisition**

For Nozick, justice in acquisition is the criteria by which we evaluate the moral fairness of the original creation of property rights in an object.<sup>134</sup> It is that original establishment of property rights that creates the moral basis for the later analysis of justice in holdings and justice in transfer, so justice in acquisition is clearly a foundational part of the argument for Nozick. He explicitly recognizes that the justice of holding property is contingent on the acquisition of that property. “Justice in holdings is historical, it depends on what actually happened.”<sup>135</sup> Further, Nozick recognizes that, in order to prove one’s entitlement to a particular piece of property, one must be able to establish the justice of one’s acquisition of that property. As Nozick famously writes,

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<sup>133</sup> Nozick, p. 151.

<sup>134</sup> *Id.*

<sup>135</sup> Nozick, 152.

“whatever arises from a just situation by just steps is itself just.”<sup>136</sup> One might expect, then, that Nozick would lay out a careful argument for his view of justice in original acquisition, however he resists making that argument.<sup>137</sup> Although Nozick resists making an argument about justice in holdings, he endorses a natural rights version of justice in holdings.<sup>138</sup> Beyond that relatively ambiguous claim, however, Nozick’s only explanation of what he means by “justice in acquisition” is a reference to the Lockean arguments regarding personal property rights.<sup>139</sup>

On Locke’s view, the original moral claim of ownership, essential to a coherent theory of property rights, is established through the mixing of one’s labor with previously unowned things in the world.<sup>140</sup> Once an individual has mixed her labor with the world by, say, tilling an acre of land, she can lay claim to that land, and her ownership claim will carry the weight of moral authority. However, Locke included in his theory an important proviso: one can only claim ownership in a thing if one leaves “as much and as

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<sup>136</sup> *Id.* at 151.

<sup>137</sup> In Chapter 7 of *Anarchy, State, and Utopia*, Nozick sets himself the task of identifying justice in acquisition, justice in holdings, and justice in transfer. However, he writes “[t]o turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holdings: the principle of acquisition of holdings, the principle of transfer of holdings, and the principle of rectification of violations of the first two principles. I shall not attempt that task here.” Robert Nozick, *ANARCHY, STATE, AND UTOPIA* at 153.

<sup>138</sup> “[T]hings come into the world already attached to people having entitlements over them.” *Id.* at 160.

<sup>139</sup> *Id.* at 174.

<sup>140</sup> John Locke. *THE SECOND TREATISE OF GOVERNMENT*, chapter 5 “Of Property”.

good for others.”<sup>141</sup> Much has been written about what this proviso means, and an extensive examination of the Lockean proviso is outside of the scope of this Chapter.<sup>142</sup> However, it is at least relevant to note that there is a great difference of opinion regarding whether Locke’s proviso relates only to the truly *original* acquisition of property rights, or whether it can continue to apply going forward. In other words, Locke’s requirement that claiming an ownership right over land must leave as much and as good for others clearly would have prohibited the first European explorers to reach the New World from claiming all of North America for themselves.<sup>143</sup> However, if, four hundred years later, all of the land in North America is already claimed, so that an individual with no money, but plenty of labor available for mixing will have no chance of claiming property rights in that way, does *that* violate the Lockean proviso? And, further, how much labor mixing is required to claim property rights in land?<sup>144</sup> It seems clearly insufficient to run a fence

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<sup>141</sup> *Id.*

<sup>142</sup> For a further discussion of Locke’s proviso and, in particular, what it means for Nozick and libertarianism more generally, see Peter Vallentyne, *Nozick’s Libertarian Theory of Justice*, in THE CAMBRIDGE COMPANION TO NOZICK’S ANARCHY, STATE, AND UTOPIA, EDS. RALF M. BADER AND JOHN MEADOWCROFT (Cambridge University Press: 2011). Vallentyne cites further to HILLEL STEINER, AN ESSAY ON RIGHTS (Oxford: Blackwell, 1994); MICHAEL OTSUKA LIBERTARIANISM WITHOUT INEQUALITY (Oxford: Oxford University Press, 2003); and Peter Vallentyne, *Left-Libertarianism and Liberty*, in DEBATES IN POLITICAL PHILOSOPHY, EDS. T. CHRISTIANO AND J. CHRISTMAN (Oxford: Blackwell Publishers, 2009) for examples of various interpretations of the Lockean proviso that one must leave enough and as good for others.

<sup>143</sup> This is, of course, leaving aside that there were already people present in the land the explorers called North America who had been mixing their labor with the land for centuries.

<sup>144</sup> In his seminal work, SELF-OWNERSHIP, WORLD-OWNERSHIP, AND EQUALITY, written primarily as a response to Nozick, G.A. Cohen explores this question of what constitutes “mixing one’s labor” to a sufficient extent to establish ownership in conjunction with an exploration of what Locke’s proviso that, in claiming a property right, one must leave enough and as good for

around a 300 acre piece of property and claim that one has mixed one's labor with it, but is paying someone else to till the land sufficient for Locke's purposes? Is tilling the land once enough to establish morally meaningful property rights, or must the owner mix her labor with the land regularly? Answering these questions is outside the scope of this chapter, but because so much of Nozick's central arguments will hinge on accepting this theory of justice in acquisition, it is at least worth raising them (something Nozick himself failed to do).

## **B. Justice in Holdings**

Nozick's conception of justice in holdings is deeply libertarian. Once one has justly acquired a property right, one's rights in holding that property are absolute.<sup>145</sup> Indeed, for Nozick, it is nonsensical to talk about the justification of a right to hold property, once it has been justly acquired. There is no property until it has been acquired. "Things come into the world already attached to people having entitlements over them."<sup>146</sup> Property rights are inviolable, on Nozick's model, although, like his arguments

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others. Cohen argues that Nozick never does sufficiently establish what the criteria should be for morally justifying one's property claims. *See*, G.A. COHEN, *SELF-OWNERSHIP, WORLD-OWNERSHIP, AND EQUALITY*, (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS) p. 75.

<sup>145</sup> Nozick's explanation of the freedom individuals have to do with their property what they will (limited only by the constraint that they must avoid injuring others or else compensate the injured for the injury) is explained later in this Chapter, *infra* Part V.B. The argument is also found in the Wilt Chamberlain example, *in* Nozick, p. 160-164.

<sup>146</sup> Nozick, p. 160. The quote arises in the context of the following explication: "Whoever makes something, having bought or contracted for all other held resources used in the process (transferring some of his holdings for these cooperating factors), is entitled to it. The situation is *not* one of something's getting made, and there being an open question of who is to get it. Things

for justice in acquisition, Nozick does not make much of an argument for this view. Primarily, Nozick's position stems from a natural rights theory of property, arguing that property rights are absolute, and that violating or curtailing property rights, without explicit consent from the property holder, is an immoral and impermissible taking of those rights.<sup>147</sup>

### **C. Justice in Transfer**

Because of Nozick's belief that the holder of a property right has an absolute and inviolate right over that property, it is unsurprising that he argues that a property holder has an absolute right of transfer as well. Justice in transfer means that the property holder has the right to dispose of her property as she wishes, unfettered by restrictions imposed by the government or other third parties. These transfers may include both a sale in a market transaction, or a gift or bequest, given freely and without the expectation of compensation. Although he does not explicitly make the argument for it, Nozick's vision of justice in transfer includes the right to transfer one's good after death, which I will

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come into the world already attached to people having entitlements over them. From the point of view of the historical entitlement conception of justice in holdings, those who start afresh to complete 'to each according to his \_\_\_\_\_' treat objects as if they appeared from nowhere, out of nothing." (emphasis in original).

<sup>147</sup> Natural rights theorists believe that the moral authority for holding or acting on a particular right stems from a pre-social, pre-legal authority. This authority might be extra-worldly (God, angels, other deities) or it might stem from essential qualities of human beings (rationality, self-determination). By contrast, positive rights are those rights created by the state. These rights do not exist until the state is established, which means that, unlike natural rights, a state could conceivably limit its citizens' positive rights. For a detailed explanation of the history of the natural rights theory of property, see Eric Mack, *The Natural Right of Property*, 27 Soc. Phil. and Pol. 53 (2010).

address later in this Chapter.<sup>148</sup> Again, turning to Locke to fill in the gaps in the argument left by Nozick, we see that post-death transfers are contemplated by this version of libertarianism. Since Locke argues that a moral claim over private property stems from an investment of labor on the part of the property holder, one might expect that Locke believed that the moral claim ended with the life of the laborer, but that is not, in fact, the view Locke espoused.<sup>149</sup> Instead, Locke claimed that one of the rights a property holder has in her property is the right to transfer that property after her death.<sup>150</sup>

### III. CRITICISMS OF NOZICK'S VIEWS ON PROPERTY RIGHTS

While my primary purpose in this Chapter is not to provide a response to Nozick's version of libertarianism, but instead to adopt his libertarian position, and examine the estate tax through that lens, I will nonetheless pause briefly here to explore some of the most serious criticism's of Nozick's views on property rights. As I have explained already, much of what Nozick does say about private property rights, he says without argument, adopting a natural rights view of property, without defending his

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<sup>148</sup> *Infra* Part V.

<sup>149</sup> Locke expresses this position in the FIRST TREATISE ON GOVERNMENT as follows: “[I]f any one had began and made himself a Property in any particular thing, (which how he, or any one else, could do, shall be shewn in another place) that thing, that possession, if he dispos'd not otherwise of it by his positive Grant, descended Naturally to his Children, and they had a right to succeed to it, and possess it.” JOHN LOCKE, TWO TREATISES OF GOVERNMENT, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988) treatise 1, sec. 87.

<sup>150</sup> *Id.* For a longer discussion of Locke's views on the rights of inheritance and bequest, and the way in which these rights potentially come into conflict, *see* Part V.

expansive view. Interestingly, though, at least one critic argues that Nozick has *no* coherent view on property rights, ultimately conflating a variety of positions, and finally coming out as a utilitarian, rather than a pure libertarian.<sup>151</sup> Barbara Fried's argument traces the way that Nozick's view evolves throughout the three parts of *Anarchy, State, and Utopia*. In particular, she points to the fact that, although he insists on the importance of obtaining explicit consent from property owners before collecting from them (in the context of taxation) Nozick ultimately accepts that property owners can have their property rights limited, as long as they receive compensation for the curtailment of their naturally held unlimited rights.<sup>152</sup> But the argument, that, in the interest of all, the interest of a few (property owners) could have their rights violated, with compensation paid to them, is a utilitarian argument, not a libertarian one.<sup>153</sup>

Traditionally, utilitarians (John Stuart Mill, foremost among them), have held that, in order to determine the most moral action in any particular circumstance, one must calculate which action will maximize total happiness.<sup>154</sup> Since any particular action may

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<sup>151</sup> Barbara Fried, "Does Nozick have a theory of property rights?" in *THE CAMBRIDGE COMPANION TO NOZICK'S ANARCHY, STATE, AND UTOPIA*. Eds. Ralf M. Bader and John Meadowcroft, Cambridge University Press, Cambridge (2011).

<sup>152</sup> *Id.* at 240-241.

<sup>153</sup> The utilitarianism of Jeremy Bentham, John Stuart Mill and others requires the calculation of the rights and interests of the various members of a society in order to determine the morally right action. Morality is defined as the action that provides the greatest benefit to the greatest number of people. See John Stuart Mill, "Utilitarianism." Edited by John Gray, *ON LIBERTY AND OTHER ESSAYS*. Oxford: Oxford University Press (1998); Jeremy Bentham, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*. New York: Hafner (1948).

<sup>154</sup> Mill, "Utilitarianism".

cause both some unhappiness and some happiness, utilitarians advocate using their calculus to weigh the respective advantages of any decision. One famous articulation of this calculus is the trolley example, introduced by Phillipa Foot.<sup>155</sup> In this example, a trolley driver is at the helm of an out of control trolley, which he cannot stop.<sup>156</sup> He sees a split in the rails ahead, and on one of the rails there is one workman working, while there are five workmen on the other rail.<sup>157</sup> The conductor must instantaneously choose which path he will take. The utilitarian calculus compares the loss of one life with the loss of five lives, and determines that the moral choice of the trolley driver is to steer the trolley down the path with only one worker.<sup>158</sup> Similarly, a utilitarian would argue that limiting one individual's private property right (for instance, through the imposition of taxation) for a significant increase in the happiness of many other people (by, for example, increasing revenue available to fund government programs) would be a morally appropriate action. This kind of moral reasoning would allow utilitarians to see a government taking or a zoning restriction as morally justifiable. However these types of infringements on the absolute rights of individual citizens would be anathema to the moral feeling of libertarians. While Nozick, as a libertarian endorsing a natural rights

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<sup>155</sup> Phillipa Foot, "The Problem of Abortion and the Doctrine of the Double Effect," in *VIRTUES AND VICES*. Oxford: Basil Blackwell (1974).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*



view of property, explicitly rejects the utilitarian calculus, certain of his arguments do have a definite utilitarian feel.<sup>159</sup>

### III. TAX STRUCTURES TRADITIONALLY ACCEPTED BY LIBERTARIANS

Even the pure libertarian view of property rights, endorsing an inviolable set of rights that cannot be breached without consent, has historically been viewed as consistent with some kinds of taxation. Libertarians have disagreed about the level of consent required in order to legitimately tax property owners, with Nozick seeming to require explicit consent received from every individual subject to the tax, to more pragmatic views, which argue that remaining within the society or accepting government-provided benefits are sufficient forms of implicit consent to legitimate the tax.<sup>160</sup> Regardless of these differences regarding the necessary form of consent, libertarians have generally

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<sup>159</sup> Barbara Fried explains Nozick's theory of compensation, in identifying the move from anarchy to the permissible minimal state. Fried demonstrates that Nozick cannot, in fact, move beyond anarchy without authorizing occasional violations of individual rights, requiring that the injured party receive compensation from the injuring party, even (or especially) when the injuring party is the state itself. Fried, *supra* note 39 at 238-243.

<sup>160</sup> Nozick makes clear his views of implicit consent when he writes that "...everyone realizes that tacit consent isn't worth the paper it's not written on..." ANARCHY, STATE, AND UTOPIA, p. 287. Earlier in the book he claims to have demonstrated that the reason a minimal state is not redistributive, when the amounts paid by some are used to pay for the protection of others, stems from the fact that those who are receiving protection without paying are getting that protection for free in compensation for the rights they may have given up. *Id.* at 114. However, Fried demonstrates that Nozick's lack of a coherent theory of property rights and consent leads to the result that, in certain circumstances (such as the move from a minimal state to a slightly more than minimal state), consent to limit the rights of citizens does not have to be explicitly attained. Fried claims that "...in place of actual or implied consent, Nozick does away with consent entirely," Fried, *supra* note 39 at 235.

agreed that taxation as payment for services received is a legitimate form of taxation by the government.<sup>161</sup> This kind of tax, justified by the so-called benefit principle of taxation, views the government as a provider of services, collecting payment for those services (in the form of taxes) as part of a market transaction.<sup>162</sup> On this argument, citizens might argue that the government should limit the kinds of services it provides to those that *only* the government could provide, or to services where there is a significant increase in the efficacy of the service, or a lowering of the cost of the service, when the service is provided by the government. The kinds of services for which the government could assess fees via the collection of taxes might include the maintenance of roads and sewers or the provision of security (both local and national).<sup>163</sup> In a more expansive state, services might include public education, the regulation of markets, or the provision of public healthcare. While a classic libertarian might balk at the second set of services, the libertarian position merely requires that the citizens receiving (and paying for,

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<sup>161</sup> In Nozick's explanation of the shift from anarchy to a minimal state he demonstrates the situation in which an individual could be compelled to pay for protection, since she is benefitting from the provision of that protection. *ANARCHY, STATE, AND UTOPIA* at 110-118.

<sup>162</sup> The benefit principle of taxation, authorizing taxation only to the extent that it compensates the government for services it provides to its taxpaying citizens, is not a view held only by libertarians. For a discussion of the benefit principle of taxation, and an explanation of its ongoing role in tax policy debates, *see* Jon Bakija and Joel Slemrod, *TAXING OURSELVES* (Cambridge: MIT Press, 2008) at 86.

<sup>163</sup> Even Milton Friedman himself, in many ways the father of libertarianism, imagined that a government should provide certain services, and could therefore assess tax on its citizens in order to receive payment for those services. *MILTON FRIEDMAN, CAPITALISM AND FREEDOM* (Chicago: University of Chicago Press, 1962) at 65.

through taxes) the services in question *consent* to have the government provide the services.<sup>164</sup>

For purposes of this dissertation, which is centrally concerned with the estate tax, it is important to note that the payment for services benefit principle model of taxation seems to fit most naturally with an income tax, rather than an estate tax or other transfer tax. Because the services in question (such as maintenance of roads, national security, and garbage collection, for example) would be provided regularly, an annual accounting of the cost of the services, and the amount of that cost allocable to any particular taxpayer, would be easier to administer than a lifetime calculation done via the estate tax. In addition to the ease of administration, the income tax seems to fit the payment for services model better than the estate tax would, since it charges the taxpayer for the services in the general time period in which the services were received, rather than waiting until the end of the taxpayer's life to calculate the amount due.<sup>165</sup> However, a society could elect to administer a payment-for-services type of tax as an estate tax. That

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<sup>164</sup> There is a tradition known as Left Libertarianism, in which a more expansive state, such as one that might provide the second set of services listed above, is more likely to be endorsed. What Left Libertarianism shares with the tradition of Right Libertarianism is the insistence on the importance of consent in providing moral legitimacy to the government and its curtailing of property rights. For examples of Left Libertarianism, *see, e.g.*, Michael Otsuka, *LIBERTARIANISM WITHOUT INEQUALITY*. Oxford: Oxford University Press (2003); Peter Vallentyne and Hillel Steiner *THE ORIGINS OF LEFT-LIBERTARIANISM: AN ANTHOLOGY OF HISTORICAL WRITINGS*, London: MacMillan (2001).

<sup>165</sup> In most payment-for-services scenarios payment is made in the general timeframe in which the services are provided. Providing a lifetime of services and waiting for payment until the end of that lifetime seems to leave significant room for error.

structure would use the end of life as a time to calculate the benefits enjoyed over a lifetime, and would assess tax to compensate the government for the benefits it had provided to the deceased. There are several reasons that this does not seem to be the ideal scenario, not least because, if the potential taxpayer had no estate remaining at her death, there would be no way to recover payment for the services the government had provided.<sup>166</sup>

For the reasons explained above, libertarians might approve of an income tax, if it were designed to satisfy the libertarian benefit principle requirements. Unsurprisingly, however, a wealth transfer tax that was justified as a method of redistributing wealth from the richest taxpayers to the rest of society is anathema to the libertarian moral view.<sup>167</sup> Because it would likely violate the principle of taking from the taxpayer only with her (implicit or explicit) consent, government-facilitated redistribution through the tax code is immoral, on the libertarian view.<sup>168</sup> I note this in order to emphasize that there is not

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<sup>166</sup> Under the current system, individuals receive the benefits of government services, and then must pay an annual income tax. If an individual does not have sufficient funds available to pay the income tax that the government assesses against her, then the government has a variety of methods available to help it decide whether to forgive some amount of the assessed taxes, or collect from the individual in future years. For a discussion of the way the government makes these decisions, see Shu-Yi Oei, *Who Wins When Uncle Sam Loses? Social Insurance and the Forgiveness of Tax Debts* 46 U.C. DAVIS L. REV. 421 (2012). However, if a government held its collection of taxes until the end of an individual's life, it seems significantly more likely that there would be no money left to pay the bills accumulated over that lifetime.

<sup>167</sup> G.A. COHEN, *SELF-OWNERSHIP, FREEDOM AND EQUALITY*, (Cambridge: Cambridge University Press, 1995) at 68.

<sup>168</sup> Of course, redistribution *could* be consistent with a libertarian model, as long as the redistribution was explicitly consented to by the taxpayers involved. Here one might imagine Warren Buffett, Bill Gates, and others insisting that they should be taxed more heavily in order

necessarily a fundamental libertarian objection to the estate tax. As a logistical matter, libertarian-sanctioned benefit principle taxation is likely easiest to administer through the income tax. However, an estate tax is permissible on libertarian grounds, as long as the justification for the tax were limited to benefit principle grounds. The Nozickian view of absolute property rights objects to taxation intended to redistribute when that redistribution has not been explicitly consented to. The form of the taxation (whether the tax is assessed as an income tax or as an estate tax) does not affect the analysis.

#### IV. LIBERTARIAN INHERITANCE

In order to explore Nozick's libertarian position on the estate tax, one must first examine the libertarian position on the rights of inheritance and bequest.<sup>169</sup> To clarify, a right of inheritance lies squarely with the heir. If an heir has a right to inherit, then the heir has some version of a property right in the assets held by the testator, although the right cannot be exercised until after the testator dies. A right of inheritance might be held

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for the government to have more funds available to support social welfare programs. *'Patriotic Millionaires' Lobby Congress for Higher Taxes on Rich*, PBS Newshour, Nov. 16, 2011. Transcript available at: [http://www.pbs.org/newshour/bb/politics/july-dec11/millionaires\\_11-16.html](http://www.pbs.org/newshour/bb/politics/july-dec11/millionaires_11-16.html).

<sup>169</sup> Throughout this Part I reference particular state statutes authorizing rights of bequest, inheritance, or intestacy. It is important to note, though, that Nozick, Locke and other libertarians believe that the rights in question here are natural rights, not positive rights. That is to say, a natural rights theorist believes the rights to inherit or leave the bequests one wishes exist regardless of the statutory schemes in place in any particular state. On this model, the statute is merely a codification of the right, not a creation of that right. For a further discussion of natural vs. positive rights *see supra* note 54.

by an individual explicitly named in the will of a testator<sup>170</sup>, but rights of inheritance can be found elsewhere as well. For instance, state intestacy laws create rights in individuals that the state has determined are the most likely to have been named beneficiaries of the deceased, if she had, in fact, created a will.<sup>171</sup> However, some states move beyond mere intestacy laws, and creating a right in the surviving spouse, or, in one case, the surviving children, to inherit from the assets of the deceased, *even though the deceased explicitly disinherited them*.<sup>172</sup> Such laws value the rights of the survivors to inherit above the rights of the deceased to determine the distribution of her assets after she dies.

By contrast with the right to inherit, held and exercised by an heir, the right of bequest is a right held by the deceased, the testator, in the case of an individual who

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<sup>170</sup> See, e.g., K.R.S.394.020, stating that “Any person of sound mind and eighteen (18) years of age or over may by will dispose of any estate, right, or interest in real or personal estate that he may be entitled to at his death, which would otherwise descend to his heirs or pass to his personal representatives, even though he becomes so entitled after the execution of his will.”

<sup>171</sup> State intestacy laws most commonly identify the spouse and children of the deceased as the individuals who inherit in the absence of a will. However, if the deceased had no spouse or children, the statutes also create schema that identify who inherits the assets of the deceased. See, e.g., K.R.S. 391.010 (Kentucky intestacy law providing for the disposition of real property in the case of a decedent who dies intestate. Succeeding statutes refer back to the real property statute in order to determine the disposition of personal property.) In certain circumstances, if no living relatives are found, the assets of the deceased escheat to the state. See, e.g. K.R.S. 393.020 (Kentucky law allowing unclaimed property to escheat to the state. “If any property having a situs in this state has been devised or bequeathed to any person and is not claimed by that person or by his heirs, distributees, or devisees within three (3) years after the death of the testator, or if the owner of any property having a situs in this state dies without heirs or distributees entitled to it and without disposing of it by will, it shall vest in the state, subject to all legal and equitable demands.”); O.R.S.112.055 (Oregon law decreeing that if no person is entitled to take under the Oregon intestacy laws, then the estate escheats to the state of Oregon).

<sup>172</sup> *Supra* note 20.

executes a will.<sup>173</sup> The right of bequest is defended by libertarians as one of the rights contained in the inviolate absolute ownership of private property.<sup>174</sup> In Nozick's model, the right of bequest is evaluated as moral matter within the purview of justice in transfer.<sup>175</sup> If the asset is one that was acquired justly by the testator, and is transferred justly by her, then the bequest must be respected as morally permitted. State statutory schemes regarding rights of bequest track these libertarian principles, respecting and enforcing most testator's wishes through the probate process.<sup>176</sup>

#### **A. Locke on Inheritance Rights**

Since Nozick identifies himself as adopting Locke's theory of property rights, and since Nozick himself does not explicitly address the issue of inheritance rights, I will turn now to a brief examination of Locke's views of inheritance rights. This requires examining both the right of a descendant to leave a bequest, and the right of an heir to claim an inheritance. As I demonstrate in this section, these rights are often (perhaps even always) in conflict, and, in many cases, cannot be simultaneously enforced.

Locke's belief in the absolute right of ownership in goods stems from his view that mixing one's labor with the world creates a property right that cannot be

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<sup>173</sup> *Supra* note 77.

<sup>174</sup> *Supra* Part III.

<sup>175</sup> *Id.*

<sup>176</sup> Of course, the large exception to this general rule is the elective share rules discussed *supra* note 20 and accompanying text.

extinguished by a third party.<sup>177</sup> This absolute right of ownership includes an unfettered right of transfer. Locke takes the right of transfer to include an unfettered right of transfer at death as well.<sup>178</sup> In other words, an individual who holds property may choose to bequeath that property as she wishes. If society respects this right, then any decision made by the deceased with respect to the disbursement of her assets must be honored. This may include a choice by the decedent to disinherit her children or her surviving spouse.

However, alongside this view that, since the right of private property includes the right of bequest, the wishes of the deceased must be respected, Locke simultaneously holds the view that children and surviving spouses have a right of inheritance as well.<sup>179</sup> At various points in his writing on inheritance, Locke states that a surviving spouse or surviving children who are disinherited by the testator's will should nonetheless be awarded an amount sufficient to allow them to survive comfortably.<sup>180</sup> The familial

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<sup>177</sup> *Supra* note 47 and accompanying text.

<sup>178</sup> Jeremy Waldron, *Locke's Account of Inheritance and Bequest*, 19 *J. of Hist. Phil.* 1 (1981) at 44.

<sup>179</sup> "This gives Children a Title, to share in the Property of their Parents, and a Right to Inherit their Possessions. Men are not Proprietors of what they have meerly for themselves, their Children have a Title to part of it, and have their Kind of Right joyn'd with their Parents, in the Possession which comes to be wholly theirs, when death having put an end to their Parents use of it, hath taken them from their Possessions, and this we call Inheritance. Men being by a like Obligation bound to preserve what they have begotten, as to preserve themselves, their Issue come to have a Right in the Goods they are possessed of." John Locke *supra* note 47 treatise 1, sec. 88. For a discussion of Locke's position, see Jeremy Waldron, *id.* at 42; Leslie Kendrick, *The Lockean Rights of Bequest and Inheritance*, 17 *Legal Theory* 145 (2011) at 148.

<sup>180</sup> "[O]ne of Locke's justifications for inheritance is the right to parental support, the 'Right [of children] to be nourish'd and maintained by their Parents, nay a right not only to a bare



relationship between the surviving family members and the testator creates a moral claim in those survivors that should be enforced by the society, Locke thinks.<sup>181</sup> In particular, Locke focuses on the “surplus” that may exist in the estate of the deceased, arguing that surplus can be disposed of as the testator wishes, while the essential part, required to care for the survivors, should be passed to the children under their right of inheritance.<sup>182</sup>

### **B. Bequest and Inheritance – Incompatible Rules?**

So how can a property holder have an unmitigated right of bequest while a surviving family member simultaneously holds a right of inheritance? In instances where these two rights conflict (the testator leaves all of his property to his friends, while his surviving children wish to claim an inheritance right in some of the property), what action should society take? In situations where they conflict, must society enforce the wishes of the now deceased testator or of the surviving children? Commentators disagree about the coherence of Locke’s view.<sup>183</sup>

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Subsistence but to the convenience and comforts of Life, as far as the conditions of their Parents can afford it.’ Locke says multiple times that parents have this duty and children this corresponding right.” Kendrick, *id.* at 151, quoting Locke, treatise I, sec. 87.

<sup>181</sup> *Id.*

<sup>182</sup> “A decedent’s estate must first provide for the subsistence and comfort of dependents, and only then may any remaining property go to satisfy the decedent’s bequests. If the entire estate is required by the right to parental support, any bequests are void. The passages in which Locke discusses bequest without acknowledging the right to parental support must be understood to be subject to this qualification.” Kendrick, *supra* note 86 at 151.

<sup>183</sup> Notably, Waldron argues that Locke’s position’s on bequest and inheritance are incompatible. He writes “There is no way in which Locke’s ranking bequest ahead of inheritance can be justified on the basis of natural right, given his justification of inheritance. We must, I think, dismiss this ranking in the end as a mistake on Locke’s part. What, then, is the position? A man’s children have the right to inherit as much of his property as is needed to give them the

Ultimately, Locke's view on the rights of bequest and inheritance appears utilitarian, rather than libertarian. The role of society in allocating the goods of the deceased requires a balancing of the wishes of the deceased with the needs of the survivors and other social goals.

## **V. WILT CHAMBERLAIN, PATTERNS OF JUSTICE AND THE LIBERTARIAN PROBLEM OF INHERITANCE**

Thus far I have explained the Nozickian libertarian view regarding property rights and inheritance. I now turn to Nozick's famous discussion of the effects of distributive justice, using the example of Wilt Chamberlain. In this Part I demonstrate why post-death property transfers are not required by any element of Nozick's argument.

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benefit, after his death, of the continued fulfillment of his parental duties of sustenance and nourishment. His wife is entitled to inherit as much of his wealth as she needs to continue to discharge her joint responsibility in this respect. All this is a matter of fundamental natural law. Natural law, however, allows no place for bequest or, for that matter, for the inheritance of surplus goods. Does this mean that traditional notions of bequest have therefore no place at all in a Lockean theory of property? Perhaps not. Perhaps bequest does have a place if we look upon the right to bequeath as a *civil* right rather than as a natural right." Waldron, *supra* note 85 at 47-8 (emphasis in the original). By contrast, Kendrick argues that the rights of unlimited inheritance possessed by the children or other natural heirs of the decedent actually arise out of the "imputed bequest" of the decedent. "[W]hen understood as imputed bequest, the right of inheritance becomes a default rule, imputing to the decedent a desire to transfer her wealth to those who are most likely to be identified with her life projects... Thus, while it is true that Locke never explicitly presents a full theory of imputed bequest, we may plausibly read the *Treatises* to assume that parents, prompted by their 'Natural Love and Tenderness' and their close identification with both their children and their possessions, would in most cases desire that their property descend to their children when they die. This means that the right involved is the right not of the children to inherit but of the parents to bequeath." Kendrick *supra* note 86 at 161-2.

## A. Patterns of Justice

In his argument concerning distributive justice, Nozick distinguishes his work from theories that attempt to establish patterns of distributive justice.<sup>184</sup> On Nozick's model, patterned principles of distributive justice identify a desired distribution of goods, either an end-goal or a goal evaluated at any particular moment in time, and then evaluate the current distribution by comparison to the desired pattern.<sup>185</sup> Nozick is critical of patterned principles of justice, since he thinks they will inevitably lead to a restriction on the right of individuals to freely contract for the exchange of goods. In order to demonstrate this result, Nozick introduces his famous Wilt Chamberlain example.

Nozick asks the reader to imagine an initial distribution of wealth that the reader believes is just. Because Nozick does not want to preclude any particular distribution, he identifies this initially just (on the reader's terms) distribution as D1.<sup>186</sup> Then, he says, imagine that there is an individual, call him Wilt Chamberlain, who has an incredible talent at playing basketball.<sup>187</sup> People love to watch him play basketball, and, as a result,

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<sup>184</sup> David Schmitz, "The Right to Distribute," in *THE CAMBRIDGE COMPANION TO NOZICK'S ANARCHY, STATE, AND UTOPIA*. Edited by Ralf M. Bader and John Meadowcroft, Cambridge: Cambridge University Press (2011).

<sup>185</sup> *Id.* at 204. Nozick identifies Rawls' difference principle (permitting inequalities in the distribution of goods only if the inequalities benefit the least well-off in a society) as a patterned principle with regard to distributive justice.

<sup>186</sup> *NOZICK, ANARCHY, STATE, AND UTOPIA* at 161.

<sup>187</sup> Barbara Fried identifies what she views as a critically important flaw in the Wilt Chamberlain example. While Nozick allows for the just distribution of goods and wealth in D1, he does not account for Chamberlain's talent at playing basketball as a good that has been unevenly distributed. It is this uneven distribution of talents, and the scarcity of the talent of basketball

many people agree to pay him 25 cents for the privilege of watching him play. Say, then, that ultimately one million people pay a quarter to Wilt Chamberlain to watch him play basketball. Each of these people has freely chosen to enter a contract with Chamberlain, wherein each of them pays 25 cents, and Chamberlain allows the individual to watch him play. At the end of these million transactions, Chamberlain will have \$250,000 above what he was entitled to in D1, and each of the one million people will have 25 cents less than he or she was entitled to in D1. Nozick calls this second distribution D2. We have, as a result of one million freely made transfers, radically shifted the original distribution. However, Nozick says, we cannot complain that D2, which does not match the distribution we originally believed was a just distribution, is *unjust*. Nothing unjust has occurred. Each of Wilt Chamberlain and the one million fans freely agreed to the transfers. Indeed, Nozick argues, it would be unjust for someone (the government?) to

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playing, that permits Chamberlain to demand 25 cents for the privilege of watching him play. If basketball playing talents were distributed more evenly, or were not in such short supply, then Chamberlain's fans would have been able to watch other players instead, and the price Chamberlain could command would likely fall. Fried likens Chamberlain's talents to an individual holding a large amount of land. When the landholder exchanges that land for \$250,000 we do not say that he is \$250,000 richer. We merely say that he has liquidated the asset he previously held in illiquid form. One could make the same argument about Chamberlain's basketball talents. See Barbara Fried, "Wilt Chamberlain Revisited: Nozick's 'Justice in Transfer' and the Problem of Market-Based Distribution." 24 *PHILOSOPHY AND PUBLIC AFFAIRS* 3 (1995).

enter D2 and try to make it match D1 by reallocating some or all of Chamberlain's newly acquired \$250,000 away from him, since he acquired that wealth justly.<sup>188</sup>

Nozick's conclusion, then, is that patterned principles of distributive justice necessarily violate individual freedom and property rights. In addition, he believes these patterns are ultimately unattainable, given the constant exchanging of goods that happens within a society. Because Nozick's position is that "whatever arises from a just situation by just steps is itself just,"<sup>189</sup> the Wilt Chamberlain model demonstrates that justice will result in radically different actual distributions, over time. Because D1 was a just distribution (based on the reader's own conception of justice), and because the transfers from fans to Wilt Chamberlain were all made freely (the very definition of just steps on Nozick's libertarian model) then the end result, with Chamberlain holding significantly more wealth than his fans, must also be just.

Combining this view of distributive justice with Nozick's view of private property rights, it becomes clear why Nozick believes in unfettered bequest rights. Because property rights include the unrestricted absolute ownership of the property in question, and because distributive justice must concern itself only with the free transfer of goods,

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<sup>188</sup> Nozick disputes the idea that there would be any individual or entity with the authority or even the ability to do that redistributive work. "There is no *central* distribution, no person or group entitled to control all the resources, jointly deciding how they are to be doled out." Robert Nozick, *ANARCHY, STATE, AND UTOPIA*, at 149.

<sup>189</sup> *Id.* at 151.

rather than with the pattern of justice that results from those transfers, individuals must be allowed to transfer their assets as they wish, including after death.

## **B. Chamberlain's Children and the Libertarian Problem of Inheritance**

I have two arguments against the model of inheritance rights Nozick sees as necessarily following from his views of property rights and distributive justice. I will address each of those concerns in turn.

### ***1. Future Generations and the Original Distribution***

Nozick begins his discussion of the Wilt Chamberlain example by introducing a distribution, D1, that he says the reader should imagine is whatever distribution the reader believes is most just. The end distribution, D2, must be just, Nozick argues, because it was arrived at justly, in a way freely agreed to by all parties involved in the creation of D1 and the transfers that resulted in D2. Moving from here, assume that Wilt Chamberlain and all of his fans (call them the first generation, or G1) then pass their respective wealth on to their children. Now the second generation, call it G2, begins life with D2, rather than with D1. But G2 did not agree to the justness of D2. Indeed, G2 did not agree to the justness of D1 either! And G2 does not include the members of G1 who freely engaged in the transfers that created D2. So how can we expect the members of G2 to accept as just the distribution created by others, in which they had no say, either

with regard to the original distribution or to the “free transfers” entered into by their forebears?<sup>190</sup>

Further, Nozick’s (and Locke’s) emphasis on the importance of mixing one’s labor with the world in order to generate property rights results in significantly less (or no?) moral claims in G2 for rights over the property that they inherit from G1. This is another tension in the relationship between Nozick’s view of justice in acquisition, transfer, and holding. But this tension is recognized in certain versions of Left Libertarianism, and was even recognized by Nozick himself in his later writings.<sup>191</sup>

Nozick’s argument for the rights of the heir stems from a combination of justice in acquisition and justice in transfer. Because G1 (presumably) mixed their labor with the world in order to generate morally meaningful ownership over their goods, they acquired the right to freely transfer those goods. Because G2 receives the goods as a

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<sup>190</sup> One central concern here is the determination of just what constitutes a “free transfer”. Nozick might argue that his definition of free transfer transcends cultural and temporal boundaries, so that what constitutes a free transfer in the southern part of the pre-Civil War United States is the same as what constitutes a free transfer in New York City in 2013. If that is true, then we needn’t worry that future generations might complain that the transfers which resulted in D2 were not, in fact, freely completed. However, there is a long tradition in political philosophy arguing that cultural norms evolve over time, so that what constitutes a free transfer in one society might be considered coerced in another. *See, e.g.* G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT, TRANS. MILLER (Oxford: Oxford University Press) 1971.

<sup>191</sup> Many Left Libertarians recognize a more legitimate moral right in the taxation of heirs than in the taxation of income earners, since the moral claim to private property stems from the mixing of own’s labor with the world. Because an heir has not mixed her labor, but has merely acquired property from another, this argument sees taxation of that individual as more morally permissible. Nozick himself altered his view on inheritance taxation in later years, seeing the taxation of heirs as less morally prohibited than other types of tax. *See* ROBERT NOZICK, THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS 28 (1993).

result of a freely made (post-death) transfer by G1, then they have justly acquired the goods, and may hold them with the same moral authority with which G1 held them. This may be true with regard to *inter vivos* transfers, but it does not address what I see as the second libertarian problem of inheritance.

## **2. *The Problem with Post-Death Property Rights***

In order to make, as Nozick does, the claim that property ownership rights include an unmitigated right of transfer, one must first establish that the individual making the transfer has the kind of moral claim over the property that I have identified as arising from the libertarian theory of property rights.<sup>192</sup> In other words, the right to transfer is one of the rights held by a property owner, but that right, like all property rights, is contingent on owning the property in the first place.<sup>193</sup> This is where one encounters the problem of bequest and post-death property rights. While a property owner may write a will and have the intention to make a post-death transfer during her lifetime, the effectuation of that will happens only after her death.<sup>194</sup> But in what sense does she

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<sup>192</sup> *Supra* Part III.

<sup>193</sup> It might be obvious that one cannot transfer by will assets that one does not, in fact, own, but in case that is not obvious, *see* K.R.S. 391.250 (stating that “KRS 391.210 to 391.260 does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.”)

<sup>194</sup> Some might argue that the effect of drafting a will is to transfer the asset upon the creation of the testamentary document. However, our legal system does not recognize that as the moment of transfer. Instead the transfer, and the attendant taxation upon that transfer, happens after the death of the transferor. §2001.



continue to have the property right after her death, such that she has the authority to transfer that property?

In order to have a moral claim, or to have a right that is recognizable by society, there must be an individual, a subject, who can exert that right, or that claim. After death, the individual ceases to exist. There is no subject available to claim the property right, and there is no subject available to enact the transfer. As a result, it violates the libertarian notion of property rights to authorize an individual to transfer an asset after her death. Enforcing a testamentary will is the equivalent of allowing the individual to transfer her neighbor's property, since she has no legitimate claim of ownership over either her neighbor's property or the property she claims to be transferring by will. By the time the transfer effectuated by the will takes place, the testator will no longer have the morally legitimate property right that would allow her to effect a just transfer, unfettered by third party intervention. Her moral rights cease with her life.

In what sense could it be meaningful to say that a deceased person continues to hold property after her death? To the extent that our current rules enforce the choices made by a testator in her will, they do so out of respect for the choices the testator made when she was alive, not because the document can be enforced by the drafter of the will. Indeed, our tax system creates a new legal entity, the "estate", which absorbs the rights and responsibilities of the person whose life (and, by extension, rights and

responsibilities) has ended with her death.<sup>195</sup> Because there is no subject or moral right holder present to claim the right of transfer, a rule that establishes a default, which may or may not respect the wishes of the decedent, need not concern itself with potential violations of that subject's moral claims.

## VI. ESTABLISHING A DEFAULT RULE

In the previous Part I argued that the existence of the individual claiming a property right ends at that individual's death, and therefore the property right must end then as well. Therefore, I argue, there is no moral authority to the assumption that the decedent has the unfettered right to transfer her property as she wishes after her death. Does that then mean that the government has a moral claim to the property? Not necessarily. At the moment of death of the person with the property right recognized as morally meaningful on the libertarian model, there is no one with a property claim that is morally defensible, from a libertarian perspective.

This leaves us in an interesting position. If, as Nozick and many other libertarians have assumed, moral claims of ownership extended beyond death, then their arguments that the estate tax (along with other forms of *inter vivos* taxation) is theft would be

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<sup>195</sup> The "gross estate" is defined in §2031 as follows: "The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." A number of Code sections explicitly address the way in which the estate, as a separate taxable entity, is responsible for the tax owed, and how potential heirs can recover contributions from other potential heirs of that estate. *See, e.g.*, §2205, 2207.

convincing. However, I have demonstrated that the libertarian argument does not actually entail that result. With no individual or entity that has a libertarian moral claim over the property, we are left in the position of deciding what rule to choose.

At this point, we can bring back into our consideration all of the various tax policy concerns I bracketed at the beginning of this Chapter. We might consider incentive effects and revenue raising concerns when deciding what to do with the assets of a deceased member of society.<sup>196</sup> On the one hand, we might decide that, as a matter of administrative ease, we will let the deceased draft a will telling us how she wishes the assets to be distributed, and we will distribute the assets according to that document. But we might decide that we have other goals that trump the goal of administrative ease in determining the best tax policy. Alternatively, we might decide that the goal of allowing for a more or less equal distribution of financial goods in each generation (a new D1, in the Wilt Chamberlain example) is a goal that takes priority in our tax policy, and therefore we might enact a 100% estate tax, allowing the government to claim assets that have no owner, due to the death of the previous owner. A third possibility is that the Lockean-Nozickian result would be to allow assets that are freed up upon the death of the property holder to revert to nature. On this view, the true Lockean result would be to

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<sup>196</sup> For a discussion of the potential policy considerations that might affect the decision to impose the estate tax in one form or another, *see supra* Part II.

allow individuals to come forward to mix their labor with these goods, thereby establishing new moral claims over the assets.<sup>197</sup>

The likely result is somewhere in the middle. The goal of this Chapter, however, has been to demonstrate that each of these results is consistent with the moral view of property rights espoused by libertarians, in particular by Nozick. Because there is no moral compulsion to act on the wishes of the deceased, or to treat the government as having morally deserving property rights in the assets of the decedent, we can create a rule that best reflects the needs and values of the society in question, while not violating the moral rights of any party.

## VII. WHAT ABOUT GIFTS?

I have, thus far, remained silent on the issue of gifts. Our current tax regime incorporates a gift tax with the estate tax, allowing a lifetime credit against both an individual's *inter vivos* and post-death transfers.<sup>198</sup> Because this is a lifetime credit, once

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<sup>197</sup> This possibility of reverting to a war of all against all each time a member of society dies is strongly reminiscent of the Hobbesian state of nature. See THOMAS HOBBS, LEVIATHAN (1651). I do not believe that Locke's view of property rights requires this result, since Locke believes that we agree to give up certain rights upon entering society. Therefore a society could establish a default rule regarding post-death property rights that did not involve allowing a free for all to claim the property, and that default rule would not necessarily violate Locke's position.

<sup>198</sup> §2010. The structure of the system allows a credit against taxes incurred on lifetime transfers up to an amount sufficient to permit a tax-free transfer of a set exemption-equivalent amount. Currently that amount is \$5,250,000 per individual. *Supra* note 1. The credit must be used up chronologically, so *inter vivos* transfers will command the first use of the credit, and whatever has not been used before death will remain available to permit tax-free transfers after death as well.

a taxpayer exceeds the credit, transfers made during her lifetime will be subject to gift tax, currently imposed at a rate of 40% on all transfers over the \$5.25 million exemption equivalent credit.<sup>199</sup> While the estate and gift tax are currently unified, that has not always been the case. Between 1916 and 1932, the United States had an estate tax, but no gift tax.<sup>200</sup> This meant that, during that era, transfers made during the transferor's lifetime would escape taxation, while assets held until death and then transferred post-death would be subject to the estate tax. This led, unsurprisingly, to an increase in lifetime transfers as individuals sought to escape the transfer tax regime.<sup>201</sup> As a result, in 1932, Congress enacted the gift tax as a backstop to the estate tax, ensuring that transfers would be subject to the tax regardless of timing. However, the gift and estate taxes were not unified until 1976.<sup>202</sup> At that point the two tax regimes were partially unified, but the taxes were not fully unified until 2010, meaning that for almost seventy years the rates and exemption levels varied between the two credits.<sup>203</sup>

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<sup>199</sup> §§2501, 2502, 2503, 2505.

<sup>200</sup> The estate tax was enacted in 1916. The first gift tax was enacted in 1924, but repealed in 1926. The modern gift tax was enacted in 1932, and the United States has had both gift and estate taxes for all years since then, with the exception of the one year repeal of the estate tax in 2010. Darien B. Jacobson, Brian G. Raub, and Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, available at: <http://www.irs.gov/pub/irs-soi/ninetyestate.pdf>.

<sup>201</sup> *Id.*

<sup>202</sup> Before 1976, “it cost substantially more to leave property at death than to give it away during life,” due to the lower tax rate applied to gifts. *Id.* citing BORIS I. BITTKER AND ELIAS CLARK, *FEDERAL ESTATE AND GIFT TAXATION*, Boston: Little, Brown, and Co. (1990) at 20.

<sup>203</sup> *Id.*

I have demonstrated that the libertarian moral view of property rights is consistent with a 100% estate tax.<sup>204</sup> But does this necessarily entail a gift tax as well? Because of the libertarian view of the absolute moral claim of private property rights (of the living), the Nozickian views a gift tax as an immoral violation of the rights of the property holder. On the libertarian view, a property holder must be able to transfer her property as she wishes, with no limits on that transfer imposed by third parties. The imposition of a tax on the transfer, as occurs when the government taxes a gift, is a fetter to transfer imposed by the government.<sup>205</sup> This makes the gift tax impermissible, on the libertarian model.

If, then, a society opted to impose an estate tax on assets that had been held by its citizens at their death, would the tax become meaningless, because all citizens would transfer their assets during their lives? I think there is at least some chance that the answer to that question is no. The estate and gift taxes have not always been unified, and, even in years when they were not fully integrated, the estate tax did take in revenue.<sup>206</sup> Further, individuals often have reasons to hold on to their assets, not wanting to spend their wealth down to nothing before they die. There are a variety of reasons for this (wanting children and other relatives to remain dependent, wanting the safety net

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<sup>204</sup> *Supra* Part VI.

<sup>205</sup> Certain Left Libertarians would view a gift tax as morally permissible, as long as it is imposed on the recipient of the gift, because it does not violate the property rights of an individual with a right that arises because of labor. For more on this argument, *see supra* note 98.

<sup>206</sup> *Supra* note 1.

provided by accumulated wealth, not trusting that others will spend the money wisely) that would likely continue to exist, even in the face of a robust estate tax.

Regardless of the logistical concerns of enacting an estate tax without a backstop gift tax, arguing for the moral legitimacy of a gift tax on libertarian grounds in the way I have done for the estate tax is unconvincing. The robust libertarian view of personal property rights makes the gift tax immoral. While it might make an estate tax easier to enforce, a libertarian would argue that instituting a gift tax would violate the property rights of potential taxpayers. Therefore, the estate tax is consistent with libertarian views, but the gift tax is not.

## **VIII. CONCLUSIONS**

In this chapter I have demonstrated that, contrary to much popular political rhetoric, the libertarian position on property rights (often viewed as the strongest argument for property rights) is consistent with a robust estate tax, reaching even 100%. Because the death of the individual property owner ends the moral ownership right of that individual, the estate tax is not “theft,” as libertarians have often called all taxation. Instead, in the absence of any moral claims over the property, society is in the unique position of being able to design a post-death property regime that reflects the needs and wants of that society. This may mean that society decides to enact a 100% estate tax, claiming all assets left by individuals upon their death. This seems unlikely, but the point

of this chapter is to demonstrate that such a plan would not violate the moral claims of either the deceased or any of that individual's potential heirs.

This chapter provides a way to start thinking about the estate tax that allows us lawmakers to consider the variety of important tax policy considerations the tax could address. Rather than thinking of the estate tax as a violation of the moral claims of any individual, the estate tax can be used as a tool to achieve desired social ends. Society can move forward with its deliberations on the tax without fear that it is trampling on the rights of any of its citizens. Indeed, on the libertarian view, the estate tax is in a unique position, allowing the government to collect revenue without the risk of taking from those who do not consent to the tax. Even though Nozick himself failed to recognize it, the estate tax should be held up as the model of a libertarian tax.



## CHAPTER 3 - UNSEATING PRIVILEGE: RAWLS, EQUALITY OF OPPORTUNITY, AND WEALTH TRANSFER TAXATION

### I. INTRODUCTION

The modern estate tax in the United States dates from 1916<sup>207</sup>, but the recent history of the tax makes clear that it is in decline.<sup>208</sup> While historically the tax collected as much

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<sup>207</sup> The estate tax (a tax on transfers made at the death of the donor) was first enacted in the United States in 1916. The first estate tax was enacted with no accompanying gift tax, meaning that the tax could easily be avoided by having the donor transfer the majority of her assets tax-free during her lifetime, rather than waiting until death to pass on her wealth. Congress realized the absence of a gift tax was eviscerating the estate tax. As a result, the first gift tax (a tax on transfers made during the donor's lifetime) was enacted in 1924, but repealed in 1926. The modern gift tax was enacted in 1932, and the United States has had both gift and estate taxes for all years since then, with the exception of the one year repeal of the estate tax in 2010. For more on the history of wealth transfer taxes in the United States, see Darien B. Jacobson, Brian G. Raub, and Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, available at: <http://www.irs.gov/pub/irs-soi/ninetyestate.pdf>.

<sup>208</sup> Before the passing of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the Code provided a lifetime credit against tax of \$675,000. §2010. Any transfers made, whether *inter vivos* or after death, that exceeded the credit amount were taxed at 55%. §2001. EGTRRA slowly increased the lifetime credit amount and simultaneously lowered the rate, culminating in a one year repeal of the estate tax in 2010. See Congressional Budget Office, "Economic and Budget Issue Brief: Estate and Gift Taxes, available at: [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update\\_One-Col.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf). The peculiarities of EGTRRA resulted in a complete sunset of the law on December 31, 2010. Congress and President Obama signed a two year extension of the EGTRRA provisions, including a reinstatement of the estate tax with a \$5 million lifetime credit (indexed for inflation) and a 35% rate on amounts transferred above the credit amount. That extension expired on December 31, 2012, at which point the estate and gift tax credit and rate were scheduled to revert to 2001 levels. *Id.* The Congressional Budget Office estimated that extending the EGTRRA estate and gift tax provisions that lowered the transfer tax rate and increased the lifetime credit amount would have cost approximately \$402 billion over the period of 2010 to 2019, as compared with the revenue that would have been raised if EGTRRA had been allowed to expire. Congressional Budget Office, "Budget Options, Volume 2," p. 240, available at: <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/102xx/doc10294/08-06-budgetoptions.pdf>; Congressional Budget Office, "An Update to the Budget and Economic Outlook: Fiscal Years

as 10 percent of total tax revenues, that percentage has decreased dramatically in recent years, and now the wealth transfer taxes (including the estate tax, the gift tax, and the generation-skipping transfer tax) account for less than one percent of total tax revenues.<sup>209</sup> Observing this shift in the importance of the estate tax, one might be led to believe that there is a reason for the change. That is, one might think that the values embodied by the estate tax are not values that are held by Americans in contemporary society. Perhaps this change in the role of the wealth transfer taxes reflects a concurrent change in Americans' beliefs about the importance or impact of concentrated, inherited wealth in the modern day United States. I argue in this chapter that is not, in fact true. In this chapter I examine the view that a just society is one in which all citizens are given equal opportunity to achieve success. In particular, this chapter explores the form of equality of opportunity endorsed by John Rawls. Rawls endorsed the principle of justice

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2012 to 2022,” p. 64, *available at*:

[http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update\\_One-Col.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf). Leaving the 2009 rates and exemption levels in place would have raised a total of \$420 billion (or 1.2% of total revenues) from 2010 to 2019. Congressional Budget Office, “Economic and Budget Issue Brief: Estate and Gift Taxes, p. 5, *available at*:

[http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update\\_One-Col.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf). Instead of these options, Congress and the President reached an agreement to avoid going over the so-called “fiscal cliff.” The agreement was reached in the final hours of 2012, and the bill was signed into law on January 2, 2013. The law sets the estate tax lifetime exemption-equivalent credit at \$5 million, adjusted annually for inflation (which brings it to \$5.25 million in 2013; *see* §2010) and sets the tax rate at a flat 40% for amounts in excess of that (*see* §2001). The new tax law does not have a sunset date, and thus will not have to be extended by another Congressional vote.

<sup>209</sup> *See* Jacobson, Raub, and Johnson *supra* note 1.

as fairness, primarily based on the concept of luck egalitarianism.<sup>210</sup> While it may not come as a surprise that Rawls' position is consistent with an estate tax, I argue in this chapter that the wealth transfer taxes are, in fact, especially well-suited to achieve equality of opportunity goals. Indeed, without a wealth transfer tax system in place, even a robust income tax would be unable to address the fundamental inequality of opportunity present in the contemporary United States.

Equality of opportunity is at the heart of American political thought. At least in part, the United States was founded as a rejection of the European traditions of aristocracy and inherited privilege.<sup>211</sup> However, contemporary American society is more unequal than ever before.<sup>212</sup> Equality of opportunity does not necessarily require actual social economic equality – this is what distinguishes equality of opportunity from egalitarianism.<sup>213</sup> However, when that inequality results in an inequality in the opportunities being made available to future generations, then equal opportunity theorists should object. Perhaps even more noteworthy than the marked differences in wealth

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<sup>210</sup> For a detailed exploration of Rawls' theory, *see infra* Part II.

<sup>211</sup> Much has been written about the fundamental reasons for the American Declaration of Independence and the American Revolutionary war. For one argument that the Founding Fathers were motivated by the goal of reducing inequality of opportunity *see* Gordon Wood, *THE RADICALISM OF THE AMERICAN REVOLUTION*.

<sup>212</sup> A widely seen video has been circulating on the Internet, demonstrating the growing divide between what Americans think is a fair distribution of wealth, what they think the current distribution of wealth looks like, and the *actual* distribution of wealth in America today. The differences are stark. *See* "Wealth Inequality in America" *available at*: <http://visual.ly/wealth-inequality-america>.

<sup>213</sup> For more on this distinction *see infra* Part II.

between the best and worst off in contemporary American society, is the information we have about social mobility in the modern United States.<sup>214</sup> The presence of social and economic inequality in the United States does, without question, result in unequal opportunities being made available to members of society, and this is a violation of the equality of opportunity principle. As I will demonstrate in this chapter, great social and economic inequality, such as that seen currently in the United States, limits equality of opportunity, both as a theoretical matter, consistent with Rawls' arguments, but also as an empirical matter, as can be seen in studies of social and economic mobility in the United States.<sup>215</sup>

Unlike the income tax<sup>216</sup>, or the less common, but occasionally proposed wealth tax<sup>217</sup>, wealth transfer taxes are especially well-suited to achieve equality of opportunity

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<sup>214</sup> For evidence on social and economic mobility within the United States see Daniel Aaronson and Bhashkar Mazumder, *Intergenerational Economic Mobility in the U.S., 1940 to 2000*, Federal Reserve Bank of Chicago Working Paper 2005-12 (demonstrating that social and economic mobility in the United States has decreased since 1980, after rising sharply between 1940 and 1980); Sommarat Chantarat and Christopher B. Barrett, *Social Network Capital, Economic Mobility, and Poverty Traps*, J. OF ECONOMIC INEQUALITY (2008) (arguing that social network capital contributes greatly to the amount of social and economic mobility available to individuals).

<sup>215</sup> *Id.*

<sup>216</sup> The United States personal income tax is imposed by the Code in §1, and is imposed on the basis of marital and household status in graduated rates that increase by income bracket to a maximum, in 2013, of 39.6%. In addition to the personal income tax, §11 of the Code imposes a tax on corporations, with a maximum rate, in 2013, of 35%.

<sup>217</sup> There is no wealth tax currently imposed by the United States federal government. For a discussion of the possibility of imposing a wealth tax, see, e.g. David J. Shakow, Reed Shuldiner, *A Comprehensive Wealth Tax*, 53 TAX. L. REV. 499 (2000); Beverly Moran, *Wealth Redistribution and the Income Tax* 35 HOWARD L. J. 319 (2010) (discussing the possibility of a wealth tax, and specifically exploring the use of a wealth tax as a means of funding reparations).

goals. Because wealth transfers typically occur between family members, they are at the very heart of the advantages that stem from being born into a wealthy family. Taxing these transfers with the goal of reducing the amount transferred and possibly discouraging such transfers altogether increases the likelihood that members of modern American society will experience true equality of opportunity. In addition, if the funds raised through the taxation of wealth transfers are then used to fund expenditure programs meant to benefit the least well-off, this system will go even further towards attaining the equality of opportunity goal.<sup>218</sup>

Just like the previous chapter on libertarianism, this chapter is meant neither as an endorsement nor a refutation of the equality of opportunity position, or luck egalitarianism, or Rawlsianism itself. Because of the general consistency of public beliefs with Rawlsian arguments (whether or not most people are aware of this consistency), tax scholars should take Rawls seriously in contemplating good tax policy. In this chapter I take seriously the Rawlsian position and explore whether and to what extent wealth transfer taxation can help to achieve the goals of that theory. I further

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India currently imposes a wealth tax on its citizens. The Indian wealth tax statute is *available at*: [http://law.incometaxindia.gov.in/DIT/other-income-tax-acts.aspx?page=ODTA&TabId=tab\\_WTA](http://law.incometaxindia.gov.in/DIT/other-income-tax-acts.aspx?page=ODTA&TabId=tab_WTA).

<sup>218</sup> In her article “Equal Opportunity and Inheritance Taxation,” Anne Alstott argues that, in addition to wealth transfer taxation, the federal government should enact a social inheritance program that would ensure all members of society access to a certain amount of money, regardless of their socio-economic status. This is one form of expenditure program aimed at helping those whose social positions reduce their opportunities from birth. I discuss this proposal *infra* at Part III. Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 Harv. L. Rev. 472 (2007).

explore what forms of wealth transfer taxation are best suited to achieve Rawls' aims. The goal of the chapter is both to demonstrate the way in which some form of wealth transfer tax plays a critical role in Rawls' overall theory, and also to make clear how such a tax would help to achieve the egalitarian goals of that theory.<sup>219</sup>

## II. RAWLS AND THE ESTATE TAX

Commentators generally agree that Rawlsian liberalism is compatible with heavy redistribution.<sup>220</sup> Below I discuss the elements of Rawls' writings (the original position, the veil of ignorance) that most clearly contribute to the view that Rawlsian equality of opportunity requires redistributive tax policy.<sup>221</sup> However, much of the work using Rawls to analyze or justify tax policy has focused on the income tax.<sup>222</sup> While this work is incredibly useful in making arguments about the fundamental nature of philosophical

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<sup>219</sup> Note, these two points are not the same. Rawls is not an egalitarian as such, although he does believe that societies that satisfy his criteria for justice are much more likely than unjust societies to be egalitarian. For true egalitarian arguments see G.A. Cohen, *SELF-OWNERSHIP, FREEDOM, AND EQUALITY* (Cambridge University Press, 1995); G.A. Cohen, *IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH?* (Harvard University Press, 2000); Karl Marx, *CAPITAL* (Translation, Penguin, 1976).

<sup>220</sup> Most, if not all, tax law articles that make reference to Rawls do so in support of the proposition that Rawls endorses a redistributive liberal position. See, e.g., Alstott, *supra* note 13; Eric Rakowski, *Taxing Wealth Liberally* 51 *TAX L. REV.* 419 (1996); Charles R. T. O'Kelley, *Rawls, Justice, and the Income Tax*, 16 *GA. L. REV.* 1 (1981); Kerry Ryan, *Human Capital and Transfer Taxation*, 62 *OKLAHOMA L. REV.* 223 (2010).

<sup>221</sup> See *infra* Part II.

<sup>222</sup> See, e.g. Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 *CHAP L. REV.* 157 (1999); Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*. 72 *FORDHAM L. REV.* 1991 (2004). O'Kelley, *supra* note 30. Notable exceptions include Anne Alstott, *supra* note 13, and Kerry Ryan, *supra* note 30.

arguments in justifying tax policy, I argue in this chapter that the income tax alone is not capable of satisfying the goals of a Rawlsian equality of opportunity.<sup>223</sup> Because of the incredible opportunities afforded to recipients of transferred wealth, the estate tax is the appropriate tool to use in order to achieve true equality of opportunity.<sup>224</sup>

### **A. Rawlsian Equality of Opportunity**

John Rawls' central work of political philosophy, *Theory of Justice*, published in 1971, was seen in many ways to be changing the conversation that had been happening in that field for thousands of years.<sup>225</sup> An intellectual descendant of Immanuel Kant, among others, one of Rawls' central arguments was to the principle that, in contrast to the arguments of utilitarianism (one of the dominant political philosophical positions of the 20<sup>th</sup> century), there are central human liberties that cannot be violated in a just society,

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<sup>223</sup> Sugin argues that "...[Rawls'] analysis of philosophical principles does not require commitment to any particular tax system at all. Numerous tax systems could conceivably satisfy Rawls's principles of justice." Sugin, *supra* note 32 at 1998. While this may be true with regard to the particular mechanics of the tax system imposed, I argue in this chapter that some kind of wealth transfer taxation is, in fact, required by Rawlsian principles of equality of opportunity.

<sup>224</sup> In her article *Equal Opportunity and Inheritance Taxation*, Anne Alstott notes the way in which wealth transfer taxes are especially well-suited to achieve equality of opportunity goals more broadly. "Equal opportunity...is widely understood to be the bedrock principle for wealth transfer taxation..." Alstott *supra* note 13 at 542.

<sup>225</sup> "In the 1950s and 1960s political philosophy was declared to be dead, or at least moribund, and it was claimed that creatively constructing a valuational frame of reference had been abandoned...Political philosophy, which is after all a field that by definition is concerned with normative questions, came in academic circles to be considered an 'unscientific activity,' and it was pushed more and more into the background...It is in this context that 'at the right moment' *A Theory of Justice* was published. While acknowledging that it is 'scientifically' impossible to prove the 'correctness' of a normative opinion, this theory provided the possibility of reasoning on normative issues in an intersubjective manner." Percy B. Lehning, JOHN RAWLS: AN INTRODUCTION (Cambridge University Press, 2009) at 12-14.

regardless of the overall good of society that might be attained by such a violation.<sup>226</sup>

The extension of Rawls' thought in the form of so-called "luck egalitarianism" holds that equality of opportunity within society must account not only for economic inequalities but also for the many individual characteristics (beauty, intelligence, family connections) that make up opportunities in contemporary society.<sup>227</sup> Rawls' primary concern was to explain how a society could be understood to be just and how its citizens could be seen to be equal.<sup>228</sup> In order to explain the way that the wealth transfer taxes can contribute to the version of equality that Rawls sees as best, I will first lay out the fundamentals of

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<sup>226</sup> "The basic shortcoming of utilitarianism – in whatever form – is that basic rights of individuals can be sacrificed for a collective societal goal such as maximizing social welfare. It allows an unacceptable trade-off among persons: utilitarianism formulates a principle which may require lesser life prospects for some, simply for the sake of a greater sum of advantages enjoyed by others. Utilitarianism does not recognize that everyone has equal moral worth (which, as we will see, for Rawls does not entail that distributive shares have to be equal), and therefore recognizes neither the way persons are equal to each other, nor the way they differ from each other." *Id.* at 17-18.

<sup>227</sup> "Freedom of fair choice, fair equality of opportunity, and relative priority for the position of the least advantaged, are not only core elements of a (political) conception of justice, they are also characteristics of modern welfare states. Pointing to the importance of freedom of choice means that, in actual social economic policies in welfare states, more than has been the case in the past, a distinction is being made between the positions that people are in, and for which they themselves bear responsibility, and the positions that they are in for which they are not to blame, positions that are a consequence of the 'Rawlsian' 'contingencies of social life,' so to speak. Freedom of choice, in this line of reasoning, goes together with stressing personal responsibility, provided that conditions are fulfilled such that people can actually take responsibility for their choices." *Id.* at 220-221.

<sup>228</sup> "One can try to deal with this question [of freedom] by viewing political society in a certain way, namely, as a fair system of cooperation over time from one generation to the next, where those engaged in cooperation are viewed as free and equal citizens and normal cooperating members of society over a complete life. We then try to formulate principles of political justice such that if the basic structure of society – the main political and social institutions and the way they fit together as one scheme of cooperation – satisfies those principles, then we can say without pretense and fakery that citizens are indeed free and equal." JOHN RAWLS, JUSTICE AS FAIRNESS at 4.



Rawls' political philosophy. This Part will explain the veil of ignorance, the original position, and the two principles of justice (including the famous difference principle), three of the central elements of Rawls' political philosophy, and the central components of the role the wealth transfer taxes can play in ensuring a just society under Rawls' theory.

Importantly, Rawls endorses an equality of opportunity position, *not* an equality position. That is, Rawls' focus is on the equality of members of society at the outset, rather than on whether or not there is an equal distribution of assets within society at any given moment.<sup>229</sup> Ultimately a lot hangs on this distinction. An egalitarian might require a regular and on-going redistribution of wealth to ensure that goods are distributed equally among all, but such redistribution would not necessarily be required on an equality of opportunity theory. If the distribution of assets (both economic and non-economic) were sufficiently equal *ex ante* to ensure that all members of society were afforded an equal opportunity to achieve success, then later redistribution would not be required. At that point, any uneven distribution within society would arguably be attributable to differences in effort. That would not, on an equality of opportunity theory, require alteration, since the individual members of society all began from the same position. There is much to be said on what it means for assets to be distributed equally *ex*

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<sup>229</sup> As Linda Sugin writes, "the benefits from individual effort appropriately produce inequalities in income and wealth, and should not require adjustment under the difference principle." Sugin, *supra* note 32 at 2004.

*ante*. In particular, one central question faced by equal opportunity theorists is whether or not talents and tastes should be considered assets, whose original distribution must be accounted for.<sup>230</sup> One could go even further, and argue that the ability to work hard is itself an arbitrary characteristic, whose presence should qualify as an asset from the perspective of equality of opportunity. However, in all of this, the central argument remains that material distributions must be evaluated in the context of their ability to serve liberty and justice. That is, the optimal economic distribution *constitutes* justice.

The argument for equality of opportunity generally comes from the principle that all individual members of society are equally valuable. If one believes that each person has equal worth, then each person's goals and choices should be valued equally as well. However, the equal opportunity argument does not claim that, throughout an individual's life, her choices should be rewarded equally, regardless of how the market values that choice. Rather, the equal worth of all individuals is reflected by the assurance of equal opportunities and the freedom to engage in those opportunities for all individuals from the beginning. However, this freedom cannot be merely a formal freedom, meaning that an individual will not be restrained from acting in accordance with her wishes. That kind of negative freedom does not ensure any true opportunity, if the individual in question has significantly fewer material goods than other individuals. Instead, material resources

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<sup>230</sup> See, e.g. Alstott, *supra* note 13.

must be made available to all individuals in approximately equal amounts before true equality of opportunity can be said to have been attained.<sup>231</sup>

## **B. The Veil of Ignorance and the Original Position**

In *Theory of Justice*, Rawls first articulated his famous theory of the original position and the veil of ignorance.<sup>232</sup> He then clarified and extended his view in *Justice as Fairness*.<sup>233</sup> A central concern with any work in political philosophy, Rawls contends, is that one's views of justice will necessarily be influenced by one's own actual place in the world.<sup>234</sup> In response to this, Rawls proposes that political philosophy and evaluations of justice should be done from behind a veil of ignorance.<sup>235</sup> That is, the justice of any particular distribution of wealth and other beneficial qualities should be evaluated before one knows where one will fall within that society. In that way, even the worst off

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<sup>231</sup> See PHILLIPPE VAN PARIJS, *REAL FREEDOM FOR ALL* (1995); BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); BRUCE ACKERMAN AND ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999).

<sup>232</sup> Rawls describes the original position as follows: "First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this, I assume that the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong." Rawls, *A THEORY OF JUSTICE*, at 137.

<sup>233</sup> Rawls, *JUSTICE AS FAIRNESS* at 15.

<sup>234</sup> "The difficulty is this: we must specify a point of view from which a fair agreement between free and equal persons can be reached; but this point of view must be removed from and not distorted by the particular features and circumstances of the existing basic structure." *Id.* at 15.

<sup>235</sup> *Supra* note 42 and accompanying text.

member of society will have a position that will have been endorsed as acceptable by all.<sup>236</sup> Rawls views this hypothetical ignorance as critically important in attaining a truly just society, as various inequalities that result from historical accidents should not be allowed to influence the definition of justice.<sup>237</sup> This is central to Rawls' particular view of equality of opportunity, since it is not only economic particularities that are hidden behind the veil of ignorance, but also, among other things, the particulars of an individual's race, sex, geographical location, and level of education. As a result, insights about justice can be made from the point of view of a truly blank slate, free from the prejudices of any specific individual situation.

The point of view of the individual who is hidden behind the veil of ignorance is what Rawls calls the original position. It is from this position that we are best poised to determine what true justice looks like. Rawls argues that without the prejudicial influences of particular situations, reasoned argument can be used to arrive at the social structure that most closely satisfies the requirements of justice. Rawls moves from the

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<sup>236</sup> One might argue that it is impossible to fully engage in this thought experiment, since one cannot truly shed one's own identity in evaluating the justice of particular distributions. Rawls himself acknowledges the difficulty of appropriately applying the original position when he writes "Some may object that the exclusion of nearly all particular information makes it difficult to grasp what is meant by the original position." *THEORY OF JUSTICE* at 119. However, Rawls' response to this concern is that the goal of the original position is limited to determining what principles should apply universally. "Since the differences among the parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments. Therefore, we can view the agreement in the original position from the standpoint of one person selected at random." *THEORY OF JUSTICE* at 120.

<sup>237</sup> "Contingent historical advantages and accidental influences from the past should not affect an agreement on principles that are to regulate the basic structure from the present into the future." *Justice as Fairness* at 16.

original position to establish what he views as the social structure that satisfies the requirements of justice. It is from this argument that the title of his last work, *Justice as Fairness*, comes.<sup>238</sup> In the original position, all individuals are equal, and they develop fair rules regardless of their particular subjectivity. That is to say, the rules developed from the original position are those one would choose, regardless of whatever else it is that one would want in the world.

### **C. The Two Principles of Justice**

The rationale Rawls uses for applying the veil of ignorance to deliberations about the just distribution of goods in society is that individuals in the original position (that is, the position of individuals behind the veil of ignorance) are uniquely qualified to evaluate fairness within society.<sup>239</sup> As a result, the position of justice that deliberation behind the veil of ignorance arrives at is necessarily a fair position. Rawls argues that deliberation regarding fairness in society that occurs behind the veil of ignorance results in the adoption of two principles of justice, which are the articulation of freedom.<sup>240</sup> Rawls articulates the two principles as follows:

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<sup>238</sup> “[The] position is set up as a situation that is fair to the parties as free and equal, and as properly informed and rational. Thus any agreement made by the parties as citizens’ representatives is fair. ... Hence the name: justice as fairness.” *Justice as Fairness* at 16.

<sup>239</sup> For more on this point, see *supra* note 42 and accompanying text.

<sup>240</sup> *Id.*

- (a) Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all<sup>241</sup>; and
- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).<sup>242</sup>

These two principles are at the core of Rawls theory of what social structure constitutes a just system. The first of these two principles (point (a) above, the “first principle of justice”), deals with the required liberties an individual must have in society in order for that society to be properly considered just.<sup>243</sup> Rawls endorses a Kantian view

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<sup>241</sup> The basic liberties that Rawls endorses are “freedom of thought and liberty of conscience; political liberties (for example, the right to vote and participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and psychological) of the person; and finally, the rights and liberties covered by the rule of law.” Rawls, *JUSTICE AS FAIRNESS* at 42.

<sup>242</sup> *JUSTICE AS FAIRNESS* at 42-43.

<sup>243</sup> Sugin argues that this first principle of justice has significant negative implications for the design of any tax structure held to be just on Rawlsian grounds. “The first principle may impose significant limitations on systems of taxation because it demands that every individual have equal basic liberties. Based on this limitation, justice as fairness would preclude an endowment tax, which taxes people according to their abilities to earn, regardless of the actual choices they make to earn. *Protection of individual autonomy, not economic justice, drives the limitation.* In addition, the first principle precludes any tax system that allows economic inequalities to interfere with the integrity of the political system. Thus, where concentrations of wealth produce concentrations of political power, the first principle would require the tax system to break up

of liberty.<sup>244</sup> At the core of his first principle is a notion of equal liberty, where there are no special liberties available to people on the basis of race, gender, economic or social status, or any other arbitrary criteria.<sup>245</sup> Instead, under Rawls' theory, essential liberties must be available to all members of society equally, regardless of their specific situations.<sup>246</sup> While this is a critically important issue, and much has been written about it<sup>247</sup>, the first principle of justice is not as essential to an analysis of the tax system as the second principle of justice (point (b) in the excerpt above).<sup>248</sup> Therefore, I will focus the

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politically threatening concentrations of wealth so that equal liberties of citizenship are possible.” Sugin *supra* note 32 at 2005 (emphasis added).

<sup>244</sup> His Kantian view differs from other views like those of Locke and Mill in that it is ultimately a view of positive liberty, much closer to Hegel's view of *Ethical Life* than to Mill's harm principle. See, for instance, Berlin, Hegel, PHILOSOPHY OF RIGHT, Mill, ON LIBERTY. Rawls elaborates his positive view of liberty in the third part of THEORY OF JUSTICE. For Rawls' Kantian heritage see Rawls THEORY OF JUSTICE §40 and “Themes from Kant's Moral Philosophy”.

<sup>245</sup> “It is assumed, then, that the parties do not know certain kinds of particular facts. First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like.” Rawls, THEORY OF JUSTICE at 118.

<sup>246</sup> From the original position behind the veil of ignorance, priority is given to basic liberty. This priority is independent of any particular characteristics since, again, behind the veil of ignorance no individual knows her particular characteristics. As Rawls writes, “The persons in the original position are moved by a certain hierarchy of interests. They must first secure their highest-order interest and fundamental aims (only the general form of which is known to them), and this fact is reflected in the precedence they give to liberty; the acquisition of means that enable them to advance their other desires and ends has a subordinate place.” Rawls, THEORY OF JUSTICE at 476.

<sup>247</sup> See, e.g. Michael J. Sandel, LIBERALISM AND THE LIMITS OF JUSTICE (1998); Amartya Sen, THE IDEA OF JUSTICE (2009); Ronald Dworkin, *The Original Position*, in READING RAWLS (1975).

<sup>248</sup> Importantly, Rawls saw the first principle of justice as prohibiting an endowment tax, which could easily take the form of a wealth tax (although not all wealth taxes would necessarily be endowment taxes). In *Justice as Fairness*, Rawls writes, “[an endowment tax] would violate the priority of liberty. It would force the more able into those occupations in which earnings were

rest of this Section on the second principle of justice, the second part of which is known as the difference principle.

#### **D. The Difference Principle**

At the core of Rawls' equal opportunity theory of justice is the second part of the second principle of justice, known as the difference principle. Importantly, this principle does not forbid social and economic inequalities in a just society.<sup>249</sup> Rather, such inequalities are permitted, but only to the extent that the positions with which the inequalities are associated are open to all, and the inequalities are such that they improve the position of the least well-off.<sup>250</sup> This requirement is at the center of the distinction

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high enough for them to pay off the tax in the required period of time...our native endowments are ours and not society's: we cannot be subject to [an endowment tax] to equalize the advantages our endowments might confer. That would violate our basic liberties." Rawls *JUSTICE AS FAIRNESS* at 158.

<sup>249</sup> While it is true that Rawls' position tolerates inequalities, it does not tolerate massive inequalities, as he explicitly explains. "The objection is that since we are to maximize (subject to the usual constraints) the prospects of the least advantaged, it seems that the justice of large increases or decreases in the expectations of the more advantaged may depend upon small changes in the prospects of those worst off. To illustrate: the most extreme disparities in wealth and income are allowed provided that they are necessary to raise the expectations of the least fortunate in the slightest degree." *THEORY OF JUSTICE* at 136. Rawls' response to this objection is to refer back to the way in which the two principles of justice reinforce one another, which means that in a truly just society, massive disparities of wealth will not occur. "The possibilities which the objection envisages cannot arise in real cases; the feasible set is so restricted that they are excluded. The reason for this is that the two principles are tied together as one conception of justice which applies to the basic structure of society as a whole. The operation of the principles of equal liberty and fair equality of opportunity prevents these contingencies from occurring." *THEORY OF JUSTICE* at 136.

<sup>250</sup> Rawls illustrates the so-called maximin rule nicely when he writes "The two principles are those a person would choose for the design of a society in which his enemy is to assign him his place. The maximin rule tells us to rank alternatives by their worst possible outcomes; we are to



between an egalitarian philosophy (such as that endorsed by Karl Marx and G.A. Cohen, among others<sup>251</sup>) and a philosophy requiring equality of opportunity. Egalitarian theories generally would not view as just a system that permitted any social or economic inequalities.<sup>252</sup> By contrast, Rawls' theory understands that such inequalities may be present in a just society. However, if the inequalities are such that the positions that bring higher incomes and better rewards are only available to those who are born into certain families, or who look a certain way, or who live in certain places, then those inequalities would violate the first requirement of the second principle of justice (namely, the requirement that positions associated with inequalities be open to all).<sup>253</sup>

The second requirement of the second principle of justice (the difference principle), the requirement that inequalities be to the benefit of the least well-off, is the element that is often appealed to in order to justify progressive taxation and general theories of taxation that impose heavier taxation on economically better-off members of society.<sup>254</sup>

Under this theory the current levels of inequality in contemporary American society

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adopt the alternative the worst outcome of which is superior to the worst outcomes of the others.” THEORY OF JUSTICE *at* 133.

<sup>251</sup> Karl Marx, THE COMMUNIST MANIFESTO; G.A. Cohen, SELF-OWNERSHIP, FREEDOM, AND EQUALITY.

<sup>252</sup> *Id.* Marx and Cohen, as well as other egalitarians, are primarily concerned about equality of outcome, more than merely equality of opportunity. As a result, these theories tolerate heavy redistributive taxation throughout an individual's lifetime.

<sup>253</sup> “Positions are to be not only open in a formal sense, but all should have a fair chance to attain them...those with similar abilities and skills should have similar life chances. More specifically, assuming that there is a distribution of natural assets, those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system.” Rawls, THEORY OF JUSTICE *at* 63.

<sup>254</sup> See, e.g. Cohen and Marx, *supra* note 61 and accompanying text.

might be permissible, under the theory that large concentrations of wealth allow for high levels of tax, which create government revenues that can, in turn, be used for the benefit of the lowest-income members of society.<sup>255</sup> However, the second requirement of this principle of justice is clearly not met in contemporary American society. Much contemporary wealth is passed down from generation to generation. Social mobility in the United States is surprisingly low, and individuals generally grow up to enter the same social and economic class in which their parents lived.<sup>256</sup> This fact about contemporary American society flies in the face of the second part of the second Rawlsian principle of justice.

The first part of the second principle of justice requires that the positions associated with social and economic inequalities be open to all members of society. This requirement of equal opportunity means that inherited wealth, which provides economic advantages to the children of wealthy parents, must be limited in a just society. Importantly, though, it is not only the inheritance of wealth that offers social and economic advantages to the children of wealthy parents. Even if a government imposed a confiscatory wealth transfer tax, so that no wealth could be passed down to future generations, parents would still have numerous ways to improve the lives of their

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<sup>255</sup> Note, I am not here making the argument that this is in fact the case in contemporary American society. Much empirical work would be needed to determine whether the least well-off are or are not better off under the system of inequality in place today. That is not the work of this chapter.

<sup>256</sup> See, e.g. Aaronson and Mazumder *supra* note 9.

children. Education, health care, clothing, vacations, even introductions to the rights social circles, are all benefits given to children by their parents, none of which would be affected by a confiscatory wealth transfer tax. Indeed, our current wealth transfer tax system exempt from transfer taxation amounts that are paid for the education or healthcare of another.<sup>257</sup> Properly following the second principle of justice, all of these benefits made available by parents to their children violate a just society.

### **III. WEALTH TRANSFER TAXES AND RAWLS' SECOND PRINCIPLE OF JUSTICE**

Wealth transfer taxes are not the only tool a government can use to try to ensure equality of opportunity. Indeed, in most societies, wealth transfer taxes have been a relatively small part of the tax system. Further, many argue that one cannot determine the justice of any particular governmental system without examining both the tax and transfer regimes of that government.<sup>258</sup> Government revenues are primarily generated through taxation.<sup>259</sup> That means that an analysis of the justice of any particular society must involve a consideration of both the tax system and the transfer systems or expenditure

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<sup>257</sup> §2503 of the Code exempts transfers made directly to the provider of health care or education services from gift tax. As a result, large amounts of wealth can be transferred for the benefit of another without the imposition of any tax. This exemption can apply to the payment of insurance premiums, tuition for university, high school, primary school, and even preschool. Courts have ruled that even the prepayment of tuition, as long as it is non-refundable, can be excluded under §2503. *See, e.g.,* TAM 199941013, PLR 200602002. For more on this issue, *see* Kerry A. Ryan *Human Capital and Transfer Taxation* 62 OKLAHOMA L. REV. 223 (2010).

<sup>258</sup> Louis Kaplow, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS* (2010).

<sup>259</sup> For example, in 2012 the revenue collected by the United States federal government was \$2,450,164,000,000. The tax system was responsible for collecting over 95% of that amount. From Office of Budget Management Historical Table of Government Revenue, separated by source, *available at* <http://www.whitehouse.gov/omb/budget/historicals>.

programs that are funded by the revenues raised through that tax system. A society that demonstrated the equality of opportunity required by Rawls must have robust expenditure programs in place in order to ensure that education, healthcare, housing, and more are made available to all members of that society. The revenues needed to provide these programs must be raised by taxation, and it has generally been accepted that wealth transfer taxation alone would be insufficient to generate that kind of revenue.<sup>260</sup> If that is true, then Rawlsian equality of opportunity will require not only a wealth transfer tax, but also an income tax.<sup>261</sup> However, an income tax alone, even one with high rates, would be insufficient to achieve Rawlsian equality of opportunity.<sup>262</sup> Income taxes do not address

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<sup>260</sup> This has primarily been true because the base of the wealth transfer tax has always been small (and has been shrinking dramatically in recent years). If the base was increased, by shrinking the exemption equivalent credit, and if the rate was increased beyond the current 40% level, then the wealth transfer tax system would generate significantly more revenue.

<sup>261</sup> Anne Alstott explains the concerns associated with using an income tax to fund the expenditure programs necessary to achieve equality of opportunity. Because an income tax can violate the principles of equality of opportunity, tending instead towards egalitarianism, Alstott sees risks in funding her proposed public inheritance (one form of an expenditure program meant to equalize opportunity) with income tax revenues. She writes, “Whether this solution [a 100% inheritance tax] is the right one depends on the justice and injustice of the alternative revenue sources. Lowering inheritance tax rates below 100% means tolerating private inheritance, which is unjust. But raising other taxes – say, income taxes – may also work an injustice. For example, the income tax tends to penalize market work relative to leisure and nonmarket work (as does a consumption tax). An income tax also penalizes savers relative to spenders (which a consumption tax arguably does not). Thus, raising income taxes may require weighing an affront to equal opportunity (unequal inheritance) against an affront to neutrality (penalizing certain ways of life).” Alstott, *supra* note 13 at 495.

<sup>262</sup> The current U.S. federal income tax does not include gifts and inheritances in income. §102. Because of that, even a robust income tax would not tax amounts received in gratuitous transfers. One possible solution to this part of the problem would be to include gratuitously transferred amounts in income. Indeed, this has been proposed by several commentators. See Joseph Dodge, *Comparing a Reformed Estate Tax with an Accessions Tax and an Income-Inclusion System, and*

the privileged position of heirs, which is why wealth transfer taxes are especially well suited for attaining equality of opportunity.

### **A. Inequality of Position**

Contemporary American society has significant economic inequality.<sup>263</sup> This in itself is not a violation of Rawls' theory of equal opportunity since, again, Rawls endorses equality of opportunity, rather than equality of position, or egalitarianism.<sup>264</sup> If the inequalities present in society had been arrived at only through differences in effort, then it is entirely possible that Rawls would accept the current distribution of wealth as just.<sup>265</sup> Because equality of opportunity theorists accept that, even with true equality of opportunity present, equality of condition does not necessarily result, Rawls need not critique current society as necessarily unjust. It is possible that, with the same original opportunities, different members of society end up in different positions with regard to social and economic status. Equality of opportunity does not necessarily view as unjust

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*Abandoning the Generation-Skipping Tax* 56 SMU L. REV. 551 (2003). However, even including these amounts in income would be insufficient to achieve equality of opportunity, since those who are born into positions of privilege would receive wealth merely as a result of their position, even if the amount of that transfer is reduced via the income tax. Treating earned and inherited amounts in the same way (rather than preferencing inherited amounts, as our current tax system does) will not resolve the problem Rawls sees.

<sup>263</sup> See, e.g. Aaronson and Mazumder *supra* note 9.

<sup>264</sup> For a discussion of equality of opportunity versus equality of outcome, see *supra* Part II.

<sup>265</sup> As discussed earlier, Rawls does not actually believe that a society following his two principles of justice would have great social and economic inequality. *Supra* note 59 and accompanying text.

the uneven distribution of talents or ability to exert effort.<sup>266</sup> If that uneven distribution of talents and effort results in additional opportunities being made available to the children of the talented, then that would violate the principles of Rawlsian equality of opportunity. It is not difficult to see that, if wealth is allowed to pass unchecked down to future generations, the inequality present in the original, equal opportunity state could grow exponentially. Consider the following example: Assume a society with true equality of opportunity, where no child is given any financial or social advantages at birth.<sup>267</sup> Michael and Nicholas are born into this society in the same year, and have exactly the same economic situation at birth. Through a series of events, because he works harder, is more intelligent, and is more cutthroat than Nicholas, Michael becomes significantly wealthier than Nicholas. By the time they are thirty, Michael has \$500,000 in assets, and Nicholas has only \$50,000 in assets. Michael has a son named Oliver and Nicholas has a son named Paul. Both Michael and Nicholas die in a car accident as soon as their sons are born. Assuming no prohibitions on inheritance, no wealth transfer tax, and no other heirs, Oliver inherits \$500,000, while Paul inherits only \$50,000. Even if everything else is equal in this society, and even if nothing has changed since Michael and Nicholas were children, I submit that Oliver and Paul will likely end up in very

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<sup>266</sup> However, proponents of equality of opportunity might actually view the uneven distribution of talents as unfair. See Part \_\_\_\_.

<sup>267</sup> Clearly such a state seems at least unlikely, if not impossible. However, a small commune with these characteristics might not be as impossible. History provides examples of many such communes, none of which has continued successfully. For further discussions of this issue, see Clifford F. Thies, *The Success of American Communes* 61 SOUTHERN ECONOMIC J. 186 (1999).

different places by the time they are adults. Whereas the difference between the positions of Michael and Nicholas was a result of the differences in their personal qualities (intelligence, effort, etc.), differences between Oliver and Paul will come, at least in part, from the very different economic situations from which they begin. Not only that, but it is very likely that the gap between Oliver and Paul will continue to grow. Oliver's large amount of wealth will permit him to engage in opportunities that just will not be available to Paul. Oliver will be able to afford an expensive education, better healthcare, memberships in influential clubs, and nicer housing. Further, Oliver can invest his wealth to increase his income even further. In this way, the mere presence of additional wealth at birth results in significant differences (and, at least potentially, exponentially growing differences) between these two members of what was, just one generation ago, a society with equality of opportunity for all of its members.

This is to say, it is not the mere existence of social or economic inequality that violates the Rawlsian requirements of justice. Even a society rife with inequality, like the contemporary United States, could satisfy Rawls' requirements, if inheritance is prohibited. But allowing wealthy individuals to transfer their wealth to the objects of their affection ensures that the wealth gap will continue to grow. In this way, significant wealth inequality in society makes it *more likely* that equal opportunity will not be available within that society. Additionally, the accumulation of large amounts of wealth in the hands of a small number of people also makes it significantly less likely that such a

society is an equal opportunity society. If an individual accumulates more wealth than she is able to spend in her lifetime, then that wealth will pass to her heirs upon her death. As wealth in the United States becomes more concentrated in the hands of fewer people, it becomes more likely that those people will transfer some of their wealth to others, rather than consuming all of their wealth during their lifetimes.<sup>268</sup>

## **B. A Rawlsian Wealth Transfer Tax**

So far this chapter has focused on the role that a wealth transfer tax can play in achieving the equality of opportunity goals endorsed by Rawls and others.<sup>269</sup> I will now turn to an exploration of what form of wealth transfer tax best suits those goals. Currently the United States imposes an estate and gift tax on wealth transfers.<sup>270</sup> These taxes are, as a matter of mechanics, imposed on the transferor.<sup>271</sup> The tax is imposed in the same way and at the same rate regardless of the recipient.<sup>272</sup> As a result, a donor can

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<sup>268</sup> The concentration of wealth in the United States has, in turn, led to further concentrations of wealth, thereby limiting social and economic mobility. For a further discussion of this issue, *see supra* note 9 and accompanying text.

<sup>269</sup> *Supra* Part II.

<sup>270</sup> §§2001, 2501.

<sup>271</sup> §§2002, 2502. The estate and gift taxes are excise taxes imposed on the transfer of wealth, but the tax itself is levied on the transferor – the estate in the cases of an inheritance, the donor in the case of a gift.

<sup>272</sup> The only exception to this is transfers made to the spouse of the transferor. There is an unlimited marital deduction in both the gift and estate taxes. §§ 2056, 2556. As a result, a donor (or decedent) can give (or bequeath) unlimited wealth to her spouse without having any tax imposed. This marital transfer, combined with the newly implemented portability of the lifetime credit, is at the heart of much estate planning. Any credit that goes unused in the hands of one



transfer large sums of money, indeed, the entirety of her wealth, to a single donee with the same tax consequence as if she had distributed it to several donees.<sup>273</sup> There is, of course, great debate about where to set the transfer tax rate, but unless the rate is set at 100%, the wealthiest members of society will still be able to transfer all of their wealth (minus the transfer tax that they owe) to one donee. As a result, concentrated wealth will remain in the hands of heirs. The tax system, as it stands now, creates no incentive for wealthy donors to diversify their gifts, since the amount of tax owed is the same whether the donor gives to several recipients or only one. Another transfer tax structure could do more to encourage the breaking up of large concentrations of wealth.

Rawls himself, in *Justice as Fairness*, endorsed an accessions tax.<sup>274</sup> An accessions tax, a version of an inheritance tax, imposes a tax on the recipient of the transfer. An

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spouse can now be used by the surviving spouse. §2010. As a result, for many couples the best strategy now is to leave all wealth at death to the surviving spouse, and also leaving the entirety of the \$5.25 million exemption equivalent credit to that spouse. That way the surviving spouse can both use what he needs during his lifetime, but still get the benefit of both spouses credit when he dies.

<sup>273</sup> There is one way that transfers to several recipients can reduce the amount of transfer tax owed by a donor. §2503 of the Code permits an annual transfer of \$14,000 per individual to occur tax-free. In fact, this Code section defines that first \$14,000 present-interest transfer as *not a gift at all*. There are limits, primarily the limit that the transfer must be of a present interest and not a future interest. However, a donor could conceivably transfer all of her wealth tax-free if she finds a sufficient number of donees to receive the \$14,000 per year. While this is an important exception, I do not consider this a real impact on the equality of opportunity provided by our current system, since most donors do not, in fact, transfer all of their wealth in increments of \$14,000 to millions of people.

<sup>274</sup> As Alstott notes, “the familiar – and correct – point is that equality of opportunity tends to support a lifetime tax on inheritance, that is, an accessions tax.” Alstott *supra* note 13 at 503, citing David G. Duff, *Taxing Inherited Wealth: A Philosophical Argument*, 6 CAN. J. L. & JURIS. 3 (1993), and Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX L. REV. 419 (1996). See

accessions tax incorporates a lifetime perspective, meaning in most accessions tax structures, an individual will have one lifetime exemption, above which all inheritances received will be taxed, either at graduated or flat rates.<sup>275</sup> While the federal government does not have an inheritance tax in place, several states in the U.S. do have such a system.<sup>276</sup> In addition to the imposition of the tax on the recipient of the transfer, inheritance taxes typically have a per donee exemption.<sup>277</sup> Because of this per donee

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*also* “Because equal opportunity must be renewed at every generation, an accessions tax may be preferable to an estate tax because it is sensitive to the concentrations of individual wealth going forward. If the allocations of resources that develop over time produce concentrations of wealth that prevent equal opportunities across generations, then taxation would be necessary to readjust those opportunities at every generation.” Sugin *supra* note 32 at 2009.

<sup>275</sup> “An estate tax collects tax at graduated rates based on lifetime bequests by individuals, while an inheritance tax collects tax at graduated rates based on inheritance by individuals. When an inheritance tax incorporates a lifetime perspective, it is termed an ‘accessions tax.’” Alstott *supra* note 13 at 502.

<sup>276</sup> Indiana (I.C. 6-4.1), Iowa (Iowa Code Ch. 450), Kentucky (KRS 140.010), Maryland (Maryland Code 7-202), Nebraska (Nebraska Statute 77-2018.04), New Jersey (N.J.S.A. 54:33-1 et seq.), and Pennsylvania (Pa. Code section 2106) each have a different set of criteria, rates, and exemption classes and amounts. However, in general, transfers to surviving spouses or children are either exempted from the tax or are subject to tax only after a large exemption amount, or at lower rates, or both.

<sup>277</sup> In the version that is currently in place in most of the states in the U.S., in addition to a per donee exemption, there is a larger exemption for those who are more closely related to the decedent. For instance, in Kentucky, Class A beneficiaries, including spouses and children are not taxed at all on their inheritances, while Class B beneficiaries, including nieces and nephews receive a \$1,000 exemption, are taxed at 4% on inheritances between \$1,000 and \$10,000, and are taxed at rates that graduate to 16% on amounts over \$200,000, and Class C beneficiaries, including those with no blood or legal relation to the decedent, receive a \$500 exemption from the inheritance tax, are taxed at 6% on inheritances between \$500 and \$10,000, and are taxed at rates that graduate to 16% on amounts over \$60,000. *See* K.R.S. §§ 140.080, 140.070, 140.060. This system actually flies in the face of equality of opportunity goals. Because additional exemptions and lower tax rates are given for transfers to those closest to the decedent, this system works to ensure that the wealth *remains* concentrated in the hands of that wealthy family. In this way, not all inheritance or accessions tax systems are necessarily best for the goal of equality of opportunity. For a further discussion of this issue, *see* Bird-Pollan, *supra* note 1.

exemption, an accessions tax encourages the diffusion of wealth by reducing the tax owed when wealth is distributed more widely, rather than being transferred all to one or two donees.<sup>278</sup> In this way, the tax system itself can be set up to encourage the dilution of concentrated wealth. However, merely imposing tax at a higher rate, or offering additional tax exemptions if the wealth is transferred to several recipients, cannot, on their own, *ensure* that concentrated wealth is dispersed, or that the children of wealthy parents will not receive additional opportunities as a result of their position. It is entirely conceivable that a wealthy decedent would decide to leave all of her wealth to her daughter, despite the fact that such a decision would increase the total amount of tax that would be paid on that wealth. Consider the following example. Assume an inheritance tax is in place that has a \$1 million per heir exemption, regardless of the relationship between the heir and the donor. Assume that, after amounts excluded by the exemption, an inheritance tax is assessed on the donee at the rate of 75%. Abigail has a \$101 million estate. She has many friends and relatives, all of whom would be thrilled to receive \$1 million transfer tax-free upon Abigail's death. However, Abigail has only one child, a daughter, Beatrice. Abigail is not especially opposed to taxation, and she would prefer to transfer all of the assets in her estate to her daughter, rather than distributing the assets in \$1 million pieces to 101 various friends and relatives, thereby avoiding taxation entirely.

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<sup>278</sup> "From an equal opportunity point of view, an estate of \$500,000 divided among ten heirs is less objectionable than the same estate left to one heir, but an estate tax treats the two scenarios the same." Alstott *supra* note 13 at 503.

If Abigail leaves everything to Beatrice, \$1 million of the inheritance will be exempt from tax, an Beatrice will owe \$75 million in tax on the remainder of the transfer. This leaves \$26 million to Beatrice (the \$1 million exempted amount and the \$25 million left over after the tax is imposed). In this instance, the inheritance tax, meant to encourage the breaking up of Abigail's \$101 million of concentrated wealth, did not truly attain that end. Despite the fact that more taxes were imposed on her wealth, Abigail's desire to transfer her wealth in as concentrated a form as possible to her daughter trumped her desire to pay less tax. If donors remain more motivated to keep their wealth within their family than they are motivated to pay less tax, then it will not matter what form the tax takes. Perhaps Abigail would leave a few million dollars tax free to some of her nieces or nephews – this may break up a bit of her wealth. However, since every additional dollar that Abigail gives to someone other than Beatrice reduces by 25 cents the amount that her daughter receives, if Abigail's primary concern is to provide for her daughter, she is likely to limit the amount she gives to other people, even though that will increase the total amount of tax incurred by the transfer.<sup>279</sup> For many donors, this seems likely to be true.

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<sup>279</sup> Because, in the proposed model, every dollar over \$1 million that Abigail transfers to Beatrice incurs a tax of 75 cents, leaving Beatrice with 25 cents of inherited wealth. Abigail could choose to transfer that entire dollar to a niece, which would be a tax-free transfer, assuming that person has not yet used up her \$1 million exemption. As a result, leaving an addition dollar to another heir would reduce Abigail's transfer to Beatrice by 25 cents.

Despite the fact that the inheritance tax system described above does not prevent the continued concentration of wealth in the example I give, there is a clear benefit to the transfer described. Because of the heavy tax rate, the government will have collected \$75 million in taxes on that transfer. With that new revenue, the government could create significant programs aimed at improving the situations of the least well-off members of society, thus increasing overall equality of opportunity in that society. Since this is the goal of this transfer tax system, at least for the purposes of this chapter, one might still call this overall result a success. Of course, the imposition of an estate tax at 75% would also raise significant amounts of revenue. However, a 75% inheritance tax seems more politically feasible than a 75% estate tax. Because the inheritance tax is, at least arguably, avoidable if the decedent distributes her wealth more widely, it seems possible that a heavy tax on amounts transferred above the exemption amount would be seen as more reasonable than a heavy tax on all amounts transferred above one total exemption amount, as in the current estate tax model.

Given that it is unlikely that the form of transfer tax imposed on wealth transfers will have a significant impact on the concentration or dilution of that wealth, it seems at least possible that the only truly effective strategy to prevent the continued transfer of concentrated wealth is the prevention of transferring wealth altogether. However, given the political unpopularity of all wealth transfer taxes in the contemporary United States, it

seems incredibly unlikely that a 100% confiscatory tax would garner any political support.

#### IV. WHAT ABOUT GIFTS?

Imposing an estate tax at a rate of 100% with no exemption would effectively prevent transfers of wealth at death. This prevention of inherited wealth would reduce the additional opportunities afforded to the children of wealthy parents, at least to some degree.<sup>280</sup> However, even a rate of 100% could not prevent transfers of wealth by gift, as demonstrated in the following example. Suppose Charlotte has \$100 million in assets, and wants to transfer the assets to her daughter Diana. Suppose further that there is no wealth transfer tax exemption, and the federal tax rate on all wealth transfers is 100%. Assuming Charlotte holds on to the assets until she dies, the tax will be assessed at a rate of 100% with no exemption, and the federal government will collect \$100 million from Charlotte's estate in the form of an estate tax. By contrast, if the transfer happens while Charlotte is still alive, then she can transfer \$50 million to Diana, and the assessed transfer tax at a rate of 100% will result in a gift tax of \$50 million paid to the federal government. In other words, a 100% estate tax is essentially a prohibition on transfers at death, but there is no way to prohibit *inter vivos* transfers through the use of a tax. Even

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<sup>280</sup> Even without the possibility of leaving wealth to children, wealthy parents could still provide significant advantages to their children in the form of education, good healthcare, and a powerful last name, among other things. For more discussion of this point, *see supra* note 67 and accompanying text.

if the gift tax is at 200%, Charlotte can make a transfer of \$33 million to Diana, which would incur a tax of \$66 million, which she could pay out of her existing assets. If Charlotte is willing to pay the tax, then a wealth transfer tax on a transfer she makes by gift cannot prohibit that transfer, it can only reduce the amount available to be transferred. While this reduction is clearly desirable, from an equality of opportunity perspective, large amounts of wealth could still be transferred by gift. There are U.S. citizens with tens of billions of dollars of wealth. Even a 200 or 300% gift tax would still allow these donors to transfer vast amounts to their loved ones. Of course, those transfers would generate a lot of tax revenue, and that revenue could be used to fund programs aimed at increasing the opportunities available to the least well off members of society. But despite the additional opportunities made available by this revenue, a gap in opportunity will remain if *inter vivos* wealth transfers occur.<sup>281</sup>

If the government permits the transfer of wealth by gift, then some of those transfers will, in fact, occur. No amount of taxation can prevent those transfers; the tax system can only make *inter vivos* transfers more expensive. It might be then, that in order to achieve true equality of opportunity in the United States, the government must impose a prohibition on these transfers, rather than merely attempting to tax them. As a matter of

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<sup>281</sup> In her article *Equal Opportunity and Inheritance Taxation*, Anne Alstott does not distinguish between *inter vivos* transfers and post-death transfers. She does not argue for a distinction between the two, claiming "...unless otherwise specified, the tax treatment of gratuitous transfers should be the same whether the transfer is *inter vivos* or at death." Alstott, *supra* note 13 at 501. In this respect, I disagree with Alstott, since the effect of an estate tax at 100% is radically different from the effect of a gift tax at 100%. That is the argument of this Part.

political viability, however, it seems extremely unlikely that the government would enact a prohibition on transfers by gift. If an outright prohibition on transfers is impossible, the next best option, from the perspective of equality of opportunity, is likely a high tax rate on those transfers. At a minimum, that high rate would reduce the amount of wealth available to be transferred. In addition, the tax could raise significant amounts of revenue for the government, which could then be used to fund programs aimed at improving opportunities for the least well-off members of society. While this would not ensure complete equality of opportunity (since the wealthy would still be able to transfer wealth to their children) it would generally improve the situation by reducing inequalities in opportunity, at least to some degree.

## **V. CONCLUSIONS**

In this chapter I have demonstrated that Rawlsian equality of opportunity is consistent with, and, indeed, demands a heavy wealth transfer tax in order to ensure justice within a society. Further, I have demonstrated that the form of transfer tax that is most consistent with Rawls' goals is an accessions tax with one lifetime exemption, above which the tax should be imposed at a rate of 100%. In order to ensure that this tax is not avoided through the transfer of wealth by gift during the donor's lifetime, gifts above the lifetime exemption rate should be prohibited by law.



Without this system in place, equality of opportunity would be impossible, since individuals who accumulate more than they can spend in their lifetime, would pass that accumulated wealth on to their children, who would, as a result, have a significant advantage of other, less well-off, members of society from the beginning. The income tax would go some way towards combatting this inequality by raising revenue that could be used to provide opportunities to low-income members of society, but that alone would not ensure equality of opportunity within that society. Rawlsian liberty requires that no special advantages be made available on the basis of any arbitrary criteria. Whether or not one is related to a wealthy person, who then decides to bestow her wealth in one's direction, is the epitome of arbitrariness. A wealth transfer tax is at the core of ensuring such arbitrariness does not result in an unjust society.

## CHAPTER 4: UTILITARIANISM AND WEALTH TRANSFER TAXATION

### I. INTRODUCTION

As I have argued throughout this dissertation, a nation's tax laws can be seen as its manifested distributive justice ideals. While it is clear that the United States' Tax Code contains a variety of provisions aimed at particular non-distributive justice goals<sup>282</sup>, underneath the political rhetoric and backroom deals, our tax and transfer systems embody (or should embody) the model of distributive justice that we as a nation have endorsed.<sup>283</sup> Unfortunately, these ideals often get lost or smothered underneath politics. Even if it were possible to understand a nation's fundamental distributive justice goals, pushing those goals through the political sausage-making machine makes it difficult to identify the foundational beliefs in the resulting legislation.<sup>284</sup> One of the problems of seeing taxes as a manifestation of distributive justice is that in a nation as large as the

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<sup>282</sup> These goals range from the basic goals of revenue raising and the funding of government projects to incentive goals encouraging such things as the purchase of business equipment (§179), the provision of employee health insurance by employers (§106), or the installation of solar panels in residential homes (§25D).

<sup>283</sup> Internal Revenue Code of 1986, as amended; hereafter "Code". All citations to sections are citations to the Code.

<sup>284</sup> There is much written about the complexity of the Code and about the structural reasons our legislative process often results in such messy rules. One cynical interpretation of this is that "If Congress were to bind itself to make no major changes in tax law during the next congressional session – or ever again – the contributions would start to dry up, these members' lunch and dinner invitations would taper off, and so on." Joel Slemrod and Jon Bakija, *TAXING OURSELVES*, MIT Press, 4<sup>th</sup> Edition (2008) at 171.

United States, it is difficult to argue that the nation as a whole has one coherent set of distributive justice beliefs.<sup>285</sup> Indeed, it would be absurd to make such a claim in 2016, when the country appears more politically divided than it has ever been.

Because of the political differences among the contemporary American citizenry, lawmakers ought to consider any tax policy proposals (indeed, policy proposals of any kind) from the perspectives of the major political views endorsed by the citizenry. Distributive justice asks whether any particular distribution of wealth within a society is more just than another, or whether justice demands a redistribution of the current state of wealth distribution. Thinking about the American citizenry's views of distributive justice can inform tax policy decisions and help legislators draft tax rules that most accurately reflect the wishes of the population they represent. Democracy, of course, is meant to elicit the views of a majority of the citizens, and then enact those views as a series of laws. However, even if we believed our democracy did that effectively, it would still mean that, potentially, a sizable minority of citizens would not necessarily have their political beliefs reflected in the nation's laws.

Because the United States is not comprised entirely of people who share one set of philosophical beliefs<sup>286</sup>, this dissertation considers some of the most commonly

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<sup>285</sup> Even when the review of arguments for distributive justice is limited to academic theories, it remains difficult to articulate a coherent view of the "right" distributive justice outcome. "It is the lack of intellectual coherence on equity questions that results in the view that equity is less important than efficiency." James Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129 at 1131.

endorsed philosophical belief systems, and then examines one important element of the federal tax system, the wealth transfer taxes, through the lens of that belief system. A loose form of utilitarianism (the judgment that the best action is the one that maximizes overall “utility” to the greatest degree) is an extremely popular view in contemporary American politics. Individuals on both sides of the political aisle make utilitarian arguments in support of their views. In particular the language of “increasing the pie” appears in discussions of tax reform and debates about social welfare programs, regardless of the speakers’ belief about how that newly expanded pie should be allocated.<sup>287</sup> While discussions of this growing pie are often Rawlsian in nature, there is a distinctly utilitarian bent to such discussions as well, since more pie means more utility, making choices that produce more value for more people the appropriate choices under a utilitarian model. This utilitarian language, manifested primarily in 21<sup>st</sup> century debates as the language of economics, exercises significant authority in contemporary political discussions. In this chapter, I take up classical utilitarianism, in particular as articulated by John Stuart Mill, and apply it to an analysis of the United States’ wealth transfer tax regime.

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<sup>286</sup> Indeed, if one examines recent elections within the United States, one might conclude that philosophical (and political) beliefs are more diametrically opposed than they have ever been.

<sup>287</sup> In an editorial discussion of tax reform, former FDIC chairwoman Sheila Bair (a self-proclaimed conservative Republican) described the Republicans as “a party that prides itself on increasing the pie, not redividing it.” “Grand Old Parity, Sheila C. Bair, New York Times, February 26, 2013.

Utilitarianism has been adopted and transformed in contemporary political theory into welfare economics.<sup>288</sup> In this chapter I will demonstrate why a consideration of classical utilitarianism, in its most philosophically rigorous manifestation, can offer to tax policy analysis something beyond the traditional welfare economics arguments. Further, I will show that Mill's utilitarianism is consistent with a robust, heavily redistributive, wealth transfer tax system. Just as in the previous two chapters, this chapter should not be taken as an endorsement of the utilitarian position. Rather, I explicate classical utilitarianism and then adopt it for purposes of the chapter in order to apply its precepts to an examination of the taxation of wealth transfers.

## II. WHAT IS UTILITARIANISM?

The language of welfare economics often dominates modern day tax policy discussions.<sup>289</sup> Consequentialism, the larger category of theories of which utilitarianism is the most common version, is the most common method of approaching public policy-making in the contemporary world. Stemming from the work of Adam Smith, through Ricardo and Musgrave, among others, and articulated in contemporary discussions by Louis Kaplow and others, welfare economics arguments have a distinctly utilitarian

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<sup>288</sup> For a further discussion of this claim, *see infra* Part III.

<sup>289</sup> "The classical economists, especially the three most famous of them, Adam Smith, Malthus and Ricardo, were utilitarians." John Plamenatz, *THE ENGLISH UTILITARIANS*, Basil Blackwell Press (1949) at 111.

bent.<sup>290</sup> Much has been written by welfare economists about the estate tax and wealth transfer taxes, as well as about tax policy more generally.<sup>291</sup> If utilitarianism were nothing more than welfare economics, this chapter would not be adding significantly to the conversation. However, welfare economics has focused on a particular aspect of utilitarianism, and has left behind some of the unique elements of the theory that contributed to the evolution of the ethical debate in the 19<sup>th</sup> and 20<sup>th</sup> centuries. In this Part, I will explicate the original theory of utilitarianism, as proposed first by Jeremy Bentham, and then endorsed by John Stuart Mill, including in his treatise of the same name. I will then identify how utilitarianism is distinct from welfare economics, and how it has evolved in the nearly one hundred and fifty years since Mill's book was published.

### **A. Classical Utilitarianism**

Versions of the utilitarian ethical theory date as far back as Plato, Aristotle, and Epicurus.<sup>292</sup> The unifying characteristic of utilitarian theories is the idea that, rather than make *a priori* claims about the rightness or wrongness of any particular action, ethical

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<sup>290</sup> Much of the discussion in contemporary tax policy begins from utilitarian premises, even when those premises go unacknowledged. See Miranda Perry Fleischer, *Charitable Giving and Utilitarianism: Problems and Priorities*, 89 IND. L. J. 1485 (2014), n. 8 and accompanying discussion. See also, Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 TAX L. REV. 229 (2011).

<sup>291</sup> See, eg., Louis Kaplow, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS*, PRINCETON UNIVERSITY PRESS (2010).

<sup>292</sup> “Though Bentham is usually cited as the founder of utilitarianism, the antecedents of utilitarian principles have a far older vintage in the philosophy of Plato, Aristotle, and Epicurus, and in early Christian thought. Other significant dimensions of the theory can be traced to the seventeenth-century writings of Hobbes, Locke, and Richard Cumberland.” James E. Crimmins, *ON BENTHAM*, Wadsworth Press (2004), at 3.

evaluations should be consequentialist.<sup>293</sup> That is to say, for utilitarians, ethics is primarily a process of examining the outcomes (usually the expected outcomes, rather than the actual outcomes, since ethical decisions must be made in advance of knowing the *actual* outcome of the choice) of actions and determining whether those outcomes tend towards the goal of the ethical theory.<sup>294</sup> On a consequentialist model, actions cannot be evaluated in the abstract, and actions should not be evaluated based on the motivations behind them. Rather, what makes an action “right” for a consequentialist, as an ethical matter, is the degree to which that action achieves the desired ethical end. The utilitarian version of consequentialism evaluates the rightness and wrongness of actions by the degree to which those actions increase utility.<sup>295</sup>

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<sup>293</sup> “Utilitarianism is often described as a *consequentialist* theory.... A non-consequentialist theory, such as Kantian ethics, will claim that certain actions are just wrong *in themselves*, and not wrong because of their consequences for happiness or anything else. But consequentialist theories make the rightness of actions depend on their consequences. Kantian ethics may claim that murder is wrong in itself, while utilitarianism will claim that it is wrong only because of its consequences (the decrease in overall happiness brought about by the absence of the person killed, by the grief, distress, anxiety caused to others, and so on).” EDITOR’S INTRODUCTION TO UTILITARIANISM at 14.

<sup>294</sup> Utilitarianism is not the only consequentialist theory, but it may be the best known. Other examples of consequentialism include pragmatism, hedonism, and egoism. There is some debate about how broadly or narrowly to define consequentialism, but there is at least general agreement about one central element of all consequentialist theories. “Any consequentialist theory must accept the claim that...certain normative properties depend only on consequences. If that claim is dropped, the theory ceases to be consequentialist.” Stanford Encyclopedia of Philosophy, *Consequentialism* (22 October 2015), available at: <http://plato.stanford.edu/entries/consequentialism/>.

<sup>295</sup> At the heart of debates among those who hold utilitarian ethical beliefs is the definition of “utility.” Section A of this Part of the Article explores what Mill meant by utility. Section B examines the form “utility” takes in the language of welfare economists. Finally Section C highlights the differences between these two approaches.

## ***1. Jeremy Bentham***

In many ways John Stuart Mill is thought of as the father of utilitarianism, and he is certainly its most famous advocate. However, at least at the beginning of his philosophical career, Mill saw himself as extending and building on the work of Jeremy Bentham, a friend of Mill's father, and something of a mentor to Mill himself.<sup>296</sup> A social revolutionary, Bentham believed that measuring the good in terms of human happiness was not only more scientifically accurate than references to idealist criteria, but also that appeals to happiness would democratize society. The targets of his philosophical critique included, to a certain extent, idealists like Immanuel Kant, but also, to a greater extent, the traditional values espoused by most religious thinkers. In this regard, Bentham is philosophical heir to David Hume's empiricism.<sup>297</sup> Like most consequentialist thinkers, Bentham believed that ethical analyses begin with facts about the world. Actions have consequences in the empirical world, and it is to that world that we must look to determine whether or not an action is ethical. Much of the ethical debate until this point had focused on an evaluation of motives and intentions, judging an action as good or bad on the basis of the thoughts behind it, rather than based on the results it

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<sup>296</sup> "Mill saw himself as an advocate, and evangelist even, for utilitarianism, telling us later that he never gave up the greatest happiness principle. One of his first moves was to establish a group of fellow sympathizers, which met in a disused room at Bentham's house." Roger Crisp, *MILL ON UTILITARIANISM*, Routledge Press (1997), p. 4.

<sup>297</sup> Hume was one of the first philosophical empiricists, insisting that philosophy, like the other natural sciences, must begin all analysis with facts from the world, rather than with ideas. David Hume, *A TREATISE OF HUMAN NATURE* (1739).



produced. Furthermore, ethics had focused on the good of the community, but Bentham objected that the good of the community could only mean the good of all of the individual members of the community.<sup>298</sup> This turned ethical calculations into a balancing act, totaling the consequences to each individual member of society when determining the most ethical action. Rather than speaking in abstract terms about the good of “mankind” or “society”, Bentham focused on real people and the way a particular action impacted the lives of those people. Bentham insisted that ethics must focus on all the consequences of an action for people in the world. However, this emphasis does not yet clarify what makes an action good or bad.

The next step of Bentham’s argument was to establish what it means to talk of the “good” of individuals. Again, Bentham disagreed with the arguments of traditional thinkers in this discussion of ethics. “A thing is said to promote the interest, or to be *for* the interest, of an individual, when it tends to add to the sum total of his pleasures: or, what comes to the same thing, to diminish the sum total of his pains.”<sup>299</sup> For Bentham, the first philosopher to robustly articulate the ethics of utilitarianism, an action is deemed ethical if it promotes pleasure and diminishes pain. Bentham ultimately equated utility

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<sup>298</sup> “The interest of the community is one of the most general expressions that can occur in the phraseology of morals: no wonder that the meaning is often lost. When it has a meaning, it is this. The community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community this is, what? – the sum of the interests of the several members who compose it.” Jeremy Bentham, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*, (1789), p.3

<sup>299</sup> *Id.*

with pleasure and claimed that ethical calculations should determine the amount of pleasure produced by an action. When compared to the philosophers of his time, who made ethical arguments with appeals to reason, or God, or natural rights, Bentham's work looks radical. Grounded firmly in the world of experience, Bentham refuses to make non-empirical judgments about the "quality" of an interest, instead insisting that happiness and pleasure are all just matters of degree.<sup>300</sup> All pleasure is equally valuable, so more pleasure is just better.

In order to understand the way in which Mill's utilitarian calculus differs from Bentham's, one must first understand what Bentham means by saying an action increases pleasure. First of all, unlike Mill, Bentham endorsed a theoretically consistent version of ethical hedonism.<sup>301</sup> Bentham argued that all pleasure was equal, and that ethics had nothing to say about the value of one form of pleasure over another.<sup>302</sup> Bentham's

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<sup>300</sup> Among even those who admire Bentham's work, there is a concern that he is fundamentally wrong about his position that all pleasure is the same. For instance, "He saw an analogy where there was none. He also confused measurements of quantity with comparisons of effects. When a man has to choose between two alternative pleasures, one of which is mild but lasting, and the other intense but brief, he never can choose the greater, for the simple reason that neither is the greater. What he can do, however, is to choose the one he desires the more intensely." John Plamenatz, *THE ENGLISH UTILITARIANS*, Basil Blackwell Press (1949) at 74. However, this flaw is remedied in Mill's version of utilitarianism. *See, infra* note \_\_\_\_ and accompanying text.

<sup>301</sup> Again, although he is consistent, Bentham may also be wrong. Treating all pleasure as inherently the same ignores real differences that seem to have effects on how that pleasure is experienced in the world. "The intensity of a pleasure cannot be measured against its duration, nor its duration against its certainty or uncertainty, nor this latter property against its propinquity or remoteness." *Id.* at 74.

<sup>302</sup> Bentham refuses to categorize kinds of pleasure, and instead measures pleasure (and pain) by variations in degree. But pleasure as such is one kind of thing, capable only of differences in degree, not in kind. "By utility is meant that property in any object, whereby it tends to produce

philosophical account included the explication of a utilitarian calculus, meant to analyze the rightness and wrongness of actions with reference to the extent to which the action tended to produce more pleasure.<sup>303</sup> Again, for Bentham, because all pleasures are of equal worth, the difference between more or less worthy actions is the degree to which the actions produce more or less pleasure, and more or less intense pleasure.<sup>304</sup> Bentham then argues that, in effect, ethics must perform a calculus with regard to all ethical decisions, totaling up the value of all pleasures and pains produced by choosing one action and comparing the result to the pleasures and pains produced by an alternative action. The comparison of the amounts arrived at will then determine the correct ethical choice.

## 2. *John Stuart Mill*

While Mill claims to be continuing Bentham's utilitarianism, Mill ultimately disagreed with Bentham's pure hedonism.<sup>305</sup> Some pleasures are more valuable than

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benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered." *Supra* note 55 at 9.

<sup>303</sup> "To a person considered *by himself*, the value of a pleasure or pain considered *by itself*, will be greater or less, according to the four following circumstances: 1. Its intensity. 2. Its duration. 3. Its certainty or uncertainty. 4. Its propinquity or remoteness." *Supra* note 55 at 29.

<sup>304</sup> "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness." *Supra* note 55 at 2.

<sup>305</sup> "Like Bentham, Mill believes that pleasantness is the only 'good-making' property. But how valuable a pleasure is depends not only on its duration, but on its nature." Roger Crisp, *Editors Introduction*, UTILITARIANISM, Oxford University Press (1998), p. 12. "It is quite compatible

others, Mill argues, but the only arbiter of the value of two distinct pleasures, is someone who has experienced them both.<sup>306</sup> Mill goes on to conclude that the quality of the so-called “higher” pleasures is so much more intense as to make them incomparably better than the “lower” pleasures. As he famously claims, “It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, is of a different opinion, it is because they only know their own side of the question.”<sup>307</sup> Some have objected that this turn away from Bentham’s pure hedonism demonstrates an inconsistency in Mill’s theory. However, the mere acknowledgement that pleasure admits of qualitative difference does not necessarily entail the conclusion that there is some measure, other than pleasure, that determines value.<sup>308</sup> Indeed, as Mill himself notes, those who criticize the theory of utilitarianism for

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with the principle of utility to recognize the fact, that some *kinds* of pleasure are more desirable and more valuable than others. It would be absurd that while, in estimating all other things, quality is considered as well as quantity, the estimation of pleasures should be supposed to depend on quantity alone.” John Stuart Mill, *UTILITARIANISM*, Oxford University Press (1998), p. 56.

<sup>306</sup> “Of two pleasures, if there be one to which all or almost all who have experience of both give a decided preference, irrespective of any feeling of moral obligation to prefer it, that is the more desirable pleasure. If one of the two is, by those who are competently acquainted with both, placed so far above the other that they prefer it, even though knowing it to be so attended with a greater amount of discontent, and would not resign it for any quantity of the other pleasure which their nature is capable of, we are justified in ascribing to the preferred enjoyment a superiority in quality, so far outweighing the quantity as to render it, in comparison, of small account.” *Id.*

<sup>307</sup> *Id.* at 57.

<sup>308</sup> “If a man were to say that nothing is beautiful except colour and then to place the colours in an order of beauty, it would not follow that he was admitting that anything but colour could be beautiful. The difference between one colour and another is not a difference of degree, nor yet is it a difference in respect of anything except colour. So, too, the higher and lower pleasures,

valuing pleasure and who claim that pleasure is nothing but a “base value” reveal more about their own understanding of pleasure, than they do about the coherence of utilitarianism.<sup>309</sup>

At the center of Mill’s theory of utilitarianism, and the element that makes utilitarianism more than merely an ethics of self-interest, is that, when one calculates how any particular action will maximize happiness, one must not privilege one’s own happiness over that of any other person.<sup>310</sup> All human beings have equal value when calculating how much happiness there is in the world.<sup>311</sup> Therefore, even an action that threatens to impose pain on one individual or on a group of individuals might still be held to be ethical on a utilitarian calculus, as long as the totality of pleasure created by the action exceeds that pain.<sup>312</sup> It is this universal nature of the utilitarian calculus that

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though different in kind, may yet differ only in respect of pleasure.” Plamenatz *supra* note \_\_ at 137.

<sup>309</sup> Discussing the Epicureans response to those who alleged their belief system as a “doctrine worthy only of swine”, Mill points out, “Epicureans have always answered, that it is not they, but their accusers, who represent human nature in a degrading light; since the accusation supposed human beings to be capable of no pleasures except those of which swine are capable.” Mill, *UTILITARIANISM* at 55.

<sup>310</sup> “[Impartiality] is involved in the very meaning of Utility, or the Greatest-Happiness Principle. That principle is a mere form of words without rational signification, unless one person’s happiness, supposed equal in degree (with the proper allowance made for kind), is counted for exactly as much as another’s.” Mill, *UTILITARIANISM*, at 105.

<sup>311</sup> “...the happiness which forms the utilitarian standard of what is right in conduct, is not the agent’s own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator.” *UTILITARIANISM* at 64.

<sup>312</sup> Mill acknowledges that, in some instances, the good of others can only be achieved by the sacrifices of some. “Though it is only in a very imperfect state of the world’s arrangements that anyone can best serve the happiness of others by the absolute sacrifice of his own, yet, so long as

makes taxation ethically possible, since the “pain” imposed by the government collecting the tax will be offset by the pleasure created by the services the government provides with the revenue.<sup>313</sup>

Mill’s emphasis that there are higher and lower pleasures, and that the higher pleasures are more ethically valuable than the lower ones, serves as the basis for thinking that Mill is concerned with more than just self-interest. Mill goes on to explain that, for example, “justice” is nothing more than a higher pleasure that must be included in the utilitarian calculus. Justice is a term used regularly in most discussion of ethics. But Mill argues that justice has no meaning outside of the utilitarian calculus. Valuing “justice”, even giving it absolute dominance over all other values, only demonstrates that what we call justice must be given great worth in the utilitarian calculus. Justice is nothing but a surfeit of pleasure produced by certain actions. Part of what often gets left out of discussions of the utilitarian calculus is Mill’s belief that, if people are, in fact, highly moral, then they will get pleasure from helping others.<sup>314</sup> A world that is just, by

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the world is in that imperfect state, I fully acknowledge that the readiness to make such a sacrifice is the highest virtue which can be found in man.” Mill, *UTILITARIANISM at 107*.

<sup>313</sup> Mill discusses taxation towards the end of *UTILITARIANISM*, primarily by criticizing non-consequentialist analyzes of the justice of taxation. Mill claims that the only way out of the debate about the appropriate way to tax is with the application of utilitarian principles. Having pointed out that some theories of justice will demand equal taxation from all, and others will require graduated tax, Mill states “from these confusions there is no other mode of extrication than the utilitarian.” Mill, *UTILITARIANISM at 102*.

<sup>314</sup> “In a properly constituted world, the individual’s happiness will be found in doing what is morally right.” *EDITOR’S INTRODUCTION, UTILITARIANISM at 5*.

utilitarian measures, will tend towards equality, as those with means will experience happiness by sharing what they have with those who have less.<sup>315</sup>

One consequence of Mill's theory of utilitarianism for theories of government and social justice generally is that the best forms of government will be those that align the well-being of individuals with that of society as a whole. When the choices that produce the most happiness for individuals also lead to the most happiness for all members of society, then individuals must not engage in a difficult moral calculus in determining the best action. Instead, the choice of which action is most ethically appropriate will be obvious. Mill believes that the power to align these interests effectively lies with the government.

[L]aws and social arrangements should place the happiness or (as, speaking practically, it may be called) the interest of every individual as nearly as possible in harmony with the interest of the whole; and, secondly, education and opinion, which have so vast a power over human character, should so use that power as to establish in the mind of every individual an indissoluble association between his own happiness and the good of the whole, especially between his own happiness and the practice of such modes of conduct, negative and positive, as regard for the universal happiness prescribes; so that not only he may be unable to conceive the possibility of happiness to himself, consistently with conduct opposed to the general good, but also that a direct impulse to promote the general good may be in every individual one of the habitual motives of action, and the sentiments connected therewith may fill a large and prominent place in every human being's sentient existence.<sup>316</sup>

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<sup>315</sup> "The utilitarian morality does recognize in human beings the power of sacrificing their own greatest good for the good of others. It only refuses to admit that the sacrifice is itself a good. A sacrifice which does not increase or tend to increase the sum total of happiness, it considers wasted." *Id.* at 107-8.

<sup>316</sup> *Id.* at 108.

That is to say, it is the task of the government to arrange affairs so that individuals see their incentives as aligned with the good of the whole, rather than in conflict with that good. When members of a society understand that their utility is increased in concert with the utility of the rest of the world, then they are more likely to make choices that increase total utility, and are therefore moral choices, on utilitarian grounds.

Since the ethical discourse of his day focused primarily on the language of justice and fairness, Mill spends a fair amount of his text contemplating what utilitarianism implies for notions of justice. On Mill's account, a strict application of utilitarian principles, where each individual's happiness counts the same as any other's, and where the higher pleasures, including those produced by social equality and fairness are preferred over the lower pleasures, will necessarily lead to a just society. Towards the end of *UTILITARIANISM*, Mill makes a prescient comment about the nature of justice in society. Observing that social norms about acceptable differences in treatment evolve over time, Mill contemplates the evolution of the understanding of justice in society within the utilitarian framework. Because utilitarianism demands that each individual be able to seek the maximization of happiness in the world, including his own individual happiness, utilitarianism contemplates in everyone "an equal claim to all the means of happiness except in so far as the inevitable conditions of human life and the general interest in which that of every individual is included sets limits to the maxim."<sup>317</sup> Mill

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<sup>317</sup> *Id. at* 144.



goes on to note that the evolution of justice in society reflects just this reality. People have been given the freedom to pursue their own happiness, unless and until that pursuit infringes on others. Society regularly imposes restrictions on the ability of certain groups or individuals to pursue their own happiness. As society evolves, those restrictions evolve as well, and we often identify as “unjust” what we previously saw as merely expedient.<sup>318</sup> Mill emphasizes that a focus on maximizing social utility might allow us to avoid the kind of expediency that results in social norms we later identify as unjust. The utilitarian standard treats all individuals as equally valuable, and Mill thinks this treatment might avoid the kind of injustice that has evolved under other ethical theories.

Mill’s theory of utilitarianism creates a set of ethical rules based on the measuring of pleasures and pains across a society. Mill ultimately holds that there are meaningful differences between the higher and lower pleasures, and that among the higher pleasures are those that tend towards equality and justice. And since motives are irrelevant, from

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<sup>318</sup> “All persons are deemed to have a *right* to equality of treatment, except when some recognized social expediency requires the reverse. And hence all social inequalities which have ceased to be considered expedient assume the character, not of simple inexpediency, but of injustice, and appear so tyrannical that people are apt to wonder how they ever could have been tolerated – forgetful that they themselves, perhaps, tolerate other inequalities under an equally mistaken notion of expediency, the correction of which would make that which they approve seem quite as monstrous as what they have at last learned to condemn. The entire history of social improvement has been a series of transitions by which one custom or institution after another, from being a supposed primary necessity of social existence, has passed into the rank of a universally stigmatized injustice and tyranny. So it has been with the distinctions of slaves and freemen, nobles and serfs, patricians and plebeians; and so it will be, and in part already is, with the aristocracies of color, race, and sex.” *Id. at 144.*

an ethical perspective, laws can and should create ethical behavior by mandating happiness-producing actions.

## **B. Welfare Economics**

Just as in its intellectual forbear, “utility” is the fundamental measure of value in the welfare economic model.<sup>319</sup> And while “utility” is the unified concept at the foundation of the economic calculus, welfare economists have also taken from Mill’s utilitarianism the notion that not all “utility” is the same. This view that not all happiness is equally valuable becomes manifest in the form of the theory of declining marginal utility.<sup>320</sup> Economists generally claim that it is impossible, in the abstract, to determine what provides utility to individual people. We have no way to see inside the minds of members of society, and doing thorough empirical research on the happiness producing outcomes of all members of society is impossible. However, economics does not abandon the fundamental empiricism of the utilitarian theory. We must make judgments about utility based only on the information available to us. Economics therefore focuses

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<sup>319</sup> As Louis Kaplow explains it, “The welfare economic approach to social assessment...determines the effects of any policy under consideration on each individual’s utility – also referred to as an individual’s well-being or welfare. Thus...positive analysis entails identifying policies’ consequences for each individual. Second, to form a social assessment, the information on everyone’s utility is aggregated using a [social welfare function, “SWF”], in particular an individualistic SWF, indicating that social welfare is a function (only) of individuals’ utilities.” Louis Kaplow, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS*, Princeton University Press (2008) at 37.

<sup>320</sup> Declining marginal utility is a fundamental premise of contemporary welfare economics, and, indeed, is considered so fundamental that is incorporated into introductory textbooks on the subject (although it is not a premise adopted by all economists). *See, e.g.*, N. Gregory Mankiw, *PRINCIPLES OF MICROECONOMICS*, South-western Cengage Learning (2009) at 447.

on the “expressed preferences” of members of society in order to determine utility. Most economic theories believe that the most easily calculable expression of preferences is through the use of money.<sup>321</sup> Therefore, welfare economic theorists conclude that it is reasonable to use money as a substitute for utility.<sup>322</sup> While examining the financial choices people make in an attempt to identify their utility preferences might give us some insight into their individual utilitarian calculus, even limiting utility to a monetary calculus does not allow those seeking to apply welfare economic analysis to an issue to get a clear universalizable result. Individuals have different preferences, even with regard to something as universal as money. Retrieving reliable empirical information about those differing preferences is difficult, so welfare economics makes simplifying assumptions about the preferences of individuals. The primary simplifying assumption economists make is that everyone desires *more* money (utility). Therefore the action that

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<sup>321</sup> “...we can determine what people care about by what they buy and do not buy.” Neil H. Buchanan, *The Role of Economics in Tax Scholarship*, in BEYOND ECONOMIC EFFICIENCY IN UNITED STATES TAX LAW at 21.

<sup>322</sup> “It is familiar to economists that well-being or utility (the terms are used interchangeably throughout) is a broad, subjective notion, not one limited to material pleasures, hedonistic enjoyment, or any other a priori class of pleasures and pains. Resources, often measured in monetary units, are means to obtain goods and services; these, in turn, are means to generating utility, which may be derived directly from goods or indirectly and intangibly, such as through fulfillment, sympathetic feelings for family and friends, aesthetic enjoyment of art or the environment, and so forth.” Kaplow, *supra* note 58 at 359. “...legal scholars have traditionally tried to avoid specifically defining what constitutes utility, happiness, or well-being. Instead, legal scholars use proxies such as liberty and money, which are thought to influence happiness, regardless of the precise way in which happiness or well-being is defined. To that end, utilitarianism as traditionally applied in tax policy uses income or wealth as a proxy for utility and assumes the declining marginal utility thereof...” Fleischer, *supra* note \_\_\_ at 1505 (footnotes omitted). “It may not be possible to measure utility at all.” Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, at 908.

produces more money will typically be the better action, according to a welfare economic analysis.

However welfare economists also recognize that not all money is equal to all people. A dollar is worth much more to the person with only \$50 to her name than it is to Bill Gates. The idea that a dollar is worth more to someone with less overall is known as declining marginal utility. “Marginal utility” is the usefulness of the last item, in comparison to the item immediately before it. If one’s marginal utility declines, then the last item is *less* useful than the second to last item.<sup>323</sup> This theory of the declining marginal value of money, and its extension to a theory of declining marginal utility more broadly, is generally accepted by welfare economists.<sup>324</sup> Declining marginal utility allows economic theory to incorporate a social welfare component, by then arguing that the allocation of goods between higher and lower income members of society can include an estimation of the value of those goods to each potential recipient. If the theory of declining marginal utility indicates that the good will be less valuable to the higher income (or higher wealth) individual, then the utilitarian goal can be met by allocating the good to the lower income (or lower wealth) individual. This theory of declining marginal

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<sup>323</sup> “...declining marginal utility of income means each dollar is worth less than the dollar before. (“Marginal” utility of income refers, of course, to the utility of the dollar “at the margin,” that is, the last dollar.)” Lawsky at 915.

<sup>324</sup> “The assumption of declining marginal utility of income – that the next dollar a person receives is “worth less” to a wealthy person than a poor person – has been crucial in tax scholarship over the last sixty or so years, as optimal tax theory and welfarism have become important ways that many in the legal academy evaluate tax policy.” Lawsky at 904.

utility justifies progressive taxation, both income taxation and wealth transfer taxation. Because the last dollar earned by the wealthier individual provides little value to her, the government can take that dollar, in the form of an income tax, and transfer it to a less wealthy individual, usually in the form of services, but sometimes in the form of a direct financial transfer, as in the refundable income tax credit aimed at low income taxpayers.<sup>325</sup>

### **C. Classical Utilitarianism is not Welfare Economics**

As should now be clear, there are significant differences between classical utilitarianism and its modern-day interpretation in welfare economics. In an attempt to simplify the utilitarian calculus and make it useful in determining real-world policies, including tax policies, welfare economics has left behind Mill's view that higher pleasures, like the pleasures of justice and equality, must be valued more highly in determining the correct course of action. While more sophisticated versions of welfare economics include a "social welfare function" that can incorporate the values of justice and equality as values a society holds<sup>326</sup>, most welfare economists do not endorse the view held by Mill that those values *are*, in fact, more valuable than other values. This resistance to ranking preferences, outside of the ranking permitted by applying a theory

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<sup>325</sup> For an explanation and discussion of the Earned Income Tax Credit, which is the largest direct transfer to low-income taxpayers through the Federal Income Tax, *see*, Jennifer Bird-Pollan, *Who's Afraid of Redistribution? An Analysis of the Earned Income Tax Credit* 74 MO. L. REV. 251 (2009).

<sup>326</sup> For an explanation of the role of the social welfare function, *see* Kaplow, *supra* note \_\_\_\_.

of declining marginal utility, makes it harder to justify equality-producing laws on a welfare economic basis.

What makes Millian utilitarianism a more robust ethical theory than a simple “greatest good for the greatest number” arithmetic calculation is that Mill believed that the higher pleasures received additional weight in that ethical calculation. Because not all pleasures are alike, determining the correct utilitarian outcome requires not just comparing the raw numbers of pleasures produced by an action, nor even comparing the intensity and duration of those pleasures, as Bentham would claim. Mill’s theory introduces the idea that those pleasures that are of a higher order must be preferred above the lower pleasures. And included in those higher pleasures are the social goods we identify as justice and equality. Because these pleasures are of such a great magnitude than the lower pleasure of satisfying self-interest, much social policy and law could be designed to achieve the higher pleasures of justice and equality. While the use of the social welfare function in welfare economics goes some way towards allowing the utilitarian calculus to prefer certain kinds of pleasure (or utility) over others, welfare economics does not go so far as to say that some forms of utility are by their very nature to be preferred over others.

Of course, one objection to Millian utilitarianism is that Mill claims that some pleasures are greater and more valuable than others without providing any criteria by which to determine which pleasures those are. His elitist claim that Socrates and his ilk

are better judges of what true pleasure is than the lowly pig gives us some insight into Mill's beliefs regarding the higher and lower pleasures, but very little information about how the utilitarian calculus ought to be applied in society. Welfare economics responds by leaving this element of Mill's theory out of its take-up of utilitarianism, but by leaving this element behind, welfare economics loses some of the ethical force of Mill's original theory. There may be legitimate objections to the argument that some pleasures are more meaningful and valuable than others, but abandoning that portion of the theory without replacing it with another element risks making the theory unintelligible.

### **III. WHAT DOES UTILITARIANISM SAY ABOUT WEALTH TRANSFER TAXATION?**

At the heart of Mill's ethical argument is a belief that the moral actor experiences pleasure, and therefore makes ethical choices, by performing the action that promotes the good of the entire community, rather than based solely on his own self-interest.<sup>327</sup> At first glance this might seem to indicate that a moral society does not need wealth transfer taxation, since individuals acting in accordance with utilitarian ethical theory will make

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<sup>327</sup> "Utility...enjoins first, that laws and social arrangements should place the happiness, or (as speaking practically it may be called) the interest, of every individual, as nearly as possible in harmony with the interest of the whole; and secondly, that education and opinion, which have so vast a power over human character, should so use that power as to establish in the mind of every individual an indissoluble association between his own happiness and the good of the whole...so that not only he may be unable to conceive the possibility of happiness to himself, consistently with conduct opposed to the general good, but also that a direct impulse to promote the general good may be in every individual one of the habitual motives of action, and the sentiments connected therewith may fill a large and prominent place in every human being's sentient existence." John Stuart Mill, UTILITARIANISM, *supra* note \_\_\_\_ at 64.

choices about the distribution of their wealth that will tend towards an increase in the happiness of the entire society. The natural goals of all individuals to maximize their own utility will lead them to redistribute their own wealth, making direct transfers to those members of society who have less, until society becomes more or less equal. With this sort of self-motivated redistribution, one of the central functions of taxation would be eliminated.<sup>328</sup> However, Mill does not expect that all individuals will share the appropriate utilitarian motivation from the outset. We are, as Mill notes, becoming more ethical, and since utilitarianism is an empirical approach, more information about the world results in more and more ethical behavior.<sup>329</sup> But until individuals become sufficiently aware about their own utility and how best to maximize happiness (by recognizing that a more equal society promotes the most happiness, says Mill), we may need laws that encourage us to act in a way that is most likely to produce that happiness. And, importantly, Mill's consequentialist ethics is unconcerned with motives, counting as ethical an action that increases overall happiness, whether or not that action is motivated by a desire on the part of the actor to act ethically.<sup>330</sup> Consequentialist ethical theories

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<sup>328</sup> Federal tax performs several functions, many of which could not be achieved merely by relying on self-motivated redistribution, such as military spending, environmental and investment regulation, or foreign policy. However, one motivation for taxation, and especially for progressive taxation (including the estate tax) and spending programs aimed at the least well-off members of society, is the goal of having a more equitable distribution of wealth in society.

<sup>329</sup> *Supra* note 75.

<sup>330</sup> “[Critics of utilitarianism] say it is exacting too much to require that people shall always act from the inducement of promoting the general interests of society. But this is to mistake the very meaning of a standard of morals, and to confound the rule of action with the motive of it. It is the



concern themselves only with the result of an action, such that “ethical intentions” count for little to nothing in consequentialist theories.<sup>331</sup> Mill’s utilitarian ethics counts as ethical any action that does, in fact, increase utility/happiness, whether or not the *intention* of the actor is to increase utility/happiness. Therefore, if it were demonstrated that any particular government plan would increase happiness, then analyzing that plan from the utilitarian perspective would lead to an endorsement of that plan. For purposes of this Article, the question to be considered is whether or not adopting utilitarianism would lead to the endorsement of a system of wealth transfer taxation. If a heavily redistributive wealth transfer taxation did, in fact, increase overall happiness, then a utilitarian analysis would endorse that tax.

In determining whether or not utilitarianism leads to the conclusion that wealth transfer taxation is ethically justified, one must consider another essential element of Mill’s classical utilitarian calculus - the fact that not all pleasures are equally valuable. Classical utilitarianism is still primarily empirical, so performing a utilitarian calculus does, to a certain extent, depend upon empirical evidence of the utility provided in various scenarios. Empirical research on the effects of various wealth transfer tax schemes is outside of the scope of this project. Despite that, there is evidence examining

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business of ethics to tell us what are our duties, or by what test we may know them; but no system of ethics requires that the sole motive of all we do shall be a feeling of duty; on the contrary, ninety-nine hundredths of all our actions are done from other motives, and rightly so done, if the rule of duty does not condemn them...the motive has nothing to do with the morality of the action.” Mill, UTILITARIANISM at 65.

<sup>331</sup> *Supra* note 51.

the general well-being of societies with more or less equitable distributions of wealth.<sup>332</sup> Sophisticated welfare economics research does include these insights in determining the utility of particular actions. Utilitarianism would require this weighing of pleasures as well. Because some pleasures are higher than others, the utilitarian calculus must weight those particular sources of pleasure more heavily. Therefore evaluations of wealth transfer taxation that consider only the utility of the decedent/donor, or the heir, or evaluations that consider those utilities in comparison with the utility of a more equitable society, but give all those estimations of utility equal weight, will miss the point of classical utilitarianism. Mill claimed that the quality of higher pleasures like justice and equality were so intense as to make them *infinitely* more valuable than any other source of pleasure. Since robust utilitarianism evaluates pleasures based not merely on their intensity or duration, but also on the *quality* of the pleasure, it does not go too far to say that utilitarianism is consistent with robust redistribution. While this redistribution could be achieved through other methods of taxation, using wealth transfer taxation to effect that redistribution targets the tax at combating the concentration of wealth in a way that income taxation does not.

While it seems evident that utilitarianism is consistent with and, indeed, might even demand heavily redistributive taxation, without more empirical evidence regarding

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<sup>332</sup> Mill himself, writing 150 years ago, believed society was poised to wipe out poverty and the suffering it caused. “Poverty, in any sense implying suffering, may be completely extinguished by the wisdom of society, combined with the good sense and providence of individuals.” UTILITARIANISM at 62.

the effect of different forms of taxation on the utility of those involved, it is difficult to say what form that redistributive taxation should take. There are reasons to believe that wealth transfer taxation does more in a more direct way to combat unequal wealth distributions than do other forms of tax, such as income or consumptions taxes. However, even within the category of wealth transfer taxation there are many possible options for organizing the tax. An inheritance or accessions tax would impose a tax on the recipient of the transfer, which is likely the best way to achieve more equality of outcome, especially if the revenue raised from the tax is then used to increase opportunities available to the least well-off members of society.<sup>333</sup> However, even an estate and gift tax system like the one currently in place in the United States, if the exemption levels were reduced, if the rates were increased, and if the valuations were more robustly enforced, could increase utility and happiness by decreasing the concentration of wealth and increasing social justice. Achieving this utilitarian ethical result would depend on using the revenue raised through the estate and gift taxes to achieve a more equitable society, which would balance the cost of any pain produced by the imposition of the tax.<sup>334</sup>

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<sup>333</sup> For a discussion of the role of inheritance taxation in increasing equality of opportunity, *see* Bird-Pollan *supra* note 5 and accompanying text. For a discussion of the use of an accessions tax to combat the intergenerational transfer of political power *see* Miranda Perry Fleischer, *Divide and Conquer: Using an Accessions Tax to Combat Dynastic Wealth Transfers*, 57 B.C. L. REV. \_\_\_ (2016).

<sup>334</sup> A utilitarian may be especially drawn to the use of an estate tax to achieve these redistributive goals, since the tax is only collected after the death of the taxpayer. Therefore, the pain suffered

#### IV. CONCLUSION

This chapter has examined the current state of wealth transfer taxation in the United States and applied the utilitarianism of John Stuart Mill to an analysis of wealth transfer taxation more broadly. This utilitarian analysis is an important step in the tax policy debate, as many U.S. taxpayer/voters, as well as numerous tax policy scholars, embrace utilitarianism as a philosophical approach. A utilitarian analysis that demonstrates that robust wealth transfer taxation is endorsed by a theoretically consistent utilitarian philosophy moves the conversation about the future of the estate tax forward. Much political debate about the estate and gift tax system is mired in convoluted and confused versions of poor philosophical argumentation. This chapter clarifies the utilitarian view, and carefully applies that view to the arguments around wealth transfer taxation.

Because the utilitarian calculus espoused by Mill permits of a ranking of pleasures, valuing “higher” pleasures more than “lower” pleasures, and because equality and justice are higher pleasures on Mill’s analysis, taxation that redistributes wealth in order to create a more equal society will be judged ethical under Mill’s utilitarianism.

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by that taxpayer is only the pain of the *anticipation* of paying the tax, rather than the actual pain or unhappiness experienced by paying the tax. Of course, the heir to the wealth may feel some unhappiness knowing that her inheritance is smaller, due to the burden of the tax, but that pain might also be mitigated by the knowledge that the legal system allows the inheritance to proceed, thereby enriching the heir with the wealth of the decedent.

While this redistribution need not necessarily come in the form of wealth transfer taxation, under the current system of taxation in the United States, the taxation of wealth transfers is the most heavily redistributive tax, collecting tax only from the wealthiest members of society, and, primarily, only after they have died. While a utilitarian evaluation of the current federal wealth transfer taxes must consider the loss of utility felt by the individual subject to the tax, and by any heir who receives a smaller inheritance as a result of the tax, those will be lower pains, insufficient to offset the higher pleasure of increased social equality.

## **CHAPTER 5: AN IDEAL TAX**

### **I. INTRODUCTION**

Should we still, in 2016, at the one hundredth anniversary of the estate tax in the United States, ask the question “why tax wealth transfers”? Is the answer merely one of political exigency? A leftover set of arguments from the early twentieth century? Or is there new evidence? Are there reasons why, in 2016, scholars and elected officials should consider wealth transfer taxation as an essential part of any coherent tax policy? And further, if this form of taxation is economically or philosophically important, is it also politically feasible? Are there reasons to think that the American public would endorse a healthy estate tax, bringing the purview of the tax back to its pre-2001 levels, and strengthening it against aggressive tax planning strategies that threaten to eviscerate the tax base? And if such endorsement is possible, how best to present the tax? What arguments demonstrate the tax’s position in an ideal tax system, designed to enact the most commonly endorsed principles of fairness and justice? While a glance at the current state of the U.S. federal wealth transfer tax system might lead one to conclude that saving the estate tax might be impossible, if not undesirable, this dissertation attempts to outline reasons to believe that a more robust wealth transfer tax system, although not necessarily in the form it currently takes, is an essential component of a comprehensive progressive tax system aimed at increasing economic equality in this country. Further, this

dissertation demonstrates that wealth transfer taxation is consistent with most commonly held philosophical-political views, when those views are examined and their logical consequences identified.

Philosophy as a subject matter is most commonly relegated to hallowed halls and the ivory towers of universities. An individual might dabble in Nietzsche or Plato as an eighteen-year-old, but most people leave the study of ideas behind when choosing a career, a life plan, or moving on to the post-college “real world”. This is unfortunate. Philosophy represents civilization’s greatest tradition of thoughtful contemplation about life’s most important questions, including, among other things, how best to structure society. One element of the structuring of society is the design of a tax system, and philosophy has, historically, had something to say about tax design.<sup>335</sup> But beyond specific recommendations regarding best practices in tax design, philosophy can help us think through the consequences of the particular philosophical views that individuals articulate. For instance, if an individual believes that property rights are fundamental, and argues for the preeminence of property rights over all other elements of structural design in society, what consequence should that claim have on the tax system? Is such a

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<sup>335</sup> There are numerous examples of philosophers discussing tax system design. These discussions range from mere mentions of the issue, to robust discussions with particular suggestions. Among the many philosophers who have written about tax, Aristotle includes an extensive discussion of taxation in his *POLITICS*. Plato’s *REPUBLIC* also includes a discussion of tax. Kant, in his *METAPHYSICS OF MORALS*, includes an explanation of his theory of tax. Thomas Hobbes and John Locke, in their respective work on property, include discussions of taxation in their theories of the state. In more recent years, Robert Nozick and Milton Friedman have both articulated theories of taxation.

belief consistent with social life? Should we interpret the claim in a way that makes it consistent with that individual's lived experience? If the individual lives in society, benefitting from the advantages that come from that life, should we understand the claim of priority for property rights differently than we would understand the claim if the individual chose to live off the grid, rejecting the benefits attributable to social life? In addition to understanding the consequences of particular claims, philosophical analysis allows us to identify what structural components might be endorsed by a variety of belief systems. This dissertation begins from this point, applying philosophical analysis to the question of wealth transfer taxation. Despite the apparent political opposition to the current U.S. federal estate tax, a robust wealth transfer tax system is, in fact, consistent with most philosophical views about property rights, social rights and obligations, social opportunity, and government responsibilities. At the center of this argument is my claim that the political expressions of social will, especially to the extent they must be reduced to a preference for "Democrat" or "Republican", do not accurately represent the complex of ideas addressed by the taxation of wealth transfers.

## **II. THE CURRENT TAXATION OF WEALTH TRANSFERS IN THE UNITED STATES**

The current state of the U.S. federal wealth transfer tax system represents a dramatic shift from the state of the tax at the beginning of the 21<sup>st</sup> Century. Before 2001,



the lifetime exemption for wealth transfers was only \$675,000.<sup>336</sup> Amounts transferred by *inter vivos* gift or post-death above that amount were then subject to tax at 55%. These higher levels of tax and lower exemption amount meant that the tax was imposed on more people (2.1% of estates in the year 2001, as opposed to only .2% in 2015), and collected more total revenue (\$28.4 billion in 2001, but only an estimated \$19.8 billion in 2015).<sup>337</sup> While the total dollar amounts were always a relatively small portion of total U.S. tax revenue, the importance of that kind of revenue should not be dismissed. In 2015 dollars, year 2000 levels of wealth transfer tax collections would have covered the costs of, for instance, all student aid funding administered through the federal government.<sup>338</sup>

This evolution of the taxation of wealth transfers in the U.S. tracks a political evolution that has created more and more opposition to taxation in general, and to the

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<sup>337</sup> These numbers about the historical impact of the estate tax come from the Internal Revenue Service, Statistics of Income, Historical Data Tables, *available at* <http://www.irs.gov/uac/SOI-Tax-Stats>.

<sup>338</sup> Converting 2001 dollars to 2015 dollars, the estate tax collected approximately \$38.3 billion in 2001. The cost of all federal student financial aid programs in the 2015 budget is under \$31 billion. Alternatively, the revenue raised from imposing the estate tax at 2001 levels could cover the costs of both the special education budget (\$12.5 billion) and the funds for school districts with low-income K-12 students (\$15.6 billion) and there would still be some left over to cover part of the costs of the federal response to natural disasters (estimated at \$15.4 billion). This information, and much more, is *available at* <https://www.whitehouse.gov/interactive-budget>.

taxation of wealth transfers (in this political discourse, known as the “death tax”) in particular.<sup>339</sup>

In the lead-up to a presidential election, prominent politicians on both sides of the aisle are asked to articulate a view about taxes. Their views often include a pronouncement about the role wealth transfer taxation should play. The 2016 presidential campaign cycle is no exception. Candidates for the Republican nomination included Jeb Bush, whose tax proposal contained the following claim: “Death should not be taxable event. This reform [proposal] ends the estate and gift tax to protect family businesses and farms from an unfair tax.”<sup>340</sup> Republican candidate Donald Trump previously supported a curtailed version of the estate tax.<sup>341</sup> In 2011 Trump was a vocal proponent of lowering taxes, and his 2016 platform included a proposal to eliminate the “death tax.”<sup>342</sup> Candidate Ben Carson’s tax plan also proposed eliminating the estate tax as part of a massive overhaul of the tax system in order to replace the progressive income

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<sup>339</sup> Michael Graetz, DEATH BY A THOUSAND CUTS.

<sup>340</sup> Jeb Bush, *Reform and Growth Plan*, JEB 2016 (Sept. 9, 2015), <https://jeb2016.com/background-jeb-bushs-tax-reform-plan/> [<https://perma.cc/W2R3-AUCS>].

<sup>341</sup> DONALD TRUMP, *THE AMERICA WE DESERVE* 170–74 (2000).

<sup>342</sup> Trump’s 2011 book, *Time to Get Tough*, articulates a “five-step plan [that] includes eliminating the estate tax and the corporate income tax, lowering the tax rate on capital gains and dividends, enacting a 20 percent tariff on all imported goods and creating a new, lower income tax rate structure,” according to the research institute Citizens for Tax Justice. Richard Phillips, *Donald Trump’s Regressive and Retrograde Tax Plan*, TAX JUST. BLOG (June 22, 2015, 01:46 PM), [http://www.taxjusticeblog.org/archive/2015/06/donald\\_trumps\\_regressive\\_and\\_r.php#.VwFqG6QrK](http://www.taxjusticeblog.org/archive/2015/06/donald_trumps_regressive_and_r.php#.VwFqG6QrK) [<https://perma.cc/EZY4-KU84>]. Trump’s 2016 campaign webpage includes the statement, “No family will have to pay the death tax. You earned and saved that money for your family, not the government. You paid taxes on it when you earned it.” Donald Trump, *Tax Reform That Will Make America Great Again*, TRUMP: MAKE AM. GREAT AGAIN!, <https://www.donaldjtrump.com/positions/tax-reform> [<https://perma.cc/M8GD-VU6R>].

tax with a flat tax.<sup>343</sup> Candidates for the 2016 Democratic nomination also articulated their views about tax reform. Unsurprisingly, Democratic candidates tend to support the taxation of wealth transfers, as consistently as their Republican counterparts tend to oppose it. Democratic candidate Hillary Clinton focused her discussion of tax reform primarily on changes in the taxation of capital gains,<sup>344</sup> however, she also endorsed returning estate and gift taxation to 2009 levels.<sup>345</sup> Candidate Bernie Sanders repeatedly expressed the view that taxes on wealthy individuals in the United States must be increased. As a U.S. Senator, Sanders proposed an estate tax reform bill that would have raised the highest rate of wealth transfer tax from 40% to 65%.<sup>346</sup> Candidate Sanders has also proposed increasing the estate tax rate and decreasing the exemption level.<sup>347</sup>

Given the variety of political views espoused by candidates in the 2016 presidential election, it seems likely that taxation in general, and wealth transfer taxation in particular, will remain a topic of debate through November 2016 and beyond. Despite the ongoing interest in the debate surrounding wealth transfer taxation, and the number of vocal opponents willing to fight against its continued existence, at least some commentators

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<sup>343</sup> See Kyle Pomerleau, *Details and Analysis of Dr. Ben Carson's Tax Plan*, TAX FOUND. (Jan. 6, 2016), <http://taxfoundation.org/article/details-and-analysis-dr-ben-carson-s-tax-plan> [https://perma.cc/7QM7-6VMF].

<sup>344</sup> Alan Cole, *The Details of Hillary Clinton's Capital Gains Tax Proposal*, TAX FOUND. (July 28, 2015), <http://taxfoundation.org/blog/details-hillary-clinton-s-capital-gains-tax-proposal> [https://perma.cc/Q5BE-9GC9].

<sup>345</sup> See Kyle Pomerleau & Michael Schuyler, *Details and Analysis of Hilary Clinton's Tax Proposals*, TAX FOUND. (Jan. 26, 2016), <http://taxfoundation.org/article/details-and-analysis-hillary-clinton-s-tax-proposals> [https://perma.cc/9HTT-VQLJ].

<sup>346</sup> Responsible Estate Tax Act, S. 1677, 114th Cong. (1st Sess. 2015).

<sup>347</sup> See Alan Cole & Scott Greenberg, *Details and Analysis of Senator Bernie Sanders's Tax Plan*, TAX FOUND. (Jan. 28, 2016), <http://taxfoundation.org/article/details-and-analysis-senator-bernie-sanders-s-tax-plan> [https://perma.cc/2QY6-GV9P].

believe that the estate tax will never be completely eliminated from the tax code, for reasons of political exigency.<sup>348</sup>

### III. IS ECONOMIC INEQUALITY IN THE 21<sup>ST</sup> CENTURY EXCEPTIONAL?

Thomas Piketty's popular treatise *Capital in the 21<sup>st</sup> Century* identified a variety of economic trends in the past 150 years that reflect changes in political organization, social will, and social and economic (in)equality. At the heart of Piketty's argument is the claim that the distribution of wealth in contemporary western democracies is more uneven than at almost any point in the past century.<sup>349</sup> Piketty uses tax return information, as well as references from popular fiction of the early 20<sup>th</sup> century, to demonstrate that the levels of wealth inequality in the early years of the 21<sup>st</sup> century are extreme. Piketty goes on to argue that the consequences of this wealth inequality are detrimental to society at large, and are inconsistent with most commonly expressed views about economic and social mobility, and about the importance of equality of opportunity as a foundational principle in most western democracies.

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<sup>348</sup> See generally Edward J. McCaffery, *The Dirty Little Secret of (Estate) Tax Reform*, 65 STAN. L. REV. ONLINE 21 (2012) (arguing that Congress does not make any fundamental changes to the estate tax in order to allow individual members of Congress continue collecting campaign contributions from special interests).

<sup>349</sup> Notably, Piketty is not claiming that things might have been worse before then. Indeed, Piketty's intuition seems to be that economic inequality might very well be worse now than it has *ever* been, but without empirical evidence to justify that claim, he limits his arguments to the 20<sup>th</sup> century and beyond.

Importantly, part of Piketty's claim is not only that there is a disproportionate amount of wealth in the hands of certain individuals rather than others, but also that the longer the inequality remains, the more problematic it becomes. Piketty's economic claim is that previously accumulated wealth becomes disproportionately important over time.<sup>350</sup> Because, in most modern economies, there is some period of economic stagnation at some point, while returns to capital remain at least steady, if they don't exponentially increase, while incomes remain low, that capital becomes more important. If all members of a society experience some kind of limitation in their income potentials, but returns to capital continue to grow, then those with capital become even wealthier, while income earners, and those with little reserved capital, cannot participate in the economic growth. The implication, then, is that inequality of income is a significantly less important factor over time than inequality of wealth, especially inequality of accumulated wealth. And inequalities of wealth that survive over long periods of time are the most problematic inequalities. And these inequalities are exactly the inequalities addressed by the taxation of wealth transfers.

The evidence of inequality unearthed by Piketty is fundamentally related to a foundational principle of U.S. political identity. One typical response to the claim that wealth transfers should be subject to tax is the argument that keeping such transfers free from tax ensures a free market meritocracy, in which individuals are financially rewarded

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<sup>350</sup> Page 166.

for talent and hard work. The United States is regularly held up as an example of a true democracy – no inherited positions of authority, no dynastic wealth or family lands, none of the trappings of aristocracy historically evident in European countries. America has historically prided itself on being the land of opportunity, where the mailroom errand boy can become the president of the company, pulling himself up by his bootstraps to achieve success. However, by tracing income and wealth quintiles over time, Piketty demonstrates that the current levels of wealth inequality in the United States and other western democracies are stagnant. The concentration of wealth that has grown in the last hundred years has been passed down and further concentrated from one generation to the next.

In addition to the concern that the further exacerbation of wealth inequality makes the American dream of success despite starting from the bottom more unlikely than ever, there is reason to believe that concentrations of wealth make democracy less viable. Commentators have repeatedly observed that great wealth inequality is inconsistent with democratic ideals.<sup>351</sup> If this inverse relationship between inequality and democracy is true, then we must find a way to combat that inequality, in particular as it is transmitted from one generation to the next, growing along the way.

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<sup>351</sup> “As we’ve already seen in this Republican primary election, a handful of extraordinary wealthy people can virtually control the election result – not entirely, but have a huge impact. That’s not a democracy. As the great American jurist and Supreme Court associate justice Louis Brandeis once said: “we can have huge wealth in the hands of a relatively few people or we can have a democracy. But we can’t have both.”” Robert Reich, “What Happened to the Moral Center of American Capitalism?” <http://robertreich.org/post/128336881225>.

#### IV. CAN WEALTH TRANSFER TAXATION ADDRESS ECONOMIC INEQUALITY?

The form of taxation best situated to address problems of intergenerational wealth inequality is the taxation of wealth transfers. Because wealth transfer taxation focuses intercepts wealth at the moment it would otherwise be transmitted to the next generation, estate and gift (or inheritance) taxation can combat the concentration of wealth over time and the stagnation of opportunity over generations in a democracy. Unlike income and consumption taxes, or even direct wealth taxes (such as a real property tax), wealth transfer taxation is specifically targeted at the transmission of wealth. The problems of inequality identified in the previous Part are primarily problems that arise over time, and income tax and direct taxes on wealth are time-limited taxes. Of course, robust income and wealth taxes can reduce the concentration of wealth in individual taxpayers' hands, and therefore, necessarily, there would be less wealth remaining to be transferred to that taxpayer's heirs, either during lifetime or at death. However, these taxes, at least in their current forms, do nothing to combat the receipt of wealth through inheritance. And an income tax would have to include the imposition of tax at levels last seen in the 1960s to combat the concentration of wealth over time at the very highest income levels.<sup>352</sup>

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<sup>352</sup> In 1960 the highest marginal income tax rate in the United States was 90%. In 2015 the highest income tax rate is 39.6% and that rate applies to all single taxpayers who earn over \$413,200, or married couples with incomes over \$464,850. United States Federal Income Tax Code (as amended) §1, Revenue Procedure 2014-61. This means that the *highest* tax rate is 39.6%, and a married couple earning \$465,000 finds itself in the same marginal tax bracket as the

Direct taxation of wealth might help combat the inequalities identified in the previous part, but this form of tax tends to find opposition along a variety of lines. Defenders of meritocracy claim that a second layer of tax, a wealth tax, imposed on amounts that were already subject to income tax when earned by that same taxpayer, penalizes success in an inexcusable way. Further, the consumption of wealth by high-earning individuals is not, as such, a problem along the lines identified in Part III. It is the concentration of wealth and its exacerbated concentration over time that threatens democracy. Therefore, allowing a taxpayer to earn significant income, invest it, produce additional income from that investment, and then consume it all in his lifetime, while potentially distasteful to some, does not threaten fundamental principles of equality of opportunity and democracy in the United States. In this way, a wealth tax might go too far, collecting tax from those who would otherwise mostly consume their wealth during their lifetimes, rather than attempting to transfer it to their heirs.

While taxation in general suffers a lack of popularity in contemporary political discourse, there is good reason to believe that wealth transfer taxation, as opposed to the taxation of income or consumption, might be most palatable to people holding a wide

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married couple earning \$100 million. This income tax system does nothing to combat high levels of wealth inequality, as it does not distinguish, for tax purposes, between top 5% of income earners, and the top .1% of income earners, allowing the very richest American taxpayers to keep a very significant portion of their pre-tax unequal incomes. Of course, high income taxpayers consume a smaller percentage of their post-tax income than do their lower income counterparts, thereby allowing them to then transfer larger amounts of that income to their children, creating intergenerational wealth.



variety of political and philosophical beliefs. As I have demonstrated through the course of this dissertation, many different philosophical positions, which find themselves on different ends of the political spectrum, are consistent with, and often even endorse, wealth transfer taxes.

## **V. DO CURRENT PHILOSOPHICAL BELIEFS COMPORT WITH WEALTH TRANSFER TAXATION?**

Identifying coherent philosophical viewpoints in the miasma of the current political debate in the United States can seem like a daunting task. However, approaching the problem from within the perspective of the philosophical tradition gives structure to what might otherwise be a hopeless endeavor. One of the fundamental premises of tax design in a democracy is that the tax system should comply with a majority of the citizens' ideas of fairness. While this is an easily identifiable goal in theory, what that actually means in practice is incredibly complex. Economists, tax lawyers, drafters of legislation, and politicians are responsible for taking this political will and applying it in the thousands of particular ways necessary to draft the tax law. However, spending so much time in the proverbial weeds of tax policy often means leaving behind the bigger picture. At the same time, the loudest political voices often focus on one particular element of the tax law, most often at a particular outcome, rather than considering that element in the context of a larger discussion of fairness overall,

which makes for much less convincing political soundbites. To that end, opposition to the current estate tax, while following the lines of the “death tax” campaign discussed above, often focuses on the tax as an “unfair double tax” or “punishing death” or “punishing savings”, rather than thinking of the estate tax as part of a larger cohesive system aimed at achieving a particular democratically endorsed goal. This dissertation has taken this responsibility seriously, and considers the major philosophical systems most commonly endorsed in contemporary society.

## **VI. HOW SHOULD A SYSTEM OF WEALTH TRANSFER TAXATION BE DESIGNED?**

While libertarianism places primary importance on private property rights, the other philosophical approaches contemplated in this dissertation prioritize other values over property rights. Millian utilitarianism and Rawlsian liberalism aren’t entirely in agreement as to the primary social goals, but as I show above, applying both theories to an analysis of wealth transfer taxation leads to the conclusion that a robust system of the taxation of inherited wealth is desirable. That particular form of tax receives the strongest justification under a liberalism framework, but is entirely consistent with utilitarianism as well, as long as overall social well-being is improved as a result of the imposition of the tax. As I demonstrated in chapter 2, even Nozickian libertarianism isn’t entirely opposed to a system of wealth transfer taxation, as long as it is not imposed on

the individual whose labor created the wealth. An estate tax, imposed only after the death of the relevant moral actor, would therefore not violate the principles of libertarianism.

At this point one might ask what ultimate goal is achieved through the taxation of wealth transfers. It is important to understand that none of the central philosophical political viewpoints addressed in this dissertation are fundamentally opposed to such a tax, but does the tax help to achieve an end identified as desirable by the theory? As I have attempted to demonstrate in chapters 3 and 4, both utilitarianism and liberalism give great importance to general social equality, and to the possibility of each person in a society to achieve well-being. While this isn't a specific goal of libertarianism, neither is it anathema to its central theoretical tenets, as long as nothing in this project violates fundamental premises of libertarianism, such as the primacy of private property rights or other individual liberties or freedoms.

An important element of the libertarian framework that is often left behind when supporters tout the importance of private property rights or the immoral actions of a government when it taxes its citizens, is Nozick's emphasis that the libertarian theory begins with an assumption of justice in acquisition and justice in holding. That is, if there is fundamental unfairness in the way wealth is acquired or held, then a government would be justified in reallocating that wealth to compensate for the initial injustice. An elaborate history of the United States, including the origins of black slavery and recurring racial injustice is beyond the scope of this dissertation. This form of unjust acquisition,

seems to be just the kind of thing that Nozick had in mind when he describes this problem. Indeed, Thomas Piketty's research on the economic situation of the contemporary United States, as described earlier in this chapter, makes clear that ongoing entrenched inequality is a real problem in the United States. There are many studies that show, at a minimum, that economic inequality based on racial identity is significant in the U.S.<sup>353</sup> It seems from these studies that forty acres and a mule was never enough to overcome the moral and economic injustice of enslavement.

In addition to the morally reprehensible theft that left the descendants of Africans brought to the United States as slaves in an ongoing disadvantaged economic position, the U.S. economic system in its origin allowed certain individuals and families to profit from the protection of rights, including rights in other people's bodies, which should never have been recognized. Therefore, a system of tax aimed at leveling up those whose present situation reflects years of state-sanctioned abuse and disadvantage should also level down, by imposing heavy taxation, those whose current economic situation reflects generations of holding assets that were unjustly acquired.

If the goal of wealth transfer taxation is the dilution of concentrations of wealth, and the minimization of dynastic wealth, our current system is not necessarily the best approach. The United States federal gift and estate tax system imposes a tax on the wealth held by the taxpayer at death, or transferred by the taxpayer during her lifetime.

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<sup>353</sup> For an introduction to studies addressing racial economic inequality, *see* Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 Wash. & Lee L. Rev. 1485 (2004).

That wealth is taxed in the same way, regardless of the identity of the recipient of the transfer<sup>354</sup>, and regardless of the amount transferred to any one particular recipient.<sup>355</sup> Another model of tax system design focuses on the recipient of the transfer, taxing at the site of receipt, rather than the site of distribution. Many states in the United States have an inheritance tax designed like this, most of which also exempt transfers made to surviving spouses or direct descendants of the transferor, although such an exemption is not an essential part of the tax.<sup>356</sup> Focusing on the economic status of the recipient of the transfer, rather than on the status of the transferor, allows this form of wealth transfer taxation (I will call this an “inheritance tax”, although that term has different meanings in different parts of the world<sup>357</sup>) to more directly combat the inequalities that most vex proponents of wealth transfer taxation.

If the primary concern of the problem of inequality is increasing concentration of wealth in the hands of some at the expense of the well-being of other members of society, an inheritance tax that specifically targets the transfer of large amounts of wealth to one particular individual would best address that problem. The proper focus of the tax should be the recipient, rather than the transferor. An inheritance tax, focused on the recipient of

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<sup>354</sup> The exception to this rule is transfers to surviving spouses, which are entirely exempt from tax under §2056.

<sup>355</sup> This excepts the annual exclusion amount described earlier. *See*, §2503, *supra* note \_\_\_\_.

<sup>356</sup> Relevant states – KY, etc.

<sup>357</sup> The United Kingdom’s tax system refers to its wealth transfer tax as an “inheritance tax”, although the structure of the tax is quite similar to what we call the “estate tax” within the United States wealth transfer tax system.

gifts or bequests at death, could offer a per recipient exemption amount, taxing all transfers over a lifetime that exceeded that basic amount. By focusing on the recipient of a transfer, rather than the transferor, an inheritance tax would encourage the breaking up of concentrations of wealth. Rather than facing the same tax bill, whether she transfers the entirety of her estate to a single heir or multiple heirs, the potential transferor could significantly reduce the overall tax bill, thereby transferring more of her estate to her intended recipients, rather than the government, if she chooses to distribute her wealth more broadly. Of course, many transferors' decisions will be unaffected by the structure of the wealth transfer tax as either an estate tax or an inheritance tax. For these taxpayers, there may be only one or two potential heirs to receive the wealth, and it may be the desire of the transferor to pass the wealth to those heirs, regardless of the size of the tax bill. However, even in those cases, an inheritance tax may bring the economic situation more in line with the goals of wealth transfer tax proponents. Because the tax would be levied more heavily on transfers made entirely to one heir, there would be less wealth remaining after the tax to be transferred to the hands of the heir. In that sense, the concentration of wealth would be broken up, at least in part. Whether this form of the tax would be more effective at breaking up the concentrations of wealth for those who choose to transfer all of their wealth to one heir, despite the higher tax assessed on such a transfer than would be assessed on a transfer to several heirs, would depend on the rates imposed. If the rates were high enough (for instance a tax of 100% on all transfers over a

fixed exemption amount), then likely the potential transferors would find additional heirs to whom they would like to transfer at least some of their wealth, or, if charitable contributions remained deductible, as they are currently, then a large portion of the transferred wealth would likely be donated to charity.

## **VII. CONCLUSION**

The estate and gift tax system in the United States is a battered soldier, having withstood one hundred years of attacks and amendments. Constantly threatened with extinction, our wealth transfer taxes still play an incredibly important role in the preservation of progressivity in our nation's tax system. Indeed, as more and more empirical research and economic theory demonstrates, economic inequality in the United States is at historic levels. A robust system of wealth transfer taxation is best suited to combat that inequality in the 21<sup>st</sup> Century. As this dissertation has shown, wealth transfer taxation is consistent with most philosophical belief systems. Alternate forms of wealth transfer taxation, in particular a system focused primarily on the recipients of wealth, rather than its transferors, may better comport with most common philosophical beliefs. However, in order to see the way that wealth transfer taxation fits within these philosophical frameworks, it is often necessary to consider them in a larger context, as part of a system that tends toward desirable philosophical aims, rather than as individual

elements of the law. This dissertation attempts to contribute to that project, thereby shoring up the U.S. wealth transfer tax system for its next hundred years.



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