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Taxing Inherited Wealth: A Philosophical Argument

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David G. Duff

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I. Introduction

Tax reform is, as it should be, a major issue on the political agenda. Wealth taxation should form part of the basis of that agenda if any of the goals, particularly that of equality of opportunity, which we cherish as a civilized and democratic society, are to be realized.

Maureen A. Maloney,
"Distributive Justice: That is the Wealth Tax Issue,"
(1988) 20 Ottawa L. Rev. 601 at 635.

After two decades of decline and indifference in the Anglo-American world,¹ the subject of taxing inherited wealth has recently begun to resurface. In the past five years, the number of books and articles on the topic has shown a noticeable increase.² And in Ontario, Canada's most populous and industrialized province, the unexpected election of the New Democratic Party in September 1991, promising to reintroduce a provincial succession duty,³ has put the issue back on the political agenda.⁴

Given the discouraging record of the past two decades, the introduction of such a tax undoubtedly represents a significant political challenge. On the other hand, given the current absence of any such taxes in Canada, the process currently underway in Ontario also represents an enormous opportunity: the opportunity to write

1. In Canada, the federal estate tax was abolished in 1971, and provincial succession duties disappeared during the fourteen years thereafter. See Richard M. Bird, "The Case for Taxing Personal Wealth" in *Report of the Proceedings of the Twenty-Third Tax Conference, 1971* (Toronto: Canadian Tax Foundation, 1972) 6; John Bossons, "Economic Overview Tax Reform Legislation" in *Report of the Proceedings of the Twenty-Third Tax Conference, 1971* (Toronto: Canadian Tax Foundation, 1972) 45; George E. Carter, "Federal Abandonment of the Estate Tax: The Intergovernmental Fiscal Dimension" (1973) 21 Can. Tax J. 232; Richard M. Bird, "Canada's Vanishing Death Taxes" (1978) 16 Osgoode Hall L. J. 133; David W. Smith and Martin J. Rochweg, "Abolition of Ontario Succession Duty and Gift Tax" (1979) 27 Can. Tax J. 360; Douglas G. Hartle, "Some Analytical, Political and Normative Lessons from Carter" in W. Neil Brooks, *The Quest for Tax Reform* (Toronto: Carswell, 1988) 397; Linda McQuaig, *Behind Closed Doors* (Markham: Penguin, 1988) at 174-81; and Keith Banting, "The Politics of Wealth Taxes" (1991) 17:3 Canadian Public Policy 351. In Australia, wealth transfer taxes were abolished in 1979. See Willard H. Pedrick, "Oh, To Die Down Under! Abolition of Death and Gift Duties in Australia" (1983) 35 Tax Lawyer 113. In Great Britain and the United States, recent exemption increases and incomplete integration of estate and gift taxes have seriously weakened what limited effectiveness these taxes once had. On Great Britain, see Simon James and Christopher Nobes, *The Economics of Taxation*, 3rd ed., (Oxford: Philip Allan, 1988) at 236-37. On the United States, see Michael J. Graetz, "To Praise the Estate Tax, Not to Bury It" (1983) 93 Yale L.J. 259; and Harry L. Gutman, "Reforming Federal Wealth Transfer Taxes After ERTA" (1983) 69 Va. L. Rev. 1183. With the exception of France and Luxembourg, the relative importance of wealth taxation has also declined among E.E.C. countries. See Denis Kessler and Pierre Pestieau, "The Taxation of Wealth in the EEC: Facts and Trends" (1991) 17:3 Canadian Public Policy 309 at 310-12.
2. See, e.g., D.W. Haslett, "Is Inheritance Justified?" (1986) 15 Phil. & Pub. Affairs 122; Hartle, *supra*, note 1 at 418-21; McQuaig, *supra*, note 1 at 42, 174-81, 347-49; Edward C. Halbach, Jr., "An Accessions Tax" (1988) 23 Real Pty. Prob. & Trust J. 211 (1988); Maureen A. Maloney, "Distributive Justice: That Is the Wealth Tax Issue" (1988) 20 Ottawa L. Rev. 601; Gordon Bale, *Wealth Transfer Taxation: An Important Component of a Good Tax System* (Victoria, N.Z.: Institute of Policy Studies, 1989); Mark L. Ascher, "Curtailing Inherited Wealth" (1990) 89 Mich. L. Rev. 69; Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990) at 380-418; Maureen A. Maloney, "The Case for Wealth Taxation" (1991) 34:2 Can. Pub. Admin. 241; and Douglas J. McCready, "Is Wealth Taxation a Plausible Reform?" (1991) 34:2 Can. Pub. Admin. 260. See also the recent conference on wealth taxes in (1991) 17:3 Canadian Public Policy.
3. New Democratic Party, *An Agenda for People* (August 18, 1990) at 1-2.
4. The Government has referred the issue to the Province's Fair Tax Commission which is scheduled to report to the Treasurer in the fall of 1993. In the interim, the Fair Tax Commission has established a specific working group to consider the viability of alternative types of wealth tax for Ontario.

on a clean slate and to draft an inheritance tax appropriate to the last decade of the twentieth century—free from the conceptual baggage embodied in traditional estate taxes, themselves the products of the late nineteenth and early twentieth centuries.

This paper presents a preliminary argument for the introduction and design of a lifetime accessions tax: a progressive tax on inherited wealth levied on the cumulative lifetime gifts and inheritances of the recipient.⁵ As such, it contains an elaboration of the rationale for the tax and a presentation of distributive principles to govern its design. However, it does not include a detailed exposition of the actual design of the tax, nor an analysis of its feasibility in a given context. As a result, it provides an ethical blueprint for the design of an ideal inheritance tax without fully considering concrete questions of compliance and administration which any actual tax must ultimately address.⁶ Nevertheless, even this exercise should serve as a useful guide to concrete tax policy. In addition, to the extent that this paper strengthens the ethical argument for taxing inherited wealth and stimulates creative thinking about the actual design of such a tax, it will have served a useful purpose.

II. Rationale

Without a normative principle, the structure of the tax [system] is theoretically meaningless. A normative principle provides a blueprint for designing a transfer tax structure and enables identification and evaluation of any departures from the norm.

Harry L. Gutman,
"Reforming Federal Wealth Transfer Taxes After ERTA,"
(1983) 69 Va. L. Rev. 1183 at 1216.

Why tax inherited wealth? Although Eustace Seligman was able to dismiss this question in 1911 with the simple reply that "[t]he inheritance tax today scarcely needs defence,"⁷ the experience of the past twenty years has effectively denied this option to the contemporary advocate. On the contrary, the decline of wealth transfer taxes during this period suggests the disintegration of whatever justification appar-

5. The accessions tax idea has a long history, dating back to Harry J. Rudick, "A Proposal for an Accessions Tax" (1945) 1 Tax L. Rev. 25 (1945), and Harry J. Rudick, "What Alternative to the Estate and Gift Taxes?" (1950) 38 Calif. L. Rev. 150. Prominent analyses since then have included William D. Andrews, "The Accessions Tax Proposal" (1967) 22 Tax L. Rev. 589; C.T. Sandford, J.R.M. Willis, and D.J. Ironside, *An Accessions Tax* (London: Institute for Fiscal Studies, 1973); and Halbach, *supra*, note 2. An accessions tax was introduced in Ireland in 1984, and was proposed in the 1992 election platform of the British Labour Party. On the Irish accessions tax, see Organization for Economic Cooperation and Development (OECD), *Taxation of Net Wealth, Capital Transfers and Capital Gains of Individuals* (Paris: OECD, 1988) at 81. On the Labour Party proposal, see Peter Lawson, "An Accessions Tax?" 129 Taxation (5 March 1992) at 537.

6. See, e.g., Robert D. Brown, "A Primer on the Implementation of Wealth Taxes" (1991) 17:3 Canadian Public Policy 335. This is particularly true with respect to the introduction of a wealth transfer tax in a sub-national jurisdiction of a federation in which no other jurisdiction (national or sub-national) taxes wealth transfers.

7. Cited in Louis Eisenstein, "The Rise and Decline of the Estate Tax" (1956) 11 Tax Law Rev. 223 at 224. See also Henry C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (Chicago: University of Chicago Press, 1938) at 126 ("There is now little dispute as to the propriety of taxing gifts, inheritances, and bequests"); and Rudick (1945), *supra*, note 5 at 28 ("it is doubtful whether any statesman today would have the temerity to suggest the complete abolition of death duties").

ently once made them indisputable.⁸ Consequently, it must follow, the practical restoration of these taxes requires a theoretical reconstruction of their rationale. It is to this task that this paper is devoted.

A. Traditional Tax Principles

Death taxes in most countries have evolved over many years and several countries did not feel able to indicate why the taxes had been introduced. Of those which did, the majority referred to reasons of revenue-raising and taxing according to ability to pay.

Organization for Economic Co-operation and Development,
Taxation of Net Wealth, Capital Transfers and Capital Gains of Individuals,
(Paris: OECD, 1988) at 78.

That “several countries” in a recent OECD study could not even explain why their wealth transfer taxes had been introduced is hardly cause for optimism about their restoration, let alone their continued existence. Nor also is there much to celebrate in the response of the majority which did respond, citing considerations of revenue-raising and taxation according to ability to pay. As this section explains, these and other traditional tax principles are at worst indefensible and at best indeterminate grounds for the preservation (let alone the introduction) of a distinct tax on inherited wealth.

I. Revenue

The permissible size of inherited wealth is an issue to be resolved on its own in the light of social policy. While one answer may collaterally yield more revenue than another, the wisdom of the answer has little to do with revenue.

Louis Eisenstein, “The Rise and Decline of the Estate Tax,”
(1956) 11 *Tax Law Rev.* 223 at 253.

Notwithstanding Eisenstein’s conclusion that the wisdom of wealth transfer taxation “has little to do with revenue,” the practice of levying taxes at death was originally devised for the simple expedient of obtaining revenue. In Great Britain, the enactment of a progressive estate duty in 1894 was intended as a means of raising revenue, given the perceived technical obstacles to the introduction of a progressive income tax at that time.⁹ In the United States, between 1797 and 1903, “death taxes” were introduced on three separate occasions to finance impending or actual war and subsequently repealed when these political crises (and their attendant revenue needs) had passed.¹⁰ When the forerunner of the current U.S. Estate Tax was introduced in 1916, again it was revenue considerations related to involvement in the

8. The same may also be said for progressive income taxes, which have also declined over the past decade. See Bale, *supra*, note 2 at 1-10.

9. See Cedric T. Sandford, *Taxing Inheritance and Capital Gains: Towards a Comprehensive System of Capital Taxation* (London: The Institute of Economic Affairs, 1967) at 13-14; and Cedric T. Sandford, *Taxing Personal Wealth* (London: George Allen & Unwin, 1971) at 73-74.

10. See Rudick (1945), *supra*, note 5 at 26-27; and Eisenstein, *supra*, note 7 at 225-27.

First World War that were paramount.¹¹ Similarly, in Canada, it was wartime revenue considerations that prompted the federal government to introduce a succession duty in 1941.¹²

Nevertheless, although British estate tax revenues accounted for 16.1 percent of total revenues from 1908 to 1915,¹³ and U.S. gift and estate taxes totalled roughly 10 percent of federal revenues in 1936,¹⁴ in the postwar years wealth transfer taxes have been eclipsed by the growth of the individual (and corporate) income tax,¹⁵ and more recently by the enormous expansion of employment or payroll taxes.¹⁶ In Great Britain, estate tax revenues fell from slightly more than 4 percent of total revenues between 1949 and 1965 to 2.5 percent by 1970 and only 0.64 percent by 1985.¹⁷ In the United States, these percentages declined steadily from about 2 percent of total federal revenues in the 1960s to roughly 1.5 percent in the late 1970s to less than 1 percent in the mid-1980s.¹⁸ Among the twenty-one OECD countries which maintain taxes on inherited wealth, the percentage of total revenue raised by such taxes in 1985 ranged from a low of 0.1 percent in Norway to a high of 1.19 percent in Japan.¹⁹

Although steeper rates, tighter exemptions and stricter anti-avoidance provisions could certainly increase these figures to some extent,²⁰ there are at least three reasons why wealth transfer taxes cannot be expected to perform a significant revenue-raising role.²¹ First, since transfer taxes, unlike income and payroll taxes, have never been and (as I shall argue) should not be imposed on a large proportion of the population,²² they are necessarily constrained in their revenue-raising potential due to

11. See Rudick (1945), *supra*, note 5 at 27-28; and Eisenstein, *supra*, note 7 at 230-31.

12. James B. Davies, "Does Canada Need Capital Transfer Taxation?" in Wayne R. Thirsk and John Whalley, eds, *Tax Policy Options in the 1980s*, Canadian Tax Paper No. 66, (Toronto: Canadian Tax Foundation, 1982) 337 at 338.

13. See Sandford (1971), *supra*, note 9 at 68 (Table 2.5).

14. Eisenstein, *supra*, note 7 at 239.

15. *Ibid.* at 240.

16. Graetz, *supra*, note 1 at 264-67. See also the figures in Joseph A. Pechman, *Federal Tax Policy*, 5th ed., (Washington, D.C.: Brookings Institution, 1987) at 370 (Table D-4).

17. See Sandford (1971), *supra*, note 9 at 68 (Table 2.5); and OECD, *supra*, note 5 at 27 (Table 0.2).

18. Pechman, *supra*, note 16 at 370 (Table D-4).

19. OECD, *supra*, note 5 at 27 (Table 0.2). For a brief overview of the Japanese inheritance tax, see Richard M. Bird, "The Taxation of Personal Wealth in International Perspective," (1991) 17:3 *Canadian Public Policy* 322 at 326-27.

20. See, e.g., Lester C. Thurow, *Generating Inequality: Mechanisms of Distribution in the U.S. Economy* (New York: Basic Books, Inc., (1975) at 197: "In practice, loopholes have become so large that inheritance taxes have virtually ceased to exist: collections amount to an annual wealth tax of less than 0.2 percent. For all practical purposes, gift and inheritance taxes do not exist in the United States. They do not stop wealth from being transferred from generation to generation." For an extensive survey and critique of estate tax avoidance techniques in the United States, see George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance* (Washington, D.C.: Brookings Institution, 1979).

21. I ignore for the purposes of this analysis the added issue of whether, as one recent study suggests, transfer taxes actually *reduce* net tax revenues by encouraging avoidance measures that lower income tax receipts. See B. Douglas Bernheim, "Does the Estate Tax Raise Revenue?" in Lawrence H. Summers, ed., *1 Tax Policy and the Economy* (Cambridge, MA: NBER and MIT, 1987) 113 at 132 (estimating that U.S. estate taxation induced a net *loss* of federal tax revenues of about \$3 billion in 1983). To the extent that these results depend enormously on the specific design of the transfer tax, it is impossible to generalize from this U.S. experience to other transfer tax regimes.

22. See *infra*, section II.B.1.

the narrowness of their base.²³ Second, notwithstanding recurrent revenue-motivated recommendations to restrict or abolish tax exemptions for transfers to spouses and charities,²⁴ these provisions have become permanent fixtures in most transfer tax regimes,²⁵ and (I shall argue) are integral to the very structure of an appropriate tax on inherited wealth.²⁶ Finally, as more than one proponent has observed, to the extent that these taxes are effective at reducing immense concentrations of wealth, they are certain to generate less revenue over time.²⁷ Indeed, as Cedric Sandford argues, “[t]here is even a sense in which the less revenue they raise the more effectively they are achieving their purpose.”²⁸

For transfer tax advocates, the conclusion that these taxes are unlikely to serve as a main source of government revenue is both useful and dangerous. On the one hand, against critics who urge abolition (or resist reenactment) of wealth transfer taxes because revenues raised are slight,²⁹ the reply that revenue yields are merely incidental and largely irrelevant to the primary aims of these taxes is *theoretically* persuasive.³⁰ On the other hand, if governments view revenue potential as an essential counterweight to the “political costs” associated with the imposition of any tax, recognition that the revenue potential of an acceptable wealth transfer tax is necessarily limited can render such taxes particularly vulnerable to the vagaries of short-term *political* calculation.³¹

In response to this latter concern, therefore, it is important to emphasize that, although revenue production cannot justify a distinct tax on inherited wealth, and should not govern the form that such a tax should take, it is nonetheless foreseeable as an inevitable consequence of its primary objectives. Even in the United States, where 1981 reforms dramatically reduced both the relative and absolute yield from federal gift and estate taxes, the combined revenues from wealth transfer taxes amounted to more than US\$12 billion in 1989.³² And in Canada, the abolition of all federal and provincial transfer taxes was estimated in 1971 (the abolition of the estate tax) “to be the equivalent of a lump-sum transfer of approximately \$4.5

23. Eisenstein, *supra*, note 7 at 240-41. In the United States, for example, less than 2 percent of those who died in 1985 were subject to estate or gift taxes, a figure that was expected to fall even further as a 1981 increase in the exemption amount becomes fully effective. Pechman, *supra*, note 16 at 238-39. Even the more broadly-based Japanese inheritance tax only fell on 6.9 percent of decedents in 1986. Bird, *supra*, note 19 at 326.

24. See, e.g., David Westfall, “Revitalizing the Federal Estate and Gift Taxes” (1970) 83 Harv. L. Rev. 986 at 995-1000, 1002-06; and Gilbert Paul Verbit, “Do Estate and Gift Taxes Affect Wealth Distribution?” (1978) 117 Transfer & Estate 598 at 674-77.

25. See, e.g., Gutman, *supra*, note 1 at 1219-21; and OECD, *supra*, note 5 at 100-07 and 113.

26. See *infra*, sections II.B.1.(C)(2) and II.B.2(B)(3).

27. See, e.g., Sandford (1971), *supra*, note 9 at 156; Sandford *et al.*, *supra*, note 5 at 4-6, and 20; Richard M. Bird, “Taxing Personal Wealth” (1980) 2 Can. Taxation 35 at 37; and Munzer, *supra*, note 2 at 382.

28. Sandford (1971), *supra*, note 9 at 156.

29. See, e.g., Richard E. Wagner, *Inheritance and the State: Tax Principles for a Free and Prosperous Commonwealth* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1977) at 23; and Joel C. Dobris, “A Brief for the Abolition of All Transfer Taxes” (1984) 35 Syracuse L. Rev. 1215 at 1217-18.

30. See, e.g., Eisenstein, *supra*, note 7 at 224-25 and 253.

31. See especially Douglas G. Hartle, *Political Economy of Tax Reform: Six Case Studies*, Discussion Paper No. 290, (Ottawa: Economic Council of Canada, 1985) at 56-84 (outlining the decline and fall of Canadian wealth transfer taxes in terms of a public choice perspective of political costs and benefits).

32. Organization for Economic Co-operation and Development (OECD), *Revenue Statistics of OECD Member Countries, 1965-1990* (Paris: OECD, 1991) at 150 (Table 61).

billion to individuals who currently own wealth that would be taxed in future years under the estate tax.³³ More recently, it has been estimated that a restored federal tax on wealth transferred by the wealthiest 5-10 percent of Canadian families could raise roughly \$2 billion per year.³⁴ Given the current level of government deficits in each country, these revenues should not be overlooked.³⁵

2. Vertical Equity

[W]e must look elsewhere than the production of revenues if we are to justify strengthening, rather than eliminating, the estate tax. That place should be its role in the distribution of the tax burden, in particular, its role in providing an important element of progressivity in the federal tax system.

Michael J. Graetz, "To Praise the Estate Tax, Not to Bury It,"
(1983) 93 Yale L.J. 259 at 270.

If raising revenue is not the primary purpose to tax inherited wealth, what is? For many contemporary defenders of such taxes, this answer is supplied by the traditional tax concept of vertical equity. Simply put, it is said that although transfer taxes themselves may not raise substantial revenues, they play a crucial role in contributing to the progressivity of the tax system as a whole.³⁶ In an era when progressivity has been greatly eroded by the levelling of income tax rates and the introduction of new sales and payroll taxes, it is argued, wealth transfer taxes may be "necessary to counteract these trends."³⁷

This is an appealing and empirically verifiable argument to which I am largely sympathetic. As Michael Graetz has shown, comparing the revenue yield from the U.S. estate and gift taxes to that raised by individual income taxes in excess of the average rate reveals a contribution to overall progressivity of about a third of the federal income tax in 1970 and 1972, falling to 12 percent by 1980.³⁸ Since wealth transfer taxes fall solely on the wealthiest taxpayers, their contribution to the progressivity of the tax system as a whole is necessarily considerable.

Nevertheless, there are three reasons why I find this explanation ultimately inadequate. First, as the decline of progressive income taxes over the past decade makes abundantly clear, it is no longer sufficient to invoke vertical equity as a justification for taxing inherited wealth without also showing why progressivity *itself* is justified.

33. Bossons, *supra*, note 1 at 54.

34. Neil Brooks, *Paying for a Civilized Society: The Need for Fair and Responsible Tax Reform* (Ottawa: Canadian Centre for Policy Alternatives, 1990) at 13.

35. See, e.g., Ascher, *supra*, note 2 at 91-93 (arguing that wealth transfer taxes offer an opportunity to achieve "deficit reduction in a painless and appropriate fashion"). Unfortunately, Ascher takes this argument too seriously, allowing considerations of revenue-production to influence the design of his proposed tax. I return to this issue at *infra*, section II.B.1.(C)(2).

36. See, e.g., Eisenstein, *supra*, note 7 at 241; Graetz, *supra*, note 1 at 270-73; Gutman, *supra*, note 1 at 1193-96; and Maloney (1988), *supra*, note 2 at 602, 611.

37. Maloney (1988), *supra*, note 2 at 611. See also Bale, *supra*, note 2 at 10.

38. Graetz, *supra*, note 1 at 272. Similar estimates can be found in Gutman, *supra*, note 1 at 1194-96. See also the *Report of the Royal Commission on Taxation* (Carter Commission), (Ottawa: Queen's Printer, 1966), Vol. 3 at 474 (explaining that taxes on middle and high income earners would have to increase by 7 to 10 percent to raise an equivalent amount of revenue to that raised by the federal gift and estate taxes then in force).

Second, although recent advocates, to their credit, have devoted considerable attention to precisely this defense of progressivity,³⁹ this principle alone cannot account for a *distinct* tax on inherited wealth instead of a return to the more progressive income tax rates that prevailed from the 1940s to the 1970s.⁴⁰

Finally, although proponents of this progressivity argument offer two responses to this second concern, neither is fully persuasive. First, if transfer taxes are viewed as a sort of “second best” means of “rescuing” progressivity from the trend of the past decade,⁴¹ it is unclear how these taxes, if themselves justified solely in terms of vertical equity, can be expected to be any more immune from the general assault on progressivity that has plagued the tax system as a whole. Second, although it is often argued that the economic impact of progressive transfer taxes is more neutral than the effects of a progressive income tax that produces an equivalent revenue yield,⁴² the following section suggests that this claim is only weakly supported by an analysis of each type of tax.

3. Neutrality

There are sound reasons for imposing death taxes in societies like ours. What a consideration of the economic effects of these taxes reveals is that no one need be deterred from supporting such taxes by those effects.

Gerald R. Jantscher, “The Aims of Death Taxation,”
in Edward C. Halbach, Jr., ed., *Death, Taxes and Family Property*,
(St. Paul: West Publishing Co. 1977) at 46.

For contemporary microeconomic analysis, the economic effects of progressive income and wealth transfer taxes are best understood by examining the incentives that each creates for individuals to alter the manner in which they would otherwise allocate their resources (time and money) between work or leisure and between saving or current consumption. Accepting the validity of exogenously presumed preferences with respect to each choice, the goal of tax neutrality is to raise a given sum of revenue with the least possible impact on the choices that individuals would have made in the absence of any tax.

From this perspective, it is easy to see why transfer taxes are often claimed to

39. See, e.g., Graetz, *supra*, note 1 at 274-78; and Maloney (1988), *supra*, note 2 at 611-26. See also *infra*, section II.B.2(A)(3)(b).

40. See, e.g., Gerald R. Jantscher, “The Aims of Death Taxation,” in Edward C. Halbach, Jr., ed., *Death, Taxes and Family Property* (St. Paul: West Publishing Co., 1977) 40 at 41 (noting that, although the \$4.6 billion raised by U.S. estate and gift taxes in 1975 was “not negligible...the addition of just one percentage point to the full range of federal individual income tax rates would add an even larger sum to income tax receipts, at what presumably would be a minor addition to administrative and compliance costs”).

41. See Graetz, *supra*, note 1 at 273 (“The principal reason, therefore, to revise the estate tax is to rescue this mechanism for achieving progressivity, and perhaps to rescue progressivity itself, from both short- and long-term threats.”).

42. See, e.g., Carl S. Shoup, *Federal Estate and Gift Taxes*, (Washington, D.C.: The Brookings Institution, 1966) at 104; Westfall, *supra*, note 24 at 989; Bird (1971), *supra*, note 1 at 17-18; Gerard M. Brannon, “Death Taxes in a Structure of Progressive Taxes” (1973) 26 Nat. Tax J. 451-52; Graetz, *supra*, note 1 at 273; Gutman, *supra*, note 1 at 1188; Pechman, *supra*, note 16 at 234; and Maloney (1988), *supra*, note 2 at 628.

have “less adverse effects on incentives than do income taxes of equal yield.”⁴³ While the former taxes affect only the relative price of current consumption and bequest-motivated saving,⁴⁴ the income tax alters not only the relative price of *all* saving/consumption decisions *but also* the relative rewards from labour and entrepreneurial efforts as opposed to leisure.⁴⁵ Furthermore, while transfer taxes represent only a future contingent liability, income taxes “reduce the return from effort and risk-taking during life as income is earned.”⁴⁶ As a result, it follows, progressive wealth transfer taxes should have “decidedly lesser disincentive effects” on both saving and productivity than progressive income taxes producing similar amounts of revenue.⁴⁷

These are persuasive arguments with which I generally concur. Nevertheless, there are at least two reasons why this avowed neutrality advantage of progressive transfer taxes over progressive income taxes may be mistaken. First, notwithstanding the predictions of orthodox microeconomic theory, empirical evidence suggests that (at least for primary household earners) work effort is insignificantly affected by marginal tax rates even as high as 70 percent.⁴⁸ Whether employees work harder to compensate for lost income, or continue working as they would in a non-tax world in order to enjoy the non-monetary satisfactions of work, because labour markets are not as flexible as simple microeconomic models generally presume, or because progressive income taxes fall largely on economic rents that workers and entrepreneurs derive from the exercise of their particular talents,⁴⁹ the economic effects of progressive income taxes are nowhere near as pernicious as often suggested. Second, although progressive transfer taxes discourage only bequest-motivated saving, to the extent that they impose a much higher burden on saving for *this* purpose than progressive income taxes do on *all* saving, it is at least conceivable that aggregate disincentives to saving or productivity might be greater under a progressive transfer tax than under a progressive income tax with equal yield.

On the other hand, it would be wrong to exaggerate the degree to which savings and productivity are actually discouraged by progressive transfer taxes. While bequest-motivated saving appears to be more prevalent among older and more afflu-

43. Pechman, *supra*, note 16 at 234.

44. See, e.g., Bird (1971), *supra*, note 1 at 17 (“Only if the estate motive, the desire to pass wealth on to one’s heirs, is dominant at the margin will death taxes have much economic effect.”).

45. See, e.g., Sandford (1967), *supra*, note 9 at 25: “unlike income tax, estate duty influences only work and enterprise undertaken from one particular motive. Whatever the motive, income tax exerts its effects.” See also Sandford *et al.*, *supra*, note 5 at 128: “A death duty (unlike an income tax) does not prevent a man from himself enjoying the full fruits of labour or of risk-taking. Enterprise and effort will only be affected by death duty considerations if the person concerned wishes to save at least a part of the income so acquired for his heirs or to pass his business on to them.”

46. Bird (1971), *supra*, note 1 at 17. See also Pechman, *supra*, note 16 at 234-35 (“Income taxes reduce the return from effort and risk taking as income is earned, whereas death taxes are paid only after a lifetime of work and accumulation and are likely to be given less weight by individuals in their work, saving, and investment decisions.”).

47. Maloney (1988), *supra*, note 2 at 628.

48. Brannon, *supra*, note 42 at 451. See also Thurow, *supra*, note 20 at 49; and Jantscher, *supra*, note 40 at 42.

49. See the discussion of this issue in Richard Krouse and Michael McPherson, “Capitalism, ‘Property-Owning Democracy,’ and the Welfare State,” in Amy Gutmann, ed., *Democracy and the Welfare State* (Princeton: Princeton University Press, 1988) 79 at 97.

ent households,⁵⁰ the impact of wealth transfer taxes on aggregate saving and work effort is probably slight. First, as economic theory cautions, although a tax-induced increase in the 'price' of making gifts and bequests may cause potential donors to consume more and/or work less, it may also stimulate increased savings and work effort in order to maintain the transfer of a desired after-tax amount. Theory cannot say which effect will dominate, and empirical analysis has little to add.⁵¹ Further, as numerous commentators have observed, the desire to save solely for the purpose of making bequests is probably slight compared to other reasons such as saving for retirement, and saving for the security, independence, and power that come with a substantial property holding.⁵² Indeed, this latter interpretation is supported by evidence on the large number of childless decedents who leave substantial estates,⁵³ on the apparent reluctance of wealthholders to participate in annuity-type arrangements "even on quite favourable terms,"⁵⁴ on the surprising infrequency of lifetime donations in the United States despite considerable tax advantages to *inter vivos* giving,⁵⁵ and on the tendency for saving among top wealthholders to continue up to the time of death instead of declining after retirement.⁵⁶ Finally, since the prospect of a diminished inheritance is apt to induce potential heirs to work harder and save more, whatever disincentives reduce work effort and savings on the part of potential donors is partly offset by the encouragement to productivity and saving on the part of prospective recipients.⁵⁷

In the end, therefore, while it is unlikely that the impact of progressive transfer taxes on savings and productivity is any worse than whatever adverse effects progressive income taxes have on incentives to save and to work,⁵⁸ one cannot conclude that the former are necessarily any more neutral than the latter. Thus, while a con-

50. See, e.g., Sandford *et al.*, *supra*, note 5 at 128; Alan S. Blinder, "Intergenerational Transfers and Life Cycle Consumption" (1976) 66:2 *Amer. Econ. Rev.* 87 at 92; and James B. Davies and France St-Hilaire, *Reforming Capital Income Taxation in Canada: Efficiency and Distributional Effects of Alternative Options* (Ottawa: Minister of Supply and Services, 1987) at 111-15.

51. See, e.g., Sandford *et al.*, *supra*, note 5 at 128.

52. See, e.g., Sandford (1967), *supra*, note 9 at 22-24; Bird (1971), *supra*, note 1 at 17; Thomas (R.) Ireland, "Inheritance Justified: A Comment" (1973) 16 *J. Law & Econ.* 421; Thurow, *supra*, note 20 at 141-42; Haslett, *supra*, note 2 at 144-45; and Ascher, *supra*, note 2 at 102-10. For contrasting views, emphasizing intergenerational altruism or self-interested exchange with one's heirs ("strategic bequests"), see Nigel Tones, "The Family, Inheritance, and the Intergenerational Transmission of Inequality" (1981) 89 *J. Pol. Econ.* 928; B. Douglas Bernheim, Andrei Schleifer, and Lawrence H. Summers, "The Strategic Bequest Motive" (1985) 93 *J. Pol. Econ.* 1045; and B. Douglas Bernheim, "How Strong Are Bequest Motives? Evidence Based on Estimates of the Demand for Life Insurance and Annuities" (1991) 99 *J. Pol. Econ.* 899. For a useful review of much of this literature, see Davies and St-Hilaire, *supra*, note 50 at 105-27.

53. See Sandford (1967), *supra*, note 9 at 23; and Michael D. Hurd, "Savings of the Elderly and Desired Bequests" (1987) 77 *Amer. Econ. Rev.* 298.

54. Bernheim, Schleifer and Summers, *supra*, note 52 at 1069.

55. See Shoup, *supra*, note 42 at 17-25; Pechman, *supra*, note 16 at 243-44; and Bernheim, Kotlikoff and Summers, *supra*, note 52 at 1071.

56. See Thurow, *supra*, note 20 at 137-42; and John A. Brittain, *Inheritance and the Inequality of Material Wealth* (Washington, D.C.: The Brookings Institution, 1978) at 59-66.

57. See, e.g., Shoup, *supra*, note 42 at 89; Sandford (1967), *supra*, note 9 at 26; Sandford *et al.*, *supra*, note 5 at 131; Bird (1971), *supra*, note 1 at 17-18; Jantscher, *supra*, note 40 at 44-45; Maloney (1988), *supra*, note 2 at 627; and Ascher, *supra*, note 2 at 106.

58. See Jantscher, *supra*, note 40 at 45-46.

sideration of these incentive effects indicates that they afford no reason to oppose the existence of wealth transfer taxes, neither do they supply an affirmative argument for their introduction. Once again, it is necessary to seek an alternative justification for taxing inherited wealth.

4. Horizontal Equity

[T]ax burdens should bear similarly upon persons whom we regard as in substantially similar circumstances, and differently where circumstances differ.

Henry C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy*, (Chicago: University of Chicago Press, 1938) at 30.

Like the principles of vertical equity and neutrality just considered, the idea of horizontal equity has been a pillar of traditional tax policy since at least the time of Henry Simons. Nonetheless, as a moment's reflection reveals, it is impossible to apply the horizontal equity concept to any concrete situation without a normative theory to explain in what way which persons' "circumstances" are to be considered "substantially similar." Further, although traditional tax policy has generally embraced a utilitarian standard of horizontal equity that attempts to impose an "equal sacrifice" on taxpayers conceived to be similarly situated in terms of their "ability to pay,"⁵⁹ there are at least three separate interpretations of how this standard should apply to the taxation of inherited wealth, each with a significantly different notion of precisely whose circumstances are similar and in what way this is so, and each with radically different implications for the manner in which wealth transfers ought to be taxed. Nevertheless, as the following sections argue, none of these explanations provides an adequate justification for a distinct tax on inherited wealth.

(A) Comprehensive Income and Ability to Pay

In principle, all receipts from gifts, inheritances, and bequests should be included in determining the basis of individual contributions under income taxes.

Henry C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy*, (Chicago: University of Chicago Press, 1938) at 207.

For Simons himself, espousing a comprehensive definition of personal income as "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question,"⁶⁰ horizontal equity required that gifts and

59. See the discussion and criticisms of this standard in Alvin Warren, "Would a Consumption Tax Be Fairer Than an Income Tax?" (1980) 89 Yale L.J. 1081 at 1092. In one respect, section II.B. can be viewed as an extended critique of this concept of distributive justice as a guide to tax policy.

60. Simons, *supra*, note 7 at 50.

bequests be included as income to the recipient.⁶¹ Persons are similarly situated, on this account, solely according to their comprehensively defined incomes during the stipulated tax period (generally one year), regardless of the character or source of these receipts.⁶² Since all receipts represent changes in taxpayers' economic power, and since these changes are presumed to reflect taxpayers' ability to pay during the tax period, a utilitarian account of horizontal equity requires the aggregation of all these receipts to determine the manner in which taxpayers are similarly or differently situated.

Ignoring for the moment the utilitarian aspects of this argument, and aside from the obvious fact that this comprehensive income rationale cannot account for a *distinct* tax on inherited wealth, there are two reasons to suspect that its explanation for taxing wealth transfers is radically incomplete. First, as Simons' himself observed, since "opinion generally supports especially heavy taxation of 'income' in this form," the case for "supplementary levies" on inherited wealth "is also strong."⁶³ Clearly, though, this case cannot rest on the same ability to pay rationale that sustains comprehensive income taxation.

Second, as any attempt to apply Simons' definition to the taxation of wealth transfers immediately indicates, it is impossible to ignore the character of these receipts and their source of origin in attempting to devise an equitable tax regime. For example, since strict comprehensive income treatment would impose a light burden on the recipients of large amounts transferred very gradually and a heavy burden on taxpayers who receive even a modest inheritance in a single year, even Simons himself acknowledged that special arrangements were necessary to redress the horizontal *inequity* that such treatment would entail.⁶⁴ In addition, all efforts to translate the comprehensive income concept into a concrete scheme for taxing gifts and bequests as income have had to wrestle with difficult issues concerning intra-familial transfers and appropriate exemptions.⁶⁵ To resolve these design questions, indeed to determine what horizontal equity even means in these situations, something more than the definition of comprehensive income is required.

61. *Ibid.* at 56-58, 125-47. The same approach was adopted in the ill-fated U.S. income tax of 1894 [Tariff Act of 1894, ch. 349, s. 28, 28 Stat. 553],—declared unconstitutional by the U.S. Supreme Court on other grounds in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *on rehearing*, 158 U.S. 601 (1895), and was also proposed by the Carter Commission, *supra*, note 38, Vol. 3, Ch. 17. For an excellent summary and analysis of the Commission's proposals on the taxation of gifts and bequests, see Gerald R. Jantscher, "Death and Gift Taxation in the United States After the Report of the Royal Commission" (1969) 22 Nat. Tax J. 121. For a more recent recommendation for income tax treatment of gifts and bequests by a contemporary U.S. tax scholar, see Joseph M. Dodge, "Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income" (1978) 91 Harv. L. Rev. 1177.

62. See Simons, *supra*, note 7 at 128: "the objective of policy must be fairness among persons, not fairness among kinds of receipts (whatever that might be construed to mean)." See also Carter Commission, *supra*, note 38, Vol. 3 at 465 ("the source of a gain and the expectation and intentions of the recipient of a gain are completely irrelevant"); and McQuaig, *supra*, note 1 at 349 (observing that the slogan "a buck is a buck is a buck" that was used to describe the view of the Carter Commission meant "that the government wasn't going to pass judgment on how that buck came to be in the taxpayer's pocket. What mattered was that it was there and that it gave the taxpayer a certain command over available resources").

63. Simons, *supra*, note 7 at 144.

64. *Ibid.* at 143-47.

65. See, e.g., *ibid.* at 135-43; Carter Commission, *supra*, note 38, Vol. 3 at 497-500; Jantscher, *supra*, note 61 at 122-24; and Dodge, *supra*, note 61 at 1202-08. (Subsection entitled "Support Obligations" dealing with what members of the family should be included in the taxable unit.)

(B) Wealth and Ability to Pay

[A] tax on the transfer of inherited wealth as it passes down from parent to child is in effect a periodic charge, levied once a generation, on the holding of such wealth.

Report of a Committee Chaired by J.E. Meade,
The Structure and Reform of Direct Taxation,
 (London: George Allen & Unwin, 1978) at 317.

For several transfer tax advocates this “something more” is readily available in the idea of taxing wealth once every generation.⁶⁶ As economists since Nicholas Kaldor have often emphasized,⁶⁷ the possession of wealth itself affords a special ability to pay tax, irrespective of any money income that the wealth actually provides.⁶⁸ Moreover, since income taxes typically exempt the accretion of unrealized capital gains and the imputed income from various kinds of wealthholding,⁶⁹ it is often argued that a tax on net wealth is essential to complete an equitable tax structure.⁷⁰

I have no disagreement with these arguments as possible reasons for introducing a periodic tax on net wealth. Nor do I deny that the idea of a once-a-generation tax on family wealth can furnish a detailed set of proposals for the specific design of transfer tax provisions regarding, for example, inter-spousal and generation-skipping transfers.⁷¹ Nevertheless, in addition to the enormous complexity that these

66. See, e.g., Shoup, *supra*, note 42 at 100-01, 107-08; Gerald R. Jantscher, “Proposal to Tax Gifts and Bequests as Income to the Recipient,” in *Report of the Proceedings of the Twentieth Tax Conference, 1967* (Toronto: Canadian Tax Foundation, 1968) 417 at 421-23; William D. Andrews, “What’s Fair About Death Taxes?” (1973) 26 Nat. Tax J. 465 at 466-67; Report of a Committee Chaired by Professor J.E. Meade (hereinafter Meade Committee Report), *The Structure and Reform of Direct Taxation* (London: George Allen & Unwin, 1978) at 317; and Joseph M. Dodge, “Redoing the Estate and Gift Taxes Along Easy-to-Value Lines” (1988) 43 Tax L. Rev. 241 at 248-51.

67. See the excerpts from Kaldor’s 1956 recommendations to the Indian government in James Cutt, “A Net Wealth Tax for Canada?” (1969) 17 Can. Tax J. 298 at 304 (“The main argument in equity for the [annual tax on wealth] is that income taken by itself is an inadequate yardstick of taxable capacity as between incomes from work and incomes from property, and also as between the different property owners. The basic reason for this is that the ownership of property in the form of disposable assets endows the property owner with a taxable capacity as such, quite apart from the money income that the property yields.”).

68. See, e.g., Bird (1971), *supra*, note 1 at 8 (“the possession of wealth, it may be argued, provides advantages of opportunity, flexibility and security...over and above the income enjoyed from the employment of capital; it is therefore in itself an appropriate subject for differential taxation.”). See also Meade Committee Report, *supra*, note 66 at 40, 317-18.

69. See Bird (1971), *supra*, note 1 at 8 (mentioning as “important forms of property which do not produce anything recognized as taxable income...owner-occupied houses and consumer durables,...cash and other low-yielding assets,...non-income-earning art objects, etc.,...[and] unrealized capital gains”).

70. *Ibid.* at 8. See also Gutman, *supra*, note 1 at 1188-93 (emphasizing also the proliferation of tax preferences in the U.S. federal income tax, and the role of federal estate and gift taxes as “a ‘backstop’ to the income tax by taxing the wealth that taxpayers accumulate through tax-preferred income sources”).

71. See, e.g., Jantscher, *supra*, note 40 at 48 (“If death taxes are intended to tax wealth once a generation, there is a clear case for either exempting transfers between spouses, but taxing all transfers from parents to children, or taxing transfers between spouses, but subsequently exempting the transfer of the same property to children (because the property had already been taxed once in that generation). Transfers to one’s parents should be tax-free, or even occasion a refund of tax, but transfers to grandchildren should be charged at double the rate that applies to transfers to children.”). For transfer tax proposals based on this periodic wealth tax approach, see William Vickrey, *Agenda for Progressive Taxation* (New York: The Ronald Press Company, 1947), Ch. 8 and Appendix IV; Andrews, *supra*, note 5; Meade Committee Report, *supra*, note 66; George Cooper, “Taking Wealth Taxation Seriously” (1979) 34 *The Record of the Ass’n of the Bar of the City of New York* 24 at 48-53; and Halbach, *supra*, note 2.

proposals invariably entail,⁷² there are at least three reasons why this argument is unsatisfactory as an explanation for a distinct tax on inherited wealth.

First, the idea of a generational tax on *family* wealth is inconsistent with contemporary notions of the family which reject the dynastic conception implicit in this approach to wealth transfer taxation.⁷³ Second, since transfer taxes exclude all accumulated wealth consumed before death, they are “at best crude once-a-generation approximations” to regular taxes on net wealth.⁷⁴ Finally, although it is also claimed that this generational view of wealth transfer taxes can be justified on the grounds that a periodic wealth tax is difficult to enact or administer,⁷⁵ it is by no means clear that a wealth transfer tax aimed at a once-a-generation levy on family wealth will be any easier to enact *or* to administer than an annual net wealth tax like those currently in existence in most Western European countries.⁷⁶ Indeed, by the appearance of at least one recently proposed scheme for such a generationally-neutral transfer tax,⁷⁷ it is conceivable that these hybrid arrangements could be even more complex to administer and more conducive to elaborate tax planning measures than a regular net wealth tax. Thus, once again, it is necessary to look elsewhere to find an acceptable reason for taxing inherited wealth.

(C) Windfalls and Ability to Pay

Estates represent ability to pay. And as they are mere windfalls to the beneficiaries, they should be taxed more heavily than any other kind of acquisition.

Louis Eisenstein, “The Rise and Decline of the Estate Tax,”
(1956) 11 Tax Law Rev. 223 at 256.

A final horizontal equity argument for a distinct transfer tax emphasizes the character of inheritances as windfalls to their recipients.⁷⁸ Although some emphasize the unearned and fortuitous aspect of these receipts as grounds for special tax treat-

72. These complexities are inherent in any tax that attempts to substitute a single tax at the moment of transfer for a periodic flow of taxes without knowing how long the recipient will retain the property. As Jantscher observes: “Some heirs will cling to their property all of their lives; others will consume their inheritances within a few years.” Jantscher, *supra*, note 40 at 48. Moreover, some heirs will live for many years before the property is transferred once again, while others will enjoy their inheritance for only a short time before death intervenes and the property is again subject to taxation. Thus, as Jantscher concludes: “Obviously death taxes of different sizes are called for if they are intended to replace annual taxes that would have been imposed during the duration of the heirs’ ownership.” *Ibid.* For an especially complex arrangement to achieve horizontal equity along these lines, see Meade Committee Report, *supra*, note 66 at 317-49.

73. See, e.g., John Stuart Mill, *Principles of Political Economy*, ed., Donald Winch, (London: Penguin Books, 1970) at 371-72 (concluding that “the feudal family...has long perished, and the unit of society is not now the family or clan, composed of all the reputed descendants of a common ancestor, but the individual; or at most a pair of individuals, with their unemancipated children.”). (Book II, Chapter II, paragraph 3)

74. Bird (1971), *supra*, note 1 at 8. See also Sandford (1971), *supra*, note 9 at 137; Jantscher, *supra*, note 40 at 48; and Dodge, *supra*, note 66 at 250-51.

75. See, e.g., Shoup, *supra*, note 42 at 101.

76. See OECD, *supra*, note 5 at 30-75.

77. See, e.g., Meade Committee Report, *supra*, note 66 at 317-49.

78. See, e.g., Eisenstein, *supra*, note 7 at 256; Shoup, *supra*, note 42 at 100-01; Jantscher, *supra*, note 66 at 419, and 421; Bird (1971), *supra*, note 1 at 8-9; Andrews, *supra*, note 66 at 465; Jantscher, *supra*, note 40 at 49-51; Dodge, *supra*, note 61 at 1190; and McQuaig, *supra*, note 1 at 347.

ment,⁷⁹ in terms of ability to pay criteria it is argued that beneficiaries have a greater taxpaying capacity than the recipients of other income since they (the beneficiaries) have no prior expectations to be disappointed and no anticipatory commitments to be disrupted.⁸⁰ To the extent that tax burdens properly impose an equal sacrifice on all taxpayers, it is said, these successors should bear a special tax liability since the discomfort they experience is less than that caused by an equal amount levied upon taxpayers with regular or recurring receipts.⁸¹ Furthermore, since more distant and non-related heirs are generally less likely to expect inheritances than more immediate relations, this windfall rationale is often employed to explain the consanguinity-related rate differentials that are found in several transfer tax regimes.⁸²

Aside from the questionable application of this concept to justify rate discrimination among different recipient classes,⁸³ and even assuming the validity of this utilitarian conception of horizontal equity,⁸⁴ there is at least one obvious reason to reject this justification for taxing inheritances at a higher rate than ordinary income. Since expectations are presumably shaped by the prevailing tax structure, it is impossible to say that heavily taxed bequests are any more or any less expected than the after-tax amounts of more regular and recurring receipts.⁸⁵ If inheritances are to be taxed according to the ability to pay of their beneficiaries, there is no reason to suppose that this ability is any greater than that of taxpayers with identical receipts, however derived, during the same tax period.

79. See, e.g., McQuaig, *supra*, note 1 at 347, (describing material inheritance as “nothing more than a windfall, a lottery-like prize for being born into the right family,” and commenting that “[i]n a reasonable moral scheme of things, we might expect inheritances to be taxed at higher rates than regular income, reflecting our greater respect for those who *earn* what they receive.”) I return to this argument for wealth transfer taxation at *infra*, section II.B.2(A)(3).

80. See, e.g., the description of this argument in Bird (1971), *supra*, note 1 at 8-9 (“It has sometimes been urged that a special justification for death taxes lies in the fact that many inheritances contain a substantial windfall component and hence a special ability to pay tax without in any way affecting the actions before or after the lucky, and surprised heir receives his benefaction.”).

81. See the descriptions of this argument in Jantscher, *supra*, note 66 at 419; Sandford *et al.*, *supra*, note 5 at 45; and Jantscher, *supra*, note 40 at 49.

82. See, e.g., Shoup, *supra*, note 42 at 107; Jantscher, *supra*, note 66 at 421; Bird (1971), *supra*, note 1 at 9; Jantscher, *supra*, note 40 at 49; and OECD, *supra*, note 5 at 102.

83. First, in terms of utilitarian theory itself, there are undoubtedly exceptions to this presumed pattern of expectations. As Jantscher observes: “We can all think of instances in which a distant relative has a higher expectation of receiving a bequest than a close relative”; furthermore: “A child who receives an unusually large bequest may have a much larger ‘taxable surplus’ than a cousin who received a small bequest.” Jantscher, *supra*, note 40 at 49-50. See also Ontario Committee on Taxation Report (Toronto: Ontario Printer, 1967), Vol. III at 136; and Sandford *et al.*, *supra*, note 5 at 45. Second, and more seriously, by assuming a rigid conception of the family as uniformly nuclear, this approach contradicts the principle of family autonomy inspiring the current shift to more pluralist conceptions of the family. See *infra*, section II.B.2.(B)(3).

84. See *supra*, note 59.

85. See Jantscher, *supra*, note 40 at 50 (“the case for graduating the tax according to putative expectations rests on the assumption that these are formed without regard to the tax that will fall on the bequest. This assumption seems highly unrealistic. If bequests to children are taxed heavily and this fact is well known, children presumably form expectations about their inheritances net of the tax that they must pay. That is, even when bequests come as no surprise, the effect of the tax has often been discounted already and the tax is then no more burdensome than it is when the bequest was truly unexpected.”).

5. Conclusions

In a strange sort of way abolition meets many of the requirements of a well-made tax system. There is equity, there is efficiency, and there is administrability.

Joel C. Dobris, "A Brief for the Abolition of All Transfer Taxes,"
(1984) 35 *Syracuse L.Rev.* 1215 at 1226.

That wealth transfer taxes have been in decline for the last twenty years should come as no surprise given the inability of traditional tax principles to provide a convincing account of why they should exist. If revenue potential is limited and relative neutrality uncertain, and if vertical and horizontal equity can be equally or more effectively achieved through income and net wealth taxes, a separate tax on inherited wealth would seem to have no purpose whatsoever. As Joel Dobris concludes, equity, efficiency, and administrability would all be served best by their abolition.⁸⁶

Yet the implicit argument running throughout this section is that this conclusion reveals not the limitations of transfer taxes, but rather the limitations of traditional tax policy itself. First, by assuming that revenue-raising is the primary reason for every tax, traditional tax policy narrows the scope of legitimate taxation and limits the agenda for conceivable social reform. Establishing a false dichotomy between presumably objective and determinable questions of tax policy proper and allegedly vague and arbitrary "social policy" concerns,⁸⁷ it marginalizes the latter and forces them either to compete against or conform to the "real" substance of tax policy. Second, to the extent that traditional tax policy embraces a utilitarian conception of fairness in the distribution of tax burdens, it hinges its arguments for progressivity and horizontal equity on an outmoded and discredited moral theory that disregards widely held convictions that there are indeed ethical differences among different types of receipts. In each respect, as the next section attempts to establish, traditional tax policy overlooks the most persuasive justifications for taxing inherited wealth.

B. Principles of Distributive Justice

"Distributive justice: that is the wealth tax issue."

Maureen A. Maloney, Dean of the Faculty of Law,
University of Victoria, British Columbia

That traditional tax policy cannot account for the existence of distinct wealth transfer taxes by no means suggests that such a rationale does not exist. On the contrary, as this section argues, ethically defensible and widely accepted principles

⁸⁶ Dobris, *supra*, note 29 at 1226.

⁸⁷ See, e.g., Bird (1971), *supra*, note 1 who although emphasizing "the social case for wealth taxation" nevertheless distinguishes this justification from traditional ability to pay arguments and consigns the former to the realm of unresolvable "value judgments". See also Cooper, *supra*, note 71 at 30 (describing the "social policy" argument for "a capital-directed wealth tax" as "a little more sticky" than traditional equity arguments).

of distributive justice can provide the justification that traditional tax policy has failed to supply. Indeed, it is a mark of most recent arguments for taxing inherited wealth that they have tended to emphasize these arguments of distributive justice rather than the traditional tax policy arguments found wanting in the previous section.⁸⁸

In the argument that follows, three principles are central. First, on a societal level, moderate equality in the distribution of wealth is defended as an instrumental end to better achieve the more fundamental goods of political democracy and individual autonomy.⁸⁹ While these goals do not demand strict equality, and must be balanced against competing goods of economic efficiency and generosity,⁹⁰ they require redistributive measures to prevent immense concentrations of wealth on the one hand or extreme propertylessness on the other. Second, on an individual level, inheritance taxation is proposed as an essential corollary to liberal-egalitarian ideas of equal opportunity and individual desert.⁹¹ Although these principles are neither absolute nor uncompromising, they suggest that, except for specifically exempt transfers,⁹² a progressive tax should be levied on the cumulative total of all gifts and inheritances above a lifetime threshold available to each recipient.⁹³ Finally, re-examining the relationship between transfer taxation and the institution of the family, it is argued that principles of mutuality and obligation mandate further qualifications to the transfer tax regime otherwise recommended by the first two principles alone.⁹⁴ In this respect, all three principles combine to provide both an explanation for taxing inherited wealth and a normative blueprint for the actual design of a specific wealth transfer tax.

1. Moderate Equality and the Distribution of Wealth

Virtue...is a mean between two vices, one of excess and one of deficiency.

Aristotle, *Nicomachean Ethics*, Bk. II, Ch. 6.

Moderate equality in the distribution of wealth has been a professed ideal of political philosophers from Aristotle⁹⁵ to Thomas Jefferson⁹⁶ and is also espoused

88. See, e.g., Michael B. Levy, "Liberal Equality and Inherited Wealth" (1983) 11 *Pol. Theory* 545; Haslett, *supra*, note 2; Maloney, *supra*, note 2; Munzer, *supra*, note 2; and Ascher, *supra*, note 2.

89. *Infra*, sections II.B.1.(B)(2) and (3).

90. *Infra*, sections II.B.1.(C)(1) and (2).

91. *Infra*, section II.B.2.(A).

92. *Infra*, sections II.B.1.(C)(2) and II.B.2.(B)(2).

93. *Infra*, sections II.B.1.(B)(4) and II.B.2.(A).

94. *Infra*, section II.B.2.(B)(3).

95. Aristotle, *The Politics*, trans. Carnes Lord, (Chicago: University of Chicago Press, 1984) Book IV, Chapter 11 (1295b13-1296a15) (arguing that since "those who are preeminent in the goods of fortune...neither wish to be ruled nor know how to be...[whereas] those who are excessively needy...are too humble [and] do not know how to rule but only how to be ruled, and then in the fashion of rule of a master," a regime with a moderately equal distribution of wealth will be most stable and best governed, while a regime characterized by great extremes of wealth "is a city not of free persons but of slaves and masters, the ones consumed by envy, the others by contempt.").

96. As Eisenstein relates, Jefferson's image of the ideal United States was "a country in which none was very rich; none very poor; all were producers, all owners and consumers." Eisenstein, *supra*, note 7 at 259.

by contemporary liberal and communitarian theorists alike.⁹⁷ As an argument for taxing the transfer of inherited wealth, it was emphasized by the American Progressive Movement of the late 19th and early 20th centuries,⁹⁸ accepted by President Theodore Roosevelt in his 1906 proposal for a U.S. inheritance tax,⁹⁹ and adopted by President Franklin Roosevelt as explicit justification for sharp increases in the U.S. estate and gift tax rates during the Great Depression.¹⁰⁰ It was also cited by the Ontario Committee on Taxation as a key reason to maintain the succession duty then in force in the province.¹⁰¹ Although it has been challenged more recently as a plausible rationale for the current U.S. estate and gift tax regime (given its apparent failure to moderate the distribution of wealth during the past fifty years),¹⁰² it remains one of the more convincing and oft-repeated rationales for preserving and strengthening wealth transfer taxes.¹⁰³

The following discussion reviews evidence on the distribution of wealth in major Western industrialized countries, advances arguments for moderate equality in the distribution of wealth, examines qualifications and counter-arguments to these initial arguments, and considers their implications for the design of a tax on inherited wealth. While moderate equality alone cannot justify a distinct tax on *inherited* wealth, the arguments of this section constitute an essential building block to the more specific rationale advanced in the next section.

97. The liberal argument appears in John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 225-26, and 277 (criticizing “[d]isparities in the distribution of property and wealth” and advocating progressive inheritance taxes to “encourage the wide dispersal of property which is a necessary condition, it seems, if the fair value of the equal liberties is to be maintained”). Communitarian arguments can be found in Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 119-28.

98. See Rudick (1945), *supra*, note 5 at 27; Eisenstein, *supra*, note 7 at 226-27; and Ronald Chester, *Inheritance, Wealth, and Society* (Bloomington: Indiana University Press, 1982) at 52-58. Among the leading figures of this nineteenth century “death tax movement” was Andrew Carnegie, who favoured a progressive transfer tax that should exempt “moderate sums” to dependents, but rise “rapidly as the amounts swell.” See Rudick (1945), *supra*, note 5 at 27; and Eisenstein, *supra*, note 7 at 227.

99. See Eisenstein, *supra*, note 7 at 228-29; and Chester, *supra*, note 98 at 60.

100. See Eisenstein, *supra*, note 7 at 235-36.

101. *Report of the Ontario Committee on Taxation*, *supra*, note 83, Vol. III at 136.

102. See, e.g., Verbit, *supra*, note 24 at 609 (concluding that since “transfer taxes have not been effective wealth redistributors or deconcentrators...the transfer tax system should be relieved of the burden of wealth redistribution and/or deconcentration and should instead be viewed primarily as a revenue producer”); and Graetz, *supra*, note 1 at 271 (concluding that because “the estate tax has done very little to dilute the greatest concentrations of wealth” this ‘deconcentration’ aim is a “myth” that, by condoning the “narrowing of the estate tax base...necessarily defeats the contribution of this tax to the progressivity of the federal tax system.”). For a critique of both these revenue-raising and progressivity arguments for wealth transfer taxation, see *supra*, section II.A.1-3. Evidence that wealth transfer taxes may have contributed to reduced wealth inequality in Great Britain over the course of the twentieth century can be found in A.B. Atkinson and A.J. Harrison, *The Distribution of Personal Wealth in Britain* (Cambridge: Cambridge University Press, 1978).

103. See, e.g., Rudick (1945), *supra*, note 5 at 29; Eisenstein, *supra*, note 7 at 252-55; Shoup, *supra*, note 42 at 101-03; Bird (1971), *supra*, note 1 at 10-12; Brannon, *supra*, note 42 at 451; Jantscher, *supra*, note 40 at 51-55; Maloney (1988), *supra*, note 2 at 603-04, and 612-13; and Munzer, *supra*, note 2 at 403-11.

(A) Inequality, Inheritance, and the Distribution of Wealth

It has long been suspected that intergenerational gifts and inheritances are a major factor in the perpetuation of economic inequality.

John A. Brittain, *Inheritance and the Inequality of Material Wealth*,
(Washington, D.C.: The Brookings Institution, 1978) at 1.

Countless studies have been conducted and many pages have been written presenting figures on the distribution of wealth in Western industrialized countries, challenging the data reflected in these figures or interpretations of their significance, and responding to these challenges with counter-arguments and renewed data.¹⁰⁴ Similarly, studies have estimated the extent to which inheritance accounts for the current stock and distribution of wealth.¹⁰⁵ There is no need for this paper to retrace these debates.

Instead, presuming that most data omissions in estimates of the distribution of wealth probably cancel each other out,¹⁰⁶ concluding that life-cycle saving explanations account for only a limited component of reported inequality,¹⁰⁷ and emphasizing that material inheritance is at least a significant contributor to economic inequality,¹⁰⁸ I am content merely to restate some of the most prominent findings on the overall distribution of wealth and to note the striking similarities in wealth distribution in representative Western industrial countries. As John Brittain has observed, “[f]ew are likely to challenge the casual observation that the inequality

104. See, e.g., Wagner, *supra*, note 29 at 35-36; Brittain, *supra*, note 56 at 3-6; James B. Davies, “On the Size Distribution of Wealth in Canada” (1979) 25 *Rev. Income & Wealth* 237; Gilbert Paul Verbit, “Taxing Wealth: Recent Proposals from the United States, France, and the United Kingdom” (1980) 60 *Boston U. L. Rev.* 1 at 8-9; Haslett, *supra*, note 2 at 123-24; Munzer, *supra*, note 2 at 383-88; James B. Davies, “The Distributive Effects of Wealth Taxes” (1991) 17:3 *Canadian Public Policy* 279; and Henry J. Aaron and Alicia H. Munnell, “Reassessing the Role for Wealth Transfer Taxes,” (1992) 45 *Nat. Tax J.* 121-30.

105. See, e.g., Thurow, *supra*, note 20 at 129-54; Brittain, *supra*, note 56; Laurence J. Kotlikoff and Lawrence H. Summers, “The Role of Intergenerational Transfers in Aggregate Capital Accumulation” (1981) 89 *J. Pol. Econ.* 706; Haslett, *supra*, note 2 at 125-26; Franco Modigliani, “The Role of Intergenerational Transfers and Life Cycle Saving in the Accumulation of Wealth” (1988) 2 *J. Econ. Perspectives* 15; Munzer, *supra*, note 2 at 392-94; Aaron and Munnell, *supra*, note 104 at 130-32; James B. Davies, “Inheritance and the Distribution of Wealth in Britain and Canada,” Paper Prepared for the International Symposium on Saving and Bequest, (Tokyo: Institute for Telecommunications Policy, 1992); and Edward N. Wolff, “Changing Inequality of Wealth” (1992) 82 *Amer. Econ. Rev.* 552.

106. Although the omission of pension and social security wealth and measures of human capital overestimates measures of wealth inequality, the omission of the value of trust funds underestimates evidence of wealth inequality. Furthermore, since human capital is inalienable and riskier than physical capital, and since wealth therefore represents an important determinant of economic security above and beyond the income it provides, it is questionable whether human and physical capital should be weighed equally in arriving at measures of overall wealth distribution. See, e.g., Thurow, *supra*, note 20 at 17-18; Brittain, *supra*, note 56 at 4, 6-7; Chester, *supra*, note 98 at 4, 78; and Munzer, *supra*, note 2 at 383.

107. See, e.g., Sandford (1971), *supra*, note 9 at 28; Brittain, *supra*, note 56 at 51-72; and Munzer, *supra*, note 2 at 388.

108. Since many inheritances occur only after the recipients are well into adulthood, it is important to consider the effects over at least two generations to get a good sense of the relationship between inheritance and inequality. Unfortunately, from my brief review of the empirical studies it seems as though most studies are confined to the impact of material inheritance on the immediately following generation. Consequently, it is not surprising that these studies suggest that material inheritance plays a lesser role in the perpetuation of inequality than does the inheritance of genetic and socio-cultural endowments. Regardless, for the purposes of the present argument, it is sufficient to accept the findings of most studies that the relationship between material inheritance and economic inequality in the immediately following generation is at least significant, even if not substantial.

of material wealth is very pronounced.”¹⁰⁹ For those who have not seen this in the world around them, it is doubtful whether mere figures will convince them otherwise.

Nevertheless, recent evidence portrays a striking picture indeed. In the United States, 1986 survey data indicate that the top 20 percent of households owned almost 80 percent of total wealth, that the top 1 percent owned 31.7 percent and that the top 0.5 percent owned 23.9 percent; in contrast, the lowest 40 percent owned only 2.1 percent of total wealth while the bottom 20 percent had almost zero net wealth.¹¹⁰ While these figures are largely unchanged from those discovered in a 1962 survey,¹¹¹ more recent evidence suggests a sharp increase in U.S. wealth inequality in the 1980s.¹¹² In Canada, a 1984 survey indicates that the wealthiest 20 percent of households owned almost 70 percent of total wealth and that the top 1 percent owned about 17 percent; in contrast, the lowest 40 percent owned only 2.1 percent of wealth while the bottom 20 percent had negative net wealth.¹¹³ Similar patterns are apparent in Great Britain,¹¹⁴ and in other Western European countries.¹¹⁵ Assuming the validity of these figures, or something relatively close to them, one can conclude that the distribution of wealth is extremely unequal in most Western industrialized countries.

(B) Egalitarian Teleologies

Without some notion of an optimal or most preferred degree of inequality, there is no basis for saying that more equality or less equality is desirable.

Richard E. Wagner, *Death and Taxes:
Some Perspectives on Inheritance, Inequality, and Progressive Taxation*,
(Washington, D.C.: American Enterprise Institute for Public Policy Research, 1973) at 12.

Granted that the distribution of wealth is extremely unequal, why should this matter? As Richard Wagner responds, unless there is a *reason* to favour greater material equality, there is no basis to criticize the existing distribution of wealth nor to adopt policies, such as taxing inherited wealth, to reduce current disparities

109. Brittain, *supra*, note 56 at 3.

110. Aaron and Munnell, *supra*, note 104, Table 4. These figures are based on a narrow definition of wealth that includes the replacement value of tangible assets, the market value of equities, the book value of bonds, and the cash surrender value of trusts and pensions, but excludes the full value of trusts and pensions and the present discounted value of social insurance benefits. However, even according to the broadest definition of wealth, the shares of the top 20 percent, 1 percent and 0.5 percent of households are 67.5 percent, 21 percent and 16 percent respectively, while the shares of the lowest 40 percent and the bottom 20 percent increase only slightly to 3.4 percent and 0.2 percent.

111. *Ibid.*

112. *Ibid.* Figure 3. This evidence is based on estate tax returns and has yet to be confirmed by household survey data. For an analysis of factors likely to have caused increased U.S. wealth inequality in the 1980s, see Wolff, *supra*, note 105.

113. Davies, *supra*, note 105, Table 3. These estimates have been challenged on the grounds that they fail to adequately portray the extreme upper tail of the wealth distribution, particularly by underreporting the value of stock ownership. Correcting for these defects, Davies estimates that the share of wealth held by the top 1 percent is likely more in the range of 23-27 percent. *Ibid.* at 16.

114. See Anthony B. Atkinson, James P.F. Gordon and Alan Harrison, “Trends in the Shares of Top Wealth Holders in Great Britain, 1923-1981” (1981) 51 *Oxford Bulletin of Economics and Statistics* 315.

115. See Kessler and Pestieau, *supra*, note 1 at 316 (Table 7).

of wealth holdings. What, then, is the rationale for increased equality in the distribution of wealth?

One answer might be that extreme inequality is “unlovely per se” or ‘aesthetically’ unattractive in itself.¹¹⁶ But surely this response is unsatisfactory. Material equality is not an end in itself, a value to be pursued for its own intrinsic merits as an object of contemplation or admiration. On the contrary, it is valued instrumentally for the goods that it helps to realize. Thus, it is to these ends, these egalitarian teleologies, to which one must look to justify increased equality in the distribution of wealth as a social goal and inheritance taxation as a policy proposal.

(1) Introduction: Utility Disclaimed

[E]ven the simplest exercise of the right of bequest, that of determining the person to whom property shall pass immediately on the death of the testator, has always been reckoned among the privileges which might be limited or varied, according to views of expediency.

John Stuart Mill, *Principles of Political Economy*,
(1848), Bk. II, Ch. 2, para. 4.

Two of the most prominent teleological explanations for a more equal distribution of wealth and inheritance taxation are explicitly utilitarian. On the one hand, assuming a diminishing marginal utility of wealth (and income) and relatively similar capacities for individual satisfaction among different persons, it follows that rough equality maximizes overall utility.¹¹⁷ For John Stuart Mill, this utilitarian consideration was a central reason for imposing limits on inherited wealth.¹¹⁸ Alternatively, more recent economic theories have conceived of the distribution of wealth as a pure public good, for which individual demands may be aggregated through a social welfare function that maximizes overall preference satisfaction.¹¹⁹ To the extent that most voters prefer increased equality in the distribution of wealth or dislike inherited wealth (for example, because they are risk averse or envious), utilitarian ethics requires that redistributive policies such as inheritance taxation be adopted to maximize overall preference satisfaction.

Notwithstanding the historical prominence of these two arguments and their frequent application to traditional tax policy analysis, this paper disclaims each utilitarian approach as an acceptable reason for egalitarian redistribution generally or for taxing inherited wealth specifically. As utilitarians themselves have often noted, since aggregate utility is likely also increased by the security of expectations associated with a system of permanent and bequeathable private property rights,¹²⁰ the

116. See Bird (1971), *supra*, note 1 at 11; and Simons, *supra*, note 7 at 18-19.

117. See, e.g., R.M. Hare, “Justice and Equality,” in John Arthur and William H. Shaw, eds, *Justice and Economic Distribution*, (Englewood Cliffs, NJ: Prentice-Hall, 1978) 116 at 125; and Haslett, *supra*, note 2 at 135.

118. Mill, *supra*, note 73 at 379 (“it must be apparent to every one, that the difference to the happiness of the possessor between a moderate independence and five times as much, is insignificant when weighed against the enjoyment that might be given, and the permanent benefits diffused, by some other disposal of the four-fifths.”). Book II, Chapter II, paragraph 4.

119. See Thurow, *supra*, note 20 at 38-39.

120. The term “a permanent bequeathable property right” is derived from Robert Nozick’s theory of private property rights. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, Inc., 1974) at 178.

ultimate utilitarian prescription regarding the distribution of wealth generally and the treatment of inherited wealth specifically is largely uncertain.¹²¹ Further, as recent works in political theory have consistently emphasized, utilitarianism itself is ethically unattractive since (as John Rawls explains) by aggregating preferences across all persons it fails to “take seriously the distinction between persons,”¹²² and (as Michael Sandel has argued) by taking all preferences as given, no matter how perverse, it fails to take seriously the ethical distinction between different orders of preferences.¹²³

For the purposes of this argument, the rejection of utilitarianism has two obvious advantages. First, by disavowing the ethics of preference-aggregation, the argument for moderate equality and inheritance taxation is freed from the unacceptable ambiguities associated with interpersonal comparisons of utility and attempts to aggregate individual utilities into a social-welfare function.¹²⁴ Second, by disclaiming preference-neutrality, the argument can abandon envy as a legitimate basis for redistributive inheritance taxation, and therefore also dismiss objections to such taxation on the grounds that it represents nothing more than the expression of base majoritarian envy.¹²⁵ On the other hand, by renouncing traditional utilitarian arguments for redistribution, the argument thus far provides no ethical justification for increased equality in the distribution of wealth nor for taxing inherited wealth. Nevertheless, as the following two sections outline, the teleological argument for moderate equality can rely on more plausible and ethically appealing objectives than mere preference satisfaction.

(2) Democracy

Death taxes, if adequately protected by gift taxes, are admirably suited to control the growth in this country of an economically powerful minority whose influence is based on inherited wealth. By this device, the amount of capital that passes from one generation to another can be controlled, an essential safeguard to the fabric of a democratic society.

Ontario Committee on Taxation Report,
(Toronto: Ontario Printer, 1967), Vol. III at 136.

Democracy is one of the animating norms of contemporary Western societies.

121. See, e.g., Hare, *supra*, note 117 at 125. For an excellent exposition of this tension in utilitarian theories of property rights, see Alan Ryan, *Property and Political Theory* (Oxford: Basil Blackwell, 1984) at 91-117.

122. Rawls, *supra*, note 97 at 27.

123. See Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) at 165-68 (arguing persuasively that the former failure to take seriously the distinction between persons is merely symptomatic of this latter failure to take seriously the qualitative distinctions of worth between different orders of desires—a failure rooted in an impoverished account of the good shared by Rawls’ own theory of justice as fairness).

124. See, e.g., Thurow, *supra*, note 20 at 35-36.

125. See, e.g. Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960) at 93; Gordon Tullock, “Inheritance Justified” (1971) 14 J. Law & Econ. 465 at 472; Richard E. Wagner, *Death and Taxes: Some Perspectives on Inheritance, Inequality, and Progressive Taxation* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1973) at 48-49; Wagner, *supra*, note 29 at 19-20, and 83; and David A. Ward, “The Case Against Capital Taxes” (1980) 2 Can. Taxation 31.

Yet time and time again the ideal of self-government on the basis of equal representation is distorted by the economic power that a small minority is able to wield in the political arena. Both by selective funding of sympathetic politicians and political parties, and through threatened or actual withdrawal of capital to protest unwelcome policies, wealthy elites are able to command far more political clout than their numbers alone warrant.¹²⁶

Thus, it is not surprising that liberal-democrats from John Stuart Mill to the Ontario Committee on Taxation have favoured transfer taxes to contain “improper power” on the part of “an economically powerful minority whose influence is based on inherited wealth.”¹²⁷ Combined with redistribution to the politically under-represented group of small or non-existent wealthholders, wealth transfer taxation may be essential to the existence of even a minimally satisfactory democratic society. Furthermore, although this democratic argument for moderate equality might support several different kinds of redistributive taxation (such as progressive income taxes, capital gains taxes, or periodic net wealth taxes), inherited wealth represents a particularly appropriate tax base since the institution of dynastic power is even more opposed to democratic ideals than the political influence of economic power confined to only one generation.

(3) Autonomy

A [person] with much property has great bargaining strength and a great sense of security, independence, and freedom.... The propertyless [on the other hand] must continuously and without interruption acquire [their] income by working for an employer or by qualifying to receive it from a public authority. An unequal distribution of property means an unequal distribution of power and status.

James E. Meade, *Efficiency, Equality, and the Ownership of Property*, (Cambridge, MA: Harvard University Press, 1965) at 39.

“Improper power,” as Mill called it, is not neatly confined to the political arena as conventionally understood.¹²⁸ On the contrary, as the record of twentieth century contract, employment and landlord-tenant law so eloquently attest, extreme inequality has implications for the shape of social and economic relations generally and for the ability of those at a significant economic disadvantage to achieve anything like the individual autonomy that freedom of contract expressly promises.¹²⁹

Although Karl Marx was certainly one of the first to emphasize the contradiction between the formal freedom and the substantive unfreedom of wage labourers in a capitalist economy,¹³⁰ one need not be a Marxist nor an opponent of private prop-

126. See, e.g., Bird (1971), *supra*, note 1 at 11; and Walzer, *supra*, note 97 at 121.

127. See Mill, *supra*, note 73 at 379 (Book II, Chapter II, paragraph 4); and the Ontario Committee on Taxation Report, *supra*, note 83, Vol. III at 136. See also Rawls, *supra*, note 97 at 225-26, 277; and Walzer, *supra*, note 97 at 127.

128. See Walzer, *supra*, note 97 at 121 (arguing that concentrated wealth “also has political effects...in the market itself and in its firms and enterprises”).

129. See, e.g., Munzer, *supra*, note 2 at 248, and 397.

130. See, e.g., Karl Marx, *Wage Labour and Capital*, in Karl Marx and Frederick Engels, *Selected Works in One Volume*, (New York: International Publishers, 1968) at 64-94. See also the useful analysis of Marx and Hegel in Munzer, *supra*, note 2 at 148-87.

erty to appreciate the connection between moderate equality in the distribution of wealth and meaningful autonomy in the domain of social and economic interaction. Even Adam Smith recognized that “upon all ordinary occasions” employers would have the power to “force” employees into “compliance with their terms.”¹³¹ And Max Weber was not the last to conclude that the extent to which “the total amount of ‘freedom’ within a given legal community” is effectively maximized cannot, as libertarians typically assume,¹³² be derived deductively from the abstract minimization of nonvoluntary obligations, but instead requires attention to the actual substance of society, depending upon “the concrete economic order and especially upon the property distribution.”¹³³

In the context of contemporary Western industrialized countries, it is hard not to conclude that the enormous disparities in property ownership and associated economic power outlined earlier are significantly responsible for the alienation and dependency that characterize many contractual, employment and tenancy relationships. In this setting, provided that they are not so frequent, extreme or unpredictable as to seriously undermine the personal autonomy that private property itself secures,¹³⁴ redistributive measures are indispensable to the maximization of individual autonomy in the social and economic, as well as the political, realm. Moreover, to the extent that inherited wealth is a significant contributor to the inequalities of wealth and power that undermine individual autonomy, wealth transfer taxation represents a particularly appropriate policy response to encourage individual autonomy. Thus, for this reason too, as well as for the end of political democracy, it is clear that non-utilitarian teleologies can supply persuasive arguments for taxing inherited wealth.

(4) Design Implications

[I]f we recognise that modern death duties are necessarily mainly about the distribution of wealth, then there should be wide acceptance for the view that one of the most important criteria for determining the form of death duty is its effectiveness in promoting a more even distribution. It should be possible to agree on the *form* of duty most suitable for that purpose.

C.T. Sandford, J.R.M. Willis, and D.J. Ironside, *An Accessions Tax*, (London: Institute for Fiscal Studies, 1973) at 6.

The actual design of a wealth transfer tax is a detailed exercise requiring con-

131. Adam Smith, *The Wealth of Nations* (Chicago: University of Chicago Press, 1976) at 74–75 (observing that: “A landlord, a farmer, a master manufacturer, or merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment”).

132. See, e.g., Hayek, *supra*, note 125; Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962); and Nozick, *supra*, note 120.

133. Max Weber, “Freedom and Coercion,” in *Max Weber on Law in Economy and Society*, 20th Century Legal Philosophy Series, Vol. VI (Cambridge, MA: Harvard University Press, 1954) 188 at 188–91. See also Thomas M. Scanlon, “Liberty, Contract and Contribution” in G. Dworkin, G. Bermant and P.G. Brown, eds, *Markets and Morals* (Washington, D.C.: Hemisphere Publishing, 1977) at 61.

134. See Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 438.

siderably more institutional detail than is possible in this argument for a lifetime accessions tax.¹³⁵ Nevertheless, even at this preliminary stage, the goal of moderate equality suggests at least four features in the design of such a tax. First, since it is the total amount acquired by each *recipient*, not the amount transferred by each donor, that contributes directly to wealth inequality, the tax should ideally be imposed upon beneficiaries rather than donors or their estates.¹³⁶ Second, since it is the *total* amount of accessions (gifts and inheritances from all donors) over the course of each recipient's lifetime that contributes to wealth inequality, not only discrete successions following the deaths of individual benefactors, the tax should ideally be based on the cumulative total of lifetime accessions, rather than on amounts obtained only through inheritance or upon the aggregate of gifts and inheritances from each separate donor.¹³⁷

Third, since it is only the receipt of large amounts of wealth that contributes to inequality, not the receipt of an average or moderate sum, the tax need not apply to all accessions, but should apply only above a dollar threshold permitting the lifetime accession of a moderate amount free of tax.¹³⁸ Although the notion of a "moderate amount" is admittedly somewhat vague,¹³⁹ possible approaches might be to fix this threshold by reference to the mean or median amount of household wealth¹⁴⁰ or to the average amount of wealth transferred in the jurisdiction within a specified prior duration such as the past five years.¹⁴¹ In addition to the intrinsic connection that this arrangement would maintain to egalitarian goals that the tax is intended to serve, this method of defining the threshold would have the added administrative advantages of excluding a large number of recipients from taxation¹⁴² and of auto-

135. More detailed design issues are discussed in Andrews, *supra*, note 5; John H. Alexander, "Federal Estate and Gift Taxation: The Major Issues Presented in the American Law Institute Project" (1967) 22 Tax L. Rev. 635; Ontario Committee on Taxation Report, *supra*, note 83, Vol. III at 143-44, and 147-208; Jantscher, *supra*, note 61; Wolfe D. Goodman, *The New Provincial Succession Duty System: An Examination of the Succession Duty Acts of the Atlantic Provinces, Manitoba and Saskatchewan*, Canadian Tax Paper No. 56, (Toronto: Canadian Tax Foundation, 1972); Sandford *et al.*, *supra*, note 5; The Advisory Committee on Succession Duties (Langford Committee), *Report*, (February 23, 1973); Meade Committee Report, *supra*, note 66 at 316-49; Gutman, *supra*, note 1; Dodge, *supra*, note 66; Halbach, *supra*, note 2; and Ascher, *supra*, note 2.

136. See, e.g., Sandford *et al.*, *supra*, note 5 at 11-14; and OECD, *supra*, note 5 at 80-81. For this purpose, it is the legal incidence and structure of the tax, not its ultimate incidence that matters. Hence, provided that the tax is based on the amount received by each beneficiary, it does not matter that the tax may actually be paid by donors or their estates. Nor is this design principle violated if for administrative reasons legal obligations to withhold taxes are imposed on donors, executors or trustees.

137. See, e.g., Sandford *et al.*, *supra*, note 5 at 14-19 and 27-31. While most OECD countries levy taxes on amounts received by beneficiaries, few aggregate all gifts and inheritances into a common base, and only Ireland levies tax on the basis of gifts and inheritances received from all donors as opposed to receipts from each individual donor. See OECD, *supra*, note 5 at 81 and 94-100.

138. See Eisenstein, *supra*, note 7 at 252-55; Sandford *et al.*, *supra*, note 5 at 53; Haslett, *supra*, note 2 at 152-53; Munzer, *supra*, note 2 at 406; and Ascher, *supra*, note 2 at 101-02, 132-35.

139. See Eisenstein, *supra*, note 7 at 254 (commenting on Franklin D. Roosevelt's proposal to exempt a "reasonable inheritance" with the admonition that: "a 'reasonable inheritance' does not carry the same arithmetical connotations to everybody. The most reasonable minds will quarrel over what is reasonable"). While the notion of a "moderate amount" is similarly indeterminate, I believe that it nevertheless conveys a more precise meaning than the idea of a "reasonable" amount.

140. For example, if mean household wealth is \$250,000, this amount could be receivable free of tax. For a demonstration of how such an exemption might operate under a lifetime accessions tax, see Sandford *et al.*, *supra*, note 5 at 27-31.

141. This suggestion closely follows a similar proposal in Haslett, *supra*, note 2 at 153.

142. Ascher, *supra*, note 2 at 132.

matically adjusting to changing circumstances over time.¹⁴³

Finally, since the receipt of a larger amount of wealth contributes more to wealth inequality than the receipt of a lesser sum, the tax should apply at progressive rates.¹⁴⁴ Besides striking directly at one of the root causes of inequality, a progressive lifetime accessions tax would also create an incentive for donors themselves to distribute wealth more widely in order to reduce the total burden of the tax.¹⁴⁵

(C) Qualifications and Counter-Arguments

Equality is a complex relation of persons, mediated by the goods we make, share, and divide among ourselves; it is not an identity of possessions. It requires then, a diversity of distributive criteria that mirrors the diversity of social goods.

Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*,
(New York: Basic Books, 1983) at 18.

Although the goals of political democracy and individual autonomy recommend rough equality in the distribution of wealth, these two aims are not the only social goods. On the contrary, as both critics and advocates of wealth transfer taxation have often cautioned, the pursuit of other social goods suggests alternative distributive criteria that challenge the strongly egalitarian impulse of the argument thus far. The following sections consider three such goods—material prosperity, generosity, and individual liberty—and their impact on the general argument for increased equality and the specific argument for taxing inherited wealth. While the first two goods temper the simple egalitarianism of the initial argument, the third is rejected as a reason for renouncing moderate equality and abandoning the taxation of inherited wealth.

(1) Material Prosperity

If both equality and efficiency are valued, and neither takes absolute priority over the other, then, in places where they conflict, compromises ought to be struck.

Arthur M. Okun, *Equality and Efficiency: The Big Tradeoff*,
(Washington, D.C.: The Brookings Institution, 1975) at 88.

A regime of simple equality, in which everyone owns an equal share of wealth,

143. Haslett, *supra*, note 2 at 153.

144. See Eisenstein, *supra*, note 7 at 255 ("A policy of levelling is rooted in the tacit premise that if an estate exceeds a certain amount, whatever that amount may be, the excess should be taken away. It logically follows that as the excess becomes larger, the progression should become sharper."); Ontario Committee on Taxation Report, *supra*, note 83, Vol. III at 186 ("only a progressive tax would help to prevent undue concentrations of wealth from being transmitted by inheritance without at the same time being unduly severe to those of modest fortune"); and Munzer, *supra*, note 2 at 406 (advocating "steeply progressive rates").

145. See, e.g., Sandford *et al.*, *supra*, note 5 at 13-14; and OECD, *supra*, note 5 at 81. For the purpose of this argument, it does not matter whether many donors would actually change the pattern of their gifts and bequests in order to obtain a tax saving, only that some marginal effect is created to further the general objective of the tax.

would be unattractive for at least two reasons.¹⁴⁶ First, by prohibiting all differences in belongings between persons, it would efface the individual autonomy that moderate equality is itself intended to promote. To the extent that distinct individuals have unique preferences and make different life choices, individual autonomy implies that dissimilar consequences should follow. Second, by eliminating all economic incentives to work and to save, simple equality would undermine crucial conditions for material prosperity which is itself both an essential precondition for meaningful autonomy and a significant value in and of itself. It is this latter issue of economic incentives that is taken up here.¹⁴⁷

To address this economic challenge it is useful to begin by restating that the argument of this paper prescribes not just any kind of redistribution, but rather a particular method of redistribution directed specifically at the taxation of inherited wealth. Consequently, in considering the efficiency implications of *this* argument for moderate equality, it is reasonable to focus on the economic effects of wealth transfer taxes alone, rather than upon any or all other redistributive measures. In this respect, at least four separate economic disadvantages are generally mentioned: (a) tax-induced incentives to transfer wealth in the form of nontaxable human capital instead of taxable physical capital¹⁴⁸; (b) tax-related liquidity disruptions to small businesses and family enterprises¹⁴⁹; (c) disincentives to saving and/or work effort (productivity)¹⁵⁰; and (d) the fragmentation of large pools of private capital with negative implications for capital accumulation and economic growth.¹⁵¹ The following sections examine each of these effects, and their implications for the taxation of inherited wealth.

(a) Human Capital and Physical Capital

[A]mong the many ways in which those who have gained power and influence might provide for their children, the bequest of a fortune is socially by far the cheapest. Without

146. For a critical exposition of the idea of simple equality, see Walzer, *supra*, note 97 at 18.

147. The former issue of difference and autonomy is considered at *infra*, section II.B.2.

148. See, e.g., Hayek, *supra*, note 125 at 91; Michael J. Boskin, "An Economist's Perspective on Estate Taxation," in Edward C. Halbach, Jr., ed., *Death, Taxes and Family Property* (St. Paul: West Publishing, 1977) 56 at 62-63; and Wagner, *supra*, note 29 at 16. For two recent responses to this argument, see Maloney (1988), *supra*, note 2 at 620-22; and Munzer, *supra*, note 2 at 414.

149. See, e.g., Wagner, *supra*, note 125 at 40-41; Wagner, *supra*, note 29 at 69; and Ward, *supra*, note 125 at 34. Detailed considerations of this argument can be found in Shoup, *supra*, note 42 at 94-97; Sandford (1967), *supra*, note 9 at 28-42; Sandford (1971), *supra*, note 9 at 90-126; Bird (1971), *supra*, note 1 at 20-21; Sandford *et al.*, *supra*, note 5 at 134-36; Graetz, *supra*, note 1 at 284-85; and Maloney (1988), *supra*, note 2 at 630-38.

150. See, e.g., Tullock, *supra*, note 125 at 471; Wagner, *supra*, note 125 at 23-25; Boskin, *supra*, note 148 at 60-62; Wagner, *supra*, note 29 at 14-19; and Richard E. Wagner, "Sense versus Sensibility in the Taxation of Personal Wealth" (1980) 2 Can. Taxation 23 at 26-27. For opposing arguments, see Shoup, *supra*, note 42 at 86-91; Sandford (1967), *supra*, note 9 at 22-27; Bird (1971), *supra*, note 1 at 16-18; Sandford *et al.*, *supra*, note 5 at 127-33; Jantscher, *supra*, note 40 at 41-46; Haslett, *supra*, note 2 at 144-45; Maloney (1988), *supra*, note 2 at 627-29; Munzer, *supra*, note 2 at 414-16; and Ascher, *supra*, note 2 at 100-10.

151. See, e.g., Hayek, *supra*, note 125 at 90-91; Sandford (1967), *supra*, note 9 at 27; Dan Throop Smith, "A U.S. View of a Wealth Tax," in *Report of the Proceedings of the Twenty-Third Tax Conference, 1971* (Toronto: Canadian Tax Foundation, 1972) 24 at 25-27; Boskin, *supra*, note 148 at 64; Ward, *supra*, note 125 at 34; and Levy, *supra*, note 88 at 551. Diverse responses appear in Shoup, *supra*, note 42 at 91-93; Bird (1971), *supra*, note 1 at 18-19; Graetz, *supra*, note 1 at 278-83; Haslett, *supra*, note 2 at 145-48; Maloney (1988), *supra*, note 2 at 627-30; and Ascher, *supra*, note 2 at 110-11.

this outlet, these [parents] would look for other ways of providing for their children, such as placing them in positions which might bring them the income and the prestige that a fortune would have done; and this would cause a waste of resources and an injustice much greater than is caused by the inheritance of property.

Friedrich A. Hayek, *The Constitution of Liberty*,
(Chicago: University of Chicago Press, 1960) at 91.

Since wealth transfer taxes typically exclude the transmission of most human capital while taxing all transfers of physical wealth, critics often point to this discrepancy as a reason to reject such taxes altogether.¹⁵² Ignoring for the moment philosophical objections regarding the status of equal opportunity as a distributive justification for taxing inherited wealth,¹⁵³ these opponents condemn this inconsistency on the grounds that it creates undesirable incentives to transfer wealth in socially unproductive or simply inefficient ways.¹⁵⁴

Notwithstanding Hayek's admonition that "[t]hose who dislike the inequalities caused by inheritance should therefore recognize that, men being what they are, it is the least of evils,"¹⁵⁵ these social and economic objections are quite easily dismissed. First, while it is undoubtedly true that tax disincentives to the transfer of physical wealth will encourage some parents to transfer more wealth in the form of nontaxable human capital, this substitution is not necessarily as socially unproductive as the critics suggest. On the contrary, parental investments in their children's education have significant societal benefits¹⁵⁶ and counteract market imperfections that make it difficult to borrow to finance investments in human capital. Furthermore, since "occupational inheritance" and nepotism generally prevail even where material wealth can be freely transferred, it is uncertain whether this behaviour would significantly increase even if inherited wealth were effectively taxed. Instead, it seems, the prevention of these socially unproductive transfers requires alternative methods of social control like grievance procedures and human rights guarantees, rather than the preservation of unlimited material inheritance as an "outlet" for parents to transfer social and economic advantages to their children. Indeed, to the extent that these procedural measures promote meaningful equality of opportunity, they are both the logical and historical complements to the taxation of inherited wealth.

152. See, e.g., Hayek, *supra*, note 125 at 88-91; Friedman, *supra*, note 132 at 164; Wagner, *supra*, note 125 at 48; Boskin, *supra*, note 148 at 62-63; and Wagner, *supra*, note 29 at 16, 83, and 85.

153. These are addressed at *infra*, section II.B.2.(B).

154. For Friedrich Hayek and Richard Wagner, these incentives threaten a return to a semi-feudal state, as "men...look for other ways of providing for their children, such as placing them in positions which might bring them the income and prestige that a fortune would have done," and as this "increased inheritance of occupational positions" retards social mobility and makes "caste and status...loom larger than they do now in the social order." Hayek, *supra*, note 125 at 91; Wagner, *supra*, note 29 at 85. For Michael Boskin, on the other hand, the concern is strictly economic and explicitly utilitarian: "these taxes create an incentive for wealthy individuals to give their heirs human instead of nonhuman capital, creating inefficiency by decreasing the total utility of a given level of transfer." Boskin, *supra*, note 148 at 63.

155. Hayek, *supra*, note 125 at 91.

156. See, e.g., Brittain, *supra*, note 105 at 7, n. 19.

Second, although wealth transfer taxes clearly bias the choice between transfers of human and nonhuman capital,¹⁵⁷ this acknowledged “inefficiency” is ethically objectionable only according to the most narrow of utilitarian perspectives, namely one that looks only at the preference satisfaction of the individuals immediately party to the transfer.¹⁵⁸ Moreover, since this paper has already rejected utilitarianism as an ethical basis for the distribution of wealth,¹⁵⁹ this economic objection is itself suspect; instead, as a subsequent section of this paper argues,¹⁶⁰ since the transfer of human capital is ethically defensible in a way that the transfer of physical capital is not, it is entirely appropriate to encourage the former and to discourage the latter, notwithstanding that this may diminish the aggregate utility of a given transfer to the immediate parties.

(b) Closely-Held Enterprises and the Liquidity Squeeze

The public joint stock company with readily marketable shares is not affected by estate duty; the death of a major shareholder will mean a transfer of ownership, but the resources of the company are undiminished. It is on businesses run by sole proprietors, partnerships or private companies that estate duty may impinge, and possibly also, to a lesser extent, on public companies with a limited market for their shares. In short it is the ‘family business’ which is primarily affected by estate duty.

Cedric T. Sanford, *Taxing Inheritance and Capital Gains: Towards a Comprehensive System of Capital Taxation*, (London: The Institute of Economic Affairs, 1967) at 28.

A second economic objection to taxing inherited wealth points to the liquidity-related disruptions such taxes inflict upon closely-held enterprises such as small businesses and family farms.¹⁶¹ As critics and advocates of wealth transfer taxes both observe, to the extent that taxpayer ability to satisfy transfer tax liabilities may compel the sale or partial liquidation of these closely-held enterprises, this result is often deplored on the ethical grounds that it is “inequitable and harsh,”¹⁶² and on the economic grounds that it fosters inefficient fragmentation of productive

157. Although, even here, it is possible to reduce this bias by also taxing certain transfers of human capital, such as tuition payments for students above a stipulated age of majority. Indeed, some such transfers are arguably already taxable, for example private elementary and secondary education, for which parents must pay additional fees above and beyond public school taxes. Furthermore, as Munzer argues, the extent to which capital can be transferred in human form may be limited by the recipient’s “capacity to absorb and profit from education.” Munzer, *supra*, note 2 at 414.

158. On a broader utilitarian analysis, one would have to consider the aggregate utility associated with the taxation and redistribution of wealth, and with the transfer of human capital to the frustrated heir.

159. *Supra*, section II.B.1.(B)(1).

160. *Infra*, section II.B.2.(A)(2).

161. See, e.g., Wagner, *supra*, note 125 at 40-41; Wagner, *supra*, note 29 at 69; and Ward, *supra*, note 125 at 34.

162. Maloney (1988), *supra*, note 2 at 630. See also Sanford (1967), *supra*, note 9 at 32, and Sanford *et al.*, *supra*, note 5 at 135 (emphasizing the loss of family control and the inequity of forced liquidation in an imperfect market where sudden sales are apt to yield unfavourable terms); and Bird (1971), *supra*, note 1 at 20 (noting the “hardship” caused by “realization under compulsion” and “uncertainty as to the amount of tax that will be due”).

enterprises¹⁶³ and discourages investment in small businesses and family farms.¹⁶⁴

Ignoring for now the objection that these liquidity-related problems may compel the loss of family control in such closely-held enterprises,¹⁶⁵ what implications do these equitable and economic considerations have both for the desirability of a tax on inherited wealth and/or its optimal design? At the outset, it is important to recognize that the apparent extent of this liquidity dilemma is actually quite slight.¹⁶⁶ Without going into detailed figures, empirical evidence suggests that the vast majority of transfers subject to tax contain mainly “liquid and readily marketable assets, principally securities,”¹⁶⁷ and that only a very small percentage of taxable transfers including illiquid “trade assets” are unable to satisfy transfer tax liabilities from liquid assets also transferred.¹⁶⁸ Thus, to the extent that these liquidity problems require any responses, they should be in the form of specific exceptions to general transfer tax provisions, not the rejection of transfer taxes altogether.

Second, as many respondents to this economic objection are quick to point out, the economic effects of the liquidity squeeze may be even more beneficial than they are harmful.¹⁶⁹ To the extent that partial liquidation encourages closely-held enterprises to introduce improved management techniques, and outright sale moves productive assets to more highly valued uses, the liquidity requirements of a tax on inherited wealth may act as a positive stimulus to economic efficiency. Indeed, as these transfer tax advocates proceed to explain,¹⁷⁰ since specific exceptions for small businesses and family farms extend special benefits to these enterprises and no others, such preferential treatment is arguably itself both inequitable and inefficient: society in effect “subsidiz[es] the desires of certain taxpayers who, for sentimental reasons or lifestyle preferences, wish to live on farms and [or] own small companies,”¹⁷¹ and thereby creates undesirable incentives for people to invest in such closely-held enterprises primarily for tax avoidance purposes.¹⁷² Thus, on effi-

163. See, e.g., Sandford (1967), *supra*, note 9 at 30-32; and Sandford (1971), *supra*, note 9 at 148: “heavy death duties carry the danger of diminished efficiency through a reduction in the scale of production.”

164. See, e.g., Sandford (1967), *supra*, note 9 at 35-37 (mentioning also gifts and partial sale as alternative anticipatory measures to avoid the potential liquidity problems of transfer tax liability); Bird (1971), *supra*, note 1 at 20 (emphasizing inducements to merge and hold liquid assets, and the disincentive to invest as owners get older); Wagner, *supra*, note 125 at 40, and Wagner, *supra*, note 29 at 69 (citing figures on tax-induced mergers of closely-held enterprises with larger corporations); and Maloney (1988), *supra*, note 2 at 630 (commenting that “the prospect of forced liquidation at death may reduce investment in small businesses which would have unfortunate implications for the economic growth of the country”).

165. I return to this issue at *infra*, sections II.B.2.(B)(2) and (3).

166. See the analysis and studies cited in Sandford (1967), *supra*, note 9 at 33-35; Bird (1971), *supra*, note 1 at 20-21; Sandford *et al.*, *supra*, note 5 at 134-46; Graetz, *supra*, note 1 at 284-85; and Maloney (1988), *supra*, note 2 at 631.

167. Graetz, *supra*, note 1 at 285. See, e.g., Ontario Committee on Taxation Report, *supra*, note 83, Vol. III at 138 (reporting that of all estates subject to succession duty in 1963, 65 percent of assets were liquid—a percentage that increased to 81.4 percent among estates valued at \$1,000,000 or more).

168. Sandford (1967), *supra*, note 9 at 33.

169. See, e.g., Sandford (1967), *supra*, note 9 at 38-40; Bird (1971), *supra*, note 1 at 20; Sandford *et al.*, *supra*, note 5 at 137-45; and Maloney (1988), *supra*, note 2 at 632.

170. See, e.g., Sandford (1967), *supra*, note 9 at 40-42; Sandford (1971), *supra*, note 9 at 146-49; Bird (1971), *supra*, note 1 at 20; and Maloney (1988), *supra*, note 2 at 630-33.

171. Maloney (1988), *supra*, note 2 at 632. See also Sandford (1967), *supra*, note 9 at 40; and Bird (1971), *supra*, note 1 at 20.

172. See Sandford (1971), *supra*, note 9 at 146-47; and Maloney (1988), *supra*, note 2 at 633.

ciency grounds alone, the case for any exceptions for closely-held enterprises is extremely weak.¹⁷³

In any event, to the extent that liquidity problems are judged to create inefficiencies or inequities, these effects are easily resolved through specific design provisions permitting deferral or payment by instalment,¹⁷⁴ and by special insurance schemes such as the British Estate Duties Investment Trust (EDITH)¹⁷⁵ or by the creation of flexible non-voting preference shares such as proposed by the Meade Committee.¹⁷⁶ Given these arrangements, therefore, there would seem to be little reason to adopt additional exceptions for small businesses and family farms.¹⁷⁷

(c) Savings, Productivity, and the Bequest Motive

[A]s the price of bequests increases with rising tax rates, the tax will reduce total savings and will do so with increasing force.

Richard E. Wagner, *Inheritance and the State: Tax Principles for a Free and Prosperous Commonwealth*,
(Washington, D.C.: American Enterprise Institute for Public Policy Research, 1977) at 19.

The third alleged economic disadvantage of wealth transfer taxes was examined in an earlier section of this paper,¹⁷⁸ and requires little further discussion here. Since the bequest motive is probably small compared to other reasons to save, it is plausible that transfer taxes have only a limited effect on donor choices to save and to work.¹⁷⁹ Indeed, this hypothesis is supported by what limited empirical evidence exists on the question.¹⁸⁰ Moreover, since the prospect of a diminished inheritance is apt to induce potential heirs to work harder and to save more, whatever disincentives reduce work effort and savings on the part of potential donors is partly offset by the encouragement to productivity and saving on the part of prospective recipients.¹⁸¹

Thus, progressive transfer taxes are likely no less neutral and possibly slightly more neutral than progressive income taxes or net wealth taxes having a similar total yield¹⁸²; and compared to any other redistributive capital tax, they almost certainly distort economic decisions less.¹⁸³ Therefore, insofar as efficiency consid-

173. This is not to suggest that some other principle, as yet unexpressed, cannot justify preferential tax treatment for family enterprises. See *infra*, sections II.B.2.(B)(2) and (3).

174. See, e.g., Sandford (1971), *supra*, note 9 at 151; Bird (1971), *supra*, note 1 at 20; Gutman, *supra*, note 1 at 1259-71; and Maloney (1988), *supra*, note 2 at 631.

175. See, e.g., Sandford (1967), *supra*, note 9 at 37-40.

176. Meade Committee Report, *supra*, note 66 at 359-60.

177. But see *infra*, sections II.B.2.(B)(2) and (3).

178. See *supra*, section II.A.3.

179. Bird (1971), *supra*, note 1 at 18: "the quantitative significance of all these effects is close to nil."

180. See *supra*, section II.A.3.

181. See, e.g., Shoup, *supra*, note 42 at 89; Sandford (1967), *supra*, note 9 at 26; Bird (1971), *supra*, note 1 at 17-18; Jantscher, *supra*, note 40 at 44-45; Maloney (1988), *supra*, note 2 at 627; and Ascher, *supra*, note 2 at 106.

182. See, e.g., Jantscher, *supra*, note 40 at 53: "Death taxes receive high marks for being less burdensome than alternative instruments of redistribution, principally the income tax and a hypothetical wealth tax."

183. See, e.g., Sandford (1971), *supra*, note 9 at 13: "no other form of capital tax can achieve the same effect with less antagonism and less economic disturbance."

erations conflict with the egalitarian imperatives of political democracy and individual autonomy, wealth transfer taxes represent perhaps the most effective means of managing this tension in a way that minimizes the extent of the conflict.

Moreover, appreciation of at least some bequest-motivated saving and productivity, and acknowledgment that the bequest motive likely increases among older and more affluent wealthholders suggests at least one additional feature in the design of a wealth transfer tax to further reduce any disharmony between efficiency and equality. Along with the encouragement to gifts and bequests that is preserved by a lifetime threshold permitting the tax-free transfer of a moderate amount of wealth, progressive rates should reach a top marginal rate somewhere around 50 percent in order to maintain a significant incentive for bequest-motivated saving and productivity among even the most substantial wealthholders.¹⁸⁴

(d) Accumulation, Growth, and Prosperity

[T]he power to tax is the power to destroy. A tax on wealth is a tax not on income but on capital. If the nation's stock of capital is to be taxed with the objective of disbursing the money thereby raised through government welfare or other expenditure programs, capital has not been redistributed but, in fact, reduced, since the ultimate beneficiaries of the tax on capital will immediately spend what they receive with the result that in aggregate terms the stock of private capital will have been dissipated.

David A. Ward, "The Case Against Capital Taxes,"
(1980) 2 Canadian Taxation 31.

The final and most significant economic objection to wealth transfer taxes rejects the goal of dispersing immense concentrations of inherited wealth, whether through progressive taxation of large inheritances or by incentives to encourage donors to distribute wealth more widely. To the extent that governments do not use transfer tax revenues to increase public investment or to decrease government deficits but instead redistribute these resources to low-income and non-wealthholding groups, *and* to the extent that those of moderate wealth and income tend to save proportionately less than those with high incomes and substantial wealthholdings,¹⁸⁵ it follows that—even with continued incentives for bequest-motivated saving—transfer taxes will decrease aggregate capital accumulation and jeopardize economic growth.¹⁸⁶ Alternatively, if governments use transfer tax revenues to increase social investment or decrease government deficits, public accumulation along these lines may withdraw major investment decisions from the creative and accountable hands of private investors, and vest this power in bureaucratic and fiscally undisciplined

184. See, e.g., Ontario Committee on Taxation Report, *supra*, note 83, Vol. III at 187. See also Munzer, *supra*, note 2 at 406-11; and Ascher, *supra*, note 2 at 109. Since a subsequent section of this paper argues that, above the lifetime threshold, accessions should be taxed more heavily than ordinary income, I assume here that the top marginal income tax rate is less than 50 percent.

185. This is nothing more than a restatement of the traditional microeconomic insight that the marginal propensity to save increases with income and wealth.

186. See, e.g., Hayek, *supra*, note 125 at 90-91; Sandford (1967), *supra*, note 9 at 27; Smith, *supra*, note 151 at 25-27; Boskin, *supra*, note 148 at 64; Ward, *supra*, note 125 at 34; and Levy, *supra*, note 88 at 551.

state agencies.¹⁸⁷ While the former prospect of reduced economic growth compromises both aggregate welfare and social equality,¹⁸⁸ the latter alternative of public investment threatens inefficiency and inflation as well as government monopolization over the direction of some of the most significant social and economic determinants.¹⁸⁹ Thus, it is argued, notwithstanding its acknowledged contributions to economic inequality, the institution of private inheritance is essential to political liberty, material prosperity and even equality itself.

These are persuasive and challenging objections to wealth transfer taxation, requiring serious responses from contemporary transfer tax advocates. It is not enough to proclaim that the notion of economic growth is itself overrated, that uneven material prosperity and massive environmental destruction demand a shift in the economic priorities of the twenty-first century from the simplistic accumulation of the nineteenth and twentieth centuries. Although there is much to be said for this diagnosis, even the most dedicated efforts to improve material prosperity for the economically disadvantaged sectors of the Western industrial democracies, to promote economic development in the Second and Third Worlds, and to achieve environmental reconstruction and harmonization on a global scale will require enormous investments that cannot themselves be financed by mere redistribution without continued economic expansion.

Nor is it sufficient to deny the importance of capital accumulation to labour productivity and economic development, to assert the adequacy of current levels of savings,¹⁹⁰ and to emphasize instead the role of technological improvements and population increases as engines of economic growth.¹⁹¹ Although empirical studies suggest that labour productivity and economic growth does not depend on savings alone,¹⁹² the record of Japan, which maintained an average annual net national saving rate of more than 20 percent between 1962 and 1985 (roughly three times that of the United States during this period) and achieved annual productivity gains of more than 8 percent during this period (compared to less than 3 percent in the United States),¹⁹³ supplies overwhelming empirical support to the argument that capital accumulation contributes both to aggregate growth and to real wage increases.¹⁹⁴

187. See, e.g., Hayek, *supra*, note 125 at 90-91 (defending private inheritance as an "essential...means to preserve the dispersal in the control of capital and as an inducement for its accumulation").

188. See, e.g., Levy, *supra*, note 88 at 551 (observing that diminished savings undermines "the welfare and opportunity of future generations"); and Boskin, *supra*, note 148 at 64 (explaining that "a decrease in saving and capital accumulation will decrease the capital-labour ratio in the economy" thereby increasing the return to capital and decreasing "the productivity of labour and wage rates compared to what they would have been otherwise").

189. See, e.g., Sandford (1967), *supra*, note 9 at 27 (warning that transfer tax revenues "cannot be used for current expenditure without being inflationary"); and Levy, *supra*, note 88 at 551 (rejecting state-controlled accumulation on the grounds that "capital would become concentrated in ways that might be detrimental to liberty"). See also Friedman, *supra*, note 132 at 7-21 (emphasizing the relation between economic and political freedom).

190. See, e.g., Graetz, *supra*, note 1 at 279.

191. See, e.g., Graetz, *supra*, note 1 at 279; and Maloney (1988), *supra*, note 2 at 627.

192. See Graetz, *supra*, note 1 at 279, n. 121.

193. Lawrence H. Summers, "How Best to Give Tax Incentives to Saving and Investment?" Testimony to the Senate Finance Committee, (September 29, 1989) at 4 (Figure 2).

194. *Ibid.* at 2-5.

Nor, finally, is it adequate merely to advise that transfer tax revenues be employed to repay public debts,¹⁹⁵ and to dismiss concerns about the direction and consequences of government investment as mere anti-statist ideology, without any basis in fact or reason. Although strict application of transfer tax revenues to the reduction of government deficits would free up already-existing savings for private investment, this would do nothing to restore aggregate savings to the levels attainable under a regime of unlimited private inheritance; moreover, to the extent that transfer taxes encourage donors themselves to distribute wealth more widely in order to reduce the overall tax burden, transfer tax revenues are unlikely to match the diminished saving that can be expected to accompany moderate equality in the distribution of wealth. Alternatively, while a deliberate strategy of surplus budgeting or balanced-budget increases in public investment could increase aggregate savings, this proposal inspires scepticism about government accountability and apprehension over political control of major investment decisions—reactions that are not wholly without justification in light of the deepening fiscal crises of the Western industrial democracies, and the recent collapse of the Eastern European economies.

Regardless, while this paper cannot present a detailed answer to this final economic objection to wealth transfer taxes, enough of a response can be outlined to rebut the argument that the institution of unlimited private inheritance is essential to the pursuit of prosperity, liberty, and equality itself. First, recalling Arthur Okun's admonition that, when efficiency and equality conflict, "compromises ought to be struck,"¹⁹⁶ one could reply that even if present taxation of inherited wealth operates to diminish economic growth and real wages gains, this future price might nonetheless be warranted by the immediate equality gains that wealth transfer taxes might achieve.¹⁹⁷

More convincingly, though, one can reply that these presumed conflicts between equality and efficiency, between equality and liberty, and between current equality and future equality are not the rigid contradictions they are often perceived to be, that (to use Roberto Unger's term) they reflect a false necessity more than a real constraint,¹⁹⁸ and that the apparent antagonism between these competing values can be softened or minimized by practical and familiar policies and institutional reforms.

195. See, e.g., Sandford (1967), *supra*, note 9 at 27; Sandford (1971), *supra*, note 9 at 137; Bird (1971), *supra*, note 1 at 19; Graetz, *supra*, note 1 at 282-83; Maloney (1988), *supra*, note 2 at 629; and Ascher, *supra*, note 2 at 91-92, and 110-11. This approach to the use of transfer tax revenues was suggested almost 150 years ago by John Stuart Mill and was reiterated by Franklin Roosevelt in his 1935 Message to Congress. See Mill, *supra*, note 73 at 174 (Book V, Ch. 2, para 7) (observing that "the argument [that inheritance taxes will reduce capital accumulation] cannot apply to any country which has a national debt, and devotes any portion of revenue to paying it off; since the produce of the tax, thus applied, still remains capital, and is merely transferred from the tax-payer to the fundholder"); and Verbit, *supra*, note 24 at 680 (citing Roosevelt's statement that "the proceeds of this tax should be specifically segregated and applied, as they accrue, to the reduction of the national debt. By so doing, we shall progressively lighten the tax burden of the average taxpayer, and, incidentally, assist in our approach to a balanced budget").

196. Arthur M. Okun, *Equality and Efficiency: The Big Tradeoff* (Washington, D.C.: The Brookings Institution, 1975) at 88.

197. See, e.g., Simons, *supra*, note 7 at 24 ("To stress obligations to our children's children is often a means of diverting attention from patent obligations to our contemporaries").

198. Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge: Cambridge University Press, 1987).

Thus, as James Meade argued more than 25 years ago,¹⁹⁹ a moderately egalitarian “property-owning democracy” can maintain a high level of capital accumulation and economic growth by increasing the level of private savings through specific tax-inducements to middle-class investments in retirement pensions, employee share purchase arrangements, and home ownership plans.²⁰⁰ Similarly, the presumed conflicts between both equality and efficiency, and between equality and liberty, can be reduced by organizational reforms in the capital market to pool private savings in the hands of informed and responsible financial intermediaries,²⁰¹ and through democratic reforms of government to promote efficient and accountable management of public investment funds.²⁰² Finally, these approaches would not only ensure economic growth and allocative efficiency, but actually enhance individual autonomy, by expanding democratic control over the direction of private and public investment, *and* increase social equality both by increasing the capital-labour ratio and by transforming workers into worker-capitalists whose income is derived not only from labour but also from the return on their personal investments.²⁰³

In other words, the concentration of wealth via unlimited private inheritance is not necessary for economic growth, for political liberty, or for equality itself. As Earl Rolph and George Break have written: “a society that happened to escape the great concentration of wealth in the hands of a few would have no good economic reason [nor, one might add, any other reason] to arrange reforms designed to encourage concentration; instead it may count its blessings.”²⁰⁴

(2) Generosity

[G]enerosity...seems...to be the mean about wealth; for the generous person is praised...in the giving and taking of wealth, and more especially in the giving.

Aristotle, *Nicomachean Ethics*, Bk. IV, Ch. 1.

Material prosperity is not the only distributive criterion that suggests qualifications to the egalitarian thrust of the democratic and autonomy-based arguments for moderate equality and wealth transfer taxation. On the contrary, as Aristotle’s remarks on the virtue of generosity suggest,²⁰⁵ important values are also associated with the giving of wealth, even if this practice makes distributive outcomes more unpredictable and uneven than a simple egalitarianism would prescribe.²⁰⁶

Aside from whatever economic effects they may have, and ignoring for the

199. J.E. Meade, *Efficiency, Equality, and the Ownership of Property*, (Cambridge, MA: Harvard University Press, 1965) at 40-65.

200. *Ibid.* at 53-54, 59. See also Okun, *supra*, note 196 at 99; and Summers, *supra*, note 193.

201. Meade, *supra*, note 199 at 40, 59.

202. See, e.g., Unger, *supra*, note 198 at 491-502.

203. See, e.g., Meade, *supra*, note 199 at 40-41; and Krouse and McPherson, *supra*, note 49 at 91.

204. Earl Rolph and George Break, *Public Finance* (New York: Ronald Press, 1961) cited in Bird (1971), *supra*, note 1 at 19.

205. Aristotle, *Nicomachean Ethics*, trans. Terence Irwin, (Indianapolis: Hackett, 1985), Bk. IV, Ch. 1.

206. See Walzer, *supra*, note 97 at 123-28.

moment the specific relationship between material inheritance and the institution of the family,²⁰⁷ several benefits from the practice of donative transfers can be easily identified. For the individual donor, the power to give or bequeath one's wealth permits the exercise of Aristotelian virtue, serves as a valuable instrument to help forge affective bonds with others,²⁰⁸ and allows for individual autonomy in the disposition as well as the acquisition and enjoyment of one's possessions.²⁰⁹ For society as a whole, donative transfers can encourage both civic pluralism as organizations and ideas are able to survive and to flourish independently of state or majoritarian support,²¹⁰ and social solidarity as philanthropic and mutual protection initiatives are undertaken on a voluntary and grassroots basis in addition to and alongside the provision of welfare and social insurance by the state.²¹¹ In each respect, therefore, as Michael Walzer remarks, the power to give and bequeath is surely "one of the finer expressions of ownership as we know it."²¹²

Nevertheless, as illustrated by the earlier emphasis on the need to balance the competing values of efficiency and equality, neither is generosity an absolute good that necessarily "trumps" the egalitarian imperatives of democracy and autonomy.²¹³ Moreover, as the previous section attempted to exemplify, a major goal of legal and institutional reform should be to soften or diminish the contradictions between apparently irreconcilable values, instead of taking for granted the tensions embodied in their current institutional expressions.²¹⁴

207. I return to this issue at *infra*, section II.B.2.(C)(2).

208. See, e.g., Munzer, *supra*, note 2 at 381. Consider birthday presents and the exchange of gifts during religious and secular holidays.

209. See, e.g., Walzer, *supra*, note 97 at 123: "If I can shape my identity through my possessions, then I can do so through my dispositions."

210. See, e.g., Wagner, *supra*, note 125 at 27-28; and Wagner, *supra*, note 29 at 84 (defending the institution of private inheritance on the grounds that it "makes possible the establishment of private sources of wealth...to compete with public wealth in supporting a variety of artistic, cultural, educational, philanthropic, and scientific activities," thereby promoting the diversity of views that is essential to a free society "by preventing monopoly control over the financing of such spheres of life"). See also Friedman, *supra*, note 132 at 17 (emphasizing "a role of inequality of wealth in preserving political freedom that is seldom noted—the role of the patron"). As criticisms of strict prohibitions against public philanthropy, these comments are unimpeachable. As arguments for unlimited private inheritance, however, they are vulnerable to two rejoinders: first, in each case, the alleged arguments for inheritance and inequality are really only arguments against cultural monopolization in the hands of the state, not against transfer taxation to ensure moderate equality in private holdings of wealth; second, as the sections on democracy and autonomy argued, far from threatening freedom and diversity, the promotion of moderate equality through wealth transfer taxation is likely to ensure even more political freedom and greater cultural diversity, since those with minority opinions need not depend on the uncertain support of a few wealthy patrons (or foundations) to advance their views.

211. See, e.g., Marvin K. Collie, "Estate and Gift Tax Revision" (1973) 26 Nat. Tax J. 441 at 448 (endorsing the idea of a "partnership" between government and private philanthropy); and Mill, *supra*, note 73 at 380, n. 3 (commending the "[m]unificent bequests and donations for public purposes, whether charitable or educational, [which] form a striking feature in the modern history of the United States, and especially of New England") (Book II, Chapter II, paragraph 4, footnote). These solidaristic initiatives can take many forms, from donations for First or Third World food relief, to individual payment for the medical treatment of a friend or community member, to community contributions to rebuild a home destroyed by fire or natural disaster. Furthermore, contributions may be made directly to the recipient or indirectly through a charitable or self-protection organization.

212. Walzer, *supra*, note 97 at 128.

213. See, e.g., *ibid.* at 128 (concluding that, although the benefits of donative transfers require us "to respect those men and women who give their money away to persons they love or to causes to which they are committed," this practice must be confined to its proper "sphere", and cannot be allowed to undermine the egalitarian exigencies of political democracy and individual autonomy).

214. See generally Unger, *supra*, note 198.

With these comments in mind, the following two elements can be suggested for the specific design of a tax on inherited wealth. First, since the individual advantages of unconstrained generosity can be reasonably achieved with the transfer of a limited amount to each recipient per year, in addition to the lifetime threshold proposed earlier,²¹⁵ the tax should include a modest annual exclusion for transfers received from each individual donor.²¹⁶ In addition to the scope that this exclusion would allow for tax-free expressions of friendship and affection, it would serve the valuable administrative purpose of excluding *de minimis* transfers that involve more effort at record-keeping and valuation than they warrant.²¹⁷

Second, to the extent that the pluralistic and solidaristic purposes of individual beneficence do not undermine the quality of political democracy and individual autonomy, these too can be accommodated through specific exemptions for education or maintenance,²¹⁸ and for charitable purpose transfers either directly to qualifying individuals,²¹⁹ or indirectly to qualifying organizations.²²⁰ While this approach introduces the admittedly difficult task of determining precisely *which* individuals and organizations qualify for tax exempt status, this is a challenge that the income tax and existing transfer taxes have faced for decades. Although these solutions have often been less than satisfactory,²²¹ the administrative hurdle is not insurmountable. Moreover, although this proposal is certain to reduce transfer tax revenues from the levels they might otherwise attain,²²² tax-exempt transfers for these purposes promote the values of generosity, pluralism, and social solidarity without undermining the egalitarian requirements of democracy and autonomy, *and* promise to lessen the need for government revenues to the extent that they reduce the need

215. *Supra*, section II.B.1.(B)(4).

216. See, e.g., Rudick (1945), *supra*, note 5 at 41-42; and Gutman, *supra*, note 1 at 1244-49. Such an annual exclusion (currently amounting to \$10,000) is contained in the U.S. Gift Tax, I.R.C. s. 2503(b). For similar proposals, associated with widely differing tax bases, see Carter Commission Report, *supra*, note 38, Vol. 3 at 498-99 (\$250 annual exclusion; income tax base); Andrews, *supra*, note 5 at 592 (\$1,500 annual exclusion; lifetime accessions tax base); Sandford *et al.*, *supra*, note 5 at 53-56 (£250 exclusion; lifetime accessions tax base); Halbach, *supra*, note 2 at 235-36 (\$5,000 annual exclusion; lifetime accessions base); and Ascher, *supra*, note 2 at 143 (\$5,000 annual exclusion; estate tax base). Although the notion of a "modest annual exclusion" is as vague as or perhaps more vague than the concept of a "moderate exemption," \$10,000 strikes me as unnecessarily excessive; \$1,000 seems adequate to serve the virtues of individual generosity, particularly where a lifetime exemption also exists to exclude more substantial transfers. Presumably this amount would have to be indexed for inflation.

217. See, e.g., Rudick (1945), *supra*, note 5 at 42; Sandford *et al.*, *supra*, note 5 at 55; Gutman, *supra*, note 1 at 1248; and Ascher, *supra*, note 2 at 143.

218. See, e.g., Sandford *et al.*, *supra*, note 5 at 56-58.

219. See, e.g., Levy, *supra*, note 88 at 559 (recommending "tax exemptions for handicapped heirs"); and Ascher, *supra*, note 2 at 96-97, 130-31 (proposing a specific exemption for "disabled lineal descendants"). Unfortunately, these proposals have a disturbing tendency to limit the scope of charitable expression to the confines of the traditional nuclear family. If the purpose of the exemption is to allow tax free acts of generosity, why should it matter whether the disabled recipient is a "lineal descendant" or the child of a friend, a member of one's community, or a foster child whom one has never met?

220. See, e.g., Sandford *et al.*, *supra*, note 5 at 59-60; and Ascher, *supra*, note 2 at 135-36.

221. In this respect, see especially McQuaig, *supra*, note 1 at 44-58 (detailing the extensive use of nominally charitable purpose trusts primarily for private tax avoidance purposes).

222. See, e.g., Westfall, *supra*, note 24 at 1002-06 (advocating restriction or termination of the U.S. Gift and Estate tax charitable deduction in order to increase revenue); and Ascher, *supra*, note 2 at 135-36 (limiting the exemption to "20% of a decedent's estate" in order to protect transfer tax revenues, since "[a]lmost every testator would be able to find at least one charity he or she preferred to the federal government").

for government transfers.²²³

(3) Liberty

If one objects to the use of coercion in order to bring about a more even or a more just distribution, this does not mean that one does not regard these as desirable. But if we wish to preserve a free society, it is essential that we recognize that the desirability of a particular object is not sufficient justification for the use of coercion.

Friedrich A. Hayek, *The Constitution of Liberty*,
(Chicago: University of Chicago Press, 1960) at 87.

A final objection to moderate equality and the taxation of inherited wealth purports to reject teleological arguments altogether. Irrespective of how desirable the goal of moderate equality may be, it is claimed, and notwithstanding the ability of a well-designed wealth transfer tax to accommodate the competing goods of economic efficiency, individual generosity, civic pluralism, and social solidarity, redistribution generally and transfer taxation specifically are inherently unjustified on the grounds that they infringe individual liberties by violating private property rights.²²⁴ The right, it is said, is prior to the good,²²⁵ and no amount of benefit can justify government coercion to achieve any greater social or individual good,²²⁶ regardless of whether the good is defined in terms of a crude utilitarianism or according to a more elaborate “quasi-Aristotelian” teleology.²²⁷ In a free society, it is argued, the distribution of wealth and income is not the *object of social choice*, but instead the *result of individual choices*,²²⁸ not the product of some “patterned” principle of distributive justice,²²⁹ but rather the unregulated and unpredictable out-

223. See, e.g., Collie, *supra*, note 211 at 448 (emphasizing the role of charitable transfers both in widening the distribution of wealth and as a “substitute for [government] revenues otherwise needed for [charitable] purposes”). “Every deductible dollar paid to charity must be devoted to public purposes and, in many instances, will substitute for Federal revenues otherwise needed for these purposes.”

224. See, e.g., Nozick, *supra*, note 120 at 168 (“redistribution is a serious matter indeed, involving, as it does, the violation of people’s rights”). See also Ward, *supra*, note 125 at 31 (“All taxation may be defined as the compulsory seizure of privately-owned property or money by the State”); Wagner, *supra*, note 150 at 28 (“Inheritance is an aspect of private property... . The taxation of inheritance therefore represents the socialization of property”); and Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985) at 304 (“there is no principled distinction between the right of property and the right of succession”).

225. See, e.g., Nozick, *supra*, note 120 at ix: “Individuals have rights, and there are things no person or group may do to them (without violating their rights).”

226. See, e.g., Hayek, *supra*, note 125 at 87; and Friedman, *supra*, note 132 at 174: “I find it hard, as a liberal, to see any justification for graduated taxation solely to redistribute income. This seems a clear case of using coercion to take from some in order to give to others and thus to conflict head-on with individual freedom.”

227. William A. Galston, *Justice and the Human Good* (Chicago: University of Chicago Press, 1980) at x.

228. Wagner, *supra*, note 29 at 27–28 (adding that: “To say that one must participate in a collective choice over the distribution of rewards is to commit a holistic fallacy. It treats the pattern of distribution as something that must be agreed to and chosen by all for all”).

229. Nozick, *supra*, note 120 at 153–64. See also Hayek, *supra* note 125 at 87 (objecting to “all attempts to impress upon society a deliberate[ly chosen] pattern of distribution, whether it be an order of equality or of inequality”).

come of a repeated sequence of just transfers of justly-acquired holdings.²³⁰

This is a prevalent and powerful objection to wealth transfer taxation that contemporary transfer tax advocates cannot afford to dismiss lightly. It is not acceptable to ignore the moral force of this complaint, to abandon ethical justification altogether, and to invoke the purely positivistic rejoinder that private property is only “a creation of the state,”²³¹ unconstrained by principles of justice or right.²³² Although there is considerable accuracy to this description as an *empirical* matter, by conceptualizing property rights as the mere products of political conflict or majoritarian sentiment,²³³ this response forswears the critical distance necessary to advance normative arguments for the reform of current institutions: for the definition of just private property rights, and for the establishment of a fair scheme of taxation. Moreover, to the extent that legal positivism explains property rights (rules determining the distribution of wealth) as nothing more than “what the opinions and feelings of the ruling portion of the community make them,”²³⁴ it concedes perhaps the strongest political instrument for the struggle over transfer tax reform: the argument that justice not only permits but affirmatively requires the taxation of inherited wealth.

Nor is it satisfactory to accept the general moral force of the natural rights con-

230. See Nozick, *supra*, note 120 at 150-53 (explaining his “entitlement theory” of distributive justice as the articulation of three elements: (1) a principle of justice in acquisition, describing “how unheld things may come to be held, ... the things that may come to be held by these processes, the extent of what comes to be held by a particular process, and so on”; (2) a principle of justice in transfer, describing the “processes [by which] a person [may] transfer holdings to another [and by which] a person [may] acquire a holding from another who holds it,” including “general descriptions of voluntary exchange, and gift and (on the other hand) fraud, as well as reference to particular conventional details fixed upon in a given society”; and (3) a principle of just rectification that attempts to correct for violations of the first two principles by formulating “its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice has not taken place.”).

231. Bird (1971), *supra*, note 1 at 14; and Bird, *supra*, note 27 at 36.

232. See, e.g., Bird (1971), *supra*, note 1 at 14-15; and Maloney (1988), *supra*, note 2 at 618-20 (arguing, among other things, that “[t]he conditions upon which income may be kept and wealth held are determined by a free and democratic government, elected by the populace who agree to abide by its rules. The individual taxpayer, informed of the rules of the game, chooses to earn or hold property on this basis. Quite simply there is no coercion.... [T]he owners of property do not earn, inherit or hold property except at the behest of the state which provides laws concerning private ownership, intestacy, contract and the institutions to enforce them. The ownership of property does not and cannot exist without state recognition and enforcement.”). An excellent articulation of this position appears in Mill, *supra*, note 73 at 350: “[T]he Distribution of wealth...is a matter of human institution solely. The things once there, mankind, individually or collectively, can do with them as they like. They can place them at the disposal of whomsoever they please, and on whatever terms. Further, in the social state, in every state except total solitude, any disposal whatever of them can only take place by the consent of society, or rather of those who dispose of its active force. Even what a person has produced by his individual toil, unaided by any one, he cannot keep, unless by the permission of society. Not only can society take it from him, but individuals could and would take it from him, if society only remained passive; if it did not either interfere *en masse*, or employ and pay people for the purpose of preventing him from being disturbed in the possession. The distribution of wealth, therefore, depends on the laws and customs of society. The rules by which it is determined are what the opinions and feelings of the ruling portion of the community make them, and are very different in different ages and countries; and might be still more different, if mankind so chose.” (Book II, Chapter I, paragraph 1)

233. See, e.g., Bird (1971), *supra*, note 1 at 15 (“These views simply cannot be reconciled except through the cumbersome mechanism of the political process—which is, as has been well said, the only game in town!”); and Maloney (1988), *supra*, note 2 at 620 (“In the final analysis, most people would agree that there should be some restriction or state regulation over the transmission of excess wealth”).

234. Mill, *supra*, note 73 at 350. (Book II, Chapter I, para. 1)

ception of private property, but to reject its specific application to the transfer of property at death: to argue, as have William Blackstone and the U.S. Supreme Court,²³⁵ that natural rights apply only to the living, and that, because the testator no longer exists, the state “necessarily reallocates [property] rights at an owner’s death.”²³⁶ Not only does this response assume a questionable ethical distinction between the embodied will of a living person and the represented will of that person after death, but practically-speaking, by failing to provide any ethical justification for taxing lifetime gifts,²³⁷ it admits a potentially unlimited substitute for taxable transfers at death, rendering the transfer tax ineffective and inequitable²³⁸: either a voluntary contribution to the state,²³⁹ or a levy on the misfortune of unexpected death,²⁴⁰ ignorance of tax avoidance alternatives,²⁴¹ or inability or reluctance to part with one’s wealth before one dies.²⁴²

Nor is it reasonable to adopt John Stuart Mill’s proposed distinction between the right to give or bequeath and the right to inherit,²⁴³ as if the inescapably bilateral act of donative transferral could be separated into two discrete moments of donation and receipt, and subject to distinct treatment on that basis. On the contrary, as Stephen Munzer observes, “if a society restricts inheritance, it indirectly restricts bequest to some extent.”²⁴⁴ If private property contains the right of unlimited disposition, it necessarily includes the right of unrestricted receipt.

Nor is it adequate simply to embrace a libertarian conception of distributive justice,²⁴⁵ but nonetheless to insist that human history is so littered with instances of conquest and violence that redistribution and wealth transfer taxation are vital merely to rectify historic injustices and to reconcile current holdings to the ethical

235. See Blackstone, *Commentaries* 10-11, cited in Ascher, *supra*, note 2 at 77 (arguing that inheritance is “no natural, but merely a civil, right...[f]or, naturally speaking, the instant a man ceases to be, he ceases to have any dominion”); *Magoun v. Illinois Trust and Savings Bank et al.*, 170 U.S. 283, 288 (1898) (“[t]he right to take property by devise or descent is the creature of the law, and not a natural right,—a privilege,—and therefore the authority which confers it may impose conditions on it.”); and *Irving Trust Co. et al. v. Day*, 314 U.S. 556, 562 (1942) (“Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance.”).

236. Ascher, *supra*, note 2 at 78. For extensive discussions of this modified positivism, see Chester, *supra*, note 98 at 11-58; and Ascher, *supra*, note 2 at 76-85.

237. See, e.g., Levy, *supra*, note 88 at 562, n. 17 (avoiding the “more complex” issue of lifetime gifts “since it limits the absolute property rights of the living”).

238. See, e.g., Meade Committee Report, *supra*, note 66 at 54-55 (criticizing the then U.K estate tax, which excluded lifetime gifts, as “farcical” since: “Any rich property owner, in the absence of a similar tax on gifts *inter vivos*, can avoid any death-duty obstacle to the concentration of his own wealth into the possession of a single wealthy heir by transferring the greater part of his property as a gift during his life time.”).

239. See, e.g., Cooper, *supra*, note 71; and James and Nobes, *supra*, note 1 at 239 (describing the current U.K. transfer tax, which excludes all gifts made more than 7 years before death, as “largely voluntary and paid by those who are either over optimistic about the timing of their demise or who consider leaving money to their relatives worse than leaving it to the government!”).

240. Cooper, *supra*, note 71 at 79.

241. See, e.g., Ward, *supra*, note 125 at 34 (describing death taxes as “a tax on incompetence”).

242. Cooper, *supra*, note 71 at 79.

243. Mill, *supra*, note 73 at 371 (Book II, Chapter II, paragraph 3) (arguing that “although the right of bequest, or gift after death, forms part of the idea of private property, the right of inheritance, as distinguished from bequest, does not.”).

244. Munzer, *supra*, note 2 at 405, n. 35.

245. *Supra*, note 230.

foundations upon which this conception of private property itself is properly based.²⁴⁶ Although there is undeniable accuracy to this historical characterization, as a justification for the taxation of inherited wealth, it is deficient for three reasons. First, while many injustices can be historically traced,²⁴⁷ many others are buried and forgotten. Consequently, a principle of rectification provides at best an incomplete rationale for wealth transfer taxation—a rationale that requires the further assumption that those with substantial current wealth are generally the beneficiaries of historic injustices, while those of moderate and small properties are largely the descendants of history's victims. Second, although this additional assumption is undoubtedly warranted in many contexts,²⁴⁸ to the extent that dynastic fortunes disappear over time²⁴⁹ and to the extent that fewer recent fortunes are likely to have been obtained by force or fraud,²⁵⁰ the rationale for rectification itself is weakened.²⁵¹ Third, the extent to which this principle of rectification can justify redistribution and wealth transfer taxation is presumably limited to the time it takes to restore individual holdings to a condition of relative justice. Thereafter, on this account, redistribution would be prohibited again, and wealth transfer taxes would once more be abolished.

Nor, finally, is it sufficient to reply that libertarianism itself adopts an implicit teleology (of individual liberty), to insist that this value (individual liberty) is only one among several competing goods, thereby to reassert an alleged primacy of the good over the right, and thence to emphasize equality over liberty. While there is

246. See, e.g., Mill, *supra*, note 73 at 358-59 (observing that “[t]he social arrangements of modern Europe commenced from a distribution of property which was the result, not of just partition, or acquisition by industry, but of conquest and violence: and notwithstanding what industry has been doing for many centuries to modify the work of force, the system still retains many and large traces of its origin. The laws of property have never yet conformed to the principles on which the justification of private property rests.” (Book II, Chapter I, para. 3)); Alan A. Tait, *The Taxation of Personal Wealth* (Urbana: University of Illinois Press, 1967) at 17 (“Existing distribution is the outcome of historical accident, immured in time and fossilized by law. It is necessary to clear this point, that the original distribution of property, often on some basis no longer socially acceptable (rule of force, exploitation of child labour, etc.), is legalized and transmuted through generations by the power of the law.”); Sandford (1971), *supra*, note 9 at 24 (“Many of the inequalities in the distribution of wealth, perpetuated by inheritance, stretch far back into history, some with their origin in acquisition by conquest—which would not nowadays be thought to constitute a morally strong claim!”); and Bird (1971), *supra*, note 1 at 9 (“The existing distribution of assets among individuals at any point in time is to a large extent the outcome of historical accident, as condoned by the state and fossilized in law.”).

247. Consider, for example, the history of slavery and colonialism, and the conquest and dispossession of aboriginal peoples throughout the world.

248. Again, consider the current social and economic status of the descendants of colonialists and slave-owners compared to the descendants of the colonized and enslaved.

249. See Wagner, *supra*, note 125 at 13-17; and Wagner, *supra*, note 29 at 30-33. While there is probably some truth to this claim, it is likely also true, as Cedric Sandford observes, that: “Wealth generates wealth because large wealth owners obtain a much higher return on their wealth than small wealth holders; a larger proportion of large wealth holdings is in the form of income-yielding investments and also large wealth holders can afford the best advice on where to invest, either for high yield or capital gains.” Sandford (1971), *supra*, note 9 at 29.

250. Mill, *supra*, note 73 at 359. (Book II, Chapter I, para. 3)

251. See, e.g., Ward, *supra*, note 125 at 32 (arguing that “even if [such a rationale] is more or less convincing if applied to the United Kingdom, some European countries and elsewhere, where historical extremes of inherited wealth have persisted for long periods, I doubt whether its premise applies to Canadian conditions.”). While this point has some validity, the current status of Canada’s aboriginal population serves as a constant reminder that even the New World is not free from the historical injustices of the Old.

inchoate truth to this philosophical response, it is incumbent upon transfer tax advocates to show precisely *how* the idea of private property does not entail an unlimited right of disposition, *where* the libertarian argument for a “permanent bequeathable property right” fails,²⁵² and *why* society in general is any more justified in taxing and redistributing inherited wealth than individuals themselves are in bequeathing their property free of tax to whomever they please.

To respond to these questions in detail would require a paper all of its own. Nevertheless, for the present purpose, the following summary will suffice. First, as Jeremy Waldron explains, the concept of private property is neither absolute nor unalterable, but instead constitutes an “organizing idea” admitting diverse conceptions that neither imply nor demand an unlimited right of disposition.²⁵³ Second, the choice of a preferred conception of private property from among an array of competing conceptions cannot be governed by conceptual argument alone,²⁵⁴ nor on the basis of arbitrary and irreconcilable “value judgments,”²⁵⁵ but rather must be justified by the ethical arguments one is able to advance to support one’s favoured conception over any other.

Third, turning to Nozick’s celebrated “entitlement theory” of distributive justice,²⁵⁶ it is evident that since private appropriation necessarily affects the position of all others (who are now no longer at liberty to use or to appropriate the previously unowned thing), society as a whole has a residual claim on all private property.²⁵⁷ Consequently, as Nozick himself acknowledges,²⁵⁸ the institution of private property must be justified by some teleological good to which it itself contributes.²⁵⁹ Fourth, although economic efficiency, individual autonomy and political liberty are three such goods that convincingly justify the institution of private property,²⁶⁰ none of

252. Nozick, *supra*, note 120 at 179.

253. Waldron, *supra*, note 134, at 26-61.

254. See, e.g., Tullock, *supra*, note 125 at 466 (“We are...compelled by the mere logic of private property to permit a man [or woman] not only to give it away while he [or she] is alive, but also to give it away on his [or her] death”); Wagner, *supra*, note 150 at 28 (“inheritance is an aspect of private property.... The taxation of inheritance therefore represents the socialization of property”); and Epstein, *supra*, note 224 at 304 (“there is no principled distinction between the right of property and the right of succession. The conception of property includes the exclusive rights of possession, use, and disposition”). Alternatively, consider the positivistic claim that the concept of private property does not imply an unlimited right to give or bequeath. Without something more, these are just empty expressions at cross purposes.

255. Bird (1971), *supra*, note 1 at 14.

256. Nozick, *supra*, note 120 at 150-82.

257. *Contra* Epstein, *supra*, note 224 at 304: “There is no residual claim that runs in favour of strangers or of the public at large.”

258. Nozick, *supra*, note 120 at 175-77.

259. See, e.g., Mill, *supra*, note 73 at 376: “property is only a means to an end, not itself the end.” (Book II, Chapter II, para 4)

260. Efficiency arguments are as old as Aristotle, were emphasized by John Locke, and are most recently associated with economic theories of private property. See Aristotle, *Politics*, *supra*, note 95, Bk. II, Ch. 3 (1261b35); John Locke, *Second Treatise of Government*, C.B. Macpherson, ed., (Indianapolis: Hackett, 1980), Ch. V, para. 36-37, 40; Harold Demsetz, “Toward a Theory of Property Rights” (1967) *American Economic Review*, Proceedings and Papers, Vol. 57 at 347-59; Nozick, *supra*, note 120 at 177; Lawrence C. Becker, *Property Rights: Philosophical Foundations* (Boston: Routledge & Kegan Paul, 1977) at 67-74; and Munzer, *supra*, note 2 at 191-226. Autonomy arguments are frequently associated with G.W.F. Hegel, and are eloquently restated by Jeremy Waldron. See G.W.F. Hegel, *Hegel’s Philosophy of Right*, trans. T.M. Knox, (London: Oxford University Press, 1952), para. 41-71; and Waldron, *supra*, note 253 at 284-445. Finally, libertarian arguments appear in Hayek, *supra*, note 125; Friedman, *supra*, note 132; Nozick, *supra*, note 120; and Becker, *supra*, at 75-80.

these goals requires the rigid conception of “permanent bequeathable” private property that traditional libertarians like Nozick wish to defend.

Fifth, recalling Waldron’s distinction between the concept of private property and conceptions of this concept, and drawing on Roberto Unger’s notion of false necessity,²⁶¹ it is instantly apparent that the choice of property regimes is not (as often assumed) one between two abstract models of pure communism or “permanent bequeathable” private property, but instead about the detailed elaboration of a concrete system of property rights and tax arrangements that, within the context of the specific societies under consideration, best promotes the ultimate ends of economic efficiency, individual autonomy, and political liberty for which the institution of private property itself operates only as a means. In this respect, finally, the arguments for moderate equality in the distribution of wealth, and the specific proposals for taxing inherited wealth ultimately prevail.

2. *Equality of Opportunity and Individual Desert*

The transmission from generation to generation of vast fortunes by will, inheritance, or gift...is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our Government.

President Franklin Delano Roosevelt, Message to Congress,
(June 19, 1935).

Although the specific transfer tax proposals of the previous section accommodate the values of material prosperity and generosity, and prevail against the libertarian objections just examined, their connection to the goal of moderate equality remains contingent and insecure. While an effective wealth transfer tax would doubtless contribute to the achievement of moderate equality, the same might be said for a progressive income tax (particularly one that includes gifts and bequests as income to the recipient) or for a steeply progressive periodic net wealth tax. Indeed, it is sometimes argued that since wealth transfer taxes do nothing to prevent the accumulation of wealth during the lifetime of its owner, moderate equality might be better served by taxes on one or both of these alternative bases than by a specific tax on inherited wealth.²⁶²

This is a persuasive response, suggesting that some of the arguments of the previous section may also be used to justify progressive income and net wealth taxes.²⁶³ Nevertheless, far from refuting the rationale for a distinct wealth transfer tax, this objection merely confirms that the explanation for such a tax is as yet incomplete. In fact, much more than moderate equality, equality of opportunity and individual desert are consistently mentioned as principal reasons for the specific taxation of inherited wealth. First, it is said, equal opportunity requires that immense fortunes

261. Unger, *supra*, note 198.

262. See, e.g., Tullock, *supra*, note 125 at 470; Wagner, *supra*, note 125 at 5-6; and Wagner, *supra*, note 29 at 11-14.

263. On the other hand, to the extent that the sections on efficiency and generosity are specifically devoted to the analysis of inherited wealth, additional arguments would have to be forthcoming.

not be transferable without any restriction.²⁶⁴ Second, it is argued, since potential heirs have done nothing to earn their inheritances, they have no special moral claim to these receipts that precludes their heavy taxation.²⁶⁵ Together, these arguments complete the rationale for a distinct tax on inherited wealth, establishing a strong case that, above the lifetime threshold proposed earlier, these receipts should be taxed more heavily than ordinary income, particularly labour and business income in which individual effort plays a far greater role.

This section develops this specific justification for wealth transfer taxation, extending and modifying the general argument of the section on moderate equality and the distribution of wealth, and considering counter-arguments and qualifications to the initial liberal-egalitarian argument.

(A) Liberal Equality and Inherited Wealth

Inherited wealth resembles a living fossil, curiously surviving in the liberal egalitarian ethic of western societies.

Michael B. Levy, "Liberal Equality and Inherited Wealth,"
(1983) 11 Political Theory 545.

Principles of equality of opportunity and individual desert are so frequently invoked in contemporary Western societies that it seems almost unnecessary to explore the assumptions upon which they are based. Nevertheless, the argument for a distinct tax on inherited wealth relies fundamentally upon the role that these two ideas perform in distinguishing the transfer of material wealth both from the

264. See, e.g., Eisenstein, *supra*, note 7 at 257-58 ("an economic system which prides itself on equality of opportunity should level 'unreasonable' estates without compunction."); Bird (1971), *supra*, note 1 at 9 ("The unlimited right to pass along accumulated wealth to subsequent generations fundamentally violates the principle of equality of opportunity alleged to be upheld in our society."); and Maloney (1988), *supra*, note 2 at 612 ("Freedom of testation is in direct contradiction to the ideal of enhancing equality of opportunity.").

265. See, e.g., Mill, *supra*, note 73 at 359 ("Private property, in every defence made of it, is supposed to mean the guarantee to individuals of the fruits of their own labour and abstinence. The guarantee to them of the fruits of the labour and abstinence of others, transmitted to them without any merit or exertion of their own, is not of the essence of the institution.") (Book II, Chapter I, para. 3); Rudick (1945), *supra*, note 5 at 31, n. 38 (opposing treating gifts and bequests as income or making progression depend upon the independently accumulated wealth of the recipient, since "these methods would discriminate against those who had earned their wealth."); Sandford (1967), *supra*, note 9 at 11 (noting "the particular ethical justification for taxing inherited property that its acquisition is generally unrelated to the merits and efforts of those who benefit from it."); Bird (1971), *supra*, note 1 at 10 ("Even if one believes that the right to private property...necessarily entails the right to enjoy the fruits of one's own labour and abstinence, it does not follow that anyone has the right to enjoy the fruits of anyone else's labour, even that of his ancestors. By this criterion the distribution of wealth should rest on the earnings of each generation, and we should all be returned by taxation to start with as clean and even a slate as possible."); Brittain, *supra*, note 56 at 88 ("The less the rewards of wealth are associated with one's own contribution, the better the case for taxing them."); "It...seems appropriate to contrast inheritance—an unearned reward—with earned incomes as targets of redistributive tax policy."); Chester, *supra*, note 98 at 80 ("to the extent that tax policy favours wealth associated with one's own contribution, lifetime accumulation should still be taxes [sic] less than inheritance"); Levy, *supra*, note 88 at 548-49 (arguing that inherited wealth is "unearned" and "unrelated to personal contribution"); and McQuaig, *supra*, note 1 at 347 ("In a reasonable moral scheme of things, we might expect inheritances to be taxed at higher rates than regular income, reflecting our greater respect for those who earn what they receive.").

inheritance of genetic and socio-cultural endowments on the one hand, and from the receipt of “earned” income on the other. Since these two distinctions are nowhere near as obvious as the two principles upon which they rest, it is essential to reconsider the principles themselves in order to understand their implications for the treatment of inherited wealth.

(1) Liberal Equality and Distributive Justice

[E]veryone agrees that what is just in distributions must fit some sort of worth, but what they call worth is not the same.

Aristotle, *Nicomachean Ethics*, Bk. V, Ch. 3.

Ideas of equality of opportunity and individual desert are the distinctive product of modern liberal-egalitarian thinking as it has developed at least since Immanuel Kant and perhaps as far back as John Locke’s *Second Treatise of Government*.²⁶⁶ As Michael Levy explains, this unique theory of distributive justice combines notions of equality and inequality as both “necessary prerequisites and consequences of individual development.”²⁶⁷

On the one hand, if individuals are to be respected as equal moral persons, with the autonomy to develop their own unique capacities and to determine their own course of life, unhindered by the limitations that historically have been imposed on people on account of morally arbitrary characteristics like race, class, or gender, “they require exposure to a full range of opportunities and an equal voice in the political institutions which shape much of their environment.”²⁶⁸ “The logic of this enterprise,” Levy explains, “has led egalitarian liberals to espouse equal rights (political, social, and economic), and equal opportunity.”²⁶⁹

On the other hand, even aside from instrumental considerations with respect to market incentives,²⁷⁰ liberal-egalitarians have typically rejected strict equality of reward on the non-instrumental grounds that it would deny to individuals “the consequences of their unique development.”²⁷¹ Thus, for example, to the extent that individuals devote themselves to dissimilar pursuits (labour, leisure, or education) or allocate resources differently between savings and consumption, liberal-egalitarians typically regard at least some disparity of resulting wealth and income as distributively just.²⁷²

While the first idea of moral equality expresses a notion of individual freedom and speaks to what is the same in us, the second idea of differential outcomes reflects a conception of individual desert, and speaks to our distinctiveness. The

266. For an extensive survey of the liberal-egalitarian tradition, see Amy Gutmann, *Liberal Equality* (Cambridge: Cambridge University Press, 1980).

267. Levy, *supra*, note 88 at 548.

268. *Ibid.*

269. *Ibid.*

270. See, e.g., Okun, *supra*, note 196 at 40-50.

271. Levy, *supra*, note 88 at 548.

272. See, e.g., Okun, *supra*, note 196 at 44.

challenge for a liberal-egalitarian theory of distributive justice, therefore, is to specify what “prerequisites” are essential to a conception of equal moral personality, at the same time as it identifies morally relevant distinctions that can serve as the basis for legitimate claims to differential distributive shares. The former task requires an ethical theory of equal opportunity; the latter demands a normative account of individual desert.

(2) Liberal Equality and Equal Opportunity

The race is going to be uneven enough. Do we really want to let a small group of citizens start half way to the finish line?

Linda McQuaig, *Behind Closed Doors:
How the Rich Won Control of Canada's Tax System...And Ended up Richer*,
(Markham: Penguin, 1987) at 348.

Two popular ways of understanding the principle of equality of opportunity are by analogy to the notions of a fair race²⁷³ or a fair game of chance.²⁷⁴ Inequality of outcome is just, it is often declared, so long as everyone has an “even start”²⁷⁵ or “an equal chance to win.”²⁷⁶

For many liberal-egalitarians, however, this formulation poses an immediate dilemma. To the extent that biological and socio-cultural endowments associated with the institution of the family imply *differently* situated individuals with *disparate* life prospects, it appears, true equality of opportunity is impossible short of mass genetic engineering and abolition of the family.²⁷⁷ Although liberal-egalitarians typically favour a number of programs designed to minimize the effects of natural and social disadvantages (for example, special education, public education, and child protection), none go so far as to advocate either of these two extreme measures.²⁷⁸ As a result, it is argued, the ideal of equal opportunity can be only imperfectly realized.²⁷⁹ More importantly, for the purposes of this paper,

273. See, e.g., *ibid.* at 43, 76, 84, and 87.

274. Thurow, *supra*, note 20 at 27-32. See also Wagner, *supra*, note 150 at 27 (“equal expected value[s] of lifetime earnings”).

275. Okun, *supra*, note 104 at 43.

276. Thurow, *supra*, note 20 at 27. See also Wagner, *supra*, note 150 at 27 (equating equality of opportunity with the prospect of equal “expected income”).

277. See, e.g., Haslett, *supra*, note 2 at 128. For an extended analysis of this issue, see James S. Fishkin, *Justice, Equal Opportunity, and the Family* (New Haven: Yale University Press, 1983). For recent examples of this argument by opponents of inheritance taxation, see Wagner, *supra*, note 150 at 27; and Ward, *supra*, note 125 at 32.

278. See, e.g., Brittain, *supra*, note 105 at 28-29; Fishkin, *supra*, note 277; and Haslett, *supra*, note 2 at 128. Although Rawls displays considerable ambiguity regarding both genetics and the family, he accepts their inequalitarian effects so long as these inequalities are made to work to the maximum advantage of the least fortunate. Since this “difference principle redefines the grounds for social inequalities,” he explains, “the natural distribution of assets and the contingencies of social circumstances can be more easily accepted. We are more ready to dwell upon our good fortune now that these differences are made to work to our advantage, rather than to be downcast by how much better off we might have been had we had an equal chance along with others.” Rawls, *supra*, note 97 at 102-03, 511-12. For Rawls’ pronouncements on genetics and the family, see *ibid.* at 102-103 (eugenics) and 74, 301, 511 (family).

279. See, e.g., *ibid.* at 74, 301, 511; and Haslett, *supra*, note 2 at 128.

the distinction between taxing inherited wealth on the one hand and allowing genetic and socio-cultural inheritances on the other can be explained only as a *pragmatic* compromise necessitated either by practical necessity or vaguely-defined offsetting “costs,”²⁸⁰ rather than an *ethical* imperative based on the unique *moral* characteristics associated with each specific form of transfer.

Both as a justification for distinguishing among different types of inheritance and as an account of equal opportunity itself, this line of reasoning is deeply flawed. First, although the practical impediments to this simple conception of equal opportunity are undoubtedly enormous,²⁸¹ dystopian visions from Plato’s *Republic* to Aldous Huxley’s *Brave New World*, and contemporary advances in genetic engineering, suggest that it is not inconceivable.²⁸² More importantly, a moment’s reflection on the fair race analogy, and the manner in which it differs from the idea of a fair game of chance, suggests that the latter conception of equal opportunity is also mistaken.

In a race, after all, no one suggests that the runner with the longest legs or the best trainer be made to wear leaden shoes or to run a greater distance so that each competitor may have an “equal start.” On the contrary, although these disadvantages might be applied to achieve statistical randomness in the outcome of the race (“an equal chance to win”), they would eliminate precisely those characteristics that the race is designed to determine: who, *given* his or her natural abilities and training regimen, is in fact the fastest runner. As a result, to hinder the best runner in the manner suggested would be the very antithesis of moral equality, *not* its prerequisite.

To say this, of course, is not to suggest that *economic* rewards should be distributed according to flight of foot,²⁸³ nor that all effects of nature and training are equally legitimate,²⁸⁴ nor indeed that distributive outcomes should or even can be made to depend on individual desert alone.²⁸⁵ Nevertheless, this reflection on the ethical difference between a fair race and a fair game of chance *does* serve to remind us, as Aristotle observed, that “what is just in distributions must fit some sort of worth.”²⁸⁶ Since the idea of a fair game of chance necessarily excludes all distinctive attributes of the participants that might possibly constitute a basis for differential assessments of worth, it cannot suffice as an archetype for equal opportunity, let alone for any theory of distributive justice.

Returning to the fair race analogy, then, it is evident that the central task for a

280. See, e.g., Haslett, *supra*, note 2 at 141 (“To be sure, we do ‘allow’ unearned advantages resulting from biological inheritance to continue to exist because, first of all, we cannot eliminate them and second, even if we could, we would not want to since the costs of doing so would outweigh the benefits.”).

281. See, e.g., Sandel, *supra*, note 123 at 69, 75.

282. On the other hand, see Walzer, *supra*, note 97 at 230 (suggesting that the radically *inegalitarian* character of these dystopian visions is no accident, since the loss of individual autonomy and special affections that these societies necessarily entail dictate social control by a privileged elite).

283. Aristotle, *Politics*, *supra*, note 95, Bk. III, Ch. 12 (1283a10) (“If some are fast and others slow, they should not have more or less on this account; it is in gymnastic contests that being outstanding in these things wins honour.”).

284. In the Disabled Olympics, for example, it would be perfectly appropriate to disadvantage an able-bodied competitor.

285. See *infra*, section II.B.2.(A)(3)(b).

286. Aristotle, *Ethics*, *supra*, note 205, Bk. V, Ch. 3 (1131a25).

liberal-egalitarian theory of equal opportunity is to distinguish between morally justifiable and morally indefensible transfers to the next generation. In particular, for a liberal-egalitarian argument in favour of a distinct tax on inherited *wealth*, it is essential to explain how genetic and socio-cultural inheritances associated with the institution of the family are commendable in a way that the inheritance of property is not.

This is not a simple argument to make, and it will require two subsequent sections of this paper to develop a full account of the relationship between material inheritance and the institution of the family.²⁸⁷ Nevertheless, for the purposes of this immediate discussion, the following provisional argument will suffice. To begin, recall that inherited wealth is a significant contributor to the enormous disparities in the distribution of personal wealth that predominate in contemporary liberal-democratic societies,²⁸⁸ disparities that are themselves objectionable for their adverse impact on political democracy and individual autonomy.²⁸⁹ For these instrumental reasons, therefore, the inheritance of large fortunes is similarly problematic.²⁹⁰ Furthermore, the transmission of such legacies effects vast differences in the opportunities available both to the immediately following generation and, more importantly (since most inheritances are not received until middle-age), to all subsequent generations able to enjoy the advantages of the dynastic estate.²⁹¹ For this reason too, therefore, absent some offsetting ethical consideration or set of considerations,²⁹² the inheritance of material wealth is intrinsically as unacceptable as the arbitrary designation of one's social position and life expectations by virtue of one's race, class, or gender.

What, then, of genetic and socio-cultural inheritances? Don't they also effect significant differences in the life prospects of the next and subsequent generations? Surely the children of healthy, attractive or intelligent parents stand a better chance of good health, good looks or good minds than the offspring of those with frail constitutions, ordinary features, or average intellects. Surely the children of emotionally caring and financially secure families stand a better chance of emotional stability and financial security than the children of emotionally unstable and financially insecure families. And surely these genetic and socio-cultural inheritances also account for at least some disparities in the distribution of income and wealth among the next and in subsequent generations. Nevertheless, although even these inheritances are not always unrestricted (consider child protection legislation for example) both instrumental and intrinsic reasons *generally* argue for different treatment from that

287. *Infra*, sections II.B.2.(B)(2) and II.B.2.(B)(3).

288. See *supra*, section II.B.1.(A).

289. See *supra*, sections II.B.1.(B)(2) and II.B.1.(B)(3).

290. For similar instrumental arguments against inherited wealth, see Okun, *supra*, note 104 at 83-84; Haslett, *supra*, note 2 at 128-31; and Maloney (1988), *supra*, note 2 at 626.

291. See, e.g., Haslett, *supra*, note 2 at 130 ("Wealth is opportunity, and inheritance distributes it very unevenly indeed. Wealth is opportunity for realizing one's potential, for a career, for success, for income. There are few, if any desirable occupations that great wealth does not, in one way or another, increase—sometimes dramatically—one's chances of being able to pursue, and to pursue successfully.").

292. See *supra*, sections II.B.1.(C)(1) and II.B.1.(C)(2); and *infra*, sections II.B.2.(B)(2) and II.B.2.(B)(3).

generally applicable to the inheritance of material wealth.

First, as theorists from Aristotle to contemporary libertarians and liberal-egalitarians have argued, reproductive and family autonomy are typically beneficial both for children themselves and for society as a whole. Although the ideals of individual and family autonomy underlying contemporary liberalism imply a rejection of the rigidly naturalistic conceptions of the family that traditionally enter into most of these arguments,²⁹³ it is reasonable to assume that adults are apt to care for their own children (defined *both* biologically and culturally) better than they would for children with whom they share no special relationship.²⁹⁴ In addition, as Friedrich Hayek has written: “the transmission of the heritage of civilization within the family is as important a tool in man’s striving toward better things as is the heredity of beneficial physical attributes.”²⁹⁵

More important than these instrumental considerations are the intrinsic values associated with family life itself. In addition to the enormous constraints on individual autonomy that would be required in order to achieve absolute equality of life prospects,²⁹⁶ the affective bonds formed within the family setting are valuable in and of themselves.²⁹⁷ Similarly, as Joseph Carens explains, while liberal-egalitarianism advocates equal opportunity, it “also values diversity among ways of life” and acknowledges “the desirability of different experiments in living, some of which are possible only in the context of a group life with shared traditions.”²⁹⁸ The opportunity to transmit one’s traditions and genetic endowments is an aspect of human existence that would be lost under any arrangement of cultural and genetic collectivization. In each respect, as Carens concludes: “One cannot make sense of the concept of equal opportunity without addressing the question ‘opportunity for what?’”²⁹⁹

293. See, e.g., Martha Minow, “The Free Exercise of Families,” Unpublished Paper Presented to the University of Illinois (4 Oct. 1990). See also David G. Duff and Roxanne Mykitiuk, “Parental Separation and the Child Custody Decision: Toward a Reconception” (1989) 47 U. of Tor. Faculty L. Rev. 874.

294. Consider, for example, Aristotle’s response to Plato’s scheme for the extreme collectivization of child care: “Each of the citizens comes to have a thousand sons, though not as an individual, but each is in similar fashion the son of any of them; hence all will slight them in similar fashion.” Aristotle, *Politics*, *supra*, note 95, Book II, Chapter 3 (1262a). See also Hayek, *supra*, note 125 at 89-90: “The value which most people attach to the institution of the family rests on the belief that, as a rule, parents can do more to prepare their children for a satisfactory life than anyone else.” As the remarks in the text suggest, these arguments should not be taken to suggest opposition to the provision of child care outside the traditional nuclear family. On the contrary, they support precisely the family autonomy of which parent-selected child care is an expression.

295. *Ibid.* at 90.

296. See Sandel, *supra*, note 123 at 69: “even if compensatory education and other reforms could fully, or even nearly, correct for social and cultural deprivation, it is difficult if not vaguely forbidding to imagine what kind of social policies would be required to ‘correct’ in a comparable way for the contingencies of natural fortune.”

297. See, e.g., Walzer, *supra*, note 97 at 227-32; and Charles Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985) at 295.

298. Joseph H. Carens, “Difference and Domination: Reflections on the Relation Between Pluralism and Equality,” in John Chapman and Alan Wertheimer, eds, *Majorities and Minorities: NOMOS XXXII* (New York: New York University Press, 1990) 226 at 234.

299. *Ibid.*

(3) Liberal Equality and Individual Desert

In a reasonable moral scheme of things, we might expect inheritances to be taxed at higher rates than regular income, reflecting our greater respect for those who *earn* what they receive.

Linda McQuaig, *Behind Closed Doors:
How the Rich Won Control of Canada's Tax System...And Ended up Richer*,
(Markham: Penguin, 1987) at 347.

Even if the transfer of genetic and socio-cultural endowments is legitimate in a way that the transfer of material wealth is not, it is not immediately apparent why income derived from the exercise of one's individual talents is more deserved than the wealth acquired through gift or inheritance. Yet the argument for a distinct lifetime accessions tax (as opposed to the inclusion of gifts and bequests in a comprehensive income base³⁰⁰) depends crucially on the ethical distinction between both kinds of receipts. Nonetheless, two distinct lines of argument suggest that so-called "earned" income may be just as undeserved as material inheritance itself: the first, rejecting the notion that individual characteristics, themselves constituted by undeserved inheritances, can serve as a basis for legitimate claims of individual desert³⁰¹; the second, arguing that the social context in which individual talents are cultivated and rewarded deprives individuals of any moral claim to a particular distributive outcome.³⁰² The following sections examine and rebut these two objections as well as a third challenge to the argument for a distinct tax on inherited wealth: the claim that it is administratively infeasible to distinguish between earned and unearned receipts.³⁰³

(a) Moral Arbitrariness and Individual Desert

[N]o one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society. The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases.

John Rawls, *A Theory of Justice*,
(Cambridge, MA: Harvard University Press, 1971) at 104.

Although also found in many libertarian challenges to distinct taxes on inherited wealth,³⁰⁴ the first argument is most prominently associated with John Rawls' liberal-egalitarian *Theory of Justice*.³⁰⁵ For Rawls, the argument against individual

³⁰⁰. See *supra*, section II.A.4.(A).

³⁰¹. *Infra*, section II.B.2.(A)(3)(a).

³⁰². *Infra*, section II.B.2.(A)(3)(b).

³⁰³. *Infra*, section II.B.2.(A)(3)(c).

³⁰⁴. See, e.g., Hayek, *supra*, note 125 at 93-100; Friedman, *supra*, note 132 at 163-66, 172-76; Wagner, *supra*, note 125 at 48; and Wagner, *supra*, note 29 at 82-83.

³⁰⁵. See Rawls, *supra*, note 97, especially at 65-83, 100-08, 274-84, and 310-15.

desert as a principle of distributive justice proceeds in the following three steps. First, he notes, individual abilities, including “[e]ven the willingness to make an effort,”³⁰⁶ are “strongly influenced by natural and social contingencies”³⁰⁷; they are “the outcome of the natural lottery” and “dependent upon happy family and social circumstances.”³⁰⁸ Second, even if sound reasons can be adduced to support genetic and socio-cultural transfers, individuals *themselves* cannot be said to *deserve* their natural endowments nor the dispositions attributable in large part to their family and childhood experiences.³⁰⁹ Consequently, he concludes, it is wrong to believe that individual desert can serve as a principle of distributive justice: “the concept of moral worth...plays no role in the substantive definition of distributive shares.”³¹⁰ As a result, it necessarily follows, whatever justification may ultimately support a distinct tax on inherited wealth,³¹¹ it cannot involve the claim that these proceeds are in any respect less deserved than earned income.³¹²

Like the simple notion of equal opportunity criticized in the previous section, this disavowal of individual desert and its role in the argument for a lifetime accessions tax is also deeply flawed. As several critics of Rawls have pointed out, although a principle of individual desert requires a basis in “some possessed characteristic or prior activity” of the deserving individual,³¹³ this basis need not itself have been deserved.³¹⁴ On the contrary, as the example of a fair race in the previous

306. *Ibid.* at 74.

307. *Ibid.* at 72.

308. *Ibid.* at 74.

309. *Ibid.* at 102, 104. See also Hayek, *supra*, note 125 at 90 (“There is, of course, neither greater merit nor any greater injustice involved in some people being born to wealthy parents than there is in others being born to kind or intelligent parents”); Friedman, *supra* note 132 at 166 (“The man who is hard working and thrifty is to be regarded as ‘deserving’; yet these qualities owe much to the genes he was fortunate (or unfortunate?) enough to inherit.”); and Wagner, *supra*, note 125 at 48 (“It is sometimes suggested that ‘earned’ wealth is more legitimate than inherited wealth, though it is never said just how being born with great athletic ability, a glib tongue, a pleasing singing voice, good looks, high intellect, or a charismatic presence on television can be said to be ‘earned’”).

310. Rawls, *supra*, note 97 at 313. Although Rawls and libertarians concur on this crucial point, they diverge enormously on its implications for the ultimate determination of distributive outcomes. For Rawls, this moral arbitrariness requires a hypothetical social contract whereby distributive shares are to be determined within a social framework according to which: “Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.” *Ibid.* at 83. For Friedman, on the other hand, the system of economic distribution “must be regarded as instrumental or a corollary of some other principle such as freedom.” Friedman, *supra*, note 132 at 165. For a useful discussion of this divergence, see Levy, *supra*, note 88 at 549.

311. See, e.g., Rawls, *supra*, note 97 at 277: “The purpose of these levies and regulations is not to raise revenue (release resources to government) but gradually and continually to correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity.”

312. *Ibid.* at 278: “The unequal inheritance of wealth is no more inherently unjust than the unequal inheritance of intelligence. It is true that the former is presumably more easily subject to social control; but the essential thing is that as far as possible inequalities founded on either should satisfy the difference principle. Thus inheritance is permissible provided that the resulting inequalities are to the advantage of the least fortunate and compatible with liberty and fair equality of opportunity.” See also Friedman, *supra*, note 132 at 164 (dismissing as “untenable” attempts to distinguish “appropriate” inequalities “resulting from differences in personal capacities, or from differences in wealth accumulated by the individual in question” from “inappropriate” inequalities attributable to inherited wealth).

313. Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970) at 48.

314. See, e.g., Nozick, *supra*, note 120 at 225; Galston, *supra*, note 227 at 170-76; Sandel, *supra*, note 123 at 82-95; and Munzer, *supra*, note 2 at 261-62.

section suggests, at least some desert-related characteristics (for example the length of one's legs) are inescapably *undeserved*.³¹⁵ Thus, inasmuch as one's genetic traits and socio-cultural endowments are profoundly constitutive of one's very person,³¹⁶ it is mistaken to conclude that these characteristics cannot serve as the basis for differential claims of individual desert. Nor is it legitimate to assume that because one's talents and disposition are "strongly influenced by natural and social contingencies"³¹⁷ that one's actions lack any moral worth, as if they were wholly scripted from beyond, without any scope for self-reflection and self-authorship. Here too, therefore, individual actions can serve as a basis for differential claims of desert.

To say that one's possessed characteristics and prior activities can serve as the basis for differential claims of desert, is not to suggest that desert-based claims extend solely or even primarily to *economic* or *monetary* rewards,³¹⁸ nor that individual characteristics and actions sustain only desert-based *rewards*,³¹⁹ nor finally that economic rewards should or even can be determined solely on the basis of *individual* attributes and efforts.³²⁰ To say that individuals may have differential claims of desert does not say what they deserve nor how it is deserved. What it does say, however, is that individual actions *can* have moral worth, and thus, for the purposes of this argument, that moral distinctions can be drawn and differential tax treatment may be justified between earned income and inherited wealth.

(b) Individual Desert and Social Context

Individuals never acquire property on their own. Society plays a crucial role in every individual's acquisitive activities.

Mark L. Ascher, "Curtailing Inherited Wealth,"
(1990) 89 Mich. L. Rev. 69 at 86.

A second challenge to the ethical distinction between earned income and inher-

315. See, e.g., Munzer, *supra*, note 2 at 262 ("If all desert rests on a desert basis, and if that desert basis must rest on some further desert basis, and so on, then the search for an ultimate desert basis must continue ad infinitum. Eventually one comes to universal necessary conditions of desert, and it is hopeless to claim that these are deserved. For example, to deserve anything one must be born, but no one deserves to be born."). See also Sandel, *supra*, note 123 at 84 ("there must be some basis of desert prior to desert.").

316. See, e.g., *ibid.* at 74 ("whether I deserve the intelligence with which I am born, for example, is not the point; what matters is that my native intelligence is a fact irreducibly about *me*"). See also Hayek, *supra*, note 125 at 90 ("belonging to a particular family is part of the individual personality"); and Levy, *supra*, note 88 at 549 (describing genetic and socio-cultural assets as "part of one's personality").

317. Rawls, *supra*, note 97 at 72.

318. Consider, for example, Aristotle's observations that swiftness should be honoured "in gymnastic contests" and that the best flutes should be given to those who are the best flute players: "it is to one who is pre-eminent in the work that preeminence in the instruments should be granted." Aristotle, *Politics*, *supra*, note 95, Bk. 3, Ch. 12 (1282b30-1283a15). See also Galston, *supra*, note 227 at 172 ("One may well agree that money, goods, or services do not constitute an appropriate means of recognizing moral excellence; not only is there no internal relation between the desert-basis and what is claimed, but also this form of recognition may cheapen or even pervert what it is intended to reward.").

319. On the contrary, individuals may deserve not only rewards and honours, but redress and compensation or, alternatively, blame and punishment. See *ibid.* at 175.

320. See *infra*, section II.B.2.(A)(3)(b).

ited wealth emphasizes the social context in which individual talents are cultivated and individual efforts are rewarded. To the extent that economic rewards are attributable much less to individual actions than they are to joint productive enterprises,³²¹ imperfect and unpredictable market forces,³²² and ultimately to the social and physical infrastructures of contemporary economies that were gradually and laboriously constructed over the entire course of human civilization,³²³ it is argued, the idea of individual desert can play no part in a theory of distributive justice nor in the rationale for a distinct tax on inherited wealth.³²⁴

This is a persuasive and well-reasoned argument against any attempt to claim that economic rewards should or even can be based solely on individual desert. Nevertheless, it is important to recognize what it does and does not prove. Crucially, for the argument of this paper, while this second challenge *does* suggest a *social* basis of desert that can, for example, sustain a desert-based rationale for progressive

321. See, e.g., Okun, *supra*, note 196 at 45 (“The value of my marginal product does not depend solely on my own skills or effort. It can be altered greatly by changes in the behaviour of other people, even though I keep doing the same old thing no better or no worse.... In view of those dependencies on other people, the concept of *my* contribution to output becomes hazy. Production comes out of a complex, interdependent system and may not be neatly attributable to individual contributors”); Graetz, *supra*, note 1 at 275-76 (“even in a perfectly functioning market economy, most production is based upon the joint use of different resources, typically provided by different people. In such circumstances, it is usually impossible, as an ethical matter, to determine which person—or even which resource—produces or deserves what share of the total output.”); and Maloney (1988), *supra*, note 2 at 616 (“Sometimes the rewards are the result of the culmination of many talents and much input for which only one person ultimately is rewarded.”).

322. See, e.g., Hayek, *supra*, note 125 at 94 (“The inborn as well as the acquired gifts of a person clearly have a value to his fellows which does not depend on any credit due to him for possessing them. There is little a man can do to alter the fact that his special talents are very common or exceedingly rare.”); Rawls, *supra*, note 97 at 311 (“Surely a person’s moral worth does not vary according to how many offer similar skills, or happen to want what he can produce. No one supposes that when someone’s abilities are less in demand or have deteriorated (as in the case of singers) his moral deservingness undergoes a similar shift.”); Thurow, *supra*, note 20 at 197 (“the wealthy are not wealthy because their productive contribution is higher than others, but because they are luckier than others.”); Graetz, *supra*, note 1 at 275-77 (noting, among other things, that: “The rewards the market place bestows depend on factors outside an individual’s control. In a market economy, people who supply capital or labour to industries or endeavours where demand for the product or service proves strong will do very well; people who work or risk their capital in industries or endeavours where market demand for the product or service proves weak will do quite badly.”); and Maloney (1988), *supra*, note 2 at 614-17 (arguing that “[t]he empirical evidence does not sustain the premise that the market distributes its rewards in accordance with the particular industry, abilities and talents of the individual who is being rewarded”; that “[s]everal random market factors play an important role in the success of a particular individual. Over many of these factors the individual has little influence or control”; and that “perhaps more conclusively, the rewards that society distributes, particularly the lavish ones, are more often than not the product of sheer luck—being in the right place at the right time—producing or investing in the correct and transient article of consumer taste.”).

323. See, e.g., Brannon, *supra*, note 42 at 451 (“The concentrations of income and wealth are largely the result of the recipient being favourably positioned vis-à-vis the structure of civilization, that is, the large incomes and wealth holdings are in large part produced by society itself.”); Graetz, *supra*, note 1 at 276 (“some share of total market returns to capital and labour are attributable to societal conditions. The existence of public institutions, including laws and law enforcement mechanisms—criminal and corporate codes and courts to enforce them, for example—affects returns to private institutions and individuals.”); Waldron, *supra*, note 253 at 404 (“there is no sense to the idea that there is a natural phenomenon called ‘reaping the benefits of one’s talents’ which is understood apart from the social arrangements and institutions that define one’s relationships to other people.”); and Ascher, *supra*, note 2 at 86-87 (concluding that “society has a major stake in all accumulated wealth.”).

324. See, e.g., Graetz, *supra*, note 1 at 277 (concluding that “the justification for a market distribution must ultimately be grounded in concerns about total output—economic efficiency rather than ethics—and in concessions to certain liberties.”).

income taxation,³²⁵ it *does not* refute the role of individual desert as a simultaneous or synchronous principle of distributive justice.³²⁶ Indeed, to the extent that individual desert-based claims to economic rewards are conceived (as they should be) in terms of their *instrumental* role in promoting the goods of allocative efficiency and material prosperity,³²⁷ and not according to some non-instrumental conception of recognizing “intrinsic worth” or moral excellence,³²⁸ it is evident that most appeals to such instrumental criteria of distributive justice are not in fact inconsistent with the notion of individual desert, but rather an expression of this very principle within the context of competing social claims of desert.³²⁹ Finally, returning to the central argument of this paper, this analysis confirms the initial claim that it is ethically defensible for a tax system to distinguish between earned and unearned receipts, and to levy a separate and more progressive tax on inherited wealth.

(c) Legitimacy, Administrability, and Inheritance

All receipts are joint products, both individual and societal. Because individual characteristics and social characteristics are both essential to their joint outcome, there is simply no means by which a percentage of individual and social “desert” can be calculated.

Michael J. Graetz, “To Praise the Estate Tax, Not to Bury It,”
(1983) 93 Yale L.J. 259 at 277.

That a distinction between earned and unearned receipts is ethically defensible does not mean that it is administratively feasible. Thus, a final challenge to a desert-based argument for a distinct tax on inherited wealth might insist that, even if a

325. See, e.g., Warren, *supra*, note 59 at 1090-93 (arguing, among other things, that “a producer does not have a controlling moral claim over the product of his capital and labour, given the role of fortuity in income distribution and the dependence of producers on consumers and other producers to create value in our society—factors that create a general moral claim on all private product on behalf of the entire society.”); Graetz, *supra*, note 1 at 274-78 (challenging “the analytical starting point of virtually all of the detractors of progressive taxation”); and Maloney (1988), *supra*, note 2 at 614-19 (adopting a Rawlsian argument for progressive taxation). On the idea of a social basis of desert, see Sandel, *supra*, note 123 at 66-132. For a persuasive critique of utilitarian arguments for progressive income taxation, see Walter Blum and Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation* (Midway Reprint), (Chicago: University of Chicago Press, 1978).

326. Thus, for example, Warren appears to take this argument too far, denying any role for individual desert as a principle of distributive justice, and concluding that “the distribution of social product is a matter for collective decision.” Warren, *supra*, note 59 at 1091. That the producer’s moral claim is not (as Warren rightly observes) “controlling” does not mean that it is not relevant.

327. See, e.g., Galston, *supra*, note 227 at 170 (“Desert-related facts need not be moral characteristics. If one claims, for instance, that A deserves to be the contractor for a particular building because he has the most experience with construction of that type, one is basing the judgment, not on virtue, but rather on instrumental ability. Thus, even if the claim that virtue or moral worth cannot logically serve as a basis for distributive shares were valid, this would not prove...that desert *simpliciter* is an inappropriate basis.”).

328. Rawls, *supra*, note 97 at 311. See also Hayek, *supra*, note 125 at 94, 99 (commenting that “the value which a person’s capacities or services have for us and for which he is recompensed has little relation to anything that we can call moral merit or deserts”; and that “the problem of rewarding action of outstanding merit which we wish to be widely known as an example is different from that of the incentives on which the ordinary functioning of society rests.”).

329. See, e.g., Rawls, *supra*, note 97 at 303-15 (outlining several instrumental “precepts of justice” and erroneously distinguishing between the notion of moral desert and the concept of “legitimate expectations” to the economic rewards promised by just social institutions). See also Maloney (1988), *supra*, note 2 at 617 (invoking Rawls’ distinction as an argument for progressive taxation).

distinction between earned and unearned receipts is *ethically* legitimate, the difficulties of calculation in each specific case make it administratively unfeasible.³³⁰ Indeed, to the extent that attempts to discern the earned and unearned components of particular receipts might impinge upon the liberty of the individual recipient, it is also arguable that this competing value of individual autonomy necessarily constrains the notion of individual desert as a principle of distributive justice.³³¹

However reasonable this final challenge might be as applied to other types of receipts,³³² it is difficult to see how it can justify treating *all* gifts and bequests the same as income from labour and entrepreneurial efforts or from independently accumulated savings. On the contrary, although there are undoubted exceptions that deserve special treatment,³³³ the inheritance of material wealth is generally one of the purest examples of receiving something for nothing, a windfall unrelated to individual contribution or personal desert.

(B) Counter-Arguments and Qualifications

It is difficult to imagine that a society in which people were prohibited from leaving legacies would be more attractive to most people than a society in which people were able to leave legacies.

Richard E. Wagner,
“Sense versus Sensibility in the Taxation of Personal Wealth,”
(1980) 2 Canadian Taxation 23 at 29.

Even if liberal-egalitarian principles of equal opportunity and individual desert support a distinct tax on inherited wealth, competing principles of distributive justice might invalidate or qualify this initial argument. This section examines three such counter-arguments: the first, from the perspective of utility; the second and third, concerning the relationship between material inheritance and the institution of the family. While the utilitarian counter-argument is rejected outright, the other two arguments demand additional qualifications to those implied by the goods of efficiency and generosity considered earlier.³³⁴

330. See, e.g., Graetz, *supra*, note 1 at 277.

331. See, e.g., Hayek, *supra*, note 125 at 97 (“Though most people regard as very natural the claim that nobody should be rewarded more than he deserves for his pain and effort, it is nevertheless based on a colossal presumption. It presumes that we are able to judge in every individual instance how well people use the different opportunities and talents given to them and how meritorious their achievements are in the light of all the circumstances which have made them possible. It presumes that some human beings are in a position to determine conclusively what a person is worth and are entitled to determine what he may achieve. It presumes, then, what the argument for liberty specifically rejects: that we can and do know all that guides a person’s action. A society in which the position of the individuals was made to correspond to human ideas of moral merit would therefore be the exact opposite of a free society.”). Note that part of Hayek’s dilemma here is his misconception of the relationship between individual desert and economic rewards. See *supra*, section II.B.2.(A)(3)(b).

332. This is not to suggest that I reject the application of desert-based arguments to the taxation of other receipts. Indeed, lottery winnings and speculative gains are two such categories that may be appropriate targets for distinctive treatment. Nevertheless, since the arguments for separate taxation of these bases would require a separate ethical analysis (considering, for example, the potential role of speculative investments in promoting allocative efficiency), I reach no conclusions on these issues in this paper.

333. See *infra*, section II.B.2.(B)(3).

334. See *supra*, sections II.B.1.(C)(1) and II.B.1.(C)(2).

(1) Introduction: Utility Against Justice

At the moment, if I find someone who is better off than I, I can excuse this fact to myself by claiming that he inherited his wealth. If we abolish inherited wealth, I could no longer do this and the cost in individual satisfaction might be quite great.

Gordon Tullock, "Inheritance Rejustified,"
(1973) 16 J. Law & Econ. 425 at 426.

As with the utilitarian arguments for moderate equality, rejected much earlier in this paper,³³⁵ the utilitarian claim that people would be happier in an unjust world where all differences of wealth and income can be excused as the mere products of that injustice is equally unacceptable.³³⁶ Aside from the implausible assumption that people are indeed happier in an unjust society than in a just society, this argument suffers from the same defects of utilitarian ethics already employed in the critique of egalitarian utilitarianism: that it fails to take seriously the differences between people; and, more importantly, that it fails to take seriously the ethical distinction between different orders of preferences. A preference for distributive injustice, even if it were to exist, cannot outweigh the claims for distributive justice. Consequently, to the extent that distributive justice demands the taxation of inherited wealth, no amount of (hypothetical and implausible) satisfaction from an institution of unlimited private inheritance can reverse this moral imperative.

(2) Inheritance and the Family

[I]nheritance is natural and proper as both an expression and a reinforcement of family ties, which in turn are important to a healthy society and a good life.

Edward C. Halbach, Jr., *Death, Taxes and Family Property*,
(St. Paul: West Publishing Co., 1977) at 5.

That utility does not limit the liberal-egalitarian argument for wealth transfer taxation by no means implies that principles of equality of opportunity and individual desert demand absolute prohibition against the practice of material inher-

335. *Supra*, section II.B.1.(B)(1).

336. See, e.g., Gordon Tullock, "Inheritance Rejustified" (1973) 16 J. Law & Econ. 425 at 426 ("On the whole, if I am poorer than another man because he inherited his money, this reflects no discredit on me. On the other hand, if we started out equal and he won the race, then that indicates that he is not only wealthier than me but also he is superior to me. Under the circumstances, I may prefer (and many people clearly do prefer) to think that he has been the beneficiary of inherited wealth rather than inherited genes. In any event, many people clearly act as if this were part of their preference function. At the moment, if I find someone who is better off than I, I can excuse this fact to myself by claiming that he inherited his wealth. If we abolish inherited wealth, I could no longer do this and the cost in individual satisfaction might be quite great."); and Hayek, *supra*, note 125 at 98 ("it is more than doubtful whether even a fairly successful attempt to make rewards correspond to merit would produce a more attractive or even a tolerable social order. A society in which it was generally presumed that a high income was proof of merit and a low income of the lack of it, in which it was universally believed that position and remuneration corresponded to merit, in which there was no other road to success than the approval of one's conduct by the majority of one's fellows, would probably be much more unbearable to the unsuccessful ones than one in which it was frankly recognized that there was no necessary connection between merit and success. It would probably contribute more to human happiness if, instead of trying to make remuneration correspond to merit, we made clearer how uncertain is the connection between value and merit.").

itance. On the contrary, as the initial argument for moderate equality concluded, this objective is consistent with a lifetime threshold permitting the tax free transfer of a moderate amount of wealth.³³⁷ Further, competing values of material prosperity and generosity suggest special provisions for the transfer of illiquid assets,³³⁸ a top marginal rate somewhere around 50 percent,³³⁹ a modest annual exclusion for transfers from each individual donor,³⁴⁰ and specific exemptions for transfers for the purposes of education, maintenance or charity.³⁴¹ In addition, as this and the following section explain, the relationship between material inheritance and the institution of the family recommend further qualifications in the design of a specific tax on inherited wealth.

The section on equal opportunity argued that genetic and socio-cultural transfers are commendable in a way that material inheritance is not.³⁴² Nevertheless, even there, the distinction between these different types of inheritance was described as immediate and provisional. As this section argues, in addition to the exemptions and exclusions outlined earlier, appreciation of at least some connection between material transfers and the values of family life imply two further qualifications to the transfer tax regime proposed thus far.

First, to the extent that gifts and bequests are necessary to express and reinforce the bonds of familial affection,³⁴³ they can be adequately accommodated by specific exemptions for distinctive categories of physical transfers, like principal residences and family heirlooms, that are most closely associated with the experience of family life and the expression of familial bonds.³⁴⁴ In conjunction with the general exemption proposed earlier,³⁴⁵ this specific exemption would not only permit the expression of affective bonds while respecting the principles of moderate equality and rough equality of opportunity, but also by averting difficult valuation issues in many cases, contribute to the overall administrability of the tax.³⁴⁶

337. *Supra*, section II.B.1.(B)(4).

338. *Supra*, section II.B.1.(C)(1)(b).

339. *Supra*, section II.B.1.(C)(1)(c).

340. *Supra*, section II.B.1.(C)(2).

341. *Supra*, section II.B.1.(C)(2).

342. *Supra*, section II.B.2.(A)(2).

343. Edward C. Halbach, Jr., ed., *Death, Taxes and Family Property* (St. Paul: West Publishing, 1977) at 5. See also Wagner, *supra*, note 29 at 19-22 and 84-85 (concluding that “[i]t does not seem unreasonable to suspect that one impact of the abolition of inheritance would be to diminish intergenerational bonds, with potentially far-reaching consequences for the character of the social order”); and Munzer, *supra*, note 2 at 381, and 410 (arguing that “the abolition of inheritance is apt, over time, to undermine reciprocity between generations. A common, though not unique, way to express love and affection for the next generation is through gifts and bequests. This practice stems from powerful human desires and plays some role in humane care for the elderly by children and grandchildren.”).

344. See, e.g., Haslett, *supra*, note 2 at 149 (proposing such an exemption in the context of a scheme of complete inheritance prohibition above a general exemption). An exemption for household and personal effects is relatively common in developed countries with wealth transfer taxes: OECD, *supra*, note 5 at 114.

345. *Supra*, section II.B.1.(C)(1). To prevent double exemption, the value of transferred tangible assets should ideally reduce the amount of the general monetary exemption.

346. On the other hand, to the extent that this exemption encourages transfers in these non-taxable forms, additional provisions would be necessary to preclude this method of tax avoidance and to discourage these tax-induced incentives to invest in non-taxable physical assets. One solution might involve a monetary limit on these transfers, although in what way it should differ from the general monetary exemption is difficult to determine. See Ascher, *supra*, note 2 at 111-12. Alternatively, by limiting this exemption to the transfer of non-income-producing assets, and by taxing these assets at full transfer tax rates upon subsequent sale, exchange or conversion to income-producing use, any undesirable incentives to invest in and transfer assets in this form are likely to be minimal.

Second, to the extent that material inheritance sustains the perpetuation of a distinct way of life,³⁴⁷ liberal-egalitarian values of pluralism and diversity require specific provisions (higher exemptions or special valuation rules) to permit tax-preferred transfers of productive assets, like family businesses and family farms, that are closely bound up with such a distinct way of life.³⁴⁸ While these preferences go beyond those already contemplated,³⁴⁹ to the extent that these transfers conform to the general goal of moderate equality,³⁵⁰ and provided they are not susceptible to manipulation for tax avoidance purposes,³⁵¹ they are neither horizontally inequitable nor unjust.

(3) Mutuality, Obligation, and the Family

Getting and spending, in the ordinary sense of those words, belongs to the sphere of money and commodities, and it is governed by the principles of that sphere, which are principles of freedom. But the distribution of the family estate belongs to another sphere—the sphere of kinship—which is governed by principles of mutuality and obligation.... This is collectively, not individually, determined; and the determination reflects our collective understanding of what a family is.

Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*,
(New York: Basic Books, 1983) at 126.

The principles of the previous section on inheritance and the family are not the only features of the family context that require qualifications to the basic moderate-egalitarian and liberal-egalitarian arguments for wealth transfer taxation. On the contrary, principles of mutuality with respect to spousal partnerships, and obligation with respect to dependent spouses and children recommend further modifications to the transfer tax arrangement advanced thus far. This section examines these two principles, and explains how they apply to the taxation of inherited wealth.

To understand how principles of mutuality and obligation affect “the distribution of the family estate,” it is essential, as Walzer observes, to begin with a conception of the family.³⁵² For traditional dynastic conceptions—viewing the family as organically defined and perpetually enduring, at least for the life of the (traditionally patriarchal) genetic line—the “distribution” of the family estate never occurs, since

347. See, e.g., Hayek, *supra*, note 125 at 90-91 (arguing that “[t]he family’s function of passing on standards and traditions is closely tied up with the possibility of transmitting material goods” and that if the family is to serve as “an instrument for the transmission of morals, tastes, and knowledge...some continuity of standards, of the external forms of life, is essential”). Although Hayek himself employs this argument to support unlimited freedom of private inheritance, his very use of the expression “some continuity” [emphasis added] suggests that this rigid conclusion cannot be sustained.

348. See, e.g., Sandford (1971), *supra*, note 9 at 147 (“Agriculture is a way of life as well as an occupation, and one can appreciate the human problem posed to an owner-occupier by estate duty”); and Okun, *supra*, note 196 at 37 (“small businesses and family farms...are extensions of their owners, and that fact helps to explain the political enthusiasm they engender”).

349. See *supra*, section II.B.1.(C)(1)(b).

350. Although the underlying value of the asset is often substantial in these cases, the way of life associated with these enterprises, and their general compatibility with the goods of democracy and autonomy suggest that it is the latter considerations that should be controlling, not the former.

351. See the suggestions at *supra*, note 346.

352. Walzer, *supra*, note 97 at 126. The following argument draws heavily on Duff and Mykitiuk, *supra*, note 293 at 877-94. I am especially indebted to Roxanne Mykitiuk for helping me to see the deficiencies of the liberal-individualistic conception outlined below.

its descent to the natural heir (traditionally defined by rules of primogeniture) is predetermined by the very idea of the family and by the very meaning of the family estate. On this traditional communitarian conception, mutuality and obligation are defined by the ‘natural duties’ assigned to individuals by virtue of their social roles, and the taxation of inherited wealth is inconceivable since there is no “transfer” from one tax unit to another upon which to levy any tax.

Alternatively, for liberal-individualistic conceptions of the family—understanding this “association” as freely formed and freely terminated by the contractual agreement of the founding parties—property is “inherent in individuals, not in families,”³⁵³ and there is no “family estate” as such to be “distributed” at all. On this contractual conception, mutuality and obligation are defined according to the terms of the founding parties, and every wealth transfer is potentially taxable since each tax unit is a single individual and each individual is a single tax unit.

As accounts of the family, and as ways of understanding how the principles of mutuality and obligation apply to the taxation of inherited wealth, these dynastic and contractual conceptions are neither consistent with current understandings and practices, nor ethically attractive on their own terms. With respect to the former, the initial enactment of wealth transfer taxes at the turn of the century and developments in family law during the past twenty years signal the displacement of the feudal and patriarchal family by a conception of the family that is neither dynastic nor organic, but egalitarian and pluralistic.³⁵⁴ With respect to the latter, family law obligations of spousal and child support, statutory principles of equal division of “net family property” between separating spouses, and transfer tax provisions exempting transfers to both spouses and dependent children all suggest notion of a “family estate” upon which family members have specific and distinctive claims. Moreover, while the former dynastic conception contradicts the liberal-egalitarian ideal of equal opportunity by restricting individuals to a predestined existence determined by their social position and social role, the latter contractual conception abandons the liberal-egalitarian ideal of individual desert by neglecting the differential distributive claims and responsibilities that flow from individuals’ unique actions and relationships. In each respect, therefore, current understandings and practices and liberal-egalitarian ethics suggest a pluralistic and egalitarian conception of the family—in which the family is conceived as a sphere of intimate relations of mutuality and dependence, defined neither by marriage nor biology—and a notion of the “family estate” to which spousal partners and other family members involved in the operation of a family farm or business have special claims based on the principle of mutuality,³⁵⁵ and to which dependent spouses and children have distinct claims based on the principle of obligation.

353. Mill, *supra*, note 73 at 372. (Book II, Chapter II, para 3)

354. See, generally, David G. Duff, “The Supreme Court and the New Family Law: Working Through the *Pelech* Trilogy” (1988) 46 U. of Tor. Faculty L. Rev. 542; and Duff and Mykitiuk, *supra*, note 293.

355. This principle is widely acknowledge with respect to spousal transfers. See, e.g., Sandford *et al.*, *supra*, note 5 at 41: “Where the husband has made money, as distinct from inheriting it, it can be (and often is) strongly argued that the wife has a moral right to a share of it; although in form it results from his exertions, his wife in her sphere of activity has contributed perhaps just as much as he has, and his success is in reality a joint effort.” The same principle does not appear to have been recognized as further justification for special treatment for transfers of family enterprises.

For the design of a specific tax on inherited wealth, this pluralistic and egalitarian conception of the family has three important consequences. First, since contemporary conceptions of the relationship between spousal partners are generally based on a notion of equal partnership,³⁵⁶ transfers of “family property” from one spouse to another (whether during life or at death) should be taxable only to the extent that they cause the recipient’s share to exceed 50 percent.³⁵⁷ Second, where other family members receive shares or assets of a family farm or business, the principle of mutuality provides further reason for the special provisions already proposed for these transfers.³⁵⁸ Finally, to the extent that a spouse or child is dependent upon the other spouse or parent(s), tax-free transfers should be permitted to satisfy these obligations of support.³⁵⁹ Although these principles of mutuality and obligation require further institutional detail before they can serve as the basis for specific transfer tax provisions,³⁶⁰ their general implications are clear.

III. Conclusion

There is little to add by way of conclusion to the argument of this paper. Methodologically, I have attempted to show how traditional tax principles are unable to supply an adequate rationale for a distinct wealth transfer tax, and how principles of distributive justice *can* provide such an explanation. Substantively, I have endeavoured to derive from these principles of distributive justice the contours of an ethically defensible tax on inherited wealth. While these tasks alone are not sufficient to fully specify the actual design of the proposed lifetime accessions tax, and can only be the beginning of a lengthy practical and political effort to reshape the concrete tax provisions of any specific legal regime, it is my hope that they can nonetheless serve as a useful guide.

356. See, generally, Berend Hovius, *Family Law: Cases, Notes and Materials*, (Toronto: Carswell, 1987) at 191-293.

357. Thus, where one spouse dies owning 80 percent of net family property, 30 percent of this should be transferable to the other without incurring any tax liability. Absent any other exemptions, the remaining 50 percent would be taxable at full transfer tax rates.

358. See *supra*., sections II.B.1.(C)(1)(b) and II.B.2(B)(2).

359. See, e.g., Sandford *et al.*, *supra*, note 5 at 48-49. For a useful discussion of the design issues involved in such an exemption, see Ontario Committee on Taxation, *supra*, note 83, Vol. III at 178-81.

360. In this respect, see the discussions in Gutman, *supra*, note 1 at 1218-39; OECD, *supra*, note 5 at 100-07; and Ascher, *supra*, note 2 at 123-30, and 141-45.