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## FEDERAL TRANSFER TAXES: THE POSSIBILITY OF REPEAL AND THE POST REPEAL WORLD

This essay is the footnoted text of Professor's Dobris' presentation to *The Death of the "Death Tax"?* Conference on October 6, 2000. Predictions and repeal of the estate tax have proved to be so volatile a question during the fall of 2000 and the winter of 2001 that the author and the editors decided to publish the speech as it was given at the conference. Think of it as a shard from some tax midden.

JOEL C. DOBRIS<sup>1</sup>

"What amazes me is that there are so many rich people, and no one knows who they are."<sup>2</sup>

I would like to thank Debby for inviting me to speak today and Norm Stein for suggesting me to her.<sup>3</sup> And, I would like to thank her for an early speaking slot. I would also like to thank my colleagues Dan Simmons and Bruce Wolk, who couldn't be here, my economist friend David Levine and Jim Poterba. Dan, Bruce and David listened to me above and beyond the call of duty and Jim was kind enough to send me a draft of an article he is writing.<sup>4</sup>

Like any other law professor, I could talk for hours about this, or any other topic. So, please forgive me for simplifying or talking too fast. All errors in this are mine and anything good was stolen from Simmons, Wolk, Levine, Poterba, John Langbein, or someone in this room.

I assume I was invited today because in 1984 I gave myself the job of stating the case for repeal of the estate tax.<sup>5</sup> I did that because I read the Gutman<sup>6</sup> and the

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<sup>1</sup>Copyright © 2000 Joel C. Dobris. Professor of Law, School of Law, University of California, Davis. This article was begun while on sabbatical from the School of Law, UC Davis, in London, England, where the author was associated with the London Goodenough Trust, The Institute of Advanced Legal Studies and the London School of Economics, Law Department. The author thanks all these institutions for their direct and indirect support of his research. This article is related to Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends*, 35 REAL PROP., PROB. & TR. J. 601 (2000), which the author wrote on the same sabbatical.

<sup>2</sup>RICHARD HUGO, DEATH AND THE GOOD LIFE 208 (1991). The Treasury expects 48,691 taxable estate tax returns in 2001. See *Tax Report, Death and Taxes*, WALL ST. J., Nov. 29, 2000, at 1.

<sup>3</sup>The author also thanks many other people including, Jennifer Walker (UC Davis, Class of 2001) for her able research assistance, Rex R. Perschbacher, Kevin R. Johnson, David Schaengold, a CPA in New York City, and others. I very much doubt those named agree with everything in here and I am sure that "others" don't.

<sup>4</sup>James M. Poterba, *Estate and Gift Taxes and Incentives for Intervivos Giving in the U. S.*, 79 J. PUB. ECON. 237 (2001).

<sup>5</sup>Joel C. Dobris, *A Brief for the Abolition of All Transfer Taxes*, 35 SYRACUSE L. REV. 1215, 1217 (1984). The debate continues in many places including Charles Davenport & Edward McCaffery, *Should We End Life Support for Death Taxes?*, 55 REC. ASS'N B. CITY

Graetz<sup>7</sup> articles calling for reform of the tax and I felt the arguments also supported repeal. My little article got more attention than it likely deserved and here I am, in the flesh, to prove it.<sup>8</sup>

I am reminded of the Samuel Beckett line. “Try Again. Fail Again. Fail Better.”<sup>9</sup>

My basic arguments in 1984 were “(1) the gift and estate tax does not raise a meaningful amount of revenue; in other words, the revenue effect is small; (2) the gift and estate tax does not adequately vindicate any of the social policies it is supposed to; and (3) the tax is costly and inefficient in many ways.”<sup>10</sup>

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N.Y. 603 (2000) (Based on the Herman Goldman Memorial Lecture given by them). *See also* Edward J. McCaffrey, *Federal Tax Policy in the New Millennium: The Missing Links in Tax Reform*, 2 CHAPMAN L. REV. 233 (1999) (proposing a consistent and progressive consumption tax); Edward J. McCaffrey, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994) (stating the case for the repeal of the estate tax); Christopher E. Erlich, *To Bury Federal Transfer Taxes Without Further Adieu*, 24 SETON HALL L. REV. 1931 (1994) (examines the main arguments both for repealing and retaining the estate tax system and concludes that the estate tax system should be repealed). Messrs Blattmachr and Gans would reform the tax. *See* Jonathan G. Blattmachr & Mitchell M. Gans, *Wealth Transfer Tax Repeal: Some Thoughts on Policy and Planning*, 140 TR. & EST. 49 (2001).

<sup>6</sup>*See* Harry L. Gutman, *Reforming Federal Wealth Transfer Taxes After ERTA*, 69 VA. L. REV. 1183 (1983).

<sup>7</sup>*See* Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259 (1983).

<sup>8</sup>My thanks to those who have reprinted parts of it, including PHILIP D. OLIVER & FRED W. PEEL, JR., *TAX POLICY* (1996); PAUL L. CARON, GRAYSON M.P. MCCOUCH & KAREN C. BURKE, *FEDERAL WEALTH TRANSFER TAX ANTHOLOGY* (1998).

<sup>9</sup>Mel Gussow, *Samuel Beckett is Dead at 83; His ‘Godot’ Changed Theater*, N.Y. TIMES, Dec. 27, 1989, at A1.

<sup>10</sup>Joel C. Dobris, *A Brief for the Abolition of All Transfer Taxes*, 35 SYRACUSE L. REV. 1215, 1217 (1984). I would add a pro repeal argument that denying the marital deduction to “committed partners” is unfair and thus repeal removes this inequity. *See* Patricia A. Cain, *Death Taxes: A Critique From the Margin*, 48 CLEV. ST. L. REV. 677 (2000). “Committed partners” is a term used in Professor Waggoner’s mid-1990s reform proposal to be found in Marissa J. Holob, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1519 n.235 (2000) and discussed in many places including: Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. J. 1 (1998); Susan Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. J. 1 (2000); T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513 (1999); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999). Another pro-repeal argument is that with anti-tax fever so strong, perhaps we should toss this weakling tax to the wolves that are chasing the tax sleigh and make our escape across the steppes that way (with an end to the step-up in basis at death). I would note that transfer taxes can inhibit savings activity on the part of oldsters, especially if they are at the margin of first being taxed at death. In order to avoid estate tax, in my experience, some old folks take money out of the bank to avoid profit. This is bad because capital does not reach its highest and best use, and more importantly, people who may well need all the money they can get at the end of life are induced to save less. *See* Barry Bracewell-Milnes, *Throwing good money at bad taxes*, THE TELEGRAPH, May 30, 2000, at 22, col. 3. Transfer taxes are not the only way to tax wealth. *See Symposium on Wealth Taxes Part I*, 53 TAX LAW REV. 257 (2000).

I will not make the arguments again today, but I do want to focus you on what I now see as the crucial social policy behind transfer taxes in America. And, today I would say, that the death tax, if amended, can vindicate that crucial policy.

Rightly or wrongly, I think we do not focus on the key purpose of death taxation in this country. I believe knowing the “secret” makes it easier to explain why the environment is so pro-repeal and it makes it easier for me to prescribe for the future.

For better or worse, I believe the crucial purpose of the tax is to assert the hegemony of the common people and the egalitarian<sup>11</sup> nature of our society; to undermine oligarchy. To put it crudely, I think the purpose of the tax is to take a little bite out of rich people’s butts, to remind them of the essential nature of this country.

I would next like to talk about why the question of estate tax repeal is front and center these days. Why is the ground so fertile?<sup>12</sup>

I see several reasons.

People, today, are not mad at rich folks.<sup>13</sup> Envy and populism are at an all time low. And I say that fully aware of Gore’s populism-lite.<sup>14</sup>

Just as states are repealing the Rule Against Perpetuities,<sup>15</sup> the federal government is being asked to repeal transfer taxes. People accept large aggregations of wealth.<sup>16</sup> We<sup>17</sup> do not see harm in big pools of capital, whether in trusts or corporations. Most people this summer saw nothing but good in large corporations

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<sup>11</sup>Two recent books about egalitarianism are worth noting. See G.A. COHEN, *IF YOU’RE AN EGALITARIAN, HOW COME YOU’RE SO RICH?* (2000); RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000). See also LISA A. KEISTER, *WEALTH IN AMERICA* (2000) (Concentration of wealth in a small number of hands).

<sup>12</sup>See Krisanne M. Schlachter, *Note, Repeal of the Federal Estate and Gift Tax: Will It Happen and How Will It Affect Our Progressive Tax System?*, 19 VA. TAX REV. 781 (2000).

<sup>13</sup>Taxing the rich is discussed in many places, including DOES ATLAS SHRUG? (Joel B. Slemrod ed., 2000). The fascination with rich people in America is manifest in many places. See, e.g., Daniel Costello & Rachel Emma Silverman, *Tales of Two Cities Money*, WALL ST. J., Oct. 12, 2000, at B1. As noted in an email from Professor Geier to the author, 1997 *Tax Notes* published a noncomprehensive bibliography of estate and gift tax articles. See 75 TAX NOTES 9 (1997).

<sup>14</sup>John B. Judis, *The Populist Al Gore*, N.Y. TIMES, Aug. 20, 2000, § 4, at 15.

<sup>15</sup>I try to speak to this phenomenon in Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends*, 35 REAL PROP. PROB. & TR. J. 601 (2000).

<sup>16</sup>Professor Mark Ascher puts forth his arguments against aggregations of wealth in Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990). But see WILLIAM W. BEACH, *THE CASE FOR REPEALING THE ESTATE TAX* (1996). An essay of special interest is Jeffrey N. Pennell, *Repeal? The Wealth Transfer Taxes?*, 138 TR. & EST. 52 (1999). We are in a moment where the economy magnifies the human and financial capital advantages of the haves. See Michael Prowse, *In the market for a winning set of clothes*, FIN. TIMES WEEKEND, FEB. 26-27, 2000, at 20. To everyone’s surprise the asset poor majority seems to have no preference for a weak death tax that makes incremental mitigation of the inequality.

<sup>17</sup>The word “we” is used in several different ways in this article. Here it refers to some large piece of the populace. The meaning of “we” is the problem of essentialism, which I briefly discuss in Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends*, 35 REAL PROP. PROB. & TR. J. 601 (2000).

until they started hearing about Firestone tires and Ford Explorers.<sup>18</sup> Similarly, the monster of perpetual wealth frightens very few people these days.

We are in a strange materialist moment when people are identifying with the rich. We like rich people these days. Indeed, reverence for rich folks is at an all time high. Socialism is out of fashion. We even like aristocrats.<sup>19</sup> People wrongly see most rich folks as entrepreneurs.<sup>20</sup> They do not realize how much wealth is in passively invested financial assets.<sup>21</sup>

Most people don't care about farmers any more,<sup>22</sup> but we are being told that the nice folks who own football teams will lose them if we don't repeal the estate tax. If football's at stake, the tax is in deep trouble.<sup>23</sup>

When I grew up our family was modestly, though cheerfully, middle class. I was raised to believe that we had as much money as virtually anyone in America, with the few people who had more money being either bad people or famous people. No wealth without pain. I was stunned when I became a trusts and estates lawyer and saw how much money there was out there. Owning the land under a dozen hamburger restaurants meant you were worth 12 million dollars in the late 1960s.

The perceived democratization of wealth in the last few years means that "anyone" can be "rich." At that point, "everyone" wants the rich man's advantage.<sup>24</sup>

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<sup>18</sup>See Michael Winerip, *What's Tab Turner Got Against Ford?*, N.Y. TIMES, Dec. 17, 2000, (Magazine), at 46.

<sup>19</sup>As Professor James G. Wilson told the audience during the program, concern about the potentially unwholesome effects of aristocracy goes back to Aristotle. I explore these themes further in Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends*, 35 REAL PROP., PROB. & TR. J 601 (2000).

<sup>20</sup>Puritans all, we assign a moral superiority to earned wealth. See Edward J. McCaffery & Richard E. Wagner, *A Bipartisan Declaration of Independence from Death Taxation*, 88 TAX NOTES 801, 811 (2000). These days, the author believes, we assign an especially high value to entrepreneurial wealth. There is dispute about how much of today's wealth is earned wealth. The U.S. Trust survey of affluent baby boomers suggests that 89% of the baby boomers in the top 1% of the population as measured for income self assess their wealth as coming from labor. U.S. Trust, *Affluent Baby Boomers: A Profile of Affluent Baby Boomers* (June 1999), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/AffluentBabyBoomers.html>. See also U.S. Trust, *The "Roots" of the Affluent* (Oct. 1993), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/RootsoftheAffluent.html>. Puritanism is discussed in Leslie A. Fiedler, *Love and Death in the American Novel* at xxiv, 50, 87 (1960).

<sup>21</sup>Professor James R. Repetti states that 50% of American wealth is inherited. See James R. Repetti, *Democracy, Taxes and Wealth*, 76 N.Y.U. L. REV. 825 (2001).

<sup>22</sup>To use a term Professor James G. Wilson used from the podium, we are no longer "agrarian sentimentalists."

<sup>23</sup>See David S. Gasperow, *Note, Are Estate Taxes Sounding the Death Knell for High-Value Family-Owned Businesses? An Examination of the Jack Kent Cooke Estate and the Forced Sale of the Washington Redskins Football Franchise*, 2000 COLUM. BUS. L. REV. 303 (2000).

<sup>24</sup>If you die owing an estate tax then the government has branded you as rich, for all eternity. For some, that is an epithet of an epitaph.

And, this new wealth has little to do with control of social resources we care about, or perceived social advantage. People may envy Bill Gates his money, but not his place in society. Very few people in the general population are concerned about Bill Gates' apparent monopoly and its practices. There is no fear of an aristocracy arising in the land. The idea is as quaint and musty as *The Scarlet Pimpernel*.<sup>25</sup>

So, economic elites are seizing a prosperous moment in time to press for advantage. Rust never sleeps.<sup>26</sup> Rich people have been looking for this chance to repeal the estate tax for decades. And, it's yet another stake through the hearts of Franklin and Eleanor Roosevelt.<sup>27</sup>

There's a story in New York that when Ed Koch first ran for Congress he was approached by some investment bankers who offered to bankroll all his campaigns if he would be a constant advocate of repeal of the estate tax.<sup>28</sup> It is just like the story that Richard Nixon was bankrolled from the first day by descendants of the forty-niners, who wanted gold ownership legalized.<sup>29</sup>

Another reason repeal is hot is that society's guardians, whom we rely on to save us from such onslaughts, seem to be either asleep at the gatehouse, or ineffective. Politicians and Pundits<sup>30</sup> are millionaires and the people who defend the tax often make empty claims for it.

And, dramatically oversimplifying, we don't need the revenue. The tax is a war tax and we're not at war.<sup>31</sup> We are very prosperous these days and some of us think we can afford to give up the 30 billion dollars.<sup>32</sup>

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<sup>25</sup>See BARONESS EMMUSKA ORCZY, *THE SCARLET PIMPERNEL* (Bantam Books, Inc. 1992) (1905).

<sup>26</sup>Gene Epstein, *Getting Soaked: A Short History of Taxing the Rich*, BARRON'S, Sep. 18, 2000. "Rust never sleeps" is the title of a Neil Young album. Hear Neil Young, *RUST NEVER SLEEPS* (Reprise 1979). Or, if you prefer, "If I rest, I rust." MARTIN LUTHER, *MAXIMS* (1540).

<sup>27</sup>Professor Repetti cites the reader to Roosevelt's pro-transfer tax speech of 1935. See James R. Repetti, *Democracy, Taxes and Wealth*, 76 N.Y.U. L. REV. 825 (2001).

<sup>28</sup>The author was told the story. It is obviously hearsay and there is no printed source.

<sup>29</sup>The author read the story. There is no printed source available. A vaguely similar story can be found in Anthony Pignataro, *Nixon's Rap Sheet: Anthony Summers on America's Most Dangerous President*, 16 O.C. WEEKLY, Oct. 6-12, 2000, at 16. The story in the text to which this footnote, and the preceding footnote, are attached may be, at best urban legend. Sometimes it is appropriate to discuss urban legends in law review articles. A crude search of the Lexis database on December 19, 2000, suggests the term appears 48 times in law review articles.

<sup>30</sup>As to the punditocracy, see ERIC ALTERMAN, *SOUND AND FURY, THE MAKING OF THE PUNDITOCRACY* (2000).

<sup>31</sup>The point is noted in many places. See, e.g., Charles O. Galvin, *Tax Policy - Past, Present, and Future*, 49 SMU L. REV. 83, 90 (1995). For a recent discussion of resistance to other war taxes, see Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 Wis. L. Rev. 939 (1999).

<sup>32</sup>At the conference, the agreed upon number was \$30 billion. In a recent article the figure was said to be \$20-25 billion. See Edward J. McCaffery & Richard E. Wagner, *A Bipartisan Declaration of Independence from Death Taxation*, 88 TAX NOTES 801, 804 n.9 (2000). Gale and Slemrod put the number at \$28 billion, as does Joulfaian. See William G. Gale & Joel B. Slemrod, *Ancestor Worship: Everything You Ever Wanted to Know about Estate Taxes*, 2

Paradoxically, people are unusually hungry for money these days. That is because there is so much prosperity without security.<sup>33</sup> Except for the tenured professoriate and civil servants, jobs are no longer secure. It is hard enough to secure your own future, let alone your children's.<sup>34</sup> There is going to be a massive transfer of Depression wealth to the Boomer Generation.<sup>35</sup> The estate tax looks to cut into the expected inheritances of large numbers of people who see themselves as middle class. Those people feel entitled to collect those inheritances in gross, rather than net form. In large part, middle-class and upper-middle-class support for repeal is a demand to be allowed to receive extra money to save for uncertain times.

Many people have lost faith in government as a provider of services and as a redistributor of wealth. Indeed, most people have lost faith in the idea of redistribution.

Law changes when the change is good for the middle class<sup>36</sup> and changing the estate tax looks good for the middle class. In other words, the estate tax bites way too soon. Repeal will be good for the prosperous middle class, and upper-middle class and it's been mis-sold as a jobs program to those who want to see the poor prosper.<sup>37</sup>

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MILKEN INST. REV. 36, 40 (2000); David Joulfaian, *A Quarter Century of Estate Tax Reforms* 53 NAT'L TAX. J. 343 (2000) (About \$28 billion in 1999). In 1998, the IRS collected \$24,630,962,000 in estate and gift taxes and that figure represented 1.4% of the total 1998 collections. See *I.R.S. Data Book* (Oct. 1, 1997 – Sept. 30, 1998). In calendar year 1999, the estate and gift tax total was \$28,385,607,000 and the percentage was 1.5%. See *I.R.S. Data Book, Summary of Internal Revenue Collections, by Type of Tax, Fiscal Years 1999 and 2000* (Sept. 5, 2000), available at [http://www.irs.gov/tax\\_stats/soi/est\\_gif.html](http://www.irs.gov/tax_stats/soi/est_gif.html). Professors Soled and Davenport consider the revenue raised to be substantial. See Jay A. Soled & Charles Davenport, *Cremating Transfer Taxes: Is There Hope for a Resurrection?*, 34 WAKE FOREST L. REV. 229 (1999).

<sup>33</sup>People are tenuously prosperous, rather than genuinely rich. See Louis Menand, *A Fine Detachment*, N.Y. REV. BOOKS 8 (Mar. 9, 2000). U.S. Trust writes of the "Retirement Worries" of the affluent. U.S. Trust, *Retirement Planning: Retirement Worries* (May 1996), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/RetirementPlanning.html>.

<sup>34</sup>See U.S. Trust, *Financial and Economic Worries and Concerns of the Affluent* (June 1999), at <http://www.ustrust.com/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/WorriesoftheAffluent.html>; U.S. Trust, *Retirement Planning: Retirement Worries* (May 1996), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/RetirementPlanning.html>.

<sup>35</sup>See U.S. Trust, *Retirement Planning: Retirement Worries* (May 1996), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/RetirementPlanning.html>.

<sup>36</sup>Law changes when it's good for the middle class. See RASHI FEIN, *MEDICAL CARE, MEDICAL COSTS: THE SEARCH FOR A HEALTH INSURANCE POLICY* 161 (1986).

<sup>37</sup>The money being saved to pay estate taxes will not go into more production and more jobs. To speak colloquially, if the demand for more ironing boards is there then people will enter the market and make them and one business owner's failure to meet demand will not affect the market. And, if all ironing board companies are owned by 63 year olds who are focused on estate taxes, and if none will invest then prices will rise. Then banks will loan money for taxes or to increase production (and jobs) or, more people will enter the ironing

Unlike many people in this audience, most Americans hear the special pleadings of the rich. PR for rich folks has never been better.<sup>38</sup>

I will say no more about why repeal is popular. I try to go into greater detail in a forthcoming article on why we are so willing to repeal the Rule Against Perpetuities. I see both repeal movements as very much related.

I'd like to turn now to my predictions.<sup>39</sup>

Let me start with the assumption that the repeal passes.

And let me start with the obvious point that the results will be unexpected. Every reform reaches an unintended result.

Having said that, here are my predictions.

Let me talk about charitable giving first. There's been a lot of speculation that charitable gifts will go down. I don't agree. I submit that MORE money will go to charity.

Let me explain. The argument is David Levine's<sup>40</sup> and it goes like this. Simply put, the wealth effect will lead to more charitable giving. The non-tax reasons for giving to charity will remain.<sup>41</sup> Those non-tax reasons include buying respect, immortality, a place in heaven and fifty yard line tickets. There's even a role for old-

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board market and thus create the jobs. See James R. Repetti, *Entrepreneurs and the Estate Tax*, 84 TAX NOTES 1541 (1999).

<sup>38</sup>See Dennis J. Ventry Jr., *Straight Talk About the 'Death' Tax: Politics, Economics, and Morality*, 89 TAX NOTES 1159, 1160-61 (2000) (This special report also contains citations to a number of recent relevant academic articles and articles in the popular press). See generally ROLAND MARCHAND, *CREATING THE CORPORATE SOUL: THE RISE OF CORPORATE RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS* (1998) (a history of, and a commentary upon, the American public relations industry). Professor Repetti makes the point about the Duponts' suppression of unfavorable stories. See James R. Repetti, *Democracy, Taxes and Wealth*, 76 N.Y.U. L. REV. 825 (2001). For a discussion of cultural constructs in the estate taxation of the rich see, William S. Blatt, *Minority Discounts, Fair Market Value, and The Culture of Estate Taxation*, 52 TAX L. REV. 225 (1997).

<sup>39</sup>On December 19, 2000, I believe that total repeal will not happen. I cannot decide if the Democrats will somehow stop dramatic relief because it is such a Republican idea or if Congress, desperate to show they can do something, will get together on an estate tax relief bill. I assume that through voting or filibusters that total repeal will be stopped. See *Tax Report, Estate-Tax Relief*, WALL ST. J., Nov. 22, 2000, at 1. The risks of law professors making predictions is delightfully discussed in David A. Hyman, *Medicine in the New Millennium: A Self-Help Guide for the Perplexed*, 26 AM. J. L. & MED. 143 (2000) (Professor Hyman also discusses Austin Powers). Kevin Hassett points out the dilemma of the members of one party supporting a tax reform they can live with when it comes from the other party. Kevin Hassett, *Time for Tax Reform*, WALL ST. J., Dec. 20, 2000, at A22. A number of predictions can be found in Editorial Advisory Board, *Forecast For 2001: Hazy, Some Clearing By End of Year*, 140 TR. & EST. 20 (2001).

<sup>40</sup>The argument is noted in William G. Gale & Joel B. Slemrod, *Ancestor Worship: Everything You Ever Wanted to Know about Estate Taxes*, 2 MILKEN INST. REV. 36, 47 (2000).

<sup>41</sup>See Gerald E. Auten, Charles T. Clotfelter, & Richard Schmalbeck, *Taxes and Philanthropy Among the Wealthy*, in DOES ATLAS SHRUG? 355, 414 (Joel B. Slemrod ed., 2000); David Jouffaian, *Estate Taxes and Charitable Bequests by the Wealthy*, 53 NAT'L TAX J. 743 (2000). Professor Rakowski considers the effect of repeal on charitable giving in Eric Rakowski, *Estate Tax Reform and Charitable Giving*, 77 TAX NOTES 463 (1997).



fashioned altruism.<sup>42</sup> Generally, consumption of a good increases with wealth, unless the good is tacky or sleazy. In other words, basic economics tells us that when people get extra money they increase purchases of what they are in the habit of buying. The exception is tacky goods. In the old days, the proof of that statement was that margarine consumption decreased with wealth, although butter consumption increased. Charity is not a sleazy good. In fact, I submit that the main determinant of inter vivos charitable gifts these days is household net worth, not taxes. And, in the recent past, household net worth has been a function of stock market performance.<sup>43</sup>

OK, please bring to mind all the parents with new wealth who claim they plan to cap the amount going to their children, with the rest going to charity.<sup>44</sup> I submit those parents will not raise the cap amount if repeal gives them more money.<sup>45</sup> The extra money will go to charity.

My friend Levine, who is against repeal, predicts an increase in charitable gifts of 5 billion dollars, if there is a repeal. In other words, I submit strongly, that the charitable deduction is not as magnetic as some people think it is.<sup>46</sup> Only gifts to the “Margarine Foundation” will decline.

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<sup>42</sup>The U.S. Trust Survey of Affluent Americans states that 76% of those surveyed planned to “pursue philanthropic work” in retirement. See U.S. Trust, *Retirement Planning: Retirement Worries* (May 1996), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/RetirementPlanning.html>. I submit that such a commitment to charity cannot be easily harmonized with predictions of lower financial commitment to charity. Of course, anything is possible.

<sup>43</sup>Stock ownership, household wealth and consumption are discussed in James M. Poterba, *Stock Market Wealth and Consumption*, 14 J. ECON. PERSP. 99 (Spring 2000). A U.S. Trust survey of affluent persons strongly supports Levine’s point. There it is said, “Foremost, 76% of the affluents surveyed believed their gains have increased their propensity to aid charitable causes.” See U.S. Trust, *The Impact of the 1990s Bull Market: Financial Worries* (June 1998), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/ImpactoftheBullMarket.html>. David Levine is the co-author of Roger Hertog and David A. Levine, *Income versus Wealth: Making the Trade-Off*, J. OF INVESTING, Spring 1996, at 5. Levine’s point is supported in a column in the Wall Street Journal. See Albert R. Hunt, *Charitable Giving: Good, but We Can Do Better*, WALL ST. J., Dec. 21, 2000, at A19.

<sup>44</sup>A famous instance of a parent refusing to leave the family fortune to the kids is that of Andrew Carnegie who chose not to leave property to his children. See Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 60 n.104 (1999).

<sup>45</sup>U.S. Trust, Estate Planning, Transfer of Wealth supports this (and the idea that capping may become a useful estate planning product) in that it states that affluents surveyed believe that “\$5.5 million was the most money that an individual could inherit without having ‘a detrimental effect on the values of that person.’” See U.S. Trust, *Estate Planning: Transfer of Wealth* (March 1994), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/EstatePlanning.html>.

<sup>46</sup>See, e.g., Leon Bottstein, *America’s Stake in the Estate Tax*, N.Y. TIMES, July 23, 2000, § 4, at 15. It is not clear to the author what will happen to the world of charitable split interest trusts. The Financial Times states that in winter of 2000 there were about 100,000 charitable remainder unitrusts in the U.S. with assets of \$75 billion. See Elizabeth Wine, *Caring Ways to Ease the Tax Burden*, FIN. TIMES WEEKEND, March 4-5, 2000, at 24. The author believes these are as much fueled by income tax savings as by transfer tax savings, thus should remain

If I were pro-repeal, and the only hurdle to enacting repeal was concern about charitable giving, I would push for a charitable pickup tax. Make the estate tax 5% unless the decedent devises an amount to charity equal to the tax on her estate.

Moving on, I note the obvious: lawyers, other advisers and bankers will adapt. They will aggrandize and hype other aspects of the trusts and estates practice.

On the state law side, I think that people will continue to hire lawyers to help them avoid probate, creditors, snoops, and the taxes that remain.<sup>47</sup> In other words, trust advisers and bankers will concentrate on asset protection trusts, clever trust investing,<sup>48</sup> revocable trusts, Medicaid trusts,<sup>49</sup> family business succession planning, and the imagined capacity of trusts to enhance beneficiaries' characters.<sup>50</sup> We are all aware of the argument that trusts make beneficiaries weak. Let us call that sissification. Sissification. Mary Louise Fellows' article on that topic is particularly interesting.<sup>51</sup> Recently, we've been asked to look at the imagined other side of this sissification coin.<sup>52</sup> Merrill Lynch, in particular, would have its customers believe that trusts, with their perceived magic powers,<sup>53</sup> are capable of curing "affluenza."<sup>54</sup> Affluenza is a "disease" that strikes when the earned millions of middle-class parents

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fashionable. It must be noted that marketing of charitable arrangements based on tax savings will have to be rearranged. A 1997 U.S. Trust survey of affluent persons strongly suggests to the author that lower taxes will yield greater charitable contributions. There it is said that "If government spending and taxes are cut, over two-thirds of the affluent said they would donate more to charities or causes." See <http://www.ustrust.com/concerns.htm> (last visited December 14, 2000) (on file with the author).

<sup>47</sup>See generally JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING (2d ed. 2000) (superior estate planning desk treatise).

<sup>48</sup>In other words, more lawyers will try to become Boston trustees. See CHARLES E. ROUNDS, LORING, A TRUSTEE'S HANDBOOK (2000).

<sup>49</sup>See Joel C. Dobris, *Medicaid Asset Planning by the Elderly A Policy View of Expectations, Entitlement and Inheritance*, 24 REAL PROP. PROB. & TR. J. 1 (1989).

<sup>50</sup>See Gary Silverman, *Affluenza Hits Nouveau Rich Kids*, FIN. TIMES, Jan 10, 2000, at 1.

<sup>51</sup>See Mary Louise Fellows, *Spendthrift Trusts: Roots and Relevance for Twenty-First Century Planning*, 50 REC. ASS'N B. CITY N.Y. 140 (1995).

<sup>52</sup>See Kit R. Roane, *Affluenza strikes kids*, U.S. NEWS & WORLD REPORT, March 20, 2000, at 55. This also illustrates the invasion of estate planning by non-lawyers. The author discusses this in Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Any More*, 62 ALB. L. REV. 543 (1998).

<sup>53</sup>I discuss the perceived magic of trusts in a prior article. See Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't have to think of England Anymore*, 62 ALB. L. REV. 543 (1998).

<sup>54</sup>See, e.g., Ken Brown, *Franklin to Buy Fiduciary in Stock Deal*, WALL ST. J., Oct. 26, 2000, at C25. See Monica Langley, *Rich Parents Find New Way To Keep Tabs on Heirs: "Family Incentive Plans*, WALL ST. J., Nov. 17, 1999, at 1; Gary Silverman, *Affluenza Hits Nouveau Rich Kids*, FIN. TIMES, Jan 10, 2000, at 1. See also David R. Hodgman & Debra L. Stetter, *Can Incentive Trusts Encourage Children to Behave Responsibly*, 27 EST. PL. 459 (2000) (Drafting of so-called incentive trusts).

turn good bourgeois children into wastrels.<sup>55</sup> The “solution” is magic trusts with incentive terms. Millions for education and entrepreneurship, but not a dime for yachts. As Bruce Wolk put it to me, “The trustees will be raising the grandchildren.”<sup>56</sup>

If affluenza trusts turn out to be a good product,<sup>57</sup> and if the tax is repealed, advisers will encourage clients and customers to become more concerned about the effect of money on their children, now that the clients see that they are richer. Trusts, which were once seen as potentially ruinous for beneficiaries, will be over-sold as devices to save children in peril. People will be told they are richer and pressed to prevent the ruin of their children. More money will go to charity to inspire children to work.

However, even with Affluenza trusts, richer offspring will likely work less and thus contribute less to the economy. Similarly, more money will allow people so inclined to retire earlier.

On the tax side, I believe that advisers will glorify other tax aspects of the trusts and estates practice. For instance, they will focus on carryover basis<sup>58</sup> if it is enacted, and Subchapter J planning.<sup>59</sup> Lawyers and accountants will quickly further complicate both bodies of law.

Used copies of Blattmachr and McGrath’s book on Carryover Basis will dramatically increase in value.<sup>60</sup>

Returning to state law, I believe repeal will set off an even quicker legislative race to the bottom. States will seek to curry favor with the rich, and save the profits of local trust bankers, by setting aside more and more, policy-based rules of trust

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<sup>55</sup>Affluenza is discussed in several places including U.S. Trust, *The Affluent and Their Children, Affluent Parents’ Concerns* (Nov. 1996), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/AffluentandtheirChildren.html>.

<sup>56</sup>Merrill Lynch actually refers to its family office service as “financial parenting.” See Kit R. Roane, *Affluenza Strikes Kids*, U.S. NEWS & WORLD REPORT, March 20, 2000, at 55.

<sup>57</sup>I suspect that “Affluenza Trusts” may be a good product. See U.S. Trust, *The Affluent and Their Children: Affluent Parents’ Concerns* (Nov. 1996), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/AffluentandtheirChildren.html>.

<sup>58</sup>JONATHAN G. BLATTMACHR & THOMAS J. MCGRATH, CARRYOVER BASIS UNDER THE 1976 TAX REFORM ACT (Journal of Taxation 1977).

<sup>59</sup>One can imagine the IRS asserting that trusts set up to last for a long period of time are to be taxed as partnerships or corporations if the facts allow and if the prospect of additional revenue is there. I thank Professor Dan Simmons for sharing this thought with me and I add the following related thought. If the estate tax is repealed the IRS will likely look ever more closely at the income taxation of trusts, not only under Subchapter J, but also in ways akin the one set out in the preceding sentences. For a proposal for the integration of the income and transfer taxation of trusts, see Robert T. Danforth, *A Proposal for Integrating the Income and Transfer Taxation of Trusts*, 18 VA. TAX REV. 545 (1999).

<sup>60</sup>JONATHAN G. BLATTMACHR & THOMAS J. MCGRATH, CARRYOVER BASIS UNDER THE 1976 TAX REFORM ACT (1977).

law.<sup>61</sup> In other words, more states will repeal the Rule against Perpetuities, allow self-spendthrifts of grantor trust interests and the like.

I predict that without transfer taxes, and with ultra flexible state law, trust creation will be unrestrained. That means we will see some pretty weird trusts out there. I think that fairly standard, and relatively normal, features will come to include: extremely broad trustee powers of invasion; dramatic beneficiary powers to demand principal;<sup>62</sup> general powers of appointment in beneficiaries to create perpetual trusts; and the like.<sup>63</sup> Few beneficiaries will challenge the terms of these trusts at their creation. Without the restraint of the transfer tax, and the occasional intrusive estate tax auditor, trust terms will only be challenged on some vague public policy ground, by a disgruntled beneficiary, far in the future. Unwholesome terms in perpetual trusts, discovered far in the future, will have to be undone. They will be undone by a yet to be invented 'changed circumstances' doctrine, like the one used to erase unwieldy equitable servitudes in older land developments.

When I combine unrestrained trust creation, in my mind, with already unrestrained trust administration, and perpetual trusts, I see a trust world reminiscent of a wild-west saloon or the bar in Star Wars.<sup>64</sup>

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<sup>61</sup>See generally Stewart E. Sterk, *Asset Protection: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000).

<sup>62</sup>One can easily imagine trust structures allowing beneficiaries to vote on partial or complete revocation.

<sup>63</sup>General powers of appointment might not be so attractive if they were open to creditors' claims. At that point the author assumes some jurisdictions would change that rule of law.

<sup>64</sup>STAR WARS (Twentieth Century Fox 1977). Under the current system, the presence of the IRS, although without direct enforcement duties, acts as a modest restraint on unwholesome trust creation. In the author's experience, at one time, in New York City, senior IRS estate tax examiners would occasionally police problem trusts by threatening to exercise, or by refusing to exercise, their *de facto* powers. The point is made in another context in Evelyn Brody, *A Taxing Time for the Bishop Estate: What is the I.R.S. Role in Charity Governance?*, 21 U. HAWAII L. REV. 537, 543 (1999). In other words, speaking loosely, the Treasury and the IRS have provided the social engineers to run the "National Bureau of Wholesome Trust Enforcement" and if transfer taxes are repealed this "Bureau" will be closed. With the government out of the picture, it's another reason to suggest that trusts are going to get really strange. Civil servants are the only class of people with any power in the trust world who are immune to the siren song of the special pleaders for the rich. Untrammelled trust creation is a special concern because of the craft tradition of lawyers. By that I mean lawyers tend to write their own trusts if no rule of law interferes, and rich folks tend to get what they want from their lawyers. There will be few, if any, constraints on trust creation until the totally free market in trust creation I foresee explodes some decades hence. Until then, the only constraint on trust administration will be trust beneficiaries. To my mind, this Wild West atmosphere is why a leading British civil servant has called for the establishment of an international body to regulate trust banking practices in Island jurisdictions. See Andrew Edwards, *Trusts and Governments*, AMICUS CURIAE Issue 26, at 23 (2000). There will also be a lot of unconstrained trust creation because of the diminishing sense of duty in the trust world. I try to write of diminished duty in Dobris, *supra* note 52. The occasional trust income tax audit, or the offshore concept of the trust protector is not likely to make any difference either. As to trust protectors see Donovan W. M. Waters, *The Protector: New Wine in Old Bottles?*, in TRENDS IN CONTEMPORARY TRUST LAW 63 (A. J. Oakley ed., 1996); Edward C. Halbach, Jr., *Significant Trends in the Trust Law of the United*

The opportunities thus created just about guarantee that the American love affair with trusts will continue.<sup>65</sup>

Eventually, however, I believe there will be a downturn in trust creation. At that point there will be a fierce fight for garden-variety trust business.<sup>66</sup> That fight may actually begin earlier, rather than later.

I believe more flight capital will come to the U.S. We will become even more of a Switzerland. This will be especially good for New York City and Miami.

Please recall my belief that the key policy behind transfer taxation is to put a dog collar on the very rich, for at least a few minutes, every time there's a transfer. I predict that this populist urge will not go away with estate tax repeal. If I am right, then mild hostility towards the rich will find other outlets, especially if there's an economic downturn. There will be more Bill Gateses called to testify before Congress and more Michael Milken going to jail. I don't see pitchforks or guillotines, but there has to be an outlet of some sort. At that point, I am reminded of *The Monkey's Paw*.<sup>67</sup> You have to be careful what you wish for in this world, because you might get it. Increased hostility toward the rich might well be an unintended result of repeal. At that point, I see another reason for the rich to give more to charity.<sup>68</sup> My proof is Milken<sup>69</sup> and Gates.<sup>70</sup>

Elimination of transfer taxes will lead to increased pressure for more probate reform. In other words, with the distraction of the estate tax removed, the spotlight will turn to simplification of the transfer of property at death. Probate avoidance trusts will turn into even more of a commodity business, which in turn will lead to more commodification of the whole transfer at death business.

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*States*, 32 VAND. J. TRANSNAT'L L. 531, 553-54 (1999). Antony Duckworth, *Protectors - Fish or Fowl, Part I*, 4 J. INT'L TR. & CORP. PLAN. 131 (1995); Antony Duckworth, *Protectors - Fish or Fowl, Part II*, 5 J. INT'L TR. & CORP. PLAN. 18 (1996); P. Matthews, *Protectors: Two Cases, Twenty Questions*, 9 TR. L. INT'L 108 (1995) all as cited in David Hayton, *English Fiduciary Standards and Trust Law*, 32 VAND. J. TRANSNAT'L L. 555 (1999).

<sup>65</sup>I have written of the love affair with trusts in Dobris, *supra* note 52.

<sup>66</sup>I believe that one response to reduced profit and opportunity from garden variety banks will be that they will lobby through changes in state law that will reduce the risks they run in providing fiduciary services. In other words liability will be reduced by way of legislation. See Unif. Principal and Income Act (1997 Act) § 105, 7B U.L.A. 3. This will eventually lead to "abandon-all-hope-ye-who-enter-here" trusts for Grantors who want to pay lower fees or for grantors with smaller amounts to put in trust, who discover that no one wants their business. Minimum standards can be lowered.

<sup>67</sup>W.W. JACOBS, *THE MONKEY'S PAW* (Books of Wonder 1997) (1902).

<sup>68</sup>And to pay public relations people to keep their name out of the newspaper. If I am right this should also lead to an increase in people making asset protection arrangements.

<sup>69</sup>See Michael White, *Former Junk Bond King Rules Over New Empire*, BOSTON GLOBE, May 2, 1999, at C15; *Clinton May Pardon Milken, McDougal, Others*, WASH. POST, Dec. 10, 2000, at A2. He did not.

<sup>70</sup>See *Charity Created by Gates is Now Largest in U.S.*, N.Y. TIMES, Aug. 23, 1999, at A13. Bill Gates' father favors the estate tax. See Lynn Thompson, *Giving Back Has Always Inspired Bill Gates Senior*, L.A. DAILY J., Oct. 9, 2000, at 1, col. 5.

In that regard, I found an interesting item in the *Economist* magazine. The article said that chain funeral parlors are starting to offer bereaved families legal assistance.<sup>71</sup>

I believe that a wholesome recasting of trust services will take place as commercial trustees scramble to retain business and to distinguish themselves in what will eventually be a shrinking market.<sup>72</sup> I am thinking, specifically, of J.P. Morgan's recent decision to offer serious, trust-type services on the web<sup>73</sup> and mycfo.com offering web-based trust services to the seriously rich.<sup>74</sup>

Similarly, I believe that insurance companies will come up with new products to replace the business lost because of the reduced need for insurance to fund estate tax payments.<sup>75</sup> I also believe that insurance companies will lobby for additional income tax advantages for insurance products. And, insurance will be sold more heavily as an asset protection device<sup>76</sup> and trust substitute. To the extent these delicious results<sup>77</sup> can only be obtained by changing state law, and the Internal Revenue Code, I expect the grass roots insurance lobby to be very effective.<sup>78</sup>

Once the repeal is fully implemented, there will be a race to make gifts either directly to family members, or by cramming assets into perpetual trusts. Those perpetual trusts will give trustees and beneficiaries the broadest imaginable powers. Cramming will take place because of the fear that a depression, war or politics will bring back transfer taxes.<sup>79</sup>

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<sup>71</sup>*The Death Business, Staying Alive*, ECONOMIST, Aug. 5, 2000, at 61.

<sup>72</sup>Mass market financial operations are buying up-market trust banks. See, e.g., Ken Brown, *Franklin to Buy Fiduciary in Stock Deal*, WALL ST. J., Oct. 26, 2000, at C25. See Monica Langley, *Rich Parents Find New Way To Keep Tabs on Heirs: Family Incentive Plans*, WALL ST. J., Nov. 17, 1999, at 1; Gary Silverman, *Affluenza hits nouveau rich kids*, FIN. TIMES, Jan 10, 2000, at 1.

<sup>73</sup>Grace W. Weinstein, *Private banking goes online for millionaires*, FIN. TIMES WEEKEND, Sep. 9-10, 2000, at 25 (discussing new service "Morgan OnLine").

<sup>74</sup>The web site mycfo.com offers web-based financial, and presumably trust, services, to the seriously rich. See www.mycfo.com (last visited October 1, 2001).

<sup>75</sup>See JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING § 6.4 (2d ed. 2000).

<sup>76</sup>See Stephen Z. Starr & Brian C. Bandler, *Life Insurance and Annuities May Insulate Some Assets from Loss in Unexpected Bankruptcy Filings*, 28 N.Y. ST. B. ASS'N J. 28 (2000).

<sup>77</sup>See Stephen Greer & David G. Shaftel, *Alaska Enacts Additional Estate Planning Legislation*, 27 EST. PL. 376 (2000).

<sup>78</sup>The insurance companies are opposing repeal. See *US Insurance Companies, Survivorship*, ECONOMIST, Nov. 5, 2000, at 93.

<sup>79</sup>In other words, what is done can be undone. See Ronald D. Aucutt, *Washington Watch, The Campaign to Repeal the Estate Tax: What a Splendid Little War it Was!*, 27 EST. PL. 493 (2000). People will make hay while the sun shines, because you never know what the next Congress will do. Lawyers and trust companies may well push perpetual trusts in wills before the full phase-in of the zero tax, if it comes to be enacted, and they will push the quick funding of inter vivos trusts if and when the full phase-in takes place. It will be interesting to see if surviving spouses' rights of election at death will interfere with cramming by way of testamentary perpetual trusts. Professor Myron Grauer predicted at the conference that \$10,000 gifts and GRATS will essentially disappear.

Put differently, there will be an increase in the number of perpetual trusts created. That increase will lead to the repeal of the Rule in more jurisdictions.<sup>80</sup>

Someday, this proliferation of perpetual trusts will lead to a lot of trust law problems involving managing large beneficiary populations,<sup>81</sup> questions of impartiality, agency problems and the like.

I think a lot of lawyers and trust companies will push perpetual trusts in wills before the full phase-in of the zero tax, just as they will push the quick funding of inter vivos perpetual trusts once the full phase-in takes place. Eventually misuse of such ultra long-term trusts will increase hostility to the rich.<sup>82</sup>

If the repeal is phased in, as I assume it would be, a whole pseudo-science of beating the phase-in will arise. For instance, there will be new forms of formula drafting to cover the phase in and post-phase in periods.<sup>83</sup> The formulary will become a bestiary, if you will.<sup>84</sup>

If transfer taxation does come back, some day, I predict that there will be an attempt to tax trusts created during the no-tax period with a new generation skipping transfer tax.<sup>85</sup> And, there will be a lot of litigation to unwind unwanted irrevocable trusts.<sup>86</sup>

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<sup>80</sup>In his article on states repealing the Rule against Perpetuities, Professor Bloom stated that 11 jurisdictions have abolished or dramatically changed the Rule against Perpetuities. See Ira Mark Bloom, *The GST Tax Tail is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569, 571 (2000).

<sup>81</sup>Blackstone discussed this problem quite specifically in his Commentaries. WILLIAM BLACKSTONE, COMMENTARIES 203-04 (1979). The author is grateful to Professors John Langbein and Bruce Wolk for pointing this out to him. They are the authors of JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 430 (3d ed. 2000). The author thanks Professor Bruce Wolk for discussing the beneficiary population issue with him on several occasions.

<sup>82</sup>*Congress Hotel Co. v. Martin*, 143 N.E. 838 (Ill. 1924) (rich spendthrift trust beneficiary successfully avoids paying hotel and clothing bills).

<sup>83</sup>I discussed formula drafting in Joel C. Dobris, *Marital Deduction Estate Planning: Variations on a Classic Theme*, 20 SAN DIEGO L. REV. 801, 813-18 (1983).

<sup>84</sup>I believe that much energy will go into the problem of beating the fading tax if someone dies during the phase-in period. Similarly, much energy is going into the question of how to plan for the uncertainty during the period where the old system is in place and it's not clear what, if any, changes will take place. See, e.g., Edward M. Manigault, *Hedging for the Possible Repeal of the Transfer Tax System*, PROB. & PROP., Sept.-Oct. 2000, at 59.

<sup>85</sup>The thought is Professor Bruce Wolk's.

<sup>86</sup>See *Simches v. Simches*, 671 N.E.2d 1226 (Mass. 1996), discussed in JOEL C. DOBRIS & STEWART E. STERK, RITCHIE, ALFORD & EFFLAND'S ESTATES AND TRUSTS 575-79 (9th ed. 1998). Section 514 of the Uniform Trust Code allows modifications of trusts to meet a settlor's tax goals. Similar powers have been given to fiduciaries by the New York State Legislature. See N.Y. EST. POWERS & TRUSTS LAW § 11-1.11 (2000). I am reminded of a comment I once heard made by Professor Edward Halbach. He said that if lawyers change the nature of trusts too much the IRS would cease to respect state law trust rules. See generally Ronald Chester, *Modification and Termination in Trusts in the 21<sup>st</sup> Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. (forthcoming) (discussion of trust termination).

QTIPS will remain a tool of estate planning because of serial monogamy, except to the extent that younger spouses successfully lobby for better terms. Without government sanction of the income-only QTIP, I suspect that QTIP terms will become more generous.<sup>87</sup>

Obviously, there will be a rush to do new wills after enactment of repeal and state death taxes will be repealed in many jurisdictions.

Let me talk about changes in consumption. Surely, someone more able than I will discuss this today, but let me put in my two cents worth.

Again, with the help of David Levine, I predict that consumption will increase marginally and that people will buy what they were buying before, only a little bit more and/or a little bit better. They might buy more art but they are just as likely to buy better art. They won't drink more wine, only better wine. The increase in spending should be about five billion dollars. In other words, the marginal propensity to spend by rich people is low.<sup>88</sup> Especially, on margarine.

This suggests that people will not spend the tax money they have already saved and that they will continue to save future return that previously would have been saved to pay taxes.<sup>89</sup> Of course, some new money will be redirected away from insurance and some insurance policies will be cashed in and reinvested. Being richer will not make most people more adventurous in their asset allocations or the riskiness of their investments.<sup>90</sup>

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<sup>87</sup>See Joel C. Dobris, *Marital Deduction Estate Planning: Variations on a Classic Theme*, 20 SAN DIEGO L. REV. 801 (1983); Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729 (1998).

<sup>88</sup>I thank David Levine for this point. Spending on the part of donees is much more likely. See James M. Poterba, *Stock Market Wealth and Consumption*, 14 J. ECON. PERSP. 99, 103, 114 (2000). This is a function of both wealth shock and mental accounting. See *ibid.* citing Richard P. Thaler, *Anomalies: Savings, Fungibility, and Mental Accounts*, 4 J. ECON. PERSP. 193 (1990). For a discussion of the savings habits of the rich see Christopher D. Carroll, *Why Do the Rich Save So Much?*, in DOES ATLAS SHRUG? 465 (Joel B. Slemrod ed. 2000).

<sup>89</sup>Why prosperous people save is an intriguing question, outside the scope of this article. Explanations include: shame, self-protection (against the tumbrels and the guillotine), Puritanism, excess concern about the cost and the length of old age, and a desire to exercise power in old age. These are discussed in many places including Barbara Redman, *Rethinking the Progressive Estate and Gift Tax*, 15 AKRON TAX J. 35 (2000); Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 74 n.147, 150 (1999); See James M. Poterba, *Stock Market Wealth and Consumption*, 14 J. ECON. PERSP. 99 (2000). See also JOEL C. DOBRIS & STEWART E. STERK, RITCHIE, ALFORD & EFFLAND'S ESTATES AND TRUSTS 874 (9th ed. 1998) (The costs of the end of life and long term care insurance.). Professor Poterba suggests that lower transfer taxes may increase the attractiveness of bequests. See James M. Poterba, *Stock Market Wealth and Consumption*, 14 J. ECON. PERSP. 99, 107 (2000). A survey by U.S. Trust supports the position that savings will remain stable, or perhaps even increase. See U.S. Trust, *The Impact of the 1990s Bull Market: Financial Worries* (June 1998), at <http://www.ustrust.com/ustrust/html/knowledge/WealthManagementInsights/SurveyofAffluentAmericans/ImpactoftheBullMarket.html> ("the affluent save, on average, at least as much or slightly more today").

<sup>90</sup>The author thanks David Levine for this point. See Joel C. Dobris, *Why Trustee Investors Often Prefer Dividends to Capital Gain and Debt Investments to Equity—A Daunting Principal and Income Problem*, 32 REAL PROP. PROB. & TR. J. 255, 275 n.65 (1997).



Let me make one more prediction to conclude this repeal section of my speech. I predict that Al Gore is going to win the election by one vote and that the tax will not be repealed.<sup>91</sup>

At that point, I have a much shorter list of predictions about a Gore presidency<sup>92</sup> and the reform of the estate tax.

I believe there will be fairly immediate reform. I think the million dollar taxable estate threshold will be phased in before 2006 and that it will then go up to a larger number like 1.5 or 2 million dollars over ten years.<sup>93</sup> I believe the threshold amount will not be indexed,<sup>94</sup> or that it will be indexed so as to rise very, very slowly.

I believe that Congress will keep the step up in basis. Insofar as it makes estate administration easier, that's good. In real life, carry over basis is a zoo. As a practitioner who liked a simple life, I loved the fresh start of a step up at death.<sup>95</sup>

I predict the highest bracket will be below 50% – probably 49.999.

In other words, I predict the same-old, same-old with some modest jiggling of the numbers.

Now I want to tell you what I'd like to see happen. First, I tell you that I am a Yellow Dog Democrat.<sup>96</sup> I have never voted for a Republican in my life. Having said that, I predict that the moderates and the left of center, with lots of encouragement from Treasury and the Professoriate, will mess up the reform

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<sup>91</sup>On the day I made the speech, in early October of 2000, I found I could not make a prediction and so I made the joke you find in the text. I had no idea how close this flip remark would come to reality.

<sup>92</sup>Of course, Bush became president.

<sup>93</sup>*The Politics of Tax Cuts*, S.F. CHRON., Sept. 11, 2000, at A18.

<sup>94</sup>Just as the Alternative Minimum Tax (AMT) is not indexed. The point is made by Kevin Hassett, *Time for Tax Reform*, WALL ST. J., Dec. 20, 2000, at A22. He also inferentially makes the point that a tax that is subject to lobbying is a tax that legislators are unlikely to repeal, once they figure out things.

<sup>95</sup>Professor Joseph Dodge predicted from the podium that low basis for closely held businesses that were held by small cohesive groups (*e.g.* families) might go unrecognized into eternity as long as people were willing to continue owning the assets. If the topic is simple estate administration, the simplest administration of all would be if the states enacted a durable power of attorney statute that allowed the attorney in fact to distribute the decedent's assets, subject to certain positive parameters and safeguards. Distributions might be limited to nuclear family members and there could be prohibitions against distributions to the attorney in fact in excess of her intestate share. Distributions to the surviving spouse could be limited to the survivor's share under the UPC, with a special exception for 100% distributions to surviving spouses of very long term traditional first marriages. It would be similar to a special power of appointment. I note that this idea is not mine, but I confess I no longer remember who gave me the idea. For a recent discussion of the durable power see Russell E. Haddleton, *The Durable Power of Attorney: An Evolving Tool*, 14 PROB. & PROP. 59 (2000).

<sup>96</sup>The term, yellow dog democrats, refers to "southern democrats so loyal they'd vote for an old yellow dog if it ran on the ticket." Dick Polman, *Investigating the President: Why Democrats Vote Against Clinton*, SEATTLE TIMES, Oct. 8, 1998, at A2.

process.<sup>97</sup> They will mess-up by setting the taxable threshold too low. I think the threshold should be ten million dollars for a single person and that the rate should be meaningfully below 50%.<sup>98</sup> I say ten million, but I would settle for five.

I say ten because of what I said earlier. This tax is not about revenue, or breaking up wealth, or achieving distributional equity. It is not about anything except marking rich people and reminding them about “We the people.” At that point, it is vital to draw a very bright line between the prosperous upper middle class and the really rich;<sup>99</sup> and it is vital to have rates that appear fair.<sup>100</sup> The estate tax is about political theater and culture, not revenue or concentrations of wealth.<sup>101</sup> We have got to get the sentimental junk about farmers and taxing frugal widows<sup>102</sup> out of the equation. We have got to make it clear that we only take death taxes from people who are stinking rich.

I am reminded of an old Saturday Night Live skit where Bob Dole is running against George Bush Senior for the Republican nomination for president and Dole says, “Bob Dole didn’t grow up with a silver spoon in his mouth, Bob Dole didn’t have a riding lawn mower.” Or, if you prefer, I am talking about the bit in Austin Powers<sup>103</sup> where Dr. Evil wants to hold the world hostage for a million dollars. It’s not about riding lawn mowers and it’s not about a million dollars. It’s time for tax reformers to face that.

In one of my more idiosyncratic footnotes I wrote that if I had 12 million dollars I would be rich. My friend Levine, who is well left of center, and against repeal, called me and said, “You really are a schlepper aren’t you? Twelve million dollars is

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<sup>97</sup>Attitudes about transfer taxes among professionals are discussed in Wayne M. Gazur, *Muddling Along With the Federal Wealth Transfer Tax: A Survey of Practitioners and Law School Professors*, 34 REAL PROP. PROB. & TR. J. 517 (1999).

<sup>98</sup>See Rebecca Thomas, *Smartmoney.com: Kill the Death Tax*, DOW JONES NEWS SERV. (2000). The bulk of wealth for most homeowners is their home equity. See Nicole D. Bellamy, *Homes, Sweet Homes*, FORD FOUND. REP., Fall 2000, at 23.

<sup>99</sup>See Peter H. Lewis, *Going Mobile*, FORTUNE, Oct. 9, 2000, at 295, 296 (“Like the definitions of ‘rich’ or ‘supercomputer,’ the standards for earning ‘broadband’ status will keep getting higher.”). There seems to be some growing agreement in the financial press that five million dollars is an important milestone on the road to riches. See, e.g., Leslie P. Norton, *The Wealth Revolution*, BARRON’S, Sept. 18, 2000, at 33.

<sup>100</sup>I believe that if the tax is perceived as being unfair by rich people that, in the world of offshore trusts, more and more assets will be hidden from the IRS. Too high a rate inspires cheating on the part of rich folks and pity on the part of the populace, at least these days. I sought to discuss related themes in Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don’t Have to Think of England Anymore*, 62 ALB. L. REV. 543 (1998).

<sup>101</sup>If we were to totally accept the idea that the estate tax is political theater any number of ideas might flow from that. We could adopt a super simple tax, just so we could say we had one. Or we could make assessment, payment etc a public event, with flags and bears and music.

<sup>102</sup>See Stanley Herz, *Rich? No, Frugal*, N.Y. TIMES, Sept. 21, 2000, at A29, available at <http://www.nytimes.com/2000/09/21/opinion/21HERZ.html> (letter to the editor).

<sup>103</sup>AUSTIN POWERS: INTERNATIONAL MAN OF MYSTERY (New Line Productions, Inc. 1997).

not rich.”<sup>104</sup> Of course, the remark was part of a nuanced and ongoing dialogue about endowments, return on capital, spending only the 1% dividend on the S & P 500.<sup>105</sup> He was saying the dividend return on an endowment of \$12 million is only about \$120,000 and that’s not rich. I took his point.

As I said, I would have a ten million dollar threshold, index every pro-taxpayer number and make the highest bracket 39%. That would get the junk out of the system and clarify for everyone that this is a tax on rich people. In 1995, of the roughly 31,500 estate tax returns filed, almost 44% of the estates were at or under one million dollars and they yielded 5.5% of the revenue. We are taxing Kulaks<sup>106</sup> not aristocrats.<sup>107</sup> Money magazine says that rich is 3 million dollars. Barrons says 5 million. I say let’s not argue about who’s rich. Remember Everett Dirksen. Let us talk about real money. Stealing a line from Meade Emory, let’s not tax single digit millionaires.<sup>108</sup>

If Gore is elected, there is a unique opportunity to frame the issue properly and for all time. We can save the estate tax by taking it out of the popular press and by

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<sup>104</sup>See Wendy Bounds, *A ‘Million’ Just Isn’t as Valuable In Dot-Com Era*, WALL ST. J., Oct. 11, 2000, at B1. The winner take all society has made a lot more people rich. See ROBERT H. FRANK & PHILLIP J. COOK, *THE WINNER-TAKE-ALL-SOCIETY* (1995).

<sup>105</sup>James P. Garland, *A Market-Yield Spending Rule for Endowments and Trusts*, FIN. ANALYSTS J., July-Aug. 1989, at 50 (an update of this article can be found at [www.jeffreyco.com](http://www.jeffreyco.com); Roger Hertog & David A. Levine, *Income versus Wealth: Making the Trade-Off*, J. OF INVESTING 5 (1996). Oversimplifying, his point was that if one rationally allocates a portfolio 100% to equity in the form of the Standard and Poor’s 500 and makes the conservative commitment to spend only the dividend income that \$12 million will only yield a gross income of about \$130,000 per year. As to the dividend return on the S & P 500, I note the following, “The S. & P. 500 last traded at a 3 percent dividend yield in October 1992, when the index itself was around 420. As of Friday [Nov. 5, 1999], with the S. & P. 500 more than three times as high, its dividend yield is near its record low of 1.18 percent. At that rate, the S. & P. 500 would have to decline by more than half just to bring it back to the level that has signaled a major market top.” See Mark Hulbert, *Strategies: Dividends are Fading as Market Signals, Too*, N.Y. TIMES, Nov. 7, 1999, § 3, at 8. See Joel C. Dobris, *Why Trustee Investors Often Prefer Dividends to Capital Gain and Debt Investments to Equity—A Daunting Principal and Income Problem*, 32 REAL PROP. PROB. & TR. J. 255 (1997). The S&P 500’s reported cash dividend will decline this year. That is, the year 2000 dividend will be smaller than the 1999 dividend. This will be the first nominal decline since 1970-71, and that 1970s decline was caused by governmental price controls. There was also a recession-related decline in 1958. This will be the first “fair-weather” decline since at least 1951. (email of December 19, 2000 from James Garland to the author.) David Levine is referred to in the New York Times, by author Tom Redborn, as one of “three of the smartest economists I know.” See Tom Redborn, *Down Goes the Market. Is the Surplus Next?*, N.Y. TIMES, March 11, 2001, § 3, at 4 col. 5. On the topic of how much money is enough see Andy Borowitz, *I Am Set For Life*, N.Y. TIMES, May 31, 2000, at A27.

<sup>106</sup>A kulak was a prosperous peasant in Czarist Russia and was seen as a special enemy of the Revolution. See J.V. STALIN, *WORKS* 184-89 (Foreign Languages Publishing House 1952); <http://www.britannica.com/search?query=kulak+ct=> (last visited November 5, 2001).

<sup>107</sup>For a recent portrait of a dead American aristocrat see Susan Watters, *Dazzling Harvest From a Cereal Heiress*, FIN. TIMES WEEKEND, Sep. 30-Oct. 1, 2000, at 3.

<sup>108</sup>Meade Emory, *Relief for the Merely Rich Sacrificed by Estate-Tax Foes*, SEATTLE TIMES, July 20, 2000, (Opinion), at B7.

indirectly exempting all the millionaire pundits and most of their readers. As Dan Simmons said to me, Congress has to find the “sweet spot” where everyone agrees “middle class” ends and rich begins.<sup>109</sup> Of course, as Dan understands middle class is really upper middle class, but who’s counting.<sup>110</sup>

Second best is the better solution.<sup>111</sup>

And if I turn out to be wrong in any of these predictions, look me up in Davis, California and I’ll buy you a drink.<sup>112</sup> Like everything else, this all began in California with the repeal of the state’s death tax in the early 1980s.<sup>113</sup>

I would like to close with the voice of the people. I asked my ninety-five year-old mother and my eighty-seven year-old aunt if they approved of repeal. They are two classic Roosevelt Democrats. My mother said, “I don’t think it should apply to me.” And my aunt said, “I am in favor of anything that makes rich people pay money to the Government.”

Thank you.

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<sup>109</sup>The number has to be both big enough and small enough (big enough to make Republicans happy and small enough to make Democrats happy). A Goldilocks number.

<sup>110</sup>What is middle class to some is upper class to others.

<sup>111</sup>See *Catch up if you can: Europe and Japan cannot afford to miss the boat*, ECONOMIST, Sept. 23, 2000, at S32. The early bird gets the worm but the second mouse gets the cheese. See also Brian O’Keefe, *Havens Can Wait*, FORTUNE, Oct. 30, 2000, at 272 (Over-aggressive trust practices can create problems).

<sup>112</sup>This offer applies only to members of the audience in Cleveland, although other applicants’ applications will be given fair consideration.

<sup>113</sup>See Fairbanks & Billiter, *Voters Put Crimp in Plans for Tax Increase*, L.A. TIMES, June 10, 1982, pt. 1, at 3, col. 3, cited in Mark L. Ascher, *Curtailling Inherited Wealth*, 89 MICH. L. REV. 69, 75 n.29 (1990). Professor Graetz discusses the matter, as well. See Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 285 (1983).