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The Moral Hazard of the Estate Tax

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Basic elements of our federal tax system – the income and estate taxes – emerged from the social debates of the Progressive era. Andrew Carnegie, in his famous essay, "Wealth," placed individual morality against a backdrop of social and community need. He praised the heavy taxation of large estates left at death as the means by which "the state marks its condemnation of the selfish millionaire's unworthy life."[2] Carnegie had a clear notion of the moral path for the wealthy. First, "the man of Wealth" should "set an example of modest, unostentatious living", and then "provide moderately for the legitimate wants of those dependent on him." All surplus revenues should be considered "simply as trust funds" to be administered according to his judgment in the manner "best calculated to produce the most beneficial results for the community."[3] Carnegie saw "the man of Wealth" as " the mere agent and trustee for his poorer brethren, bringing to their service his superior wisdom, experience, and ability to administer, doing for them better than they would or could do for themselves."[4] The passage of federal income taxes and estate taxes in the early twentieth century resulted in part from beliefs about morality.[5] The focus was upon the moral obligations of the wealthy to those less fortunate. For Carnegie, at least, death was the point of reckoning on that score and death taxation a moral instrument.

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[2]Andrew Carnegie, *Wealth*, NORTH AM. REV. 659 (June 1889).

[3]*Id.* at 661-62.

[4]*Id.* at 662. For an analysis of the degree to which the wealthy of the late nineteenth century engaged in philanthropy, *see* Merle Curti, Judith Green & Roderick Nash, *Anatomy of Giving: Millionaires in the Late 19th Century*, 15 AM. Q. 416, 419 (1963). The authors concluded that self-made men were more philanthropic than those who had inherited wealth. *Id.* at 429-30.

[5]*See* EDWIN R.A. SELIGMAN, ESSAYS IN TAXATION 316-17 (9th ed. 1923).

> (". . .[T]he government cannot derive any revenue . . . without inevitably affecting social relations . . . . The distinguishing mark of modern social science is that it endeavors to explain not only what is, but also what should be. All practical action is thus brought to the crucible of justice, and all systems of taxation are put to the test of conformity with this principle, irrespective of the intentions of the legislature.").

For a treatment of moral considerations surrounding tax policy *see* JOSEPH J. THORNDIKE III & DENNIS J. VENTRY, JR., TAX JUSTICE FOR THE 21ST CENTURY: RECONSIDERING THE MORAL AND ETHICAL BASIS OF TAXATION (forthcoming 2002).

The current debate about wealth transfer taxation has its themes of morality as well. Opponents have labeled the tax as "'immoral".[6] Taxation is about morality. It is both useful and necessary to consider moral arguments in the debate about the estate tax. In an area largely consigned to economists and philosophers, it is beneficial to broaden perspectives. One could expand the range of academic disciplines considered—to history, psychology, and sociology, for example. One should also take into account the narratives of those affected by the issue.[7]

This essay can only probe into this question. Beginning with Andrew Carnegie and the similar sentiments of his contemporaries, one can imagine the landscape against which Carnegie surveyed the estate tax as including the super rich and the rest of society—both classes with their interests and roles to play. Those labeling the estate tax as immoral today can be described as focusing more particularly upon the decedent (her goals or habits) and the villain of the piece—the government—the tax collector. This shift in frame is fundamental to today's debate on the morality of

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[6]Republican lawmakers have condemned the estate tax as immoral. *See*, *e.g.,* Richard W. Stevenson, *Veto of the Estate-Tax Repeal Survives Vote in the House*, N.Y. TIMES, Sept. 8, 2000, at A22, col. 1 (Rep. Jennifer Dunn called the estate tax an "immoral, unfair, and economically unsound tax."); Jackie Koszczuk, *Senate OKs inheritance tax repeal*, SAN DIEGO UNION-TRIBUNE, July 15, 2000, at A-1 (Sen. Phil Gramm stated "Republicans believe that is unfair, that is un-American and that is immoral."); Jake Thompson, *Benefits of Repealing the Estate Tax Debated*, OMAHA WORLD-HERALD, July 13, 2000, at 1 ("Whether it's a farm, ranch or store, [Sen. Chuck] Hagel said, taxing it after death is immoral."). Such sentiments have been expressed in letters to editors.

Academics have also argued that the estate tax is immoral. *See* Edward McCaffery & Richard Wagner, *A Bipartisan Declaration of Independence from Death Taxation*, TAX NOTES, August 7, 2000, at 801; Edward McCaffery, *In Favor of Repeal*, *in* Edward J. McCaffery, Charles Davenport & James Halpern, *Should We End Life Support for Death Taxes?*, TAX NOTES, Sept. 11, 2000, at 1373; Edward J. McCaffery, *Grave Robbers: The Moral Case Against the Death Tax*, TAX NOTES, Dec. 13, 1999, at 1429. McCaffery's articles argue for a progressive consumption tax. Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145 (1992); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994); *see also* Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71 (1996). For an article agreeing that taxation is "fundamentally a moral issue", but reaching a different result as to the morality of the estate tax, *see* Dennis J. Ventry, Jr., *Straight Talk About the "Death" Tax: Politics, Economics and Morality*, TAX NOTES, Nov. 27, 2000, at 1159. Taxation is of course, not the only area of law with concerns about the degree and extent of moral discourse. For example, *see* Carl E. Schneider, *Marriage, Morals and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

[7]Carolyn C. Jones, *Mapping Tax Narratives*, 73 TUL. L. REV. 653 (1998). One factor to consider in the use of narratives is the attention to direct cause and effect. When one considers the stories of those subject to taxation, narratives can be useful. It is more difficult to narrate the story of those whose lives may be improved because of the expenditure of wealth transfer tax revenues. This can have an unfortunate class-based effect. One illustration of the problem can be found in the use of tax narratives in the woman suffrage campaign. Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 U. ILL. L. REV. 265, 300-06 (1994).

estate taxation.[8] My project is to consider such moral arguments more seriously than many estate tax opponents have. We can see in the opposition to the estate tax connections with deep seated cultural and social values. However, the stories are not simple, and different arguments advanced about the immorality of the tax are not particularly consonant.

For me, a concept important to another area of law - insurance - has been useful in structuring my understanding of the estate tax immorality arguments. This concept is "moral hazard." One can draw an analogy between estate taxation and life insurance. The contention that estate taxation is immoral is based in part on the repugnant mixture of the sacred and the profane. The moment of death and its aftermath raise questions of the sacred. Opponents see the government as a profane opportunist making death a money-making (taxable) event. Similarly, life insurance faced a very difficult start in the United States in the early nineteenth century. Why? It was viewed as a foul mixture of the sacred and profane with gambling thrown in for good measure. Insurance scholars, also writing about intersections of death, money and morality, can provide a deeper appreciation of the cultural valences involved.

Sociologist Viviana Zelizer in her book *Morals and Markets* described the problem.

> The growth of individualism resulted in a new respect for the infinite worth of human personality, displacing the earlier utilitarianism with an absolute valuation of human beings. In an increasingly industrialized market economy dominated by the "cash nexus," human life and human feelings were culturally segregated into their separate incommensurable realm. Life insurance threatened the sanctity of life by pricing it. Insurance was uncomfortably reminiscent of the primitive institution of the wergild, or "blood-money" when the murder of a man was restituted with the payment of money. Thus, the financial evaluation of a man's life introduced by the industry was initially rejected by many as a profanation which transformed the sacred event of death into a vulgar commodity.[9]

Related to the moral problem of incommensurability of money and life, was another issue—moral hazard. During the nineteenth century, fire insurance companies were concerned about coverage not only of physical hazards but also of "moral hazards." Those of weak or bad character were susceptible to temptation.

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[8]I know that this phrase probably gives me away. If I were an estate tax opponent, I would be discussing the immorality of the death tax. The use of "death tax" is often credited to Republican pollster Frank Luntz (or, some would say, Frank Luntz has taken credit for this move). Luntz has said that he persuaded Trent Lott and other Republican lawmakers to use "death tax" when advocating the repeal of federal wealth transfer taxes. Peter Stone, *Man with a Message*, 29 NAT'L J. 750 (1997). Luntz's rhetorical move is consistent with the importance he places on language: As he claimed in GOPAC guide: "Words are everything. They can declare war or define a peace. They can soothe or inflame . . . We have found the words and phrases that will move the American people." *Id.* In one poll by Luntz Research Companies in 1999, 69% of those polled viewed death and inheritance taxes as unfair. Charles D. Fox IV, *Repeal of Estate and Gift Tax: Rising Tide or High-Water Mark?*, 139 TR. & EST. 56 (2000).

[9]VIVIANA A. ROTMAN ZELIZER, MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES 150-51 (1983).

Even people of good character could be tempted by the insurance relationship itself. Tom Baker, in his article *On the Genealogy of Moral Hazard*, has skillfully traced the evolution of this nineteenth century character-based concept of moral hazard into its late twentieth century incarnation. Today, moral hazard is used to argue that there are "perverse consequences of well-intentioned efforts to share the burdens of life", and these harmful externalities suggest that redistribution should be limited.[10]

The notion of moral hazard provides a useful grid to explore the morality of the death tax. Contemporary opposition to the tax may be viewed through this lens of moral hazard. Baker's very rich analysis enables us to see that both the nineteenth century character-based approach and the more recent economic externalities approach are at work in moral thinking about the estate tax.

This essay begins with character-based arguments by first illustrating this approach within the field of insurance. This character theme is then translated into the realm of taxation. Taking the current focus on decedents and their beneficiaries as a given for this part of the essay, one asks "Is the government tempted to do wrong, to act immorally, because of the existence of the estate tax?"

A story from World War I suggests the government's own concerns on this front with regard to taxing the estates of servicemen killed in wartime. That sense of the government as bad actor extends to more mundane deaths as estate taxation is seen to be interfering with the achievement of a decedent's plans. Human beings have very important connections to their property. Does this form of taxation interfere with symbolic immortality? The estate tax with its tax base of fair market value generally takes an undifferentiated view of property. Scholars have perceived complicated relationships with different sorts of property, relationships in some cases that are constitutive of personality and expressive of life's goals. When the government, by taxation, disrupts these relationships and social meanings, is the government's behavior immoral?

A second moral hazard analysis moves from moral questions which posit the government as a greedy insured to the government in the role of insurance company "redistributing wealth." By taxing those who have saved to build an estate, the government is said to reduce the incentive to save and invest–creating a perverse incentive to spend. This is Baker's contemporary version of moral hazard–"the perverse consequences of well-intentioned efforts to share the burdens of life." The writings of those who have considered the morality of spending during the twentieth century can considerably enrich this moral hazard argument. Indeed, some writers have argued against oversaving and have encouraged spending, particularly spending for culture and refinement.[11]

[10]Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996). For purposes of this essay, I am defining an externality as "aris[ing] when the decisions of some economic agents—whether in production, in consumption, or in exchange—affect other economic agents in ways that do not set up legally recognized rights of compensation or redress." Externalities can be harmful or beneficial. JACK HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 484 (3d ed. 1976).

[11]Following the September 11, 2001 terrorist attacks, Americans have been urged to express their patriotism by shopping. *See*, *e.g.*, Michiko Kakutani, *The Trivial Assumes Symbolism of Tragedy*, N.Y. TIMES, Sept. 23, 2001, at 1B. One conceptual problem, of course, is in the definition of spending, as opposed to saving and in the iteration of categories of

Finally, the question of framing returns. If the moral actor is no longer the government, but the wealthy person, the Progessive Era arguments for an estate tax return. Carnegie would argue that the wealthy man with no philanthropic impulse should be condemned as a person of bad character. The positive externalities of estate taxation are rarely described in the compendium of tales of the IRS. Just as duties to oneself, to one's family and to society in general are all implicated in a consideration of mortality and morality in the insurance field, so these same issues arise with respect to estate taxation.

I. LIFE, DEATH AND MORAL HAZARD

The nineteenth century insurance trade used the term "moral hazard" to describe both people ("negligent and fraudulent insureds") and situations (those inviting what an Aetna Guide to Fire Insurance called "carelessness and roguery.").[12] While these concerns were often discussed in the context of property insurance, similar concerns arose with respect to life insurance.[13]

A. The Example of Child Life Insurance

Perhaps one of the most vivid illustrations of this concern with moral hazard can be found in the example of child life insurance. In the latter part of the nineteenth century, insurance companies found that they could successfully market child life insurance costing a few pennies per week.[14] The purchasers were working-class or poor families who were interested in an alternative to pauper burial.[15] As the companies sold more policies, child protection groups opposed child insurance as "an offensive symbol of the prevalent materialistic orientation toward childhood" and the companies that sold such policies as having "child-blood" on their hands.[16] A newspaper article in 1878 portrayed children's insurance as a "dangerous incentive to murder . . . . It is not only the inducement which inhuman parents . . . find in insurance on their children to ill treat them or put them out of the way, but it is the tendency to cause them to neglect their children in their sickness and . . . the demoralizing effect produced by parents speculating on the lives of their children."[17] Poor and working class parents who stood to benefit from the policies were seen as moral hazards—people of low character, incipient murderers who would kill (or at

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spending. Outlays of money (for education, for example) may have current consumption benefits while building human capital.

[12]Tom Baker, *Insuring Morality*, 29 ECONOMY AND SOCIETY 559, 562 (2000).

[13]VIVIANA A. ROTMAN ZELIZER, MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES 67-89 (1983). "For many, life insurance not only offended religious sensitivities, but weakened the very fiber of society by institutionalizing gambling and encouraging murder for money." *Id.* at 79.

[14]VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 114, 118 (1994).

[15]*Id.* at 114-15.

[16]*Id.* at 118.

[17]*Id.* Over time as child mortality rates dropped child insurance continued to be sold, not so much as burial insurance, but as a "nest egg" or an endowment for a child at age sixteen or twenty-one. *Id.* at 132-37.

least fail to get medical help for an ailing child). Efforts to outlaw child insurance were premised both on the elimination of temptation and on keeping the death of a child from resulting in pecuniary compensation. Parents were seen as moral hazards capable of causing their children's deaths.

About two decades after these campaigns to outlaw child insurance, a comparable story of tax moral hazard emerged.[18]

B. The Example of World War I - Government as Moral Hazard

On April 7, 1917, the United States entered World War I.[19] In the following month, Congress passed the Selective Service Act authorizing the registration and draft of all men between twenty-one and thirty years of age.[20] A few months later, Congress enacted a War Estate Tax, to be imposed in addition to a regular estate tax.[21] The new War Estate Tax contained a provision exempting those "dying while serving in the military or naval forces of the United States during the continuance of the war in which the United States is now engaged, or if death results from injuries received or disease contracted in such service, within one year after the termination of such war."[22] The Senate Finance Committee was concerned about the estate tax as an emergency measure.[23] "Particularly, is it to be remembered that perhaps a majority of those dying during the war and leaving estates to be taxed will be soldiers and sailors dying in defense of our country."[24]

As it turned out, the influenza of 1918 coincided with the last months of World War I. While troops poured into crowded barracks and ships and as civilians moved about during the war, pandemic flu spread. Over 43,000 soldiers and sailors died of the flu and pneumonia, constituting about eighty percent of American battle deaths.[25]

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[18]ZELIZER, *supra* note 14, at 120-25. In 1895, the Massachusetts Society for the Prevention of Cruelty to Children introduced a bill to outlaw insurance on the lives of children under ten years of age, although it was defeated.

[19]Joint Resolution Declaring that a state of war exists between the Imperial German Government and the Government and People of the United States and making provision to prosecute the same. 40 Stat. 1 (Apr. 6, 1917).

[20]Act of May 18, 1917, ch. 15, 40 Stat. 76.

[21]Revenue Act of October 3, 1917 [H.R. 4280], Pub. L. No. 65-50, § 901.

[22]*Id.* at 87-88. *See also* Edwin R. A. Seligman, *The War Revenue Act*, 33 POLITICAL SCIENCE Q. 1, 7 (1918).

[23]"Only if continued at the same rate for many years - the period of a generation - does it become equal for all persons in like situation." Revenues to Defray War Expenses, Report to Accompany H.R. 4280, REP. No. 65-103, at 14 (1917).

[24]*Id.* In the Revenue Act of 1918, all estate tax obligations were relieved for those soldiers and sailors dying during the war as a result of war injuries or disease. The 1917 Act had merely exempted them from the supplemental war estate tax. Revenue Act of 1918, ch. 18, 40 Stat. 1057 (1919).

[25]ALFRED W. CROSBY, AMERICA'S FORGOTTEN PANDEMIC: THE INFLUENZA OF 1918, 206 (1989).

In all, about 550,000 Americans succumbed to this Spanish influenza and its complications.[26]

Senator Robert LaFollette of Wisconsin painted a somewhat different view of the identity of those likely to pay wealth taxes. He pointed out that "two percent of the people of this country own sixty-five percent of its wealth."[27] Like many progressives of his time, LaFollette saw big business pushing the United States into war in order to accumulate vast profits.[28] One of his Senatorial colleagues called war profiteers the "blood sucking tarantula upon the American people."[29] LaFollette wondered, "Is it too much to ask that the taxes of this war should be paid for so far as possible out of the great wealth of these two million people, particularly as the people of the poorer class will be more largely drawn upon for soldiers to suffer and die in unestimated numbers in order that the war may be prosecuted?"[30]

To many during World War I, the government was an accomplice to profiteering corporations, using war to boost corporate revenues. American soldiers and sailors were seen as dying for money. The government, in drafting men, required a sacrifice of time and, in some cases, of life itself. The sense that it would be too much to tax the estates of military personnel was not really disputed. Like the parents of insured working children, the government could be seen as a moral hazard, profiting from death it had compelled. The imposition of the newly enacted estate tax on the estate of those dying in their country's service was seen as immoral.

C. Government Interference With Symbolic Immortality

To the contemporary opponents of the estate tax, the problem of government immorality is not based upon profiteering upon wartime death, but rather upon more general issues of the identity of the deceased and his or her relation to property. As one opponent put it:

> The estate tax is immoral and dishonors the hard work of people who have passed on. Something is sacred about the fruits of your parents' labor, and you have a deep sense to protect it. This is their legacy and it is representative of what their life is all about. This tax violates the sanctity of those efforts and the government should not take part of it.[31]

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[26]*Id.* at 207. Katherine Anne Porter's novella Pale Horse, Pale Rider described the flu's effect on the narrator as she lost her lover and became afflicted herself. KATHERINE ANNE PORTER, PALE HORSE, PALE RIDER: THREE SHORT NOVELS (1939).

[27]H.R. REP. NO. 65-103, pt.2, at 11 (1917).

[28]These views were advanced by peace activists and socialists. *See* Carolyn C. Jones, *Taxes and Peace: A Case Study of Taxing Women*, 6 S. CAL. REV. OF LAW AND WOMEN'S STUDIES 361, 387-90 (1997). Some of these concerns led to the adoption of World War I's excess profits tax. W. Elliot Brownlee, *Economists and the Formation of the Modern Tax System in the United States: the World War I Crisis*, *in* THE STATE AND ECONOMIC KNOWLEDGE 401 (Mary O. Furner & Barry Supple eds., 1990).

[29]RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 116 (1954).

[30]*Id*. at 11-12.

[31]John Meagher of the House Ways and Means Committee quoted in Kerri Houston, *A Morally, Economically Bankrupt Tax,* INVESTOR'S BUS. DAILY, June 11, 1999, at A22.

The connection between human beings and the material world was a recurring theme for twentieth century intellectuals. Sociologist Georg Simmel described ownership "as an acting with and upon" things."[32] In 1900, he wrote:

> To understand the concept of property it is decisive to recognize that the rigid demarcation between it and the self, between internal and external life, is quite superficial and that it should be made more fluid for the purpose of a deeper interpretation. On the one hand, the whole significance of property lies in the fact that it releases certain emotions and impulses of the soul, while on the other hand the sphere of the Ego extends both over and into these 'external' objects just as the process in the mind of the violinist or the painter is continually transferred to the movement of the violin's bow or the brush. Just as the possession of any external object would be meaningless if it did not have a psychic value, so, at the same time, the Ego would collapse and lose its dimensions if it were not surrounded by external objects which become the expression of its tendencies, its strength and its individual manner because they obey or, in other words, belong to it.[33]

The connections between people and things have been seen as extending across time and through generations. French historian Philippe Ariès in his essay "Western Attitudes Toward Death" traces the evolution of such thought from the Middle Ages to the present. His survey found that, for modern Western families, "even when they believed in the afterlife . . . death became the unaccepted separation, the death of the other, "thy death," the death of the loved one." In our day, he said, "death has become *unnameable*. Everything henceforth goes on as if neither I nor those who are dear to me are any longer mortal."[34]

If death is unacceptable and unnameable, immortality in its various forms is a solution. Things have a role in that story. Behavioral scientist Mihaly Csikzentmihalyi and sociologist Eugene Rochberg-Halton described that interrelationship:

> When an object is imbued with qualities of the self, it expresses the being of that person, whether in written words or a chair that was crafted or a photograph. It becomes an objectified form of consciousness no less than words spoken into someone's ear, all forming part of the social self. Through these objects a part of the self comes to be embodied in the consciousness of others and will continue to exist long after the consciousness that molded them has ceased to exist. Perhaps the clearest example is when a number of people gather to mourn for someone at a wake or funeral. These people—family, kin, and friends of the departed person—are the living representation of the deceased. Although the personal self has ceased to exist, the social self has a continued existence

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[32] GEORG SIMMEL, THE PHILOSOPHY OF MONEY 321 (David Frisby ed., 2d ed. 1990) (1907).

[33] *Id.* at 322-34.

[34] PHILIPPE ARIÈS, WESTERN ATTITUDES TOWARD DEATH: FROM THE MIDDLE AGES TO THE PRESENT 106-07 (Patricia M. Ranom trans., 1974).

> in those who will remember and through those artifacts that in whatever way give testimony to that person.[35]

Robert Jay Lifton and Eric Olson have seen five modes of symbolic immortality, two of which are especially relevant to the estate tax debate. First is biological immortality—living on through children, although this can also be characterized as "biosocial immortality"—"the continuity of one's family and other social groupings."[36] They also identify a creative mode of symbolic immortality—one expressed as human works.[37]

For human beings the translation of spirit into thing is critical to the maintenance of human culture. Hannah Arendt wrote of this in *The Human Condition*:

> The whole factual world of human affairs depends for its reality and its continued existence, first, upon the presence of others who have seen and heard and will remember, and second, on the transformation of the intangible into the tangibility of things. Without remembrance and without the reification which remembrance needs for its own fulfilment and which makes it, indeed, as the Greeks held, the mother of all arts, the living activities of action, speech and thought would lose their reality at the end of each process and disappear as though they had never been. . . . The reality and reliability of the human world rest primarily on the fact that we are surrounded by things more permanent than the activity by which they were produced, and potentially even more permanent than the lives of their authors. Human life, in so far as it is world-building, is engaged in a constant process of reification, and the degree of worldliness of produced things, which all together form the human artifice, depends upon their greater or lesser permanence in the world itself.[38]

One can see in these arguments deep-seated notions about identity, death and symbolic immortality. By taxing property owned or controlled at death and by compelling its liquidation in order to pay taxes, the government is profiting from the symbolic death it inflicts. Inherited property has been characterized as "sacred" and the efforts that produced the things are said to have a "sanctity" in the current debates about the morality of estate taxation.[39] These critics, however, often refer to particular types of property, such as a family business or a farm. This leads to the question of whether estate taxation always interferes with symbolic immortality (the continuation of one's family and one's works).

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[35]MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF 190-91 (1981).

[36]ROBERT JAY LIFTON & ERIC OLSON, LIVING AND DYING 76-77 (1974). Robert Jay Lifton wrote of this type of immortality in his article on death, dying and Hiroshima. Robert Jay Lifton, *On Death and Death Symbolism: The Hiroshima Disaster*, 27 PSYCHIATRY 191, 203 (1964) [hereinafter Lifton].

[37]LIFTON & OLSON, *supra* note 36, at 77-78. *See* Lifton, *supra* note 36, at 203-04.

[38]HANNAH ARENDT, THE HUMAN CONDITION 95-96 (1958).

[39]*See*, *e.g.* Meagher, *supra* note 31, at A22.

Some legal scholars have suggested that some types of property may be more important to personhood than others. For example, Margaret Radin has suggested "a continuum that ranges from a thing indispensable to someone's being to a thing wholly interchangeable with money."[40] In exploring the loss of objects, Radin stated "In general, the moral inquiry for whether fungible property could be taken would be the same as the moral inquiry for whether it is fair to impose a tax on this particular person."[41] In the takings realm, she argued that "a few objects" may be so personal "that no compensation could be just."[42]

Ray Madoff has applied Radin's insights into property and personality to the area of estate tax.[43] Generally, the estate tax is imposed on the fair market value of assets in the gross estate, usually on the date of the decedent's death.[44] Fair market value is "the price at which the property would trade hands between a willing buyer and willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."[45]

Madoff focused on the harm to personhood that may result by taxing the right of publicity. The inclusion of the value of such a right in the wealth transfer tax base may compel beneficiaries to exploit a decedent's name and image in undesired ways in order to pay the tax liability.[46] The estate tax could necessitate the creation of ghostwritten books,[47] revivification of discarded manuscripts, the creation of an "Ernest Hemingway" line of furniture.[48]

Madoff argued that the extent to which "property interests . . . are closely aligned with an individual's identity" varies. She used Radin's continuum, ranging from "constitutive property" ("a thing indispensable to someone's being") to fungible property ("a thing wholly interchangeable with money").[49] She argued for varying estate tax treatment based upon this understanding, while noting that our current estate tax system, in its relief provisions for family farms and businesses, recognizes this principle to some extent.[50]

Small businesses and farms are leading candidates for classification as constitutive property. A 1904 *Atlantic Monthly* essay begins with the argument that "the small business . . . was a school of character second in importance only to the

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[40]Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 987 (1982).

[41]*Id.* at 1005.

[42]*Id*.

[43]Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX REV. 759 (1998).

[44]I.R.C. §§ 2031, 2032.

[45]Treas. Reg. § 20.2031-1(b).

[46]Madoff, *supra* note 43, at 762.

[47]Estate of Andrews v. United States, 850 F. Supp 1279 (E.D. Va. 1994).

[48]*See* Joe Sharkey, *Word for Word/Hemingway Memorabilia*, N.Y. TIMES, July 11, 1999, at § 4, at 7.

[49]*Id.* at 798.

[50]*Id.* at 804 et. seq. *See, eg.*, I.R.C. §§ 2032A, 2057.

Church."[51] The clergyman who wrote the article contended that dependence on customer good will "kept [the small businessman] under an impulse to be courteous and honest and considerate and truthful, until these traits become largely characteristic."[52] In other words, the author viewed the business holding as constitutive of character. Although not labeled as spiritual immortality, the author mentions long range concerns. The author described "[t]he pride of the merchant, or the manufacturer, in the business to which he was giving his life, and which bore his name, and which he hoped to make permanent in the community and to transmit to his children."[53]

The same sort of praise for small business has been repeated during the twentieth century. A 1945 report to the Senate Small Business Committee highlighted the character-building aspects of small business: "[small business] stimulates expression of the fundamental values of thrift, industry, intelligence, schooling, home ties and family pride – in short those fireside virtues which have counted for so much in developing our strength and character as a nation."[54] In another government report, a businessman described his independence, an independence in part inherited. "I own this whole outfit, as a matter of fact, my father did before me. It's all paid for. In addition, I have a little stock and a little farm my grandfather bought up. So when the plants slacken up or close down I can coast for a while."[55]

In small business, then, one could express one's autonomy and freedom, according to this line. The habits of freedom and business sense could be transformed into a legacy to be lived out through the lives of one's children or grandchildren and in passing one's creative product, a business, into the future.

The idea of constitutive property can extend beyond publicity rights, small businesses and farms. A home can be seen as crucial to one's identity. Madoff has suggested that death can diminish the constitutive nature of a home. "[O]nce that person has died, the home loses that aspect (although not all aspects) of personal

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[51]Henry A. Stimson, *The Small Business as a School for Manhood*, 93 ATLANTIC MONTHLY 337, 337 (1904) [hereinafter Stimson]. In many ways, a family farm can be seen as a similar sort of constitutive property. As with small business, there are elements of a strong intergenerational commitment to maintenance of farm life. For a documentary demonstrating the constitutive nature of farm property, *see* TROUBLESOME CREEK: A MIDWESTERN (West City Films, Inc., 1997).

[52]Stimson, *supra* note 51, at 337.

[53]*Id.* at 338-39. What may distinguish this 1904 view from more contemporary accounts is the very heavy contrast drawn between small business and the "great corporations". Those employed by great corporations were described as "clerks" and "servants" "removed from the stimulus, intellectual and moral, which the necessities of meeting the conditions of independent business require." This hostility to big business in contrast to its small counterpart is a hallmark of Progressive Era thinking and could, arguably, justify estate taxation of the "swollen fortunes" at the top of the "great corporations." *Id.* at 339-40.

[54]SENATE SMALL BUSINESS COMMITTEE-ITS RECORD AND OUTLOOK: PROGRESS REPORT OF THE SPECIAL COMMITTEE TO STUDY PROBLEMS OF AMERICAN SMALL BUSINESS, S. REP. NO. 79-47, at 2 (1945).

[55]ROWLAND BERTHOFF, INDEPENDENCE AND ENTERPRISE: SMALL BUSINESS IN THE AMERICAN DREAM IN SMALL BUSINESS IN AMERICAN LIFE 39 (Stuart W. Bruchey ed., 1980).

identity since that person can no longer live there."[56] Geographic dispersion of family members may make a family's second home intergenerational constitutive property. Nelson Aldrich, Jr. in his recent *New York Times* essay wrote of such a situation. "Our family's house is on the New England coast; its view of the ocean is a blessing. All the grace notes of my being originated there. So did my expectations of life, from learning as a boy to make the best of a good sailboat on the uncontrollable sea."[57]

Cash and publicly traded stocks seem to be the prototypes of fungible property. Money is instrumental, interchangeable, "colorless."[58] Simmel argued that money's "quality consists exclusively in its quantity."[59] He saw that money was both "the most complete extension [of the self] that can be derived from an object" and a limited extension of ego because its "flexibility is only that of an extremely liquid body which takes on any form.[60] Yet, money and cash equivalents are not entirely fungible.[61] Anthropologist Mary Douglas has written that "many of us try to primitivize our money . . . by placing restrictions at source, by earmarking monetary instruments of certain kinds for certain purposes, by only allowing ourselves or our wives certain limited freedoms in the disposal of money."[62] Economist Richard Thaler has described what he calls "mental accounting"—"the set of cognitive operations used by individuals and households to organize, evaluate, and keep track of financial activities."[63] Economists have observed that households create wealth accounts with different degrees of availability for spending.[64] People also earmark money by the source of funds.[65] Gifts as well as death money may be earmarked. Such monies are kept separate. Life insurance proceeds may be set apart. Wrongful death awards may be given to charity. An inheritance may be seen as a nest egg to

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[56]Madoff, *supra* note 43, at 799-800.

[57]Nelson W. Aldrich, Jr., *Estate of the Nation*, NEW YORK TIMES MAGAZINE, Sept. 3, 2000, at 17. Aldrich supported the estate tax despite concerns about its effect on the family property. For commentary on summer homes, *see* MARJORIE GARBER, SEX AND REAL ESTATE: WHY WE LOVE HOUSES 181-204 (2000).

[58]GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 44 (Kurt H. Wolf ed., 1950) (1908), *cited in* VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY 1 (1994).

[59]GEORG SIMMEL, THE PHILOSOPHY OF MONEY 259 (David Frisby ed., 2d enlarged edition 1990) (1907).

[60]*Id.* at 326.

[61]Viviana Zelizer has made this argument in *The Social Meaning of Money.* ZELIZER, *supra* note 58, at 2, 5.

[62]MARY DOUGLAS, PRIMITIVE RATIONING IN THEMES IN ECONOMIC ANTHROPOLOGY 139 (Raymond Firth ed., 1967), *cited in* ZELIZER, *supra* note 58, at 23.

[63]Richard H. Thaler, *Mental Accounting Matters, in* CHOICES, VALUES AND FRAMES 241 (Daniel Kahneman & Amos Tversky eds., 2000). I am indebted to Joel Dobris for a reference to these materials.

[64]*Id*. at 257-58.

[65]*Id*. at 259.

be preserved, or else spent on nonroutine purchases.[66] This earmarking process tends to make money less fungible, even constitutive.

Some sense of the nonfungibility of money and its equivalent can be gleaned from a recent op-ed in the *New York Times*. Stanley Herz described his immigrant in-laws who lived frugally, saving money by purchasing AT&T stock.

> His widow, then approaching eighty, was satisfied to have the cushion to provide for contingencies (read: nursing home). And near the end of her life, when it was clear that she wouldn't outlive her assets, she was proud she would be leaving money to her daughter and grandchildren.
>
> Then the stock market took off, and now my wife is about to give Uncle Sam a big chunk of Peter and Elsa's lifetime investments—more than a third of everything over $675,000. (The tax is graduated, with a top rate of 55 percent.) Most children and grandchildren who must forfeit part of an inheritance are from similarly middle-class families were assets arose from hard work and steady savings—family values that shouldn't be penalized.[67]

The inheritance from Peter and Elsa was seen as a fund expressive of the values in their lives. The money, the AT&T stock had social meaning that could be transmitted to the next generation. The savings were, in a sense, a creative product.

To opponents of the estate tax, the government is a greedy profiteer on death. In this case, death is not actual physical death, but rather a perceived destruction of property seen as constitutive of the deceased's personality, of property that gives to one's successors the fruits of creation whether the product is a name, a farm, a business, a summer home or an earmarked fund.

II. AN ECONOMIC APPROACH TO MORAL HAZARD

A more modern approach to moral hazard is less character-based and, instead uses economic analysis. In the 1960s economist Kenneth Arrow wrote about health insurance addressing "moral hazard"—"the effect of insurance on incentives."[68] Patients who do not have to pay the full cost for their medical care will be more likely to visit doctors and use medical services. The focus shifts from character to incentives. Economists have argued that this modern "moral hazard" has "little to do with morality" and focuses instead on rational people acting in their individual best interests.[69] Moral hazard can be described as the undesirable consequences of well-intentioned efforts to share burdens.[70]

This same type of moral hazard argument is part of the current debate. As Edward McCaffery has written recently, "The quickest and most important take on the immorality of the estate tax is that it falls on the wrong people; that is the wrong

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[66]ZELIZER, *supra* note 58, at 29.

[67]Stanley Herz, *Rich? No, Frugal*, N.Y. TIMES, Sept. 21, 2000, at A29.

[68]Kenneth Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 961 (1963), *cited in* Baker, *supra* note 12, at 567.

[69]Baker, *supra* note 12, at 560-61.

[70]Baker, *supra* note 10, at 239.

rich people. It falls on savers, not spenders."[71] McCaffery, like economists using contemporary notions of moral hazard, is concerned about incentive effects. He does distinguish himself from those claiming a "technical", "scientific" or "amoral" stance, with his explicit recognition of the importance of morality to this question.[72]

McCaffery does not present evidence demonstrating that the estate tax leads the rich to work and save less.[73] He argues that incentives in that direction are immoral. He writes:

> [A reasonable liberal society] should be wary of its rich spending inordinate sums of money on themselves, on their own pleasures, whether this is buying up yachts to compete in the America's Cup, piling up trophy houses, or running for elected office on their own considerable dimes. The estate tax is backwards—perverse—on these fronts; it spares the spenders, however decadent, and falls heavily on the savers, however thrifty and productive.[74]

McCaffery's argument needs to be placed into a larger context in order to really consider the morality or moral hazard of the estate tax. Mary Douglas and Baron Isherwood in *The World of Goods* have written:

> But it is interesting to observe the very different values that different societies set on the ratio of consumption to income. Spending only a small proportion of income may in one place and time be called thrifty, wise and provident; in another it may be held to be miserly, mean and wrong. Conversely, a high ratio of consumption may be approved as generous, magnificent, and good in one culture, while in another the selfsame behavior may be called spendthrift, feckless and bad. Evidently, the social context that generates the appropriate judgment must be worth examining.[75]

The debate over the morality of spending has continued through American history.[76] Those condemning spending have earned prominent places in American

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[71]Edward McCaffery, *In Favor of the Repeal in Should We End Life Support for Death Taxes?*, TAX NOTES, Sept. 11, 2000, at 1378.

[72]*Id*. at 1379.

[73]Edward J. McCaffery, *Being the Best We Can Be*, 51 TAX L. REV. 615, 624 (1996) ("I do not mean that there necessarily will be more consumption under an estate tax, or more work and savings without it. Rather it is a moral argument; it is one that looks where the tax falls, as a matter of principle or fairness."). *See also* Anne Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 51 TAX L. REV. 363, 386-88 (1996).

[74]McCaffery, *supra* note 71, at 1380. I am putting aside for the moment one problematic aspect of McCaffery's argument. A lot of what Thorstein Veblen would call "conspicuous consumption"—a trophy or summer house for example can, in fact, result in estate taxation.

[75]MARY DOUGLAS & BARON ISHERWOOD, THE WORLD OF GOODS: TOWARDS AN ANTHROPOLOGY OF CONSUMPTION 12 (1996).

[76]DANIEL HOROWITZ, THE MORALITY OF SPENDING: ATTITUDES TOWARD THE CONSUMER SOCIETY IN AMERICA, 1875-1940 (1985). Anne Alstott makes the point that savings is not always good and spending bad:

thought. Henry David Thoreau set an example of what he called "Spartan simplicity" at Walden Pond.[77] Thorstein Veblen's classic, *The Theory of the Leisure Class,* satirized conspicuous consumption by the wealthy.[78] The critique of consumption extended to the less fortunate as a consumer society took hold in the 1920s. In *Middletown,* a 1929 study of Muncie, Indiana, Robert and Helen Lynd saw consumerism displacing a simple, centered small town life at the turn of the twentieth century. In their chapter, "Why Do They Work So Hard," they wrote:

> The rise of large-scale advertising, popular magazines, movies, radio, and other channels of increased cultural diffusion from without are rapidly changing habits of thought as to what things are essential to living and multiplying optional occasions for spending money. Installment buying, which turns wishes into horses overnight, and the heavy increase in the number of children receiving higher education, with its occasions for breaking with home traditions, are facilitating this rise to new standards of living.[79]

Robert Frank's *Luxury Fever*, a discussion of luxury consumption over the past twenty years, follows the tradition of criticizing consumption of goods that go beyond the functional and ordinary. Frank argues that the spending of the super rich "has been a virus, one that's spawned a luxury fever that, to one degree or another, has all of us in its grip."[80]

Against this tradition of moralism, one needs to place a different tradition-- one more accepting of consumption. This tradition saw spending as a way to the higher values in life, a route to culture and refinement. While George Washington Vanderbilt's Biltmore estate with its 125,000 acres and 250 rooms could be seen as the epitome of conspicuous consumption, George Gunton praised Biltmore as "leading the way to a new direction of devoting American wealth to the uplifting of [the] American standard of taste and cultivation."[81]

The core of this "pro-consumption" tradition, however, was focused on middle and working class expenditures rather than lavish spending by the wealthy. In 1907,

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> The broader point is - once again - that there is nothing intrinsically good about savings or bad about consumption, without specifying in more detail how savings serve liberal norms like liberty, equality of opportunity or security for the least advantaged. Although savings may promote long-term investment and economic growth, the question of the "right" rate of savings is notoriously difficult when taken seriously.

Alstott, *supra* note 73, at 389.

[77]HENRY DAVID THOREAU, WALDEN AND CIVIL DISOBEDIENCE 136 (Penguin Books 1983) (1854).

[78]THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (Penguin Books 1994) (1899).

[79]ROBERT S. LYND & HELEN MERRELL LYND, MIDDLETOWN: A STUDY IN MODERN AMERICAN CULTURE 81-82 (1956).

[80]ROBERT H. FRANK, LUXURY FEVER: MONEY AND HAPPINESS IN AN ERA OF EXCESS (1999). For a review of Frank's book, *see*, *e.g.*, Edward J. McCaffery, *The Tyranny of Money*, 98 MICH. L. REV. 2126 (2000).

[81]George Gunton, *The Opening of Biltmore,* GUNTON'S MAGAZINE, Jan. 1896, at 34-35, *in* HOROWITZ, *supra* note 76, at 45 n.41.

economist Simon Patten wrote, "The new morality does not consist in saving, but in expanding consumption . . . We lack . . . courage to live joyous lives, not remorse, sacrifice and renunciation."[82] In a series of articles in the years before World War I, Martha and Robert Bruère presented case studies of middle class families' budgets. They criticized excessive thrift and an insufficient level of comfort.[83] In critiquing the Wells family living near Boston, the Bruères admonished Mrs. Wells' for making her clothes at home and "considering her savings too carefully" in purchasing a hat. Mrs. Bruère saw the result of thrift as turning "loose an ugly home and ugly clothes on an unprotected community." [84] The Bruères and others argued for more spending on goods and refinement, especially for the education and acculturation of children. Average middle-class families put aside three hundred dollars for savings, which the Bruères characterized as the families' "most serious financial mistake" causing them to "cut off $300 a year from their pleasure and usefulness."[85]

This concern with underconsumption by the working and middle classes was particularly high during the Great Depression of the 1930s. Some liberals including a contingent of Roosevelt advisers adhered to an underconsumptionist explanation for the Depression.[86] Industrialists had not passed the productivity gains of the 1920s to workers in wages, or to consumers with lower prices. Journalist Stuart Chase wrote, "It is not so much *overproduction* as *underconsumption* which is the appalling fact . . . Millions of tons of additional material could readily be marketed if purchasing power were available. Alas, purchasing power is not available."[87] In a 1933 speech Roosevelt said:

> The day of the great promoter or the financial Titan, to whom we granted everything if only he would build, or develop, is over. Our task now is not discovery, or exploitation of natural resources, or necessarily producing more goods. It is the soberer, less dramatic business of administering resources and plants already in hand, of seeking to reestablish foreign markets for our surplus production, of meeting the problem of underconsumption, of adjusting production to consumption, of distributing wealth and products more equitably.[88]

Estate taxation could play a role in this readjustment. Some comparable ideas were present in Keynesian analysis, although Keynesianism had "only an oblique"

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[82]SIMON N. PATTEN, THE NEW BASIS OF CIVILIZATION 215 (Daniel M. Fox ed., Belknap Press 1968) (1907).

[83]HOROWITZ, *supra* note 76, at 88.

[84]Martha B. Bruère, *What Is Home For?*, OUTLOOK, Dec. 16, 1911, at 911-12, *in* HOROWITZ, *supra* note 76, at 96-97 n.9. *See also id.* at 89.

[85]HOROWITZ, *supra* note 76, at 97.

[86]ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 65-85 (1995). DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, 122-23 (1999).

[87]BRINKLEY, *supra* note 86, at 70 (citations omitted).

[88]THE PUBLIC PAPERS AND ADDRESSES OF 1 FRANKLIN D. ROOSEVELT 751-52 (Samuel I. Rosenman ed., 1938).

influence on New Deal policy.[89] By taxing the estates of the wealthy and redistributing that money to the less well-off, the hope was that worker spending would renew the economy. Randolph Paul, an important figure in Roosevelt's Treasury Department, gave his account of Keynes' views on estate taxation and consumption:

> This reasoning led to the conclusion that the abstinence, or lack of spending, of the rich might impede instead of help the growth of wealth. On this premise one of the principal justifications of high-income and great wealth fell by the wayside. Keynes came finally to the conclusion that inequality of inheritances stood on a lower basis of justification than inequality of income; in his opinion death duties calculated to promote a greater propensity to consume might very well promote the growth of capital because of the redistribution of wealth they effected.[90]

While estate tax opponents see virtue in saving and in its opposite, spending, it is important to understand the conflicting strains in the morality of spending. The Veblenesque critique is countered by cautions about oversaving. Who is spending, who is saving?

The economic version of the moral hazard of the estate tax—its supposed suppression of virtuous savings—cannot be the full story. A focus only on the decedent overlooks other effects. Similar points have been made by Tom Baker with respect to insurance (very broadly conceived). Insurance arrangements benefit not only the parties to the contract. For example, "workers' compensation supports family members and communities who depend on workers' wages; workers' compensation also benefits coworkers whose health or safety would be compromised if injured workers stayed on the job. Perhaps more importantly, workers' compensation sustains the myth that employers take care of their workers, the myth that bodies are not manufacturing inputs, and the myth that people are more important than profit."[91] Surely, one can argue that the presence of the estate tax provides revenue for governmental programs. Its presence also suggests that there are limits to the extent to which individuals can be given an unequal position in society. As Baker puts it, "Unless and until economic theory can bring these public goods into the moral hazard equation, the economics of moral hazard will systematically understate the benefits of social responsibility, overstate the costs, and, in the process, provide unwarranted support for the current legal and political flight from responsibility."[92]

III. Conclusion

The expansion of moral hazard to include positive externalities suggests that a broader perspective on estate taxation is appropriate. Consideration of the estate tax

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[89] Randolph E. Paul, Taxation in the United States 226 (1954).

[90] *Id*. at 230. I take no position on the underlying economic debates here. What I do wish to do is to highlight the very contingent perceptions of the morality of consumption and the role that tax policy can play in implementing views about consumption.

[91] Baker, *supra* note 10, at 288.

[92] *Id*.

should include decedent-centered concerns, such as immortality and incentives to save or spend. However, the analysis cannot end at this point.

Some estate tax opponents would argue that the tax impedes their ability to provide for their families after death and to aid their families in maintaining their present standard of living. One could see the marital deduction as consistent with such ideas with respect to a surviving spouse.[93] Particularly as the focus moves to lower generation heirs, perceptions may alter. Stanley Herz's *New York Times* essay on his frugal in-laws[94] provoked the following response:

> He and his wife just inherited some $675,000 tax-free plus nearly two-thirds of some amount above that figure that he, presumably, never expected because his in-laws were never wealthy people. And he is complaining about paying taxes on a portion of it? And if he received this largesse tax-free it would somehow reinforce the 'family values' of hard work and savings? Why? Because he wouldn't have to work anymore?[95]

If the government could have bad character and provide perverse incentives in a decedent-centered view, so those inheriting wealth can be portrayed as corrupted by their windfalls, becoming moral hazards themselves.

Some reformers have taken this insight seriously, proposing a shift from donor-based taxation to regimes that impose taxation on the recipients of wealth.[96] Property in the hands of donees or beneficiaries seems less a matter of desert, perhaps less constitutive of personality.[97] Proposals for an accessions tax or for recipient-based income taxation have appeared from time to time.[98]

The focus can move beyond family and "the natural objects of one's bounty" to society at large. As Jane Addams wrote in 1902, "To attain individual morality in an age demanding social morality, to pride one's self on the results of personal effort when the time demands social adjustment is utterly to fail to apprehend the situation."[99] Andrew Carnegie portrayed "the man of Wealth" as separate from the state and from society, but charged with a trust relationship with the less fortunate.[100]

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[93]I.R.C. § 2056 (1994).

[94]*See supra* note 67.

[95]Charles W. Gossett, *Letter to the Editor*, NEW YORK TIMES, Sept. 25, 2000, at A26.

[96]*See*, *e.g.*, Edward C. Halbach, Jr., *An Accessions Tax*, 23 REAL PROP. PROB. & TR. J. 211 (1988); William D. Andrews, *The Accessions Tax Proposal*, 22 TAX L. REV. 589 (1967); Eugene Steuerle, *Estate or Accessions Tax - An Equity Question*, 11 TAX NOTES 459 (1980); INSTITUTE FOR FISCAL STUDIES, THE STRUCTURE AND REFORM OF DIRECT TAXATION: REPORT OF A COMMITTEE CHAIRED BY PROF. J.E. MEADE (1978); Joseph Dodge, *Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income*, 91 HARV. L. REV. 1177 (1978).

[97]Nelson Aldrich's account does suggest ways in which he was shaped by family property. *See supra* note 57.

[98]*See supra* note 96. For a recent op-ed advocating the accessions tax, *see* Michael S. McPherson & Morton Owen Shapiro, *A Sensible Tax on Fortunes*, N.Y. TIMES, Mar. 22, 2001, at A27.

[99]Jane Addams, *Introduction*, *in* DEMOCRACY AND SOCIAL ETHICS 6 (1902)

[100]*See supra* note 2.

One can see in the recent defense of the estate tax by George Soros, William H. Gates, David Rockefeller, and Warren Buffett a similar sense of obligation to others and support for incentives for charitable contribution.[101]

Finally, there is at least one other frame by which one can attempt to evaluate the moral hazard of the estate tax. Progressive economist E.R.A. Seligman's *Essays in Taxation,* first published in 1895, provided a counterpoint to perspectives dividing the individual and the state. In his critique of the single tax and of the benefit theory of taxation, Seligman wrote:

> It is now generally agreed that we pay taxes not because the state protects us, or because we get any benefits from the state, but simply because the state is a part of us. The duty of supporting and protecting it is born with us. In civilized society the state is as necessary to the individual as the air he breathes; unless he reverts to stateless savagery and anarchy he cannot live beyond its confines. His every action is conditioned by the fact of its existence. He does not choose the state, but is born into it; it is interwoven with the very fibres of his being; nay, in the last resort, he gives to it his very life.[102]

According to Seligman's argument, the focus on the individual, on family, on society at large missed a fundamental point. "We pay taxes not because we get benefits from the state, but because it is as much our duty to support the state as to support ourselves or our family; because, in short, the state is an integral part of us."[103]

The lens of moral hazard provides a way in which to more critically analyze various moral arguments about the estate tax. In the end, the estate tax provides a particularly vivid example of the ways in which taxation touches on questions of identity, individuality and one's relationship to family, to society and to the state.

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[101] David Cay Johnston, *Dozens of Rich Americans Join in Fight to Retain the Estate Tax*, N.Y. TIMES, Feb. 14, 2001, at A1. "If the estate tax is eliminated someone else will pay. YOU." Advertisement, N.Y. TIMES WEEK IN REVIEW, Feb. 18, 2001, at WK13; *see also* www.responsiblewealth.org for the project that produced the advertisement.

[102] EDWIN R.A. SELIGMAN, ESSAYS IN TAXATION 72 (2d ed. 1897).

[103] *Id.*