

DEATH, TAXES, AND PROPERTY (RIGHTS): NOZICK, LIBERTARIANISM, AND THE ESTATE TAX

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I. INTRODUCTION

Over the last twelve years the estate tax has been eviscerated. Evolving from a tax at 55% on all estates over \$675,000 to a tax at only 35% on estates over \$5.12 million per person (\$10.24 million for a married couple); the estate tax now taxes only about 5,300 estates per year, as opposed to over 58,000 estates in 1999.¹ In an era of language decrying class warfare, why abandon this project of the estate tax? Is it too late to save the tax? Are there reasons to save it? Why have an estate tax

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1. The estate tax is levied by Internal Revenue Code, Section 2001. Internal Revenue Code of 1986, 26 U.S.C.A. § 2001 (2011 & Supp. 2013) [all references to Title 26 of the United States Code Annotated will hereinafter be referred to as the "Code"]. Before the passing of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat 38 [hereinafter EGTRRA], the Code provided a lifetime credit against tax transfers up to \$675,000, *see* Darien B. Jacobson, Brian G. Raub, & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, STAT. OF INCOME BULL., Summer 2007, at 118, 122, fig. D. Any transfers made, whether *inter vivos* or after death, that exceeded the credit amount were taxed at 55%. *Id.* at 122 & fig. D. EGTRRA slowly increased the lifetime credit amount and simultaneously lowered the rate, culminating in a one-year repeal of the estate tax in 2010. *See* CONG. BUDGET OFFICE, AN UPDATE TO THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2012 TO 2022, at 74 (2012), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf [hereinafter UPDATE TO THE BUDGET]. The peculiarities of EGTRRA resulted in a complete sunset of the law on December 31, 2010. *See* MINDY R. LEVIT ET AL., CONG. RESEARCH SERV., R42884, THE "FISCAL CLIFF" AND THE AMERICAN TAXPAYER RELIEF ACT OF 2012, at 5 (2013). Congress and President Obama signed a two-year extension of the EGTRRA provisions, including a reinstatement of the estate tax with a \$5 million lifetime credit (indexed for inflation) and a 35% rate on amounts transferred above the credit amount. *Id.* That extension expired on December 31, 2012, at which point the estate and gift tax credit and rate were scheduled to revert to 2001 levels. UPDATE TO THE BUDGET, *supra*, at 74. The Congressional Budget Office estimated that extending the EGTRRA estate and gift tax provisions that lowered the transfer tax rate and increased the lifetime credit amount would have cost approximately \$402 billion over the period of 2010 to 2019, as compared with the revenue that would have been raised if EGTRRA had been allowed to expire. *Id.* at 64; 2 CONG. BUDGET OFFICE, BUDGET OPTIONS 239 (2009), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/102xx/doc10294/08-06-budgetoptions.pdf> [hereinafter BUDGET OPTIONS]. Leaving the 2009 rates and exemption levels in place would have raised a total of \$420 billion (or 1.2% of total revenues) from 2010 to 2019. CONG. BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: FEDERAL ESTATE AND GIFT TAXES 1 (2009), available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/108xx/doc10841/12-18-estate_gifttax_brief.pdf. Instead of these options, Congress and the President reached an agreement to avoid going over the so-called "fiscal cliff." *See* LEVIT, *supra*, at 1. The agreement was reached in the final hours of 2012, and the bill was signed into law on January 2, 2013. *Id.* The law sets the estate tax lifetime exemption-equivalent credit at \$5 million, adjusted annually for inflation (which brings it to \$5.25 million in 2013), *see* Code § 2010, and sets the tax rate at a flat 40% for amounts in excess of that amount, *see id.* § 2001. The new tax law does not have a sunset date, and thus will not have to be extended by another Congressional vote. *See generally id.*

in the first place?

Libertarian arguments have become standard fare in the United States, in particular with regard to debates around tax policy.² However, the libertarian view is not always fully unpacked, and often assumptions regarding particular outcomes seem to hinge more on expectations of the libertarian view rather than rigorous arguments about the topic at hand. Libertarian arguments about the estate tax claim that this particular tax is economically inefficient and violates moral claims stemming from individual property rights.³ In this Article, I will examine the estate tax through a libertarian lens, and explain why a hefty estate tax is consistent with the traditional libertarian position. I will begin by articulating Robert Nozick's libertarian views on property rights, in particular the account he provides in his seminal work *Anarchy, State, and Utopia*. I will then defend two lines of argument against the notion that the libertarian view of property rights is violated by an estate tax. Finally, I will explain why a society can, unrestricted by moral constraints regarding the property rights of the deceased, set a default rule for post-death property rights that reflects that society's values.

As a preliminary matter, I would like to stress that this Article is *not* an attempt to respond to or critique libertarianism as a political philosophy. A central part of this Article is to articulate Robert Nozick's version of the libertarian position, and I begin my exploration of the estate tax by adopting that view.⁴ While I will argue that certain views that are traditionally taken to be libertarian views (such as the rejection of the estate tax) are not necessarily implied by the core tenets of libertarianism, this Article is not intended to argue against libertarianism as such. In this Article, I will accept Nozick's libertarian political philosophical viewpoint, and explore the estate tax from within that perspective.

The primary purpose of this Article is to dispute the moral claims to post-death property rights made by libertarians when they argue against the estate tax. As I

2. I use the term "libertarianism" to encompass many different versions of the political and philosophical position that values free markets and limited government. Examples of what I include in this definition of libertarianism include much of the work produced by the Heritage Foundation and the Cato Institute, as well as the writings of Milton Friedman, Friedrich Hayek, and—of course—Robert Nozick. For one useful definition of libertarianism that reflects the concept underlying this Article, see Peter Vallentyne, *Libertarianism*, STANFORD ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/libertarianism> (last revised Jul 20, 2010) ("Libertarianism, in the strict sense, is the moral view that agents initially fully own themselves and have certain moral powers to acquire property rights in external things. In a looser sense, libertarianism is any view that approximates the strict view.").

3. See, e.g., FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); Alexander Tabarrok, *Equality and the Death Tax*, 15 *THE FREE MARKET: THE MISES INSTITUTE MONTHLY* 9 (Sep. 1997), available at http://mises.org/freemarket_detail.aspx?control=121; Laurence M. Vance, *A Libertarian View of the Estate Tax*, THE FUTURE OF FREEDOM FOUND. (Dec. 6, 2010), available at <http://fff.org/explore-freedom/article/libertarian-view-estate-tax>.

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

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

This Article offers two central arguments against the unimpeded transfer of property rights. First, I argue that the libertarian view of the moral establishment of property rights through mixing one's labor with the world is inconsistent with establishing property rights in the children of those labor-mixers.⁵ Further, Nozick's argument about the justice of particular distributions of wealth depends upon the consent of all involved to the original distribution from which the distribution in question descends. I argue that when we discuss the justice of uneven inheritances and the concerns of intergenerational justice, we cannot assume that generations further down the line have consented to the distribution agreed to by their parents or their parents' parents. Instead, libertarian values require determining the justice of the "original distribution" anew each time.⁶ Secondly, I argue that the libertarian view of morally justified property rights does not entail the right to transfer assets after death.⁷ For libertarians, the moral justification for property ownership stems from mixing one's labor with the world; the individual who holds the moral right is that individual who has, in fact, mixed her labor with the world. Once she dies, her moral rights end. She no longer has a moral claim of ownership over the goods in question, as she did during her lifetime. As a result, without a law giving her a positive right to control the post-death transfer of assets she holds during her lifetime, the labor mixer cannot determine where the goods she owns in her lifetime will go when she dies. Because the moral claim has ended, society can now determine where to set the rule regarding distribution of post-death property without concern that such a rule would violate moral rights.

II. WHY FOCUS ON THE ESTATE TAX AND NOT THE INCOME TAX?

This Article views the estate tax through the particular lens of Nozickian libertarianism. As a necessary corollary to a discussion of the estate tax, I will also address issues related to the gift tax.⁸ However, in this Article, I do not evaluate the libertarian view of the income tax. Many others have written on libertarianism and the income tax.⁹ The income tax is clearly a larger component of the U.S. tax

5. See *infra* Part V.

6. See *id.*

7. See *id.*

8. Because the estate tax can easily be avoided by the making of lifetime gifts, the estate and gift tax systems must, from a policy perspective, be contemplated together. See *infra* Part VII.

9. See, e.g., JOSEPH CARENS, EQUALITY, MORAL INCENTIVES AND THE MARKET (1981); Richard Epstein, *Taxation in a Lockean World*, in PHILOSOPHY AND LAW (Jules Coleman & Ellen Frankel Paul, eds., 1987); JOHN ISBISTER, CAPITALISM AND JUSTICE: ENVISIONING SOCIAL AND ECONOMIC FAIRNESS (2001); Richard Bulmore, *Libertarianism Without Self-Ownership: Why Owning Our Bodies Would Not Entitle Us to All of the 'Fruits of Our Labour.'* 16 UCL JURIS. REV. 1 (2010); Bruce Chapman & John

system than the estate tax is, but in this Article I have chosen to focus on the estate tax for the reasons discussed here.

A. Incentives

A discussion of “incentives” is often a central piece of any tax policy argument. In particular, in the context of the income tax, proposals attempt to balance fairness goals with concerns about the incentive effects of the income tax rules.¹⁰ This discussion of the incentives (or disincentives) created by high tax rates and various deductions was central to the tax policy discussions of the 2012 presidential election.¹¹ Since the question of incentives is primarily an economic question, and debates about incentives often override questions of morality in contemporary tax policy discussions, I have focused this Article on the estate tax, where discussion of incentives is less prevalent.

To be sure, there are incentive concerns in the estate tax, but they are much less significant than the purported incentives and disincentives found in the income tax arena. For instance, in discussions of the income tax, certain arguments claim that lowering tax rates increases job growth. Given that this increase in job growth would result in a larger tax base, it is possible that lowering tax rates could still result in more tax revenue, since the tax base would grow.¹² If this correlation

Quinn, *Efficiency, Liberty and Equality: Three Ethical Justifications for Regulatory Reform*, 20 OSGOODE HALL L.J. 512 (1982); Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399 (2005); Richard A. Epstein, *Taxation with Representation: Or, the Libertarian Dilemma*, 18 CAN. J. L. & JURISPRUDENCE 7 (2005); Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 CHAP. L. REV. 157 (1999); Thomas W. Pogge, *On the Site of Distributive Justice: Reflections on Cohen and Murphy*, 29 PHIL. & PUB. AFFAIRS 137 (2000).

10. See, e.g., JOEL SLEMRUD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES* (3d ed. 2004); Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905 (1987); Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT’L. TAX J. 139 (1989); Eric M. Zolt, *The Uneasy Case for Uniform Taxation*, 16 VA. TAX REV. 39, 86-98 (1996).

11. See, e.g., Jackie Calmes, *Obama Goes on Offensive Over Taxes on Wealthy*, N.Y. TIMES, Apr. 10, 2012, <http://www.nytimes.com/2012/04/11/us/politics/obama-to-make-case-for-buffett-rule.html>; Victor Fleischer, *The Winners and Losers Under Romney’s Tax Plan*, N.Y. TIMES, Oct. 31, 2012, <http://dealbook.nytimes.com/2012/10/31/the-winners-and-losers-under-romneys-tax-plan>; Trip Gabriel & Helene Cooper, *Romney Refines Message on Taxes and Abortion*, N.Y. TIMES, Oct. 9, 2012, <http://www.nytimes.com/2012/10/10/us/politics/romney-pledges-to-keep-tax-deductions-for-mortgages.html>.

12. The amount of tax revenue collected is equal to the tax rate times the tax base (Rate x Base = Tax). If the base increases enough, then lowering the rate would not necessarily lead to a decrease in tax collected. In fact, it may lead to an increase in total tax collected. This position, known as the “Laffer Curve,” has been endorsed by many conservative politicians arguing for a reduction in tax rates. The term “Laffer Curve” was first used by Jude Wanniski in describing the economist Arthur Laffer’s view of the relationship between economic growth and tax rates. See Jude Wanniski, *Taxes, Revenues, and the “Laffer Curve”*, 53 PUB. INT. 3 (1978). However, economists seem to overwhelmingly disagree with the assertions of the Laffer Curve. For instance, in a 2012 survey of 40 leading economists, the survey participants overwhelmingly believed that a reduction in tax rates would fail to increase annual tax revenues within a five-year period. See Chicago Booth, *Laffer Curve*, IGM FORUM (June 26, 2012, 11:47 AM), http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV_2irlss5UC27Yxi.

were demonstrated, then there would be a strong reason to lower tax rates, based on the potential incentive effects the reduction in rates would create. In that case, the discussion of incentives would be central to any tax policy consideration of where to set the rates.

By contrast, with the role of incentives in discussing the income tax, the incentives and disincentives created by the estate tax are minor, and secondary to its primary function. When proposals to eliminate the estate tax are discussed, one incentive function of the tax that arises is the concern that the current estate tax incentivizes charitable contributions.¹³ Since the current estate tax provides a 100% charitable deduction, eliminating or reducing the estate tax would arguably reduce charitable giving.¹⁴ The current estate tax motivates charitable giving at death because every dollar given to a charitable organization avoids taxation. Rather than “lose” part of her estate to the government, the taxpayer has an opportunity to donate her estate to the charity of her choice. Transfers to non-charity heirs (children, for example) are subject to the tax. Without the estate tax, taxpayers would have to choose between leaving their estates to their family (or other preferred heirs) and leaving their assets to charities. In this alternate world with no estate tax, the worry is that charities will not fare as well; without the motivation provided by the tax, charitable giving would go down.

Importantly, though, the estate tax is not the only tax tool with which to motivate charitable giving. The current income tax model gives a deduction for charitable contributions as well.¹⁵ Since any incentive concerns about the estate tax and charitable deductions can also be addressed through the income tax, the incentive arguments with regard to the estate tax are not as potent.

A second example of the potential role of incentives in policy discussions of the estate tax is the incentive the tax can provide to care for one’s family members

13. Section 2055 provides an unlimited deduction against the estate tax for amounts transferred to a charity (defined as a section 501(c)(3) non-profit entity) after death. Code § 2055. Section 2522 provides an unlimited deduction against the gift tax for amounts that are transferred as an *inter vivos* gift to a charitable entity. *Id.* § 2522. In addition, section 170 provides a deduction against the income tax for the same contributions. *Id.* § 170.

14. Allowing a tax deduction for charitable contributions makes it “cheaper” for the donor to make the contribution. Assume an estate tax rate of 50% (the estate tax rate imposed by section 2001 as of January 1, 2013, is actually 40%). If a taxpayer wishes to make a \$100,000 donation to a charity, with no deduction available, the taxpayer must have \$200,000 available at the time of her death. The tax on the \$200,000 would be 50%, leaving \$100,000 to be transferred to the charity. By contrast, with a 100% charitable deduction in place, it only “costs” the taxpayer \$100,000 to make that same \$100,000 charitable contribution. Or, with the same \$200,000 available (and no estate tax in place), the benefit to the charity can be doubled, giving to the charity the full financial benefit of the transfer. For a comparison of the deductibility of charitable contributions in the estate tax and income tax context, see Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 TAX L. REV. 263 (2007). For an explanation of the phenomenon of charitable deductions in the income tax context, see Lilian V. Faulhaber, *The Hidden Limits of the Charitable Deduction: An Introduction to Hypersalience*, 92 B.U. L. REV. 1307 (2012).

15. Code § 170. Granted, the deduction for charitable contributions is an itemized deduction and is therefore unavailable to taxpayers taking the standard deduction, and, as a deduction, has the odd effect of offering a larger (and proportionately larger) benefit to higher income taxpayers than to lower income taxpayers. *Id.* Despite that, all of the same arguments made about charitable contributions, incentives, and the estate tax can be made about the income tax as well. For a comprehensive discussion of the charitable contribution deduction and its incentive effects, see Faulhaber, *supra* note 14.

by exempting from the tax certain transfers to surviving relatives. One might argue that, because the estate tax provides an unlimited spousal deduction, in addition to a \$5.25 million exemption amount for all other transfers, which amount is currently portable between spouses, the Code is creating incentives for a taxpayer to provide for her family members after her own death.¹⁶ While the marital deduction may provide an incentive to leave assets to one's spouse in order to defer the tax until that spouse's death, the lifetime exemption-equivalent credit does not create particular incentives to provide for one's children.¹⁷ Since the credit is available to offset taxes owed on up to \$5.25 million in assets, regardless of the identity of the heir, a taxpayer could get the benefit of the credit by leaving assets to a neighbor, a lover, or a trust created to protect her dogs.¹⁸ If policymakers wished to provide incentives through the federal estate tax to care for one's children after one's death, they could create a relationship-based exemption amount, such as in the model currently found in a number of state inheritance laws.¹⁹ Under a model that values sanguinity, transfers to close relatives (e.g., siblings, children, grandchildren) could escape transfer taxation altogether, while transfers to more distant relatives or unrelated parties would be subject to the tax.

While the current estate tax does not provide many incentives to care for one's family after death, as I have demonstrated, it would be possible to create a transfer tax system that *would* have those incentives. Does that mean that incentives to care for family are an important part of an estate tax system? Not necessarily, since we could—as we do currently—institute those rules elsewhere. Many states have in place a series of laws that give priority to the rights of surviving spouses over and above the rights of a testator to determine the distribution of her assets.²⁰ In

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

17. There is no federal tax incentive to leave an inheritance to one's children, since there is no federal exemption or deduction for that transfer (outside of the lifetime exemption equivalent credit). By contrast, many states do provide tax incentives for making post-death transfers to children. *See supra* note 16 (discussing Kentucky's inheritance tax law and the tax preference granted to transfers to close relatives).

18. *See* Code § 2010. There are no restrictions in the lifetime credit restricting the use of the funds transferred tax-free under this credit. *Id.* If assets are transferred to the transferor's spouse, then they are exempt from transfer tax under section 2056, and if assets are transferred to a section 501(c)(3) non-profit organization, then the transfer is deductible under section 2055. *See id.* §§ 2055, 2056. Otherwise, the first \$5.25 million in assets transferred during (or after) the transferor's lifetime are creditable under section 2010. *See id.* § 2010.

19. *See supra* note 16 (discussing Kentucky's preferential inheritance tax treatment to heirs with closer sanguinity relationships to the decedent).

20. Many states have a “widow's elective share,” which allows the surviving spouse to inherit a statutory amount of the decedent spouse's assets, regardless of the wishes of the decedent, as

addition, at least one state gives priority to the rights of surviving children as well.²¹ If there is a federal policy goal to encourage (or require) taxpayers to provide for their family members after the death of the taxpayer, then there are much clearer and more straightforward ways to ensure that result than by creating exemption amounts and incentive structures through the estate tax.

Finally, one might argue that estate tax policy must concern itself with the incentive effects the tax has on the lifetime earning power of the potential taxpayer or with the negative effects that the absence of a tax would have on the potential heirs. If the estate tax is too high, an individual taxpayer (the future decedent whose estate would be subject to the tax) might have significantly less incentive to work, accumulate, and save over her lifetime, since she would know that, upon her death, a large portion of her wealth would be taken by the government. By contrast, with no estate tax in place, the potential *heir* has less of an incentive to work, accumulate, and save over her lifetime, as she expects to inherit a large sum (undiminished by tax) when her benefactor dies. In each case, the existence of an estate tax will play some role in changing the incentives felt by each of these individuals. However, these incentives (or lack of incentives) are not the central aim of the estate tax, but are secondary elements that must be considered when crafting the actual rule (or when deciding not to have a rule at all).²²

B. Property Rights

Another central theme in most discussions of income taxation, in particular when the discussion involves libertarian arguments, is the taxpayer's absolute property rights and the income tax's potential violation of those rights. On this argument, property rights are inviolate. Therefore, according to Nozick, "[t]axation of earnings from labor is on a par with forced labor."²³ The libertarian theory of property rights takes a number of forms, and I discuss these arguments later in this Article.²⁴ However, once one holds that strong property rights are an argument against taxation, then the discussion of the appropriate tax has to balance respect for that property right with the needs of the state or the cost of the services provided in order to determine the appropriate level of the tax. In many instances, the strength of the property rights will be found to trump any right the state might have had to impose an income tax.

However, strong theories of property rights become much more difficult to

memorialized in a will. See, e.g., ALA. CODE § 43-8-70 (1982); COLO. REV. STAT. ANN. § 15-11-201 (West 2013); FLA. STAT. ANN. § 732.201 (West 2013). For a discussion of the history and status of the elective share, and an argument in favor of abolishing it, see Terry L. Turnipseed, *Community Property v. The Elective Share*, 72 LA. L. REV. 161 (2011).

21. Louisiana has the equivalent of an elective share for children who are under the age of 23, are mentally infirm, or are disabled. LA. CIV. CODE ANN. art. 1493 (2003). For a discussion of this provision, see RAY D. MADOFF ET AL., PRACTICAL GUIDE TO ESTATE PLANNING 6003 (2009).

22. Certainly, unintended incentives that are created by the existence or expansion of an estate tax are something to be avoided. This will affect the structure of the tax, and might ultimately caution against certain structural characteristics. For an argument that the unintended negative incentive effects created by the estate tax are significant, see Edward McCaffrey, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994).

23. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 169 (1974).

24. See *infra* Part III.

defend in the context of the estate tax, since the property in question can no longer properly be said to “belong” to the taxpayer. The taxpayer is dead. Certainly in many instances society does respect the property rights (and the wishes) of the deceased,²⁵ but in each case the law reserves the ability to violate that property right if it determines that doing so is in the best interest of the state.²⁶ The same libertarian-Lockean arguments about the moral claim of a property holder who mixes her labor with the property are much harder to defend when that labor-mixer is no longer alive to make the claim herself.²⁷ In this way, a discussion of the estate tax, as opposed to the income tax, goes some way towards minimizing the property rights claims that invade discussions of the legitimacy of the government imposing tax on its citizens.

C. Revenue Raising

One central rationale for the existence of any tax regime is the satisfaction of the government’s revenue needs. Currently, the United States government raises approximately \$2.3 trillion annually through the collection of all taxes.²⁸ The individual income tax raises approximately \$1.1 trillion annually.²⁹ By contrast, the estate tax only raised about \$40 billion in 2011.³⁰ The amount raised by the estate tax has decreased dramatically in the past decade, as the phased-in tax

25. For instance, state law typically strives to respect the wishes of a decedent who creates a foundation or trust, or who expresses via a testamentary will her wishes regarding the dispersal of her assets. This can go beyond the clear language of the will, allowing courts to amend wills to reflect what they believe was the decedent’s intention. See, e.g., FLA. STAT. ANN. § 732.615 (West 2013) (“Upon application of any interested person, the court may reform the terms of a will, even if unambiguous, to conform the terms to the testator’s intent if it is proved by clear and convincing evidence that both the accomplishment of the testator’s intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. In determining the testator’s original intent, the court may consider evidence relevant to the testator’s intent even though the evidence contradicts an apparent plain meaning of the will.”).

26. Indeed, this set of laws seems to be honored in the breach, since most cases that arise are examples of the government or a third party exercising its right to violate the wishes of the decedent. See *supra* notes 20, 21 and accompanying text (discussing a widow’s elective share and children’s elective share). In addition, the *cy pres* doctrine permits a state’s Attorney General (AG) to violate the terms of a charitable trust when the AG determines that the charitable purpose of the trust cannot be satisfied within the restrictions of that trust. For a discussion of the *cy pres* doctrine and its effect on charitable giving and trusts, see Edith L. Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L. Q. 382 (1959), Alberto B. Lopez, *A Revaluation of Cy Pres Redux*, 78 U. CIN. L. REV. 1307 (2010), and Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEV. ST. L. REV. 471 (1998).

27. For a discussion of the Lockean argument regarding property rights, see *infra* Part III. For a discussion of why Locke’s argument regarding property rights no longer works after the death of the labor mixer, see *infra* Part V.C.

28. UPDATE TO THE BUDGET, *supra* note 1, at 74.

29. *Id.* at 8. Notably, the individual income tax revenues include the collection of taxes on all partnerships and sole proprietorships, since the United States income tax regime treats those entities as generating income that passes through to the individual partners of the entity, and therefore that income is reported on the returns of the individual taxpayers. See Code § 701. This, of course, increases the total amount collected under the individual income tax, by adding amounts collected from entities organized as partnerships to the individual income tax. Entities organized as corporations have taxes imposed (and revenue counted) by the corporate income tax. *Id.* § 11.

30. UPDATE TO THE BUDGET, *supra* note 1, at 74.

provisions enacted as part of EGTRRA (the so-called “Bush tax cuts”) have taken effect.³¹ However, even back in 2000, before the enactment of the Bush tax cuts, the estate tax represented only about 3% of all revenues collected by the federal government.³²

The individual income tax plays a central role in the United States government’s annual revenue raising. Given that there are minimum amounts the government needs to operate annually, there is only so much flexibility that Congress has to amend the income tax code. Changes to the revenue collection powers of the income tax are part of a larger discussion about government spending and the budgeting plans of the federal government.³³ Discussions about the appropriate levels for the income tax lead unfailingly to larger discussions about spending and government borrowing.³⁴ However, discussions of the estate tax are able to sidestep those issues, at least to some degree. Because revenues collected from the estate tax represent such a relatively small amount of total tax revenues, discussions of the policy behind the estate tax can happen without the concern that eliminating the tax would hamstring the entire operation of the government. Given the current size of the revenues collected via the individual income tax, it is entirely impractical to talk of eliminating the tax altogether without simultaneously talking about radical shifts in the federal budget. However, one could make a legitimate argument in favor of eliminating the estate tax without the concern that the budget as we know it would entirely fall apart.

It is noteworthy, however, that opponents and proponents of the estate tax

31. EGTRRA was enacted in 2001, raising the exemption amount from \$675,000 to \$1 million and lowering the rate from 55% to 50%. EGTRRA, Pub. L. No. 107-16, §§ 521, 511, 115 Stat. 38, 71, 70. The original bill was scheduled to sunset on December 31, 2010, at which time the law would have rolled back to what it had been in 2001. *Id.* § 901, 115 Stat. at 150. During the final year of the statute’s effectiveness, before the scheduled sunset of the bill, the estate tax was entirely repealed, allowing estates to transfer to heirs without the imposition of federal transfer tax. *Id.* § 501, 115 Stat. at 69. However, on December 16, 2010 Congress passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, which extended the tax cuts for another two years (until December 31, 2012). Pub. L. No. 111-312, 124 Stat. 3296. On January 2, 2013, President Obama signed into law the American Taxpayer Relief Act of 2012 (ATRA) which made many of the tax cuts permanent. *See* Pub. L. No. 112-240, 126 Stat. 2313 (2013). With regard to the estate tax, ATRA set the exemption equivalent amount at \$5 million, with an annual inflation adjustment (leading to an exemption equivalent credit of \$5.25 million in 2013) and set the tax rate at 40%. *Id.* at § 101, 126 Stat. at 2317-18.

32. BUDGET OPTIONS, *supra* note 1.

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

34. Taxes are only one part of the calculation of the federal budget. Necessary tax revenues must be considered in the context of required spending levels and permitted debt levels. *See* Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1214 (2012). With insufficient planning, the amounts of spending necessary to satisfy the needs of government programs cannot be met by the revenue raised through Congressionally approved taxes, nor satisfied by the amount of debt authorized under the debt ceiling. *See id.* at 1182-83. When the President finds himself in this constitutional “trilemma,” what must he do? For an analysis of this question, see *id.*

view this issue through very different lenses. Opponents of the tax argue that, given the miniscule amount of federal revenue raised annually through the estate tax, there is no coherent reason for maintaining the tax, and we could (and should) very easily eliminate it.³⁵ On the contrary, estate tax proponents argue that, given the importance of the estate tax as a philosophical political matter, its unique role in the tax code, and given that it affects so few people, we should maintain the tax.³⁶ In either case, the size of the revenue generated by the estate tax is not entirely determinative of whether or not to maintain the tax, given that there is such widespread disagreement about what the size means.

As a side note, in a time of diminishing federal revenues coming from all forms of tax in the United States, it is important to proceed with caution when proposing to eliminate one source of that revenue. While the amounts raised through the estate tax are small, both in absolute and relative numbers,³⁷ they do represent dollars that help to fund the annual federal budget.

D. Redistribution

My decision to focus this Article on the estate tax rather than the individual income tax stems from the primarily redistributive purposes of the estate tax. As discussed above, the individual income tax serves many different purposes; however, as demonstrated in this section, the estate tax does not primarily serve any of those roles. At its heart, the estate tax serves the purpose (or, at least, is intended to serve the purpose) of breaking up large concentrations of intergenerational inherited wealth, and using those funds (along with other funds) to support federal government spending, including spending on welfare programs such as the EITC, TANF and the federal food stamps program known as SNAP.³⁸ If one wishes to have a conversation about the merits of federally facilitated

35. This argument is regularly made in the context of arguments to reduce the size of government more generally, or reduce taxes more generally. It is sometimes part of a larger “starve the beast” approach to tax policy. See generally Bruce Bartlett, “Starve the Beast”: *Origins and Development of a Budgetary Metaphor*, XII INDEP. REV. 5 (2007). But it is also an argument made by those who have other philosophical reasons for opposing the estate tax. If the estate tax is morally unpalatable (the argument goes) and it doesn’t raise very much revenue, then why in the world should we keep it around?

36. Those who make this argument see it as the natural conclusion of an argument in favor of the estate tax on other grounds (that it serves a redistributive function, that it curtails the amassing of large estates based on inherited wealth, that it encourages the circulation of assets). Since the tax is so important, proponents argue, and since it is so unobtrusive in the lives of most U.S. taxpayers, we should clearly maintain the tax as part of the Code. See, e.g., Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffrey*, 51 TAX L. REV. 363 (1995); Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality*, 40 PEPP. L. REV. 1255 (2013).

37. Small, of course, is a relative term here. The \$40 billion raised annually by the estate tax is clearly not small compared to most taxpayers’ annual salaries, or to the gross national product of a small nation.

38. For three of the ways the federal government offers financial support to the lowest income members of society see, e.g., Code § 32 (the Earned Income Tax Credit awards refundable tax credits to low-income working families, subsidizing salary in proportion to income-level and family size); 42 U.S.C. §§ 601-687 (2006) (the Social Security Laws granting temporary assistance to needy families); 7 U.S.C. §§ 2011-2036(a) (2006) (Food Stamp Act of 1964).

redistribution, there is no better example.

This Article is concerned with the estate tax for all of the reasons stated above. It may be the case that many of the conclusions drawn in the Article will have broader consequences, especially in reference to the individual income tax. However, in order to avoid tackling the concerns identified in this Part, this Article will focus only on the particular matter of redistribution in the context of the estate tax.³⁹

III. NOZICK (AND LOCKE) ON PRIVATE PROPERTY RIGHTS

One cannot discuss the philosophical, political, or moral legitimacy of taxation from a libertarian perspective without first discussing property rights. Since this Article is concerned with a libertarian view of the estate tax, we must begin with the libertarian view of private property rights. In this Article, I primarily explore Nozick's views on taxation as he articulates them in *Anarchy, State, and Utopia*. However, Nozick's views on property rights are, at best, unclear.⁴⁰ Because Nozick regularly appeals to John Locke in his discussions of property rights, I will refer to both Locke and Nozick in order to lay out the libertarian view of property rights, and then will adopt those views for the purposes of this Article.

In *Anarchy, State, and Utopia*, Nozick identifies three stages of property rights, and three forms of justice in relation to those rights: justice in acquisition, justice in holdings, and justice in transfer.⁴¹ I will address each of these in turn.

A. Justice in Acquisition

For Nozick, justice in acquisition is the criteria by which we evaluate the moral fairness of the original creation of property rights in an object.⁴² It is that original establishment of property rights that creates the moral basis for the later analysis of justice in holdings, and justice in transfer, so justice in acquisition is clearly a foundational part of Nozick's argument. He explicitly recognizes that the justice of holding property is contingent on the acquisition of that property when he says, "[j]ustice in holdings is historical; it depends upon what actually has happened."⁴³ Further, Nozick recognizes that, in order to prove one's entitlement to a particular piece of property, one must be able to establish the justice of one's acquisition of that property. As Nozick famously writes, "[w]hatever arises from a just situation by just steps is itself just."⁴⁴ One might expect, then, that Nozick would lay out a careful argument for his view of justice in original acquisition;

39. Discussions of the estate tax necessarily require consideration of the gift tax, since the imposition of estate tax can be avoided by disposing of one's assets during one's lifetime. As a result, one Part of this Article tackles the issue of the gift tax, but only as it relates pragmatically to the issues raised and addressed with regard to the estate tax. See *infra* Part VII.

40. For an argument that Nozick's theory of property rights is, in fact, incoherent, see Barbara Fried, *Does Nozick Have a Theory of Property Rights*, in *THE CAMBRIDGE COMPANION TO NOZICK'S ANARCHY, STATE, AND UTOPIA* 230 (Ralf M. Bader & John Meadowcroft eds., 2011). For an explanation of Fried's views, see *infra* note 50 and the accompanying text.

41. NOZICK, *supra* note 23, at 151.

42. *Id.*

43. *Id.* at 152.

44. *Id.* at 151.

however, he resists making that argument.⁴⁵ Although Nozick resists making an argument about justice in holdings, he endorses a natural rights version of justice in holdings.⁴⁶ Beyond that relatively ambiguous claim, however, Nozick's only explanation of what he means by "justice in acquisition" is a reference to the Lockean arguments regarding personal property rights.⁴⁷

On Locke's view, the original moral claim of ownership, essential to a coherent theory of property rights, is established through the mixing of one's labor with previously unowned things in the world.⁴⁸ Once an individual has mixed her labor with the world by, say, tilling an acre of land, she can lay claim to that land, and her ownership claim will carry the weight of moral authority. However, Locke included in his theory an important proviso: one can only claim ownership in a thing if one "leaves as much as another can make use of . . ."⁴⁹ Much has been written about what this proviso means; however, an extensive examination of the Lockean proviso is outside the scope of this Article.⁵⁰ It is at least relevant to note that there is a great difference of opinion regarding whether Locke's proviso relates only to the truly *original* acquisition of property rights, or whether it can continue to apply going forward. In other words, Locke's requirement that claiming an ownership right over land must leave as much and as good for others clearly would have prohibited the first European explorers to reach the New World from claiming all of North America for themselves.⁵¹ However, if four hundred years later, all of the land in North America is already claimed so that an individual with no money but plenty of labor available for mixing will have no chance of claiming property rights in that way, does *that* violate the Lockean proviso? And, further, how much labor mixing is required to claim property rights in land?⁵² It seems clearly

45. In Chapter 7 of *Anarchy, State, and Utopia*, Nozick sets himself the task of identifying justice in acquisition, justice in holdings, and justice in transfer. See generally *id.* at 149-231. However, he writes, "[t]o turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holdings: the principle of acquisition of holdings, the principle of transfer of holdings, and the principle of rectification of violations of the first two principles. I shall not attempt that task here." *Id.* at 153.

46. "Things come into the world already attached to people having entitlements over them." *Id.* at 160.

47. *Id.* at 174.

48. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 133-146 (Thomas I. Cook ed., 1947).

49. *Id.* at 137.

50. For a further discussion of Locke's proviso and, in particular, what it means for Nozick and libertarianism more generally, see Peter Vallentyne, *Nozick's Libertarian Theory of Justice*, in *THE CAMBRIDGE COMPANION TO NOZICK'S ANARCHY, STATE, AND UTOPIA* 145 (Ralf M. Bader & John Meadowcroft eds., 2011). Vallentyne cites further to: MICHAEL OTSUKA, *LIBERTARIANISM WITHOUT INEQUALITY* (2003), HILLEL STEINER, *AN ESSAY ON RIGHTS* (1994), and Peter Vallentyne, *Left-Libertarianism and Liberty*, in *CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY* 153 (Thomas Christiano & John Christman eds., 2009) (explaining examples of various interpretations of the Lockean proviso that one must leave enough and as good for others).

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

52. In his seminal work, *Self-Ownership, Freedom, and Equality*, written primarily as a response to Nozick, G.A. Cohen explores the question of what constitutes "mixing one's labor" to a sufficient extent to establish ownership in conjunction with an exploration of Locke's proviso that, in claiming a property right, one must leave enough and as good for others. G.A. COHEN, *SELF-OWNERSHIP, FREEDOM, AND*

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

B. Justice in Holdings

Nozick's conception of justice in holdings is classically libertarian. Once one has justly acquired a property right, one's rights in holding that property are absolute.⁵³ Indeed, for Nozick, it is nonsensical to talk about the justification of a right to hold property once it has been justly acquired. There is no property until it has been acquired. "Things come into the world already attached to people having entitlements over them."⁵⁴ Property rights are inviolable, on Nozick's model, although, like his arguments for justice in acquisition, Nozick does not make much of an argument for this view. Primarily, Nozick's position stems from a natural rights theory of property, arguing that property rights are absolute, and that violating or curtailing property rights—without explicit consent from the property holder—is an immoral and impermissible taking of those rights.⁵⁵

C. Justice in Transfer

Given Nozick's belief that the holder of a property right has an absolute and inviolate right over that property, it is unsurprising that he argues that a property holder has an absolute right of transfer as well. Justice in transfer means that the

EQUALITY 67-91 (1995). Cohen argues that Nozick never sufficiently establishes what the criteria should be for morally justifying one's property claims. *Id.*

53. NOZICK, *supra* note 23, at 160-64 (using the Wilt Chamberlain example to illustrate this argument). Nozick's explanation of the freedom individuals have to do with their property what they will (limited only by the constraint that they must avoid injuring others or else compensate the injured for the injury), is explained later in this Article. *See infra* Part V.B.

54. NOZICK, *supra* note 23, at 160. The quote arises in the context of the following explication:

Whoever makes something, having bought or contracted for all other held resources used in the process (transferring some of his holdings for these cooperating factors), is entitled to it. The situation is *not* one of something's getting made, and there being an open question of who is to get it. Things come into the world already attached to people having entitlements over them. From the point of view of the historical entitlement conception of justice in holdings, those who start afresh to complete 'to each according to his _____' treat objects as if they appeared from nowhere, out of nothing.

Id. (emphasis in original).

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

property holder has the right to dispose of her property as she wishes, unfettered by restrictions imposed by the government or other third parties.⁵⁶ These transfers may include both a sale in a market transaction, or a gift or bequest, given freely and without the expectation of compensation.⁵⁷ Although he does not explicitly make the argument for it, Nozick's vision of justice in transfer includes the right to transfer one's goods after death, which I will address later in this Article.⁵⁸ Again, turning to Locke to fill in the gaps in the argument left by Nozick, we see that post-death transfers are contemplated by this version of libertarianism. Locke argues that a moral claim over private property stems from an investment of labor on the part of the property holder; thus, one might expect that Locke believed that the moral claim ended with the life of the laborer, but that is not, in fact, the view Locke espoused.⁵⁹ Instead, Locke claimed that one of the rights a property holder has in her property is the right to transfer that property after her death.⁶⁰

D. Criticisms of Nozick's Views on Property Rights

My primary purpose in this Article is to examine the estate tax through the libertarian position, as opposed to providing a response to Nozick's version of libertarianism. I will, however, briefly explore the more serious criticisms of Nozick's views on property rights. As I have explained already, much of what Nozick does say about private property rights he says without argument, adopting a natural rights view of property without defending his expansive view. Interestingly, though, at least one critic, Barbara Fried, argues that Nozick has *no* coherent view on property rights, ultimately conflating a variety of positions, and finally coming out as a utilitarian, rather than a pure libertarian.⁶¹ Fried's argument traces the evolution of Nozick's views throughout the three parts of Nozick's *Anarchy, State, and Utopia*. In particular, she points to the fact that, although Nozick insists on the importance of obtaining explicit consent from property owners before collecting tax from them, he ultimately accepts that property owners can have their property rights limited so long as they receive compensation for the curtailment of their naturally held unlimited rights.⁶² Ultimately, the argument that, in the interest of all, the interests of a few can be ignored or overruled, is a utilitarian argument, not a libertarian one.⁶³ Traditionally, utilitarians like John

56. NOZICK, *supra* note 23, at 150-51.

57. *See id.*

58. *See infra* Part V.

59. Locke expresses this position as follows:

[I]f any one had begun and made himself a property in any particular thing – which how he or any one else could do shall be shown in another place – that thing, that possession, if he disposed not otherwise of it by his positive grant, descended naturally to his children, and they had a right to succeed to it and possess it.

LOCKE, *supra* note 48, at 66.

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

61. Fried, *supra* note 40, at 230.

62. *Id.* at 240-41.

63. The utilitarianism of Jeremy Bentham, John Stuart Mill, and others, requires the calculation of the rights and interests of the various members of a society in order to determine the morally right action. Morality is defined as the action that provides the greatest benefit to the greatest number of

Stuart Mill, have held that, in order to determine the most moral action in any particular circumstance, one must calculate which action will maximize total happiness.⁶⁴ Since any particular action may cause both some unhappiness and some happiness, utilitarians advocate using their calculus to weigh the respective advantages of any decision. One famous articulation of this calculus is the trolley example, introduced by Phillipa Foot.⁶⁵ In this example, a trolley driver is at the helm of an out of control trolley, which he cannot stop.⁶⁶ He sees a split in the rails ahead with one workman on one of the rails and five workmen on the other rail.⁶⁷ The conductor must instantaneously choose which path he will take. The utilitarian calculus compares the loss of one life with the loss of five lives, and determines that the moral choice of the trolley driver is to steer the trolley down the path with only one worker.⁶⁸ Similarly, a utilitarian would argue that limiting one individual's private property right—for instance, through the imposition of taxation—for a significant increase in the happiness of many other people—by, for example, increasing revenue available to fund government programs—would be a morally appropriate action. This kind of moral reasoning would allow utilitarians to see a government taking or a zoning restriction as morally justifiable. However these types of infringements on the absolute rights of individual citizens would be anathema to the moral feeling of libertarians. Although Nozick, a libertarian endorsing a natural rights view of property, explicitly rejects the utilitarian calculus, certain of his arguments have a definite utilitarian feel.⁶⁹

IV. TAX STRUCTURES TRADITIONALLY ACCEPTED BY LIBERTARIANS

Even the pure libertarian view of property rights, endorsing an inviolable set of rights that cannot be breached without consent, has historically been viewed as consistent with some kinds of taxation. Libertarians have disagreed about the level of consent required in order to legitimately tax property owners, with Nozick seeming to require explicit consent received from every individual subject to the tax. Libertarians with more pragmatic views argue that remaining within the society or accepting government-provided benefits are sufficient forms of implicit consent to legitimate the tax.⁷⁰ Regardless of these differences regarding the

people. See JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 310 (1963); JOHN STUART MILL, *Utilitarianism*, in *ON LIBERTY AND OTHER ESSAYS* 129 (John Gray ed., 1991).

64. MILL, *supra* note 63, at 137.

65. PHILIPPA FOOT, *The Problem of Abortion and the Doctrine of the Double Effect*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 19, 23 (1978).

66. *Id.*

67. *Id.*

68. *Id.*

69. Barbara Fried explains Nozick's theory of compensation, in identifying the move from anarchy to the permissible minimal state. Fried demonstrates that Nozick cannot, in fact, move beyond anarchy without authorizing occasional violations of individual rights, requiring that the injured party receive compensation from the injuring party, even (or especially) when the injuring party is the state itself. Fried, *supra* note 40, at 238-43.

70. Nozick makes clear his views of implicit consent when he writes that "everyone else realizes that tacit consent isn't worth the paper it's not written on . . ." NOZICK, *supra* note 23, at 287. Earlier in the book he claims to have demonstrated that the reason a minimal state is not redistributive, when the amounts paid by some are used to pay for the protection of others, stems from the fact that those

necessary form of consent, libertarians have generally agreed that taxation as a payment for services received is a legitimate form of taxation by the government.⁷¹ This kind of tax, justified by the so-called benefit principle of taxation, views the government as a provider of services, which in turn collects payment for those services in the form of taxes as part of a market transaction.⁷² However, citizens might argue that the government should limit the kinds of services it provides to those that *only* the government could provide, or to services where there is a significant increase in the efficacy of the service, or a lowering of the cost of the service when it is provided by the government. The kinds of services for which the government could assess fees via the collection of taxes might include the maintenance of roads and sewers, or the provision of local and national security.⁷³ In a more expansive state, services might include public education, the regulation of markets, or the provision of public healthcare. While a classic libertarian might balk at this second set of services, the libertarian position merely requires that the citizens paying for (through taxes) and receiving the services in question *consent* to have the government provide the services.⁷⁴

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

who are receiving protection without paying are getting that protection for free in compensation for the rights they may have given up. *Id.* at 114. However, Fried demonstrates that Nozick's lack of a coherent theory of property rights and consent lead to the result that, in certain circumstances (such as the move from a minimal state to a slightly more than minimal state), consent to limit the rights of citizens does not have to be explicitly attained. Fried, *supra* note 40, at 235. Fried claims that "in place of actual or implied consent, Nozick does away with consent entirely." *Id.*

71. In Nozick's explanation of the shift from anarchy to a minimal state, he demonstrates the situation in which an individual could be compelled to pay for protection since she is benefitting from the provision of that protection. NOZICK, *supra* note 23, at 110-18.

72. The benefit principle of taxation (authorizing taxation only to the extent that it compensates the government for services it provides to its taxpaying citizens) is not a view held only by libertarians. SLEMROD, *supra* note 10, at 86 (discussing the benefit principle of taxation, and an explanation of its ongoing role in tax policy debates).

73. Even Milton Friedman himself—in many ways the father of libertarianism—imagined that a government should provide certain services, and could therefore tax its citizens in order to receive payment for those services. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 65 (1967).

74. There is a tradition known as Left Libertarianism, in which a more expansive state, such as one that might provide the second set of services listed above, is more likely to be endorsed. What Left Libertarianism shares with the tradition of Right Libertarianism is the insistence on the importance of consent in providing moral legitimacy to the government and its curtailing of property rights. For examples of Left Libertarianism, see, for example, OTSUKA, *supra* note 50, and THE ORIGINS OF LEFT-LIBERTARIANISM: AN ANTHOLOGY OF HISTORICAL WRITINGS (Peter Vallentyne & Hillel Steiner eds., 2000).

amount due.⁷⁵ However, a society could elect to administer a payment-for-services type of tax as an estate tax. That structure would use the end of life as a time to calculate the benefits enjoyed over a lifetime, and would assess tax to compensate the government for the benefits it had provided to the deceased. There are several reasons that this is not the ideal scenario, not least because, if the potential taxpayer dies without any remaining assets in her estate, there would be no way to recover payment for the services the government had provided.⁷⁶

For the reasons explained above, libertarians might approve of an income tax if it were designed to satisfy the libertarian benefit principle requirements. Unsurprisingly, however, a wealth transfer tax that was justified as a method of redistributing wealth from the richest taxpayers to the rest of society is antithetical to the libertarian moral view.⁷⁷ Because it would likely violate the principle of taking from the taxpayer only with her (implicit or explicit) consent, government-facilitated redistribution through the tax code is immoral within a libertarian framework.⁷⁸ I note this in order to emphasize that there is not necessarily a fundamental libertarian objection to the estate tax. As a logistical matter, libertarian-sanctioned benefit principle taxation is easiest to administer through the income tax; however, an estate tax is permissible on libertarian grounds as long as the justification for the tax is limited to benefit principle grounds. The Nozickian view of absolute property rights objects to taxation intended to redistribute when there has not been explicit consent to that redistribution. The form of the taxation (whether the tax is assessed as an income tax or as an estate tax) does not affect the analysis.

V. LIBERTARIAN INHERITANCE

In order to explore Nozick's libertarian position on the estate tax, one must first examine the libertarian position on the rights of inheritance and bequest.⁷⁹ To

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

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

77. COHEN, *supra* note 52, at 68.

78. I note this in order to emphasize that there is not necessarily a fundamental libertarian objection to the estate tax. Of course, redistribution *could* be consistent with a libertarian model, as long as the redistribution was explicitly consented to by the taxpayers involved. Here one might imagine Warren Buffett, Bill Gates, and others insisting that they should be taxed more heavily in order for the government to have more funds available to support social welfare programs. *'Patriotic Millionaires' Lobby Congress for Higher Taxes on Rich*, PBS NEWSHOUR (Nov. 16, 2011), http://www.pbs.org/newshour/bb/politics/july-dec11/millionaires_11-16.html.

79. Throughout this Part, I reference particular state statutes authorizing rights of bequest, inheritance, or intestacy. It is important to note, though, that Nozick, Locke, and other libertarians

clarify, a right of inheritance lies squarely with the heir. If an heir has a right to inherit, then the heir has some version of a property right in the assets held by the testator, although that right cannot be exercised until after the testator dies. Although an individual explicitly named in the testator's will may hold a right of inheritance,⁸⁰ such a right may also be found elsewhere. For instance, state intestacy laws create rights in individuals that the state has determined are the most likely to have been named beneficiaries of the deceased if that decedent had executed a will.⁸¹ However, some states move beyond mere intestacy laws, and create a right in the surviving spouse (or, in one case, the surviving children) to inherit from the assets of the deceased, even though the deceased explicitly disinherited them.⁸² Such laws value the rights of the survivors to inherit above the rights of the deceased to determine the distribution of her assets after she dies.

In contrast with the right to inherit, which is held and exercised by an heir, the right of bequest is a right held by the deceased (the testator in the case of an individual who executes a will).⁸³ The right of bequest is defended by libertarians as one of the rights contained in the inviolate absolute ownership of private property.⁸⁴ In Nozick's model, the right of bequest is evaluated as a moral matter within the purview of justice in transfer.⁸⁵ If the asset is one that was acquired justly by the testator, and is transferred justly by her, then the bequest must be respected as morally permitted. State statutory schemes regarding rights of bequest track these libertarian principles, respecting and enforcing most testators' wishes through the probate process.⁸⁶

believe that the rights in question here are natural rights, not positive rights. That is to say, a natural rights theorist believes that the right to inherit or leave the bequests one wishes exists regardless of the statutory schemes in place in any particular state. On this model, the statute is merely a codification of the right, not a creation of that right. For a further discussion of natural and positive rights, see generally Mack, *supra* note 55.

80. See, e.g., KY. REV. STAT. ANN. § 394.020 (West 2013) (stating that “[a]ny person of sound mind and eighteen (18) years of age or over may by will dispose of any estate, right, or interest in real or personal estate that he may be entitled to at his death, which would otherwise descend to his heirs or pass to his personal representatives, even though he becomes so entitled after the execution of his will.”).

81. State intestacy laws most commonly identify the spouse and children of the deceased as the individuals who inherit in the absence of a will. However, if the deceased had no spouse or children, the statutes also create schema that identify who inherits the assets of the deceased. See, e.g., *id.* § 391.010 (explaining Kentucky's intestacy law, which provides for the disposition of real property in the case of a decedent who dies intestate. Succeeding statutes refer back to the real property statute in order to determine the disposition of personal property). In certain circumstances, if no living relatives are found, the assets of the deceased escheat to the state. See, e.g., *id.* § 393.020 (allowing unclaimed property in Kentucky to escheat to the state); OR. REV. STAT. ANN. § 112.055 (West 2013) (decreeing that if no person is entitled to take under the Oregon intestacy laws, then the estate escheats to the state of Oregon).

82. See *supra* note 20.

83. See, e.g., *supra* note 80.

84. See *supra* Part III.

85. See *id.*

86. Of course, the large exception to this general rule is the elective share rules. See *supra* note 20 and accompanying text.

A. Locke on Inheritance Rights

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

Locke's belief in the absolute right of ownership in goods stems from his view that mixing one's labor with the world creates a property right that includes a right of transfer and cannot be extinguished by a third party.⁸⁷ Locke takes the right of transfer to include an unfettered right of transfer at death as well.⁸⁸ In other words, an individual who holds property may choose to bequeath that property as she wishes. If society respects this right, then any decision made by the deceased with respect to the disbursement of her assets must be honored. This may include a decedent's decision to disinherit her children or her surviving spouse.

However, alongside the view that the wishes of the deceased must be respected, Locke simultaneously holds the view that children and surviving spouses have a right of inheritance as well.⁸⁹ At various points in his writing on inheritance, Locke states that a surviving spouse or surviving children who are disinherited by the testator's will should nonetheless be awarded an amount sufficient to allow them to survive comfortably.⁹⁰ The familial relationship between the surviving family members and the testator creates a moral claim in those survivors that should be enforced by society.⁹¹ In particular, Locke focuses on the "surplus" that may exist in the estate of the deceased, arguing that surplus can be disposed of as the testator wishes, while the essential part—required care for

87. Locke begins by explaining that a man's body is his first property, and then explains that it logically follows that the labor produced by a man's body must also be his property. "For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others." LOCKE, *supra* note 48, at 134.

88. J.J. Waldron, *Locke's Account of Inheritance and Bequest*, 19 J. OF HIST. PHIL. 1, 44 (1981).

89. LOCKE, *supra* note 48, at 67-68 ("[T]his gives children a title to share in the property of their parents and a right to inherit their possessions. Men are not proprietors of what they have merely for themselves; their children have a title to part of it, and have their kind of right joined with their parents' in the possession which comes to be wholly theirs, when death, having put an end to their parents' use of it, hath taken them from their possessions; and this we call inheritance. Men being by a like obligation bound to preserve what they have begotten, as to preserve themselves, their issue come to have a right in the goods they are possessed of."). For a discussion of Locke's position, see Leslie Kendrick, *The Lockean Rights of Bequest and Inheritance*, 17 LEGAL THEORY 145, 148 (2011), and Waldron, *supra* note 88, at 42.

90. "[O]ne of Locke's justifications for inheritance is the right to parental support, the 'Right [of children] to be nourish'd and maintained by their Parents, nay a right not only to a bare Subsistence but to the convenience and comforts of Life, as far as the conditions of their Parents can afford it.' Locke says multiple times that parents have this duty and children this corresponding right." Kendrick, *supra* note 89, at 151 (quoting LOCKE, *supra* note 48, at 68).

91. See generally LOCKE, *supra* note 48.

the survivors—should be passed to the children under their right of inheritance.⁹²

B. Bequest and Inheritance – Incompatible Rules?

So how can a property holder have an unmitigated right of bequest while a surviving family member simultaneously holds a right of inheritance? In instances where these two rights conflict (the testator leaves all of his property to his friends, while his surviving children wish to claim an inheritance right in some of the property), what action should society take? In situations where they conflict, must society enforce the wishes of the now deceased testator or of the surviving children? Commentators disagree about the coherence of Locke's view.⁹³

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

VI. WILT CHAMBERLAIN, PATTERNS OF JUSTICE, AND THE LIBERTARIAN PROBLEM OF INHERITANCE

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

92. Kendrick, *supra* note 89, at 151 (“A decedent’s estate must first provide for the subsistence and comfort of dependents, and only then may any remaining property go to satisfy the decedent’s bequests. If the entire estate is required by the right to parental support, any bequests are void. The passages in which Locke discusses bequest without acknowledging the right to parental support must be understood to be subject to this qualification.”).

93. Notably, Waldron argues that Locke's positions on bequest and inheritance are incompatible. He writes that:

There is no way in which Locke's ranking bequest ahead of inheritance can be justified on the basis of natural right, given his justification of inheritance. We must, I think, dismiss this ranking in the end as a mistake on Locke's part. What, then, is the position? A man's children have the right to inherit as much of his property as is needed to give them the benefit, after his death, of the continued fulfillment of his parental duties of sustenance and nourishment. His wife is entitled to inherit as much of his wealth as she needs to continue to discharge her joint responsibility in this respect. All this is a matter of fundamental natural law. Natural law, however, allows no place for bequest or, for that matter, for the inheritance of surplus goods. Does this mean that traditional notions of bequest have therefore no place at all in a Lockean theory of property? Perhaps not. Perhaps bequest does have a place if we look upon the right to bequeath as a *civil* right rather than as a natural right.

Waldron, *supra* note 88, at 47-48 (emphasis in original). By contrast, Kendrick argues that the rights of unlimited inheritance possessed by the children or other natural heirs of the decedent actually arise out of the “imputed bequest” of the decedent. Kendrick, *supra* note 89, at 161-62 (“[W]hen understood as imputed bequest, the right of inheritance becomes a default rule, imputing to the decedent a desire to transfer her wealth to those who are most likely to be identified with her life projects Thus, while it is true that Locke never explicitly presents a full theory of imputed bequest, we may plausibly read the *Treatises* to assume that parents, prompted by their ‘Natural Love and Tenderness’ and their close identification with both their children and their possessions, would in most cases desire that their property descend to their children when they die. This means that the right involved is the right not of the children to inherit but of the parents to bequeath.”).

Nozick's argument.

A. Patterns of Justice

In his argument concerning distributive justice, Nozick distinguishes his work from theories that attempt to establish patterns of distributive justice.⁹⁴ On Nozick's model, patterned principles of distributive justice identify a desired distribution of goods—either an end-goal or a goal evaluated at any particular moment in time—and then evaluate the current distribution by comparison to the desired pattern.⁹⁵ Nozick is critical of patterned principles of justice because he thinks they will inevitably lead to a restriction on the right of individuals to freely contract for the exchange of goods. In order to demonstrate this result, Nozick introduces his famous Wilt Chamberlain example.

Nozick asks the reader to imagine an initial distribution of wealth that the reader believes is just. Because Nozick does not want to preclude any particular distribution, he identifies this initially just (on the reader's terms) distribution as D1.⁹⁶ Then, he says, imagine that there is an individual, Wilt Chamberlain (Chamberlain), who has an incredible talent at playing basketball.⁹⁷ People love to watch him play basketball, and, as a result, many people agree to pay him 25 cents for the privilege of watching him play.⁹⁸ Say, then, that ultimately one million people pay a quarter to Chamberlain to watch him play basketball. Each of these people has freely chosen to enter a contract with Chamberlain, wherein each of them pays 25 cents, and Chamberlain allows the individual to watch him play. At the end of these million transactions, Chamberlain will have \$250,000 above what he was entitled to in D1, and each of the one million people will have 25 cents less than he or she was entitled to in D1. Nozick calls this second distribution D2.⁹⁹ We have, as a result of one million freely made transfers, radically shifted the original distribution. However, Nozick says, we cannot complain that D2, which does not match the distribution we originally believed was a just distribution, is

94. See David Schmidtz, *The Right to Distribute*, in *THE CAMBRIDGE COMPANION TO NOZICK'S ANARCHY, STATE, AND UTOPIA* 197 (Ralf M. Bader & John Meadowcroft eds., 2011).

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

96. NOZICK, *supra* note 23, at 160.

97. *Id.* at 161. In another article criticizing the utility of Nozick's example, Barbara Fried argues that while Nozick allows for the just distribution of goods and wealth in D1, he does not account for Chamberlain's talent at playing basketball as a good that has been unevenly distributed. It is this uneven distribution of talents, and the scarcity of the talent of basketball playing, that permits Chamberlain to demand 25 cents for the privilege of watching him play. If basketball playing talents were distributed more evenly, or were not in such short supply, then Chamberlain's fans would have been able to watch other players instead, and the price Chamberlain could command would likely fall. Fried likens Chamberlain's talents to an individual holding a large amount of land. When the landholder exchanges that land for \$250,000, we do not say that he is \$250,000 richer. We merely say that he has liquidated the asset he previously held in illiquid form. One could make the same argument about Chamberlain's basketball talents. See Barbara Fried, *Wilt Chamberlain Revisited: Nozick's "Justice in Transfer" and the Problem of Market-Based Distribution*, 24 *PHIL. & PUB. AFFAIRS* 226, 234-236 (1995).

98. NOZICK, *supra* note 23, at 161.

99. *Id.*

unjust.¹⁰⁰ Nothing unjust has occurred. Chamberlain and each of the one million fans freely agreed to the transfers. Indeed, Nozick argues that it would be unjust for someone (the government?) to try to make D2 match D1 by reallocating some or all of Chamberlain's newly acquired \$250,000 away from him, since he acquired that wealth justly.¹⁰¹

Therefore, Nozick's conclusion is that patterned principles of distributive justice necessarily violate individual freedom and property rights.¹⁰² In addition, he believes these patterns are ultimately unattainable, given the constant exchanging of goods that happens within a society.¹⁰³ Given Nozick's position that "[w]hatever arises from a just situation by just steps is itself just,"¹⁰⁴ the Wilt Chamberlain model demonstrates that justice will result in radically different actual distributions over time. Thus, seeing that D1 was a just distribution (based on the reader's own conception of justice), and the transfers from fans to Wilt Chamberlain were all made freely (the very definition of just steps on Nozick's libertarian model), then the end result—with Chamberlain holding significantly more wealth than his fans—must also be just.

Combining this view of distributive justice with Nozick's view of private property rights, it becomes clear why Nozick believes in unfettered bequest rights. Because property rights include the unrestricted absolute ownership of the property in question, and distributive justice must concern itself only with the free transfer of goods (rather than with the pattern of justice that results from those transfers)—individuals must be allowed to transfer their assets as they wish, including after death.

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

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

1. Future Generations and the Original Distribution

Nozick begins his discussion of the Wilt Chamberlain example by introducing a distribution, D1, that he says the reader should imagine is whatever distribution the reader believes is most just. The end distribution, D2, must be just, Nozick argues, because it was arrived at justly, in a way freely agreed to by all parties involved in the creation of D1 and the transfers that resulted in D2. Moving from here, assume Chamberlain and all of his fans (call them the first generation, or G1) then pass their respective wealth on to their children. Now the second generation, call it G2, begins life with D2, rather than with D1. But G2 did not agree to the

100. *Id.*

101. NOZICK, *supra* note 23, at 149 (disputing the idea that there would be any individual or entity with the authority or even the ability to do that redistributive work – “[t]here is no *central* distribution, no person or group entitled to control all the resources, jointly deciding how they are to be doled out.” (emphasis in the original)).

102. *Id.* at 172.

103. *Id.* at 164.

104. *Id.* at 151.

justness of D2. Indeed, G2 did not agree to the justness of D1 either! And G2 does not include the members of G1 who freely engaged in the transfers that created D2. So how can we expect the members of G2 to accept as just the distribution created by others, in which they had no say, either with regard to the original distribution or to the “free transfers” entered into by their forebears?¹⁰⁵

Further, Nozick’s (and Locke’s) emphasis on the importance of mixing one’s labor with the world in order to generate property rights results in significantly less (or no?) moral claims in G2 for rights over the property that they inherit from G1. This is another tension in the relationship between Nozick’s view of justice in acquisition, transfer, and holding. However, this tension is recognized in certain versions of Left Libertarianism, and was even recognized by Nozick himself in his later writings.¹⁰⁶

Nozick’s argument for the rights of an heir stems from a combination of justice in acquisition and justice in transfer. Because G1 (presumably) mixed their labor with the world in order to generate morally meaningful ownership over their goods, they acquired the right to freely transfer those goods. And because G2 receives the goods as a result of a freely made (post-death) transfer by G1, then they too have justly acquired the goods, and may hold them with the same moral authority with which G1 held them. This may be true with regard to *inter vivos* transfers, but it does not address the second libertarian problem of inheritance.

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

In order to make, as Nozick does, the claim that property ownership rights include an unmitigated right of transfer, one must first establish that the individual making the transfer has the kind of moral claim over the property that I have identified as arising from the libertarian theory of property rights.¹⁰⁷ In other words, the right to transfer is one of the rights held by a property owner, but that right, like all property rights, is contingent on owning the property in the first

105. See, e.g., G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT (A. V. Miller, trans., 1977) (explaining that one central concern here is the determination of just what constitutes a “free transfer”). Nozick might argue that his definition of free transfer transcends cultural and temporal boundaries, so that what constitutes a free transfer in the southern part of the pre-Civil War United States is the same as what constitutes a free transfer in New York City in 2013. If that is true, then we needn’t worry that future generations might complain that the transfers which resulted in D2 were not, in fact, freely completed. However, there is a long tradition in political philosophy arguing that cultural norms evolve over time, so that what constitutes a free transfer in one society might be considered coerced in another.

106. See ROBERT NOZICK, THE EXAMINED LIFE 28-33 (1989). Many Left Libertarians recognize a more legitimate moral right in the taxation of heirs than in the taxation of income earners, since the moral claim to private property stems from the mixing of one’s labor with the world. Because an heir has not mixed her labor, but has merely acquired property from another, this argument sees taxation of that individual as more morally permissible. Nozick himself altered his view on inheritance taxation in later years, seeing the taxation of heirs as less morally prohibited than other types of tax. As Nozick writes in *The Examined Life*, “. . . bequests that are received sometimes are then passed on for generations to persons unknown to the original earner and donor, producing continuing inequalities of wealth and position One possible solution would be restructure an institution of inheritance so that taxes will subtract from the possessions people can bequeath the value of what they themselves have received through bequests.” *Id.* at 30.

107. See *supra* Part III.

place.¹⁰⁸ This is where one encounters the problem of bequest and post-death property rights. While a property owner may write a will and have the intention to make a post-death transfer during her lifetime, the effect of that will happens only after her death.¹⁰⁹ But in what sense does she continue to have the property right after her death, such that she has the authority to transfer that property?

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

In what sense could it be meaningful to say that a deceased person continues to hold property after her death? To the extent that our current rules enforce the choices made by a testator in her will, they do so out of respect for the choices the testator made when she was alive, not because the document can be enforced by the drafter of the will. Indeed, our tax system creates a new legal entity, the "estate," which absorbs the rights and responsibilities of the person whose life has ended.¹¹⁰ Where there is no subject or moral right holder present to claim the right of transfer, a rule that establishes a default, which may or may not respect the wishes of the decedent, need not concern itself with potential violations of that subject's moral claims.

VII. ESTABLISHING A DEFAULT RULE

In Part I, I argued that the existence of the individual claiming a property right ends at that individual's death, and therefore, the property right must end then as well. Therefore, there is no moral authority to the assumption that the decedent has the unfettered right to transfer her property as she wishes after her death. Does that then mean that the government has a moral claim to the property? Not necessarily.

108. One cannot bequest assets that one does not, in fact, own. *See* KY. REV. STAT. ANN. § 391.250 (West 2013) ("KRS 391.210 to 391.260 does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.").

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

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

When a person with property right recognized as morally meaningful on the libertarian model dies, there is no one with a property claim that is morally defensible from a libertarian perspective.

This leaves us in an interesting position. If, as Nozick and many other libertarians have assumed, moral claims of ownership extend beyond death, then their arguments that the estate tax (along with other forms of *inter vivos* taxation) is theft would be convincing. However, as I have demonstrated, the libertarian argument does not actually entail that result. With no individual or entity with a libertarian moral claim over the property, we are left in the position of deciding what rule to choose.

At this point, we can bring back into our consideration all of the various tax policy concerns bracketed at the beginning of this Article. One might consider incentive effects and revenue raising concerns when deciding what to do with the assets of a deceased member of society.¹¹¹ On the one hand, society might decide that, as a matter of administrative ease, we will let the deceased draft a will telling us how she wishes the assets to be distributed, and we will distribute the assets according to that document. We may, however, decide that we have other goals that trump the goal of administrative ease in determining the best tax policy. Alternatively, society might decide that the goal of allowing for a more or less equal distribution of financial goods in each generation (a new D1, in the Wilt Chamberlain example) is a goal that takes priority in our tax policy, and therefore, we might enact a 100% estate tax, allowing the government to claim assets that have no owner, due to the death of the previous owner. A third possibility is that the Lockean-Nozickian result would be to allow assets that are freed up upon the death of the property holder to revert to nature. On this view, the true Lockean result would be to allow individuals to come forward to mix their labor with these goods, thereby establishing new moral claims over the assets.¹¹²

The likely result is somewhere in the middle. The goal of this Article, however, has been to demonstrate that each of these results is consistent with the moral view of property rights espoused by libertarians, in particular by Nozick. Because there is no moral compulsion to act on the wishes of the deceased, or to treat the government as having morally deserving property rights in the assets of the decedent, we can create a rule that best reflects the needs and values of the society in question without violating the moral rights of any party.

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

112. This possibility of reverting to a war of all against all each time a member of society dies is strongly reminiscent of the Hobbesian state of nature. See THOMAS HOBBS, *LEVIATHAN* (J.C.A. Gaskin ed., 1996). However, since Locke believes that an individual agrees to give up certain rights upon entering society, his view of property rights does not require this result. See LOCKE, *supra* note 48, at 185 (“The first power, viz. of doing whatsoever he thought fit for the preservation of himself, and the rest of mankind, he gives up to be regulated by laws made by the society, so far forth as the preservation of himself, and the rest of society shall require; which laws of the society in many things confine the liberty he had by the law of nature.”). Therefore, a society could establish a default rule regarding post-death property rights that did not involve allowing a “free for all” to claim the property, and that default rule would not necessarily violate Locke’s position.

VIII. WHAT ABOUT GIFTS?

Our current tax regime incorporates a gift tax with the estate tax, allowing a lifetime credit against both an individual's *inter vivos* and post-death transfers.¹¹³ Because this is a lifetime credit, once a taxpayer exceeds the credit, transfers made during her lifetime will be subject to gift tax, currently imposed at a rate of 40% on all transfers over the \$5.25 million exemption equivalent credit.¹¹⁴ While the estate and gift tax are currently unified, that has not always been the case. Between 1916 and 1932, the United States had an estate tax, but no gift tax.¹¹⁵ This meant that, during that era, transfers made during the transferor's lifetime would escape taxation, while assets held until death and then transferred post-death would be subject to the estate tax. This led, unsurprisingly, to an increase in lifetime transfers as individuals sought to escape the transfer tax regime.¹¹⁶ As a result, in 1932, Congress enacted the gift tax as a backstop to the estate tax, ensuring that transfers would be subject to the tax regardless of timing.¹¹⁷ However, the gift and estate taxes were not unified until 1976.¹¹⁸ At that point the two tax regimes were partially unified, but the taxes were not fully unified until 2010, meaning that for almost seventy years the rates and exemption levels varied between the two credits.¹¹⁹

I have demonstrated that the libertarian moral view of property rights is consistent with a 100% estate tax.¹²⁰ But does this necessarily entail a gift tax as well? Because of the libertarian view of the absolute moral claim of private property rights (of the living), Nozick would view a gift tax as an immoral violation of the rights of the property holder. On the libertarian view, a property holder must be able to transfer her property as she wishes, with no limits on that transfer imposed by third parties. The imposition of a tax on the transfer, which occurs when the government taxes a gift, is a fetter to transfer imposed by the government.¹²¹ This makes the gift tax impermissible on the libertarian model.

If, then, society opted to impose an estate tax on assets that had been held by its citizens at their death, and all citizens transferred their assets during their lives,

113. See Code § 2001. The structure of the system allows a credit against taxes incurred on lifetime transfers up to an amount sufficient to permit a tax-free transfer of a set exemption-equivalent amount. *Id.* Currently that amount is \$5,250,000 per individual. *Id.* The credit must be used up chronologically, so *inter vivos* transfers will command the first use of the credit, and whatever has not been used before death will remain available to permit tax-free transfers after death as well. *Id.*

114. See *id.* §§ 2501-2503, 2505.

115. See Jacobson et al., *supra* note 1, at 121, fig. C (illustrating, in part, that: the estate tax was enacted in 1916; the first gift tax was enacted in 1924, but repealed in 1926; the modern gift tax was enacted in 1932; and the United States has had both gift and estate taxes for all years since then (with the exception of the one year repeal of the estate tax in 2010, when the gift tax remained in place)).

116. See *id.* at 122.

117. See *id.*

118. BORIS I. BITTKER ET AL., FEDERAL ESTATE AND GIFT TAXATION 17 (10th ed. 2005) (explaining that before 1976 "it cost substantially more to leave property at death than to give it away during life," before the estate and gift tax regimes were unified).

119. See Jacobson et al., *supra* note 1, at 122-24.

120. See *supra* Part VI.

121. Certain Left Libertarians would view a gift tax as morally permissible, as long as it is imposed on the recipient of the gift, because it does not violate the property rights of an individual with a right that arises because of labor. For more on this argument, see generally NOZICK, *supra* note 106.

would the tax become meaningless? Arguably, the answer to that question is no. The estate and gift taxes have not always been unified—and—even in years when they were not fully integrated, the estate tax did take in revenue.¹²² Further, individuals often have reasons to hold on to their assets, not wanting to whittle their wealth down to nothing before they die. There are a variety of reasons for this, such as: wanting children and other relatives to remain dependent; wanting the safety net provided by accumulated wealth; and/or not trusting that others will spend the money wisely that would likely continue to exist, even in the face of a robust estate tax.

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

IX. CONCLUSIONS

In this Article, I have demonstrated that contrary to popular political rhetoric, the libertarian position on property rights (often viewed as the strongest argument for property rights) is consistent with a robust estate tax, reaching even 100%. Because the death of the individual property owner ends the moral ownership right of that individual, the estate tax is not “theft,” as libertarians have often called all taxation.¹²³ Instead, in the absence of any moral claims over the property, society is in the unique position of being able to design a post-death property regime that reflects the needs and wants of that society. This may mean that society decides to enact a 100% estate tax, claiming all assets left by individuals upon their death. This seems unlikely, but such a plan would not violate the moral claims of either the deceased or any of that individual’s potential heirs.

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

122. See BUDGET OPTIONS, *supra* note 1.

123. See, e.g., Edward Feser, *Taxation, Forced Labor, and Theft*, 2 INDEP. REV. 219, 219-35 (2000).