The AILJ Reborn Again! Recycling The Reform
Walter J. Blum* and Willard H. Pedrick

The American Institute of Legal Jurimetrics—the AILJ—is virtually unknown outside the world of estate planners. Co-founded by Professors Walter J. Blum and Willard H. Pedrick some thirteen years ago, the Institute has adhered tenaciously to its announced mission—"formulating reform proposals that would make the federal estate and gift tax laws bear more equally on donors and decedents." The spirit that has motivated the AILJ can be discerned from its maiden pronouncement: "When total even-handed equality begins to operate in the field of federal estate and gift taxation, all donors and decedents will fare exactly alike without regard to how their affairs have been arranged. At that point a vast amount of human energy presently employed in tax planning will be freed for less rewarding tasks."

The following is an excerpt from the latest Institute publication, entitled "The AILJ Reborn Again! Recycling the Reform." The wisdom purveyed obviously transcends the boundaries of estate planning.

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Tax Expenditure Approach and Funeral Expenses
A stellar item on our agenda is applying the tax expenditure concept to the estate tax. This concept was developed in connection with the income tax. It is intended to deliver a message that carries a great deal of political freight. It presumes to tell us that, if by virtue of a deduction, or credit, or exemption, or bargain rate, some taxpayer is taxed less than he would be under a "pure" version of the income tax, the amount of tax dollars foregone are realistically to be viewed as though they were collected and then expended by the government.

While the AILJ has great reservations about the validity and utility of the tax expenditure concept, the Institute maintains that if the idea is sound in the income tax area it is equally sound in the area of death taxes. Once this is granted, a number of expenditures by government effectuated through the estate tax might seem slightly outrageous in our society. To take but one item, consider the deduction allowed for funeral expenses. According to the tax expenditure concept, the tax saved by virtue of that deduction is nothing more than a payment by the federal government made for the purpose of celebrating the departure of the decedent.

Now the important thing to observe is that
there is no ceiling on the deduction for funeral expenses. This means that the ceremonies can be lavish and extravagant—including, presumably, application of the wraparound technique as part of mummification, if desired. Under the income tax, we expressly would not allow the departed, during lifetime, to deduct for living lavishly while away from home in the pursuit of business. Can it be that the federal government is expressing a preference for Forest Lawn over the Ritz! In passing, it must be remembered that the higher the marginal estate tax bracket, the larger is the government expenditure that goes to subsidize funeral activities. If the rate of inflation does not abate, we can expect to witness ever more monumental departures by the rich. Maybe there will then be a sharper point in the observation that the estate tax is pyramidal in shape.

Aside from its glaring shortcomings, one other aspect of the departure subsidy is notable. This tax expenditure operates directly counter to societal efforts designed to conserve on energy. Everybody is aware that staging large burial processions and erecting elaborate mausoleums unavoidably consume gasoline and other fuel. The disallowance of funeral expenses, at least any that exceed some very modest amount, would seem to be in keeping both with the national energy policy and the aspirations of those who are enthusiastic about the tax expenditure approach to tax reform.

### Estate Planning Malpractice

Another long-range AILJ study stems from the marked growth of malpractice claims brought against lawyers. Malpractice suits involving tax lawyers, especially estate planners, were not unknown in the past, but they were comparatively rare (and not well publicized). Under the new dispensation in the tort world all this seems to be changing. Estate planners are vulnerable, and their exposure to liability is likely to be of relatively long duration and to implicate substantial sums.

The AILJ suspects that hidden in this development lies the germ of a new format for creative estate planning. Under some circumstances a recovery, perhaps including punitive dam-

ages, for negligence on the part of an estate planner might not be an asset includable in the estate of a decedent for estate tax purposes. If that is the case the improved scenario for estate planning almost writes itself: the man of means need only select an incompetent estate planner and then rely on his survivors to bring a malpractice action that will generate a recovery that escapes both gift and estate tax! Who knows, private enterprise may yet be saved by tort law.

Closely related to the malpractice study is an Institute project erected on the newly discovered constitutional right of lawyers to advertise. The limits to such advertising, of course, have not yet been determined. Fees clearly can be made known, and a statement of experience and other qualifications will likely be permissible. It is to be assumed that the evolving rules will be fully applicable to estate planners. We can look forward to refreshing messages as lawyers try to catch up with trust and life insurance companies in competing in the estate planning world. Who could resist such gems as these:

- Death planning guaranteed for life.
- Satisfaction guaranteed or your money back.
- Not a single complaint from any decedent in over half a century.

Furthermore, some interesting relationships between advertising and malpractice actions can be expected to develop. The lawyer who advertises himself as a highly skilled expert in estate planning would seem to expose himself to greater vulnerability for malpractice claims should there be a failure to minimize taxes under the circumstances with which he was dealing; conversely, the lawyer who holds himself out as an amateur in estate planning would seem to provide himself with a higher level of immunity from successful malpractice suits. On the surface, this combination appears to be a very subtle form of income equalization of a type that the Institute is just beginning to explore. Indeed, the whole business is similar to progressive taxation in that proportionately less
is to be extracted from those who are of smaller means.

**Disclosure and Equalization**

The prospective malpractice and advertising projects are both brought into better focus by another possible AILJ study, inspired by a provocative suggestion roughed out by the present Commissioner of Internal Revenue. It is widely believed that well-advised persons of affluence are now able to avoid income taxes by taking advantage of the IRS’s inability to probe deeply behind whatever appears on the face of returns. To deal realistically with the situation, the Commissioner has floated the idea that those who prepare returns for elite taxpayers be required to specify which doubtful issues had in effect been resolved in favor of the taxpayer in calculating tax liability. The crux of this notion is that the tax advisors know, while the IRS cannot know from a mere inspection of returns, to what extent taxpayers were given the benefit of the doubt. The suggested solution in essence is a call for invoking the newest natural law—full disclosure.

Without either accepting or rejecting this novel approach to administering the income tax, the AILJ is prepared to consider the consequences that might be expected to follow if it were applied to gift and estate tax returns. Fore-sight at the moment admittedly is rather murky but at least one distinct possibility can be envisaged. This disclosure scheme perhaps is the ultimate avenue for dealing with the very common complaint that the law is so complex that only a few top-flight estate planners can utilize it to best advantage. Under a rule requiring disclosure of doubt, the most sophisticated estate planners will be properly handicapped in competing with those who are less skilled.

The “hidden handicapping hand” presumably would tend to work as follows: The more knowledgeable the advisor, the more he will perceive doubtful issues, and thus the more he will be required to disclose. Conversely, the less knowledgeable the advisor, the fewer doubts he will encounter and thus the less he will be under obligation to disclose. A person seeking an advisor will accordingly be faced with a nice choice: On the one hand, he can opt for brightness and a high probability of costly controversy with the IRS; on the other hand, he can seek dullness, a low probability of such controversy and stupid exposure to heavier transfer taxes.

Freedom of choice by the consumer is a hallmark of our society. To facilitate it, every firm engaged in estate planning might have to employ at least one stupid lawyer.

The intriguing linkage between advertising and disclosure of doubt should not go unmarked. One can imagine estate planning notices that read: “When in doubt, see us because we never are.” Or: “Not a doubt in a caseload.” The possibilities are virtually limitless. For the most part they appear to turn on a modified version of an old theme: “Less is more—especially if it is in the right places.”

Compulsory disclosure of doubt, along with malpractice vulnerability geared to advertising by lawyers, will be a grand sub rosa device for achieving “vertical equity” among tax planners. It could turn out to be a giant step in levelling society.

**Death Taxes and Land Use**

One other project on the AILJ drawing board is deserving of mention. The Institute is keeping a sharp lookout on the use of taxation to improve the environment and conserve the use of irreplaceable natural resources.

But, it must be asked, is the estate tax adaptable to the new goals? Preliminary research has convinced the Institute that the project is most promising. The results of a test boring, already analyzed, should silence the skeptics. It stands to reason that we must maximize the efficient use of land in a world that is short of food. To achieve this end, all unproductive uses of available land must be discouraged. Estate planners are well acquainted with a striking instance of waste—turning land into burial plots. The estate tax is surely an ideal vehicle for reducing this awful brake on efforts to accelerate food production. All that is needed, it seems, is a credit for nonuse of land for burial purposes.

Reflect briefly on how such a credit would be amenable to fine tuning by agrarian economists.
A sliding scale arrangement is obviously appropriate. A small credit might be given for burial in tiers (a pattern that should be particularly congenial to estate planners), a larger credit for vertical interment, and perhaps a full credit for cremation.

Encouragement of cremation of course raises the specter of atmospheric pollution. Needless to say, the AILJ will not ignore this problem. Indeed, we might be confronting the ultimate case for application of the economist’s dream—a tax on discharge of effluent into the atmosphere. (And who knows, we might also be sensing the dangers that lurk in a union of estate planners and economists.)