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DEATH, TAXES, AND COGNITION

LEE ANNE FENNELL*

The psychology of the estate tax is extraordinarily interesting and surprisingly underexplored. In this Article, Professor Fennell considers the ways in which behavioral law and economics might augment and revise existing understandings of the tax and of redistributive policy generally. The Article is structured around two puzzles that have been frequently identified in the estate tax literature: first, why popular opposition to the tax is so great, even among those who have no reason to expect estate tax liability; and second, why those whose estates are likely to be subject to the tax often do not take advantage of the opportunity to lighten the transfer tax burden through inter vivos giving. Professor Fennell posits that cognitive theory can help answer both questions and can thereby contribute to a richer positive account of the estate tax. She then explores some possible normative implications of this enhanced positive account, and suggests that the estate tax may hold greater potential as a redistributive tool than existing accounts would indicate. The estate tax's impending (yet temporary) repeal makes the project particularly timely and important.

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INTRODUCTION

Two puzzles surround the estate tax.¹ First, why is it so unpopular, even among those who could not reasonably expect to be

1. I will use the term "estate tax" in this Article to refer to the federal estate tax, I.R.C. §§ 2001–2500 (Lexis 2001). The federal estate tax is linked with the federal gift tax, *id.* §§ 2501–2600, and with the federal generation-skipping transfer tax, *id.* §§ 2601–2700, to tax transfers of wealth. Almost all states have estate or inheritance taxes as well, most of which are "pick-up" taxes that collect no more than the state death tax credit allowed under the federal scheme. See David J. Roberts, *Federal Estate Tax Repeal and the State Tax Burden*, 93 TAX NOTES 991, 991–92 (2001) (noting that approximately two-thirds of all states impose a "pickup tax"—an inheritance or estate tax "based entirely on the credit

subjected to it?² Second, why do people who *should* expect estate tax liability do so little to reduce that liability through inter vivos giving?³ These questions, I contend, go to the heart of the economic and political viability of the estate tax. Finding answers to them can shed important new light on the tax's potential as a policy tool. While both questions have been explored separately in the literature, the possibility that behavioral law and economics might help supply answers has not yet been systematically analyzed.⁴ In this Article, I examine ways in which features of human cognition interact with rational decision-making processes to generate both excessive hostility towards the tax and surprisingly low levels of liability-reducing gift giving.

for state death taxes that is allowed on the federal estate tax return"—while about a third of the states have an inheritance or estate tax that is computed separately).

2. See, e.g., Michael J. Graetz, *To Praise the Estate Tax, Not To Bury It*, 93 YALE L.J. 259, 285 (1983) ("The most puzzling political obstacle to estate tax revision . . . is that the American people do not seem to like heavy taxes on bequests."); Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1944 (1994) ("Why do people oppose a very limited, nominally progressive tax, one that has the further advantage of speaking directly to liberal egalitarian notions of equal opportunity and level playing fields?").

3. See, e.g., James Poterba, *Estate and Gift Taxes and Incentives for Inter Vivos Giving in the US*, 79 J. PUB. ECON. 237, 238 (2001) (presenting empirical evidence regarding inter vivos giving patterns, which "raises the question of why households do not take advantage of readily available estate tax avoidance strategies"). Economists have long found such behavior curious. See CARL S. SHOUP, *FEDERAL ESTATE AND GIFT TAXES* 21 (1966) (discussing findings that present the "startling picture of wealthy individuals clinging to their possessions throughout life" and asking why there is so little inter vivos giving); Harold M. Hochman & Cotton M. Lindsay, *Taxation, Interest and the Timing of Inter-Generation Wealth Transfers*, 20 NAT'L TAX J. 219, 219 (1967) (noting "the dismay and consternation with which analysts respond to the well-documented failure of wealth-owners to take advantage of the 'obvious' tax break afforded, at present, by the lower effective tax rates on *inter vivos* gifts," which "suggests the belief, on the economist's part, that the observed behavior is irrational").

4. To be sure, scholars have started applying the insights of behavioral law and economics to tax policy, see, e.g., McCaffery, *supra* note 2, at 1863, as well as to questions of redistribution generally, see, e.g., Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998). The potential role of behavioral law and economics in understanding the estate tax has been recognized, but the topic has not received extended treatment. See Louis Kaplow, *A Framework for Assessing Estate and Gift Taxation*, in *RETHINKING ESTATE AND GIFT TAXATION* 164, 201–02 (William G. Gale et al. eds., 2001) [hereinafter *RETHINKING*] (suggesting some ways that behavioral law and economics could alter his account); McCaffery, *supra* note 2, at 1944–45 (discussing cognitive aspects of the estate tax); cf. Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 7 (1995) (using cognitive theory to explore propensities toward saving and spending in the context of inheritance).

The project is an important and timely one. The estate tax's threatened demise⁵ makes the tax a current locus of debate, and a better understanding of the tax can advance this public discourse.⁶ While my primary goal is to explore how behavioral law and economics might enrich our understanding of the estate tax and of redistributive policy generally, I am also interested in exploring the policy implications that flow from this analysis. The Article, therefore, addresses both positive and normative questions. I explore not only why the tax has fallen out of favor and why it affects behavior in the way that it does, but also why it might be worth saving and how it might be reshaped along lines more consistent with human cognition.⁷

The normative discussion, which I take up in the latter half of the Article, proceeds from three assumptions that I will set out in brief here and discuss in more detail later:⁸ first, that redistribution to achieve social goals is a valid end of taxation and one that we as a society will continue to pursue regardless of the fate of the estate tax; second, that improving equality of opportunity by enabling the less well-off to better develop their human capital is an especially legitimate and desirable goal of redistributive tax policy; and third, that, to the extent we do wish to improve equality of opportunity in this manner through tax policy, we would prefer to use the tax mechanism that can generate the largest amount of gain for the smallest amount of cost. As I will explain, this three-part starting point is consistent with both efficiency-based and fairness-based normative theories.⁹ One need not accept these normative

5. The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") provides for graduated federal estate tax rate reductions and increased exemptions over the next several years, with complete elimination of the tax in 2010. Pub. L. No. 107-16, §§ 501, 511, 521, 115 Stat. 38, 69-72 (June 7, 2001) (codified at scattered sections of I.R.C.); see David Cay Johnston, *Coping with a Tax That Has Nine Lives*, N.Y. TIMES, June 24, 2001, at BU1. In the absence of further congressional action, the tax would reappear the following year, in 2011. See EGTRRA § 901, 115 Stat. at 150 (adding a sunset clause). A bill that would have made the repeal permanent died in the Senate on June 12, 2002, when repeal proponents fell six votes short of the sixty necessary to bring the issue to the floor. Carl Hulse, *Effort to Repeal Estate Tax Ends in Senate Defeat*, N.Y. TIMES, June 13, 2002, at A1.

6. See, e.g., William G. Gale & Joel Slemrod, *The Estate Tax: Not Dead Yet*, 93 TAX NOTES 807, 807 (2001) (noting that, because of the complex and temporary nature of the estate tax reforms, "policymakers will likely revisit the estate tax in the near future").

7. See McCaffery, *supra* note 2, at 1864 (explaining that "[t]axing authorities might seek to exploit cognitive biases in maximizing their revenue intake and minimizing popular opposition").

8. See *infra* notes 181-90 and accompanying text.

9. See *infra* notes 184-90 and accompanying text.

assumptions, however, to find useful the positive analysis contained in the Article.

The analysis proceeds in four parts. Parts I and II are organized around the two estate tax puzzles I have identified, taken up in reverse order. Part I considers why people actually faced with the estate tax fail to undertake available steps to avoid liability through inter vivos giving, while Part II considers the roots of the general public's apparent distaste for the tax. In each case, I begin by asking how much of each purported anomaly actually can be explained by standard economic theory incorporating a traditional rational actor model. I then go on to consider ways in which behavioral or cognitive insights augment these explanations. Consistent with the purposes of behavioral law and economics, which seeks not to displace law and economics but rather to supplement it so that it serves as a more useful analytic and predictive tool,¹⁰ I suggest that these rational and cognitive explanations work together to explain behavior. Together, Parts I and II demonstrate how behavioral law and economics can offer an enhanced positive account of the behavior of taxpayers and the general public with regard to the estate tax.

In Part III, I set forth some normative arguments that flow from this richer positive account. If increasing the ability of the less well-off to develop their human capital is a worthy normative goal, and if, moreover, it is normatively desirable to pursue this goal using a mechanism that will generate the largest gains at the lowest cost, the estate tax may have more to recommend it than existing economic analyses and assessments of political viability suggest. The estate tax has often been rhetorically associated with one sort of equality of opportunity—that which results from destroying the wealth of the more well-off. I suggest that the tax should be reconceptualized as one designed to enhance equality of opportunity through the raising and redistribution of tax revenue—that is, as a tax that enhances opportunities for the less well-off.

An initial question is whether the estate tax works better as a revenue-raising tax than would another available tax. The low levels of observed inter vivos giving among people who will be subject to

10. See Jolls, *supra* note 4, at 1654 (discussing purposes of behavioral law and economics and emphasizing what it has in common with law and economics). For background on the scope and purpose of behavioral law and economics, see generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS 13 (Cass R. Sunstein ed., 2000); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

the estate tax, and the likely explanations for this phenomenon, suggest that behavioral distortions may be surprisingly low, which would make the tax attractive from the standpoint of tax policy. Further, the answers to the public opposition puzzle suggest that the current political opposition to the tax (to the extent it represents true majoritarian preferences) is in substantial measure a product of identifiable cognitive phenomena, and that this opposition might be successfully addressed through changes in the design features of the tax undertaken in light of those phenomena—including the reconceptualization just described. By linking the estate tax with specific opportunity-enhancing expenditures, I argue, both the tax and the expenditures it finances could become more palatable. In other words, Part III makes the case for reconsidering the estate tax as a redistributive mechanism, and explains, again turning to cognitive features, why the estate tax might turn out to be not only politically feasible, but actually more attractive to the public than other alternatives.

In Part IV, I briefly sketch some specific design modifications that might enable the estate tax to work as a uniquely effective mechanism for redistributing wealth and enhancing equality of opportunity. I suggest two sets of modifications. The first set involves reframing the tax, and the second responds to concerns about values of thrift and family security. The purpose of this final part of the Article is to stimulate debate and further research into the potential that the estate tax might hold. The estate tax, I suggest, may hold enormous untapped potential. Relatively minor surgery could transform it into a robust mechanism for achieving greater equality of opportunity at a low cost. Eliminating it would not only cause an immediate drop in revenue (which must translate either into reduced benefits or higher taxes elsewhere), but would also eliminate what could be a uniquely effective redistributive tool.

I. THE CASE OF THE MISSING GIFTS

As currently formulated, the federal estate tax presents ready opportunities for avoiding taxes and reducing tax liability; for this reason, it is sometimes dubbed “a voluntary tax.”¹¹ The most well-

11. See U.S. JOINT ECON. COMM., THE ECONOMICS OF THE ESTATE TAX, 98-J-842-48, at 30 (Sup. Doc. Y4.EC7:EF8) (1998) (observing that “[v]irtually any individual who invests sufficient time, energy, and money in tax avoidance strategies is capable of escaping the estate tax altogether”), available at <http://www.house.gov/jec/fiscal/tx-grwth/estattax/estattax.pdf> (on file with the North Carolina Law Review). See generally GEORGE COOPER, A VOLUNTARY TAX?: NEW PERSPECTIVES ON SOPHISTICATED

known and simple of these opportunities is the annual tax-free inter vivos gift.¹² Under current law, people can give up to \$11,000 each year to as many individuals as they like without incurring any federal gift tax liability.¹³ For example, a wealthy couple with two adult married children and four grandchildren could make tax-free gifts to the younger generations totaling \$176,000 per year.¹⁴ A program of annual giving on this scale, if pursued over a period of years or decades, would be a very effective way of reducing or eliminating estate tax liability. Over a period of thirty years, for example, our wealthy couple could transfer \$5.28 million to the younger generations without incurring any federal estate or gift tax liability.¹⁵ Moreover, even *taxable* gifts receive more favorable tax treatment than bequests, providing further opportunities to reduce tax liability through inter vivos giving.¹⁶ Given the estate tax's relatively high

ESTATE TAX AVOIDANCE (1979) (discussing estate tax avoidance techniques). *But see* Richard Schmalbeck, *Avoiding Federal Wealth Transfer Taxes*, in RETHINKING, *supra* note 4, at 113, 156 (noting that avoidance "devices have limits" and that "the stories of complete avoidance of transfer taxes by the very wealthy are mostly hyperbolic"). Tax avoidance, which involves legal minimization of one's tax liability, must be distinguished from evasion, which involves illegal attempts to reduce the amount of taxes paid. *See* PAUL WEBLEY ET AL., *TAX EVASION: AN EXPERIMENTAL APPROACH* 2 (1991).

12. *See* Schmalbeck, *supra* note 11, at 120 ("By far the simplest strategy available to wealthy individuals who wish to make tax-free transfers to subsequent generations involves the committed, regular use of the annual exclusion.").

13. Through 2001, the exclusion amount was \$10,000. I.R.C. § 2503(b)(1) (Lexis 2001). This exclusion amount increased to \$11,000 in 2002. *See id.* § 2503(b)(2) (providing for inflation adjustment); Rev. Proc. 2001-59, 2001-52 I.R.B. 623, 627 (same).

14. *See* Schmalbeck, *supra* note 11, at 120. Spouse *H* could make \$11,000 in annual gifts to each of the following eight people: son, daughter-in-law, daughter, son-in-law, grandchild 1, grandchild 2, grandchild 3, and grandchild 4. Spouse *W* could make the same eight gifts to the same eight individuals. Alternatively, one spouse could make all the gifts (\$22,000 to each recipient) and the spouses could by mutual consent elect to have these gifts treated as if half were made by each spouse. I.R.C. § 2513. The gifts do not have to go to family members in order to be tax-free; this is just a likely giving pattern.

15. The extent to which such inter vivos gifts can reduce estate taxes depends on a number of factors, including the number of years over which such giving occurs (which in turn depends on how early the giving begins and how long the donors live), as well as the number of beneficiaries to whom the gifts will be given and the rate at which the donor household is accumulating or decumulating wealth. *See* James M. Poterba, *The Estate Tax and After-Tax Investment Return*, in DOES ATLAS SHRUG? 329, 341-42 (Joel B. Slemrod ed., 2000).

16. Only the actual gift amounts received by donees are included in the tax base, whereas the estate tax base includes not only the amount the heirs actually receive, but also the amounts deducted in estate tax. *See* Theodore S. Sims, *Timing Under a Unified Wealth Transfer Tax*, 51 U. CHI. L. REV. 34, 39-41 (1984) (explaining this difference in estate and gift tax treatment). This favorable treatment of gifts is offset somewhat by the "stepped-up" basis that heirs receive in inherited property at death, although on balance the tax treatment of gifts appears to still be favorable. *See, e.g.*, Poterba, *supra* note 3, at

marginal tax rates and the amount of money that is often at stake, we might expect substantial amounts of inter vivos giving to be undertaken to reduce estate tax liability.

In fact, many wealthy people do not take advantage of the tax savings available through inter vivos giving. For example, James Poterba finds that “[n]early two thirds of the elderly households for whom the estate tax may loom as a potential burden are *not* making transfers that would substantially reduce their estate taxes, and increase the net-of-tax bequest received by their heirs.”¹⁷ Particularly surprising is the underutilization of the tax-free annual exclusion. According to one recent study, taxpayers could reduce their estate tax liability by as much as sixty-five percent by taking full advantage of the annual exclusion to make inter vivos gifts within the family.¹⁸ We might initially think that these households are eschewing the simplistic device of the inter vivos gift in favor of more elaborate and effective estate tax avoidance mechanisms, but the continued collection of substantial revenues through the estate tax suggests that this is not a complete explanation.¹⁹ For at least some significant subset of the wealthy, the opportunity to reduce tax liability by giving wealth away during life is not sufficiently attractive to induce action. Or, to put it another way, by failing to transfer wealth inter vivos at reduced tax prices, these families are paying a premium to enjoy the good of lifetime wealth retention.

The fact that people will spend money to buy (or forgo savings to keep) something they value should not baffle economists or anyone else. Yet this particular exhibited preference—for lifetime wealth retention—is nevertheless surprising to some economists because the purely economic benefits associated with wealth (liquidity and the ability to effectively deal with health risks and uncertainties about length of life) could, in theory, be achieved in other ways without

259–61 (analyzing the possibility that the “step-up” at death in basis for income tax purposes explains part of the reluctance to give inter vivos).

17. Poterba, *supra* note 3, at 261.

18. Kathleen McGarry, *The Cost of Equality: Unequal Bequests and Tax Avoidance*, 79 J. PUB. ECON. 179, 200 (2001); *see also* Poterba, *supra* note 3, at 238 (describing “the estate tax savings available to high net-worth households that use simple gift-giving strategies”).

19. *See* William G. Gale, *Commentary on Chapter 10, in DOES ATLAS SHRUG?*, *supra* note 15, at 350, 351 (“One possibility is that people are engaged in other, preferred forms of estate tax avoidance. Although there is a substantial amount of estate tax avoidance activity, it nevertheless appears that people could avoid a large amount of estate tax liabilities but do not.”); Schmalbeck, *supra* note 11, at 156 (noting that the limitations of avoidance strategies are demonstrated by the fact that substantial revenues are, in fact, collected).

stockpiling large quantities of wealth. For this reason, it is worth exploring *why* people exhibit this willingness to pay a premium for lifetime wealth retention.

In the analysis that follows, I begin with the explanations that emerge from an appropriately rigorous application of the traditional rational actor model, and then consider how behavioral insights might augment those explanations. Despite this organizational approach, nothing of importance turns on whether one agrees with my categorization of particular explanations as “rational” or “behavioral,” nor does it matter how much of observed taxpayer behavior one believes is attributable to each category.²⁰ My goal is not to make a case for the dominance of behavioral factors over purely rational ones, or even to convince the reader that the behavioral factors are necessary to explain observed behavior. Rather, my objective is to provide a fuller set of explanations for an observed phenomenon that makes better use of the available knowledge about how human beings might react to a given choice situation. Rational and behavioral explanations (in whatever combinations the reader finds convincing) together establish that people have comprehensible and predictable reasons for strongly preferring lifetime wealth retention, and that these preferences are durable and reliable enough to inform tax policy.

A. *Rational Explanations for Low Levels of Inter Vivos Giving*

The existing literature has explored a variety of possible explanations for the low observed levels of inter vivos giving.²¹ These can be divided into four categories: explanations based on the accidental bequest hypothesis; explanations based on preferences for lifetime wealth retention; explanations relating to uncertainty and bother; and explanations relating to donee circumstances. I will take these up in turn.

20. I will later add a caveat to this. See *infra* text accompanying note 196 (observing that there may be additional normative issues implicated when tax policy exploits cognitive errors to increase revenue).

21. See, e.g., McGarry, *supra* note 18, at 202 (analyzing the possibility that a desire to give equal amounts to one's children, regardless of each child's family size, reduces the ability of wealthy parents to reduce their estate tax liability optimally); Poterba, *supra* note 3, at 252–61 (discussing a number of other possible explanations, including the “step-up” in valuation for income tax purposes of bequests but not gifts, the donor's concern that beneficiaries will not use the inter vivos gifts well, the possibility the donor will need the money, and the possibility that the estate tax may be repealed); Schmalbeck, *supra* note 11, at 121–22 (discussing explanations for failure to take advantage of annual exclusions).

1. Accidental Bequests

One possibility is that people do not intend to leave bequests at all, and that any bequests they do happen to leave are merely the accidental by-products of a lifetime of risk aversion and saving.²² Even people who make a conscious effort to spend all their wealth might guess wrong about their life expectancy and consumption patterns and end up dying with enough wealth to trigger estate tax liability. To the extent bequests are indeed accidental, it would not be at all puzzling that people leaving such bequests would take no actions designed to minimize the taxation of their estates. If individuals have no thought of leaving bequests and no thought of avoiding estate tax liability, the estate tax will understandably have no impact on their behavior.²³ Indeed, if some wealthy persons were believed to fall into this category, then we might cease puzzling over their behavior and simply take advantage of it.²⁴

However, this so-called accidental bequest hypothesis has been questioned. If people are concerned only with having sufficient funds during their lifetimes, why do they not simply purchase annuities?²⁵ Imperfections in the annuities market provide a partial answer, although it appears unlikely that people would flock to annuities were these imperfections removed.²⁶ Further evidence suggesting that

22. See James B. Davies, *Uncertain Lifetime, Consumption, and Dissaving in Retirement*, 89 J. POL. ECON. 561, 562 (1981); see also Barbara H. Fried, *Who Gets Utility from Bequests? The Distributive and Welfare Implications for a Consumption Tax*, 51 STAN. L. REV. 641, 677 (1999) (noting that "a default theory of savings would posit that we save only because we haven't gotten around to spending; and whatever we still haven't gotten around to spending by the time of our death we leave to our heirs by default, rather than letting it escheat to the state"). On the failure of the elderly to dissave as fast as a life cycle model would predict, see RICHARD H. THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 118 (1992).

23. See, e.g., Douglas Holtz-Eakin, *The Uneasy Empirical Case for Abolishing the Estate Tax*, 51 TAX L. REV. 495, 508 (1996) (noting that if bequests are "accidental," the "estate tax has no behavioral impacts").

24. See Kaplow, *supra* note 4, at 180 (discussing "the familiar point that, if bequests are purely accidental, they can be confiscated completely, with no effect on donors' behavior or utility"). Of course, potential donees would suffer a utility loss. See *id.*

25. Richard Posner addresses this point:

The explanation that they do not know when they are going to die and so must retain wealth in case they live longer than they expect is somewhat superficial; by using one's wealth to purchase annuities (reverse life insurance, which pays the annuitant a fixed or variable sum until he dies, with no accumulation) one can be assured of not leaving a significant estate at death.

RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 552 (5th ed. 1998); see B. Douglas Bernheim, *How Strong Are Bequest Motives? Evidence Based on Estimates of the Demand for Life Insurance and Annuities*, 99 J. POL. ECON. 899, 924 (1991).

26. See POSNER, *supra* note 25, at 552 (discussing inadequacies of annuities); Bernheim, *supra* note 25, at 924 (arguing that "many people would stop short of

bequests are not accidental is found in empirical work showing that people react to a decrease in the “price” of bequests (that is, a change in estate tax laws that reduces tax liability associated with leaving bequests) by decreasing inter vivos giving.²⁷ We might predict that the converse would be true as well (that is, an increase in the price of bequests would result in less bequests and more inter vivos giving).²⁸ If, as it appears, people are paying some attention to the cost of leaving behind bequests, this means that the bequests cannot be entirely accidental.

2. Preferences for Lifetime Wealth Retention

A more convincing explanation for lifetime wealth retention is that, notwithstanding the existence of a bequest motive for many members of the population, people strongly prefer holding onto their wealth during life.²⁹ The empirical work described above provides some support for that thesis—people already retain wealth far beyond what would be optimal if their only goal were transferring wealth to recipients at the lowest cost, and they do so to an even greater extent whenever the tax price of bequests is lowered. If people attach substantial positive value to maintaining control over their assets during their lifetimes, as they apparently do, it is not quite accurate to speak of the estate tax as simply raising the cost of

converting all their assets into annuities, even in the presence of perfect insurance markets”).

27. B. DOUGLAS BERNHEIM ET AL., DO ESTATE AND GIFT TAXES AFFECT THE TIMING OF PRIVATE TRANSFERS? 3 (Nat'l Bureau of Econ. Research, Working Paper No. 8333, 2001) (“We find that households experiencing larger declines in the expected tax disadvantages of bequests substantially reduced gift giving relative to households experiencing small declines in the tax disadvantages of bequests. Our estimates imply that the timing of transfers was highly responsive to applicable gift and estate tax rates.”). Indeed, there is some evidence that death timing can be responsive to some degree to changes in the estate tax (whether due to decision-making by the decedent or by those who are making decisions for the decedent, often the heirs). WOJCIECH KOPCZUK & JOEL SLEMROD, DYING TO SAVE TAXES: EVIDENCE FROM ESTATE TAX RETURNS ON THE DEATH ELASTICITY 16 (Nat'l Bureau of Econ. Research, Working Paper No. 8158, 2001).

28. It is not obvious that the responses would be symmetrical in both directions, however. There could be cognitive or other factors that lead to a “stickiness” in giving patterns that might retard changes in one direction or the other. Cf. Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 54 n.133 (1994) (discussing the phenomenon of wage “stickiness”: “[a]lthough wages go up in times of economic growth, they fall much more slowly than prices in times of recession” (citation omitted)).

29. See, e.g., Schmalbeck, *supra* note 11, at 121–22 (“[S]ome observers have forcefully argued that the real barrier to full use of the annual exclusion is the strong preference of potential donors for the retention of economic power.”).

bequests relative to inter vivos gifts. The estate tax raises the price of a bundle that includes not only the ability to leave behind bequests, but also the ability to control one's property throughout one's entire life.³⁰

The benefits associated with this "bequest-control bundle" are substantial. As B. Douglas Bernheim and his coauthors explain, "[u]ncertainty concerning future health status, long-term care needs, longevity, and future rates of return enhance the option value of retaining resources until death, and thereby inhibit an aggressive program of tax-favored giving."³¹ In addition, simply having money may be valuable in itself, whether or not one uses it, because of the range of choice, power, and privilege its possession bestows on the possessor.³² Even when the wealth is not really needed, the leverage it affords (over potential beneficiaries, or over the rest of the world) is independently valuable.³³ As the wealth is transferred, this power and leverage is diminished accordingly. In addition, the wealthy may actually view themselves as purchasing a wholly different product through their bequest—a chance to achieve a limited measure of immortality—that cannot be achieved through inter vivos transfers at all.³⁴

3. Uncertainty and Bother

Uncertainty about death reduces the success with which people can engage in estate tax liability reduction through inter vivos giving, even if they were quite committed to doing so.³⁵ To optimize on taxes

30. Barbara Fried discusses this tendency:

[T]he failure of the altruistic wealthy to transfer more inter vivos, notwithstanding the tax and other advantages of early transfers, is not surprising in light of many people's desire to retain autonomy and control over their own resources, their ambivalence about making their children independent prior to their own death, and, in some cases, their paternalistic concern that children will lack the wisdom to use their wealth well when young.

Fried, *supra* note 22, at 654.

31. BERNHEIM ET AL., *supra* note 27, at 2; see also Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 103–04 (1990) (discussing clients' "almost maniacal" desire to retain control over wealth arising from the recognition that "they must face the unknown before they can face the beyond").

32. See GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* 212–18 (David Frisby ed., Tom Bottomore & David Frisby trans., Routledge & Kegan Paul 2d ed. 1978) (2d ed. 1907); Hirsch, *supra* note 4, at 24–26 (discussing the psychological utility people may gain from saving and amassing wealth).

33. See SHOUP, *supra* note 3, at 22 (discussing donors' "desire to maintain some degree of control over the actions of others").

34. Hochman & Lindsay, *supra* note 3, at 221.

35. See SHOUP, *supra* note 3, at 21 (listing "uncertainty" as the "most important" reason for low levels of lifetime giving).

without risking running short of money during life, people without truly vast fortunes would want to give the least amount that would be consistent with their goals in reducing estate tax liability. To take the simplest case, such a person might try to count backward from her actuarially-determined year of death to begin making inter vivos gifts to reduce estate tax liability. Of all people adopting this strategy, some would reduce their estates below the threshold of estate tax liability before their deaths, while others would die before managing to optimally reduce estate tax liability. This calculation may be further confounded by another source of uncertainty—uncertainty about the growth of the class of donees. People may expect that their ability to quickly “spend down” their estates through tax-free gifts will grow over time, as additional grandchildren and great-grandchildren are born.³⁶ Yet to the extent this does not end up happening, they may find themselves unable to achieve their estate tax avoidance goals.

Uncertainty about estate tax laws might also dampen estate tax reduction strategies. Giving a gift inter vivos or otherwise structuring resources to avoid estate tax liability often means taking irreversible action, while the policy choice to tax wealth at death is quite reversible. In our current political climate, it might not make sense to undertake any irreversible steps to transfer wealth inter vivos if one would otherwise prefer to hold onto the wealth. A rational donor would compare the expected cost of bequeathing the wealth (which depends, in turn, on the expected tax rate and one’s expected holdings, as adjusted to account for the chance that the estate tax will no longer be in force at one’s death) with the expected cost of giving it away now. However, the latest round of estate tax reforms, including the planned phase-out of the estate tax, occurred after (and hence could not have been reflected in) the decisions captured in the existing studies.³⁷ While these latest reforms may help explain why we might expect inter vivos transfers to drop in the future, the phenomenon of lifetime wealth retention, as documented to date, probably has other roots.

Another explanation for undergiving has to do with the costs of making the calculations necessary to minimize transfer tax liability—including not only the costs measured in dollars and hours, but also the psychological distress and unease that may accompany having to

36. I thank Mark Gergen for this point.

37. *See supra* notes 17–18 and accompanying text (citing studies conducted prior to passage of EGTRRA). Nevertheless, the possibility that the estate tax might be repealed could have provided a rational basis for failing to transfer wealth inter vivos, even before the reform legislation established a specific timetable for phasing out the tax.

think about death and taxes.³⁸ Harold Hochman and Cotton Lindsay have suggested that one explanation for low levels of inter vivos wealth transfers is that many of the wealthy simply “refuse to be bothered” with the details of such taxes, preferring instead to consume what amounts to a luxury good—the choice to “lead a quiet life, [and] to ignore the details of the tax structure rather than try to circumvent them”³⁹

4. Donee Characteristics

An additional cluster of reasons for lifetime wealth retention relates to donee characteristics. Donors may fear that their children will not use transferred wealth appropriately, and may delay giving for that reason.⁴⁰ Similarly, they may fear that gifts, especially those received too early in life, will erode their children’s work ethics.⁴¹ Finally, donors may fear that certain gift-giving patterns might sour family relationships. For example, Kathleen McGarry has observed a strong tendency for parents to give equal gifts to their children.⁴² This principle of giving equally to each child would be violated if a donor had children with different family sizes and attempted to maximize annual tax-free transfers to the younger generation.⁴³ Because donors are presumably concerned with the well-being of their donees, and not simply with transferring money to them at the lowest price, these negative side-effects of inter vivos gifts must be taken into account.

38. Hochman & Lindsay, *supra* note 3, at 221.

39. *Id.*

40. *See, e.g.,* BERNHEIM ET AL., *supra* note 27, at 2 (“Donors may eschew early transfers because they are concerned that donees will waste the money or that the transferred resources will not benefit from the donor’s superior investment skills.”); Poterba, *supra* note 3, at 262 (discussing the explanation that “wealthy older households are not convinced that their children will make appropriate use of funds that they might receive as a gift”); David Cay Johnston, *Talk of Lost Farms Reflects Muddle of Estate Tax Debate*, N.Y. TIMES, April 8, 2001, at 1 (discussing estate tax opponent Frank A. Blethen’s objection to the tax, which he felt forced him “to give half the future growth of his fortune to his two sons when they were not yet kindergartners even though he had no way of telling whether the boys would turn out to be industrious, as they did, or scalawags”).

41. *E.g.,* Schmalbeck, *supra* note 11, at 121 (observing that one explanation for failure to take advantage of inter vivos giving as a tax reduction strategy involves “the possible damage done to young donees”); *see* SHOUP, *supra* note 3, at 23 (speculating that the donor “may not want to spoil his children or grandchildren”).

42. McGarry, *supra* note 18, at 202. *But cf. infra* note 168 (discussing the possibility that bequests may be used in a compensatory fashion).

43. *See* McGarry, *supra* note 18, at 183–84. For example, a wealthy couple might have two children, one of whom is married and has six children, and the other of whom is single and childless. The couple could give the family of the first child \$176,000 tax free each year, while they could only give the second child \$22,000 tax free each year. *See supra* notes 13–14 and accompanying text (discussing the annual exclusion).

Donors could structure their gifts and bequests to overcome most of these problems. For example, donors could address uncertainties about donees by making gifts through a trust arrangement that limited the donee's access to the principal,⁴⁴ or donors could use the annual exclusions to fund an insurance trust that would not pay out until death.⁴⁵ The desire to give equal gifts to each child could also be accommodated by making adjustments to bequests that would counteract any short-term inequities. Yet these efforts could have costs of their own. Aside from the additional transaction costs that may be involved as estate planning grows more complex, these planning efforts could mean bringing the family finances out into the open and raising questions about the ultimate distribution among siblings and the fitness of beneficiaries to make financial decisions. Such dynamics might well create or exacerbate family tensions.

B. Behavioral Explanations for Low Levels of Inter Vivos Giving

Although "rational" explanations for low levels of inter vivos giving are quite cogent, they arguably fail to fully account for taxpayer behavior.⁴⁶ Adding the insights of behavioral law and economics can help to fill in any remaining gaps. The relevance of applying cognitive theory to taxpayer behavior has been noted.⁴⁷ In addition, behavioral features have been used to explain why lifetime savings and spending decisions often fail to match up with the life-cycle model predicted by economics.⁴⁸ It seems plausible, then, that cognitive features might also help explain the decisions people make (or fail to make) about accumulated wealth when confronted with the estate tax.

1. Optimism, Procrastination, and Dread

Some intuitively obvious features of human psychology first deserve attention here. We know that people, with the exception of

44. See Schmalbeck, *supra* note 11, at 122 (discussing trust arrangements).

45. *Id.* at 130–31 (discussing insurance trusts).

46. Louis Kaplow makes the following observation about people's failure to take advantage of the tax savings available through inter vivos gift opportunities: "[A]lthough some of this behavior can be explained on rational grounds, the evidence seems to suggest that a good deal of it cannot (or at least not in a straightforward manner that would be consistent with the standard models of transfer behavior)." Kaplow, *supra* note 4, at 201.

47. See McCaffery, *supra* note 2, at 1944–45.

48. See Hersh M. Shefrin & Richard H. Thaler, *The Behavioral Life-Cycle Hypothesis*, in *QUASI RATIONAL ECONOMICS* 91, 92 (Richard H. Thaler ed., 1991) (adding "self control," "mental accounting," and "framing" to the standard life-cycle account).

the clinically depressed, routinely maintain unrealistically optimistic outlooks on a broad range of questions.⁴⁹ Not only are people likely to overestimate the occurrence of positive outcomes, but they also systematically underestimate the possibility that they will fall victim to all sorts of ills, such as diseases and accidents.⁵⁰ To the extent people count backwards from their anticipated deaths to begin estate tax liability reduction activities (such as taking advantage of annual tax-free gifts), an overly optimistic outlook about the date of death could delay these reduction activities. Empirical work suggests that people's subjective life expectancies do exceed their actual life expectancies somewhat, yet the amount of overestimation observed ranged from roughly one to two and a half years, on average.⁵¹ While this amount of overestimation seems insufficient to account for much of the underutilization of tax-reducing gift-giving, it is possible that individuals maintain an even higher degree of optimism with respect to the question of whether they will die in the near-term (say, within the next three to five years).⁵² Thus, an optimistic conviction that

49. See, e.g., SHELLEY E. TAYLOR, *POSITIVE ILLUSIONS: CREATIVE SELF-DECEPTION AND THE HEALTHY MIND* 32 (1989) ("We seem to be optimistic by nature, some of us more than others, but most more than reality can support."); *id.* at 212–13 ("Clearly, the depressed person is lacking in the positive illusions that most people hold. . . . [T]he mildly depressed appear to have more accurate views of themselves, the world, and the future than do normal people.").

50. See Jolls, *supra* note 4, at 1659–61; Neil D. Weinstein, *Unrealistic Optimism about Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 810 tbl.1 (1980).

51. See Daniel Hamermesh, *Expectations, Life Expectancy, and Economic Behavior*, 100 Q. J. ECON. 389, 404–06 (1985) (presenting results suggesting that people subjectively expect to live somewhat longer than actuarial tables would indicate). Hamermesh's study involved two samples, one from a group of white male economists, and another from a telephone directory in a mid-sized midwestern Standard Metropolitan Statistical Area (SMSA) (from which white male responses were used); each sample was divided into age subgroups. The largest variance was found among the 20–39 age group from the SMSA sample (the mean subjective life expectancy was 75.81, and the actuarial life expectancy was 73.24); the smallest variance was found among the 40–65 age group from the economist sample (the mean subjective life expectancy was 76.41, and the actuarial life expectancy was 75.47). *Id.* at 394 tbl.II. Hamermesh posits that people may be "updating" the actuarial tables by incorporating new information about longevity or extrapolating from past longevity increases, *id.* at 393, but concludes that people "tend to be more optimistic about their longevity than extrapolation of the past forty years of improvements in the U.S. life tables suggests they should be." *Id.* at 400.

52. Indeed, the objective chances of dying in the very near term are relatively small for most people. For example, a seventy-year-old who consulted a recent Life Table for the United States Population would learn that only about 2.5% of her age cohort will expire in the coming year. Robert N. Anderson, *United States Life Tables, 1998*, NAT'L VITAL STAT. REP., Feb. 7, 2001, at 7 tbl.1 ("Life Table for the Total Population: United States, 1998"), at http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_18.pdf (on file with the North Carolina Law Review). Upon attaining the age of seventy-one, that individual would learn that the odds of surviving the following year would still exceed 97%. *Id.*

there is always plenty of time remaining in which to make any necessary inter vivos transfers of wealth may help explain low levels of inter vivos giving.

The discounting of future costs⁵³ could interact with optimism to further entrench procrastination in carrying out estate tax reduction activities. If optimism operated to push back the subjective date of death, this might cause people to discount their eventual estate tax burden excessively.⁵⁴ It is also possible that people discount excessively or in anomalous ways, independent of their optimism.⁵⁵ For example, there is some support for the notion that people discount hyperbolically, such that they “have a strong preference for the present compared to all future dates, but are much less concerned with the relative importance of future dates.”⁵⁶ In other words, the fact that the estate tax burden is delayed may matter more than how much it is delayed (or how much it is perceived as being delayed). For someone discounting hyperbolically, that the burden is not occurring in the present time is the single most salient fact in determining how heavily to discount it. This might also explain why a person might, in Year 1, plan to begin undertaking estate tax reduction activities in Year 2, only to find upon the arrival of Year 2 that an even later date, Year 3, now appears preferable as a beginning date for inter vivos gift-giving.⁵⁷

These odds may be deemed so small as to be unworthy of sustained attention and insufficient to trigger immediate tax avoidance efforts. Only when one reaches age eighty-six do the odds of dying in the coming year exceed 10%. *Id.* Of course, while death in any given year is relatively unlikely (given that one has survived the previous year), death in *some* year is a certainty.

53. Discounting is something in which our purely rational actor would accurately engage. See, e.g., THALER, *supra* note 22, at 93 (according to economic theory, “people should discount money streams at the (after-tax) market rate of interest”).

54. The extent to which life expectancies actually influence discount rates in the context of a tax triggered by death is empirically unknown. It has been hypothesized that people do factor in life expectancies in balancing present consumption against future consumption. Irving Fisher counted “expectation of life” as one of several factors influencing time preferences, and hypothesized that people whose lives were constantly at risk and who were without dependents, such as unmarried soldiers and sailors, would exhibit high degrees of “impatience.” IRVING FISHER, *THE THEORY OF INTEREST* 81, 87 (1930).

55. See Kaplow, *supra* note 4, at 202 (discussing the possibility that “individuals may behave myopically, greatly discounting the future”); see also THALER, *supra* note 22, at 92–106 (discussing anomalies in discounting).

56. JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 25 (2000).

57. See *id.* at 29 (describing a parallel scenario, in which a person first chooses in Year 1 to consume half of a lump sum of money and to spread the balance evenly over the rest of his lifetime, but then finds in Year 2 that he now prefers to spend half of the remaining balance and spread the remainder over the rest of his lifetime).

Significantly, the taxpayer never incurs an immediate “tax price” in choosing not to make a gift. Indeed, the true “tax price” associated with a given deferral is not at all clear; it will depend on how much longer the individual lives, as well as on the timing and quantity of future gifts. Each successive choice to wait a little while longer to begin a program of inter vivos transfers may have minimal tax repercussions on its own, although in the aggregate, these choices come with a heavy tax price attached.⁵⁸ Because the price tag is never directly confronted, and because there is no particular moment at which a failure to give a particular gift decisively imposes a future cost, deferral of giving appears more attractive.⁵⁹

An additional reason that people may delay beginning estate tax liability reduction activities is that such activities require contemplating one’s own death and preparing for it in a particularly concrete way that might run counter to one’s interests were one to continue living. While many people prepare wills and buy life insurance, both activities that require some cognizance of death,⁶⁰ these activities may be perceived as fully compatible with continued life for an indefinite period of time. Dispersing one’s assets in preparation for death is likely perceived differently. Maintaining control over assets is consistent with continuing to exercise power and authority in this life; dispersing assets suggests abdication of that power and authority and capitulation to death.⁶¹

People in general, and perhaps well-off people in particular, experience relatively low levels of “death anxiety” as measured by

58. See SHOUP, *supra* note 3, at 24 (noting that a donor who fails to give inter vivos out of a desire to preserve capital “probably fails to consider adequately the ‘accruing’ liabilities against his capital in the form of the approaching death tax”).

59. In contrast, a periodic wealth tax would squarely confront the taxpayer with the tax price of continuing to hold wealth.

60. Montaigne suggested that people were likely to put off making wills as a result of their dread of death: “No wonder that [ordinary people] often get caught in a trap. You can frighten them by simply mentioning death; and since it is mentioned in wills, never expect them to draw one up before the doctor has pronounced the death-sentence.” MICHELE DE MONTAIGNE, *THE COMPLETE ESSAYS* 93 (M.A. Screech trans., Penguin 1991), *quoted in* ELSTER, *supra* note 56, at 18 n.48. *But see* Thomas L. Shaffer, *The Lawyer as Will Maker*, 5 MARRIAGE & FAM. REV. 87, 91 (1982) (“What seems to have happened more recently is that death and will making have been separated. Each successive study of probate records shows that the time between the making of the typical will and the death of the testator grows longer.” (citation omitted)).

61. See WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 2, lines 36–40 (Stephen Orgel ed., Penguin 1999) (1606) (“Know that we have divided/ in three our kingdom; and ‘tis our fast intent/ To shake all cares and business from our age,/ Conferring them on younger strengths, while we/ Unburthen’d crawl toward death.”); Susan Snyder, *King Lear and the Psychology of Dying*, 33 SHAKESPEARE Q. 449, 455 (1982) (“For all the King’s vigor and authority, he is clearly entering a terminal phase.”).

standard psychological instruments.⁶² Nor do death anxiety levels appear to go up in old age.⁶³ While it is difficult to know what mix of cognitive strategies explains these low levels of death anxiety, one possibility is that denial and evasion feature centrally.⁶⁴ If so, people may be reluctant to engage in the sort of forthright confrontation with mortality that a plan of systematically transferring assets entails.⁶⁵ In addition, people typically desire to arrange matters so that there is improvement in their lives over time.⁶⁶ A dispersal of one's wealth, which carries with it the implicit message that things are winding down, seems to run counter to that desire.⁶⁷

62. See ROBERT KASTENBAUM, *THE PSYCHOLOGY OF DEATH* 113 (3d ed. 2000) (describing the "Death Anxiety Scale," a frequently used measure of death anxiety). Kastenbaum explains that if we view the scale scores as accurate reflections of actual death anxiety "we probably should conclude that most normal adults experience only low to moderate levels." *Id.* at 117. Moreover, "[t]here are some weak indications that people in favorable socioeconomic circumstances report relatively lower levels of death anxiety." *Id.* at 130.

63. Based on available evidence, "[v]irtually no support can be found for the proposition that elderly adults live with an elevated sense of fear, anxiety, or distress centering on the prospect of their mortality." *Id.* at 123. However, as Kastenbaum notes, the studies reporting these findings are "cross-sectional" rather than longitudinal, meaning that the surveyors are tapping into the responses of different people living in the same time period rather than comparing the responses of the same people as they age. *Id.* This methodological feature could call the results into question if we believe that different generations of individuals experience different levels of death anxiety.

64. See *id.* at 128 (discussing study responses of elderly respondents). Kastenbaum observes that "[i]gnoring, evading, and escaping death-related topics were more common strategies than out-and-out anxiety. Is it possible, then, that what might pass as serenity should be understood instead as denial? . . . An elderly individual may not be ready to make death his or her number one concern." *Id.*

65. See, e.g., Kaplow, *supra* note 4, at 201 ("[I]t is often suggested that many donors are uneasy about contemplating their own death and that this unease may affect their transfer behavior."); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 863 (2001) (noting that "death, which is the triggering event for the estate tax, is something that most people spend the majority of their lives denying" (citation omitted)); cf. Fried, *supra* note 22, at 654 ("One also suspects that many people feel a strong aversion to annuitizing their wealth, arising in part from an unwillingness to face the prospect of old age and death 'rationally.'").

66. See Jon Elster & George Loewenstein, *Utility from Memory and Anticipation*, in *CHOICE OVER TIME* 213, 231-33 (George Loewenstein & Jon Elster eds., 1992) (discussing the existence of "a strong incentive to build improvement over time into one's plans"); *id.* at 233 (presenting an example that shows how this desire might be manifested in "[m]isers and children who store away their Halloween candy until it goes stale"); see also THALER, *supra* note 22, at 101-02 (discussing the "preference for a rising consumption profile" as exhibited in experiments where subjects chose to have a less-preferred dinner at an earlier date than a more-preferred dinner (citing George Loewenstein & Drazen Prelec, *Anomalies in Intertemporal Choice: Evidence and Interpretation* (Russell Sage Found., working paper, 1989))).

67. See SHOUP, *supra* note 3, at 23 (observing that "[a]nyone in good health and spirits has a normal resistance to acting as if he were to die soon").

2. Disjunction Effects

We know from observation and intuition that people are often unable to make decisions about the future while the outcome of some other pending event is still unknown. Surprisingly, there is empirical work suggesting that this is true even in cases where the decision-maker would take exactly the same course of action regardless of the outcome of that pending event.⁶⁸ Even when decision-makers could determine an unambiguously desirable course of action by analyzing the various branches of the decision tree before them, many of them do not do so.⁶⁹ Amos Tversky and Eldar Shafir examined this phenomenon, which they termed "the disjunction effect," in a study that posed the choice of whether to purchase a vacation to Hawaii after an important test.⁷⁰ They found that most people would pay to delay making a decision about the trip until they could learn whether the test had been passed or failed, even though most people would make exactly the same decision about the trip upon learning they had passed as they would upon learning they had failed.⁷¹ Tversky and Shafir explain these results as follows: Because the reasons for taking the vacation will be different in the "pass" condition than in the "fail" condition—in the former, it is a celebration, while in the latter it is a consolation—uncertainty about the test's outcome clouds people's decision-making.⁷² Lacking a clear reason to take the vacation, people were willing to pay to delay the choice until after the outcome

68. See Amos Tversky & Eldar Shafir, *The Disjunction Effect in Choice Under Uncertainty*, 3 PSYCHOL. SCI. 305 *passim* (1992) [hereinafter Tversky & Shafir, *The Disjunction Effect*] (describing their empirical work); see also Eldar Shafir & Amos Tversky, *Thinking Through Uncertainty: Nonconsequential Reasoning and Choice*, 24 COGNITIVE PSYCHOL. 449 (1992) [hereinafter Shafir & Tversky, *Thinking Through Uncertainty*] (further discussing the results of the study).

69. Shafir & Tversky, *Thinking Through Uncertainty*, *supra* note 68, at 469 (explaining that people may not wish to make the assumptions involved in considering each branch of the decision tree, may find it hard to focus on various branches simultaneously, or "may lack the motivation to traverse the tree simply because they presume, as is often the case, that the problem will not be resolved by separately evaluating the branches").

70. Tversky & Shafir, *The Disjunction Effect*, *supra* note 68, at 305–06.

71. Different groups of subjects were used to study responses to the disjunctive choice (where the test outcome was unknown) than were used to study the choices made under the "pass" and "fail" conditions. Presumably this method was used to keep the purpose of the study from becoming transparent to the subjects. Because the same group of subjects was used for both the "pass" and "fail" conditions, it was possible to see how many would choose to purchase the vacation in either event (about two-thirds of the subjects made the same choice whether or not to purchase the vacation, regardless of the test's outcome). Among the separate group of subjects given the disjunctive choice, sixty percent said they would be willing to pay a fee to wait on the test outcome. See *id.*

72. *Id.* at 306.

of the test was revealed, even if this additional increment of information would have no actual impact on their decision.⁷³

Tversky and Shafir found the same effect in a second study where subjects were asked to imagine they had just taken a gamble with fifty-fifty odds, in which they had either won \$200 or lost \$100.⁷⁴ The subjects were then asked to decide whether to take a second (imaginary) gamble having precisely the same odds and payoffs as the first. Where the outcome of the first gamble was not revealed, most people rejected the second gamble, including about two-thirds of those who accepted the second gamble *both* upon learning they had won the first gamble *and* upon learning they had lost the first gamble.⁷⁵ Again, Tversky and Shafir's hypothesis relates to the subjects' reasons for taking the second gamble. In the event the person is "up" \$200, the second gamble is a "no lose" proposition when considered together with the first gamble. No matter the outcome of the second gamble, the person will not walk away with less money than she had when she began gambling. Given the positive expected value of the gamble, many people will take the bet. Where the person is "down" \$100, the second gamble provides a way of recouping losses, and is attractive for that reason. Because the reasons for gambling in the two different situations vary, people may reject the second gamble in the "uncertainty" situation because they lack a good reason to take it.⁷⁶

How might this relate to estate tax liability reduction? The Tversky and Shafir study underscores the fact that people often need to know their reasons for a particular decision before they can carry it out; simply knowing (or being able to figure out through introspection) that it is the "right" decision under all imaginable circumstances is not enough.⁷⁷ It is easy to imagine how this might

73. *Id.* In the study, the individual could defer making a decision about the vacation package until the results of the test were known by paying a five dollar nonrefundable fee. *Id.* at 305. That the cost of deferring the decision was small relative to the cost of the vacation package may have significantly contributed to the results, but rational actors should be unwilling to pay anything to defer a decision pending the receipt of additional information, if the additional information will have no impact on the decision.

74. *Id.* at 306.

75. *Id.* at 306-07. In this study, the same group of subjects responded to the disjunctive and the "win" and "lose" versions so that it was possible to identify the number of individuals who were actually violating the "sure-thing" principle. To keep the phenomenon under investigation from becoming transparent to the subjects, the various versions were administered one week apart from each other and were embedded within sets of other similar problems. *See id.* at 306.

76. *Id.* at 307.

77. *Id.* at 305-07.

play out in the inter vivos giving context. For example, a wealthy couple might want their children to enjoy their wealth, whether the children grow up to be successful professionals or starving artists, whether the children enjoy good luck or bad luck in various areas, whether the children marry, divorce, or stay single, and whether the children have children of their own or not. Yet the wealthy couple's reasons for wanting their children to have their wealth might vary depending on these factors—perhaps the gift would be celebratory in one case and compensatory in another. Unable to formulate reasons for undertaking a pattern of giving, the parents may delay giving.

To be sure, if the parents could focus on one overarching "reason" for giving under any and all circumstances—that of minimizing estate tax liability—the changing events on the horizon would not matter. But giving is a social act that takes place within a framework of human relationships, and the personal circumstances of the donees will be difficult for a donor to ignore. These personal circumstances relate to the utility associated with the wealth transfer and should be expected to influence the behavior of even a purely rational actor. What the disjunction effect adds to the story is this: Even where that rational actor could, through introspection, discover a course of giving that would be desirable under all imaginable future circumstances, the noise and confusion added to the situation by uncertainty may keep the actor from undertaking that course. This effect might well combine with excessive optimism and dread of death to generate substantial procrastination in conceiving and implementing estate tax liability reduction plans.

3. Loss Aversion and Regret Avoidance

Another reason people may be reluctant to implement inter vivos giving plans relates to the cognitive phenomenon of loss aversion. Cognitive work suggests that people do not view a loss of current holdings as the equivalent of a failure to obtain a gain of the same amount.⁷⁸ For example, people will be more upset about losing \$500 than they would be if they had failed to obtain the same \$500 in the first place. This is true even though the two situations should be deemed economically equivalent. Likewise, people more greatly regret losses that follow action than they do losses that follow

78. See Eldar Shafir & Amos Tversky, *Decision Making*, in 3 AN INVITATION TO COGNITIVE SCIENCE: THINKING 77, 85 (Edward E. Smith & Daniel N. Osherson eds., 2d ed. 1995).

inaction.⁷⁹ For example, one study showed that people attribute more regret to an actor who moves his stocks from investment A to investment B and subsequently loses money than they would attribute to the same actor if he left his stocks in investment A and thereafter lost money relative to what he would have achieved had he switched to investment B.⁸⁰ The difference between the amount of regret produced by action and inaction, respectively, helps explain why people tend to exhibit a status quo bias.⁸¹

The relationship between these phenomena and lifetime wealth retention is fairly straightforward. A decision to undertake an inter vivos gift is a gamble of sorts; it could indeed save one's children from paying estate taxes, but it might also have the effect of alienating needed resources and control during one's life. If one makes the decision to convey inter vivos and subsequently runs out of money as a result of an unexpectedly long life or unexpectedly heavy expenditures, one's sense of regret is likely to be enormous. On the other hand, failing to make the conveyance might well be perceived merely as the failure to secure a gain for one's children. While this too might turn out to be a "mistake" in some objective sense, it is not the sort of mistake that results in a loss from one's present-day benchmark; rather, it is a failure to improve matters for loved ones.

If failing to make the conveyance turns out to be a mistake, the error will only become manifest after the end of the would-be conveyer's life. Foreseeing the possibility of the non-conveyance turning out to have been a mistake might cause the potential

79. See, e.g., William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 38 (1988) (discussing the possible role of "regret avoidance" in explaining the bias people exhibit in favor of maintaining the status quo over making a risky choice that has the same expected value).

80. See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 657-58 (1998) (discussing this study and citing Daniel Kahneman, *Varieties of Counterfactual Thinking*, in WHAT MIGHT HAVE BEEN: THE SOCIAL PSYCHOLOGY OF COUNTERFACTUAL THINKING 375, 388-89 (Neal J. Roesch & James M. Olson eds., 1995)).

81. Robert Scott observed that:

when the prospects of either gain or loss are equally probable, individuals weight the anticipated cost of regret more heavily than the corresponding benefit of pride. . . . All other things being equal, individuals are thus reluctant to make choices in which they feel responsible for the outcomes. As a consequence, individuals are often motivated not to choose.

Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 340 (1986) (footnote omitted); see also THALER, *supra* note 22, at 73 (discussing how the "asymmetry between omission and commission" bears on levels of blame and regret experienced in the event of an unfavorable outcome, and explaining how behavior might be affected by "the anticipation of blame and regret").

conveyer some anticipatory regret, but regret over an imagined posthumous determination that one's nonconveyance was a mistake is likely much milder than that which would be experienced if the inter vivos conveyance proved to be a mistake (a state of affairs that would become known during one's own lifetime). If, as has been posited, people will often defer decision-making in order to avoid the particularly painful sort of regret that follows from taking actions that turn out to be wrong, this could lead people to defer making inter vivos conveyances.

This effect might be strengthened by the fact that people considering making such inter vivos conveyances often do so in consultation with a professional, such as an attorney, who is typically predisposed to take a highly risk-averse approach.⁸² Even if the attorney herself would feel no worse about counseling her client to make an affirmative decision that turns out to be bad than she would in counseling inaction that ends up resulting in a greater-than-necessary estate tax burden, she recognizes that the two kinds of mistakes are not equivalent from the client's perspective. If the attorney strongly counsels her client to make a conveyance and the client later comes to believe this was a mistake, the attorney will be blamed. If, on the other hand, the attorney does little to overcome her client's instincts to hold onto the money, and this has the effect of depriving the heirs or devisees of some potential estate tax savings, it is unlikely that the attorney will ever be directly blamed for this. After all, she was only carrying out her client's wishes. The only time the client will perceive that the attorney's advice was bad is in the event the client is counseled to convey inter vivos and later comes to regret it.⁸³

It is also possible that risk aversion about financial matters increases with age.⁸⁴ Richard Posner has suggested that this might occur because as one ages, more of one's wealth is held in financial rather than human capital; older people often do not have the ability to earn wages to cover any losses they encounter.⁸⁵ Hence while

82. For a general discussion of how the dynamic of the attorney-client relationship might foster excessive caution on the part of attorneys, see Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 377-78 (1997).

83. *Cf. id.* (explaining that clients cannot tell whether an attorney was excessively cautious in advising the client to forgo deals or undertake them with unnecessary precaution; the only mistakes a client can detect are those arising out of insufficient attorney caution which results in a problem for the client).

84. RICHARD A. POSNER, *AGING AND OLD AGE* 117 (1995).

85. *Id.*

people are naturally optimistic, they may become less optimistic with age and experience.⁸⁶ This could lead to an interesting life-cycle pattern: When people are relatively young and more optimistic, they may defer making inter vivos gifts because it seems unnecessary. They may reason that there will always be time later to do so, or they may wish to wait on the outcome of intervening events. Later, as people age, the optimism may to some extent be displaced by risk aversion with respect to finances, with the result that no transfers are made even when one begins to take more seriously the prospect of mortality.⁸⁷

4. Mental Accounting and Inexperience

Mental accounting may also reinforce a reluctance to give inter vivos. People tend to construct rules and habits of thought to guide their financial dealings, often substituting “brightline” rules, like “never spend principal,” for more nuanced calculations designed to maximize wealth in each particular case.⁸⁸ In other words, rather than treating all funds as fungible, people might exhibit a far greater reluctance to spend assets than to spend current income.⁸⁹ Whether or not particular funds are “coded” as savings or as income will often determine how and when those funds are spent.⁹⁰ To the extent that donors perceive gifts as a form of “spending” and the funds transferred as part of their “principal,” giving an inter vivos gift might violate a powerfully-held and deeply-internalized belief about how money is to be handled.⁹¹ In cases where the donor attributes his successful accumulation and retention of wealth to stringent lifetime compliance with this particular rule about money, the resistance to violating it may be even stronger.

The tendency to stick to tried-and-true financial principles highlights another possible reason why people might not respond as

86. *Id.* at 105 (“Experience and age are positively correlated, so that the effect of experience in grinding down natural but exaggerated optimism would be to make the old more pessimistic than the young.”).

87. Carl Shoup suggests that the onset of senile dementia may also play a role in some cases. See SHOUP, *supra* note 3, at 22–23 (describing the interplay of aversion to contemplating death on the one hand, and senility on the other, as follows: “The first factor postpones until tomorrow the decision on giving, and the second makes it less likely that tomorrow will be the day of decision.”).

88. See Shefrin & Thaler, *supra* note 48, at 95–193 (discussing use of such rules).

89. See *id.* at 96–98 (explaining this mental accounting system).

90. See *id.* at 101–02 (presenting a theory that assumes “different sources of income are encoded into different mental accounts”).

91. See SHOUP, *supra* note 3, at 23–24 (discussing the “somewhat irrational dislike for consuming one’s capital” that seems to inhibit inter vivos giving).

expected to the estate tax: their lack of experience with it. In other contexts, studies have demonstrated that lack of direct experience with a particular phenomenon may yield suboptimal precautions with regard to that phenomenon. For example, many people living in flood-prone areas will not voluntarily purchase flood insurance unless they have had a flood or know someone who has had a flood.⁹² Death, the trigger for the estate tax, is a once-in-a-lifetime affair. As a result, people have little opportunity to directly learn, through experience, about the negative consequences of a failure to avoid the tax. In this respect, the estate tax is different than an annual or other periodic tax, in which unhappy experiences involving taxes paid in one period might spur avoidance behaviors in a later period. The possibility that people adjust their tax avoidance behaviors in response to direct experience with a particular tax, rather than simply in response to expected tax liability, is an intriguing one that deserves study.⁹³

To be sure, death, unlike a flood, is an event that is certain to occur to any given individual eventually. However, death in any given year carries a relatively low probability,⁹⁴ and taxpayers' lack of personal experience with estate tax burdens might lead them to overestimate their ability to avoid the burden through future planning or giving activities. Having never had the personal experience of being "caught short" by the estate tax, people may fail to fully appreciate the implications of their failure to mitigate liability through giving. Still, the analogy is an imperfect one. People often estimate probabilities of given events based on the ease with which examples of the event come to mind, a phenomenon known as

92. See Howard Kunreuther, *Limited Knowledge and Insurance Protection*, 24 PUB. POL'Y 227, 243-44 (1976) (discussing the link between a person's experience with a particular loss, such as a flood, and the steps she is likely to take to avoid the loss). Kunreuther also used survey data to investigate whether the anticipation of federal aid might be responsible for individuals' failure to purchase insurance against hazards such as floods and earthquakes. *Id.* at 236. Although almost two-thirds of the uninsured respondents in flood- and earthquake-prone areas indicated that they did not expect any assistance from the federal government in the event of a flood or earthquake, *id.*, it is nevertheless possible that expectation of relief from private or public sources contributes to the behavior. See Saul Levmore, *Coalitions and Quakes: Disaster Relief and Its Prevention*, 3 U. CHI. L. SCH. ROUNDTABLE 1 (1996) (discussing the potential connection between disaster relief and decisions not to purchase insurance).

93. The possibility that experience may play an important cognitive role in learning and decision-making is explored in W. Bentley MacLeod, *Cognition and the Theory of Learning by Doing*, USC Olin Research Paper No. 11-11 (USC, March 2000), at <http://cfg.ucla.edu/ccpe/000407/macleod.pdf> (on file with the North Carolina Law Review).

94. See *supra* note 52 (discussing the probability of death in a given year as reflected in longevity tables).

“availability.”⁹⁵ In other words, one reason people fail to deal appropriately with possibilities with which they have little experience is because these possibilities simply never make it onto their “radar screen.”⁹⁶ Given the media attention devoted to the estate tax, it is likely to be “available” to taxpayers in at least a general way. This availability makes the estate tax distinguishable from events that literally fail to cross people’s minds.

One might further object that taxpayers have the opportunity to gain experience with the estate tax when family members die. Yet this will not always be the case. The estate tax contains an unlimited marital deduction, so that transfers to the surviving spouse are not taxed at all.⁹⁷ This means that the later-to-die spouse typically will not have had the experience of paying taxes on his spouse’s estate. Of course, children of the wealthy may gain some experience with the tax in settling the estates of their parents, and this experience might shape their own estate tax reduction behavior. However, the estate tax landscape might change substantially enough during the intervening years to keep the experience from being directly applicable. Nevertheless, it would be interesting to find out whether there is more inter vivos giving observed among people who have themselves been beneficiaries of estates subject to the estate tax. This might help us determine whether lack of experience has any independent bearing on behavioral results.

Clearly, both rational and behavioral explanations support the observed robust preferences for lifetime wealth retention. Before drawing policy implications from the foregoing analysis, however, I wish to turn to the second of the puzzles identified at the outset—the surprising unpopularity of the tax.

II. THE PUZZLE OF POPULAR OPPOSITION

We might expect the estate tax to be a popular tax, from the standpoint of rational self-interest. The great majority of Americans do not leave behind estates large enough to trigger estate tax liability.⁹⁸ Indeed, the estate tax imposes liability on only about two

95. Kunreuther, *supra* note 92, at 243.

96. *See id.* at 244 (discussing the link between “the concept of awareness of actual or anticipated loss” and “past experience with the hazard”).

97. I.R.C. § 2056 (Lexis 2001); *see* Richard Schmalbeck & Jay A. Soled, *Unnecessary Estate Tax Returns: Removing the Residue of the ‘Widow’s Tax,’* 94 TAX NOTES 235, 235 (2002) (discussing the unlimited marital deduction and observing that “about six out of seven returns filed by the estates of married decedents show no estate tax liability at all”).

98. Each decedent’s estate is entitled to a unified credit which effectively exempts a certain amount of wealth from estate and gift taxation. *See* I.R.C. § 2010 (Lexis 2001).

percent of estates.⁹⁹ As long as the money collected from this two percent is not entirely dissipated by the government, the funds collected make the other ninety-eight percent net winners. By reducing the overall tax burden that the ninety-eight percent must bear for a given menu of governmentally-provided benefits, the tax effectuates a wealth transfer from a small and very wealthy minority to the rest of the population. This ought to be appealing to the large majority receiving the transfer.

Yet apparently it is not. The estate tax seems to be very unpopular.¹⁰⁰ Not only has it fared poorly in opinion polls, but the political will to abolish it has been recently exercised. As a preliminary matter, we must ask whether these indicators fairly reflect majoritarian preferences. We might well question whether opinion polls provide a valid measure of public sentiment, especially given their susceptibility to “framing” manipulations.¹⁰¹ And, applying public choice analysis, we might also question whether the political results achieved in Congress actually line up with

For decedents dying in 1998, the exemption amount was \$625,000; in 1999, the exemption increased to \$650,000; and in 2000 and 2001, it increased to \$675,000. 26 U.S.C. § 2010 (2000) (amended version at I.R.C. § 2010 (Lexis 2001)). Decedents dying in 2002 have an exemption of \$1 million, and the exemption will increase in steps thereafter, to reach a high of \$3.5 million in 2009, before the estate tax is repealed in 2010 (subject to sunset provisions which, in the absence of further congressional action, would bring the tax back in 2011 with an exemption of \$1 million). See EGTRRA, Pub. L. No. 107-16, §§ 501, 511, 521, 901, 115 Stat. 38, 69–72, 150 (June 7, 2001).

99. In 1998, 47,483 taxable estate tax returns were filed, representing about 2.1% of adult deaths (over age 20) the previous year. See William G. Gale and Joel Slemrod, *Overview*, in RETHINKING, *supra* note 4, at 1, 8 tbls.1–2 (presenting Internal Revenue Service data on estate tax returns filed in 1998); *id.* at 7–9 (observing that the total number of estate tax returns in 1998 constituted 4.3% of the number of adult deaths in 1997, and that about 49% of these returns were taxable). Comparing the number of adult deaths in one year with the number of taxable returns filed in the following year yields only a rough approximation of the percentage of deaths generating taxable returns, as most (but not all) estate tax returns are filed in the year following death. See Internal Revenue Service, STAT. INCOME BULL., at tbl. 17 n.2 (Spring 2001) (“Estate Tax Returns as a Percentage of Adult Deaths, Selected Years of Death 1934-1996”) (explaining this point), available at <http://www.taxpolicycenter.org/taxfacts/estate/deaths.cfm> (on file with the North Carolina Law Review). The most recent IRS data tracing estate tax returns by year of death indicates that 1.79% of adult deaths in 1996 generated taxable estate tax returns. *Id.*

100. See, e.g., McCaffery, *supra* note 2, at 1944 (“[G]ift and estate taxes and other forms of wealth transfer taxes, such as inheritance ones, appear to be very unpopular. In polls, people consistently oppose these taxes, and approve reductions in them.”); Glenn Kessler & Dan Morgan, *Some Want to Keep the ‘Death Tax’ Alive*, WASH. POST, Feb. 18, 2001, at A8 (“[P]olls indicate broad support for eliminating the estate tax.”).

101. See Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 51 TAX L. REV. 363, 396–97 (1996).

majoritarian preferences.¹⁰² However, the fact that both opinion polls and political results point to the estate tax's unpopularity suggests that, at a minimum, the estate tax suffers from a life-threatening case of bad public relations.

While most taxpayers readily express blanket resentment of all taxes to which they are actually subjected, the estate tax appears to be a unique example of a tax that is widely opposed even by people who have had no direct experience with it and no objective reason to believe that such direct experience will be forthcoming.¹⁰³ Why is this so?

A. *Rational Explanations for Opposition*

Rational self-interest and standard economic analysis can account for at least some proportion of the observed opposition to the estate tax. Many individuals whose estates do not end up being taxable nonetheless make decisions under the shadow of the estate tax, and others who have no expectation of having taxable estates may nevertheless have cogent and rational reasons for their opposition. I will explore these rational bases for estate tax opposition in this subpart.

102. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21–33 (1991) (providing an overview and critique of the “economic theory of legislation,” which suggests that legislators are driven by their interest in reelection to respond to economically-motivated constituents or interest group pressures); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 42 (1991) (discussing interest group theory, which posits that “certain groups enjoy organizational advantages that enable them to exercise ‘disproportionate’ influence on politicians and regulators and thus secure laws favoring their interests even when those laws injure large groups with diffuse interests (e.g., the general public) and impose a net loss on society” (citation omitted)).

103. Sixty percent of those surveyed in a June 2000 Gallup poll supported repeal of the federal estate tax; about one-sixth of the respondents believed they would personally benefit from the repeal. Scott Bernard Nelson, *A Federal Tax With One Foot in the Grave*, *BOSTON GLOBE*, July 21, 2000, at C1. A previous poll elicited broad support for increasing the estate tax exemption amounts. See Edward J. McCaffery, *Grave Robbers: The Moral Case Against the Death Tax*, 85 *TAX NOTES* 1429, 1440 (1999) (citing a 1997 Pew Research Center survey in which 79% of those surveyed favored a gradual increase in the unified credit to \$1 million). By comparison, a recent Gallup poll indicates that 74% of Americans support a reduction in federal income taxes. Wendy W. Simmons, *Public Has Mixed Feelings About Tax Cuts*, *GALLUP NEWS SERVICE*, Jan. 24, 2001, at <http://www.gallup.com/poll/releases/pr010124.asp> (on file with the North Carolina Law Review); cf. Ascher, *supra* note 31, at 75 (noting that 64% of California voters voted to repeal the state inheritance tax, which affected only the wealthiest five to ten percent).

1. Assessing the Impact of the Estate Tax

As a starting point, it is worth scrutinizing the much-cited two percent figure.¹⁰⁴ Simply counting taxable estates (the way the two percent figure is apparently derived)¹⁰⁵ undercounts those who are directly affected by the estate tax. For example, because of the estate tax's unlimited marital deduction, bequests to a surviving spouse are not taxed.¹⁰⁶ Thus, for a typical wealthy couple, only the second-to-die spouse will leave behind a taxable estate. Nevertheless, we would expect both spouses to rationally view themselves as having estates that are "subject to the estate tax."¹⁰⁷ Similarly, if a person takes actions to avoid estate tax liability altogether, perhaps incurring great utility losses to do so, her estate will not show up as taxable.¹⁰⁸

In addition, some people whose estates are not ultimately subject to the tax may nevertheless pass through a window of time (perhaps in early retirement) during which their estates would be subject to the tax if they were to die immediately.¹⁰⁹ The estate tax doubtless causes them disutility because it decreases the expected value of their estate

104. The fact that estate tax liability is imposed on only about two percent of estates appears in virtually every news article treating the subject, as well as in many scholarly treatments. See, e.g., McCaffery, *supra* note 2, at 1944.

105. See *supra* note 99.

106. See *supra* note 97 and accompanying text.

107. To get a clearer picture of the estate tax's impact, we must look at both taxable and nontaxable estate tax returns. Executors are required to file a federal estate tax return whenever the gross estate, after adjustment for taxable gifts, exceeds the applicable exemption amount. I.R.C. § 6018 (Lexis 2001). William Gale and Joel Slemrod found that the number of estate tax returns filed in 1998 represented about 4.3% of adult deaths in 1997. See Gale & Slemrod, *supra* note 99, at 7-9. However, approximately 51% of these returns were nontaxable, largely as a result of deductions such as the marital deduction. *Id.* As Gale and Slemrod explain, "[b]equests to surviving spouses account for between 60 and 75 percent of all deductions in each estate size category." *Id.* at 9.

108. See Leonard E. Burman, *Estate Taxes and the Angel of Death Loophole*, 76 TAX NOTES 675, 676 (1997) (observing that statistics on taxable estates "understate the burden of estate taxes" and that "[p]resumably many people avoid paying tax on their estates, but the costs of avoiding the tax represent an implicit tax"); Edward J. McCaffery & Richard E. Wagner, *A Bipartisan Declaration of Independence from Death Taxation*, 88 TAX NOTES 801, 805 (2000) ("While only 2 percent of decedents leave an estate large enough to generate an actual tax paid, many more have planned their way around the tax.").

109. See Poterba, *supra* note 15, at 342 (pointing out the possibility that "some households that have enough wealth at the time of the survey to be classified as potential 'estate tax households' will have drawn down their wealth to finance their own consumption in the years before their death, and that they will no longer be affected by the estate tax"). Thus, even though more survey respondents anticipate estate tax liability than will actually end up being liable, see, e.g., Johnston, *supra* note 40 ("While 17 percent of Americans in a recent Gallup survey think they will owe estate taxes, in fact only the richest 2 percent of Americans do."), we cannot necessarily infer that the respondents are being irrational, given the possibility of shifts in fortune and the undercounting of spouses discussed above.

during that window of time. At a minimum, then, we would expect rational opposition from anyone who at any time in her life has assets sufficient to incur estate tax liability (or who would have assets sufficient to incur estate tax liability, but for actions taken expressly for the purpose of avoiding estate tax liability). Yet even this larger group (everyone who will ever have assets sufficient to trigger estate tax liability) does not contain all of our rational estate tax opponents. That would be the case only if each person knew to a certainty whether or not she would ever attain sufficient wealth to trigger estate tax liability. This is obviously not the case.

2. The Role of Uncertainty

The phenomenon of social mobility is real, if frequently overstated.¹¹⁰ People are uncertain about how their holdings will grow, shrink, or fluctuate over time. They are uncertain about their own long-term earning potential and that of others in their families. They are uncertain about the expenses they will incur. They are uncertain about the timing of their own deaths and those of others. They are also uncertain about future changes in the estate tax laws themselves.

To see why all this uncertainty matters, imagine the extreme situation in which nobody has any idea whether or not her estate will be subject to the estate tax. In other words, the tax is randomly imposed (and I am assuming, quite counterfactually, that it could actually be collected from everyone upon whom it is randomly imposed). People are aware that two percent of all estates will be subject to the tax, and they are aware of the average amount of estate tax liability imposed on that two percent (let us say it is a half million dollars),¹¹¹ but they have no idea whether or not they will be among the taxed two percent. In such a case, the expected value of each

110. For a discussion of the rational underpinnings of the "Prospect of Upward Mobility," see Roland Benabou & Efe A. Ok, *Social Mobility and the Demand for Redistribution: The POUM Hypothesis*, 116 Q.J. ECON. 447, 478-79 (2001) (showing how people might rationally expect upward mobility and oppose redistribution). See also ALBERTO ALESINA & ELIANA LA FERRARA, PREFERENCES FOR REDISTRIBUTION IN THE LAND OF OPPORTUNITIES 4 (Nat'l Bureau of Econ. Research, Working Paper No. 8267, 2001) ("Some of today's poor may become rich tomorrow and—to the extent that redistributive policies cannot be changed very frequently—they may oppose redistributive schemes that, although advantageous today, may make them net losers in the future.").

111. This is not an unrealistic figure. See Poterba, *supra* note 15, at 329 (noting that, based on 1995 data on the number of federal estate tax returns filed and 1996 data on revenue collected, "estate taxes per taxpayer average several hundred thousand dollars").

person's estate would drop by \$10,000 ($\$500,000 * .02$) as a result of the existence of the estate tax.¹¹²

We might think that a large majority would rationally oppose such a tax, even though few would actually end up being subject to it. The estate tax in such a case would appear to operate much like a tax on lottery winnings that is imposed after tickets have been purchased but before the winning lottery numbers have been announced. All lottery ticket holders would rationally oppose such a tax, because it reduces the expected value of their lottery ticket. We would not tell a lottery ticket holder that she is irrational to oppose the tax simply because she holds a statistically small chance of winning the pot and thus is unlikely to suffer from the imposition of the tax.¹¹³

Importantly, however, the estate tax will presumably also generate benefits—e.g., highways, national parks, national defense, social programs—that will be enjoyed by members of society. If a rational actor, Amelia, is deciding whether to oppose the estate tax, she should take into account at least three factors (leaving aside the cost, if any, of opposing the tax):¹¹⁴

L, the expected amount of estate tax liability

P, the probability that the tax will be imposed upon her; and

B, the expected benefits the tax will generate for her.¹¹⁵

Taking these factors into account, Amelia should rationally support the tax if $(L * P) < B$. Consider the simple case in which Amelia's society is made up of one thousand people, twenty of whom will be subject to the \$500,000 estate tax. Thus, revenues of \$10 million will be collected, which will then be transformed into benefits

112. In fact, the expected value would drop by different amounts for different individuals due to discounting, given that different individuals have different expected remaining life spans and thus different periods of time remaining before imposition of the tax. But the basic point remains valid.

113. Unless, that is, the time and effort involved in opposing the tax is larger than the reduction in expected value associated with it.

114. The kind of opposition that typically gets captured in polls is indeed costless or very nearly so; a person need only answer a question or check a box to register disapproval of the tax. The costs might even be negative if people get satisfaction out of opposing the tax. For example, some people might feel better about themselves after checking the "oppose" box than they did before they encountered the question.

115. One important complication, which I will simply note, is that both L and B ought to be discounted to present value. Presumably, the stream of benefits will start immediately for each person and will continue on until that person's death; estate tax liability will be imposed only at death. Because different people have different expected life spans, they will have different expected costs associated with the tax in present value terms, even assuming everyone is equally likely to be taxed. They will also have different expected lifetime streams of benefits, for the same reason. The simple equations presented here ignore the problem of discounting entirely.

to society. We might hope that these benefits are at least as valuable as the revenues collected. Even though administrative costs will take a bite out of the revenues and will lower the amount of funds available to be redistributed in the form of benefits, the government is presumably also adding value by, for example, solving collective action problems that would otherwise make a valuable public good unattainable.

Given the possibility that the margin of benefits over revenues is small (or perhaps even nonexistent), and the realistic likelihood that a particular individual might contemplate receiving a somewhat less than proportionate share of the benefits,¹¹⁶ a person who has an exactly random chance of estate tax liability might find it rational to oppose the tax. But for a substantial majority of the population, the chances of being subject to the estate tax are far more remote than a random chance. If the chances that one's estate will be subject to the estate tax are significantly less than random, and if one still expects to share proportionately in the benefits, opposition to the tax no longer makes economic sense. Given the number of people in this position (that is, who stand a significantly lower-than-random chance of being subject to the estate tax), we might expect more support for the estate tax than actually exists.

Nor is the case for supporting the estate tax necessarily undermined if we imagine that many of those citizens do not particularly care for the specific benefits that are purchased with the tax and would prefer not to receive them. We might take those benefits as a given—a result of a political process in which those citizens' preferences did not hold sway—and assume that the benefits must be paid for somehow. If an individual's chances of being subjected to *this* tax are lower than they are of being subjected to another tax that would otherwise be used to fund the benefits, a clear case for supporting the estate tax would emerge.¹¹⁷

Could the explanation for popular opposition perhaps be found in uncertainty about the estate tax laws themselves? Might it be the

116. It will usually be the case in the real world that benefits are not spread equally among the populace. Exceptions would be expenditures for a true public good like national defense (which is enjoyed by each person in roughly equal measure), or instances in which an identical good is provided to each person throughout the whole society (for example, if everyone in the society were simultaneously given a voucher for a free inoculation against a particular disease).

117. This assumes that the other tax that might be used to fund the same set of benefits would be of the same magnitude as the estate tax. This might not be the case. For example, if one tax were cheaper to administer than the other, a lower tax amount would fund the same benefits.

case that people are rationally factoring in the possibility that the estate tax laws will be changed during their lifetimes to impose liability on a larger universe of estates or to raise the marginal tax rates? Either type of change could conceivably alter the expected cost of the tax for a given individual enough to convert a *de minimus* risk of estate tax liability into a more serious one. But if the estate tax is generating present benefits for an individual (whether in the form of reduced liability for other kinds of taxes, or in the form of additional benefits), we would expect her to wait until a change that would render her estate vulnerable to the tax loomed on the political horizon before beginning to oppose the tax. This would enable the actor to enjoy the wealth transfer associated with the current tax scheme in the meantime.¹¹⁸

3. Other Rational Explanations

Thus far, I have been assuming that the only reason a person might rationally oppose the estate tax is if she expected her own estate to be subject to it. But the central fact about estates is that they represent assets that are about to be distributed to heirs or designated beneficiaries. These expectant others might well resent any curtailing of their bounty, regardless of whether they expected their own estates at death to exceed the estate tax liability threshold. However, there is reason to question whether this would be a significant additional source of estate tax opposition.

The way in which the estate tax presently interacts with the gift tax could make would-be beneficiaries support a strong estate tax, on the theory that this would tend to push their benefactors into making earlier *inter vivos* gifts instead.¹¹⁹ Likewise, current recipients of *inter vivos* gifts motivated by estate taxation might fear those gifts would be diminished if the estate tax motivation for them were removed.¹²⁰ On the other hand, beneficiaries may be aware of the reluctance of

118. But what if one expected one's ability to express opposition to the tax to be lower in the future? For example, an elderly person with an estate somewhere below the current estate tax threshold might fear becoming incapacitated and then being unable to oppose a ratcheted-up version of the same tax which would reach her estate. Would she not be better off opposing the tax now even though it does not yet apply to her estate? Yet this argument proves too much. Even if the estate tax were presently eliminated, it could be reintroduced later on. Or another form of taxation, even more damaging to one's assets, might be introduced prior to one's death. In the meantime, the person would be forgoing the benefits of the wealth transfer implicit in the present form of the tax.

119. See *supra* notes 12–16 and accompanying text (describing favorable tax treatment of *inter vivos* gifts).

120. In fact, empirical evidence suggests that *inter vivos* gifts drop when bequests are less heavily taxed. BERNHEIM ET AL., *supra* note 27, at 3.

potential donors to part with wealth *inter vivos*, even when this results in unnecessary estate tax liability,¹²¹ and they might rationally predict that the estate tax will reduce the net benefits they will receive. They might also fear that their would-be benefactors would react to an estate tax with consumption or donations to charities, rather than with *inter vivos* gifts.¹²² Thus it is possible that rationally expectant beneficiaries account for some of the opposition to the estate tax.

Another possibility is that people are opposing the estate tax out of rational ignorance. Perhaps it is simply too expensive to gather the information that would establish the likelihood that an individual would be subject to it.¹²³ If this is the case, opposition might simply be reflexive, reflecting a distaste for any additional, complicated, and potentially harmful tax. It is indeed likely that many people who oppose the estate tax do so without specific knowledge of even the most basic details about it, such as the threshold at which it kicks in.¹²⁴ But this information does not seem terribly expensive to acquire relative to the benefits that could be lost if one erroneously opposed the tax.¹²⁵ The reasons that people fail to obtain the information may have less to do with the costs of acquiring it than with the perceived irrelevance of it. The fact that it may not be perceived as particularly relevant suggests that people are doing something more than crunching through equations and figuring expected values when they decide whether or not to oppose the estate tax.

Could an explanation for widespread public opposition lurk instead in a more sophisticated form of rational self-interest? Perhaps people are familiar with the economic arguments against the estate tax (e.g., that it will encourage consumption over savings) and

121. *See supra* Part I.

122. *See infra* notes 224–30 and accompanying text (discussing substitutes for *inter vivos* giving).

123. *See, e.g.*, Jane G. Gravelle, *Comments*, in *TAX PROGRESSIVITY AND INCOME INEQUALITY* 335, 336 (Joel Slemrod ed., 1994) (arguing that the public's lack of knowledge about tax policy is "simply an aspect of 'rational ignorance'" and that it is rational to remain uninformed "[w]hen information is costly to obtain and retain, and when that information concerns areas where individuals are not actually making decisions").

124. *See, e.g.*, William G. Gale & Joel Slemrod, *Rhetoric & Economics in the Estate Tax Debate*, 54 *NAT'L TAX J.* 613, 619 n.5 (2001) (noting that forty-five percent of respondents in one survey of family-owned businesses said they lacked knowledge of their own estate tax liability).

125. The recent changes in the estate tax, which alter both exemption amounts and tax rates over the next nine years, have indeed greatly raised the cost of acquiring this information. But these complications cannot explain opposition to the estate tax that preceded these changes.

have decided on principled grounds to oppose the tax.¹²⁶ Again, this is possible. But the general public has not often exhibited a patient interest in probing the economic implications of particular taxation or spending decisions.¹²⁷ Moreover, were they to do so, they would find the evidence to be quite mixed.¹²⁸

More plausibly, perhaps people are responding empathetically to the imposition of the estate tax on others, or are responding on principle to something in the estate tax that offends their values.¹²⁹ The argument here would be that the equation presented earlier, which looked just at the monetary costs and benefits, did not capture all of the disutility associated with the tax. But the possibility that people are responding on principled grounds or based on personal values begs the question of where those principles and values come from, and answering these antecedent questions requires looking outside the bounds of the rational actor model.

B. Behavioral Explanations for Opposition

Rational explanations take us some distance in understanding opposition to the estate tax. However, several features of people's cognitive apparatus help to further augment our understanding of popular opposition to the estate tax.

126. See McCaffery, *supra* note 2, at 1944 (suggesting the possibility that "people do not like gift and estate taxes for good and legitimate reasons: because such taxes penalize thrift and capital accumulation, encourage and relatively reward wanton and conspicuous consumption, run counter to a deep-seated human instinct or intuition to provide for one's heirs, etc."). See generally Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994) [hereinafter McCaffery, *Uneasy Case*] (discussing objections to the estate tax).

127. See generally Steven M. Sheffrin, *Perceptions of Fairness in the Crucible of Tax Policy*, in TAX PROGRESSIVITY AND INCOME INEQUALITY, *supra* note 123, at 309, 311–15 (discussing the general public's limited knowledge of tax policy). For example, the corporate income tax is widely supported even though its incidence necessarily falls on individuals. See *id.* at 321–24.

128. See, e.g., William G. Gale & Maria G. Perozek, *Do Estate Taxes Reduce Saving?*, in RETHINKING, *supra* note 4, at 216, 235 (explaining that their analysis suggests "the effects of estate taxes on saving depend crucially on transfer motives; the overall effects require analysis of both the donor and the potential recipient; and in a surprising number of cases, higher estate taxes appear to raise savings").

129. See William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287, 331 (1996) ("Public resistance to transfer taxation . . . may be rooted not in irrational hopes but in value preferences. Regardless of their own prospects for accumulating wealth, people harbor substantial misgivings about estate taxation."); McCaffery, *supra* note 2, at 1945 (asking if there might be "a moral dimension to the factually erroneous identification of most people with estate tax targets"); McCaffery, *Uneasy Case*, *supra* note 126, at 287 (suggesting that a form of "anti-envy" seems to pervade public attitudes about the estate tax).

1. Excessive Optimism

One explanation frequently offered for the widespread opposition to the estate tax is that people are unduly optimistic.¹³⁰ Although few people are objectively justified in expecting to be subject to the tax, the argument runs, many unrealistically hope to become wealthy enough to be subject to it.¹³¹ As noted above, optimism is an important and enduring feature of human psychology.¹³² Such optimism has its limits, however, and it might initially seem a bit implausible that a large proportion of the population actually operates under the optimistic misimpression that they are going to become wealthy enough to be subject to the estate tax. In fact, a recent poll indicated that only seventeen percent of the people surveyed actually expected to be subject to the tax.¹³³ Yet optimism might well interact with some of the strictly rational reasons for opposing the estate tax to expand the number of estate tax opponents significantly.

The equation discussed above¹³⁴ indicated that a person who thought his odds of being subject to the estate tax were about as good as those that would be produced by a random lottery system of estate tax liability might well oppose it. Asking people whether or not they expect to have net assets exceeding the current exemption amount at death might draw few positive responses. Yet if we instead ask people whether they think they have “a better chance than most other people” of having net assets exceeding that amount at death, we might get a much larger number of positive responses. People characteristically believe that they will do better than average on most measures,¹³⁵ and if they were to think about the estate tax in this way, optimism might combine with uncertainty to produce opposition

130. See, e.g., Ascher, *supra* note 31, at 119 (discussing the possibility that dreams of sudden wealth explain opposition to wealth transfer taxes); Graetz, *supra* note 2, at 285 (“The only convincing explanation that has occurred to me for this phenomenon lies in the optimism of the American people.”); see also McCaffery, *supra* note 2, at 1944 (discussing the common explanation that people have a “lottery mentality”).

131. People might also be overly optimistic in expecting bequests and fear that an estate tax could diminish the amount of the bequest. On the other hand, a high estate tax might trigger more inter vivos giving, which the potential recipient would probably prefer, so the role of optimism on the part of potential recipients is not clear.

132. See *supra* notes 49–50 and accompanying text.

133. Johnston, *supra* note 40.

134. See text accompanying *supra* notes 114–16.

135. See *supra* notes 49–50.

to the tax. However, it is uncertain to what extent unrealistic optimism really extends to predictions about future wealth levels.¹³⁶

It is also possible that optimism may play out in smaller ways. People who pass through a window of time in which their estates are large enough to be subject to the tax are likely to optimistically assume that they will enjoy at least that level of wealth until their deaths, and to disregard the possibility that they will suffer reversals, such as serious health problems, that will decrease their holdings.¹³⁷ Opposition to the estate tax is likely affected by this optimism, to the extent people fail to factor in the possibility that their holdings will drop over time so that they would be net gainers, not net losers, as a result of the tax. Yet optimism alone seems insufficient to explain the high levels of opposition to the estate tax.¹³⁸

2. Framing and Mental Accounting

Empirical work has repeatedly demonstrated that the way in which a particular question or problem situation is framed can be outcome determinative.¹³⁹ In the case of public goods provision, framing a particular decision as a choice of whether or not to contribute to a public good yields more cooperation than does a

136. Compare TAYLOR, *supra* note 49, at 32–33 (“More than 95 percent of people questioned in these surveys typically believe that the economic picture will be good for everyone and that their personal economic future will be even better than that of others.”), with Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 810 tbl.1 (1980) (demonstrating that university students estimated that they had a better chance than their peers of experiencing a number of positive events—including liking their postgraduation job, earning a good starting salary, owning their own home, and living past age eighty—but that their responses were on balance slightly pessimistic when they were asked to estimate how their chances compared to those of their peers for earning more than a particular salary figure ten years hence, and for “marrying someone wealthy”).

137. See, e.g., Jolls, *supra* note 4, at 1659 (discussing findings suggesting that people systematically underestimate the chances that negative events will befall them).

138. Optimism might also play a role in discounting, which would seem to cut in the other direction. An overly optimistic actor might overestimate the length of time remaining before death (and hence, before the imposition of the tax) and might discount excessively as a result. See text accompanying *supra* notes 51–54. This might lead to an underestimation of the tax’s costs relative to the benefits. But see *infra* note 162 (explaining that such discounting would not make a difference in a decision to oppose the estate tax if the tax is not perceived as generating any benefits at all).

139. See, e.g., THALER, *supra* note 22, at 75 (discussing different perceptions of surcharges and discounts); McCaffery, *supra* note 2, at 1874 (describing different reactions when a merchant offers a cash bonus and a credit surcharge); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, in FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 274, 275–76 (Avery Wiener Katz ed., 1998) (discussing findings of preference reversals when a frame is shifted from choices regarding the number of people who will survive to the number of people who will die).

frame that asks people to decide whether or not to forgo consumption of a private good to avoid negative side effects on others.¹⁴⁰ In the tax context specifically, it matters greatly whether taxes are framed as indications of government waste or as contributions to public goods.¹⁴¹ It is possible to manipulate reactions to a proposed tax by adjusting the framing of the question to emphasize either the cost of the tax or the benefits to be provided with the tax.¹⁴²

The question of framing takes on special significance in the context of the estate tax. Perhaps as a result of its philosophical underpinnings, the tax has almost invariably been framed as a means of breaking down concentrations of wealth that are deemed to be excessive and unfair.¹⁴³ Rather than starting with the goal of

140. See James Andreoni, *Warm-Glow Versus Cold-Prickle: The Effects of Positive and Negative Framing on Cooperation in Experiments*, 110 Q.J. ECON. 1, 2 (1995); see also Eun-Soo Park, *Warm-Glow versus Cold-Prickle: A Further Experimental Study of Framing Effects on Free-Riding*, 43 J. ECON. BEHAV. & ORG. 405, 406 (2000) (discussing framing literature and reporting further findings showing that this framing effect is significant for individuals with an "individualistic value orientation" and "rather insignificant" for those with a "cooperative value orientation").

141. See John S. Carroll, *Compliance With the Law: A Decision-Making Approach to Taxpaying*, 11 LAW & HUM. BEHAV. 319, 326–27 (1987) (discussing the use of these alternative frames).

142. See ALAN LEWIS, *THE PSYCHOLOGY OF TAXATION* 48 tbl.4.2 (1982) (presenting a table entitled "How to Record the Fiscal Preferences You Want From Attitude Surveys and Public Opinion Polls"). It might be objected that differences in reactions that result from leaving out important information (the benefits that the revenue can provide) suggest that the conceptual problem is not truly one of "framing" (where equivalent information is presented in different ways) but rather just a case of omitting important information. This is a fair point. However, this use of the term "framing" is consistent with its use in the existing literature about the psychology of taxation, where framing is sometimes characterized as a mental "editing" of the problem situation to focus on certain elements. See PAUL WEBLEY ET AL., *TAX EVASION: AN EXPERIMENTAL APPROACH* 82 (1991) ("By editing or framing the situation, a simplification occurs that directs the attention to specific constituents of the restructured problem."); see also Carroll, *supra* note 141, at 326 (explaining that "[t]he framing process helps the decision maker simplify the situation by directing attention to some factors, ignoring others, and encoding aspects into meaningful forms"). Nevertheless, nothing of moment turns on this use of the term, and another term such as "conceptualization" or "presentation" could be substituted without changing the basic argument.

143. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 277 (1971) (explaining that the purpose of inheritance and gift taxes and other restrictions on bequests "is not to raise revenue (release resources to government) but gradually and continually to correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity"); SHoup, *supra* note 3, at 100–01 (listing the three goals of the estate tax as "taxation of windfalls," "taxation of property once a generation," and "taxation to reduce concentration"); Ascher, *supra* note 31, at 74 ("Children lucky enough to have been raised, acculturated, and educated by wealthy parents need not be allowed the additional good fortune of inheriting their parents' property."); D.W. Haslett, *Is Inheritance Justified?*, 15 PHIL. & PUB. AFF. 122, 123–24 (1986) (focusing on unequal concentrations of wealth); McCaffery, *supra* note 103, at 1435

improving opportunities for the less well-off and only then searching for a likely revenue source for achieving this goal, proponents of the estate tax start (and often end) with a direct attack on wealth accumulations. The metaphor of a footrace is often employed in support of limiting inheritance, using imagery that emphasizes taking away an unfair “head start.”¹⁴⁴ Significantly, this image suggests that the important work of the tax involves dragging people backwards to the “fair” starting line. Under this model, any improvement in the relative position of the less well-off is a function of the tax’s destructive work, not a result of revenue that is spent in a manner that boosts the less well-off to a more competitive position.

It is worth considering how far this frame diverges from that usually associated with taxation. The need for important benefits (and thus for revenue) usually receives top billing, with the tax representing a necessary means to that end rather than an end in itself. This is true even when the effect of the tax is redistributive. For example, the progressive income tax is usually justified not on the grounds that some people have “too much” income and that it therefore must be taken away, but rather on the grounds that people with more income are in a better position to bear a larger proportion of the costs of providing an important basket of benefits to society. In contrast, the estate tax is rarely presented as a revenue-raising tax (although it does raise some revenue),¹⁴⁵ much less as a tax that

(discussing the intellectual history of the estate tax and the focus of thinkers like Bentham and Mill on breaking up wealth concentrations). Interestingly, however, the imposition of wealth taxes at death originated in the United States in response to specific revenue crises relating to wars and impending wars; death taxes were introduced and repealed three separate times between 1797 and 1903 as these crises arose and passed, and the introduction of the estate tax in 1916 was related to revenue concerns presented by World War I. David G. Duff, *Taxing Inherited Wealth: A Philosophical Argument*, 6 CANADIAN J.L. & JURISPRUDENCE 3, 6–7 (1993). Revenue considerations also spurred the introduction of similar taxes in Great Britain and Canada. See *id.*

144. See, e.g., Haslett, *supra* note 143, at 145 (discussing the advantages of taking away a competitor’s “head start” in a footrace).

145. In 2000, the IRS netted \$28.9 billion in estate and gift taxes, which constituted 1.5% of its net collections that year. The estate tax accounted for the bulk of these collections (nearly \$25 billion, or 1.3% of net revenues). IRS, 2000 IRS DATA BOOK, PUBLICATION 55B, at tbl.1 (Sept. 2001) (“Summary of Internal Revenue Collections, by Type of Tax, Fiscal Years 1999 and 2000”), at <http://www.irs.gov/taxstats/display/0,,i1%3D40%26genericId%3D16853,00.html> (on file with the North Carolina Law Review). In addition, state governments collected \$7.5 billion in estate and inheritance taxes in 1999, about 1.5% of all state tax revenues. Kevin Sack, *States Expecting to Lose Billions from Repeal of U.S. Estate Tax*, N.Y. TIMES, June 21, 2001, at A1. But see B. Douglas Bernheim, *Does the Estate Tax Raise Revenue?*, 1 TAX POL’Y & ECON. 113, 135 (1987) (explaining that one must take into account the impact on income tax revenues associated with estate tax avoidance behaviors in order to determine how much revenue the income tax raises and arguing that “common planning techniques severely cripple the ability of

actually provides concrete valuable benefits to members of society. The revenue it raises is conceptualized as a somewhat awkward by-product, not its driving force. As Frank Knight put it, "The public confiscation of wealth at the death of the owner raises the question of what would be done with it."¹⁴⁶ Indeed it does, and even those who strongly oppose inherited wealth seem to have few answers.¹⁴⁷

This way of framing the issue makes the estate tax less attractive to people than it otherwise might be. Significantly, it makes the tax appear to have only a down-side and no up-side. When a loss is framed in isolation, rather than bundled with a corresponding benefit, it is unsurprising that it will be viewed unfavorably.¹⁴⁸ To be sure, those who emphasize the importance of removing wealth accumulations from the rich have in mind a corresponding advantage to the rest of society—greater equality of opportunity. Yet how this advantage will be manifested is not clear, and people may question whether gratuitously removing wealth will, on its own, do much to further this vague objective.¹⁴⁹ It has been well noted that simply reducing wealth accumulations does little to undo other, larger sources of inequality of opportunity, such as the fact that some parents invest more heavily than do others in developing the human capital of their children.¹⁵⁰ The possibility that the revenues collected

the federal government to achieve the dual purposes of promoting equity and raising revenue through estate taxation"); McCaffery, *Uneasy Case*, *supra* note 126, at 299–304 (contending that the estate tax raises little revenue).

146. FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 373 (Augustus M. Kelley 1964) (1921).

147. See, e.g., Haslett, *supra* note 143, at 137–38 (describing a proposal in which estates would be confiscated by the government "for the general welfare," with the confiscated property sold to the highest bidder to prevent undue government ownership of the means of production).

148. See Tversky & Kahneman, *supra* note 139, at 283 ("[T]he experience of a change for the worse may vary if the change is framed as an uncompensated loss or as a cost incurred to achieve some benefit").

149. See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 159 (2002) (arguing that, "given the importance of human capital, worsening the situation of those with inherited wealth seems unlikely to do much to improve the prospects of those with the most restricted overall opportunities"); *id.* at 187 (explaining that, however undeserved much of inherited wealth may be, "bringing down the top, unless it is a means of bringing up the rest, is not a policy that can be easily defended by politically attractive arguments").

150. See, e.g., *id.* at 158–59 (noting the significance of human capital passed from parents to children in generating inequalities and explaining that "[t]his source of inequality is probably impossible to eliminate—short of abolishing the family"); Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 502–03 (1952) (noting that economic inequality among children primarily results from disparate expenditures for their health, education, and welfare, and observing that "[n]o progressive inheritance tax, or combination of gift and inheritance taxes, can touch this

from such a tax could help to achieve the objective of equalizing opportunities (by, for example, subsidizing human capital investments among the poor) is only occasionally acknowledged.¹⁵¹

The up-side of the estate tax is not easy to detect in public policy discussions either. There are no special programs financed by the estate tax, and nothing of value has ever been identified as having been made possible by it. The revenues collected through the estate tax are a very small fraction of the total revenues collected by the Internal Revenue Service, and they are simply dropped, without further ado, into the government's large revenue bucket.¹⁵² Opponents of the estate tax seize upon this "drop in the bucket" quality of the estate tax, presenting it as proof that the tax does nothing of value.¹⁵³ Proponents of the estate tax occasionally attempt to present the tax in terms of its power to fund specific, important programs. For example, one organization opposed to elimination of the estate tax listed a slate of important programs on its website that could all be funded with estate tax revenues.¹⁵⁴ Such efforts are unlikely to be persuasive—people know the estate tax does not "really" fund these programs, and that funding instead comes from a general revenue bucket that is filled above the ninety-eight percent

source of economic inequalities among children" (citation omitted)); Kaplow, *supra* note 4, at 194–95 (noting that most intergenerational transfers are in the form of human capital and questioning the coherence of an estate and gift tax system that omits these types of transfers).

151. For a recent article noting this possibility, see Repetti, *supra* note 65, at 852 ("An important goal of a tax to prevent wealth concentrations should be to raise revenues to fund education and build an infrastructure (including communications and transportation) that will increase opportunities for all citizens."). See also MURPHY & NAGEL, *supra* note 149, at 158–59 (observing that "adequate public education for all" would help to reduce the inequality in human capital investments and suggesting that the estate tax might be a valid way "to raise revenue for legitimate social purposes" if it were found to be more efficient than alternative taxes); *id.* at 187 ("Taxation of large family fortunes at death should certainly be regarded as a legitimate source of revenue for redistribution and other purposes.").

152. See Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX L. REV. 419, 437 (1996) (noting that "taxes typically flow into a single pot from which the government pays its bills" making linkages between revenue and ends difficult to find); *supra* note 145 (quantifying 2000 estate tax revenues as a percentage of net revenues collected that year by the IRS).

153. See McCaffery & Wagner, *supra* note 108, at 805 (arguing that the estate tax does not raise revenue "for valuable social purposes" and citing the fact that "the death tax raises a small amount of revenue: 20–25 billion in a \$2 trillion budget").

154. The group is OMB Watch, and the website is <http://www.ombwatch.org/article/articleview/400/1/93/> (listing such programs as Head Start and the Child Care Block Grant) (last visited Jan. 4, 2003) (on file with the North Carolina Law Review).

mark with revenue from other sources.¹⁵⁵ People recognize that the loss of revenues from the estate tax would not necessarily determine the fate or funding levels of any of the listed programs, and they might optimistically assume that only government “fat” or “waste” would be cut as a result of the decrease in revenue.¹⁵⁶

In sum, when taxpayers search their memories in response to a survey question about the estate tax, they will find no ready answer to the question “what have you done for me lately?”; indeed, they cannot even find answers to the question “what have you done for me ever?” It is true that people pay other taxes, notably income taxes, without knowing much about precisely where the money goes or what it accomplishes.¹⁵⁷ Nevertheless, most people understand that many of the ongoing government expenditures that they see around them are largely supported by income taxes. Thus, income taxes, while widely resented, are grudgingly tolerated as offsets against income that make life in civil society possible. It seems people should also recognize and appreciate the fact that the estate tax helps to supply this same set of benefits. Indeed, we might expect a rational taxpayer who stands little chance of being subject to the estate tax to applaud when he sees estate tax revenues going into the same heap as income tax revenues; he can expect to share in the incremental benefits associated with the estate tax without being likely to bear any of the burden. Why is this not the case?

The phenomenon of mental accounting may be of help here.¹⁵⁸ Income taxes are most likely perceived as ongoing operating expenses (for the individual or for the corporation) that make possible the ongoing operating expenses of government. The estate tax, which involves the collection of a one-time lump sum from the accumulated wealth of a decedent, may be perceived as coming from an entirely different mental account. It seems incongruous for a discrete and highly salient lump of taxes to be collected at a highly salient time (a person’s death) and then be put to no similarly salient purpose. Taking a discrete lump of money that was already taxed when earned,

155. IRS, *supra* note 145 (indicating that the estate tax comprised approximately 1.3% of net revenues in 2000).

156. See Rakowski, *supra* note 152, at 425 (explaining that people may oppose the estate tax because they do not believe the loss in revenue will harm them).

157. See Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 178–86 (1996) (observing that the benefits of taxes are physically and temporally separated from the tax payment and discussing the impact of this fact on taxpayer attitudes).

158. For a general discussion of mental accounting, see THALER, *supra* note 22, at 107–21.

and then using it for ordinary government expenditures (that is, the very same expenditures for which income is routinely taxed) can easily be perceived as double taxation.¹⁵⁹ Presumably, other taxes which place burdens on dollars that were already taxed when earned—such as the property tax, which taxes property for which after-tax dollars were paid—are not commonly viewed as double taxation because they are viewed as serving wholly different purposes than the income tax. To the extent the estate tax is perceived as serving a purpose different from the income tax, it is one that many Americans view as illegitimate—the breaking down of wealth, or the punishing of the wealthy.

All this might explain why people who are actually subject to the estate tax would dislike it. But it can also explain why people who have no reason to ever expect to be subject to the estate tax might also oppose it. If people can readily perceive the down-side of a tax and can see no clear way in which it benefits them, then opposing the tax would appear to be unambiguously correct, regardless of how unlikely it might be that the tax would actually be imposed on one's own estate.¹⁶⁰ In other words, the typical framing of the estate tax issue has the effect of erasing the entire right-hand side of the equation we looked at earlier¹⁶¹ and reducing expected benefits from the tax in all cases to zero. It is as if the money collected through the tax is simply poured down a drain. Because everyone runs some

159. Some commentators have discussed the alternative of simply taxing the inheritance as income to the beneficiaries, see HARVEY S. ROSEN, *PUBLIC FINANCE* 465 (6th ed. 2002), an approach that might seem to solve this cognitive problem. However, if beneficiaries adjust their baselines to take into account the inherited funds, the payment of estate taxes might be more squarely framed as a loss than is presently the case. Compliance could also be a problem. See Scott J. Boylan & Geoffrey B. Sprinkle, *Experimental Evidence on the Relation Between Tax Rates and Compliance: The Effect of Earned vs. Endowed Income*, 23 J. AM. TAX'N ASS'N 75, 87 (2001) (presenting experimental results suggesting that where income is endowed, taxpayers react to a tax rate increase by reporting less income; where income was earned, more income was reported).

160. Eric Rakowski makes the converse point that people may not believe they will lose anything if the estate tax is abolished:

Even those who do not believe they have more than a slight chance of becoming tycoons might favor the abolition of an estate tax on self-interested grounds. They might believe that the abolition of wealth transfer taxes would not hurt them, because other taxes, in fact, would not be raised to make up the shortfall in revenue (the government would borrow more or spend less instead), whereas repealing the estate tax could help them if they get lucky.

Rakowski, *supra* note 152, at 425.

161. See text accompanying *supra* notes 114–16 (observing that a rational actor should support the estate taxation if expected liability multiplied by the probability of imposition is lower than the benefits the individual expects to receive from the tax revenues).

chance, however remote, of being subject to the tax, everyone would be expected to oppose it if it is perceived as generating no benefits at all.¹⁶²

Moreover, the estate tax is often perceived not only as a no-win proposition, but also as a strategic game against a greedy and unscrupulous opponent, the government.¹⁶³ In other words, not only is the money collected through the tax perceived as being poured down a drain, but it is also viewed as being poured down a drain rather gleefully by a government that delights in depriving citizens of the fruits of their labors.¹⁶⁴ The rhetoric surrounding the estate tax, which often focuses on the purported need to break down accumulations of wealth, reinforces this notion. It is also possible that the estate tax is viewed with even more aversion because of its perceived “voluntary” character.¹⁶⁵ The existence of well-known opportunities to avoid paying the estate tax may present a dynamic much like that experienced by many people in preparing to haggle with an automobile dealer—one fears that one will not manage to

162. Likewise, framing might explain why the overoptimistic discounting discussed above, *supra* note 138, would not necessarily lead people to support the estate tax. Overoptimistic discounting might indeed have the effect of making the costs of the tax appear disproportionately small *relative to its benefits*. But if the way in which the tax is framed makes it appear to generate zero benefits, even the most overly optimistic discounting could not turn an individual into an estate tax proponent.

163. Edward McCaffery considers the possibility that people may experience “a phenomenon of ‘tax aversion,’ akin to but distinct from loss aversion, whereby individuals attach disproportionate disutility to government extractions perceived or labelled as taxes.” McCaffery, *supra* note 2, at 1878; see also John S. Carroll, *Taxation: Compliance with Federal Personal Income Tax Laws*, in HANDBOOK OF PSYCHOLOGY AND LAW 507, 519–20 (D.K. Kagehiro & W.S. Laufer eds., 1992) (discussing the possibility that people may frame taxation in negative terms such as “losing a game against the government”); Rakowski, *supra* note 152, at 424 (suggesting that some opposition to the estate tax likely “stems from the desire that the government not claim a large slice of their winnings should they strike it rich” (citation omitted)). The possibility that many taxpayers view the government as an opponent to be outdone is consistent with observed phenomena in other tax contexts. For example, people may set up unprofitable tax shelters and consume tax deductible items beyond the point where they provide any net benefits to the taxpayer. See McCaffery, *supra* note 2, at 1914–15 & n.135, 1918. These activities fail to profit the taxpayer, but they deprive the government of revenues and may therefore allow the taxpayer to enjoy the perception that he is “beating the IRS.”

164. See McCaffery, *supra* note 103, at 1443 (finding it unacceptable that after “good and noble Americans” spend their lives working and saving, “their distant Uncle Sam should be dancing on their graves”).

165. See COOPER, *supra* note 11, at 1–2; see also Gale, *supra* note 19, at 351–52 (observing that estate taxes can be characterized as ‘voluntary’ in the sense that at least some portion of the tax is avoidable, but that they are not really ‘voluntary’ in the usual meaning of the word, given the costs associated with tax avoidance).

play the game as well as others, or as well as one should have.¹⁶⁶ An additional element of distaste associated with the possibility that one will be “suckered” may, therefore, make the tax even less palatable.¹⁶⁷

Together with the human tendency towards optimism, framing goes much of the way towards explaining the otherwise inexplicable opposition to the estate tax. But there is yet another source of opposition to the estate tax that warrants mention.

3. Savings and Security

Intrafamilial transfers can serve important purposes. For example, transfers of wealth within the family are sometimes used to compensate individual family members for bad luck or a lack of other sorts of endowments, and thus may involve a measure of redistribution in the direction of equality.¹⁶⁸ In a broader sense, accumulated familial wealth may be conceptualized as a form of social insurance for the family, to be drawn upon as needs arise.¹⁶⁹ The family's desire to maintain that same store of security even after the death of the family member who accumulated it (an event that has presumably already deprived the family unit of other tangible and intangible sources of support) is intuitively understandable. The estate tax might, therefore, seem to undercut a deeply ingrained

166. Cf. Rosenberg, *supra* note 157, at 197–99 (discussing the impact on taxpayer attitudes and behaviors of rumors that others are getting away with tax avoidance or evasion).

167. See Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390, 403 (1994) (“Human beings possess a very strong emotional desire not to be suckered.”); cf. *id.* at 401 (discussing literature on tax evasion that suggests that “people are more willing to pay their ‘fair share’ of taxes if they believe that others are not cheating the government”).

168. See Nigel Tomes, *The Family, Inheritance, and the Intergenerational Transmission of Equality*, 89 J. POL. ECON. 928, 955 (1981) (describing empirical findings based on a sample of estates in Cleveland in 1964–65 that “strongly confirm the equalizing role of inheritance” and that indicate wealth transfers are “‘compensatory’—in that (other things being equal) children with low incomes receive greater bequests than their better endowed contemporaries”). The net effect of this distribution of inherited wealth is not only greater equality within the family, but also greater equality “among families in the same income/education stratum.” *Id.* at 956.

169. See, e.g., Karl Kronebusch & Mark Schlesinger, *Intergenerational Transfers, in INTERGENERATIONAL LINKAGES: HIDDEN CONNECTIONS IN AMERICAN SOCIETY* 112, 116 (Vern L. Bengtson & Robert A. Harootyan eds., 1994) (noting that “[p]rivate transfers may also provide a ‘safety net’ for individuals whose needs are not met by their own efforts or public assistance” and may even compensate for imbalances in public benefits distributed to the various age groups (citation omitted)).

impulse—that of accumulating and transferring wealth for the security of one's family.¹⁷⁰

Moreover, these accumulations of wealth often represent the hard work, sacrifice, and self-deprivation of the individual saver.¹⁷¹ The purpose of such accumulations is not self-evident; indeed, they often appear to do little to maximize the utility of individual savers or that of their eventual beneficiaries.¹⁷² These painfully accumulated savings make more sense if one understands their goal to be that of providing family members with security and resources that will allow them to thrive as a group. While this desire for the group's long-term success could be characterized as a mere "preference" that could be accommodated within a rational actor framework, the impulse seems to transcend the atomistic preferences of individual rational actors. Regardless of how we label this impulse towards family security, it points to another source of opposition to the estate tax—one that fits with the pejorative "death tax" rhetoric. Why should a family's security (in the form of accumulated wealth) be depleted at precisely the moment that the family's security (in the form of human capital) has been deeply shaken by the loss of a family member?¹⁷³

There are some partial responses to this "savings and security" objection. First, it will not typically be the case that a death generating a taxable estate will simultaneously deprive the family of significant amounts of security in the form of human capital. Presumably, most decedents who leave behind taxable estates are retired at the time of death.¹⁷⁴ Second, one might argue that extremely large accumulations of wealth are not really necessary to provide basic familial security. One might argue that the urge to accumulate wealth is a little like the tendency to eat high-calorie foods; what was perhaps at one time an effective survival technique is

170. See McCaffery, *supra* note 2, at 1944 (suggesting that wealth transfer taxes "run counter to a deep-seated human instinct . . . to provide for one's heirs").

171. See generally THOMAS J. STANLEY & WILLIAM D. DANKO, *THE MILLIONAIRE NEXT DOOR: THE SURPRISING SECRETS OF AMERICA'S WEALTHY* (1996) (describing the frugality that some millionaires practice and positing that this frugality was instrumental in their wealth accumulations).

172. See, e.g., Fried, *supra* note 22, at 656 (asking who, if anyone, receives utility from bequests).

173. Such considerations, coupled with the incongruity of the government profiting from certain categories of untimely deaths, may help to explain Congress's decision to provide significant estate tax relief to victims of terrorist attacks. See Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 103(a), 115 Stat. 2427, 2430-31 (codified at I.R.C. § 2201 (Lexis Supp. 2002)).

174. Sixty-two percent of the taxable estate tax returns filed in 1992 were for decedents over age eighty. Poterba, *supra* note 3, at 242 (citing M.B. Eller, *Federal Taxation of Wealth Transfers, 1992-1995*, STAT. INCOME BULL. 16 (1996)).

now all too often overdone, leading to many problems.¹⁷⁵ In modern times, the amount of wealth that can be accumulated and stored far exceeds that which would be necessary to offer a reasonable measure of security to one's family. Society has also developed means for dealing with contingencies, such as life insurance, that might seem preferable to the accumulation of massive amounts of wealth.

Nevertheless, some deaths may generate insecurity for those left behind, and adding an estate tax may seem to make matters worse. For example, some decedents may leave behind security for the family in the form of a family business or a family farm (or some other large illiquid asset), and this source of security might be lost if the illiquid items must be sold to pay estate taxes.¹⁷⁶ While the specter of a family losing its business or farm as a result of the estate tax is based more on myth than on reality,¹⁷⁷ and while special estate tax provisions applicable to these assets reduce the chances of such a scenario,¹⁷⁸ cases may at least sometimes arise in which illiquid inherited assets must be sold in order to pay estate taxes.¹⁷⁹

175. Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1175 (2001) (observing that cravings for sweet foods, which may have been adaptive in the past, now often lead to obesity and health problems).

176. On the symbolic role of the family business and its widespread appeal, see Blatt, *supra* note 129, at 331. See also Haslett, *supra* note 143, at 149–51 (discussing and addressing difficulties posed by family businesses and farms for his proposal to abolish inheritance).

177. See, e.g., Burman, *supra* note 108, at 675–76 (noting that only 2,000 of the 32,000 estates subject to taxation in 1995 were those of small business owners or farmers, that these represented only about .01% of all small businesses in existence the previous year, and that “most of the small businesses subject to estate taxes hold more than enough liquid assets at death to pay the tax, for example from the proceeds of life insurance policies” (citation omitted)); Johnston, *supra* note 40 (claiming that, despite the rhetoric, few working farmers are subject to the estate tax, and noting that experts, including the American Farm Bureau Federation, which lobbies to abolish the estate tax, cannot cite even a single example of a farm being lost due to the estate tax).

178. See Leonard E. Burman & William G. Gale, *The Estate Tax Is Down, But Not Out*, 94 TAX NOTES 1039, 1043 (2002) (discussing provisions applicable to small businesses); Dennis J. Ventry, Jr., *Straight Talk About the ‘Death’ Tax: Politics, Economics, and Morality*, 89 TAX NOTES 1159, 1162 (2000) (discussing the many special provisions of the estate tax that provide tax-preferred treatment to owners of family farms and other family-owned small businesses). Some of these provisions were impacted by the recent tax reforms. For example, I.R.C. § 2057 (Lexis 2001), which allows a deduction for a decedent's interest in family-owned businesses, is repealed for estates of decedents dying after December 31, 2003. See *id.* § 2057 (amended by EGTRRA § 521(d)). Another important provision, *id.* § 6166, permits estate taxes relating to an interest in a closely-held business to be deferred and then paid in installments. EGTRRA extended this installment-payment option to certain additional business interests and expanded the number of partners or shareholders that may hold interests in a business eligible for the

The possibility that an estate tax will undercut family security, constrain family choices, or dramatically alter the lifestyles of family members is a serious concern, and one that is heightened by the fact that death, the tax's trigger, may have already destabilized the family emotionally, if not financially. Such concerns form the basis for a broad philosophical objection to the estate tax. To the extent the objection taps into values widely shared across society, it generates opposition not only among those who truly expect to be subject to the estate tax, but also among those who think their chances of being subjected to the tax are small or indeed nonexistent.¹⁸⁰ Here again, it is significant that the estate tax is framed as generating no specific benefits for anyone. Objecting to the estate tax on these philosophical grounds thus involves no perceived tradeoffs in the form of forgone benefits. Moreover, the "savings and security" argument provides (for many) a satisfying and complete response to the argument that accumulations of wealth "should" be broken down.

III. OBSERVATIONS AND NORMATIVE IMPLICATIONS

Parts I and II have provided a positive account of the behavior of wealthy taxpayers and ordinary citizens with regard to the estate tax. Cognitive theory adds explanatory force to that account. In this part, I will consider how this fuller positive account might alter our understanding of the estate tax, and how this enhanced understanding might inform a normative analysis of the tax.

Three assumptions underlie what follows. First, I assume that society has decided, for its own compelling normative reasons, that redistribution is a valid objective of tax policy.¹⁸¹ Put another way,

installment plan from fifteen to forty-five. EGTRRA, Pub. L. No. 107-16, §§ 571, 572, 115 Stat. 38, 92-93 (June 7, 2001) (codified at scattered sections of I.R.C.).

179. Burman, *supra* note 108, at 675 ("[It is] clear that estate taxes do cause some families to sell inherited assets to pay their tax bill."). Other theoretical problems involving illiquid assets might also be imagined, such as the possibility that a family inheriting a celebrity's valuable publicity rights might be forced to capitalize on those rights simply to pay the estate taxes. See Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX REV. 759, 777-82 (1998) (discussing this possibility).

180. See, e.g., Kaplow, *supra* note 4, at 193-94 (discussing the possibility that "transfer taxation may be viewed as a penalty on success—or worse, on success combined with generosity toward one's children—in which case transfer taxation may be seen as undesirable because it is corrosive of social norms favoring hard work and caring for one's family" and suggesting that this is one factor that "may help to explain why estate and gift taxation is unpopular among individuals who are unlikely ever to have to pay the tax").

181. See Rakowski, *supra* note 152, at 438 (setting forth the various goals of taxation, which, in addition to redistribution, include provision of public goods and provision of

society has reached the conclusion that the achievement of certain social goals requires moving resources to certain groups of people, and has further concluded that the resources in question are best raised through taxation. Because a great deal of the revenue raised by taxes *other than the estate tax* is used for redistributive purposes,¹⁸² it is fair to say that we inhabit a society in which redistributive taxation is an established fact, and that we will continue to inhabit such a society whether or not the estate tax is eliminated. This is not to say that there is universal agreement about the appropriate level of redistribution, about who should benefit from such redistribution, or even about whether government should be involved in redistribution at all. I am making the more limited assumption that the redistributive use of tax revenues is, in fact, a robust and persistent feature of our society, and one that will continue regardless of the fate of the estate tax.

Next, I assume that one of the goals that we, as a society, wish to achieve through redistributive tax policy is increased equality of opportunity for those who are less well-off. I am speaking here of the sorts of measures that would prevent certain morally arbitrary factors, such as childhood poverty, from blocking the full development and use of human capital.¹⁸³ Increasing equality of opportunity along this dimension fits well with both fairness-based and efficiency-based normative theories. The fairness argument is self-evident—allowing well-off children to develop their full potential while leaving untapped and undeveloped the human capital of poor children offends basic notions of fair play.¹⁸⁴ While facilitating the

appropriate incentives to engage in or refrain from engaging in certain favored or disfavored behaviors).

182. For example, the vast and redistributive Social Security system is funded entirely through payroll taxes. See ROSEN, *supra* note 159, at 184–87 (discussing the funding and distributive impacts of Social Security). Numerous other redistributive programs are funded out of general tax revenues, less than 1.5% of which are generated by the estate tax. See *supra* note 145.

183. See GARY S. BECKER, HUMAN CAPITAL 16 (3d ed. 1993) (explaining that “it is fully in keeping with the capital concept as traditionally defined to say that expenditures on education, training, medical care, etc., are investments in capital”).

184. The fairness argument is clearest and least controversial in the case of children, because adults may have made past choices that contributed to their current wealth level and their currently constrained opportunities. Inequality that results from what Ronald Dworkin terms “option luck”—the luck that results from voluntary choices people make about how to live their lives—is likely to be less troubling than that which stems from “brute bad luck”—the sort of bad luck that is utterly out of individual control. See Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 293–95 (1981) (distinguishing between these two types of luck and suggesting that differing amounts of income and wealth resulting from differences in option luck are not inconsistent with the notion of equality of resources).

development of individual talents and abilities (which are themselves unequally distributed by nature) is insufficient to satisfy some conceptions of fair equality of opportunity,¹⁸⁵ fairness surely demands at least that much.

There are also efficiency benefits associated with enabling people to fully develop their abilities and to put those abilities to their highest and best use.¹⁸⁶ When individuals are not permitted to develop or use their talents, potential human capital is squandered, and society suffers.¹⁸⁷ It is worth pointing out that children, in particular, cannot be expected to invest optimally in their own human capital.¹⁸⁸ Children lack the ability to borrow against their future productive potential to finance such investments, even if they possessed the foresight and inclination to do so.¹⁸⁹ Moreover, due to capital lending market imperfections, impoverished parents also lack the wherewithal to make optimal investments in their children's human capital, no matter how much they might wish to make these investments.¹⁹⁰ This rationale supports the free provision of public

185. See RAWLS, *supra* note 143, at 74 (asserting that “[t]here is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune”); David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171, 175 (1992) (arguing that “[i]f equality of opportunity means that a person's fortunes should not be determined by factors over which he or she has no control, then allowing people's talents to affect their fortunes violates equality of opportunity”).

186. Lynn A. Stout, *Some Thoughts on Poverty and Failure in the Market for Children's Human Capital*, 81 GEO. L.J. 1945, 1947 (1993) (explaining that society benefits from investments in human capital “as more productive individuals contribute more to social wealth and are less likely to depend on transfer payments from others for subsistence”).

187. See, e.g., ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 80–81 (1975) (describing the “inadequate development of the human resources of the children of poor families” as “one of the most serious inefficiencies of the American economy today”); BRADLEY R. SCHILLER, *THE ECONOMICS OF POVERTY AND DISCRIMINATION* 172 (8th ed. 2001) (explaining that disparities in opportunities based on factors such as race or wealth prevent society from achieving its productive potential); Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 WISC. L. REV. 235, 267–69 (observing that inequality of opportunity leads to less efficient development and deployment of human capital).

188. See Stout, *supra* note 186, at 1949–51 (discussing factors that keep children from investing optimally in their own human capital).

189. See *id.* at 1949 n.19 (discussing lack of wealth as an impediment to investments by children in their own human capital).

190. See, e.g., BECKER, *supra* note 183, at 93 (explaining that “it is difficult to borrow funds to invest in human capital because such capital cannot be offered as collateral”); OKUN, *supra* note 187, at 80 (explaining that discrimination in access to capital results in “inefficiency and inequality of opportunity [that] curb investment by the poor in setting up businesses, in buying homes, in education, and in all forms of human capital”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 166 (5th ed. 1998) (discussing the “danger of underinvestment in children”); JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR*

education, but the idea logically extends further to other goods that are instrumental to the achievement of children's full potential (e.g., adequate nutrition and basic medical care). Because the kind of equality of opportunity that leads to the optimal development of human potential can further fairness and efficiency simultaneously, it is something many people can agree on, at least in principle.

Third, and perhaps least controversially, I assume that, to the extent we are going to use tax policy to pursue increased equality of opportunity of the sort just described, we would want to do so in the manner that generates the largest gains at the lowest cost. Even if there is wide disagreement about where to strike the balance between costs and gains, choosing a mechanism that generates a larger unit of gain for each unit of cost seems unambiguously preferable. I am concerned, then, with exploring whether some appropriately-reformed version of the estate tax might possess some unique and unrecognized advantages in this regard. The two puzzles discussed above bear upon this question in interesting ways and provide guidance in pinpointing the sorts of reforms that might enable the estate tax to work better.

A. *Rethinking the Estate Tax*

An estate tax might operate in either of two radically different ways, and it is often unclear in debates over the tax which of these two possibilities is contemplated. The result is a predictably muddled discourse. The analysis developed in Parts I and II can help sort out these conflicting visions of the estate tax.

First, an estate tax might work to consciously make certain choices more costly in an effort to influence those choices, as does a "sin tax." Thus, a tax on cigarettes or alcohol might be designed to change behavior by shifting consumption from the taxed item to other, more innocuous items that have fewer harmful societal effects. The existence of the tax causes some people to refrain from consuming products they would otherwise consume in the absence of the tax, presumably substituting less-preferred alternatives (chewing gum, perhaps, or root beer) and incurring utility losses (at least in the short term) as a result. These utility losses are not made up for by any revenue gains to the government, so we might initially classify

309, 316–17 (1986) (discussing imperfect capital markets and the implications for access to higher education); Stout, *supra* note 186, at 1948 n.15 (collecting sources discussing these market imperfections).

them as deadweight losses.¹⁹¹ However, if we assume that the disfavored categories of consumption impose costs on society as a whole, then society *does* receive a corresponding benefit from the change in behavior—it does not come in the form of collected revenue, but rather in the form of reduced societal expenses for things such as health care.

If such a tax is set right, it makes people internalize the costs associated with particular consumption decisions, and therefore encourages them to do the right thing. In theory, we get the “right” number of smokers by changing the price of smoking to reflect its full cost (that is, only people who really value it more than it costs themselves and society will continue smoking). The central fact about this sort of tax is that its administrators are indifferent about the amount of revenue it raises; it is not designed to raise revenue, but rather to rectify a pricing flaw existing in the private market. Any revenue collected can be used to offset the societal costs associated with the choices people are making, but it is perfectly fine if no revenue is collected (that just means that once people confront the true cost of a particular consumption choice, they do not choose it).

It is possible to conceive of the estate tax in this same way. The rhetoric surrounding the estate tax often suggests that accumulations of wealth are bad *per se*, and that the estate tax is philosophically justified as a means of breaking down those accumulations. If this is in fact how we perceive the purposes of the estate tax, then the tax is working best when it raises the least revenue—at least if we think the reason it is failing to raise revenue is because people are changing their behavior so that large quantities of wealth are no longer amassed and transferred intergenerationally.¹⁹² To the extent the tax induces behavioral changes in the direction of less accumulation and more spending and dispersal, individuals would incur utility losses, but if these were smaller than the societal costs that were avoided as a result, the behavioral shifts would be desirable. This way of understanding the estate tax provides a convenient set of responses to many of the stock arguments against the tax. Against the objection that the tax is not raising much revenue, one can respond, “well, it isn’t supposed to.”¹⁹³ Against the objection that the tax lowers rates

191. A tax generates a “deadweight loss” or “excess burden” to the extent it imposes costs that exceed the revenues collected by the government. See ROSEN, *supra* note 159, at 282 (defining “excess burden” as “a loss of welfare above and beyond the tax revenues collected”).

192. See Duff, *supra* note 143, at 8.

193. See *id.* (discussing responses to the complaint that the estate tax does not raise very much revenue).

of capital accumulation and causes people to spend rather than save, one can likewise respond “that’s the whole point, isn’t it?”

As attractive as these responses are to estate tax proponents faced with a tax that does not generate much revenue and which allegedly discourages savings, the “sin tax” justification for the estate tax stands on shaky ground. This entire justification collapses if the idea that wealth accumulations are harmful for society is rejected as a normative matter, or if the opposite normative view holds sway—that accumulating wealth is generally good for society (that is, that these accumulations generate positive rather than negative externalities). Accordingly, some indictments of the estate tax focus heavily on the normative desirability of private wealth accumulations and the moral blamelessness (indeed, virtue!) of savings behaviors, and express dismay at the fact that such laudable activities and outcomes could be the target of taxation.¹⁹⁴

Conceptualizing the estate tax in this first way risks positioning the tax as one that sets out to consciously destroy the wealth and opportunities of those engaging in socially desirable activities. Under this view, the estate tax is necessarily framed as one whose only benefit is a negative one—keeping the rich from getting too rich by taking away some of their riches (or persuading them not to accumulate so much in the first place). If popular normative judgments fail to endorse such “leveling down” as beneficial, then the tax is one that not only has no “up-side” for individuals, but also is a tax that is fundamentally wrong-headed and counterproductive. The popular opposition to the estate tax may well be linked to this first understanding of the tax.

A second way of understanding the estate tax assumes that the tax is designed to raise revenue, and that its goal is to do so while imposing the smallest amount of cost possible. If characterized in this way, the estate tax is not seen as a unique instrument for “breaking down” wealth by triggering behavior changes, but rather as a garden-variety revenue-raising tax that attempts to do its job while changing behavior as little as possible. This way of understanding the tax is not inconsistent with a world view that holds private fortunes and private accumulations of wealth and even substantial inheritance of wealth to be socially valuable and worth preserving. Just as the taxation of property is not commonly understood to be incompatible with valuing and preserving the institution of private property, the taxation of estates need not imply any desire to destroy the target of taxation.

194. See McCaffery, *Uneasy Case*, *supra* note 126, at 343–44.

Of course, this alternative conceptualization of the tax is not very convincing if we assume that savings behaviors will respond in an extremely elastic manner to the estate tax—at the limit, we might imagine a world in which the taxation of savings leads to elimination of all savings.¹⁹⁵ If people prove willing and able to readily shift their behavior to avoid a tax, then that tax is not a very good way of raising revenue (although it may work perfectly well as an intentional behavior-modification mechanism). But what the low level of inter vivos giving seems to suggest is that people are perhaps not so ready and willing to switch their behavior from wealth-holding to wealth-dispersal. Rather, their preference for wealth-retention is fairly strong.

Moreover, there are comprehensible reasons why people fail to readily switch to gift-giving, and at least some of these reasons may be the product of deeply ingrained features of human cognition. The same behavioral factors that are dampening the use of inter vivos giving opportunities might also be expected to dampen other sorts of wealth-dispersal activities. In other words, looking at inter vivos giving behavior through the lens of behavioral law and economics suggests that wealth retention is a strongly preferred behavior, and that this behavior is both explicable and durable enough upon which to base tax policy.

To the extent cognitive factors are responsible for these preferences, however, a separate normative question emerges: Whether it is appropriate to exploit observed behavioral anomalies through tax policy.¹⁹⁶ This question becomes more tractable when disaggregated from an antecedent normative question about the appropriate degree of progressivity in a given tax system and the relative burdens that should properly be placed on each category of

195. A recent effort to assess the elasticity of behavior in response to estate taxes by examining the differences in capital accumulations in states with varying state-level estate taxes is DOUGLAS HOLTZ-EAKIN & DONALD MARPLES, DISTORTION COSTS OF TAXING WEALTH ACCUMULATION: INCOME VERSUS ESTATE TAXES (Nat'l Bureau of Economic Research, Working Paper No. 8261, 2001). This study found "a negative relationship between wealth accumulation and the estate tax, although the statistical precision of the estimates varies somewhat," and suggested that replacing the estate tax with a tax on capital income would yield modest efficiency gains. *Id.* at 21, 28. Holtz-Eakin and Marples note that their data did not include the most highly affluent portion of the population who are affected to the greatest degree by the estate tax; the "super rich" might respond either more or less elastically to the estate tax. *Id.* at 28 & n.32.

196. See Jolls, *supra* note 4, at 1677 (discussing the potential to reduce behavioral distortions by choosing a taxation method that relies on a cognitive bias, and querying whether it is "proper for government to make use of this error in citizens' perception"); McCaffery, *supra* note 2, at 1942–43 (discussing similar normative questions).

taxpayers. Once this determination as to progressivity has been made, the remaining question is whether a tax system is unacceptable if it reduces the subjective pain experienced by taxpayers in bearing what is (by definition) an appropriate share of the tax burden. A longstanding aphorism about taxation—that it should aim to “shear the sheep with a minimum of squealing”¹⁹⁷—suggests that official efforts to make taxpaying less painful are nothing new. Surely there is no obligation for government to present its every revenue-raising action in the least appealing light to maximize the torment it will cause to citizens.

Of course, if such efforts at pain reduction impeded the democratic process and compromised the ability of society to arrive at the “right answer” to the progressivity question, this would be problematic.¹⁹⁸ So, too, would be a system that violated certain precepts that we might take to be essential to a democratic government—by, for example, actually defrauding or deceiving taxpayers. Yet, some degree of manipulation of cognitive biases already occurs in the tax system (for example, in income tax withholding from wages). If we think that the group targeted by the estate tax (the very wealthy) is one that generally tends to exert disproportionate power in the political arena,¹⁹⁹ the fact that cognitive biases might to some extent contribute to the economic viability of the estate tax might seem less troubling. Indeed, one might argue that the very wealthy have successfully taken advantage of cognitive biases in their artful framing of the estate tax as a “no win” proposition, and that a reframing of the tax amounts to a correction of a pre-existing distortion, rather than the introduction of a new distortion.

197. Barry Bracewell-Milnes, *Earmarking in Britain: Theory and Practice*, in *THE CASE FOR EARMARKED TAXES: GOVERNMENT SPENDING AND PUBLIC CHOICE* 41, 51 & n.2 (Ranjit S. Teja & Barry Bracewell-Milnes eds., 1991) (tracing one version of this saying—“plucking the goose [so] as to obtain the largest possible amount of feathers with the smallest possible amount of hissing”—back to Colbert, the Controller-General of Finances under Louis XIV).

198. See ROBERT E. LANE, *THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES* 230 (2000) (observing that pain serves an important function in democratic systems and that the expression of pain serves “to make that system more responsive to popular needs and demands, that is, to fulfill its central purpose”).

199. See Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 9–13 (1991) (discussing the theory “that small bodies, groups of powerful or wealthy people, organized around some common interest, will exercise disproportionate influence on the political process” and observing that such a belief has long been part of American political discourse (citation omitted)).

It should be apparent by now that the estate tax need not be framed as it is currently.²⁰⁰ Reconceptualizing the estate tax as a viable revenue-raiser enables the estate tax to be framed in a way that links it to positive benefits, thus overcoming what is likely one of the primary sources of popular opposition. The fact that the tax does raise some revenue might seem already to position the tax as a revenue-raiser. Yet overcoming the wealth-destroying rhetoric and the “drop-in-the-bucket” perception of the revenues requires more. Where redistribution and the enhancement of equality of opportunity is the goal, the most suitable frame is one that links the two sides of the redistributive equation—the taxation side and the distribution side—in a way that resonates with the public’s sense of justice.

In fact, the estate tax carries substantial symbolic and rhetorical freight that ideally positions it to be framed as a mechanism for enhancing equality of opportunity. In providing increased opportunities for the least well-off, we might wish to avoid making any transfers of wealth that would prevent individuals from benefiting from the opportunities they have created for themselves through work and savings. Because estate tax revenues come from beneficiaries who typically did not do anything to earn the taxed wealth²⁰¹ and who have typically also received the benefit of expansive opportunities earlier in life, the estate tax seems to offer a means for funding expanded opportunities without diminishing hard-earned opportunities of others. But in order for the estate tax to be perceived as enhancing equality of opportunity, it is necessary to establish that someone is actually being provided with enhanced opportunities as a result of the tax. This requires linking the collection of estate tax revenue to specific types of expenditures that will serve to expand equality of opportunity.²⁰²

200. According to Carroll:

Individual taxpayers are motivated in multiple ways, and the way they frame taxpaying can be manipulated by the media, tax consultants, and the government. Significant numbers of people can be influenced to perceive taxpaying in positive terms, as fair, professionally administered, legitimate, collectively good, rather than in negative terms, as avoiding threat, being taken for a sucker, losing a game against the government, and so forth.

Carroll, *supra* note 163, at 519–20.

201. Exceptions are possible, as where the bequests really represent “payment” for past care. But participants in such veiled employer-employee relationships should not be able to avoid the income and payroll taxes that typically accompany earned income while also avoiding the inference that bequests are “unearned.”

202. Cf. BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 94–112 (1999) (suggesting use of a wealth tax to provide a “stake” of \$80,000 to each young person and noting the appropriateness of using such a tax for that purpose). For the relevance of expenditures linked to tax, see Carroll, *supra* note 163, at 512–13 (noting that

Linking taxing and spending in this manner seems like an obvious move. The fact that the possibility has not been given greater attention likely relates to a fundamental disconnect in the way legal and policy scholars approach their work. A division of intellectual labor seems to have developed, with tax scholars focusing on optimal revenue raising (regardless of the purpose) and social welfare policy scholars focusing on optimal spending (regardless of the source).²⁰³ Coordinating both sides of the redistributive equation permits redistribution to be more usefully framed for both donors and donees. In the context of the estate tax, this analysis would suggest “earmarking” the revenues for use in programs designed to enhance equality of opportunity.²⁰⁴

The estate tax is custom-made to take advantage of a frame that links it with opportunity-enhancing programs and can do so far more powerfully than can another sort of tax. It already carries with it the rhetoric of equalizing opportunities and by definition involves wealth that will in any event go to someone who did not earn it (at least not out in the marketplace). In addition, the fact that the estate tax is imposed on wealth while it is in transit from a deceased individual to a beneficiary provides the opportunity to position the tax as a gain-reducer rather than a loss-creator.²⁰⁵ Much of the negative rhetoric surrounding the estate tax casts the tax as one that collects money from dead people.²⁰⁶ Not only does this position the tax as a loss-generator, but also as one that unfairly inflicts losses on a shockingly

“[t]axpayers who disapprove of government spending, whether on the military or on social welfare, are more likely to think of taxes as unfair”).

203. A taxation casebook sets out the basic task of tax policy as follows: “The government is spending money. We need to come up with a way to pay for it.” JOEL S. NEWMAN, *FEDERAL INCOME TAXATION: CASES, PROBLEMS AND MATERIALS* 13 (2d ed. 2002). Of course, the potential to achieve distributive goals through the tax code has certainly been recognized, and redistributive programs such as the Earned Income Tax Credit bring some welfare scholars into contact with the tax code. However, the revenue-raising and social spending sides of the redistributive equation tend to be analyzed separately.

204. James M. Buchanan, *The Economics of Earmarked Taxes*, 71 J. POL. ECON. 457, 457–58 (1963) (“‘Earmarking’ is defined as the practice of designating or dedicating specific revenues to the financing of specific public services.”); see *infra* text accompanying notes 260–67 (discussing earmarking); cf. William H. Gates, Sr. & Chuck Collins, *Tax the Wealthy: Why America Needs the Estate Tax*, AM. PROSPECT, June 17, 2002, at 20, 21 (suggesting that “Congress should explore the possibility of linking estate tax revenue to the Social Security trust fund”).

205. See *infra* Part IV.A.2 (discussing a possible way to position the tax as a gain-reducer); see also *supra* text accompanying notes 78–81 (discussing the fact that people show a greater aversion to losses than to failures to secure equivalent gains).

206. Gale & Slemrod, *supra* note 107, at 1 (citing contributions of Winston Churchill and Steve Forbes to this rhetoric).

vulnerable and defenseless group—the dead! Recasting the tax as one that reduces the amount of unearned wealth beneficiaries will inherit would not only reposition it as a gain-reducer, but one that burdens a far less sympathetic group.

If, as suggested above, we conceptualize the estate tax as a typical revenue-generating tax (and not as a tax *designed* to change behavior), a primary economic inquiry then becomes whether this tax is better than other possible taxes at raising revenue without imposing costs on society. Because behavioral shifts in reaction to the tax are presumptively undesirable and costly in this account (rather than desirable and socially valuable, as in the earlier account) the size and content of these distortions becomes important in undertaking this comparative analysis. Two questions follow: How much do people actually change their behavior in response to the estate tax compared to other taxes? And how costly are these behavioral changes compared to those observed in response to other taxes? If persistent behavioral features are dampening what would otherwise be a rational response to the tax, then the estate tax may be a less costly way of redistributing money than economic models would predict. At a minimum, the muted behavioral response should lead us to look more carefully at the economic arguments against the estate tax.

B. *Saving and Spending*

The behavioral distortion that receives top billing in estate tax discussions is the distortion of the choice between saving and spending. At least three distinct concerns fall under this rubric. The first concern relates to the fear that the estate tax will trigger negative macroeconomic effects by altering society-wide savings levels. The second concern involves the utility loss that individual taxpayers suffer when they switch from a more-preferred activity (such as saving) to another, less-preferred activity (such as spending) as a result of a tax on the more-preferred activity. The third concern is that the estate tax will erode savings norms in society by punishing thrift.²⁰⁷ I will take up these concerns in turn.

Before doing so, however, a preliminary point must be addressed to establish the relevance of this inquiry. Even if the size of the distortion to savings and spending decisions generated by the estate tax is relatively small, some would argue that it still represents an

207. My categorization scheme builds on one drawn by Holtz-Eakin, *supra* note 23, at 513 (“[I]t is important to separate two issues: the interference of the estate tax with private decisionmaking and the aggregate level of capital accumulation.”).

additional distortion that is uniquely associated with the estate tax, over and above the distortions that one would expect to see with, say, an income tax.²⁰⁸ It might seem, then, that the estate tax is a clear loser, regardless of the precise size and shape of the distortions to savings and spending that it occasions. But we cannot simply count the number of distortions without regard to their respective sizes—several small distortions might amount to a lower total deadweight loss than one very large distortion.²⁰⁹ And there is reason to think that one of the primary distortions usually assumed to accompany the income tax—the distortion of choices between labor and leisure—is smaller in the case of the estate tax. An estate tax might be expected to result in less distortion of the labor/leisure choice than would an income tax, if only because its imposition is more remote from the decision point about labor and leisure.²¹⁰ As a matter of intuition, it seems unlikely that decisions to earn are greatly influenced by the existence of an estate tax.²¹¹

In addition, it is important to focus not only on the labor/leisure decisions made by potential donors, but also those of potential recipients. Either the donor or the donee, or both, may react to the tax by working harder, not by working less hard.²¹² To the extent an estate tax led beneficiaries to expect smaller bequests, this could lead them to work harder. On the other hand, if donors reacted to the estate tax with increased inter vivos giving, the recipients of these gifts might work less hard. If donors made up for the tax by working

208. Cf. Kaplow, *supra* note 4, at 170 (explaining that “differential taxes on different types of consumption expenditures cause distortions among types of consumption but do not alleviate the labor/leisure distortion”).

209. See, e.g., Holtz-Eakin, *supra* note 23, at 500 n.8 (explaining that “[i]t is tempting, but mistaken, to ‘count’ distortions” as a way of determining which of two taxes is superior; “[b]ecause the magnitudes of the distortions differ and because distortions interact, one must compute and compare the overall level of inefficiency in each case”); Joseph E. Stiglitz, *Pareto Efficient and Optimal Taxation and the New Welfare Economics*, in 2 HANDBOOK OF PUBLIC ECONOMICS 991, 1023 (Alan J. Auerbach & Martin Feldstein eds., 1987) (“[C]ounting the number of distortions is no way to do welfare analysis.”).

210. See Gale & Slemrod, *supra* note 124, at 624 (“[T]axes imposed at death may have smaller disincentive effects on lifetime labor supply and saving than taxes that raise the same revenue (in present value terms) but are imposed during life.”); Holtz-Eakin, *supra* note 23, at 512 (discussing how discounting would reduce the distortion in labor supply associated with an estate tax, as compared with an income tax).

211. See Repetti, *supra* note 65, at 863 (“[A]sk yourself if your decision to work or make an investment today was influenced by the thought of your mortality. Probably not.” (citations omitted)).

212. See MURPHY & NAGEL, *supra* note 149, at 152 (discussing these possible effects); Gale & Perozek, *supra* note 128, at 236 (explaining that “the overall effects of estate taxes depend critically on the recipient’s response as well as the donor’s”).

harder at accumulating, and if beneficiaries were aware of this fact, their expectations would not be reduced by the tax, and their labor efforts would be unchanged. The net effects, therefore, are indeterminate. Hence, it is worthwhile to investigate the dimensions of the distortions to saving and spending decisions.

1. Macroeconomic Effects

It is not obvious that achieving or maintaining a particular savings rate should be society's dominant goal.²¹³ For example, some kinds of consumption represent investment in human capital that may be more valuable than accumulations of private capital.²¹⁴ But even if we agree that lower savings rates would be bad from a macroeconomic perspective, it is not at all clear that the estate tax is responsible for reducing overall savings rates.²¹⁵ When effects on the savings of beneficiaries are also taken into account, there may be no negative overall impact on savings rates as a result of the estate tax; indeed, the estate tax may increase savings.²¹⁶ Nor is it obvious that getting rid of the estate tax is the best way to effect favorable changes in society-wide savings levels, given that there are other policy tools available which can also impact capital accumulation.²¹⁷ All this suggests that the macroeconomic critique is at least overstated, and possibly completely off the mark.

2. Utility Losses from Consumption Shifts

A second concern is that an estate tax will trigger personally costly behavioral shifts. For example, some people will choose to substitute inter vivos giving for bequests, based on the heavier taxation of the latter. We can assume that this behavior is costly—

213. See, e.g., Alstott, *supra* note 101, at 377.

214. See *id.* at 377 (noting that “[s]pending on health care and welfare improve not only the lives of the poor but also those who care about them and those who might employ a better-nourished and healthier work force”).

215. The argument that the estate tax will reduce savings turns, in part, on the assumption that the estate tax will induce people to give significant amounts inter vivos to people (such as their children) who are more likely to spend the money than save it. See McCaffery, *supra* note 103, at 1437–38 (presenting a fictional “case study” in which the parents give the maximum amount each year to their daughters). In reality, few people take full advantage of these opportunities to reduce transfer tax liability. See *supra* Part I.

216. See Gale & Perozek, *supra* note 128 (questioning whether estate taxes reduce savings); see also Alstott, *supra* note 101, at 387–88 & nn.95–98 (emphasizing the lack of economic consensus on the impact of the estate tax on saving behaviors).

217. See Holtz-Eakin, *supra* note 23, at 513.

like eating margarine instead of butter to avoid a tax on butter.²¹⁸ The fact that taxpayers are doing something they prefer less does not do the government any good. This is an “excess burden” or “deadweight loss” associated with the tax—a utility loss that the taxpayer suffers without rendering any corresponding benefit to the government.²¹⁹ In addition to the cost of following a less-preferred consumption path, the donor may suffer additional psychological costs, such as the dread that accompanies thinking about and planning for death.²²⁰ Unless there is some reason to think that this change in behavior generates countervailing benefits for society (a question that is actually somewhat open in the context of the estate tax),²²¹ it represents a deadweight loss that we must take seriously.

Yet there is another person in the story whose utility must also be evaluated in connection with this change in consumption patterns: the potential recipient. Assume for the moment that the relevant choice set for the donor includes only two options—bearing the estate tax by retaining wealth and transferring it by bequest at death, or switching to a tax-free or tax-discounted inter vivos gift to the same beneficiary.²²² There is reason to believe that the gift in hand would be more valuable to the recipient than an expected future bequest that is equivalent when discounted to present value and further discounted to reflect uncertainty regarding whether the money will be consumed in the interim or diverted to someone else. This pattern of preferences would follow if people are risk averse. The greater uncertainty associated with the bequest makes it less valuable—even when the expected value (after taking into account that uncertainty) is equal to that of the gift in hand.

218. See SIMON JAMES & CHRISTOPHER NOBES, *THE ECONOMICS OF TAXATION: PRINCIPLES, POLICY, AND PRACTICE* 23 (1996–1997 ed.) (presenting the butter tax example).

219. *Id.*

220. Such “dread costs” may impact not only those who ultimately decide to change their behavior, but also those who end up deciding not to do so after mulling it over.

221. An inter vivos wealth transfer typically helps to decrease inequality (as it goes from a more wealthy to a less wealthy person). See Kaplow, *supra* note 4, at 183 (noting that intergenerational gifts can reduce inequality, at least as between the parties to the transfer). The structure of the gift tax exemption (\$11,000 per person per year) encourages the broader distribution of wealth among these less wealthy individuals. Thus, we might say that whatever unhappiness the taxpayer faces as a result of having to follow the less palatable course is partly made up for by the immediate effect of reducing inequality. This rationale hearkens back to the “sin tax” way of understanding the estate tax, considered above. See *supra* text accompanying notes 191–94.

222. I consider the possibility that donors might shift from bequests to some other form of consumption below. See *infra* text accompanying notes 224–30.

The present-day gift might also be preferred if we think that there are serious imperfections in capital markets that keep potential recipients from being able to pursue their preferred lifetime pattern of consumption and investment. Having capital available at an earlier stage in the life cycle might enable the recipient to take advantage of utility-enhancing consumption and investment opportunities (including investment in human capital) that would otherwise be impossible to finance due to liquidity constraints.²²³ Thus, where a switch from a bequest to an inter vivos gift generates a utility loss for the donor, it may nonetheless represent a utility-enhancing move for the recipient. It is not obvious which of these effects would dominate.

Opponents of the estate tax sometimes express concern that people will react to the tax not only by substituting inter vivos giving for bequests, but also by substituting other sorts of consumption for savings. These other sorts of consumption would not feature the countervailing utility gain to a donee, and hence might more clearly involve a net utility loss. While raising the price of a given item through taxation lowers the relative prices of all other items, not all items are equally plausible substitutes for the taxed item. Thus, we might expect a butter tax to have a larger impact on the consumption of close substitutes, such as margarine, than on more distantly removed products, such as automotive parts or vacation packages. In the estate tax context, we might expect the closest substitute for a bequest to be gifts to those same loved ones, or perhaps gifts to a broader array of loved ones.²²⁴ We would not necessarily expect to see substitution of some unrelated good, such as a yacht.

On the other hand, such unrelated consumption might conceivably be a better substitute for a bequest than would be an inter vivos gift if the fact that the donee would be receiving the money during the donor's lifetime generates additional disutility for the donor, above and beyond the disutility associated with losing control of the money during the donor's lifetime. For example, a donor might fear that the donee's receipt of the money would alter the ongoing donor-donee relationship or cause other damage to the

223. See Kaplow, *supra* note 4, at 175 (explaining that gifts and bequests might relieve liquidity constraints on donees and permit them to make better investments in human capital, which would ultimately lead to increased productivity). If we assume that a larger lifetime productivity gain generally accompanies a transfer that relieves the donee of liquidity constraints earlier in her life, the inter vivos gift would be preferable to the bequest in this regard.

224. See Schmalbeck, *supra* note 11, at 149 (stating that most distortions in choice that result from the estate tax "involve making transfers earlier than the testators desire or to a different beneficiary").

recipient or the family. Unrelated consumption could be an important source of deadweight loss if a large number of donors were believed to have: (1) an aversion to donee receipt of gifts during the donor's life; (2) a bequest motive (meaning that the donor's aversion to the donee's receipt of funds expires at the donor's death and is not a matter of philosophical opposition to inheritance);²²⁵ and (3) a weak enough attachment to the "bequest-control" bundle that an upward tick in its price would trigger a shift to other consumption.

In addition, there may be people whose wealth accumulations have nothing to do with a bequest motive, but who nevertheless believe the estate tax is deeply unfair. These people might not care at all about getting wealth to their descendants, but might care greatly about keeping the government from collecting revenue from their estate. They simply do not want to be "suckered" by the government by ending up with taxable wealth accumulations at death. For purposes of depriving the government of estate tax revenues, a spending spree works just as well as a program of planned inter vivos giving. Yet this assumes people would be willing to engage in a less preferred activity (spending, rather than saving) solely to spite the government. Unlike people who (even in the absence of a tax) would spend freely on the theory that "you can't take it with you," these hypothetical people would spend even when they would rather not, on the theory that "at least the government won't get it." To the extent this level of anti-government sentiment is really present in wealthy taxpayers, we should consider the possibility that the sentiment is largely an artifact of the unfortunate way in which the estate tax is currently framed.²²⁶

Moreover, the type of consumption towards which the estate tax would push people, even in theory, is that which would dissipate

225. If a person were philosophically opposed to passing wealth to her descendants, consumption would represent merely the fulfillment of her preferences, not a "substitution" prompted by the presence of a tax on bequests. It is possible, of course, that philosophical positions about the suitability of transferring wealth are not wholly independent of government tax policy—that is, a tax on bequests may affect the way some people feel about bequests. But the strength and direction of this effect is indeterminate. For example, a would-be donor who decides that an estate tax makes bequests prohibitively expensive and bothersome might develop a philosophical objection to inherited wealth as a way of easing cognitive dissonance. See JON ELSTER, *SOUR GRAPES* 109–24 (1983) (discussing "adaptive preferences," which are shaped by the "feasible set"). Alternatively, an individual who had never given bequesting much thought might have the matter drawn to her attention by the estate tax and might develop an adamant desire to bequest—in part, because the tax presents an obstacle to this goal. See *id.* (discussing counteradaptive preferences in which objects appear more desirable when they are more unattainable).

226. See *supra* Part II.B.2 (discussing the framing of the estate tax).

wealth quickly rather than merely convert it into other forms of wealth. The reason is obvious: Any valuable property remaining at death (in whatever form) would still be subject to the estate tax.²²⁷ A person determined to avoid the estate tax would thus have to go on a quite specialized spending spree, purchasing only items that can be immediately consumed, or that depreciate fairly rapidly.²²⁸ As a practical matter, what will these wealthy people consume? Expensive jewelry is out. Extravagant homes in stylish areas are out. Antique furnishings are out. Lavish furs and rugs and artwork are out. Collections of china and silver are out. Fancy automobiles and yachts are, if not entirely "out," at least questionable—that Lamborghini may depreciate a bit, but probably not fast enough to entirely thwart the government.

Gambling would be quite effective. Spending large amounts of money on medical care or on a retirement home stay would work well too. Likewise, giving money to charity would be an excellent way to get rid of money quickly, and presumably this would not trouble society at all. Another obvious possibility would be to employ a large number of personal servants to attend to one's every whim—but, assuming these people were paid in accordance with applicable laws, we might think this expansion of employment opportunities laudable. Aside from various categories of illicit purchases (which, we will assume, can be properly regulated through the applicable criminal laws), the consumption pattern that will most effectively dissipate wealth involves eating expensive food, drinking expensive liquor, going on expensive vacations, buying computer equipment and other electronic gadgets with an extremely short half-life, consuming expensive "culture," wearing expensive clothes, and spending lavishly on items of personal care, such as skin creams, vitamins, facelifts, and so on.²²⁹ That people would be both willing and able to dissipate large quantities of wealth in this manner simply to reduce the size of their

227. It is true that some forms of wealth may be more difficult to value objectively and may therefore offer more opportunities for evading estate taxes than cash or cash equivalents.

228. See Schmalbeck, *supra* note 11, at 140 (pointing out that individuals who attempt to consume their wealth "may find that even their attempts at consumption involve incidental investment qualities that result in further, unintended accumulation").

229. McCaffery fears people would use their money to run for office, which indeed is a good way of getting rid of money fast. McCaffery, *Uneasy Case*, *supra* note 126, at 312 (noting the amount of estate taxes Ross Perot saved as a result of his bid for office). But it is highly questionable whether the prospect of the estate tax would induce many people to run for office who would otherwise prefer not to do so. It is also unclear why we should be more troubled by a would-be donor running for office than by his child being enabled to do the same thing by virtue of receiving a large bequest.

estates, when they would actually prefer some other consumption pattern, does not seem terribly likely.²³⁰

More plausibly, some people might use the existence of the estate tax to rationalize indulgent expenditures that they would otherwise feel guilty about making, but which they would in fact prefer to make. If behavioral changes are observed as a result of this dynamic, should it fairly be understood as distortion? If we are concerned with maximizing utility, then the fact that a tax's existence helps people engage in a preferred spending pattern without guilt should be viewed as a positive outcome. This possibility, however, highlights the need to consider whether changes in savings and spending decisions occasioned by the estate tax negatively affect attitudes toward thrift.

3. Impacts on Attitudes Toward Thrift

The last facet of the savings-related criticism focuses on the psychological impact of the estate tax on virtues of thrift and on luxury spending decisions. The estate tax is popularly conceived as one that attacks thrift, and this may account in some measure for its unpopularity. This dovetails with the more general concern that the estate tax appears to undercut the ability of family members to provide lasting security for the family.²³¹ We might worry that punishing the thrifty through an estate tax may lead to less thrift generally in our society, and that this might be a bad thing.²³² Significantly, this concern would exist whether or not the ensuing lack of thrifty attitudes translated into significant macroeconomic impacts related to reduced savings levels and regardless of whether the reduction in thriftiness occurred as a result of personally costly consumption shifts.

Here, it is important to recognize that the population whose saving and spending behavior may be affected by the estate tax is not necessarily limited to those who will actually end up being subject to

230. See Schmalbeck, *supra* note 11, at 140 (“[O]ne encounters very little anecdotal evidence suggesting that the very wealthy embark on spending sprees as a means of reducing their estates.”).

231. See *supra* Part II.B.3.

232. McCaffery expresses this concern:

The estate tax works like the opposite of ‘sin’ taxes on goods such as alcohol and cigarettes, which are (also) not designed to raise resources, but to control behavior or to curtail certain vices. The estate tax is quite possibly an anti-sin tax, or, equivalently, a virtue tax. The estate tax is a tax on work and savings, on thrift, and on altruism.

McCaffery, *Uneasy Case*, *supra* note 126, at 344; see also Kaplow, *supra* note 4, at 193 (discussing the view that estate taxation might erode thrift norms).

the tax. To the extent strong savings norms exist in a society, they can help to keep family units self-sustaining, which in turn could help prevent bankruptcy and dependence on governmental programs. Although the savers whose behavior we ought to be most concerned about are not those people who are actually subject to the tax, the consumption decisions of the wealthy may remain relevant. If the wealthy react to an estate tax by engaging in greater levels of conspicuous consumption, this could contribute to problematic cycles of dissatisfaction, overspending, and debt among those who are unable to keep up with such a lavish lifestyle.²³³ We might worry about the effects throughout society of any tax that makes saving appear less esteemed or valued, given the current low rates of savings and high rates of debt and personal bankruptcy.²³⁴ A solution to this problem would focus on fostering appropriate norms about saving and spending, or what Irving Fisher called monetary “fashions,” which could have important behavioral and societal impacts.²³⁵

This takes us back to a point raised earlier—the possibility that the estate tax might be used as an excuse for spendthrift choices that are actually preferred. Could the indulgence of preferences which might otherwise be suppressed alter the relative value that society appears to attach to savings and consumption? Advertising similarly attempts to break down ingrained notions of thrift and austerity in favor of immediate gratification, and presumably this is not something we find very troubling. However, the possibility that a *governmental* policy might be used as an excuse for abandoning thrifty behaviors might give us some pause.

One might wonder whether taking this concern with thrift seriously would require abandoning the estate tax and opting for an entirely different system of taxation, such as a consumption tax.²³⁶ Wealth only accumulates if someone, at some time, “saves” it; taxing accumulation means, in this sense, taxing “saving” behavior. But not

233. See ROBERT H. FRANK, *LUXURY FEVER* 45–63 (1999) (discussing deleterious effects of competitive cycles of conspicuous consumption).

234. See generally TERESA A. SULLIVAN ET AL., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000) (analyzing rising personal bankruptcy rates among the middle class and the societal factors contributing to that phenomenon).

235. See FISHER, *supra* note 54, at 87–88 (noting that at the time of his writing, fashion “acts, on the one hand, to stimulate men to save and become millionaires, and, on the other hand, to stimulate millionaires to live in an ostentatious manner”); *id.* at 87–89 (noting that changes in customs for accumulating and spending wealth could have significant effects on the distribution of wealth and the interest rate).

236. See, e.g., Robert H. Frank, *Progressive Taxation and the Incentive Problem*, in *DOES ATLAS SHRUG?*, *supra* note 15, at 490, 503 (discussing the advantages of a consumption tax over the current income tax).

all wealth accumulations are the result of a conscious effort to exercise thrift; rather, accumulated wealth is sometimes merely that which the consumer (already satiated with earlier consumption) never got around to consuming. At some point, consumption stops being attractive and starts becoming just plain difficult, if not impossible.²³⁷ For example, in order to keep from accumulating additional wealth, Bill Gates would have to spend millions of dollars each day.²³⁸

To be sure, wealthy people can exhibit greater or lesser degrees of thriftiness, and one can draw a distinction between a wealthy spendthrift character and a virtuously thrifty individual and use these stock characters to oppose the estate tax.²³⁹ Yet the amount of accumulated wealth remaining at death tells us nothing about whether an individual exhibited thrift in life. Some people die with substantial wealth not because they are truly thrifty, but rather because their wealth outpaces their capacity to spend. Moreover, many thrifty individuals never accumulate significant wealth because their incomes are simply too low; these individuals would not realize any "reward" from the repeal of the estate tax. In short, the accumulation of savings can properly be regarded as a luxury that is much more readily available to the wealthy than to the poor.²⁴⁰ It is not necessary to give up on taxing this luxury altogether in order to promote virtues of thrift in society.

237. See, e.g., Christopher D. Carroll, *Why Do the Rich Save So Much?*, in DOES ATLAS SHRUG?, *supra* note 15, at 465, 476–77 (discussing the proposition that the very wealthy draw near a satiation point where the "marginal utility of consumption approaches zero as the level of consumption rises"); Schmalbeck, *supra* note 11, at 140 (discussing difficulties that the very wealthy face in spending wealth more quickly than it accumulates). Barbara Fried has raised the possibility that consumption itself may be costly beyond a certain level, and people will fail to engage in it at excessive levels due to inertia: "Past a certain income/consumption level, consumption itself may not be a normal good for many people: We run out of easy ideas for things to consume, it takes work to figure out how to spend a lot of money, and it takes time to spend it." Fried, *supra* note 22, at 676–77; see also McCaffery, *Uneasy Case*, *supra* note 126, at 346 ("It is also interesting to note that, left more or less on their own, people seem to reach a consumption satiation level.").

238. Carroll, *supra* note 237, at 476–77 (calculating that Gates would have to spend \$25 million per day to avoid additional wealth accumulations, based on press accounts placing Gates's net worth at \$100 billion and assuming a ten percent annual rate of return).

239. See McCaffery, *Uneasy Case*, *supra* note 126, at 342–45 (presenting the example of Ms. Thrifty and Mr. Spendthrift to illustrate unfair effects of the estate tax on thrifty individuals).

240. See Carroll, *supra* note 237, at 481 (concluding that the rich "choose to save more and to accumulate faster because they can 'afford' the luxury of doing so"); Hirsch, *supra* note 4, at 30 & n.105 (noting that saving has the characteristics of a luxury good); Shefrin & Thaler, *supra* note 48, at 110 ("To the poor, saving is a luxury.").

C. Avoidance Costs

Another objection focuses on costs associated with efforts to avoid the estate tax. Even if the estate tax does not cause people to substitute earlier transfers or other forms of consumption for the bequest-control bundle, it does notoriously impel many people to engage in other sorts of complicated estate tax avoidance activities. Not only does this introduce additional deadweight losses (the money paid to accountants and tax attorneys to structure one's affairs in the manner that will minimize one's estate tax liability),²⁴¹ it also arguably has unfortunate distributive consequences. Insofar as the more sophisticated estate tax avoidance techniques are available only to the "super rich," one might argue that these opportunities make the tax unfair.²⁴² The availability of such devices arguably make the tax less progressive (or more regressive) within the range to which it applies.²⁴³

An initial response would be to note that if such avoidance techniques are deemed to have unfortunate consequences (either from a deadweight loss perspective, or from the perspective of tax equity), the estate tax could simply be tightened up to eliminate these opportunities.²⁴⁴ Whether or not doing so makes sense depends on a number of factors, including the administrative and enforcement costs associated with the change, the amount of additional revenue it would

241. See, e.g., Schmalbeck, *supra* note 11, at 151–54 (discussing and estimating the magnitude of "direct costs of estate planning," which include professional fees and related expenses). Estate planners interviewed by Schmalbeck estimated that approximately half of their work would be required even in the absence of transfer taxes. *Id.* at 152.

242. The same basic argument is often mounted against tax shelters in the income tax context. See David A. Weisbach, *An Economic Analysis of Anti-Tax Avoidance Doctrines*, 4 AM. L. & ECON. REV. 88, 109 (2002) (observing that "[a] common claim is that tax shelters reduce the progressivity of the tax system because they are available only to the rich").

243. The very wealthiest fraction of those paying the estate tax are responsible for a disproportionate amount of the revenues collected. See Poterba, *supra* note 3, at 241–42 & tbl.2 (reporting that in 1995, estates over \$20 million accounted for only 0.7% of the estate tax returns but accounted for 17% of estate tax payments; in contrast, estates valued at between \$600,000 and \$1 million made up 44% of the returns but accounted for less than 6% of the revenue). Of course, it is still possible that the extremely wealthy are paying a smaller percentage of their (extraordinarily large) estates in estate taxes than are the less wealthy.

244. See Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391, 1398 (2002) (book review) ("[T]ax avoidance techniques can in theory be addressed by making the tax base more comprehensive and enforcement more effective."). For example, the Treasury Department recently announced that a scheme for avoiding estate taxes that had been used by thousands of wealthy individuals was invalid. See David Cay Johnston, *U.S. Bans a Scheme to Avoid Estate Tax With Life Insurance*, N.Y. TIMES, Aug. 17, 2002, at A1.

yield, and the impact it would have on taxpayer choices and utility.²⁴⁵ This requires making predictions about what the taxpayers currently availing themselves of existing avoidance opportunities would do if those options were eliminated.²⁴⁶ Would they generally choose to leave bequests and bear the tax? If so, eliminating the avoidance opportunities would raise revenues and reduce the amount of behavioral distortion occurring as a result of the tax.²⁴⁷ On the other hand, it is possible that the withdrawal of sophisticated avoidance techniques would drive more people to give or consume inter vivos rather than bear the estate tax—or to seek out even more arcane and complex avoidance arrangements.²⁴⁸ To take one extreme case, if everyone fully substituted avoidance through tax-free inter vivos consumption and gifts for the other forms of avoidance currently available, revenues would not increase at all. Yet donors would be worse off than in the world where the original avoidance techniques were available.²⁴⁹ The only possible up-side would be countervailing utility gains to donees or to society as a result of the behavioral shift.

Moreover, it is not clear that present avoidance opportunities make the estate tax less progressive than it would otherwise be.²⁵⁰ If current tax schedules were formulated with present opportunities for tax avoidance in mind, removal of the tax avoidance opportunities

245. See generally Weisbach, *supra* note 242 (presenting an economic framework for analyzing anti-tax avoidance doctrines).

246. See *id.* at 97–99 (presenting a stylized example involving the taxation of three varieties of fruit, which illustrates this point). To put the point in economic terms, we would want to examine the cross-elasticities of three goods: the bequest-control bundle, the structures of wealth that are presently untaxed (that is, the avoidance opportunities), and the inter vivos use or gifting of wealth. If people are currently using sophisticated avoidance techniques as a substitute for the taxable bequest-control bundle, but do not view inter vivos use or gifting of wealth as an attractive alternative to the current avoidance techniques, then taxation of the structures which presently receive favored tax treatment would be more likely to induce shifts back to the bequest-control bundle than to induce shifts to inter vivos use of wealth. See *id.* at 99 (observing that taxing pears as well as apples while leaving bananas untaxed is likely to be a good idea if pears are a better substitute for apples than they are for bananas).

247. See *id.* at 103 (observing that “[a]nti-avoidance doctrines that cause taxpayers to shift back to nonavoidance behaviors and, therefore, raise significant revenue are likely to be more efficient”).

248. See *id.* (observing that “anti-avoidance doctrines that merely induce taxpayers to shift their behaviors toward worse shelters without raising significant revenues (by causing taxpayers to shift toward nonavoidance behaviors) are inefficient”).

249. See *id.* at 99 (noting that the strengthening of anti-avoidance doctrines will decrease individual utility by constraining choice, holding all else equal).

250. See *id.* at 109 (explaining that “[i]f tax shelters were reduced, the extra revenue could be used to reduce other taxes on the rich” and recognizing the possibility that “the existing marginal rate structure might already take into account the existence of tax shelters”).

might not actually make the tax more progressive; these changes might instead be matched by a flattening of the marginal tax rates.²⁵¹ Nevertheless, the existence and salience of opportunities for avoidance may contribute to the public distaste for the estate tax in a way that changes in marginal rates would not. As discussed above, people may feel uniquely “suckered” by the estate tax if they believe that others are able to make use of avoidance techniques that they cannot utilize.²⁵² Because beliefs about the taxes paid by others can play a significant role in public attitudes towards taxation, and can affect compliance levels,²⁵³ tightening up avoidance opportunities might make sense from this perspective. Sorting out these issues is difficult, but my point here is a simple one: The current existence of sophisticated tax avoidance techniques does not rule out the viability of the estate tax as a policy tool because these techniques can be addressed to the extent that doing so makes sense.

In any event, the problems presented by avoidance techniques are not unique to the estate tax. For example, when the stepped-up basis on assets transferred at death is eliminated along with the estate tax,²⁵⁴ we might expect many of the avoidance efforts currently poured into reducing estate tax liability to simply be shifted into avoiding the income tax on capital gains. Likewise, other costs associated with the estate tax, such as those relating to compliance and enforcement, also exist with other taxes. It does not appear that these categories of cost are larger in the case of the estate tax than they are in the case of an income tax; indeed, they may be smaller.²⁵⁵ My point here is not to

251. *Id.*

252. See *supra* text accompanying notes 166–67.

253. See, e.g., LEWIS, *supra* note 142, at 177 (observing that “[w]hile the relationship between tax attitudes and tax evasion is not a simple one, we can be confident in our general prediction that if tax attitudes become worse, tax evasion will increase”); Huang & Wu, *supra* note 167, at 401–02 (discussing literature on tax evasion and the role played by perceptions of equity and of other taxpayers’ compliance); Weisbach, *supra* note 242, at 111 (noting the potential impact on taxpayer compliance played by social norms and a given taxpayer’s perceptions of the compliance of other taxpayers).

254. See EGTRRA, Pub. L. No. 107-16, § 541, 115 Stat. 38, 76 (repealing I.R.C. § 1014 with respect to decedents dying after December 31, 2009); *id.* § 542, 115 Stat. at 76–86 (adding I.R.C. §§ 1022, 6716 and amending I.R.C. §§ 1040, 1618, 1619); *id.* § 901, 115 Stat. at 150 (providing a sunset for this change of December 31, 2010).

255. See, e.g., Ascher, *supra* note 31, at 116 (observing that “probably because in this country the transfer of any significant amount of wealth at death is next to impossible without the involvement of both lawyers and the court system, the estate tax traditionally has been one of the easiest taxes to enforce”); Schmalbeck, *supra* note 11, at 154–55 (explaining that the “public costs of administering and policing the transfer tax system seem modest”). Schmalbeck discusses one study that estimates administrative and compliance costs for the estate tax at about six to seven percent of revenue generated; earlier work had generated estimates of ten percent for individual and corporate income

present a comprehensive comparison of the estate tax with other taxes, but rather to suggest that the estate tax may be a more promising tool of redistribution than is sometimes supposed. Eliminating the tax based on an assumption that it is unduly distortive of individual choices seems premature.

IV. NEW LIFE FOR THE ESTATE TAX?

In this last part of the Article, I want to sketch out some possible policy directions indicated by the foregoing analysis. My reason for doing so is not so much to convince readers of the merits of any particular proposal, but rather to convince readers that proposals of this sort are worth making. If we can agree that furthering equality of opportunity is something that we as a society desire, and that some amount of redistribution is necessary to achieve this, the question then becomes how best (that is, at lowest cost per unit of progress) to achieve it. The discussion above suggests that the estate tax may have some significant advantages in this regard, but it is also the focus of significant popular opposition. Much of that opposition can be attributed to the interplay of the current design details with cognitive phenomena. But a reformulated and properly targeted estate tax could not only be politically viable, but could also make the expenditures to which it might best be linked (such as those designed to enhance opportunities for the less well-off) more palatable.

I have in mind two sets of changes. The first involves framing. I propose directly linking the estate tax to, and earmarking its revenues for, specific opportunity-enhancing programs. In addition, I suggest taking more advantage of the opportunity to frame the tax as an offset against a larger gain (the bequest). The second set of changes addresses concerns about security and savings. I propose making the estate tax sensitive to choices people make about consuming and saving. In addition, I suggest that people be given the opportunity to pre-pay wealth transfer taxes on major illiquid assets if they wish to protect their heirs from the possibility of having to sell such assets to pay the estate tax. Although I present these changes as a package, each could work as a stand-alone reform.

taxes, and two to five percent for sales taxes. *Id.* at 155 (citing Charles Davenport & Jay A. Soled, *Enlivening the Death-Tax Death-Talk*, 84 TAX NOTES 619, 622-23 (1999)); Joel Slemrod, *Which is the Simplest Tax System of Them All?*, in ECONOMIC EFFECTS OF FUNDAMENTAL TAX REFORM 355, 368-74 (Henry Aaron & William Gale eds., 1996).

*A. Reframing the Estate Tax**1. Taxing to Enhance Opportunities*

The first step in reframing the estate tax is to discard the rhetoric about destroying accumulations of wealth and dragging people back to the starting gate, and replace it with a focus on the societal benefits associated with increasing equality of opportunity for the less well-off. Helping the less well-off compete gets to the heart of the problem with inequality of opportunity—the squandering of human potential.

The next step is to identify some specific governmental programs that further equality of opportunity (or invent new ones that will further that goal) and separate this slate of programs from those benefits funded through other revenue efforts, such as the income tax. The obvious candidates are programs to help children and young people achieve their potential. Here, we might consider those programs which are popularly denoted as “welfare.” When one compares the amount and character of the revenue yielded by the estate tax with the amount and character of the expenditures necessary to fund welfare programs, one is struck by the symmetry. Federal block grants to the states to enable them to run their welfare programs amount to \$16.5 billion annually.²⁵⁶ In 2000, the estate tax netted almost \$25 billion; estate and gift taxes together netted almost \$29 billion.²⁵⁷ The projected 2001 revenue collections from transfer taxes were about \$30.5 billion.²⁵⁸ Thus, it is not unreasonable to think that the estate tax could generate sufficient revenues to fund programs that would significantly enhance the opportunities available to the less well-off.

The philosophical symmetry is as stunning as is the financial. Money would be transferred from the children of the very wealthy to the children of the very poor. The former, who grew up enjoying all the advantages money can buy, would have their unearned fortunes trimmed back just a bit to permit the latter, who were born unlucky, to have some semblance of a fair start in life. The usual complaints about the poor idly luxuriating in unearned benefits should lose a bit of force when the money the poor are receiving comes from

256. HOUSE WAYS & MEANS COMM., 2000 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMISSION OF WAYS AND MEANS 352 (2000) (describing the Block Grant Program of Temporary Assistance for Needy Families), *available at* http://utdallas.edu/~jargo/green2000/Section_7.pdf.

257. *See supra* note 145.

258. Schmalbeck, *supra* note 11, at 156.

individuals who did nothing to earn it either. We might expect taxpayer hostility towards welfare to diminish once it is funded with unearned fortunes, not hard-earned wages. On the other hand, it might be foolhardy to link something as historically unpopular as “welfare” with something as unpopular as the estate tax. It might offer too easy a target to opponents, who could claim to “kill two birds with one stone” by eliminating both at the same time. Perhaps a better approach would be to fund specific opportunity-enhancing programs that complement the core public assistance program. One possibility would be to use estate tax revenues to fund a government-sponsored loan program designed to redress the imperfections in the capital market that constrain the poor from making optimal investments in human capital.²⁵⁹ In any case, the idea of linking the estate tax to programs designed to help poor children and young people achieve their potential makes good sense.

The concept of earmarking is a familiar one that has been used to much advantage by charitable organizations. People who might be reluctant to contribute to a general pot of money for doing a random assortment of vaguely good things might well contribute money to provide assistance to a particular starving child, or to supply building materials to volunteer workers constructing homes for the poor in one’s hometown, or to add books to their alma mater’s library. The more specifically-targeted the donation, and the more control the donor feels over the expenditure, the more the transaction is framed as a contribution to a cognizable good, rather than merely as a drain on the donor’s resources.²⁶⁰ As helpful as earmarking might be for fundraising, however, one might object that requiring money to be used for specified purposes impedes the optimal allocation of funds. Indeed, charities often settle for the illusion of earmarking. For example, Defenders of Wildlife urges people to “adopt a wolf” by making a donation of a particular amount of money, but the charity does not claim (nor could anyone reasonably think) that the donation will actually go to help a specific individual animal—although presumably the funds *are* earmarked for programs to help wolves generally.²⁶¹

259. See Fennell, *supra* note 187, at 325–28 (proposing such a loan program).

260. Sometimes earmarking is carried even further, when charitable organizations not only specify the particular ends your contribution will serve (e.g., life-saving rehydration fluids for one hundred impoverished children) but also suggest the discretionary expenditures you might forgo on a daily basis to finance the contribution (e.g., a side order of french fries).

261. See Defenders of Wildlife, Adopt a Wolf, at <http://www.defenders.org/adopt/wolf/adopt.html> (last visited Nov. 25, 2002) (on file with the North Carolina Law Review)

In the tax context, we might similarly worry that earmarking specific revenues for specific purposes would prevent budget authorities from allocating revenues optimally and flexibly.²⁶² Economists, however, have done some interesting work on earmarking that suggests the practice may not necessarily generate inefficiencies.²⁶³ For example, James Buchanan has suggested that earmarking could be beneficial from the standpoint of individual participation in collective decision-making about public services.²⁶⁴ When citizens make decisions about the funding of a bundled package of goods, they may be forced to accept more than they want of some goods in the bundle, and less than they want of other goods in the bundle; in contrast, earmarking “provides a means of compartmentalizing fiscal decisions.”²⁶⁵ De facto earmarking already occurs whenever a particular taxing authority, such as a local school district, is given power to fund only particular government functions.²⁶⁶ Earmarking, therefore, may offer a useful way of framing tax-and-spending decisions, without necessarily introducing any inefficiencies.²⁶⁷

Significantly, the estate tax should be presented as a necessary and appropriate way of paying for these particular opportunity-enhancing programs, not as an end in itself. In this manner, the estate tax could be transformed from a wealth-destroying tax that incidentally raises a pittance of nonspecific revenue into a favored mechanism for providing opportunity-enhancing programs to society. None of these adjustments of the estate tax “frame” involves a

(displaying a photograph of a baby wolf and offering readers the opportunity to “adopt a small, precious wolf pup like ‘Promise’ today”).

262. See Buchanan, *supra* note 204, at 457 (noting the “near-universal condemnation of the institution [of earmarking] by experts in budgetary theory and practice”); see also Bracewell-Milnes, *supra* note 197, at 46 (listing objections to earmarking frequently found in the public finance literature).

263. For an overview of work on this topic, see JAMES & NOBES, *supra* note 218, at 136–37. See also Bracewell-Milnes, *supra* note 197, at 48–50 (questioning the standard objections to earmarking and suggesting that earmarking could be efficient); Buchanan, *supra* note 204, at 458 (observing that the standard models used to generate these critiques use the budgetary authorities’ judgments as a reference point, rather than those of citizens, and questioning whether that is the appropriate reference point).

264. Buchanan, *supra* note 204.

265. *Id.* at 458; see also *id.* at 462 (providing a more detailed analysis).

266. See *id.* at 458.

267. One practical consideration that argues against earmarking in the present context is the very tenuousness of the estate tax’s existence. See Bracewell-Milnes, *supra* note 197, at 87 (“[T]he best taxes to earmark are those with an unlimited life expectancy, and not those which are candidates for early abolition or whose longer-term future is in doubt.”). On the other hand, it is possible that earmarking the tax could be influential in securing its long-term future.

substantive change. The relative positions of the more well-off and the less well-off can be just as effectively equalized by destroying the advantages of the more well-off as by enhancing the opportunities of the less well-off. Moreover, taxing the more well-off will have the same "destructive" impact on accumulations of wealth whether the goal is destroying wealth or paying for opportunity-enhancing benefits. Finally, a dollar of revenue buys the same amount of government services, whether it is dropped in a large revenue bucket or earmarked for a special opportunity-enhancing program.²⁶⁸ Nevertheless, these small changes in "frame" would, I believe, utterly transform the public perception of the estate tax and turn it into a viable redistributive mechanism. It would also help to improve the public image of "welfare" programs by reminding taxpayers that these programs are, in fact, designed to help achieve the ideal of equality of opportunity.

Some additional refinements would help to complete the transformation. The program (both the "taxing" and the "spending" halves of it) should be given a descriptive name that repositions the package not just as a tax, but rather as a productive program that offers real benefits to society. For example, we might name it the Linked Estate and Gift Assessment for Children and Youth ("LEGACY"). Programs funded by the tax revenues would be identified by this name and would enter common parlance (e.g., "we've got some LEGACY money for this project," or "I am applying for a LEGACY grant" or "my child received a LEGACY scholarship"). Emphasizing the purposes of a tax rather than (or at least in addition to) the fact that it is a tax can make a large difference in the way the tax is perceived.²⁶⁹ Creating a program with name recognition would enable people to mentally associate the tax with some familiar and tangible benefits. Decisions about the estate tax would no longer involve simply accepting or rejecting the estate tax *qua* tax; rather, such decisions would implicate all the programs funded under LEGACY.

In addition, we could consider giving the donor the chance to make an election in her will as to which of several opportunity-

268. Of course, the number of such dollars available may vary depending on how revenues and services are linked.

269. See McCaffery, *supra* note 2, at 1873 ("[I]ndividuals may think about matters easily assimilated as 'taxes' differently from other matters and may think about different taxes differently; the nature of one's evaluation function itself depends on the cognitive label."); cf. THALER, *supra* note 22, at 119 ("Reverse mortgages (in which a bank buys a house from an elderly family, lets them live in it, and pays them an annuity) have been extremely unpopular, in part, I think, because they are called mortgages.").

enhancing programs she would like the taxes on her estate to fund.²⁷⁰ This would give the donor an active role in leaving a legacy to society and would be consistent with the choices that already exist for leaving wealth to charities.²⁷¹ The more a tax looks like a voluntary choice rather than a compelled confiscation, the more palatable it is likely to be.²⁷² Even if one doubts that a wealthy taxpayer could ever view the estate tax with anything other than outright hatred, this way of positioning the tax may have a transformative impact on the attitudes of a larger and potentially more politically powerful group—the vast majority of taxpayers who will never have to pay the tax at all.

With these changes, many people would no longer view the estate tax as a mechanism pitting a donor against the government, but rather as a mechanism for enhancing equality of opportunity. In other words, the tax would have clear winners, not just losers. In contemplating paying the tax, people would no longer envision a faceless governmental bureaucrat pouring dollars down a drain, but rather the programs that are supported by the revenues.

2. Framing the Tax As a Gain-Reducer, Not a Loss-Creator

In addition to reframing the estate tax as a generator of identifiable societal benefits, we might also explore ways to better frame the tax as a “gain-reducer” rather than as a “loss creator.” Because people tend to find a loss more painful than a failure to secure an equivalent gain,²⁷³ a frame that presents the tax as reducing a gain rather than generating a loss might be expected to make the tax more palatable. This could, in turn, decrease both the utility loss and enforcement costs associated with it. The timing of the estate tax makes it well-suited to a “gain reducing” frame, because the loss of

270. Such “tax earmarking” programs have been implemented on a limited scale in Canada; taxpayers in some provinces can choose to earmark taxes for either public schools or separate school boards. See Marc Bilodeau, *Tax-earmarking and Separate School Financing*, 54 J. PUB. ECON. 51, 52 (1994) (discussing earmarking in Canada). See generally *id.* (discussing circumstances under which limited earmarking might be feasible).

271. It is possible that individuals who were philosophically opposed to all of the choices available under the LEGACY program would be motivated to shift their bequests in the direction of additional charitable contributions. To the extent these charitable contributions translate into goods and services that would otherwise be funded through taxes, this shift may not impose a significant social cost. It is also worth remembering that a choice to leave more money to charity means leaving less money to one’s beneficiaries than would otherwise be possible. This fact presumably explains why people are willing to pay estate taxes under the present system, rather than leave all of their money to a charity of their choice.

272. See Bracewell-Milnes, *supra* note 197, at 55 (discussing gains associated with “making taxes less like compulsory payments and more like voluntary ones”).

273. See *supra* text accompanying notes 78–81.

the tax could be integrated into the larger gain of the bequest.²⁷⁴ This might not work, however, if the beneficiary immediately adjusted his baseline upward to account for the bequest. Estate taxes are due nine months after the date of death, providing a reasonable interval for a beneficiary to adjust to the pre-tax bequest amount before the taxes are actually paid. In such an instance, the tax might well be perceived as a loss from the newly-increased baseline rather than merely as a reduction in a gain.

If beneficiaries did not have an opportunity to adjust their baselines upward before paying the estate tax, this would more squarely position the tax as a "gain-reducer." To take the extreme (and obviously unacceptable) case, we might imagine a world in which donors and beneficiaries are given no information about the estate taxes that may be levied. Instead, the estate's assets go directly into a government escrow account, and then some weeks or months later each beneficiary would receive a government check for the value of the bequest, net of the (undisclosed) estate taxes. If we could set aside the general outrage that would be generated by such a scheme, the beneficiary would probably experience the government check as a gain, having no baseline against which to assess it.²⁷⁵

A slightly less fanciful alternative would be to announce that estate tax rates will be set randomly after death, so that nobody would know ahead of time the rate of taxation that would be applied.²⁷⁶ To the extent this complicated the decision set facing a potential donor, it might result in fewer attempts at liability reduction. To the extent it tempered the expectations of a potential recipient (effectively blurring the baseline against which the eventual inheritance would be evaluated) such an alternative might cause the bequest-net-of-taxes package to be viewed as a gain rather than a loss. While such a tax is not a realistic option,²⁷⁷ the role of uncertainty and its link to framing is important to recognize. For example, the uncertainty generated by the clumsy set of annual

274. See RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* 39 (Richard H. Thaler ed., 1991) (discussing greater palatability of losses that are integrated into larger gains, as are payroll reductions).

275. This scenario assumes that beneficiaries will not have independent knowledge about the size of the estate and their bequested share of it. This is likely not a realistic assumption in some category of cases.

276. See Jolls, *supra* note 4, at 1674 (discussing probabilistic taxes).

277. See *id.* (noting the political infeasibility of probabilistic taxes); Stiglitz, *supra* note 209, at 1013 (discussing the unlikelihood that a "randomized" tax could ever be implemented in a democracy—in part because of fears that "a random tax would not in fact be random, that the die would be loaded in favor of those in political power").

reforms and eventual phase-out and resurrection of the estate tax may end up having many of the same effects that a probabilistic estate tax might have.²⁷⁸

More realistically, we might imagine replacing the current estate tax collection system with one that operates on a principle similar to payroll withholding. For example, banks, financial institutions, and life insurance companies might be required to withhold and submit to the IRS a set percentage of each decedent's holdings before releasing the balance to the executor, unless the executor provides an affidavit certifying that the estate's total assets are less than the current exemption amount or that deductions will be taken (such as the unlimited deduction for transfers to spouses) that will render the estate nontaxable. To avoid hardship, there could be special exemptions from estate tax withholding for which an executor could apply in extraordinary circumstances, such as where the vast majority of the estate is held in large illiquid assets and all of the liquid assets are necessary to meet immediate short-term needs of the survivors.²⁷⁹

Provision could also be made, in accordance with state law, for a particular apportionment scheme or for designation of payment of estate taxes from a particular account, again making use of affidavits

278. Cf. Stiglitz, *supra* note 209, at 1013 (discussing the possibility that "some of the properties of optimal tax structures may reflect an attempt to introduce randomization surreptitiously"). For general background on the uncertainty resulting from the recent estate tax reforms, see, e.g., Johnston, *supra* note 5. Taxpayers might react to the added complexity with either apathy or increased attention. On the one hand, when a task becomes too complex, people may react by simply giving up. McCaffery explains how this might occur in the tax context:

Learned helplessness refers to the fact that individuals, when repeatedly confronted with stressful or difficult situations, 'learn' to become helpless—an ironic inversion of what we take a learning process to be. Complex taxes provide a fertile testing ground for the effect. My sense is that a good many individuals have learned to be helpless vis-a-vis the tax system; that is, they have given up altogether the formidable task of understanding the law, even as it applies to them.

McCaffery, *supra* note 2, at 1925. On the other hand, it is possible that the frequent changes in the law will raise the saliency of the estate tax issue and lead to heightened planning and avoidance efforts.

279. Relatively illiquid types of property (personal residences, real estate, real estate partnerships, closely held stock, farm assets, limited partnerships, other noncorporate businesses, depletable/intangibles, art, and the catch-all category "other assets") together made up just under 30% of the gross estate value reflected on 1998 taxable estate tax returns. See Gale & Slemrod, *supra* note 107, at 9–11 & tbl.1.3 (showing percentages of different categories of property held by estates, broken down by estate size, based on 1998 IRS data).

to secure release of funds from the other financial institutions.²⁸⁰ If more fine-tuning were necessary, the withholding percentage could itself be calibrated based on the executor's sworn estimates of the size of the estate. The same percentage could be withheld from the proceeds generated by the executor's sale of real estate, business interests, and other large assets, where such sales occurred before the estate tax return was filed.

Setting up the system in this manner would effectively remove the money from the scene before beneficiaries had a chance to adjust their baselines upward as a result of the bequest.²⁸¹ The actual filing of the estate tax return would require little or no additional payment or might actually generate a refund if most of the estate's wealth were held in liquid assets. As a result, we might expect such filings to be more prompt and less distressing than is presently the case. Indeed, instances of estate tax evasion might be expected to fall as fewer taxpayers were faced with the prospect of paying a positive balance due.²⁸²

The problem of premature baseline adjustment might persist, however, in estates where most of the wealth is held in the form of large illiquid assets. To the extent a beneficiary immediately adjusted her baseline upward to encompass "mom's ranch" or "dad's art collection," the prospect of having to sell that illiquid asset in order to pay estate taxes on it would likely be perceived as a loss—and perhaps a very painful one, if sentimental value is attached to the asset. Indeed, a beneficiary's baseline might well include the asset long before the death of the donor. Here, we might think of the trite image of a parent and child together surveying the family mansion and grounds, the family business, or the family farm, while the parent solemnly intones "one day all this will be yours." To the extent such conversations really occur (and to the extent estate taxation really

280. See Mary E. Hitt, Note, *Estate of Reno v. Commissioner: One Step Beyond Apportionment?*, 48 U. PITT. L. REV. 1093, 1097–1102 (1987) (discussing state law approaches to apportionment of the estate tax burden).

281. It is possible, especially where the executor will be a primary beneficiary, that withholding might be experienced as a loss (perhaps as a lot of little losses). Yet it seems plausible that the loss associated with the withholding system would be bundled together with the larger gain (the release of the balance of the asset to the executor) in much the way that payroll withholding seems to be cognitively bundled with the larger gain of receiving the pay.

282. Cf. Carroll, *supra* note 163, at 517 (discussing research showing that people who owe positive income tax balances on April 15 delay preparing their tax returns and expend more time and energy finding ways to lower their taxes). For an analysis of compliance with the estate tax generally, see Martha Britton Eller et al., *Noncompliance with the Federal Estate Tax*, in RETHINKING, *supra* note 4, at 375.

operates to dash the expectations of the child in this story), it will be difficult to recast taxation of these important assets as mere “gain reductions.” However, the possibility that people could “pre-pay” wealth taxes on large illiquid assets—a point addressed below²⁸³—might provide at least a partial answer to this framing dilemma.

B. Valuing Thrift and Security

1. Making the Estate Tax Thrift-Sensitive

If, as argued above, we are concerned with supporting thrift as a societal value, the challenge is to find a way to interject support of thriftiness into the estate tax framework. Of course, it remains an open normative question whether encouraging thrift (which means, in some sense, burdening consumption) is a good idea.²⁸⁴ Yet because estate tax opponents often focus on the importance of rewarding thrift (or at least not punishing it), the possibility that the estate tax could be made thrift-sensitive is worth investigating. One way to do this would be to allow people to earn estate tax exemptions by engaging in low-consumption, high-savings behaviors over a lifetime. The point would not be to shield all savings, but rather only that category of savings that represented a conscious and exceptional choice to forgo consumption in favor of providing additional security for one’s family.

To make the estate tax sensitive to consumption choices, the government might calculate an annual consumption benchmark that represents a suitably thrifty existence for each family size and geographical area. By consuming less than that benchmark level in a given year, individuals could earn additional annual estate tax exemptions of some standardized amount (such as \$50,000). The household’s annual consumption level could be derived by subtracting new savings from annual income (putting aside the complications associated with debt).²⁸⁵ The exemptions earned in this manner would be “banked” under the taxpayer’s social security number and could be used to make tax-free gifts or to offset any future estate tax liability. In this fashion, savings accomplished through low consumption would be rewarded; savings accompanied

283. See *infra* Part IV.B.2.

284. See MURPHY & NAGEL, *supra* note 149, at 99–103, 109–12 (discussing arguments for and against taxing consumption).

285. See Edward J. McCaffery, *Being the Best We Can Be (A Reply to My Critics)*, 51 TAX L. REV. 615, 625 (1996) (“[I]f Income equals Consumption plus Savings ($I = C + S$), then Consumption equals Income minus Savings ($C = I - S$).”).

by higher consumption levels would not be. The choice of extreme thrift would be available even to the wealthy, if they valued thrift as a good in itself, or had a strong desire to leave tax-free bequests.

Of particular importance in the present context, people could earn these exemptions regardless of income level. People who consumed very little because they earned very little would receive an exemption just as would someone who earned a great deal and consumed very little. People who became wealthy after years of low income and low consumption would be able to shield more of their wealth than would someone who had always consumed at a relatively high level. Thus, people with relatively modest incomes who run little risk of ever being subject to the estate tax would receive further assurance of that fact by "banking" large numbers of exemptions over their lifetimes. The person who lives a "rags to riches" story or builds a profitable business from the ground up will most likely be able to pass wealth tax-free to a second generation.²⁸⁶ Because of these effects, the unfairness often associated with the estate tax would be reduced, and popular opposition could be expected to wane.

There would be another salutary effect of this approach: It would make societal inequities palpable, particularly for those who are more well-off. By, for example, tying the consumption benchmark to the median consumption of a family of similar size living in that region, this system could raise awareness about the resource constraints faced by the less well-off. Although it seems extremely unlikely that very many well-off people would actually consume below such a benchmark, those who gave the possibility even a moment's thought might learn something in the process. For example, some well-off individuals might come to understand that their own continued wealth is not so much a function of extraordinary thrift, but rather a function of extraordinary resource levels.

2. Buying Security by Pre-Paying the Estate Tax

As noted above, special concerns are raised by large, illiquid assets of great sentimental value, such as small businesses and family farms. Although the actual instances in which estate tax liability

286. In this respect, my proposal bears some resemblance to that of Eugenio Rignano. Rignano believed that transfer taxes should be calibrated to reflect the extent to which the transferred wealth represented the work and thrift of the decedent, with newly created wealth taxed lightly on transfer, wealth that had been transferred once before taxed more heavily, and wealth that had been transferred twice or more before confiscated entirely. EUGENIO RIGNANO, *THE SOCIAL SIGNIFICANCE OF THE INHERITANCE TAX* 34 (1924); *see also* HERBERT KIESLING, *TAXATION AND PUBLIC GOODS: A WELFARE-ECONOMIC CRITIQUE OF TAX POLICY ANALYSIS* 157-59 (1992) (discussing Rignano's work).

forces a sale of an important family asset are relatively rare, the symbolic and emotional freight attaching to such a possibility is enormous.²⁸⁷ Because dread of such forced sales fuels much of the opposition to the estate tax, providing a mechanism for removing that dread would be quite valuable in improving the public image of the estate tax.²⁸⁸

One vehicle for achieving that goal would be to permit prepayment of estate taxes for important, illiquid assets. There are several ways this might be accomplished. The simplest would be to permit people to purchase estate tax exemptions (say, in \$50,000 increments) for a price that is based on a particular estate tax rate and discounted to present value based on actuarial data. Thus, an individual with a life expectancy of an additional thirty years could immunize a given increment of wealth at a lower price than could an individual with an additional ten years of life expectancy. Wealthy parents could purchase exemptions for their young children at heavily discounted rates. To make this scheme more closely track the estate tax rate schedule and to avoid abuse of the pre-payment option, the marginal rate on each additional exemption could be increased incrementally in accordance with the tax code. These purchased exemptions could be tracked by social security number, along with any exemptions earned through low consumption.²⁸⁹

While there are innumerable details that would have to be addressed in order to operationalize this idea, one important matter should be addressed: whether these exemptions would be refundable or transferable. Given human optimism and general uncertainty about the growth of wealth and the timing of death, some people might buy extra tax exemptions and end up not needing to use them. Another possibility is that the estate tax will no longer be in effect at the time of death, and that the exemption will turn out to have been unnecessary. What should happen in that instance? Should the heirs receive a refund? If so, how should it be calculated? Alternatively, should they be able to keep the estate tax exemption for their own future use? The way in which these issues are to be handled would

287. See Blatt, *supra* note 129, at 315 (describing the symbolic importance of family businesses in estate tax debates).

288. Cf. Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1168 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000) (explaining that when "baseless fear" cannot be dispelled through education and information, government "might be well advised to regulate . . . not to reduce the risk (which may be infinitesimal) but to quell the fear"))).

289. See *supra* Part IV.B.1.

have important implications for the viability of any such pre-payment program.

For ideas on how to handle these issues, we might look at the experience with other pre-payment plans, such as prepaid tuition plans.²⁹⁰ While plan details vary from state to state, refunds of the amount paid in (less various administrative fees) are generally available, and many plans pay some amount of interest as well.²⁹¹ Refunds are likely to be even more important in the estate tax context. Unlike tuition rates, which are almost certain to rise in the future, estate tax rates are politically contingent and subject to change in either direction at any time. If we wish to encourage pre-payment of taxes, a viable approach would be to permit refunds of all taxes that were prepaid, at any time and for any reason, perhaps even with some amount of interest built in. In addition, the exemptions might be transferable to other family members if the person for whom the exemption was originally obtained dies without leaving behind an estate for which the exemption is needed. However, if the tax were discounted to present value based on actuarial data, exemptions could not be sold or transferred to other people inter vivos—otherwise, young people could buy exemptions at low, discounted rates and transfer them to older people who are much closer to death.²⁹²

A related problem would arise if there were significant disparities between actuarial accounts of additional years to live and an individual's own information about personal life expectancy. For example, a person who has just been diagnosed with terminal,

290. These plans are known as "529 plans," after the Internal Revenue Code provision that grants them tax-advantaged status. See I.R.C. § 529 (Lexis 2001). These plans now exist or are under development in every state. See Jim Hamilton, *Notice 2001-55 and Rapid Growth of Qualified Tuition Programs*, 93 TAX NOTES 988 (2001) (discussing the growth and history of 529 plans).

291. See Sarah Max, *College Plans for the Risk Averse*, CNNmoney, Feb. 20, 2002, at http://money.com/2002/02/20/college/q_529prepaid/ (on file with the North Carolina Law Review). For example, College Illinois offers prepaid tuition plans that can be cancelled for a refund of the amounts paid, less application fees, plus (after the first three years) interest compounded at two percent annually. College Illinois 529 Prepaid Tuition Plan, Frequently Asked Questions: Cancellations and Refunds, at http://www.collegeillinois.com/entext/faqs/faq_cancellationsrefunds.htm (last visited Nov. 25, 2002) (on file with the North Carolina Law Review). The Texas Tomorrow Fund offers refunds that will "not be less than the amount of accumulated payments minus cancellation and administrative fees." Texas Tomorrow Fund, Frequently Asked Questions: What if my Child Decides not to Go to College?, at <http://www.tgtp.org/faq8.html> (last visited Nov. 25, 2002) (on file with the North Carolina Law Review).

292. It is, however, intriguing to consider the implications of permitting a market for estate tax exemptions to develop in this fashion. We would expect the results to be broadly redistributive, at least to the extent that the young people could negotiate with their elders to capture some of the surplus value.

inoperable cancer might be able to immunize a large amount of wealth at relatively low prices because actuarial data would overly discount the tax payment. This would obviously affect the revenues collected through the pre-payment system. As a matter of distributive justice, however, we might ignore this problem on the grounds that individuals unlucky enough to die prematurely (whether they can foresee those premature deaths or not) deserve whatever estate tax windfall might be generated by the system. In this manner, the pre-payment system would help compensate for the unfairness associated with estate taxes imposed in the case of premature deaths.

Obviously, there is an even simpler solution that does not involve the government at all: People who own large, illiquid assets can simply plan ahead and set aside money in a bank account, which would then grow into a fund sufficient to meet the eventual estate tax bill. Or, better yet, they can purchase life insurance sufficient to pay the estate tax. This avoids administrative costs, as well as any need for a refund down the line, and it is indeed what many well-advised wealthy people with such illiquid assets actually do today.²⁹³ Recently, insurers have even begun to offer policies that can be cancelled for a refund in the event the estate tax is repealed.²⁹⁴ The primary advantage associated with a governmentally-sponsored pre-payment system is political in nature. The provision of a highly salient mechanism for safeguarding the farm or house (effectively “insuring” it against the estate tax) should diminish complaints associated with the impact of the estate tax on these illiquid assets. Responsibility for ensuring that important illiquid assets can pass tax free to heirs is placed squarely on the taxpayer. Anecdotes concerning lost farms would likely generate less sympathy when it is widely known that regular, early payments could have immunized the asset.

293. See DOUGLAS HOLTZ-EAKIN ET AL., ESTATE TAXES, LIFE INSURANCE, AND SMALL BUSINESS 2 (Nat'l Bureau of Econ. Research, Working Paper No. 7360, 1999) (discussing a 1997 Arthur Andersen survey of family business owners with annual sales over one million dollars, which found that “more than two-thirds of family business owners expected life insurance to be the primary source of funds to cover estate taxes”) (citing Arthur Anderson, *The Arthur Anderson/MassMutual American Family Business Survey '97*, at <http://www.massmutual.com/fbn/html/res97.html> (June 1997) (on file with the North Carolina Law Review)). However, Holtz-Eakin and his coauthors found that many small business owners do not purchase life insurance that is sufficient to cover estate taxes, even when the proceeds are combined with all the liquid assets in the estate. *Id.* at 23.

294. See Kelly Greene, *Insurers Offer Escape Hatch for Estate Tax*, WALL ST. J., May 5, 2002 (online edition), at <http://online.wsj.com/public/us> (on file with the North Carolina Law Review) (describing an “estate tax repeal rider” currently offered by several insurers that permits a life insurance policy to be cashed in without penalty in the event the estate tax repeal is made permanent).

Would people actually buy the exemptions? It is hard to know for sure. One upshot of the pre-payment system might be a better popular understanding of the estate tax, its liability threshold, and the way in which its major deductions work. Once people learned more about the estate tax (in the course of deciding whether or not to purchase an exemption) they might come to a more realistic assessment of their chances of being subject to it. To the extent people discount hyperbolically, even the present value amount might seem too weighty to justify pre-payment. Sending money off early to the government is unlikely to be a satisfying strategy for many. However, those same people might start to realize the value of setting aside liquid assets or purchasing insurance against potential estate tax liability, and this pattern of saving and hedging against risk might have positive effects for many who will never be subject to the tax.

CONCLUSION

The estate tax is cognitively interesting. It has a unique trigger, death—an event that is both unexpected and unavoidable. It taxes money when the money is in transit from a departed donor to a living beneficiary. Because of a variety of factors, behavioral distortions associated with the tax are significantly buffered. The tax also uniquely lends itself to serving the mission of equalizing opportunities. Yet this tax, which could work so well from a cognitive perspective, is at risk of being discarded for reasons that are at bottom cognitive as well. In short, a closer look at the estate tax through the lens of behavioral law and economics reveals both its promise and its problems. The promise seems sufficiently bright to warrant further work directed at overcoming the problems.