Liberal Estate Tax Policy

Deborah M. Weiss
Commentary
Liberal Estate Tax Policy

DEBORAH M. WEISS*

I. INTRODUCTION

Liberals have long regarded the estate tax as indispensable to the fair distribution of economic opportunities and material wealth. In his provocative and insightful article, Edward McCaffery challenges the view that the estate tax advances liberal objectives.

Professor McCaffery's argument is complex, but can be summarized roughly as follows. First, basic liberal principles provide no support for an estate tax, although they are consistent with an accessions tax, that is, with a tax on the receipt of gift and bequest income. Second, Professor McCaffery insists that liberals think seriously about the consequences of the tax policies they endorse. He argues that an estate tax, or perhaps even a high tax rate on accessions, can unintentionally undermine liberal values by discouraging savings.

Professor McCaffery's article contains many important insights about the estate tax. Even more significantly, Professor McCaffery proposes a new approach to normative tax policy. Tax policy in recent years has drawn increasingly on economic analysis. Much of this analysis is descriptive, and can be useful to observers who take varying views on basic questions of distributive justice. Some tax policy analysis, however, explicitly rests on welfare economics, which, to date, has had a distinctly utilitarian flavor. Professor McCaffery's liberal approach to tax policy provides an alternative to the quasi-utilitarian perspective.

Many of the most interesting questions in tax policy involve issues of distributive justice. Yet, some of us who are intrigued by those questions are not ready to endorse wholeheartedly any particular the-

* Visiting Associate Professor of Law, New York University. I am grateful to Deborah Schenk and Daniel Shaviro for helpful comments on an earlier draft.


ory of distributive equity. Tax policy analysts can deal with such uncertainties in several ways. Perhaps we should avoid comment on matters of questions of fairness, leaving those issues to others, such as moral philosophers or the political system. My own inclination, though, is to begin by examining, as rigorously as possible, the implications for tax policy of various distributive theories. Just as theories can throw light on problems, sometimes the implication of theories for problems can illuminate theories.

From this perspective, welfare economics has made an immeasurable contribution to tax policy. It provides a benchmark of clarity against which all other analysis must be measured. Nonetheless, it is, at present, committed to quasi-utilitarian principles. Professor McCaffery takes the important step of considering explicitly how non-utilitarian liberal principles might be brought to bear on tax policy.

In this Commentary, I examine both Professor McCaffery's analysis of the estate tax and his methodological approach to tax policy. Section II examines Professor McCaffery's arguments from liberal first principles against the estate tax. His case is so powerful, I believe, that even he underestimates how potent some of its implications are.

Section III examines Professor McCaffery's attempt to integrate liberal principles with the economic analysis of incentives. Professor McCaffery would have made an important contribution simply by putting forth a liberal consequentialist case—any liberal consequentialist case—against the estate tax. Liberal principles seldom constrain liberals from considering the limits reality places on their agenda, but practice usually lags sadly behind theory in this respect. In addition, many individual elements of his analysis provide insight into the effects of the estate tax on savings. The precise connection between liberal first principles and the incentive effects of tax policy, however, requires more consideration than Professor McCaffery gives it. In this Commentary, I attempt to extend McCaffery's analysis by examining in more detail how liberal principles can accommodate consequentialist considerations.

II. TAX POLICY AND LIBERAL FIRST PRINCIPLES

A. Liberalism, Equality of Opportunity and an Accessions Tax

The term "liberal" is applied to a wide variety of social thinkers whose positions differ in many respects. All, however, share one com-

4 The text follows the practice of characterizing political theories by reference to the views of their academic proponents. I think Professor McCaffery is right, however, to stress that tax policy should "look[] for norms in society's actual practices and beliefs;" McCaffery, Uneasy Case, note 1, at 286, and that he is correct in asserting that American society is overwhelmingly liberal in its beliefs.
mon principle, the paramount value of allowing individuals to make autonomous decisions about matters of importance to them.\textsuperscript{5} I refer to this central principle as the autonomy principle.\textsuperscript{6}

Many though not all liberals believe that, if individuals are to meaningfully exercise autonomous choice, society must provide each individual with equal opportunity, or at least with some minimum allotment of opportunity.\textsuperscript{7} I refer to this as the principle of equitable opportunity.

Perhaps the biggest difference among those who consider themselves liberals is their view on whether society should alter the results of individual choice if the initial endowment of opportunity is fair. Some liberals believe that a just society must provide equitable opportunity but must not interfere at all in the distribution that results.\textsuperscript{8} Others would permit considerable intervention to change results.\textsuperscript{9} I suspect that most Americans fall somewhere in between these two positions, endorsing a social obligation to provide citizens with a subsistence level of resources.\textsuperscript{10} I refer to the view that society may be warranted in some interference with results as the principle of equitable results.

Translating these abstract principles into concrete tax policy is no easy task and disagreement abounds. Fortunately, all liberals do seem to have reached one common conclusion about wealth transfer taxation: the effects of taxing bequests is inextricably connected to the taxation of gifts. The two taxes raise conceptually similar issues, and to treat them differently is to invite tax evasion. I assume in this discussion that gifts and bequests are treated in a unified fashion, so that the rules that apply to one apply to the other.

Wealth transfer taxes can be divided into two types that I call donor-based and donee-based. Donor-based taxes are determined by the position of the donor while donee-based taxes are determined by the position of the donee. The principal donee-based tax is an acces-


\textsuperscript{6} Some of the disagreement in this Colloquium involves the precise meaning of the word "liberal." See, e.g., Liam B. Murphy, Commentary, Liberty, Equality, Well-Being: Rakowski on Wealth Transfer Taxation, 51 Tax L. Rev. 473, 473-75 (1996); Eric Rakowski, Transferring Wealth Liberally, 51 Tax L. Rev. 419, 419-20 (1996). To avoid entering this discussion, I attempt, where possible, to avoid using the word "liberal" and instead refer by name to each of the positions sometimes held by liberals.

\textsuperscript{7} John Rawls, A Theory of Justice 60 (1971).

\textsuperscript{8} See, e.g., Rakowski, note 6.

\textsuperscript{9} See, e.g., Murphy, note 6.

\textsuperscript{10} Most Americans, I think, also believe strongly in the autonomy and equitable opportunity principles. For the most part, American liberals and conservatives dispute merely how to implement these principles. For example, liberals, in the colloquial sense, tend to focus on the importance of an individual's control over his body while conservatives tend to focus on economic freedoms.
sions tax, or a tax based on the donee’s receipt of a transfer. Donor-
based taxes could take many possible forms, although only two are
commonly discussed. First, all transfers could be included in the tax-
able income of the donor, as is done under current law. I refer to this
practice as donor non-deductibility. Second, a tax could be levied on
wealth; an estate tax is merely a specific kind of tax on the wealth of
the testator.

Those liberals who have explicitly considered the question, includ-
ing Professor McCaffery, generally agree that an accessions tax is the
tax policy best suited to advancing the cause of equitable opportu-
nity.\textsuperscript{11} Since estate taxes and donor-deductibility take into consider-
ation only the position of the donor, the rate imposed on a given
transfer depends on the size of the total estate or total donor income.
In contrast, an accessions tax does not depend on characteristics of the
donor and can have a rate structure based on the other resources
available to the donee, which is, of course, what is relevant to equity
of opportunity. The effect of an estate upon the opportunities open to
future generations depends not on the size of the estate but on how
the estate is distributed. A million dollar estate given to one person
has a different effect than the same estate divided into $1,000 bequests
to 1,000 people.

Many liberals who defend wealth transfer taxation do not devote
much analysis to the choice between donor- and donee-based taxes.
This is, I think, extremely unfortunate, for I suspect that virtually all
liberals would agree that an accessions tax is the best tax for promot-
ing equitable opportunity, and with an accessions tax in place no fur-
ther transfer tax is needed for this purpose. If the discussion were
focused on the choice between estate and accessions taxes, the differ-
ences between Professor McCaffery and his critics would be far less
than they at first appear to be.

But even general agreement on the value of an accessions tax would
not end the debate over wealth transfer taxes, because wealth trans-
fers could be taxed more than once. In theory, a tax system might tax
wealth transfers as many as three times:\textsuperscript{12} (1) at the donor level, when
the transferred income is earned by or transferred by the donor; (2) as
part of either a comprehensive wealth tax, or a wealth tax imposed

\textsuperscript{11} See, e.g., David G. Duff, Taxing Inherited Wealth: A Philosophical Argument, 6 Can.
J.L. & Juris. 45-54 (1993); Rakowski, note 6, at 431.

\textsuperscript{12} In discussing how many times transfers should be taxed, the treatment of basis, a
sometimes neglected technical point, deserves mention. An ostensibly double taxation of
transfers, in fact, may impose a single tax if the payment of the first tax produces a step-up
in basis for the recipient. My discussion here assumes that no such step-up occurs: When I
speak of tax on both estates and accessions, for example, I assume that donees acquire
property at zero basis.
when the gift passes into an estate; (3) at the donee level when the gift is received by the donee.

If transfers are to be taxed two or three times, this double or triple taxation must be based on some consideration other than concern about equality of opportunity. At this point, however, liberals begin to disagree among themselves about the proper taxation of transfers. I turn now to the arguments for double or triple taxation of transfers.

B. Bequests and Gifts as Consumption

The estate tax might be defended on the ground that gifts and bequests are a form of consumption. If they were not, why would anyone make them? The nature of this consumption no doubt varies. Some transfers are motivated by the donor's altruistic pleasure from giving joy to others. Other transfers no doubt are intended to induce obsequious behavior through the expectation in the donee of the gift or bequest.

Even accepting the characterization of giving as consumption\(^\text{13}\) does not provide an argument for an estate tax. Consumption by gift or bequest, like the consumption of limousines or champagne, is taxed under the current Code, since donors are not allowed to deduct gifts from their income.\(^\text{14}\) There is no obvious reason to supplement this with an estate tax.

1. Possession as Use

The estate tax frequently is defended on the ground that holders of wealth derive value from possessing wealth, even when that wealth is not used to finance consumption.\(^\text{15}\) This argument supports not merely an estate tax but the periodic levy of wealth taxes.

In Uneasy Case, Professor McCaffery makes a novel and persuasive argument that possessing wealth often has no value until that wealth is used.\(^\text{16}\) Consider an individual who possesses a $10 million fortune. That money, estate tax proponents argue, provides a sense of security through the knowledge that it could be used to purchase consumption.

\(^{13}\) Some might argue that transfers are not consumption, at least in the sense relevant to the tax system, since they are not a preclusive use of resources.

\(^{14}\) Of course, the Code, only imperfectly implements many of its principles, and the rule that gifts are not excluded from the donor's tax base is no exception, notably by the rule that unrealized gains are not taxed at death. This loophole should be closed.

\(^{15}\) See Anne L. Alstott, The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery, 51 Tax L. Rev. 363, 370-75 (1996); Rakowski, note 6, at 441 & n.58.

\(^{16}\) See McCaffery, Uneasy Case, note 1, at 348-49.
This sense of security, they argue, is a form of consumption that belongs in the tax base.\textsuperscript{17}

Professor McCaffery responds by noting that this psychological sense of well-being is affected just as surely by a tax on final use as by a tax on wealth itself. Suppose that the owner of the $10 million were subject to no tax on the interest income or the wealth holding, but was required pay a tax of 50\% on any consumption goods purchased from the $10 million. His purchasing power, would drop from $10 million to $6.67 million,\textsuperscript{18} since 50\% of the $6.67 million would be owed in taxes. This decline would producing a significant drop in his sense of security.

Thus, Professor McCaffery argues, if a tax is imposed on the use of wealth, whatever value is derived from possession is included in the tax base. Professor McCaffery, however, concedes that “some benefits flow from possession alone.”\textsuperscript{19} I believe that Professor McCaffery underestimates the power of his own observation. To see this, consider a wealthy individual who uses his money to induce obsequious behavior on the part of those who work for him or supply him with services. Fawning is a commodity just like providing luxury cars or household services, and like these other commodities, it must be purchased for a price. If I want both to purchase a designer suit and to be flattered, I can head over to Bergdorf Goodman, where sales associates will satisfy my desire for sycophancy, and sell me the suit at its full retail price.\textsuperscript{20} Alternatively, if all I want is the suit, I can shop at a discounter and rifle through racks without assistance in order to pay a significantly lower price. The difference in price between the two suits represents the price of fawning. The entire purchase price is in the tax base of both a consumption and an income tax, so that both the fawning and the suit are taxed under both systems.

Of course, I may get lucky. I may hit the discounter on a slow day, encounter a deferential sales person, and head home carrying my bargain and also feeling like queen for a day. But I am in a position no different from that of someone who purchases a suit for the full retail price of $1,000 that he values at $2,000. Whether from principle or necessity, inframarginal transactions have never been the concern of the tax system. I, of course, could try to induce subservient behavior from others without actually parting with any of my cash. I might

\textsuperscript{17} See, e.g., Alstott, note 15; Rakowski, note 6.

\textsuperscript{18} In contrast to a income tax, a consumption tax takes as its the base the amount consumed, not total income. For expositional simplicity, the figure one-third disregards the time value of money, but nothing turns on this.

\textsuperscript{19} See McCaffery, Uneasy Case, note 1, at 348.

\textsuperscript{20} For further details on this process, readers may wish to consult the hilarious shopping sequence in the otherwise disappointing film \textit{Pretty Woman}. 
spend three hours looking at suits and basking in flattery and then leave without making any purchases. Since, however, entrance to Bergdorf's is free, the possibility of such behavior supports an estate tax only if rich people have an advantage in the pursuit of free fawning. Such an advantage might arise from two possible sources. Neither, however, escapes either an income or a consumption tax. First, the sales force at Bergdorf's probably will treat me more deferentially if I walk in already wearing a $1,000 suit. But although rich people can more easily afford to purchase such a suit, this purchase itself must be made from after-tax income. The price of such a suit even at a discounter incorporates the suit's obsequy-inducing properties as well as its chic. Second, a wealthy person might exploit the general knowledge of his wealth to induce groveling. But if his wealth is legendary, his spending habits are likely to be as well, certainly among purveyors of luxury goods and fawning. The sales staff at Bergdorf's, no doubt, will treat a rich cheapskate respectfully, but if a free spender of moderate means then materializes, I suspect they will politely divert their limited supply of kowtowing towards the new and more promising prospect. Of course, some sales associates no doubt will over-invest in the cheapskate, giving him a windfall, but allowing inframarginal fawning to escape tax is no different than the tax treatment of other inframarginal gain.

Similar reasoning applies to wealthy individuals who attempt to induce groveling by creating the impression that such behavior will result in a gift or bequest. As noted earlier, gifts themselves do not escape the tax system, since they are not deductible. A sly individual with wealth may sometimes elicit sycophantry from gift seekers without actually providing them with the largesse they pursue. Attempts to induce free fawning, however, are unlikely to succeed systematically. Rational gold diggers will move on to new territory when their efforts at one site do not pan out.

Estate tax proponents argue that wealthy individuals derive untaxed value from other, less direct uses of their resources. Suppose that a wealthy entrepreneur decides to leverage his wealth into political power. He may, perhaps, directly purchase commodities such as advertising, that are included in the base of an income or consumption tax. In addition, however, he pursues power by less direct means such as locating his factories in the districts of members of Congress who support him and purchasing news outlets and directing them to support him and his views. These transactions would not give rise to income or consumption taxes, since they are indistinguishable from activities that normally and properly are labelled investment rather than consumption. Estate tax proponents suggest that the value de-
rived from these transactions should be incorporated into the tax system.

In a competitive market, however, the entrepreneur pays an implicit tax for his pursuit of influence. Members of Congress whose districts can attract business without assistance need not waste their resources courting investors. Only if their districts have some competitive disadvantage will members of Congress trade their votes for factories that provide jobs. Representatives of affluent districts have other tasks, such as repealing the Federal surtax on yachts. The pursuit of power is thus subject to an implicit tax that ultimately reduces the pursuer's consumption possibilities.

Similarly, consider a wealthy individual who attempts to gain influence by purchasing media outlets. If a profit-making owner of those outlets would have directed the publications to endorse the same views as the entrepreneur's, the entrepreneur has gained nothing by purchasing the news outlet. If the entrepreneur's position is of little interest to the public, the entrepreneur hawks it only at a financial sacrifice. As in the example of suit purchases, there will always be inframarginal transactions. Again, though, the tax laws have never tried to impose additional taxes on the lucky parties to such deals.

2. Concentrations of Power

Another argument for wealth and estate taxes focuses on the supposed social effects of large holdings of wealth. As a corollary of their concern about individual autonomy, liberals are suspicious of concentrations of power. This concern is reasonable but the estate tax seems like an odd way to address it. An estate tax is both underinclusive and overinclusive. It is overinclusive because it affects equally those who would use their wealth to destroy our basic freedoms and those who would simply enjoy quietly a lavish lifestyle. It is underinclusive for many reasons. Most of the mischief that can be accomplished with wealth can be accomplished at least as easily with charisma. I am no defender of Steve Forbes, but I would gladly take his brand of vulgar laissez-faire over the racist populism of Pat Buchanan or Louis Farrakhan. Perhaps even more importantly, the estate tax operates, at best, only to restrict the second generation's abuse of power. Steve Forbes is reined in but we are still stuck with Ross Perot.

Concentrations of power arise in many places. A pluralistic society cannot fight them at their sources and remain diverse. Rather, it must devise narrowly tailored remedies that focus on specific abuses of power such as antitrust laws and campaign reform.

With respect to this argument, Professor McCaffery loses a bit of his usual nerve. To curb the effects of concentrated wealth, he proposes
requiring wealthy individuals to deposit their assets in a blind trust.\textsuperscript{21} His critics justly reproach him for deviating from his own liberal principles here,\textsuperscript{22} but he had no need to resort to the blind trust in the first place. His instinct is right: Liberal principles do not justify an estate tax, and they do not require blind trusts either.

III. \textbf{Liberal Consequentialism}

Liberals disagree among themselves about the proper role of consequentialist considerations in moral reasoning. Historically, two principal lines of thought can be discerned. Some liberals, beginning with Immanuel Kant, have adopted a deontological approach and regard the goodness of an action as independent of the results it produces.\textsuperscript{23} Other liberals, most famously John Stuart Mill,\textsuperscript{24} believe that consequentialist considerations are in no way incompatible with liberal values such as the autonomy principle.

Even liberals who in theory accept the legitimacy of consequentialist considerations, in practice, often have placed little emphasis on such considerations and instead have focused their policy analysis on the direct implications of their first principles. The reasons for this are several. The deontological tradition may have exerted a subtle influence even on liberals who reject its premises. Perhaps more importantly, consequentialist reasoning require some practical knowledge of the real effects of policies, and philosophers may be understandably reluctant to venture too far from their own area of expertise.

Nonetheless, when consequentialist liberals make policy recommendations they must consider the practical effects of those policies. Much of \textit{Uneasy Case} is devoted to arguing that estate taxes have significant disincentive effects on savings, and Professor McCaffery deserves tremendous credit for his efforts to incorporate consequentialist analysis into liberal tax policy. Still, perhaps because his project is so ambitious, Professor McCaffery's treatment of the incentive effects of savings is in places incomplete. In this Section, I advance some tentative thoughts on how liberal consequentialism in tax policy might be developed.

Professor McCaffery's argument that the estate tax discourages savings is, I believe, unnecessary to his case against the estate tax. His attack on possession as use is so persuasive that his consequentialist arguments are not needed to decide the issue. But the incentive ef-

\textsuperscript{21} See McCaffery, Uneasy Case, note 1, at 349.
\textsuperscript{22} See Alstott, note 15, at 370-75; Rakowski, note 6, at 439-45.
\textsuperscript{24} See Mill, note 5, at 12.
fects discussed in *Uneasy Case* also may serve as a warning against setting an accessions tax too high.

Viewed in this light, Professor McCaffery's analysis of incentive effects has one chief defect. He argues that liberals place an "objective moral value" on savings and correspondingly disapprove of consumption, especially conspicuous consumption.25 As Professor McCaffery's critics rightly point out, most traditional liberals do not assert the moral value of savings as such.26 The cornerstone principle of liberalism is respect for the choices that individuals make, and this must include respect for the choice to save or consume. If disincentive effects are to be part of liberal policy arguments, they must enter the argument indirectly, not through moral first principles.

Incentive effects are, of course, the province of economists. Although liberals must reject some important premises of welfare economics, they also can learn some valuable lessons from its techniques. Welfare economics is built on the foundation of descriptive economic theory. Descriptive economic theory assumes a consumer whose utility is a function of his consumption of various goods, whose consumption is subject to constraints on the resources at his disposal, and who rationally maximizes his utility subject to those constraints. For purposes of describing and predicting individual behavior, the notion of cardinal utility can be dispensed with in favor of purely ordinal utility. That is, statements like *John* got two utils of happiness from an apple but five from a banana, are not necessary and statements that *John* likes a banana more than he likes an apple are sufficient. The sufficiency of ordinal utility is a great advantage, since measuring utility is obviously problematic.

The most basic of all measures of economic welfare is Pareto-efficiency. An economic situation is Pareto-efficient if no individual can be made better off without making another worse off. For purposes of analyzing Pareto-efficiency, individual preferences may be assumed to take the form of ordinal utility.

But Pareto-efficiency is an extremely weak normative criterion, and cannot be used to analyze distributive concerns. Thus, the Pareto criterion may condone situations in which some people are destitute and others live in extravagant luxury. To address distributive issues, some economic theorists have used the so-called welfarist approach. In a welfarist analysis, moral objectives are embodied in a social welfare function that is a weighted sum of the utility of all members of society. Welfarist analysis attempts to maximize this objective function subject to social resource constraints that are analogous to the budget con-

25 See McCaffery, *Uneasy Case*, note 1, at 349.
26 See Rakowski, note 6, at 432-36.

The social welfare function approach has its origins in the utilitarian principle that the social good consists in maximizing the sum of the happiness of the various individuals in society. It differs, however, in two important ways from classical utilitarianism.

First, the nineteenth century utilitarians believed that utility could be measured cardinally, so that they could meaningfully make statements like John got two utils of happiness from an apple but five from a banana. Cardinal utility enabled utilitarians to make interpersonal comparisons of utility, and therefore to compare the total utility generated by different distributive schemes. For example, giving one banana to Amy might generate more utility than giving it to Andy. Most economists, however, are reluctant to endorse the concept of cardinal utility. Economists who use social welfare functions have finessed the problem of interpersonal comparisons of utility by assuming that all individuals have the same preferences, and differ only in their endowments of money or earning ability. This assumption enabled economists to evaluate the distributional features of a situation with reference only to the observable endowments of each individual, without need for some estimate of utility. Thus, if Amy has fewer bananas than Andy, giving one more to her would, ceteris paribus, generate more utility than giving it to Andy.

Second, social welfare functions can accommodate a wider variety of views on distribution than can pure utilitarianism. The classic utilitarian gives equal weight to the well-being of all members of society. This maximization certainly has some egalitarian implications, for it requires that the marginal happiness of each member of society be equalized. Utilitarianism, however, can also produce inequalitarian results. It permits the exaction of extreme sacrifices from some if these sacrifices increase the welfare of society as a whole. Those who find these inequalitarian aspects of utilitarianism unacceptable nonetheless may accept the welfarist approach. If the social welfare function consists of an unweighted sum of individual utility, the social welfare function becomes a mathematical implementation of the utilitarian calculus. But the function need not be additive, and the weights need not be equal. At the extreme, a social welfare function can give infinitely high weight to the well-being of the least well-off member of society. Such preferences sometimes are referred to as “lexicographic
maximin” abbreviated “leximin.”27 Intermediate weights produce results substantively intermediate between so-called Rawlsianism and utilitarianism.

The welfarist model has produced a rich and valuable literature on optimal taxation. Liberals, however, ultimately must reject some of its assumptions and their implications. First, liberals cannot always accept the assumption of identical tastes. The simplifying assumption of identical utilities in many instances has enabled researchers to examine problems to which individual differences are not relevant. The autonomy principle has little significance, however, if all individuals have the same tastes. Tax policy sometimes must address situations in which individual differences are important, and then the social welfare function becomes unacceptable to a liberal.

To see this, a hypothetical world consisting of two individuals, Common and Esthete. Both are physically healthy; both have income of $50,000 a year, but they have radically divergent tastes. Suppose for the moment that both receive their income as manna from heaven, so that neither has to work and redistributive policies have no disincentive effects policy. Common likes Big Macs, cold Budweiser and camping from a Winnebago. Esthete likes truffles, fine Bordeaux and the Spoleto festival. Because of Esthete’s refined tastes, he requires $100,000 to be able to attain the level of utility that Common can achieve with $25,000.

Since Esthete and Common have different tastes, the purely ordinalist framework of conventional welfare economics cannot analyze the proper distribution of resources between Esthete and Common. To reach any conclusion at all, the social welfare approach must be modified to assume cardinal utility. With cardinal utility, the proper allocation of resources between the two depends on the weights in the social welfare function and individual marginal utility of money. This approach to resource allocation leads to results that many people will find highly counterintuitive. Suppose, for example, that the function is a classic utilitarian welfare function that weights the welfare of both individuals equally. Suppose also, as seems likely, that a dollar given to Esthete produces, at the margin, less utility than a dollar given to Common. A welfarist approach will dictate that some resources be distributed from Esthete to Common, at least until the marginal utility of the two is equal. The prescribed redistribution could be modified by changing the weights given to the utility of each party. At the extreme, leximin weights would justify redistribution from Common to Esthete since Esthete’s utility is lower than Common’s, and he is thus

the least well-off person in this two person society. Only a few combinations of social weights and individual marginal utilities will justify leaving the status quo in place.

Most liberals will be uneasy with these prescriptions. The first reservation that liberals will have about social welfare analysis is its exclusive concern with results. If transferring resources from one party to another increases some measure of the resulting utility, the welfarist regards that transfer as socially desirable. In the welfarist tradition, an individual's opportunities have no significance apart from the results that they produce, measured in terms of utility. To welfare economists, any ethical theory that seeks to increase opportunities at the potential expense of utility suffers from a serious confusion between means and ends.

Liberals, however, are concerned with equitable opportunity rather than equitable results. The fact that Esthete is an inefficient producer of utility should justify neither taking resources away from him nor depriving others to help him. The equitable opportunity principle implies that once Common and Esthete were given equal opportunities, the greater happiness of Common is not society's concern. The liberal refusal to intervene based on final utility levels is not based simply on the conceptual difficulty of measuring taste, but on the centrality of the autonomy principle. Autonomous decisionmaking requires, above all, the possibility of variation in individual tastes. The liberal respect for individual autonomy transforms the measurement of cardinal utility from a practical problem—the difficulty of knowing what others want—to a moral problem. To the liberal, evaluating how others live their lives is an act of hubris.

A social welfare function characterizes society's objective exclusively in terms of results, measured in utility. Since liberal value equitable opportunity, they must reject this approach. The basic mathematical techniques of economics, however, may be used to determine how to maximize any well-defined objective function, not only a function based on individual welfare. The social objective function can easily be defined in terms of opportunity, since all economic analysis of individual behavior stipulates the opportunities available to the individual. The simplest type of opportunity set contains an endowment of income. More complex opportunity sets, which gener-

---

ally are needed to analyze wealth transfer taxes, consist of endowments of time and ability, which are used to produce income. A social objective function that depends on opportunity, just like a social welfare function that depends on utility, can be maximized subject to the constraints imposed by individual behavior.

This liberal consequentialist framework makes it possible for liberals to consider incentive effects without resorting to Professor McCaffery's claim that saving is, for liberals, a first principle. Since capital increases the productivity of labor, it increases the well-being of others besides the saver. Thus, liberals may wish to use the tax system to encourage, or at least not discourage, savings, as a means to some liberal end, such as increasing the opportunities available to others.²⁹

In principle, then, Professor McCaffery is right to assert that liberals can properly consider the incentive effects of the wealth transfer tax. His critics, however, correctly point out that he may have overestimated how decisive such considerations will be.³⁰ Liberals, however, will differ among themselves about how much weight such considerations should be given. Liberals can agree that the social optimization problem must include some concept of equitable opportunity but they will disagree about what distribution of opportunity is equitable. Just as welfarists may be utilitarian or Rawlsian, so liberals may wish to maximize total opportunity, the opportunity of the least well-off, or some intermediate function of individual opportunity. (Indeed, Rawls himself insisted that the difference principle applied to opportunity rather than results.)³¹ A Rawlsian liberal thus would be willing to accept a large disincentive effect in return for greater equality of opportunity. In contrast, a liberal might view opportunity in the same way that a utilitarian viewed utility; that is, he might regard society's objective as the maximization of the total opportunity in society. Liberals of this sort might be less willing to accept a tax with significant disincentive effects.

²⁹ Not all saving is invested in projects that advance social well-being, since people do not always act to advance their own needs. See Alstott, note 15, at 375-79. Such paternalistic concerns deserve serious consideration, but I do not believe that they strengthen the liberal case for the estate tax. Liberals may accept the fact that most of us are in occasional need of paternalistic help from the state, but unless they believe that that need is only occasional, they cease to be liberals. For the most part, liberals must endorse each individual’s right to make his own decisions. The exceptions to this principle must be dealt with through narrowly tailored devices such as the regulation of prescription drugs. Paternalistic concerns might be regarded as another constraint on the liberal maximization problem. At this time, however, there is no easy way to model such concerns, and in practice, they cannot yet be incorporated into mathematical models.

³⁰ See id. at 383-95.

³¹ See note 28 and the sources cited therein.
Liberals will have other reasons to differ among themselves about the proper objective function. Some, but not all, will not wish to abandon entirely the principle of equitable results. Many would say, for example, that society should provide a minimum subsistence level to the individual who receives a fair endowment of opportunity but squanders it through free choice. Like disagreements about the proper approach to equitable opportunity, these differences will generate disagreements about the ideal magnitude of an accessions tax.

Thus, while liberals may consider the incentive effects of the wealth transfer taxes, they are likely to disagree among themselves about the significance of those effects. Since liberal first principles do not rule out the desirability of an accessions tax, the proper magnitude of that tax is likely to remain a matter of dispute even among liberal consequentialists.

IV. Conclusion

Wealth transfer taxes provide an excellent case study with which to examine different theories of tax equity. They force tax analysts to consider virtually all the fundamental questions about a fair tax system, most notably the importance of equitable results as opposed to equitable opportunity and the role of incentive effects.

Professor McCaffery's articles make several important contributions to the literature on wealth transfer taxation. His attack on the estate tax, especially on the view that possession can constitute use, leaves little basis for defending the estate tax as a first-best type of transfer taxation.

Perhaps even more important is Professor McCaffery's challenge to the virtual monopoly that utilitarianism is acquiring among economically-oriented tax analysts. Utilitarian and other welfarist analysis has provided valuable insights into problems of tax policy, but even some of us who harbor some utilitarian sympathies cannot sign on without reservation to the entire utilitarian program. For us, Professor McCaffery's liberal consequentialism provides a welcome challenge to the incumbent's market power, and we look forward to the beneficial effects of increased competition.

---

32 See, e.g., Murphy, note 6, at 475-81.