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ESTATE AND GIFT TAX REFORM: A COMPENDIUM OF THOUGHT

by

Jack M. Kinnebrew*

OUR present dual transfer tax system produces only slightly more revenue than does the tax on cigarettes.¹ Revenues from estate and gift taxes have continually declined as a proportion of the total revenue raised by the federal government. Prior to World War II, seven per cent of federal revenues came from estate and gift taxes.² Today, their share is less than two per cent.³ As early as 1950, the low yield of federal estate and gift taxes was attributed to "excessive exemptions, unduly low effective rates on most estates, and the fact that the law as written favors large estates over smaller ones, and leaves substantial amounts of wealth completely beyond the reach of the tax laws."⁴ In addition, few estate and gift tax returns are even filed. Contrasted with the sixty million taxable income tax returns filed annually are the eighty thousand taxable estate and gift tax returns.⁵

The federal estate tax law and the federal gift tax law, as we know them, have been in effect for more than fifty and thirty-five years, respectively.⁶ The main outline of neither law has changed since its adoption, and the last change in rates was to the gift tax in 1940.⁷ Because of the impact which estate and gift taxation has assumed over the years, it has been suggested that drastic changes in these areas should be infrequent and adopted only in response to a real need, and after careful consideration.⁸ However, with the cry of tax reform in the air, heightened by the passage of the Tax Reform Act of 1969,⁹ it is inevitable that a re-examination of the entire federal estate and gift tax structure will be made.

In February of 1969, the Treasury Department published its tax reform studies and proposals relating to revision of the federal estate and gift tax laws.¹⁰ Hearings on these proposals were conducted by the House Ways and Means Committee at the same time hearings were conducted on the income tax reform proposals, many of which were enacted in the Tax

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¹ C. SHOUP, *FEDERAL ESTATE AND GIFT TAXES* 1 (1966).

² STAFF OF JOINT ECONOMIC COMM., 88TH CONG., 2D SESS., *THE FEDERAL TAX SYSTEM: FACTS AND PROBLEMS* 165 (Comm. Print 1964).

³ TAX FOUNDATION, INC., *FACTS AND FIGURES ON GOVERNMENT FINANCE* 93 (15th ed. 1969).

⁴ H.R. Doc. No. 451, 81st Cong., 2d Sess. 6-7 (1950) (statement of President Truman).

⁵ *Hearings on Tax Reform Before the House Comm. on Ways and Means*, 91st Cong., 1st Sess. 4034 (1969) [hereinafter cited as *Tax Reform Hearings*].

⁶ Alexander, *Federal Estate and Gift Taxation: The Major Issues Presented in the American Law Institute Project*, 22 TAX L. REV. 635 (1967).

⁷ *Id.*

⁸ *Id.*

⁹ Tax Reform Act of 1969, 83 Stat. 487, amending INT. REV. CODE of 1954.

¹⁰ U.S. TREASURY DEP'T, 91ST CONG., 1ST SESS., *TAX REFORM STUDIES AND PROPOSALS* pt. 1 (Comm. Print 1969) [hereinafter cited as *TREAS. PROPOSALS*].

Reform Act of 1969. In 1968, the American Law Institute completed its Federal Estate and Gift Tax Project, which studied for over five years the problems inherent in the system under direction of the Reporter, A. James Casner.¹¹ The Treasury proposals submitted to the House Ways and Means Committee in early 1969 "drew heavily on the work of the American Law Institute's Federal Estate and Gift Tax Project."¹² Most of the commentators and proponents of estate and gift tax reform in the United States have considered a reformation of the existing system rather than a switch to taxing receipts entirely as income. The Canadians, on the other hand, have recommended that transfers of property by death or by gift be treated as income to the recipients and thereby do away with the general concept of estate and gift transfer taxes altogether.¹³

As expected, there is heated controversy over many of the proposals now before Congress. However, before these proposals are explored in detail, it seems appropriate to quote from an article written in jest and expressing, hopefully, unwarranted fears: "There has been a disquieting number of letters suggesting that reform in the tax field is a dangerous monster, that reform almost always turns out to be retrogression and that in any case reform in taxation is invariably incomprehensible."¹⁴ I trust that this Article will be not only comprehensible, but also enlightening.

I. AN HISTORICAL VIEW OF ESTATE AND GIFT TAXATION AND THE REFORM PROPOSALS

A. Estate and Gift Taxation

Development. The present federal estate tax dates from 1916, and it has remained unchanged in principle from that date.¹⁵ The maximum rate was initially ten per cent on estates with property in excess of \$5 million, and the rates were soon increased to a maximum of twenty-five per cent on estates in excess of \$10 million in order to raise money for military expenditures.¹⁶ The net estate was determined by deducting from the gross estate a \$50 thousand exemption and deductions for certain expenses, taxes, and losses.¹⁷ However, there were no deductions similar to the present charitable and marital deductions.¹⁸ Originally, the federal estate tax consisted of a "basic estate tax" with a specific exemption of \$100 thousand

¹¹ AMERICAN LAW INSTITUTE, FEDERAL ESTATE AND GIFT TAXATION (1969) [hereinafter cited as ALI PROJECT].

¹² Westfall, *Revitalizing the Federal Estate and Gift Taxes*, 83 HARV. L. REV. 986, 987 n.6 (1970).

¹³ 3 REPORT OF THE ROYAL COMM'N ON TAXATION ch. 17 (1966).

¹⁴ Blum & Pedrick, *Estate and Gift Tax Retackled, A Progress Report on the ALI*, 44 TAXES 737, 743 (1966).

¹⁵ The first federal death tax was actually a stamp tax on receipt of legacies and intestate shares of personal property. It was in effect for only four years, from 1798 to 1802. There were additional inheritance or estate taxes in effect during the Civil War period, during 1894, and during the Spanish-American War. Casner, *American Law Institute Federal Estate and Gift Tax Project*, 22 TAX L. REV. 515, 518-19 (1967).

¹⁶ *Id.* at 519.

¹⁷ These deductions were generally of the same character as those presently allowed in INT. REV. CODE of 1954, §§ 2053, 2054.

¹⁸ See Casner, *supra* note 15, at 520.

and an "additional estate tax" with a specific exemption of \$60 thousand. This dichotomy was kept in the law in order to keep the eighty per cent credit which was allowed to the states from applying to other than the "basic estate tax."¹⁹ In order to simplify computations, the 1954 Internal Revenue Code combined the basic and additional taxes into a single rate schedule and changed the state death tax credit to a percentage based on a corresponding percentage schedule.²⁰

The first federal gift tax was imposed in 1924, but repealed in 1926.²¹ The present gift tax dates from 1932, and has not changed its basic structure since that time. This revenue act provided for a \$50 thousand specific exemption and a \$5 thousand annual exclusion per donee (other than future interests in property), and these amounts were reduced to the present \$30 thousand specific exemption and \$3 thousand annual exclusion in 1943.²² From the very beginning, the gift tax rates were three-fourths of the prevailing estate tax rates, and this ratio has remained constant with increases in the rates.

The Revenue Act of 1948²³ attempted to equalize the tax treatment of spouses in common law states with those in community property states. It produced both the estate tax marital deduction and the gift tax marital deduction which exist now.²⁴

Revenues from the federal estate tax reached a high in the early years of \$154 million for the fiscal year 1921, after which they declined until the middle depression years, reaching a pre-World War II level of \$382 million for 1938.²⁵ After World War II, a temporary high of \$822 million was reached in 1948, prior to introduction of the marital deduction in the Revenue Act of 1948, and then revenues rose from \$1.2 billion in 1958 to approximately \$3.1 billion in fiscal year 1969.²⁶

Gift tax collections have likewise varied significantly over the years, reaching a high of \$160 million in 1936, which was not reached again until recent years. Gift tax revenues rose gradually from \$134 million for 1958 to approximately \$393 million for the fiscal year 1969.²⁷

Function. The estate tax, as commonly believed, is dominated by a single purpose—the confiscation of excessive accumulations of wealth.²⁸ In the early 1950's Congressman Kean re-echoed these notions when he stated: "I favor them [estate taxes] entirely on the basis of the social benefits in

¹⁹ *Id.*

²⁰ *Id.* The \$60,000 exemption presently in the law for the additional estate tax began as a \$50,000 exemption in 1932, was reduced to \$40,000 in 1935, and was increased to its present amount in 1942. *Id.* at 520-21.

²¹ *Id.* at 529.

²² *Id.*

²³ Act of Apr. 2d 1948, Pub. L. No. 80-471, 62 Stat. 110.

²⁴ INT. REV. CODE of 1954, §§ 2056, 2523.

²⁵ Casner, *supra* note 15, at 531.

²⁶ *Id.* at 531-32; U.S. Dept. of Treasury, Internal Revenue Service Annual Report of the Commissioner 99 (1969). See also Westfall, *supra* note 12, at 986.

²⁷ Casner, *supra* note 15, at 532; U.S. Dept. of Treasury, Internal Revenue Service Annual Report of the Commissioner 99 (1969). See also Westfall, *supra* note 12, at 986.

²⁸ Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, at 224 (1956).

preventing the piling up of too big estates."²⁹ To achieve this goal, the tax can hardly avoid gathering some revenue in the process. But, according to traditional justification, the performance of the estate tax is not to be judged by the size of its fiscal haul. This understanding of the estate tax function usually satisfies its proponents, as well as its opponents.³⁰ The fact is, however, that the historical discussion presented above shows clearly that death taxes in the United States were devised to produce revenue.

Surprisingly, the leveling of hereditary fortunes as a function of the estate tax was not formally approved as one of its objectives until the Franklin Roosevelt administration.³¹ After the mid-1930's, however, rates drastically declined, and, based on historical analysis, Eisenstein concluded that the social objective of the estate tax to level inheritances was prominent only in 1934 and 1935, and his overall conclusion was that the estate tax had been primarily imposed for revenue.³² Eisenstein discussed this social objective of the estate tax in the context of "how much the heirs should keep."³³ This, of course, raises the difficult question of how large is too large and when has a too-large estate been adequately reduced.³⁴ Thus, while it is easy to state this social objective, it is much more difficult to ascertain mathematical guidelines consistent with general concepts of equity.³⁵

Shoup, in his book *Federal Estate and Gift Taxes*, identifies three chief aims of taxation of gifts and transfers at death: (1) taxation of windfalls, (2) taxation of property once a generation, and (3) taxation to reduce concentration.³⁶ Shoup takes the traditional view that achieving certain social consequences is among the primary aims of the federal estate tax. His analysis is somewhat unique. With respect to taxation of windfalls, he recognizes that it is not only the recipient who is affected, but also the transferor, who will suffer some "psychic injury from announcement of

²⁹ *Hearings Before the House Comm. on Ways and Means on Revenue Revision of 1950*, 81st Cong., 2d Sess. 125 (1950).

³⁰ Eisenstein, *supra* note 28, at 225.

³¹ President Roosevelt boldly stated that progressive death taxes as a means of regulating wealth were justified because: "The transmission from generation to generation of vast fortunes by will, inheritance, or gift is not consistent with the ideals and sentiments of the American people." H.R. REP. NO. 1681, 74th Cong., 1st Sess. 2 (1935).

³² Eisenstein, *supra* note 28, at 237-38.

³³ *Id.* at 252.

³⁴ Both Theodore and Franklin Roosevelt discussed this problem. Theodore Roosevelt advocated a "heavy progressive tax" on all fortunes "beyond a certain amount," so that only that certain amount would pass "to any one individual." 18 WORKS OF THEODORE ROOSEVELT 578 (Memorial ed. 1925). Somewhat more helpful, though not unambiguous, Franklin Roosevelt contrasted "fortunes" and "accumulations" which are "great" and "vast" with a "reasonable inheritance" which adequately serves to "provide security for one's self and one's family." H.R. REP. NO. 1681, 74th Cong., 1st Sess. 2 (1935). Herbert Hoover believed that moderate inheritances in the neighborhood of \$100,000 were a reasonable provision for dependents. He felt that "[s]everal millions of dollars is economic power and too often it falls into the hands of persons of little intention to use that power for public benefit either in expansion of enterprise or employment of public services. It is the breeding ground of playboys and playgirls of morally obnoxious and degenerating character." 3 THE MEMOIRS OF HERBERT HOOVER 136 (1952).

³⁵ While nothing has been mentioned concerning equity, it is implicit in all of the major aims discussed. Beyond that, equity requires that a tax should not strike capriciously but should take equally from similarly-circumstanced taxpayers. See C. SHOUP, *supra* note 1, at 104-05.

³⁶ *Id.* at 100-01.

a prospective tax on that transfer, and his conduct may be altered by the tax."³⁷ He also considers taxation of property once a generation to be one of the chief aims, although this appears to be a subsidiary goal under the general aim of taxation to reduce concentration. Lastly, he recognizes that taxing to reduce concentration is best accomplished by some form of death tax.

Prior to consideration of any reform proposals, the Reporter of the American Law Institute Federal Estate and Gift Tax Project, A. James Casner, considered as threshold questions the objectives which tax legislation in this field should be designed to accomplish.³⁸ He considered raising revenue a relevant, though not necessarily controlling, consideration in weighing reform proposals. He also stated that since transfer taxes usually have a significant impact in cases in which they apply, a system had to be basically fair in its conception and application. Finally, he recognized that the frequently-stated, major purpose of a transfer tax is to prevent accumulated wealth from being passed on to persons who did not accumulate it. While refraining from expressing any opinion on whether this is a major purpose of such a tax, he recognized that it is an inherent end result.

Consistent with this goal of thorough examination, the pros and cons of the material estate and gift tax reform proposals will be discussed in this Article. A taxpayer favorably affected is using public money, and society, through the government, has a right to know that an indirect subsidy by tax reduction or otherwise is indeed being used for public purposes.³⁹

B. The Reform Proposals

Prior to the completion of the American Law Institute's Estate and Gift Tax Project in 1968, there had been a wealth of studies and reform proposals in existence.⁴⁰ For the most part, these earlier efforts serve to put the American Law Institute Project and the Treasury recommendations in historical perspective, for the ideas and proposals developed during the earlier years have made it possible for the recent studies and proposals to be more sophisticated, and yet still workable.

The American Law Institute's Federal Estate and Gift Tax Project originated in order to contribute to the improvement of the presently existing transfer tax systems.⁴¹ The Institute's conclusions are expressed in forty-five recommendations for improvements in the law, embodied in resolutions adopted at the annual meeting in May of 1968. These recommenda-

³⁷ *Id.* at 101.

³⁸ Casner, *supra* note 15, at 517-18.

³⁹ See Boehm, *Cause and Effect: Federal Estate Tax Revision Tied by Law to Social Consequences*, 43 TEXAS L. REV. 479 (1965).

⁴⁰ See, e.g., U.S. TREASURY DEP'T, FEDERAL ESTATE AND GIFT TAXES: A PROPOSAL FOR INTEGRATION AND FOR CORRELATION WITH THE INCOME TAX (1947); STAFF OF JOINT COMM. ON THE ECONOMIC REPORT, 84TH CONG., 1ST SESS., FEDERAL TAX POLICY FOR ECONOMIC GROWTH AND STABILITY (Comm. Print 1955); *Hearings on the President's 1963 Tax Message Before the House Comm. on Ways and Means*, 88th Cong., 1st Sess. (1963); C. SHOUP, FEDERAL ESTATE AND GIFT TAXES (1966).

⁴¹ Williams, *The American Law Institute's Federal Estate and Gift Tax Project*, N.Y.U. 25TH INST. ON FED. TAX. 1395 (1967).

tions and the studies published with them are the product of more than five years of study of federal estate and gifts taxation by the Reporter, Professor A. James Casner of the Harvard Law School, and a distinguished group of consultants and advisors drawn from the leading specialists in this important field. It is only the official recommendations that speak for the Institute. While forty-five recommendations for improvements were adopted by the members, the resulting document could only be presented to the public and could not be recommended in an attempt "to influence legislation."⁴²

The Project developed three alternative "model" transfer tax systems: the dual transfer tax system, the single transfer tax system, and the accessions tax system. The model dual transfer tax system attempted to revise and improve the present separate estate and gift tax structures by incorporating into them many of the features of the model single transfer tax system. Accordingly, the many minor refinements in the present dual transfer tax system will not be discussed. Also, it should be noted that the Treasury has proposed a unified system for taxing both lifetime gifts and transfers at death,⁴³ making discussion of minor improvements to the present dual transfer tax system unnecessary.

Second, a model single transfer tax system was developed under which a single set of exemptions and a single rate schedule would be applicable to both lifetime and death time transfers. The total lifetime transfers (and any unused exemption) would be taken into account in determining the tax rate on property passing at death. Under such a system, much of the complexity of determining whether lifetime transfers are also taxed as death transfers (with credit for any gift tax paid) could be eliminated.⁴⁴ The Reporter and personnel of the Project assumed that the model single transfer tax system would be adopted and they tried to develop the simplest, most equitable, and most workable system possible.

Third, the Project developed a model accessions tax system which based the amount of tax on the total value of all property gratuitously received by the transferee. Many people believe that, conceptually, this would be the fairest and most equitable transfer system of all,⁴⁵ although in the words of Professor Casner: "The Institute was not invited to consider the accessions tax system, in the view that a change to such a system is not now a feasible alternative."⁴⁶

It was the overriding purpose of the Project to make certain major structural changes applicable to all of the model systems so that an informed judgment could be made as to which transfer tax system was best for the United States.⁴⁷ As noted earlier,⁴⁸ the far-reaching revisions developed by the Treasury drew heavily on the American Law Institute's

⁴² *Id.* at 1400. This inability "to influence legislation" stems from the Institute's status as a tax exempt organization. See INT. REV. CODE of 1954, § 501(c)(3).

⁴³ TREAS. PROPOSALS 6.

⁴⁴ See Williams, *supra* note 41, at 1401-02.

⁴⁵ *Id.* at 1402.

⁴⁶ ALI PROJECT 4.

⁴⁷ See Williams, *supra* note 41, at 1402-03.

⁴⁸ See text accompanying note 12 *supra*.

Federal Estate and Gift Tax Project. Professor Casner recently stated that tax reform is still very much in the air and that we have been promised in the near future a reform package in the estate and gift tax area.⁴⁹ He notes that the "reform package will rest somewhat heavily on the final report of the American Law Institute's Estate and Gift Tax Project . . ."⁵⁰ These comments and the general clamor for reform indicate that it is likely that estate and gift tax reform will take place, if not this year, then certainly during 1971.⁵¹

II. ANALYSIS OF PROPOSALS

A. Unification of Estate and Gift Taxes

Arguments For. The present dual system of estate and gift taxation provides impressive tax savings for large estates. For a married couple with \$5 million, lifetime gifts of one-half of their property produce a tax saving over testamentary transfer of all assets of about thirty-nine per cent, reducing the total tax burden \$758 thousand. If the married couple had \$10 million, the tax saving resulting from giving one-half away during life is approximately forty-four per cent, reducing the tax burden by over \$2 million.⁵² This brief description of the effect of the dual system gives rise to several arguments in favor of establishing the unified transfer tax in its place. Shoup has stated the case for unification in the negative by declaring: "The present lack of integration has scarcely anything to be said for it, except that to make a change would be costly."⁵³ The present dual estate and gift tax schedules would be replaced by a unified transfer tax schedule applicable to both lifetime and death time transfers under which the initial bracket for death time transfers would be established by the total lifetime gifts.⁵⁴

As suggested in the above example, the greatest argument for unifying the transfer taxes is to remove the present bias for lifetime gifts over testamentary dispositions. First, the most obvious factor in the bias is that the gift tax rates are only seventy-five per cent of the estate tax rates.⁵⁵ Second, there exist separate rate schedules for the estate and gift tax. Since total transfers can be divided so that a portion is subject to the estate tax and a portion to the gift tax, the advantage of starting each of

⁴⁹ 1 A. CASNER, *ESTATE PLANNING* iii (3d ed. Supp. 1970).

⁵⁰ *Id.*

⁵¹ In September of 1969, Assistant Secretary of the Treasury, Edwin S. Cohen, indicated in a speech that the administration would press for more tax reform in 1970. Among the items mentioned by Cohen was improvement of the estate and gift tax provisions of the Internal Revenue Code. Berkowitz, *Estate and Gift Tax Reform, an Overview*, 109 TRUSTS & ESTATES 12 (1970). In October of 1969, Mr. Cohen's assistant, John S. Nolan, stressed the importance of the estate and gift tax reform in the administration's future tax plans. *Id.* Most recently, in May of 1970, the Chief Counsel for the Internal Revenue Service stated that Congress is likely to give priority to proposals to revise federal estate and gift tax laws, either late this year or in early 1971. *Revision Seen for Estate, Gift Tax Laws*, 33 TEX. B.J. 440 (1970).

⁵² *Tax Reform Hearings* 4035.

⁵³ C. SHOUP, *supra* note 1, at 111.

⁵⁴ See Alexander, *supra* note 6, at 641-42.

⁵⁵ See Kurtz, *Federal Estate and Gift Tax Changes, Some Arguments in Favor of Treasury's Proposals*, 108 TRUSTS & ESTATES 458, 460 (1969).

the transfers at the lowest rate is obtained.⁵⁶ In other words, the property which is the subject of a lifetime gift comes off the top estate tax bracket while being taxed at the prevailing gift tax bracket. Because exemptions exist both for lifetime transfers and for testamentary dispositions, this movement of property from the highest estate tax bracket to the lowest gift tax bracket is especially effective to reduce taxes. Third, the gift tax rates apply only to the net amount of the gift, so that the amount of the gift tax is not subject to tax; the estate tax, however, is levied on the full value of the estate, which includes whatever amount is needed to pay the tax.⁵⁷ For example, if a decedent leaves an estate of \$10 million to a child, the estate tax would be about \$6 million, leaving about \$4 million for the child. If, on the other hand, the same taxpayer decided to give the property to his child during his lifetime, he could make a gift of approximately \$6-1/2 million on which a gift tax of about \$3-1/2 million would be paid (after adjusting for the difference in estate and gift tax rates). By transferring his property during lifetime, the taxpayer would increase the net amount given to his child from \$4 million to \$6-1/2 million, an increase of over sixty per cent.⁵⁸ The estate tax is withheld on the total amount transferred in much the same manner as the income tax is withheld on wages paid, in contrast to the gift tax which is paid only on the net amount of the transfer. If the goal were to collect the same amount of revenue under the unified tax system as presently collected under the dual tax system, the estate tax rates, which would serve as the single rate structure, could be reduced substantially.⁵⁹

The lack of "neutrality" under the dual transfer tax system operates as a powerful pressure on the taxpayer to make particular family dispositions, even though an entirely different disposition might be desired for non-tax reasons.⁶⁰ In order to reduce taxes, some persons may have made transfers which they would not have otherwise made.⁶¹ However, the importance of lifetime transfers is much less under a unified transfer tax system since the value of the property will be included in the same rate structure, and thus distinctions between the two could be simplified and made definite to avoid overlapping treatment.⁶² Completed lifetime transfers would be found in as many cases as is reasonably possible.⁶³ In this way, the difficult and occasional arbitrariness of treatment, which is inevitable in drawing a line between lifetime and death time transfers, is minimized. Whether a particular transfer is a lifetime or death time transfer would not materially alter the total tax.

⁵⁶ *Id.*

⁵⁷ See TREAS. PROPOSALS 30.

⁵⁸ See Kurtz, *supra* note 55, at 460.

⁵⁹ Alexander, *supra* note 6, at 642.

⁶⁰ See TREAS. PROPOSALS 116. It should be noted that in listing the advantages of a unified transfer tax system, the disadvantages of a dual transfer tax system provide the compelling reasons for the change, and, hence, they are listed here as arguments in favor of the proposed unified system.

⁶¹ See A.L.I. *Recommendations on Estate and Gift Taxation*, 3 REAL PROPERTY, PROBATE & TRUST J. 111, 124-25 (1968) [hereinafter cited as *ALI Recommendations*].

⁶² See Alexander, *supra* note 6, at 645.

⁶³ *Id.* at 646.

Under the present system, a decision to impose a tax on a lifetime transfer does not necessarily mean that the transferred property will escape the estate tax on the donor's death, even though present law, to a limited extent, allows a credit against the estate tax for the gift tax paid.⁶⁴ The lifetime transfer may be subject to estate taxation because it is a gift in contemplation of death;⁶⁵ because the donor retained the right to benefits for his life;⁶⁶ because the donor retained certain powers over the transferred property;⁶⁷ because the transfer was to take effect at the donor's death;⁶⁸ or because the transfer resulted in a joint ownership with right of survivorship between the donor and another.⁶⁹ Simplification in this area would be a welcomed improvement in the transfer tax system.

Arguments Against. Opponents of the unified transfer tax argue that the Government should encourage lifetime giving, and that, of course, is what the dual tax structure is intended to do.⁷⁰ One of the arguments often made is that this is socially desirable because property will be transferred into the hands of younger persons who take greater risks.⁷¹ That argument may be somewhat less than sound in the cases of transfers in trust, since fiduciaries are required by law to invest conservatively. Even assuming gifts should be favored because they put capital into the hands of younger people, one author raises the question of why the present system should be retained when it, in practice, encourages gifts by the very wealthy to a much greater extent than gifts by the less wealthy.⁷²

Some opponents of the unified transfer tax have expressed concern that a taxpayer making lifetime transfers under a unified tax system would be exposed to a greater risk of financial injury when there is a subsequent decrease in the value of his remaining assets.⁷³ The problem is illustrated by the case of a decedent who, having made substantial lifetime transfers and retaining what he considers to be an adequate estate, finds that the value of his retained estate has decreased materially at the date of his death to a point where he is not able to provide for the bequests he intended to make. Nevertheless, under the unified system, the beginning bracket into which his estate falls will be the same as if there had been no decline in value.⁷⁴ Of course, to the extent that the estate passes to a surviving spouse and a free interspousal rule were adopted as proposed, the problem would not be present.

A related risk of a unified system is the prejudice resulting to a taxpayer from a subsequent increase in tax rates, to be applied to his death time

⁶⁴ INT. REV. CODE OF 1954, § 2012.

⁶⁵ *Id.* § 2035.

⁶⁶ *Id.* § 2036.

⁶⁷ *Id.* §§ 2036, 2038.

⁶⁸ *Id.* § 2037.

⁶⁹ *Id.* § 2040.

⁷⁰ See ALI Recommendations 125.

⁷¹ Kramer, *The Federal Estate and Gift Tax Laws—Reforms for Modernization*, in THE TAXPAYERS' STAKE IN TAX REFORM 10 (U.S. Chamber of Commerce 1968).

⁷² See Kurtz, *supra* note 55, at 460.

⁷³ ALI Recommendations 126.

⁷⁴ See Alexander, *supra* note 6, at 647.

transfers, which would be more than his estate (or the beneficiaries) could afford. Under the dual system, property passing by testamentary disposition always starts at the lowest tax bracket.⁷⁵

The unified tax system would place a heavy burden on executors to investigate lifetime transfers in order to determine the decedent's estate tax brackets. This problem would exist in all estates.⁷⁶ However, certain limitations of liability for the executor-fiduciary could be built into this system. For example, lack of knowledge of lifetime transfers and their extent, if any, could be established by request that gift tax returns be furnished the fiduciary by the Internal Revenue Service.⁷⁷ Additional burdens would be placed on the Government, and fiduciaries would have to be educated, but the problem does not seem insurmountable.

Another objection to adoption of a unified system is that it would create such a basic change in the tax structure as to require a re-examination of most, if not all, existing estate plans.⁷⁸ Collateral to this is the problem of re-educating the public, government officials, and experts in the new law. However, this objection could be raised to many of the proposed estate and gift tax reforms. It might be said, therefore, that if we are to have reform, then the reconsidering of estate plans and re-educating of personnel is part of the price we have to pay for greater equity in the system. In any event, it appears that disruption of existing estate plans can be avoided only by keeping the present dual system *without* important structural revision.⁷⁹

There is one final objection to the adoption of a unified system. Since the present dual tax structure has not greatly encouraged lifetime giving, aren't we making "much ado about nothing" in advocating a major overhaul to correct a theoretical, yet little used, abuse or inequity? Most trust officers and lawyers state that regardless of the incentive produced by tax savings, most people are reluctant to actually give property away during their lifetime.⁸⁰ Shoup stated in his book: "In fact, however, wealth transferors do not use this escape route as much as might be expected."⁸¹ The fact that surprisingly few individuals avail themselves of the tax savings of lifetime giving raises interesting questions.⁸²

Schwartz and Aronson in their article quote Joseph Pechman as suggesting four non-economic reasons that discourage people from making gifts in spite of the potential tax saving:

- (1) The reluctance on the part of most people to contemplate death;
- (2) The desire to maintain control over business operations;

⁷⁵ See *ALI Recommendations* 126.

⁷⁶ Alexander, *supra* note 6, at 647.

⁷⁷ *ALI Recommendations* 127.

⁷⁸ See Alexander, *supra* note 6, at 648.

⁷⁹ *Id.*

⁸⁰ See Kramer, *supra* note 71, at 10.

⁸¹ C. SHOUP, *supra* note 1, at 127.

⁸² For thorough and well-written articles on the motivation, or lack thereof, for lifetime giving, see Hochman & Lindsay, *Taxation, Interest and the Timing of Inter-Generation Wealth Transfers*, 20 NAT'L TAX J. 219 (1967); Schwartz & Aronson, *The Preference for Accumulation Vs. Spending: Gift and Estate Taxation, and the Timing of Wealth Transfers*, 22 NAT'L TAX J. 390 (1969).

- (3) The wish to delay property transfers until children have had an opportunity to make their own careers; and
- (4) The fact that many people simply do not know the law.⁸³

Despite these common beliefs, Schwartz and Aronson suggest there is a perfectly valid economic rationale for most individuals' reluctance to make gifts. These authors discern that there are individual preferences for spending over savings and vice versa, with varying shades in between, and this, coupled with time discounting, can be used to establish economic models from which conclusions can be drawn. The authors then compare, through complex formulas, a case involving a "spender" with a million dollars of present holdings who does not wish to decrease the million dollar corpus and an "accumulator" whose desire is to transfer a maximum amount of wealth. In these examples, since time discounting is involved, the age of the donor or decedent is also important. The authors conclude on a rational basis under the factors given, that the spender should transfer his wealth through his estate, and the accumulator should pass his wealth by gift. However, even these conclusions change, depending upon the age of the holder of the wealth. However, the authors contend that "[a] rational decision is determinable when the factors are given."⁸⁴ The authors conclude:

The presumed tax advantage of the gift diminishes when reasonable assumptions are made about the utility of the spending stream compared to the utility of wealth transfers Only when there is strong desire to transfer a maximum fund is there an immediate advantage to making a gift (probably in trust). It now seems clear that there are economic as well as non-economic reasons to explain the mystery as to why so many more funds pass through the estate tax rather than through the lower gift tax.⁸⁵

The question might again be asked: Is the unified tax system really necessary to plug this "loophole" for lifetime gifts? If other reform proposals would not require reconsideration of existing estate plans, it might be argued that the change is simply not worth it. However, in light of the far-reaching reform proposals presently being considered, requiring reconsideration in any event, a switch to a unified tax system may well be justified.

American Law Institute Proposal. In the model unified transfer tax system, an exemption of \$100 thousand was recommended.⁸⁶ Surprisingly, however, there is no American Law Institute recommendation on the choice between a dual tax system and a unified tax system. Because of the complexity of the problem, the time required for its thorough exploration, and, perhaps most importantly, the improbability of reaching any clear consensus, a resolution for approval was not proposed.

Casner noted that there would be little or no support for a change to a

⁸³ Schwartz & Aronson, *supra* note 82, at 391, quoting J. PECHMAN, *FEDERAL TAX POLICY* 189-91 (1966).

⁸⁴ Schwartz & Aronson, *supra* note 82, at 395.

⁸⁵ *Id.* at 398.

⁸⁶ ALI PROJECT 50, 57.

unified tax if it were to be used to produce more revenue than presently collectible under the dual tax system.⁸⁷ He stated that some people even base their opposition to unification on the conviction that the greater revenue-raising potential of the unified tax would inevitably be exploited. The position of the Institute was articulated in Recommendation 45:

Inasmuch as the primary justification for changing to a unified tax system is to keep the rates on death time transfers for those who do not or cannot make lifetime transfers at a lower rate than would be possible under a dual tax system, it should be understood by those charged with determining the rate structure, if a unified tax is adopted, that the purpose of the shift to a unified tax would be undermined if the rate structure evolved under it were designed to produce more revenue than would be produced under a dual tax system.⁸⁸

Treasury Proposal. The Treasury has proposed full unification of estate and gift taxes into a single transfer tax to accomplish the dual objectives of fairness and reduced complexity.⁸⁹ Under the unified tax, lifetime gifts and transfers at death would be added together to determine the total wealth subject to transfer taxation. A single exemption of \$60 thousand and a single rate schedule would be made applicable to that total, and the base of the gift tax would be increased to include the amount of tax, parallel to the treatment for estate taxes. In addition, the Treasury proposes that the annual gift tax exclusion of \$3 thousand per donee be continued.

B. Rate Reduction and Revision

Arguments For. Kramer has stated that whenever you mention tax reform of a progressive tax system, you inevitably raise the question of the rate structure.⁹⁰ Another commentator believes that revising the rate schedule is central to any "reform" of present estate and gift taxation.⁹¹

The present rate schedules telescope an enormous amount of progression into the lower tax brackets, after which they level off and progress very slowly, but continue to very high brackets. The lowest bracket of the estate tax rate is three per cent, but this rate applies to only the first \$5 thousand of the taxable estate.⁹² Although the rates progress from three per cent at the lowest bracket to seventy-seven per cent for taxable estates over \$10 million, the marginal rate of thirty per cent applies at a taxable estate of \$100 thousand.⁹³ This steep progression is hardly defensible. Casner stated in the American Law Institute Estate and Gift Tax Project that the present estate and gift tax rate schedules were both strongly rejected because of the sharp progression at the lower levels.⁹⁴

⁸⁷ *Id.* at 57.

⁸⁸ *Id.* For a strong appeal that just such additional revenue-raising use should be made of the unified tax system, see Westfall, *supra* note 12, at 986.

⁸⁹ TREAS. PROPOSALS 31-32.

⁹⁰ Kramer, *supra* note 71, at 12.

⁹¹ Williams, *supra* note 41, at 1403.

⁹² INT. REV. CODE of 1954, § 2001.

⁹³ *Id.*

⁹⁴ ALI PROJECT 83.

The matter of the exemption seems not to have been much debated. Apparently, administrative considerations for removing from the tax rolls smaller estates is a major factor in keeping some sort of exemption.

Arguments Against. No arguments have been made which object to the levelling of the progression at the lower end of the estate and gift tax rate schedules. Westfall, consistent with his theory that the estate tax revenues need to be greatly increased to achieve certain social changes, apparently feels that rates should start at the same level as those of the income tax and progress to a top bracket at a level substantially below \$10 million.⁹⁵ Shoup suggests that the starting rate should be ten or fifteen per cent, with no need to reduce the seventy-seven per cent top bracket rate.⁹⁶

American Law Institute Proposal. The American Law Institute recommended that a \$100 thousand exemption be used under the unified transfer tax with a rate schedule beginning at three per cent for the first bracket of \$50 thousand, seven per cent for the second bracket, also \$50 thousand, and progressing to a rate of sixty per cent on transfers in excess of \$6 million.⁹⁷

Treasury Proposal. The Treasury Department has recommended a reduction in the rates of the unified transfer tax.⁹⁸ The top estate tax bracket, now at seventy-seven per cent, would be reduced to sixty-five per cent on taxable estates over \$10 million. Other tax brackets would be reduced by about twenty per cent, except for the lowest bracket of three per cent. There would be a transitional period for this reduction in rate which would be completed in ten years.

The Treasury proposed that the \$60 thousand exemption be retained for use in the unified transfer tax system and that the present \$3 thousand annual exclusion per donee for gifts be retained.

C. Tax-Free Transfers Between Husband and Wife

Arguments For. The fifty per cent marital deduction⁹⁹ in the estate and gift tax laws has been with us since 1948. It was originally adopted in an effort to bring greater equality between non-community and community property states. Since community property is divided on a fifty-fifty basis between husband and wife, the marital deduction is limited to about fifty per cent of the donor-spouse's estate. The so-called terminable-interest rule requires the donee-spouse to receive an interest somewhat equivalent to outright ownership in order for the transfer to qualify for the marital deduction,¹⁰⁰ and because of this rule, technical requirements to qualify an

⁹⁵ Westfall, *supra* note 12, at 990.

⁹⁶ C. SHOUP, *supra* note 1, at 116.

⁹⁷ ALI PROJECT 83-85.

⁹⁸ TREAS. PROPOSALS 44. See also Andresen, *Gift and Estate Tax Reform Proposals*, 108 TRUSTS & ESTATES 664, 670 (1969).

⁹⁹ INT. REV. CODE of 1954, §§ 2056, 2523.

¹⁰⁰ *Id.*

interest other than by outright ownership are complex.¹⁰¹ In summary, the fifty per cent marital deduction permits the decedent to pass as much as one-half of his estate to his surviving spouse without any estate tax imposed on the transfer.¹⁰²

Williams has described the sweeping changes proposed as accepting, for tax purposes, the common view that property of the husband or wife is "our property" without regard to the legalistic niceties of title holding, and they would take spouses out of the bookkeeping business *inter sese* to the extent they chose.¹⁰³ Casner agrees that a more realistic tax concept in this area may be that of recognizing the belief of the average husband and wife who refer to "our property" without regard to the technical aspects of legal ownership.¹⁰⁴

Although the fifty per cent marital deduction provision was designed to achieve complete equality between common law and community property states, it simply has not done so in many important areas.¹⁰⁵ In addition, it forces spouses into an unnatural record-keeping of inter-spousal transfers which is inconsistent with the "our" concept of property.¹⁰⁶ Kramer states that this is an area in which it is particularly hard to enforce a tax equitably without, so to speak, prying into the secrets of the bed chamber.¹⁰⁷ He questions whether it is worthwhile to try to collect the tax when so many people feel there is no transfer when title to property is changed from one spouse to the other. In smaller estates, the fifty per cent marital deduction is frequently inadequate to provide the surviving spouse with an adequate tax-free amount.¹⁰⁸ The Treasury bluntly states that an especially difficult burden may be imposed by the tax when property passes to a widow with minor children.¹⁰⁹ The present limit on the marital deduction has also been described as being "quite harsh when you are dealing with people with only moderate means."¹¹⁰ A 100 per cent marital deduction would provide considerable simplification in this entire area.¹¹¹ Under present law, complex dispositions are necessary in order to give the surviving spouse the exact fifty per cent that is the maximum marital deduction.¹¹²

The Treasury Department has provided some very interesting figures to support its proposal of free inter-spousal transfers.¹¹³ First, based on a special study, fifty per cent of husbands with estates under \$500 thousand transferred property to their surviving spouses in amounts which exceeded the allowable marital deduction. In contrast, only fourteen per cent of

¹⁰¹ See ALI PROJECT 31-32.

¹⁰² INT. REV. CODE of 1954, §§ 2056, 2523.

¹⁰³ Williams, *supra* note 41, at 1404.

¹⁰⁴ Casner, *supra* note 15, at 549.

¹⁰⁵ See ALI PROJECT 32; Alexander, *supra* note 6, at 639; Kramer, *supra* note 71, at 11.

¹⁰⁶ ALI PROJECT 32.

¹⁰⁷ Kramer, *supra* note 71, at 11.

¹⁰⁸ See ALI PROJECT 33.

¹⁰⁹ TREAS. PROPOSALS 29.

¹¹⁰ Kramer, *supra* note 71, at 11.

¹¹¹ See Williams, *supra* note 41, at 1404.

¹¹² See ALI PROJECT 33.

¹¹³ TREAS. PROPOSALS 111.

husbands with estates over \$1 million transferred property to their widows in amounts exceeding the marital deduction. Thus, in the words of the Treasury, the transfer-tax burden falls relatively more heavily on widows who are most in need of funds to sustain themselves for the balance of their lives. Even more interesting, however, are the figures which show, *inter alia*, that ten years after the husband's death, there are, on the average, fifty-four per cent of the widows still surviving. This means that no credit for prior transfers is possible, and that the estate, to the extent then in existence, may be subject to double taxation.¹¹⁴

Arguments Against. Opponents of the tax-free, inter-spousal rule suggest, on the complexity issue, that the present marital deduction rules could be improved by amendment of the law to clarify the present areas of controversy, and, further, that the proposed law would simply substitute one set of technicalities for another.¹¹⁵ Other opponents question whether this gives too much of a break to married people, particularly since our tax laws in many ways already favor the married person.¹¹⁶ In addition, there is the problem of the revenue loss, or at least the postponement, until, as already noted, on the average more than ten years later.¹¹⁷ Finally, if special consideration is due widows with minor children or those who receive smaller estates, an unlimited marital deduction may be an expensive tool for achieving these ends. Rather, the 100 per cent rule could be applicable only to gross estates up to a certain amount.¹¹⁸

American Law Institute Proposal. The American Law Institute recommended that the 100 per cent marital deduction be adopted in place of the fifty per cent marital deduction, and that the terminable-interest rule in relation to marital deduction transfers be abolished and a current-beneficial-enjoyment test adopted.¹¹⁹ In addition, since all of the property transferred to the surviving spouse would be taxed in her estate at progressive rates, the American Law Institute provided for an election on the death of the first spouse to tax part of the property in his estate. Thereafter, on the death of the surviving spouse, no transfer tax would be imposed on identifiable previously-taxed property.¹²⁰

Casner stated that the 100 per cent marital deduction is almost essential if the unified transfer tax were adopted, because a single, cumulative lifetime transfer tax rate might cause the surviving spouse to bear an unreasonable tax burden relative to lifetime donees.¹²¹

Treasury Proposal. The Treasury recommends¹²² that the 100 per cent

¹¹⁴ See INT. REV. CODE of 1954, § 2013.

¹¹⁵ ALI Recommendations 120.

¹¹⁶ Kramer, *supra* note 71, at 11-12.

¹¹⁷ Westfall, *supra* note 12, at 997.

¹¹⁸ *Id.* at 996.

¹¹⁹ ALI PROJECT 36.

¹²⁰ *Id.* at 37.

¹²¹ ALI Recommendations 121.

¹²² TREAS. PROPOSALS 29.

marital deduction be adopted and that present restrictions upon the types of interest which qualify for the marital deduction be liberalized. In addition, the Treasury recommends that an election be given on the death of the first spouse to determine if the surviving spouse and/or the administrator or executor would like to have a portion of the transferred property subject to immediate taxation so that no tax would be levied upon subsequent disposition by the surviving spouse.

D. Taxation of Generation Skipping

Arguments For. As noted earlier,¹²³ one of the aims which Shoup ascribes to transfer taxation is that of taxing property once a generation. Casner has described this as the "problem of the too-infrequent impositions of tax."¹²⁴ It has been said that the theoretical basis for taxing generation-skipping transfers lies in the assumption that a tax should be imposed each time property is transferred from one generation to another. If transfers are not subject to taxation as they bypass each generation, then the operation of the transfer tax system is undermined.¹²⁵ Under present law, successive owners of beneficial interests for life are not regarded as having made a transfer for transfer tax purposes unless each is given a power deemed the equivalent of outright ownership.¹²⁶ The Treasury in its proposals is more blunt: "The enjoyment of the property by each successive generation is not skipped—it is only the estate tax that is being skipped."¹²⁷ The wealthier the family, the greater the opportunity for use of the generation-skipping trust.¹²⁸ Evidence from a recent study indicates that those having estates of \$1 million or more make about ten times greater use of generation-skipping trusts than those leaving estates of \$300 thousand or less.¹²⁹ In estates of \$2 million or more, almost all family trusts were of the generation-skipping type.¹³⁰

Under present law, a person (not the grantor) with a life estate may have other benefits and still keep the corpus out of his estate. Thus, in addition to his life income interest, the life tenant can be given power to appoint by will the property which produces the income to anyone other than himself, his creditors, his estate, and creditors of his estate;¹³¹ the power to appoint such property during his lifetime to anyone other than himself, his creditors, his estate, and creditors of his estate;¹³² the power to draw upon such property for his own benefit if the power is limited by an ascertainable standard relating to his health, education, support, or maintenance;¹³³ and the power to draw down in each calendar year the

¹²³ See text accompanying note 36 *supra*.

¹²⁴ ALI PROJECT 26.

¹²⁵ ALI *Recommendations* 111-12.

¹²⁶ ALI PROJECT 26.

¹²⁷ TREAS. PROPOSALS 31.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ INT. REV. CODE of 1954, § 2041.

¹³² *Id.* § 2514.

¹³³ *Id.* §§ 2041(b)(1)(A), 2514(c)(1).

greater of \$5 thousand or five per cent of such property, without regard to any standard.¹³⁴ Westfall asserts that these extremely flexible trusts are being set up not for the purpose of protecting financially inept widows, orphans, or profligate descendants, but to ward off the federal tax collector.¹³⁵ Even though the period which such trusts may last is usually limited by the Rule Against Perpetuities, the Rule will ordinarily permit a trust term of eighty to 100 years.¹³⁶

Finally, the indirect social costs may be as large as the taxes that the arrangements avoid. Since trusts are noted for their conservative investment requirements, these long-term trusts tend to drain risk capital from the economy, which could affect its continued growth and stability.¹³⁷ And, since individuals must live with, pay administrative costs on, and litigate ambiguities of expression in the work product of the original draftsman of the trust, the benefits to the beneficiaries themselves might be outweighed by the problems.¹³⁸

Arguments Against. The opponents of taxation of generation-skipping transfers point out that most of the proposals either impose a penalty on the transfer or are extremely complicated.¹³⁹ In view of this, many transfers in trust might be discouraged which would otherwise be established for valid non-tax reasons.

Statistical information based upon taxable returns filed in 1959 indicate that only a small proportion of revenue wealth is left in trust, and that the revenue lost because of generation-skipping transfers is not significant.¹⁴⁰ For the taxable returns filed in 1959, there were 38,515 taxable estates, including 1,137 millionaire decedents. The latter created only 598 trusts, and of those, only forty-eight had a duration of two generations or more. These figures are considered typical of the extent of the problem. Should a proposal designed to correct abuse in approximately forty-eight estates be allowed to revolutionize the planning and administrative aspects of the whole group of 38,515 estates, and without a significant increase in revenue?¹⁴¹

In addition, opponents argue that the proposals ignore the important differences between outright ownership of property, which they concede should be subject to an estate tax, and beneficial enjoyment of trust property, which traditionally has been exempt from estate taxation.¹⁴²

¹³⁴ *Id.* §§ 2041(b)(2), 2514(e).

¹³⁵ Westfall, *supra* note 12, at 1006-07.

¹³⁶ *Id.* at 1007.

¹³⁷ STAFF OF JOINT ECONOMIC COMM., 88TH CONG., 2D SESS., *THE FEDERAL TAX SYSTEM: FACTS AND PROBLEMS* 40 (Comm. Print 1964).

¹³⁸ See Westfall, *supra* note 12, at 1008. For a detailed analysis of the generation-skipping problem, see Comment, *A Survey of Generation-Skipping Transfers—The Present Rule and the Possibility of Reform*, 22 Sw. L.J. 482 (1968).

¹³⁹ See Comment, *supra* note 138, at 490.

¹⁴⁰ ALI *Recommendations* 115.

¹⁴¹ Kramer, *supra* note 71, at 12, argues: "If it is not a problem today, maybe this is the time to do something about it before we get all these vested rights and interests involved that we are told we have to consider whenever we change the tax law. Are not tax advisors, counselors and trustees becoming more and more sophisticated?"

¹⁴² *Tax Reform Hearings* 4037.

American Law Institute Proposal. The American Law Institute approved resolutions which put it on record as favoring an additional tax on certain generation-skipping transfers, but which excluded from taxation all outright transfers to children, grandchildren, or great-grandchildren, and all transfers in trust for children for life, with remainder to descendants living at the death of such children.¹⁴³ Thus, a trust skipping one generation (a child) would not be subject to the additional tax, while a trust skipping two generations (a child and a grandchild) would be subject to such tax.¹⁴⁴

The additional tax imposed on the generation-skipping could be imposed at the time the transfer is initially made, or at the time of the shift of enjoyment, and an election could be given at the time of original transfer whether to pay or defer the tax.¹⁴⁵

Treasury Proposal. The Treasury's proposal would impose a special tax on all transfers which skip a generation. It would serve as a substitute tax for the tax that would have been paid on the net gift by the estate of the skipped generation. That is, if property is transferred directly to a grandchild without passing through the child's estate, the special tax would approximate the tax which would have been paid had it been included in the child's estate on the transfer.¹⁴⁶ The special tax is computed at a rate equal to sixty per cent of the decedent's marginal rate. Sixty per cent represents the relationship between the overall effective rate and the marginal rate on an estate. At a marginal rate of fifty per cent, the effective overall rate is approximately thirty per cent. However, a taxpayer, at his election, may achieve the exact result by agreeing with his child to tax the property at the time it passes from the child to the grandchild.¹⁴⁷

E. Taxation of Capital Gains of Assets Transferred at Death or by Gift

Arguments For. The concept of taxing capital gains at death or time of gift is probably the most controversial reform proposal in the estate and gift tax area. One commentator states:

It is clear . . . that the keystone of the arch of the entire plan is the novel concept of a tax on the unrealized appreciation of property owned by a decedent at the time of his death. Since the other proposals would result, according to their proponents, in a net revenue loss, the capital gains tax provision is necessary in order to make the reform proposals fiscally responsible.¹⁴⁸

If the capital gains proposal is indeed the keystone, it becomes necessary to subject it to careful scrutiny.

A major argument in favor of taxing capital gains at death is the "lock-

¹⁴³ ALI PROJECT 30-31.

¹⁴⁴ See ALI Recommendations 129.

¹⁴⁵ ALI PROJECT 29.

¹⁴⁶ TREAS. PROPOSALS 43.

¹⁴⁷ *Id.* pt. 3, at 395.

¹⁴⁸ Dane, *Federal Estate and Gift Tax Reform—Some Arguments Against the Treasury Proposals*, 108 TRUSTS & ESTATES 782 (1969).

in" argument.¹⁴⁹ Stated generally, the argument is that the prospect of avoiding the gains tax by holding an appreciated asset until death distorts the allocation of resources, because investments which would have been sold are retained to secure gains tax forgiveness. It follows that if the incentive of avoiding the gains tax were removed, the incentive for holding appreciated assets until death would decline as the prospect of death became greater.

The Treasury recognizes that investors become "locked-in" by the prospect of avoiding income tax completely by holding appreciated assets until death rather than selling them.¹⁵⁰ Yet another author, Hanrahan, asserts that the lock-in effect results because the investor knows that there will be an ultimate escape from the tax if he holds until death.¹⁵¹

This lock-in effect is said to curtail the essential mobility of capital in our economy and deprive it of the fruits of an unencumbered flow of capital toward enterprises promising the largest rewards.¹⁵² Somers describes this effect as hampering the optimum allocation of resources.¹⁵³ It has also been described as retarding the flow of investment funds from safe ventures to new and risky undertakings.¹⁵⁴

Another economic effect of the lock-in problem is on market stability. Any lock-in of assets tends to make the markets for them thinner and thereby accentuates price fluctuations. In a period of rising prices, investors tend to hold their investments to avoid paying tax on their gains. This, in turn, restricts supply and drives prices even higher. However, when prices are generally falling, investors sell more readily to take deductible losses and this creates an over-supply, reducing prices even lower. Swings in market prices are thus accentuated according to the market instability theory.¹⁵⁵

The taxing of capital gains at death and at time of gift may be justified on equitable grounds as well as economic theories.¹⁵⁶ Under present law, an investor who retains appreciated assets until death is given a tax advantage over the investor who sells before he dies, since no capital gains tax is levied on the death time transfer of the first investor and the transferee receives a stepped-up basis on the property.¹⁵⁷ Only an estate tax is imposed on the transfer at death. However, the investor who sells during life pays a capital gains tax upon the sale, and an estate tax upon the proceeds when he dies. This difference in treatment is a violation of horizontal equity which requires that similarly-situated taxpayers pay similar taxes.

¹⁴⁹ Waterbury, *A Case for Realizing Gains at Death in Terms of Family Interests*, 52 MINN. L. REV. 1, 48 (1967).

¹⁵⁰ TREAS. PROPOSALS 28. Former Secretary of the Treasury Dillon testified to this effect in favor of the 1963 constructive realization proposal. *Hearings on the President's 1963 Tax Message Before the House Comm. on Ways and Means*, 88th Cong., 1st Sess., pt. 1, at 54 (1963).

¹⁵¹ Hanrahan, *A Proposal for Constructive Realization of Gains and Losses on Transfers of Property by Gift and at Death*, 15 KAN. L. REV. 133, 137 (1966).

¹⁵² TREAS. PROPOSALS 28.

¹⁵³ Somers, *The Case for a Capital Gains Tax at Death*, 52 A.B.A.J. 346-47 (1966).

¹⁵⁴ Hanrahan, *supra* note 151, at 138.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 144-47.

¹⁵⁷ INT. REV. CODE of 1954, § 1014(a).

Here, although both taxpayers have accrued gains, one disposes of his property by sale and pays a capital gains tax while the other transfers his property at death and pays no capital gains tax on the accrued gains.

A further inequity exists since the lack of a gains tax severely curtails the progressivity of the individual income tax.¹⁵⁸ In fact, the effective tax rate on these gains is zero. Taxing these gains at death would restore the progressivity, if only to a limited extent.

Finally, there is the argument that the revenue loss is so large that it simply cannot be justified. The Treasury estimates that at least fifteen billion dollars a year of capital gains fall completely outside the income tax system.¹⁵⁹ The taxing of these gains would add an estimated 2 billion dollars in revenues to the federal budget.¹⁶⁰ The proposal to tax capital gains at death is part of the balanced revenue proposal which includes the other estate and gift tax reform proposals. In other words, the aggregate revenue to be collected from the estate and gift tax and the capital gain at death proposals will roughly equal the taxes now collected under the existing estate and gift tax systems. Therefore, to the extent that the tax burden is increased by reason of taxing capital gains at death, it will be reduced by the estate and gift tax proposals and the revised rate structure which the Treasury proposes.¹⁶¹

Arguments Against. The most forceful argument against taxing unrealized gains at gift and death is the severe liquidity problem it poses for many estates.¹⁶² Wormser has argued that catastrophic, practical, and sociological results would follow.¹⁶³ The impact is greatest in the estates consisting primarily of stock in a closely-held company where the tax basis is generally small and there has been substantial appreciation in the value of the stock. The payment of estate taxes is already a problem in this situation and payment of capital gains tax at death would severely aggravate the problem.¹⁶⁴

Substantial amounts of wealth are found today in stock of closely-held corporations since the corporate form is particularly well suited for accumulating fortunes. However, when the founders and operators of these corporations die, the problem of liquidity to pay death taxes and administration expenses, and even living expenses for the family, is not easily solved.¹⁶⁵

If stock held by an estate is actively traded, then liquidating part of it may be comparatively easy, though the market for such property is usually

¹⁵⁸ Holt & Shelton, *The Lock-In Effect of the Capital Gains Tax*, 15 NAT'L TAX J. 337, 352 (1962).

¹⁵⁹ TREAS. PROPOSALS 110.

¹⁶⁰ Berkowitz, *supra* note 51, at 12.

¹⁶¹ See Kurtz, *supra* note 55, at 461. For an extensive, detailed economic analysis of existing unrealized appreciation in stock holdings and real estate, see Eilbott, *The Revenue Gain from Taxation of Decedents' Unrealized Capital Gains*, 22 NAT'L TAX J. 506 (1969); Okun, *The Taxation of Decedents' Unrealized Capital Gains*, 20 NAT'L TAX J. 368 (1967).

¹⁶² Hanrahan, *supra* note 151, at 154.

¹⁶³ Wormser, *The Case Against a Capital Gains Tax at Death*, 51 A.B.A.J. 851, 852 (1965).

¹⁶⁴ Hanrahan, *supra* note 151, at 154.

¹⁶⁵ Wormser, *supra* note 163, at 852.

thin and the stock would likely have to be sold at a sacrifice price.¹⁶⁶ On the other hand, if the stock is not traded, the liquidity problem can result in economic and social tragedy.¹⁶⁷ To avoid such results, it has been noted that prudent owners usually sell to larger corporations years before their deaths.¹⁶⁸ Such sellouts only fuel the highly undesirable trend toward centralization of economic power.¹⁶⁹ To add to the present liquidity problem the burden of further liquidation to pay a capital gains tax would indeed create hardship.¹⁷⁰ If two estates were of equal value but one were composed of bonds and the other were composed of closely-held stock which had greatly appreciated in value, the executors of each would pay vastly different amounts of tax if a gains tax at death were in effect even though the estates were equal in value.¹⁷¹

There are a number of techniques which, to some extent, could be used to provide liquidity upon death: personal life insurance, business life insurance and buy-sell agreements, judicious sales of stock during life, and the ten-year installment payment privilege under the present tax law,¹⁷² expanded to include provisions for payment of capital gains taxes imposed at death.

The proposed capital gains tax at death would be largely a tax on inflation, the same as the present capital gains tax on lifetime transfers is largely a tax on the declining purchasing power of the dollar. When the breadwinner, typically, has been removed from the family, it becomes even more unreasonable for the estate to pay a tax on inflation and not real appreciation in value.¹⁷³

The proposal has the very practical difficulty of requiring a cost basis to be established for each of the assets, including securities held by a decedent for many years, and miscellaneous other items.¹⁷⁴

Finally, a basic problem still remaining is the constitutional one. The United States Supreme Court in *Eisner v. Macomber*¹⁷⁵ dealt with the taxability of a common stock dividend as a distribution of earnings and profits, but stated also that unsevered asset appreciation was not income within the sixteenth amendment to the Constitution. This case is the bulwark for those who think that realization at death poses a serious sixteenth amendment problem.¹⁷⁶ Even among those who favor the taxation of capital gains at death, there is belief that the *Eisner* case might yet prevent the constructive realization of capital gains at death and its taxation.¹⁷⁷ Even though Congress may pass a statute declaring death to be a "taxable event,"

¹⁶⁶ Hanrahan, *supra* note 151, at 154.

¹⁶⁷ Wormser, *supra* note 163, at 852.

¹⁶⁸ Bosland, *Has Estate Taxation Induced Recent Mergers?*, 16 NAT'L TAX J. 159 (1963).

¹⁶⁹ Hanrahan, *supra* note 151, at 154.

¹⁷⁰ Wormser, *supra* note 163, at 852.

¹⁷¹ See Dane, *supra* note 148.

¹⁷² INT. REV. CODE of 1954, §§ 6161, 6166.

¹⁷³ See Dane, *supra* note 148.

¹⁷⁴ Wormser, *supra* note 163, at 853-54.

¹⁷⁵ 252 U.S. 189 (1920).

¹⁷⁶ See Roehner & Roehner, *Realization: Administrative Convenience or Constitutional Requirement*, 8 TAX L. REV. 173, 174-75 (1953).

¹⁷⁷ Somers, *supra* note 153, at 347.

it is not clear whether the sixteenth amendment will permit it to stand.¹⁷⁸

However, others who favor capital gains taxation at death and time of gift are convinced that such taxation would not be unconstitutional. Hanrahan has stated that the constitutionality of taxing unrealized appreciation at time of gift or at death is reasonably certain.¹⁷⁹ Both Hanrahan in his article and Waterbury in his article have listed cases subsequent to *Eisner* which they contend have modified its holding to such an extent that no constitutional bar against taxation now exists.¹⁸⁰

In support of the constitutionality of President Kennedy's proposal, Secretary of Treasury Dillon submitted an opinion to the House Committee on Ways and Means prepared by the General Counsel of the Treasury.¹⁸¹ The opinion points out what the writers above pointed out: that federal courts have given a liberal construction to the Congressional power to tax by recognizing its broad discretion to define income. The opinion, after referring to the *Eisner* decision, stated:

Later Supreme Court cases have so modified and qualified its concepts that there is every probability that the Supreme Court will now recognize power in Congress to tax appreciation in value as income at appropriate times. . . . The proposed legislation is not inconsistent with the foregoing definition as it proposes to tax as income 'something of exchangeable value' that is 'drawn by' the taxpayer for his 'disposal.' The increase in value, having an exchangeable value, would be disposed of by the taxpayer according to his wishes to accomplish his economic objectives.¹⁸²

To some extent, the increase of the maximum capital gains rate by the Tax Reform Act of 1969 might be said to militate against taxing capital gains at death since the total impact at such time would be even greater than when the proposals were first presented to Congress.

Finally, it might be argued that realization of gain at death or gift is objectionable since there is a reasonable alternative, *i.e.*, a carry-over of basis approach similar to that now used for transfers by gift.¹⁸³ Heirs would refer to the basis which the decedent had in computing their gain or loss on disposition of the assets. This approach is worth considering since it

¹⁷⁸ *Id.*

¹⁷⁹ Hanrahan, *supra* note 151, at 155.

¹⁸⁰ Some of these cases in which courts have found the existence of income, though in the sense of the *Eisner* dicta the taxpayer would be considered as receiving nothing, include *United States v. Davis*, 370 U.S. 65 (1962) (transfer of appreciated shares for release of marital claims); *Helvering v. Horst*, 311 U.S. 112 (1940) (father taxed on gift of interest coupons to son); *Helvering v. Eubank*, 311 U.S. 122 (1940) (assignment of renewal commissions); *United States v. General Shoe Corp.*, 282 F.2d 9 (6th Cir. 1960), *cert. denied*, 365 U.S. 843 (1961) (contributions of appreciated assets to a pension trust); *International Freighting Corp. v. Commissioner*, 135 F.2d 310 (2d Cir. 1943) (transfer of appreciated shares to employees as a bonus); *Commissioner v. Halliwell*, 131 F.2d 642 (2d Cir.), *cert. denied*, 319 U.S. 714 (1942) (transfer of appreciated securities pursuant to divorce decree); *Commissioner v. Mesta*, 123 F.2d 986 (3d Cir.), *cert. denied*, 316 U.S. 695 (1941) (transfer of appreciated stock pursuant to divorce settlement).

¹⁸¹ *Hearings on the President's 1963 Tax Message Before the House Comm. on Ways and Means*, 88th Cong., 1st Sess., pt. 1, at 592-98 (1963).

¹⁸² *Id.* at 593. In a closely related matter, Lewis Del Cotto in *Del Cotto, The Trust Annuity as Income: The Constitutional Problem of Taxing Gifts and Bequests as Income*, 23 TAX L. REV. 231, 256 (1968), concludes that there is no constitutional inhibition from taxing the entire receipt as income to the recipient.

¹⁸³ Marshall & Crumbley, *Reform Proposals for Taxation of Capital Gains—Some Alternate Suggestions*, 108 TRUSTS & ESTATES 871, 878 (1969).

was substituted for the Kennedy proposal for constructive realization in the Revenue Act of 1963 by the House Ways and Means Committee.¹⁸⁴ The Committee later eliminated this section entirely from the tax bill. The carry-over basis approach would completely avoid the constitutional question and eliminate the liquidity problem that would be caused by the capital gains proposal. It would remove the incentive to hold appreciated property until death in order to avoid completely the capital gains tax and this would diminish the lock-in effect on investments.

American Law Institute Proposal. Although there was fairly extensive discussion, proposals relating to taxation of appreciation at death and gift and/or the basis problem only produced disagreement. Casner concluded that: "[B]ecause of the deeply felt differences of opinion on the basis problem, no position in this regard will be taken in the American Law Institute's Estate and Gift Tax Project."¹⁸⁵

Treasury Proposal. The Treasury has proposed to treat a transfer by gift or bequest as the equivalent of a sale and tax appreciation in value under the income tax provisions.¹⁸⁶ However, only the appreciation which occurred after the day of enactment of the law would be subject to tax. The tax on the appreciation of assets would be allowed as an estate tax deduction. Therefore, the amount of the tax would not be included in the decedent's gross estate, the same as with taxpayers who realize their gains prior to their deaths.

There would be a minimum basis of \$60 thousand permitted for all taxpayers so that no gains tax would be payable on assets transferred where the total value were \$60 thousand or less.

On transfers between spouses or to a charitable organization there would be a complete exemption from the tax. In addition, there would be a limited exemption for transfers to orphan children who were minors and for transfers of household goods and personal effects.

Unrealized losses and unrealized gains would be permitted to offset each other and, in addition, any net unrealized losses would be permitted to apply against capital gains for the three taxable years prior to the decedent's final income tax return. The unrealized losses could also be offset against ordinary income, subject to the usual limitations.

Finally, gains on transferred assets would become eligible for income-averaging in the year of the decedent's death.

F. Accessions Tax

Description. Because of the unique features of the accessions tax, a brief description of it would be in order before discussing the pros and cons. Accessions are defined as including all property received by way of in-

¹⁸⁴ *Id.*

¹⁸⁵ Casner, *supra* note 15, at 583.

¹⁸⁶ For a discussion of the Treasury proposals, see TREAS. PROPOSALS 29; Andresen, *supra* note 98, at 667; Berkowitz, *supra* note 51, at 12-13.

heritance or gift.¹⁸⁷ An accessions tax, therefore, is an excise tax on the transfer of property at death or by gift, but one which is measured by the amount of property received by each recipient rather than the total amount transferred.¹⁸⁸ The accessions tax has been called a sort of combination income and inheritance tax.¹⁸⁹ It is like a special income tax because it is measured by the total gifts and inheritances received during a lifetime. It is also like an inheritance tax because it is imposed on recipients rather than transferors. However, unlike an inheritance tax, the amount of the accessions tax is determined by the total received from all sources, which is accumulated to find the rate applicable to the current amount received. Thus, an accessions tax may bear more heavily than a transferor tax in the case of a single person inheriting from several sources, while it will bear less heavily when a single estate is divided among several recipients without accessions from other sources.

With one major exception, property which is taxed under the unified transfer tax is the same as that which would be taxed under the accessions tax proposal. The major exception is a transfer in trust, which is not deemed received by the transferee upon creation of a trust, but only upon receiving distribution from it, whether of income or corpus.¹⁹⁰ Because of this deferral in tax, a typical accessions tax proposal includes a separate tax on property left in trust where significant amounts are left therein.¹⁹¹

Arguments For. Many feel that an accessions tax system would be the most equitable type of transfer tax system possible on the theory that it is fairer to impose a lower rate of tax on property which is transferred to three children of a decedent than it is on property which is transferred to only one child of a decedent.¹⁹² Also, large inheritances received from others would be taken into account in determining the tax rate to be applied.¹⁹³ Shoup takes the position that transferee graduation is preferable because it is transferees who bear the burden of the tax in any event, no matter how it is graduated.¹⁹⁴

Since the rate of tax would depend upon all lifetime accessions to the recipient, the system would encourage the spreading of wealth among a number of people and result in a wider distribution of wealth.¹⁹⁵ If this redistribution did not occur voluntarily, the relatively higher tax for distribution to fewer individuals would help achieve the goal of breaking down concentrations of wealth.

The accessions tax would eliminate many of the complex problems of trust taxation under our present system of transferor taxation.¹⁹⁶ However,

¹⁸⁷ Andrews, *The Accessions Tax Proposal*, 22 TAX L. REV. 589, 591 (1967).

¹⁸⁸ *Id.* at 589.

¹⁸⁹ Kramer, *supra* note 71, at 13.

¹⁹⁰ Andrews, *supra* note 187, at 591-92.

¹⁹¹ *Id.* at 593.

¹⁹² Alexander, *supra* note 6, at 651.

¹⁹³ C. SHOUP, *supra* note 1, at 29-31.

¹⁹⁴ *Id.* at 31.

¹⁹⁵ Alexander, *supra* note 6, at 653.

¹⁹⁶ ALI PROJECT 450.

in their place would be the problem of the penalty tax on large transfers in trust in order to keep trustees from avoiding the accessions tax by accumulating trust property.

Provisions for splitting of gifts between husband and wife would no longer be needed,¹⁹⁷ and the whole problem of contemplation of death and dual taxation of certain incomplete gifts would be eliminated, although these could also be eliminated in large part under a unified transfer tax system as presently proposed.¹⁹⁸

Arguments Against. Since the accessions tax system would represent such a drastic departure from our present system, there would have to be a complete re-education of the experts and the public, and a careful reconsideration of all existing estate plans.¹⁹⁹ The accessions tax system would be more difficult to administer since a great many more returns would need to be filed and processed.²⁰⁰ Not only would each person who received property under an estate have to file an accessions tax return, but whenever distributions were received from a trust, the beneficiary would have to file a return.²⁰¹ Careful record keeping of prior accessions would be a necessity.

It is sometimes asserted that an accessions tax would produce less revenue than a transferor tax since the property is scattered among more individuals, and, therefore, it would produce a lower overall effective rate under a progressive rate schedule.²⁰² Also, if gifts were made directly to grandchildren rather than children, there would be generation-skipping transfers which would represent a serious erosion of the transfer tax base.

Finally, probably the most repeated criticism of the accessions tax proposal is that the provisions for taxing trust transfers are too complex.²⁰³ Since it is proposed that no accession be recognized upon the creation of a trust, and that a beneficiary be deemed to have an accession only upon receipt of property from the trust by way of distribution, an additional trust penalty imposed on its creation would have to be implemented, at least on the larger trusts. In addition to the complexity, there would be a considerable deferral of tax and consequent loss of revenue.

American Law Institute Proposal. Although the Associate Reporter, William D. Andrews, of the American Law Institute Estate and Gift Tax Project, prepared several drafts of an accessions tax proposal, it was never voted upon among either the consultants, the tax advisory group, or the Institute as a whole.²⁰⁴ It was felt that there was a lot of informing and educating to do before an accessions tax could be made publicly and

¹⁹⁷ Alexander, *supra* note 6, at 653.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 653-54.

²⁰⁰ ALI PROJECT 456.

²⁰¹ Alexander, *supra* note 6, at 655.

²⁰² ALI PROJECT 454-55.

²⁰³ Alexander, *supra* note 6, at 658.

²⁰⁴ ALI PROJECT 446-47.

politically acceptable, and, further, it did not want such a tax to stand in the way of presently attainable reforms in transferor taxation, including the unification of the present gift and estate taxes.²⁰⁵

The draft prepared by Andrews levied an accessions tax on any person receiving property by way of *inter vivos* gift or death time transfer. A small annual exclusion would be allowed for outright gifts during life, and no tax would be payable until a taxpayer received accessions in excess of \$24 thousand.²⁰⁶ All prior accessions would be taken into account in determining the rate and tax on the current accession. In addition, many of the concepts developed in the unified tax proposal were incorporated into the accessions tax proposal, such as the tax-free inter-spousal transfer rule. As previously mentioned, the gift-splitting provision would not be applicable under an accessions tax system. Accessions from parents, parents-in-law, parents of a deceased parent, children and siblings were given favored treatment in the form of a deduction of forty per cent from the amount of property received.

A trust was not treated as having an accession upon transfer of property to it, but, rather, upon distribution of income or corpus to the beneficiary. An additional penalty tax would be imposed on property included in trust if the value of property placed in trust were at least \$100 thousand, or if the entire estate of the decedent disposed of at death exceeded \$500 thousand.

Treasury Proposal. The Treasury Department has made no proposal for change to an accessions tax system.

G. Canadian Royal Tax Commission Proposal

General Description. The publishing by the Royal Commission on Taxation in Canada of its report on tax reform coincides with a time when there is careful consideration of estate and gift tax reform in this country.²⁰⁷ The thrust of the Commission's recommendations is to tax gifts and inheritances as income in much the same manner as salary income, dividends, and other familiar taxable income items are taxed, without allowing the donor or the decedent's estate a deduction for any of the amount transferred. The estate and gift tax laws would be repealed, and gifts and bequests would be taxed as ordinary income to the recipient, with the top bracket in the income tax equal to fifty per cent.

Under the proposal, the individual would be replaced by the family as the fundamental accounting unit for income taxation. It is proposed that gifts and inheritances within the family tax unit be completely exempt

²⁰⁵ *Id.* at 447.

²⁰⁶ Alexander, *supra* note 6, at 650-51.

²⁰⁷ The recommendations of the Canadian Royal Tax Commission concerning gifts and inheritances can be found in 3 REPORT OF THE ROYAL COMM'N ON TAXATION chs. 10, 17 (1966). For a discussion of these recommendations, see Goodman, *Royal Commission Would Tax as Income Gifts and Inheritances of Canadians*, 26 J. TAXATION 370, 371-72 (1967); Kramer, *supra* note 71, at 14; Jantscher, *Death and Gift Taxation in the United States After the Report of the Royal Commission*, 22 NAT'L TAX J. 121 (1969).

from tax. Accordingly, where children received gifts or inheritances from their parents, the transfers would not be subject to taxation, and if the child were a minor and the money were used for his maintenance, no tax would ever become payable. Upon leaving the family, however, the children would be taxed on the value of the assets which they took with them as if it were income received at that time, and an exemption of \$5 thousand would be allowed. In many cases, therefore, the tax forgiveness on the transfer would merely be a tax deferral until the children became adults.

In addition to taxing as income the receipt of property, the Royal Commission proposes that capital gains be taxed upon the transfer, thus placing a substantial tax burden on even relatively modest estates. For example, on a \$100 thousand estate, the overall effective tax rate for both the capital gains and the income tax could easily be forty per cent.

To alleviate some of the tax burden of the new system, the Commission also proposes that the maximum, marginal personal income tax rate be fifty per cent and some liberal income averaging provisions be enacted.

Relationship to United States Proposals. The feeling has been expressed that although many of the Commission's recommendations in other areas have been accepted as valid,

The income-inheritance tax that they recommend does not appear to be a promising alternative to the existing U.S. Federal estate tax. Where our estate tax is most deeply flawed and needs amendment most, the income-inheritance tax generally does not provide a more attractive tax result than an amended estate tax would.²⁰⁸

The problems in taxing transfers in trust and generation-skipping transfers, which exist under an accessions tax proposal, exist also under the Commission's proposal to tax receipts as income.²⁰⁹ In addition, to impose an income tax on transfers by gifts and at death would be to compound the present inequities, or, at least, the varying treatments, existing in the present income tax law to these receipts.²¹⁰ In any event, the study of the Canadians' approach to tax problems which are basically similar to ours is enlightening and will serve as a basis of comparison for United States reform.

III. CONCLUSION

Analysis of reform in the estate and gift tax area is different from that in the income tax area. In the latter, proponents of the comprehensive tax base stand ready with a normative theory of income to which many preferences, loopholes, or exceptions can be compared and thereby evaluated.²¹¹ Unfortunately, no such theoretical model can be used to direct our

²⁰⁸ Jantscher, *supra* note 207, at 137.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See generally the incisive analysis contained in the debate between Bittker, Musgrave, Pechman, and Galvin, in Bittker, A "Comprehensive Tax Base" as a Goal of Income Tax Reform, 80 HARV. L. REV. 925 (1967); Musgrave, In Defense of an Income Concept, 81 HARV. L. REV. 44

footsteps in the area of estate and gift tax reform, apart from the concept of treating all receipts as income. The approach is ad hoc, and the policy considerations of the major reform proposals have been discussed in this Article. Fortunately, we do have the brilliant and thorough examination of the entire area by the American Law Institute's Estate and Gift Tax Project. With this type of analysis and dedication, a greater understanding of the entire area has been achieved and estate and gift tax reform can move equitably and effectively forward. Eisenstein stated in his article in 1956: "The estate tax, I believe, is in a period of decline."²¹² Recent events convince this writer that the decline is at an end, and that substantial reform is appearing on the horizon.

(1967); Pechman, *Comprehensive Income Taxation: A Comment*, 81 HARV. L. REV. 63 (1967); Galvin, *More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR*, 81 HARV. L. REV. 1016 (1968); Bittker, *Comprehensive Income Taxation: A Response*, 81 HARV. L. REV. 1032 (1968).

²¹² Eisenstein, *supra* note 28, at 255.