

Commentary

Family Values, Inheritance Law, and Inheritance Taxation

ANNE L. ALSTOTT*

I. INTRODUCTION

Thomas Nagel's essay¹ provides a clear, thoughtful, and useful analysis of some of the values at stake in political, legal, and academic debates over inheritance taxation. In this Commentary, I want to focus on just one of the normative commitments that Nagel identifies, quite correctly, as at stake in U.S. discussions of estate tax reform.

Nagel suggests that "the right to devote one's resources to one's family" is "a right whose exercise is seen as a virtue," and he considers it to be "the most significant legitimate value in support of limits on the taxation of inheritance."² Nagel also suggests that a high exemption level could help implement the value of "helping people" while also preserving taxation of inheritances above that level.³

This Commentary begins to examine what it might mean for the law to protect a "right to use one's resources to benefit one's family." The inquiry requires a theory of the family, of course: Without some notion of what the family ought to be or ought to do, it is impossible to say what the right to benefit one's family entails. My method here is to look to historical debates over inheritance law to draw out three rather different ideals of the family that have recurred over time.

The analysis here suggests that, while Nagel is quite right that one *can* interpret values associated with family life in such a way as to oppose the inheritance tax, there are equally plausible interpretations of these values according to which the family can co-exist peaceably with the taxation of inheritance, at least in some form. And this basic point holds whether one conceives of the family in liberal terms, in conventional terms, or in functional terms. Put another way, any of

* Manley O. Hudson Professor of Law, Harvard Law School. The Harvard Law School and the Harvard Law School Fund for Tax and Fiscal Research provided research support.

¹ Thomas Nagel, *Liberal Democracy and Hereditary Inequality*, 63 *Tax L. Rev.* 113 (2009).

² *Id.* at 120.

³ *Id.*

the three ideals of the family is compatible with a range of positions on the relationship of the family to the state. But although each vision of the family might co-exist with inheritance taxation, the three ideals do have markedly different implications for the terms of inheritance law and inheritance taxation.

II. INHERITANCE TAXATION, INHERITANCE LAW, AND THE FAMILY

Inheritance taxation is obviously a tax matter, and as such it raises familiar issues about the relationship of the individual and his property to the state. At the same time, inheritance taxation also forms part of inheritance law—the body of law that regulates the transmission of property by gift during life and by bequest during death. And inheritance law is intimately bound up with ideals about the family: The family is, after all, one of the key institutions for transmitting assets, knowledge, and values across generations, and in the broadest sense the family itself forms part of the structures of inheritance that determine what children receive from their elders.

Thus, it is not surprising that values associated with family life have been front and center in debates over the federal estate tax in the United States in recent years. As Michael Graetz and Ian Shapiro recount, opponents of the so-called “death tax” have claimed that the tax harms families, particularly families that own farms and small businesses.⁴ Graetz and Shapiro track the importance of family stories in the lobbying and legislative processes that gradually accumulated the votes needed to repeal (if only for the year 2010) the federal estate tax,⁵ and I return to one such story a bit later on.⁶

The present debate over the estate tax continues a long tradition of linking ideals of family life to inheritance law. In an important new book, Jens Beckert traces debates over inheritance law and inheritance taxation occurring in the United States, France, and Germany over the last 300 years.⁷ Beckert discusses testamentary freedom, reserved shares, intestacy, and entails, as well as inheritance taxation.⁸ Each of these controversies also involved claims not particularly related to the family: For instance, people have long debated the economic effects of different inheritance rules. But Beckert also finds

⁴ Michael J. Graetz & Ian Shapiro, *Death by a Thousand Cuts: The Fight over Taxing Inherited Wealth* 50-51 (2005).

⁵ *Id.* at 50, 231-32.

⁶ See Part III.

⁷ Jens Beckert, *Inherited Wealth* (Thomas Dunlap trans., Princeton Univ. Press 2008)(2004).

⁸ *Id.* at 10-12.

that claims about family life played a significant role and that ideals of family varied across countries and across time.⁹

Any analysis of the relationship between the family and inheritance taxation requires some theory of the family. That is, before we can consider whether or not family values stand in tension with inheritance taxation, we have to know the values the family is supposed to serve. In building such a theory, one might look to different academic disciplines. We could start with anthropology and ask how our society understands kinship in order to infer some ideal of the family. Alternatively, we could begin with sociology and consult the rapidly changing demographics of the U.S. family in order to ask whether there are constellations of family values that endure across demographic groups and amidst change.

In this Commentary, however, I take a different approach. Drawing on Beckert's comparative study, I identify three ideals of the family that have recurred in Western debates over inheritance law in the past three centuries. To make the analysis tractable, I term these "the liberal family," "the conventional family," and "the functional family."¹⁰ The liberal family reflects ideals of individual freedom, the conventional family incorporates traditions of family obligation, and the functional family reflects the family's social role as a source of economic security for its members.

Thus, a preliminary point, which I think emerges beautifully from Beckert's work, is that inheritance law does not reflect a simple or unitary ideal of the family. Instead, there are multiple conceptions of the family that sometimes have conflicting implications, even though each might support a generic claim that one has a "right to use one's resources to benefit one's family."

My principal thesis in this Commentary is that none of the three ideals necessarily stands in opposition to inheritance taxation. Nagel is quite right that one can interpret values associated with family life in such a way as to oppose the inheritance tax. But there are equally plausible interpretations of these common ideals of family that can co-exist peaceably with the taxation of inheritance. In each case, a strong anti-inheritance tax argument requires grafting a particular normative position onto the relationship between the family and the state, a position that holds (1) that the family alone must serve its values or its functions and (2) that any taxation represents an inappropriate interference by the collective with the exercise of those values or functions.

⁹ Id. at 110-13.

¹⁰ Beckert does not use these names or these three categories, which I adopt simply to organize the analysis. Throughout the Commentary, however, I cite to Beckert for examples of how these conceptions of the family have appeared in debates over inheritance law.

Still, the three ideals of the family do have distinctive implications for the terms of inheritance law and the specific legal details of inheritance taxation. Institutional design questions including spousal exemptions, favorable rates for bequests to close kin, and valuation and timing rules might look very different depending on which conception of the family one adopts.

One clarification before I move on. Throughout this Commentary, I use the terms “inheritance tax” and “estate tax” to refer generically to the taxation of wealth transfers. I realize that there are importance differences among types of wealth transfer taxes,¹¹ but my question here is whether family values should lead one to oppose (or favor) any variant of such taxes, and so I abstract from the institutional differences among types of taxes.

III. A FAMILY STORY

To make the following discussion a bit more concrete, begin with one of the family stories offered by opponents of the estate tax.¹² Testimony delivered by Mr. K. L. Bliss to a congressional committee in 2001 sounds many of the common themes found in these stories: hard work by members of several generations, a modest income and lifestyle, and a very specific, local context, in this case cattle ranching in Montana.

My grandfather came to Montana in the late 1800's and homesteaded near Broadus, Montana. He passed away in the 1940's and my grandmother eventually sold that ranch to help my parents purchase the ranch that my wife, Cheryle, and I operate, along with my son, Matt, and his family today. My family has operated this ranch since 1955, and I am proud to be a third generation Montana rancher. . . .

I started working this ranch at six years old driving a tractor in the hay field. The assets I received from my parents were not a windfall. I operated the ranch for 25 years before they died, and took a great deal of financial risk that almost cost us the ranch in the early 1980's. I started in 1973 with an old house and a couple of old wooden sheds and with years of hard work and good management, our ranch today is one

¹¹ See Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 *Harv. L. Rev.* 469, 502 *tbl.1* (2007).

¹² For additional stories, see William W. Beach, *Heritage Found., Death Tax Devastation: Horror Stories from Middle-Class America* (1995). Graetz and Shapiro discuss some of Beach's stories. Graetz & Shapiro, note 4, at 50-51, 57, 63, 65.

of the most productive and improved ranches in the county. Hard work should be rewarded, not penalized by a death tax.

Our ranch is more than just a business or a home; it is a lifetime commitment by past, present and future generations. We have worked hard all our life on this ranch, and at some point we'd like to be able to do more than buy fence posts and insurance policies. This is my reality, but could become my son's nightmare if the death tax is not eliminated.

Some would have you believe that only the richest 1 or 2% ever pay death taxes. My wife sure doesn't feel rich; she still has the same old carpet that was put in the house in 1976.¹³

I assume that Mr. Bliss' story is true (although, as Graetz and Shapiro point out, some elements of some stories offered by the anti-death-tax forces are not).¹⁴ But the literal truth of this particular story is not critical to my analysis. Instead, I want to suggest that this familiar kind of story actually contains the seeds of three different normative views of the nature and social function of the family.

A. *The Liberal Family*

The family sometimes appears in U.S. law and in liberal theory as a sphere for the exercise of individual freedom. Call this the *liberal family*. I do not mean, of course, "liberal" as in right-left politics. Instead, I use the term liberal to invoke the strand of political theory that gives pride of place to individual liberty as a defining value.

There are many strands of liberalism, and in a moment I insist on some demarcations. But I want to begin with a big and somewhat underspecified category called "liberalism" because the liberal family is deeply ingrained in U.S. law and culture, and I suspect many people have something like the liberal family in mind when they suppose that the family stands in opposition to inheritance taxation.

The liberal family, in the U.S. tradition, treats the family as a private sphere, a place where consenting adults come together to define mutually agreeable relationships and a shared way of life. The liberal principle of state neutrality suggests that the law should take a hands-off attitude when it comes to the family. The family, by and large, should be immune from legal attempts to prescribe emotional or fi-

¹³ Preserving and Protecting Family Business Legacies: Hearing Before the Subcomm. on Taxation and IRS Oversight of the Sen. Finance Comm., 107th Cong. 2, 5 (2001) (statement of K.L. Bliss, National Cattlemen's Beef Association), available at <http://finance.senate.gov/031501kbttest.pdf>.

¹⁴ Graetz & Shapiro, note 4, at 65-66 (discussing the story of Chester Thigpen, whose estate was likely too small to be taxable under the existing estate tax).

nancial relationships among individuals. Within wide boundaries, the law should permit people to consort with those they wish; they should determine for themselves the content and expectations attending their relationships, including the terms for entry and exit into the relationship.

This is not to say that there are no liberal rationales for legal intervention in family life. Familiar principles would permit, even require, legal measures to protect people from coercion and violence. But unless relatively severe harm is at stake, the traditional version of the liberal family grants wide scope for individual freedom and privacy and only a narrow role for legal regulation of family life.¹⁵

The ideal of the liberal family undergirds U.S. inheritance law, including the core principle of testator freedom, and it recurs throughout U.S. family law as well.¹⁶ As Beckert's survey points out, the value of testamentary freedom has been especially strong and uncontested in the United States since its founding. In contrast to France and to Germany, which debated repeatedly the appropriate degree to which the law ought to defer to testators' wishes, the United States has a solid tradition of testamentary freedom, grounded in an ideal of individual liberty.¹⁷

Many people may have something like the liberal family in mind when they think that the right to leave one's property to one's family stands opposed to the taxation of inheritance. If family life is properly a sphere for individual freedom and state nonintervention, then it may seem to follow that the individual ought to be free to leave his property to those he chooses *and* that the state should not regulate, whether by taxation or otherwise, the inheritance arrangements that individuals construct for themselves. It would seem, then, that the nontaxation of inheritance is a simple extension of testator freedom: The state should not use its coercive power to require individuals to leave any part of their wealth to anyone in particular, including the state.

But this simple intuition is too simple. A closer look suggests that a commitment to testator freedom does not necessarily require opposition to the taxation of inheritance. We can certainly get there if we lump the state together with all other heirs not chosen by the testator. By making that move, we treat the state's exercise of its taxing power as an illegitimate legal requirement that the testator leave a portion of her wealth to the state.

¹⁵ At least, this is one familiar liberal view. For a different view, at least with respect to families involved in child-rearing, see Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. Cal. L. Rev. 2 (2008).

¹⁶ *Id.* at 5.

¹⁷ Beckert, note 7, at 80-81.

But the proposition that the state is just an unchosen beneficiary (and therefore illegitimate) is a radical and contested claim—and it is, of course, one of the critical premises that separates libertarianism from egalitarian forms of liberalism. On the libertarian view, the state has no legitimate power to take private property via taxation, except for very limited uses. By contrast, egalitarian views endow the state with greater powers to structure the conditions in which individuals properly exercise their freedom. An egalitarian might argue, just to take one example, that measures to equalize the distribution of inherited wealth take priority over testator freedom—in other words, that laws regulating inheritance help to define the sphere in which family privacy properly may and may not operate.

Many theorists have developed the implications of egalitarian liberalism for inheritance taxation,¹⁸ and Nagel's article lays out a variety of values at stake.¹⁹ My point is simply that the ideal of the liberal family, standing alone, cannot answer the question whether society should—or should not—adopt an inheritance tax. The liberal family leads to the antitax result only if we graft on the libertarian principle identified as Nagel's value number seven: the view that the testator alone should have the power to determine her heirs, and that therefore the state is an illegitimate (because unchosen) heir.²⁰

Still, the core values associated with the liberal family do have strong implications for the design of inheritance law and inheritance taxation. The principle of state neutrality, for instance, suggests that the law should neither require nor reward inheritances given to certain individuals rather than to others. On the liberal view, the individual is king, and she may legitimately choose to leave her wealth to her children, to a home for poodles, or to the Boston Red Sox. The core values here are freedom, individualism, and self-determination rather than obligation (unless the testator has bound himself by contract in some way).

B. The Conventional Family

By contrast, the second ideal of the family centers on obligation and responsibility, and it tends to endorse legal measures that constrain the individual to attend to her socially determined duties. Call this second ideal the *conventional family*, because it draws on certain conventions or social norms that treat the family as if it exists and endures as a social unit apart from the individual.

¹⁸ See, e.g., Alstott, note 11, at 471-72, 475.

¹⁹ Nagel, note 1, at 114.

²⁰ *Id.*

On this view, the family is defined, not by individual choice, but by a web of obligations that bind the members of the family together. In legal discourse, the conventional family ideal has found expression in inheritance law through the value that Beckert terms “family property,” which treats family assets as if they belong to the family rather than to the individual owner.²¹

While the conventional family and family property may at first sound less familiar to American ears than the liberal family and the value of testator freedom, something like family property is, I think, at work in typical claims made in debates over the estate tax. For instance, many stories offered by “death tax” opponents emphasize the hard work contributed by several generations to specific property—often, a ranch or a business—that the family views as a collective asset.

In the testimony quoted above, for instance, Mr. Bliss speaks of his family’s ranch as a “lifetime commitment by past, present and future generations” and notes that “[w]e have worked hard all our life on this ranch.”²² This account suggests that neither Mr. Bliss nor any other *individual* in his family would feel free to dispose of the ranch, even though the law might technically permit the owner of record to do so. Instead, there is a sense of communal ownership and mutual obligation, as each generation contributes labor and makes sacrifices and, in return, shares in the family’s property.

Beckert’s historical survey returns several times to the ideal of family property, which takes varying forms across countries and centuries. A version of family property was invoked to defend aristocratic systems of inheritance, for example.²³ The ideal of family property also has been influential in debates over testamentary freedom, particularly in Germany and in France.²⁴ In Beckert’s account, family property has been less often asserted in the U.S. context,²⁵ although I suspect that his methodology may lead him to underplay the extent to which family values have now entered the U.S. debate over the estate tax.

Does the conventional family ideal in fact counsel against inheritance taxation? Initially, it is difficult to answer that question because the conventional family might actually reflect a variety of underlying

²¹ Beckert, note 7, at 8.

²² Bliss Testimony, note 13, at 5.

²³ Beckert, note 7, at 147 (noting that some commentators defended entailed property as a mechanism for ensuring the continuity of the family and its property over time).

²⁴ See, e.g., *id.* at 54-56 (family property in nineteenth century German debates over testamentary freedom); *id.* at 37-39 (legal mandates for equal distribution to state-identified heirs in eighteenth century France).

²⁵ *Id.* at 70, 78.

ideals about individuals, relationships, and the state. For example, suppose that we think the conventional family is important because grouping people into intergenerational social units tends to preserve social order. Perhaps marriage helps regularize adult life; parents serve as a useful source of discipline for adult children, and so on. In that case, the question would be whether inheritance taxation would undermine social order, and one would need a deeper discussion. Indeed, the scope of testamentary freedom has been debated in just such terms: Nineteenth century French scholars debated whether granting strong control over property to the older generation would (properly) cement patriarchal control or would (improperly) exclude too many heirs from the security provided by family property.²⁶

To be sure, we could shortcut such discussions by grafting on a libertarian premise to the conventional family ideal. One could take the view that, whatever the reasons for keeping property within the family, the state is always an outsider and has no proper claim on any family assets. But if one takes that route, then the value doing the work is not family property: It is the claim that only family members, and never the state, can properly partake of family assets. Without that libertarian premise, it could be entirely compatible with the ideal of family property for the state to take its share in inheritance taxation, as long as the residue stays within the family. The point is that the ideal of family property really only hints at family members' obligations to one another: It does not, without some deeper rationale or additional premises about the state, tell us much about the proper scope of the state's taxing power.

But even though the conventional family ideal, at least in this broad-brush form, is indeterminate on the question of whether the state ought to tax inheritance, it does have implications for the terms of inheritance law and taxation. Unlike the liberal family, which privileges testator freedom, the ideal of family property suggests that the law should not be indifferent to whether the testator chooses the Red Sox over her children. The notion of family property in effect treats other family members as having claims that properly limit the freedom of the testator.

Thus, the conventional family ideal tends to imply that the law should require or encourage testators to leave their wealth within the family. The law, for example, might mandate that parents leave their wealth to their children. Less coercively, the law might reserve a minimum share for the children. Less coercively still, the state might craft an inheritance tax so that it rewards gifts and bequests within the family. The U.S. federal estate tax arguably does something like this by

²⁶ *Id.* at 41-46.

giving an unlimited spousal exemption²⁷ (although there are other rationales for that provision, including the difficulties of assigning ownership interests to spouses). Other countries have adopted something like a family property approach by adopting lower rates of inheritance tax on intra-family inheritance, especially by children.²⁸

At this point, we have begun to run up against the limitations of the method adopted in this Commentary, which is to use some rather general ideals of family, drawn from inheritance law, as the lens through which to analyze inheritance taxation. The problem with this method is that the law offers only very general categories, which tend toward indeterminacy. Put another way, if one were to take seriously the conventional family as an ideal, one would have to do much more theoretical work to determine, for example, what constitutes a family and which family relationships are to take priority over others.²⁹

The liberal family avoids these questions by saying that a family is simply an arrangement produced by free choice. But because the conventional family demands strong legal protections for some relationships and not others, it also requires a normative ideal of who is included, and who is excluded, in drawing the family circle. In the United States and Europe over time, as Beckert shows, the law has come to privilege the nuclear family rather than the extended family, has extended important rights to spouses, including women, and has come to treat all children equally rather than favoring the oldest sons.³⁰ This trend might reflect a liberalizing approach, as the law attempts to capture the actual arrangements chosen by people. Or it might reflect some changing notion of what the conventional family ought to be.

I will not attempt to specify or to defend a robust notion of the conventional family here, but it is worth speculating on one possible extension of the conventional family, since it has implications for one of the most contentious issues in debates over inheritance taxation—whether or not the law ought to extend special protections to particular types of family property, notably family farms and businesses.

The impact of the federal estate tax on family farms and businesses has been vigorously debated, with much attention given to the empirical question: How many farms and businesses are sold or shut down

²⁷ IRC § 2056(a).

²⁸ See, e.g., Beckert, note 7, at 261, 270 (discussing French tax rates applied to inheritance by children, spouses, and siblings and comparing German rules).

²⁹ This is a familiar problem in family law. See, e.g., Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 *Yale J.L. & Feminism* 83, 85-86 (2004) (suggesting that the law should recognize a variety of nonmarital and nonconjugal family relationships).

³⁰ Beckert, note 7, at 110.

to pay the estate tax? The answer seems to be “very few,”³¹ but the stories are nonetheless powerful, because they are not simply invoking family property but a very specific type of family property. Mr. Bliss, for example, is asserting his desire to inherit his family’s ranch—and not an equally valuable portfolio of municipal bonds. The family farm or business seems to have a personal quality that sets it apart from fungible wealth owned by the family. The ranch is not only a source of income and economic security: It also typically bears the family name and, over time, has created for each family member a reputation, a status in the community, and a sense of belonging. So, the value offended by the prospect that a family might lose its farm or business is what we might term the identity value of the family.

The claim, then, might be stated in something like these terms: The older generation has a right, and perhaps an obligation, to transfer, and the younger generation has a right, and perhaps an obligation, to receive, intangible assets like reputation, community standing, and other identity goods.

Stating this claim begins to point up the many questions it raises. The clash with testator freedom is obvious: What if Dad wants to sell the family business? Should the law enable the children to stop him? And then there are questions about what identity means, and to what extent the law should privilege identity that is wrapped up in material inheritance of large, lumpy assets over identity that takes a more fungible or less lucrative form.

For instance, what about the person who would dearly love to continue the religious missionary work her mother encouraged her to do—but needs cold, hard cash to support her and provide travel funds? Should the law exempt her financial inheritance because it arrives in the service of family-linked personal identity? That would, obviously enough, probably mandate repeal of the wealth transfer taxes entirely, since many people genuinely understand even the most generic financial inheritance to be at least weakly linked to family and personal identity (“my parents cared enough about me to leave me this money”).

And what about the many people without assets to support their family-linked identity? Should the state subsidize them? Or is family-

³¹ Less than 2% of all estates pay any estate tax at all. And of those estates that do pay tax, the absolute numbers of those that belong to farmers and small business owners is fairly small, ranging from a couple thousand per year (under prior law) to a few hundred per year under current law. Of these, only a minority experience liquidity problems in paying the tax that they owe. Cong. Budget Office, *Effects of the Federal Estate Tax on Farms and Small Businesses*, at vii, 15 tbl.8 (2005), available at <http://www.cbo.gov/ftpdocs/65xx/doc6512/07-06-EstateTax.pdf>.

linked identity only worth special treatment for those who inherit it along with valuable assets?

Once again, the conventional family ideal, in the form I have described it, is insufficiently rich to draw boundary lines around which kinds of inheritances have a sufficient link to identity to merit special treatment. Still, without addressing these thorny definitional issues, we can see that, as many people have pointed out, there are a number of legal options for accommodating the identity concern as it appears in the context of inheritance. Special valuation rules are one option. Delayed payment is another option. Favorable rates are a third possibility.

One basic insight, then, is that the family as a source of identity can co-exist peaceably with inheritance taxation. Whether via special valuation rules, delayed payment, or otherwise, the law might privilege forms of inheritance with an identity element but still exact some inheritance tax, at least on inheritances of very large value. It is only if we add the premise that the state may not tax identity inheritance no matter how large its money value that we reach the conclusion that inheritance tax should not be permitted on identity-laden assets.

This additional premise—that the money value of identity-creating assets should be irrelevant for taxation—is not typically articulated in the political stories, since all these families seem to live modestly.³² But the question is worth taking seriously, since it is not obvious how, if at all, identity and monetary value are linked. As a corollary, it is not obvious that even a very high exemption level would adequately address the concern that inheritance taxation may compromise families' ability to pass on their chosen way of life.

One view would hold that wealth is indeed irrelevant. Even if one's family name is Hilton, as in Hilton Hotels, or Walton, as in Wal-Mart, one should be entitled to participate in the sense of intergenerational continuity that owning a multibillion corporation can bring. An alternative view of identity and wealth would require some personal participation: Perhaps it should make a difference if the junior Hilton is working day to day to help build or maintain the company—rather than jet-setting to parties. Put another way, the strategy of incorporating a high exemption level is effective *only* if the protected ways of life can adequately be defined by their monetary value rather than by some other quality.

³² See Beach, note 12. Of course, the Beach stories do not portray the families with the most to gain from estate tax repeal. Cf. Graetz & Shapiro, note 4, at 17-19 (noting that very wealthy families like the Mars and Gallo families contributed to lobbying organizations dedicated to estate tax repeal).

But without attempting to offer a theory of wealth and identity, I want to end with the final iteration of my basic thesis: While there is some account of family and identity that could lead one to oppose inheritance taxation (and even then, perhaps only for certain assets), there are equally plausible theories that could co-exist with inheritance taxation, particularly with special rules for family enterprises and so on. Thus, recognizing inheritance as a source of personal identity does not necessarily undermine inheritance taxation, although it does suggest that the terms of the tax should perhaps offer special treatment for certain identity-laden assets.

C. The Functional Family

A third ideal adopts a functional perspective: The family does—and ought to—serve as one of the social institutions that promote economic security for its members. Family property and inherited wealth, on this view, would serve the function of providing assets to be used to care for family members in times of need. Beckert identifies this strand of thought in various historical debates over inheritance law and taxation.³³

There are hints of this ideal of the family in some of the anti-death-tax stories. For instance, Mr. Bliss recounts that the first generation of ranchers used the family's assets to give a start to the second generation: Mr. Bliss's grandmother sold their original homestead to help his parents buy the ranch that he and his children now run.³⁴ The Bliss story also refers to reinvestment, to financial prudence, and to modest spending, all of which add to the sense that the family is a unit, and one that properly conserves its property against hardships like the tough economic times Mr. Bliss refers to.

It is fascinating to think about what inheritance law and inheritance taxation might look like if we were to take seriously the ideal of the family as a source of insurance against financial hardship. Just as in the conventional family ideal, the law would need to define family, but this time with an eye to what obligations the law should enforce. Today, U.S. law generally obligates parents to support their minor children and, with some exceptions, their spouse. But beyond that, adults have few to no responsibilities for other adults, including unmarried

³³ Beckert, note 7, at 41-45 (discussing arguments among French commentators over the effects of testamentary freedom on families' ability to provide for their members); *id.* at 129-30 (describing how both sides invoked the rationale of providing for family members in French debates over entails in 1826); *id.* at 214-15 (discussing the concern in nineteenth century Germany that redistribution might interfere with the function of the family as providing financial support to its members).

³⁴ Bliss Statement, note 13, at 2.

partners (unless a palimony claim can be sustained), adult children, aged parents, and so on. De jure, the United States is an individualistic society with few legally cognizable family claims. De facto, of course, many families provide extensive care to their members over long periods, and many families understand it to be their duty to do so.

If the goal were to maximize the family's functionality as a source of financial insurance, it seems that a number of reforms in inheritance law and inheritance taxation would be in order. For instance, inheritance law might require (or inheritance tax rules might encourage) family members to leave their wealth not simply to other family members, but to those who are neediest. The law could even explicitly direct or encourage gifts and bequests based on the disability status of the recipient or her age or her wealth.

Of course, any such obligation would clash with the value of testator freedom, but it could also clash with conceptions of family property, particularly those that emphasize the equal treatment of family members. For instance, Beckert describes how Western inheritance laws gradually evolved to mandate or encourage the equal division of property among children.³⁵ Today, in the United States, as Lily Batchelder's article mentions, equal division tends to be the norm.³⁶ Requiring division of assets according to need would mark a significant normative shift.

Does the ideal of the family as social insurer militate against inheritance taxation? At first, it may seem so. If families are supposed to provide economic security to their members, the taxation of family wealth will necessarily reduce the pool of money available for needy or distressed family members.

But, once again, there is an elision in the antitax argument. It is not obvious that the social insurance function of the family mandates the perpetuation of family wealth, completely untaxed, forever, in the absence of an identifiable need for the money. Here, I think, Nagel's intuition about high exemption levels becomes especially salient.³⁷ (Note that Batchelder's proposal would provide an exemption per heir of \$1.9 million, and she suggests that a person inheriting that amount could live her entire life without working.³⁸) If one function of inheritance is to permit families to make reasonable financial provision for care for those in need, then a large exemption per heir should

³⁵ Beckert, note 7, at 110-11.

³⁶ Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 *Tax L. Rev.* 1 (2009).

³⁷ See text accompanying note 3.

³⁸ Batchelder, note 36, at 63.

answer the concern that inheritance taxation interferes with the family's mission.

Put another way, high exemption levels fail to resolve the functional-family objection to inheritance taxation *only if* the ideal of the functional family insists that 100% of family wealth should be available to meet family members' future needs, even if need is not present among living heirs.

But even if something like a perpetual fund for family need is the ideal, then there would be further legal questions. Something like a perpetual trust might be in order, but the law might mandate beneficiaries, rather than leaving it to testator choice. Further, the law might impose distribution rules to ensure that the wealth was in fact used to meet need rather than simply to improve consumption opportunities, forcing distributions to (say) poor cousins rather than to rich children, whatever the testator's wishes might have been.

One suspects that a mandatory family welfare fund is not quite what opponents of the inheritance tax have in mind. Instead, they seem to want to invoke the ideal of family as social insurer in service of a regime that largely implements a libertarian ideal of unconstrained testamentary freedom. It is logically possible to combine these values, but only by returning to a relatively stark libertarian view that has much to do with a particular conception of the individual and the state and relatively little to do with the family and the relief of financial distress. This view would hold simultaneously that (1) the state has no legitimate role in assuaging financial distress or need suffered by individuals, (2) taxation by the state therefore cannot be justified by the state's social insurer function, and yet (3) it should remain entirely up to the individual property owner to decide for herself how to respond to the financial distress of family members.

