A Good Time to Die: Family-Based Objections to Inheritance Taxation

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Anne Alstott, *Family Values, Inheritance Law, and Inheritance Taxation*, **87 Tax L. Rev.** (forthcoming 2009), available at SSRN.

Now is a good time to die. Congress's failure to take action on the extension of the estate tax caused it to "expire" on December 31, 2009. This repeal is scheduled to last for only one year, and Congress likely will enact some form of estate tax before then. So only those who die soon will be able to transmit wealth entirely tax-free. In the meantime, questions about the economics, fairness, morality of inheritance taxation–broadly defined–will figure prominently in political and social debates. Anne Alstott's essay, *Family Values, Inheritance Law, and Inheritance Taxation*, forthcoming in the Tax Law Review, will help ground these discussions.

Alstott's argument is that taxing inheritance can be consistent with valuing families; it all depends on what view of the "family" one takes. Alstott begins by locating her work in the academic debate about inheritance tax (the umbrella term she uses to refer to wealth transfer taxation generally, acknowledging that there is no federal inheritance tax *per se*). She launches her analysis on the springboard of Tom Nagel's argument that "the right to use one's resources to benefit one's family" [1] is at odds with inheritance taxation. Alstott evaluates this claim using three perspectives on the family – she calls them the liberal, conventional, and functional views. She synthesizes these from a careful reading of Jens Beckert's historical study, *Inherited Wealth* (2008). Roughly characterized, the liberal view approaches the family as a private sphere within which individuals should have freedom to choose their beneficiaries. The conventional view construes the family as a privileged unit of economic and social organization that transmits identity and values from generation to generation. A functional view emphasizes the family's socio-economic welfare role–i.e., providing needed financial and other assistance to its members.

Each of these views of the family comports with an inheritance tax, Alstott argues clearly and persuasively. She explains, in the first instance, that classic liberalism's embrace of individual freedom includes a role for the state "to structure the conditions in which individuals properly exercise their freedom." An inheritance tax is an acceptable structured condition, she argues. Alstott deftly detangles liberalism from libertarianism. It is the latter, she explains, that elevates individual freedom (including freedom of testation) above state authority (imposition of taxes). Alstott thus exposes arguments against "death taxes" as (perhaps selective) objections to government regulation.

Alstott turns her attention to tax preferences for family farms and other small businesses. She asks whether these assets receive favorable treatment because they are linked to (or transmitted in connection with) intangible assets such as reputation, community and personal values. If so, how can the law make logical and fair distinctions between "identity"-linked property (like a family farm) and generic property (like marketable securities)? What happens when a right to transmit, or even receive, "identity"-type assets conflicts with the right of testation? Inheritance taxation concerns could be accommodated through increased exemptions or other tax benefits, Alstott explains, but the other problems are not as easy to solve.

In the final part of the essay, Alstott makes quick work of the family-as-social insurer argument. She points out that a legal system deeply committed to that particular theory likely would need to adopt forced heirship rules (almost unknown in the United States) or a requirement that heirs show financial need as a condition of inheritance. Furthermore, Alstott argues, with exemptions set at an appropriate level, the family can fulfill insurance function in a taxable environment. In other words, the law could permit tax-free transfers of sufficient wealth to meet heirs' needs, but perhaps not all of their desires.

Alstott's essay brings a measured tone and a broad perspective to a debate that often takes on a feverish pitch. Ironically, her careful application of theoretical perspectives on the family allows her to show that the inheritance tax debate is not (much) about the "family" at all. Anti-tax arguments instead arise out of "a particular conception of the individual and the state and relatively little to do with the family and the relief of financial distress," as Alstott says. This essay is a clear, well-reasoned and insightful analysis that should appeal to all who are interested in the politics and practicalities of good governance.

[1] Thomas Nagel, *Liberal Democracy and Hereditary Inequality*, 87 Tax L. Rev. (forthcoming 2009).

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