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Curing Deficiencies in Tax and Property Law: Effects on Justice and Legal Service Costs*

Edward C. Halbach, Jr.**

I. INTRODUCTION

The cost and the effective availability of legal services have properly become matters of increasing concern in recent years both to the legal profession and to the public it serves. Legitimate concern is widespread—not only among the poor, but among middle-income and even wealthy citizens as well—over the capacity of our legal system to achieve efficient and fair resolution of controversies, and over the tendency of some of our laws to encumber, complicate, and distort relatively simple transactions.[1] Lawyers and lay critics alike perceive these problems as significantly attributable to an accelerating growth in the sheer volume and complexity of our laws.

It is quite possible that this perception has existed

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1. In an explanation of the need for the Rand Corporation's special new research center, the Institute for Civil Justice, the following were listed as "illustrations of the kinds of problems that worry observers of the system":

> The volume of civil lawsuits filed is growing several times faster than the population.
>
> The legal rules governing disputes are changing at an unprecedented rate, and outcomes are less and less predictable even by the most practiced professionals.
>
> Court backlogs are growing to such an extent that in many states the average case consumes three to five years before coming to trial.
>
> Producers of goods and services assert that the current system suppresses innovation and increases cost, thereby driving up prices and harming consumers. Others argue the reverse—that the system exerts too little discipline upon producers to assure high quality, and safe goods and services for the public.
>
> Many changes in the rules of the system are made through judicial decisionmaking, a process that involves little public debate and no organized, sustained professional capacity to analyze the likely social and economic consequences.

An Institute for Civil Justice, 4 RAND RESEARCH REV. 1, at 2 (1980).

throughout modern society and that the increase in legal complexity is but a manifestation of the inherent complexity of modern economic and social orders within an effectively shrinking world. Nevertheless, to the extent this perception is valid, it becomes important to resist the adverse consequences of the trend toward increasing complexity. The trend itself should also be resisted insofar as new complexities are unnecessary to other values or to other forms of what we optimistically call progress. We need not always accept the bad with the good, or through inertia, accept the bad with the bad. While law grows, we should still seek simplicity where we can; it appears quite clearly that significant steps can be taken to lessen complexity and to reduce the burdens it brings to the public as well as to the legal profession.

At stake are: (a) in some situations,[2] the legal system's ability to produce just results in individual cases; (b) the overall need for lawyers, and their productivity, cost, and operating competency; and (c) the ability of government programs to provide, and individuals to afford, essential legal services—thus also involving the degree to which presently unmet needs can be fulfilled. At issue in the long run, therefore, are the availability of quantitatively and qualitatively adequate legal services to all segments of the public, and ultimately, the availability of meaningful individual autonomy and distributive justice.

A major element of any serious program to deal with these concerns is a concerted, self-conscious, unselfish effort by lawyers to minimize the amount as well as the difficulty of the legal work to be done in society. Even the much discussed workload of our courts, and the simply intolerable delays that are still not being taken seriously enough, will, I believe, more readily respond to improvements in the substantive law than to efforts at streamlining court procedures and improving judicial administration.

The discussion that follows attempts to describe general types of situations and to identify specific examples in which law improvement is likely to significantly lessen legal service requirements and other "complexity costs." These examples will come, for obvious reasons, from my own areas of specialized interest: estate planning and the taxation and administration of decedents' estates and trusts. The particular emphasis will be upon the correction of specific rules of taxation and

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2. These are typically situations in which defects are most readily curable. *See* text accompanying notes 4-6 *infra*.

property law the unsoundness of which impairs lawyer efficiency, inflates the need for legal services, and also increases the risk of harsh or inequitable applications. In such situations—surprisingly common and cumulatively important—the ingredients of reform are essentially recognition of deficiencies and then some determination either to overcome inertia or to exercise restraint. These situations simply cry out for remedial activity—efforts that should involve little cost and little controversy.

Some attention will also be given to situations in which a greater consciousness of complexity burdens should lead to a more comprehensive, and therefore better, weighing of the costs and benefits of particular features of the law—with the possibility that different conclusions might be reached respecting the wisdom even of defensible doctrines and practices. In many of these latter situations, the legal premium for "insuring" against various *risks* may be too high and "consumer" choice too restricted because of the compulsory nature of such safeguards. In others, it is the overall price of implementing certain *values* or *equity concepts* that may be too high.

II. THE NATURE, SOURCES, AND IMPLICATIONS OF THE "COMPLEXITY" PROBLEM

The term "simplicity" is not used here to refer to brevity and simplicity in the structure and language of a statute, or even to ease in understanding its terms, useful as that may be; the "complexity" of concern here is not really a matter of the length, detail, and intricacy of legislation, or of how difficult its contents and meaning are to master. Elaborate, complicated provisions may well be essential to the precision and completeness of a statutory scheme—to simplicity in its operation. Even when this is not so such a vice is likely to be a lesser one than that of other statutes the terms and wording of which are clear and straight-forward, but the *implications* of which are onerous to lawyers and clients in the ordering of private affairs.[3]

In its most significant sense, then, simplicity is a matter of avoiding the need (or opportunity) for overly elaborate, tedious, and sometimes manipulative planning. Such planning is likely to be intrusive, is inevitably costly, and involves undue risks from minor deficiencies in the details of execution. Thus, our concern is with the effect a law has on the personal and

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3. *See, e.g.*, notes 23-25 *infra* and accompanying text.

financial lives of clients and therefore on the professional behavior and responsibility of lawyers. In short, the problem is not so much one of complexity *in* a law as it is one of external complexity *caused* by it. Of course, this concern is not by any means confined to legal rules that originate in statutes.

A. COMPLEXITY CAUSED BY UNSOUND RULES

The negative consequences of complexity frequently go beyond the financial costs imposed on all concerned, for there is a causal and direct relationship between certain forms of complexity and injustice. Complexity tends to be a *source* of unfairness, and it also *follows* from the tendency of unsound rules to produce inequitable or inappropriate results. For example, ill-founded or outmoded rules of property law increase the complexity of documents and of activities ranging from planning to administration to litigation,[4] just as inequity and complexity regularly go hand in hand in the tax law.

These "unsound rules" usually appear in one of two forms. First are those under which outcomes turn on fine distinctions that are arbitrary or unnecessarily petty (i.e., unimportantly related to relevant policies, or occasionally even irrelevant to the real merits of the controversies affected). This form is particularly common in the tax law, aptly illustrated by inequitably different treatment of taxpayers who, in terms of the policies involved, are similarly situated.[5] Second are those rules that consistently cause or tend to cause wrong results in cases falling within their purview. This form is illustrated by inappropriate presumptions that jeopardize transferor intentions even though the particular intentions are neither impermissible nor disfavored under legal policies.[6] The result of such rebuttable rules of construction is that even the exceptional "finding" of

4. For a discussion of "the affirmative case for overruling unsound precedent," see Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CALIF. L. REV. 921, 932-45 (1964).

5. A shocking example of this type is Rev. Rul. 75-128, 1975-1 C.B. 308. Other examples of tedious requirements and distinctions leading to dubious differences in treatment are: in the estate tax field, the orphans deduction qualifying requirements in paragraphs (c) and (d) of I.R.C. § 2057; in the income tax law, rules on when gain is recognized upon a non-prorata division of undivided interests in residuary estates under Rev. Rul. 69-486, 1969-2 C.B. 159; and in the property law, rules under which results turn on the distinction between conditions precedent and conditions subsequent, painfully but entertainingly discussed in Dowd v. Scally, 174 N.W. 938, 939 (Iowa 1919).

6. A common example of this is the refusal of most courts to allow adoptees to share in class gifts under the so-called "stranger-to-the-adoption rule," acknowledged in RESTATEMENT OF PROPERTY § 287 (1940).

the more probable intention is made more difficult than it should be and, of course, more costly both in resources of the court and client and in terms of unnecessary family animosity. Just as it is sometimes true that "hard cases make bad law," it is regularly true that *bad law makes hard cases*—and more cases, too.

Because it is quite permissible within the law to avoid the results of these rules attorneys regularly seek to do so through elaborate, tedious, and costly planning and drafting. The aggregate complexity of all this in turn increases the risk of error, even in fairly routine wills or other transactions, by any generalist who is not an expert and by any expert who is mortal. When these errors that should properly be immaterial do occur, so do harsh results, inequities, and unintended dispositions.

Assuming a serious commitment to law improvement, these unsound rules would be among the most easily corrected of the legal system's deficiencies, and their correction would be among the system's least controversial reforms.

B. Other Sources of Complexity

Other complexities are of such a nature that they are not so easily corrected. These result from rules that were adopted for the very purpose of improving fairness and furthering other chosen objectives. They may arise from purposeful decisions to subject an area of behavior to administrative regulation, or from an elaborate rule system that is intended to improve the legal system's allocation of rights or burdens, or simply from attempts to cope with inherently troublesome and complicated issues or relationships to which the law necessarily must respond. Again, however, our interest is not so much in laws that have complicated structures or wording—for these may simplify life in otherwise complex matters—as it is in those that cause complexities in enforcement and compliance, that encourage or require lawyer-advised responses, and the like. For our purposes, the question in these diverse types of situations is whether the complexity costs are really necessary or worthwhile. Here, unlike the patently unsound rule situations, the challenges of legal creativity or of policy choice may be quite substantial.

Complexities that flow naturally from the efforts of conscientious courts and legislatures to cope with certain intrinsically tedious and troublesome problem areas may, in general, be the

most difficult to remove.[7] More significant, both because the stakes tend to be higher and because the prospects for simplification are greater, are the complexities generated by rules or regulatory controls deliberately injected into a sphere of activity in order to create a better community. This may be done to increase the security of personal or property rights, to achieve a more appropriate allocation of burden or of good, to induce or discourage particular patterns of behavior, or to express certain equity concepts or other values held by particular judicial, legislative, or administrative policymakers.[8] Complexities from such purposeful rules will, of course, be legitimately more controversial because of the clash of values involved.

Even in the latter types of situations, it is important for policymakers to be self-conscious about the full range of implications in what they are doing: at the same time they are con-

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7. A particular body of law with which I regularly work, the income taxation of trusts and their beneficiaries, has been resistant to serious efforts at simplification. The law here is still highly complex in its practical implications for estate planning—in its opportunities and its hazards—despite thoroughgoing revision in the Tax Reform Act of 1969, significant modifications in the 1976 Act, and technical amendments in 1978. But then no legal system which has the trust device to contend with has worked out rules that combine reasonable simplicity with reasonable security against tax avoidance and inequity.

Also, it is not appropriate to criticize as "unsound" *all* very fine lines of distinction or to label all associated complexities and apparent inequity risks "unwarranted" or "unnecessary." As with any line-drawing along a continuum, it may be inevitable that the case just to one side of the dividing line and the case immediately to the other side will look more like one another than either resembles most of the other cases in its own category. Yet, in the tax context, there may be solutions in the form of fundamental reforms that, *if* otherwise acceptable, challenge the assumption that lines of gross distinction "must" be drawn; these are reforms that either eliminate any need to distinguish along a given continuum or greatly increase the number of categories.

For example, the significance and thus the need for drawing important distinctions between "incomplete" and "complete" transfers for estate tax purposes was largely removed by the first of these methods (i.e., eliminating need to distinguish) when the estate and gift taxes were "unified" by the Tax Reform Act of 1976. That Act cumulated lifetime and death transfers and subjected both essentially to the same tax structure and rates. Unfortunately, however, the opportunity for simplification and equity was unconscionably squandered in the political haste of an election year by a total failure to redesign the rules governing "completeness" and certain related problems, such as the treatment of joint tenancies. *See* text accompanying notes 85-90 *infra*.

Another example of simplification of seemingly inherent complexity involves the rule against perpetuities. After other false starts, *e.g.*, the New York experiments, the reformation approach (often called the "*cy pres*" rule) has greatly relieved lawyers' practical difficulties in living with the rule by removing its traditionally drastic penalty.

8. Complexity of this general type is what much of the controversy is all about between those who believe in having an array of specific deductions in the income tax law and those who advocate the broader, simpler "comprehensive base" advocated by many others.

sidering the good in an apparently constructive idea they should also take account of what the proposal would add to the overall, cumulative complexity-load in personal and economic life. Thus, a suitably ironic complexity—an encumbrance on political life—might result from a requirement that a legal services impact statement accompany all proposals of new legislation. The cumulation of complexity deposits over time is, after all, a form of pollution to be taken into account in our legal and social environment, much as we now make other producers take costs of polluting the physical environment into their expense calculations. Within my own field, the probate system itself might be a candidate for total reconsideration in light of the expense, delays, and other complexity byproducts it entails.[9] Most foreign legal systems fare quite well without imposing such expensive "insurance" on decedents' creditors and successors.

III. SIMPLIFYING LIFE UNDER OUR PROBATE, TRUST, AND RELATED PROPERTY LAWS

There are three basic types of law change that could improve the legal working environment and thus facilitate the rendering of legal services or the achievement of results that are normally thought of as involving legal services:

(a) correction or clarification of specific legal rules not only for the purpose of reducing and simplifying dispute resolution but also to facilitate the planning of private transactions and documents and to smooth the course of implementation (usually, in our context, estate or trust administration);

(b) ready-made or "canned" arrangements that may be made available on a voluntary basis as alternatives to individually tailored transactions; and

(c) fundamental revision of processes and related rule-systems in ways that would reduce and simplify the lawyer work required in those processes.

A. EXAMPLES OF CATEGORIES (b) AND (c)

I do not intend to say much about the latter two classes of reforms. I have written and spoken of these at some length elsewhere,[10] and proposals of these types are currently being

9. *See* Halbach, *Probate and Estate Planing: Reducing Need and Cost Through Change in the Law*, in DEATH, TAXES AND FAMILY PROPERTY 165, 175-79 (E. Halbach ed. 1977).
10. *Id.*, at 169-79.

developed or considered by state legislatures, by the Joint Editorial Board for the Uniform Probate Code, and by bar association committees.[11] Just for illustrative purposes, however, some examples may help to suggest the nature of these possible reforms.

Examples of category (c), basic *process* and *rule-system* modifications, might include: (1) authorizing wholly unadministered succession by doing away with the process of estate administration altogether for most estates, using our courts of probate only as necessary for the more traditional judicial role of dispute resolution; and (2) a thorough reexamination of substantive rules governing the rights to non-probate assets on the death of a joint tenant, an insured, an employee covered by a retirement plan, or the like—with particular reference to whether a single testamentary instrument might under some circumstances be permitted to make a more broadly inclusive disposition of a decedent's wealth and entitlements.[12] In each of these matters there is a more successful experience with departures from traditional principles in this country than a casual observer might suppose;[13] and in most civil law legal systems the wealth-transmission process at death is fundamentally simpler than the range of more or less typical practices here. As a result of their experience in such processes, informed lawyers in many civil law countries are generally appalled at the idea of following American-type procedures for the protection of beneficiaries and other interests, at a cost not only to the public but also to the very dignity of the roles played by lawyers and judges.

An example of reforms in category (b) is the possibility of legislation offering statutory "pre-packaged" trust options or fa-

11. *See, e.g.*, Committee on Trusts, Estates, and Surrogates' Courts, *The Statutory Will*, 34 THE REC. 302 (1979).

12. My first encounter with an idea that is now sometimes called the "blockbuster will" came through discussions at the American Assembly on "Death, Taxes and Family Property" in Atlanta, Georgia in 1976. A committee of the American Bar Association Section of Real Property, Probate, and Trust Law is currently studying the possibilities of this concept.

13. For one of the rare cases upholding a change of insurance beneficiary designation by will, see Connecticut Gen. Life Ins. Co. v. Peterson, 442 F. Supp. 533 (D. Mo. 1978).

Succession without administration exists, on essentially a Civil Law pattern, in Louisiana. Limited examples of unadministered succession range from the array of will substitutes recognized in all of the states, to the use of community property contracts in Washington and California's 1974 legislation allowing a surviving spouse who takes the deceased spouse's share of community property outright to do so without administration. *See* CAL. PROB. CODE § 202 (West Supp. 1980).

cilitating the use of other wholly or partially standardized trust plans. Such laws could do much to save lawyer time and client expense, while also encouraging wider utilization of worthwhile legal services. The objective of such "canned" options is not to eliminate the carefully personalized work lawyers now perform for their clients who can afford it, but rather to offer individuals, if they prefer or need, some less personalized, less costly lawyer-advised alternatives. These lower cost services might be used by some who now, with distress, pay the higher cost of elaborate services, but they would also be used by many who now leave their affairs unplanned or inadequately planned because they cannot or will not pay for the services that are called for by their family or financial situations.[14] In addition, legislation facilitating standardization of certain routine transactions can make the transactions safer, easier, and more fair to all parties, while reducing the risk of financially and emotionally costly disputes. In all states some modest steps along these lines have already been taken,[15] and a number of broader proposals are now under consideration in various quarters.[16]

It will not always be clear which of these two routes, category (b) or (c), might best be followed in any given effort to simplify a troublesome, major problem area of legal practice, such as the complexities of ERISA or those of split-interest trusts having partially charitable purposes. Maybe what both of these areas call for is a fundamental rethinking of the federal tax rule-systems that have created the problems, or failing that, state legislation or perhaps federal regulations to facilitate the use of "canned" arrangements.[17]

The substantial, basic types of law change represented by categories (b) and (c) tend severely to challenge would-be reformers in terms of both the imagination and patience required. This is primarily because serious, legitimate issues of

14. For example, young couples with small children are often in this situation.

15. In my field, for example, the Uniform Gifts to Minors Acts are of this type—ironically, a response to gift-tax objectives of well-to-do individuals.

16. One example is an unpublished, recent report and continuing study by a committee of the American Bar Association's Section of Real Property, Probate and Trust Law. *See also* note 11, *supra*.

17. It is interesting, by way of analogy, to note again the gifts-to-minors problem where the interplay of state legislation and liberal federal interpretations under I.R.C. § 2503(c) has facilitated standardization of transactions (especially via versions of the model and uniform gifts-to-minors acts) while at the same time lessening the hazards of nonstandardized arrangements, as under Commissioner v. Herr, 303 F.2d 780 (3d Cir. 1962), Rev. Rul. 68-670, 1968-2 C.B. 413, and their progeny.

competing policies are frequently involved.[18] On the other hand, if our profession genuinely strives for a detached perspective, we will find that some of the apparent obstacles to fundamental revisions of these types actually involve unwarranted paternalism—well-intentioned as it usually is, but excessive in its failure to recognize the high cost of the "insurance" that is involved in some of our traditional procedures, practices, or policies.

B. CATEGORY (a): A CLEAN-UP PROGRAM

The principal focus here is on correcting unsound doctrines which tend to invite wrong results, unnecessary litigation, or both—which thereby also create a legal background against which planning and administration are more tedious, more costly, and more hazardous than necessary. In category (a), then, we are concerned with the cleaning up of specific rules—an undertaking that is thoroughly traditional for the legal profession and that would be relatively easy if we and our legislatures (and sometimes our courts) would simply get serious about it. The problem here is much more one of inertia than it is of policy tensions or even of a need for fresh ideas.

Unsound rules need to be and can be improved either (1) by clarification of uncertainties or (2) by correction of rules that are already clear but are distinctly outdated or otherwise inappropriate. Troublesome, often needless litigation is invited in the application of rules of either of these types. Because of this risk of litigation and thus of possibly unwanted results, such rules require special care in counseling and drafting—resulting in unnecessarily lengthy, intricate and costly documents. By cleaning up such rules, we can lessen the frequency and difficulty of occasions for which the services of lawyers are needed, not to mention improving the outcomes of individual transactions or disputes. Although each rule is individually of

18. With a little imagination and some success in our legislatures, however, some once highly troublesome areas have been—or are being—greatly simplified with considerable ease. Pour-over (testamentary additions to trusts) legislation has now quieted a whole area of risk, planning difficulty, and litigation in most states.

Simplicity has also resulted from lessening the penalties and facilitating "repairs" in the event of violation of the rule against perpetuities in states that have enacted so-called *cy pres* or reformation statutes, although controversy still reigns over the desirability of a "wait-and-see" approach (as evidenced by the heated debates on the floor of the American Law Institute in the 1978 and 1979 sessions concerning work under way on the Restatement Second of Property, which will embrace "wait-and-see" as well as judicial reformation).

relatively minor significance in these broader terms, such a campaign to clarify or correct deficient rules can, in the aggregate, make a substantial contribution both to removing unnecessary cases from our courts and to simplifying the planning and implementation of private transactions.

No doubt most existing doctrine is at least arguably sound. Yet, in some instances it can be persuasively demonstrated that specific items of present law are seriously objectionable and operate badly. Examples of litigation-producing, transaction-complicating rules can readily be drawn from the field of probate, trust, and property law, and a representative collection would include some rules that survive in the vast majority of states and others that still exist in but a significant minority.

Of particular interest and urgency in this field are unsound rules of construction. That is, those various presumptions of intention that are "unsound" in that they regularly invite a "wrong result"[19] where the right or more suitable result would have been easy to reach but for the existence of the inappropriate rule. The relatively objective indicia of bad rules of construction typically include: (1) opinions frequently containing apologies by the very courts that feel they have to live with the objectionable rules and administer them;[20] (2) opinions declaring that "the rule yields to the faintest indication of contrary intention" (a badge of judicial disapproval that is an obvious

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19. That is, with no good reason, a result that is contrary to the probabilities of intention and other policy preferences that are relevant to the particular constructional situation.

There are, of course, important constructional preferences, based on both forceful probabilities of intent and social policies, that offer useful guidance in many of the recurring constructional situations of probate and trust law; these are especially important in the area of future interests, where it is often necessary to apply a legally attributed intention to situations about which it is normally unrealistic to expect to discover an actual intention. Such contructional preferences are discussed and reviewed in AMERICAN LAW OF PROPERTY §§ 21.2, 21.3 (A. Casner ed. 1952).

20. A leading case of this type, and a favorite of many critics of the so-called "no-residue-of-the-residue" rule, is *In re* Gray's Estate, 147 Pa. 67, 23 A. 205 (1892), in which the court said of this rule that still prevails in the vast majority of states:

> The rule thus established does not commend itself to sound reasoning, and is a sacrifice of the settled presumption that a testator does not mean to die intestate as to any portion of his estate, and also of his plain actual intent shown in the appointment of general residuary legatees, that his next of kin shall not participate in the distribution at all.
>
> If the question were new in this state, speaking for myself I should not hesitate to reject the English rule as wrong in principle and subversive of the great canon of construction,—the carrying out of the intent of the testator.

Id. at 74-75, 23 A. at 206.

invitation to litigate);[21] and (3) a resulting trail of litigation yielding no consistent pattern of results and affording little or no basis for predicting the outcome of potential controversies.[22] Thus, the identification of unsound rules of construction is not a particularly subjective undertaking, and upon examination, such presumptions of intent would bring a quite solid consensus of opposition from lawyers and informed laymen alike.

Possibly the most widespread example of such an objectionable rule of construction is the general presumption that, absent exceptional circumstances, language in a will or trust instrument referring to someone's "children," "issue," "descendants," or the like does not include that person's adoptive children or their descendants.[23] Probably no other problem in the entire field of probate and trust law generates more litigation today than this one. Yet, most courts and legislatures have failed both to reverse this troublesome presumption and to clarify other principles applicable to closely associated questions concerning adoptees. This is so despite sociological studies and intestate succession rules contrary to the presumptive exclusion of adoptees from class gifts—even though we can readily handle the unwanted side effects of a constructional rule that would normally include adoptees within class terminology.[24] It has proven unrealistic to expect that constructional

21. *See, e.g.*, United States v. 654.8 Acres of Land, 102 F. Supp. 937, 941 (E.D. Tenn. 1952) ("a slight indication of variant intention is sufficient to justify a court in by-passing" the so-called Rule in Wild's Case to satisfy "the requirements of plain justice").

In Petry v. Petry, 186 A.D. 738, 175 N.Y.S. 30 (1919), the court actually called in vain for the New York Court of Appeals to overrule another disfavored doctrine (*see* note 32 *infra* and accompanying text) which, although yielding to faint indications of contrary intention, it felt unable honestly to find rebutted by the evidence before it. After the higher court rejected this plea and affirmed without opinion in Petry v. Langan, 227 N.Y. 621, 125 N.E. 924 (1919), the state legislature abolished the doctrine within two years. *See* N.Y. EST., POWERS & TRUSTS LAW § 2-1.2(McKinney 1971).

22. *See generally* Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CALIF. L. REV. 921, 926-32, 941-51 (1964).

23. This still prevalent rule, often called the "stranger-to-the-adoption rule," is expressed in RESTATEMENT OF PROPERTY § 287 (1940):

> (1) When a limitation is in favor of the "children" of a designated person, all persons adopted by the designated person are excluded from the possible takers thereunder except when a contrary intent of the conveyor is found from additional language or circumstances.
> (2) The following are the most frequently encountered factors tending to establish the existence of the 'contrary intent of the conveyor' referred to in Subsection (1):
> (a) the conveyor is the designated person.
> (b) the conveyor at the same time of the execution of the instrument containing the limitation knows of the adoption.

24. The law and the reasonable underlying concerns of those who oppose

problems in this area will be effectively handled by lawyers on a case-by-case basis in the drafting of private instruments; in fact, it is not as easy as one might assume to deal comprehensively in each instrument with the full array of constructional issues concerning the rights of adoptees under all the varied circumstances in which these questions are likely to arise.[25] Furthermore, different but analogous issues are now becoming increasingly common with respect to the rights of illegitimate descendants,[26] and any reasonable hope for effectively dealing with the diverse array of questions inherent in such matters will depend on a comprehensive, thoughtfully designed background of presumptions with respect to the meaning of class gift terminology.[27]

Another important example of a recurring constructional situation calling for judicial or legislative attention is that of the meaning of the word "heirs." Here, even with the approaching extinction of such antiquated doctrines as *Worthier Title* and the *Rule in Shelley's Case*, there remains an array of modern issues that are regularly neglected or mishandled in drafting,[28] despite the considerable aid available in modern form books.[29] The most troublesome of many questions about "heirs" arises in the future interest context and has to do with the time of their ascertainment—*e.g.*, is it at the date of the designated rel-

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change, together with suggestions for meeting those concerns while adopting a basic rule favorable to adoptees, are discussed in Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971 (1965). Probably the best of the recent statutes in the area is ORE. REV. STAT. § 112.195 (1979); *see also* UNIFORM PROBATE CODE §§ 2-611, 2-109 (1975). For a study of progress through common law evolution, see Estate of Coe, 42 N.J. 485, 201 A.2d 571 (1964) (establishing a rule favorable to adoptees as a flexible general principle); Estate of Nicol, 152 N.J. Super. 308, 377 A.2d 1201 (1977) (refining and limiting the rule as had been promised by *Coe*). *See also In re* Estate of Griswold, 140 N.J. Super. 35, 354 A.2d 717 (1976).

25. *See* Halbach, *supra* note 24, at 990-95 (examining adoptions "out" of a family as well as the more common adoptions "in").

26. Some of the difficulty begins with the confusion over the various opinions enunciated in Lalli v. Lalli, 439 U.S. 259 (1978), which immediately followed Trimble v. Gordon, 430 U.S. 762 (1977). Also, pretermitted heir cases like Estate of Gardner, 21 Cal.3d 620, 147 Cal. Rptr. 184, 580 P.2d 684 (1978), will not make the lawyer's drafting chore easier.

27. The difficulties for the lawyer who would try to meet these problems in the drafting of each instrument are suggested in Halbach, *Estate Planning: Selected Recent Developments and Some Current Problems*, 1 U.C.L.A. SCHOOL OF LAW ESTATE PLANNING INSTITUTE § 1.41 (1979).

28. *See generally* SIMES & SMITH, 2 FUTURE INTERESTS §§ 727-737 (2d ed. 1956).

29. *See, e.g.*, DRAFTING CALIFORNIA IRREVOCABLE INTER VIVOS TRUSTS 405 (Cohan ed. 1973); J. JOHNSON, A DRAFTSMAN'S HANDBOOK FOR WILLS AND TRUST AGREEMENTS 408-09 (1961).

ative's death or at the date of distribution, when distribution occurs after the relative's death? It is clear that the usual presumption favoring the former[30] does not accord with typical transferor intentions or even with the expectations of most lawyers who might casually use the term or its rough counterpart, "next of kin." A revision of the present general rule on the time for ascertaining "heirs" should probably be accompanied by implied powers of sale and management in legal life estate situations, or by more drastic steps as in modern English law, in order to deal with undesired rigidities that would otherwise exist in the frequent nontrust context in which unsophisticated use of the term is encountered.[31]

A final example that is especially revealing for present purposes is the traditional doctrine that a bequest to the "issue" of a designated person is presumed to pass *per capita* rather than *per stirpes*.[32] Under early English doctrine that still thrives in a number of states, a transfer simply "to A's issue" is presumptively taken as requiring distribution in equal shares to each and every one of A's descendants of all degrees. Thus, for example, each living grandchild takes the same share as any other child or grandchild. This is so despite the fact that the grandchild's parent (a child) is then living and claiming a share, regardless of the number of grandchildren in each family line, and despite the fact that the local *intestacy* laws would provide for distribution among an intestate decedent's issue to be made by right of representation in some form.[33] Here again, even the draftsman who is alert to the need to supply an answer to the *per capita/per stirpes* question will not find it easy to do so properly. Merely to provide, as many will and trust forms do, that issue and descendants take "*per stirpes*" or "by right of representation" is insufficient, for such language itself

30. The presumption reflects the "proper and strict technical meaning" of the term. *See, e.g.*, Michigan Trust Co. v. Young, 347 Mich. 78, 78 N.W.2d 581 (1956); RESTATEMENT OF PROPERTY § 308 (1940).

31. For thoughtful suggestions along these lines and a review of post-1926 English doctrine, see Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517.

32. The traditional rule has been abandoned by a majority of legislatures and courts today. *See, e.g., In re* Mayhew's Estate, 307 Pa. 84, 160 A. 724 (1932). But Stickel v. Douglass, 7 N.J. 274, 81 A.2d 362 (1951), illustrates modern application of the early English doctrine, the possible revival of which was also suggested as a real possibility by RESTATEMENT OF PROPERTY—CALIFORNIA ANNOTATIONS § 303 (1950) (dropping of a statutory *per stirpes* rule in the restructuring of civil and probate codes).

33. *See, e.g.*, Stickel v. Douglass, 7 N.J. 274, 81 A.2d 362 (1951).

is not free from ambiguity.[34]

A particularly relevant study for our purposes is the New York experience with the *per capita* presumption. Over many years the traditional rule had produced a flood of costly family litigation, often extending through one or two levels of appeal, with the rule being rebutted about as often as it was applied. In 1920, however, the legislature adopted an appropriate rule, one in which the new legal presumption (based on a scheme of representation) was designed to coincide with probabilities of intention and other relevant policies. At that time, litigation on the *per capita/per stirpes* question in post-1920 instruments virtually ceased; yet, because the new rule operated only prospectively, the old problems continued with respect to pre-1920 instruments. The New York experience gives us an interesting opportunity to observe, side by side, the differing consequences of sound and unsound constructional doctrine.[35]

Numerous examples can also be found of nonconstructional rules that breed litigation and otherwise complicate the planning and administration of decedents' estates and trusts. These problem areas usually result from adherence to antiquated property doctrines. For example, the rights of litigants in a variety of situations may turn upon distinctions between conditions precedent and conditions subsequent—distinctions that are highly technical, formalistic, and without content.[36] Yet in each litigation situation for which the distinction is used it is possible to find principles for resolving the particular type of controversy on a basis that is both relatively simple and legitimately related to valid policy considerations.[37] A similarly

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34. *See, e.g.*, Maud v. Catherwood, 67 Cal. App. 2d 636, 155 P.2d 111 (1945) (illustrating the problem of ascertaining the "stock" generation when there is no surviving member of the first generation of descendants).

35. The New York experience is reviewed in some detail in Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CALIF. L. REV. 921, 926-30 (1964).

36. The distinction becomes not only hopelessly elusive but also susceptible to frequently and deliberately manipulative judicial decisionmaking, usually to reach fair or appropriate results that would have been easily attained if the supposed vested-contingent distinction were openly replaced by principles based on properly relevant policies. *See, e.g.*, Greer v. Parker, 209 Ark. 553, 191 S.W.2d 584 (1946) (voluntary alienation issue, construing an apparent condition precedent as a condition subsequent in order to achieve alienability); Adams v. Dugan, 196 Okla. 156, 163 P.2d 227 (1945) (involuntary alienation issue, construing an apparent condition subsequent as a condition precedent in order to put the "contingent" interest beyond the reach of creditors); Estate of Budd, 166 Cal. 286, 135 P. 1131 (1913) (one of many American cases construing apparent conditions precedent as subsequent in order to salvage the interest from the rule against perpetuities).

37. *See* Halbach, *Vested and Contingent Remainders: a Premature Re-*

antiquated and silly rule is still involved in everyday handling (or mishandling) of estate planning and family ownership matters. That is the typical requirement that a "straw" conveyance be used by a co-owner who wishes unilaterally to sever a joint tenancy (as he is entitled to do) while retaining his proportionate interest in the property—i.e., by conversion to tenancy in common.[38] Two courts in recent years have been willing to erase this requirement rather than defeat permissible intentions and insist that what ought to be easy be done the hard way.[39]

IV. ESTATE AND GIFT TAXATION: AN AGENDA FOR LAW IMPROVEMENT

At least in recent years, the tax laws and hence the taxpaying public seem to have been victimized by a peculiar kind of neglect. In some respects, "neglect" is too kind in reference to the role of government, but all of us who deal with the tax laws share responsibility. When not addressing broad policy issues, lawyers, economists, and others in academia and government have quite properly tended to focus on preventing tax avoidance—on "loophole" closing—but have found little time for more than lip service to the goal of simplicity. The practicing professionals, too, talk of simplification but show little actual concern over complexities that have become familiar or that grow out of tax breaks for broad client groups.

Obviously, many complexities and even some harshness and inequity are unavoidable in a modern tax system; and many proposed reforms will inevitably prove controversial on the merits, while others will be politically sensitive. Least understandable and acceptable, however, are those defects that have neither policy justifications nor political explanations. Some of these survive only by reason of sheer inertia.[40] Others, however, appear to involve more than neglect. They

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quiem for Distinctions Between Conditions Precedent and Subsequent, in PERSPECTIVES OF LAW: ESSAYS IN HONOR OF AUSTIN W. SCOTT 153-72 (1964).

38. On the nature and roots of doctrine in this area, see Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466 (1954).

39. Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n, 281 Minn. 462, 161 N.W.2d 688 (1968), led the way in recognizing a joint tenant's unilateral severance of a joint tenancy without use of an intermediary. Modern intermediate appellate authorities in California are split. *Accord*, Riddle v. Harmon, 102 Cal. App. 3d 524, 162 Cal. Rptr. 530 (1980); *contra*, Clark v. Carter, 265 Cal. App. 2d 291, 70 Cal. Rptr. 923 (1968) (finding the use of a "straw conveyance" essential).

40. A most extreme example of this is the congressional failure to revise I.R.C. §§ 2036-2038 when the gift and estate taxes were unified in 1976.

seem more the product of adversary habit or myopia within Treasury or legislative staffs, to whom we should be able to look for detached expertise or concern over the fairness, practicality, and overall quality of the tax system. Defects of this last type generally take the form of unnecessary requirements, unwarranted distinctions, and inappropriate interpretations, when viewed in the light of relevant policies. These problems usually result from administrative rulemaking that suggests a willingness to exact a tax on any basis that Code language will bear,[41] and occasionally from legislation that reflects an overreaction to real or imagined risks.[42] These defects have been particularly apparent and costly in the areas of federal tax law that affect the planning and administration of family wealth transfers, especially in the estate and gift taxes.

A. CHARACTERISTICS OF A GOOD TRANSFER TAX

Substantial differences in philosophy are inevitable with respect to the goals of transfer taxation, how heavily to tax, and a variety of other questions of a broad socioeconomic and political nature. Most interested observers, however, would be able to agree in at least a general way about basic qualities to be sought in a tax on the transmission of wealth. It will be helpful at this point briefly to review these important characteristics.

Initially, the tax should impose reasonable and effective restrictions on the transmission of economically significant wealth and power from generation to generation,[43] but it must at the same time avoid excessive impairment of incentives and capacities to acquire, accumulate, and preserve capital.[44] Second, the design of the transfer tax should reflect due regard for its consistency with other taxes, such as the income tax, and for the capacity of various taxes to be mutually reinforcing.

41. An extreme example is Rev. Rul. 75-128, 1975-1 C.B. 308.

42. One of the latest and most extreme examples is I.R.C. § 2057(c) and (d).

43. *See generally* Jantscher, *The Aims of Death Taxation*, in DEATH, TAXES AND FAMILY PROPERTY 40 (E. Halbach ed. 1977).

44. Even typical egalitarian principles recognize that an objective of equal distribution of wealth, by redistribution in favor of the poorest in society, is qualified to the extent that an unequal distribution may in the long run, by reason of incentives to productivity and saving and the like, enable the poorest classes to receive more than they would under strict equality. *See generally* J. RAWLS, A THEORY OF JUSTICE (1971). This requires even those espousing egalitarianism to struggle with arguments concerning the price to be paid by all through lost productivity if transfer taxes are raised to the point where capital formation greatly suffers. *See, e.g.*, Boskin, *An Economists' Perspective on Estate Taxation*, in DEATH, TAXES AND FAMILY PROPERTY 56 (E. Halbach ed. 1977).

Failures in this area are a common source of unnecessary complexity in both planning and administration.[45] Third, the tax should produce reasonable amounts of revenue without being excessively costly for the government to enforce or for taxpayers to comply with. This means the system must be readily understood and, in particular, readily applied to ordinary, recurring transactions.[46] Finally, the tax's structure and detail must generally be regarded as fair, in terms of both vertical and horizontal equity. Of particular importance for present purposes, the system's rules should, as nearly as possible, (a) assure similar treatment of similarly situated taxpayers and (b) minimize the likelihood that the mere form or timing of a transfer will alter its tax treatment.[47] This latter "neutrality" is essential so that the tax does not intrude into taxpayers' decisions except insofar as the intrusion is important to the system's internal integrity or reflects a deliberate policy to favor some patterns of disposition over others.

Serious challenges arise with respect to this final characteristic, the pursuit of fairness and neutrality. Particular difficulties lie in attempts to achieve agreement on the appropriate ability-to-pay factors to be built into a transfer tax and in determining what situations constitute "like cases" that are to be treated alike. Deficiencies in this latter undertaking are a particularly visible source of apparent inequities, unnecessary intrusiveness, and complexity.[48] A fair, neutral transfer tax, one

45. Compare, *e.g.*, the lack of coordination in significant detail between the "grantor rules" of the income tax (I.R.C. §§ 671-677) and their counterparts in the estate tax (I.R.C. §§ 2036-2038) and between the income tax "virtual ownership rule" (I.R.C. § 678) and its estate tax counterpart, the general power of appointment rule (I.R.C. § 2041).

46. In this respect, the Code's treatment of joint tenancies and tenancies by the entirety (I.R.C. §§ 2040, 2515) is little understood by spouses—an invitation to good-faith noncompliance, especially with respect to gift-tax treatment of jointly held securities.

47. This dual objective was fundamental to the major action taken, albeit hastily and clumsily, to unify the estate and gift taxes in 1976. It also underlies most of the changes suggested in the agenda for law improvement, *see* text accompanying notes 61-104 *infra*.

The gift tax annual exclusion, although at some modest level essential to a reasonably workable system, is a prime example of a feature that generally operates contrary to this most important objective. Therefore, in my opinion, the exclusion should be confined to the basic purpose of allowing us to disregard routine, minor gifts (i.e., to "keep the IRS out from under our Christmas trees and birthday cakes") and should not be increased in light of inflation to maintain some earlier standard of unreported giving, especially if interspousal exemptions are liberalized and if some explicit recognition is given to exclusions for transfers for consumption and education.

48. An example of a broad area of long-standing problems of this type is that of marital deduction qualifying rules under I.R.C. § 2056, *see* text accompa-

that is to be workable and to have integrity, must also take account of the full array of will substitutes and gifts, and it must identify and appropriately tax trusts and various subtle substitutes for ownership or control—inescapably a source of some complexity but unfortunately also a temptation to excess.[49]

In the discussion that follows, I have tried to keep in mind these characteristics of a good system generally and also the need to secure the transfer tax base from erosion by taxpayer avoidance. The prime concern, however, has been with the interrelationship between: (a) the quality of justice and the need, availability, and cost of adequate legal services; and (b) either specific, immediately curable defects within the present system or areas in which specific present policies might at least be reconsidered because the legitimate values underlying them may be outweighed by their inequity/complexity costs.[50]

B. Asides on Structural Features and Policy-Based Complexities

1. *Basic structural features*

The emphasis just described excludes consideration of fundamentally different approaches to the taxation of wealth transfers,[51] such as taxing gifts and inheritances as income, or converting to an accessions tax (which I believe offers the only realistically foreseeable possibility of a system that is truly simple and satisfactory in terms of generally accepted goals of transfer taxation).[52] Also not emphasized in the ensuing discussion are possible changes in the rate structure of the gift

nying notes 79-81 *infra*. An example of a quite specific current problem is that of qualifying a grandchild's trust interest under anticipated administrative interpretations of the $250,000 generation-skipping transfer tax exclusion in I.R.C. § 2613(b)(6).

49. *See, e.g.*, Rev. Rul. 79-353, I.R.C. 1979-2 C.B. 385 (especially in the context of the post-1976 unification of the transfer taxes).

50. *See generally* text accompanying notes 7-9 *supra*.

51. *See* McNulty, *Fundamental Alternatives to Present Transfer Tax Systems*, in Death, Taxes and Family Property 85 (E. Halbach ed. 1977).

52. *See* Hearings and Panel Discussions Before the House Comm. on Ways and Means 94th Cong., 2d Sess. 1416-18, 1439-41 (1976) (statement of E. Halbach). This is also the conclusion in Steuerle, Equity and the Taxation of Wealth Transfers (Department of the Treasury, Office of the Tax Analysis Paper no. 39, 1980) [hereinafter cited as Treasury Studies]. For a full discussion and carefully developed model of such a tax, see American Law Institute, Federal Estate and Gift Taxation Project 226 (1969) [hereinafter cited as A.L.I. Project]; Andrews, *The Accessions Tax Proposal*, 22 Tax L. Rev. 589 (1969).

and estate taxes or in their effective exemption levels.[53] These fundamental matters necessarily involve values other than those stressed in this discussion, although it is worth noting that decisions on these structural matters do affect complexity/simplicity issues as well as vertical equity issues.[54] The basic structural decisions that are likely to have greatest relevance to our subject in the near future are those having to do with possible adjustments in the transfer taxes to provide inflation relief, which can be expected to be a major consideration in bills that will soon begin to surface in Congress.[55]

2. *Reconsideration of policy-based rules on complexity grounds*

As noted earlier,[56] some complexity problems are not readily corrected because they stem from rules purposefully injected into the system as expressions of other values that clash with the goal of simplicity and sometimes with related equity

53. Such exemption stems from the unified credit and the annual gift exclusion.

54. This is especially true, for example, of the size of the unified credit, which establishes the basic exemption level, because the credit effectively excludes estates below a certain size from the estate tax system—resulting in relief from the various planning and administrative complications that arise from the very presence of tax considerations.

55. If such relief is to be granted, the following illustrate some of the simplicity/complexity considerations:

(a) Indexing or the "spreading" of the tax rate table may have other justifications, but simplification objectives would be better served by general relief granted at the "bottom" through an increase in the unified credit, thus entirely eliminating many estates from the system. *See* note 54 *supra.*

(b) Rather than increasing the per donee annual exclusion of the gift tax (as forthcoming bills will understandably propose) for the purposes of simplification, it would be preferable to grant the equivalent of such relief in an across-the-board fashion through the general exemption level, i.e., via an increased unified credit. Relief via increased annual gift exclusions (i) squanders the opportunity of wholly releasing some appropriate estates from the tax system, (ii) distributes relief selectively in ways that intrude upon and complicate taxpayer behavior, and (iii) as a result of this selectivity, tends to be highly regressive because it is available only to those who can afford major gift programs. Other legitimate, inflation-related concerns that appear to call for enlarged gift exclusions can be covered by explicit statutory recognition that transfers for current consumption and education are not gifts, as proposed in A.L.I. PROJECT, *supra* note 52, at 19-21. *See also* note 47 *supra.*

(c) One of the least frequent but most desirable approaches to tax relief is to invest it in improvements in the system—that is, to grant the relief by financing simplifications and other improvements that would involve a revenue loss. The best example of such a reform is expansion of the marital deduction, discussed at note 61 *infra.*

56. *See* text accompanying notes 7-9 *supra.*

goals. Because of the deliberate, policy-based decisions involved, these are not cases of readily-corrected "unsound rules" in the sense used here; nevertheless, some mention of examples may suggest bodies of doctrine that might usefully be reconsidered with the overall quality of the legal environment in mind. That is, these bodies of rules might be abandoned, revised, or at least inhibited in the future on simplicity grounds if complexity/equity costs are not ultimately outweighed by the other social, economic, and political concerns that led to their enactment in the first place. These areas of complexity have in some instances been thrust into the system at the behest of the Treasury Department and in other instances at the behest of special interest taxpayer groups.

One important illustration of the Treasury Department's contribution to the problem is the set of charitable-deduction qualifying requirements applicable to charitable remainder trusts and other split-interest arrangements. The Tax Reform Act of 1969, with its requirements for annuity trusts, unitrusts, and the like, may have been an overreaction to some abuses and a variety of technical problems encountered in administering the prior law. The rules are now so intricate and treacherous that the area has become one of undue specialization—even most specialists in the general field of estate planning fear to tread there. As noted earlier,[57] "canned" arrangements based on state legislation or federal regulations may lessen the problems, but the area at least calls for reexamination. At a minimum, the "penalty" for noncompliance with Code requirements here, as in a number of other areas,[58] should be made to correspond to the "offense."

An example of complexity arising from special interest pressure, which also requires sensitive, imaginative reexamination, is the whole range of liquidity-related problems of farms and closely held businesses, including "special use valuation"[59] as well as special breaks allowed in conjunction with tax deferral.[60] A natural outgrowth of selective, discriminatory treatment is a body of arbitrary and complicated qualifying requirements, which produce sporadic benefits even for estates

57. *See* note 17 *supra*.

58. For example, such an approach could also be taken with respect to marital-deduction qualifying rules, as it has been regarding the rule against perpetuities in jurisdictions that have enacted rules calling for judicial reformation of offending interests.

59. I.R.C. § 2032A (added by the 1976 Tax Reform Act).

60. *See* I.R.C. §§ 6166, 6166A; *see also* I.R.C. § 6601(j) with reference to interests under § 6166(f).

within the target categories. In marginal cases, the qualifying requirements themselves induce counterproductive behavior and present a disincentive for taxpayers to prevent or provide for the liquidity problems of their own estates. Admittedly some serious problems, particularly of a temporary nature, arise on the deaths of some owners of farms and other family businesses. Nevertheless, the goals of both equity and simplicity would seem to justify a reexamination of the cumbersome, nongeneralized subsidies in this area. It is difficult to see why one group of heirs should be preferred over others merely on the basis of how the decedents made their fortunes, or why special privileges should be accorded only those attempting to retain an inherited enterprise rather than those faced with paying off the higher debt burden resulting from their attempts to acquire a farm or business on their own. Even if calls for special treatment in this area are hard to resist for political reasons, as well as some reasons that go to the merits, we might consider whether the transfer taxes are an appropriate place to express the particular social and economic values involved. The subject, of course, is both too controversial and far too complex to attempt to treat seriously in a few lines, but it is a good example both of the source of complexity and of the difficulty of pursuing simplicity where that value clashes with other pressures and values that are strongly held.

Although not strictly within this discussion of federal tax law, a closely related situation is the widespread reliance of state tax systems upon the inheritance tax format. Clearly, this significantly different approach to taxing wealth transfers at death, plus many other differences in details of state taxes, greatly increase complexity problems in estate planning and administration and in tax administration. It is doubtful that the relatively modest "bite" of a state system can express social values or reallocate tax burdens to a degree that would justify the complexity costs involved—hence the widespread recent reexamination of these state tax systems and the trend toward either "conformity" with the federal tax or reliance simply on a federal credit "pick-up" tax. The state of New York now has a good example of a "conforming" estate tax system. But on the other end of the continent a serious study and proposal failed to bring about such a change, at least for the time being; possibly relevant to the present discussion was the attitude of an influential opponent of this proposal who, at a crucial 1980 California legislative hearing, expressed the view that simplifi-

cation of this type would ease the burdens and increase the profits of probate practitioners but not benefit the public.

C. SPECIFIC PROPOSALS: UNSOUND RULES AND RELATED MATTERS

This agenda focuses upon remedies for unsound, specific rules of the present transfer tax system—changes through which significantly improved equity and simplification can be achieved. Also, most of the cases selected involve, I believe, no serious issues of revenue loss or other policy conflict to impede the adoption of corrective measures. The first situation discussed, however, cannot fairly be said to fit the concept of an "unsound rule" because legitimate questions of policy (especially revenue loss) can be raised; still, the case for change is overwhelming.

1. *Tax-free Interspousal Transfers*

No single reform can do so much in so many ways for the simplicity and evenhandedness of the transfer taxes, and at so reasonable a cost and in ways consistent with the underlying objectives of such taxes, as can the granting of an unlimited marital deduction.[61] In fact, much of the complexity and underlying concerns inherent in the split-interest and liquidity problems just discussed would disappear or become insignificant if interspousal transfers were completely exempted.[62] Such a change would also improve the structural background against which to deal with other problems to be discussed later.[63] To a lesser degree, analogous benefits would follow if the marital deduction were merely modified and expanded.[64]

A 100% marital deduction was recommended in the 1969 Treasury Studies[65] and today seems greatly preferable to the present "50% or $250,000/$100,000" rule.[66] The Treasury's 1969

61. *See*, A.L.I. PROJECT, *supra* note 52, at 31-37; U.S. TREASURY DEPARTMENT, TAX REFORM STUDIES AND PROPOSALS 29, 43, 111, 119, 351-87 (1969) [hereinafter cited as TAX REFORM STUDIES].

62. The most frequently used charitable remainder trust with prior provision for the surviving spouse would present no problem if the charitable deduction were not needed until the death of the widow or widower; and some of the most forceful appeals for tax relief with respect to family farms and businesses are based on concerns over possible hardship to surviving spouses.

63. For example, note the amount of technical Code material devoted to interspousal transfers and interests and joint tenancies in particular in the sections dealing with joint tenancies, I.R.C. §§ 2040, 2515.

64. *See* note 80 *infra* and accompanying text.

65. TAX REFORM STUDIES, *supra* note 61, at 119.

66. *See* I.R.C. § 2056(c)(1)(A).

report concluded that transfers between spouses were not "appropriate occasions for imposing tax" because of "difficult burdens" that are likely to result and because such taxation "does not accord with the common understanding of most husbands and wives that the property they have accumulated is 'ours' " and thus curtails the use of some natural forms of transfers between spouses.[67]

The Treasury report also pointed to harshness, inequity, and other objections to the present system.[68] In particular, it noted the risk of inequitable double taxation associated with the necessity of planning to ensure "that no more property than the exact amount needed to utilize the marital deduction passes to the surviving spouse" because the result of "overqualifying" by will, joint ownership, or otherwise "is to leave property in a way in which it is taxable in the surviving spouse's estate without a corresponding deduction in the first decedent's estate."[69] Another inequity cited was that of allowing estate splitting only when the wealthier spouse is the first to die, with an important opportunity for tax saving being lost when the poorer spouse dies first—a problem that cannot be cured under the present system by lifetime gifts to equalize the estates. The report notes in this "an undesirable discrimination between common law and community property states."[70] In addition, the report identifies a troublesome practical problem of complexity and harshness that arises under the gift tax when one spouse's property is treated as "ours" and is converted to joint ownership. This problem, together with the tax penalty that results from attempts to equalize estates during life, results from the gift tax marital deduction being limited to half of the property *given* inter vivos, whereas the present so-called "50% deduction" at death is really an exemption of one hundred percent of the amount transferred up to a maximum of half the adjusted gross estate.

The 100% marital deduction would, of course, resolve all of these problems. The 1976 modifications, including the exemption of the first $100,000 of interspousal gifts during life, do not resolve these problems in most substantial estates. Also, they do nothing to eliminate the unrealistic requirement of record keeping even for modest estates, modest gifts, and co-owner-

67. *See* TAX REFORM STUDIES, *supra* note 61, at 329, 358.

68. *Id.* at 112, 357-60. In fact, the Studies' overall conclusion is that this "disparity of tax results is counter both to progressivity and equity." *Id.* at 111.

69. *Id.* at 358.

70. *Id.* at 112.

ship conversions, and they do little to remove the harsh consequences of unintended gifts and of unrecognized, sporadically enforced tax liabilities that result from the almost instinctive and essentially tax-neutral behavior of placing "our" property in some form of concurrent ownership.

If a complete exemption for interspousal transfers is deemed too costly, this array of current problems can be dealt with in a more limited but reasonably workable way by allowing the 100% marital deduction only for inter vivos gifts.[71] The inter vivos limitation on such an exemption would be reinforced by a rule that restores to the gross estate (and thus charges against the marital deduction at death) transfers made to a spouse during the last three years of the donor's lifetime.[72]

The Treasury was right, however, not to be inhibited in its proposals by concern over revenue loss, most of which would be temporary and a small price to pay for a long-range improvement in the transfer tax system.[73] The one permanent form of revenue loss from the 100% marital deduction would actually be an improvement in the system: the loss of revenue from double taxation in the spouses' generation involves a loss of revenue of a type that *ought* not to be collected anyway and which *is* not collected from planned estates. Thus, the unintended burden of double taxation typically falls on estates that can least afford it and reaches beyond both the purposes and the design of even our present tax law. Also, unfortunately, the 50% deduction rule requires the use of trusts or trust counterparts in planned estates when one wishes to provide for one's spouse while avoiding the second tax—which is onerously intrusive, a widespread source of planning complexity (adding unnecessary risk of error), and an ironic inversion of the generation-skipping problem.

71. The ceiling for exempt transfers at death would not change.

72. *See* I.R.C. § 2035. Another approach might be to extend to all other forms of interspousal co-ownership the present nonrecognition-of-gift rule applicable to joint tenancies and tenancies by the entirety (I.R.C. § 2515). Still another approach, and one that might be useful even in the context of some forms of a 100% marital deduction, is to allow a full credit for property previously taxed and to give it an unlimited duration with respect to the estates of surviving spouses. (Incidentally, such an enlargement and extension of the credit might be appropriate for all members of the transferor's and higher generations, and it may well be that the present P.P.T. credit under I.R.C. § 2013 is too broad in other respects and should not be available at all to younger generation transferees, even on the present declining basis).

73. At one point, estimates of long-run revenue loss from a 100% marital deduction were put at 7% of transfer tax receipts; but a substantial portion of any such loss has already been sustained by the 1976 changes in the allowable deduction as it might be used in many previously taxable estates.

Now that the transfer taxes have been integrated, and the deduction somewhat expanded by the 1976 changes, the other "loss" from allowing a 100% marital deduction—a temporary revenue loss—should be modest and soon recouped. What is actually involved is a deferral of revenue from allowing a greater amount of tax to be postponed than is now allowed by the limited deduction. In this respect, however, the planning advantages and disadvantages of the marital deduction must be understood and considered realistically by policymakers, just as they must be by estate planners. After all, the primary advantage of the marital deduction is in allowing equalization of the spouses' estates (with deferral to that extent), and this is already allowed by existing law. Beyond this level of estate equalization, planners must weigh the alleged benefits of further tax deferral against the combined disadvantages of (a) increasing the aggregate tax base of the two spouses[74] and (b) eventually subjecting the property to a higher rate of taxation under the progressive rate structure on the second death. Unification of the taxes, it should be noted, has removed understandable earlier concern over the possible effects of major gifts the survivor might make during the deferral period. Also, as a practical matter, deferring a transfer tax is not like the interest-free loan that results from deferring income tax: the government, in effect, gets its tax share of the property by a proportional sharing in the property's fruits until the tax is finally collected (by levying on the larger tax base at the later time).[75] This not only compensates for the deferral but may overcompensate due to rate progression. Thus, it will rarely be

74. *See* note 75 *infra* and accompanying text.

75. An admittedly simplified and somewhat artificial example might help to illustrate the point, if it is not self-evident. Assume that a 50% tax is imposed on a million dollars today, with the government taking $500,000 and leaving a like amount for the taxpayer. If we assume that a fund would double in value in 10 years (the growth being a combination of capital appreciation and accumulated earnings), the government and taxpayer would have $1,000,000 apiece at that later time.

Let us now revise the facts and have the 50% tax deferred for 10 years. The original, untaxed $1,000,000 will, having doubled in value, be worth $2,000,000 when the deferred period ends; the 50% tax will then be imposed, leaving the taxpayer with $1,000,000 and giving the government a like amount.

The taxpayer has not gained by the deferral under these facts. If we had injected progressivity but otherwise left the facts unaltered, we would find that the deferral in the second situation gave the taxpayer less and the government more. On the other hand, deferral might have changed the lifestyle of the taxpayer (really, the surviving spouse for our purposes); and increased consumption might have made up for the progressive rates or might even leave the government with less, and it would certainly leave less for the ultimate recipients.

desirable under a graduated, unified transfer tax for property owners to plan for more than the estate splitting already allowed by present law; and, where transfers significantly in excess of equalization do occur, as the result of neglect or error, at least the unwarranted penalty of double taxation would be eliminated by the proposed change.

Another concern occasionally expressed—a most dubious concern—relates to the "temptation" an unlimited deduction would offer for the first spouse to make dispositions more favorable to the surviving spouse than would otherwise be made. Even the risk of this supposed distortion, however, would be removed by adopting the relatively uncontroversial proposal that follows.

2. *Qualifying for the Marital Deduction: Elimination of the Terminable Interest Rule*

The 1969 Treasury Studies recognized that the present terminable interest rule[76] is unnecessary;[77] few commentators would disagree, and I have heard of none who doubts the need to liberalize the rule in fundamental ways. This is so in the context of either a 50% or 100% maximum marital deduction. Because the rule is treacherously complex and unnecessarily harsh with some regularity,[78] its primary practical effect is to further the need for sophisticated counsel and to create excessive risks for nonspecialists and their clients.

When the surviving spouse receives only a life interest or other limited interest in property of the decedent, a deduction could be allowed in the first estate if the survivor consents to later taxation in his estate,[79] with the increased tax at the later time to be borne by such marital deduction property at margi-

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76. I.R.C. § 2056(b).

77. In fact, as also suggested here, the Tax Reform Studies conclude that the rule detracts from the goals and quality of tax system. TAX REFORM STUDIES, *supra* note 61, at 29, 43, 111-12, 119, 357-60, 377-81. "Furthermore the distinctions drawn by present law between [qualifying and non-qualifying transfers] have generated drafting complexities, artificial limitations upon dispositions, and considerable litigation." *Id.* at 358.

78. An example of one frequent source of unjustified harshness is that general-power-of-appointment properties are often included in the survivor's gross estate under I.R.C. § 2041, even though the interests received are insufficient to qualify the disposition for the deduction in the first spouse's estate under the "exercisable alone and in all events" requirement of I.R.C. § 2056(b)(4), with the result of unwarranted double taxation. *See, e.g.*, Estate of Field, 40 T.C. 802 (1963).

79. Alternatively, the survivor would consent to gift taxation if the interest ends during life.

nal rather than average rates, as suggested in the 1969 Treasury Studies.[80] Short of this, the law should at least be changed to eliminate all of the technical deductibility requirements that exceed the requirements for inclusion in the survivor's estate, so that the terms of the statute and the risks to taxpayers would be confined more rationally to the policy purposes underlying the terminable interest rule.

In summary, a workable estate and gift tax marital deduction would result from some combination of (a) a simple new rule to replace the present terminable interest rule and (b) either an unlimited marital deduction or rules that would eliminate both inadvertent gifts and the need for tax-planned trusts for spousal provisions that exceed the deduction. The result would be significantly less intrusive into private decisions and planning than the present law. Such a combination would alleviate the gross inequities of the present qualifying rules while doing away with a broad range of complexities in the marital deduction and elsewhere in tax administration and in estate planning and administration. In short, such comprehensive improvements in the marital deduction would contribute immensely to neutrality, equity, and simplicity throughout the transfer taxes.

3. *Lifetime Transfers Included in the Gross Estate*[81]

Only the press of more urgent Congressional business and the haste with which the transfer tax portions of the 1976 Tax Reform Act were enacted can explain the Congress' failure to rewrite Internal Revenue Code sections 2036 through 2038.[82] The entire function of these sections has either ceased or changed drastically with the integration of the estate and gift taxes. After all, the purpose and effect of unification was to reduce the significance of whether a transfer was subject to the gift tax or the estate tax and to eliminate the enormous oppor-

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80. *See* TREASURY STUDIES, *supra* note 52, at 378.

81. The essence of the Code sections under discussion here is at least suggested by their titles: "Transfers With Retained Life Estate," I.R.C. § 2036; "Transfers Taking Effect at Death," I.R.C. § 2037; and "Revocable [also including amendable] Transfers," I.R.C. § 2038.

82. Not only were unification related revisions ignored, but the so-called *Byrum* rule, now I.R.C. § 2036(b), was so hastily enacted that it contained a critical typographical error, involved an unthinkable case of overkill (corrected in the 1978 cleanup amendments), and failed to deal with the most significant issue represented by United States v. Byrum, 408 U.S. 125 (1972) (the question of continued control over dividend policy via shares retained by a transferor). A great man once said that it is "one thing to hunt a mouse with a cannon and quite another to fire the cannon and miss."

tunity for tax avoidance through inter vivos gifts. Now that unification has occurred, there should be a thorough reexamination of both the rules dealing with will substitutes and the whole question of when an inter vivos transfer should be deemed sufficiently complete to remove the property from the transferor's gross estate. As both the American Law Institute and the United States Treasury recommended earlier when these matters were patiently and carefully examined in the late 1960s,[83] the rules of a unified system can and should be designed to prevent, in almost all instances, the application of both taxes to a given transfer. There is no reason for the earlier rules to be retained or merely patched up, perpetuating complexities and now aggravating the risks of inequity, when the problems for which they were designed have for the most part become extinct.[84] Some questions concerning the manner and detail of revision, as distinct from whether or not it needs to be done, do involve some policy questions and low-level controversy—*e.g.*, "easy-to-complete" versus "hard-to-complete" approaches. Each of us may understandably have his own favorite answers to these questions, but any proposal that is carefully worked out should be able to improve upon the present situation to the reasonable satisfaction of all who are interested.

4. *Joint Tenancies*

Another relic of the earlier dual transfer tax system that should be fit into the current context is the extraordinarily complex and frequently inequitable treatment of joint tenancies. The consideration-tracing requirements and other aspects of the estate and gift tax treatment of these co-ownership forms[85] are a nightmare to taxpayer (both in planning and in administration) and government alike; yet it is a nightmare that has an easy, appropriate, and revenue-neutral solution.

83. *See generally* A.L.I. PROJECT, *supra* note 52; TAX REFORM STUDIES, *supra* note 61.

84. Even section 2035 is largely a relic, needed only to deal with the specialized problem of life insurance and the so-called "gross-up" for tax payments on certain lifetime gifts.

85. *See* I.R.C. §§ 2040, 2515. Under the regime of I.R.C. § 2040(a), the gross estate consists of the entire value of the property held jointly at the time of the decedent's death by the decedent and another person or persons with right of survivorship, less any part attributable to consideration furnished by the surviving joint owner or owners. The decedent's estate has the burden of proving the extent of the consideration furnished by the surviving joint owner or owners. In addition, the consideration furnished cannot consist of money or property acquired from the decedent for a less than adequate price.

The present approach was always dubious but has no real justification under the post-1976 tax structure.

Evidence enough of the law's difficulty can be found in the increasing length and detail of section 2040. Additional provisions were added to section 2040 in 1976 and readjusted and expanded in 1978 in an effort to try to deal with artificial concepts that are no longer warranted because the problems for which they were designed no longer exist. Essentially, section 2040 has long provided a "consideration-furnished" test for determining inclusion in the gross estate at a joint tenant's death, with a 1976 amendment that created an exception for certain "qualified" interspousal tenancies,[86] followed by some corrections and further amendments in 1978.[87] Overall, the scheme is as deficient as it is complex, for the simple reason that even elaborate refinements cannot fit a square peg into a smaller round hole. Furthermore, the strangely limited nonrecognition rule for certain interspousal gifts under section 2515 can be repealed as totally unnecessary if lifetime transfers between spouses are exempted as suggested above;[88] otherwise, the section should be expanded and adapted to the full, current realities of interspousal co-ownership.[89]

In simplest terms, all that is needed under our present unified transfer tax system is to treat joint tenancies as if they were tenancies in common, with all co-owners being treated as holding equal interests. For estate and gift tax purposes alike, because of the equality of interest and unilateral right of severance possessed by each joint tenant in most states, this change

86. The Tax Reform Act of 1976 changed the estate tax rule for certain joint tenancies created after December 31, 1976 when the joint tenants are husband and wife. *See* I.R.C. § 2040(b). Under this "fractional interest rule," if the circumstances meet the conditions required for a "qualified joint interest" described in § 2040(b)(2), only one half of the property owned in joint tenancy is included in the decedent's gross estate regardless of which joint tenant furnished the consideration. I.R.C. § 2040(a).

87. The Revenue Act of 1978 amended the Fractional Interest Rule in § 2040(b) by allowing qualified husband and wife joint tenancies created prior to 1977 to receive favorable fractional interest treatment if the taxpayer elected to report the creation of the joint tenancy as a gift in any quarterly return filed in 1977, 1978, or 1979. I.R.C. § 2040(d). In addition, the new section 2040(c) allows executors of estates of decedents dying after December 31, 1978, to elect to use a special rule for excluding a portion of the value of jointly owned property used for farming or in any other trade or business based on the material participation of the decedent's spouse in the operation.

88. *See* text accompanying notes 61-75 *supra*.

89. That is, the section should apply to personalty as well as realty and to tenancies in common and community property as well as co-ownership with right of survivorship—which is often avoided, if (or abandoned when) the spouses have a lawyer.

in treatment would correspond to both property law and tax policy realities.[90]

The resulting similarity of treatment for all forms of concurrent ownership, including community property, effects a startling simplicity and has obvious equity advantages. In part this is because complexity and inequity, as usual, go hand in hand in this area. It is also because, in short, the case for change is based on simple realities: (a) joint tenancy and other forms of concurrent ownership are matters about which people generally, and spouses in particular, tend to be uninformed or misinformed, unwary and most unlikely to comply with the law; (b) past efforts to rationalize and simplify the tax rules have understandably failed because the basic scheme fails to reflect the realities of either family life or property law; (c) administration and enforcement by the government are at best difficult and uneven; and (d) basic equity between residents of separate property and community property states cannot be easily achieved without some change of the type suggested. In addition, it should be noted that revenue is not in issue.

5. *Employee Death Benefits*

In recent years, Congress has wisely sought both to rationalize and to lessen the special treatment of death benefits under qualified plans and other favored retirement programs. These measures, however, have not gone far enough, and in fact they have added new complexities.[91] There is no persuasive reason for these particular forms of wealth to be singled out from nonqualified arrangements, or from other ways of providing for one's family, and to be permanently exempted for estate tax purposes.[92] The considerations are actually far

90. Where tenancies by the entirety exist, however, this treatment does not correspond precisely to the realities of property law, in that the interests of the spouses are typically neither equal nor severable by unilateral action. Nevertheless, the 1969 recommendations of both the American Law Institute and the Treasury support this type of proposal, disregarding the special characteristics of tenancies by the entirety as insignificant. *See* A.L.I. PROJECT, *supra* note 52, at 12-15; TAX REFORM STUDIES, *supra* note 61, at 363, 375-76. This seems especially appropriate inasmuch as tenancy by the entirety, unlike joint tenancy, is available only to husband and wife.

91. *See, e.g.*, I.R.C. § 2039(c); Proposed Treas. Reg. §§ 20.2039-2 through -5, 44 FED. REG. 11791 (1979).

92. TAX REFORM STUDIES, *supra* note 61, at 363. This was even the view of the A.L.I. PROJECT, *supra* note 52, at 15-16. The lack of a consistent rationale in this area leads to such ironies as public employees often finding death benefits under their retirement programs not qualified for the benefits of I.R.C. § 2039(c) while their spouses' plans with corporate employers qualify; but, under state

different from what they are with the income tax, where the policies and issues essentially concern not exemption but merely when and how to tax. Simple amendments can remove this source of disparate treatment of like cases, together with the associated complexities. The topic is no doubt politically delicate, but if a 100% marital deduction were adopted, the death benefit area could be remedied with a minimum of political resistance.

6. *The Disclaimer Rule*

Section 2518 of the Internal Revenue Code was enacted in 1976 ostensibly to bring some uniformity and certainty to an area where I am prepared to agree there was a need to do so—if only the legislation had not also introduced a new definition of "qualified disclaimer" and thereby undercut simple and socially desirable prior concepts and practices. The present rule unduly restricts postmortem clean up and places an unwarranted and unrealistic demand for wills to be perfected and updated before a testator's death. Most graphically, the objectionable net effect of the new definition is to require that a seriously ill property owner see his lawyer before seeing his doctor if his family is to receive the same treatment that under our tax policies is perfectly permissible for other families through an updated will. Simple corrective measures should: (a) make it clear again, as in the past, that the timely renunciation of a general power of appointment does not constitute a release or otherwise a "transfer" of the appointive interest; and (b) remove the already amended but still inadequate subparagraph (b)(4) of the statute.[93]

If an interest or a power is disclaimed in a timely fashion, without qualification and without accepting any of its benefits, that interest or power should be treated as if it had not been created in the first place. The objectionable provision requires

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inheritance tax law, it is the former program that is favored and the latter that is disfavored. *See, e.g.*, CAL. REV. & TAX. CODE § 13880 (West 1970).

93. I.R.C. § 2518(b)(4) provides that "as a result of such refusal, the interest [must pass] without any direction on the part of the person making the disclaimer . . . either

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer."

As hastily amended in 1978, this provision exempts disclaiming spouses—subprovision (A) has that effect—from the requirement stated in what is now (B), which is actually the troublesome requirement. The terms of an anticipated regulation concerning the "without any direction" requirement's application to a spouse also will apparently undercut the intended purposes of the 1978 amendment.

virtually mistake-free drafting and regular review and updating of wills in order to respond, even on one's deathbed, to frequently overlooked changes of circumstances—all under the threat of unwanted, potentially adverse results that could have been avoided under prior law by prompt postmortem evaluation and action. The objective of the proposal here is simply to allow simple postmortem actions to do that which is not prohibited or disfavored in principle, inasmuch as the decedent with foresight—and time—could have made the same adjustments in the will. The results of timely, unconditional disclaimers should be treated just as if those results had been accomplished by the testator personally—at least so long as it is our policy generally to fix tax consequences on a basis that accepts prompt, postdeath adjustments by disclaimer. The fact that *some* results in an imperfect tax world will inevitably turn on how a taxpayer's affairs have been planned does not necessitate accepting such an outcome unnecessarily, especially without tax policy justification.

7. *The Orphans Deduction and Its Problems*

The orphans deduction was a rather civilized innovation added to our estate tax in 1976.[94] Unfortunately, however, the legislation included qualifying requirements that, with some modifications, parallel the terminable interest rule of the marital deduction.[95] There are no revenue or other policy considerations at stake to justify even the existence of detailed rules for qualification—rules that turn out to be complex, burdensome, intrusive, and treacherous, even in the planning of simple, small estates. Two reasonable and uncomplicated alternatives appear: (a) simply increase the amount of an estate that is exempt from tax based on the existence, number, and ages of qualified orphans, without regard to the disposition of the estate; or (b) if it is felt necessary to require the deductible prop-

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94. Estates of decedents dying after December 31, 1976 are allowed a limited deduction for the value of property interests included in the gross estate and passing from the decedent to a qualified child of the decedent. I.R.C. § 2057. The deduction is allowed only if the decedent has no surviving spouse and the surviving child is under the age of 21 with no known parent immediately after the decedent's death. I.R.C. § 2057(a).

95. I.R.C. 2057(c) provides, in part:

> A deduction shall be allowed under this section with respect to any interest in property passing to a minor child only to the extent that a deduction would have been allowable under section 2056(b) if such interest had passed to a surviving spouse of the decedent.

erty to pass in some qualifying form, it should be sufficient if the will makes any substantial provision for the orphan.

The importance of doing something to eliminate the gratuitously troublesome qualifying requirements can readily be illustrated in two ways. First, at a cost of staff time that must already outweigh any foreseeable revenue risks, the staff of the Joint Committee on Revenue and Taxation has attempted both initially and again in the 1978 amendments to develop rules that would make various common, wholesome forms of family trust arrangements[96] eligible for the deduction—but with a dismaying lack of success.[97] The government's overinvestment in this problem has only begun, inasmuch as the more elaborate work of writing regulations remains. Second, on the private side, the importance of this question can already be seen in the understandable and widespread overreaction of respected lawyers who are prepared to ask for repeal of the whole deduction[98] in order to remove a substantial planning and drafting problem from their clients' wills and their clients' bills. As in the marital deduction, both terminable interest problems and formula-amount complications are involved, the latter being a natural consequence of clients' desires to minimize amounts placed in an unwanted form of trust dictated by intrusive requirements. All this is required in order to deal with a situation that lawyers know is unlikely to arise but that most feel cannot ethically be ignored so long as the deduction is in the statute.

8. *Some Anticipated Problems in New Chapter 13 on Generation Skipping*

One could well make the argument, though this time I would disagree, that the problem we have come to call genera-

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96. These trusts are part of traditional planning for the possibility of young parents' simultaneous deaths.

97. One example of a pointless, no doubt unintended, deficiency in the "qualified minors' trust," *see* I.R.C. § 2057(d)(2)(A), forbids the family trust to include among its beneficiaries any child who happens to be over the age of 21 at the decedent's death. As a result, the trust cannot encompass the will provisions for *all* of the children, as would normally and properly be intended.

98. *See, e.g., Hearing on Small Business and Estate Taxation Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 2d Cong., 96th Sess. 118, 191-92 (1980) (statement of Frank S. Berall).

I am not so without hope, if a truly fresh start can be made; but if the only alternative is for the staff again to attempt to patch up an inherently defective solution to a virtually nonexistent problem, I will join with those who have already given up the faith even though I advocated this deduction in 1976 testimony before the Ways and Means Committee.

tion skipping does not warrant the complexity costs involved in attempting to deal with it. The new tax on generation-skipping transfers[99] is admittedly—and inevitably—based on an intricate, difficult-to-master set of Code provisions. Yet I personally believe it was essential, even if painful, to move in the general direction of this reform if we are to have a sound transfer tax system. In fact, I would have preferred that some of Chapter 13's more lenient provisions be omitted, for the ultimate equity, simplicity, and neutrality of the system will be enhanced if tax inducements to partially "skip" generations by the use of trusts can effectively be minimized. Unlike the carryover basis rule, under which complexity increased as one's mastery of the statute increased,[100] Chapter 13 does become easier to live with as our understanding of it improves. Unfortunately, however, it already appears that arbitrary distinctions and unduly fine lines are being drawn administratively in this area,[101] distinctions that are justified neither by the legislative language and history nor by policy considerations that are legitimate within the presently given legislative context.[102] Broad, novel legislation of this type offers, by its very nature, many opportunities for short sighted regulations or ill-conceived rulings that create inequities among similarly situated taxpayers and thus greatly complicate planning.[103]

99. I.R.C. §§ 2601-2622. Since the termination of a trust beneficiary's interest was not taxable under prior law unless he or she had a general power of appointment or was also the grantor, it was possible for a family to pay transfer taxes only once every several generations. For example, a transfer in trust for the grantor's child for life, then to his grandchild for life with remainder over to his great-grandchild would be subject to tax neither in the child's nor the grandchild's estate. The Tax Reform Act of 1976 added new Chapter 13 to the Code to diminish the tax advantages of setting up this kind of trust. *See* I.R.C. §§ 2602, 2611.

100. This might be the hallmark of an inherently defective concept.

101. For example, see Proposed Treas. Reg. § 26.2601-1, 43 FED. REG. 59849 (1978), for proposals that would stretch beyond recognition of the effective date and grandfathering provisions contained in the legislation; this seems inappropriate even to those of us who believe that the legislation was excessively generous. Another example involves anticipated regulations with respect to the so-called "grandchild exclusion." *See* note 103 *infra*.

102. Included as "context" are some of the very leniencies that I myself would have preferred to see omitted but which are law and ought now to be administratively accepted.

103. Complexity follows from planning *opportunities* as well as problems, not to mention the problems arising from overly long grace periods for preexisting but amendable instruments, conditioned on those instruments in fact remaining unchanged in relevant particulars (often a treacherous line to draw).

A couple of examples of tax saving opportunities that will complicate planners' lives are: the "income exclusion" in I.R.C. § 2613(a)(1)'s definition of "taxable distribution;" and the $250,000 per-child "grandchild exclusion" in I.R.C.

I hope proposed administrative interpretations will not continue to offend even those of us who are basically what are often called tax-policy liberals. My fears here may be exaggerated, but they are not wholly paranoid in light of some of what we have been seeing recently in regulations and rulings under Chapter 13 and other areas.[104] In *developing* the rules of the game, as distinguished from the role of *enforcing* those rules, it is important to guard against an adversary outlook in order to ensure the long-range quality of the system.

V. SOME CONCLUDING OBSERVATIONS

In its most significant sense, simplicity is not a matter of merely avoiding complicated and difficult language or concepts. It is a matter of not injecting into our personal and financial lives unnecessary controversy, complexity, distortions, or the need (or opportunity) for tedious, manipulative, and costly planning. In the property and tax law that affect my fields of interest, and almost certainly in all other areas of the law as well, both simple clean-up campaigns and more challenging, controversial law-improvement efforts are needed. They are needed in order to upgrade the quality of justice in our society and to make it possible to meet the legal service needs of all segments of the public at reasonable cost.

As must be apparent from the preceding discussion, the equity and complexity problems of estate and gift taxation are matters of great concern. Sufficient attention is simply not be-

§ 2613(b)(6). But these privileges are now a part of the statute, and it is deeply troubling to face the unwarranted complexity (also a source of potential inequity among like cases) illustrated by forthcoming administrative insistence that, in order to qualify, any trust interest of a grandchild must be so designed as to assure its inclusion in that grandchild's gross estate for *estate tax* purposes, should the child die before receiving full distribution—thus disallowing the deduction for all other interests that would nevertheless be subject to Chapter 13 on the grandchild's death. For all significant purposes, the latter interests satisfy the qualifying policies associated with the grandchild exclusion. The net result simply is that the wary lawyer will draft the grandchild's interest so as to include an otherwise pointless general testamentary power of appointment in the event of death. The unwary lawyer will fail to do so, and the client's family will lose the benefit of the grandchild exclusion that would otherwise be available. The two plans ought to be viewed as equivalent, and to do so would neither do violence to legitimate tax policies nor open up opportunities for tax avoidance.

104. In addition to the generation-skipping matters mentioned in preceding footnotes, see also the appalling example in Rev. Rul. 75-128, 1975-1 C.B. 308, involving I.R.C. § 2056. The kind of extraordinary administrative interpretations that we all should worry about can also fall excessively on the taxpayers' side of the line, *see, e.g.*, Letter Rul. 7903018, June 23, 1978 (allowing an orphan's deduction in *both* estates where the minor's parents died simultaneously).

ing given to this array of problems. Yet much could be accomplished if political expediency were put aside and a serious, dedicated, professionally-spurred effort were made to improve the details of the tax law. This should be done independently, if necessary, from the more controversial and politically significant issues of fiscal and social policy that obviously must command high priority in Congress. Nevertheless, the goals of tax reduction programs should include the "financing" of worthy permanent reforms that will improve the overall quality of the tax system—a capital investment in the system itself. Such an investment will pay dividends indefinitely in the form of reduced costs of administration by government and compliance by taxpayers, in the form of greater equity and hence reduced economic distortion in arranging the personal, financial, and testamentary affairs of taxpayers, and ultimately in the form of enhanced respect and honesty on the part of taxpayers whose behavior is fundamental to our self-assessment system.

This discussion has sought to demonstrate that purported simplification of tax or property principles will prove illusory if we do not honor the equitable objective of affording like treatment to beneficiaries who, in all relevant respects, are similarly situated. Petty or arbitrary distinctions and requirements that are irrelevant or insignificant from a policy viewpoint merely invite inequity. Moreoever, by increasing the burdens and risks of both planning and administration, these laws produce significant complexity costs that range from expensive lawyer-work to emotional distress and even badly overburdened courts. Current transfer taxes and probate and trust laws remain replete with flaws simply awaiting corrections that are or ought to be noncontroversial. Of course, other features of these fields offer opportunities for important long-run simplification and improved equity but involve serious policy questions or political difficulties.

Because any hope of solving problems of judicial workload and legal service availability depends on improvement and simplification of law and its processes, the responsibilities of the legal profession and others interested in the legal system are obvious and need to be taken seriously. Because legal service needs of clients and the productivity and competence of lawyers depend on the simplicity of our laws, so do the effective demand, supply, and cost of legal services, and therefore also the quality of justice around us. By eliminating unnecessary legal services and reducing the effort and cost associated with those that are essential, a given supply of lawyers, judges, and

legal service expenditures can go further toward meeting society's real need for legal services and timely justice.

Our profession must come to recognize the legal system itself as a prime capital asset and take seriously, as a long-run professional goal, the achievement of a sound, fair, and efficient system that is both simple to understand and, more importantly, simple for the profession and others to operate and live within.