USC Gould School of Law

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Distracted from Distraction by Distraction: Reimagining Estate Tax Reform

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The title of this symposium is "Tax Advice for the Second Obama Administration." I find myself on a panel, one of four for the day, my one discussing "estate and gift taxation." My short, simple advice to the Administration on the specific point of the gift and estate tax is to, as they say in certain parts of the country, "forget about it." The gift and estate tax has long since ceased to be a major part of any compelling policy objective – such as, to name four, raising revenue, instilling progressivity into the tax system, "backing up" the income tax, or breaking up large concentrations of wealth.[2] Two decades of reform and repeal efforts have produced scores of votes, boatloads of campaign contributions and lobbying expenditures -- and a tax more porous and limited than ever.[3] As left on life support by the Taxpayer Relief Act of 2012[4] ("TRA 2012")– the fiscal cliff "fix" bill from January 1, 2013 – the so-called death tax will now affect far fewer than one percent of decedents each year.[5] What is more, the

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[1] Robert C. Packard Trustee Chair in Law, Economics and Political Science, USC Gould School of Law, and Visiting Professor of Law and Economics, California Institute of Technology. I thank Stephan Airapetian and June Yang for excellent research assistance. The title alludes to a line from T.S. Eliot's *Burnt Norton*, part of the Four Quartets. This article is being presented at a symposium to be held at Pepperdine Law School, *Tax Advice for the Second Obama Administration*, January 18, 2013. A later version will appear in the *Pepperdine Law Review*.

[2] Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994).

[3] Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. Rev. 1159 (2006).

[4] Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 852 (2013).

[5] Paul Sullivan, *The End of a Decade of Uncertainty Over Gift and Estate Taxes* THE NEW YORK TIMES (Jan. 4, 2013) http://www.nytimes.com/2013/01/05/your-money/fiscal-deal-ends-decade-of-uncertainty-over-gift-and-estate-taxes.html?pagewanted=all&_r=1&

continuing structure of the law, with its now "permanently" unified exemption of five million dollars, indexed off a 2011 baseline, for gift, estate, and generating-skipping taxes, actually provides a perfectly handy roadmap for the creation and perpetuation of dynastic wealth: exactly the opposite effect of the best intentions behind the tax.

It is time to give up on the idea that we will ever see a meaningful tightening of the gift, estate and generation-skipping taxes, or their outright repeal.[6] It is time to stop being distracted by the gift and estate tax, or what is left of it, and to move on to address more seriously the concerns behind the tax in the first place: to face, that is, the eight hundred pound gorilla head on, as I shall anon. The gift and estate tax is now, largely, irrelevant, but its animating principles – the desires to raise revenue, insert more progression into the tax system, and back up the income tax system – are not irrelevant. Indeed, they are more pressing than ever.

The first section of this essay canvasses the recent legislative history of the estate tax, with a particular emphasis on the Taxpayer Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010[7] ("TRA 2010") and TRA 2012. The second section explains in greater detail why the gift and estate tax, especially as now constituted, cannot serve any of its compelling justifications in general, and takes a closer look at the phenomenon of "dynasty" or "perpetual" trusts in particular. The third section turns toward the eight hundred pound gorilla in the room – unrealized appreciation. Untaxed capital wealth is the key to engaging in high levels of *consumption*, not savings, completely tax-free, under what I have dubbed "Tax Planning 101," or the simple advice to buy, borrow, and die. The fourth and final section then contains my advice, and reasons for hope, by completing the circle. Without a meaningful estate tax, the principal *justification* for the stepped-up basis on death rule – one of the central pillars of Tax Planning 101 – disappears. The case for moving to a carryover basis or a realization-on-death regime strengthens. In sum, with the distraction of gift and estate tax reform/repeal on hold for the indefinite future, perhaps we can turn to potentially effective means to generate more progressivity and less concentration in wealth-holdings in America, including

[6] *See* Edward J. McCaffery, *The Dirty Little Secret of (Estate) Tax Reform*¸ Stanford Law Review Online (2012).

[7] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2011).

abandoning the long-time statutory rule of a "stepped-up" basis for assets acquired from a decedent.[8]

I. Decades of Distraction

The story of estate tax reform as it has led to the status quo can begin in many different places, but let us choose 1994, the time when the well-named Death Tax Elimination Act, H.R. 8, (initially introduced as part of H.R. 2717, The Family Heritage Preservation Act) was introduced by Representative Christopher Cox (R-Ca) into Congress.[9] Over the next six years there were several votes, culminating in Bill Clinton's veto of a bill to kill the death tax that had passed both the House and Senate, with significant Democratic support.[10] Then came George Bush, a Republican House and Senate, and near-certain repeal.[11] Only we got the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") instead.[12] This Act gradually weakened the gift and estate tax, raising its exemption levels and lowering its rates, until 2009, when the exemption was set to be $3.5 million and the rate 45%.[13]

The only technical statutory matters that really affect the analysis of this article, by the way, are the tax's rate and its exemption levels – and whether or not these exemption levels apply to lifetime gifts as well as to death-bed transfers, that is, in both the gift and estate taxes, a point that features prominently below. The exemption levels noted are per individual donor/transferor; married couples, with proper planning, can double them. Virtually all of the discussions and negotiations in and around the TRA 2012 were about exemption levels (specifically, $3.5 versus $5 million, with $5 million prevailing) and rates (specifically 35 or 45%, with 40% being the compromised answer). I am introducing the relevance of the difference between a "carryover" basis, as exists for gifts[14] (meaning that the donee takes the donor's basis, and hence any built-in gain is preserved), versus a "stepped up" basis, as we have for assets passing from a decedent,[15] (meaning that the donee/transferee's basis is the asset's fair market value, such that all built-in gain has

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[8] I.R.C. § 1014.

[9] Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. Rev. 1201-1203 (2006) (hereafter "*Shakedown*").

[10] *Id.* at 1203.

[11] *Id.* at 1207.

[12] Pub. L. No. 107-16, 115 Stat. 38 (2001)

[13] *Shakedown*.

[14] IRC Section 1015.

[15] IRC Section 1014.

disappeared for tax purposes). This issue was not on any table inside the Beltway as the nation careened towards its self-created fiscal cliff.

Back to the running narrative: in 2010 there was to be no estate tax at all under EGTRRA -- an infinite exemption, as it were -- at the "cost" of a carryover basis rather than the traditional stepped up one. EGTRRA was then set to expire after 2010, bringing, in 2011, a return to a $1 million exemption and a 55% rate for gift and estate taxes. There were many votes during the first decade of this century, but none stuck. As EGTRRA played itself out, the law seemed headed to a place considered unimaginable to many: a year without an estate tax at all. Surely, something would have to happen to prevent that extreme result from obtaining.

Only it did not. The Year 2009 saw no end-of-the year patch or fix to the situation that EGTRRA had left us in. What follows is a point that some observers of Congress and the estate tax saga fail to understand. Many interested persons concluded that a divided and highly partisan Congress simply never acts, such that, now, in 2013, we would be seeing a return to the pre EGTRRA levels of a $1 million exemption and a 55% rate – the inertial default. For such observers, what happened at the end of 2009 – that is, nothing –became the decisive proof of the pudding. But looking at things over a slightly wider lens of time, we see a different pattern. Congress does not act when tax *decreases* result from inaction. Hence, the inaction in 2009 and at the beginning of 2010. Congress does act when tax *increases* would result from inaction. Hence, the Congressional action at the end of 2010 (to create and extend the $5 million exemption and 35% rate[16] (TRA 2010)), 2011 (to renew the "payroll tax holiday"[17]), and 2012 (TRA 2012).

The particular bill from 2010 bears closer analysis. For one thing, TRA 2010 retroactively gave estates for decedents who died in 2010, like George Steinbrenner, a choice: accept the no estate tax/carryover basis regime provided for by EGTRRA, or instead chose a $5 million exemption, "portable" between spouses, and a 35% rate, with stepped-up basis. The very fact that this was a choice – not to mention that many families chose the latter, nominally taxable, option -- shows how deep the concerns over basis step up run. We get back to those below.

TRA 2010 did one more thing: it "reunified" the gift, estate, and generation-skipping exemption levels, which had been torn asunder by EGTRRA. Prior to EGTRRA and for some time, the

[16] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2011).

[17] Temporary Payroll Tax Cut Continuation Act of 2011 Pub. L. 112-78, 125 Stat. 1280 (2011)

exemption level was the same for inter vivos transfers, under the gift tax, and death-time ones, under the estate tax, as well as for generation-skipping taxes once those came into play in the Tax Reform Act of 1986.[18] EGTRRA, however, kept the gift tax exemption level at $1 million, including in its no-estate-tax year, 2010. What this meant, in practice, was that one had to die to take advantage of the higher exemption levels. It also kept alive a meaningful political threat that the estate tax could one day come back in fuller force, since the living could not use large exemption levels to whittle down their estates.

Now is as good place as any to make the general point that exemption levels under the gift and estate tax do not come down. They have not since 1935, when the exemption for both went from $50,000 to $40,000. Setting that one year aside, we could say exemption levels never come down. If we ignore the "infinity" of 2010, and count it instead as a $5 million exemption, there has been a steady increase. Figure 1 shows the history of the exemption level under the estate tax, in nominal dollars.

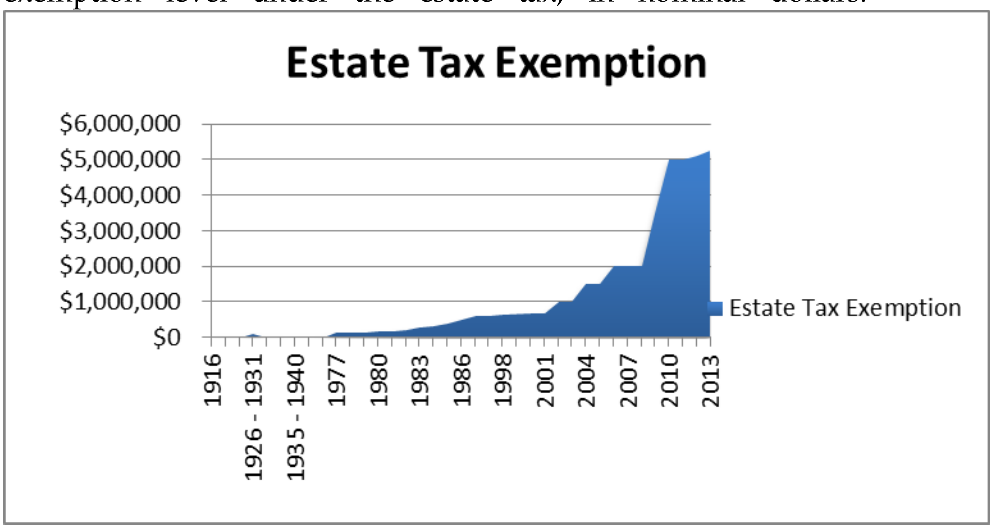

Figure 1: Estate tax exemption, 1916-2013

TRA 2010 changed the pattern established under EGTRRA. It very importantly – and rather quietly – reunified the three transfer taxes, making their exemption levels $5 million each, indexed for inflation off a 2011 baseline (thus the exemptions rose to $5,120,000 in 2012). In other words, while TRA 2010 technically continued the estate tax exemption of 2010 for another two years, with indexing, it increased *more than five-fold* the gift and

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[18] Jeffrey Rohaly, *Wealth Transfer Taxes: How do the estate, gift, and generation-skipping transfer taxes work?* TAX POLICY CENTER (updated June, 2011) http://www.taxpolicycenter.org/briefing-book/key-elements/estate/what-is.cfm.

generation-skipping exemptions. Figure 2 shows the estate and gift tax exemption levels since 1976. Note the gap between the two, evident since 2006, and closed – at the estate tax's higher level – in 2011.

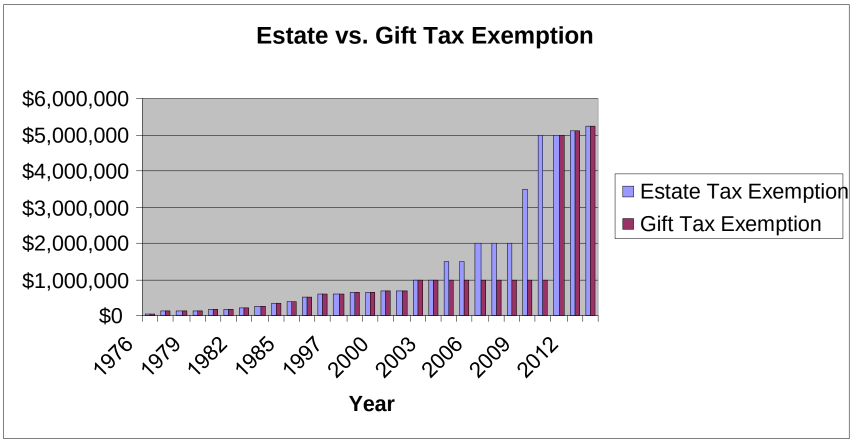

Figure 2: Gift and estate tax exemptions 1976-present

This was a very big deal, and suggests another major lobbying force had entered the room: the dynasty trust crowd. "Dynasty" or "perpetual trusts" are one of the great unintended consequences of all time in tax law, which is saying quite a bit. They sprung into life after the Tax Reform Act of 1986 finally shut down a "loophole" in the transfer tax system. Gift and estate taxes apply to beneficent transfers. Normally, these go from parent, Generation 1, to child, Generation 2. At some point thereafter, Generation 2 faces its estate planning issues, and passes some wealth along to Generation 3, and so on. The gift and estate tax stands ready at each transfer to come down on large transmissions. But truly wealthy families can afford to "skip" generations. Thus grandparents, in Generation 1, can pass wealth onto grandchildren, in Generation 3, "skipping" the need to pay taxes at Generation 2. Estate planners, being a clever breed, devised ways to make these transfers in trust, with Generation 2 having limited but significant access – the family getting their cake and eating it, too. The Tax Reform Act of 1986 added a "generation-skipping tax" to stop the perceived abuse, such that transfers from Generation 1 to Generation 3 or lower would bear a double transfer tax.

Only there was an exemption level for generation-skipping taxes, too, initially set at $1 million per transferor. And this exemption provided a roadmap: a couple would place $2 million or more (with "fractional share discounts" and other valuation techniques to be discussed below) into a generation-skipping tax-exempt trust, never to pay transfer tax. The next question for many wealthy families and their advisors was, How long could such trusts last? The initial answer was for as long as the rule against perpetuities allows. But this answer was considered unsatisfactory for the enlightened, and so the next step was to eliminate the rule against perpetuities in many jurisdictions, provided that the assets be placed in trust, that the trustee have the power to dispose of particular assets – and, usually, that the trustee be local. Because private individuals can choose any state law to govern their private contracts or trusts, wealthy individuals in New York, California, Illinois and the like were soon flocking to dynasty or perpetual trusts in faraway places such as Delaware, Alaska, and South Dakota. By 2004, one study suggested that there were $100 billion in dynasty trusts, mainly in South Dakota. Today, South Dakota, with a large presence of Citibank, is the state with the highest banking deposits. Not coincidentally, Senator Tim Johnson, a Democrat from South Dakota, is chairman of the Senate Banking Committee.

Dynasty Trusts and the financiers who run them – as well as insurance companies, who often sell "second to die" life insurance policies on wealthy married couples as the (highly income tax favored) asset to be held in dynasty trusts, were huge winners from TRA 2010. Instead of being able to put down $2 million for a dynasty trust or insurance policy, it appeared – perhaps for two years only! – that the same couple could now lay down $10 million. Anecdotal evidence shared with this author suggests that, for major banks and trust companies, the number of dynasty trusts created in 2012 more than quadrupled.

In any event, all that had come before set the stage for the "fiscal cliff" slated for January 1, 2013, when EGTRAA, which had been extended by TRA 2010 for two years, and other tax provisions was set to expire. Insofar as the estate tax was concerned, the law as written meant a return to the $1 million exemption and 55% rate of pre EGTRRA times. Some practitioners, aided by the media, stirred up fears that this would indeed happen, leading to aggressive planning under the large gift-tax exemption in place for 2012. This was precisely the situation that could *not* obtain under the initial ten EGTRRA years, because the gift tax exemption had stayed frozen at $1 million.

But, in point of fact, a full return to Year 2000 levels never seemed to be in the cards. President Obama, as he had in his 2008 platform, consistently staked out a position at a $3.5 million exemption and a 45% rate – the 2009 status quo. In December 2012, Obama reiterated his stance, and commentators "scored" the proposal as raising $119 billion over ten years, from the 2012 baseline. The *next day*, however, Senator Max Baucus, the *Democratic chair of the Senate Finance Committee*, came out in dissent, supporting a perpetuation of the status quo – a $5 million exemption, indexed off 2011, and a 35% rate. And it appears that is what would have happened, with a late leak suggesting that there was a deal brokered by Vice President Biden and Senator Mitch McConnell (R-Ky) at a $5 million exemption and 35% rate. The same purported deal featured a return to the top pre-EGTRRA marginal *income* tax rate of 39.6% for individuals/married couples earning more than $400,000/$450,000. At this point Senator Tom Harkin (D-Ia), objecting from the left, took to the floor of the Senate and stated that the purported deal was too much of a give-away to the rich, with its $400,000/$450,000 floor on tax rate increases for singles and married couples, and its $5 million, 35% rate on estates: more specifically, that he could accept one, but not both, of these levels. The next the public heard, the deal was struck with the Senate overwhelmingly approving TRA 2012 with a triple-transfer-tax exemption of $5 million, and a rate of 40% (and the income tax rate levels as leaked). Senator Harkin was among the 8 Senators voting "no." "Moderate Democrats from farm states" were credited in the press with insisting that the exemption levels remain unified and indexed for inflation – with South Dakota and Montana possibly counting as "farm states."

At the end of the day, the raise in the gift and estate tax rate to 40% was "scored" as a tax increase of $19 billion over 10 years, which is a little hard to believe, given that the Tax Policy Center has estimated that the estate tax will bring in $10.6 billion in 2011, with essentially the same law in place as in 2013, with the exception of the 40% rate. As time goes by, the very large gift and generation-skipping exemptions have the capacity to greatly shrink the estate tax's base. Meantime, to put the $19 billion over ten years in perspective, the expiration of the 2% payroll tax holiday is said to bring in $100 billion – *a year*.

II. Unintended Consequences: The Estate Tax and Dynastic Wealth

It is hard to overstate the extent to which the generous exemption levels and the other rules and practicalities of the estate tax have led to its practical evisceration. It was in 1979, after all, that George Cooper published his classic study of the wealth transfer tax system, *A Voluntary Tax, New Perspectives on Sophisticated Estate Tax Avoidance.*[19] Cooper based his book on studies and interviews mainly performed before the Tax Reform

[19] George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, Brookings, 1979.

Act of 1976 took effect, such that the exemption level was $60,000 and the highest rate 70%. As I have written elsewhere, Cooper's main point – namely, that those wealthy families, like the DuPonts, who were so motivated could largely avoid the estate tax altogether -- has remained true.[20] My own analysis on that point was published in 2000, before the higher exemption levels and lower rates of EGTRRA had come into place.

Today**,** estate planning practitioners use vehicles and techniques such as grantor retained annuity trusts (GRATs), family limited partnerships (FLPs), fractional share discounts, insurance and charitable trusts, and more to plan around the tax. A particularly attractive device of late, using the current high gift tax exemption levels combined with historically low interest rates on intra-family transactions – the "applicable federal rate" ("AFR") that families can use for loans among themselves has for some time been under 1% for loans up to nine years in duration, and has dropped as low as 0.22% for loans up to three years -- has been what is called a sale to an "intentionally defective grantor trust" ("IDGT"). Mitt Romney rather famously used this device and, even as he sits on a personal fortune estimated by *Forbes* to be $250 million, his five children have trusts with an aggregate value of $100 million, all presumably put in place with little or no transfer taxes having been paid. The technique bears explaining, if only for illustrative purposes.

An individual, as the grantor, sets up a trust for his children that is irrevocable for gift tax purposes but, essentially, ignored for income tax ones because of a deliberate "defect" in the trust's terms, generally involving the retention of some power or control. Just as with the dynasty trusts discussed above, the "intentionally defective trust" strategy is a story of unintended consequences. In the 1970s, with high and highly variable income tax rates, "income shifting" within the family became an attractive game. It was better for Junior, in his low bracket, to be responsible for income tax, rather than the Seniors, in their high one. This gave an incentive for Seniors to give wealth to their children and have the children pay tax on its yield. The rub was that many parents, perhaps having read *King Lear*, were fearful of what might happen if they simply gave their kids the keys to the empire. Such parents would then set up trusts for their minor children, having the trust pay the income to the kids -- whose guardian, that is, the parent, would then collect the income and use it for the kids' needs, like medical and educational expenses, which the parent would have paid anyway. To avoid the *King Lear* problem, the grantor would

[20] Edward J. McCaffery, A Voluntary Tax, Revisited, 2000, National Tax Ass'n Proceedings and SSRN.

provide that the trust would terminate, and come back to him, after, say, eighteen years.

The IRS did not like the tax reduction that resulted from this particular game, and so they enacted rules that shut the technique down. For *income tax* purposes, such trusts would continue to be responsibility of the grantor, parent, in his or her high tax bracket. Such trusts were deemed "defective." But, for *gift* tax purposes, the trust was deemed to be a completed gift. These rules meant a double whammy for the client of the 1970s – he would be denied his income tax shift and hit with a gift tax, to boot.

Alas, the punishment has turned into a blessing for taxpayers. Clients now "intentionally" create such defective trusts. They then transfer some cash into them. Then they use the cash as a ten percent down-payment on a sale of some valuable family asset. The remaining, ninety percent, balance is paid with a note, at the low AFR. Because the trust is ignored for income tax purposes – it is defective, after all – there is no gain recognized on the sale. The grantor continues to pay income tax on the gains of the trust, which is a further gift-tax free benefit to the next generation(s).

Now let us add some numbers, using the gift tax exemption levels from 2011-2012. A husband and wife transfer $10 million into an IDGT for their children. The IDGT then buys an asset from the parents using the $10 million cash, down, and a note for $90 million, interest only for nine years, at an interest rate under 1%. Now the IDGT holds an asset or business valued at $100 million, and must make interest payments – income tax-free, by the way – of under $1 million a year. And in fact the asset or business is almost certainly worth more than $100 million, because the taxpayer/client controls the valuation in the first instance, and well-tested methods such as "fractional share discounts" routinely reduce the value of assets for gift and estate tax purposes. Martin Sullivan has estimated that one half to two thirds of all value for taxable estates escapes the base because of these strategies alone.[21] Imagine that the IDGT really holds an asset worth $200 million. Now if that asset grows at a rate of 5% a year, the IDGT is growing by a net $9 million -- $10 million appreciation minus $1 million interest – all income-tax free to the IDGT. After ten years, the IDGT has grown by nearly $90 million, to a real value of $290 million. It pays off the $90 million note, and the children now have a trust, transfer-tax free, with a value of $200 million. Such results – and more – can be achieved with a $10 million exemption. By the way, the generation-skipping tax exemption can and is routinely applied to IDGTs, and the $10 million "seed"

[21] Martin Sullivan, For Richest Americans, Two-Thirds of Wealth Escapes Estate Tax. TAX NOTES 87:328-33 (2000).

money can easily purchase a single-premium, second-to-die life insurance policy, leaving the income-tax-free investing to others, and lying in wait until a South Dakota dynasty trust holding say $100 million, cash, comes into full bloom.

Estate planning blew up in 2012. Clients, motivated by the carrot of a $5.12 million per donor gift tax exemption, and the stick of the return of a $1 million exemption and 55% rate, rushed to make non-taxable gifts by year end. A big winner, as intimated above, were dynasty trusts.

Let us return to the four possible goals for estate taxation noted above: raising revenue, instilling progressivity into the tax system, "backing up" the income tax, and breaking up large concentrations of wealth. The estate tax, such as it now stands, post TRA 2012, would seem to be 0 for 4 on these policy objectives.

It never has, and certainly will not now, raise much revenue. The Tax Policy Center has estimated that the 2011 estate tax – for which the current law exemption of $5 million was in place, and the rate was 35% -- resulted in fewer than 3500 taxable estate tax returns and less than $11 billion in revenue. This is less than 1% of the annual *deficit*, and a rather trivial collection effort in gross. Recall that allowing the payroll tax rate to go up by 2% in absolute terms, applying to earned income (wages) for individuals up to around $120,000, is estimated to bring in an additional $100 billion a year of revenue. And the case that the tax *loses* revenue, on balance, is more compelling than ever, given the significant income tax savings from various insurance and charitable trusts -- not to mention the losses from the stepped-up basis for assets acquired on death rule, to which I shall return, and which can plausibly be thought of as part of the broader transfer tax regime.

The tax will now apply to something like 0.3% of decedents each year. By their nature these are wealthy people, some of whom simply did not care to plan around the tax, or who were surprised by an early death. For many who do pay the tax, the true effective rate will be one-half or less of the stated rate of 40%, itself historically low. And it bears noting that an effective rate of 20% is less than the capital gains rate of 23.8% -- and capital gains disappear in the hands of heirs under current law. Indeed, specifically in terms of the "backing up the income tax" rationale, note that the 99.7% of decedents who will not pay an estate tax will still be fully able to pass along stepped-up basis to their heirs. If we take the stepped-up basis rule as a central component of our wealth transfer tax system – as logic as well as financial economics suggest we ought – then that tax system is only "backing up" the income tax in the ironic sense that it is central to the tax system's *failure* to tax wealth, or those who live off of wealth, as the next section explores.

Finally, as far as breaking up large concentrations of wealth, the discussion above, on dynasty trusts, suggest that the law, as is, may be creating and exacerbating that problem on a very big scale.

The gift and estate tax, in other words, is essentially dead. Its sole remaining purpose seems to be as an inducement for extremely wealthy families to plan ahead to set up dynastic and other forms of trust. It is no longer the answer to any compelling question.

III. The Gorilla in the Room

There is a deep irony that grows out of the analysis thus far. The Year 2010's ultimately optional no estate tax/carryover basis regime, as provided for by EGTRRA, is *worse* for most wealthy individuals and families – and hence better for revenue-raising and the other compelling goals for the law here -- than the current law's combination of a $5 million and a 40% rate with a stepped up basis. What TRA 2010 and 2012 did, in addition to raising the exemption level, indexing it "permanently," keeping rates low, and reunifying the gift, estate, and generation-skipping taxes, was to maintain stepped up basis as a seemingly "sacred cow" in the statute. We have now seen, first under Jimmy Carter, now under EGTRRA, two attempts at a carryover basis regime for assets passed at death – and both were, essentially, retroactively repealed.

The stepped-up basis rule of IRC Section 1014 provides the last step in what I have dubbed Tax Planning 101, the advice to buy/borrow/die.[22] In Step One, an individual buys an asset, such as real estate or growth stocks, which rises in value without producing a taxable cash income stream, taking advantage of the realization requirement of *Eisner v. Macomber*. In Step Two, the taxpayer borrows – income-tax free, by virtue of the basic structure of an income tax – to finance her lifestyle. In Step Three, she dies, passing the assets – and debt – along to her heirs. The assets are acquired by the heirs tax-free, under IRC Section 102, and with a fully stepped up basis, under IRC Section 1014. They can now be sold tax-free and the debts paid off.

Played right, Tax Planning 101 means no federal taxes – no payroll tax, because the player does not "work" in a traditional

[22] Edward J. McCaffery, A new Understanding of Tax, Michigan law Review (2005); Edward J. McCaffery, *Oxford Introductions to US Law: Income Tax law* (Oxford University Press 2012).

sense; no income tax, for the convergence of income tax rules just noted; and no gift or estate tax, because the estate tax is a net tax, on assets minus liabilities held at death, and, properly played and planned, Tax Planning 101 does not leave a large enough net estate on any deathbed to generate tax. The essential elements of Tax Planning 101 have been in place for nearly 100 years, and have never seriously been challenged. This leaves unrealized appreciation as the "800 hundred pound gorilla" in the room, a major item of theoretical "income" left altogether out of the tax base – and out of virtually all contemporary discussions of "base broadening" and loophole closing, such as in the repeated calls to limit personal deductions under the income tax (meaning, mainly, the deductions for home mortgage interest, employer-provided health care, charitable contributions and pension plans).[23] Unlike these classic tax expenditures, which largely affect wage-earners, the non-taxation of unrealized appreciation affects – in a highly beneficial manner – those wealthy individuals who live off financial capital, not traditional "work."

By buying capital assets that appreciate without producing taxable dividends, borrowing to finance present consumption, and continuing the game straight onto death, the rich can avoid all federal taxes. Warren Buffet, Bill Gates, and countless others among the rich and famous have figured this all out, perfectly well. Tax Planning 101 means no taxes, notwithstanding a comfortable lifestyle for those with the assets in hand to play it: Those, that is, who live on the capital side of the capital-labor divide.[24] There are two pieces of critically important advice here. The first is to buy assets rather than getting paid wages: that is, to get on the capital side of the capital-labor divide. This is because wages are taxed. The second is to save in a form that avoids current taxation. "Ordinary" savings, such as those kept in a simple bank account, fall smack into the double-tax sting of the income tax. By buying assets that rise in value without triggering taxable gains — real estate works pretty well here — one gets to grow wealthy without taxation. This is Robert Kioyasaki's Rich Dad's "rule no. 1," the "only rule." It leads people to invest in, and the economy to provide, non-cash-producing assets, such as real

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[23] Jesse Drucker, *Buffett-Ducking Billionaires Avoid Reporting Cash Gains to IRS*, BLOOMBERG (Nov. 20, 2011, 9:01 PM), http://www.bloomberg.com/news/2011-11-21/billionaires-duck-buffett-17-tax-target-avoiding-reporting-cash-to-irs.html.

[24] EDWARD MCCAFFERY, OXFORD INTRODUCTION TO U.S. LAW: INCOME TAX LAW (2011). Further information about Buy, Borrow, and Die can be found in ROBERT KIYOSAKI (WITH SHARON LECHTER), RICH DAD/POOR DAD: WHAT THE RICH TEACH THEIR KIDS ABOUT MONEY — THAT THE POOR AND MIDDLE CLASS DO NOT! (New York: Warner 1997).

estate and Internet stocks: two asset classes prone to spectacular bubbles. The somewhat obscure debate over "carried interest" by hedge fund managers and private equity investors is all about the attempt by these highly compensated individuals to argue that their remuneration is "capital" — taxed at favorable capital gains rates when it is taxed at all.

Here is the silver lining in the practical death of the gift and estate tax: it removes the principal, and best, reason to maintain the stepped-up basis rule. With far fewer than 1% of decedents even paying an estate tax, the case for allowing the game of unrealized appreciation to move from one of deferral to one of escape – as Section 1014 allows it to do – is precarious at best. Canada has gone to a rule of capital gains on death – making death a realization event. This deserves consideration in America, as well. Short of that, a systematic repeal of Section 1014 and a master rule of carryover basis as provided for gifts under Section 1015 would widen the tax base by bringing in previously untaxed capital appreciation. So it would raise revenue. Joseph Dodge and Jay Soled have suggested that the problem of overstating basis – taxpayers simply listing an incorrectly high basis in their sold assets – costs the US government $25 billion a year, and possibly more.[25] Without the burden of a meaningful estate tax to audit and administer, the IRS can devote additional resources to monitoring the problem of over and mis-stated basis. A clear statutory presumption that basis shall be 0 unless the taxpayer can produce adequate records – a serious substantiation requirement, such as we now have for travel and entertainment expense deductions under the income tax – could also help.

Either a realization-on-death or a consistent carryover basis rule, while not being an ideal solution, would at least practically advance the four goals of tax policy mentioned throughout this article. It would raise revenue, by broadening the base. It would "back up" the income tax by assuring that appreciation is at least sometime taxed. It would also insert more progressivity into the system and at least help to break up large concentrations of wealth by getting those who live off financial wealth to sometime, somehow, pay some taxes. Either rule (especially the capital gains at death rule) would also undercut the "lock in" effect, whereby many wealthy families hold onto assets until death in order to get the stepped-up basis – a problem that almost certainly will be growing worse under TRA 2012, as few

[25] Joseph M. Dodge and Jay A. Soled, *Inflated Tax Basis and the Quarter-Trillion-Dollar Revenue Question*, TAX ANALYSTS (Jan. 24, 2005), http://www.taxanalysts.com/www/freefiles.nsf/Files/106TN0453.pdf/$file/106TN0453.pdf.

families face any real pressure to make lifetime transfers to avoid the estate tax, the capital gains tax rate has increased significantly – and stepped up basis remains. The short story of TRA 2012, as with some many acts including TRA 1986, is that the wealthy (as opposed to the high income) win. Truly principled tax policy requires rethinking that.

IV. Conclusions, Advice and the Curious Case for Hope

Here then is my simple advice to the second Obama Administration in regard to the gift and estate tax: Forget about it. The tax, which was quite possibly never a good idea, has ceased to play any real meaningful role in meeting any compelling goal for tax policy, such as raising revenue, breaking up concentrations of wealth, increasing the progressivity of the tax system, and "backing up" the income tax. These goals can only plausibly be met by attacking the planks in Tax Planning 101, individually or all at once.

I continue to believe, as I have written for years, that the best, most systematic way to achieve these goals is to move the current "income" tax, in fact a hybrid of income and consumption tax elements, into a consistent progressive consumption or (equivalently) a cash-flow spending tax. Such a comprehensive solution shuts down Tax Planning 101 primarily by including debt-financed consumption in the tax basis, renders the realization requirement (and all issues of tax law "basis") moot, and lays the foundation for greater progressivity in the rate structure.[26] But if it is politically impracticable to go that far, and if there is no commitment to abrogating the realization requirement or systematically rethinking the taxation of debt, than the best available option is to attack the "die" step in buy/borrow/die, with either a capital gains/realization-on-death rule, in the manner of Canada, or a straight repeal of IRC Section 1014, leaving a carryover basis regime for all gratuitous transfers, in life or on death. Combined with a clear presumption of zero basis unless rebutted by taxpayer records, and a serious commitment to tracking and auditing all questions of basis, such a change might, indeed, meet some of the goals motivating the failed near-century long estate tax experiment. Out of the ashes of the death tax's demise, it just may be that hope springs.

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[26] Edward J. McCaffery, *Fair Not Flat: How To Make the Tax System Better and Simpler* (University of Chicago Press, 2002); Edward J. McCaffery and James R. Hines, *The Last Best Hope for Progressivity in Tax*, Southern California Law Review 2010.