of this, which would change the estimated percentage reduction in contributions to about 13 percent.

Clotfelter also has made some recent calculations for the effects of varying assumed tax changes on charitable giving.[62] One of the changes he analyzed was the elimination of the capital gains exemption for donated assets, for which he estimated a fall in contributions slightly below $1.0 billion in 1983. This compares favorably with Lindsey's estimate for 1986. Otherwise, Clotfelter made simulations for two flat-tax plans that could be considered somewhat similar to the 1986 act. In one of these, he assumed a flat-rate tax of 20.7 percent on all adjusted gross income for everyone (including on 40 percent of capital gains), but with the appreciated part of capital gains in gifts exempted. This resulted in a predicted decrease in contributions of 10.0 percent. The other plan would have taxed all income including all capital gains (including, presumably, those in donated assets) at a flat rate of 13.6 percent. This resulted in a predicted drop of 20.4 percent in donations.

Given that Clotfelter's first flat-rate plan is somewhat closer to the 1986 act than the second one, it would appear that his figures are quite consistent with Lindsey's estimate of 13 percent. Time will tell whether this is close to the mark or not.

If a fall in charitable contributions of this magnitude should take place, the question remains as to whether contributions to the social services will be similar to the average. Clotfelter admits that very little work has been done on the effects of the tax laws on different classes of charitable giving, although evidence presented by him seems to suggest that social service contributions are not very different from the average for the whole category.[63] If the fall in contributions to social services does turn out to be in the neighborhood of 13 percent, this will fall heavily on a sector already burdened by cuts in federal expenditures in the past several years.

62. Clotfelter 1985, 120–28.
63. Clotfelter 1985, 278 and 107.

CHAPTER 8

Taxation and Liberty

All that makes existence valuable to any one, depends on the enforcement of restraints upon the actions of other people.

As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself. . . .

—John Stuart Mill, *On Liberty*, 1859

The most compelling aspect of the socialist criticism of economic liberalism lies . . . not in any aspect of the market mechanism but in the imperfections from the standpoint of justice of the initial allocation of resources.

—John Gray, *Liberalism*, 1986

Only the state obtains its revenue by coercion, threatening dire penalties should the income not be forthcoming. That coercion is known as "taxation," although in less regulated epochs it was often known as "tribute." Taxation is theft, purely and simply. . . .

—Murray Rothbard, *The Ethics of Liberty*, 1982

Liberalism . . . is the supreme form of generosity; it is the right which a majority concedes to minorities and hence it is the noblest cry that has ever resounded on this planet. It announces the determination to share existence with the enemy; more than that, with an enemy which is weak.

—José Ortega y Gasset, *The Revolt of the Masses*, 1932

Few would deny the central importance that individual freedom has occupied as a dimension of human existence. In explicit form, this is especially true in Western political philosophy since the seventeenth century, but surely considerations of human freedom have been of at least some importance since the time that humans began to reason about their social relationships. This being so, it is remarkable that the subject of freedom has been given so little attention by the tax writers, taxation being one of the key social institutions

that involves coercion. One sometimes finds mention of the liberty-taxation relationship in the writing of the social philosophers, especially libertarian ones, but seldom in the work of the tax experts themselves.

One putative rationale for this neglect runs something like the following: In doing technical analysis of taxation, it is reasonable to assume and take for granted a certain institutional framework for the tax policies we discuss. To be sure, this is a reasonable enough line of argument. Taxation is a complex subject, much of it highly technically sophisticated. There is only so much that tax experts can be expected to do. The method of science is simplification, which, among other things, often means holding the institutional framework for analysis in the social sciences ceteris paribus. This can be compared to not requiring a critic of a theatrical production to include discussion of the proscenium arch and physical layout of the stage of the theater in which a play is presented. While the physical characteristics of the theater are an important part of a dramatic production, they can be assumed to exist without further discussion.

Reasonable as this argument is, it is not without pitfalls. As was discussed in chapter 1, a central theme of this book is that no important ethical dimension of our social existence can be neglected in tax analysis without introducing value biases. It is only too obvious how freedom arguments may affect any complete analysis of taxation, as taxation and freedom arguments are both important concerns in the area of property rights. This is particularly true with respect to the matter of inheritance and the accumulation of wealth, and one could easily suspect that there are strong but unspoken value beliefs about property right freedoms behind the curious fact, pointed out by many writers, that economists have systematically neglected the study of wealth and its transfer, including, in particular, the role of taxation in the wealth transfer process.[1] Rather than neglect one entire ethical dimension of demonstrable relevance to taxation, it will be far better to hold it up to scrutiny directly, which is the task of this chapter.

It is not an easy task. The concept of freedom is deceptive. At first glance it seems simple enough—freedom means being given "your own space" where nobody else is allowed to enter. But closer examination brings the realization that it is not difficult to imagine circumstances in which conflict arises between one's own space and the space reserved to others. And there are great differences of opinion concerning what ought to be in one's individual space to begin with. Even a clear explication of the basic issues required for understanding the concept of freedom is not easy.

Fortunately, our task here is not to give a thorough review of the philosophical literature concerning liberty, but the more restricted one of relating

1. See chap. 4, n. 35.

liberty to the study of taxation. The central thrust of our interest will be the relationship of liberty ideas to concepts of private property, and especially the distribution of it through time. There is also some relevance of liberty ideas to the legitimacy of taxation as an institution per se, although this is only a minor element in the larger discussion. The space is not available for dealing with some of the more fascinating aspects of the historical literature, although some of these will be treated in passing. A lively and informative discussion has taken place among philosophers dealing with freedom issues over the past two or three decades.

This chapter has three substantive sections. The first deals with the fundamental issues, the second with libertarianism, and the third with the treatment of wealth and inheritance.

The Dimensions of Freedom

The Boundaries of Freedom

Positive and Negative Freedoms

The quotation at the head of this chapter taken from Mill's classic essay goes far toward providing a statement of both the ideal and the fundamental conflict involved with the idea of human freedom. An important quality of a happy existence, perhaps the most important quality, is to be allowed to do what one wishes to do. This is not always possible because sometimes one wishes to do things that affect the actions of others prejudicially (thus adversely affecting what they wish to do), and then there is a need for some higher authority to intervene. But only then. And the state (or higher authority) must never intervene when a person's conduct "affects the interests of no people besides himself," as contemporary teenagers might put it, when a person's actions are "completely within his own space."[2] In any event, the restraints imposed by the state must be designed to impinge on the sum total of individual liberties as little as possible.

The privilege of being allowed to operate freely within a stipulated space has come to be known among social philosophers as enjoying *negative freedom,* meaning the freedom to not be interfered with. (The term *negative* refers only to this noninterference and should not be taken as a value judgment.) These are the freedoms that have been of paramount importance to the classical liberals down through the years. They include guarantees such as those in the U.S. Bill of Rights—freedom of religion, speech, assembly—as well as the freedom to move, to choose one's own occupation, etc. For tax analysis,

2. While it is true that the term *space* is important in current teenage slang, it is sometimes used more formally by philosophers in exactly the way it is being used here.

the right to retain title to private property is a negative freedom that requires special attention, but taxes, being coercive, can seriously affect any number of the negative freedoms.

While the basic idea of freedom is straightforward enough, operationalizing it to the complex world of day-to-day affairs is as difficult as the basic freedom concept is simple. Much of the difficulty comes when an attempt is made to specify the precise boundary between a person's own space and the space of others. The requirement is to define what is meant by the word *prejudicially* in Mill's statement. Exactly what conditions are required for a person's actions to be prejudicial to the interests of others? There are two aspects of this question, reflecting the fact that there are always two actors involved in any freedom discussion. The first has to do with what people are allowed to do and the second deals with the quality of the actions that are defined as being prejudicial to a person's interests. As we discuss alternative boundary specifications from these two perspectives, we will be able to define the characteristics of the two important concepts of liberty: negative, as just defined, and positive, which deals with the ability of individuals to fully explore lifetime opportunities.[3] We should also gain an understanding of two fundamental world views concerning the relationship between the individual and society. They are world views varying from a live-and-let-live philosophy, on one hand, to one that approves of intervention into social affairs under some circumstances on the other.

Allowable Actions

That people are to be allowed, in advance, some kinds of actions without threat of hindrance is central to the freedom idea. The important difference in ethical outlook with respect to allowable actions can be viewed as a matter of perspective, including time perspective. Those who would stress only negative liberty tend to move in the world of today, accepting things as they are, implicitly, if not explicitly, approving of the institutional arrangements that have brought people to the status they currently enjoy (or do not enjoy). Here is a person, John Jones, as we find him today. He owns so much property, has a religious preference, values the health of himself and the members of his family, enjoys certain friendships, wishes to express his own ideas, etc. What is important is that he not be hindered from doing these things unless they are demonstrably harmful (perhaps quite harmful) to others. He should be allowed to keep his property, be free of physical violence, practice the religion of his choice, state his own mind, etc. So long as this situation exists, no social intervention is needed. If we find these conditions being violated, only then will corrective action need to be taken. Negative libertarians have a

3. The negative-positive freedom distinction owes its origin to a lecture given by Isaiah Berlin at Oxford University in 1958. See Berlin 1969, 118–72.

reactive view of liberty: it is only when guaranteed rights are being actively violated, that action is necessary. The state then reacts. And the stress is laid on what is happening now; it is the status of a person at a given time that matters, not so much what happens over time.

People who stress the positive liberty idea tend to take a longer-term view of social existence. Thus many social commentators complain that the negative libertarian takes far too narrow a view of what a person is allowed to do. Suppose a person finds herself in great poverty, or in great ignorance because she received no education for reasons beyond her control, or who is quite ill, or is incapacitated through the need to bear and care for children. Is it not true that such people are so limited in the range of actions that they can take that even generous quantities of negative freedom will be of little use to them? What is necessary for human freedom, such people claim, is that people be given a reasonable range of opportunities for implementing a life plan in which they will achieve meaningful self-realization. Only after this has been accomplished will all people be free to enjoy the guarantees of the rights that the negative libertarian would wish them to have. This is the fundamental idea behind the concept of positive freedom.

While there is no denying the noble quality of the positive libertarians' cry for self-actualization and choice among meaningful alternatives, there are potential dangers to the approach. If social institutions are to be engineered to expand the life choices of previously disadvantaged people, it seems likely that important negative liberty guarantees of other people will be violated. In extreme form, we have the history of the Eastern socialist societies (before 1989) as ample evidence. But, even in Western societies, there are few "affirmative action" type programs in which one cannot find some loss of freedom by the nondisadvantaged, however mild. Isaiah Berlin writes eloquently about the possible danger that allowing one person to achieve "self-mastery" or "self-realization" may result in his becoming a dictator over others.[4] And there exists an education-information problem with the positive freedom idea that seems to be intractable. This involves the apparent need to sometimes "educate" an ignorant person as to life choices. But before he is so "educated," no one has any way of knowing whether the person will be grateful or resentful if society (the government) decides to coerce him into receiving the education. Does the chance of greater "freedom" justify the coercion, and what if, after being coerced, we learn that the person is resentful rather than grateful?[5]

We have gotten into the domain of harmful action, the subject of the next

4. Berlin 1969, 166.

5. Again, see the eloquence of Berlin 1969, 133–34; 139–40.

As Berlin and others have also pointed out, perhaps an even greater problem exists when governments deny knowledge on grounds of positive liberty justifications; viz., the propaganda-like education in almost all totalitarian regimes. Also, see Kiesling 1983, 422ff.

section, ahead of time, although it is difficult to avoid doing this. Let us return, however, to the issue at hand and ask whether we can visualize allowable actions using the positive freedom justification. The answer to this question depends, as do so many ethical questions, on balancing against each other varying ethical goals and so resolving ethical conflict. The satisfaction of positive freedoms (and negative ones) will usually come only at the cost of moving farther away from other social goals, including those having to do with the freedoms. If it is felt that the benefits of reaching positive freedom goals outweigh the costs, the actions become allowable.[6] This point becomes even more relevant in the discussion of harmful actions, which we turn to now.

Harmful Actions

We can reach for a more definite understanding of the freedom dimension when we turn our attention to the nature of actions that are to be considered harmful. Unfortunately, the "understanding" involved largely amounts to an awareness of difficulties, as finding definitions of *harmful* that are precise and unexceptionable is a frustrating task indeed. Whenever we settle on a definition, we find that, because of the trade-offs just mentioned, the definition itself needs further definition, and so on, a process that presumably would not stop until a resolution were given in advance for all possible scenarios, an impossible task.

Beginning with the negative freedom perspective, a good understanding of the basic issues, and the difficulties involved, can be had from examination of the arguments used by John Stuart Mill in his classic essay "On Liberty."[7] Central to his conceptualization was the statement that the only cause for which anyone ever has the right to harm anyone else is the right of self-protection.[8] Good as that sounds, it launches us immediately into the need for further definitions. What is harm? What is self-protection? Is the key element in both definitions to be actual physical harm? This would be a reasonably precise notion, but it leaves hanging any number of situations that most people would rather have resolved. For example, what if the person in the house next door turns up the radio so loud that I find it almost impossible to concentrate on the book I am reading (or much of anything else), even though there is no

6. This is recognizable as a position taken from ethical pluralism, which denies the existence of some values that take precedence over all others. Philosophers such as Rawls, who take deontological positions, would disagree, but I think it safe to say that most (virtually all) social scientists reject such absolutist thinking. See chap. 2 and the passages cited earlier from Berlin's *Four Essays*, which are in effect rather eloquent defenses of the pluralistic approach. See also Gordon 1980, 41–49.

7. Mill, 1912.

8. Mill 1912, 15.

actual damage to my eardrums. There is no physical harm, but many would think that my freedom to concentrate is more important than my neighbor's freedom to listen to extra-loud music. What if a band of religious fanatics sets up a loudspeaker and preaches loudly across from my church (whose members' beliefs are far different) as people are leaving after Sunday services? Or what if a person tells my boss a lie that keeps me from being promoted? Countless such examples can be found to show that the actual physical harm criterion is very narrow indeed.

Elsewhere in his essay Mill equivocates considerably from the self-protection proviso. We have seen his statement in the epigraph concerning harm being done through actions "prejudicial to the interests of others."[9] This surely is much broader than self-protection from physical harm, but again, what is prejudicial, and what is an interest? Further along, Mill comes to the conclusion that

> whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.[10]

Now the concept of harm is broader still, having been extended to the risk of damage, not just damage itself. This opens up a new Pandora's box of possibilities. While damage or risk of damage to an individual or the public is a fine sentiment, one that most people surely would endorse, operational definitions would be impossible to obtain without a complete system of law, courts, and jury decisions designed to define case-by-case what is to be the risk of damage to a person's interests. How loud must the radio be to be too loud? When does accidental negligence turn into criminal negligence? Where does freedom of speech become incitement to riot?

The classical Lockean conception of harm is not much different from Mill's narrower conceptualization. One was not to disturb another person's life, health, or liberty, where liberty was considered to be absolute command over one's own property—property that a person had appropriated from the common by mixing with it "his own labour," or having been given it by someone who had so done.[11] For Locke, harmful acts were those involving violence, theft, or taking more than one's share from the common. Difficulties involved with deciding on what a person's "rightful share" is are considerable, and will be discussed at greater length later. Locke's minimal domain of harmful acts is subject to the same criticism as that mentioned earlier for Mill's narrower view.

9. Mill 1912, 92.

10. Mill 1912, 100.

11. Locke 1970, II, art. 27, 305–6; art. 123, 368.

The modern scholar who has carried the narrow Lockean view to its ultimate extreme is Rothbard. For Rothbard, all ownership "reduces ultimately back to . . . each man's naturally-given ownership over himself, and of the land resources that man transforms and brings into production."[12] This is pure Locke, or indeed, an extreme version of Locke—"more holy than the Pope," so to speak. As also with Locke, property ownership is legitimate if the holder can trace his holdings back (through voluntary gifts) to someone who brought the original property into production. (Rothbard however adds the explicit proviso that the property was legitimately obtained in the first place. If it were found that the first wealthy Du Pont obtained some of his property through fraud, the modern Du Ponts should lose that portion of their wealth traceable to the fraud.) Absolute freedom is then enjoyed when a person's "naturally owned property (in his person or in tangibles) is free from invasion or molestation by other people,"[13] and harmful action is defined as coercion in the sense of "invasive use of physical violence or the threat thereof against someone else's person or (just) property. . . ."[14]

Again, this definition of harm suffers from the narrowness pointed out earlier, although Rothbard brings into play a rather ingenious device for dealing with that problem. He specifically restricts people from enjoying the various civil liberties anywhere except on their own property. People are free to speak their mind to any extent they wish if standing on their own property; if someone else comes onto their property and speaks, they have a right to tell that person to stop. This quaint device is interesting enough, and has the virtue of making the definition of harmful actions more precise, but brings up a number of obvious other problems. It could be noted here that allowing civil liberties on state property would be an obvious way around some of the inconvenience of such a restriction, but Rothbard's libertarianism is of such pure form that he denies the need for having any state at all![15] This is an extreme statement of a position that in one form or another is of direct interest to our concerns in this book, the idea that taxation in general, beyond minimal levels, is an invasion of personal liberty. It is by no means a politically obsolete argument, as anyone who followed the rhetoric of President Ronald Reagan in the 1980s knows well.[16]

Another argument in the Lockean tradition made by James Buchanan and many others concerns the virtues of voluntary exchange contracts.[17] Since people only enter into voluntary contracts if all parties gain, no infringement

12. Rothbard 1982, 40. By "man" Rothbard presumably means "person."
13. Rothbard 1982, 41.
14. Rothbard 1982, 219.
15. See the quotation in the chapter introduction, taken from Rothbard 1982, 162–63.
16. Reagan 1989.
17. See, for example, Buchanan 1977.

of personal freedom is possible. Harmful actions are those that impede the voluntary contract process, including those that curtail competitive free markets or that prevent people in other ways from making unforced agreements. Such libertarians argue against the existence of monopoly power (for example) on the part of firms or labor unions not only because of the harm done to economic efficiency but also because they restrict the domain of individual freedom. Since taxes typically have some adverse effect on the efficiency of markets, this line of argument is germane to our interests here.

Another important line of argument is that of the twentieth century libertarian economist Friedrich Hayek.[18] Hayek considers the important part of liberty to be the condition in which an individual is free from the arbitrary direction of other people, including superiors. In this definition, the word *arbitrary* is important. Harmful actions are those where people control the actions of others where there is no stipulated, preferably published, policy for such control that is well known by all parties in advance. It is acceptable, therefore, for a person to be subject to regularized restrictions published in advance and equally applicable to everyone, that is to say, properly constituted legislation. However, the laws themselves must be designed to have minimal interference in people's lives: They must be perfectly general, nondiscriminatory, and well known in advance. A specific example used by Hayek for an action that violates the nondiscrimination restriction is a progressive income tax.

Hayek's ideas of harm go beyond mere coercion, extending to "control of the environment or circumstances of a person of another [so] that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another."[19] Thus it is quite possible for peaceful and nonaggressive actions to be harmful, a position that many classical liberals in the Lockean tradition find unacceptable. On the other hand, Hayek does not consider legal and institutional restraints on a person's lifetime alternatives as an invasion of liberty if they are known in advance so that individuals are able to plan around them. This seeming acceptance by Hayek of the possible tyranny of law has been criticized by many commentators,[20] although we should not forget Hayek's strictures about the scope of good legislation in the first place. (Some would consider this naive: Who is to decide what is "good" legislation?) Finally, Hayek tends to stress the importance of economic liberties, sometimes even over political ones. As Barry states, "Hayek maintains that if the individual has legal status as a protected member of the community, free choice in occupation and the rights to free

18. Hayek 1973, 1976, 1979.
19. Hayek 1960, 20–21.
20. See, e.g., Barry 1984, 273.

movement and ownership of property, the necessary conditions for liberty have been met irrespective of whether he has the conventional political liberties."[21] This is another view that classical liberals would find difficult to accept.

In summary, the concept of harmful actions is, to the negative libertarian, difficult to define exactly, although most libertarians undoubtedly would avow that they would know one if they saw one. The idea of liberty involves the existence of a charmed circle, inside of which is an individual's exclusive territory where no one else is allowed to intrude. Nice as this idea is, most writers would agree that the boundary of the circle is impossible to draw in advance with anything like precision.[22] But still, the idea has meaning, a meaning that varies from society to society and from time to time. There is a line to be drawn, as well as can be done, by a society's appointed decision makers, by its legislators, and by its courts. At the same time, it is a line consistent with the broad reaches of public opinion. While the circle of freedom will vary in size from nation to nation, there is no land in which it fails to exist entirely.

More on Positive Freedom

One likely reason why the circle of negative freedoms varies in size is the different emphasis societies place on the positive freedoms. As already indicated, people stressing the positive freedoms adopt a broad view of human social existence, and this is reflected in how they view actions harmful to human freedom. The goal is to allow people to best realize their own potential by making the number of paths open to them as great as possible. This requires considerable knowledge. No writer realized this more than Karl Marx, who pointed out quite explicitly the importance of being able to understand the extent to which humanity can control its environment, both physical and social.[23] If we consider the scope of such control as broad, then we will believe that we can create an institutional and technical environment in which many alternatives can be made available. To Marx, the fault of the classical liberals was the unquestioning acceptance of unfettered free-market institutional arrangements, which result in severely restricting the lifetime options of all but the fortunate few. Marx felt that institutional arrangements could be

21. Barry 1984, 275.

22. Amartya Sen has proven an impossibility theorem according to which there is no area of social preferences in which an individual can always determine the outcome (Sen 1970). However, in interpreting Sen's result much depends on how he defines the limits of social preferences, and this is not completely clear. With respect to this point, see Sugden 1985.

23. Walicki 1984.

altered enough to allow all people the opportunity to choose their own life plans, subject only to the limitations of their own abilities.

It is likely that Marx and other socialists have been overoptimistic with respect to how much intervention human social institutions can stand, especially with respect to the overcoming of selfish incentives. That leaders in the Soviet Union found it necessary after seventy years of strong central planning to depart from orthodox socialist practices and adopt reforms that are highly market-oriented seems proof enough of this, if any were needed. Nevertheless, there is considerable truth in Marx's basic argument that laissez-faire capitalism may restrict the life options of many in a manner that may not only be cruel but also unnecessary. Such sentiments have been shared by many social thinkers over the years, some with far different political leanings than the socialists. Thus, the great libertarian economist Frank Knight, in a footnote accompanying a statement about the need for personal liberty, made the following observation:

> Paradoxically, it is out of this inalienable right [to personal liberty] that the special handicaps of the propertyless individual arise; because he cannot sell or mortgage his personal capacities, and must satisfy fundamental needs continuously, he finds himself in a weak bargaining position.[24]

Knight continues with the following sentiments, after pointing out the importance to nineteenth century social philosophy of the "driving motive" of the desire "to get ahead in the world."

> Under this dominant motive, and under historically normal conditions of life, economic liberalism in the negative sense of extreme individual *laissez-faire* is impossible, for two fundamental reasons which were generally overlooked in the accepted theory. The first reason is the fact that wealth can be used to get more wealth; for, the more of it anyone has, the more advantage he has in the struggle to get still more. Consequently, under individualistic freedom, and under the condition that men want more wealth, for whatever reason, it will be used to get more, giving rise to a cumulative growth in inequality. Two further consequences naturally follow in turn: (a) with "gross" inequality in the distribution of wealth among individuals, all ethical defenses of freedom lose their validity; and (b) the automatic system of control (market com-

24. Knight 1935, 288.

petition) breaks down, for competition requires a large number of units, every one of negligible size.[25]

These are strong statements, especially for a libertarian such as Knight, but they state the positive freedom argument very well. Notice that Knight points to not only the problem of anticompetitive devices, such as monopolies, but also to the difficulties brought about by the concentration of wealth per se, which are exacerbated all the more by the fact that there are great economies of scale in the accumulation of fortunes.[26] One wonders if Knight was serious in stating that gross inequalities in wealth will destroy all ethical defenses of freedom, a complete denial of negative freedom in favor of positive freedom. Perhaps Knight had in mind a rather extreme definition of the word *gross*.

Referring again to Hayek's arguments, it is noteworthy that in his hands the positive and negative freedom ideas are not very far apart. Recall his idea of harm—a person cannot act according to a coherent plan of his or her own but instead must serve the ends of another. If we change the active idea, "serving the ends of another," to the more passive (but not all that different) one, "being forced into undesired life plans by the social environment," the two concepts become very close to each other.

It is not difficult to see how the positive freedom argument, if pushed very far, becomes a welfare argument for the least advantaged, and not an argument for the traditional freedoms as most people think of them. Indeed, as the socialist experience in the Soviet Union, China, and elsewhere shows, when positive freedom arguments are pushed in a heavy-handed manner they are implemented only at considerable cost in terms of the negative freedoms. There is a trade-off between the two types of freedom; the important question involves how large this trade-off is and whether or not there may be ways in which society could accomplish a great deal in the way of the positive freedoms while not sacrificing a great deal in terms of the negative freedoms (or vice versa). A careful and impartial scholar could construct a valuable, empirically based discussion of these trade-offs based on the considerable variation that has taken place in the historical experiences of the more advanced nations of the world, East and West, an effort that seems overdue. Such a broad effort is beyond the scope of this book, although many such trade-offs are directly related to taxation issues and are further discussed later.

Finally, we cannot understand the concept of positive freedom without

25. Knight 1935, 291.

26. Another libertarian who greatly feared extreme wealth concentration was Simons, of course; see chap. 2. We have also seen how the great tax writer Edwin Seligman, certainly no political radical, considered the economies of scale in wealth accumulation argument as the only legitimate argument for progression in taxation.

realizing the danger, pointed out so eloquently by Berlin, that the idea of allowing people to pursue self-mastery by realizing their potential in a life plan of their own choosing will result in an attitude wherein people feel that they have a right to power, a power that could easily result in not only mastery over themselves but also mastery over others. This danger is made the greater by the existence of the problem already mentioned involving information and education. Who is to decide that a person is able to see his or her own life opportunities? If one person (or a group with impressive credentials) is convinced that he or she (or it), perhaps because of a longer and "more proper" perspective, understands another person's opportunities better than does that person, we have the potential either for social improvement, or for tyranny.

Berlin:

> The perils of using organic [the individual as part of a more inclusive group interest] metaphors to justify the coercion of some men by others in order to raise them to a "higher" level of freedom have often been pointed out. But what gives such plausibility as it has to this kind of language is that we recognize that it is possible, and at times justifiable, to coerce men in the name of some goal (let us say, justice or public health) which they would, if they were more enlightened, themselves pursue, but do not, because they are blind or ignorant or corrupt. . . . Once I take this view, I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, on behalf, of their "real" selves, in the secure knowledge that whatever is the true goal of man . . . must be identical with his freedom—the free choice of his "true," albeit often submerged and inarticulate, self. . . .
>
> This monstrous impersonation, which consists in equating what X would choose if he were something he is not, or at least not yet, with what X actually seeks and chooses, is at the heart of all political theories of self-realization. . . . This demonstrates . . . that conceptions of freedom directly derive from views of what constitutes a self, a person, a man. Enough manipulation with the definition of man, and freedom can be made to mean whatever the manipulator wishes.[27]

There are potential dangers to the concept of positive freedom, but it is fair to say that these result not from the concept itself, but rather from abusing it with a paternalistic assumption that one person can represent the wishes of another better than that other person can. There is no foolproof way to avoid this danger except to institute a public choice procedure in which collective decisions are wise ones. The practice of accepting revealed individual prefer-

27. Berlin 1969, 132–34.

ence as the basis of demand, which is of course the tradition of Western economic science, certainly provides a long step toward overcoming the danger also.[28]

Taxes and Freedom

Taxation requires coercion, and no discussion of individual liberty can avoid discussing taxes. The well-known phrase of Chief Justice John Marshall is no exaggeration: the power to tax is in fact the power to destroy. And yet we have the historical experience to show that considerable individual freedom can exist side-by-side with substantial, even heavy, tax burdens. Taxes need not greatly destroy liberty, although surely they have the potential for doing so.

As we have seen, and as with all ethical issues, the definition of what would be a harmful destruction of freedom is a matter of opinion. Murray Rothbard argues that all taxation is tantamount to common ordinary theft; the harm done to personal liberty by taxes is greater than the benefit of any public expenditure. But there are few people whose views are this extreme. John Gray points out that "all" of the classical liberal thinkers not only favored the existence of taxation, but also even favored taxation for the purpose of achieving the redistribution of wealth.[29] Rather than insisting on no taxes, most liberals would ask for a tax system that is fair in the sense of falling evenly across all individuals and thus leaving their relative positions unchanged, therefore depriving no single person or group of excessive freedom relative to the others. Thus it can be argued that fairness in taxation has a liberty component in addition to the more direct justice-as-fairness criterion we normally think of. An important part of our discussion in this chapter will be the identification of canons of evenhanded treatment meant to best preserve individual liberty.

This section is organized as follows. For the negative and positive freedoms, respectively, we first present some general principles of evenhandedness in taxation from the liberty perspective and then discuss how the various taxes perform according to these. In discussing these for negative freedoms, we will first point to one important historical experience in which the negative freedoms were greatly violated. The section concludes with some discussion of the role of taxation in the conflicts that exist between the different dimensions of negative and positive freedoms. While there is general discussion of

28. Berlin also points out, again eloquently, that there is much less danger of such paternalistic abuse of freedom when people do not believe in the possibility that somewhere there is to be found the 'Truth' with a capital T. Ethical deontologists are much more tempted to engage in the tyranny of paternalism than are ethical pluralists (Berlin 1969, 167ff.).

29. Gray 1986, 66.

property rights in this section, treatment of the important issues involving large transfers of property to the state, i.e., capital levies and transfer taxes, will be deferred to the section to follow.

Taxes and Negative Freedoms

Our goal here will be to posit a set of tax principles that best preserves the negative freedoms, and then to make some comments concerning how contemporary tax policies fare according to those principles. We know, of course, that if goods accruing to all members of a nation together could be provided somehow on a voluntary basis, there would be no need for taxes at all, as Rothbard so trenchantly points out. But since no way has been found to do this, taxes are necessary, and the question then becomes how they might best be designed to protect the personal liberties.

It is my suspicion that tax writers in the English law tradition do not fully appreciate the terrible potential that exists for the violation of the individual freedoms in the name of taxation. Tax legislation by the English-speaking peoples historically has been rather reasonable in this respect, troubles in the English North American colonies in the eighteenth century to the contrary notwithstanding.[30] This same thing cannot be said about the French historical experience, however. There is possibly no better example in modern times, and perhaps ever, of the malevolent potential for harm to the negative personal freedoms by the tax apparatus of a state than that which existed under the ancien régime in France during the several decades just preceding the French Revolution of 1789. We will find this French experience instructive as we set about constructing principles of taxation unobtrusive to the negative freedoms.

French Taxation in the Ancien Régime

The abuses to freedom present in French taxation in the mid–eighteenth century were not so much due to the kinds of taxes that were used as they were to the way they were administered—the guiding principle was the rule of man rather than the rule of law. The ultimate source of all tax policies was the king and his ministers, of whom the most important were the intendants, chief administrative officials in each geographic district who wielded near-

30. It is relevant that the complaints of the American colonists did not center on the form that the taxes took but on what contemporary Frenchmen would have considered the legal nicety concerning whether they were properly represented in Parliament, such were the ideas of due process already residing in English legal traditions. The French of the same period would have been delighted to have the luxury of worrying only about the finer points of representation.

dictatorial powers in matters of local governance.[31] Custom was also important, which itself in turn derived mostly from the actions of earlier kings. Without going into great detail as to the taxes themselves, in the following I wish to emphasize the effects of this capricious aspect of tax administration, in particular how this infringed on the personal freedoms of most French subjects. There were four major kinds of taxes: land taxes, income taxes, indirect consumption taxes, and taxes requiring labor in kind.

The Land Tax (Taille)

Most revenue came from a tax on real and personal property, paid by people residing on the site (not the owners), with nobles and clergy exempt. A majority of the revenues from the land taxes came from the "personal" property portion, levied roughly (very roughly) according to profits of land or industry.

The base for the land taxes was set as follows. The king and royal council met in secret twice yearly to determine the amount to be due from each of the twenty-four districts of France, based on custom and, roughly, ability to pay (more accurately, what the traffic would bear). At the district level this was further subdivided using the same principles among subdistricts and parishes. In this process the leaders at each of these levels were of singular importance, making decisions that were final. Personal influence, at whatever level, was important to the whole process. However, in the parishes, three to seven collectors were elected by popular vote and these then apportioned the tax among the inhabitants. These people were allowed to collect a percentage above the revenue requirement as salary. If the percentage happened to be large, no questions were asked, at least not directly.

The liability of the taille was joint. If some people did not pay, others had to pay more to make up the difference. Once a collector was chosen, he was responsible to higher authority for the tax payment with no excuses for failure accepted. If he failed to collect enough, he was personally liable and could be jailed and financially ruined. This happened not infrequently. Otherwise, everyone attempted as best they could to hide any wealth they had, for fear of having their assessments raised. Many refused to make improvements to their farm or business that they could otherwise have afforded, such was the fear of the tax, which was quite burdensome.[32] People also did their best to avoid paying their taxes on time, in order to appear poor and so avoid having their assessment increased. Assessments, of course, were based to some extent on ability to pay, but otherwise were quite arbitrary. People with influence received lower assessments, and vice versa. Assessment practices varied widely. They were reasonably good in some districts, although this was very much the exception.

31. Dabney 1906, 116. Another source with a brief but good discussion of taxation during this period, and which has been useful for my discussion here, is Lowell 1893.

32. The adverse effects on overall efficiency and technological progress of such behavior are not difficult to imagine.

Income Taxes

There were two types of income tax, the twentieth and the poll taxes. The *twentieth* was in fact two-twentieths and a bit more, about 11 percent in theory. Poll taxes (a misnomer) were income taxes levied by profession and class, with the population divided into twenty-two categories. The income taxes together did not yield half as much as the taille. Nobles were liable to pay, although often they succeeded in gaining light assessments. The clergy were exempt.

Theoretically, the income taxes were more uniform than the land taxes; in practice they were not. There was much underassessment. Personal influence was important. The poor were exempt in theory, but few were in fact. About failure to pay, Lowell has this statement:

> If the poor man failed to pay, a garrison (garnison) was lodged upon him. A man in blue, with a gun, came and sat by his fire, slept in his bed, and laid hands on any money that might come into the house, thus collecting the tax and his own wages.[33]

Indirect Taxes

The indirect taxes included commodity taxes and export-import duties. The latter, together with outright trade prohibitions, had the effect of greatly restricting international trade. Of the former, most important were the taxes on tobacco, salt, and wine. The tobacco tax was simple enough, taking the form of a state monopoly on the sale of tobacco products, the government revenue coming from setting prices considerably above costs. The wine and salt taxes are unsurpassed historically as examples of government meddling in the personal lives of those being governed.

The salt tax perhaps is best known historically for its infamous inconsistency of rates. It varied geographically, from provinces where there was no tax to those where it cost sixty-two livres for a hundredweight, making for a thirtyfold difference in the price of salt. Two-thirds of the salt tax revenue (the salt tax yielded about 10 percent of total government revenue) was collected from one-third of the population.[34]

But just as egregious as the inconsistent rates was the heavy-handed way the tax was administered in order to ensure compliance. In the first place, it

33. Lowell 1893, 219–20.

34. Lowell 1893, 223.

was the law that seven pounds of salt per year must be purchased for every person more than seven years old. This was to be used for cooking purposes only. For other purposes other salt must be purchased; salt available elsewhere, as in salt marshes or in seawater, could not be used for any purpose. These and many other strictures were enforced by inspectors who were likely to invade a person's household at any time unannounced. Penalties for noncompliance were heavy fines, which judges were forbidden to reduce. Should a person lack the liquidity to pay, officials would seize and sell his belongings until the fine was paid.[35]

Perhaps the most burdensome were the wine and cider taxes, given the importance of these products to the French economy. These were taxes in turnover fashion, substantial duties being charged at every stage of production or consumption. (A tax was due even on gifts of wine and cider.) Again, there were inspectors everywhere, arriving unannounced to see that the letter of the law was being followed. And there were ridiculous numbers of tolls collected on the transportation of wine and cider through France. The following quotations taken from Dabney's account give the flavor of all this.

> At any hour the officials could come to the house of the wine-grower to take an inventory of his wine, to dictate to him how much he could drink, and to tax the rest. . . .
>
> Officials were . . . on the alert to pounce unawares upon every suspected house. They multiplied their visits and kept registers so exact that they could judge at a glance of the state of a man's cellar. The wine-grower having paid his 30 and then his 75 francs, it became the turn of the wine-merchant, who had to pay 75 more upon shipping the wine to the retailer. The wine starts on its journey, the tax-farmers prescribing the route. If it swerves from the route, it is confiscated; and if it keeps on the route, additional payments must be made at every step. A boat-load of wine . . . to Paris . . . paid . . . thirty-five or forty kinds of taxes in addition to the tariff levied at the gates of Paris, which was forty-seven francs a hogshead. The taxes on the route were paid at fifteen or sixteen different places—thus necessitating a voyage of twelve or fifteen days more than if it all had been paid at once.[36]

Forced Labor Taxes

Finally, there were taxes taking the form of forced labor, the corvée. This was exacted of farmers and agricultural workers to build roads and military barracks, to transport military baggage, etc. Such labor was often used, with the

35. Dabney 1906, 98ff.
36. Dabney 1906, 99–100.

result that French highways were of high quality even though lightly traveled. Again, it was rule by man rather than rule by law. There was no legislation whatsoever underlying such activity, which was instead based on custom originating in feudal times. Intendants, military commanders, and many nobles could arbitrarily require such service whenever they chose.

Conclusion: Taxation in the Ancien Régime

In the design of institutional arrangements, much can be learned from failure, and we can gain considerable understanding about the potential evils of taxation vis-à-vis the personal freedoms from this remarkable episode in world history. The lessons seem clear, and they seem to bear out nicely Hayek's insights about legislation and freedom. As we have seen, to best preserve the negative freedoms, Hayek insisted on laws that were perfectly general, nondiscriminatory, and known in advance.

It would be difficult to imagine a tax regime that violated these principles more thoroughly than the one just described. Tax rates were not uniform. They varied according to personal decisions not made according to any impartial principle, or indeed, any principle at all that could be ascertained in advance. Much depended on personality and influence. If there was any portion of the mechanism that could be anticipated, it was that to some extent one could predict on the basis of custom. But customs were often departed from, and for reasons that were not well explained.

In his dealings with tax collection officialdom, the ordinary Frenchman had a circle of individual liberties that was extremely small, if it existed at all. Due process did not exist. There was no such thing as a search warrant, nor any guarantees against personal bankruptcy. Property could be seized, and people themselves jailed, with only slow (or no) recourse. Officials could even attempt to dictate how one was to salt one's food. There were simply no rights to privacy at all. Nor was the Frenchman free from the possibility of blackmail or extortion, or against being informed against by his neighbors, for which positive incentives existed under the land tax system of assessment. The temptations to smuggle were strong, punishments for those caught severe. And the tax collector himself had few rights should he fail to collect his allotted portion. Many moderately prosperous farmers moved to town solely to avoid being voted the job of tax collector, with its dangers of financial ruin, or at least of great personal unpopularity.

It cannot be claimed, of course, that all of the problems were due only to the tax system. The reasons reached far deeper than that. But a close examination of the day-to-day existence of most French common folk of that day would suggest that the part of their lives that caused them the most personal anguish due to invasion by the state of their personal freedoms was that having something to do with the word *taxation*. And we should also note that the

grievances noted here were not generated by any particular malevolence by the state other than the earnest desire by the crown to collect revenues. It was the need for revenue that caused the difficulty, not some other objective evil in itself. With the advent of constitutional democracy, many of the abuses of the Ancien Régime are no longer possible, although some of them are still instructive, even in North America (see the subsequent discussion), and there remain nations where some of these practices are not unknown. I believe that we could not fully understand the potential dangers of taxes to personal freedoms without studying this remarkable period in French history.

Optimal Tax Principles for Negative Freedoms

We can now proceed to develop a set of optimal tax principles with respect to the preservation of negative freedoms, using in part the insights we have gained from the ancien régime experience. It does not require much subtlety to understand the central lesson to be taken from these insights: required are predictable laws impartially enforced rather than arbitrary actions of officials swayed by questions of personal influence. The writer who has most carefully explored the characteristics of predictable laws impartially enforced required for a free society is Friedrich Hayek, and Hayek's ideas are most useful for our purposes here.

Hayek's Principle of Law

Perhaps there is no suggestion in the writings of the great libertarian economist that he would consider more important than how a society should arrive at "predictable laws impartially enforced." This requires a conception of law somewhat different from that which has developed in modern times. Rather than an act passed by a majority-controlled legislature, laws ought to be more magisterial in scope, which guarantees evenhanded treatment. For, as Hayek is quick to remind us, there is no guarantee anywhere that majorities will not violate the negative rights of minorities.

The key idea is the familiar one that the legislators ought to be subject to their own rules; furthermore, the rules should discriminate against no group by being identified with any meaningful group characteristic. This idea was widespread already in the eighteenth century (Hayek considers the understanding and appreciation of the idea to have been retrograde over the past century or so). Thus John Locke thought that people wielding authority "are to govern by promulgated established Laws, not to be varied in particular cases."[37] A more detailed early explication of the idea is the following, taken from a 1721 statement by John Trenchard.

37. Hayek 1979, 20. The quotation is a paraphrase of Locke by M. J. C. Vile, cited by Hayek (Vile 1967, 63).

> When the deputies thus act for their own interest, by acting for interest of their principals; when they can make no laws but what they themselves, and their posterity must be subject to; when they can give no money, but what they must pay their share of; when they can do no mischief but what fall upon their own heads in common with their countrymen; their principals may then expect good laws, little mischief, and much frugality.[38]

Trenchard's statement gives the core of what Hayek has in mind, although not quite all. The stricture about deputies paying their share of the taxes they impose is especially relevant to the discussion here, of course.

The following is Hayek's own statement of the idea. A government of laws, in which government is suitably limited to protect individual liberty, obtains when the laws are

> rules regulating the conduct of persons towards others, applicable to an unknown number of future instances and containing prohibitions delimiting (but of course not specifying) the boundaries of the protected domain of all persons and organized groups. . . .
>
> Law was meant to prevent unjust conduct. Justice referred to principles equally applicable to all and was contrasted to all specific commands or privileges referring to particular individuals and groups.[39]

Hayek's conceptualization is somewhat more stringent than that of Trenchard, in that he asks not only that the legislators be subject to their own laws, but also that there be no difference in the laws' impacts according to any identifiable group characteristic. (This only becomes fully obvious from some of the examples Hayek gives.) Depending on how literally this is taken, it could be a very strong limitation; for example, a public works project in Tennessee would be disallowed on the grounds that all other areas of the country are not getting similar projects. This could be relaxed a step by specifying that there exist a set of criteria according to which all areas that pass the requirements will get public works projects, although Hayek himself might consider such thinking tantamount to opening a Pandora's box.

Hayek recognizes both that there would be definitional problems and that conflicts between rights endowed by the negative freedoms (and, perhaps, required by the positive freedoms) will need to be resolved in practice. To deal with these difficulties, Hayek proposes a procedural solution, i.e., to have an elected legislature whose only function would be to specify the content of laws in the sense of rules as already discussed. These would be general rules

38. Trenchard and Gordon 1965, 121, cited in Hayek 1979, 20–21.
39. Hayek 1979, 100–101.

defining rights and justice principles, including features such as those incorporated in the Bill of Rights of the U.S. Constitution and, in addition, all interpretive rulings of the kind often made by the U.S. Supreme Court. For such specific legislation as the construction of budgets, Hayek would have another branch of the legislature entirely, subservient to the rules of the "legislative" body. A high court would be necessary for seeing to it that the legislative rules were properly followed. Since Hayek's solution to the problems of definition and conflict is a procedural one, he would seem to be above criticism on these grounds, unless his procedure would not work well, something we cannot know in advance. Since we have no such legislature available to us, in our tax discussion we must rest content with considering notions that we think such a legislature would pass, should one in fact exist. But, that taxes that follow the main thrust of Hayek's principles would best preserve the negative freedoms seems a reasonable enough proposition.

Taxation Principles

We can now turn to consideration of taxation principles directly, considered from the perspective of the negative freedoms. This discussion incorporates the assumption that there is a stipulated revenue requirement; it goes without saying that the best tax for the preservation of the negative freedoms is no tax.

Following Hayek's example, as well as the lessons learned from the ancien régime in France, the following taxation principles are required in order to best protect the negative freedoms.

(1) *Taxes ought to be as general as possible.* The broader the tax base, the better. Taxing all consumption is better than taxing part; taxing income is better than taxing consumption; taxing all business income is better than taxing corporation income. Given a revenue requirement, the best that can be done from a freedom standpoint is to maintain each person's position unchanged relative to that of others. This is best done with proportional general taxes.

(2) *Taxes ought to be impersonal.* Taxes should not relate to features of personal characteristics, and this applies both directly and indirectly. To be avoided are taxes by a person's name (where the name somehow determines the tax), or by personal characteristics—hair color, or even income. The construction of taxes that are impersonal in the indirect sense is impossible, and so following this principle becomes a matter of degree. All taxes are related to personal characteristics to some extent: import taxes relate to those with a taste for the imported items, a consumption tax relates to big spenders and misers, a proportional (not to say progressive) tax on income or wealth falls heavier on those with high income and/or wealth, etc. Broader-based taxes tend to discriminate somewhat less in this respect, and so this principle overlaps with principle (1).

(3) *To the extent necessary, taxes should follow widely accepted ethical principles.* Even if tax bases are chosen for economic reasons and are quite general, no tax can fall evenly across all people in every respect. The variations that do exist should follow widely accepted ethical notions. That taxes generally ought to follow both benefit and ability to pay are such notions. So, the very definition of *evenhanded* is ethical in nature. Thus, the notion used in principle (1) that evenhanded means that relative positions are to remain unchanged falls in this category. While this presumably is a widely held view in Western culture, it is nonetheless ethical; evenhandedness could be defined as extracting the same absolute amount of tax revenue from each taxpayer, for example.

(4) *Taxes should be enforceable in ways that preserve the negative freedoms.* We saw how important enforcement practices can be to personal liberty as we examined eighteenth century French taxation. Important here is getting the idea across to the taxpayers that reasonable and honest efforts at self-enforcement on their part will result in little invasion of their personal liberties. Enforcement procedures should be formal, governed by rules, and fair. Much could be said about more detailed methods for proper enforcement methods, but the general principles should be obvious enough, especially to anyone who has studied the ancien régime.

(5) *To the extent possible, taxes should allow taxpayers some personal choice.* This may not be to a very large extent, because personal choice in behavior before the tax collector often involves avoiding the tax itself. This overlaps with principle (1) because broader taxes allow more choice than specific taxes. Taxes on luxury goods allow more personal choice than taxes on necessaries, but, of course, taxes on items for which the demand is elastic may not raise required levels of revenue. Still, when possible, this principle should be considered.

(6) *Taxpayers should not be asked to give up funds needed to maintain basic subsistence needs.* Among libertarians, this principle may be controversial. Some—those who think that leaving relative positions unchanged requires proportional taxation of everyone—would perhaps opt to tax even the very poor. But most people, libertarians such as Hayek included, think that there is some level below which people are not to be taxed, on the grounds that all people possess the negative freedom that the right to life and minimal levels of comfort should not be violated. Of course, as was discussed in chapter 6, reasonable people can disagree as to what income is needed to maintain this level.

(7) *Application of the above six principles must be adjusted as needed to account for what is known about how tax burdens are shifted.* Once again, we cannot forget the importance of what is known about the shifting of taxes, as discussed in chapter 4. The personal income tax is good because it largely rests where it falls. The corporation income tax with inelastic supply of saving falls on all capital owners equally, not a bad tax from the freedom viewpoint.

If the supply of savings is elastic, on the other hand, the tax falls significantly on workers, including the likely creation of unemployment. Since denial of employment is a serious invasion of the personal freedoms, the corporation tax would rate poorly in the elastic savings case.

U.S. Taxes and the Negative Freedoms

We can conclude our discussion of the negative freedoms with a few comments about how U.S. taxes fare in this respect. As already indicated, taxation in English-speaking lands has had a reasonably good history with respect to the maintenance of negative freedoms. This is now true in most of northern Europe as well. Self-enforcement is reasonably good; arbitrary invasions by officials, while never absent completely, typically are not egregious in nature. (Some people who have experienced particularly irritating audits by the U.S. Internal Revenue Service [IRS] would likely disagree.)[40] The following are some areas where U.S. taxation provisions and practices may affect some of the negative freedoms. Issues dealing with progressive taxation and transfer taxes are deferred for a later, separate discussion.

Complexity

Some feel that the very complexity of the U.S. tax law, especially that of the federal income taxes, causes a significant violation of personal liberties. Hall and Rabushka present figures to show that the cost to taxpayers in complying with the federal income tax is on the order of ten billion dollars,[41] and this complexity requires much more intervention by IRS agents than would otherwise be necessary. Substituting a national sales or value-added tax would eliminate much of this.

Social Security Taxes

Many libertarians think that the U.S. system of compulsory Social Security tax payments, rather than allowing people to determine their own retirement arrangements, is a serious infringement of liberty. Writers in this category include Milton Friedman, Martin Larson, and Richard Wagner.[42] This is technically correct, although most Americans seem satisfied with the system.

Selective Taxes

Excise taxes are not important to American taxation, and therefore the first principle stated earlier is not greatly violated. Possible exceptions are the

40. See the critical discussion of the Internal Revenue Service in Larson 1985. Larson, an extreme libertarian, titled one chapter of his book "IRS Atrocities."

41. Hall and Rabushka 1983, 6.

42. Friedman 1962, 182; Larson 1985, 106; Wagner 1977. As Wagner puts it, "Being made to spend a percent of your income on the purchase of a certain kind of retirement contract is a denial of economic freedom," (9).

heavy taxes on automobiles and related products, and on tobacco and liquor, the "sumptuary" taxes. All of these fall with special force on the poor, and could be considered an unreasonable violation of their negative freedoms.

Property Tax Assessment Practices

Students of local property tax administration in the United States are aware of serious violations of evenhandedness that often obtain in property assessment practices, violations that are milder first cousins to some of the aberrations that existed under the ancien régime. The mechanism for this invasion of negative rights is simple and very real. It comes through the seemingly innocuous, common practice for assessors to value property less than the level provided for by statute. With property generally undervalued, property owners are afraid to complain about injustices in comparative assessments for fear that the assessor will raise the valuation to the level provided for by law. (People typically can make formal appeals concerning their own assessments, but not those of others.) This gives local property tax assessors power over taxpayers inconsistent with the institutions of a free society. Instances of graft and extortion, especially where business assessments are concerned, are not infrequent. At the very least, friends and political party colleagues of the tax assessor often find themselves enjoying relatively low assessments. While assessment practices have been improving over the years, this situation retains considerable potential for violations of the negative freedoms.

The Corporation Tax

We have already seen how the corporation tax removes job opportunities under one shifting scenario. Second, there is the time-honored complaint about double taxation. People owning stock in corporations must pay the corporation tax in the form of lower returns on their investment, with the after-tax income taxed once again by the personal income tax. With steep progression, this double impact theoretically can approach confiscatory levels. The shifting assumption is relevant, as is the tax rate on capital gains. With inelastic savings supply, the corporation tax falls on all capital owners, and the argument is valid (although the impact is less spread over all capital owners than if it fell only on corporation owners). If capital gains are taxed at lower rates than is regular income, as they were before 1987, corporations can avoid dividend distribution, parlaying retained earnings into higher equity values, allowing owners to realize capital gains and so pay the lower rate. The lower tax rates introduced in the 1970s and 1980s have muted the double-taxation argument a great deal, at least insofar as it might be a serious threat to the negative freedoms.

Taxation Levels of the Poor

In chapter 7 we saw how tax burdens on the very poor are higher than is commonly supposed, with average income losses in the 15 percent to 20 per-

cent range likely. For a person whose income already is too low for what most would describe as a decent existence, to then be required to part with one-fifth of that is a grievous denial of the right to a basic subsistence level.

Taxes and the Positive Freedoms

Because of the considerable overlap that exists in the topics of positive freedom and need, much of our task of analyzing the relationship of taxation to positive freedom has been accomplished in chapter 7. All needs are relatable either to positive or negative freedoms, or both. The negative freedom aspect has just been mentioned in the last paragraph of the previous section—the right to a basic level of subsistence and comfort. As in general with the negative freedom perspective, this is an immediately relevant right; the need establishes the right, no other considerations are pertinent.

Need from the positive freedom perspective on the other hand requires the longer view, stressing the right to develop one's own potential according to realistic life plans. In practice, this means that the most important difference between aid designed for the two kinds of freedom is that aid meant to help people whose productive periods of life are mostly behind them, elderly people for the most part. For people with significant potential remaining in their productive life spans, there is very little difference in practical meaning between the negative and positive freedom aspects of need. Giving nourishment to a hungry child who then better learns his school lessons has both short- and long-term ramifications.

From the viewpoint specifically of taxation with respect to the positive freedoms, there is a further consideration, however. That consideration relates to the argument advanced by many economists over the years, also discussed in the introduction to chapter 7—that questions of need are best dealt with from the expenditure side of the fisc than from the tax side—and deals with the amount of wisdom people in disadvantaged groups bring to formulation of their lifetime plans. It is a question that can only be settled with empirical knowledge. In chapter 6 we compared the virtues of the present expenditure-based welfare system with the alternative of having welfare take the form of money subsidies paid through the same administrative apparatus as used for the normal collection of taxes. If political decision makers should decide, hopefully on the basis of good empirical evidence, that people given cash will lack wisdom in devoting it to long-term goals, the proper policy would be to implement expenditure programs devoted to such goals specifically. Otherwise, the negative income tax plan would be attractive in terms of both kinds of freedom. The tax would give human dignity to disadvantaged people by allowing them to avoid food stamp and welfare queues, means tests, and social workers inquiring into their personal lives. The freedoms from embarrassment, from loss of human dignity, and from bureaucratic harassment must

surely rank high on the list of negative freedoms, although, curiously enough, they are not much discussed in the otherwise eloquent tracts of libertarian political philosophers. A straightforward demonstration in simple economic theory is enough to show that cash payments allow greater utility than equal payments in kind. And secure cash payments would allow the poor to plan their life prospects and build up human capital both in themselves and their children much better than they can in the current welfare system.

To be sure, there are drawbacks to a negative tax scheme, some associated with freedoms and others with efficiency concerns about incentives. These have been discussed in the previous two chapters. Also pointed out earlier from the findings of the Congressional Budget Office study, was the fact that a negative income tax with suitable coverage would be slightly more expensive than the current system, especially if it were decided not to reduce payments to single parents with two or more children. A negative tax is also less selective in pinpointing its benefits, and this can cause inefficiency. But these additional burdens would not be great, and it would be difficult to imagine disincentive effects greater than those in the current system. Given the near comparability of the two approaches in other respects, it seems a reasonable proposition that the salutary effects of a negative income tax on both kinds of freedoms would be enough to raise the welfare levels of the poor and, indirectly, the health of the entire society substantially.

Meanwhile, there are any number of other possibilities for tax-related mechanisms that would help build human capital, a central concern of positive freedom. Nontaxation of savings devoted to college tuition is one; tax credits for tuition paid and, if a family is poor, for student expenses is another. Special tax credits or deductions for remedial instruction meant to prepare students from disadvantaged backgrounds for regular college matriculation would be a third. Given the spectacular result when one person guaranteed college tuition and expenses for an entire class of disadvantaged elementary-school children some years ago, such devices would seem to be a promising avenue for the enhancement of the positive freedoms, with numerous other benefits for the broader society.[43]

Taxation and Property Rights

Property Rights and Rights to Large Accumulations

We turn last to what is perhaps the most important point of the taxation-freedom relationship, that dealing with property rights. Because of its im-

43. Ten years after Eugen Lang promised to pay the college tuition for all members of a sixth-grade class at East-Harlem school, of 54 children, 45 finished high school and 32 had gone on to college (Associated Press 1991).

portance, the topic is treated separately, even though it fits properly under the heading of negative freedoms.

Property rights, and particularly rights to private property, have always been given great emphasis by libertarians; many of them over the years have even tended to equate unfettered private property ownership with freedom itself. Whether or not this is true, there can be no doubt that property rights are important to human freedom. This is all the more apparent when we note that every property right defines both a freedom and a restriction of freedom. A property right given to *X* for his enjoyment at the same time restricts all other people from its use. Property rights necessarily are basic to the human freedoms, and property right arrangements therefore require justification no matter what they are.

The focus of the discussion will be on property rights as they apply to large accumulations of wealth. This is not to say that property rights considered more broadly are not important, but rather that a full discussion of them would carry us too far afield, inasmuch as we should be able to accept the proposition that a firm belief in the institution of private property is a cornerstone of Western culture. Many applications for private property rights from the standpoint of the negative freedoms should be clear from the earlier discussion. The optimum taxation principles enunciated from the standpoint of the negative freedoms apply just as well to the right to own and control property. On the other hand, we cannot deal with large accumulations without considering ideas about property rights more generally.

With few exceptions, throughout recorded history there has been a general belief in private property rights, if not for all people, at least for those who are "important," and, if not in the ideal state, at least in those attainable in practice.[44] There are at least three compelling reasons for this, reasons that must have appeared obvious already far back in antiquity. Private property is necessary for work incentives, for fostering feelings of personal identity and self-worth, and for reasons of administrative efficiency. Any one of these reasons is powerful enough to justify private property rights, including certainly the last one, which tends sometimes to be overlooked. If a collectivity wishes, for example, to have a parcel of land well cared for without the bother of having to assume day-to-day administrative supervision, a simple way to achieve this is to give the ownership rights to a person who will take pride in the property and hence exercise the required care.

44. One of the more important ideal states was the Garden of Eden before the Fall. Thus, Christian theology long held (and there may be traces of it still in the Roman Catholic faith at least) that existence in the state of grace was fully communal; that private property was only necessary after the Fall and, therefore, is associated closely with the fact that humanity lives in a state of sin. An important ramification of this belief over the centuries was the conservative

The difficult questions about property rights are not those dealing with whether, but with how much. In a world of scarcity, with uneven patterns of ownership, here is where the tough philosophical questions reside. No matter what position one takes about the wealth distribution, justification is necessary. Our task is to examine the arguments commonly used to justify private property ownership, with special attention paid to the rights to large accumulations. In property right discussions, as in the subject of freedom generally, the central issue deals with how power is to be shared between the individual and the collectivity.

There is a huge historical literature on the philosophy of property ownership, and the discussion here can only scratch the surface. Since Renaissance times, the principle lines of argument concerning property rights, particularly in the sense of how much, have been related to natural law and utilitarianism. Two others, somewhat less important, deal with ideas of self-identity and exploitation.[45]

Natural Rights

The fundamental ideas associated with the natural law concept were discussed in chapter 2. They consisted of somewhat vague ideas that there were natural laws governing the universe that people of reason could discover. After the Renaissance, with such writers as Grotius in Holland and Pufendorf in Germany, the idea turned from the fact that there were laws in nature that could be discovered to the idea that natural laws were principles that all "people of reason" could accept as being self-evident.[46] Some of the principles that had seemed obvious even in ancient times were founded on the behavior of people in the state of nature, where people were naturally free and had equal rights. It was there, before the introduction of formal governments, that people made

defense of unjust states of property distribution on the basis of humanity's sinful nature. A good discussion of this appears in Schlatter 1951, chap. 3.

45. I deal here with the English-speaking tradition, which also became the tradition of Western Europe after 1945. Before that, in Europe (Germany especially), there was a third tradition based on the idea of an organic state whose interests came before those of its individual citizens. This was also true in the Communist nations, at least before 1989.

46. As Schlatter (1951, 125) interprets Grotius (all of the inner quotes are the words of Grotius 1925, 13–14, 23, 38, 40):

> there was a natural law governing the human world [which was] a "dictate of right reason," . . . "manifest and clear," having a "degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God," and "unchangeable—even in the sense that it cannot be changed by God."

Pufendorf, 1934.

reasonable agreements with each other as to how to proceed, or, if this was not historical fact, it is instructive to think about what they should have done and would have done had they been reasonable. The key concepts in all this were freedom, equality, the use of correct reason, and contracts.

Perhaps the most important contractual bargaining in the state of nature was that dealing with property rights. People would bargain with each other and somehow agree to a reasonable division of property. But how was this to be accomplished? For a long time, natural law writers were not able to supply convincing and believable arguments for how such a process may have taken place, and it is here that John Locke made his great contribution, simple as it seems in retrospect. According to Grotius and Pufendorf, Locke's two most important predecessors, the contract must have been made on the basis of some kind of unanimous agreement, an eventuality that even writers most sympathetic to natural law ideas could not accept as being very likely. Not so with Locke's suggestion, which was that if a man was to take a part of the common and appropriate it to himself by "mixing his labor with it," no right reasoning person could deny his ownership rights to that property so long as he mixed his labor with all the property he took and did not take so much as that some of its product might spoil.[47] The power of this idea was that it constituted a believable method for how people appropriated property in the state of nature that only required a kind of informal unanimous consent that was practical. And all this transpired before the rise of formal governments, the powerful argument against despotic monarchies that Locke was looking for.

Locke's conceptualization quickly caught on,[48] and it has been important down to the present in fostering the widely held belief that people deserve to own property, especially if they work hard for it.[49] But, while this is fine as a philosophical attitude, it does not get us very far as a more fully developed theory for justifying real-world property right conventions. Indeed, Locke's own ideas for the conventions of a modern society were quite different from those for a state of nature in at least two respects. First, in a modern economic society it was necessary to deal with the existence of money. Here was a form of property whose existence required a considerable departure from the golden days of the state of nature. Not only could large amounts of it be accumulated through blameless trading of one's own property, but it did not spoil. Locke himself seemed to be aware of the implications of this for large

47. Locke 1970, bk. II, chap. v.

48. "Before 1690 no one understood that a man had a natural right to property created by his labour; after 1690 the idea came to be an axiom of social science." (Schlatter 1951, 156)

49. This has been especially true in the United States: during the revolutionary period, in judicial rulings, and in the general culture. Among other things, this is reflected, I think, in public subsidy and tax policies heavily committed to the maintenance of the small family farm and to home ownership. For some of the constitutional history, see Wright 1942.

accumulation, and he did not seem very enthusiastic about them.[50] But his way out of the difficulty was simple, bringing up the second difference between modern society and the state of nature, the existence of governments. The way to deal with property accumulations that arise because of the existence of money, or indeed, any other issue considered important, was simply to have property right conventions determined by the government, at least if it could be certified as nondespotic. Thus Locke in the end comes to the position that governments define property rights, not a very spectacular position, and a position that does not get us very far in dealing with the "how much" question.

This is not quite the end of the story, however, because Locke is somewhat ambiguous and contradictory from one passage to another. There is one set of passages that gives the impression that governments should make property rules completely as they see fit in the manner of other laws. A good example of this, in addition to his general position just described and quite relevant to our concerns here, concerns inheritance, where Locke makes a distinction between the state of nature and civil society quite consistent with that impression. While inheritance is a natural right of children in the state of nature, law and custom determine the amount of inheritance, although minors still have a natural right to inherit enough to maintain them.[51]

On the other hand, in other passages Locke seems to be saying that the rights of ownership are more natural than conventional and that property is one of the inalienable rights. But rather than claiming that property should be distributed according to the law of nature, a position containing obvious difficulties, as Schlatter states, Locke "followed the usual tradition, maintaining that the present distribution, though conventional, was inviolable since it was based on voluntary agreements protected by the law of nature."[52] To the extent that he followed this branch of his argument, Locke's theory is very much addressed to the "how much" question and is heavily slanted in favor of the status quo. These two strains in Locke's reasoning are never reconciled. It is obvious enough which strain would be followed by critics, and which by apologists, of the existing distribution of wealth.

Voluntary Exchange

While numerous writers since Locke's time have been in the natural law tradition, at least in part, the aspect of natural law that continues to assume great importance in contemporary times is the notion just mentioned that it

50. Ryan 1984, 25–26.

51. Schlatter 1951, 158. Compare the passages from *Two Treatises*, I, sects. 88–94, and II, sects. 65–73 (Locke 1970).

52. Schlatter 1951, 158, citing *Two Treatises*, I, 195–96.

provides justification for voluntary exchange. This is, of course, reinforced by the economic theory of markets, where buyers and sellers always achieve gains from trade from bargains voluntarily reached. Many of those who stress the natural rights of voluntary exchange are advocates of minimal state interference, such as Buchanan, Hayek, Nozick, and Rothbard. The process of voluntary exchange, beneficial as it is, works best when individual rights, property rights in particular, are sharply defined and mutually agreed on. As Buchanan states,

> if rights are known to be well defined and nonarbitrary but if knowledge about them is available to people only on considerable investment in information gathering, many exchanges that are otherwise mutually beneficial may never come into being. Once both parts of the principle are met, however, once the limits of each person's rights are defined by agreement, economic interchange becomes almost the archetype of ordered anarchy. Individuals can deal with one another through wholly voluntary behavior without coercion or threat.
>
> Under regimes where individual rights to do things are well defined and recognized, the free market offers maximal scope for private, personal eccentricity, for individual freedom in its most elementary meaning.[53]

While modern writers in the natural rights tradition believe in well-defined rights for the salutary purpose of voluntary exchange, this still does not address the question of what the proper distribution of property should be, although in many of these writers there is a presumption, at times somewhat reluctant, in favor of the status quo. Buchanan again:

> My own approach is . . . [that] . . . there is an explicit prejudice in favor of previously existing rights, not because this structure possesses some intrinsic ethical attributes, and not because change itself is undesirable, but for the much more elementary reason that only such a prejudice offers incentives for the emergence of voluntarily negotiated settlements among the parties themselves.[54]

And, with respect to initial acquisition,

> of course, a necessary starting point is some agreement on the structure of rights. We have to acknowledge that any attempted economic

53. Buchanan 1975, 18.
54. Buchanan 1977, 109.

> exploration of the emergence of initial rights will be "insufficient." There cannot be an exclusive contractarian answer. Perhaps it was an "internalizing of externalities" process. Some natural division may have resulted from an effort to avoid conflict, then trade from there. But you do need to have *some* starting point. But no matter what this is, there will be gains from trade.[55]

Despite this disclaimer, a page or two later Buchanan attempts his own construction of an initial set of property rights arrived at in a state of nature where, at the outset, everyone has a right to everything.

> Each would find it advantageous to invest effort, a "bad," in order to secure the good x. Physical strength, cajolery, stealth—all these and other personal qualities might determine the relative abilities of the individuals to secure and protect for themselves quantities of x, which may be quite different from the relative quantities that were arbitrarily assigned by the initial disposition. . . . As a result of the actual or potential conflict over the relative proportions of x to be finally consumed, some "natural distribution" will come to be established. . . . But, in the natural distribution, both A and B will recognize, on rational observation, that much of the effort expended in securing and defending stocks of x is wasteful. Whatever might be the characteristics of this distribution, whether rough symmetry prevails or whether one participant becomes a consumption giant and the other a pygmy, and even if all of x is secured by one party, *both* parties will be made better off if agreement can be reached. Trades can be arranged in the sense of agreement on a set of behavioral limits.[56]

Buchanan is eager to get *some* property distribution established, no matter what, so that the process he truly admires, voluntary exchange, can begin. There is no judgment in his description that the initial distribution is one that would be considered just. Indeed, in a later chapter he seems to rue the fact that it is necessary to deal with such an initial distribution, suggesting that there would be virtue in periodically having a "consensual redefinition of individual rights and claims."[57] But Buchanan seems quite satisfied with the initial assignment of property rights forthcoming from the process just described. In the sentence following the preceding quotation, he concludes that "it is appropriate to call this a genuine basis for the emergence of property rights."

55. Buchanan 1975, 23.
56. Buchanan 1975, 24–25.
57. Buchanan 1975, 178.

Nozick and Rothbard

Two other contemporary writers are noteworthy for being close to the Lockean natural law tradition. One of these is Robert Nozick, who describes a rather ingenious sequence by which he views people being removed from the state of nature and in which they subscribe voluntarily to a succession of "protective agencies," finally arriving in a situation where there is a state with minimal caretaker powers.[58] Clever as it is, Nozick's scheme is not very believable, as Rothbard and many others have pointed out.[59] Of particular interest in Nozick's scheme is the supposition that, unlike the world Buchanan describes, people are constrained from taking more property from the common pool if there exist other people who have greater need for it. But how this is to happen, or even how the process of original claims-making takes place, is not made very clear.

Finally, we must reconsider the work of Rothbard, that ultimate purist in the natural law tradition. To begin with, Rothbard seems to have more faith than anyone since medieval times that there exists a Truth somewhere discoverable through right reason.[60] For property right theory, he extends Locke's ideas for the state of nature much farther than did Locke. All property rights come from either production or exchange, but "ultimately [are traceable] to production itself, since a gift must be preceded by production, if not directly . . . , then somewhere back down the line."[61] All ownership "reduces ultimately back to: each man's naturally-given ownership over himself, *and* of the land resources that man transforms and brings into production."[62]

Rothbard envisions a society with close to absolute freedom, in which a person's "'naturally' owned property (in his person and in tangibles) is free from invasion or molestation by other persons."[63] It is a society of voluntary exchanges only. There is no need at all for a state—people merely need exert complete control over all activities conducted on their own property and none over activities conducted over anyone else's.

58. Nozick 1974.
59. Rothbard 1982, chap. 29; Gordon 1976.
60. That faith is evident in this passage:

> In natural law philosophy, then, reason is not bound, as it is in modern post-Humean philosophy, to be a mere slave to the passions, confined to cranking out the discovery of the means to arbitrarily chosen ends. For the ends themselves are selected by the use of reason; and "right reason" dictates to man his proper ends as well as the means for their attainment. (Rothbard 1982, 6)

61. Rothbard 1982, 37.
62. Rothbard 1982, 40.
63. Rothbard 1982, 41.

Although Rothbard's plan is impractical enough, he must nonetheless be given credit for stating a consistent theory of property acquisition that does not duck the question of "how much." All property is rightfully possessed if a person or some ancestor (or some person who can be traced back through a legitimate chain of gifts) derived it legitimately through his own production. Property was obtained legitimately if there was no dishonesty or fraud involved, and if there was no undue exploitation, such as that practiced by medieval nobles of their serfs. The practical difficulties in enforcing these strictures in the manner that Rothbard seems to require would surely be insurmountable.

Utilitarianism

The rise of the utilitarian tradition was discussed at length in chapter 2, and of course is familiar enough to social scientists in our era, economists especially. The basic principle of how the utilitarian looks at property rights is not far to seek—it is overall welfare that is to be maximized, and so there would seem to be a presumptive right of the collectivity over that of the individual. But there is no certainty because of the well-known difficulty of measuring utility, which muddies the water when it comes to making policy decisions. Since we cannot measure utility (interpersonally), the following scenario is at least possible. Assuming a utility measure were theoretically obtainable, in the mind of God perhaps, let us assume that taking a specified body of rights away from individual A would add N utility to the collective welfare of everyone besides A (N a large, but finite, number), but it turns out that it would subtract $2N$ utility from A's welfare. (Perhaps impartial observers mistakenly estimate this as $0.001N$.) Or, since the action is setting a precedent that might later be used against all other members of society, the action creates a potential for future welfare loss of $50N$. With the inability to measure utility, counterexamples such as this can never be ruled out.

On the other hand, there is a way in which utility can be measured and interpersonal comparisons made, at least roughly, and that is in the minds of legitimately chosen governmental decision makers. Legislators may assess the effects on total welfare of a program that removes some rights from one citizen but that helps the others in some way. This directly leads to the position reached by John Locke (one of his two), that all property rights are properly subject to conventions drawn up through enlightened legislation. Indeed, this is the conclusion that most utilitarians over the years have reached. This does not mean that a utilitarian would rule out having rather fixed rules about property rights that were all but inviolable. Such is quite possible, but he or she would subscribe to this on the basis that establishing such a set of rules would itself maximize the group welfare over the long run; that efficient operation of a market economy (considered best from the welfare

viewpoint) requires property-right conventions where people can be absolutely certain in advance exactly what property rights they can expect to have. But it is the property rights that are serving group welfare, not the other way around.

Utilitarians have been dominant in social science for well over a century, and it would be possible to write a book devoted to what utilitarian thinkers have had to say about property rights. And yet, surprisingly perhaps, there is no better, single figure to study who dealt with the important issues than the first great utilitarian, Jeremy Bentham.[64] Bentham identified four major social goals important to total welfare: security, equality, subsistence, and abundance.[65] *Security* referred to the right to keep property for which past law and custom had created a strong expectation that it would not be taken. *Subsistence* of course is the meeting of minimum requirements for everyone, while *abundance* refers to reserving a place for people to hold wealth, other things equal. Abundance also included the idea of maximizing the total economic product, which is greatly fostered by incentives stemming from wealth ownership.

It is obvious, and was to Bentham, that fundamental conflicts arise between equality and subsistence on the one hand and security and abundance on the other. Armed with his utility concept, Bentham was well prepared to deal with such conflict, however, which of course was one of the great virtues of his method. Since he believed legislation to be the basis of property (or any other) rights, he could leave it up to the government to resolve conflicts as it saw fit, which would then mark the end of the story.

Before leaving utilitarianism, we might briefly consider ways in which major utilitarians have resolved conflicts between Bentham's four goals. Bentham himself had a very shrewd treatment, perhaps not unlike the mainstream of contemporary public opinion. He was quite firm about meeting the subsistence objective, and he was largely (but certainly not fanatically) in favor of greater equality (he understood the declining marginal utility argument, although he may not have considered all utility functions to be identical). On the other hand, Bentham was extremely chary about tampering with expectations. Ryan explains Bentham's position on expectations quite well.

> Property is mostly about expectation; and Bentham all but defines it as a basis for expectation. . . . The fact that law creates expectation is a source of happiness, and also a potential source of unhappiness. Expectation is itself enjoyable, and by creating expectation the law creates happiness directly. Thus, by assuring me that I shall be able to live in my own house when I choose, the law gives me the pleasure of anticipation now, even if I shall not live there for some time.
>
> The same thing applies to inheritance: before I inherit I have the pleasure of looking forward to my inheritance, and my parents have the pleasure of looking forward to my future enjoyment of their property. This possibility of pleasure is bought at a price, however, for if the pleasures of anticipation are sweet, the pains of disappointed expectation are particularly severe. There are many things which we should not much miss if we had had them and had lost them. The disappointment of expectation is thus one of the things we should guard against in legislation; innovations by the legislator will almost inevitably disturb some expectations, and skill is required to minimize these disappointments.[66]

This is the counsel of gradual change. The state should avoid taking away property in ways different from those used in the past. If it cannot avoid doing so, it should introduce its changes gradually, with long announcement periods. Expectations are important to human happiness. It is this kind of consideration that surely gave rise to the age-old maxim in public finance that "an old tax is a good tax."

Bentham's attitude toward great wealth was conservative, despite the fact he accepted the argument for leveling due to declining marginal utility. His distaste for tampering with expectations was one reason; another was the belief that the abundance of the wealthy provides a resource for the whole community in times of trouble.[67] Subject to these arguments, he still believed governments should engage in redistribution activities when possible. These positions may or may not have been somewhat contradictory. Implied in Bentham's arguments is the position that taxing down some portions of very large wealth accumulations would be acceptable if it could be made a long-standing policy so that all concerned would know what to expect. He also believed that the state could tax heavily the estates of wealthy people who died without children or near heirs.[68]

64. See Bentham (1887) 1931. An excellent discussion of the property rights ideas of the utilitarians, especially those of Bentham, is in Ryan 1984, chap. 4.

65. Ryan 1984, 95.

66. Ryan 1984, 98. This passage is closely based on Bentham 1887 (London, Trubner) 110–14.

67. Ryan 1984, 96, reference to Bentham 1887, 101–2.

68. Bentham 1887.

> When property by death of the proprietor ceases to have an owner, the law can interfere with its distribution, either by limiting in certain respects the testamentary power in order to prevent too great an accumulation of wealth in the hands of an individual; or by regulating the succession in favor of equality in cases where the deceased has left no consort, nor relation in the direct line, and has made no will. The question then relates to new acquirers

Finally, Bentham does not neglect mentioning the possibility that utility might be forthcoming from viewing property ownership as a mode of self-expression, although he does not stress it. As Ryan describes, Bentham

> recognized that one important feature of property is the extent to which we see something of ourselves in it. The things we have made, the houses in which we have lived, the fields we have farmed, all have in them some part of ourselves says Bentham, and it is this which justifies tenderness towards the fears of owners for the security of their property.[69]

Most mainstream utilitarians over the years would not have been far removed from Bentham's positions of almost two centuries ago. Some, like J. S. Mill, Marshall, and Pigou, would have stressed equality more, while others such as Sidgwick and many contemporary American economists would have seen things much the same way as Bentham. But the common sense of his position is undeniable. If property must be taken, it should be done gradually and with a long announcement period, and in a way that does not damage incentives. Otherwise, the needy must be given succor, and wealth should be made more equal. And there is no property right that stands above the will of the legislature; property rights are inside the domain of public choice.

More Critical Ideas

Finally, we should turn our attention to arguments more critical of the private property tradition, or at least that part of it resulting in large accumulations. Again, the literature is huge, much of it the writing of socialists, of course. Although there is no way to reasonably cover all of this, my hope is that most of the more important arguments can be examined by discussing the ideas of just four writers, Rousseau, Hegel, J. S. Mill, and Marx.

While only one of these writers was a true socialist, all four were keenly interested in sociological issues, being especially critical of problems due to the unequal distribution of wealth. All four believed that the fundamental justification for property ownership was work, and all, with the possible exception of Hegel, were highly critical of large property holdings that were not directly justified by work.

who have formed no expectations; and equality may do what is best for all without disappointing any. (Bentham 1887, pt. 1, chap. 12, quoted in Chester 1982, 18)

69. Ryan 1984, 110.

Two of the four, Rousseau and Hegel, had theories in which the institution of property ownership was of key importance to the psychological well-being of the personality, providing individuals with avenues for self-expression and self-identity. Rousseau believed people to be social beings entirely, their personalities molded by society, where property ownership conventions were of special importance. This had both a good and a bad side. For small property owners, with certain kinds of property (land, for example) in particular, this was beneficial in ways that could assume romantic overtones. But otherwise, because there existed people, the "vulgar rich," who owned much more property than was good for their souls, and because an emphasis on property ownership fostered self-centered, crass materialism, Rousseau saw private property conventions as causing social malaise.[70] Unlike Marx and others who would prescribe actions to be taken to deal with the problem, Rousseau was rather pessimistic that anything could be done.

Hegel also had ideas that property ownership contributed to the human personality, although he was less put off by large holdings than was Rousseau. For Hegel, property was a bit like a creation, such as a work of art. With property rights based on work, property has something of the owner's personality stamped on it. Like Rousseau, Hegel thought property an important form of self-identity and self-expression. Property ownership is important also in that it anchors a person's place in society, giving a sense of identity and belonging, although property ownership was not the only means by which this could be accomplished; ownership of skills that give a person secure employment can do the same thing.

That all people should have a secure place, or role, in society was of central importance in Hegel's scheme of things. That people may not have worked for part of their property, although not especially good, worried Hegel less than the existence of a fairly large underclass of people who had no anchored place in society. If this situation could be improved through redistribution of wealth, Hegel presumably would have approved. In any event, a policy of guaranteed employment would be highly desirable, and Hegel was critical of laissez-faire market economies for the unemployment they allowed.

We became familiar with the complex personality of John Stuart Mill in chapter 2. While a staunch defender of free-market economic institutions on grounds of efficiency, he was a profound critic of the income and wealth distribution of his day. In taxation, this combination resulted in arguments in favor of a proportional income tax together with high transfer taxes. His prescriptions for property rights was consistent with this two-pronged policy: a firm belief in private property because of its salutary effect on incentives, while denying the rights of people to large accumulations of wealth who

70. Ryan 1984, 61.

worked far less than many laborers who had no wealth at all. Mill was a severe critic of how the industrial system of his day was organized, resulting as it did in the amount of workers' wages being, in his opinion, seriously at odds with their deserts. Since work was at the foundation of property rights, holders of large accumulations, unless they had worked for them directly, were undeserving. Mill was not opposed to inheritance per se, but he was against large accumulations of inherited wealth. This placed him in favor of graduated accessions taxes as the optimal form of transfer taxes.

About Marx there is little to say, presumably. His theory of the exploitation of labor by capitalists is well known, as is his prescription that the only way to cure the difficulty was to expropriate all capital and give it to the workers or to their qualified representatives. Under capitalism, workers felt alienated from their society, a line of argument that in milder form was present in the three other critical writers we have discussed. Marx was optimistic that social institutions could be fashioned by people as desired, with the required system of communal ownership of all capital being achievable with proper effort. In a way consistent with Hegel's views about employment, he considered a society organized to guarantee meaningful employment, which would give each worker a proper sense of place or self-identity, as providing all the property rights that are necessary, except perhaps for the rights to minor personal possessions.

Arguments from the Transfer Tax Discussion

There have been a variety of freedom-related arguments made by proponents and opponents of large transfer taxes. A central argument of most of the proponents is already familiar from our look at the four critical writers just given, the idea that people should only have the right to property earned through their own efforts. It is no invasion of freedom for the state to tax down property obtained with no effort. And, since such property otherwise would be in the hands of others, not taxing it away amounts to an invasion of the freedoms of those who otherwise would have had it.[71]

Another argument often used by proponents of transfer taxes is the idea that a person's rights must necessarily cease with his or her own demise, and hence little weight should be given to the wishes of the dead with respect to matters not pertaining to the living. Any number of writers have taken this position, including utilitarians such as Bentham.[72] This argument is strengthened when it is pointed out that it is, anyway, not the dead father who is supporting people who have inherited wealth, but other people living in the same generation. Harlan Read states all this rather trenchantly:

> No parent has authority to bind or control the acts of his own son past the age of twenty-one, even when living. How then has he the right to bind or control the acts of an entire generation toward that son? . . . If he cannot command his son to contribute in labour toward the world's support, upon what theory of justice may he require the world to feed, clothe, and shelter his son? Make no mistake here—the father who is dead is not supporting the son. This son is being supported entirely by his living fellow citizens. . . .[73]
>
> If the wealthy father has a natural right to declare that his son shall be supported at the public charge, why cannot the son of an indigent father be required to pay his father's debts? In the latter case we recognize that such an obligation placed upon a son would be unfair. Is it not clear that the inheritance of a fortune is as unfair to the public as the inheritance of debts would be unfair to the son? . . . [74]
>
> The denial of the property rights of others that is made whenever an heir is granted, without labour, a part of the property control of the world, enforces a degree of slavery upon the rest of the world in proportion to the size of the estate inherited. . . .[75]

Again, the fundamental logic underlying these positions is that people only deserve property earned through their own efforts. Also intertwined in Read's arguments is the idea that contracts are only valid when they are constantly reaffirmed among the living. A person living off of inherited capital violates the rights of all those who must support that person, for which nothing is received in return, and where contracts, if legitimately struck, would not allow this.[76]

Harlan Read also raises another interesting argument, in which he claims that inheritance of great wealth is exactly parallel to both the inheritance of the right of monarchs to govern according to divine right and to inheritance of the status of slavery. The world has recognized the arguments for slavery and

71. "I shall show that the bequeathing of an estate to other than the man and woman who created it, constitutes a denial of the inalienable rights of all other men and women to the property they create." (Read 1918, 19)

72. Chester 1982, 18.

73. Read 1918, 39–40.

74. Read 1918, 40–41.

75. Read 1918, 44.

76. This position touches a tender nerve of the contractarians, since unanimous consent is an important feature of the contractarian tradition, and contracts obviously can only be made among the living. An example of this is Buchanan's obvious unease about how to deal with the existing distribution of wealth. See Buchanan 1975, 178, and the previous section on voluntary exchange.

divine right as balderdash, and since the justifications are identical, the world should come to recognize the argument for inheritance as equally worthless.[77]

Many writers have opposed large inheritances on the grounds that they lead to undue concentration of political power, which carries potential danger to maintenance of a viable democratic order. Even if wealth concentration does not violate the rights of the nonwealthy directly in the manner suggested by Read, it leads to unreasonable political power, which indirectly results in public policies harmful to the nonwealthy. The argument can be taken a step farther by bringing up the potential of civil unrest and upheaval if the poor become too embittered, with resultant damage to all, rich and poor alike. The idea is reinforced by the argument we associate with Seligman that the real dangers of accumulation are much enhanced by the fact that there are substantial economies of scale in the accumulation of fortunes. The importance of this line of argument is an empirical matter of course, although it stands to reason that there is a point at which it becomes operative.

Important freedom-related arguments have been advanced by opponents of high transfer taxes also.[78] The fundamental argument has been the simple natural law idea that people may keep what is theirs and may give it to whom they please. To the argument that the dead cannot give away property, they answer that parents give property to their sons and daughters (or whomever else) while they are still alive, implicitly if not explicitly. It is natural that people be allowed to make gifts to those for whom they feel affection; high transfer taxes are an invasion of this right. As Wagner puts it, "one might indeed wish to tax activities that reflect hate, but why activities that reflect love?"[79] These arguments are then reinforced by the natural law right of contract if one admits that the gift contract is made de facto while all contracting parties are still alive.

While the argument is seldom made explicitly, there seems to be an

77. The parallel drawn between inheritance of power to govern and of wealth relates to a point made by Rothbard in his discussion. While Rothbard as much as (or more than) any other writer defends the inheritance of large wealth accumulations (provided it was legitimately acquired in the first place), he has a proviso that social conventions are only valid if they are equally applicable to all people, no matter what the time or place. He then gives as an example of this principle's failure, the claim that "the Hohenzollern or Bourbon families have the 'natural right' to rule. . . ."

> This kind of doctrine is easily refutable by simply pointing to the fact that there is here no uniform ethic for every person: one's rank in the social order being dependent on the accident of being, or not being, a Hohenzollern. (Rothbard 1982, 42)

It would seem difficult to make a distinction between the accident of being a Hohenzollern and the accident of being born with wealthy parents.

78. These are many, including of course Rothbard 1982. Also see Hayek 1960 and 1979, Friedman 1962, Wagner 1977, and Yeager 1971.

79. Wagner 1977, 85.

assumption made by opponents of inheritance taxation, and indeed by many members of the public at large, that if a person holds title to wealth, and if this is not questioned for some specific reason (such as presenting proof that it was stolen, for example), then he or she retains the right to keep it.[80] "Possession is nine points of the law" is a very familiar maxim, one that seems to have many adherents. While this principle is consistent with modest inheritance taxation, it is not consistent with taxation that could be considered confiscatory. These seem to be deeply held beliefs, especially in the United States, probably stemming from the importance of the natural law tradition, as already discussed.

Another important argument against high transfer taxes is what Chester has called the "lottery phenomenon."[81] Many people, Americans especially, seem to be gamblers at heart (at least in their romantic daydreams), with a romantic attachment to the idea of high payoff, however remote. People seem more kindly disposed toward large wealth accumulations by the possibility that anyone might inherit a windfall. This seems to exist despite the fact the odds of winning once one finds oneself born to nonwealthy parents are negligible in the extreme. But large transfer taxes would remove the right of people to "win big."

Many people, especially among the wealthy, feel that it should be the right of each family to build a family dynasty, perhaps lasting many generations. If considerable effort was exerted over the generations to build such a dynasty, it would be unjust to have a major portion of it taken away. Being a member of such a dynasty confers special privileges, and perhaps also, special responsibilities. In a society without a formal aristocracy, these families form "the nobility."

A somewhat related argument has been advanced by Jouvenal and others that having wealthy families with disparate tastes gives rise to beneficial artistic and cultural diversity.[82] Another is that taking away large amounts of wealth is pandering to envy, an unacceptably evil emotion.[83] There is no good

80. Many Americans, including members of the legal profession in particular, are very legalistic with respect to what they consider a person's right to property. The idea is that even if wealth is acquired through illegal activity (heroin sales, for example), if the state cannot obtain conviction for some reason (which may include a legal technicality), then the person has every moral right to it. In this, many people are much more extreme than Rothbard.

81. Chester 1982, 51.

82. de Jouvenel 1952.

> the existence of several thousand pillars of economic strength, many of them able and some of them willing to support causes and persons that may be unpopular with the general public and with the government, may be of great value in preserving a free society. (Yeager 1971, 426)

83. Economists in particular have traditionally despised envy. This began at least with J. S. Mill and continues to the present. See chap. 9.

reason to deny people good fortune if it is doing other people no palpable harm. As Yeager states:

> Great wealth is the opposite of something that almost everyone would consider bad for himself. It, or the opportunity to choose it, broadens the range of alternatives open to people, as we can recognize without supposing that material abundance must form the very core of the good life. Ideally, a liberal would like each person to have the opportunity for it if that is what he wants. A policy aimed at levelling down the exceptionally wealthy few would deprive some people of their good fortune—a good fortune that a liberal would welcome for everyone—because other people are less fortunate.[84]

Finally, opponents of transfer taxes deny the argument that wealth is concentrated enough to pose a political danger (in the industrialized nations at least). The number of people with extremely large fortunes is too small to pose any real threat in a democracy, and the power of wealth lies only in the ability to offer "financially attractive deals," which is not the ability to deny people alternatives they would have had anyway.[85]

Conclusions: Freedom and Large Accumulations

We have considered a large and somewhat confusing number of arguments concerning property rights to large accumulations of wealth, and it will be useful now to attempt some conclusion. But first, a few observations can be made to focus the discussion.

The first observation concerns the possibility of finding justifications for perfectly guaranteed unexceptionable freedoms in the area of property rights. With apologies to Rothbard, there is nothing in the preceding remarks to suggest that this is possible. Even in the American legal tradition, heavily influenced as it has been by natural law ideas, the courts have always ruled that property-right matters, including inheritance, are subject to the civil law. Rothbard aside, none of the writers we have discussed would have supported such a position. And we saw how Rothbard's prescriptions would be quite impossible to implement and would be grotesquely supportive of the status

Yeager relates envy, again considered illegitimate, to crime. "The practice of brooding about whether wealthy people have something they "deserve" may have something to do with crime." (Yeager 1971, 436). Of course, Yeager has hold of a two-edged sword here. One wonders if these economists, in condemning all envy without asking about the reasons for it, realize that they are making an egregious ethical value judgment.

84. Yeager 1971, 423–24.

85. Yeager 1971, 426.

quo even if they could be made practical. No property right is absolutely sacrosanct if the commonwealth finds a pressing reason for denying it. On the other hand, this cannot be taken to mean that there exist no justifications for property rights whatsoever. These exist in the form of the opinions held by most people, reflected in social policies, as to what are reasonable rights. Here we can only attempt to identify such reasonable positions.

The second observation is a reminder that the subject being discussed is atypical, or extra-heavy, taxation of extremely large accumulations of wealth and the income therefrom. Only extremely large wealth holdings are of concern with respect to excessive concentration and political power, and only these could provide enough tax revenue for useful redistribution to the poor, should that be desired. The estates being discussed are in the range above several tens of millions of dollars. As we have seen, even the staunchest of libertarians have condoned some, often proportional, taxation of the income from great wealth, and it is only taxation in excess of this amount that is considered here.

These qualifications in hand, we can attempt to draw some conclusions. To begin with, it should be obvious to even the most casual student of property rights that a fundamental difference exists in the arguments for property acquired through a person's own, direct efforts and property not so acquired. The key foundation of all the natural law arguments is the mixing in of one's own labor. Writers who stress the self-identity and personality benefits of property ownership are quick to point out that positive feelings of self-worth are largely due to having acquired property through one's own exertions. Most anticapitalist critics of large property holdings base their criticism on the argument that workers are not rewarded consistent with their efforts. And since most of the very large wealth accumulations exist through inheritance, the declining marginal utility arguments of the utilitarians apply largely to inherited wealth also. If there is any "safe" area in property rights, it would seem to be here. Even if it is decided to lay extra-high taxes on great wealth accumulations, many would argue that a partial exception, at least, should be made for wealth obtained through the taxpayer's own efforts.[86]

As we might have expected all along, the great freedom issues in property rights discussions exist with respect to the right to large accumulations of inherited property. Since, as we saw in chapter 4, inheritance accounts for most of the great wealth in quantitative terms, these are issues of central concern to us in this book. One of the most emotionally charged areas in social science, it is not an easy one to discuss, since there seems to be a low

86. People who think it proper to consider families as dynasties are the exception here. It should be noted, however, that there is no reason why the prestige of belonging to a family dynasty is more a function of relative rather than total wealth. If all family dynasties were asked to give up the same percentage of their wealth, their relative position would remain unchanged.

boiling point at which heat begins to drive out light. Economists, in particular, have avoided the area, presumably as one that is too "ethical."

I think it fair to say that there are two fundamentally different approaches that can be used to look at freedom issues with respect to large inherited accumulations, depending on the depth that one goes into the underlying philosophical discussion. The first would inquire into the philosophy somewhat less deeply and invoke a live-and-let-live attitude about the world of property rights. This is not meant to be pejorative; it is the reasonable approach of people who say: "If it's not broken don't fix it." After all, the ideal of live-and-let-live is what freedom is all about, and most would argue that there does not seem to be much reason for changing social institutions if there is nothing demonstrably wrong with society in the first place. Henry Sidgwick has described this viewpoint well. People who feel this way, he wrote in his *Principles of Political Economy,* "have admitted that very great inequalities of income, due to inheritance, would probably continue to exist; but they have thought it not unjust that A's income should be augmented by the results of his ancestor's labour and care, whether in the form of material wealth or personal aptitudes—assuming, of course, that such augmentation did not tend to make B's income less than it would otherwise have been."[87] While, according to some abstract principles, we might think large accumulations unfair, if they are not doing any harm, why tinker with them?

The important phrase in Sidgwick's statement, and for people who take this approach generally, is "assuming, of course, that such augmentation would not tend to make B's income less. . . . " If the assumption Sidgwick mentions cannot be made, then the implication is that in fact something is broken, and positive property right reasons exist for the taxing down of wealth. Where the truth lies here is a question of technical economic analysis. If Mill and Marshall (for example) were correct, some additional taxing down of inherited wealth would not adversely affect incentives. Indeed, one can easily imagine scenarios, as did Hayek, in which higher taxes on inherited wealth make possible lower taxes on earned income (and wealth) thereby increasing incentives.[88] And, of course, the tax revenues could be directly used to augment the incomes and educational opportunities of the poor. But there can be no doubt that as taxes on inherited wealth become higher there would come a point at which the economic incentives in society at large would suffer.

The second approach for discussing freedom issues with respect to large inherited accumulations involves a more fundamental examination of all the philosophical issues underlying the justifications for acquiring and holding

87. Sidgwick 1901, 506.
88. Hayek 1953, 231.

inherited property. When this is done, it seems fair to say that arguments against the progressive taxation of large inherited wealth accumulations are not strong, although not altogether absent. In particular, few if any of the philosophical arguments can be addressed successfully to the answering of the "how much" question. This means that even when arguments can be found for the holding of wealth, it is not possible to use them in support of the holding of great wealth, especially if relative positions are left unchanged. While arguments emphasizing personal effort provide some support for the right to inherited property, the right becomes progressively weaker as the generations become farther away from the person first earning the wealth. Somewhat more support is found from the part of the natural law and legal tradition that emphasizes the right of contract, since it can be readily argued that, in a contractarian society, people have the right to form contracts to give property to whomever they wish. But even this has shaky foundations. It is possible to argue, as Read does, that contracts should only be valid between members of the same generation, and it would be impossible for all members of the same generation to reach a voluntary agreement that allowed a few of them to hold much of the wealth. Otherwise, when intergenerational contracts are allowed, a person searching for philosophical justifications cannot help but be carried backward through the generations in order to find a justification for some initial distribution of property. As we have seen, even the contractarian writers (except Rothbard) have found it necessary to admit that no such justification exists. Thus, the contractarian justification fails no matter which generational perspective one takes.

While there are a number of other valid arguments for allowing inheritance, none of these answers the "how much" question, and all of them could seemingly be met even if the very large estates are taxed much heavier than they are now. These include the lottery argument, the argument for leaving property to people for whom one feels affection, and the family dynasty argument. With respect to the last, it can be noted that the prestige value of asset holdings to families should obtain with respect mainly to relative relationships, and so the prestige value of family dynasties can be maintained if only the rank order of estate size is preserved. Even Bentham's arguments about expectations do not completely deal with the "how much" question, especially if taxation of large inheritances were introduced gradually and substantial wealth was left untaxed. Presumably, the utility from expectations that Bentham had in mind would be nearly as great for an inheritance of $100 million as it would be for $300 million, since there is little one can do with the latter estate that one cannot do with the former.