

THE QUICK, THE DEAD AND THE LIBERTARIAN:

AN ESSAY ON SOME LIBERTARIAN INHERITANCE THEORIES

GEORGE STEVEN SWAN

This essay was originally published in *The Dandelion*, 1, 2, Summer 1977. This magazine is now defunct and we have been unable to locate the copyright holders. We are therefore reprinting this piece *without* permission, but, we hope, without offence, either to Mr Swan or, if that, regretably, is appropriate, his descendants or other beneficiaries. We don't know anything about George Steven Swan except what it said in *The Dandelion*:

"George S. Swan holds a B.A. in political science from Ohio State University, the J.D. from the University of Notre Dame, and the L.L.M. from the University of Toronto. He is an Ohio attorney. Mr. Swan has published articles in *Reason* and in *Optim*."

We greatly regret the paucity of the footnotes, totally absent in the original. We have been able to locate some of the easier references, but have been unable to track down all the quotations. In view of the fierce noises we have made in the past on this subject, why have we nevertheless decided to reprint this piece in this imperfect state? Simply, we want to cover as many different issues from a libertarian perspective as possible, and we've so far published nothing about the rights and wrongs of inheritance. Hence our eagerness to publish this. Also, such a thoughtful piece of libertarian writing surely deserves the wider and longer-lasting readership that we can give it.

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FOR LIFE, LIBERTY AND PROPERTY

The following examination of the inheritance analyses of five prominent contemporary libertarians notes the premises underlying their common conclusion as to the validity of inheritance. It indicates that much of these defenses of inheritance seems founded upon false analogies from gift and contract. Elementary potential inheritance questions are presented, and the need for the inheritance function as an incentive to capital accumulation is thrown into some doubt in light of known facts of economic behavior. It is concluded that a more searching analysis of inheritance is required than offered by the popular presentations referred to herein.

THE CASE FOR INHERITANCE

Brief contemporary libertarian discussions of inheritance have been offered by Nathaniel Branden, John Hospers, James A. Sadowsky, Murray N. Rothbard and David Friedman. These analyses have so overlapped and been mutually consistent that they in effect constitute a single argument. Despite the broad acceptance among libertarians of the pro-inheritance stance of these influential authors, their thinking may not be unassailable; much of it indeed may turn upon a demonstrably false analogy.

Dr Rothbard, for example, forthrightly addresses himself to those who recognize the right of income earners to their earned wealth but balk at inheritance:

The libertarian answer is to concentrate not on the recipient, the child Rockefeller or the child Rothbard, but to concentrate on the *giver*, the man who bestows the inheritance. For if Smith and Jones and Stargell have the right to their labor and property and to exchange the titles to this property for the similar property of others, they also have the right to *give* their property to whomever they wish. And of course most such gifts consist of the gifts of the property owners to their children — in short, inheritance. If Willie Stargell owns his labor and the money he earns from it, then he has the right to give that money to the baby Stargell. (Italics in Rothbard)¹

Note the explicit right to which Mr Rothbard appeals: that to give gifts. Repeatedly he relies upon the terms "giver", "give" and "gifts".

Herbert Spencer wrote very similarly as early as 1891:

The right of gift implies the right of bequest; for a bequest is a postponed gift. If a man may legitimately transfer what he possesses to another, he may legitimately fix the time at which it shall be transferred. When he does this by a will, he partially makes the transfer, but provides that the transfer shall take effect only when his own power of possession ceases. And his right to make a gift subject to this condition, is included in his right of ownership; since, otherwise, his ownership is incomplete.

Spencer too relied upon the gift-giving right to underpin bequest; his thinking in this regard is consistent with that of Rothbard.

In complete consistency with Mr Rothbard, Dr Branden adds: "It has been argued that, since the heir did not work to produce the wealth, he has no inherent right to it; that is true: the heir's is a *derived* right; the only *primary* right is the producer's."² (Italics in Branden) Reiterates Professor Sadowsky: "All the objection to inherited wealth is an attack on the right of a man to give away his property."³ And, again, Dr Hospers tells the heir regarding his inheritance: "Consider the man who willed it to you: it was his, he had the right to use and dispose of it as *he* saw fit; and if he decided to give it to you, this is a windfall for you, but it was only the exercise of *his* right."⁴ (Italics in Hospers)

The critical holder of rights to whom all authors look is the decedent. The right explicitly depended upon is his right to be-

stow gifts, Professors Sadowsky, Rothbard and Hospers even choosing to frame their contentions with that very word.

Even if all of these advocates are correct, their conclusion emphatically is not self-evident to all honest and intelligent observers. Compare, as does Martin Mayer, America's European ancestors:

Prior to the collapse of feudalism, it was understood that whatever a man owned when he died was to be divided according to the custom of the country; whatever privileges his ownership might give him while he was alive, it was unthinkable that he should be permitted after death to disturb the normal organization of society.

Or as Milton Friedman thoughtfully reminds:

The notion of property, as it has developed over centuries and as it is embodied in our legal codes, has become so much a part of us that we tend to take it for granted, and fail to recognize the extent to which just what constitutes property and what rights the ownership of property confers are complex social creations rather than self-evident propositions.⁵

THE GIFT AND CONTRACT ANALOGIES

Professor Rothbard states that on the free market the only *given* is the property right of every person in himself and his production, and in his gains from gifts and voluntary exchange. Notice will be taken of the relationship of the dead to gift and to voluntary exchange (contract) to allow comparison with the inheritance formula. Since Mr Rothbard believes the Anglo-American common law to be justly celebrated as embodying rational and very frequently libertarian principles, the law may prove instructive in these areas.

Delivery of possession of the subject matter by the donor to the donee with intention to give is a valid and irrevocable method of gift. This mode and that of gift by deed are the only ones available during donor's lifetime at common law. A mere announcement of a gift fails to pass title, if prior to delivery the donor dies.

The lifetime promise to bestow parallels bequest in that in each case the property owner designates the would-be recipient of particular property. Indeed, in the former instance the donor at his own expense is willing to enrich the donee; in bequest the giver has nothing to lose. But death extinguishes the former donor's right to choose the beneficiary. Why the latter case should differ is not apparent.

The common law principle that mere declaration of a gift fails to transfer title happens to be consistent with certain libertarian thinking. Reminds Mr. Rothbard: "It is not the business of the enforcing agency or agencies in the free market to enforce promises merely because they are promises; its business is to enforce against theft of property, ..." To say that the government should enforce private promises merely sounds dangerously like calling for government-enforced morality.

The common law principle that mere announcement of a gift fails to transfer title is on its face a practical policy. If on impulse a passionate promisor freely promises his mistress to devote his savings to keeping her in high style for the rest of her days, should she really have a claim on him?

Yes, replies Dr Rothbard:

Evidence of a *promise to pay property* is an enforceable claim, because the possessor of this claim is, in effect, the owner of the property involved, and failure to redeem the claim is equivalent to theft of the property. (Italics in Rothbard)

But, fortunately for many males, this answer is logically circular.

In contexts both of practical policy and of certain libertarian thinking the common law principle that mere announcement of a gift fails to pass title is a good one. Insofar as gift-giving is cited as the foundation of bequest, the bequest argument seems to crumble.

The law does recognize the *donatio mortis causa*, or gift made in contemplation of the donor's death. (Should the donor survive the life-and-death crisis triggering the bestowal, the donor can recover the gift.) The parallel here with bequest is the plainer. But even the *donatio mortis causa* requires an actual delivery of the gift to the donee or his agent.

Similarly, if a property holder announces his intent to later create an *inter vivos* trust — or even promises to do so — but dies before either delivering the property to a trustee or naming himself as trustee, no *inter vivos* trust has arisen. For a trust to be created by a settlor, the settlor must manifest the present intention. Life encompasses alternatives; the would-be settlor is expected to utilize his delivery option, just as the gift donor. In the *inter vivos* trust as in the gift circumstance the alternative must be exploited during life; death seals off alternatives.

In contract as in gift bestowal and *inter vivos* trust formation, death cuts off the alternatives of the decedent-offeror. The rationale involved here is not obscure; if contract requires mutual assent it would necessarily be impossible to form a contract where either the offeror or offeree died prior to the mutual assent. It generally is held that an offer is terminated by the death of the offeror. The ordinary offeror does not successfully make his assent to the prospective contract survive him.

This contemporary reality is far from novel. As the Supreme Judicial Court of Massachusetts in 1877 determined in an extremely instructive case in this area:

Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke. (JORDAN v. DOBINS)

Even in 1877 this principle was not new. As England's Lord Justice Mellish already had written in a High Court of Justice Chancery Division decision of 1876:

It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, ... (DICKINSON v. DOBBS)

Life insurance contracts afford a good example of enforceable contract enriching the beneficiary after another's death, rather as would bequest. But the life insurance contract is entered into not by the dead, but by the living; the living insurance purchaser manifests his present assent to the mutual contract. The premium burden is incurred ordinarily by someone living, typically the insured or the beneficiary. As a device hinging on the present assent of the living, whose premium payment demonstrates his own choice among alternative lifetime expenditures, life insurance sharply contrasts with bequest.

THE CLAIM TO EARNED ALTERNATIVES

David Friedman's overview of inheritance includes the illuminating idea that money represents a bundle of alternatives: money is an easily stored means whereby present options are retained for future choice. Mr. Friedman feels concerning the dead father who leaves his son capital that the option chosen with the wealth passed on is the posthumous enrichment of the son by the father.

This dependence upon the concept of alternatives may not be entirely effective in justifying inheritance. During his own lifetime the father truly enjoys the alternatives of contract, of gift-giving, and of establishing *inter vivos* trusts. But the most salient feature of the decedent, after all, is that he is dead. The alternatives remaining available to corpses are not obvious; perhaps even regarding capital the dead must abandon any options in the realm of the living.

As in another context the late Ludwig von Mises agreed:

Man lives in the shadow of death. Whatever he may have achieved in the course of his pilgrimage, he must one day pass away and abandon all that he has built.

It might be only practical for social performers to exploit their alternatives before their chance is lost. Reminds Dr Rothbard:

Human action occurs in stages, and at each stage an actor must make the best possible use of his opportunities in light of expected future developments. The past is forever bygone.

Acceptance of a paternal claim to influence posthumously the world the living share means that the fathers in question not only can contract, bestow gifts, and establish *inter vivos* trusts during their own spans — alternatives they exploit or avoid consequent to their own lives — but can exploit alternatives from the grave. A libertarian society however which saw circumstances of the living continually being altered at the option of ancestors long dust might seem paternalistic with a vengeance.

Herbert Spencer seems to have been very much aware of the threat of posthumous “paternalism”:

But while, along with the right of gift, the right of bequest is implied by the right of property, — while a man’s ownership may justly be held to include the right of leaving defined portions of what he owns to specified recipients; it does not follow that he is ethically warranted in directing what shall be done by the recipients with the property he leaves to them.

Presented in its naked form, the proposition that a man can own a thing when he is dead, is absurd; and yet, in disguised form, ownership after death has been largely in past times, and is to a considerable extent at present, recognized and enforced by the carrying out of a testator’s orders respecting the uses to be made of his bequests. For any prescribing of such uses, implying continuance of some power over the property, implies continuance of some possession; and wholly or partially takes away the possession from those to whom the property is bequeathed.

The Spencerian solution seems to have been to restrict the bequest right, but not, concededly, altogether to deny it.

If the alternative concept hinges on the father’s right to command his own life, his right to command alternatives arguably must close with his life, in inheritance as well as in contract and gift-giving. Libertarian economist Milton Friedman gently jibes the notion, supposedly implicit in Marxism, of present-day rewards being owed to earlier hired laborers since deceased; perhaps the idea of contemporary alternatives being determined by fathers deceased is somewhat similar.

DECEDENT CHOICE IN PRACTICE

Exclusive reliance in the disposition of property left behind by decedents on the desires of decedents could run the risk of painfully unworkable outcomes. Mr Branden goes so far as to assert that

... if the future heir has no moral claim to the wealth, except by the producer’s choice, *neither has anyone else* —

certainly not the government or ‘the public’. (Italics in Branden)⁶

If Mr Branden is serious, his policy might generate awkward problems in the case of intestates. Absent an actual choice by the decedent among would-be heirs, no one at all would have a moral claim on the decedent’s goods and realty. As to realty alone, every death of an intestate landowner either could trigger an immediate land rush to stake out the realty as if it were virgin land, or else the bulk of the whole planet slowly could slide off-limits to the entire global populace as intestate landowners died and their realty forever were closed to others. It is little wonder that Dr Hospers climaxes his own inheritance argument with the rather plaintive reference to the testator and his wealth:

If he doesn’t have the right to determine who shall have it, who does?⁷

Of course, the real and personal property of intestates might be available for one or another form of homesteading by the public. This is at first glance consistent with libertarian theory, and is a more productive policy outcome than letting property slide off-limits to the living. But policy also calls attention to the intestate’s destitute widow and orphans, about to be evicted from their New York City apartment into the snow because all of the valuable California realty into which the intestate invested all his wealth has been staked out by homesteaders.

This widow and her orphans could be rescued, as is done today, by a mandatory division of the property left behind by a decedent without a will. But precisely why have these New York City charity cases a libertarian claim to the California land superior to that of the energetic western homesteaders?

Intestates do not present the only questions. Suppose a rich conservationist left behind wilderness land preserved wild in perpetuity. Can some of the world’s surface thus actually be tied up forever by the dead? Or suppose a business owner leaves behind a vast and detailed book of business operation principles to his executor. Should real-world business decisions be reached perpetually on the explicit, continuing authority of the dead?

But no need arbitrarily to stop here. Perhaps those libertarians enjoying a personal right to the ballot should via will instruct their estates to cast their vote for the Libertarian Party in every election. Should the dead not share political as well as economic authority, because until utopia arrives the government will pressure or threaten the property interests (the land preserved by the dead, the dead-directed private business) of the dead? Libertarians regularly analogize the free market to an ongoing electoral process wherein dollars are votes. If the dead control their own dollars, why deny them control of their votes? These questions, like many of social policy, are easier to ridicule than to answer.

The wilderness preserve, the ongoing business, and the ballot hypotheticals are not distinguishable from the ordinary bequest on the ground that the power/right to “command” (in the three hypotheticals) differs from the power/right to “give” (in the typical bequest). Neither the heir nor the executor of a will is or should be forced into his role. The testator no more needs the advance consent of the executor to leave “commands” via his will than he needs the advance consent of the heir in order to “give” via his will.

Milton Friedman confesses that he considers the inequality of income stemming from prior differences in property endowment a genuinely difficult ethical issue. He goes so far as to conclude of the capitalist ethic:

I find it difficult to justify either accepting or rejecting it, or to justify any alternative principle. I am led to the view that it cannot in and of itself be regarded as an ethical prin-

ciple; that it must be regarded as instrumental or a corollary of some other principle such as freedom.

Insofar as the right of inheritance were to hinge on a capitalist ethic regarded itself as instrumental of other principles, it would be worthwhile to recall that Nobel laureate Friedrich A. Hayek deems the chief arguments for inheritance to be its apprehended role in preserving a dispersed control of capital, and also its role in inducing capital accumulation. But libertarians who fight on this latter ground expose themselves to a fierce counter-attack.

Socialist scholar Christopher Jencks points out that experience with the graduated income tax does not suggest that taxpayers lose interest in increasing their incomes even if half of the increment is taxed away. And Dr Jencks adds:

The kibbutz, with no wage differentials whatever, has had a higher rate of economic growth than the rest of the Israeli economy, which has hardly been stagnating. Japan, with the highest rate of economic growth in the world, also seems to have the most equal distribution of wages. Closer to home, casual observation suggests that high-level civil servants work as hard for \$25,000 a year as high-level business executives receiving five or ten times as much. Likewise, low-level civil servants seem to work at least as hard as their unionized counterparts in the private sector.

The unlikely-sounding fact that taxpayers do not lose interest in increasing their incomes even if half of the increment is taxed away is comprehensible once it is recognized that (as socialist John Kenneth Galbraith points out) the generally far better-paying employment is the pleasant, not the unpleasant, work. Dr Jencks speculates that even if the most productive fifth of all workers accounts for half the Gross National Product, it need not follow that they require half the income. A third or quarter well might suffice to keep both them and others productive.

Nor is this satanic socialist billingsgate. As Dr Hayek records, perhaps with himself in mind:

The pianist who was reported not long ago to have said that he would perform even if he had to pay for the privilege probably described the position of many who earn large incomes from activities which are also their chief pleasure.

If the best-remunerated employment in fact is that otherwise most satisfying as well, inheritance might lose much of its practical defense as an incentive to capital accumulation. The producers of wealth presumably enjoy the game of production itself, independently of whether they amass capital to be consumed by others after they themselves are deceased.

CONCLUSION

Popular discussion of inheritance by leading libertarians defends inheritance seemingly by means of false analogies. There may arise elementary problems if the right of decedents to leave property as they see fit is deemed absolute. Too, the inheritance function itself as an important factor in capital accumulation may be exaggerated, at least in view of fragmentary evidence. In light of the seemingly false analogies defending inheritance, the problems that can stem from inheritance, the possibly modest utility of it, a more comprehensive libertarian analysis of inheritance than is provided by the five authors in reference herein may be called for.

The foregoing examination of contemporary libertarian inheritance discussions has, of course, looked at the inheritance thinking of various friends of *laissez-faire*. This discussion might best be concluded with references to criticisms of inheritance by men among the most influential of history's anarchists

and the most influential of the advocates of the mixed economy. Inheritance has been attacked from both sides.

The great Russian anarchist Michael Bakunin forthrightly declared

The one thing that the State can and must do, in our opinion, is gradually to modify the right of inheritance so as to achieve its complete abolition as soon as possible. Being purely a creation of the State, and one of the essential conditions of the very existence of the authoritarian and divine State, the right of inheritance can and should be abolished by liberty within the State — which amounts to saying that the State itself must dissolve into a society freely organized on the basis of justice. We claim that this right will necessarily have to be abolished because as long as *inheritance* lasts, there will be *hereditary* economic inequality — not the natural inequality of individuals, but the artificial inequality of classes — which will necessarily continue to be expressed in hereditary inequality of the development and cultivation of intelligence and will remain the source and sanction of all political and social inequality. Equality for all, from birth until entry into adult life, as far as such equality depends on the economic and political organization of society, in order for every individual — natural differences apart — to be the true offspring of their own efforts; this is the problem of justice. (Italics in Bakunin)

John Maynard Keynes — in a passage notably consistent with the quotation above from Jencks — proffered this speculation in 1925:

I believe that the seeds of the intellectual decay of Individualistic Capitalism are to be found in an institution which is not the least characteristic of itself, but which it took over from the social system of Feudalism which preceded it, — namely, the hereditary principle. The hereditary principle in the transmission of wealth and the control of business is the reason why the leadership of the Capitalist Cause is weak and stupid. It is too much dominated by third-generation men. Nothing will cause a social institution to decay with more certainty than its attachment to the hereditary principle. It is an illustration of this that by far the oldest of our institutions, the Church, is the one which has always kept itself free from the hereditary taint.

In light of these words of Bakunin and of Keynes, a man not always wrong, contemporary libertarians — including the anarcho-capitalists among them — well might reconsider whether the legitimacy of inheritance necessarily derives from the premises of either anarchism or capitalism.

NOTES

1. Murray N. Rothbard, *For A New Liberty*, Macmillan, New York, 1973, p. 42. A virtually identical passage can also be found in his essay "Justice and Property Rights" in Samuel L. Blumenfeld, ed., *Property in a Humane Economy*, Institute For Humane Studies, Menlo Park, California and Open Court, La Salle, Illinois, 1974, p. 115; reprinted in Rothbard, *Egalitarianism as a Revolt Against Nature and Other Essays*, Libertarian Review Press, Washington D.C., 1974, p. 65.
2. Nathaniel Branden, "Inherited Wealth", *The Objectivist Newsletter* (New York), 2(6), June 1963, p. 22.
3. James A. Sadowsky, "Private Property and Collective Ownership", Blumenfeld, *op. cit.*, p. 87.
4. John Hospers, *Libertarianism: A Political Philosophy for Tomorrow*, Reason Press, Santa Barbara, California, 1971, p. 71.
5. Milton Friedman, *Capitalism and Freedom*, Chicago University Press, 1962, p. 26.
6. Branden, *op. cit.*, p. 23.
7. Hospers, *op. cit.*, p. 71.