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I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance†

by
DEBORAH A. Batts*

The sanctity and inviolability of the parent-child bond is a fundamental concept imbedded in America's social and legal structure. An integral part of that bond has been the parental obligation to nurture, support, educate, and provide for the child, at least during the life of the parent. As sacred and fundamental as the bond may be, however, it is consistently abandoned whenever it clashes with another fundamental concept imbedded in America's social and legal structure: testamentary freedom.

A review of the current law in America makes clear that when it comes to inheritance, American children are in need of a champion.

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This Article is dedicated to my loving and loved parents, Dr. and Mrs. James A. Batts, who should take it very seriously, and to my wonderful children Alix and Jamie McCown, who should not!

The author also wishes to thank her mentor Professor Michael Martin, Professors Helen Hadjiyannakis Bender, Gail Hollister, Robert Kaczorowski, and Steve Thel of Fordham University School of Law for their support and assistance, as well as Jo Ann Harris, Esq., who once again has come through far beyond the bounds of longstanding friendship. Additionally, her sisters Diane Batts Morrow and Denise Batts have provided invaluable insight and perspective for this Article. Finally, the author wishes to thank Paul Solomon and Magda Vives, her devoted and responsible research assistants.

1. Of course, the sanctity of the parent-child bond is not unique to American society. While it varied from society to society, that bond is more ancient than civilization itself. See, e.g., H. MAINE, ANCIENT LAW 132-33, 136, 162 (1970).

Until recently, societal attempts at intervention to protect the child from the parent have been hampered by governmental reluctance to interfere in the parent-child relationship, even to benefit the child. See, e.g., Hafen, The Family as an Entity, 22 U.C. DAVIS L. REV. 865, 868-89 (1989).

2. Inheritance is defined as "[t]hat which is inherited or to be inherited. Property which descends to heir on the intestate death of another. An estate or property which a man has by
Many countries today protect children from disinheritance by will through either a forced share system—an automatic process by which a set portion of each parent's estate is reserved for their children—or a family maintenance system—a discretionary judicial process that can provide for the needs of a child by overriding a parent's will upon a showing of just cause. In America, however, a parent can disinherit a child without giving any reason. Until 1989, Louisiana was the only American jurisdiction to protect children of the deceased, regardless of age or need, against disinheritance by will. In July 1989, however, even Louisiana essentially abolished these legal protections for adult children.\(^3\)

When contrasted with the protections for children found in the laws of intestacy, this lack of protection for children whose parents have executed wills becomes even more difficult to understand. The laws of intestacy dictate how the decedent's assets are to be distributed in the absence of a will: first, among the surviving spouse and children of the decedent, then among other relatives. In these circumstances, statutes prescribe the shares of the decedent's property to which the various relatives have a recognized claim, reflecting society's sense of what should be done.

The decedent's will is the mechanism that provides the decedent with the testamentary freedom to control from the grave the disposition of property amassed during life. Even though we have come to recognize that "you can't take it with you," the law of wills has developed as the next best thing. Courts often strain to divine the intent of the deceased in order to fulfill the decedent's wishes, as set forth in the will.\(^4\)

This American indifference to the disinheritance of children, who indeed did not ask to be born, is irreconcilable with protections provided disinherited surviving spouses. When the surviving spouse has been written out of the deceased spouse's will, or has been devised inadequate assets, many American jurisdictions provide the surviving spouse with a remedy known as the elective share.\(^5\) In the majority of jurisdictions that

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5. See infra note 291 and accompanying text.
have this remedy, the surviving spouse may receive as much as one-third or one-half of the estate.\(^6\)

One justification for this clear derogation of the intent of the deceased spouse is the overriding state concern that the surviving spouse does not become a ward of the state.\(^7\) Another justification is recognition of the surviving spouse’s contributions to the estate,\(^8\) which is analogous to the economic partnership of marriage theory.\(^9\) While direct financial contributions of children to the acquisition of the estate are rarely a modern consideration,\(^10\) in the analogous area of delinquent child support payments,\(^11\) in which the government frequently bridges the gap, the possibility that children will become wards of the state if disinherited is at least as compelling a concern for the state as the possibility that surviving spouses will become its wards.\(^12\)

This statutory protection for adult spouses focuses more sharply the concomitant need for statutory protection of children:

\(^6\) Id.

\(^7\) The elective share statute was passed in New York in 1929 to end “the glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death.” THIRD REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, N.Y. LEGIS. DOC. NO. 19 (1964) (footnote omitted) [hereinafter THIRD REPORT ON ESTATES].


\(^9\) See, e.g., THIRD REPORT ON ESTATES, supra note 7, at 212.

\(^10\) While the “economic partnership of marriage” theory has been seen as a judicially convenient way to express the interests of the spouses at divorce, it has been criticized as inapposite to the real concerns between the parties at divorce. See, e.g., M. GLENDON, supra note 8, at 65-67; Batts, Remedy Refocus: In Search of Equity in “Enhanced Spouse/Other Spouse” Divorces, 63 N.Y.U. L. REV. 751, 756-57 n.21 (1988).

\(^11\) See, e.g., M. GLENDON, supra note 8, at 18.

\(^12\) In 1985, for example, 26% of the child support payments awarded and due to begin that year were not paid at all. Of the remaining 74%, it is not known how many were full payments and how many were only partial payments. Of the 1,416,000 women who were awarded child support in 1985 from a spouse of a prior marriage and who had remarried, 32% did not receive child support payments in 1985. Of the 2,179,000 women who were divorced but not remarried and were awarded child support in 1985, 25% did not receive the payment. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 368 (chart 609) (1989) [hereinafter STATISTICAL ABSTRACT OF THE UNITED STATES].

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12. “When a dependent family member is disinherited, however, the taxpayer’s interest again asserts itself, to be weighed together with the claims of the disinherited person. On the other side of the scales are the interests of the intended objects of the decedent’s bounty and the policy of free testation.” M. GLENDON, supra note 8, at 58-59. In ancient law, even when the parent disowned or disinherited the child, the child still had to be supported out of the estate. H. GROTIIUS, DE JURE BELLII AC FACIS, LIBRI TRES 273 (F. Kelsey trans. 1925).
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While few would gainsay the moral right of the spouse to protection against disinheritance, a decedent's dependent children would seem to have an even higher moral claim to such protection. Spouses, after all, enter into the husband-wife relationship voluntarily at an age when they can protect their interests while children do not volunteer to be brought into the parent-child relationship thrust upon them at birth.\(^{13}\)

Indeed, the case for statutory protection of children is even more compelling. Not only has the surviving spouse married knowingly and voluntarily, when old enough to protect his interests, but at the death of the testator, he is or could become self-supporting. The surviving spouse might have assets independent of the deceased, or may be able to establish another financially supportive relationship through remarriage or cohabitation with a significant other. None of these options is available to the minor child, who did not voluntarily or knowingly establish the family relationship with the testator. If public policy has seen fit to protect spouses from disinheritance, the same statutory protections should be provided for children.

An equally significant consideration is the substantial fifty percent divorce rate and the frequent incidence of remarriage,\(^{14}\) which often attenuates the child's bond with one parent and leads to the increased possibility of disinheritance of children.\(^{15}\) In 45.7 percent of the marriages performed in the United States in 1985, one or both of the parties had


15. This problem was addressed in New York in 1963-65 by the Bennett Commission, which was revising the estate law at that time:

As to the urgency for specific legislation to prevent the disinheritance of dependent children in New York, statistics will probably never be available. Yet the high rate of divorce and remarriage in this state, as elsewhere in the country, resulting in the fact that testators frequently leave children of more than one marriage, makes the likelihood that certain dependent children will be inadequately provided for, if not actually neglected, at least as great if not greater than in those countries presently having either forced heirship or family maintenance laws. Some program for the protection of dependent children would therefore seem to be in order.

**FOURTH REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, N.Y. LEGIS. DOC. NO. 19, AT 146 (1965) [HEREINAFTER "FOURTH REPORT ON ESTATES"] (FOOTNOTE OMITTED).**

Several commentators have recognized the plight of disinherited children and have acknowledged that the lack of a remedy at law for them forecloses any opportunity to gauge accurately how many children are affected. See, e.g., Cahn, *Restraints on Disinheritance*, 85 U. Pa. L. Rev. 139, 144 (1936); Haskell, * supra * note 3, at 526; Nathan, *An Assault on the Citadel: A Rejection of Forced Heirship*, 52 Tul. L. Rev. 5, 16 (1977); Rein, * supra * note 13, at 14 n.16.

Authors of some empirical studies undertaken in the 1960s and 1970s, on the other hand, have concluded that true disinheritance in America is rare. See, e.g., Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. Chi. L. Rev. 241, 257, 263
been married previously. Furthermore, since 1970 the annual divorce rate in this country has increased while the marriage rate has declined. The number of minor children involved in this increasing divorce rate has grown: in 1970, it was 12.5 per thousand children; in 1985, it was 17.3 per thousand children.

As a result of the increasing divorce rate, more children grow up living with and knowing only one parent. In 1970, 85.2 percent of all children under eighteen years of age lived with both parents; by 1987, this figure was reduced to 73.1 percent. In 1970, 10.8 percent of minor children lived with their mother alone; by 1987, this figure had risen to 21.3 percent. Furthermore, of those minor children living with their mothers alone, 3.3 percent lived with divorced mothers in 1970, but the percentage rose to 8.5 percent in 1987. The possible alienation and disaffection of the noncustodial parent toward the child might result in disinheritance of the child who that parent never really knew.

To understand and attempt to reconcile the tension between the parent-child bond and testamentary freedom, it is useful to consider both the history of these concepts and the modern interests and concerns of the surviving family members, the state, and the public. This Article proposes that a duty of continuing responsibility of parent for child should be incorporated into the law of testate succession so that testamentary freedom for the property owner with children is more circumscribed than it is presently in most American jurisdictions.

Part I of the Article considers the historic sources of inheritance and examines inheritance in countries outside of the United States. Part II


16. **Statistical Abstract of the United States**, supra note 11, at 85 (chart 129). Further breakdown of these statistics for 1985 shows that 11.5% were remarriages for the man, 10.9% were remarriages for the woman, and 23.4% were remarriages for both. Id.

17. In 1970, the marriage rate was 10.6% and the divorce rate was 3.5%. In 1975, the marriage rate was 10.0% and the divorce rate was 4.8%. In 1980, the marriage rate was 10.6% and the divorce rate was 5.2%. In 1985, the marriage rate was 10.2% and the divorce rate was 5.0%. In 1987, the marriage rate was 9.9% and the divorce rate was 4.8%. The World Almanac and Book of Facts 807 (1989).


19. Id. at 52 (chart 71).

20. Id.

21. Id.

22. Since, after death, the former property owner hardly can be affected by any post mortem disposition of the property, the concerns of the state and the living indeed could take precedence over the wishes of the deceased. "Death renders less essential, not more, the liberty to dispose of property." Samuel, Shaw & Spaht, Successions and Donations, 45 La. L. Rev. 575, 594 (1984).
discusses the tension between testamentary freedom and children's rights of inheritance, and considers whether the historic adjustment of that tension should be reevaluated in light of today's fluid and multiple families. Part III examines how other areas of the law have resolved their tensions with testamentary freedom. Part IV proposes the concept of protected inheritance for children as an additional, but not total, restriction on testamentary freedom. Protected inheritance seeks to take the best of the family maintenance systems—flexibility toward need—and the best of the modern forced heirship systems—automatic application, simplicity, estate planning certainty—to suggest a system appropriate for the vast majority of American jurisdictions in the 1990s and beyond. The Article concludes that protected inheritance would be more consistent with the societal view of the parent-child bond and more equitable than the law of inheritance as it exists in most American jurisdictions today.

I. Inheritance Protection for Children

The idea of protected inheritance for children is neither new nor uniquely suited to our American jurisdictions. It was practiced in ancient societies and documented, if not mandated, in ancient religious texts. It is currently practiced in many countries.

A. Ancient Historical Roots

The United States is a relatively young country. Many of the social and political ideas that took root here are either a reaffirmation of or a revolt against experiences that originated in other, older cultural and political systems. A search for the bases of our society's attitude toward protected inheritance for children requires an examination of the historical attitudes toward protection in these other, older cultures and civilizations.

It is not possible to trace definitively the legal history of the right of children to inherit. One reason for this is that the practice or custom of passing possessions from generation to generation developed long before the formal law of inheritance was established. The "unit" of the an-

23. See, e.g., Deuteronomy 21:16; Rambam (Maimonides) Ch. 6, Laws 1-4, 11.
24. See infra notes 68-83 and accompanying text.
26. Henry Maine discusses pre-Roman, ancient Greek, Hebrew, and "Hindoo" [sic] societies and concludes that the "difficulty . . . is to know where to stop, to say of what races of men it is not allowable to lay down that the society . . . was originally organized on the patriarchal model." H. Maine, supra note 1, at 118-19. In discussing the elements of the patriarchal
cient society was the family, not the individual; consanguinity, actual or fictionalized by adoption into the "family," was the cohesive social force.27

Family, familial obligations, and family protection were fundamental to survival in those ancient societies. The patriarchal model of ancient society, which vested the eldest male parent with absolute power and authority over the members of the family and their possessions, invested the head of the family with onerous obligations as well. The later Roman version of the patriarchal model, the *patria potestas*, invested the *paterfamilias* with duties or liabilities that balanced his omnipotent rights:

It was not a legal duty, for law had not yet penetrated into the precincts of the Family. To call it *moral* is perhaps to anticipate the ideas belonging to a later stage of mental development; but the expression "moral obligation" is significant enough for our purpose, if we understand by it a duty semiconsciously followed and enforced rather by instinct and habit than by definite sanctions.28

This family duty, an almost involuntary human response, did not directly shape the development of inheritance law.29 Indeed, this preexisting and traditionalized "family response" was often in tension with developing law.30

model, Maine states: "[T]he possessions of the parent, which he holds in a representative rather than in a proprietary character, are equally divided at his death among his descendants in the first degree . . . ." Id.

27. Id. at 121, 123-27.
28. Id. at 141 (emphasis added).
29. See Teitelbaum, Placing the Family in Context, 22 U.C. DAVIS L. REV. 801 (1989); see also, H. MAINE, supra note 1, at 216.

Of course, there are examples of when the right to inherit did inform the development of the law:

The sanctity of inheritance as the great safeguard of family security is a theme which runs continually through the history of property. It would be hard to find a more striking illustration than the charter of 1066: the Conqueror's message of reassurance to the nation was in terms which all could appreciate: I "will that every child be his father's heir."

T. PLUNKNETT, A CONCISE HISTORY OF THE COMMON LAW 712-13 (5th ed. 1956) (footnote omitted). The Magna Carta of 1215 also recognized, in a fashion, a share of or *legitim* in the dead man's estate for both the wife and the children. 2 F. POLLOCK & F. MAITLAND, supra note 25, at 350.

30. See, e.g., H. MAINE, supra note 1, at 140-41, 216; T. PLUNKNETT, supra note 29, at 711, 743; 2 F. POLLOCK & F. MAITLAND, supra note 25, at 245; Hafen, supra note 1, at 869.

Moreover, this tension between the family response and the political aim of the law is not limited to ancient times or lands. Professor Stanley Katz discusses the new Soviet government's unsuccessful attempt in 1918 to abolish inheritance. The 1918 law decreed that all property would escheat to the state upon the death of the owner; the law was "quickly reduced" to "a mere declaratory statement." Later attempts to tax inheritance out of existence in the U.S.S.R. "were equally ineffective." Katz, Republicanism and the Law of Inheritance in the American Revolutionary Era, 76 MICH. L. REV. 1, 3 n.3 (1977). See also Kornstein, supra
Ancient historical sources seem to support a right of children to inherit. In fact, Roman wills or testaments originated to recognize legally the family response that had been circumscribed by law: "It will be found that Wills were never looked upon in the Roman community as a contrivance for parting Property and the Family . . . but rather as a means of making a better provision for the members of a household than could be secured through the rules of Intestate succession." Roman freedom of testation emerged not to disinherit children, but rather to protect adult or emancipated children who were not heirs under the then existing laws of intestate succession. Thus, the advent of wills and testaments, and later, Roman freedom of testation, were responses to a divergence between the family response and the developing law:

We cannot, however, for a moment suppose that the limitations of the family imposed by legal pedantry had their counterpart in the natural affection of parents. Family attachments must still have retained that nearly inconceivable sanctity and intensity which belonged to them under the Patriarchal system. . . . It may be unhesitatingly taken for granted that enfranchisement from the father's power was a demonstration, rather than a severance, of affection. . . . If sons thus honoured above the rest were absolutely deprived of their heritage by an Intestacy, the reluctance to incur it requires no farther explanation.

Ancient history, then, would not be a likely source to support our predilection for not protecting children.

B. The Feudal System in Medieval England

At the decline of the Roman Empire, the Roman Civil Code had taken hold more tenaciously in some foreign lands than in others. Although the Romans ruled Britain for 350 years, the Roman Civil

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31. See, e.g., 2 H. Grotius, supra note 12, at 269 n.2, 270; H. Maine, supra note 1, at 191-92.
32. H. Maine, supra note 1, at 188-89.
33. The rules of Intestate Succession, which the Romans must at this period have practiced, account, I think—and more than account—for that vehement distaste for an Intestacy to which Roman society during so many ages remained constant. The order of succession was this: on the death of a citizen, having no will or no valid will, his Unemancipated children became his Heirs. His emancipated sons had no share in the inheritance. Id. at 214.
34. Id. at 215-16.
35. See infra notes 64-83 and accompanying text.
36. T. Plucknett, supra note 29, at 6.
Code ultimately did not prevail in Britain. The British family response of legitim, or the share of chattels that "by law or custom" went to the surviving wife and children, developed in England as early as the 1100s from that Roman influence. By the 1600s, however, the right to legitim effectively had disappeared.

German and Anglo-Saxon influences in Britain after the fall of Rome clearly show the existence of the concept of inheritance in the law, if not its effect on the law. It was not until well after the Conquest, however, that more definite rules of inheritance emerged in Britain. In 1066, William the Bastard became William the Conqueror and installed

38. The law or custom of legitim was enforced by the Chancery Court:
   If a testator leaves neither wife nor child, he can give away the whole of his moveable goods. If he leaves wife but no child, or child but no wife, his goods must, after his debts have been paid, be divided into two halves; one of these can be disposed of by his will, it is "the dead's part," the other belongs to the widow, or (as the case may be) to the child or children. If he leaves both wife and child, then the division is tripartite; the wife takes a share, the child or children a share, while the remaining third is governed by the will; we have a "wife's part," "bairns' part," and "dead's part." Among themselves children take equal shares; the son is not preferred to the daughter . . . .
2 F. POLLOCK & F. MAITLAND, supra note 25, at 348.
39. Helmholz, supra note 37, at 665. Pollock and Maitland note that the legitim disappeared without a discernable legal trace by the 17th century:
   Our English law seems to slip unconsciously into the decision of a very important and debatable question. Curiously enough the Act of 1692, which enables the inhabitant of the northern province to bequeath all his goods away from his family, was confessedly passed in the interest of his younger children. To the modern Englishman our modern law, which allows the father to leave his children penniless, may seem so obvious that he will be apt to think it deep-rooted in our national character. But national character and national law react upon each other, and law is sometimes the outcome of what we must call accidents.
2 F. POLLOCK & F. MAITLAND, supra note 25, at 355 (footnote omitted). See also T. PLUCKNETT, supra note 29, at 746 (Inheritance Act of 1692 did not revive legitim).
40. Under German laws of inheritance, which governed in parts of Britain in the post-Roman, pre-Norman period, "[t]he kinsmen were called to the inheritance class by class, first the children, then the brothers, then the uncles. The Lex Salica has a law of intestate succession; it calls the children, then the mother, then the brothers and sisters, then the mother's sister." 2 F. POLLOCK & F. MAITLAND, supra note 25, at 250 (footnotes omitted). These laws apparently applied to movebales only, though the Lex Salica also addressed the inheritance of land: "the dead man's land descends to his sons, and an express statement that women can not inherit it is not deemed superfluous." Id. at 251.
41. A doom of King Alfred speaks thus: "If a man has book-land which his kinsmen left him, we decree that he is not to alienate it outside his kindred" . . . . [Thus]; here about the year 900, we see the current of legislation moving, at least for the moment, in favour of the expectant heirs.
Id. at 253.
42. Id. at 255-56.
the feudal system of sole ownership of land by the king. Barons could "hold" land as "tenants" under the king, and in turn, others could hold land as tenants of the barons, and so on. The imposition of this tenurial system on the existing customs and laws of England exacerbated the recurring tension between family and law.

The "great revolution of the twelfth century which produced primogeniture and freedom of alienation" caused a major change in inheritance. Primogeniture, by which the eldest surviving son of the decedent inherits all of his land or estate, was "not a natural part of the law of inheritance," but ultimately served the purposes of the king.

43. See, e.g., T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 4 (2d ed. 1984).
44. Id. at 11-13.
45. For example, family preservation instincts as part of the family response were in tension with the lack of family generational security inherent in this tenurial system. Heirs of the baron-tenant eventually secured the right to succeed the tenant in his fee:

The Conquest had settled many families which looked for their economic foundation to purely feudal holdings. . . . [T]he Crown and other lords regarded these grants as being for life only, but a long and persistent struggle ended with the recognition of the heritability of these fiefs—indeed, the word fee finally became a term of art for a heritable interest in land, so thorough was the victory of the family principle over political feudalism. T. PLUCKNETT, supra note 29, at 713 (footnote omitted).

This was a short-lived victory for the heirs, however, since the heir in the 12th century had no legal recourse if his father, the holder of certain types of tenancies, conveyed away the complete estate by an inter vivos transfer, even without the consent of the heir. Prior to this period, there had been a long-standing restriction on the alienation of land in favor of the heir apparent: any inter vivos disposition of land had to be with the consent of the heirs. This was a family protection practice that was ultimately defeated by primogeniture:

We seem to see here . . . the complement of that new and stringent primogeniture which the king's court had begun to enforce. The object of the restraint in time past had not been solely, perhaps not mainly, the retention of land "in a family"; it had secured an equal division of land among sons . . . . It became useless, inappropriate, unbearable, when the eldest son was to have the whole inheritance. No great harm would be done to the feudal lords, at all events to the king, by abolishing it.

2 F. POLLOCK & F. MAITLAND, supra note 25, at 311-12. The authors, in discussing the apparently swift disappearance of this restriction on alienation in favor of the heir apparent, are critical of the "high handed court of professional justices who were all for extreme simplicity and who could abolish a whole chapter of ancient jurisprudence by two or three bold decisions." Id. at 313.
46. T. PLUCKNETT, supra note 29, at 714.
47. 2 F. POLLOCK & F. MAITLAND, supra note 25, at 262.

The authors went on to distinguish this statement as "not referring to any fanciful 'law of nature,' " but simply explaining that "the law of inheritance does not come by this rule if and so long as it has merely to consider what, as between the various kinsmen of the dead man, justice bids us do." Id.

Since neither justice nor nature require that primogeniture be the rule, the authors suggest that the law of inheritance, by requiring primogeniture, is in effect ignoring the interests of the dead man, his heirs and equity. With primogeniture, the law of inheritance is protecting "one
Freedom of alienation gave control to the tenants-in-chief who could dispose of their estates at will, to the detriment of their heirs. As stated by one commentator:

Primogeniture upset everything. It is true that freedom of alienation accompanied it and gave landowners the power to make their own dispositions, and that most of them no doubt used those powers reasonably; but nevertheless it is obvious that the law henceforth disclaimed any responsibility for seeing that those dispositions were equitable.

The law of descent, which predated by centuries the legal testamentary capacity to convey land in England, controls how the decedent's property would be distributed among the surviving kin or family. From the twelfth century on, it embraced primogeniture and expanded its application to more and more classes of estates or fees throughout England. The advantage of a system that provides that, "when one man leaves the world one other should fill the vacant place," was simplicity of administration; primogeniture gave the king a limited number of tenants to look to for the obligations of holders of the feudal estates. But even though convenient for the lord and established as the law, primogeniture still had to contend with the family response. Primogeniture had "to encounter a powerful force, a very ancient and deep-seated sense of what is right and just."

who is a stranger to the inheritance, some king or lord, whose interests demand that the land shall not be partitioned." Id.

48. T. PLUCKNETT, supra note 29, at 714.
49. Id. at 743.
50. H. MAINE, supra note 1, at 187-89.
51. The law of descent, or the law of intestacy, at that time can be thus described: The first class of persons called to the inheritance comprises the dead person's descendants; in other words, if he leaves an "heir of his body," no other person will inherit. Among his descendants, precedence is settled by six rules. (1) A living descendant excludes his or her own descendants. (2) A dead descendant is represented by his or her own descendants. (3) Males exclude females of equal degree. (4) Among males of equal degree only the eldest inherits. (5) Females of equal degree inherit together as co-heiresses. (6) The rule that a dead descendant is represented by his or her descendants overrides the preference for the male sex, so that a granddaughter by a dead eldest son will exclude a younger son.
2 F. POLLOCK & F. MAITLAND, supra note 25, at 260. The authors explain further, "The preference of descendants before all other kinfolk we may call natural: that is to say, we shall find it in every system that is comparable with our own." Id. at 260-61.
52. Id. at 274.
53. Id. at 265.

This tension between the sense of what was right and just—that is, all sons sharing equally—and primogeniture was relieved somewhat by the development of the practice of subinfeudation, transfers to younger sons that cut the overlord off from the services and incidents of the tenancy of the subinfeudated land. In 1290, the Statute Quia Emptores attempted to curb this by, among other things, forbidding subinfeudation and permitting alienation of the land by the tenant in fee simple. T. PLUCKNETT, supra note 29, at 715-16; F.
Coupled with freedom of alienation, then, primogeniture\textsuperscript{54} set up a legal structure whose primary concern clearly was not the family. As one authority has stated: "Men had burst forth from the medieval collectivism of the feudal system and had begun to learn of their inalienable rights, while forgetting their inescapable obligations."\textsuperscript{55} While the legal framework was consistent with inheritance by children and in some ways facilitated it,\textsuperscript{56} the lawgivers through the centuries of the English legal system, unlike those of the Roman Civil Code, did contemplate and permit the disinheriting of children. "It is in the province of inheritance that our medieval law made its worst mistakes."\textsuperscript{57}

C. Inheritance in the United States

The United States of America evolved after the suppression and supplanting of the indigenous Native American culture and laws by the invading European peoples. France, Spain, and the Netherlands all established colonies in the infant United States. Each of these countries had and continues today to have some form of forced heirship for children.\textsuperscript{58}

\textit{(1) The British Colonies}

The tradition of inheritance that British colonial America had was that of the feudal system, not that of the Roman Civil Code. But the colonies had revolted from the mother country. Founded on then current democratic ideas, if not ideals, the colonies had an opportunity to start anew with a form of government that could comprise only the best of the past and discard all legal barriers that were inequitable and unjust.\textsuperscript{59} The American Revolution could have abolished inheritance alto-

\textbf{POLLOCK & F. MAITLAND, supra} note 25, at 293. \textit{See also} T. BERGIN & P. HASKELL, \textit{supra} note 43, at 16-17 (\textit{Quia Emptores} as a reason for the slow erosion of feudal pyramids over hundreds of years).

\textsuperscript{54} Primogeniture as a legal concept was not abolished in England until 1925. T. BERGIN & P. HASKELL, \textit{supra} note 43, at 9.

\textsuperscript{55} Cahn, \textit{supra} note 15, at 140.

\textsuperscript{56} The Statute of Wills, which in 1540 permitted alienation of land by writing for the first time, along with freedom of alienation, provided avenues for a testator to provide equitably for all his heirs.

\textsuperscript{57} F. POLLOCK & F. MAITLAND, \textit{supra} note 25, at 363.

\textsuperscript{58} \textit{See infra} note 68.

\textsuperscript{59} Daniel J. Kornstein argues that there is no constitutional right to inheritance in America. In discussing the motivations of the founders, he states: [T]he framers' intent must be looked at more generally to see if they viewed inheritance as so fundamental a right as to deserve constitutional protection. Of great relevance here is the nature of the American Revolution. Much more was involved than a simple colonial break from England. There was in America at the time a
gether, especially if such abolition were consonant with the prevailing views of the political revolutionaries. Abolition of inheritance was not, however, on the agenda of this fledgling country.

One commentator has considered the political options available to our founders regarding inheritance: "repudiation of the traditional concept of inheritance" or "reform of the law of inheritance by excision of what were regarded as its aristocratic excesses, namely primogeniture and entail." The author noted that Thomas Jefferson, who advocated repudiation, limited his goals to more equitable distribution of property through inheritance, rather than abolition of inheritance altogether. Furthermore, Jefferson recognized the integral role of family in inheritance:

[T]he consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivision go hand in hand with the natural affections of the human mind. The descent of property of every kind therefore to all the children, or to all

radical transformation of political ideas, which included a desire to overturn the stratified social and political order that had marked the Old World and that had been reproduced to some extent in the colonies. The American revolt against rank and birth opposed economic forms of privilege and inherited status in the political order. . . . Thus inheritance of property in colonial America reflected a paternalistic and aristocratic bias incompatible with the economic and political goals of the Revolution.

Kornstein, supra note 25, at 758-59 (footnotes omitted).

Considering that primogeniture, in which the eldest surviving son takes all, was the inheritance system in England at the time of the American Revolution, one might as readily argue that the Civil Law solution of forced heirship among all children was an equally available solution to the "economic and political goals of the Revolution." Primogeniture was the method employed under the English feudal system to amass and maintain political, and later economic, power among the few. By preventing division among heirs and thus dilution of assets, primogeniture was a potent weapon of the few. See supra notes 46-49 and accompanying text. Professor Katz, on the other hand, sees the American Revolution as more of a "reform movement" than an "internal revolution." He argues that terminating inheritance was never a goal of the American Revolution: "The changes instituted in the law of inheritance were not trivial or startling. Neither primogeniture nor entail, the principal targets of statutory revision, were widely practiced before the Revolution . . . so that in some sense the Revolution cannot even be credited with truly reforming the law of inheritance." Katz, supra note 30, at 26.

60. Katz, supra note 30, at 11. For a description of primogeniture, see supra notes 46-49 and accompanying text. "Entail," or "estate in fee tail," or "entailed estate" was a feudal device whereby the original grantor of the estate could insure that his near lineal heirs would not alienate the estate and thus deprive more distant lineal heirs of the estate. This restriction was avoided through several ingenious ploys that in turn were thwarted by later statutes. See, e.g., T. BERGIN & P. HASKELL, supra note 43, at 28-33.

61. Katz, supra note 30, at 18. In fact, Jefferson is described therein as standing "alone among his American compatriots in espousing such radical views." Id.
the brothers and sisters, or other relations in equal degree is a politic measure, and a practicable one.62

Thus, the most radical revolutionary of colonial America sought through legislation merely to increase the number of beneficiaries under inheritance, not to abolish it.

(2) Louisiana

The British feudal experience, while the main political root of inheritance in America, was not the only one.63 Shortly after the American Revolution, France experienced its own revolution. The laws of inheritance in France, as codified in 1803 in the Napoleonic Code and adopted by Louisiana in 1825, took a radically different approach to the problems endemic in the feudal concept of primogeniture.64 In order to ensure equality among heirs, all heirs were statutorily guaranteed a *legitim* or forced share of the estate; the portion of the estate subject to this forced share increased with the number of heirs.65

62. 8 THE PAPERS OF THOMAS JEFFERSON 682 (J. Boyd ed. 1950).

Professor Katz states that Jefferson recommended that the rules of inheritance require wide distribution of a decedent's estate among his relations and that the state levy progressive estate taxes on large estates. Katz, supra note 30, at 17. Daniel J. Kornstein, however, describes Jefferson as the "best known opponent of inheritance at the time" who was not alone among the founding fathers in holding his views. Kornstein, supra note 25, at 760.

These conflicting views can be brought together if Jefferson is viewed as being opposed to inheritance as he knew it, complete with dominant primogeniture and entailed estates artificially limiting the availability of land for productive use, not necessarily to the concept of inheritance itself.

63. The Spanish Civil Code influence and the Dutch influence were also present in Colonial America. See, e.g., Dainow, The Early Sources of Forced Heirship; Its History in Texas and Louisiana, 4 LA. L. REV. 42, 54-56 (1941).

64. See, e.g., Lemann, In Defense of Forced Heirship, 52 TUL. L. REV. 20, 21-24 (1977) (detailed description of the debates preceding the enactment of the pertinent Napoleonic Code sections). Lemann notes that during the debates the desirability of total testamentary freedom was not the issue, but rather how much of the estate should be subject to the forced share or *legitim*. Id. at 24.

Professor Gerald Le Van traces the *legitim* through its ancient Hindu and Roman origins, combines it with the Germanic concept of the "sib" or family ownership of lands, and notes its unsuccessful confrontation with the political needs of feudal England. Le Van, Alternatives to Forced Heirship, 52 TUL. L. REV. 29, 30-35 (1977). He notes that France was divided in its hereditary practices and that the "French Revolution provided the catalyst for a synthesis of *sib* and *sacra* and the complete elimination of primogeniture in France." Id. at 33.

65. Le Van notes that "since 1825, the reserve has remained at one-third if the decedent leaves only one child, one-half, if two children, and two-thirds, if three or more. The forced portion of surviving parents has remained at one-third (one-fourth for a sole surviving parent as to separate property)." Le Van, supra note 64, at 35.

In 1981, the percentages subject to forced heirship were lowered so that only one-fourth of the estate is subject to the *legitim* if there is one child and only one-half if there are two or more children. Ascendant forced heirship, in which parents inherit, was abolished in 1981 as well. Samuel, Shaw & Spaht, supra note 22, at 575-76.
Until 1989 Louisiana maintained this statutory protection of the historic right of heirs, regardless of age or need, to share in the estate of their parents. In July 1989, however, the Louisiana Legislature adopted legislation limiting the protection of forced heirship to children who are under the age of twenty-three or are incapacitated. This new legislation is not without its vigorous opponents. It is clearly antithetical to the concept of protected inheritance proposed herein.

D. Modern Approaches to Inheritance

There are two current practices for protecting the inheritance of children. One is the forced heirship provisions employed by the Scandinavian countries as well as many countries that follow the civil code. The other is the family maintenance system adopted by the commonwealth countries.

(1) Forced Heirship

Countries other than the United States have found more responsive means of addressing the tension between protection of children and testamentary freedom. Today, Scandinavian and civil code countries protect lineal descendants by a statutory allocation of some portion of the decedent's estate.

Sweden protects the right of children to inherit by considering invalid any will that gives away so much of the testator's estate to third persons that children are left less than one-half of what they would have

66. Even in Louisiana, forced heirship is not without its critics. See, e.g., Le Van, supra note 64, at 48-49 (suggesting that forced heirship is partly a product of tradition and inertia and advocating its repeal in favor of an alternative form of family maintenance); Nathan, supra note 15, at 5 (noting that Texas did try forced heirship in the 1850s, but repealed it after ten years).

67. At the meeting of the Civil Law and Procedure Committee on June 13, 1989, which reported out SB 264 with amendments, opponents of the bill were heard. Among others, Professor Fred Swain of Loyola Law School challenged the constitutionality of the bill with the arbitrary age cut off of 23 years. Professor Cynthia Samuel of Tulane Law School felt that more wills would be contested under the new law than in the past. She also stated that "if the concept of the parent-child relationship as a lifetime relationship is 'gone and only lasts for a certain period of time until a child reaches 23, and then, forget it, I think we're in trouble.'" Transcript, Minutes of Meeting, Civil Law and Procedure Committee, June 13, 1989, at 6.

68. For the forced heirship provisions of 27 countries, see Digest of Laws, International Section in 8 Martindale-Hubbell Law Dictionary (1990).

69. See infra notes 86-97 and accompanying text.

70. See supra note 68.
received under intestacy (the *legitim*). Supra note 64, at 34 (footnote omitted).


77. C. CIV. art. 913 (Fr.).
While the *legitim* effectively disappeared in most of England and its affiliated countries, Scotland continued to honor the *legitim* and today recognizes this right statutorily. Applicable to the “net moveable estate,” or personal property of the decedent, the *legitim* essentially is divided equally among children, or their share divided among their lineal descendants. Children are entitled to one-third of the moveable estate if there is a surviving spouse or one-half if there is not. Parents cannot contract out of a child’s right to *legitim* in an antenuptial contract unless the child agrees to accept the provisions made for him in the contract.

Although highly selective and clearly nonexhaustive, this description of certain modern countries resolutions of the conceptual conflict between the parent-child bond and testamentary freedom helps put in perspective the position of the majority of United States jurisdictions. The Civil Code resolution clearly is influenced by its ancient Roman heritage of family-oriented law. It is a compromise that recognizes the legitimacy of both concepts: the testator has freedom to dispose of a portion, but not of the entire estate; the family of the testator, including the children, has a statutorily protected right to a portion, but not to the entire estate.

Commentators critical of the lineal descendant, forced heirship provisions in Louisiana argue that the concept is anachronistic; difficult to apply to moveable, modern sources of wealth; rigid; obstructive to modern estate planning; inimical to the interests of surviving spouses; and blind to the actual circumstances of the forced lineal heirs. Nevertheless, forced heirship as a viable, modern concept is very much in evidence.

(2) Family Maintenance Systems

The common law countries’ resolution of the conflict between the parent-child bond and testamentary freedom—the family maintenance system—while not as dispositive and uncontroversible as that of many civil code countries, nevertheless is more flexible and balanced than most United States jurisdictions. Under a family maintenance system depen-

79. *See supra* notes 38-39 and accompanying text.
80. Succession Act of 1964, ch. 41, §§ 10, 11 (Scot.).
82. Succession Act of 1964, ch. 41, § 12 (Scot.).
dent children, among other categories of claimants, may initiate court proceedings seeking discretionary judicial intervention to provide for their needs if left out of the will.86

a. New Zealand

New Zealand is the premier example of the statutory family maintenance system solution. In 1900 it passed the Family Protection Act,87 which has been described as "the most comprehensive and uncompromising version" of the family maintenance system.88 Modified in 1939 to apply to intestate inheritance as well, the Act assures to a decedent's surviving family, above all his spouse and children, adequate maintenance whenever his will does not provide it. A dependent who claims that the will failed to make proper provision for him may apply to the court within twelve months of probate. Eligible dependents are not only the testator's spouse, child, or grandchild, but also his parents and his adopted and illegitimate children. Upon application the court will determine whether the testator has adequately provided for the dependent.89

Under the Act, it is the court that exercises wide discretion in determining whether the testator adequately provided for the dependent, whether the dependent's conduct merits the court's intervention on her behalf, from which testamentary assets payments will be made, whether periodic or lump sum payments will be made, and on what terms the payments out of the estate will be made to the dependent.90 The court can maintain jurisdiction over the matter to make adjustments for changed circumstances.91 In applying the Act, courts have recognized that "maintenance means more than mere subsistence."92

The court does not operate in a vacuum in reviewing a particular dependent's application under the Act; the situation of others who have not applied but are dependent on the estate also is taken into account.93 Need is the chief operative consideration and the court applies a means

88. Laufer, supra note 3, at 282. Professor Laufer states that some form of the family maintenance system has been adopted in 14 other common-law jurisdictions, including all Australian jurisdictions, five Canadian provinces and, of course, England. Id. at 284.
89. Id. at 282.
90. Id. at 282-83.
91. Id.
92. Id. at 290.
93. Rein, supra note 13, at 48.
test, looking to all financial resources available to the dependent, whether included in the estate for other purposes or not.94

One authority has summarized the profound effect of the Act:

As a result of this development, family maintenance has in substance been transformed in New Zealand from a mere limitation on testamentary power into a general principle of the law of succession: the rules of intestate succession or the provisions of a will (or both combined) become operative only after maintenance of the decedent's dependents out of his estate has been adequately safeguarded.95

New Zealand, then, has resolved the tension between the parent-child bond and testamentary freedom by separating out the elements of each concept and elevating certain aspects of the parent-child bond over certain aspects of testamentary freedom. When there is need on the part of a dependent, that need is addressed, testamentary wishes notwithstanding; when there is no need, testamentary wishes are followed.

b. England and Wales

England and Wales also had a more restricted form of family maintenance protection. In 1975, however, England and Wales seriously challenged the position of the New Zealand Act as "the most comprehensive and uncompromising version" when Parliament expanded the category of dependents who could apply for relief under its own inheritance act.96 New Zealand's potential claimants are family members such as spouses, children, stepchildren, parents, and grandchildren; English and Welsh case law, however, has interpreted their statute to include "mistresses, lovers, sisters and children of mistresses."97

The significance of this expanded class of applicants is the flexibility and pragmatism underlying the legal recognition and codification of certain expectations and rights of extralegal, but nonetheless "familial," re-

94. Id. at 48-49.
95. Laufer, supra note 3, at 284 (emphasis added).
96. R. OUGHTON & E. TYLER, supra note 81, at 198.
97. Id. (footnotes omitted). More precisely, the Inheritance (Provision for Family and Dependents) Act of 1975 permits the following categories of persons to apply for "reasonable financial provision" when either testate or intestate provisions are inadequate or nonexistent:

(a) the wife or husband of the deceased;
(b) a former wife or former husband of the deceased who has not remarried;
(c) a child of the deceased;
(d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
(e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased . . . .

Inheritance Act (Provision for Family and Dependents Act), 1975, ch. 63, § 1.- (1).
relationships. This expansion in effect further restricts testamentary freedom, not only to protect the traditional "legal" family and its attendant obligations, but also to recognize and protect the "natural" and informal family, along with its obligations. Procedurally, however, this broadening of claimants merely expands the classes of individuals who still must bring a lawsuit and establish need or dependence in order to prevail.

Critics of the concept of family maintenance point out that it requires a lawsuit to be activated, thus increasing litigation in already overworked judicial systems; that it does not set forth clear guidelines for the testator who would, in a will, honor its requirements if they were explicitly stated; and that the ad hoc, highly discretionary process is too unwieldy to be effective. One commentator, however, has documented that, at least in New Zealand, a "climate of decision" has generated predictability for estate planning and avoidance of frivolous suits and that voluminous lawsuits "have not materialized."

The fortune of New Zealand and England in avoiding a deluge of litigation from the family maintenance system may not repeat here, of course, where litigation may be "the American way." This is of special concern since one must litigate to take advantage of the maintenance system. With the exception of England, "no jurisdiction with as large a population as New York has adopted it." Moreover, the uncertainty of what a court in its discretion might do would make effective estate planning more difficult for the conscientious testator, who would prefer to know what the law requires. Yet, compared to the total lack of protection present in most American jurisdictions, the family maintenance system does have advantages for protecting children.

From the foregoing, one can see that United States jurisdictions that permit disinherintance of children have not addressed the tension between the parent-child bond and testamentary freedom, much less begun to resolve it. The issue thus raised is whether, in light of the considerable number of divorces and multiple marriages in America today, the conceptual conflict between the parent-child bond and testamentary freedom, as part of the larger and more ancient tension between the family response and the law generally, should now be resolved by protecting children by statute.

98. See, e.g., Laufer, supra note 3, at 312; Rein, supra note 13, at 53.
99. Laufer, supra note 3, at 313-14; Rein, supra note 13, at 15, 53-54.
100. See, e.g., THIRD REPORT ON ESTATES, supra note 7, at 211.
101. Id. at 212.
102. See infra note 314 and accompanying text.
II. The Internal Tensions Among the Multiple Aspects of Inheritance

The tension between the family response, formalized in ancient tradition and custom, and the law of inheritance, which developed for nonfamilial purposes, further complicates the analysis of inheritance. Theorists disagree on the source of the inheritance right: is it a natural, and therefore irrevocable, right or, as the positivists argued, a civil or statutory, and therefore terminable, right? There also is the two-sided coin aspect of inheritance: the “heads” side being the right of the decedent to control disposition of the estate, and the “tails” side being the right of the heir to receive the inheritance. Throughout history and into the present, neither side of these paired aspects of inheritance has triumphed completely over the other in any absolute sense: one aspect may be “down” in current public favor, but it is never permanently “out.” In analyzing whether there can be viable American laws to protect children in this area, it is helpful to look at the historical rationales for inheritance and the perceived advantages and disadvantages of the two-sided aspect of inheritance.

103. See supra notes 25-30 and accompanying text.
104. See supra notes 45-47 and accompanying text for a discussion of this tension during the feudal period.
105. See, e.g., Chester, Inheritance and Wealth Taxation In a Just Society, 30 Rutgers L. Rev. 62, 78-81 (1976); Katz, supra note 30, at 18; Kornstein, supra note 25, at 749-53.
106. Kornstein, supra note 25, at 749. Many authorities concentrate on the decedents', or “heads” part of the two-sided aspect of inheritance; the focus of this Article, however, is on the heirs,' or “tails” side of that coin.
107. See, e.g., M. Glendon, supra note 8, at 244.
108. As Mr. Lemann noted:
Instead of Louisiana's abolishing its system of forced heirship for children, other states should perhaps consider following Louisiana's system. That very suggestion has recently been put forward by a writer [Paul G. Haskell] from a common law state, who observed that “failure to protect the children defies explanation,” citing with approval the Louisiana legitime.
Lemann, supra note 64, at 24 n.36 (citation omitted).
109. An even more fundamental tension, which is beyond the scope of this Article, is whether the law should recognize inheritance at all. As an alternative to inheritance, the law could require that property escheat to the state at death. While there may be fruitful debate on this question, this Article assumes the existence of inheritance. See infra note 262 and accompanying text; T. Atkinson, Law of Wills 30-36 (2d ed. 1953); Chester, supra note 105. But see A. Gulliver, E. Clark, L. Lusky & A. Murphy, Cases and Materials on Gratuitous Transfers 3 (1967).
A. The Sources of Inheritance

While both the naturalists and the positivists agreed that upon death property should return to its natural state, namely the sovereign, or common pool, until earned or claimed by another individual, they each offered their own explanations of why, instead, it is presumed to go to the children of the decedent. The natural law theorists opined that, whether by will or by operation of the laws of intestacy, it is "of nature" that family rather than strangers should acquire the possessions of the deceased. Indeed, were a Roman to attempt to use a will to leave his possessions to other than his family, the will was overborne. "Nature is the best teacher of all animate beings as regards the preservation not only of themselves but also of their offspring, to the end that as a result of this affection for kin the stock by uninterrupted succession may complete the circle of eternity."

These idyllic explanations of inheritance from the school of natural law, however, did not sufficiently impress the positivist theorists. Blackstone maintained that legislation, not nature, developed the law of wills and intestacy "in order to avoid that confusion which [property's] becoming again common would occasion."

Whichever explanation of the source of inheritance is accepted—the idyllic one of inheritance being the natural familial response, or the pragmatic one of legislative intervention preventing resultant chaos from a

110. John Locke, a Naturalist, acknowledged that property owned by an individual in life should at death be returned to "the common stock of Mankind" but for the natural human drives of self-preservation and procreation, which give children "a Title to share in the Property of their Parents, and a Right to Inherit their Possessions." J. LOCKE, TWO TREATISES OF GOVERNMENT § 88 at 224-25 (P. Laslett rev. ed. 1967) (3d ed. 1698); Blackstone, a positivist, concurred:

For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and inconvenient. All property must therefore cease upon death. . . .

2 W. BLACKSTONE, COMMENTARIES *10.

111. 2 H. GROTIIUS, supra note 12, at 265, 269. John Locke said:

Men are not Proprietors of what they have meerly for themselves, their Children have a Title to part of it, and have their Kind of Right jyn'd with their Parents, in the Possession which comes to be wholly theirs, when death having put an end to their Parents use of it, hath taken them from their Possessions, and this we call Inheritance.

J. LOCKE, supra note 110, § 88 at 225.

112. H. MAINE, supra note 1, at 185.

113. 2 H. GROTIIUS, supra note 12, at 270 (quoting Diordorus Siculus).

114. 2 W. BLACKSTONE, supra note 110, at *11.
free-for-all property grab at the death of the owner—the family and children are the beneficiaries, not the state by escheat or society at large.\textsuperscript{115}

B. The Two-Sided Coin

The naturalists stated it was "natural" for property to go to the family rather than strangers; the positivists preferred property to go to the family to avoid confusion. Neither school assumed a concomitant right in the children or the family to receive the property that the testator had a right to give to them.\textsuperscript{116} This right, however, has been recognized in both ancient and modern law.\textsuperscript{117} The tension between the justifications advanced for the "heads" side of the coin of inheritance, the right of the testator to control disposition, and those for the "tails" side of that coin, the right of the heir to receive the property, is itself historic.

\begin{itemize}
\item \textit{(I) Perceptions of Inheritance from the "Heads" Side}
\end{itemize}

For the "heads" side, inheritance means freedom of testation—the right of the testator to control \textit{post mortem} disposition of the property. How much control the testator has is the issue here, for freedom of testation has always been a relative term; the testator has never enjoyed absolute freedom of testation.\textsuperscript{118}

One perceived advantage of testamentary freedom is that it is "a logical extension of an owner's freedom to deal with his property during his lifetime."\textsuperscript{119} While testamentary freedom may be a "logical extension" of a property owner's control over property owned while alive, it is not clear that it is a necessary, inevitable, or equitable extension.\textsuperscript{120} As one "heads" commentator has postulated:

\begin{quote}
Whether inheritance is or is not a property right is the very question to be decided. That inheritance is ancillary to property is uncontroverted. The real question... is whether or not the ability of the property owner to control the devolution of property after his death is a necessary attribute of his right to enjoy that property while alive.\textsuperscript{121}
\end{quote}

\begin{thebibliography}{99}
\item \textsuperscript{115} See supra note 109.
\item \textsuperscript{116} See infra note 128.
\item \textsuperscript{117} See infra notes 23-102 and accompanying text.
\item \textsuperscript{118} See, e.g., 2 F. Pollock & F. Maitland, supra note 25, at 349-50; M. Rheinstein & M. Glendon, \textit{The Law of Decedents' Estates} 8 (1971); Haskell, supra note 3, at 501; Kornstein, supra note 25, at 755-56.
\item \textsuperscript{119} R. Oughton & E. Tyler, supra note 81, at 31.
\item \textsuperscript{120} "It seems odd that we unhesitatingly restrict a living person's freedom of alienation in order to protect his dependents and yet, with sublime inconsistency, we fairly blanch at the idea of imposing similar restraints on the same person once he is dead." Rein, supra note 13, at 19.
\item \textsuperscript{121} Kornstein, supra note 25, at 747.
\end{thebibliography}
If the freedom to control property while alive is the basis for extending that freedom into death, however, it would be more "logical" to extend into death the same kind of "freedom" that was exercised in life. In reality, this freedom to deal with property during life is more illusory than real.

Society does not hesitate to restrict the uses to which a property owner, while alive, may put his property when it is unreasonably harmful to others, when he has obligations of family support, or when he is indebted to others. Moreover, each of these legal incursions into the property owner's freedom directly affects the owner while alive. In light of the current legal incursions already made into the property owner's use and enjoyment of property while alive, it is not so clear that testamentary control over property at death is at all "logical," much less necessary or equitable.

Testamentary freedom "enables a living person to extract advantages from others in return for the hope of a favourable mention in the deceased's will." This recognized power of the testator is a substantial source of tension between the "heads" side and the "tails" side, and the state is held hostage by the former. For under the law as it exists now in all American jurisdictions except Louisiana, the state by omission consistently supports the testator.

When there is disagreement about a proper course of action for a child to take, or not to take, the parent can always exercise the final and unilateral sanction of disinheritance. There is no objective determination of whether the parent or the child is right in the dispute. Yet, by permit-

123. See, e.g., Rein, supra note 13, at 15-18.
125. Judges sometimes proclaim that "[t]he wishes of the dead are more sacred than the dispositions of the living," but they never say why this should be so. Is there any rational basis for such a claim? . . . Certainly common sense tells us that we should be more concerned with the rights of the living than with the rights of the dead. Sentimentality is a luxury we can hardly indulge when such indulgence harms the society of the living. Moreover, interference with a living property owner's dominion constitutes a much greater encroachment on individual liberty and freedom of disposition than could any conceivable postmortem restraint.
126. R. OUGHTON & E. TYLER, supra note 81, at 32. See also, W. McGOVERN, S. KURTZ & J. REIN, supra note 8, at 88 (noting that King Lear was mistreated by his daughters after their share of his estate was secure, but also suggesting that testamentary freedom can be misused by parents who seek to control the lives of their adult children).
ting and enforcing the disinherition, the state indirectly is making the judgment automatically and consistently in the parent's favor.\textsuperscript{127}

The other perceived substantive advantage of testamentary freedom is that "guaranteed inheritances cause heirs to cease to work and so reduces the total wealth of the country."\textsuperscript{128} Perhaps in an age when physical danger, rampant disease, frequent wars, plagues, natural disasters, and myriad other life-threatening and shortening factors severely curtailed adult life expectancies, the fear of children "waiting around" to inherit, rather than getting on with their own lives, may have had some currency. In our present era of miracle drugs, life-saving surgery and technology, health and fitness consciousness, and better diet, all resulting in increased longevity, it is not likely that sixty-year-old "children" are holding their lives in abeyance, waiting for eighty-five and ninety-year-old-parents to finally die and leave them an inheritance.\textsuperscript{129}

In sum, the presumed advantages of testamentary freedom discussed above are generally illusory. Those that have some currency today are arguably inequitable. In light of current encroachments on testamentary

\textsuperscript{127.} See Teitelbaum, \textit{Family History and Family Law,} 1985 Wis. L. Rev. 1135, 1174-76 (commenting that the effect of courts' hands-off attitudes in family matters really is to "ratify the power of one family member over others.").

\textsuperscript{128.} R. OUGHTON & E. TYLER, \textit{supra} note 81, at 32-33 (footnote omitted). A similar theme is noted in a critical comment on the French Code by Professor Le Van: "the French compromise not only 'atomizes successions' but also takes away from the privileged heir that economic incentive that would otherwise keep him active and intelligent." Le Van, \textit{supra} note 64, at 34 (citation omitted).

From the historical perspective, Bracton argues against the \textit{legitim:} "for a citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives." 2 H. BRACTON, \textit{ON THE LAWS AND CUSTOMS OF ENGLAND} 181 (S. Thorne ed. 1968).

Blackstone had similar views:

While property continued only for life, testaments were useless and unknown: and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong . . . . This introduced pretty generally the right of disposing of one's property, or a part of it, by \textit{testament} . . . .

\textsuperscript{2} W. BLACKSTONE, \textit{supra} note 110, at *12.

This sentiment is also shared by Professor Nathan: "children who know they will inherit from their parents, and who know they cannot be disinherited, can essentially ignore their parents with the confidence that they will nonetheless inherit a large portion of their parents' estates." Nathan, \textit{supra} note 15, at 15.

\textsuperscript{129.} For children born in the United States in 1987, the life expectancy was 74.9 years (71.5 male and 78.3 female). \textit{STATISTICAL ABSTRACT OF THE UNITED STATES, supra} note 11, at 71 (chart 106).
freedom for the protection of surviving spouses, creditors, and state and federal coffers, children deserve similar consideration.

(2) Perceptions of Inheritance from the "Tails" Side

For the "tails" side, inheritance means the guaranteed right to inherit a share of the testator's assets. In all American jurisdictions this is a legally protected right under the laws of intestacy; it is only when the parent has written a will that the existence of the child's right is at issue.

Historically and in several modern countries today, one protection for the child's inheritance interest has been the legitim or forced heirship. Forced heirship is the guaranteed right of a child to inherit some of his parents' estate.

a. Perceived Historic Advantages

Forced heirship is said to promote family bonding, stability, solidarity, harmony, and responsibility; however, some commentators disagree with this assertion. Some commentators argue that forced heirship creates family bonding, or a reciprocal exchange between family and individual of loyalty, security, and "a sense of the continuity of life and responsibility for future generations." This argument relies on a definition of bonding that is grounded in the traditional interrelationship of family with economics and property. This definition, however, may not be appropriate in the 20th century. A state-recognized continuing obligation based on kinship certainly reinforces state approval and support of the family unit. On the other hand, the stubborn persistence of the family unit in some form or another in modern times among many residents of the United States, despite the lack of a legitim or forced share in

130. See infra notes 291-97 and accompanying text.
131. See infra notes 280-90 and accompanying text.
132. See infra notes 275-79 and accompanying text.
134. Samuel, Shaw & Spaht, supra note 22, at 592. See also infra notes 259-262 and accompanying text.
135. Mary Ann Glendon notes that 20th century family bonding has itself changed from the traditional notion of bonding to a "relatively loose bonding," and defines "loose bonding" as "the comparative ease with which individuals can and do move into and out of family relationships." M. GLENDON, supra note 8, at 17. She quotes Lawrence Stone in describing this 20th century bonding as "intense affective and erotic bonding" rather than the more traditional bonding considerations of economics and property. Id. at 17-18. Despite "loose bonding," however, a "legal attenuation of connections between parents and adult children" does not necessarily presage "an actual loosening of family bonds." Id. at 115.
most jurisdictions, greatly attenuates the argument of the need for a *legiti-

tim* or forced heirship to maintain family stability, harmony, and responsi-

bility.

Forced heirship recognizes both consanguinity and dependence.\textsuperscript{136} As discussed below,\textsuperscript{137} the decision to become a parent and accept the attendant joys and responsibilities of the child's dependence is worthy of formal renewal and acknowledgment at the death of the parent. The symbolism of the share may be more meaningful to the child than the substance of it;\textsuperscript{138} the cost to the unwilling parent who is now dead is, if anything, negligible by comparison.

More significantly, because of its blanket applicability, forced heir-

ship ensures that the "financial needs of the child, regardless of his age or condition" are met in the first instance by the parent and not the state.\textsuperscript{139} While this is closely related to the "moral" obligation of a living parent to "support, maintain, educate, and provide for the future of his children,"\textsuperscript{140} it is also of compelling interest to the state, which would prefer to have the parent provide for the child rather than have the child de-

pend on the state. It would be economically inefficient, inequitable, and illogical to force the state to allocate its limited resources to provide for a child when the parent has left assets at death that could do so.

Forced heirship also acknowledges the economic, family co-owner-

ship theory, giving back to those who contributed to the accumulation of the wealth, directly and indirectly. This factor applies equally to children and surviving spouses, although the nature of the contributions of the child in the modern, nonagricultural, protective child-labor law con-

text is different.\textsuperscript{141}

\begin{itemize}
  \item \textsuperscript{136} Cahn, *supra* note 15, at 145.
  \item \textsuperscript{137} See infra Part IV.
  \item \textsuperscript{138} See infra note 261 and accompanying text.
  \item \textsuperscript{139} Cahn, *supra* note 15, at 145. See also, Rein, *supra* note 13, at 55 (such an approach will insure fairness to all parties involved in the decedent's estate).
  \item \textsuperscript{140} Samuel, Shaw & Spaht, *supra* note 22, at 594. See also Rein, *supra* note 13, at 15-18 (statutes and case law demonstrating that society views the support of minor or dependant children as a high policy). Professor Haskell states most emphatically that our laws impose the obligation of support on individual family members for one another, with exceptions for the unworthy:
    
    [F]ew would seriously question the propriety of these obligations; it is clear that the law in its imposition of such obligations reflects accurately the attitude of our society with respect to family responsibility. If it were suggested that such duties are im-
    proper . . . , it is doubtful that one would attract a following except from among the dissolute and the depraved. Such is the moral sensitivity of our society.
    
    Haskell, *supra* note 3, at 500.
  \item \textsuperscript{141} Halbach, *An Introduction to Chapters 1-4*, in *DEATH, TAXES AND FAMILY PROPERTY* 6 (1977); Cahn, *supra* note 15, at 145. See infra notes 366-67 and accompanying text.
\end{itemize}
Another social interest that forced heirship satisfies is "our general feeling that a child has a reasonable expectancy from his father and our repugnance to the disappointment of that expectancy."\(^{142}\) One source of this general feeling is the status of kinship, of belonging to this particular family unit. Our repugnance at the expectation's disappointment is based in part on the fact that under existing law there need be no reason or justification for that disappointment. This expectation, whether a natural right or a cultural product, is entrenched in our laws of intestacy,\(^ {143}\) yet totally discarded when in tension with testamentary freedom.

Forced heirship also is credited with providing a "legally protected status to each child, as well as a measure of equality among children."\(^ {144}\) Of course, to the extent that forced heirship dictates a known minimum and an equal allotment of the estate among children, it would minimize fraternal competition and foster familial harmony. On the other hand, the status of each child at the death of the testator parent may require different allotments, a fact that the current forced heirship concept does not address.

Another perceived advantage of this inheritance scheme benefits the testator as well: "The ability to give at death provides psychological satisfaction to the donor in two ways. First by treating property as an extension of personality, the donor is able to achieve a measure of immortality. Second, giving expresses love, a value society should encourage."\(^ {145}\) It may be questionable how far the immortality aspect of giving can continue beyond the first testamentary disposition because of the dilution by subsequent dispositions and the immortality then attached to those subsequent testators. Giving as an expression of love is a more universal experience. It is difficult to argue that society should not encourage love; the more relevant inquiry, however, is whether society can legislate love. In other words, the question is whether societal legislation of an obligation to leave something to one's children when the means to do so are present is a desirable societal objective in lieu of individual motivations generated by love.

In sum, several of the advantages of inheritance from the child's side may be more idyllic, but remain just as illusory as many of the benefits of

\(^{142}\) Cahn, supra note 15, at 144.

\(^{143}\) See, e.g., T. Atkinson, supra note 109, at 32-33.

\(^{144}\) Samuel, Shaw & Spaht, supra note 22, at 593.

\(^{145}\) J. Dukeminier & S. Johanson, supra note 133, at 120. See also Halbach, supra note 141, at 5 (an argument in support of inheritance is that it reinforces family ties and provides individuals with the comfort of knowing that even after their death, they will be able to provide for their loved ones).
testamentary freedom. The 1990s definition of family may be a far cry from the romantic family ideal of bygone eras; but nevertheless we do have families in America today. It is questionable, however, whether we have "a sense of the continuity of life and responsibility for future generations," as evidenced by our testamentary permissiveness.

The idealistic goals of forced heirship—a fostered sense of family, kinship, identity, belonging, and commitment—are attributes that would be appropriate for society to encourage. The more difficult question is whether, when the family response is absent, the state can legislate it into existence. Perhaps the better state objective would be to protect its citizens from the consequences of this lack of familial sense, bonding, and responsibility for future generations. Thus, when the family response is not inherent in the family context, the state should seek to legislate at least the economic protections that would flow to the children were the family response functioning.

Certain procedural aspects of forced heirship, such as the simplicity of automatic application without court process, the certainty of its application by way of a fixed share of less than the entire estate, and the protection of the child, either in her expectations or her actual needs, seem to recommend the adaptation of forced heirship principles for our modern needs and purposes.

b. Perceived Historic Disadvantages

Forced heirship is not without its critics. Forced heirship has been termed anachronistic. It is an historic, traditional, even ancient recognition of a right in children based on family. Since it also currently is practiced in many countries of the world, however, it is neither "chronologically out of place [n]or incongruous in the present." Indeed the modern multiple marriage trend brings into focus a pressing need for some guaranteed protection for the children of prior marriages.

As currently practiced in many countries, forced heirship divides equally some set portion, less than the whole, of the estate among the

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146. "In 1988, 27%, or 24.6 million, of the country's 91.1 million households fit the traditional definition of a family—two parents living with children. In 1970 the proportion was 40%." Family Redefines Itself, And Now the Law Follows, N.Y. Times, May 28, 1989, at E6, col. 1.
147. See supra note 134 and accompanying text.
148. See supra notes 66, 84-85 and accompanying text.
149. An "anachronism" is "a person or thing that is chronologically out of place; esp: one from a former age that is incongruous in the present." WEBSTER'S NEW COLLEGIATE DICTIONARY 40 (1973).
150. Id.
children of the deceased.\textsuperscript{151} Neither the size of the estate, the age of the children, nor the need of the children is relevant. Thus, forced heirship has been criticized for being rigid and blind to the actual circumstances of the forced lineal heirs.\textsuperscript{152}

This criticism is accurate. Forced heirship, the distribution of the estate by intestacy in the absence of a will, and the operation of the statutory elective share for surviving spouses\textsuperscript{153} all dispose of property without regard to the particularized needs of the recipients. Forced heirship formalizes the ancient familial distribution of the decedent's estate to the decedent's kin; the emphasis is on family, not individual need. This is not to say, however, that a plan that would be more sensitive to different needs of children, while taking advantage of the simplicity and automatic features of forced heirship principles, should not be considered.\textsuperscript{154}

Further criticism of forced heirship results from the direct competition of the child's protected right with that of the surviving spouse. Indeed, there seems to be initial support for this criticism from an analysis of the empirical studies of public opinion on these issues.\textsuperscript{155} Most of those interviewed would leave most, if not all, of small estates to the surviving spouse only, contrary to the property distribution of most intestacy laws between surviving spouse and children.\textsuperscript{156} This preference did not continue when there were remarriages, adult children, or children of prior marriages.\textsuperscript{157} Moreover, at least one of these studies showed that the public felt that the responsibilities of the surviving spouse toward the minor children were so compelling that the award to the surviving spouse was contingent on it being used for the support of the children.\textsuperscript{158}

Significantly, the current statutory protections for surviving spouses could operate further to disinherit children by permanently foreclosing the rights of the children to assets of their first decedent parent. For example, if S1, a young surviving spouse, were to remarry and then pre-decease S2, despite any preventive measures attempted by a will of S1, the elective share would operate to permit S2 to take a large portion of S1's estate, which might be made up of the assets of S1's first spouse, the

\textsuperscript{151} See supra note 68.
\textsuperscript{152} See supra notes 66, 84-85 and accompanying text.
\textsuperscript{153} See infra notes 291, 295 and accompanying text.
\textsuperscript{154} See infra Part IV.
\textsuperscript{155} See infra notes 210-20, 229-47, 264 and accompanying text.
\textsuperscript{156} See infra notes 195-204, 210-20 and accompanying text.
\textsuperscript{157} See infra notes 233-47, 250-57 and accompanying text.
\textsuperscript{158} See infra notes 248-52.
first testator parent. Such would not be the case, however, if the interest of the children were recognized and protected at the death of S1’s first spouse.

The difficulty in applying forced heirship to moveable property and the resulting obstruction to modern estate planning are two additional criticisms that have been leveled against forced heirship. Of course, historically the *legitim* only applied to chattels or moveable property, so the change in the nature of modern wealth from land to movables hardly presents anything new to forced heirship.

While it may be possible that a forced share might inhibit imaginative and tax-advantageous estate planning maneuvers, dealing with the forced share as a known and invariable obligation would be identical to the adjustments necessary in estate planning when the spousal elective share statutes were passed. Indeed, estate planners could take advantage of the known quantity aspect of forced heirship in planning the estate.

C. Modern Considerations

Our legal system, based on legal precedent, would not and should not eschew legal customs, beliefs, and practices hailing from that same tradition. Nevertheless, the durability of the legal system stems in great part from its flexibility and adaptability to needed change. Many of the advantages of both sides of the inheritance coin developed in historic times when economic circumstances made these perceptions appropriate and functional. In light of current economic practices, sources of wealth, technological advances, and dependent international economies, what are the perceived advantages or concerns of each side today?

(1) The “Heads” Side

Freedom of testation developed in Roman times to permit decedents to include adult emancipated children in the distribution of their assets because the intestate law of that time excluded adult emancipated children. In other words, it developed as the antithesis of what it can be used for today, namely, the disinheretance of children. Because of the looser family bonding and freer intimate associations enjoyed by many

159. See infra note 291.

A pre-nuptial agreement that waived any rights the subsequent spouse had in the estate of the surviving parent could prevent this, but not many average Americans do, would, or know how to take advantage of this somewhat sophisticated legal protection.

160. See, e.g., supra notes 38-39, 79-82 and accompanying text.

161. See supra notes 31-34 and accompanying text.
today,\textsuperscript{162} it is quite possible for testators to develop family-like attachments, affections, and loyalties for individuals who are not or cannot be recognized legally as family, and to desire to provide for them in a will.\textsuperscript{163} Forced heirship, however, does not engulf the entire estate of the testator.\textsuperscript{164} Even with forced heirship—and with protected inheritance as proposed herein\textsuperscript{165}—the decedent can still provide for those nonfamily attachments out of the part of the estate that is \textit{not} claimed by forced shares of legal family members.

A testator today may wish to differentiate among his children. One obvious reason for a testator to treat his children differently is that some may be minors who currently are dependent on the testator and whose immediate substantive needs are being met by the testator. The adult children, whose needs had been met during the life of the testator, have an expectation of inheritance that often must be subordinated to the needs of the minor children. As proposed herein,\textsuperscript{166} differentiation based on the minority or dependence of some of the children would be addressed by protected inheritance. Other bases for differentiation, however, such as subjective feelings or the testator's beliefs about the worthiness of a particular child, still could be vented out of the portion of the estate that is not subject to forced shares. Nonetheless, most children\textsuperscript{167} would be protected from outright disinherition by the minimum share proposed by this Article.

Testators rightly are concerned with intelligent and economically efficient estate planning. A forced share for children might impede particular plans. To the extent the amount of the share is fixed, however, it is a known factor around which the estate planner can work. Estate planners similarly had to adjust to forced shares decades ago when states adopted the elective share for spouses.

Testators want to ensure that the assets designated in the will to benefit the children actually are used for that purpose. From empirical studies of public attitudes toward inheritance, it is clear that testators are concerned about what will happen to their children when financial mis-

\textsuperscript{162} See supra note 135 and accompanying text.
\textsuperscript{163} Same-sex lovers or extramarital lovers may be extremely important to the testator, but society does not protect them through intestacy laws or forced heirship. Freedom of testation thus would be the only recourse of a testator to protect these loved ones. The right of the testator to protect these relationships, however, should not be at the expense of the testator's children.
\textsuperscript{164} See supra note 68.
\textsuperscript{165} See infra Part IV.
\textsuperscript{166} See infra notes 322-33 and accompanying text.
\textsuperscript{167} Those children who meet the objective criteria for disinherition could be left with nothing. See infra notes 338-41 and accompanying text.
management by or remarriage of the surviving spouse interferes with the testator's expectations.168 Thus, children from prior marriages often are provided for specially. This concern of testators matches the protected right of children to inherit as proposed herein. It is a common concern of the two sides of the coin of inheritance, and its resolution also may ease some of the traditional tension between them.

(2) The "Tails" Side

Minor and dependent children have a clear and pressing need for continued support beyond the death of their parents. While the law has not recognized any post mortem obligation of a parent to a child,169 it is clear that the death of the parent has not changed either the age or dependence of the child; the need continues, even though the preferred source has died. And although the parental support obligation is applicable to both parents, in many instances the surviving parent may not have sufficient independent resources to provide for the child. Thus, the state must step in and support the child while the deceased parent is free to leave estate assets to strangers at the expense of both the children and the state. Support for minor and dependent children is a mutual concern, then, of both the children and the state.

All children, regardless of age or need, have a recognized expectation of inheritance from their parents.170 Those testators who do provide for their children share in that expectation. Unless the interest of the children in those assets is recognized and protected at the death of the first parent, however, intervening circumstances may abort the plans and expectations of both the children and the testator. Dissipation of assets by the surviving spouse because of incompetence, poor advice, or intentional waste will defeat the expectations of the children and the testator. Remarriage by the surviving spouse may defeat their expectations if the surviving spouse predeceases the new spouse and the new spouse claims an elective share of the assets. Disinheritance of the children by the surviving spouse, despite "understandings" with the testator, would defeat the expectations of the children and the testator. In this modern era of multiple divorce and remarriage, this possibility increases, but it was not unheard of through the centuries.171

168. See, e.g., infra notes 233-47 and accompanying text. Respondents to interviews on inheritance expressed their concerns on these matters and opted for different dispositions because of them. Id.
169. See infra notes 314-18 and accompanying text.
170. See supra notes 142-43 and accompanying text.
171. See, e.g., BROTHERS GRIMM, Sweetheart Roland, Cinderella, Snow White and the Seven Dwarfs, Hansel and Gretel, in GRIMMS FAIRY TALES 62, 155, 166, 330-31 (E. Lucas, L.
Thus, when reasons for either testamentary freedom or protection of children are considered in the context of today's world, although there are still tensions, it appears that there are also common interests. The real question is whether the need today to guarantee some portion of the estate left by the decedent to the children of the decedent is of sufficient societal interest to encroach further on the already restricted freedom of testation. In seeking some balance between these two competing concerns, it is helpful to inquire into the public's views on whether the financial, moral, and legal obligations of the parent to the child should end, as they do in most American jurisdictions, upon the death of the parent who has willed his assets elsewhere. 172

D. Public Opinion of the Law of Inheritance

Empirical studies of people's knowledge of and attitudes toward the laws of inheritance both in the United States 173 and in England 174 were carried out from the mid-1950s until the late 1970s. The purpose, scope, form, content, and follow-up procedure on the introductory questions differed in each study. The sizes of the statistical samples and the demographic backgrounds of those interviewed varied widely. Limitations inherent in any empirical undertaking involving personal interaction, such as subjective and subconscious messages emanating from the tone, inflec-


172. See, e.g., Haskell, Restrains Upon The Disinheritance of Family Members, in DEATH, TAXES AND FAMILY PROPERTY 105, 114-15 (E. Halbach ed. 1977); Haskell, supra note 3, at 502; Rein, supra note 13, at 12, 18.


tion, and body language of the interviewer, as well as the subjective interpretation, assumptions, and intelligence of the interviewee, affected the studies. These imperfections notwithstanding, an analysis of these studies is useful.

(1) Summary of Findings

These empirical studies reflect the effect of changing societal family patterns. Intentional disinheritance of children is quite rare. In the earlier studies the expectation of the testator that the surviving spouse would leave the assets to their common children meant a postponement of inheritance rather than outright disinheritance. In the later studies, undertaken at a time when the divorce and remarriage rates were increasing, the testator's concern for the children was expressed by the testator's use of a separate provision in the will for the children.

The testators in these studies were motivated more by the practical need to provide for both a surviving spouse and children with limited resources than by an abstract assertion of testamentary freedom. This is not to say that the testators were not aware of or interested in the preservation of this right; rather, they attempted to reconcile it with their recognized familial obligations. Limited assets, rather than testamentary freedom, seemed to be the controlling factor in distribution of the estate.

In the earlier studies, where the survivors of the testators were or were expected to be both the testator's children and a spouse who was the natural parent of those children, the majority of people either left the entire estate to the surviving spouse or thought the law of intestacy should accomplish this. This was true where the estate was small, but this consensus was markedly reduced when the estate was increased in size.

A pattern emerged in the later studies: the testator, although leaving the majority of the estate to the surviving spouse in the traditional family pattern, often made specific provisions for the children independent of those for the surviving spouse. Assets were left directly to the children, or uncertainty over what the surviving spouse actually would

175. See infra notes 192-93, 196-99, 202, 208-09 and accompanying text.
176. See infra notes 195-204 and accompanying text.
177. See supra notes 14-21 and accompanying text.
178. See infra notes 236-47 and accompanying text.
179. See infra notes 221-28 and accompanying text.
180. See infra notes 210-20 and accompanying text.
181. See infra notes 195-204 and accompanying text.
182. See infra notes 211-20 and accompanying text.
do for the children was expressed. 183 When the questions asked specifically about provisions for children from other marriages or children not living with the respondent, the distribution of the estate differed significantly from the traditional pattern used when the surviving spouse was the natural parent of children. 184

The later studies also show an increasing awareness of the parental obligation of support for the children. In one study, respondents spontaneously included a requirement that the estate left to the surviving spouse be used for the benefit of the minor children. 185

The data demonstrated the symbolic significance of generational transfers 186 to both the testator and the children. In one study, children who were disinherited by their father in favor of their aunt were upset despite the fact that they knew the estate was insolvent. 187

Finally, when the personal experience of the respondent was factored into the study, those who had been separated, divorced, or remarried gave significantly different responses from those who had not. 188

a. Rare Intentional Disinheritance

In the 1950s Nebraska study, 189 the respondents were asked whether parents should be allowed legally to will property outside the family and leave nothing to the children. 190 The difficult decision whether to provide for both surviving spouse and issue was eliminated because the questions assumed that there was no surviving spouse. 191 Of those

183. See infra notes 250-57 and accompanying text.
184. See infra notes 233-47 and accompanying text.
185. See infra notes 248-52 and accompanying text.
186. See infra notes 258-62 and accompanying text.
187. See infra note 261 and accompanying text.
188. See infra notes 264-67 and accompanying text.
190. The actual initial inquiry on this topic was as follows: Suppose that either the husband or wife is dead, and the survivor willed all of his or her property to persons or groups outside the family, and left nothing at all for the children. If the parent is legally allowed to do this, it could mean that the child might have to depend on some outside source for the necessities of life. On the other hand, if the parent is prevented by law from doing this, he would not be able to will his property as he sees fit. In these circumstances, do you think that the parent should legally be allowed to will all of his or her property to persons or groups outside the family and leave nothing at all for the children, or should the law prevent this?
191. Id. at 76.
192. Id. at 44, 76-78. While the absence of a surviving spouse in the questions may account for the greater overall support for protection of the interests of children found in this early study, it also focused the inquiry solely on the children, unhampered by surviving spouse considerations.
interviewed, 93.4 percent believed that parents should not be allowed to disinherit children under twenty-one years of age; 63.4 percent felt parents should not be allowed to disinherit children over twenty-one years of age. Ninety-two percent felt that parents should not be allowed to disinherit children who are poor, and 57.3 percent felt that parents should not be allowed to disinherit children who are well-off financially. The authors noted, "[T]here appears to be an impressively high degree of agreement in the population that parents do have an obligation to their children which extends beyond their own death."

The 1963 Cook County, Illinois study showed that all testators in the sample survived by both a spouse and issue left the entire estate to the spouse alone. This finding would seem to indicate that the preference in Cook County was to disininherit children, at least when there was a surviving spouse. The author suggested, however:

The fact that 100 percent of the wills where there is a surviving spouse and children produced a technical disinheritance of the children by leaving all to the wife must mean that most testators do not regard this method of distribution to be a "disinheritance." If this conclusion is correct, it follows that the true meaning of disinheritance in the minds of people using the term is that which results only on the final distribution from one generation to the next, that is, when the surviving spouse distributes and excludes children or includes persons other than children.

When the testators in the sample had no surviving spouse, but only children, as in the Nebraska study, twenty-two out of the twenty-four wills left the estate to the children; children were disinherited in only two cases. Similarly, in the mid-1970s Iowa study, when there was no

192. Id. See also M. GLENDON, supra note 8, at 24 ("Opinion studies done in France indicate that, while attitudes there are favorable to improvement in the position of the surviving spouse, there is also substantial continuing attachment to the traditional idea that property should be preserved for children.").


194. Id. at 78. Analysis of the social profiles of the population interviewed showed that, while the overall population supported obligations of parents to children beyond death, there was more support among the rural than the urban respondents for more parental authority over children as well as parental obligations toward children. Id. at 128-31.

Respondents with children tended to be slightly more protective of children against disinheritance than those without children. Id. at 296. Respondents over 40 years of age tended to favor protecting the child more than those under 40. Id. at 278. Protestants more than Catholics would not allow disinherirtance when the child was well off financially. Id. at 274. Respondents with no college education tended to protect children over 21 years of age more than those with some college education. Id. at 282. Those in the higher income brackets tended to disinherit more than those in the lower brackets. Id. at 286.

195. Dunham, supra note 15.

196. Id. at 256.

197. Id. From this, the author concluded that "disinheritance even in the sense of distri-
surviving spouse but only minor and adult children, seventy-seven percent preferred dividing the estate equally between the adult and minor children.\textsuperscript{199}

The 1965 Ohio study\textsuperscript{200} found that eighty-five percent of those studied\textsuperscript{201} left the entire estate to the surviving spouse when the decedent was survived by both a spouse and children. The authors explained, however, that the eighty-five percent figure was not a strict and permanent disinheritance of the children, but rather a postponement of their inheritance. They stated, “[A] man may leave all to his wife with the assurance that she will leave her estate to their common children.”\textsuperscript{202}

When adult children were the only survivors, fifty-seven percent of the testators left equal shares of the estate to their children and also made dispositions to other relatives and friends.\textsuperscript{203} Of the survivors interviewed, however, ninety-one percent left equal shares to their adult children but did not distribute the entire estate to them.\textsuperscript{204}

Finally, a 1977 five-state telephone survey\textsuperscript{205} focused on the issue of how the respondents would want their estates distributed between surviving spouse and children, both when the children were minors and when the children were minors and adults. While there was no separate question regarding surviving spouse and only adult children,\textsuperscript{206} the authors

\begin{footnotesize}

\begin{enumerate}
\item Whether the author would so conclude today, in light of our more recent multiple divorce and remarriage syndrome, is not clear.

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\item Note, Iowa's Dispositive Preferences, supra note 173.
\item Id. at 1102.
\item M. SUSSMAN, J. CATES & D. SMITH, supra note 173.
\item Id. at 89 (Table 5-1).
\item Id. This belief was borne out by the actions of the intestate survivors who in essence signed over their intestate interests to the surviving spouse. Their explanatory remarks “indicated that they made no searching analysis in reference to this decision. It was a matter-of-fact action; in their family it was the right and proper thing to do.” Id. at 127. The same belief also was supported by hypotheses from the 1974-75 Morris County, New Jersey study in which the author stated that, while the study did not test for it, most people probably assumed that the children should receive the property upon the death of the surviving spouse. Note, Intestate Succession in New Jersey, supra note 173, at 273 n.70.
\item M. SUSSMAN, J. CATES & D. SMITH, supra note 173, at 98.
\item Id. at 101. The authors concluded that disinheritance rarely occurs. Id. at 312. Again, whether the authors would so conclude today, based on examination of estates probated in the late 1980s compared with estates probated in 1964-65, is not clear.
\item Fellows, Simon & Rau, supra note 173.
\item The questions were:
\begin{enumerate}
\item How would you like your property distributed if you were survived by your (wife/husband) and a minor son and daughter both by your present marriage?
\item How would you like your property distributed if you were survived by (wife/husband), a minor child, and an adult child?
\end{enumerate}
\item Id. at 358.
\end{enumerate}
\end{enumerate}
\end{footnotesize}
theorized that when the children are adults the balance would shift in favor of the surviving spouse:

[T]he problem becomes one of balancing the interest of the children in obtaining some of the deceased's property without waiting for the surviving parent to die and the interest of the surviving spouse to have available the accumulated wealth [sic] of the marriage so as to minimize the risk of financial insecurity. Once the problem is so characterized, the claims of adult children to their parents' estates would seem to be less deserving than the claims of surviving spouses. Adult children are likely to be self-supporting; therefore, a delay in inheritance or possibly even permanent disinheritance because of mismanagement by the surviving spouse does not warrant depleting the financial resources of the spouse, who is likely to have established a financial interdependence with the decedent, or even to be wholly dependent on the decedent.\textsuperscript{207}

Despite their analysis, the authors found that when the distributees were minor children and a surviving spouse, 58.3 percent of the respondents would give the entire estate to the surviving spouse; when the distributees included an adult child, however, only 51.6 percent would give the entire estate to the surviving spouse.\textsuperscript{208} The authors conceded that this finding of recognition of adult children was consistent with other studies.\textsuperscript{209}

b. Size of the Estate as a Factor

Many of the studies showed that as the size of the estate increased, the number of respondents willing to leave the entire estate to the surviving spouse decreased. The 1963 Cook County, Illinois study\textsuperscript{210} showed that when the estate was 36,000 dollars, eighty-five percent of the respondents would choose to leave the entire estate to the surviving spouse. When the estate was described as 180,000 dollars, however, only twenty-five percent would choose to leave the it entirely to the surviving spouse.\textsuperscript{211} Likewise, while the 1965 Ohio study\textsuperscript{212} found that eighty-five percent of those studied\textsuperscript{213} left the entire estate to the surviving spouse when the decedent was survived by both a spouse and children, this was more likely when smaller estates were involved and there had been no remarriage.\textsuperscript{214} The 1970-71 English study\textsuperscript{215} found that "[m]ore people

\textsuperscript{207} Id. at 355-56 (footnotes omitted).
\textsuperscript{208} Id. at 359 (Tables 11-12). However, the division between minor children and adult children in this latter group was equal; adults were not favored over minors.
\textsuperscript{209} Id. at 358 & n.132.
\textsuperscript{210} Dunham, supra note 15.
\textsuperscript{211} Id. at 260.
\textsuperscript{212} M. SUSSMAN, J. CATES & D. SMITH, supra note 173.
\textsuperscript{213} Id. at 89 (Table 5-1).
\textsuperscript{214} Id. at 90, 290.
\textsuperscript{215} J. TODD & L. JONES, supra note 174.
thought the children should have a share when the value of the estate was higher.\textsuperscript{216} The mid-1970s Iowa study\textsuperscript{217} found that "[a]lthough a majority of Iowans want the spouse to receive 100 percent of relatively small estates—those valued at less than $50,000—only a minority of Iowans want the spouse to receive 100 percent of estates valued over $100,000."\textsuperscript{218} Similarly, in the 1974-75 Morris County, New Jersey study,\textsuperscript{219} as the size of the hypothetical estate increased, the share of the surviving spouse decreased: when the estate was ten thousand dollars, all of it went to the surviving spouse; as the estate increased to one million dollars, the surviving spouse’s share decreased to about half of the estate.\textsuperscript{220}

c. Testamentary Freedom

Two studies explored the significance of testamentary freedom. In the 1970-71 English study,\textsuperscript{221} sixty-nine percent of the husbands and sixty-five percent of the wives felt a man should have testamentary freedom to exclude children from his will, while only twenty-one percent of the husbands and twenty-six percent of the wives felt the children should be protected by law.\textsuperscript{222} In choosing a method of inheritance protection for children, only twenty-nine percent of the husbands and thirty-three percent of the wives felt the \textit{legitim} system should be employed over the family maintenance system.\textsuperscript{223} When asked what kind of inheritance protection a spouse should get, fifty-seven percent of the husbands and fifty-nine percent of the wives said that the testator should be required to provide for them in the will.\textsuperscript{224}

In the 1977 five-state telephone survey,\textsuperscript{225} the public was asked whether testators should be limited to naming relatives and friends of long standing as beneficiaries and if so, why.\textsuperscript{226} While eighty-nine per-

\begin{itemize}
\item \textsuperscript{216} \textit{Id.} at 54.
\item \textsuperscript{217} Note, \textit{Iowans’ Dispositive Preferences}, \textit{supra} note 173.
\item \textsuperscript{218} \textit{Id.} at 1091.
\item \textsuperscript{219} Note, \textit{Intestate Succession in New Jersey}, \textit{supra} note 173.
\item \textsuperscript{220} \textit{Id.} at 274.
\item \textsuperscript{221} J. \textsc{Todd} & L. \textsc{Jones}, \textit{supra} note 174.
\item \textsuperscript{222} \textit{Id.} at 48. Similarly 73\% of the husbands and 67\% of the wives favored testamentary freedom over forced inclusion of children when the testator was a mother. \textit{Id.}
\item \textsuperscript{223} \textit{Id.} at 49. It is interesting to note, however, that of the vast majority who felt protection through application to the court was preferable to a \textit{legitim} system, only 9\% gave as a reason that children should have no special rights. \textit{Id.} at 50.
\item \textsuperscript{224} \textit{Id.} at 47.
\item \textsuperscript{225} Fellows, Simon & Rau, \textit{supra} note 173.
\item \textsuperscript{226} The precise questions on this topic were:
\begin{enumerate}
\item Should the law limit inheritance to either relatives, to friends of long standing, or
\end{enumerate}
cent of those interviewed felt there should be no restrictions generally, further inquiry established that under certain conditions only forty-three percent felt that there should be no restrictions.

**d. Changing Family Patterns as a Factor**

In the 1965 Ohio study, the authors noted, "It should be remembered that children expect to inherit from their surviving parent; hence, they are not irrevocably renouncing their rights to the property. This expectation, however, is not as likely when the surviving spouse is a stepparent." Indeed in intestacy cases, when the heirs received part of the small estate they often willingly signed over their interest to the surviving spouse. This was not true, however, in those estates where the surviving spouse was not the natural parent of the surviving children.

The mid-1970s Iowa study asked respondents for their estate distribution preferences if they were survived by a spouse and two minor or adult children. Sixty-one percent would leave the entire estate to the spouse. When the surviving spouse was not the parent of the surviving children, however, respondents were asked how they would like their estate distributed between the spouse and adult children. Only twenty-nine percent allocated the entire estate to the surviving spouse. The authors explained that this smaller percentage was an indication "that the respondents felt the stepchild would need protection from disinheri-
tance by the stepparent spouse and should take a larger share of the estate at the expense of the spouse." The two children, however, were still treated equally.

The 1970s study of Illinois residents asked those interviewed what percentage of their estate they would leave to specified survivors; the examples included minor and adult children and children by the surviving spouse as well as children from other mates. The study showed that where there was a minor child of the marriage, 53.3 percent of the sample would leave the entire estate to the spouse; with an adult child, 41.2 percent would do so; where there is a minor child from a previous marriage living at home, 18.8 percent would do so; and where there is a minor child living with the former spouse, 16.8 percent would do so.

Interestingly, fewer respondents would leave the entire estate to the surviving spouse when there are adult children, 41.2 percent, than would do so when there are minor children, 53.3 percent. This indicates a recognition of the competing interest of the testator's children with that of the surviving spouse and is consistent with studies supporting protection of children when there is no surviving spouse. These percentages also could be interpreted to mean that adult children are entitled to their share without waiting for the surviving spouse to die and that the surviving spouse with minor children is expected to use some of the estate for the benefit of those children.

It is also noteworthy that fewer than twenty percent would leave the entire estate to the surviving spouse when there are children from other unions, whether living with the decedent or the other parent. The most popular division in these cases was approximately half to the surviving spouse and half to the children. The modern trend appears to recog-

238. Id. at 1095.
239. Id.
241. The actual questions asked which are relevant to this discussion were:
   1) What percentage of your estate would you wish to give each survivor if you were survived only by your husband/wife and a minor child by your present marriage?
   2) What percentage of your estate would you wish to give each survivor if you were survived only by your husband/wife and an adult child?
   3) What percentage of your estate would you wish to give each survivor if you were survived only by your husband/wife and a minor child by a previous marriage? The child lives with you.
   4) What percentage of your estate would you wish to give each survivor if you were survived only by your husband/wife and a minor child by a previous marriage who lives with your former spouse?

   Id. at 729.
242. Id. (Table 7).
243. Id. at 732.
nize the divergence of interests of surviving spouses and nonbiological children and the need to address that divergence.

In the 1977 five-state telephone survey,244 when the respondents were questioned about estate allocation between a surviving spouse and children of another mate,245 the authors found that only twenty-three percent gave the entire estate to the surviving spouse, compared with 58.3 percent and 51.6 percent when there were minor children or minor and adult children by the same mate.246 Extrapolating from prior data, the authors theorized that "respondents would prefer that an adult child receive a greater share of the estate than . . . [that] going to the [surviving spouse's] minor child of a prior marriage."247

e. Emerging Concern for Minor Children

In a 1974-75 Morris County, New Jersey study,248 thirty-four percent of those interviewed would give all or a larger share of the intestate estate to the surviving spouse than is done under the intestacy laws.249 Forty-two percent, however, favored the interests of the children over those of the spouse. "Half of this group allocated to the widow all or part of the intestate estate but placed on her share the same restriction that she use it primarily for the support of the children and only secondarily for her own needs."250 The other half of the forty-two percent declined to make an allocation but placed on the spouse's share the same restriction that it be used primarily to support the children. Significantly, this support obligation was not part of the survey questions; this spontaneous restriction was suggested by the respondents themselves.251

The question was modified by factors such as the age of the children and size of the estate: when the children were fourteen and fifteen, the only significant shift was that many of the respondents who did not allocate shares between the spouse and children now did so; again, they placed a spontaneous support limitation on the spouse's share. When the children were twenty-four and twenty-five years of age, however, almost seventy-five percent allocated a larger share to the spouse than the intestate succession laws provided.
tacy laws do; thirty-four percent gave the estate to the spouse outright with no spontaneous support obligation. 252

When the 1977 five-state telephone survey 253 focused on minor children, respondents expressed additional concerns. Despite lawyers' concerns regarding problems of guardianship and the independent legal obligation of the surviving parent to support minor children, 254 a significant minority of the respondents would distribute portions of their estate to minor children. From the explanations provided by the 34.8 percent of the respondents who chose to give fifty percent or more of their estate to minor children, 255 the authors concluded that "many of these respondents apparently felt that their spouses were untrustworthy. They worried about the possibility that the children might be disinherited, especially if the surviving spouse remarried." 256 Additionally, comparing the needs of the spouse with those of the minor children, those of the children won. 257 The answers to these questions reflect the pervasive influence of the multiple divorce and remarriage syndrome on modern American awareness.

f. Generational Transfers

The 1965 Ohio study examined the implications of inheritance in terms of its role in the family. 258 The authors concluded that when testators deviated from equal distribution it was to acknowledge some special service performed by one of the children:

Testators will their estates to designated children or other individuals according to their perception of their needs, emotional ties with them, and services exchanged among family members over the years. Serial service, the transfer of worldly goods from parents to lineal descendants that occurs in due course, exists side by side with serial reciprocity, which specifies the giver-taker relationship based on exchanges of goods and services and patterns of interaction. 259

The authors found that the heirs agreed generally with the testators' apportionment of the estate along lines of dependence and service. Indeed, in the small intestate estates, in which the heirs automatically received

252. Id. at 271.
254. Id. at 356.
255. Id. at 359 (Table 11).
256. Id. at 360.
257. Id.
259. Id. at 118. See also M. GLENDON, supra note 8, at 104.
part of the estate by law, the heirs often willingly signed over their interest to the surviving spouse.260

The relevance of inheritance in intergenerational family behavior was illustrated best by the reaction of two adult children who had been disinherited in favor of the testator's sister and had expressed feelings of unfairness. Significantly, the estate was insolvent. The authors hypothesized:

Since there was no money or property involved, it might be expected that the heirs would have regarded the distribution indifferently. Yet knowing that a parent has some concern and feeling is psychic income; and evidently for some survivors, this knowledge is as valuable as real property. Being in the thoughts of the decedent is often more important than the amount of money involved and the actual distribution.261

The authors concluded that inheritance plays a significant and irreplaceable role in family continuity:

These functions (meeting the maintenance needs of family members and symbolic identification) have relevance for the proposition that inheritance helps perpetuate the family through time. Although testamentary freedom permits the disinheritance of immediate or distant kin in favor of unrelated persons, this rarely occurs. . . . The providing of symbolic meaning and identification cannot be achieved by society-wide generational transfers in effect today or by those to be created in the future. For this reason alone, there is little prospect that the inheritance system as we know it today will ever be abolished.262

g. Personal Experience as a Factor

The 1970-71 English study263 differed from the other studies in that it carved out a discrete class of interviewees and analyzed their responses separately. Those formerly married, whether widowed, divorced, or separated, were asked questions regarding freedom of testation and inheritance protection for children; 264 the responses were, in some instances, markedly different.

The views of widowed men were not very different from those of husbands, but divorced or separated men were more in favor of freedom with regard to the inclusion of children in the parent's will. Although the majority of formerly married women preferred freedom for the

260. See supra note 231.
262. Id. at 312.
264. For this group the precise questions were: (1) "When a married man makes a will, do you think he should be entirely free to distribute his possessions as he wishes, or should he be made, by law, to include his wife in the will?" Id. at 70. (2) "When a father makes a will do you think he should be entirely free to distribute his possessions as he wishes, or should he be made, by law, to include all his sons and daughters in the will?" Id. at 74.
parent on this issue it was among this group that the highest proportion (over a third) felt children should have an automatic inheritance right.

Thus, actual experience of separation and divorce seems to influence the responses of those interviewed along gender lines:266 divorced and separated men were more prone to favor testamentary freedom over protection of either spouse or children, and divorced and separated women were more prone to favor automatic protection for children and spouses. Those who may have had negative experiences in the analogous field of child support payments, either in having to make them or in trying to collect them, may have permitted those experiences to influence their judgments in the area of inheritance.267

In conclusion, the fact that these empirical studies of public attitudes toward inheritance are at least ten years old is not a reason per se to dismiss them. Spanning two cultures and three decades, they evince a discernable pattern when existing societal experiences and phenomena are accounted for. There is no conscious belief that children should be disinherited. Earlier expectations that the surviving spouse naturally would pass on the assets to the children have been replaced with concerns for the children in the face of incompetence, remarriage, or betrayal by the surviving spouse. Furthermore, the higher incidence of divorce and remarriage makes the possibility of a second surviving spouse responsible for children from previous marriages more of a consideration in the later studies than in the earlier ones268 when the expectation, whether stated or assumed, was that the surviving spouse would also be the natural or adopted parent of the children and their inheritance merely would be postponed, not terminated. Finally, from the later studies one could conclude that there is less tension between testamentary freedom and the right of children to inherit than between the

265. Id. at 74-75.
266. See, e.g., id. at 70 (chart).
267. Id.
268. In 1986, of those marrying, it was the first time for 65.7% of the men and 65.8% of the women; it was the second time for 26.6% of the men and 26.4% of the women; and it was the third (or more) time for 7.6% of the men and 7.8% of the women. Telephone interview with Barbara Wilson, United States Dept. of Health and Human Services, National Center for Health Statistics (Dec. 1989).
proper allocation of assets among survivors, especially when the size of the estate is small.

III. Testamentary Freedom Balanced Against Other Interests

The preceding analysis examined the historic reasons for favoring testamentary freedom over the interests of children and suggested that these reasons are no longer persuasive. Indeed, when testamentary freedom has been in tension with other legal interests, the law has balanced the tension in favor of those other interests.

A. Obligations of Estate Administration and Testamentary Freedom

There are temporary familial obligations, enumerated and protected by statute in the various states, as well as expenses of estate administration, that must be satisfied before final disposition of property under the will. These include the "family allowance," the "homestead allowance," and the "exempt property allowance." These obligations re-

269. See, e.g., Estate of Thelma Owens, N.Y.L.J., May 23, 1988, at 23, col. 3 (Totten Trusts, which are non-estate assets that pass money to the beneficiary without a will, were invaded to pay medical, administration, and funeral expenses of the decedent when the estate assets were not sufficient). The Uniform Probate Code extends this protection to creditors and statutory allowances such as the family or widow's allowance, homestead allowance, and exempt property allowance. UNIF. PROB. CODE § 6-107 (1969).

270. The family allowance "[c]onsists of a certain amount of decedent's property allocated for the support of the widow and children during the period of estate administration." BLACK'S LAW DICTIONARY 544 (5th ed. 1979). It is similar to the "widow's allowance." See Id. at 1433. Professor Glendon considers "family allowance" or "widow's allowance" statutes as "significant protection against disinheritance in the neediest families" due to the fact that where the allowances exist, the court may deplete the personal property of the estate to meet the support requirements of the surviving spouse and children, but only during the period of probate or administration of the estate. Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 TUL. L. REV. 1165, 1189 (1986).

271. The homestead allowance generally frees certain real property from the claim of creditors, either permanently or during the period of the surviving spouse's life and the minority of the children. "[T]he most states, legislation has assured the surviving members of the family the enjoyment of the home place against both the testamentary caprices of the husband and the demands of his creditors." T. ATKINSON, supra note 109, at 127-28 (footnote omitted).

272. Some states carry over the personal property exemption from creditors that the decedent had in life to specific articles for the benefit of the family at the decedent's death:

Laws which are primarily motivated by this consideration are apt to set aside to the widow or to the family the deceased's clothing, furniture, supplies, tools, implements, animals and the like of a specific number or value. The injustice which may result to creditors is generally slight compared with the benefit received by the family. However, many of such provisions are obsolete with regard to the sort of property designated. The more modern type of statute exempts a specified amount of money or goods of a certain value.

Id. at 129 (footnotes omitted). Often the family Bible was included in the exempted items.
fect a public policy determination that certain familial assets and obligations have priority over the wishes of the testator.\textsuperscript{273}

B. The Sovereign and Testamentary Freedom

There are certain obligations that the estate must satisfy before or in spite of any testamentary dispositions. The sovereign taxing authorities have a claim to estate assets superior to the wishes of the testator. Taxes payable out of the assets of the estate may include personal federal income taxes of the decedent,\textsuperscript{274} federal estate taxes,\textsuperscript{275} and federal gift taxes.\textsuperscript{276} Likewise, states have superior claims for state income taxes as well as state inheritance or estate taxes.\textsuperscript{277} In addition, there may be state gift taxes for which the estate is liable. Any outstanding property tax also comes out of the estate assets.\textsuperscript{278}

The general order of payment of estate obligations is the family allowance, funeral expenses, medical expenses during last illness, costs of estate administration, federal taxes, and finally state taxes.\textsuperscript{279} After these obligations are met the estate is then liable for the debts of the decedent, again before distribution of estate assets in accordance with the will.

C. Creditors' Rights and Testamentary Freedom

As early as 1805, Chief Justice Marshall made clear that although creditors should pursue executors first, they then could pursue devisees

\begin{itemize}
\item \textsuperscript{273} The Uniform Probate Code, for example, states in pertinent part:
\begin{quote}
The power of a person to leave property by will and the rights of creditors, devisees, and heirs to his property are subject to . . . this Code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will . . . or in the absence of testamentary disposition, to his heirs . . . subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.
\end{quote}
\item \textsuperscript{274} T. \textsc{Atkinson}, \textit{supra} note 109, at 680.
\item \textsuperscript{275} \textit{Id.} at 681. Currently, if the gross estate is $600,000 or more, federal estate taxes would be due.
\item \textsuperscript{276} \textit{Id.}
\item \textsuperscript{277} \textit{Id.} at 681-82.
\item \textsuperscript{278} \textit{Id.} at 682.
\item \textsuperscript{279} \textit{Id.} at 708-10. Professor Atkinson notes other priority obligations that may exist by statute in a particular jurisdiction: certain trust beneficiaries, judgment debts obtained during decedent's lifetime, and wages and rent have priority over secured and unsecured debts of the decedent, but these all have priority over disposition of assets in accordance with the will. \textit{Id.} at 710-12. The Uniform Probate Code recognizes certain statutory allowances: the homestead allowance, \textsc{Unif. Prob. Code} \S 2-401 (1969); the family allowance or widow's allowance, \textit{id.} \S 2-403; and the exempt property allowance, \textit{id.} \S 2-402.
\end{itemize}
and legatees to satisfy debts of the decedent. While it is true that a testator may designate which assets of the estate are to be used to satisfy the debts, a “testator cannot, by his will, withdraw from his creditors any property which the law subjects to their claims.” Both real and personal property are subject to the decedent’s debts.

Today, under the Uniform Probate Code, “claims” against the decedent’s estate exclude estate or inheritance taxes, but include “liabilities of the decedent . . . whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration.” Creditors must assert their claims in a timely manner to the personal representative of the decedent’s estate. If their claims are not barred, however, creditors can enforce their claims against the distributees even after distribution of the estate.

Many jurisdictions that have not enacted the Uniform Probate Code have similar estate obligations and creditor protections. For example, Article 12 of New York’s Estates Powers and Trust Law (EPTL) is designed to make available to creditors and other persons with claims against the estate of a decedent an action against beneficiaries under the decedent’s will or intestate distributees to whom the real or personal property of the decedent has been distributed—whenever proceedings in the surrogate’s court or an action against the personal representative to reach estate assets are no longer available.

280. Milligan v. Milledge, 7 U.S. (3 Cranch) 220, 228 (1805).
284. UNIF. PROB. CODE § 1-201(4) (1969).
285. Failure to assert the claim timely (four months after publication of first notice by personal representative; within three years of death, if no publication) will bar the claim against both the personal representative and the distributees of the estate. Id. § 3-803.
286. Creditors present claims to the personal representative who either allows or disallows them. The personal representative notifies the claimant of the action taken; failure to notify is an allowance of the claim. If the claim is disallowed by the representative, the creditor must file a petition of allowance with the probate court or bring an action against the representative within 60 days of disallowance or the claim is barred. Id. § 3-806.
287. Id. § 3-104.
Thus, in resolving the tension between testamentary freedom and the interests of creditors and other obligations of the testator, public policy consistently has dictated that the short-term emergency needs of the spouse and children, the exigencies of the burial of the decedent, the administration of the estate, the decedent’s tax obligations, and claims of the decedent’s creditors be satisfied before distribution of the remaining estate may proceed according to the testator’s wishes.

D. Spousal Elective Share

In the majority of states, public policy has resolved the tension between testamentary freedom and the mutual spousal obligation of support against testamentary freedom. The type of protections afforded surviving spouses range from life estate interests in part of the decedent’s estate to the intestate share of the estate.

290. See supra notes 269-73 and accompanying text.
291. See ALA. CODE § 43-9-70 (1982) (the lesser of one-third or all minus value of surviving spouse’s separate estate); ALASKA STAT. § 13.11.070(a) (1985) (one-third of augmented estate); ARIZ. REV. STAT. ANN. § 14-2310A (1975) (same as intestate share unless transfer outside of will or intentionally omitted); ARK. STAT. ANN. § 28-39-401 (1987) (after one year of marriage, women get dower in real estate and personalty as if intestate, plus homestead; men get curtsey in same); CAL. PROB. CODE § 6560 (Deering 1990) (one-half community property, separate property); COLO. REV. STAT. § 15-11-201(1) (1987) (one-half augmented estate); CONN. GEN. STAT. ANN. § 45-273a(a) (West 1981 & Supp. 1990) (one-third estate for life); DEL. CODE ANN. tit. 12, § 901 (1987) (one-third elective estate less amount of all transfers to the surviving spouse by decedent); D.C. CODE ANN. § 19-113 (1989) (intestate share including dower rights not to exceed one-half of estate); FLA. STAT. § 732.207 (West 1976) (30% of all assets); HAW. REV. STAT. § 560.2-201 (1988) (one-third of net estate); IDAHO CODE § 15-2-203(a) (1979) (one-half of total augmented quasi-community property estate); ILL. ANN. STAT. ch. 110 1/2, para. 2-8 (Smith-Hurd 1978) (one-third of estate if decedent has a descendant; one-half of estate if no descendant); IND. CODE ANN. § 29-1-3-1 (West Supp. 1989) (one-half of estate but if survivor is subsequent spouse without children and the decedent has descendants, one-third of net personal estate and life estate in one-third of testator’s lands); IOWA CODE ANN. § 633.238 (West 1964) (one-third estate in real property; all personal property); KAN. STAT. ANN. § 59-603 (1983) (intestate share); KY. REV. STAT. ANN. § 392.080 (Michie/Bobbs-Merrill 1984) (intestate share for personal property; one-third of real estate seized in fee simple at the decedent’s death in the decedent or for the decedent’s use); ME. REV. STAT. ANN. tit. 18-A, § 2-201(a) (1981) (one-third of augmented estate); MD. EST. & TRUSTS CODE ANN. § 3-208 (1974) (intestate share); MASS. GEN. LAWS. ANN. ch. 191, § 15 (West 1990) (one-third of personal and real property if decedent left issue; $25,000 plus income from trust of one-half of remaining property if decedent left kindred but no issue but only $25,000 outright—spouse receives income from trust for remaining amount; $25,000 plus one-half of remaining property absolute if no kindred or issue); MICH. COMP. LAWS ANN. § 700.282 (West Supp. 1990) (one-half of all property less one-half of value of all property derived from decedent by means other than testate or intestate succession); MINN. STAT. ANN. § 524.2-201 (West Supp. 1990) (one-third of augmented estate); MISS. CODE ANN. § 91-5-25 (1989) (intestate share but only one-half of real or personal estate); MO. ANN. STAT. § 474.160 (Vernon Supp. 1989) (one-half estate if no lineal descendants; one-third if there are lineal descendants); MONT. CODE ANN. § 72-2-702 (1987) (one-third of augmented estate); NEB. REV.
New York's statutory elective share for the surviving spouse is illustrative. New York passed the statutory elective share to eliminate "the glaring inconsistency ... which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death." As originally enacted in New York in 1929, the spousal elective share guaranteed "the surviving spouse a definite portion of the estate regardless of its size, the decedent's other responsibilities, the needs and resources of the surviving spouse, or any non-testamentary provisions the decedent made in his or her favor." In the 1960s the Bennett Commission, which further revised New York's estates law, noted that thirty-three states plus the District of Columbia had adopted elective share laws. In summarizing the resultant protections for surviving spouses, the commission concluded:

STAT. § 30-2313 (1989) (up to one-half of augmented estate); NEV. REV. STAT. ANN. § 123.250 (Michie 1986) (community property rights only; no election); N.H. REV. STAT. ANN. § 560:10 (1974) (if there are children, one-third of personality and real estate; if no children but parent or sibling, $10,000 personality, $10,000 real estate, and one-half remainder; if no children, parents, or siblings, $10,000 plus $2000 for every year of marriage plus one-half of remainder); N.J. STAT. ANN. § 3B:8-1 (1983) (one-third of augmented estate); N.M. STAT. ANN. § 45-2-102 (1978) (community property only; no elective share); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(c)(B) (McKinney 1981) (one-third of estate if issue; one-half if no issue); N.C. GEN. STAT. § 30-3 (1984) (intestate share, but if no children then one-half of estate; if children or descendants of a previous marriage, one-half intestate succession); N.D. CENT. CODE § 30.1-05-01 (1975) (one-third of augmented estate); OHIO REV. CODE ANN. § 2107.39 (Anderson 1989) (one-third of estate if decedent is survived by two or more children or lineal descendants; one-half otherwise); OLKA. STAT. ANN. tit. 84, § 44 (West. Supp. 1990) (intestate share); OR. REV. STAT. § 114.105 (1984) (one-fourth of net estate); 20 PA. CONS. STAT. ANN. § 2303(a) (Purdon 1989) (one-third of probate estate); R.I. GEN. LAWS § 33-6-21 to -22 (1984) (dower and curtesy); S.C. CODE ANN. §§ 62-2-201 to -207 (LAW. CO-OP 1986) (one-third of estate); S.D. CODIFIED LAWS ANN. §§ 30-20-1, 30-20-16 to -19, 30-5A-1 to -8 (1984) (both will provisions and homestead rights unless will requires election); TENN. CODE ANN. § 31-4-101 (Supp. 1989) (one-third of estate); UTAH CODE ANN. § 75-2-201 (Supp. 1989) (one-third of augmented estate); VT. STAT. ANN. tit. 14, §§ 461-475 (1989) (dower or curtesy or will); VA. CODE ANN. § 64.1-16 (1987) (one-third of estate surplus if there are children; one-half of estate surplus if no children); W. VA. CODE § 42-3-1 (1982) (share spouse would have taken had decedent died intestate with children); WIS. STAT. ANN. §§ 861.01-03 (West Supp. 1989) (one-half deferred and augmented marital property); WYO. STAT. § 2-5-101 (1980) (one-half of estate if no issue or spouse is parent of only issue of decedent; one-fourth if spouse is non-parent of issue). Several states do not have elective share statutes, including Georgia, Louisiana (community property; see LA. CIV. CODE ANN. art. 889 (West Supp. 1990)), and Texas (spouse can take community property at common law).
In nearly all of the other states having a right of election, the surviving spouse can in all events take the intestate share or some portion or fraction thereof no matter what provisions the decedent has made in the will in lieu thereof. Thus, with very few exceptions, no matter how large the estate may be or how inexperienced the surviving spouse is in money matters, or what independent assets the surviving spouse has, he or she is guaranteed as a minimum, the intestate share.  

In creating the spousal elective share, the state has interfered with testamentary freedom to protect the surviving spouse against the wishes of the testator for reasons of public policy. The public policies include preventing the spouse from becoming a ward of the state and recognizing the contributions, economic or otherwise, the spouse made toward the acquisition of the decedent's estate. The ward of the state concerns are even more compelling for dependent children. While contributions of the child toward acquisition of the family assets are of a more indirect and different nature, the status of the child in the family may suggest a claim to those assets even when dependence is not a factor.

E. Parental Responsibility for Financial Support of Dependent Children

The foregoing tensions between testamentary freedom and other public policies all have been resolved in favor of the other interests. This Article suggests that the time has come to resolve yet another tension: parental responsibility for child support and testamentary freedom. As proposed herein, child support, just as creditor's rights, taxes, and spousal support have been, would be the victor.

Children historically have had a surfeit of control, protection, guidance, and restrictions from the dual sovereignty of parents and state.

295. Id. at 207. In New York, unlike the other 33 states that have the spousal elective share, the testator can prevent the spouse from claiming the elective share by creating trusts for the benefit of the surviving spouse that are equal in value to the elective share. Id. at 193-96, 207.

296. See, e.g., id. at 212.

297. See infra notes 366-367 and accompanying text.

298. The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life, and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.


In the same case, however, the Supreme Court reaffirmed that "[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." Id. at 402.
Which sovereign should control on particular children's issues, however,
often was unclear: "It is cardinal with us that the custody, care and
nurture of the child reside first in the parents, whose primary function
and freedom include preparation for obligations the state can neither
supply nor hinder." This historic tension between the family response
and the law, coupled with the traditional emphasis on the testator's
side of the inheritance coin, has, except in Louisiana, created a vac-
uum in protecting the right of children to inherit.

Yet this same reticence on the part of the state to wrest familial
control from the family has existed in all family issues. Modern flexible
approaches have been found to balance the competing considerations.
An examination of some of these issues and the solutions conceived and
employed is useful.

(1) Living Parents

The historic moral obligation of the father to support his children
has evolved into the integrated legal and moral obligation of both parents
to support their children. This integration has not, however, dimin-
ished the force of the moral component. The obligation extends to all

This duality of sovereign responsibilities seen here in education occurs in other areas in which
the family response and the law is in tension.

299. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The Prince court also referred to
the "private realm of family life which the state cannot enter." Id. Cf. M. Glendon, supra
note 8, at 117 (although social welfare programs are well established and accepted, families
still play crucial support roles, particularly in such areas as child support after a divorce);
Hafen, supra note 1, at 869-78 (documenting a "natural swaying of the historical pendulum . . .
between an emphasis on the private sphere and an emphasis on the larger social sphere");
Teitelbaum, supra note 29, at 812-13 (a "shrinking" of family functions occurred in the 19th
and 20th centuries because courts and legislatures determined that public agencies were better
able to educate, control, and provide for children).

300. For example, while acknowledging that "[n]o one would seriously dispute that a
deeply loving and interdependent relationship between an adult and a child in his or her care
can exist even in the absence of a blood relationship," the Supreme Court nevertheless ac-
nowledged "important distinctions between the foster family and the natural family." Smith
v. Organization of Foster Families, 431 U.S. 816, 844-45 (1977). When the foster family exists
because of "positive-law sources" the Court will assess the family liberty interest alleged, not
from the familial liberty interest in a "right to family privacy in the integrity of their family
unit," but from state-law-created "expectations and entitlements of the parties." See id. at
842-46. See also supra notes 30-32.

301. See supra note 106 and accompanying text.

302. "At common law, a father is bound to support his legitimate children, and the obliga-
tion continues during their minority. We may assume this obligation to exist in all the States.
Dunbar v. Dunbar, 190 U.S. 340, 351 (1903). See also M. Glendon, supra note 8, at 68-69;
Glendon, supra note 270, at 1173.

children of the parent, whether in or out of wedlock or from current or prior marriages.\textsuperscript{304} This fundamental responsibility for financial support of children, however, must adapt to the realities of the limited resources available to the supporting parent. Thus, despite the recognized primary obligation of a parent for support of a child, the state must intervene when the parent's resources are deficient.\textsuperscript{305}

Nonsupport can exist in intact families as well as in divorced families. Nonsupport by a parent still living at home with the child presumably would be based on an inability to support rather than on a refusal to support. In post-divorce support cases, however, while there may be an inability to make support payments, often there are other complicating, residual factors from the dissolution of the marriage such as blame, guilt, or bitterness, which result in nonsupport even though the means are available.\textsuperscript{306} Direct involvement of the state through enforcement proceedings and court orders are much more prevalent in post-divorce nonsupport proceedings.\textsuperscript{307}

Despite this legal standoff, courts and commentators have been imaginative in forging solutions when adequate support of children is the goal. As one authority has stated:

A 'children first' principle should govern all such divorces [couples with minor children]. Implicit in the existing law of child support is that having children engages all of the parents' income and property to


\textsuperscript{305} The establishment of the federal Aid to Families with Dependent Children (AFDC) program is a good example of governmental intervention. To qualify for federal assistance, a child must be deprived of a parent. In King v. Smith, 392 U.S. 309 (1968), Alabama attempted to deny assistance to families with "substitute fathers" who have no biological relation to child or duty to support, but live with the mother. Id. at 313-14. Alabama claimed this was "a legitimate way of allocating its limited resources available for AFDC assistance" as well as discouraging "illicit sexual relationships and illegitimate births" and equalizing informal marital relationships with formal ones that would be ineligible for AFDC funds. Id. at 318.

In striking down Alabama's substitute father statute, the Supreme Court noted that the state had other means to discourage immoral behavior and that by subsequent amendments to the Social Security Act, Congress made clear "that destitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father." Id. at 334. Cf. M. Glendon, supra note 8, at 74, 219. Furthermore, even judicial preference for supporting prior families is dissipated when it confronts enforcement attempts. Id. at 72, 74.

\textsuperscript{306} See, e.g., Parnas & Cermak, supra note 303, at 764. See also Rice v. Andrews, 127 Misc. 826, 217 N.Y.S. 528 (1926) (testator disinherited his seven-year-old son for no reason other than the father's bitter relationship with the mother).

\textsuperscript{307} See, e.g., M. Glendon, supra note 8, at 111; Teitelbaum, supra note 127, at 1145. Studies on the effect of remarriage on support payments interestingly enough show either no effect or a positive effect. When additional children result from these new liaisons, however, it often led to reduced support payments to the prior family. Parnas & Cermak, supra note 303, at 766.
the extent necessary to provide decent subsistence for the children at least until they reach their majority. Consistent application of this principle in divorces involving minor children would mean that, in these cases, the judge's main job would be to design the best possible package of property, income and in kind personal care to meet the needs of the new family unit composed of the children and their custodian. . . . All property, no matter when or how acquired, would be subject to the duty to provide for the children. Nor would there be any question of 'spousal support' as distinct from that allocated to the custodial spouse in his or her capacity as custodian. 308

Other commentators note “creative mechanisms” employed “to locate defaulters, discover tax returns, intercept tax refunds and other payments, garnish and redirect wages and attach property.” 309

The federal government plays a role in helping locate and enforce obligations of child support defaulters. In 1987, there were 2.9 million non-AFDC child support enforcement cases and 7.6 million AFDC and AFDC arrears cases. 310 The federal Child Support Enforcement Program 311 collected almost 3.9 billion dollars, of which over 2.5 billion dollars was for non-AFDC families. 312 These collections, however, were for only 31.7 percent of the non-AFDC cases, 10.7 percent of the AFDC cases, and 10.6 percent of the AFDC arrears cases. 313 These attempts to balance the public interest in parental responsibility for support of children against the realities of inability to pay or indifference suggest an approach to finding the appropriate balance between testamentary freedom and the right of children to inherit.

308. Glendon, supra note 270, at 1173-74. Professor Glendon cautions that this judicial practice must have “subsidiary guidelines” in order to incorporate the effect of subsequent liaisons, choose the appropriate standard of living by which to measure the support, and gauge the proper allocation of support from the parents. Id. at 1175-76. Most importantly, these subsidiary guidelines should be statutory: “The judge's role should be to adapt the principles, not to invent them for each new situation.” Id. at 1176.

309. Parnas & Cermak, supra note 303, at 759-60.

310. STATISTICAL ABSTRACT OF THE UNITED STATES, supra note 11, at 369 (Chart 610).

311. A note in the Statistical Abstract describes the Child Support Enforcement Program: The Child Support Enforcement Program locates absent parents, establishes paternity of children born out of wedlock, and establishes and enforces support orders. By law, these services are available to all families that need them. The program is operated at the State and local government level but 68% of administrative costs are paid by the Federal government. Child support collected for families not receiving Aid to Families with Dependent Children (AFDC) goes to the family to help it remain self-sufficient. Most of the child support collected on behalf of AFDC families goes to Federal and State governments to offset AFDC payments.

312. Id.

313. Id.
(2) Deceased Parents

While the foregoing discussion is illustrative of the historic, deeply rooted moral and legal obligation of support owed to children by their parents that is in tension with modern financial realities, it also highlights an inexplicable statutory and judicial concession to testamentary freedom. Despite the recognized compelling interest of parental support of children, "there is apparently no [American] jurisdiction where a dependent child may not be disinherited by a parent who makes his desire to disinherit the child sufficiently clear."314

Recognition of the tension between morality and law in this area was evident to New York's Foley Commission in 1929:

The Commission has left to be considered by others whether a parent has a moral duty, which should be made a legal duty, to provide for the support and maintenance of children during the period of their dependence. Should the law compel a parent at death to provide for his helpless dependents? The right of a testator to pauperize his helpless dependents now exists under our law. When will the State step in to take away that privilege? When will such public policy be changed? The State is vitally interested in the care of minor children from both a pecuniary and a social viewpoint.315

The illogic at work when testamentary freedom remains victorious over the fundamental need of dependent children for parental support has been aptly pointed out.316 Testamentary freedom has bowed to creditors' rights, the "whole panoply of property, income, excise, gift and death taxes,"317 and, of course, the spousal elective share. It is now time for testamentary freedom to defer as well to the inheritance rights of children.318

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314. Rein, supra note 13, at 12. See also supra note 3 and accompanying text. Aside from halfhearted end-runs made at testamentary freedom on behalf of children by the various pretermitted child statutes, there are no current statutory safeguards for children. See, e.g., Cahn, supra note 15; Rein, supra note 13, at 37. These statutes seek to protect the afterborn child or the child inadvertently left out of the will, increasingly rare actual occurrences. When used by the courts in an attempt to protect disinherited children, they are ineffective. Rein, supra note 13, at 37.

315. FOURTH REPORT ON ESTATES, supra note 15, at 198 n.23. The Foley Commission was the predecessor commission to the Bennett Commission in the 1960s.

316. See Rein, supra note 13, at 12-22.

317. Id. at 18-19 (quoting the Foley Commission).

318. In 1965, the New York Bennett Commission commented: "The continued complete freedom of the New York testator to disinherit his dependent children appears to reflect an indifference to moral and social irresponsibility and is certainly out of harmony with the vast social legislation which has characterized the last half century in this State and Country." FOURTH REPORT ON ESTATES, supra note 15, at 197. The Bennett Commission proposed a modified family maintenance system for New York, but this was not enacted by the Legislature. See id. at 198-201.
IV. The Concept of Protected Inheritance

The term "protected inheritance" as used in this Article describes the proposed right of children to inherit from their parents despite any will of their parents to the contrary. Protected inheritance is distinguishable from the general concept of inheritance whereby the possessions of the deceased may, but need not, devolve on the heirs of the deceased either by operation of the deceased's will or by the dictates of the law of intestacy.

Looking at the question from the child's rather than the testator's perspective, inheritance is separated from the concept of property, at least temporarily, and clearly wedded to the concept of family. The child's expectation, right, or interest in the asset is based not on ownership, but rather on relationship to the owner. Protected inheritance is substantively similar to the *legitim* or forced heirship found in civil law countries and in Louisiana today. Conceptually and quantitatively, however, it is distinguishable. As a term of art, "protected inheritance" emphasizes the positive effect on the "tails" side of the coin, while the term "forced heirship" merely describes a negative impact on the "heads" side of the coin. Furthermore, protected heirship recognizes and addresses the fact that there may be differences in need among the lineal descendants of a testator.

A. Protected Inheritance: The Proposal

This proposal is not a ceiling, but a floor. The suggested protection here is for those who do not conform to the minimum societal expectation of providing for their children, yet have the means to do so. The tension between the family response and the current law calls for the law to provide protection to children that the majority of the population would find morally compelling. This floor of obligation does not affect those who have no assets. It does not prevent the majority of those who recognize their responsibilities to their children from continuing to leave assets above and beyond the minimum suggested here.

A simple yet comprehensive plan that acknowledges the tradition of testamentary freedom when possible, introduces an automatic protection of some degree for all children, is sensitive to need, and statutorily recognizes the family response, would be ideal.319 Neither modern forced heir-

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319. Professor Paul Haskell earlier had proposed an excellent and comprehensive scheme of a similar nature. See Haskell, supra note 3, at 518-26.

Professor Haskell proposed a basic forced share of one-third of the first $200,000 of the estate for *all* children, regardless of age; and then, on top of that, a supplemental amount equal to the original share for each child under 21 years of age, or through 26 years of age if engaged
ship nor a family maintenance system is the answer. Family maintenance is inappropriate: "Because the Anglo-American procedural tradition is preoccupied with adversarial and litigational values, the decision to organize any function as a judicial proceeding is inconsistent with the interests that ordinary people regard as paramount when they think about the transmission of their property at death: dispatch, simplicity, inexpensiveness, privacy." Modern forced heirship is inappropriate because it does not recognize the difference between minor dependent children, the parental obligation of support, and the general family re-

in full-time education. For children in this category, their basic and supplemental forced shares are placed in trust and the income paid until the child is 21 or completes formal education. "Upon termination of the trust, the basic forced share shall be distributed outright to the child, and the supplemental forced share shall be disposed of in accordance with the terms of the decedent's will." Id. at 519.

Payment of the basic forced share to adult children is deferred until all children have reached majority or 26 years of age, and the adult children's basic forced share is added to the supplemental trusts for minor children. That basic share corpus, however, would not be invaded for support of the minor children. Id. at 520.

For smaller estates, Professor Haskell proposes that one-third of the estate be a basic forced share when there is no surviving spouse and two-thirds when there is both a surviving spouse and children; the balance is "freely disposable," subject only to the requirements of the supplemental trust, if any. Id. at 522.

His proposal for the surviving spouse is analogous to the elective share found in most jurisdictions today, except his is a minimum share: if the current state law gives more, Professor Haskell defers to that amount. Id. at 520.

Additionally, Professor Haskell has a forced share for needy parents of the decedent. Need is to be determined by the courts. If there is not enough in the estate to meet all forced share demands, Professor Haskell would have the needy parents wait until the trust for minor children is no longer needed and the basic forced share distribution is made to all children. The proceeds of the trust for minors then would be available to maintain the needy parents. Id. at 520-21.

The New York Commission on Estates reviewed Professor Haskell's proposal when it considered legislation to protect children in 1962-65. The Committee felt, however, that Professor Haskell's proposal would "seriously interfere with freedom of alienation and estate planning" and was not based on need. They preferred a family maintenance system model. Nothing was adopted by the New York Legislature. FOURTH REPORT ON ESTATES, supra note 15, at 191.

The proposal herein differs from Professor Haskell's in several respects: first, regardless of the size of the estate, one-half of the intestate share allocated to children is used; next, recognizing the support obligations of both parents for their children, the elective or intestate share of the surviving spouse would be used to contribute to the children's share; furthermore, the share of adult children may be lost entirely if the needs of the minor and dependent children require it; and finally, protected inheritance would permit exhaustion of principal from nonfamily legatees before exhaustion of that of family members if necessary to support minor and dependent children. Assets comprising the estate for purposes of calculation differ as well.

sponse claim of all children regardless of age. With limited assets, this difference could be crucial.

Protected inheritance recognizes the need of minor children and the family response claim of all children; simplicity of application recommends it. Under protected inheritance, one-half of the children's intestate share of the decedent's estate automatically would be subject to this plan whenever the decedent is survived by children. Protected inheritance thus is preferable to the procedural complexities of a family maintenance system in which need and dependence are the only criteria for judicial intervention and litigation is the required procedure to seek an adjustment.

(1) Description: Mechanics and Details

Simply put, when there are surviving minor or dependent children, their needs must be met before the surviving spouse, adult children, other kin and dependents, and nonfamilial devisees are provided for by the decedent. When there is one or more children of any age, one-half of the intestate share of the estate for children automatically would be subject to the protected inheritance plan. Since the needs of dependent and minor children would be satisfied first out of this share, it is possible that adult children would receive very few assets. If there is money left out of this share when all children finally are emancipated, all of the children would be entitled to share in the remaining assets equally.

The operative theory is that the adult children already benefited from the assets of the decedent while growing up and being educated. The protected share assures minor and dependent children the same financial support that the decedent already has given the adult child. Once that has been accomplished, the other purpose of the protected share—formal recognition of the familial bonds to the decedent—requires that all children share the remainder of the estate.

321. The need to activate protection only through litigation and to have no established boundaries but the discretion of the court prevents testators who would honor a floor in their will from doing so, guarantees litigation expenses devouring estate assets, and wastes time in providing for the minor child.


323. Just as Professor Haskell proposed, the "needs" of minor and dependent children would have an expanded, 1990s definition that transcends mere survival and subsistence and includes higher, full-time education directed toward emancipating an adult truly capable of self-support.

324. Minor children would be those under the age of 18 or 21, depending on the particular jurisdiction. Dependent children are those, regardless of age or formal court adjudication of status, who are not able to support themselves or who, while beyond the age of majority, nevertheless are pursuing full-time education.
Assume an estate of 300,000 dollars with a surviving spouse who is also the biological mother of the decedent's three children, aged fifteen, twenty-two, and thirty, in a jurisdiction in which the intestate share is two-thirds for children. Half of the intestate share, or 100,000 dollars, would be the protected share for the children. There would not, however, be an immediate equal payout of that amount to the three children; all of it would go into a trust account.

Moreover, since there is an equal obligation on both parents to support their children, the spousal elective or intestate share of one-third, or 100,000 dollars, also would make a contribution to this trust account. Finally, the 100,000 dollars from the residual estate (that portion of the estate available for the exercise of testamentary freedom) also would be added to this trust.

The income from the entire amount of the trust would be applied to the support and education of the minor dependents until majority or completion of education pursued full time, whichever occurred later. If income alone is adequate to meet the needs of the minor dependent, the corpus would be paid out at majority or emancipation according to the interests of the contributors: equal shares to all now emancipated children, then the return of the spousal contribution, and the return of the nonfamilial or other devisee contributions. If income alone is not sufficient to support and educate the minor dependent, the principal of the various shares making up the trust would be invaded only as necessary in the following order: The corpus of the shares of the minor dependent, that of the nonfamilial devisees, that of the adult children, then finally, that of the surviving spouse.

The order of ability to invade the principal of the various contributions is consistent with the obligations of the decedent to the family and the priority of claims of the various beneficiaries on the estate. The corpus of the children directly benefiting from the protected share logi-

325. If the 22-year-old is not pursuing full-time education, the 22-year-old and 30-year-old are considered adults; if the 22-year-old is pursuing full-time education, then the 15-year-old and 22-year-old are considered dependent minors.

326. The amount would be one-half of either one-third (15-year-old) or two-thirds (15- and 22-year-old), that is, $16,500 or $33,000.

327. In this example, the residuary estate would be $100,000, which the testator would be free to leave to whomever he pleases if there were no minor children. Since there is either one or two minor children depending on the status of the 22-year-old, however, that $100,000 cannot be distributed immediately to the legatees. It will be added to the trust in its entirety, as opposed to the partial contribution to the trust by the surviving spouse, and eventually will be distributed to the designated legatees only when all children reach majority, if in the interim the principal has not been consumed in meeting the requirements of the minor child or children.
cally is consumed first. The nonfamilial devisees, however, have no direct claim on the decedent that society would recognize as superior to the decedent’s obligations to his family; their corpus, therefore, would be invaded if necessary.

Next, since the adult children already have benefited from being raised by the decedent and the assets are being consumed to give siblings equivalent benefits, it is appropriate for their share to be used to help their family if necessary. It is the familial relationship, after all, that gives them the right to this protected share, if there are assets left to pay out; so it is the familial relationship that calls upon them to help out their siblings.\textsuperscript{328}

Finally, the corpus of the contribution of the surviving spouse is the last resource consumed for the minor dependent children. This recognizes both the parental obligation to support the children and the spousal obligation of mutual support.

When the surviving spouse is \textit{not} the biological parent of some or all of the decedent’s children, the same principle still applies. That is, the surviving spouse would still have to contribute half of the spousal elective or intestate share to the support and education of the minor or dependent children.\textsuperscript{329} That corpus would be invaded, albeit as a last resort, to support and educate the minor dependent children.

This requirement is equitable because it recognizes and fulfills at death the parental obligations to all the children of the decedent, even as courts are becoming increasingly frustrated in attempts to enforce support obligations of parents for both current and prior families.\textsuperscript{330} This also would establish the parental support obligation as an equal priority with the spousal support obligation, a societal position not so inequitable in light of the relative positions of the spouse and the children.\textsuperscript{331}

Moreover, since these are spouses of subsequent marriages, the much greater likelihood is that any children who do fall into the minor dependent category will be shared biologically by the decedent and surviving spouse. Children from a prior marriage are more likely to be older and will need support, if at all, for a shorter period of time and thus would invade less of the corpus of the spousal contribution to the trust.

\textsuperscript{328} See infra notes 353-54 and accompanying text.
\textsuperscript{329} This result is supported in part by the public opinion studies where answers posited a spontaneous support obligation for children on the surviving spouse. See supra notes 249-51 and accompanying text.
\textsuperscript{330} See supra notes 302-13 and accompanying text.
\textsuperscript{331} See supra note 13 and accompanying text.
Finally, by having the children's interest in the property of the first parent vested and recognized at the death of the decedent rather than after the intergenerational transfer when the surviving parent dies, protected inheritance would safeguard the expectations of the first decedent parent that the children would inherit the property. With the multiple marriage and divorce syndrome experienced by an increasing number of American families, the surviving parent who remarries may jeopardize the children's access to the assets of the first spouse because the second spouse is entitled to an elective share of the assets of that surviving parent if the parent predeceases the second spouse. With protected inheritance for children, however, this would not happen because the children's share of the assets would not be part of the estate available to the second spouse.

(2) Exceptions

The testator can, by the terms of the will, prevent the statutory protected inheritance from becoming operative. If the testator has provided for all children in the will such that they would receive the same or greater protection as under the proposal, the requirement would be satisfied. Also, if the testator has provided for all children by means other than estate assets so that the children would receive their equivalent share by these nonestate means, the proposal would be satisfied.

For example, life insurance policies in which the benefits payable to the children equal the protected share of the estate assets would satisfy the requirements. Pension plans in which the payout to the children equals the protected share would satisfy the proposed plan. Joint tenancies with children, joint bank accounts, Totten Trust accounts, and other nonestate assets of which children are the beneficiaries also would satisfy the requirements of the proposal. When the children are the beneficiaries of these non-probate assets, the assets would not be includable in calculating the value of the estate; however, they would satisfy payment of the protected share for children. When extrafamilial devisees are the beneficiaries of these assets, however, they would be includable in the decedent's estate.

The composition of the estate from which a protected share would be given to children should be defined. While several commentators correctly criticize the ability of testators effectively to denude their estates by

332. See supra note 202 and accompanying text.
333. Admittedly this result can be avoided by a prenuptial agreement whereby the second spouse waives the elective share; but this is a sophisticated legal route that most Americans are not likely to take.
revocable *inter vivos* transfers, a balance must be set between the "heads" interests and the "tails" interests. In this regard, it is important not to lose sight of what inheritance is: the right to share in the assets owned by the decedent at death, not to share in every asset ever owned by the decedent during life.

An intentional plan to strip the estate of major assets at death in order to defeat and avoid the purpose of the proposed statute would not be condoned. The right of the owner to make *inter vivos* transfers of assets and deprive himself of the use and benefit of them, however, should be part of the protected right of ownership. Indeed, one might argue that if the testator can part with assets and fulfill obligations of support owed to spouse and family while alive, it would be inappropriate for a potential future owner to be able to restrict the full exercise of ownership by the present owner.

In other words, if the testator irrevocably transferred any asset while alive such that the testator was deprived of dominion and control over and use and enjoyment of it, the asset would be excluded from calculation of the estate subject to the protected share for children. If the testator lived without the asset the children should have no right to claim it. Indeed, to minimize the burden on the courts of the unpleasant familial surprise that testamentary dispositions of this sort may cause, the testator should be encouraged to make nonfamilial *inter vivos* dispositions. The testator, not the courts, thus would bear the brunt of that decision.


335. It would seem inappropriate, for example, for a child to sue a parent who lost money in the stock market in October 1987 because the family assets had been depleted. The case of *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904), is instructive because the court held the trust beneficiary was entitled to whatever monies were in the bank account when the owner of the account died and his interest could be realized, but not to whatever monies had been in the account during its existence, because the owner of the account could do whatever she wanted with the account, including closing it out, while she was alive. *Id.* at 124-26, 71 N.E. at 752.

336. It is not so clear, however, whether to include in the estate those assets over which the owner had divested himself of dominion and control, but had continued to enjoy. *See, e.g.*, Gruen v. Gruen, 68 N.Y.2d 48, 496 N.E.2d 869, 505 N.Y.S.2d 849 (1986).

At least one commentator has concluded, consonant with the federal tax laws, that they should be includable in the estate. Cahn, *supra* note 15, at 152.

337. This assumes that all the precautions emphasizing the seriousness and finality of an irrevocable *inter vivos* transfer are operative to prevent impulsive and regrettable dispositions. If the donor is unalterably disposed to confer property on a nonfamily member, then perhaps the donor, and not the courts, should deal with the familial displeasure.

This proposal does not totally eliminate judicial involvement if displeased members of the family challenge the competency of the donor to make the *inter vivos* transfer to a nonfamily member, but it assumes the number of cases of this nature would be fewer than those of dis-
(3) Disinheritance

Just as freedom of testation should not be an absolute right, the right to inherit also should bow to overriding societal concerns. There are some limited circumstances in which protected inheritance would be inappropriate. "Worthless" is a relative and subjective term. A child that one family would like to disown might be welcomed with open arms into another family. There are, however, societal norms or expectations that are held generally and to which most individuals are capable of conforming.

Though the thesis of this Article is that all children should be protected from disinheritance, there should be recognized objective standards for disinheritance in those cases that truly merit it.338 Louisiana, for example, now has twelve statutory bases for disinheritance.339 Adop-

338. See, e.g., W. McGovern, S. Kurtz & J. Rein, supra note 8, at 88 (suggesting that "[p]erhaps the law should allow a parent to disinherit a child only for certain misconduct” and citing La. Civ. Code Ann. art. 1621 (West 1987), which lists the 12 approved causes of disinheritance in Louisiana).

339. "Disinheritance" in the civil law is "the act of depriving a forced heir of the inheritance which the law gives him." “Disinheritance” is, on the other hand, “the act by which the owner of an estate deprives a person, who would otherwise be his heir, of the right to inherit it.” Black’s Law Dictionary, 421 (5th ed. 1979). The 12 specified reasons for disinheritance in Louisiana are the only reasons legally recognized. La. Civ. Code Ann. art. 1620 (West 1987). They must be specifically set forth in the will, id. art. 1624, and are as follows:

1. If the child has raised his or her hand to strike the parent, or if he or she has actually struck the parent; but a mere threat is not sufficient.
2. If the child has been guilty, towards a parent, of cruelty, of a crime or grievous injury.
3. If the child has attempted to take the life of either parent.
4. If the child has accused a parent of any capital crime, except, however, that of high treason.
5. If the child has refused sustenance to a parent, having means to afford it.
6. If the child has neglected to take care of a parent become insane.
7. If the child refused to ransom them, when detained in captivity.
8. If the child used any act of violence or coercion to hinder a parent from making a will.
9. If the child has refused to become security for a parent, having the means, in order to take him out of prison.
10. If the son or daughter, being a minor, marries without the consent of his or her parents.
11. If the child has been convicted of a felony for which the law provides that the punishment could be life imprisonment or death.
12. If the child has known how to contact the parent, but has failed without just cause to communicate with the parent for a period of two years after attaining the age of majority, except when the child is on active duty in any of the military forces of the United States.

Id. art. 1621.
tion of statutory guidelines by other states would guarantee that the bases for disinheritance conform to societal norms, are known and accepted by the general public, and are objective. Such guidelines would prevent disinheritance from being a personal, subjective, behavior-modification weapon of parents. In those instances where the child could not be disinherited by law but has exhibited behavior that seriously questions the wisdom of giving the child control over the inheritance, there are other avenues open to the objective and genuinely concerned parent.

(4) Applicability: The Small Estate

Popular opinion, as gleaned from several empirical studies, would have small estates given over almost entirely to the surviving spouse by operation of law. This generally assumes the postponement of the children's inheritance rather than their outright disinheri- tance. It also assumes that the surviving spouse is the natural parent of the children. The studies have shown a public preference for separate allocation of assets between surviving spouse and children when the surviving spouse is not the natural parent of the children, and also when there are adult children.

The problem with inheritance, according to the public, is not tension between the "heads" and "tails" sides of inheritance, but rather the satisfaction of competing needs when the resources are insufficient to meet the expectations of both the surviving spouse and the children. When

340. The standards proposed here would be limited to those acts that are so heinous and repugnant to society that other laws are in most instances already on the books to forbid them: murder of a parent-testator; unprovoked physical assault on a parent-testator; knowingly and intentionally making parent-testator a ward of the state when the child had the means to support the parent. This last example makes the parent an unlikely source of assets at death, unless the parent's fortunes turn around. But generally these examples involve legitimate state interests: the prevention of violence or murder and the avoidance of an economic burden on the state.

On the other hand, whom a child marries, or the lack of contact with a parent for two years, does not address the (extremely unlikely) possibility that the child is right and the parent wrong about the marriage, or that the parent did something that deserved no contact for two years. These more subjective criteria should be avoided because they give too much control to the parent without any safeguard or objective determination that the parent is right.

341. The establishment of a protective or spendthrift trust for that child's share of the estate is one example.

342. See, e.g., supra notes 195-96, 201, 206-09 and accompanying text.
343. See supra notes 196-202 and accompanying text.
344. See, e.g., supra notes 230-39 and accompanying text.
345. See, e.g., supra notes 203-04, 208-09 and accompanying text.
346. The five-state 1977 telephone survey suggested that when the tension was between a surviving spouse and adult children, the surviving spouse should win. See supra notes 227-29 and accompanying text. Even there, however, the authors found a smaller percentage distrib-
the estate is small, the majority of the public would prefer to see the entire estate go to the surviving spouse. While there are those who quite appropriately challenge the wisdom of this, perhaps the more relevant question is what is meant by a "small estate."

There are many assets that families acquire that because of the state of the title of ownership, would not be part of the decedent's estate. Families in which the only substantial asset is the family home, for example, would in many instances be exempt from the operation of the protected inheritance requirement. This is because many jurisdictions recognize a special type of ownership between husband and wife, the tenancy by the entirety, which passes sole title to the surviving spouse upon the death of the first spouse by operation of law. The house, or the decedent's interest in it, is not considered part of the estate for distribution. The same result occurs in those jurisdictions in which the family home, or any real estate, is owned by the husband and wife as joint tenants. Upon death of one joint tenant, his or her interest passes immediately to the surviving tenant. Under either of these circumstances, the real property would not be part of the decedent's estate and would pass directly to the surviving spouse.

Many Americans have other assets that are not considered part of the decedent's estate and thus would not be subject to the protective inheritance requirements. Such assets include life insurance policies, Social Security survivor benefits, pension plan beneficiaries, Totten Trust bank accounts, and joint bank accounts. If these types of assets made up the

uting the entire estate to the spouse when there were adult children (51.6%) than when there were only minor children (58.3%).

347. See, e.g., Haskell, supra note 3, at 521 (Professor Haskell's response that the competency of the surviving spouse should be considered, and if he or she is incompetent this would justify "denying to the decedent the power to leave his entire estate to the spouse").

348. In those cases in which the property was held in the name of the decedent only, the house would be part of the decedent's estate. Here, however, where there is a surviving spouse and children, the interest of the children would vest at the decedent's death, and they would become co-owners with the spouse, but they would not be able to force a partition or otherwise interrupt the peaceful enjoyment of the property by the survivor spouse. Continued use and enjoyment of the house by the spouse and minor children would be consistent with the obligation to support the minor children.

A difficulty might arise at the point when the children were not living at home or wanted to continue their education full time but there were not enough funds available without a sale of the home. Then there would be a tension between the need of the surviving spouse to have an affordable place to live and the dependent children in continuing their education full time, a tension that could have been avoided by a survivorship form of concurrent ownership between husband and wife.

If the survivor spouse sells the home, the interest of the children would be transformed into an equivalent interest in either the new property acquired or the money realized from the sale.
bulk or all of the family assets in a given estate, though substantial assets to the surviving spouse or children if they were the named beneficiaries, they would not be part of the decedent's estate and thus not subject to protected inheritance.

If the beneficiaries were other than spouse and children and the estate had few if any assets, these assets would be includable in the decedent's estate. While the testator is free to make truly irrevocable *inter vivos* transfers, he cannot denude the estate by employing these nonprobate mechanisms.

In modern terms of wealth, the types of estates that would be subject to protected inheritance are probably those estates that would not be considered small estates. This proposal is thus consistent with the sentiment expressed in the empirical studies.

The fact that every estate in America would not be affected by this proposal is no reason not to implement it for those estates that would be affected—those estates in which the testator is not living up to his or her family obligations. It is not possible to document precisely how many estates would be affected because the present lack of an available remedy provides no forum for these cases and therefore no reliable means to measure the extent of the problem.

B. The Family Response and Protected Inheritance

When parents die, the dependent status of their minor children does not also die. While the parent no longer is there to provide for the child as he was expected to be while alive, the needs of the child remain. When the parent has the means to continue the support of the child, the state should protect the child by requiring some of the assets to be set aside for the child. For if the state does not enforce this protection, the state itself may have to support the child. This is a practical, economic consequence of resolving the tension between the parent-child bond and testamentary freedom in favor of the latter. Other reasons support legislative enactment of protected inheritance.

(1) *Consanguinity*

Consanguinity is one basis for protected inheritance as proposed herein. One commentator earlier acknowledged the pivotal role consanguinity plays in the rationale for such a proposal:

349. *See, e.g., supra* notes 211-20 and accompanying text.
351. Kinship; blood relationship; the connection or relation of persons descended from the same stock or common ancestor. *BLACK'S LAW DICTIONARY* 275 (5th ed. 1979).
To begin with, I do not believe that need should necessarily be the exclusive criterion for the determination of the claims of spouse or children. I believe that consanguinity may be justification in and of itself for claim to some portion of the property of the decedent. I would not attempt to offer a reasoned justification for this position, since it involves considerations which I do not believe have their roots in reason. I believe, however, that it is a view widely held, albeit inadequately articulated.352

In a more cosmic context, consanguinity has been identified as a fundamental familial function: “a strong sense of loyalty to ancestors, living blood relatives and future descendants, and a preoccupation with the continuation of the bloodline.”353 This function is just as vital today as it was centuries ago. While a return to past fixations on bloodlines and duty is not being suggested, “a lineage mentality for today, when we are faced with many threats to the survival of the species and, indeed, to life on the planet, could embrace not only our own children, and their children’s children, but also the children and descendants of other inhabitants of the earth.”354

Procreation, at once one of the most selfish and selfless phenomena,355 creates bonds that often transcend the grave. Honoring the dead is a central part of several ancient cultures and the responsibility falls to one related by blood to the deceased.356 In modern societies, children often donate considerable sums of money to educational, cultural, and healing institutions for buildings named to honor their parents. The passionate surge of emotions and primitive protective instincts kindled in the hearts and minds of rational, socialized adults when there is a perception of danger or threat to their children of any age is witness to the power of

Consanguinity is also an integral factor in forced heirship, but perhaps more to identify who should receive the assets than to explain why these individuals should receive them.

352. Haskell, supra note 3, at 525.
353. M. Glendon, supra note 8, at 239.
354. Id. at 239-40. Samuel, Shaw & Spaht agree, stating:
   At a time when man is faced with threats to the survival of the species and to life on this planet, it is once again time to assume responsibility for future generations. . . .
   To acquire this mentality, individuals need to be supported and nourished “first, in small family, work and political societies.” Hence, the importance of encouraging family bonding is demonstrated.
   Samuel, Shaw & Spaht, supra note 22, at 593 (footnotes omitted). Dean Hafen notes: “By its nature, the familialistic entity has a greater capacity to encourage the kind of human caring and sense of mutual responsibility for which the contemporary world cries out—even though such sensitivities cannot always be legally required or enforced.” Hafen, supra note 1, at 914.
355. Selfish in that reproduction is the ultimate satisfaction of the ego’s search for immortality; selfless in that, for decades to come after the birth of a child, most parents sacrifice personal benefits for the benefit of the child.
356. See, e.g., H. Maine, supra note 1, at 182-90 (“Hindoo” and Roman cultures); F. Pollock & F. Maitland, supra note 25, at 257-58.
the call of blood. Likewise the euphoric emotional swells experienced by a parent at the milestones of life and accomplishments of their offspring are caused in part by the common blood between them, resulting in shared honor.

Lest one get carried away with the visceral images conjured up by the call of the blood, this biological, emotional, and unbreakable bond has been socialized and adapted from ancient times to encompass unrelated individuals who have been chosen consciously by the natural family members to join as members of their family. Adoption statutes give state and social recognition to this ability of families to create legal ties of blood line strength and endurance with non-blood-related individuals. References to blood line and consanguinity thus also include these legally created family relationships. Finally, natural children who can establish their blood connection to the decedent, whether acknowledged in life by the decedent or not, would receive the benefits of protected inheritance.

Consanguinity does not have intense significance merely at times of danger, honor, and accomplishment. The sanctity of the parent-child bond is encouraged and reinforced by the state or society as a whole because, until the age of majority, parents are expected and required to provide for all the needs, education, and nurturing of each child they conceive or adopt. Living parents, in other words, are responsible for their minor children because minor children cannot survive in the world on their own.

(2) Responsibility

The parental role in societal perpetuation requires more than mere physical survival of the children. With no education, training, morality, ethics, culture, and socialization, the survivors would be humans, but incapable of continuing the advancement of society. Historically, it has been parents who were charged with the responsibility to provide for the child's needs; even today it is at best a shared responsibility with the state.

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357. In an article on dreams, the author reported: "The distinguishing trait of all nightmares is that the dreamer is endangered. Parents are the exception: they dream their babies are in trouble." Begley, *The Stuff That Dreams Are Made Of*, NEWSWEEK, Aug. 14, 1989, at 41, 43.

358. See, e.g., Smith v. Organization of Foster Families, 481 U.S. 816, 841 n.51 (1977) ("[a]doption, for example, is recognized as the legal equivalent of biological parenthood" (referring to N.Y. DOM. REL. LAW § 110 (McKinney 1977))).

359. See supra notes 298-300.

360. "Parents committed to a familistic tradition," according to Dean Hafen, "accept the normative obligation to 'nourish and educate' children," which cannot be done effectively with "state intervention in ongoing family relationships." Hafen, supra note 1, at 911. Professor
Bearing children who truly did not ask to be born is a commitment to give them the best that one can, even at personal sacrifice. Indeed, if it were not for all the positive, rewarding, and wonderful aspects of parenting, parenthood could be described as permanent reparation for the indulgence of self-perpetuation.

The purpose of protected inheritance is recognition and reaffirmation of familial choices made and serious obligations undertaken by the decision to have children. By requiring some part of the assets of the parent to be passed on to the child, society recognizes and honors that relationship, even if those parents who would disinherit children do not. This would more realistically protect minor and dependent children, children in multi-marriage relationships, and child victims of bitter divorces against irresponsible testators. Family interests thus are protected, and testators still will have their testamentary freedom.

Protected inheritance would bring home the solemnity of the decision to have children by defining the scope of the parental obligation to the beings created as extending beyond the grave when the parent has left behind the means to fulfill that obligation. Protected inheritance requires no more of the parent at death than what the parent has undertaken to do for the child in life.

(3) On Behalf of Adult Emancipated Children

While there are compelling reasons for protected inheritance for minor children, many feel that there is no legitimate reason to protect adult children. This Article suggests that there are reasons to include adult, independent children under the proposed protections.

Most people are opposed to guaranteeing an inheritance to an adult if the adult has independently made a fortune or is deemed to be worthless. One can assume that the adult child who has made an independent fortune has indeed done those very things that the parent instilled in the

Teitelbaum, on the other hand, sees the interaction of parent and state as more cooperative. Teitelbaum, supra note 29, at 813-18. See also supra note 302.

361. "Moreover, contemporary pluralism does not require that, in the name of protecting our cultural heterogeneity, we reject the idea that the obligations of marital partners and parents carry serious moral overtones." Hafen, supra note 1, at 906.

362. See supra note 15 and accompanying text.

363. However, as the empirical studies show, this is not a universal sentiment: in the 1958 Nebraska study, 63.4% felt parents should not be allowed to disinherit adult children. See supra note 192 and accompanying text. In the 1976 Illinois study, fewer interviewees would leave the entire estate to the surviving spouse when there were adult children (41.2%) than when there were minor children (53.3%). See supra note 242 and accompanying text. The same was true in the 1977, five-state telephone survey. See supra notes 208-09 and accompanying text.
child during minority and is a credit to the parent. It then would be illogical to reward the achievements of the adult child by denying an inheritance that would be guaranteed to those children who did not achieve as much. This would be negative reinforcement of the qualities and goals instilled in the child since birth.

While it could be argued that adult children have less of a need due to resources and assets earned on their own, need is not the only consideration here; consanguinity is also relevant. Furthermore, there is always the consideration that the child may have less ability to earn because of decisions made by the parent while the parent was legally responsible for the welfare and education of the child. For example, if the parent forced the child into a mold totally unsuited to the child but fitting the parent’s image of who the child should be, the parent may be responsible for the child’s current, less than optimal status. If because of a refusal to invest in the child’s training and education or physical, mental, or emotional well-being, the child is less capable of earning than she would be otherwise, the parent may be responsible for the child’s status. These were decisions over which the child had no influence.

a. The Professor Henry Higgins Complex

Another reason that people may be reluctant to protect adult children is that many people, consciously or subconsciously, want to use the ability to disinherit a child to force the child to do what they want, when they want, and the way they want. Actually, unmarried aunts and uncles without children of their own may abuse this as much as, if not more than, parents; but the ability to disinherit is unquestionably a way for the testator to coerce someone who expects to be left something to do what the testator wants. The relevant question here, however, is whether it should be.

The ego and love of self that motivate some individuals to reproduce may be a useful artifice of Nature to encourage procreation, but neither is a valid or sufficient reason to have children nor a viable standard by which to raise them. If the nurturing or nesting instinct is the dominant procreative urge, the adjustment to the true parental role may be less startling, but will be required nevertheless. Whatever the reasons for having children, parents must accept that children are independent human beings with their own goals, aspirations, standards, preferences, talents, predilections, weaknesses, characters, and personalities.

364. See, e.g., Laufer, supra note 3, at 310.
Parents should not force children to be what they want them to be, or do what they want them to do. The fact that children are independent human beings and not merely extensions of their parents, however, does not diminish either parental responsibility for the child or the familial experiences that forge and nurture the parent-child bond. Society should not condone parental abandonment by permitting subjective disinheritance.\textsuperscript{365}

b. Child Contributions

If we look at the level of control that a parent rightfully exercises over a child with state approval and expectation, one could argue that a child has “earned” the right to inherit by having to do what the parent wanted during minority, and even beyond. Because the child did not ask to be born, and the parents consciously chose to have the child, the parents are responsible for making decisions for the child that the child cannot make herself. This parental role continues even when the child is able to know what she wants but cannot make the separate judgment of what is best for herself and others in the family. In many instances, daily decisions affecting all children, such as schools attended, extracurricular activities pursued, sports learned, music lessons taken, camps attended, clothes purchased and worn, friends cultivated, books read, television programs viewed, social events missed as well as attended, courses of medical and emotional treatment pursued or foregone, and lineal and lateral family members cultivated or ignored, are all determined by the parents.\textsuperscript{366}

Family decisions such as moving to a new neighborhood, city, or state usually are based on parental objectives such as a better job opportunity or a perceived improved style of living. Nevertheless, these decisions take an even greater toll on the child’s existing friendships, neighborhood, and school relationships. The decision whether to have more children has a clear effect on existing children, and their preference is rarely determinative, nor should it be.

\textsuperscript{365} This is not to say that parents are completely responsible for how their children turn out. Of course, it is possible that the decedent was the most sensitive, loving, caring, giving, selfless parent in the world and still the children developed into miserable human beings. Nevertheless, the child is part of the decedent’s family. Indeed the rotter of a child may not be to blame either. It is possible that biological or chemical imbalances in the child are creating the problem.

\textsuperscript{366} To varying degrees the child may be permitted some input into these decisions, and others may have external forces being the final determinant; but in the main, the parent is expected to exercise final authority in these decisions.
The parent is not "wrong" in exercising the decisive role in these choices; that is the role of the parent. In many instances, the child is not capable of making the choice, nor would it be appropriate for the child to do so. What these examples show is that the child's role does permit the child to "earn" her way in the family by doing those things she would prefer not to do, or not doing those things she would prefer to do.

These non-choices, which may result in unhappiness and disappointments for the child, are the contributions that the child makes to the family assets. While the child has no choice in making the contribution, "going along" benefits the family unit and permits each member to play out their role, thus earning the child the right to partake in the family assets.

Conclusion

Parents have an obligation to their children that continues even after death. This obligation arises from the parent-child bond that the parents initiated and created and continues whether support is actually needed, as in the case of minor children or emancipated but financially dependent children, or not needed; and from the commemoration of the commitment the parents made to the unborn child when they decided to have a child.

This thesis is not born out of a resurgent, romantic view of the family or a paean to traditionalist familial definitions, limitations, or values. The continued narrow definition of family is neither realistic, desirable, or necessary for the obligation of protected inheritance to endure after death. Rather, this Article's proposal is a call to responsibility and accountability for actions taken by individuals, whether within a familial context or not, that have directly affected the children. If one has children and also the financial means to support them, parental obligations should be recognized and enforced, even at death.

This is not a revolutionary proposal; in some ways it is older than civilization. It is not a reactionary proposal; some variant of this proposal, in the form of forced heirship, is practiced in many modern societies throughout the world. The modern phenomena of multiple marriages and divorces, statutory protections for some family members but not others, and limited resources of parents of multiple families tip the balance in favor of protected inheritance for children at the expense of the romantic theory of testamentary freedom, which is already besieged by

prior public policy restrictions. It is time for the state legislatures to champion the "tails" side of the two-sided coin of inheritance.