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Caregiving and the Case for Testamentary Freedom

Joshua C. Tate*

Almost all U.S. states allow individuals to disinherit their descendants for any reason or no reason, but most of the world's legal systems currently do not. This Article contends that broad freedom of testation under state law is defensible because it allows elderly people to reward family members who are caregivers. The Article explores the common-law origins of freedom of testation, which developed in the shadow of the medieval rule of primogeniture, a doctrine of no contemporary relevance. The growing problem of eldercare, however, offers a justification for the twenty-first century. Increases in life expectancy have led to a sharp rise in the number of older individuals who require long-term care, and some children and grandchildren are bearing more of the caregiving burden

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than others. Recent econometric studies, not yet taken into account in legal scholarship, suggest a tendency among the American elderly to bequeath more property to caregiving children. A competent testator, rather than a court or legislature, is in the best position to decide how much care each person has provided and to reward caregivers accordingly. Law reform, therefore, should focus on strengthening testamentary freedom while ensuring that caregivers are adequately compensated in cases of intestacy.

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INTRODUCTION

By all accounts, Leona Helmsley had a special relationship with her dog, "Trouble."¹ Those who knew the billionaire real estate magnate and luxury hotelier were not surprised, therefore, by news reports shortly after her death naming Helmsley's beloved canine companion as the beneficiary of a \$12 million trust.² When Helmsley's will became public, however, the document revealed a disapproval of two of Helmsley's four grandchildren just as strong as her passion for Trouble. Two of the grandchildren, all of whom were children of Helmsley's predeceased son, Jay Panziner, received \$5 million each plus additional distributions on the condition that they visit their father's grave "at least once each calendar year." Nevertheless, Helmsley continued, "I have not made any provisions in this Will for my grandson Craig Panziner or my granddaughter Meegan Panziner for reasons which are known to them."³ This statement fueled immediate speculation as to why Helmsley cut Craig and Meegan out of the will,⁴ but the truth was probably buried with Helmsley.

Helmsley died in Connecticut, which, like every American state save Louisiana, has long allowed testators to disinherit their children and grandchildren for any reason or no reason.⁵ In cases involving

¹ According to Helmsley's former bodyguard, Trouble was her first priority, followed by herself, then the Park Lane Hotel. Lindsay Fortado & Patricia Hurtado, *Leona Helmsley Leaves \$12 Million to Her Dog, Trouble*, BLOOMBERG, Aug. 29, 2007, <http://www.bloomberg.com/apps/news?pid=20601115&sid=aA1ThuAnS7z4&refer=muse>.

² See, e.g., *Helmsley's Will: Dog — \$12 Million, 2 Grandkids — \$0*, CNBC.com, Aug. 29, 2007, <http://www.cnbc.com/id/20491003> (AP Report). Helmsley's former real estate rival Donald Trump was quoted as saying, "The dog is the only thing that loved her and deserves every single penny of it." Fortado & Hurtado, *supra* note 1. Trouble's newfound wealth has had a downside, however. See *Helmsley's Dog Getting Death Threats: \$12 Million Legacy Apparently Sparks Problems for "Trouble," Leona's Pampered Pooch*, CBS, Nov. 26, 2007, <http://www.cbsnews.com/stories/2007/11/26/earlyshow/leisure/celebspot/main3539580.shtml>.

³ See Last Will and Testament of Leona M. Helmsley at 3, N.Y. DAILY NEWS, http://multimedia.nydailynews.com/pdf/2007/08/28/leona_helmsley_will (last visited Sept. 9, 2008); see also Alan Feuer, *Helmsley, Through Will, Is Still Calling the Shots*, N.Y. TIMES, Aug. 30, 2007, at B2, available at <http://www.nytimes.com/2007/08/30/nyregion/30leona/html?ref=nyregion>.

⁴ An anonymous Wikipedia editor suggested that Craig and Meegan's failure to name any of their own children after their father precipitated the disinheritance. See Wills, Trusts & Estates Prof. Blog, *Craig and Meegan's Million Dollar Mistake?* (Aug. 30, 2007), http://lawprofessors.typepad.com/trusts_estates_prof/2007/08/craig-and-meega.html.

⁵ Even in Louisiana, protection of children from intentional disinheritance has recently been significantly curtailed. See *infra* text accompanying note 38.

donative transfers, courts in the United States follow the donor's intention unless prohibited by law. U.S. law does not protect descendants from intentional disinheritance.⁶ Had Helmsley been domiciled outside the United States, however, foreign law might have limited her ability to disinherit her grandchildren. Most countries in Continental Europe guarantee a testator's descendants a fixed share of the estate with limited exceptions. At the same time, several countries in the British Commonwealth give wide discretion to judges to amend a testator's estate plan in order to provide for certain members of the testator's family. Moreover, had Helmsley died intestate, every U.S. jurisdiction would have allowed her grandchildren to take by representation of their deceased father.⁷ Nevertheless, if Helmsley's will was validly executed,⁸ under the laws of Connecticut — or New York, where much of Helmsley's property was located — the so-called "Queen of Mean" was free to leave her grandchildren nothing.⁹

In recent years, many scholars have compared the U.S. regime allowing freedom of testation to the various alternatives.¹⁰ Some of

⁶ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 cmt. i (2005); *id.* § 10.1 cmt. c (2003).

⁷ "Representation" refers to the various schemes by which property is divided when there are descendants beyond the first generation. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 (1999).

⁸ As this Article was being edited for publication, the *New York Post* reported a settlement between Helmsley's heirs and beneficiaries, in which the disinherited grandchildren were given a share (and Trouble's share drastically reduced) to avoid a will contest by the disinherited grandchildren, who alleged that their grandmother lacked the mental capacity to execute a will. See Dareh Gregorian, *Screw the Pooch: Leona's Pup Loses \$10M of Trust Fund*, N.Y. POST, June 16, 2008, http://www.nypost.com/seven/06162008/news/regionalnews/screw_the_pooch_115715.htm. On the role of will contests as a de facto check on testamentary freedom in the United States, see *infra* Part II. As it turns out, however, the charitable trust funded by Helmsley's will may benefit many dogs other than Trouble. See Stephanie Strom, *Helmsley Left Dogs Billions in Her Will*, N.Y. TIMES, July 2, 2008, at A1, available at <http://www.nytimes.com/2008/07/02/us/02gift.html>.

⁹ The law of the decedent's domicile at death governs the disposition of personal property, while situs law governs the disposition of real property. See 1 JEFFREY A. SCHOENBLUM, *MULTISTATE AND MULTINATIONAL ESTATE PLANNING* § 14.05[A], at 14-21 (2008 ed.).

¹⁰ For examples of recent comparative scholarship, see RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 90-120 (2004); RONALD CHESTER, *FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND* 81-92 (2007); Deborah A. Batts, *I Didn't Ask to be Born: The American Law of Disinheritance and a Proposal for a Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197 (1990); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1994); Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1 (1996) [hereinafter Brashier, *Protecting the Child*]; Ronald Chester,

these scholars have criticized the U.S. approach, suggesting that the United States would be better off adopting some variant of a forced heirship regime or Commonwealth-style family maintenance system. A few commentators would seek to protect from disinheritance not only minor or disabled descendants, but also adult, nondisabled descendants, as is the case in many European and Commonwealth countries. Proponents of other inheritance regimes have thoroughly explained their merits.¹¹ Their arguments sometimes assume, however, that there is no contemporary justification for allowing unlimited freedom of testation.¹² Recent commentary on the U.S. rule suggests that it emerged for reasons that are no longer relevant or that fail to address modern societal problems. This Article questions that premise.

Specifically, this Article highlights a pragmatic justification for broadly empowering testators to disinherit adult, non-disabled descendants, and explains how the American law of inheritance could

Disinheritance and the American Child: An Alternative from British Columbia, 1998 UTAH L. REV. 1 [hereinafter Chester, *American Child*]; Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405 (1997) [hereinafter Chester, *Children*]; Frances H. Foster, *Linking Support and Inheritance: A New Model From China*, 1999 WIS. L. REV. 1199, 1217 [hereinafter Foster, *Linking Support*]; Frances H. Foster, *Towards a Behavior-Based Model of Inheritance? The Chinese Experiment*, 32 UC DAVIS L. REV. 77 (1998) [hereinafter Foster, *Behavior-Based Model*]; Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986); Jennifer R. Boone Hargis, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions from Common Law Tradition*, 2 WASH. U. GLOBAL STUD. L. REV. 447 (2003); Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1, 9-16 (2006); Thomas Oldham, *What Does the U.S. System Regarding Inheritance Rights of Children Reveal About American Families?*, 33 FAM. L.Q. 265 (1999); Katherine Shaw Spaht, *Forced Heirship Changes: The Regrettable "Revolution" Completed*, 57 LA. L. REV. 55 (1996); Tamara York, *Protecting Minor Children from Parental Disinheritance: A Proposal for Awarding a Compulsory Share of the Parental Estate*, 1997 DET. C.L. REV. 861; and Brian C. Brennan, Note, *Disinheritance of Dependent Children: Why Isn't America Fulfilling Its Moral Obligation?*, 14 QUINNIPIAC PROB. L.J. 125 (1999).

¹¹ Among American scholars, Deborah Batts has made the principal case for forced heirship, while Ronald Chester has, until recently, led the charge for family maintenance. See, e.g., Batts, *supra* note 10, at 1201 (proposing "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"); Chester, *Children*, *supra* note 10, at 408 (arguing that "the United States should adopt the English and Commonwealth system of family maintenance, particularly as practiced in the Canadian Province of British Columbia").

¹² See, e.g., Batts, *supra* note 10, at 1243 (suggesting that "historic reasons for favoring testamentary freedom over the interests of children . . . are no longer persuasive").

be revised in light of that justification.¹³ The thesis of the Article is that, although the U.S. rule may have emerged for historical reasons that no longer have much force, recent demographic changes have strengthened the case for the rule and have widened its field of application. Once a punishment inflicted primarily on wayward progeny, disinheritance of adult, non-disabled descendants has become an unfortunate but necessary consequence of the need to reward those who care for their aging parents or grandparents. The new paradigm of the disinheriting testator may not be Helmsley, who could rely on her immense wealth for support, but rather the loving parent who wants to leave her few possessions to the child who took on the heavy responsibility of eldercare. Facilitating the goals of the latter parent, however, may mean continuing to allow the Leona Helmsleys of the world to disinherit their descendants for any reason.

The phenomenon of eldercare is not a new one. Descendants have long felt compelled to take care of elders who need assistance. What has changed is the number of elders requiring such care.¹⁴ As the so-called “baby boom” generation — those born in the few decades following the Second World War — ages, the number of elderly individuals in developed countries is expected to rise rapidly.¹⁵ The number of Americans age eighty-five and older, which was just under 1.0 million in 1960 and approximately 4.2 million in 2000, is expected to rise to between 14.3 and 53.9 million by 2040.¹⁶ Moreover, the percentage of the overall U.S. population aged sixty-five and older is expected to increase from thirteen percent in 2000 to twenty percent by 2030.¹⁷ Someone will need to provide care for these elderly Americans, and the most likely candidates are their children and grandchildren.

In a study conducted in 2004, the National Alliance for Caregiving and AARP estimated that approximately twenty-one percent of the adult population in the United States provides unpaid formal or informal care to an adult age eighteen or over.¹⁸ Eighty-three percent

¹³ The Article does not take a position on what protection should be offered to minor or disabled children, a worthy topic in its own right.

¹⁴ See Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 *BERKELEY J. EMP. & LAB. L.* 351, 355-59 (2004).

¹⁵ KEVIN KINSELLA & VICTORIA A. VELKOFF, U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, *AN AGING WORLD: 2001*, at 1 (2001), available at <http://www.census.gov/prod/2001pubs/p95-01-1.pdf>.

¹⁶ *Id.* at 31 fig.3-8.

¹⁷ *Id.* at 10.

¹⁸ NAT'L ALLIANCE FOR CAREGIVING AND AARP, *CAREGIVING IN THE U.S.* 6 (2004) [hereinafter *CAREGIVING*], available at <http://www.caregiving.org/data/04>

of these caregivers provide care for a relative, and, where the recipient of care is over fifty years old, the recipient is most commonly the caregiver's mother, father, or grandmother.¹⁹ Women bear a greater share of the caregiving burden.²⁰ More than a third of those providing care do so on their own, without any assistance from siblings or other relatives.²¹ The value of unpaid care provided for adults in the United States is about \$257 billion per year.²² Eldercare imposes an emotional and financial strain on the family members who provide it, and these caregivers deserve to be rewarded accordingly. Doing so, however, may mean allowing care recipients to leave less, or even nothing, to those who have not assumed their share of the eldercare responsibility. Empirical research, discussed in this Article, suggests that some care recipients are currently using testamentary freedom for exactly this purpose.²³ A care recipient, rather than a judge or jury, has the best information regarding the provision of care and should be allowed to act upon it when competent.²⁴

The eldercare problem is not the only possible justification for the U.S. preference for freedom of testation. American individualism,

finalreport.pdf.

¹⁹ *Id.* at 34-35.

²⁰ The AARP study found that 61 percent of caregivers are women. *Id.* at 8. Other studies have found that women provide between 70 and 75 percent of eldercare services. See Smith, *supra* note 14, at 360 n.55; see also Susan C. Eaton, *Eldercare in the United States: Inadequate, Inequitable, but Not a Lost Cause*, FEMINIST ECON., July 2005, at 37-38 (noting that "[m]uch of the responsibility for long-term care continues to fall on families, and it is largely women — many of them over the age of 55 — who provide such care").

²¹ CAREGIVING, *supra* note 18, at 10.

²² *Id.* at 3 (citing Peter S. Arno, Albert Einstein Coll. Of Med., *Economic Value of Informal Caregiving: 2000*, Presentation at the Annual Meeting of the American Association for Geriatric Psychiatry, (Feb. 24, 2002), available at <http://www.thefamilycaregiver.org/pdfs/pa2000.ppt>).

²³ This is not to say that testamentary freedom is the solution to the problem of eldercare. There is much more that employers and the government could do to help caregivers and care recipients. See, e.g., Richard L. Kaplan, *Retirement Planning's Greatest Gap: Funding Long-Term Care*, 11 LEWIS & CLARK L. REV. 407, 448-50 (2007) (proposing changes to Medicare and standardization of long-term care insurance contracts); Matthew Pakula, *A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly*, 39 FAM. L.Q. 859, 870-77 (2005) (suggesting that federal government enact filial responsibility statute); Smith, *supra* note 14, at 393-98 (proposing amendments to Family and Medical Leave Act).

²⁴ The inefficiency of third-party interference with norm-based relationships has been pointed out in other contexts. See, e.g., Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1932-40 (1996) (defending lack of court supervision of at-will employment contracts).

problems with the U.S. probate system, the shift to human capital as the dominant form of inheritance, and many other factors may also provide some support for a power to disinherit, along with the basic argument that inheritance is a windfall for children of the rich.²⁵ Moreover, wayward children will continue to disappoint their parents, and there remain many reasons other than caregiving for why a parent might wish to disinherit a particular descendant.²⁶ We must consider all aspects of the problem in evaluating the claim that U.S. law's commitment to testamentary freedom has allowed parents to abandon obligations toward their children.²⁷ This Article seeks only to call attention to the growing and accelerating problem of eldercare and its impact on testamentary freedom.²⁸

This Article is divided into five parts. Part I compares the U.S. rule to the existing foreign alternatives, principally the forced-heirship regime of Continental Europe and the Commonwealth family maintenance scheme. It then evaluates some of the arguments critics have made against the U.S. regime. Part II examines the likely origins of the U.S. rule in the English common law of inheritance, explaining how testamentary freedom in the common law originally emerged in the shadow of primogeniture. Part III discusses possible contemporary justifications for the U.S. rule, other than the problem of eldercare. Part IV then turns to the eldercare phenomenon and what bearing it has on the arguments for and against disinheritance. Recent econometric studies, not yet taken into account by legal scholars, suggest that parents who divide their estates unequally tend

²⁵ See *infra* Part IV.

²⁶ See, e.g., *Ramsey v. Taylor*, 999 P.2d 1178, 1187 (Or. 2000) (refusing to set aside estate plan of testator who favored his paramour on ground that his son and grandsons had, for several years, "been more concerned with my wealth than my well being"). A parent might also wish to leave more to a child or grandchild who is disabled or who has greater financial need.

²⁷ For this claim, see, for example, *Batts*, *supra* note 10, at 1197. The response that follows does not require the reader to agree with Judge Batts that parents have an obligation to support adult, non-disabled children, a claim with implications outside the estate planning context. Moreover, the application of the parental obligation argument to grandchildren and more remote lineal descendants is far from clear. Nonetheless, this Article takes as a starting point that there may be some valid case for protecting adult, non-disabled descendants from disinheritance, as the legal systems of most Western countries currently do. See *infra* text accompanying notes 34-47.

²⁸ This Article will not consider the possible constitutional arguments against new limitations on freedom of testation, which are not insignificant in light of the Supreme Court's decision in *Hodel v. Irving*, 481 U.S. 704 (1987). On these issues, see Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 130-32 (2006).

to reward caregivers with a greater share. In light of this finding, Part V suggests possible improvements to the current regime, including how courts and legislatures might reform contract law to treat caregivers more fairly when the care recipient dies intestate.

I. THE U.S. RULE IN COMPARATIVE PERSPECTIVE

Many Americans may be unaware of the extent to which the U.S. position on disinheritance differs from the positions taken by other developed legal systems around the world. Legal scholars, however, have not ignored the difference, and some have argued that the U.S. approach lacks a sound policy basis. This Part will offer some context for the U.S. rule, comparing it to the most common alternatives and discussing the various critiques that have been offered against it.

A. *Children and Inheritance: Three Legal Traditions*

In the United States, the basic rule is that a parent can disinherit a child or grandchild for any reason or no reason. However, this general rule is subject to some limitations. For instance, when a child is born or adopted after the making of the will, and the testator fails to provide for that child, the child may have a claim as a “pretermitted” — overlooked — child.²⁹ In some jurisdictions, a child born before the will’s execution may also have a claim if the testator failed to mention the child in the will.³⁰ In every American state except Louisiana, however, a child or other descendant alive at the time of the will’s execution and expressly disinherited in the will has no claim to receive a share of the estate.³¹ This is true regardless of the age of the disinherited individual, although in the case of a child of

²⁹ See, e.g., UNIF. PROBATE CODE § 2-302 (1990) (awarding omitted child intestate share under certain conditions). As of this writing, the Uniform Probate Code drafting committee is considering amendments to the provisions relating to inheritance rights of children, especially those children who are adopted or conceived by assisted reproduction. See E. Gary Spitko, *Open Adoption, Inheritance, and the “Uncleing” Principle*, 48 SANTA CLARA L. REV. 765, 782-86 (2008).

³⁰ See, e.g., *In re Estate of Hastings*, 567 P.2d 200, 203 (Wash. 1977) (allowing preexisting child to qualify as pretermitted); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 cmt. d (2003) (noting variation among jurisdictions); 80 AM. JUR. 2D WILLS § 1539 (1975) (explaining that protection of preexisting children is minority rule); JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 270 (7th ed. 2005) (comparing modern statutes to traditional common-law approach).

³¹ See, e.g., Batts, *supra* note 10, at 1198. In addition to Louisiana, Puerto Rico has a forced heirship statute. Chester, *Children*, *supra* note 10, at 441-43.

divorced parents, some states provide that child support obligations survive the death of the parent obligated to furnish such support.³² With this limited qualification, a parent has no obligation to provide support even for a minor child after death.³³

The approach of the United States contrasts sharply with those of civil law and Commonwealth jurisdictions around the world. In most civil law jurisdictions, descendants are generally entitled to a reserved share of the estate unless interested parties show some specific grounds for disinheritance.³⁴ In Austria, for example, a child is entitled to one-half of the amount she would have inherited under the intestacy rules unless the child was (1) convicted of a crime and sentenced to twenty years or more as punishment; (2) committed an offense against the testator that involved intent and was punishable by more than a year's imprisonment; or (3) grossly neglected duties of care and support to the testator when the testator was in a position of need.³⁵ Similar provisions are found in most Continental legal systems, although the grounds for disinheritance vary.³⁶ In these

³² York, *supra* note 10, at 882-85. This is the minority view. See *id.* at 882 & n.146 (listing jurisdictions in which death of obligor extinguishes obligation to pay future child support in absence of contrary separation agreement or decree).

³³ On the other hand, in almost all common-law states, a surviving spouse has a right to some fixed share of the estate, regardless of how much is left to that spouse in the will. This is generally referred to as the surviving spouse's elective share. See, e.g., UNIF. PROBATE CODE § 2-202 (1990) (defining elective share amount).

³⁴ See John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 304 (1987). The share to which a child is entitled by forced heirship may be distinct from his or her intestate share. See SCHOENBLUM, *supra* note 9, § 12.02[A], at 12-4 (discussing French system).

³⁵ DAVID HAYTON, *EUROPEAN SUCCESSION LAWS* ¶¶ 2.47-51, at 323-33 (2d ed. 2002).

³⁶ In Greece, for example, there are five grounds for disinheritance of descendants: (1) attempting to take the life of the testator, the testator's spouse, or other descendants; (2) willfully causing bodily harm to the testator or the testator's spouse; (3) intentionally committing grave felonies or grave misdemeanors against the testator or the testator's spouse; (4) maliciously violating their legal obligation to sustain the testator; or (5) leading an immoral or amoral life against the wishes of the testator. The last of these grounds does not apply when the will was written long before the testator's death and the descendant has reformed himself or herself in the meantime. *Id.* ¶ 10.71, at 290-91. Committing a serious crime or tort against the testator or the testator's close family is grounds for disinheritance in Portugal. *Id.* ¶ 16.71, at 421. In Switzerland, the grounds are committing a serious offence against the testator or the testator's family or seriously failing in the duties incumbent on the heir with regard to the testator or the testator's family. *Id.* ¶ 19.75, at 492. The existence of these grounds for disinheritance has led to a rich tradition of "unworthy heir" litigation in civil-law jurisdictions. See Paula Monopoli, "Deadbeat Dads": *Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 259 n.8 (1994) (citing conversation

jurisdictions, therefore, the baseline rule is precisely the opposite of the U.S. rule — a presumption in favor of inheritance notwithstanding the testamentary disposition.³⁷

Because of its civil law tradition, Louisiana has a system of forced heirship similar to that in place in Continental Europe. However, the state legislature amended the system in 1995 to apply only to children who are under the age of twenty-four, permanently disabled, or likely to become permanently disabled in the future due to an “inherited, incurable disease or condition.”³⁸ Although the testator has the freedom to bequeath a substantial part of the estate to persons of the testator’s choosing, the statute reserves a certain portion, called the *legitime*, for qualified children and other lineal descendants entitled to take by representation.³⁹ Grounds for disinheritance in Louisiana include (1) injuring, cruelly treating, or attempting to kill a parent; (2) unjustly accusing the parent of a serious crime (one punishable by life imprisonment or death); (3) committing a serious crime; (4) interfering with the parent’s attempt to make a will; (5) marrying while a minor without the parent’s permission; and (6) failing to communicate with the parent for two years without just cause after attaining the age of majority and knowing how to contact the parent.⁴⁰ Unless one of these limited grounds for disinheritance is shown, a

with John Langbein).

³⁷ This presumption has a long pedigree. See Raymond Westbrook, *The Character of Ancient Near Eastern Law, Introduction in 1 A HISTORY OF ANCIENT NEAR EASTERN LAW 1*, 56-60 (Raymond Westbrook ed., 2003) (explaining that principle of forced heirship applied throughout ancient Near East, although Egypt of the New Kingdom allowed father to disinherit some of his children in favor of others).

³⁸ LA. CONST. art. 12, § 5; LA. CIV. CODE ANN. art. 1493 (2000 & Supp. 2008); see also Spaht, *supra* note 10, at 68-77 (analyzing changes). Although Louisiana has abolished its forced share for most adult children, disabled adult children remain protected, but the exception is ambiguous. See *Stewart v. Estate of Stewart*, 966 So. 2d 1241, 1243-44 (La. Ct. App. 2007) (holding that child with bipolar disorder qualified under statute although she was “not permanently incapable of taking care of herself in the literal sense”); *In re Succession of Ardoin*, 957 So. 2d 937, 944-45 (La. Ct. App. 2007) (reaching same result on similar facts); Katherine Shaw Spaht, *The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What’s Become of Disinheritance, and the Unfinished Business of the Stepparent Usufruct*, 60 LA. L. REV. 637, 643-47 (2000). As stated above, *supra* note 13, this Article does not take a position on the inheritance rights of minor or disabled children.

³⁹ The amount of the *legitime* is one-fourth if one forced heir survives and one-half if two or more forced heirs survive; descendants are entitled to a claim as forced heirs by representation only in limited circumstances. LA. CIV. CODE ANN. arts. 1493-95 (2000).

⁴⁰ Failure to communicate is excused if the child is on active duty in the United States military. *Id.* art. 1621(A)(8) (Supp. 2008).

parent cannot disinherit a child who qualifies under the statute of that child's share of the *legitime*.⁴¹ Grounds for disinheritance, moreover, may be challenged in court after the testator's death, although the disinherited child bears the burden of proof.⁴² Because of the 1995 amendments, however, the statute no longer protects nondisabled children twenty-four years or older. Testators may disinherit these children in Louisiana just as in the rest of the United States.

Certain countries of the British Commonwealth, including England, Wales, New Zealand, Australia, and some parts of Canada follow another alternative to the U.S. rule that may be referred to as the "family maintenance" system.⁴³ In these jurisdictions, courts have wide discretion to depart from a testator's estate plan to provide for a class of persons protected by legislation, typically including specified members of the testator's family.⁴⁴ The statute of New South Wales, Australia is illustrative. It begins by defining a list of "eligible persons," including spouses, domestic partners, former spouses, children, and dependent grandchildren.⁴⁵ It then provides that when the testator insufficiently provides for an eligible person, the court "may order that such provision be made out of the estate . . . as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education, or advancement in life of the eligible person."⁴⁶ The statute allows the court to consider (1) contributions that eligible persons make to "the acquisition, conservation, or improvement of property of the deceased person" or "the welfare of the deceased person"; (2) the "character and conduct of the eligible person before and after the death of the deceased person"; (3) "circumstances existing before and after the

⁴¹ *Id.* art. 1620 (Supp. 2008).

⁴² *Id.* art. 1624 (Supp. 2008).

⁴³ The word "maintenance" has been used since the early 20th century to describe the provision made for the testator's family under this system. See, e.g., 2 BURGE'S COMMENTARIES ON COLONIAL AND FOREIGN LAWS 580 n.(f) (Alexander Wood Renton & George Greenville Phillimore eds., Sweet & Maxwell new ed. 1908) (discussing New Zealand statute).

⁴⁴ The statutes apply to both testate and intestate succession. See Langbein & Waggoner, *supra* note 34, at 304 n.6. New Zealand was a trailblazer among the Commonwealth countries, adopting the first family maintenance statute in 1900. See Joseph Laufer, *Flexible Restraints on Testamentary Freedom: A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 282 (1955). On the origins of family maintenance legislation in England, see Elizabeth High, Note, *Tension Between Testamentary Freedom and Parental Support Obligations: A Comparison between the United States and Great Britain*, 17 CORNELL INT'L L.J. 321, 323-30 (1984).

⁴⁵ Family Provision Act, 1982, § 6 (N.S.W.) (Austl.).

⁴⁶ *Id.* § 7.

death of the deceased person”; and (4) “any other matter which it considers relevant in the circumstances.”⁴⁷

The efficacy and merit of family maintenance systems such as that in New South Wales depend on the insight of the judge making the distribution. The judge becomes a surrogate testator, adjusting the testator’s estate plan to reflect her own view of an adequate provision for the testator’s deceased family. It is interesting, therefore, that courts in family maintenance jurisdictions sometimes award provision to a child despite allegations of notoriously bad conduct. For example, in the New South Wales case *Wheatley v. Wheatley*, the court awarded provision to the testator’s son, who was disinherited in favor of his sister. This was despite the testator’s allegations of “disrespectful volatile, physical and vocal abuse” of both the testator and her daughter by the son. The court held that provision for a child would not be “withheld as punishment for perceived bad conduct on the part of the applicant.”⁴⁸ Similarly, another New South Wales court increased the share of one daughter beyond what her mother bequeathed her, notwithstanding the mother’s reported statement that the daughter physically and verbally abused her sister and refused to speak to her mother.⁴⁹ Whether or not these decisions cast doubt on the wisdom of the family maintenance system, they certainly highlight how different that system is from the U.S. rule.⁵⁰ Rather than leave the

⁴⁷ *Id.* The inheritance system in China also delegates much discretion to courts, but it focuses on the “conduct of heirs and claimants toward the decedent.” See Foster, *Behavior-Based Model*, *supra* note 10, at 81.

⁴⁸ *Wheatley v. Wheatley* (2005) N.S.W.S.C. 785 ¶¶ 35, 46, 55 (Austl.), available at http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2005/785.html. The basis for the order was “the [son’s] health problems, which appear to be genuine and which are largely the cause of his reduced circumstances and lifestyle.” *Id.* ¶ 52.

⁴⁹ *Mikulic v. Pub. Tr.* (2006) N.S.W.S.C. 256 ¶¶ 4, 74 (Austl.), available at http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2006/256.html. The mother had apparently left her two daughters equal shares of the residue, but the court decided to increase the residuary share of one daughter, Mira, to 60% on the basis of her greater financial need, and also significantly reduce various specific bequests to other relatives, despite the mother’s statements regarding Mira’s alleged negative behavior toward her mother and sister. *Id.* ¶¶ 2, 68, 74. In e-mail correspondence with this author, Mira defended the court’s judgment on the grounds that she, not her sister, had done more to help her mother in time of need, and that she had not in fact mistreated her mother as suggested in the will. See E-mail from Mira Mikulic to Joshua C. Tate, Assistant Professor of Law, Southern Methodist University (Apr. 26, 2008, 23:58 EDT) (on file with author).

⁵⁰ England and Wales also grant courts a large degree of discretion under a family maintenance statute. Inheritance (Provision for Family and Dependents) Act, 1975, c. 63 (U.K.). The applicable statute permits a person who is enumerated in the statute to apply to a court for an order of provision out of the estate if the will or intestate

decision of how to divide the estate to the testator, family maintenance systems transfer this power to a judge, who divides the estate after the testator's death without any personal experience of the relevant facts.⁵¹ This reassignment of power typifies the wide gulf between other western countries and the U.S. in the latter's recognition of an unlimited power to disinherit descendants.

B. *The Limits of Testamentary Freedom*

Nevertheless, this power to disinherit is more limited in reality than the black-letter law suggests. Through substantive doctrines and procedural mechanisms, the U.S. legal system has checked absolute testamentary freedom. These legal institutions include the doctrine of undue influence; rules concerning mental capacity, fraud, and duress; and the right to trial by jury in probate proceedings.

In practice, when a testator disinherits her descendants, this may lead to a postmortem will contest. In separate articles published in the mid-1990s, Melanie Leslie and Ray Madoff argued that courts tend to manipulate the doctrine of undue influence to undo testamentary

disposition of the deceased's property does not make reasonable financial provision for the applicant. *Id.* §§ 1-2. Possible claimants include spouses and former spouses of the deceased, children of the deceased, and any person being maintained, wholly or partly, by the deceased. *Id.* § 1. When determining whether reasonable financial provision has been made for the applicant, and if not, the size of the order to make, the court is directed to consider factors such as the financial resources and needs of the applicant and other beneficiaries; the obligations and responsibilities of the decedent; "the size and nature of the net estate"; and "any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant." *Id.* § 3(1). As in the New South Wales family maintenance system, judges in England and Wales are granted a great deal of discretion in making provision for applicants which may produce similarly questionable results. *Id.* § 2; see, e.g., *In re Land*, [2006] EWHC (Ch.) 2069, [1011]-[12] (U.K.) (ordering that provision be made for claimant despite reported evidence that he permitted his mother to suffer painful death while he was being paid to care for her, which led to four-year sentence for manslaughter). The birth of family maintenance in England has been attributed to the fact that, unlike the United States or Continental Europe, England offered no protection to spouses from disinheritance until the enactment of the statute. See Glendon, *supra* note 10, at 1186-87.

⁵¹ For a discussion of a few cases from British Columbia that "might bother many Americans," see CHESTER, *supra* note 10, at 87-88. In *Sawchuk v. MacKenzie Estate*, for example, the British Columbia Court of Appeals awarded \$1 million to the testator's daughter, who was only devised \$10,000 in the will, on the ground that "a judicious parent would recognize a moral obligation to provide for a substantially higher standard of living." *Sawchuk v. MacKenzie Estate*, [2000] 72 B.C.L.R.3d 333 ¶¶ 18, 24 (Can.), available at <http://www.canlii.org/en/bc/bcca/doc/2000/2000bcca10/2000bcca10.html>.

dispositions that fail to provide adequately for the “natural” objects of the testator’s bounty.⁵² The doctrine of undue influence allows the court to set aside a testamentary disposition when the beneficiary or a related party interfered with the testator’s competent volition by substituting his desire for that of the testator. Although the doctrine can apply to bequests in favor of children or other relatives as well as unrelated parties, in practice courts tend to find undue influence only when the beneficiary is not related to the testator.⁵³ If the will leaves most or all of the estate to the testator’s spouse or blood relatives, the court is more likely to consider the bequest “natural” and will not overturn it on the ground of undue influence.⁵⁴

The doctrine of undue influence, therefore, may serve in reality as a check on testamentary freedom. A similar analysis could be applied to will contests involving the testator’s mental capacity,⁵⁵ fraud,⁵⁶ or duress.⁵⁷ All of these doctrines allow courts to undo testamentary dispositions that fail to provide for the testator’s children or other close relatives. Moreover, another protection that descendants have against disinheritance in the United States, at least in some states, is the availability of jury trial in the probate process.⁵⁸ In jurisdictions that allow trial by jury in will contest proceedings, disinherited descendants will have an opportunity to testify before a jury about the

⁵² Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236-37, 245-46 (1996); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 589-92 (1997). *But see* Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 964 (2006) (arguing that “legal contests over deviant wills are instead best read as evidence of deep and abiding tensions in the liberal conception of the ‘free agent’”).

⁵³ Leslie, *supra* note 52, at 243-44.

⁵⁴ Madoff, *supra* note 52, at 602.

⁵⁵ *See, e.g., In re Strittmater’s Estate*, 53 A.2d 205 (N.J. 1947) (invalidating testamentary disposition in favor of women’s rights organization on theory that testator suffered from insane delusion that men were evil), *discussed in* DUKEMINIER ET AL., *supra* note 30, at 149-50. The doctrine of insane delusion (also known as monomania) at issue in *Strittmater* has recently been criticized as ill-conceived, and unnecessary, given the existence of general rules concerning mental capacity. *See* Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB. & TR. J. 67, 102-11 (2007).

⁵⁶ *See, e.g., Puckett v. Krida*, 1994 Tenn. App. LEXIS 502 (1994) (setting aside on grounds of fraud bequest made in favor of nurses who cared for testator).

⁵⁷ *See, e.g., Latham v. Father Divine*, 85 N.E.2d 168 (N.Y. 1949) (allowing complaint to go forward on theory that bequest in favor of religious organization was procured by duress).

⁵⁸ *See* John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2043 (1994) (reviewing DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1993)).

scheming behavior of the nonrelative beneficiary.⁵⁹ Jurors might sympathize with the disinherited child and find undue influence or lack of mental capacity, if the trial even proceeds to that stage. In some cases, the beneficiary, terrified that the jury will give the child everything, will settle.⁶⁰

Although will contests do impose a limitation on the freedom of testation in the United States, their importance should not be exaggerated. A 1987 study of Tennessee probate records found that will contests occurred in less than one percent of probated wills.⁶¹ There are many reasons why disinherited children or grandchildren might not bring a will contest. These include a perception that the reasons for disinheritance were fair, a reluctance to have the family's dirty laundry aired out in court, or a lack of knowledge about the legal avenues available.⁶² Moreover, a skilled estate planner can always take steps to make a will contest less likely or less likely to succeed. For instance, planners may gather evidence of capacity before death, making sure that potential witnesses see that the testator is competent. They may also draft an effective no-contest clause in the will.⁶³ Thus a good estate planner can make disinheritance of children or grandchildren effective, unless the testator obviously lacks testamentary capacity or competent volition.

⁵⁹ See *id.* (noting that “[t]rying a will contest to a panel of lay persons invites litigation such as the Seward Johnson case, in which the strategy is to evoke the jurors’ sympathy for disinherited offspring and to excite their likely hostility towards a devisee such as Basia, who can so easily be painted as a homewrecking adventurer”).

⁶⁰ See *id.* Langbein details how Seward Johnson disinherited his adult children, to whom he had already given millions in trust, in favor of his wife, who was 40 years his junior, and how his children forced her to settle their meritless will contest for \$40 million and \$25 million in legal fees (his total estate being \$400 million). *Id.* at 2039-41.

⁶¹ Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 614 (1987). Will contests may have been more common in earlier stages of American history, although the limited research to date (focusing on California) has produced contradictory findings. Compare Lawrence M. Friedman et al., *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1453, 1467-69 (2007) (finding only seven contested wills in sample of 342 testate probate files from San Bernardino County in 1964), with Kristine S. Knaplund, *The Evolution of Women’s Rights in Inheritance*, 19 HASTINGS WOMEN’S L.J. 3, 30-31 (2008) (finding that 11 of 108 wills probated in Los Angeles County in 1893 were formally contested and another seven cases resulted in distributions different from those in will).

⁶² Schoenblum, *supra* note 61, at 614-15.

⁶³ See Langbein, *supra* note 58, at 2046-47.

C. Criticisms of the U.S. Rule

Those who prefer a more family-centered inheritance model criticize the ability to disinherit descendants in the United States (except for Louisiana). When Louisiana amended its forced heirship scheme to exclude adult, non-disabled descendants, Katherine Shaw Spaht, a professor at Louisiana State University, disapproved of the change:

[F]orced heirship, an institution tested through the ages, remains a sound social policy to date because it helps preserve and strengthen the family by reminding parents of their societal responsibilities and by binding family members together throughout life and beyond. . . . [O]ther states are now beginning to realize that the rampant disintegration of the family is not unrelated to legal institutions that prompted a selfish individualism by glorifying the unrestricted freedom of testation.⁶⁴

Others have made similar arguments concerning the disadvantages of testamentary freedom. Vincent Rougeau, for example, associates the abolition of forced heirship in Louisiana with “the weakening of the bonds of kinship, love, and friendship in cultural life” and calls it “a small part of a larger tale about an increasingly libertarian American culture and the legal system that has grown out of it.”⁶⁵ Some writers have focused on the natural connection between parent and child, viewing disinheritance as unnatural.⁶⁶ To these authors, unrestricted testamentary freedom is almost immoral.

⁶⁴ Spaht, *supra* note 10, at 57-58.

⁶⁵ Vincent D. Rougeau, *No Bonds But Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law*, 1 CIV. L. COMMENT. (forthcoming Dec. 2008) (manuscript at 74, 76, on file with author).

⁶⁶ See, e.g., CHESTER, *supra* note 10, at 81-82 (“The glue of the traditional family is biological connection, sometimes supplemented by adoption. . . . American ‘exceptionalism’ is now too often exemplified by excessive regard for the individualistic whims of parents to the possible detriment of their children.”); Batts, *supra* note 10, at 1197 (“As sacred and fundamental as the [parent-child] bond may be . . . it is consistently abandoned whenever it clashes with another fundamental concept imbedded in America’s social and legal structure: testamentary freedom.”). The idea is centuries old, and was expressed eloquently by Locke. 1 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, ch. 9, § 88 (Peter Laslett ed., Cambridge University Press 1988) (1689). A related point is that unequal division of estates “can poison the reservoir of family joy that parents want to bequeath to the next generation, resurrecting or exacerbating sibling rivalries, especially in blended families created through divorce or remarriage after the death of a spouse.” David Cay Johnston, *Learning to Share*, N.Y. TIMES, Sept. 10, 2008, at SPG 1, available at <http://www.nytimes.com/2008/09/10/business/businessspecial3/10FAMILY.html>.

Not surprisingly, some of these same commentators have proposed alternatives to the U.S. rule, generally based on either the family maintenance or forced heirship systems. Until recently, the principal American champion of family maintenance has been Ronald Chester, who favors the system currently in place in British Columbia, Canada.⁶⁷ Chester has argued that the British Columbia system is both predictable and generally respectful of the testator's wishes,⁶⁸ and has contended that the family maintenance system's flexibility is preferable to the forced heirship regime.⁶⁹ More recently, however, Chester has acknowledged that problems in the U.S. probate system call into question the viability of a family maintenance scheme in the U.S., and he now seems to favor a forced-share approach.⁷⁰

Deborah Batts, who was a law professor before becoming a federal judge, has argued in favor of a slightly modified forced heirship scheme. Batts's proposal, which she calls "protected inheritance," differs slightly from the regime of modern civil-law jurisdictions because it gives preference to children who are dependent or disabled.⁷¹ When there are surviving children of any age, Batts's scheme would automatically set aside for the children one-half of their intestate share of the estate, regardless of the terms of the will, and the children's share would take precedence over that of any other devisee, including the surviving spouse.⁷² Needs of dependent or disabled children would take precedence, but adult, nondisabled children could still receive a portion of the statutory fixed share.⁷³ The children's fixed share would be placed in a trust, together with a portion of the surviving spouse's share (because the surviving spouse also has a duty of support to the children), as well as any residue of the estate (regardless of the devisee).⁷⁴ Income from this trust would be payable to the minor children until their education is complete, and then the

⁶⁷ Chester, *Children*, *supra* note 10, at 449-53.

⁶⁸ *Id.* at 449-50 ("[T]he norms that constrain judicial discretion are well known and decisions seldom unduly surprise anyone. . . . Moreover, if litigation does ensue, the judge will generally take the testator's testamentary wishes into account in fashioning the final shares of the litigants.").

⁶⁹ *Id.* But see Glendon, *supra* note 10, at 1186 (suggesting that "[m]ost of the defects of the existing American family protection systems can be remedied without introducing such a drastic change into a body of law that by and large functions well on a day-to-day basis").

⁷⁰ See CHESTER, *supra* note 10, at 89-92.

⁷¹ Batts, *supra* note 10, at 1253-58.

⁷² *Id.* at 1255.

⁷³ *Id.*

⁷⁴ *Id.* at 1256.

corpus would be paid out according to the interests of the contributing heirs. The children would then receive their share, the surviving spouse's portion would be returned, and the residue would be returned to the residuary beneficiaries.⁷⁵ Batts's scheme would include objective grounds for disinheritance of a child similar to those in Louisiana, but would not allow disinheritance for subjective reasons.⁷⁶

While Batts and Chester would protect even adult children from disinheritance, Ralph Brashier would limit protection to minor children. In a 1996 article, Brashier proposed, as an alternative to the U.S. rule, a system that attempts to preserve the core of testamentary freedom.⁷⁷ Brashier suggests extending existing inter vivos child support statutes to apply after death, so that minor children would be entitled to support from their parent's estate.⁷⁸ This alternative, Brashier contends, poses less of a threat to the American ideal of testamentary freedom.⁷⁹ Moreover, it fills a hole in the current U.S. regime by ensuring that parents do not leave minor children destitute upon their deaths.⁸⁰

With the possible exception of Brashier, who acknowledges the importance of testamentary freedom to the American psyche,⁸¹ those proposing changes to the U.S. rule in recent years have not discerned any valid contemporary justification for a broad power to disinherit.⁸² There are, of course, many arguments that proponents of testamentary freedom have historically made, some of which will be discussed in Part III of this Article. Advocates of reform, however, do not always confront these arguments. Nor do they often consider whether testamentary freedom might serve a useful purpose in modern society. Rather, those proposing alternatives to the U.S. rule convey the impression that the original reasons for the rule are no longer valid today and that any new justifications do not merit discussion. These authors contend we should instead concentrate our attention on

⁷⁵ *Id.* at 1257.

⁷⁶ *Id.* at 1260; *see also* LA. CIV. CODE ANN. art. 1621 (Supp. 2008); *supra* note 40 and accompanying text (providing 13 objective reasons for disinheritance).

⁷⁷ Brashier, *Protecting the Child*, *supra* note 10, at 24-25.

⁷⁸ *Id.*

⁷⁹ *See id.* at 26 (“[T]he argument that an individual’s right of testamentary freedom outweighs his moral obligation to his minor children is absurd.”)

⁸⁰ *See id.* at 25.

⁸¹ *See* BRASHIER, *supra* note 10, at 109.

⁸² *See, e.g.,* Batts, *supra* note 10, at 1243 (concluding that testamentary freedom lacks compelling modern justification); Rougeau, *supra* note 65 (manuscript at 73, on file with author) (same); Spaht, *supra* note 10, at 57-58 (same).

developing an alternative regime that will protect the family ties so easily broken by disinheritance.⁸³

Parts III and IV discuss several possible contemporary justifications for the U.S. rule, some of which have received more attention than others. Before evaluating these justifications, however, we must first determine why the U.S. rule developed as it did. Only by understanding the rule's origins can we assess its continued relevance.

II. DISINHERITANCE AND THE HISTORY OF THE COMMON LAW

To the extent that critics of the U.S. rule offer an explanation for its existence, the explanation tends to involve a perceived American tendency toward individualism.⁸⁴ This account, however, cannot explain the origins of the U.S. rule, because it was not invented in America. Rather, like many American legal institutions, the rule was imported here from England, where it was once a rule of the common law. Although the continued survival of unlimited disinheritance in the United States probably owes something to contemporary individualism, or at least a commitment to private property rights and the free market, the story of the doctrine begins in England. This Part sketches the rough outlines of this story.

Ironically, the tale of inheritance in the common law begins not with complete freedom of testation, but with the exact opposite — primogeniture, a rule providing that all of a father's qualified land is inherited automatically by his eldest son. Testamentary freedom in England emerged in the shadow of primogeniture, and this fact is key to understanding why an absolute power of disinheritance had already developed in England by the time the American colonies were settled. Disinheritance in the common law came into being as a byproduct of reform, not as an independent policy.

⁸³ For relevant proposals, see Batts, *supra* note 10, at 1269-70; Brashier, *Protecting the Child*, *supra* note 10, at 24-25; and see also Rougeau, *supra* note 65 (manuscript at 72) (noting that "maximizing individual choice is not the only way to bring dignity to a human life or to build a just society").

⁸⁴ See, e.g., CHESTER, *supra* note 10, at 81-82 ("[U]nrestrained individualism in the United States is at war with the very concept of family. . . . The uniquely American ability to disinherit one's children, even if they are minors or otherwise incapable, exhibits, in part, an excessive need for control."); Rougeau, *supra* note 65 (manuscript at 73) ("[T]he concept of a permanent, communal identity grounded in social institutions such as family groups is not a strong social current in American life. American legal rules, economic conditions, political life, and social interactions reflect this cultural reality by rewarding individual effort, achievement, and autonomy at the expense of weaker community stakeholders like children, whose needs tend to constrain individual freedom and choice.").

A. *England and the Common-Law Tradition*

Primogeniture, or the right of the firstborn son to succeed to his father's land, was not a custom of Anglo-Saxon England. Rather Norman conquerors introduced it to the kingdom.⁸⁵ From the perspective of the king, primogeniture considerably simplified the problem of deciding whose homage to receive at the death of a tenant-in-chief.⁸⁶ At the end of the reign of Henry II (d. 1189), the principle was limited to land held by knight-service or military tenure,⁸⁷ but the common law subsequently extended it to most free tenures.⁸⁸ If one or more sons survived the decedent, the eldest son would inherit the land. Only if no son survived the decedent would the decedent's daughters have a claim, and in that case they would all take as coparceners.⁸⁹ However, by the reign of Edward I (1272-1307), a rule

⁸⁵ J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 267 (4th ed. 2002).

⁸⁶ See Charles Donahue, Jr., *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 81-82 (1979). For a modern economist's explanation of primogeniture, see C.Y. Cyrus Chu, *Primogeniture*, 99 J. POL. ECON. 78, 97 (1991), who argues that "family heads prefer the unequal bequest division policy so that at least one of their children is more likely to stay (or become) rich, hence making their succession lines firm." Homage was the ritual ceremony by which a tenant acknowledged his subservience to his lord. See 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 296-98 (2d ed. 1968). So-called "tenants-in-chief" held their land directly of the king and not through a mesne (intervening) lord. See *id.* at 232-33.

⁸⁷ BAKER, *supra* note 85, at 268; THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL, bk. VII, ch. 3, at 75 (G.D.G. Hall ed., 1965) (treatise completed ca. 1187-89) [hereinafter GLANVILL]. Originally, holding land by knight-service (military tenure) required the tenant to provide a certain number of knights to the lord for military service, but this was commuted to a monetary payment (*scutage*) within a century after the Norman Conquest. BAKER, *supra* note 85, at 227-28. Tenure by knight-service differed from socage tenure, which was always characterized by the payment of rent rather than military service. See 1 POLLOCK & MAITLAND, *supra* note 86, at 293.

⁸⁸ BAKER, *supra* note 85, at 268. Land in the county of Kent, which provided for partible inheritance among male heirs, was an exception. See, e.g., N. Neilson, *Custom and the Common Law in Kent*, 38 HARV. L. REV. 482, 487-90 (1925) (discussing peculiarities of Kentish gavelkind tenure). Other boroughs of England also had customs allowing freedom of testation prior to the Statute of Wills. For examples from the Year Books, see Y.B. 39 Edw. 3, fols. 232b-33a, Lib. Ass., pl. 6 (1365) (evaluating customs of Salisbury); and Y.B. 40 Edw. 3, fols. 246-47b, Lib. Ass., pl. 27 (1366) (discussing certain lands in Denham).

⁸⁹ The term "coparceners" (*participes*) designated those who inherited in co-ownership, especially sisters who inherited in default of a male heir. See KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY 274 (1892); 2 POLLOCK & MAITLAND, *supra* note 86, at 272.

had developed that if the eldest son predeceased the decedent leaving children of his own, any younger sons of the decedent would not take; rather the eldest son's children would take instead.⁹⁰

As far as the courts of common law were concerned, no father could circumvent these rules through testamentary disposition, "for only God, not man, can make an heir."⁹¹ The common law, in other words, did not recognize testamentary freedom with respect to most freehold land,⁹² and treated such land as passing by intestacy notwithstanding an attempted testamentary disposition. In order to prevent the eldest son from inheriting the land, the father had to convey it to a third party before death, which could pose practical difficulties for the father.⁹³

On the other hand, personal property was an entirely different matter. It fell within the jurisdiction of the ecclesiastical courts, which recognized and encouraged the making of wills.⁹⁴ Even with regard to personal property, however, these courts imposed a limitation on testamentary freedom in the form of the *legitim*, a custom derived from Roman law that granted forced shares to the testator's surviving

⁹⁰ 2 POLLOCK & MAITLAND, *supra* note 86, at 262-63. This last rule evolved in response to the famous *casus regis*, the king in question being John, who succeeded to the throne notwithstanding the better claim of his nephew Arthur, son of Geoffrey, the elder brother of John. See Joseph Biancalana, *For Want of Justice: Legal Reforms of Henry II*, 88 COLUM. L. REV. 433, 507-08 (1988).

⁹¹ The original Latin is *solus Deus heredem facere potest, non homo*. GLANVILL, *supra* note 87, bk. VII, ch. 1, at 71.

⁹² In general, the early common law distinguished between different types of tenure based on the free or villein (serf) status of the tenant. However, it was possible for a freeman to hold land but owe villein services, thus complicating the line between freehold land and land held in villeinage. See 1 POLLOCK & MAITLAND, *supra* note 86, at 390-91. The distinction was important, however, in that the king's courts originally protected the seisin only of those who held freehold land. See 2 *id.* at 35.

⁹³ An heir had a duty under the common law to warrant his ancestor's reasonable grants. See Biancalana, *supra* note 90, at 493-94. Prior to the development of the use, however, conveyance to a third party might mean a loss of lifetime enjoyment of the land by the father, which could pose difficulties in an agrarian society. The development of a market for land in the early 13th century may have made disinheritance by inter vivos conveyances more feasible, however, by providing monetary proceeds which the landlord could consume or dissipate before death. Cf. Joseph Biancalana, *The Origins and Early History of the Writs of Entry*, 25 LAW & HIST. REV. 513, 548-51 (2007) (discussing how Henry II's reforms facilitated development of market for land). Land held in fee tail posed special problems. See JOSEPH BIANCALANA, *THE FEE TAIL AND THE COMMON RECOVERY IN MEDIEVAL ENGLAND 1176-1502*, at 98-121 (2001) (discussing development of writ of formedon in descender). On the development of the use, which further facilitated disinheritance by inter vivos transfers, see *infra* notes 97-99 and accompanying text.

⁹⁴ BAKER, *supra* note 85, at 386-87.

spouse (if any) and descendants.⁹⁵ Unlike the common-law rules for land, the ecclesiastical *legitim* seems to have treated sons and daughters equally, and did not favor the eldest son over others. Nevertheless, while an Englishman of the late thirteenth century would have been able to devise between one-half and one-third of his personal property to persons of his choosing, he would have had no testamentary control over his remaining personal property or any land he owned at death. Testamentary freedom, in other words, was the exception rather than the rule, applied only to personal property, and even then subject to limitations.

Despite its persistence in English law, the rule of primogeniture appears to have been unpopular almost from the start; many landowners wished to circumvent it. By the fourteenth century, some of them were able to do so by taking advantage of the developing concept of a “use.” Although it was not possible to devise land by will, a landowner could transfer the land to, or “enfeoff,” a group of friends or neighbors “to the use” (*ad opus*) of a certain named individual, who was entitled to possession at the original landowner’s death.⁹⁶ Although the common law did not recognize this use, the king’s chancellor could nonetheless enforce it.⁹⁷ Because the so-called feoffees to uses — the third parties — had legal title to the property, the beneficiary, or *cestui que use*, effectively disinherited the heir, and could enforce his right to possession in Chancery.⁹⁸ This innovation proved so popular that by the beginning of the sixteenth century most of the land in England was held in use.⁹⁹

An additional benefit of the use concerned taxation rather than testamentary freedom. When a tenant died seised — roughly, in

⁹⁵ 2 POLLOCK & MAITLAND, *supra* note 86, at 350-51. Under the evolved version of the rule, a man who was survived by a wife or a child, but not both, would have testamentary power over one-half of his personal property. *Id.* On the other hand, if he were survived by both his wife and one or more children, his power would extend only to one-third. *Id.* At least by 1215, daughters were also protected by the English *legitim*. See *id.* at 350 n.4 (“It is fairly certain that by *pueri* both the charter and Bracton mean, not sons, but children.”). The defunct English custom is generally spelled *legitim*, while the current Louisiana institution is spelled *legitime*. The two institutions are distinct, although they share a common origin and are functionally similar. See Foster, *Linking Support*, *supra* note 10, at 1210 n.47.

⁹⁶ BAKER, *supra* note 85, at 248-50.

⁹⁷ See R.H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1503 (1979).

⁹⁸ Before the Chancellor began to intervene, feoffments to uses seem to have been enforced by some English ecclesiastical courts. See *id.* at 1503-04.

⁹⁹ BAKER, *supra* note 85, at 251.

possession — of freehold land,¹⁰⁰ the lord was normally entitled to certain “incidents,” which were essentially feudal taxes. If the tenant left an heir, he might be obligated to pay relief to enter into the inheritance; and if the heir was underage, the lord would be entitled to wardship, retaining possession of the land (and its profits) until the heir came of age.¹⁰¹ On the other hand, if the tenant enfeoffed the land to feoffees to uses during his lifetime, these incidents would not attach at his death.¹⁰² Thus, the use allowed landowners not only to circumvent the rule of primogeniture, but also to avoid feudal taxes. Because most lords were also tenants, they gained as much as they lost by this aspect of the use. But there was one lord who was not a tenant — the king — and he did not like to be deprived of a valuable source of revenue. In 1536, King Henry VIII prevailed upon Parliament to remedy this problem by passing the Statute of Uses, which “executed” all uses and thereby transferred legal title of all land held in use from the feoffees to the beneficiaries.¹⁰³

Although the Statute of Uses curbed the tax avoidance the use had made possible, it did not remedy the inflexibility of the common law rule of primogeniture. Landowners understood the need of the king to collect taxes, but they were not pleased by the loss of testamentary freedom that the use had made possible. Under pressure from these landowners, therefore, Parliament enacted the Statute of Wills in 1540, which for the first time created a right to dispose of land by a

¹⁰⁰ The term “seisin” in the common-law is difficult to define. Although some have associated it with the Roman concept of possession, it also connoted the special bond between lord and tenant, which was alien to Roman law. For different views on the matter, see, for example, S.F.C. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* 39-40 (1976) (arguing that seisin must be understood in context of lord-vassal relationship); DONALD W. SUTHERLAND, *THE ASSIZE OF NOVEL DISSEISIN* 41-42 (1973) (describing seisin and right as “reference points in a continuum”); Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 *AM. J. LEGAL HIST.* 280, 312-13 (2006) (arguing that English seisin had some features in common with Roman possession, but that two concepts were nonetheless distinct).

¹⁰¹ BAKER, *supra* note 85, at 238-41.

¹⁰² *Id.* at 252-53.

¹⁰³ 27 Hen. 8, c. 10 (1536) (Eng.); BAKER, *supra* note 85, at 255-56. On the origins of the statute, see, for example, J.M.W. BEAN, *THE DECLINE OF ENGLISH FEUDALISM 1215-1540*, at 270-92 (1968), who attributes the king’s success to “a series of extra-parliamentary manoeuvres which ultimately gave him a victory over uses in the courts of law and thus presented the Commons with a *fait accompli*”; 2 *THE REPORTS OF SIR JOHN SPELMAN* 195-202 (J.H. Baker ed., The Selden Soc’y 1978), who sees the statute as the outcome of a debate among counsel in the courts and readers in the inns of court; and E.W. Ives, *The Genesis of the Statute of Uses*, 82 *ENG. HIST. REV.* 673, 694-95 (1967), who argues that King Henry was more responsible for the Statute than his minister, Thomas Cromwell, despite popular sentiments against Cromwell at time.

will that the common-law courts would recognize.¹⁰⁴ Although the statute protected one-third of land held by knight-service for the decedent's heir, a landowner was otherwise free to devise his land to whomever he pleased.¹⁰⁵ By 1660, a subsequent statute eliminated the requirement that one-third of land held by knight-service pass to the heir, allowing testators to devise land by will without restriction.¹⁰⁶

While testamentary freedom for land came suddenly by statute, testamentary freedom for personal property evolved more gradually as the institution of *legitim* became obsolete. By the end of the fourteenth century, the *legitim* was enforced only in the north of England and a few places in the south.¹⁰⁷ By the end of the seventeenth century, even northern England no longer observed the custom.¹⁰⁸ The passing of the rule may partly reflect the difficulty of enforcing it (decedents could evade it through inter vivos conveyance) and uncertainty among scholars and practitioners of canon law as to the status of the doctrine.¹⁰⁹ A growing sentiment in favor of testamentary freedom, however, most likely played a role as well.¹¹⁰ Nonetheless, Parliament did not enact a statute granting testamentary freedom for personal property equivalent to the Statute of Wills for land.

For present purposes, the most significant fact about the rise of testamentary freedom in England is that it emerged in the shadow of a

¹⁰⁴ 32 Hen. 8, c. 1 (1540) (Eng.); BAKER, *supra* note 85, at 256; BEAN, *supra* note 103, at 293-301. Part of the motivation for the Statute of Wills appears to have been a fear that conveyancers would find means to avoid the Statute of Uses "by drawing a feoffment to the use of the testator for life, with remainder to such persons as he should by will appoint." BAKER, *supra* note 85, at 203. Because the ultimate policy goal of the Henrician reforms was to raise royal revenue, the Statute of Wills has been described as "a taxation statute that happened to create the right to devise a certain portion of land." M.C. Mirow, *Bastardy and the Statute of Wills: Interpreting a Sixteenth-Century Statute with Cases and Readings*, 69 MISS. L.J. 345, 347 (1999); see also N.G. Jones, *The Influence of Revenue Considerations Upon the Remedial Practice of Chancery in Trust Cases, 1536-1660*, in COMMUNITIES AND COURTS IN BRITAIN 1150-1900, at 99, 99 (Christopher Brooks & Michael Lobban eds., 1997) (noting significance of Statute of Wills as "the background to an assessment of the influence of revenue considerations upon trust remedies in Chancery").

¹⁰⁵ See A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 191-92 (2d ed. 1986). The provision requiring one-third of land held by military service to pass to the heir was meant to preserve the right of the king and other lords to the feudal incident of wardship. See BEAN, *supra* note 103, at 293.

¹⁰⁶ Tenures Abolition Act of 1660, 12 Car. 2, c. 24 (Eng.); see SIMPSON, *supra* note 105, at 198-99.

¹⁰⁷ R.H. Helmholz, *Legitim in English Legal History*, 1984 U. ILL. L. REV. 659, 670.

¹⁰⁸ 2 POLLOCK & MAITLAND, *supra* note 86, at 355.

¹⁰⁹ Helmholz, *supra* note 107, at 670-71.

¹¹⁰ *Id.* at 671.

rule that rewarded the eldest son with all the decedent's land, in a society where land was the primary source of wealth and power.¹¹¹ The Statute of Wills, like the institution of the use, allowed a landowner to spread his wealth more evenly among his descendants, rather than transmit the entire estate to the eldest son. In other words, a desire to provide for all descendants, rather than a desire to disinherit them, may have played the dominant role in the rise of testamentary freedom in the common law. Had the common law treated younger children more fairly, there might have been more resistance at the outset to the development of unlimited freedom of testation. Parliament was not thinking about the possibility of intentional and unwarranted disinheritance of children at the whim of the testator because the problems at hand were tax avoidance and the existence of compulsory primogeniture. While the disappearance of the *legitim* for personal property in the ecclesiastical courts suggests that opposition to primogeniture was not the only factor behind the development of testamentary freedom in England, it certainly played a role with regard to land.

B. *Freedom of Testation in Early America*

By the time of Blackstone, settled law in England did not impose any obligations on a parent to devise property to descendants.¹¹² This was also true in the British colonies that eventually became the United States. Early American opinions sometimes state that an heir cannot be disinherited "but by plain words,"¹¹³ precluding disinheritance by implication through a rule of construction that served to protect some heirs. There is no indication, however, of any resistance in the British colonies in America to the basic English rule allowing disinheritance

¹¹¹ "Throughout the Middle Ages, land was the central source of power in England. It was the basis for wealth, for authority, for jurisdiction, and for military strength." MARGARET MCGLYNN, *THE ROYAL PREROGATIVE AND THE LEARNING OF THE INNS OF COURT* 1 (2003).

¹¹² 2 WILLIAM BLACKSTONE, *COMMENTARIES* *502. Blackstone explains the common practice of leaving each disinherited heir a shilling as deriving from the Roman presumption that a testator who left a child nothing lacked mental capacity; however, he states that this was not the law in England. *Id.* at *503.

¹¹³ *Dill v. Dill*, 1 S.C. Eq. (1 Des. Eq.) 237, *2 (1791); see also *Wilder v. Goss*, 14 Mass. (1 Tyng) 357, 359 (1817); *Sprig v. Weems*, 2 H. & McH. 266, *5 (Md. 1789). This was a common rule in 19th-century America, and was usually provided by statute, not being English in origin. Unlike forced heirship in the civil law, the rule was meant to serve the presumed intent of the decedent. See Joseph W. McKnight, *Spanish Legitim in the United States: Its Survival and Decline*, 44 AM. J. COMP. L. 75, 91-92 (1996).

of children.¹¹⁴ On the other hand, by 1800, all American states had abolished the rule of primogeniture, even for intestate distribution, on the ground that the rule was incompatible with a republican form of government.¹¹⁵ Anglo-Americans seemed unaware of the restrictions on testamentary freedom formerly imposed by the *legitim*.¹¹⁶

By contrast, in areas that passed from the control of Spain or France to the United States, particularly Louisiana, New Mexico, and Texas, forced heirship survived for a time.¹¹⁷ As increasing numbers of Anglo-Americans from the East Coast settled in New Mexico and Texas, however, opposition to forced heirship grew, leading to its abolition in Texas in 1856 and in New Mexico in 1889.¹¹⁸ Only in Louisiana, whose legal system retained many features of the civil law, did forced heirship survive, and there only in a diluted form.¹¹⁹ Anglo-Americans had become accustomed to personal freedom, and the nineteenth century Western spirit of individualism did not tolerate the restrictions that forced heirship imposed.¹²⁰

Because it occurred more recently, the rejection of forced heirship in the former Spanish colonies of the United States is perhaps more relevant to the debate over the current U.S. rule than the original English history of that rule. Even so, much has changed about American society since the nineteenth century, and the reasons for the rejection of forced heirship in Texas and New Mexico — which may have included suspicion of “foreign” legal customs — need not require

¹¹⁴ See McKnight, *supra* note 113, at 77-78.

¹¹⁵ See Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 394-95, 441 n.249 (2006). This process began in the colonial period in New England and Pennsylvania, which adopted partible descent beginning in the 17th century, although the eldest son was often given a double share. See George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L.J. 1280, 1280 (1942); Carole Shammas, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145, 153-57 (1987). Thomas Jefferson, who viewed reform of the law of inheritance as an important component of the creation of a republican society, spearheaded the abolition of primogeniture (and entails) in Virginia. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 12-18 (1977); John V. Orth, *After the Revolution: “Reform” of the Law of Inheritance*, 10 LAW & HIST. REV. 33, 33-36 (1992). On the other hand, primogeniture in cases of intestacy was not abolished in England until 1925. See Administration of Estates Act, 1925, 15 Geo. 5, c. 23, § 45 (Eng.).

¹¹⁶ See McKnight, *supra* note 113, at 78.

¹¹⁷ See *id.* at 81-85.

¹¹⁸ See *id.* at 92-98.

¹¹⁹ See *id.* at 98.

¹²⁰ See *id.* at 107.

its rejection today.¹²¹ Such an argument would come close to the fallacy so famously rejected by Justice Holmes, who did not find mere historical precedent a sufficient justification for current policy.¹²² The next two Parts will explore whether there is a better reason for an unlimited power to disinherit children than history alone.

III. CONTEMPORARY JUSTIFICATIONS FOR TESTAMENTARY FREEDOM

If the historical development of unlimited disinheritance in the common law does not necessarily justify its continued existence, many other explanations can be offered that may carry more weight. These include the positive incentives that freedom of testation may create; a noted American tendency toward individualism; a shift to human capital as the dominant form of inheritance; and obvious problems with the U.S. probate system. All of these arguments must be considered in evaluating whether unlimited disinheritance has some justification besides its historical pedigree.

A. *The Bequest Motive*

One of the most prominent arguments in favor of freedom of testation concerns the positive incentives that it may provide for the donor. It is said that allowing each individual to decide how property will be used after death encourages work and savings, thereby maximizing total wealth.¹²³ This argument is not a new one; it appears in the thirteenth century English legal treatise known as *Bracton*,¹²⁴

¹²¹ According to Professor McKnight, Anglo-American settlers in the Southwest rejected the “traditional Germanic tribal concept of familial right to property” adhered to in Hispanic law. See *id.* at 106-07. With the recent popularity of perpetual “dynasty trusts,” however, the U.S. may ironically be moving back toward this rejected concept of familial property. See Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 410-12 (2005) (reporting substantial flow of money into jurisdictions that allow perpetual dynasty trusts); Joshua C. Tate, *Perpetual Trusts and the Settlor’s Intent*, 53 U. KAN. L. REV. 595, 617-20 (2005).

¹²² “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

¹²³ Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 480-82 (2006).

¹²⁴ See 2 BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 181 (George E. Woodbine & Samuel E. Thorne eds. & trans., The Selden Soc’y 1968) (c. 1235) [hereinafter BRACON] (“[A] citizen could scarcely be found who would undertake a

and was restated by various philosophers in subsequent centuries.¹²⁵ Eliminating freedom of testation, it is argued, would “discourage individual initiative and thrift,” because some individuals would have less of an incentive to accumulate property if they could not choose who would receive it after death.¹²⁶ Related to this argument is the claim that frustrating testamentary intent would lead to the depletion of resources, as property owners might focus solely on present needs to the exclusion of long-term conservation interests.¹²⁷

Some critics oppose the notion that freedom of testation leads individuals to work harder and save more. As noted by Adam Hirsch and William Wang, individuals may strive to accumulate wealth beyond the needs of lifetime consumption for a variety of reasons unrelated to the power of testation.¹²⁸ In many cases, persons may accumulate wealth “to gratify their egos, to gain prestige, to gain power — and simply out of habit. Once these impulses are taken into account, the economic contributions traceable to freedom of testation could turn out to be small.”¹²⁹ It is even less clear that the power to disinherit one’s children, as opposed to freedom of testation generally,

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.”). The treatise probably was not written (as once thought) by the royal judge Henry de Bracton, although he may have been responsible for certain revisions. See Paul Brand, *The Age of Bracton*, 89 PROC. OF THE BRIT. ACAD. 65, 66-73 (1996) (arguing that treatise was written in mid to late 1230s); Morris S. Arnold, Book Review, 91 HARV. L. REV. 517, 519 (1977) (discussing findings of Samuel Thorne). But see J.L. Barton, *The Mystery of Bracton*, 14 J. LEGAL HIST. 1, 1-142 (1993) (defending traditional view).

¹²⁵ See, e.g., JEREMY BENTHAM, *Principles of the Civil Code*, in 1 THE WORKS OF JEREMY BENTHAM 297, 338 (1843) (suggesting that individuals would become spendthrifts, purchase annuities, or spend all their money during life if they could not devise it by will); 1 FRANCIS HUTCHESON, *A SYSTEM OF MORAL PHILOSOPHY* (1755) (arguing that “industry should be much discouraged” if right of testation were eliminated); HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 53 (Kraus Reprint Co. 1969) (4th ed. 1919) (stating that “the abrogation of the power of bequest would remove from [the individual] an important inducement to the exercise of industry and thrift in advancing years”).

¹²⁶ See THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 34 (2d ed. 1953).

¹²⁷ ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 158 (4th ed. 2004).

¹²⁸ See Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 8 (1992); see also A.C. PIGOU, *THE ECONOMICS OF WELFARE* 718-19 (1938) (suggesting that transfer taxes “should impose a relatively small check upon the creation of capital” because individuals have other reasons to accumulate wealth besides desire to direct its disposition after death).

¹²⁹ Hirsch & Wang, *supra* note 128, at 8-9.

has much of an effect on the work and saving habits of typical Americans.¹³⁰

In recent decades, several economists have debated the extent to which a “bequest motive” — the desire to leave something behind after death — plays an important role in the accumulation of wealth. Those who adhere to the so-called “life-cycle” hypothesis, prevalent since the 1950s, assume that the average individual “neither expects to receive nor desires to leave any inheritance.”¹³¹ Laurence Kotlikoff and Lawrence Summers challenged this assumption, arguing that “the pure life-cycle component of aggregate U.S. savings is very small” and that “American capital accumulation results primarily from intergenerational transfers.”¹³² Although some studies following that of Kotlikoff and Summers challenged their findings, more recent research seems to support a significant bequest motive, at least among some segments of the population.¹³³ The conflicting studies might partially be reconciled by concluding that, while people primarily accumulate wealth to guard against future contingencies during life, the desire to bequeath wealth to future generations does play a secondary role.¹³⁴ This conclusion, however, does not provide much

¹³⁰ This is because intentional disinheritance of children appears to be the exception rather than the rule. See Edward C. Norton & Donald H. Taylor, *Equal Division of Estates and the Exchange Motive*, 17 J. AGING & SOC. POL'Y 63, 74 (2005); *infra* note 233 and accompanying text.

¹³¹ Albert Ando & Franco Modigliani, *The “Life Cycle” Hypothesis of Saving: Aggregate Implications and Tests*, 53 AM. ECON. REV. 55, 56 (1963).

¹³² Laurence J. Kotlikoff & Lawrence H. Summers, *The Role of Intergenerational Transfers in Aggregate Capital Accumulation*, 89 J. POL. ECON. 706, 707 (1981).

¹³³ Compare Michael D. Hurd, *Savings of the Elderly and Desired Bequests*, 77 AM. ECON. REV. 298, 306 (1987) (finding “no evidence for a bequest motive”), and Franco Modigliani, *The Role of Intergenerational Transfers and Life Cycle Saving in the Accumulation of Wealth*, 2 J. ECON. PERSP. 15, 37-38 (1988) (“A certain amount of evidence suggests that the pure bequest motive — the accumulation of wealth entirely for the purpose of being distributed to heirs and not . . . for own consumption — affects a rather small number of households, mostly located in the highest income and wealth brackets.”), with B. Douglas Bernheim, *How Strong Are Bequest Motives? Evidence Based on Estimates of the Demand for Life Insurance and Annuities*, 99 J. POL. ECON. 899, 924 (1991) (finding “powerful bequest motives for a large segment of the population”), and William G. Gale & John Karl Scholz, *Intergenerational Transfers and the Accumulation of Wealth*, 8 J. ECON. PERSP. 145, 156 (1994) (suggesting that bequests and inter vivos transfers account for “at least 51 percent of net worth accumulation”). The most recent study, based on the AHEAD survey of elderly Americans, suggests that roughly three-fourths of the population has a bequest motive. Wojciech Kopczuk & Joseph P. Lupton, *To Leave or Not to Leave: The Distribution of Bequest Motives*, 74 REV. ECON. STUD. 207, 230 (2007).

¹³⁴ See Karen E. Dynan et al., *The Importance of Bequests and Life-Cycle Saving in Capital Accumulation: A New Answer*, 92 AM. ECON. REV. 274, 277 (2002) (suggesting

support for the possibility of unlimited disinheritance, because the bequest motive may be more or less coextensive with a desire to provide in general terms for one's descendants.¹³⁵ A testator whose goal is simply to offer support for that person's descendants might not object to a forced heirship or family maintenance scheme. The advantage of the U.S. rule is that it allows the testator to treat descendants unequally, and the debate over the life-cycle hypothesis does not explain why a testator might want to do this.

B. *American Individualism*

If the possible incentives for work and savings do not fully justify the U.S. rule, many other arguments can be made on its behalf. One argument is that the rule simply reflects an undeniable tendency toward individualism in American society, and legal rules must operate within a societal framework.¹³⁶ Because individualism is deeply embedded in the American psyche, the argument goes, the law of inheritance should respect the rights of individuals with respect to their property, even to the point of allowing disinheritance of descendants.¹³⁷

Americans have a long tradition of resisting restraints on personal freedom. Anti-tax rhetoric, for example, although found in many countries, has a uniquely patriotic aspect in the United States dating back to the revolutionary period.¹³⁸ Contemporary arguments in favor of an individualist interpretation of the Second Amendment also highlight the perceived connection between individualism and patriotism in the United States.¹³⁹ American property law is committed, at least in theory, to a broad right to exclude others.¹⁴⁰

that "if the bequest motive suddenly disappeared because of a confiscatory estate and gift tax, saving behavior would likely change only modestly for all but the very wealthy").

¹³⁵ *But see* Kopczuk & Lupton, *supra* note 133, at 230-31 (finding that "a significant number of households without children report a desire to leave a bequest").

¹³⁶ *See, e.g.,* Oldham, *supra* note 10, at 273-74 (quoting Louisiana legislator who allegedly justified abolition of *legitime* on basis that "this is my money, I made it and I can do what I want with it").

¹³⁷ *See id.*

¹³⁸ *See* Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 *BUFF. L. REV.* 819, 820-28 (2002).

¹³⁹ *See generally* H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 *CHL.-KENT L. REV.* 403, 406-07 (2000).

¹⁴⁰ *See, e.g.,* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding minor but permanent physical occupation of owner's property constitutes

However limited this is in practice, it nonetheless plays an important role in the American understanding of ownership. The U.S. rule allowing disinheritance of descendants extends this concept of absolute ownership beyond the grave, favoring the right of the individual owner over familial responsibilities.

Although the individualism argument no doubt helps to explain the persistence of the U.S. rule, its application is less clear with regard to another aspect of the American law of inheritance, namely, the protections accorded to the surviving spouse. With the exception of Georgia, every American state limits the ability of a testator to disinherit a surviving spouse. States accomplish this either through a statutory "elective share" of the testator's property or by classifying both spouse's earnings as community property, one-half of which belongs automatically to the surviving spouse.¹⁴¹ The elective share, which is used in common-law or separate-property states, typically protects a certain percentage of the property for the surviving spouse, who can elect to take that property notwithstanding the decedent spouse's will.¹⁴² By contrast, in community-property states, property acquired during the marriage other than by gift, devise, or inheritance (or by exchanging property acquired before marriage) generally

"taking" for Fifth and Fourteenth Amendment purposes); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997) (finding landowners entitled to punitive damages for trespass that resulted in no actual damage to their property).

¹⁴¹ See Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at Death? (or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 739-40 (2006). For discussion of Georgia's unusual lack of spousal protection, compare Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447, 463-70 (1976), who defends the lack of elective share, with Peter H. Strott, Note, *Preventing Spousal Disinheritance in Georgia*, 19 GA. L. REV. 427, 427-28 (1985), who argues that Georgia should enact an elective share statute. Elective share statutes exist only in separate-property states, as a replacement for the spousal protection that is provided in those states that classify property acquired during the marriage through the labor of either spouse as community property. See Langbein & Waggoner, *supra* note 34, at 306.

¹⁴² There is substantial variation among elective share statutes, but a common provision guarantees one-third of the decedent's estate for the surviving spouse if the decedent left surviving issue, or one-half if the decedent left no surviving issue. See Turnipseed, *supra* note 141, at 739. The 1990 Uniform Probate Code applies the elective share to the "augmented estate," which includes certain nonprobate transfers by the decedent and awards the surviving spouse a percentage of the property that varies from three to fifty percent of the augmented estate depending on the length of the marriage. UNIF. PROBATE CODE §§ 2-202 to -213 (1990). The recapture scheme of the UPC was preceded by earlier rules such as the "illusory transfer" doctrine, through which courts attempted to prevent evasion of elective share statutes through inter vivos transfers. See *Newman v. Dore*, 9 N.E.2d 966, 968-69 (N.Y. 1937).

belongs to the married couple as a community, in which case one-half of the undivided property belongs to each spouse.¹⁴³ Thus, under either the elective share or community-property law, neither spouse can completely disinherit the surviving spouse if either spouse has acquired property through labor during the marriage. Testamentary freedom is unlimited only with respect to the unprotected portion of the marital estate. Civil-law forced share systems differ from the U.S. regime in how they define the class of protected persons, not in their recognition of a protected share.¹⁴⁴

It is possible to avoid many elective-share statutes by inter vivos transfers.¹⁴⁵ This technique, however, has its limits, as will be discussed shortly.¹⁴⁶ Elective-share statutes pose a significant limitation on testamentary freedom, preventing complete disinheritance of spouses. When it comes to the rights of spouses, U.S. law imposes significant limitations on the right to dispose of one's property as one sees fit. It is not difficult to see why the law treats spouses differently than descendants: spouses may be perceived as contributing to the accumulation of family property and thus having a stronger claim upon it.¹⁴⁷ Moreover, U.S. law does not recognize plural marriage, but tolerates unlimited procreation: each adult can legally have many children, but only one spouse at a time. And it is possible to divorce one's spouse, but not one's child. Nevertheless, spousal protection suggests that individualism is not the sole driving force in American inheritance law.

¹⁴³ See BRASHIER, *supra* note 10, at 11-12, 21-23.

¹⁴⁴ See *supra* text accompanying notes 34-37.

¹⁴⁵ See Turnipseed, *supra* note 141, at 739-40, 786 (explaining how, even if statute has recapture provision similar to 1990 UPC, spouse can still avoid statute through offshore inter vivos trusts as well as domestic irrevocable life insurance trusts, gifts made more than two years before death, joint purchases of property with non-spouse, and annual exclusion gifts). It may also be possible to evade the elective share by purchasing U.S. Treasury bills. See LAWRENCE W. WAGGONER ET AL., *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 10-24 (4th ed. 2006). Changing one's domicile to a jurisdiction that does not have an elective share is the "most certain alternative for a client who wants to minimize the entitlement of a surviving spouse." Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, in 32 U. MIAMI INST. ON EST. PLAN. ¶ 904.3(C), at 9-35 (1998). As Professor Pennell points out, there may be legitimate reasons for a client to minimize the spouse's elective share in some circumstances. *Id.* ¶ 906, at 9-52 to -53. Turnipseed argues that states should either abolish the elective share, and allow disinheritance of spouses, or adopt a community-property system. See Turnipseed, *supra* note 141, at 793-94.

¹⁴⁶ See *infra* text accompanying note 187.

¹⁴⁷ See WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* § 3.1, at 122-23 (3d ed. 2004).

In general, the centrality of individualism as the defining American trait is debatable.¹⁴⁸ Although ownership of property carries with it certain rights in U.S. law, it also entails certain obligations.¹⁴⁹ In the family law context, this is particularly evident in the imposition on parents of a duty to support their children. Every state has some mechanism for collecting child support from noncustodial parents of a minor child.¹⁵⁰ Most states require parents to support a disabled adult child, at least if the disability arose before the child reached the age of majority.¹⁵¹ Similarly, federal law gives priority to support claims over all other debts in the event of bankruptcy.¹⁵² Such rules impose a significant restraint on the notion that ownership of property entails an absolute right to exclude others. Although U.S. law continues to protect the rights of parents in various contexts,¹⁵³ it also recognizes that parents have a basic duty to provide for their children, at least until they reach the age of majority.¹⁵⁴

¹⁴⁸ See, e.g., BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT* (1996) (arguing that 18th-century American political thought had significant communitarian strain).

¹⁴⁹ For example, although the law generally allows an owner to destroy property, courts will often ignore a request to destroy property after the owner dies. See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *YALE L.J.* 781, 783-87 (2005) (criticizing this trend). Even during the owner's lifetime, there are significant limitations on the right to exclude others from one's property. See Joseph William Singer, *The Reliance Interest in Property*, 40 *STAN. L. REV.* 611, 675-77 (1988) (discussing cases where non-owners are allowed access to land to prevent serious harm to themselves or others, or when owner has previously opened up his or her property to others).

¹⁵⁰ This is required by federal law. See 42 U.S.C. § 667 (2000); see also Jo Michelle Beld & Len Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 *FAM. L.Q.* 165, 165 (2003) (discussing interaction of state and federal requirements).

¹⁵¹ See Sandie L. Buhai, *Parental Support of Adult Children with Disabilities*, 91 *MINN. L. REV.* 710, 723-36 (2007). On the other hand, a majority of states also have statutes requiring adult children to support parents who become indigent, although these statutes may not be frequently enforced. See Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 *MARQ. L. REV.* 401, 422-28 (2002); Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 *J.L. & POL'Y* 709, 713-17 (2001).

¹⁵² 11 U.S.C. § 507 (2006). For an argument that this provision does not go far enough, see Brian W. Leach, *The Unfinished Business of Bankruptcy Reform: A Proposal to Improve the Treatment of Support Creditors*, 115 *YALE L.J.* 247, 247-49 (2005).

¹⁵³ See Jill Elaine Hasday, *The Canon of Family Law*, 57 *STAN. L. REV.* 825, 851-53 (2004) (pointing to right of parents to discipline their children and parental immunity from liability for torts committed against their children as examples).

¹⁵⁴ This parental duty, of course, is not new; it has long justified the parental rights of custody and control. The duty, however, tends to be enforced by the courts only when the parent utterly fails to discharge it, as in the case of child abuse or neglect.

In short, while individualism is most likely a factor in the U.S. law of inheritance, it cannot serve as a complete justification for a rule allowing total disinheritance of descendants, given the limitations on individual freedom that U.S. law does impose. Moreover, the alternatives to the U.S. regime are not entirely inconsistent with an individualist philosophy. European forced-heirship regimes do give testators freedom of disposition over some portion of their property. By the same token, the adoption of a family maintenance system would not necessarily require courts to ignore the wishes of the decedent entirely. In order to justify the U.S. rule, we must explain why the law grants owners an unrestricted right to dispose of their property in one context but denies or significantly limits that right in other contexts.

C. *Inheritance and Human Capital*

One possible contemporary justification for the U.S. rule that does not depend on American individualism is the change in the nature of wealth transmitted from parent to child. In a classic article published in 1988, John Langbein argued that the nature of wealth transmission changed dramatically over the course of the twentieth century.¹⁵⁵ In the nineteenth century, Langbein argued, wealth transmitted from parent to child typically took the form of the family farm or firm. During the twentieth century, however, this form of wealth was gradually supplanted by human capital — the investment of the parents in the skills of the child. Consequently, “the business of educating children [became] the main occasion for intergenerational wealth transfer.”¹⁵⁶ At the same time, increasing life expectancy meant that parents needed to consume more of their assets during retirement, leaving children with less of an expectation that they would inherit property from their parents at death.¹⁵⁷ Langbein predicted that wealth transfer at death would continue to decline in importance, at least with respect to the middle classes, while educational expenditures would become more prominent.¹⁵⁸

See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 395-96 (2008).

¹⁵⁵ See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 722-24 (1988).

¹⁵⁶ *Id.* at 723.

¹⁵⁷ *Id.* at 740-43.

¹⁵⁸ *Id.* at 750-51. Langbein’s prediction that transfer at death would decline in importance was based on the then-current predominance of annuitized “defined-benefit” pension plans, which have greatly declined in importance in the last 20 years.

Although this transformation in the nature of family wealth transmission cannot explain why an absolute right to disinherit descendants became embedded in U.S. law, it helps to justify the continued existence of that rule. As increases in college tuition continue to outpace inflation,¹⁵⁹ the amount of money parents invest in their children's education could also increase, and this lifetime investment may satisfy any moral obligation parents might have to provide for their adult children. According to this view, when the parents adequately provided for a child during their lifetime by an investment in the child's skills, that child has no reason to complain if the parents choose to devise what little remains at death to someone else.¹⁶⁰

The fact that human capital has become the dominant mode of family wealth transmission goes a long way toward justifying the U.S. rule allowing disinheritance of descendants. Taken to its logical extreme, however, it might call into question a central principle of the law of intestate succession in every American state, namely, the rule that parents of the intestate do not take when the intestate is survived by descendants.¹⁶¹ If children are adequately provided for through the human capital transferred to them by their parents, one would expect the law of intestacy to favor an elderly parent of the intestate over an adult child, but this is not the case. The apparent assumption is that the typical decedent would prefer for her children to inherit even if they are adults and the decedent is also survived by her own parent.¹⁶² If this assumption is incorrect, we should rethink not only the rules

See Internal Revenue Service, *Choosing a Retirement Plan: Defined Benefits Plan*, <http://www.irs.gov/retirement/article/0,,id=108950,00.html> (last visited Sept. 9, 2008) (citing statistics from Pension Benefit Guaranty Corporation).

¹⁵⁹ See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *PAYING FOR COLLEGE 9-12* (2004), available at <http://nces.ed.gov/pubs2004/2004075.pdf>.

¹⁶⁰ Cf. Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 90 (1990) (proposing "a system that allows (or even encourages) parents to use their material advantages to benefit their children through acculturation and education yet prohibits transfers of purely financial advantage").

¹⁶¹ For examples of U.S. statutes favoring descendants over parents on intestacy, see CAL. PROB. CODE § 6402(a) (West 1991); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1998); 20 PA. CONS. STAT. § 2103 (2005); TEX. PROB. CODE ANN. § 38(a)(1) (Vernon 2003); and UNIF. PROBATE CODE § 2-103(1), (2) (1990). This preference is the rule in all U.S. jurisdictions. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 cmt. b (2003); DUKEMINIER ET AL., *supra* note 30, at 62.

¹⁶² A traditional policy goal of an intestacy statute is to give effect to the presumed intent of an average property owner, although there are also other concerns, such as providing for dependents, ensuring fairness, and promoting the interests of society. See Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1033-37 (2004).

regarding disinheritance of children, but also the shares children take when the parent dies intestate.

The human capital justification for disinheritance is related to a broader argument, namely, that inheritance of any sort exacerbates the gap between rich and poor and increases concentration of wealth in the hands of a few. Mark Ascher has suggested that the government should reverse the default rule in favor of freedom of testation and allow inheritance by healthy adult descendants only in limited circumstances.¹⁶³ According to Ascher, “[c]hildren lucky enough to have been raised, acculturated, and educated by wealthy parents need not be allowed the additional good fortune of inheriting their parents’ property.”¹⁶⁴ This is an important argument in light of the widening gap between the very wealthy and the rest of the world’s population.¹⁶⁵ One may find further support for Ascher’s position in studies suggesting that individuals who inherit large sums of money are more likely to leave the labor force.¹⁶⁶ If inheritance by wealthy children is, in general, bad for society, why should we impose any restrictions on disinheritance?

This question is not easily answered. A rebuttal may depend, in part, on the fact that despite the U.S. rule tolerating intentional

¹⁶³ Ascher, *supra* note 160, at 72-76 (proposing that inheritance by healthy adult descendants be allowed only for “a moderate amount of property” under “[a] universal exemption”).

¹⁶⁴ *Id.* at 74. Warren Buffett has described such children as being members of the “lucky sperm club” or having won the “ovarian lottery.” See Rachel Breitman & Del Jones, *Should Kids Be Left Fortunes, or Be Left Out? Buffett’s Donation Reignites the Debate*, USA TODAY, July 26, 2006, at 1B, available at http://www.usatoday.com/money/2006-07-25-heirs-usat_x.htm.

¹⁶⁵ See Robert Frank, *The Wealth Report: Global Wealth Gap Widens*, WALL ST. J. ONLINE, Oct. 3, 2007, <http://blogs.wsj.com/wealth/2007/10/03/global-wealth-gap-widens/> (citing Boston Consulting Group study).

¹⁶⁶ See Douglas Holtz-Eakin et al., *The Carnegie Conjecture: Some Empirical Evidence*, 108 Q.J. ECON. 413, 432-33 (1993) (finding that those who received larger inheritances were “more likely to reduce their labor force participation to zero” than those who received smaller inheritances, and “high inheritance families experienced lower earnings growth than low inheritance families, which is consistent with the notion that inheritance reduces hours of work”); cf. Guido W. Imbens et al., *Estimating the Effect of Unearned Income on Labor Earnings, Savings, and Consumption: Evidence from a Survey of Lottery Players*, 91 AM. ECON. REV. 778 (2001) (finding average reduction in labor earnings and increased consumption of leisure among individuals who win lottery). But see DARIEN BERKOWITZ & JACOB MIKOW, INTERNAL REVENUE SERV., BEYOND ANDREW CARNEGIE: USING A LINKED SAMPLE OF FEDERAL INCOME AND ESTATE TAX RETURNS TO EXAMINE THE EFFECTS OF BEQUESTS ON BENEFICIARY BEHAVIOR 5 (2000), available at <http://www.irs.gov/pub/irs-soi/estincl.pdf> (finding that beneficiaries who started out in labor force tended to remain in it even after receiving bequest).

disinheritance, there is little political support in the United States for abolishing testamentary bequests to children, even if they are healthy adults.¹⁶⁷ If society is to tolerate inheritance by healthy adult children, then, it may be preferable as a policy matter for the inheritance to be divided more evenly among such children than to allow a testator to concentrate wealth in the hands of a single heir, depending on the nature of the assets in question.¹⁶⁸ It might be possible to design a forced-heirship scheme that would allow a testator to leave an unlimited amount of money or property to charitable organizations, but would require that any bequest to descendants be divided more or less evenly among them (or in accordance with a statutory representation scheme).¹⁶⁹ Over time, if the law requires estates to be divided among a large number of beneficiaries, wealth will be less concentrated in the hands of a few.¹⁷⁰ Thus, in a system that acknowledges freedom of testation as a baseline rule, a limited forced-heirship scheme could actually reduce inequalities of wealth in the long run.

D. The U.S. Probate System

Apart from philosophical and socioeconomic arguments, one can deduce certain practical reasons for the U.S. rule allowing disinheritance of descendants. As noted by Langbein, there are significant problems with the probate bench in the United States.¹⁷¹ Connecticut, for example, allows individuals to serve as probate judges who either lack formal legal training or who continue to

¹⁶⁷ Cf. Adam J. Hirsch, *American History of Inheritance Law*, in OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (Stanley N. Katz ed., forthcoming Spring 2009) (manuscript at 23), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982428 (noting that “the United States stands out as a country peculiarly deferential to the wishes of the dead”).

¹⁶⁸ For an argument that testators should be prohibited from leaving too much to any particular heir, see Irving Kristol, *Taxes, Poverty, and Equality*, PUB. INT., Fall 1974, at 3, 26-28, as reprinted in DUKEMINIER ET AL., *supra* note 30, at 16-17. Similar arguments were made against the institution of primogeniture in the late 18th century. See sources cited *supra* note 115.

¹⁶⁹ For an intestate representation scheme that treats descendants equally at each generation, see UNIF. PROBATE CODE § 2-106 (1990). A similar scheme could be incorporated into a forced-heirship statute, but applied only to the portion of the estate that is not devised to charity or to the surviving spouse.

¹⁷⁰ See Kristol, *supra* note 168, at 27.

¹⁷¹ Langbein, *supra* note 58, at 2044-45 (citing NORMAN F. DACEY, *HOW TO AVOID PROBATE* 1-7 (5th ed. 1993)).

practice law part-time during their tenure as judges.¹⁷² In some jurisdictions, probate and other state judges are elected by the populace in elections that may not be entirely free from political partisanship.¹⁷³ Moreover, in many states, parties in will contests have a right to demand trial by jury, in which case a group of ordinary individuals with no expertise in probate matters will be called upon to decide the matter.¹⁷⁴ One study of will contests found that juries are more likely than courts to rule in favor of the will contestant,¹⁷⁵ which calls into question the impartiality of the jury as a dispute resolution mechanism.¹⁷⁶

These shortcomings of the U.S. probate system may explain why academic arguments in favor of adopting a family maintenance system in the United States have not resulted in any significant legislative reform. Family maintenance may be accepted in Commonwealth jurisdictions partly because those jurisdictions have a more or less uniformly competent and meritocratically selected bench.¹⁷⁷ However, for Americans who believe in testamentary freedom, giving too much discretion to judges and juries to interfere with a testator's estate plan

¹⁷² *The Scandal of Connecticut's Probate Courts*, Conn. Joint Standing Comm., Interim Hearing on Probate Court Systems, Program Review and Investigations, Pt. 2, 2005 (statement of John H. Langbein, Sterling Professor of Law and Legal History, Yale Law School), available at <http://www.law.yale.edu/faculty/1766.htm>.

¹⁷³ See, e.g., TEX. CONST. art. 5, § 30 (requiring that criminal district and county-wide judges be elected to four-year terms); *Dozens of Judges Lose Seats in Democratic Tidal Wave*, DALLAS MORNING NEWS, Nov. 8, 2006, at 15A (reporting election in which Democratic candidates obtained 41 out of 42 contested judgeships, unseating several long-serving veterans on bench). The role of political ideology in judicial decisionmaking is a question that has received much attention in recent literature. See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 836-41 (2008).

¹⁷⁴ See Josef Athanas, Comment, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529, 536-40.

¹⁷⁵ See Ronald Chester, *Less Law, but More Justice? Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 178-81 (1999) (reporting that, in survey of will contests reported nationwide over one-year period, will contestants prevailed before judges 5 out of 22 times, but prevailed 6 out of 8 times before juries).

¹⁷⁶ Chester, on the other hand, argues that jury trial is preferable to bench trial precisely because juries are more sympathetic to disinherited children, although he would favor mediation as a third alternative. See *id.* at 176-77.

¹⁷⁷ Cf. Langbein, *supra* note 58, at 2044 ("Americans can only look with envy to the esteemed and meritocratic chancery bench that conducts probate adjudication in English and Commonwealth jurisdictions."). Even in family maintenance systems, however, there seems to be some resistance among attorneys to the broad discretion given to courts. See 1 SCHOENBLUM, *supra* note 9, § 13.01[B], at 13-10 to -12 (discussing English example).

is a somewhat frightening prospect.¹⁷⁸ The testator, it is assumed, is in a better position to decide how the estate should be divided than an elected judge or lay jurors, who may be more sympathetic to the pleas of disinherited heirs.¹⁷⁹ As a practical matter, therefore, a family maintenance system is unlikely to be enacted in any U.S. jurisdiction in the foreseeable future.

Nevertheless, although family maintenance may be precluded as a viable option in the United States, a forced-heirship regime similar to that in Continental Europe would not pose the same problem of discretion. A statute could guarantee a fixed share to a testator's descendants without giving much discretion to the finder of fact. As discussed above, Louisiana followed this approach for all children until 1995 and continues to do so for disabled children and those under age twenty-four.¹⁸⁰ Moreover, the elective share that exists in almost all U.S. common-law jurisdictions operates the same way, without granting undue discretion to courts and juries.¹⁸¹

On the other hand, although a forced-heirship regime does not raise the same problems of discretion as family maintenance, both schemes share another practical objection, namely, the possibility of evasion through inter vivos transfers. A testator who does not wish his descendants to inherit at death can simply give the property away to others during life. Unless something is done to recapture the inter vivos transfers, the descendants can be effectively disinherited of most, if not all, of the estate. As discussed above, this may have been one of the reasons for the disappearance of the *legitim* in English law by the seventeenth century; if the testator can simply give the property away during life, the descendants will have nothing to claim at the testator's death.¹⁸²

Once again, the common-law elective share for spouses offers a helpful comparison. Early elective share statutes applied only to property owned by the decedent at death, and thus inter vivos evasion was relatively simple.¹⁸³ In response, state courts began extending the

¹⁷⁸ See Glendon, *supra* note 10, at 1188-89 (predicting that adoption of family maintenance scheme would lead to frequent advertisements encouraging disappointed heirs to bring claims under statute).

¹⁷⁹ Cf. Langbein, *supra* note 58, at 2044 (arguing that "the integrity and ability of the American probate bench has so often been found wanting that confidence in the predictability and correctness of adjudication in these courts has been impaired").

¹⁸⁰ See *supra* text accompanying notes 38-41.

¹⁸¹ See *supra* note 142 and accompanying text.

¹⁸² See *supra* note 109 and accompanying text.

¹⁸³ See BRASHIER, *supra* note 10, at 17-19.

application of the statutes to cover certain inter vivos transfers and including these as part of the testator's estate for purposes of calculating the elective share.¹⁸⁴ The 1969 Uniform Probate Code ("UPC") introduced the concept of the "augmented estate," which added certain inter vivos transfers to the probate estate and determined the elective share from the balance.¹⁸⁵ The 1990 UPC retained the concept of the augmented estate, but expanded it to include additional transfers made by the decedent.¹⁸⁶ These changes made it more difficult for spouses to avoid the elective share through inter vivos transfers.

Despite the changes made by the UPC, it is still possible to avoid the elective share through certain techniques, including the creation of a trust in a jurisdiction that does not recognize the surviving spouse's elective share.¹⁸⁷ Any forced share for descendants could be avoided through similar means.¹⁸⁸ This, however, has not deterred the various

¹⁸⁴ See, e.g., *Sullivan v. Burkin*, 460 N.E.2d 572, 577 (Mass. 1984) (treating "assets of an inter vivos trust created during the marriage by the deceased spouse over which he or she alone had a general power of appointment" as part of testator's estate for purposes of elective share).

¹⁸⁵ UNIF. PROBATE CODE § 2-202 (1969).

¹⁸⁶ *Id.* §§ 2-204 to -207 (1990). The purpose of these changes was to bring the elective share into line with the partnership theory of marriage. See Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 724 (1992); see also AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.09 cmt. c (2002) (explaining partnership theory of marriage, which is based on idea that both spouses contribute equally to entire marital relationship). But cf. Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1282-89 (criticizing partnership theory of marriage as reinforcing traditional gender roles). For proposals to reform the elective share even further, see, for example, Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred Community-Property Alternative*, 49 EMORY L.J. 487, 524 (2000), who proposes "a value deferred-community-property elective-share system," and Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 9 (2003), who suggests various changes to "make the system more transparent and therefore more understandable."

¹⁸⁷ See Turnipseed, *supra* note 141, at 783-87. Due to variance among American states in the treatment and recognition of an elective share, creating an offshore trust may not be necessary to accomplish this objective. See 1 SCHOENBLUM, *supra* note 9, § 10.18, at 10-50. Some jurisdictions allow evasion simply by using a revocable living trust. See, e.g., Susan N. Gary, *The Oregon Elective Share Statute: Is Reform an Impossible Dream?*, 44 WILLAMETTE L. REV. 337, 356 (2007) (discussing OR. REV. STAT. § 114.105 (1990)).

¹⁸⁸ See MCGOVERN & KURTZ, *supra* note 147, § 3.2, at 131. It might also be possible to avoid a forced share for descendants by entering into an express contract with a third party not to revoke the will, which could lead to litigation over whether good consideration was offered for the contract.

countries which retain a forced share for descendants from doing so. If there is a sound policy basis for protecting the inheritance rights of descendants, then the mere fact that those who are sufficiently well informed can partially evade any statutory scheme ought not preclude its adoption. There may be some property the testator cannot easily transfer to third parties inter vivos or remove from the jurisdiction of the testator's domicile, such as the testator's principal residence and the personal property located thereon. With regard to this property, the courts might effectively protect a descendant's share, and could bar any devisee receiving unreachable property from participating in the reachable assets.¹⁸⁹ The question, then, is not whether it is possible as a practical matter to implement a forced share for descendants, but whether one would be justified as a matter of policy. The next Part addresses this question.

IV. DISINHERITANCE AND THE CHALLENGE OF ELDERCARE

The discussion in the previous Part has omitted one argument in favor of freedom of testation: it allows a parent to reward or reimburse children for services performed during the parent's lifetime. This argument is at least as familiar as those discussed in the previous Part, and, like the other arguments, has its detractors as well as its proponents. On the one hand, various authors over the centuries have argued that testation is necessary in order to preserve the good order of the family.¹⁹⁰ Anthropologists have shown that gifts are sometimes best understood in a context of reciprocity and social exchange.¹⁹¹ Several modern economists have argued that parents may use bequests to reward children who are more attentive to them in old age.¹⁹²

¹⁸⁹ This could be accomplished through a recapture scheme similar to that of the UPC. See BRASHIER, *supra* note 10, at 11-12, 21-23.

¹⁹⁰ See, e.g., 1 BENTHAM, *supra* note 125, at 337 (arguing that testation prevents ingratitude on part of children in parent's old age); 2 BRACON, *supra* note 124, at 181 (arguing that testation will "put in the way of both wives and children an occasion for good behavior").

¹⁹¹ See CLAUDE LÉVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* 52-68 (James Harle Bell et al. trans., rev. ed., Beacon Press 1969) (1949); MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* 8-18 (W.D. Halls trans., Routledge 1990) (1950).

¹⁹² For examples of this argument, see especially Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1, 18 (1988); B. Douglas Bernheim et al., *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045, 1046 (1985); and Donald Cox, *Motives for Private Income Transfers*, 95 J. POL. ECON. 508, 540 (1987). The opposite conclusion, however, is reached by Maria G. Perozek, *A Reexamination of the Strategic Bequest Motive*, 106 J. POL. ECON. 423, 424 (1998), who argues that "the

On the other hand, some have responded that freedom of testation encourages beneficiaries to engage in socially wasteful activities in the hope of capturing a bequest.¹⁹³ Others have noted that many children would no doubt continue to care for elderly parents even if the United States abolished freedom of testation; whether a particular child looks after an elderly mother or father may not be correlated with that child's expectations regarding inheritance.¹⁹⁴ Thus, while scholars have long recognized a possible connection between eldercare and testamentary freedom, they have disagreed as to the significance of that connection.

This Part contends that demographic changes over the past few decades have considerably strengthened the argument that society should tolerate freedom of testation because it allows parents to reward children for lifetime services. Increasingly, now that parents are living longer and surviving formerly fatal medical conditions, they call upon their children to assist them with basic life needs. Not all children answer this call, and parents should be able to reward those who do by leaving them a larger share of the parents' property at death. The greater the challenge eldercare poses, the stronger the case for testamentary freedom.

A. *The Eldercare Dilemma*

There is little doubt that individuals are living longer today than they did in the past. According to data from the Center for Disease Control, not only did average life expectancy at birth increase markedly from 1950 to 2001, but average life expectancy at age sixty-five also increased significantly over the same period.¹⁹⁵ A lower rate of infant mortality may be a factor in the overall rise in life expectancy, but it does not explain the increase in life expectancy at age sixty-five. Advances in medical technology, along with improved nutrition, help

association between bequeathable wealth and attention weakens when child and family characteristics are added to the specification."

¹⁹³ This phenomenon is termed "rent-seeking." See James M. Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & ECON. 71, 71-72 (1983); Hirsch & Wang, *supra* note 128, at 10 & n.34, 11; see also Ascher, *supra* note 160, at 112 ("Children all too often make their parents' lives miserable trying to ensure places for themselves in their parents' wills.").

¹⁹⁴ See Hirsch & Wang, *supra* note 128, at 11.

¹⁹⁵ Average life expectancy at birth increased from 68.2 years in 1950 to 77.2 in 2001, while average life expectancy at age 65 increased from 13.9 to 18.1. Elizabeth Arias, *United States Life Tables, 2001*, NAT'L VITAL STAT. REP., Feb. 18, 2004, at 33, available at http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_14.pdf.

to explain why people are living longer today than they did in the early twentieth century.¹⁹⁶ Moreover, because of high fertility after World War II, the percentage of the population over sixty-five years of age is expected to rise dramatically after 2010.¹⁹⁷ In recognition of these facts, the United Nations designated 1999 as “The Year of the Older Person.”¹⁹⁸ Based on current predictions of population growth, a similar designation could apply to the twenty-first century.

Improved health care may have significantly improved the lot of elderly persons in the United States, but it has also increased the number of individuals who survive to old age despite having chronic conditions that require long-term care.¹⁹⁹ Although many elderly people are capable of functioning independently, others must rely on caregivers for assistance, particularly if they have medical conditions that require constant treatment. When this occurs, the elderly often turn to their children and other relatives as the most likely source of help, or the relatives may volunteer out of a sense of duty to the elderly person.²⁰⁰ Services provided by unpaid caregivers can range from transportation, grocery shopping, housework, managing finances, preparing meals, giving medicines, and arranging services, to more basic activities such as dressing, bathing, toileting, and feeding.²⁰¹

Although some elderly persons with sufficient wealth can turn to paid caregivers for assistance, others may not have sufficient funds to do so or may not welcome hired help.²⁰² Moreover, if the care recipient has limited resources, arranging for paid care could

¹⁹⁶ KINSELLA & VELKOFF, *supra* note 15, at 1.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ ROBERT B. FRIEDLAND & LAURA SUMMER, DEMOGRAPHY IS NOT DESTINY, REVISITED 55 (2005), available at <http://www.agingsociety.org/agingsociety/publications/demography/demographydestiny.pdf>.

²⁰⁰ For documentation of such behavior, see CAREGIVING, *supra* note 18, at 34-35; Jane Gross, *As Parents Age, Baby Boomers and Business Struggle to Cope*, N.Y. TIMES, Mar. 25, 2006, at A1; Jane Gross, *Forget the Career: My Parents Need Me at Home*, N.Y. TIMES, Nov. 24, 2005, at A1 [hereinafter Gross, *Forget the Career*]; and Maggie Jackson, *More Sons Are Juggling Jobs and Care for Parents*, N.Y. TIMES, June 15, 2003, at 3:39, available at <http://query.nytimes.com/gst/fullpage.html?res=9E01EFD61E39F936A25755C0A9659C8B63&sec=&spoon=&pagewanted=all>.

²⁰¹ CAREGIVING, *supra* note 18, at 47.

²⁰² Moreover, if a child pays a third party to provide care to an elderly parent, there will be associated agency costs, and there may be some ambiguity as to whether the paid caregiver is an agent of the child or of the parent. Cf. Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 623-25 (2004) (discussing competing principal-agent relationships in trust context).

necessitate selling off some of the care recipient's assets and moving the person to a nursing home, which might be undesirable for all parties involved.²⁰³ It is far more common for paid care to be used as a supplement to informal care than for it to displace informal care completely.²⁰⁴ In any event, current estimates indicate that "after 2015 the number of people likely to need long-term care will increase substantially faster than the number of people available either as family or paid caregivers."²⁰⁵

Some adult children choose to leave behind productive careers and devote their time to caring for elderly parents.²⁰⁶ Other children remain in the workplace but devote a significant amount of time to helping their parents with medication management, transportation, and other needs.²⁰⁷ These activities can negatively affect the caregiving child's job performance and may lead to increased stress even if the

²⁰³ Many older persons prefer to stay at home rather than enter a nursing home facility, "not only because of the images they have of institutional care, but because they are better off psychologically and socially in familiar surroundings." JAMES A. THORSON, *AGING IN A CHANGING SOCIETY* 261 (2d. ed. 2000); see also Eugene V. Boisubain et al., *Perceptions of Long-Term Care, Autonomy, and Dignity, by Residents, Family and Care-Givers: The Houston Experience*, 32 J. MED. & PHIL. 447, 458-459 (2007) (discussing survey of long-term-care residents, family members, and health-care providers in which "[k]eeping the elderly living in a caring and loving home care situation (theirs or family) for as long as possible was the situation most preferred by almost everyone"); Rebecca A. Johnson et al., *Residential Preferences and Eldercare Views of Hispanic Elders*, J. CROSS-CULTURAL GERONTOLOGY 91, 97-98 (1997) (reporting that independence was strong factor promoting happiness among elderly Hispanics, and "[t]he most preferred source of assistance or care was the subjects' children and family, followed by friends and an outside 'helper' or community services"). On the prevalence of abuse in institutional care facilities, see STAFF OF REP. HENRY A. WAXMAN, *ABUSE OF RESIDENTS IS A MAJOR PROBLEM IN U.S. NURSING HOMES* 4-8 (2001), available at <http://oversight.house.gov/documents/20040830113750-34049.pdf>. Recent data indicate that although the percentage of elderly persons who receive formal (paid) care in addition to informal care increased from 24.4% to 28.0% from 1989 to 1994, the percentage who received formal care alone decreased from 9.0% to 7.8% over the same period. By far the largest percentage of elderly persons (66.6% in 1989 and 64.3% in 1994) receive only informal care. CTR. ON AN AGING SOC'Y, *A DECADE OF INFORMAL CAREGIVING* 5 (2005) [hereinafter *DECADE*], available at <http://ihcrp.georgetown.edu/agingociety/pubhtml/caregiver1/caregiver1.html> (citing statistics from U.S. Department of Commerce).

²⁰⁴ *DECADE*, *supra* note 203, at 5.

²⁰⁵ See ROBERT B. FRIEDLAND, *CAREGIVERS AND LONG-TERM CARE NEEDS IN THE 21ST CENTURY: WILL PUBLIC POLICY MEET THE CHALLENGE?* 1 (2004), available at <http://ltc.georgetown.edu/pdfs/caregiversfriedland.pdf>.

²⁰⁶ See Gross, *Forget the Career*, *supra* note 200. The percentage of informal caregivers who live with the care recipient, however, appears to be declining. See *DECADE*, *supra* note 203, at 3.

²⁰⁷ See Jackson, *supra* note 200.

caregiver is successfully able to balance work and family responsibilities.²⁰⁸ Children who do not live in the immediate vicinity of their parents are particularly likely to miss days of work or rearrange their work schedules because of caregiving responsibilities.²⁰⁹

Although both men and women contribute to eldercare, the burden is not evenly distributed between the sexes. According to a recent survey, approximately sixty-one percent of unpaid caregivers are women.²¹⁰ Women are also likely to provide more hours of care than men and to perform more difficult (and less pleasant) tasks such as bathing, feeding, and toileting.²¹¹ Predictably, therefore, a larger percentage of women than men report experiencing emotional stress as a result of caregiving.²¹² Women also more frequently report that they did not have a choice regarding whether to provide care.²¹³

When there is more than one adult child in a family, one child commonly bears a greater share of the caregiving burden.²¹⁴ In some families, children provide care without regard to the contributions of their siblings, but in other families, a child's provision of care is inversely proportional to the care provided by siblings.²¹⁵ Although siblings may provide emotional support to the caregiving child, there

²⁰⁸ *Id.*; see also CAREGIVING, *supra* note 18, at 12-13 (finding that emotional stress and physical strain of caregivers varies with level of caregiving burden).

²⁰⁹ See NAT'L ALLIANCE FOR CAREGIVING & ZOGBY INT'L, MILES AWAY: THE METLIFE STUDY OF LONG-DISTANCE CAREGIVING 2 (2004) [hereinafter MILES AWAY], available at <http://www.caregiving.org/data/milesaway.pdf>.

²¹⁰ CAREGIVING, *supra* note 18, at 8. The imbalance may be even greater than this statistic suggests, because some of the men providing care may be doing so not for their own parent, but for a mother-in-law or father-in-law, meaning the daughter's family continues to bear the greater eldercare burden. Recent data suggest that the number of men who provide informal care is increasing, but whether these men are providing care for their own parents or grandparents is less clear. See DECADE, *supra* note 203, at 2.

²¹¹ CAREGIVING, *supra* note 18, at 8.

²¹² *Id.* at 9.

²¹³ *Id.* at 8.

²¹⁴ See Tennille J. Checkovich & Steven Stern, *Shared Caregiving Responsibilities of Adult Siblings with Elderly Parents*, 37 J. HUM. RESOURCES 441, 442-43 & tbl.1 (2002) (citing data from National Long Term Care Survey indicating that, while shared caregiving is "important phenomenon" in families with multiple children, provision of care by single caregiver is more common in those families); see also CAREGIVING, *supra* note 18, at 10 (noting that more than 37% of caregivers report receiving no assistance from others, while only 10% of those who report shared caregiving responsibilities say that division of responsibilities is equal).

²¹⁵ Checkovich & Stern, *supra* note 214, at 444.

is also a significant possibility of intersibling conflict.²¹⁶ Thus, while the unequal distribution of care may or may not reflect an agreement among the siblings, the reality is that some children provide more care than others.

Just as increases in life expectancy have made eldercare more of a necessity, changes in the average childbearing cycle have made the provision of care more difficult for some adult children. Over the past few decades, the mean age of mothers in the United States has increased significantly.²¹⁷ Because couples are waiting longer to start their own families, it has become more common for individuals to provide care for elderly parents and at least partially dependent children simultaneously.²¹⁸ A recent study found that approximately nine percent of women ages forty-five to fifty-six in the United States give a significant amount of care to both their children and their parents, thus falling into what has been termed the “sandwich generation.”²¹⁹ Caregivers in this category are likely to face additional emotional stress and negative career consequences in comparison with those whose responsibilities are not divided.²²⁰ On the other hand, some potential caregivers who have children of their own may attempt to delegate the responsibility of eldercare to their siblings who do not have children or whose children are independent.²²¹ Thus, the rising age at which women have children has the potential not only to make eldercare more difficult, but also to spread the burden more unevenly among siblings.

Geographical mobility among adult children also makes caregiving more difficult and may lead to a more unequal burden. Migration is

²¹⁶ CAREGIVING, *supra* note 18, at 8.

²¹⁷ T.J. Matthews & Brady E. Hamilton, *Mean Age of Mother, 1970-2000*, in NAT'L VITAL STAT. REP., Dec. 11, 2002, at 1, 2 (showing increase from mean age of 24.6 in 1970 to 27.2 in 2000).

²¹⁸ See Emily Grundy & John C. Henretta, *Between Elderly Parents and Adult Children: A New Look at the Intergenerational Care Provided by the “Sandwich Generation.”* AGEING & SOC'Y, Sept. 2006, at 707, 707-08 (finding that, although it is unusual for individuals to provide care for aging parents and underage children simultaneously, individuals more commonly take care of aging parents and adult, but partially dependent, children).

²¹⁹ Charles R. Pierret, *The “Sandwich Generation”: Women Caring for Parents and Children*, MONTHLY LAB. REV., Sept. 2006, at 3, 3-4.

²²⁰ See Cyndi Brannen, *Women's Unpaid Caregiving and Stress*, CENTRES OF EXCELLENCE FOR WOMEN'S HEALTH RES. BULL., Apr. 4, 2006, at 12, 13.

²²¹ See Berit Ingersoll-Dayton, *Redressing Inequity in Parent Care Among Siblings*, J. MARRIAGE & FAM., Feb. 1, 2003, at 201, 208 (discussing how additional family responsibilities such as provision of child care can affect distribution of eldercare responsibilities among siblings).

common in the United States, especially among the college-educated population.²²² A recent survey found that approximately five percent of caregivers live between one and two hours away from their parents, and ten percent live more than two hours away.²²³ Driving long distances imposes an additional strain on caregivers, forcing them in many cases to make significant career adjustments.²²⁴ Not surprisingly, these long-distance caregivers tend to rely heavily on siblings who live closer to the care recipients.²²⁵ In many cases, siblings will expect the child who lives closest to an aging parent to take on the primary caregiving responsibilities for the parent, particularly if that child is female and has fewer career or family responsibilities of her own.²²⁶ If that child is not willing to take on the job, however, a sibling who lives further away may make considerable sacrifices to perform the caregiving role.

B. *Eldercare and Estate Division: Empirical Evidence*

This unequal distribution of caregiving responsibilities raises the question of whether elderly parents reward those children who provide more care. Prior to the last decade or so, the studies conducted on individual preferences for postmortem distribution of property generally did not focus on the possible effect that caregiving might have on that distribution.²²⁷ Because equal division of estates

²²² See U.S. CENSUS BUREAU, DOMESTIC MIGRATION ACROSS REGIONS, DIVISIONS, AND STATES, 1995 TO 2000, at 1 (2003) (reporting that over 22 million Americans moved from one state to another from 1995 to 2000); U.S. CENSUS BUREAU, MIGRATION OF THE YOUNG, SINGLE, AND COLLEGE EDUCATED, 1995 TO 2000 (2003) (reporting that over three-quarters of young, single, and college-educated U.S. population moved between 1995 and 2000, and about one-quarter of young, single, and college-educated residents of central U.S. cities moved there from another state).

²²³ CAREGIVING, *supra* note 18, at 42.

²²⁴ See MILES AWAY, *supra* note 209, at 9.

²²⁵ See *id.* at 12.

²²⁶ See Francine Russo, *Who Cares More for Mom?*, TIME, June 20, 2005, at F7, available at <http://www.time.com/time/magazine/article/0,9171,1071271-2,00.html> (quoting Cleveland University sociologist Sarah Matthews).

²²⁷ For a sample of the older literature, see Allison Dunham, *The Method, Process, and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 252-55 (1963); Paul Menchik, *Primogeniture, Equal Sharing, and the U.S. Distribution of Wealth*, Q.J. ECON., Mar. 1980, at 299, 303-04; Paul Menchik, *Unequal Estate Division: Is It Altruism, Reverse Bequests, or Simply Noise?*, in DENIS KESSLER & ANDRÉ MASSON, *MODELLING THE ACCUMULATION AND DISTRIBUTION OF WEALTH* 105, 111-14 (1988); Mark O. Wilhelm, *Bequest Behavior and the Effect of Heirs' Earnings: Testing the Altruistic Model of Bequests*, 86 AM. ECON. REV. 874, 890-91 (1996); and Sheldon F. Kurtz, *Comment, A Comparison of Iowans' Dispositive Preferences with*

appeared to be the norm, scholars tended to focus their attention on the motivations for equal division.²²⁸ As eldercare has become a more important phenomenon, however, researchers have begun to examine whether the receipt of care plays a role in the estate planning of those elderly who opt for unequal division.²²⁹ Current research suggests that the answer is yes, at least in some cases, and that the effect tends to favor children who have provided or are expected to provide care.²³⁰

In 2005, Edward Norton and Donald Taylor conducted a study of estate division practices that has some bearing on the relationship between caregiving and testamentary distribution.²³¹ Norton and Taylor combined data from a study of elderly individuals in five North Carolina counties with actual probate records from those counties.²³² Examining probate files of unmarried individuals with at least two children, Norton and Taylor found that equal division among the children occurred in seventy to eighty-three percent of the cases, depending on what definition of “equal” was used.²³³ However, the researchers determined that two factors made it more likely for a parent to divide the property unequally among the children: having a larger number of children and revising a will within five years of death.²³⁴ Norton and Taylor inferred from that the latter factor that provision of eldercare may have played a role in the division of estates, as those who revised a will within five years of death were likely to have better information about how much care and attention their children had provided.²³⁵ This finding is consistent with the hypothesis that caregiving plays a role in the distribution of estates, although other explanations can be given.²³⁶ Norton and Taylor

Selected Provisions of the Iowa and Uniform Probate Codes, 63 IOWA L. REV. 1041, 1100-16 (1978).

²²⁸ For a recent attempt to explain this phenomenon, see B. Douglas Bernheim & Sergei Severinov, *Bequests as Signals: An Explanation for the Equal Division Puzzle*, 111 J. POL. ECON. 733, 735 (2003), who argue that parents use equal division to signal to their children that they love them equally, even if they are partial to one particular child.

²²⁹ See sources cited *infra* notes 231-246.

²³⁰ See *id.*

²³¹ Norton & Taylor, *supra* note 130, at 79-80.

²³² *Id.* at 72. Norton and Taylor relied on the Piedmont Health Survey of the Elderly, a survey of individuals age 65 and over who resided in five North Carolina counties from 1986 to 1993. *Id.*

²³³ *Id.* at 74. The strict definition included only equal divisions of property, while the looser definition included divisions that were nearly equal (within two percent). See *id.* at 73.

²³⁴ *Id.* at 79-80.

²³⁵ *Id.*

²³⁶ For example, a parent who revises his or her will shortly before death would

reported having encountered “examples in the probate records where parents explicitly rewrote wills a few years prior to death and changed the allocation due to recent interactions (or lack of interactions) with their children.”²³⁷

Although the Norton and Taylor study gives some support for a correlation between caregiving by children and the division of estates, a recent study by Meta Brown provides stronger evidence. In an article published in 2006 in the *Journal of Human Resources*, Brown offered additional proof that parents with care needs may adjust their estate plans to reward children who are current or projected caregivers.²³⁸ Brown’s study analyzed data from the first wave of the Assets and Health Dynamics among the Oldest Old (AHEAD) study of U.S. residents age sixty-nine and over. She determined that, with respect to unmarried parents with two or more living children, “parents more often make end-of-life transfers to children who provide them with regular care and to the children they expect to care for them should the need arise.”²³⁹ Like Norton and Taylor, Brown reported that equal division among all the children was the norm.²⁴⁰ When parents did opt for unequal division, however, current or expected provision of care by a child commonly resulted in the child receiving a greater share of the estate.²⁴¹

The data in the AHEAD study included information on current caregiving provided by children as well as predictions regarding future care.²⁴² The study also indicated which children were included in the parents’ wills and whether the division among those children was equal or unequal, as well as information on life insurance policies and beneficiary designations.²⁴³ Performing a regression on this data, Brown found a strong correlation between the provision of care by a child whose parent had current care needs and expected end-of-life transfers from the parent to that child.²⁴⁴ Brown also found a similar

also have better information about the children’s finances, which could also influence the division of the estate in an altruistic model. *See id.* at 80.

²³⁷ *Id.*

²³⁸ Meta Brown, *Informal Care and the Division of End-of-Life Transfers*, 41 J. HUM. RESOURCES 191, 217 (2006).

²³⁹ *Id.* The first wave of the AHEAD study did not include individuals who reside in institutions such as nursing homes. *Id.* at 199.

²⁴⁰ *Id.* at 203 tbl.2 (reporting that 49.8% of all decedents in survey provided equally for their children by will and that 37.1% did not have wills).

²⁴¹ *See id.* at 193.

²⁴² *Id.* at 199.

²⁴³ *Id.* at 199-200.

²⁴⁴ *Id.* at 211 tbl.1 (finding positive correlation at one-percent significance level).

correlation in the planned end-of-life transfers from parents who did not have current care needs, except that the expected transfers were to children whom the parents predicted would be future caregivers.²⁴⁵ Parents in both groups evidently intended to transfer more of their wealth to caregiving children.²⁴⁶

The Brown study has important implications for inheritance law. Because the U.S. does not mandate equal division of property among the testator's children, it allows parents to reward their children for providing eldercare. If an American state adopted a forced share for children, testators in that state would have less flexibility to respond to the provision of care through the division of their property at death. A family maintenance system would delegate the decision to a court rather than to the parent. The U.S. rule allows a parent to punish a child for failing to provide care, but it also allows a parent to reward a child (or someone else) who does provide care.²⁴⁷ Therefore, changing the U.S. rule requires the conclusion that rewarding caregivers for their services is either not a sufficient justification for disinheritance or that the parent is not the best person to decide whether a child deserves to be rewarded.

In assessing the role of end-of-life transfers in the provision of eldercare, one must concede that children often provide care altruistically, without regard to any monetary reward. In an unpublished study, Brown herself has come to this conclusion.²⁴⁸ Because the amount of bequeathable wealth diminishes over the

²⁴⁵ *Id.* (one-percent significance level).

²⁴⁶ Parents with current care needs in the survey intended to transfer an average of \$11,303 more to caregiving children, while other parents intended to transfer an average of \$22,301 more to children expected to provide help in the future. *Id.* at 193. Brown's findings are consistent with an earlier study by Audrey Light and Kathleen McGarry, who examined interviews that were conducted in 1999 as part of the National Longitudinal Surveys of Mature Women and Young Women. Analyzing this data, Light and McGarry found that, among mothers who reported an intention to divide their estates unequally, those who were over age 75 or in poor health were significantly more likely to give an exchange-related explanation, such as the provision of additional care by one child. Audrey Light & Kathleen McGarry, *Why Parents Play Favorites: Explanations for Unequal Bequests*, 94 AM. ECON. REV. 1669, 1678 (2004).

²⁴⁷ See, e.g., *In re Estate of Price*, 388 N.W.2d 72, 75-76, 80 (Neb. 1986) (upholding will devising property to daughter and son-in-law who cared for testator when he was ill); *Lipper v. Weslow*, 369 S.W.2d 698, 700-03 (Tex. App. 1963) (reversing finding of undue influence when testator rewarded children who were "attentive" to her and her husband "especially during the past few years when we have not been well"); see also Leslie, *supra* note 52, at 248 n.68 (citing similar cases).

²⁴⁸ Meta Brown, *End-of-Life Transfers and the Decision to Care for a Parent* (Feb. 2007) (unpublished manuscript, at 2, <http://www.ssc.wisc.edu/~mbrown/EndofLife3.pdf>).

lifetime of the parent, a child who helps prolong the parent's life by providing eldercare may receive a smaller bequest than he or she would if the parent died immediately.²⁴⁹ Analyzing the AHEAD data, Brown found "no evidence that children's caregiving behavior is influenced by parents' planned bequests."²⁵⁰ Thus, unequal treatment by the parents may not have much of an effect on the willingness of children to provide care.

Nevertheless, even if end-of-life transfers are not necessary to induce altruistic children to provide care, there is still a moral argument for allowing parents to reward children who have provided care through unequal estate division. When one child has worked harder than others have, sacrificing career goals and serenity as a result, it seems right and fair for a parent to reward that child with a larger bequest. Conversely, by guaranteeing each child an equal share, a forced-heirship regime may reward children who have not shouldered their share of the eldercare burden, and make the caregiving child become resentful of undeserving siblings. It will also treat sons and daughters equally, despite the evidence that women devote more time than men to taking care of their parents.²⁵¹ The U.S. rule avoids this apparent unfairness. Moreover, to the extent that any child is not altruistically motivated, restrictions on testamentary freedom would limit the utility of wealth as an inducement for care.

Assuming that the parent is of sound mind and not subject to undue influence, fraud, or duress, the parent is uniquely qualified to pass judgment on the amount and quality of care each child provided. No one is better positioned to see how much care is being offered than the recipient of that care, assuming the recipient is mentally competent and not subject to undue influence.²⁵² If, rather, the decision is left to a court or jury, persons who did not witness the actual care and who are guided by their own general assumptions about how children behave will make the determination. The U.S. rule utilizes this informational advantage of the testator. Although a forced-share regime might give the testator flexibility of disposition with regard to most or all of the estate, some portion would necessarily pass to all the

²⁴⁹ *Id.* (manuscript at 1-2).

²⁵⁰ *Id.* (manuscript at 41). On the other hand, the provision of care does appear to respond to "the expected present value of life insurance settlements." *Id.*

²⁵¹ See *supra* notes 210-213 and accompanying text.

²⁵² As discussed above, the U.S. probate system is quite good at ensuring that the testator had competent volition — in fact, it arguably overprotects against that prospect, and may frustrate the intent of some competent testators. *Supra* notes 52-54 and accompanying text.

children whether they deserve it or not. In contrast, by allowing complete testamentary freedom when the testator has competent volition, the U.S. rule puts the decision in the hands of the one who has the best knowledge of all the relevant facts. When one individual — often, but not always, a descendant — has helped the testator more than anyone else, the testator is uniquely situated to notice the difference and reward that individual accordingly.

It is unfortunate, but inevitable, that some testators will not use the information at their disposal to reach a fair decision.²⁵³ Yet much the same could be said of supposedly neutral judges and jurors, not only in the flawed U.S. probate system,²⁵⁴ but also in jurisdictions with a meritocratic judiciary.²⁵⁵ Anyone can err, particularly when someone else's property is involved. Because the testator accumulated the wealth that will be distributed at death, there is a strong case for entrusting the testator with the difficult choice of who should inherit that wealth.

V. IMPLICATIONS FOR FURTHER REFORM

Thus far, this Article has essentially made a case for the status quo: that is, for retaining a theoretically unlimited power to disinherit adult, non-disabled children. This Part will ask whether anything about inheritance law in the U.S. should be changed in light of the eldercare problem, beginning with the treatment of caregivers when someone dies without leaving a will. Testamentary freedom, by itself, will not solve the problem of eldercare: indeed, it is doubtful whether any change to inheritance law could accomplish that goal. If the

²⁵³ For example, a parent who abused a child in the past still has the power to disinherit that child, and a parent could disinherit a child for reasons that have nothing to do with the provision of care by other children. Distinguishing these situations from the usual case, however, would involve giving considerable discretion to the finder of fact, which, as discussed above, may not work in the U.S. probate system. See *supra* notes 171-176 and accompanying text. Judicial intervention may be necessary, however, when the testator goes beyond merely dividing the property and attempts to restrain the personal freedom of the devisees. See Daphna Lewinsohn-Zamir, *More Is Not Always Better than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 644-47 (2008); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1301-06; Tate, *supra* note 123, at 464-66, 491-96.

²⁵⁴ See Langbein, *supra* note 58, at 2044-45; see also *supra* notes 171-176 and accompanying text (discussing problems with U.S. probate system).

²⁵⁵ See *supra* notes 48-50 and accompanying text (discussing cases from England and Australia where courts have ordered provision for heir beyond testamentary share notwithstanding alleged negative conduct toward testator).

contributions of caregivers are to be properly acknowledged, however, steps must be taken to protect their interests in cases of intestacy, while guarding them against meritless will contests when a valid estate plan does exist.

A. *Eldercare and Intestacy*

The challenge of eldercare discussed in the previous Part offers a rational basis for continuing to permit freedom of testation. Nevertheless, freedom of testation is essentially irrelevant to the estates of the millions of Americans who die intestate. Evidence suggests that testate succession remains the exception among ordinary Americans rather than the rule, although the reverse may be true for the wealthy.²⁵⁶ When a person dies intestate, the court-appointed administrator will distribute the property, per the statutory scheme, to the decedent's heirs. The administrator will not consider caregiving services in the determination of each heir's intestate share.²⁵⁷ It is not possible to capitalize on the informational advantage of the decedent when the decedent died without any kind of estate plan. Thus, on intestacy, children who provide more eldercare services will not automatically be rewarded or compensated for their efforts by receiving a larger share of the estate.²⁵⁸

Although intestacy statutes do not alter the shares of individuals based on their contributions to the decedent's welfare, those individuals may still claim property from the estate not as heirs, but as creditors. In such a case, however, the caregiving individual may be frustrated by a doctrine known as the "doctrine of non-recovery" or "family member rule."²⁵⁹ Normally, under the law of contracts, when a person undertakes to perform services for someone "in the apparent expectation of payment," the law presumes that the person was

²⁵⁶ Recent studies suggest that 39% to 48% of American adults have a valid will, although the figure is higher (up to 69%) for wealthier Americans. See DUKEMINIER ET AL., *supra* note 30, at 59 (citing surveys by Roper Center for Public Opinion Research).

²⁵⁷ See, e.g., UNIF. PROBATE CODE §§ 2-102 to -103 (1990) (allocating shares to surviving spouse and descendants without regard to provision of caregiving services).

²⁵⁸ Given the problems associated with judicial discretion under family maintenance statutes, see *supra* notes 48-50 and accompanying text, it is not clear that giving the court a power to adjust the shares of heirs on the basis of caregiving services (rather than simply compensate them for the actual value of services provided) would be a good solution in any event.

²⁵⁹ See Jonathan S. Henes, *Compensating Caregiving Relatives: Abandoning the Family Member Rule in Contracts*, 17 CARDOZO L. REV. 705, 706 (1996); Heather M. Fossen Forrest, Comment, *Loosening the Wrapper on the Sandwich Generation: Private Compensation for Family Caregivers*, 63 LA. L. REV. 381, 391 (2003).

“offering to furnish them for reasonable compensation,” and thus may bring an implied contract claim.²⁶⁰ When the person is providing services for a family member, however, the presumption is reversed. Thus, the claimant will have to prove that the services were not gratuitous.²⁶¹ The burden is therefore on the caregiving family member to show that she performed the services with the expectation of compensation.

In practice, when the caregiver expends considerable effort in taking care of a relative who is elderly and infirm, courts tend to find the presumption rebutted and allow an implied contract claim to proceed.²⁶² Such cases, however, tend to involve a claim by an in-home caregiver providing continuous care for an elderly relative, not a

²⁶⁰ See E. ALLAN FARNSWORTH, *CONTRACTS* § 3.10 (2d ed. 2001).

²⁶¹ *Id.* Family caregivers also face difficulty bringing restitution claims. The original *Restatement of Restitution* provides that “[a] person who has conferred a benefit upon another, manifesting that he does not expect compensation therefor, is not entitled to restitution merely because his expectation that the other will make a gift to him or enter into a contract with him is not realized.” *RESTATEMENT (FIRST) OF RESTITUTION* § 57 (1937). The case of a nephew providing support to an elderly aunt out of a sense of moral obligation to the family, without manifesting an intention that he would be compensated, was specifically mentioned as a case where no restitution is warranted. *Id.* § 57 cmt. b, illus. 1. A discussion draft of the pending *Restatement (Third) of Restitution* states that “[t]here is no liability in restitution in respect of a benefit intentionally conferred by the claimant on the recipient, unless the circumstances of the transaction are such as to excuse the claimant from the necessity of basing a claim to payment on a contract with the recipient.” *RESTATEMENT (THIRD) OF RESTITUTION* § 2 (Discussion Draft 2000). Exceptions include the provision of services to protect another person’s life, health, property, or economic interests, and the performance of a duty to supply necessities to a third person. *Id.* §§ 20-22. In some circumstances, it may be possible for a caregiving child to bring a restitution claim against the noncaregiving children on the theory that all the children owed the parent a duty of support. See *In re Application of Mach*, 25 N.W.2d 881, 882-83 (S.D. 1947); *RESTATEMENT (THIRD) OF RESTITUTION* § 22 cmt. g, illus. 8 (Tentative Draft No. 2, 2002).

²⁶² See, e.g., *In re Estate of Beecham*, 378 N.W.2d 800, 804 (Minn. 1985) (allowing daughter-in-law who “rendered around the clock care for an elderly, chronically incontinent woman” to bring implied contract claim despite presumption of gratuitousness); *In re Estate of Griffith*, 758 P.2d 407, 409 (Or. 1988) (finding niece of decedent overcame presumption when her “usual occupation was in-home care, and she was normally paid for her services”); *Adams v. Underwood*, 470 S.W.2d 180, 186 (Tenn. 1971) (finding presumption overcome when daughter moved into her father’s home “for the purpose of rendering services of an extraordinary burdensome nature”). It is difficult to find modern cases where a gratuitous promise is “refused enforcement solely on the ground that consideration was lacking.” Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 44-45 (1992). However, there is a “wealth of dictum in support of the traditional rule,” *id.* at 45, and this may dissuade some claimants from pursuing expensive litigation.

child who lives outside the home but helps the parent with activities such as shopping, transportation, and financial management.²⁶³ Because of the presumption, the latter type of plaintiff is unlikely to file a claim, or may settle for a lesser amount than the true value of the services. Even some live-in caregivers may be discouraged from suing, or settle for less than they deserve, because they fear they will be unable to rebut the presumption.²⁶⁴

In recent years, commentators have argued that the presumption of gratuitousness in the context of eldercare is outdated and needs to be reformed or rejected entirely.²⁶⁵ Illinois enacted a statute in 1988 that partly reflects this judgment, allowing a close family member who “dedicates himself or herself to the care of [a] disabled person by living with and personally caring for the disabled person for at least 3 years” to bring a claim against the person’s estate.²⁶⁶ However, neither the recent commentary nor the Illinois statute draws any distinction between claims brought against the estate of a decedent who left a will and claims brought against the estate of an intestate. These two categories of claims involve different policy issues, and therefore should be evaluated separately.

Although some decedents may die intestate because they have consciously selected the statutory scheme, those who die intestate more commonly do so for other reasons. For example, the decedent

²⁶³ See sources cited *supra* note 262.

²⁶⁴ An additional reason not to bring the claim, not related to the presumption of gratuitousness, is the possibility that success will lead to income tax liability. See 26 U.S.C. § 61(a)(1) (2006) (defining gross income to include “compensation for services”). If a will does not recite that a testator made a bequest in return for services, it is unlikely to be subject to income tax. See Rev. Rul. 66-167, 1966-1 C.B. 20. If the caregiver prevails under an implied contract theory, however, the IRS may claim income tax due on the amount recovered. Nevertheless, depending on the size of the caregiver’s intestate share relative to the value of the caregiving services, it may be worth paying the income tax in order to recover in implied contract. The presumption of gratuitousness complicates this calculus by making success less certain for the caregiver.

²⁶⁵ See Henes, *supra* note 259, at 718; Forrest, *supra* note 259, at 392. In general, the American legal system has a tendency to impose restraints on economic exchange within intimate relationships, which can lead to undesirable distributive consequences. See Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 517-22 (2005). The presumption that caregiving services provided by a family member are gratuitous may be an example, given that caregivers are more likely to be female. See sources cited *supra* note 20.

²⁶⁶ 755 ILL. COMP. STAT. 5/18-1.1 (2007). Forrest argues that this statute does not go far enough, insofar as it is limited to situations where the caregiver and the care recipient live in the same household and it contains a three-year minimum caregiving requirement. Forrest, *supra* note 259, at 405-07.

may have been afraid to confront the possibility of death,²⁶⁷ unable to afford an attorney,²⁶⁸ or may have mistakenly assumed that the statutory scheme would match the decedent's own preferences.²⁶⁹ Given the evidence that testators reward caregiving children,²⁷⁰ presumptively denying a claim on intestacy to such caregivers would seem to conflict with the goal of state intestacy statutes to give effect to the average person's intent.

With regard to decedents who die leaving a will, the issues are more complicated because the case for reversing the presumption for family caregivers is less clear. The Brown study suggests that parents not only devise more property to children who are current caregivers, but also devise more to expected future caregivers.²⁷¹ If this is so, then the division of property in a will may take into account the parent's estimation of how much care each child will provide in the future, even if the parent wrote the will before the child actually provided care. If a caregiving child is presumptively entitled to reimbursement even when the parent left a will, then the child may be compensated twice: once by the testator as a devisee and again by the court as a creditor. Assuming that most children care for their parents for altruistic reasons, as seems to be the case,²⁷² overcompensating children for the provision of care may encourage wasteful and

²⁶⁷ See DUKEMINIER ET AL., *supra* note 30, at 59-60; SIGMUND FREUD, *Our Attitude Towards Death*, in 4 COLLECTED PAPERS 304, 304-05 (John D. Sutherland ed. & John Riviere trans., 10th ed., The Hogarth Press Ltd. & Inst. of Psycho-Analysis 1957) (1925) (noting that one's own death is difficult to imagine).

²⁶⁸ The cost of will drafting is leading to a proliferation of "do-it-yourself" estate planning software programs, which allow the testator to draft his or her own will by entering information into a computer. See Gene Meyer, *Companies See Potential Business in Do-It-Yourself Legal Kits*, KAN. CITY STAR, Jan. 13, 2008, at D3. Whether this software will lead to a decline in the percentage of decedents who die intestate remains to be seen, although it is likely to produce at least some new business for probate attorneys after the testators die and the mistakes of the inexperienced testators are brought to light. *But cf.* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. PROB. & TR. J. 27, 70-71 (2008) (finding that will contests are in fact rarely brought to challenge homemade wills). For an argument that the prevalence of intestacy reflects a failure on the part of the legal profession to market wills effectively, see Alyssa A. DiRusso & Michael R. McCunney, *Marketing Wills*, 16 ELDER L.J. 33, 35 (2008).

²⁶⁹ For an example of this mistake, see *Mahoney v. Grainger*, 186 N.E. 86, 86 (Mass. 1933) (reviewing will of testator who wished her 25 first cousins to share equally in her estate, but devised her estate to her "heirs at law," category that under state law consisted of one person, testator's maternal aunt).

²⁷⁰ See Brown, *supra* note 238, at 203-17.

²⁷¹ See *id.* at 201 tbl.1.

²⁷² See Brown, *supra* note 248, at 41.

manipulative activities on the part of the children without increasing the supply of genuine eldercare services.²⁷³

In order to address this problem, we might distinguish between situations where the testator has opted for equal division of the estate among the children from those where the testator provided one child a larger share. In the former instance, the law could discourage the court from adjusting the share of the caregiving child to reflect expected future services. To make this distinction, however, we would have to abandon the assumption that the testator is the best judge of the value of the services that each child provides,²⁷⁴ thereby making it easier for a court or jury to second-guess the testator's decision.²⁷⁵

Therefore, rather than reverse the traditional presumption of gratuitousness in all cases where a family member provides care, we might make the presumption dependent on whether the care recipient died intestate or left a will. In cases where the decedent died intestate, the traditional presumption of gratuitousness would be reversed. Caregivers would be presumptively entitled to compensation from the probate estate for services rendered regardless of the relationship with the decedent, unless the other heirs can affirmatively show that the services were intended to be gratuitous.²⁷⁶ When the decedent left a

²⁷³ See Buchanan, *supra* note 193, on the problem of rent-seeking in inheritance law. The provision of care by persons unrelated to the decedent could conceivably be more responsive to anticipated bequests, and a similar argument might be made concerning relatives by affinity, such as daughters-in-law and sons-in-law. See *infra* note 277. With regard to those caregivers, the risk of overcompensation may be outweighed by the incentives for eldercare created by treating them like other creditors of the decedent. Moreover, there may be less cause to trust the testator's judgment when caregiving by a son-in-law or daughter-in-law is involved because the testator may not view spouses of children as natural objects of his or her bounty notwithstanding the caregiving they provide. Cf. CAL. PROB. CODE § 6402(g) (West 1991 & Supp. 2008) (allocating share on intestacy to certain relatives by affinity of decedent when decedent left no next of kin, but excluding daughters-in-law and sons-in-law of decedent). When the will devises some property to a son-in-law, daughter-in-law, or unrelated person, however, the heirs might be allowed to argue that the devise was meant to satisfy the obligation to repay the caregiver for services performed.

²⁷⁴ See *supra* text accompanying note 254.

²⁷⁵ To some extent, courts may already engage in this second-guessing by manipulating undue influence and will formalities statutes so as to protect members of the testator's family. See Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 586-608 (1999). A rule that presumptively allowed family caregivers to claim an implied contract when a decedent left a will could exacerbate this tendency.

²⁷⁶ Whether or not this presumption is reversed on intestacy, a statute should also

will, on the other hand, and the caregiver was a family member whose services could be anticipated by the decedent, the traditional rule would apply, and the caregiver would need to rebut the presumption of gratuitousness, perhaps by showing that the services provided were unusually burdensome or the care recipient indicated an intent to pay the caregiver.²⁷⁷ This rule could be promulgated by statute, or, since the presumption of gratuitousness is generally a matter of common law, by judicial decision.

Making a distinction on the basis of whether the care recipient died intestate is not necessarily a simple solution. In particular, courts will have to decide what rule to apply when the decedent died partially intestate or employed one or more nonprobate will substitutes to dispose of a significant share of her property.²⁷⁸ Courts might also

provide for the opposite situation, namely elder abuse. When an heir or devisee has abused an elderly decedent, that person should forfeit his or her share. Cf. CAL. PROB. CODE § 259 (West 2002) (restricting ability of abuser to inherit damages awarded to victim's estate or to serve as victim's fiduciary). However, state statutes vary widely in their treatment of abuse of decedents, and it is not clear that a bright-line rule is the most effective strategy. See Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 986-87, 990-91 (2007) (arguing in favor of more subjective approach).

²⁷⁷ Cf. FARNSWORTH, *supra* note 260, § 3.10 ("The presumption can be rebutted if, for example, the services are unusually onerous and there are expressions of intent to pay."). If a caregiving child was not yet born or adopted by the testator at the time the will was executed, or was believed by the testator to be dead, he or she may be protected by a pretermitted child statute if nothing is left to him or her in the will. For an example of such a statute, see UNIF. PROBATE CODE § 2-302 (1990). Relatives other than children, however, would not benefit from a pretermitted child statute in most jurisdictions, and the presumption of gratuitousness might be reversed for such individuals if they first become known to the care recipient after execution of a will. Moreover, it is not clear that the presumption of gratuitousness should apply in any case to relatives by affinity, such as sons-in-law and daughters-in-law, even though such individuals may assist with caregiving. *But cf. In re Estate of Beecham*, 378 N.W.2d 800, 803-04 (Minn. 1985) (applying presumption to daughter-in-law, but holding it rebutted given nature of services performed). On the special issues raised when eldercare is provided by friends of the care recipient, see David Horton, *The Uneasy Case for California's Care Custodian Statute*, 11 CHAP. L. REV. (forthcoming 2008) (manuscript at 21-24, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1184610); Ethan J. Leib, *Friendship and the Law*, 54 UCLA L. REV. 631, 697-99 (2007); and Kirsten M. Kwasneski, Comment, *The Danger of a Label: How the Legal Interpretation of "Care Custodian" Can Frustrate a Testator's Wish to Make a Gift to a Personal Friend*, 36 GOLDEN GATE U. L. REV. 269, 283-90 (2006).

²⁷⁸ On the increasing popularity of nonprobate will substitutes, and the reasons for their popularity, see John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109-25 (1984); and Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 170-77 (2008).

struggle with cases where the testator left a will later deemed to be invalid, either because it failed to satisfy the statutory formalities, or because it was procured by fraud, undue influence, or some other unjust cause. In some cases, it may be difficult to decide whether reversal of the presumption of gratuitousness is warranted.

The problem of wills that fail to satisfy statutory formalities would be reduced or eliminated by the enactment of a statute similar to the “harmless error” provision of the UPC. This uniform law allows the court to probate a document on the basis of clear and convincing evidence that it was intended to be the decedent’s will, even if the formalities are not complied with.²⁷⁹ John Langbein has made a convincing case, which does not depend on the provision of eldercare, for the enactment of such a provision.²⁸⁰ If the court excuses harmless defects in execution, a child intentionally omitted from the will cannot gain an undue advantage in a contract claim simply because a parent failed to comply with the technical requirements for executing a will. On the other hand, courts could resolve cases of partial intestacy or provision by will substitute on the basis of how comprehensive or fully realized the nonprobate or partial testamentary disposition is and how likely it is to reflect a considered evaluation of the caregiver’s services.

When the court sets aside a will on the ground of undue influence, fraud, duress, or lack of testamentary capacity, there is a tougher policy dilemma. In such cases, the main beneficiary under the invalidated will may well be the family caregiver, who has persuaded the testator to alter the estate plan in the caregiver’s favor.²⁸¹ It may be unjust to reward the caregiver by facilitating an implied contract claim when the caregiver’s wrongdoing frustrated the testator’s intent. If the court allows an implied contract claim, however, this may have the beneficial effect of discouraging meritless will contests, as the contestants have less to gain in the event the will is set aside.

²⁷⁹ UNIF. PROBATE CODE § 2-503 (1990).

²⁸⁰ See John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 4-5 (1987); see also Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 603-06 (2007) (suggesting that Australian courts applying “harmless error” rule since 1987 “continue, overall, to be extremely successful in distinguishing cases where the decedent accidentally or mistakenly failed to comply with Wills Act formalities from those where he hesitated to finalize his intentions or where the will was the subject of fraud”). But see John V. Orth, *Wills Act Formalities: How Much Compliance Is Enough?*, 43 REAL PROP. PROB. & TR. J. 73, 78-81 (2008) (arguing that it is difficult to tell whether courts apply “harmless error” provisions correctly).

²⁸¹ See sources cited *supra* note 247.

As a compromise, a statute might direct the courts to disallow the caregiver's implied contract claim only when the caregiver's behavior was particularly egregious, such as when the caregiver procured the will through fraud, malice, or bad faith. Depending on the nature of the testator's interference, the caregiver might forfeit the allocated testamentary share, but still be presumptively able, as a creditor of the estate, to recover the fair value of unpaid services performed, assuming that the success of the will contest results in the estate passing by intestacy.²⁸²

One obvious objection to reversing the presumption of gratuitousness in cases where a caregiver provided services to an intestate relative is that it could lead to frequent litigation in an area of the law normally characterized by cooperative administration.²⁸³ This argument, however, always applies whenever a party is allowed to bring a claim before a court. Because a caregiver (or an attorney working on commission) bears the expense of bringing an implied contract claim, there will be a significant disincentive to bring such claims when they lack merit or when the estate contains insufficient assets, even if the presumption is in the caregiver's favor. The main effect of reversing the presumption may be to enhance the bargaining position of the caregiver vis-à-vis the other heirs of the decedent, so that the caregiver will be able to negotiate a fair share without the necessity of a lawsuit.²⁸⁴ To ensure that this is done only when the caregiver has a meritorious claim, a jurisdiction might require an unsuccessful claimant to pay the costs incurred by the estate in defending litigation, which would prevent so-called "strike suits" from draining the assets of an estate.²⁸⁵ This might be a fair tradeoff for the additional advantage conferred on the caregiver by the reversal of the presumption on intestacy.

²⁸² In cases where the will contest results in the probate of an earlier will, the presumption of gratuitousness would apply, on the theory that the previous will already took into account the future provision of care.

²⁸³ On the infrequency of will contests in the United States, see Schoenblum, *supra* note 61, at 614. Because intestacy appears to be more common than succession by will, see *supra* note 256, facilitating challenges to intestate distribution could have a more significant impact on the volume of probate court business.

²⁸⁴ Under the UPC, for example, the heirs to an estate may agree to alter their shares, and such agreement is binding on the personal representative as to the parties involved. UNIF. PROBATE CODE § 3-912 (1990). If the non-caregiving children know that the presumption is in favor of the caregiving child on intestacy, they may be more inclined to reach such an agreement.

²⁸⁵ See Langbein, *supra* note 58, at 2043 (discussing disadvantages of American rule requiring litigating parties to bear their own costs).

B. Reducing Meritless Will Contests

Whether or not state courts or legislatures choose to remove barriers for caregivers who claim a share on intestacy, they should certainly ensure meritless will contests do not frustrate testamentary dispositions intended to benefit caregiving relatives. Under the *Restatement (Third) of Property: Wills and Other Donative Transfers*, in order to establish a presumption of undue influence in a gratuitous transfer, it is necessary to show not only a confidential relationship with the donor, but also some suspicious circumstances, as when the donor is in a “weakened condition” or there is a “decided discrepancy between a new and previous wills or will substitutes of the donor.”²⁸⁶ A comment to the *Restatement* expressly states that “[a] testator’s decision to leave a substantial devise or even the bulk or all of his or her estate to voluntary caregivers — relatives or other persons voluntarily caring for the testator — is not a basis for invalidating a will, in the absence of suspicious circumstances.”²⁸⁷

If the *Restatement* rule is correctly applied, voluntary providers of eldercare should have less cause to fear meritless will contests by disinherited heirs. There remain a few states, however, that apply a different rule, rejected by the drafters of the *Restatement*. In these states, at least with regard to some transfers, a claimant raises a presumption of undue influence merely by demonstrating a confidential relationship, without any showing of suspicious circumstances.²⁸⁸ Under this rule, if the court deems the provision of eldercare by a child to constitute a confidential relationship, it would raise a presumption of undue influence that would be difficult to rebut, despite the absence of suspicious circumstances. Moreover, even if the caregiver prevails, the court might not reimburse the caregiver for the costs of litigation.²⁸⁹ In order to protect caregivers from meritless claims of undue influence, therefore, those jurisdictions

²⁸⁶ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmts. f-h (2003).

²⁸⁷ *Id.* § 8.3 cmt. h.

²⁸⁸ Jurisdictions following this rule for some donative transfers include Indiana, Iowa, Maryland, Mississippi, and Utah. See *Summit Bank v. Quake*, 631 N.E.2d 13, 15 (Ind. 1994); *Jackson v. Shrader*, 676 N.W.2d 599, 604 (Iowa 2004); *Upman v. Clarke*, 753 A.2d 4, 9-10 (Md. 2000); *Holmes-Pickett v. Holmes-Price*, 961 So. 2d 674, 680 (Miss. 2007); *Robertson v. Campbell*, 674 P.2d 1226, 1233 (Utah 1983).

²⁸⁹ See *Bailey v. Sawyer*, No. 2050707, 2007 WL 4357396, at *9 (Ala. Civ. App. Dec. 14, 2007) (holding that caregiving child who successfully defended undue influence challenge by noncaregiving grandchildren could not recover attorney’s fees from contestants because latter “offered credible evidence in support of their theory of [the] will contest”).

that have not already done so should embrace the better rule of the *Restatement*.²⁹⁰

In addition to adopting the *Restatement* rule concerning the presumption of undue influence, states might consider the possibility of adopting a “living probate” alternative. Through this mechanism, a testator may establish testamentary capacity *inter vivos*.²⁹¹ Although proposals for living probate differ in their details, the testator will typically come before the court, produce the will, and establish the necessary testamentary capacity through witness testimony or other evidence.²⁹² Three U.S. jurisdictions, Arkansas, North Dakota, and Ohio, currently offer such a system as an option for those who have concerns about postmortem probate.²⁹³ Living probate admittedly has not been particularly popular in the states that have it; critics have argued it is expensive and unfair to presumptive takers under a will.²⁹⁴ Some of these problems, however, may be specific to the “contest model” that was adopted in Arkansas, North Dakota, and Ohio. Moreover, these problems could be ameliorated by changing the procedures involved.²⁹⁵ Although the Uniform Law Commission considered adopting a Uniform Ante-Mortem Probate of Wills Act in

²⁹⁰ California recently enacted a statute that presumptively disqualifies non-family “care custodians” from being beneficiaries of testamentary transfers from dependent adults for whom they provide care. CAL. PROB. CODE § 21350(a)(6) (West Supp. 2008). The new statute seems to conflict with previous California law on the subject of undue influence, which has been characterized as more protective of testamentary freedom than the law of other states. Horton, *supra* note 277 (manuscript at 6-8). Although the new statute does not affect caregiving children directly, it embraces the disfavored approach of applying bright-line rules for undue influence, as contrasted with the balancing test of the *Restatement*. For an argument that traditional undue influence doctrine is superior to California’s new bright-line approach as applied to unpaid caregivers, see Kwasneski, *supra* note 277, at 291-92.

²⁹¹ See John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 63 (1978).

²⁹² See *id.* at 63, 72, 77.

²⁹³ See ARK. CODE ANN. § 28-40-202 (2004); N.D. CENT. CODE § 30.1-08.1-01 (1996); OHIO REV. CODE ANN. § 2107.081 (West 2005).

²⁹⁴ See Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1080 (1980); see also WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 4 (illustrating complications antemortem estate division may involve).

²⁹⁵ Compare Langbein, *supra* note 291, at 77-85 (arguing that living probate should incorporate principles currently applied in conservatorship proceedings), with Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89, 112-19 (1979) (proposing *ex parte* administrative proceeding instead).

1980, the Commission abandoned the idea.²⁹⁶ Now may be an appropriate time to reconsider that project.²⁹⁷

Although living probate may be costly and cumbersome in some cases, it allows the testator to choose whether the additional time and expense is worth the security that living probate provides. The fact that living probate is not used much in the states that have it may reflect a lack of understanding of its benefits on the part of estate planners and testators more than any intrinsic flaw in the concept. Admittedly, the significance of will contests as a check on testamentary freedom may not be as great as is sometimes assumed.²⁹⁸ Given current demographic trends,²⁹⁹ however, together with the apparent trend among elderly persons to leave more property to caregiving children,³⁰⁰ the number of will contests brought by noncaregiving children may increase in the future. Any measures that could further protect testamentary freedom should accordingly be given serious consideration.

CONCLUSION

The ghost of Leona Helmsley, who may have inflicted a final punishment on her grandchildren through disinheritance, casts a shadow over the arguments for testamentary freedom. Rather than focus on an unsympathetic spirit like Helmsley, however, we might think of Mary Ellen Geist, a successful radio news anchor who, according to the *New York Times*, left behind a lucrative career to care full-time for her elderly parents in Michigan.³⁰¹ A self-sacrificing daughter like Geist deserves to receive whatever property her parents

²⁹⁶ See Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 *ARK. L. REV.* 131, 180-81 (1990).

²⁹⁷ See *id.* at 181-82; cf. Nicole Reina, Comment, *Protecting Testamentary Freedom in the United States by Introducing into Law the Concept of the French Notaire*, 46 *N.Y.L. SCH. L. REV.* 797 (2002-2003) (proposing that French Notaire system be adopted as quasi-administrative way of assessing testator capacity at time will is drafted). In crafting a workable antemortem probate regime, legislators and law reformers might take note of existing probate mediation programs, which have been highly successful and popular in some states. See Lela P. Love & Stewart E. Sterk, *Leaving More than Money: Mediation Clauses in Estate Planning Documents*, 65 *WASH. & LEE L. REV.* 539, 544-51 (2008).

²⁹⁸ See Schoenblum, *supra* note 61, at 614-15.

²⁹⁹ See *supra* notes 195-198 and accompanying text.

³⁰⁰ See Brown, *supra* note 238, at 217.

³⁰¹ Gross, *Forget the Career*, *supra* note 200.

choose to leave her by will, even if this might entail the partial or total disinheritance of other kin.³⁰²

Under a system of forced heirship, a sibling of Geist would be presumptively entitled to a share of the inheritance at death even if that sibling's contributions to caregiving were minimal or nonexistent. A family maintenance system would provide more flexibility to reward or reimburse a caregiving child, but it would leave the final division of the estate to a judge rather than the parents themselves. When a parent is mentally competent and not subject to undue influence, and chooses to reward a caregiving child with a greater share of the estate, why should we disregard the parent's intent in order to benefit those who offered no help when the parent needed it? No critic of testamentary freedom has yet given a satisfactory answer to this question. Those who sow in tears may not always reap in joy,³⁰³ but when this is the last wish of a parent for a caring child, it is not the province of the law to interfere.

³⁰² The *New York Times* story does not discuss the estate plan of Geist's parents, but it does state that Geist is "sandwiched between two more traditional sisters, both with spouses, children and less demanding careers." *Id.*

³⁰³ *Cf. Psalm 126:5.*
