

Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents

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INTRODUCTION

American intestacy law frequently forces children to honor financially their father and mother, but little evidence suggests they want to, at least after their own deaths. Although the parent-child relationship is one of the most innate and primordial of all human bonds, this bond does not seem to manifest itself in a child's sense of financial obligation to his parents after his death.

Much has been written on the role of parents' obligations and intentions toward their children. Parents owe a duty of support to their children in all states, and children are the primary recipients of parental affection, even sometimes before the surviving spouse. As a result, children are frequently the primary beneficiaries of their parents' estates after death. Surprisingly little scholarship, however, exists on the reverse phenomenon of children's obligations or intentions toward parents in a like context. Although not all states impose an obligation on children to support parents in necessitous circumstances, a natural affinity undoubtedly exists between children and parents given the nearness of the blood relationship and a child's desire to reciprocate for the love and support given to him by his parents over the course of his lifetime.

This Paper examines the unexplored issue of parental inheritance from children in the context of intestacy. Part I of this Paper delineates the general theories that motivate the basic rules of intes-

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tate inheritance. After doing so, Part II explores those purposes in the context of a child dying and being survived by (a) parents and a surviving spouse; (b) parents and siblings; and (c) so-called “bad” parents. Within each of these three situations, this Paper reviews the current approaches in the United States and posits which approach is the dominant trend in the area and why. Finally, Part III assesses the evidence with regard to the purposes of intestacy, finds American law largely defective, and concludes with suggestions for reform.

I. THEORIES AND PURPOSES OF INTESTACY LAW

Most people die without a will and are therefore subject to the laws of intestacy.¹ Regardless of their broad application, intestacy laws are important because they embody the collective judgment of a society as to how an individual’s property should devolve in the absence of an expression by the decedent. This societal judgment is a product of, among other things, societal mores, cultural influences, and the availability of economic resources.² Despite the importance

¹ JOEL C. DOBRIS, STEWART E. STERK & MELANIE B. LESLIE, *ESTATES AND TRUSTS: CASES AND MATERIALS* 62 (2d ed. 2003) (“Most Americans die without wills.”); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 248 (1963); Mary Louise Fellows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 324, 337 (1978) (finding only about forty-five percent of the sample population had wills); Mary Louise Fellows, Rita J. Simon, Teal E. Snapp & William D. Snapp, *Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717, 718 n.3 (1976); Monica K. Johnson & Jennifer Robbennolt, *Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners*, 22 LAW & HUM. BEHAV. 479 (1998) (finding only forty percent of respondents with opposite-sex partners had wills, but finding a majority of those with same-sex partners had wills); Edward H. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 396 (1950). *But see* MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, *THE FAMILY AND INHERITANCE* 64 (1970) (finding approximately fifty-eight percent of the sample population had wills); LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 35 (2002) (suggesting that the conventional wisdom may be incorrect and that perhaps “it’s more accurate to suggest that most people who die prematurely die intestate”); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 295 (1975) (finding fifty-nine percent of the respondents in the Washington study were testate).

² *See generally* SUSSMAN, CATES & SMITH, *supra* note 1, at 121 (“The decedent’s conception of justice is embodied in his last will and testament Society’s conception of justice may be considered to be shown by the . . . Statute of Descent and Distribution.”); Jack Goody, *Strategies of Heirship*, 15 COMP. STUD. IN SOC. & HIST. 3, 3–20 (1973) (concluding that “different uses made of strategies of heirship in Africa and Eurasia seem to be related” to the availability or scarcity of land, as distinct from labor, as a resource). *See also* Jack Goody, *Sideways or Downwards? Lateral and Vertical Succession, Inheritance and Descent in Africa and Eurasia*, 5 MAN 627, 627–638 (1970);

of these rules and their application, a thoroughgoing theory as to what the rules are attempting to achieve proves elusive. Recently, scholars have characterized the area of intestate succession as a “theoretical grab bag,” which is “so chock-full of ideas [that it] is, in practical consequence, evacuated of content” and which “serves to justify nothing—or anything at all.”³ Two theories, however, generally motivate and underlie the rules of intestacy: the “presumed will” theory and the “duty” theory. The first follows the maxim that the presumed intent of the decedent is the “pole star” by which intestacy statutes must steer.⁴ The second looks not to what the decedent would have intended had he expressed his preferences but rather to how society thinks an individual’s property *ought* to be distributed.⁵

A. *The “Presumed Will” Theory*

The presumed will theory asserts that the rules of intestacy distribute property according to the objects of the decedent’s natural affection and consequently fulfill the presumed wishes of the decedent. For example, children are listed first in an intestacy scheme, perhaps, because most decedent-parents wish their estates to devolve to their children.⁶ This principle has gained much modern currency

Vladimir Gsovski, *Family and Inheritance in Soviet Law*, 7 *RUSSIAN REV.* 71, 71–87 (1947).

³ Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1036–37 (2004); see also John H. Beckstrom, *Sociobiology and Intestate Wealth Transfers*, 76 *NW. U. L. REV.* 216, 217 (1981) (“Various possible purposes behind intestate succession laws have been listed by commentators.”).

⁴ 4 *JAMES KENT, COMMENTARIES ON AMERICAN LAW* 537 (6th ed. 1848). Although the exact quotation from Kent applies to the courts’ interpretation of devises, the aphorism applies equally, *mutatis mutandis*, to the law of intestacy.

⁵ See, e.g., Thomas E. Atkinson, *Succession Among Collaterals*, 20 *IOWA L. REV.* 185, 187 (1935) (stating that individuals who are “more apt to be dependent on the intestate in the average case *should* be preferred to those not so likely to be dependent”) (emphasis added).

⁶ The presumed will theory, however, is subject to an important limitation. In *Trimble v. Gordon*, the United States Supreme Court emphasized that intestacy laws, irrespective of their motivations, are the product of state acts. 430 U.S. 762, 775 n.16 (1977). As such, they are subject to the limitation in the Fourteenth Amendment. *Id.* Thus, the Court stated:

Even if one assumed that a majority of the citizens of the State preferred to discriminate against their illegitimate children, the sentiment hardly would be unanimous. With respect to any individual, the argument of knowledge and approval of the state law is sheer fiction. The issue therefore becomes where the burden of inertia in writing a will is to fall. At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of “presumed intent.”

and is historically well-situated. The most recent version of the Uniform Probate Code (the “UPC”)⁷ explicitly states that its provisions on intestacy are an attempt “to reflect the normal desire of the owner of the wealth as to the disposition of his property at death.”⁸ This is not just the prevailing trend of the times. At least as far back as Grotius, this theory was well advanced.⁹ In fact, Treillhard, the Counsellor of State at the time the French Civil Code was presented to the legislature, declared that “[t]he legislation on successions is the presumed testament of every person who dies without having validly expressed a different will.”¹⁰ Treillhard spoke of the necessity of the legislation to “dictate as the deceased himself would have dictated at the last instant of his life, if he had been able and willing to express himself.”¹¹ More modern scholars have concurred and argued that the function of intestacy “should be to act as a will substitute when a citizen dies intestate; therefore, its distribution pattern should pattern what people desire to do in distributing an estate.”¹²

B. *The “Duty” Theory*

The second theory is quite different. Instead of the belief that the rules on intestacy ought to mirror the intent of the deceased—

Id. (citing *Eskra v. Morton*, 524 F.2d 9, 12–14 (7th Cir. 1975)).

⁷ The Uniform Probate Code is the most popular and influential uniform statute in the United States on the topic of successions. It was first approved in 1969. Article II on intestacy was rewritten and reapproved in 1990.

⁸ UNIF. PROBATE CODE art. II, pt. 1 gen. cmt. (1969); *see also* MODEL PROBATE CODE § 22 cmt. (1946) (“[Any scheme of intestate succession] should in the main express what the typical intestate would have wished had he expressed his desires in the form of a will or otherwise.”).

⁹ 2 HUGO GROTIUS, THE LAW OF WAR AND PEACE ch. 7 (1625). Although Grotius recognized the obligation of support to certain family members, he ultimately concluded “intestate succession . . . has its origin in natural inference as to the wishes of the deceased.” *Id.*

¹⁰ J.R. TRAHAN, LOUISIANA CIVIL LAW: DONATIONS AND SUCCESSIONS 365 (3d ed. 2004) (quoting 1 GEORGES ANTOINE CHABOT, COMMENTAIRE SUR LA LOI DES SUCCESSIONS no. 12, at 8–10 (5th ed. 1818)); *see also* WM. F. WOERNER & F.A. WISLIZENUS, THE LAW OF DESCENDENTS’ ESTATES INCLUDING WILLS 53 (1913) (“In default of the testamentary disposition of the property of a deceased person, the law disposes of the same precisely as the deceased himself would do if acting rationally, and without motive or influence of an extraneous nature.”).

¹¹ TRAHAN, *supra* note 10, at 365.

¹² Joel R. Glucksman, *Intestate Succession in New Jersey: Does It Conform to Popular Expectations?*, 12 COLUM. J. L. & SOC. PROBS. 253, 266 (1976); *see also* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1070 (1999) (“Intestacy statutes generally seek to further the testamentary freedom. . . . These statutes do so by attempting to approximate the distributive scheme that the decedent likely would have chosen had she acted to provide for the distribution of her estate at her death.”).

had he made a will—this second theory, sometimes called the “duty” theory, is concerned with the intent of the deceased “not so much according to what it was, as according to what it ought to have been, and agreeably to the Rules of *Duty*.”¹³ This theory appears to have had more adherents, at least early on, in the civil law than in the common law. Pufendorf, Toullier, and Planiol are only a few of the many adherents to this theory. In fact, some authors have argued that laws regulating intestacy preceded the existence of testaments and are connected more with the concept of the “community of family” than with a decedent’s “presumed will.”¹⁴ Others claim that “it is on the duties of the deceased, rather than on his affections, that the order of succession ought to be regulated.”¹⁵

In the twentieth century, however, the “duty” theory of intestacy has experienced a resurgence—this time in the Anglo-American common law world. In the 1930s, Professor Atkinson advocated a version of this theory by asserting that one of the goals of every intestacy plan should be to prefer those who are more apt to be dependent on the decedent.¹⁶ Moreover, in a much-cited 1978 survey of intestate preferences, the authors concluded that there were four societal aims of intestacy law, including protecting the dependent family and encouraging the nuclear family.¹⁷ Finally, the authors of a national Trust and Estate textbook add an additional purpose: “to produce a pattern of distribution that the recipients believe is fair and thus doesn’t produce disharmony within the surviving family members or disdain for the legal system.”¹⁸

¹³ 4 SAMUEL VON PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 373 (1672). As the name indicates, this second theoretical foundation for intestacy has been characterized as a “natural law” argument, but such a characterization is not a necessary conclusion. Although natural law may certainly impose limitations on how property ought to be distributed at death, so too might secular views of public policy. For example, parents may have a moral obligation to support their children imposed upon them by the dictates of a supreme being or in their very capacity as parents who created a child. At the same time, general public policy of not allowing parents to leave their children to be wards of the state may create such a duty. Either rationale, natural law or public policy, might support an intestacy scheme that lists children as the primary recipients of a parent’s estate in intestacy. *See also* Estate of Ford, 552 So. 2d 1065, 1067 (Miss. 1989) (“Our fundamental premise is that there is no natural law of inheritance. Intestate succession via descent and distribution is purely a function of the positive law of the state.”) (citing Jones v. Stubbs, 434 So. 2d 1362 (Miss. 1983)).

¹⁴ 3 MARCEL PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, No. 1700, at 495 (La. St. L. Inst. trans., 11th ed. 1959).

¹⁵ TRAHAN, *supra* note 10, at 367 (quoting 2 C.B.M. TOULLIER, *LE DROIT CIVIL FRANCAIS* nos. 127–129, at 81–83 (J.B. Duvergier, 6th ed. 1846–48)).

¹⁶ Atkinson, *supra* note 5, at 187.

¹⁷ Fellows, Simon, & Rau, *supra* note 1, at 351.

¹⁸ WAGGONER ET AL., *supra* note 1, at 38.

Because these two theories¹⁹ have historically tended to produce the same outcome, at least in the most important and common situations, no great debate has raged as to which theory is more important and primary. For example, when a decedent is survived by his children and any other relative, most decedents want their estate distributed to their children. Similarly, for reasons of support and parental obligation, children are the very same individuals who ought to receive the estate.²⁰ When the reverse happens, however, i.e., when a child dies and is survived by his parents, the two theories frequently diverge. It is this divergence that this Paper explores.

II. PARENTS UNDER INTESTACY

In intestacy situations, parents figure in many different regards. A child may die survived only by parents. In that case, the parents will receive the entirety of the child's estate. Similarly, a child may die survived by his parents and by children of his own. In that case, the decedent's children are the recipients of the decedent's estate.²¹ Neither of the above cases, however, is fruitful for discussion because the duty theory and the presumed will theory seem to be in accord and no evidence exists to suggest otherwise. Three other instances in which parents survive children are, however, fertile sources to ascertain what societal values and policies are embedded in the intestacy provisions. The first situation involves the death of a decedent who is survived by both a surviving spouse and one or more parents; the second concerns a decedent who has no surviving spouse, but who is survived by both parents and siblings; and the third instance entails situations in which a decedent is survived by parents who would inherit from their child, if not for their status as "bad parents."

¹⁹ By limiting the discussion in this Paper to the "presumed will" and the "duty" theories, this Paper does not assert that no other theories of intestacy exist. In fact, many others do exist. See, e.g., PETER STEIN, LEGAL INSTITUTIONS: THE DEVELOPMENT OF DISPUTE SETTLEMENT 173 (1984) ("The aim of the rules of succession in Roman law was to ensure the continuance of the family into the next generation after the death of the family head."); Beckstrom, *supra* note 3, at 216-70 (discussing a sociobiological theory of intestacy). The theories discussed in this Paper, however, are the most dominant and influential in the United States.

²⁰ This is not to suggest that the prevailing approach in states of awarding the spouse the inheritance rather than the children when both survive is incorrect. For elaboration of this situation and the underlying principles, see *infra* Part III.B.2.

²¹ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 cmt. b (1999) ("In the absence of a surviving spouse, the law of all states awards the entire intestate estate to the decedent's descendants.").

A. Surviving Spouse and Parents

When a decedent is survived by a surviving spouse and parents, two general approaches exist throughout the United States: that in which a spouse excludes parents and that in which a surviving spouse does not. As will be seen, the dominant trend is to allow parents to share with a surviving spouse, at least in some sense. This trend is based not upon the preferences of the majority of society, but upon conceptions of a child's duty to his parents.

*1. Current Approaches**a. Surviving Spouse Excludes Parents*

The first approach is the least charitable to parents, because it excludes them altogether when a spouse survives a decedent. Twenty-one states take this approach: Arizona, Florida, Georgia, Illinois, Iowa, Kansas, Minnesota, Missouri, Mississippi, New Mexico, New York, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.²² In any one of these states, a \$1,000,000 estate would go entirely to the surviving spouse, with the parent or parents receiving nothing.

b. Surviving Spouse Does Not Exclude Parents

The second group of states does not exclude parents from inheritance merely because a surviving spouse exists. Within this broad classification, however, at least three main variants (i.e., the Modern UPC Approach, the Former UPC Approach, and the Remainder) exist.

i. Modern UPC Approach

According to the most recent version of the UPC (the "Modern UPC Approach"), which has been adopted by a significant number of states, when a decedent is survived by a spouse and one or more parents, the first \$200,000 of his estate is distributed to his surviving

²² ARIZ. REV. STAT. ANN. § 14-2102 (1994); FLA. STAT. § 732.102 (2001); GA. CODE ANN. § 53-2-1 (1996); 755 ILL. COMP. STAT. ANN. 5/2-1 (West 1976); IOWA CODE § 633.211 (1985); KAN. STAT. ANN. § 59-504 (1994); MINN. STAT. § 524.2-102 (2002); MISS. CODE ANN. § 91-1-7 (1930); MO. ANN. STAT. § 474.010 (West 1992 & 2006 Supp.); N.M. STAT. § 45-2-102 (1975); N.Y. EST. POWERS & TRUSTS § 4-1.1 (McKinney 1992); OHIO REV. CODE ANN. § 2105.06 (West 2000); OR. REV. STAT. § 112.035 (2005); S.C. CODE ANN. § 62-2-102 (1986); S.D. CODIFIED LAWS § 29A-2-102 (1995); TENN. CODE ANN. § 31-2-104 (1978); UTAH CODE ANN. § 75-2-102 (1998); VA. CODE ANN. § 64.1-1 (1990); W. VA. CODE § 42-1-3 (1990); WIS. STAT. § 852.01 (2002); WYO. STAT. ANN. § 2-4-101 (1985).

spouse, and the remaining estate is distributed three-fourths to the surviving spouse and one-fourth to his parents.²³ Thus, an estate composed of \$1,000,000 in which a surviving spouse and one parent of the decedent exist would be distributed \$800,000 (\$200,000 + \$600,000 (i.e., three-fourths of \$800,000)) to the surviving spouse and \$200,000 (i.e., one-fourth of \$800,000) to the surviving parent.²⁴ Alaska,²⁵ Colorado,²⁶ Hawaii,²⁷ Montana,²⁸ North Dakota,²⁹ and New Jersey³⁰ have all adopted the Modern UPC Approach. With minor variation, New Hampshire and Michigan are included in this group too, with New Hampshire increasing the fixed dollar amount to \$250,000³¹ and Michigan decreasing the amount to \$150,000.³² The District of Columbia, Indiana, and Washington also fall into this class, as they maintain the same fractional distribution of the Modern UPC Approach, but eliminate any fixed dollar award to the surviving spouse.³³

ii. Former UPC Approach

The second major approach taken in the United States is even more favorable toward surviving parents. This approach is endorsed by the first version of the UPC, prior to its revision in 1990 (the "Former UPC Approach"), and awards the first \$50,000 to the surviving spouse and then divides the remainder of the estate in half between the spouse and the parents. For example, in the same hypothetical above involving a \$1,000,000 estate, the surviving spouse would receive \$525,000 (\$50,000 + \$475,000 (i.e. one-half of \$950,000)) and the parent of the decedent would receive \$475,000. Maine³⁴ and Nebraska³⁵ still maintain this approach, with California³⁶,

²³ UNIF. PROBATE CODE § 2-102 (1990).

²⁴ For simplicity purposes, this hypothetical assumes that there are no applicable federal or state taxes or any other claims that might diminish the estate.

²⁵ ALASKA STAT. § 13.12.102 (1996).

²⁶ COLO. REV. STAT. § 15-11-102 to 103 (1995).

²⁷ HAW. REV. STAT. § 560:2-102 (1997).

²⁸ MONT. CODE ANN. § 72-2-112 (1993).

²⁹ N.D. CENT. CODE § 30.1-04-02 (1993).

³⁰ N.J. STAT. ANN. § 3B:5-3 (West 2004).

³¹ N.H. REV. STAT. ANN. § 561:1 (2003).

³² MICH. COMP. LAWS § 700.2102 (2002).

³³ D.C. CODE § 19-302 (2000); IND. CODE § 29-1-2-1 (2005); WASH. REV. CODE § 11.04.015 (1974) (for separate property).

³⁴ ME. REV. STAT. ANN. tit. 18-A, § 2-102 (2003).

³⁵ NEB. REV. STAT. § 30-2302 (1980).

³⁶ CAL. PROB. CODE § 6401 (West 1991) (awarding one-half of the separate property to the surviving spouse and one-half to any parent, parents, or issue of them).

Idaho³⁷, and Nevada³⁸ awarding a full one-half of the separate property to the parents, without regard to the initial fixed sum. Alabama,³⁹ Connecticut,⁴⁰ Massachusetts,⁴¹ Maryland,⁴² Pennsylvania,⁴³ and Vermont⁴⁴ also maintain this distributive pattern, but vary the initial fixed-dollar award within a range of \$200,000 to \$15,000.

iii. The Remainder

Finally, eight states have adopted an approach which does not fit into either of the above paradigms. Briefly, these remaining states can be divided into five, sometimes overlapping, subcategories. The first is a group of four states that retains the distinction between real and personal property and assigns different rights based upon the classification of the property existing in the estate. States included in the first group are Delaware, North Carolina, Rhode Island, and Texas.⁴⁵ All states in this group, however, allow parents, at least in

³⁷ IDAHO CODE ANN. § 15-2-102 (2001).

³⁸ NEV. REV. STAT. ANN. § 134.050 (LexisNexis 2006) (awarding one-half of the separate property to the surviving spouse and one-half to any parent or parents or issue of them).

³⁹ ALA. CODE § 43-8-41 (1982) (awarding the first \$100,000 to the surviving spouse).

⁴⁰ CONN. GEN. STAT. ANN. § 45a-437 (West 1992) (awarding the first \$100,000 to the surviving spouse).

⁴¹ MASS. GEN. LAWS ch. 190, § 1 (1986) (awarding the first \$200,000 to the surviving spouse).

⁴² MD. CODE ANN., EST. & TRUSTS § 3-102 (West 1991) (awarding the first \$15,000 to the surviving spouse).

⁴³ 20 PA. CONS. STAT. ANN. § 2102 (West 1975 & 2006 Supp.) (awarding the first \$30,000 to the surviving spouse). Pennsylvania appears to be unique in providing in its intestacy law that notwithstanding the provisions on intestate inheritance, "in the case of a decedent who died as a result of the terrorist attacks of September 11, 2001, a surviving spouse shall be entitled to 100% of any compensation award paid pursuant to the Air Transportation Safety and System Stabilization Act." *Id.*

⁴⁴ VT. STAT. ANN. tit. 14, § 551 (1971) (awarding the first \$25,000 to the surviving spouse).

⁴⁵ Del. Code Ann. tit. 12, § 502 (2001) (awarding the surviving spouse the first \$50,000 of the personal property plus one-half of the balance of personal property, and a life estate in the realty); N.C. Gen. Stat. § 29-14 (2001) (awarding the surviving spouse one-half of real property and the first \$50,000 plus one-half of the excess of personal property); R.I. Gen. Laws §§ 33-1-1 & 33-1-5 (1956) (awarding the surviving spouse the first \$50,000 of the personal property plus one-half of the balance of personal property, and a life estate in the realty); Tex. Prob. Code Ann. § 38 (Vernon 2003) (awarding the surviving spouse all the personal property and one-half of the separate realty, with the remainder of the estate to be distributed to the decedent's parents or siblings). Although some other states such as Kentucky technically fall within this scheme, the fractional distribution of personalty and realty is half for both, making the distinction functionally irrelevant for the purposes of this Paper. See, e.g., Ky. Rev. Stat. Ann. §§ 392.020, 391.010 & 391.030 (West 2002).

some instances, to share with a surviving spouse. The second subcategory of states awards parents future rights, rather than present ones, in a decedent's estate. Delaware and Rhode Island fall into this second subgroup and award parents a remainder interest at the termination of a life interest held by the surviving spouse in certain property.⁴⁶ The third subcategory follows the Former UPC Approach, but assigns only a one-third interest rather than a one-half interest in the intestate estate to the surviving spouse. Here, Oklahoma stands alone.⁴⁷ The fourth subclassification is particular to Arkansas, which maintains dower and curtesy provisions under which a surviving spouse receives a one-half interest in non-ancestral real property and a one-half interest in personal property of the decedent, in addition to a one-half interest in the remaining estate if the surviving spouse and decedent have been married less than three years.⁴⁸ Finally, the fifth group allows parents to succeed *in preference* to the surviving spouse, at least in some instances. Louisiana and Kentucky make up this group. In Kentucky, a parent is second in line behind a decedent's descendants, while a spouse comes fourth in line behind descendants, parents, and siblings, at least in the case of real estate.⁴⁹ Similarly, in Louisiana, if no descendants exist, a decedent's parents and siblings share in his separate property ahead of a surviving spouse.⁵⁰

2. The Trend and Rationale

In summary, the states are about evenly divided between those in which a surviving spouse excludes parents and those in which parents share—at least in some percentage—with the surviving spouse. Of those states that split the estate between the parents and the surviving spouse, eleven have opted for the Modern UPC Approach, which awards the parents one-fourth of the estate, after distributing an ini-

⁴⁶ DEL. CODE ANN. tit. 12, § 502 (2001) (awarding the surviving spouse the first \$50,000 of the personal property plus one-half of the balance of personal property, and a life estate in the realty); R.I. GEN. LAWS §§ 33-1-1 & 33-1-5 (1956) (awarding the surviving spouse the first \$50,000 of the personal property plus one-half of the balance of personal property, and a life estate in the realty).

⁴⁷ OKLA. STAT. ANN. tit. 84, § 213 (West 1994).

⁴⁸ See ARK. CODE ANN. §§ 28-11-307 & 28-9-214 (1987). Where the couple has been married three years or more, the surviving spouse takes the entire estate. *Id.* § 28-9-214. See generally Lawrence H. Averill, Jr. & Hon. Ellen B. Brantley, *Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers With Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L. REV. 631, 643-47 (1995).

⁴⁹ KY. REV. STAT. ANN. § 391.010 (West 2003).

⁵⁰ LA. CIV. CODE ANN. arts. 891-94 (2000).

tial fixed dollar sum to the surviving spouse, and another eleven states have elected to follow the Former UPC Approach of giving the parents a full one-half share in the estate, after subtraction of a fixed dollar amount.

It would be a mistake, however, to assume that all states have thoroughly debated the issue in recent times and simply come to different conclusions about the appropriate share parents ought to receive. On the contrary, the divergence appears to be the result of the sporadic rate of legislative action and the inertial pull of history. Of the states in which a surviving spouse precludes parental inheritance, the mean amount of time that has passed since the last amendment to those statutory provisions is 19.10 years.⁵¹ On the other hand, for states adopting the Former UPC Approach, the mean number of years since amendment is 14.09.⁵² And finally, the mean number of years that have passed since amendment to the statute in states adopting the Modern UPC Approach is only 8.18.⁵³ This lends credence to the idea that the states that continue to exclude parents do so largely as a result of history.⁵⁴ The modern trend is clearly in favor of allowing parents to share with the surviving spouse.

Given the modern trend away from the old approach that totally excluded parents, the motivation for this trend must be ascertained. The official comment to the current UPC provision on this issue, section 2-102, provides little guidance, other than stating that “[t]his section is revised to give the surviving spouse a larger share than the pre-1990 UPC.”⁵⁵ Empirical studies, the comment recounts, support this trend.⁵⁶ Given this rationale, it is surprising that the surviving spouse is not awarded the entire estate to the exclusion of parents. Some states, such as Missouri, which have recently revised their intestacy law to exclude parents when a spouse survives, have noted that the

⁵¹ The above number was obtained by calculating the mean number of years between the last amendment to the relevant statute and June 1, 2006. This calculation is not an attempt to ascertain when each state adopted its table of descent and distribution, but is instead only a rough guide as to when the legislature in the relevant states last took the opportunity to amend, in any way, the pertinent provisions.

⁵² See *supra* note 51.

⁵³ *Id.*

⁵⁴ Sources from Bracton to Blackstone recount the common law’s total exclusion of parents in intestacy. MATHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND (1713).

⁵⁵ UNIF. PROBATE CODE § 2-102 cmt. (1990).

⁵⁶ *Id.*

change is “long overdue” and brings the law into “line with common preferences.”⁵⁷

Lawrence Waggoner,⁵⁸ the reporter for the UPC revision, provides insight.⁵⁹ In his much celebrated article, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, he asks the question: “Why not officially grant the surviving spouse the entire intestate estate when the decedent is childless but leaves a surviving parent?”⁶⁰ Thankfully, he next answers the question:

The rationale is that a childless decedent survived by a spouse and a parent, and who dies intestate with an estate significantly in excess of \$243,000, [i.e., the fixed dollar amount awardable to the surviving spouse along with applicable probate exemptions and allowances] most likely died at a fairly young age without expecting such a large estate An intestate estate of this size likely consists of a large tort recovery.⁶¹

To further explain, he poses a hypothetical situation involving two fictitious individuals, Ben and Elaine:

Suppose that shortly after their marriage, Ben was injured on his way to work by a negligent truck driver employed by a large, publicly held corporation, and that Ben eventually died from those injuries. Ben’s estate, swelled by a tort recovery stemming from the accident, amounted to a million dollars. Disregarding the probate exemptions and allowances for the sake of simplicity, the formula adopted has the advantage of granting Elaine, who might well remarry, a thoroughly adequate share of \$800,000 (\$200,000 plus \$600,000), with a \$200,000 return to Ben’s parents, who bore the cost of raising and educating Ben.⁶²

Thus, the rationale appears to be two-fold: (1) the property may be from a tort recovery and not the product of marital effort, and (2) the UPC scheme provides the surviving spouse with “a thoroughly adequate share” with the remainder going to the decedent’s parents, “who bore the cost of raising and educating”⁶³ the decedent. Unfortunately, it is not immediately apparent which of the two theories of

⁵⁷ 4 FRANCIS M. HANNA, PROBATE CODE MANUAL ch. 474 (MO. PRAC. SERIES 2d ed. 2000).

⁵⁸ Professor Waggoner is director of research and chief reporter of Joint Editorial Board for the Uniform Probate Code and reporter for the Drafting Committee to Revise Article II of the Uniform Probate Code.

⁵⁹ Lawrence Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 231 n.32 (1991).

⁶⁰ *Id.*

⁶¹ *Id.* at 231–32 n.32. (internal citations omitted).

⁶² *Id.* at 232 n.32.

⁶³ *Id.*

intestacy are endorsed by the above rationales. Although they may track the presumed wills of decedents, the total absence of any language suggesting Ben's preference and the normative tone of the example suggests the duty theory is operational.

Empirical studies⁶⁴ detailing the actual preferences of individuals with regard to their estates are helpful in ascertaining which theory of intestacy explains the trend of parental inclusion. One such study examined dispositive preferences of Iowans by soliciting responses to a series of hypotheticals.⁶⁵ Two questions were asked with regard to situations in which a decedent was survived by parents and a surviving spouse.⁶⁶ The first inquired as to the dispositive preference of the decedent if his parents were "financially secure," and the second asked for the preference of a decedent if the parents were "less well-

⁶⁴ Some of the empirical studies relied upon in this Paper are based upon personal or telephone interviews regarding the dispositive preferences of individuals. See, e.g., Fellows, Simon & Rau, *supra* note 1, at 326–32; Fellows, Simon, Snapp & Snapp, *supra* note 1, at 720–22; SUSSMAN, CATES & SMITH, *supra* note 1, at 36–61 (examining probate court records and conducting interviews); Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1052–54 (1978) (examining probate files and conducting a public opinion poll); Glucksman, *supra* note 12, at 254–56, 261–62 (performing will studies and conducting interviews). Others relied upon probate record examinations or will studies. See, e.g., Dunham, *supra* note 1, at 241–42; Ward & Beuscher, *supra* note 1, at 393–94; Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1303–04 (1969); Glucksman, *supra* note 12, at 254–56, 261–62 (performing will studies and conducting interviews); SUSSMAN, CATES & SMITH, *supra* note 1, at 36–61 (examining probate court records and conducting interviews); Price, *supra* note 1, at 285–89; Contemporary Studies Project, *supra* at 1052–54 (examining probate files and conducting a public opinion poll). Neither approach is without problems. The drafters of wills are subject to influences by lawyers and other advisors that may be motivated by cultural standards, rather than an individual's actual desires. Also, probate records and wills are likely to emphasize disproportionately the preferences of wealthy, well-educated Americans over the poorer, less educated who are more likely to die without wills and with estates too small to undergo administration. On the other hand, interviews are problematic insofar as they impose unreasonable time restrictions on individuals deciding how to dispose hypothetically of their estate. They also require a significant degree of personal extrapolation by interviewees about how they would want their property distributed if they were to die. See generally Beckstrom, *supra* note 3, at 2–6. Some studies have acknowledged the problems with both approaches yet have found, at least in a limited context, little difference in the outcome, regardless of the approach employed. See, e.g., Johnson & Robbenolt, *supra* note 1 (concluding that "in the current study, for those respondents who had wills, there was a close correspondence between the respondent's will and his or her stated distributed preference on the hypothetical scenarios"). In the end, the empirical studies relied upon in this Paper are the same ones relied upon by the drafters of the revised Uniform Probate Code and, by default, the legislatures of many American States. See, e.g., UNIF. PROBATE CODE § 2-102 cmt. (1990).

⁶⁵ Contemporary Studies Project, *supra* note 64, at 1041–1152.

⁶⁶ *Id.*

off.”⁶⁷ In both cases, a majority of respondents preferred giving 100% of the estate to the surviving spouse.⁶⁸ In the case of “financially secure” parents, the absolute preference for the surviving spouse was overwhelming, with seventy-three percent of the respondents giving all to the surviving spouse and only eight percent allocating anything to the parents.⁶⁹ The response was so overwhelming that the authors indicate that “[t]his was the highest percentage of respondents giving 100 percent of the estate to the spouse of any hypothetical survivor situation examined in the survey.”⁷⁰ Even in cases where the parents were designated as “not well-off financially,” a majority still favored awarding 100% of the estate to the surviving spouse.⁷¹

Furthermore, a more recent and comprehensive empirical survey conducted in 1978 surveyed respondents in five states (Alabama, California, Massachusetts, Ohio, and Texas) and confirmed the results of the Iowa study.⁷² The authors asked respondents to “[i]ndicate the percentage of your estate that you would want to give each survivor if you are survived by your wife/husband and your mother.”⁷³ Again, an overwhelming majority of respondents favored awarding the entirety of the estate to the surviving spouse, with 70.8% of respondents “favor[ing] disinheriting the mother and distributing the property entirely to the spouse.”⁷⁴ In fact, respondents in all five states surveyed preferred such a distribution pattern, with respondents in Ohio even more inclined than respondents in other states to

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1099–1100, 1124, 1138 App. B.

⁷⁰ *Id.* at 1099–1100.

⁷¹ Contemporary Studies Project, *supra* note 64, at 1124. Other studies confirm these results. For example, a 1976 telephone survey of 182 Chicago residents revealed the same preference as that of Iowans. When asked what division of the estate respondents would allocate if survived only by a surviving spouse and one or both parents, 54.4% of respondents would award the entire estate to the surviving spouse when the choice was between a mother and a surviving spouse; 59.7% to the surviving spouse, as between a father and a surviving spouse; and 58.6% to the surviving spouse when both a father and a mother were in existence. A majority of both genders of respondents favors the surviving spouse to the exclusion of either parent. The strongest preference for exclusion occurs with the subgroup of deceased husbands survived by their wives and fathers, with 83.7% preferring total exclusion of the father. *See* Fellows, Simon, Snapp & Snapp, *supra* note 1, at 726–27, 734–35.

⁷² Fellows, Simon & Rau, *supra* note 1, at 348–55.

⁷³ *Id.* at 351. The authors indicate that the term “mother” rather than “parent” was used because, in their view, the mother is “traditionally less likely to be thought of as self sufficient.” *Id.* And, correspondingly, if the respondents prefer the spouse to the mother, a logical inference was that they would also prefer the spouse to the father or to siblings. *Id.*

⁷⁴ *Id.*

award the entirety to the surviving spouse.⁷⁵ The authors found no significant correlation between family income and preference in this regard.⁷⁶

Thus, as is evident, the best empirical data on the dispositive preferences of individuals suggests that parents should not receive the large distributions sometimes provided by modern intestacy law. This appears to be the preference in almost all circumstances, irrespective of both the financial need of parents and an individual decedent's wealth. Given the clear preference among individuals, the dominant trend in intestacy law—at least for parents and surviving spouses—can only be explained as an endorsement and application of the duty theory, rather than the presumed will theory.

B. Parents and Siblings

As with the situation in which one or more parents and a spouse survive a decedent, instances in which one or more parents and a sibling (but no spouse) survive a decedent also provide a window into the general policies and rationales of the laws of intestacy. Here, unlike above, only two main approaches exist in the fifty states. In some states, parents exclude siblings and in others, parents share with siblings. Again, the dominant approach is the former, and for reasons of duty rather than reasons of individual preference.

⁷⁵ *Id.* The corresponding percentage of respondents awarding the entirety of the estate to the surviving spouse by state are as follows: Alabama, 64%; California, 75.5%; Massachusetts, 64.3%; Ohio, 82.8%; Texas, 72.3%. Fellows, Simon & Rau, *supra* note 1, at 351.

⁷⁶ *Id.* at 353. Interestingly enough, the Fellows, Simon, and Rau study found that those with the largest estates (i.e., \$100,000 and over) demonstrated the strongest preference for favoring the surviving spouse, with 80.2% of respondents in this group desiring to leave their entire estate to their surviving spouse. One of the purposes of intestate schemes that award to a surviving spouse a large fixed dollar amount and a fraction of the remainder is to exhaust or nearly exhaust small estates in favor of surviving spouses. Large estates, however, are more likely to be split between parents and a spouse. The evidence from the Fellows, Simon, and Rau study suggests the current UPC approach does not track the dominant preference. But see Sussman, Cates & Smith, *supra* note 1, at 89 (concluding that in the case of a decedent survived by both a spouse and one or more parents, a “large majority of testators altered the [intestate] distribution by bequeathing all to the surviving spouse,” but finding the mean and median net estates for those willing all to their surviving spouses was smaller than those who preferred other distribution schemes).

1. Current Approaches

a. Parents Exclude Siblings

In the absence of descendants and a surviving spouse, most states list parents as next in line to receive an intestate child's estate.⁷⁷ Both the Modern UPC Approach and the Former UPC Approach endorse this outcome. Similarly, the Restatement (Third) of Property lists parents as the next in line to inherit after the surviving spouse and descendants.⁷⁸ Only in the absence of both parents are the siblings of the decedent considered in the inheritance scheme. The statutes in forty-three states preclude the decedent's siblings from representing a deceased parent and thus allow for the survival of even one parent to exclude all of a decedent's siblings from inheritance.⁷⁹

b. Parents Share with Siblings

Seven states, however, allow siblings to share with parents in the absence of descendants. Illinois, Indiana, Louisiana, Mississippi, Missouri, Texas, and Wyoming are included in this category. About half of these seven states allow parents and siblings to share equally. The

⁷⁷ See, e.g., UNIF. PROBATE CODE § 2-103 (1990).

⁷⁸ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 (1999).

⁷⁹ See, e.g., UNIF. PROBATE CODE § 2-103; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4; ALA. CODE §§ 43-8-42 (1991); ALASKA STAT. § 13.12.103 (2004); ARIZ. REV. STAT. ANN. § 14-2103 (1995); ARK. CODE ANN. § 28-9-214 (2004); CAL. PROB. CODE § 6402.5 (West 1991); COLO. REV. STAT. ANN. § 15-11-103 (West 2005); CONN. GEN. STAT. ANN. § 45A-439 (West 2004); DEL. CODE ANN. tit. 12, § 503 (2001); D.C. CODE § 19-308 (2001); FLA. STAT. ANN. § 732.103 (West 2005); GA. CODE ANN. § 53-2-1 (1997 & 2005 Supp.); HAW. REV. STAT. § 560:2-103 (2005); IDAHO CODE ANN. § 15-2-103 (2001); IOWA CODE ANN. § 633.219 (West 1992 & 2005 Supp.); KAN. STAT. ANN. § 59-507 (1994); KY. REV. STAT. ANN. § 391.010 (West 2003); ME. REV. STAT. ANN. tit. 18-A, § 2-103 (1998); MD. CODE ANN., EST. & TRUSTS § 3-104 (West 2001 & 2005); MASS. GEN. LAWS ch. 190, § 3 (2004) (real property); MICH. COMP. LAWS ANN. § 700.2103 (West 2002); MINN. STAT. ANN. § 524.2-103 (West 2002); MONT. CODE ANN. § 72-2-113 (2005); NEB. REV. STAT. § 30-2303 (1995); NEV. REV. STAT. ANN. § 134.050 (West 2003); N.H. REV. STAT. ANN. § 561:1 (1997 & 2004 Supp.); N.J. STAT. ANN. §§ 3B:5-4 (West 1983); N.M. STAT. ANN. § 45-2-103 (West 1978); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1998); N.C. GEN. STAT. § 29-15 (2003); N.D. CENT. CODE § 30.1-04-03 (1996); OHIO REV. CODE ANN. § 2105.06 (West 2005); OKL. STAT. ANN. tit. 84, § 213 (West 1990); OR. REV. STAT. ANN. § 112.045 (West 2003); 20 PA. STAT. ANN. § 2103 (West 1975); R.I. GEN. LAWS § 33-1-1 (2006) (real estate); S.C. CODE ANN. § 62-2-103 (1976 & 2004 Supp.); S.D. CODIFIED LAWS § 29A-2-103 (1997); TENN. CODE ANN. § 31-2-104 (West 2001); UTAH CODE ANN. § 75-2-103 (West 1953 & 2004 Supp.); VT. STAT. ANN. tit. 14, § 551 (1989); VA. CODE ANN. § 64.1-1 (West 2002); WASH. REV. CODE ANN. § 11.04.015 (West 1998) (for separate property); W.VA. CODE § 42-1-3a (2004); WIS. STAT. ANN. § 852.01 (West 2002).

basic language of these statutes provides that in the absence of a surviving spouse or descendant, the estate descends to “the brothers and sisters and father and mother of the intestate and the descendants of such brothers and sisters in equal parts.”⁸⁰ Thus, in an instance in which a decedent was survived by a mother, two sisters, and a brother, a \$1,000,000 estate would be divided \$250,000 to each.

Illinois and Texas, however, favor parents over siblings and allow siblings to succeed only in place of one or more predeceased parents. Although they vary in their application of the principle, both states allow siblings to succeed by virtue of representation of a parent.⁸¹ The final state, Louisiana, maintains a unique civil-law approach under which surviving parents are granted rights in “usufruct” with “naked ownership” devolving in equal shares to the decedent’s siblings.⁸² Although the character of a parent’s rights in Louisiana can depend upon the classification of the property at issue,⁸³ for simplicity’s sake, a parent in the \$1,000,000 estate hypothetical would have the right to spend, invest, and draw interest and revenues from the \$1,000,000, but would be obliged to return \$1,000,000 at his death to the siblings of the decedent.⁸⁴

2. The Trend and Rationale

Although a handful of states allow siblings to share with parents, at least as early as 1976 scholars observed “[t]he trend is to grant pri-

⁸⁰ MISS. CODE ANN. § 91-1-3 (West 2004); *see also* IND. CODE ANN. § 29-1-2-1 (West 1999); MO. ANN. STAT. § 474.010 (West 1992); WYO. STAT. ANN. § 2-4-101 (1992).

⁸¹ 755 ILL. COMP. STAT. ANN. 5/2-1 (West 1992 & 2005 Supp.). Illinois divides the estate in equal shares with respect to who is alive and then grants a double share of the estate to a surviving parent if the other is predeceased. Thus, in the \$1,000,000 hypothetical, the mother would receive \$400,000 and each of the three siblings \$200,000. In Texas, if only one parent has predeceased the decedent, half of the estate (i.e., \$500,000 in the \$1,000,000 hypothetical) passes to the surviving parent, here the mother, and the other half to the siblings as a group, resulting in each of the three siblings receiving approximately \$166,667. *See* TEX. PROB. CODE ANN. § 38 (Vernon 2003).

⁸² LA. CIV. CODE ANN. art. 891 (2000). The right of usufruct is a civil law notion, under which the holder of the right, the usufructuary, is granted rights to use a thing and to derive fruits therefrom. Naked ownership is a right that imposes duties of noninterference with respect to the usufruct and grants the naked owners an eventual right to full ownership of a thing at the death of the usufructuary. The closest common law analogues to usufruct and naked ownership are life estate and remainder interests, respectively.

⁸³ *Compare* LA. CIV. CODE ANN. art. 538 (1980), *with*, LA. CIV. CODE ANN. art. 539 (1980) (discussing the different rights of a usufructuary based upon classification of the property at issue as consumable or nonconsumable).

⁸⁴ LA. CIV. CODE ANN. art. 538 (1980); LA. CIV. CODE ANN. art. 891 (2000).

ority to parents over brothers and sisters and other collaterals.”⁸⁵ Even though the trend is clear in this area, the rationale is complex. The comments to the 1990 UPC indicate that this parental exclusion of siblings was not a new creation of the 1990 board, but a hold-over from the 1969 version. Neither the revision⁸⁶ nor the earlier version of the UPC provide any hint as to why the current rule was adopted.

This is surprising because in 1946, at the time of the drafting of the Model Probate Code, the parents and siblings of a decedent were treated equally in the inheritance scheme.⁸⁷ The explanation provided for this approach was that it was both the approach “commonly provided in statutes,”⁸⁸ and the distribution that most closely tracks the purpose of the intestacy rules, i.e., to “express what the typical intestate would have wished had he expressed his desires in the form of a will or otherwise.”⁸⁹

In the time intervening between the publication of the Model Probate Code and the creation of the UPC in 1969, a revised version of the Model Probate Code was completed in 1966.⁹⁰ There, for the first time, a different approach was taken with regard to parents and siblings inheriting in intestacy. When an unmarried decedent dies below the age of twenty-one, the drafters opted to award the entire estate to the parents of the decedent and exclude the siblings.⁹¹ “The thought behind this is that the estate of a minor is likely to have been derived from his parents or grandparents”⁹²—an explanation sorely lacking in any discussion of intent. Professor Powell, in his treatise on real property, further explains the rationale that probably motivated the drafters of the UPC:

Descendants and the surviving spouse constitute the primary group needing, and deserving, maintenance and whatever more than maintenance becomes available. But increased longevity increases the number of persons likely to die with living parents, and these surviving parents are themselves likely to be as of the decedent's death, of more advanced years and of less physical

⁸⁵ Verner F. Chaffin, *Descent and Distribution—Inheritable Property and Relative Rights of Heirs and Administrator*, in *COMPARATIVE PROBATE LAW STUDIES* 17, 30 (1976).

⁸⁶ UNIF. PROBATE CODE § 2-103 cmt. (1990) Under the section discussing the “Purpose and Scope of the Revisions” to this section, the comments indicate that the “revisions are stylistic and clarifying.” *Id.*

⁸⁷ MODEL PROBATE CODE § 22(b)(2) (1946).

⁸⁸ *Id.* § 22 cmt.

⁸⁹ *Id.*

⁹⁰ William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1040–41 (1966).

⁹¹ *Id.* at 1049–50.

⁹² *Id.* at 1049 n.52.

strength than in earlier decades. In contrast with brothers and sisters, often widely scattered and living separate and unrelated lives, parents are likely to be, in general, closer to the decedent and socially *more deserving* of subsidy than the siblings.⁹³

In other words, parents are favored because they tend, more often than not, to be geographically and emotionally closer to the decedent, in addition to being “more deserving” of inheritance. This explanation suggests that both the presumed will and the duty theory might support the approach of the UPC.

Empirical evidence suggests that such is not the case. The dominant preference of decedents is exactly the opposite. Most individuals, if survived by at least one parent and one sibling, prefer their parents and siblings to share in their inheritance, rather than to bestow an exclusive award to their parents.⁹⁴ In the Fellows, Simon & Rau study examining public attitudes across five states, the authors discovered that in a situation in which a father, brother, and sister survived a decedent, only 29.2% of the respondents favored awarding all of the estate to a surviving parent.⁹⁵ When the hypothetical included both parents and the two siblings, the pattern did not change—only 31.9% favored splitting the estate between the parents and excluding the siblings, while 40.3% wanted to split the estate into fourths, with the father, mother, brother, and sister sharing equally.⁹⁶ The study further demonstrated that neither family income nor estate size affect the above preferences.⁹⁷

Despite evidence suggesting a continuing preference for siblings and parents to share in an estate, the laws of most states award the estate to the parent of a decedent. Again, at least in terms of the dominant approach, the duty theory triumphs over the presumed will theory, in departure from both history and the majoritarian preference.

⁹³ 6 RICHARD POWELL, POWELL ON REAL PROPERTY ¶ 997 (1970) (emphasis added).

⁹⁴ Fellow, Simon & Rau, *supra* note 1, at 346.

⁹⁵ *Id.*

⁹⁶ *Id.* Although another 8.9% favored awarding the entire estate to one parent to the exclusion of the other parent and the siblings, 59.2% preferred some other distribution scheme in which siblings shared with parents. *Id.*

⁹⁷ *Id.*; see also Fellows, Simon, Snapp & Snapp, *supra* note 1, at 724 (finding that in hypotheticals in which an individual is survived by both parents and two siblings, fifty percent of respondents favored excluding siblings and fifty percent favored including them in some fractional distribution). When the hypothetical was altered to provide only for survival by a father, brother, and sister, approximately sixty percent of respondents favored including one or both siblings in the distribution. *Id.* at 724.

C. *Bad Parent Statutes*

Although the two preceding examples are the core of parents' rights in intestacy, one other situation is relevant to develop fully the parent/child relationship. These situations involve the application of "bad parent" statutes or statutes in which society deems a parent to have acted so obnoxiously with respect to a child that he no longer merits inheritance from the child.⁹⁸ Acts that tend to qualify under these "bad parent" statutes are ordinarily egregious ones such as abandonment, refusal to acknowledge the child, or acts that have resulted in the termination of parental rights. Although all states maintain approaches by which parental inheritance rights can be severed, a multiplicity of grounds for doing so exist among the states, as do a variety of effects as a result of such termination.⁹⁹ For purposes of this Paper, the common element and effect of many of these statutes, however, is to punish "bad" parents for violations of parental *duty* and therefore to absolve a child of his *inheritance duty* toward his parents. Again, the duty theory reigns supreme.

1. Current Approaches

a. Open Acknowledgement and No Refusal of Support

Both the Restatement (Third) of Property and the UPC contain "bad parent" provisions by which a parent's inheritance rights may be terminated. The Restatement (Third) of Property provides that "[a] parent who has refused to acknowledge or has abandoned his or her child . . . is barred from inheriting from or through the child."¹⁰⁰ Similarly, the UPC also provides that "[i]nheritance from or through a child by either a natural parent or his [or her] kindred is precluded

⁹⁸ In an article on this topic, Richard Lewis Brown has argued that these statutes should not be classified as "bad" parent statutes, as they include within their ambit parents who deserve no societal reproach but whose parental rights are terminated due to mental illness and similar conditions. See Richard Lewis Brown, *Undeserving Heirs?—The Case of the "Terminated" Parent*, 40 U. RICH. L. REV. 547, 569–78 (2006). For example, in *In re Marcus W*, the Nebraska Court of Appeals terminated the parental (and thus inheritance) rights of a mother with an IQ of seventy-three who "truly love[d] her children" and who had the "proceeding brought against her through no fault of her own." *In re Marcus W*, 649 N.W.2d 899, 913–14 (Neb. Ct. App. 2002). Although Professor Brown is, of course, correct in his assessment of the range and applicability of these statutes, this article employs the nomenclature of "bad parent statutes" merely for purposes of simplicity of reference.

⁹⁹ The federally enacted Adoption and Safe Families Act of 1997 requires states to terminate parental rights on certain grounds. See 42 U.S.C. 670 (2000).

¹⁰⁰ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5(5) (1999).

unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.”¹⁰¹ The former version of the UPC is almost identical in its provision, except that it was limited to the fathers, and the newer version expands to include any natural parent.¹⁰² Thus, a biological mother is precluded from inheriting from a deceased child unless the mother has both openly acknowledged the child and not refused him support. A number of states have adopted the UPC approach either verbatim or in close approximation thereto. These states include Alaska, Arizona, Colorado, Hawaii, Michigan, Minnesota, Montana, New Mexico, North Dakota, South Dakota, and Utah.¹⁰³

For clarity’s sake, these types of “bad parent” statutes must be distinguished from filiation statutes. Despite the language of some statutes, these penal “bad parent” statutes should not be mistaken for statutes that require specific proof of paternity or filiation to establish a parent/child relationship. For example, Alaska’s “bad parent” statute provides that “[i]nheritance from or through a child by either natural parent . . . is precluded unless that natural parent has openly treated the child as the natural parent’s child, and has not refused to support the child.”¹⁰⁴ This intestacy statute is separate and apart from a similar family law statute that allows for the admission of acknowledgments and biological evidence to establish parentage.¹⁰⁵ The “bad parent” statute may apply and preclude inheritance even after a biological link has established natural parentage of the child involved. Hence, in a Mississippi decision, *Estate of Ford*,¹⁰⁶ the court held that even though there was “no doubt” as to the biological filiation of the parties, no inheritance was allowable because the plaintiffs failed to establish that the father of the child at issue “openly treated the child . . . as his” and that he “did not refuse or neglect to support” her.¹⁰⁷

¹⁰¹ UNIF. PROBATE CODE § 2-114(c) (1990).

¹⁰² *Id.* § 2-114 cmt, subsection (c).

¹⁰³ ALASKA STAT. § 13.12.114 (2004); ARIZ. REV. STAT. ANN. § 14-2114 (1995); COLO. REV. STAT. § 15-11-114 (2005); HAW. REV. STAT. § 560:2-114 (2005); MICH. COMP. LAWS ANN. § 700.2114 (West 2002); MINN. STAT. ANN. § 524.2-114 (West 2002) (modifies Revised UPC § 2-114 by providing that an adopted stepchild continues to be a child of his or her noncustodial natural parent only if the adoption occurred after the death of that natural parent); MONT. CODE ANN. § 72-2-124 (2005); N.M. STAT. § 45-2-114 (1978); N.D. CENT. CODE § 30.1-04-09 (1996); S.D. CODIFIED LAWS § 29A-2-114 (1997); UTAH CODE ANN. § 75-2-114 (1953 & 2004 Supp.).

¹⁰⁴ ALASKA STAT. § 13.12.114.

¹⁰⁵ *Id.* § 25.20.050.

¹⁰⁶ 552 So. 2d 1065 (Miss. 1989).

¹⁰⁷ *Id.* at 1067–68; see also *Estate of Richardson v. Cornes*, 2002-CA-01485-COA (¶ 23) (Miss. Ct. App. 2004) (holding that “the natural father, who has not fulfilled his

Thus, the primary aim of these “bad parent” statutes is not to establish a paternal link between the child and the person alleged to be the father.¹⁰⁸ Instead, the purpose is to insure the acceptance of parental obligations for the child and to punish those who fail to do so. Bad parent statutes affirmatively cut off inheritance rights even after one has established the parental link.¹⁰⁹

b. Conduct Against the Child

Other states have adopted statutes with an even broader ambit to preclude parental inheritance. For example, in addition to requiring support and open acknowledgment of a child, the Pennsylvania statute includes the commission of certain crimes, such as sexual abuse or endangerment of the welfare of the child as grounds for barring intestate inheritance.¹¹⁰ Hawaii has one of the broader statutes, which includes within the range of prohibited acts failure to “communicate with the child when able to do so for a period of at least one year when the child is in the custody of another.”¹¹¹

Even outside the successions context, family law statutes often provide that sexual abuse against a child or abandonment may be grounds for termination of *all* parental rights. These statutes are ordinarily premised on parental misconduct toward the child and frequently include termination of inheritance rights as an effect of a

obligations to acknowledge and support the child during the child's lifetime, is prevented from enjoying the benefits of inheritance”), *aff'd in part and rev'd in part*, No. 2002-CT-01485-SCT (Miss. 2005); *Estate of Evjen v. Novotny*, 448 N.W.2d 23, 24 (Iowa 1989) (concluding that “proving paternity . . . is not enough to establish heirship under section 633.222”).

¹⁰⁸ Such a goal would be laudable, but it is expressly not the purpose of these provisions. As courts have noted, “[t]he legislature has a legitimate interest in adopting measures that minimize or avoid the difficult problems associated with proof of paternity. The more serious problems of proving paternity might justify a more demanding standard for fathers claiming under their illegitimate children's estates than that required for mothers claiming under the estates of their illegitimate children.” *Estate of Hicks*, 675 N.E.2d 89, 96 (Ill. 1996). For example, in Louisiana, “[a] man who marries the mother of a child not filiated to another man and who, with the concurrence of the mother, acknowledges the child by authentic act or by signing the birth certificate is presumed to be the father of that child.” LA. CIV. CODE ANN. art. 195 (2000 & 2006 Supp.). This presumption is sufficient for inheritance by the father from the child.

¹⁰⁹ Also, the wording of the provision of Revised Uniform Probate Code and the statutes in the states where it has been adopted explicitly precludes, in the absence of such acknowledgement, inheritance by a “*natural parent*.” UNIF. PROBATE CODE § 2-114(c) (1990) (emphasis added).

¹¹⁰ 20 PA. CONS. STAT. § 2106 (1975).

¹¹¹ HAW. REV. STAT. § 560:2-103 (2005).

termination order.¹¹² For example, Louisiana has no specific “bad parent” statute in the context of inheritance. It does, however, have detailed provisions for the termination of all parental rights, including the right of inheritance, for “[m]isconduct of the parent toward this child . . . which constitutes extreme abuse, cruel and inhuman treatment, or grossly negligent behavior below a reasonable standard of human decency.”¹¹³ Because these statutes serve, at least in part, the same function as the more narrowly tailored “bad parent” statutes in intestacy, their effects and their application are properly included in this analysis.

c. Commission of Crimes Against the Other Parent

A third group of states goes even further and includes crimes or conduct against the other parent as grounds for precluding inheritance from the child. For example, Maryland provides that rape or certain sexual crimes against a child or *the other parent* may be grounds for precluding intestate inheritance from the child.¹¹⁴ Other states such as Connecticut, Kentucky, Missouri, New York, and Pennsylvania have even broader laws that include abandonment of the other spouse or adultery as grounds for disinheritance from a deceased child.¹¹⁵

2. The Trend and Rationale

The trend in this area is clear: the vast majority of states provide at least some mechanism for courts to terminate inheritance rights of “bad parents.”¹¹⁶ Moreover, the most influential doctrinal work in

¹¹² See, e.g., KAN. STAT. ANN. § 38-1583a(f) (2000) (“Upon . . . termination [of parental rights], all the rights of birth parents to such child, including their right to inherit from or through such child, shall cease.”). But see ME. REV. STAT. ANN. tit. 22, § 4056(1) (2004) (“An order terminating parental rights divests the parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, except the inheritance rights between the child and his parent.”). For a thorough discussion of this matter and other related issues, see Brown, *supra* note 98, at 569–78.

¹¹³ See LA. CHILD. CODE ANN. art. 1015(3) (2004). On the effect of a judgment of termination of parental rights, see *id.* art. 1038.

¹¹⁴ MD. CODE ANN., EST. & TRUSTS § 3-111 (West 2001 & 2005 Supp.).

¹¹⁵ CONN. GEN. STAT. ANN. § 45a-436(g) (West 2004); KY. REV. STAT. ANN. § 392.090(2) (West 1999); MO. ANN. STAT. § 474.140 (West Supp. 2005); N.Y. EST. POWERS & TRUSTS § 5-1.2(a) (Consol. 1979 & Supp. 2005); 20 PA. CONS. STAT. § 2106(a) (West Supp. 2005).

¹¹⁶ See generally Brown, *supra* note 98, at 569–78; Anna-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517 (1994); Tracy B. Harding, Note, *Involuntary Termination of Parental Rights: Reform Is Needed*, 39 BRANDEIS L.J. 895 (2001).

this area, the UPC, endorses a broad authority of courts to preclude parental inheritance.¹¹⁷ The UPC has and continues to influence development of this area of the law. In fact, UPC in its recent promulgation has expanded the applicability of its “bad parent” provisions to include even more instances of conduct meriting disinheritance.¹¹⁸

Unfortunately, the evidence generated from empirical studies in this context is limited. No study inquires as to the preferences of children when parents commit various crimes or bad acts against them. Although it seems natural to assume that the presumed will theory has emerged because “[r]arely would distribution to an unresponsive[, abandoning, or abusive] father approximate the intent of an illegitimate child,”¹¹⁹ other evidence suggests the duty theory is operational here because “children continue to love and bond with parents who have badly abused and/or abandoned them.”¹²⁰

Although it appears uncertain which theory is endorsed by “bad parent” statutes, further examination suggests the duty theory has prevailed. Consider the “bad parent” situation in reverse. If a “bad parent” rather than the abandoned child is to die first, it is at least a plausible assumption that the parent who abandoned or at least refused to acknowledge the child would not want his child to inherit from him after death.¹²¹ In other words, the “presumed will” of such a “bad parent” is likely not to favor the child he abandoned. Despite this plausible assumption, the law does not disinherit the child in these circumstances, even though a parent could do so by means of a testament. Instead, the child is allowed to inherit from his parent, as any other child would. The point of this observation is not to suggest that the child should be disinherited, but that the disinheritance of the parent is imposed as a penalty for violation of the parent’s duty, not in an attempt to track the presumed will of the deceased child.

¹¹⁷ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 (1999); UNIF. PROBATE CODE § 2-114 (1990).

¹¹⁸ Compare UNIF. PROBATE CODE § 2-114 (1990), with, UNIF. PROBATE CODE § 2-109 (1969). See also RESTATEMENT (THIRD) PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5.

¹¹⁹ Julian R. Kossow, *The New York Law of Intestate Succession Compared with the Uniform Probate Code: When There’s No Will There’s No Way*, in COMPARATIVE PROBATE LAW STUDIES 55, 85 (1976).

¹²⁰ Paula A. Monopoli, “Deadbeat Dads”: Should Support and Inheritance Be Linked?, 49 U. MIAMI L. REV. 257, 277 (1994).

¹²¹ Hirsch, *supra* note 3, at 1086 (“When an abandoning parent is the first to die, his or her abandoned child can inherit as an intestate heir Yet, even more directly, [one] could infer from the parent’s lifetime decision a preference not to provide for the child at death either.”).

III. ASSESSMENT

A. *Problems with the Duty Theory*

The preceding discussion has demonstrated that the dominant trend in parental intestacy rights is motivated, or at least influenced strongly by, the “duty theory” rather than the “presumed will” theory. This conclusion is problematic because both theories are not equally acceptable in the context of intestacy. To see why this is the case, the concept of a “duty” must be clearly defined. As it has been used in the preceding discussion, the term “duty” is imprecise and somewhat inaccurate. Although more accurate variants of the duty theory exist, they too are problematic. The presumed will theory serves as a better model for intestacy law. This conclusion, as will be shown, addresses the practical and pragmatic needs of a modern society and does not portend a weakening of the parent/child relationship.

1. Defining a Duty

The concept of a duty seems intuitively clear. To say that one has a duty to another is to say that there is an obligation owed from one party to another. The concept of a duty is used frequently in the criminal law context. To say that one has a legal duty not to kill others means that if one does kill, legal penalties or punishments attach to such conduct. In the words of H.L.A. Hart:

If we disobey [the criminal law] we are said to “break” the law and what we have done is legally “wrong,” a “breach of duty,” or an “offence.” The social function which a criminal statute performs is that of setting up and defining certain kinds of conduct as something to be avoided or done by those to whom it applies, *irrespective of their wishes*.¹²²

Outside the criminal context, the concept of the law imposing duties is not foreign to the civil or private law.¹²³ The term “breach of duty” is frequently used in tort law, where it indicates that conduct has violated a legal norm and that compensation must be paid to another for damage. The important similarity between these duties of criminal law and the duties of the private law is that the “duty,” whether it be not to kill or not to damage another’s property, applies irrespective of the wishes of the person who owes the duty. That is, the criminal or the tortfeasor owes a duty not to injure or interfere

¹²² H.L.A. HART, *THE CONCEPT OF LAW* 27 (2d ed. 1994) (emphasis added).

¹²³ Note that the distinction employed in this instance is between civil and criminal law (or private and public law), not that between civil and common law.

with others even if he does not want to owe that duty. He cannot avoid the duty, at least not unilaterally.

In the family law context, a parent owes a duty to a minor child. While the parent is alive, the parent owes a legally enforceable duty of support, care, and maintenance to a minor child. The rise of legislation punishing “deadbeat dads” evidences the enforceability of this duty, which is not severable by divorce. The duty exists even if the so-called deadbeat dad does not want to support his child.¹²⁴ He cannot unilaterally evade his duty.

In fact, in civil law countries and in Louisiana, the obligation is not even severable by death. Civil law systems have a concept of “forced heirship,” which provides a guaranteed or a forced share of a parent’s estate to a child. This obligation is legally enforceable by the child and enforceable whether a parent dies intestate or dies with a will that provides to the contrary. If a parent dies with a will excluding his child and leaving his entire estate to his second or third spouse, the child has rights against the parent’s estate for payment of his “forced share.” Absent “just cause,” the parent cannot unilaterally disinherit the child merely by making a will.¹²⁵

Similarly, all non-community property states provide that spouses have duties toward each other, even after death.¹²⁶ For instance, even if all the assets of the marriage are titled in the name of one spouse, that spouse cannot effectively disinherit his surviving spouse by leaving his entire estate to his secret lover, a needy parent, a sibling, or a charity. In such cases, the surviving spouse can “elect” against the will and receive a designated share or fraction of the deceased spouse’s estate, the provisions of the will notwithstanding to the contrary. The deceased spouse cannot unilaterally avoid his “duty” of support owed to his surviving spouse.¹²⁷

¹²⁴ For discussion of the connection between parental misconduct and inheritance, see Monopoli, *supra* note 120, at 277.

¹²⁵ See LA. CIV. CODE ANN. art. 1617 (2000 & 2006 Supp.).

¹²⁶ Georgia is the only non-community property state without an elective-share statute. See JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 425 n.1 (7th ed. 2005). Georgia does, however, grant a surviving spouse and children a right of support and maintenance for one year after the deceased spouse’s death. See GA. CODE ANN. § 53-3-1 to -5 (1996 & Supp. 2005).

¹²⁷ Two points of clarification are in order. First, although the forced or elective share right of a surviving spouse is frequently thought of as a property right based upon a spouse’s contribution to the marriage, this is not the only rationale behind the elective share. “Another theoretical basis for elective-share law is that the spouses’ mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent’s estate.”

These are true legal duties. In each of the cases described above, i.e., when a child dies survived by (1) a spouse and parents; (2) siblings and parents; and (3) “bad” parents, something is missing. In those cases, the “duty” owed can be lifted by the unilateral act of the party on whom it is imposed. In the first two cases, the obligation that the child has to his parents exists only in intestacy and can be avoided by the unilateral act of the child in making a will leaving any, all, or none of his estate to his parents without sanction or reprisal by the law. The child can totally exclude the parents in favor of his surviving spouse, siblings, or even his childhood pet.¹²⁸ In such a scenario, the parents would have no relief or recourse against the child’s estate under the law of wills.

The third case, involving “bad parents,” is slightly different because the issue there concerns the absence of a child’s duty toward his parent in intestacy by virtue of the parent’s conduct rather than the existence of a duty. Even in this case, however, the duty of the child, i.e., repayment or gratitude, prior to the parent’s bad act is still the same. This is evident by the non-application of these “bad parent” statutes due to the mere unilateral act by the child of executing a will. For example, if a child makes a will leaving his estate to a parent who later commits a defined “bad act,” the “bad parent” statute does not apply. These statutes do not operate like “slayer statutes,”¹²⁹ which preclude a killer from receiving property by a will, intestacy, or a nonprobate transfer device. The “bad parent” statutes apply only in intestacy; any duty that might be owed from a child to his parent is relieved once a will is executed.

In summation, the “duty” theory appears, at a minimum, to be a misnomer. Although these statutes are clearly motivated by what society perceives to be the obligations or duties that children have to repay parents for their time, effort, and money in supporting, raising, and educating them, the term “legal duty” is not accurate.

See UNIF. PROBATE CODE Pt. 2 Gen. Cmt. (1990). Secondly, although a deceased spouse cannot unilaterally avoid his duty to his surviving spouse, a surviving spouse can unilaterally absolve the decedent spouse from his duty by executing a binding waiver of elective-share rights. This observation does not affect the classification of the above situation as one involving a true legal duty. Tort victims may similarly relieve tortfeasors of their duties through consent. The general maxim of *volenti non fit iniuria* applies.

¹²⁸ For a discussion of the use and rise of pet trust legislation in American states, see Robert E. Blizard, Roger A. Kindler, Murdaugh S. Madden & Nancy Peterson, *Helping Clients Provide for Pets in Their Estate Plans*, 18 PROB. & PROP. 52 (2004).

¹²⁹ See, e.g., UNIF. PROBATE CODE § 2-803; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (2003).

2. Variants of the Duty Theory

a. Moral or Social Duties

Perhaps, then, the imposition of these rules of intestacy is not in fulfillment of legal duties, but merely in satisfaction of moral or social ones. In other words, legal duties may exist in the context of criminal law and tort law, but intestacy law seeks not to enforce legal duties, but merely to encourage the performance of moral or social ones. To illustrate, perhaps there exists a moral or social duty to contribute to charity or to aid the impoverished. The law does not mandate contributions to the Red Cross as a legal duty, but merely encourages fulfillment of moral or social duties to do so. The law performs this function by allowing deductions for contributions from personal income tax.¹³⁰ By so doing, the law provides an incentive to contribute to charity and to fulfill social or moral duties. Correspondingly, the law penalizes those who fail to give by increasing, in relative terms, the tax burden on those who do not contribute to charities.

The law may also seek to encourage social or moral obligations inherent in relationships between certain family members, such as spouses. The law may perform such a function by establishing suppletive rules that apply unless individuals affirmatively opt out of a system. In so doing, the law encourages observance of the suppletive or default rules by making adherence to them economically and socially cheaper. To avoid the default rules, transaction costs must be incurred.

Take, for example, community property laws. Community property laws, among other things, encourage the performance of a spouse's social duty to protect financially his surviving spouse after he dies by allowing a surviving spouse to claim a fraction of property acquired during the marriage.¹³¹ Although the law allows avoidance of this social duty by electing out of the community property regime, the law does encourage the performance of the social duty to care and provide for a surviving spouse.¹³² This encouragement takes the

¹³⁰ 26 U.S.C.S. § 170 (LexisNexis 2006).

¹³¹ This is not the exclusive rationale for community property laws. *See supra* note 127.

¹³² *See* WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 33 (6th ed. 2004). *See also* ARIZ. REV. STAT. ANN. § 25-202 (1991); CAL. FAM. CODE § 1500 (West 1994); IDAHO CODE ANN. § 32-906 (1980); LA. CIV. CODE ANN. art. 2329 (1980); NEV. REV. STAT. § 123.070 (1873); N.M. STAT. ANN. §§ 40-3A-1 to -10 (West 1995); TEX. FAM. CODE ANN. § 4.202 (Vernon 2000); WASH. REV. CODE § 26.16.120 (1998); WIS. STAT. ANN. § 767.58 (West 1983). *But see* ALASKA REV. STAT. § 34.77.030 (1998). Unlike other community property states, the default regime in

form not of a tax credit but of decreased transaction costs. That is, a community property regime, along with its ancillary spousal protection, exists by virtue of marriage, without need for further documentation or legal proceedings. Those electing to avoid their social duties must incur the increased transaction costs involved in varying from the default rule and in choosing a separate property regime.

Similarly, the rules of intestacy set up default rules.¹³³ Important rules in American intestacy law include a parent's right to share in a child's estate along with the child's surviving spouse, a parent's right to inherit to the exclusion of a deceased child's siblings, and preclusion from inheritance by "bad parents." All of these rules seek to encourage fulfillment of social duties of repayment and gratitude that children owe to parents. Those seeking to avoid the default rules must incur the additional expense of drafting a will. Thus, society, by virtue of the content of the chosen intestacy rules, promotes certain social or moral duties.

b. The Expressive Theory

A different but related way of looking at this situation is in terms of the "expressive function" of the law. Law provides rules for allowable and unallowable conduct and expresses a societal view or policy that a particular regime, relationship, or status is favored or disfavored. For example, by including children as the first class of recipients in an intestacy scheme, society expresses its view that children are important and should be cared for by parents—even after a parent's death. Similarly, the existence of a community property regime expresses approval of a certain economic partnership view of marriage. It does so by creating laws that treat property acquired during marriage as property equally owned by both spouses. The law does not require or mandate this type of arrangement, but instead seeks merely to encourage it. If individuals, for whatever reasons, seek to create a different marital property regime, they are free to do so by specifically so electing. By establishing this regime, however, society communicates its view that marriage is most properly viewed as an economic partnership and that the subjugation of one spouse to the other is, while not prohibited, at least not a favored status.

Similarly, by refusing to acknowledge homosexual marriage or civil unions in the laws of intestacy, society has implicitly condemned such a social arrangement, expressed its disapproval, and sought to

Alaska is a separate property one and individuals must affirmatively elect into a community property regime if they so desire. *See id.*

¹³³ *See Hirsch, supra* note 3, at 1033–1061.

dissuade citizens from entering such arrangements.¹³⁴ In the words of E. Gary Spitko:

It is a truism that the law teaches as it governs. The law has great potential to teach and reinforce the values that ground it or appear to ground it. Those who experience the law operating on them personally and those who observe the law operating on others are likely to learn whom the law respects, ignores, privileges, and disadvantages.

In this way, intestacy law not only reflects society's familial norms but also helps to shape and maintain them. Thus, succession law reform has great potential to change the way our society views gay men and lesbians and, indeed, how gay men and lesbians view themselves.¹³⁵

A significant number of scholars have recently adopted this "expressive" theory of intestacy law.¹³⁶ Although similar to the "social" or "moral" duty theory, the expressive theory is less harsh. Under the expressive theory, society need not label an individual as immoral or antisocial in choosing not to follow a particular default provision of the law. Instead, under the expressive theory, society merely attempts to teach individuals how their fellow citizens view particular relationships, statuses, or regimes.

3. Problems with the Variants

Although the duty theory ought to be more accurately renamed the "social duty" theory or recast as the "expressive" theory of law, these variants of the duty theory are likewise problematic. This is so because of the ineffectiveness of the chosen route of communication and the disproportionate impact such expressions have on those of a lower socio-economic class. To fully understand this critique, two issues must be examined: (1) who dies intestate and (2) how well individuals know and understand the rules of intestacy that embody societal values or expressions.

¹³⁴ See generally RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 40–89 (2004); T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55 (2004) (discussing the variety of approaches taken by states on inheritance by domestic partners); Ronald J. Scalise Jr., *New Developments in United States Succession Law*, 54 AM. J. COMP. L. 103, 103–08 (2006). For a discussion of the issues involved in estate planning for same-sex or other unmarried couples, see Wendy S. Goffe, *Estate Planning for the Unmarried Couple/Non-Traditional Family*, 31 ACTEC J. 177, 177–207 (2005).

¹³⁵ Spitko, *supra* note 12, at 1100–01.

¹³⁶ See, e.g., *id.* at 1100; Mary Louise Fellows, Monica Kirkpatrick Johnson, Amy Chiericozzi, Ann Hale, Christopher Lee, Robin Preble & Michael Voran, *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 8 (1998).

a. Who Dies Intestate?

The exact frequency of intestacy in the United States is not specifically known. A number of studies suggest that the majority of the population dies intestate.¹³⁷ Within this large group, however, further patterns can be detected. That is, some demographic segments of the population are much more likely to die intestate than others. Among the factors contributing positively to the likelihood of intestacy are low income, low occupational status, and low educational level.

Wealth tends to be a significant characteristic among testators. The variety of studies that have examined the correlation between wealth and testacy have done so in different ways. However, all seem to agree that increased wealth tends to correspond with an increased rate of testacy. Studies that have examined family income have uniformly found that those most likely to have a will are those at the top end of the scale and those least likely to have a will are at the bottom end of the income scale.¹³⁸ Correspondingly, those with estates at the bottom end of the scale are least likely to die testate, while those with estates at the top end of the scale are most likely to die testate.¹³⁹ In short, “[t]he greater the accumulation of wealth, the less likely that individuals will die intestate.”¹⁴⁰

¹³⁷ See *supra* note 1. *But see* WAGGONER ET AL., *supra* note 1, at 35 (“Of course, even for those people who die intestate, intestacy is often not the prevailing form of family property transfer. Many decedents will die having provided for the disposition of at least some of their property through a will substitute, such as a joint tenancy with right of survivorship or a life insurance contract.”). See also John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108–1141 (1984); Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54, 102–04 (1985).

¹³⁸ Fellows, Simon & Rau, *supra* note 1, at 338 (finding only 38.8% of those with family income of less than \$8000 have a will, while 65.4% of those with family income of \$25,000 or more have a will).

¹³⁹ *Id.* at 338 (finding only 14.7% of those with estate size between \$0 and \$12,999 have a will, while 69.0% of those with an estate between \$100,000 and \$500,000 have a will); SUSSMAN, CATES & SMITH, *supra* note 1, at 73 (finding the average net estate for testate decedents to be \$35,160 and the average net estate for intestate decedents to be \$6694); Ward & Beuscher, *supra* note 1, at 412 (finding only 35.6% of those with estates up to \$5000 have wills, while 92.3% of those with estates over \$50,000 have a will).

¹⁴⁰ INHERITANCE AND WEALTH IN AMERICA 201 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998).

Occupation also corresponds with the frequency of testation,¹⁴¹ with white-collar workers being significantly more likely to have wills than blue-collar workers.¹⁴² Other studies have classified workers differently, but have predictably found that groups such as “proprietors” more frequently have wills, while craftsmen, sales workers, and clericals have a much lower testacy rate.¹⁴³ Still other studies have found that “Major Professionals and Top Executives” were most likely to die testate, while those with jobs characterized as “Unskilled Manual Labor” are least likely to die testate.¹⁴⁴ In short, testacy tends to be “associated with high occupational status.”¹⁴⁵

Even aside from wealth and occupation, high levels of educational attainment correspond with high rates of testacy.¹⁴⁶ While few studies have investigated the significance of this variable on the propensity of testation, one study examining this issue observed that the tendency to die with a will directly increased with educational level. Thus, those with less than a high school diploma are most likely to die intestate, and those with an advanced degree are least likely to die intestate.¹⁴⁷ In between these two extremes, the relation generally continues to be a direct one, with those having a “bachelor’s degree” being more likely to have a will than those with “some college but less than a bachelor’s degree.”¹⁴⁸ Although there is a possibility that education and occupation track the same variable with respect to testacy, studies that have examined both variables have found that high educational attainment operates independently of occupation, and when

¹⁴¹ Thomas J. Mulder, *Intestate Succession Under the Uniform Probate Code*, 3 PROSPECTUS 301, 309 (1970); REMI CLIGNET, DEATH, DEEDS, AND DESCENDANTS: INHERITANCE IN MODERN AMERICA 130 (1992). *But see* Ward & Beuscher, *supra* note 1, at 412 (concluding that “[t]here did not appear to be any significant occupational difference with respect to use of a will”).

¹⁴² Fellows, Simon & Rau, *supra* note 1, at 338 (finding only 30.4% of blue-collar workers have a will, while 45.4% of white-collar workers have a will); Glucksman, *supra* note 12, at 258 n.15 (finding 24% of white-collar respondents were intestate, while 35% of blue-collar ones had no will).

¹⁴³ Dunham, *supra* note 1, at 248.

¹⁴⁴ SUSSMAN, CATES & SMITH, *supra* note 1, at 77, Table 4-15.

¹⁴⁵ *Id.* at 82.

¹⁴⁶ ALICE S. ROSSI & PETER H. ROSSI, OF HUMAN BONDING: PARENT-CHILD RELATIONS ACROSS THE LIFE COURSE 473 (1990) (“The predictions concerning income and education are also confirmed, with written wills more prevalent among those with higher educational attainment and higher income . . .”).

¹⁴⁷ Fellows, Simon & Rau, *supra* note 1, at 338 (reporting 63.3% of those with “less than a high school diploma” do not have a will, while only 40% of those with an “advanced degree” have no will).

¹⁴⁸ *Id.* (reporting 57.2% of those with “college less than a bachelor’s degree” do not have a will, while only 46.7% of those with a “bachelor’s degree” have no will).

the two are combined, that group demonstrates the highest levels of testacy.¹⁴⁹

In conclusion, those with wills tend to be wealthy, well-educated, white-collar workers, while those without wills tend to be less financially secure, have less formal education, and perform less lucrative jobs. This fact, by itself, is rather unremarkable and expected. The implications of this obvious demographic trend, however, merit consideration. Intestacy laws affect and influence more of those in the latter group than in the former. Although the latter class may have fewer absolute assets to distribute at death, the relative importance of those assets to the decedent and his heirs is no less meaningful.

b. Effectiveness of “Expression”

The second main problem facing the “social duty” or “expressive” theory of intestacy is that studies have shown that intestacy law is a very poor way to promote or express social duties. Irrespective of the content of the message that the law seeks to express, the mode of expression is particularly ineffective. In a study conducted by Fellows, Simon and Rau, participants were asked the following question:

“If you died today without a will, do you know who would inherit your property?”¹⁵⁰

Over 70% of respondents indicated that they did in fact know to whom their property would be distributed in intestacy, but when pressed further as to how the property would be distributed, only 44.6% responded “correctly or nearly so.”¹⁵¹ In an Illinois study, a similar question was asked; again, seventy percent of respondents claimed they knew to whom their property would devolve in intestacy, but an overwhelming sixty-four percent of them were wrong.¹⁵² Finally and most astonishingly, a survey of residents of Morris County, New Jersey, revealed that “[f]ourteen percent of the sample did not know that intestate inheritance exists” and believed that if an individual died intestate the government received a decedent’s property.¹⁵³ Thus, under all studies, the average respondent demonstrates an absence of understanding of the laws of intestacy.

It is not difficult to see why this is the case. A number of factors are influential. First, the rules of intestacy are complex. Even the Roman intestacy laws, which governed a society much less complex

¹⁴⁹ SUSSMAN, CATES & SMITH, *supra* note 1, at 80–81.

¹⁵⁰ Fellows, Simon & Rau, *supra* note 1, at 339.

¹⁵¹ *Id.* at 340.

¹⁵² See Fellows, Simon, Snapp & Snapp, *supra* note 1, at 723.

¹⁵³ Glucksman, *supra* note 12, at 263.

than our own, have been described as “a mass of detail, throwing little light on other parts of the law.”¹⁵⁴ For a modern example, consider the elective share rights of the surviving spouse under the current UPC. To properly ascertain a spouse’s right in intestacy involves the calculation of an augmented estate with the inclusion of certain non-probate transfers and the subsequent application of a fractional share whose value fluctuates based upon the length of the marriage.¹⁵⁵ In fact, Lawrence Waggoner, the principal drafter of the UPC’s elective share system, has recently proposed a new and simpler method of calculation, in part as an effort to “add transparency and clarity to the system.”¹⁵⁶

The intestacy rules of parental inheritance are likewise complex. That is, in those states in which the surviving spouse does not exclude parents, the law awards a fraction of the estate, usually one-fourth or one-third, only after the dispersal to the surviving spouse of a fixed dollar amount, usually \$50,000 or \$200,000. Such a system, although designed to award the majority of a small estate to a surviving spouse, lacks the kind of clarity and intuitive transparency necessary to communicate effectively to the lay populace.¹⁵⁷

In addition to the complexity of intestacy laws, the brief temporal effectiveness of the laws has also served to obscure the societal message. In other words, the expression of the law is jumbled by the frequent amendment and change to the rules of parental inheritance. As seen above, the UPC has served as one of the most influential causes of reform in modern intestacy law. Its two major promulgations, one in 1969 and the other in 1990, contain a number of important differences.¹⁵⁸ As a result, a number of states have undergone major revision within the time frame of one generation. Although the revision was a laudable one, it significantly altered intestacy law in such a way that it risks running afoul of Aristotle’s warning that “the easy alteration of existing laws in favor of new and different

¹⁵⁴ W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 365 (Peter Stein rev., 3d ed. 1963) (1921).

¹⁵⁵ UNIF. PROBATE CODE §§ 2-202 to 2-205 (1990).

¹⁵⁶ Lawrence W. Waggoner, *The Uniform Probate Code’s Elective Share: Time for a Reassessment*, 37 U. MICH. J. L. REFORM 1, 32 (2003).

¹⁵⁷ See generally Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L. J. 1, 1-17 (1993) (discussing the danger of overly complex default rules); George S. Geis, *An Experiment in the Optimal Precision of Contract Default Rules*, 80 TUL. L. REV. 1109, 1124-29 (2006).

¹⁵⁸ UNIF. PROBATE CODE, Prefatory Note, Article II Revisions (“In 1990, Article II of the Code underwent significant revisions.”).

ones weakens the power of law itself.”¹⁵⁹ Here, the alterations have significantly changed the content of the expressions or social duties conveyed less than thirty years ago. Thus, the lessons likely learned from the death of older relatives may have substantially changed from the lessons being communicated by the laws of intestacy today.

Similarly, the rules of intestacy among states are diverse, again partly as a result of the differing sections and differing versions of the UPC being enacted at a variety of times in a variety of states. In each of the topics examined in this Paper, multiple approaches exist. In inheritance situations involving both parents and a surviving spouse, at least four major approaches exist with a host of minor differences embedded within those major themes. In instances where parents and siblings survive, at least two variants exist in the United States. Finally, in “bad parent” situations, there are countless variations in state laws, which have been grouped into three large classes of cases pertaining to parental acknowledgment and support, parental conduct directed against a child, and parental conduct against a spouse. Thus, even if one were to have sufficiently learned the intestacy regime of a given state and not to have been faced with significant alteration, the increased mobility of citizens in today’s society is likely to frustrate any lessons previously learned. One may very well have learned the law of one state only to move because of a job, to be close to children, or for a preferable climate and thus be faced with different rules of intestacy in a new state of residence. “[T]here is no uniformity between the laws of most of the fifty states. This fact may cause not only unjust results but also an inherent confusion and distrust among a very mobile lay populace.”¹⁶⁰

Furthermore, there appears to be no unifying theme to intestacy law against which the layman can apply a very basic knowledge in one area of intestacy to other factual situations. Some rules are unqualifiedly based on the presumed intent of the decedent (e.g., inheritance by one’s surviving spouse rather than one’s children), while others rely upon the duty theory (e.g., the surviving spouse’s elective-share rights), and still others on the expressive purpose of the law (e.g., parental inheritance rights). In the words of Professor Averill:

Tracking policies in probate laws, even the 1990 UPC, may be similar to tracking court decisions concerning rules of will construction. It may be difficult to distinguish between what is a pervasive objective policy and a mere subjective result. Even among

¹⁵⁹ ARISTOTLE, *THE POLITICS* 73 (Carnes Lord, trans., 1984).

¹⁶⁰ Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 895 (1991).

ascertainable and accepted policies there are overlaps, conflicts, and inconsistencies.¹⁶¹

Finally, inquiry must be made as to the exact way in which the laws of intestacy purport to teach societal expressions and values. One scholar has noted that “[t]hose who experience the law operating on them personally and those who observe the law operating on others are likely to learn whom the law respects, ignores, privileges, and disadvantages.”¹⁶² For obvious reasons, it is rather difficult to observe the rules of intestacy operating on oneself. Intestacy rules are not like contract rules or even family law rules. Once one is in a position to see personally the rules’ application, it is, alas, too late to learn anything.

The intestacy laws, however, may be observed in operation on others. In such a case, those learning from or being encouraged by the rules will be the recipients of a decedent’s property, rather than the decedent himself. In other words, by receiving property as an intestate heir, an individual learns which familial relations are favored in society and which are not. Be that as it may, the application of intestacy rules on others has in practice provided little pedagogical value—at least as to the respondents in the above studies of whom nearly two-thirds not only failed to learn the lesson or expression that society wanted to teach, but even worse, by their misunderstanding of the law presumably learned a lesson society had no intention of teaching at all.

In short, any system that seeks to enforce moral or social duties through the laws of intestacy or that attempts to express society’s view that some relations or statuses are favored and others disfavored is inherently flawed. It is flawed by virtue of its disparate impact and disproportional imposition on the poorer, lower educated, underemployed part of the populace, while leaving its message or its mores not only unheard by but also unvoiced to the more affluent, well-educated, and professional class. Such a message is at best paternalistic and at worst discriminatory. At a minimum it violates the basic idea of justice as fairness.¹⁶³ Even if an argument for the paternalistic treatment of the lower educated and underemployed could be made,

¹⁶¹ *Id.* at 911.

¹⁶² Spitko, *supra* note 12, at 1100.

¹⁶³ See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 108–14 (1971). By reference here to Rawls’s work, this Paper does not attempt to endorse or reject the details of Rawls’s philosophy or even to suggest their applicability in the context of intestacy law—a topic well-beyond the scope of this Paper. Here, the only purpose is to borrow his characterization and assertion that for justice to be done some level of fairness between and among the parties involved must be accorded.

the success in communicating this message through the laws of intestacy is, again, either at best ineffective or at worst counterproductive, given that most of those who claim to understand intestate distribution actually misunderstand it.

4. Societal Implications

In light of the above, an initial reaction may be one of great distress over the state of a society in which children appear to feel no sense of obligation or concern for their parents. If the duty theory motivates most laws in this context and the majoritarian preference is contrary to such duties, concern may exist about the repercussions of such an observation. The implications are not, however, as startling as one might think.

Sociological evidence demonstrates that the bond children have with their parents is one of the strongest bonds in human relations. In a factorial study conducted by Rossi and Rossi in 1984 and 1985, individuals responded to a random sampling of 32 from a possible 1600 vignettes to ascertain the existence and strength of a particular obligation felt by an individual for his kin.¹⁶⁴ The vignettes varied from those testing obligations in a “crisis” event, such as an unmarried sister undergoing a major surgery, to those assessing a “celebratory” event, such as a widowed father having a birthday.¹⁶⁵ For each vignette, respondents were asked to gauge, on a scale of zero to ten, with zero begin no obligation and ten being a “very strong obligation,” the significance of an obligation, if any, felt toward the individual in the given circumstance.¹⁶⁶ The test further inquired as to the types of obligations felt, such as the duty to supply “comfort” in a crisis as opposed to “money,” and an inclination to provide a “gift” for a celebratory event as opposed to a “visit.”¹⁶⁷

Interestingly enough, of all the kinship relationships examined, one’s “own parents” tested, in all situations, either first or second in the degree of obligation felt, even sometimes before one’s own children, as in the situation of providing comfort in a crisis event.¹⁶⁸ More relevant for inheritance purposes, though, is the degree of obligation felt by children for their parents to provide money in a time of crisis or a gift for a celebratory event. In both cases, parents either

¹⁶⁴ ROSSI & ROSSI, *supra* note 146, at 155–209.

¹⁶⁵ *Id.* at 162.

¹⁶⁶ *Id.* at 167.

¹⁶⁷ *See id.* at 168.

¹⁶⁸ It is important to note that one’s spouse was not one of the relations included in this survey.

ted for first with children in the crisis situation or placed second in relation to children in the celebratory gift situation. In all cases, the mean rating of the obligation that children feel toward parents exceeds eight on a ten-point scale, indicating respondents feel a “strong” to “very strong” sense of obligation.¹⁶⁹

These results seem surprising. When compared with the dispositive preferences examined earlier, the Rossi and Rossi data on emotional affinity seems, at first glance, to be contradictory. That is, if the degree of emotional affinity and the sense of obligation are often highest with respect to one’s parents, one would expect to find parents at or near the top of the list of intended beneficiaries in intestacy. As has been shown, such is not the case. In attempting to explain the dispositive preferences of individuals against this backdrop, a number of theories present sensible and practical reasons why a child’s dispositive preference diverges from the strong emotional ties he has to his parents.

First and perhaps most obviously, individuals may choose to leave their estates to their spouses or siblings rather than their parents for purely financial reasons. Quite simply, spouses and siblings ordinarily have more of a need for financial support than parents. As a demographic group, those sixty-five and older are one of the most affluent age groups in American society.¹⁷⁰ Siblings and spouses, often those between the ages of thirty and fifty, however, are frequently financially strained with educational costs of children, home mortgages, and countless other expenditures. Oftentimes, the financial goals of those sixty-five and older are to dissipate their estates in order to avoid taxation and costly administration procedures. It makes little sense to augment through inheritance the estates of the very individuals who are otherwise attempting to diminish their assets.

Secondly, upon death, children may wish to favor younger generations rather than older generations to avoid the rapid imposition of double taxation. Although it is true that the Applicable Credit Amount¹⁷¹ provides a sufficient exemption from estate taxes for all but the most wealthy of decedents—a group that is rather unlikely to die intestate—state estate taxes may become applicable at lower levels

¹⁶⁹ ROSSI & ROSSI, *supra* note 146, at 173.

¹⁷⁰ U.S. CENSUS BUREAU, NET WORTH AND ASSET OWNERSHIP: 1998 AND 2000 9–12 (May 2003) (reporting that “[t]he age of a householder has a positive relationship with household net worth up to age 74” and finding that only those between the ages of 55 and 64 have a higher median net worth than those over 65 years of age).

¹⁷¹ The “Applicable Credit Amount” is a tax credit that exempts estates of a specified size from federal estate taxes. *See* 26 U.S.C. § 2010 (2000).

as may state and federal income taxes payable by all those who receive inheritances. The prospect of leaving an inheritance to a parent who dies shortly after the decedent and then transmits the very same property to the siblings of the original decedent seems to invite double taxation within a short period of time—something individuals are apt to avoid.

Thirdly, those who desire their siblings to receive their estates rather than their parents likely do so not out of malevolence felt toward their parents but rather under the “conduit theory” of inheritance. Under the conduit theory, individuals receive legacies not only for their own benefit but also for purposes of channeling those assets to other favored groups.¹⁷² The most common example of this conduit theory is the share of the estate left to the surviving spouse, if the decedent is survived by both descendants and his surviving spouse who is also the parent of the descendants.¹⁷³ When this is the case, the surviving spouse receives the entire estate, not because a parent wishes to abandon his children but, instead, because a parent wishes to provide both for his surviving spouse and his children and because the parent knows that his surviving spouse will do so and at death transmit the property to the children.

As in the situation in which a decedent leaves the entire estate to his surviving spouse to enjoy and to provide for the children, decedents might also leave inheritances to their siblings to enjoy and provide for their ailing, elderly parents. Anecdotal evidence uncovered by Sussman, Cates, and Smith in their study on inheritance bolsters the idea that this rationale motivates at least some decedents.¹⁷⁴ In examining two estates in which decedents favored siblings over parents in wills, the authors found that “[t]he reasons for disinheriting parents in these circumstances were not based on malicious forethought. Rather, this pattern of distribution was chosen because the care and protection of the parents was uppermost in the minds of the testators.”¹⁷⁵ Even in cases of financial need by parents, a dispositive preference for a sibling or spouse who may have a similar financial need is sensible. Those sixty-five and older have access to social welfare and safety-net programs (e.g., Social Security) that younger generations do not. Although older generations have higher medical costs than younger ones, programs such as Medicare help to offset some of those costs. Other costs for ailing elderly parents are fre-

¹⁷² Spitko, *supra* note 12, at 1078.

¹⁷³ *Id.*

¹⁷⁴ See SUSSMAN, CATES & SMITH, *supra* note 1, at 95–96.

¹⁷⁵ *Id.*

quently borne by family members, thus giving rise to the term the “Sandwich Generation,” in reference to those individuals sandwiched between caring for their own children and their parents.¹⁷⁶ Even if a decedent’s parents are financially needy, it is a sensible disposition in many cases to prefer one’s siblings over one’s parents in the knowledge that the siblings will care for ailing parents with the inheritance.

Fourthly, decedents may also have their dispositive preferences affected by their parents’ behavior, specifically their parents’ decisions regarding remarriage. Incidences of remarriage, even in old age, are not uncommon. Recent estimates are that half a million people in the United States over the age of sixty-five remarry each year.¹⁷⁷ Sociological studies have demonstrated that adult children feel less of an obligation to stepparents than to their own parents.¹⁷⁸ The diminished character of this obligation is perhaps due to lack of a close relationship during a child’s formative years, a minimum amount of time spent together, or even a fear of the loss on a child’s inheritance.¹⁷⁹ Whatever the rationale, a diminished sense of obligation—emotional, financial, and otherwise—is clear in the case of stepparents.¹⁸⁰ The dispositive preferences of decedents toward their own parents may reflect recognition of this fact. That is, a decedent may be concerned with a stepparent receiving the property left to a blood parent after a blood parent dies, thus precluding a sibling of the original decedent from ever receiving anything. In short, a child’s dispositive preference toward his parent at death may be af-

¹⁷⁶ Heather M. Fossen Forrest, Comment, *Loosening the Wrapper on the Sandwich Generation: Private Compensation for Family Caregivers*, 63 LA. L. REV. 381, 383 (2003) (reporting that more than eighty percent of care is provided by family members or unpaid volunteer caregivers).

¹⁷⁷ Lawrence Ganong, Marilyn Coleman, Annette Kusgen McDaniel & Tim Killian, *Attitudes Regarding Obligations to Assist an Older Parent or Stepparent Following Later-Life Remarriage*, 60 J. OF MARRIAGE AND THE FAM. 595, 595 (1998).

¹⁷⁸ *Id.* at 605; see also ROSSI & ROSSI, *supra* note 146, at 173, Table 4.7.

¹⁷⁹ Ganong, Coleman, McDaniel & Killian, *supra* note 177, at 596–97.

¹⁸⁰ As discussed elsewhere in this Paper, this diminished sense of obligation is already recognized in intestacy law when a decedent is survived by a child and a spouse who is not the parent of the child. Laws in many states reduce the award given to a spouse if the decedent’s child is not also the child of the surviving spouse. See, e.g., UNIF. PROBATE CODE § 2-102(2), (3), & (4) (1990). Similarly, most states exclude stepchildren from any rights of intestate inheritance. For critique of these laws, see Margaret M. Mahoney, *Symposium: The Changing Role of the Family in the Law: Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917 (1989); Thomas M. Hanson, Note, *Intestate Succession For Stepchildren: California Leads The Way, But Has It Gone Far Enough?*, 47 HASTINGS L.J. 257 (1995); Kim A. Feigenbaum, Note, *The Changing Family Structure: Challenging Stepchildren’s Lack of Inheritance Rights*, 66 BROOK. L. REV. 167 (2000).

fectured by a belief that a stepparent will block the conduit of inheritance that begins with his own parents and ends with his siblings.

Thus, there are a host of good reasons why individuals may prefer to leave all of their estate to their spouse or all or at least some of their estate to their siblings, rather than their parents. This Paper does not attempt to explain definitively the actual rationale motivating such preferences. It does, however, suggest several plausible rationales for the dispositive preferences discussed above, while at the same time explaining the strong sense of obligation felt by children toward their parents. Practical reasons based on tax minimization, financial planning, and long-term preferential strategies can explain current dispositive preferences, without sounding a bellwether for the end of the parent/child bond.

B. Revision Based on the Presumed Will

Having assessed the existing system and found it wanting, the following section makes a number of suggestions for revision and improvement of the law based on the empirical evidence regarding the presumed will of decedents.

1. Parents and the Surviving Spouse

In the situation in which parents and a surviving spouse survive a decedent, the current trend in American law of awarding a fraction (usually one-half or one-fourth) ought to be discontinued. It is out of line with the presumed will of decedents, which is to award the entire intestate estate to the surviving spouse. As argued above, this does not portend an end to society or, even necessarily, a decline in the parent/child relationship. The bond between parents and children is still strong, and the sense of obligation that children feel toward parents is likewise very strong. Practical reasons of avoiding taxation or leaving the inheritance to those to whom it could be most beneficial could very probably motivate preferences.

Although the above recommendation serves as a general rule, two potential exceptions must be considered. The first is an exception based on the economic means of parents. In other words, although a 100% distribution in favor of the surviving spouse might make sense in situations in which one's parents are financially secure, perhaps some award ought to be made to parents in cases in which they are in economic need. Although this argument has some intuitive force, it does not appear to be a sufficient reason to detract from a surviving spouse's share. The empirical evidence described above demonstrates that most respondents still favor leaving all to their sur-

viving spouse, even when the parents are “less financially well off.”¹⁸¹ This preference is perhaps explained by a similar spousal need or by a faith in their siblings’ ability to fulfill their lifetime obligations toward their parents.

The second situation is posited by Lawrence Waggoner in his explanation of the rationale governing the current UPC provision on this topic. Waggoner poses, by way of example, the idea that significant assets in a decedent’s estate might be the result of a tort recovery.¹⁸² This example is presumably intended to illustrate that an individual in a marriage may die possessed of assets that are not the product of marital effort and therefore are more appropriately awarded to parents in recognition of their support and assistance rather than to the surviving spouse. The same could be said—perhaps even more forcefully—of property given by parents to their children as gifts either prior to or during a child’s marriage.

This argument, however, is problematic. First, the desire to have deceased children return money or property to their parents in exchange or in reciprocation for raising and educating children, rather than to have the love and affection throughout one’s life as repayment, is curious to say the least. Certainly, a parent does not perform his obligation to his children out of a sense or even expectation of repayment. The rationale behind this argument, then, must proceed from a sense of moral duty or social obligation, which has previously been rejected in this context. Moreover, the idea of tracing the origin of assets as a basis for award is reminiscent of the old repudiated ancestral property statutes, which were largely jettisoned because of over-complexity and lack of accord with a decedent’s preferences.¹⁸³ This system has long since been abandoned, and its remnants, or at least its ideology, ought to be abandoned here too.

2. Parents and Siblings

Furthermore, in situations in which both parents and siblings survive a decedent, the presumed preferences suggest awarding some share of the estate to the siblings in conjunction with the parents. Discovering the exact percentage is not an easy task. First, recall that

¹⁸¹ Contemporary Studies Project, *supra* note 64, at 1140 (reporting fifty-four percent of respondents allocated their entire estate to their surviving spouse even when survived by parents who were less well off financially).

¹⁸² Waggoner, *supra* note 59, at 231 n.32.

¹⁸³ Only a very small minority of states still maintain ancestral property statutes or an equivalent thereof. *See, e.g.*, LA. CIV. CODE ANN. art. 897 (2000); KY. REV. STAT. ANN. § 391.020 (West 2003); NEV. REV. STAT. § 134.070 to 080 (2003).

a majority of respondents advocate leaving something to their siblings, whether it be shares equal to those of parents or merely a per capita division of the half of the estate not devolving to the parents. The exact percentages indicate that 29.2% of the respondents favor awarding all of the estate to a surviving parent, 36.4% want to split it equally between parents and siblings, 15.4% favor half to the father and one-fourth to each sibling, and 7.6% want to split the estate equally between the siblings to the exclusion of the father.¹⁸⁴

Here, no majoritarian preference exists. Majoritarian preferences are important in setting default rules (here, the rules of intestacy) because they serve to eliminate transaction costs for the majority of society.¹⁸⁵ Gone are the days of Roman times when wills served as devices for expression of beliefs and emotions.¹⁸⁶ Current evidence indicates that testators make wills to alter or depart from intestate distribution schemes.¹⁸⁷ By discovering the intestate preference of the majority and establishing a clear distribution to track that preference, most of society is saved the expense of making a will. For obvious reasons, then, the absence of a majoritarian preference is problematic. Tracking a mere plurality preference, rather than a majoritarian one, may in some instances result in adopting a rule that provides transaction-cost savings only to that mere plurality and requires a majority to avoid the system of intestacy by making a will to realize their preferences.

Consequently, while further empirical evidence is necessary to ascertain the exact fractions that would most accurately reflect the presumed will or intent of decedents, a basic majoritarian preference does exist. That is, in this situation involving both surviving parents and siblings, less than thirty percent of respondents favored totally excluding siblings.¹⁸⁸ Reform in modern American intestacy law should be considered to reflect this basic majoritarian preference.

Once again, an exception must be considered. When a decedent's sibling is a minor, a direct award to the sibling could be prob-

¹⁸⁴ Fellows, Simon & Rau, *supra* note 1, at 346 (reporting that 11.6% of respondents favored some alternative disposition scheme).

¹⁸⁵ See Hirsch, *supra* note 3, at 1039.

¹⁸⁶ EDWARD CHAMPLIN, FINAL JUDGMENTS: DUTY AND EMOTION IN ROMAN WILLS, 200 B.C.–A.D. 250 8–11 (1991) (stating Roman wills served many purposes including “most obviously, express[ing] emotions”).

¹⁸⁷ See SUSSMAN, CATES & SMITH, *supra* note 1, at 125 (“[M]ajor redistributions occurred in over 50 percent of the cases.”); Browder, *supra* note 64, at 1312 (“The data . . . shows that most wills do depart to some degree from . . . patterns [of intestacy].”).

¹⁸⁸ Fellows, Simon & Rau, *supra* note 1, at 346.

lematic. A direct award to a minor sibling may involve the costs of appointment of a guardian to administer to his interests. To avoid these unnecessary administrative costs, the minor sibling's share could be awarded to his parent (i.e., the parent of decedent), which would serve as an indirect award to the sibling and at the same time avoid the administrative costs.

A similar situation exists in the intestacy scheme with respect to children and a surviving spouse. In situations in which both exist, many states award the entire estate to the surviving spouse, in part as an indirect award to the child which avoids unnecessary administrative costs. In situations in which the surviving spouse is a step-parent of the deceased's child, however, the duty of support for the child and the filial bond is not as strong. Consequently, an award is made directly to the child, and the administrative costs are seen as necessary to protect his interest.

Lessons from the surviving spouse context may also be applied in this area. In cases in which a decedent is survived by a parent and a minor sibling, an inheritance award should be made to the parent on behalf of the sibling if the surviving parent is also the parent of the surviving sibling. There the familial bonds and obligations exist between the survivors, which should be sufficient to protect the interests of the minor sibling. On the other hand, in situations in which a parent and minor half sibling¹⁸⁹ survive a decedent, an award should not be made to the parent on behalf of the half sibling, if the surviving parent is not also the parent of the half sibling. For example, situations frequently occur in which two children are the products of different marriages and therefore share only one parent. In the case in which the surviving parent is the common parent between the two half siblings, again the duties and bonds between parent and child should serve as sufficient protection of the minor sibling's interest and therefore allow an award to the parent on behalf of the child. On the other hand, in situations in which the non-common parent survives, the duties and obligations existing between the decedent's parent and his or her minor stepchild (i.e., the decedent's half sibling) are ordinarily not of sufficient strength to merit an award to the step-parent on behalf of his or her stepchild. The inheritance should be awarded directly to the minor sibling and the administrative costs

¹⁸⁹ Most states treat siblings and half siblings the same. See Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-Blood Statutes to Reflect the Evolving Family*, 58 SMU L. REV. 137, 186-92 (2005) (persuasively arguing for a new system under which probate courts have discretion to determine the intestate share of half-blood relations).

of guardianship should be seen as necessary to protect the minor child's interest.

Thus, in instances in which a decedent is survived by parents and siblings, siblings, as a general rule, ought to be allowed to share with parents in intestacy. The exact distribution to each of the heirs is an issue beyond the scope of this Paper, but it is hoped that further empirical work will provide an appropriate recommendation. When a sibling of a decedent is a minor, however, practical reasons suggest that he ought not receive a direct distribution from his deceased sibling's estate. Rather, the award should be made to the common parent that the decedent and minor sibling shared. In the absence of such a common parent, a direct award, even to a minor sibling, is appropriate.

3. Bad Parents

Finally, the category of "bad parents," with slight modification, can easily be rescued under the presumed will theory. As has been indicated, "[r]arely would distribution to an unresponsive father approximate the intent of an illegitimate child."¹⁹⁰ Thus, in most cases, this rule can remain, but merely be revised to "unintended" heirs rather than "unworthy" heirs.¹⁹¹ The term "unworthiness" is a concept of normative significance that corresponds well with a duty theory of inheritance. The term "unintended," on the other hand, is a descriptive term that more accords with the presumed will theory of intestacy.

At a minimum, though, alterations need to be made. First, reconciliation needs to be incorporated as a way a parent can rebut the presumption that his "bad" acts have made him an "unintended" heir. For example, suppose a parent, after having abandoned a child, reconciles with him and resumes his parental duties prior to the child's death. Although neither the Restatement nor the UPC provides an exception for the above situation,¹⁹² a few states do allow parents who have abandoned their children to inherit from them if "the

¹⁹⁰ Kossow, *supra* note 119, at 85.

¹⁹¹ Hirsch, *supra* note 3, at 1086 ("In a word, default rule theory demands that we jettison the very concept of the unworthy heir and replace it with the unintended heir.").

¹⁹² In fact, both the Restatement and the UPC appear to have overreached in addressing past situations in which parental conduct or misconduct was irrelevant for intestate inheritance purposes.

parental relationship and duties are subsequently resumed and continue until the death of the child.”¹⁹³

A recent case demonstrates this idea. In *McKinney v. Richitelli*, the North Carolina Supreme Court addressed the issue of parental rights in the context of a father’s claim to his deceased son’s estate.¹⁹⁴ The main asset of the estate was a wrongful death claim against a radiologist alleged to have caused the child’s terminal illness of cancer.¹⁹⁵ After having concluded that the father “abandoned” his son by failing to make child support payments and failing to communicate with his son during a fifteen year period, the court considered whether, under the statute, the father should still be allowed to inherit from his son by virtue of having “resumed . . . care and maintenance at least one year prior to the death of the child and continued the same until its death.”¹⁹⁶ In concluding that the decedent’s father did not fit within the resumption of parental duties exception, the court noted that the statute requires not merely the reestablishment of a relationship with the child, but a resumption of care *and* maintenance of the child.¹⁹⁷ Because contact with the child was not established by the father until the child was almost twenty years old, the court concluded that a father could not “resume the maintenance of the [child] because his legal obligation to do so ceased at eighteen.”¹⁹⁸ The court found the applicability of the North Carolina exception to parental disinheritance to apply only when a parent renews “both the care and the maintenance of the child during the child’s minority, when care and maintenance are most valuable.”¹⁹⁹

Although the *McKinney* case is instructive, the court’s interpretation goes too far. If the goal in intestacy is to track the presumed will of the deceased, then the court’s reading is too narrow. For situations involving minor children, ascertaining their presumed will may be difficult, and imposition of the “care and maintenance” standard

¹⁹³ N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1998). To qualify under this provision, the resumption of parental duties must be a real one intended to recreate the parent/child relationship. See, e.g., *In re Lascelles’ Estate*, 68 N.Y.S.2d 70 (N.Y. Sur. Ct. 1947); *In re Herbster’s Estate*, 121 N.Y.S.2d 360 (N.Y. Sur. Ct. 1947); see also N.C. GEN. STAT. § 31A-2(1) (2001).

¹⁹⁴ 586 S.E.2d 258 (N.C. 2003).

¹⁹⁵ *Id.* at 260–61.

¹⁹⁶ *Id.* at 261 (quoting N.C. GEN. STAT. § 31A-2(1) (2001)).

¹⁹⁷ *Id.* at 264.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*; see also *Estate of Lunsford*, 610 S.E.2d 366, 371 (N.C. 2005) (concluding that duties of “care and maintenance” are “interrelated components of a parent’s overall responsibilities to his or her minor children,” and thus a parent cannot inherit if he abandoned only the “maintenance” but not the “care” of the child).

for resumption of a parental relationship may be a wholly appropriate way to encourage parents to resume their parental obligations. In the context of a child having reached the age of majority, however, the standard is too rigorous. If, despite abandonment during childhood, a parent resumes a familial relationship with a child who has reached the age of majority, such that the adult child has reconciled with or forgiven the parent, the apparent grounds for parental disinheritance appear to have evaporated.

The creation of such a resumption-of-parental-duties exception, however, will undoubtedly result in increased litigation by otherwise unworthy parents raising spurious claims that parental duties have been resumed in an attempt to benefit from the estate of a deceased child. The tension between providing a remedy for some and preventing abuse by others is real. To avoid such vexatious litigation, the standard of proof for a parent to establish his resumption of parental duties ought to be high. After all, it is the parent who seeks to inherit from the child—the very parent who the law deems to be a “bad” parent for having shirked his responsibility with respect to the child. It would be both counterintuitive and counterproductive to allow a claim for reconciliation to be made easily. By setting the standard high, frivolous claimants would be dissuaded, yet most meritorious ones should succeed. Louisiana may serve as an example in this regard. By virtue of its concept of forced heirship, Louisiana requires a fraction of one’s estate to descend to his children, unless just cause exists for disinheritance.²⁰⁰ If just cause does exist and a child is disinherited, he is no longer entitled to his forced share, unless the child can demonstrate “reconciliation” with the testator by *clear and convincing* evidence.²⁰¹ This standard has served Louisiana well in its struggle to avoid frivolous assertions of reconciliation, while at the same time allowing for meritorious claims of reconciliation. The same standard is suggested here.

Secondly, consideration must be given as to whether a child can correspondingly inherit in intestacy from the parent who committed the bad act.²⁰² That is, if the parent has abandoned and refused to acknowledge the child, the parent’s presumed will is likely not to allow the child to inherit from him in intestacy either. Although such

²⁰⁰ LA. CIV. CODE ANN. art. 1494 (2000).

²⁰¹ *Id.* art. 1625.

²⁰² Hirsch, *supra* note 3, at 1086 (“When an abandoning parent is the first to die, his or her abandoned child can inherit as an intestate heir Yet, even more directly, [one] could infer from the parent’s lifetime decision a preference not to provide for the child at death either.”).

an outcome may offend a societal sense of propriety by allowing a “bad parent” to further estrange and abandon an innocent child, even after death, this problem is not insuperable. Adoption of a wholesale concept of “forced heirship” would solve the problem. For years, scholars have called for a protection in American law of children against disinheritance.²⁰³ America stands virtually alone in the world by allowing parents to disinherit not only adult children, but also minor dependent children. Even England, America’s intellectual and historical foster parent in the common law, has since 1925 recognized the importance of protecting minor children from abandonment after the death of a parent and allows application to be made by a child for “reasonable financial provision.”²⁰⁴

Thus, bad parent statutes that preclude inheritance should be retained as they comport with the presumed will of the decedent. They should, however, be reformed to include an exception to allow for parental inheritance for parents who, despite earlier bad acts, have established by clear and convincing evidence that they either resumed the “care and maintenance of a child” during the child’s minority or reconciled with the child and reestablished their parental relationship after the child attained the age of majority. In addition, consideration should also be given to the “bad parent’s” preferences at his or her death, however unpalatable those preferences may be. Further empirical work may reveal that “bad parents” do not in fact want to disinherit their children, but instead feel that they must repent and make up for in death what they neglected in life. In the meantime, however, no such evidence exists, and society must decide among adopting a real conception of duty through enactment of a family maintenance allowance or a system of forced heirship, or be-

²⁰³ 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 (2000); Ralph C. Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1 (1996); BRASHIER, *supra* note 134, at 90–120; Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405 (1997).

²⁰⁴ United Kingdom Inheritance (Provision for the Family and Dependents) Act, 1975, §2 (Eng.); *see also* Civil Code of Québec art. 684 (“Every creditor of support may within six months after the death claim a financial contribution from the succession as support.”). On the danger of these types of discretionary support regimes, however, at least in American succession law, see Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1185–94 (1986) (“Our American experience with discretionary distribution on divorce should make us extremely wary of any system that would encourage a variety of friends and relatives to challenge wills and permit a probate judge to rearrange estate plans.”).

ing content to witness the fruits of a scheme of complete unrestrained donative disposition.

CONCLUSION

In conclusion, although parts of our laws on intestacy endorse the presumed will theory, a majority of state statutes addressing parental inheritance do not. Instead, they endorse the duty theory, or a variant thereof, such as the moral duty or expressive theory. Application of these theories is a direct contravention of the presumed will of the decedent, a contravention that affects the lower-income, lower-educated, and underemployed individuals disproportionately more than their wealthier, well-educated counterparts. Returning to a presumed will theory in the context of parental inheritance need not herald a decline in parent/child relations or serve as a concession to a society in which the familial ties seem to be spiraling into a bottomless abyss.

The parent/child bond is still strong. Studies show that a child's sense of familial obligation is near its zenith in the relationship with his parents. Modern laws, though, must adapt to modern societies. They cannot stand in a paternalistic role seeking to impose the fulfillment of the sense of parental protection and childhood obligation that may have prevailed years, decades, or even centuries ago. Rather, intestacy law must change to reflect societal preferences and desires. To do otherwise is not only ineffective in communicating the intended message, but also serves to endorse a harsh sense of paternalism that fails to accord equal treatment to all those affected by the law.