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John T. Gaubatz

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NOTES TOWARD A TRULY MODERN WILLS ACT

JOHN T. GAUBATZ*

The formal requirements of our highly structured succession law frequently frustrate both the goals of decedents and the basic purposes of the law itself. In this article, Professor Gaubatz reviews the goals of succession law and the ways the law as currently structured fails to satisfy these goals. He discusses the ability of the Uniform Probate Code to resolve these insufficiencies pointing to the lack of flexibility in the Code to work changes in result where factual deviations indicate change is necessary. Concluding that basic substantive problems remain unresolved by the Code, the author suggests increasing the flexibility of inheritance laws by providing for investigation into individual cases to ascertain the extent to which underlying succession law policy is fulfilled. In addition, it is argued that many nontraditional forms of expression of testamentary intent be validated where the dispositive act is consistent with succession law policy. Finally, the author outlines how the proposed modifications would work in practice.

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* B.S., Colorado State University; J.D., University of Chicago. Professor Gaubatz is on leave as Associate Professor and Associate Dean, Case Western Reserve University, Franklin Thomas Backus School of Law, and is visiting Professor and Associate Director of the Institute on Estate Planning, University of Miami School of Law.

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I. INTRODUCTION

In the January 1975 *Harvard Law Review*, Professor John Langbein of the University of Chicago Law School proposes that courts adopt a "substantial compliance" doctrine in passing upon the validity of wills under the various statutes of wills.¹ His suggestion is a judicial alternative to, and an extension of, the legislative cure suggested by Mechem in 1948² which was largely adopted in the Uniform Probate Code. Given the lack of legislative activity since Mechem's article, the limited change worked by the Uniform Probate Code, and the problems outlined by Professor Langbein, a judicial solution may well be needed to validate wills that violate no ascertainable public policy. Some relief from relentless application of the formal requirements of the Wills Act³ would certainly seem appropriate considering the trivial flaws that frustrate many testamentary plans.⁴

The Langbein article discusses one example of a more general problem that is particularly prevalent in the area of succession law—the lack of relationship between the technical rules of law and the goals sought to be achieved by those rules. The function of the will is to provide instructions as to the decedent's testamentary

1. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

2. Mechem, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501 (1948).

3. The Wills Act generically names the various statutes relating to wills. The specific requirements for wills were unified in the Wills Act of 1837, 7 Will. 4 & 1 Vict., c.26.

4. Among those cited by Langbein are *In re Estate of Thorn*, 183 Cal. 512, 192 P. 19 (1920) (printed word on holograph will); *In re Moody's Will*, 155 Me. 325, 154 A.2d 165 (1959) (nominal bequest to witnesses); *Re Beadle* [1974] All E.R. 493 (not signed "at end").

desires. In theory, its validity should depend only on testamentary intent in its expression, clarity of its instructions, and lack of improper influence in its creation. It is judged, however, against standards of formal execution having little if anything to do with such intent, design, or influence. As a result, plans possessing all of the inherent characteristics of valid testaments are denied effect, to the dismay of such commentators as Professor Langbein. More importantly, those taking under such testaments are denied the fruits of the decedent's bounty for no justifiable reason.

This lack of correspondence between rule and goal is not unique to the execution of wills. To take another example, many have noted similar discontinuities in the inability of the existing law to protect adequately the surviving spouse and children against disinheritance.⁵ Common statutory provisions in favor of the surviving spouse are tied to property owned at death and thus are easily avoided by inter vivos transfers by the decedent. The more limited statutory protections available to children are similarly avoidable. Further, the technical provisions of these statutes are not capable of achieving their apparent goals, specifically, the necessary support of the surviving family and societal recognition of the meritorious nature of the claims of surviving members of the family.

This article suggests that each of these problems is symptomatic of the more general, and thus more serious, problem of the inability of the existing highly formalized and structured substantive succession law to provide consistently acceptable results in a broad spectrum of fact patterns presented by life and death. In each there is a common pattern and cause—a legal rule devised to solve a particular problem, resulting in unacceptable consequences in many other cases. Each problem illustrates the difficulty: the lack of mechanisms sufficiently flexible to allow for shaping succession rules around the demands of particular causes. It is this difficulty which this article discusses.

It is the thesis of the article that provision ought to be made in the substantive law of succession to allow the flexibility inherent in equity theory to be applied in the distribution of decedents' estates.

5. W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960); Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139 (1936); Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499 (1964); Laube, *The Right of a Testator to Pauperize His Helpless Dependents*, 13 CORNELL L.Q. 559 (1928); Simes, *Protecting the Surviving Spouse by Restraints on the Dead Hand*, 26 U. CIN. L. REV. 1 (1957).

Improvement will come when the existing law is changed to incorporate procedures by means of which a court, operating within general principles, can adjust interests in the estate. It will come when provision is made to treat all of a decedent's gratuitous transfers as part of succession law. Professor Langbein suggests such a move towards flexibility in urging a "substantial compliance" doctrine upon courts faced with problems of validity.⁶ Mathews suggested much the same flexibility in his leading article on pretermitted heirs.⁷ Others have suggested that there should be adoption of the more flexible Commonwealth treatment of disinherited spouses and other family members.⁸ Such flexibility is notably lacking in the current law, and is lacking to a large degree in the Uniform Probate Code. Yet, it is suggested, without such flexibility the law inherently will lack the ability to resolve succession law problems in any satisfactory manner.⁹

As with many legal problems, the discussion can be divided into more manageable parts. First, this article briefly addresses the ultimate goals of succession law — what is it that is sought to be accomplished by that law in all cases. Second, an attempt is made to illustrate some of the more obvious ways in which current succession law fails to satisfy these goals. Third, the Uniform Probate Code is reviewed to gauge its ability to resolve the problems identified. Finally, suggestions are offered as to possible improvements in the manner our legal system deals with such problems. This article is not intended to be a definitive work. For detailed analysis of particular problems the reader is urged to peruse the work of Professors Langbein, Mathews and others. Rather, the article attempts to draw together problems to a large extent previously identified by others, to illustrate the common roots of those problems, and to

6. Langbein, *supra* note 1.

7. Mathews, *Pretermitted Heirs: An Analysis of Statutes*, 29 COLUM. L. REV. 748 (1929).

8. Laufer, *Flexible Restraints on Testamentary Freedom — A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955).

9. See THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH, *Ethica Nicomachea*, Book VI, § 10 at 1137b (Ross ed. 1966):

[A]ll law is universal but about some things it is not possible to make a universal statement which shall be correct. . . . When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission — to say what the legislator himself would have said had he been present, and would have put into his law if he had known.

provide a basis for more sweeping change than might occur were attention concentrated upon a single area at a time.

II. THE GOALS OF INHERITANCE LAW

There is surprisingly little discussion in the legal literature concerning the nature of the goals of succession laws. Perhaps this is because there is little dispute as to what those goals are. Perhaps it is because such goals are difficult to state in any but the most general terms. Perhaps it is because every law advances some goals while denying others, and thus statements of goals by their nature must come from less than pure supporting evidence. In any event, while commentators may vary in the extent to which they concentrate upon one aspect or another, it is generally agreed that it is the purpose of such laws to give effect, subject to the constraints of other public policies, to the wishes of the decedent while providing for the well-being of his family.¹⁰ More specifically, as Professor Ely has suggested, the goals of most succession laws are: (1) continuation of the regime of private property as dominant in the social order; (2) effectuation of the wishes of the individual; (3) provision for the well-being of the family; and (4) provision for the well-being of society.¹¹

Ely merely described these goals; he did not legitimize them. They do, however, have their roots in history and appear throughout the development of succession laws of the Western world. Without taking a stand upon the question of the existence of natural law, one can note that recurring themes in history suggest some constancy

10. Probably the most complete discussion in the literature is 1 R. ELY, *PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH* 425-34 (1914). The law of inheritance was stated by Plucknett to be "an attempt to express the family in terms of property." T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 711 (5th ed. 1956). See also L. MIRAGLIA, *COMPARATIVE LEGAL PHILOSOPHY* 741 (1912). Almost every article criticizing law reflects upon the "purpose" of the aspect under attack. Professor Langbein, for example, notes that the formalities required of wills serve evidentiary, channeling, cautionary, and protective functions. Langbein, *supra* note 1, at 491-97. See also Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 Wisc. L. Rev. 340; Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941). These functions should be distinguished from the purpose of the laws themselves. Goal definition necessarily assumes that there is a consistent and universal pattern to legal structures and that one can identify such a pattern. See generally J. STONE, *THE PROVINCE AND FUNCTION OF LAW* (1950).

11. 1 R. ELY, *supra* note 10, at 425.

in social goals.¹² Even though one cannot assign weights to the various goals except in specific situations, history may, through example, define and justify such goals. A brief look at the goals as they appear in history will aid in weighing the efficacy of current laws.

A. *The Continuation of Private Property*

If there is to be private property (property owned by individuals) then there must be a provision for its transfer upon death. Otherwise, all such property would disappear within a generation (assuming effective prohibitions against inter vivos avoidance). Thus, in a way, the very existence of a history of succession law suggests the existence of the goal, as does the existence of the institution of private property itself.

While in very early times ownership of property may have been in the family, clan, or tribe, most indications suggest that even in such systems property used by these units was protected as against the rest of society, and thus was somewhat "private." Certainly most of recorded Western history reflects such privacy. Under Biblical law property could be passed to one or more family members.¹³ The same was true in early Roman law, although there, as in the Germanic law,¹⁴ ownership as a concept was closely associated with the family, rather than with any single individual.¹⁵ Even regal ownership in the Norman manner was not defined such that there were no individual rights as opposed to the rights of the lord or state. Passage of the use of property by inheritance within the family was customary, even if not technically necessary.¹⁶ The incidents of ownership remaining in the lord operated much like a system of inheri-

12. The value of history in sociological jurisprudence is discussed in 1 P. VINOGRADOFF, *HISTORICAL JURISPRUDENCE* 61-83 (1920).

13. And you shall say to the people of Israel, "If a man dies, and has no son, then you shall cause his inheritance to pass to his daughter. And if he has no daughter, then you shall give his inheritance to his brothers. And if he has no brothers, then you shall give his inheritance to his father's brothers. And if his father has no brothers, then you shall give his inheritance to his kinsman that is next to him of his family, and he shall possess it. And it shall be to the people of Israel a statute and ordinance, as the Lord commanded Moses."

Numbers 27:8-11 (Rev. Stand. Ver.).

14. See 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 244 (2d ed. 1898). As to Teutonic patterns generally, see 1 P. VINOGRADOFF, *supra* note 12, at 215-31.

15. H. MAINE, *ANCIENT LAW* 193-94 (5th ed. 1874). See generally C.R. NOYES, *THE INSTITUTION OF PROPERTY* (1936).

16. A.W.B. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF THE LAND LAW* 46-48 (1961).

tance taxation as contrasted with an exercise of royal or baronial ownership rights. Furthermore, the king and barons were themselves private individuals; an escheat or reversion to a lord provided for a succession of property into private hands, although those hands might not belong to the decedent's family.¹⁷

The continuation into modern times of this concept of privateness of property goes without saying. No one suggests seriously that private ownership of, or succession to, property totally cease. The concept is deeply entrenched in the ethos of the body politic of this country. For example, Senator McGovern's recently suggested absolute estate tax plan met with almost universal disdain.¹⁸ This reaction mirrors a similar experience in communist Russia where private inheritance survived the Revolution and in fact has slowly been expanded.¹⁹ People, it seems, want their laws to continue reflecting the concept. Theoretically, inheritance may be a "privilege"; practically, it is a right.²⁰

B. *Effectuating the Desires of the Individual*

Implicit in the definition of private property in many minds is

17. 3 W. BLACKSTONE, COMMENTARIES 50 (Tucker ed. 1803); F. GANSHOF, FEUDALISM 46-49 (trans. Grierson 1964). Under Norman feudal law ownership in the technical sense may not have existed in any but the king. See F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 159-92 (1896). However, a tenant's possession against others was normally protected and thus reflected modern "ownership" in the looser sense. An interesting parallel is found in Aztec law, under which property was distributed upon death to family and then clan members:

No one had title to the land he worked, he was allowed only the produce of it; if he died without issue or the land was neglected . . . the piece reverted back to the holding corporation.

W. VON HAGEN, THE ANCIENT SUN KINGDOMS OF THE AMERICAS 68-69 (1961). Land holding in feudal England was not significantly dissimilar, if the lord is substituted for the clan as ultimate owner of the property. The tenancy relationship existed until the grant of the power to devise land made continuation of the "non-ownership" an unreasonable fiction. Indeed, the use of the word "ownership" to describe the interest of the landholder was not used until 1584. 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 153 n.1; H. MAINE, *supra* note 15, at 217.

18. Early in the 1972 presidential campaign, Senator McGovern suggested a 100 percent estate tax on large estates. Prior to the Wisconsin primary election, however, it became evident that this was not a popular proposal, even among "blue collar" workers, and the Senator had to modify his position. TIME, May 8, 1972, at 19.

19. For a concise description of Russian inheritance law, see J. RITCHIE, N. ALFORD & R. EFFLAND, CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 117 n.4 (4th ed. 1971).

20. Whether inheritance is a right or merely a privilege provided a lively debate earlier in this century. Cf. *Nunnemacher v. State*, 129 Wis. 190, 108 N.W. 627 (1906) (right). *Contra*, *Irving Trust Co. v. Day*, 314 U.S. 556 (1942) (privilege).

the ability to do with the property that which the owner desires. Although the ability to direct by means of inter vivos or testamentary disposition of property has varied substantially over the millennia, most societies have recognized such a power in some situations and in some form. Most have had at least one form of inter vivos gratuitous transfer.²¹ Outright gifts have been common, although sometimes restricted as to size or type of donee.²² More sophisticated alternatives have a similarly long history. The modern trust, which grew from the use, which grew from the *post obit* gift, had precedent in Roman law.²³ In addition, adoption as a means of eventual transfer has perhaps the oldest history of all.²⁴

Purely testamentary transfers as validated expressions of indi-

21. Indeed, the concept of alienability may be critical to the definition of property. C. R. NOYES, *supra* note 15, at 412.

22. Teutonic law had restrictions against transfers of property subject to birthright. H. MAINE, *supra* note 15, at 221. Cf. 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 248. Roman law had a similar concept in the *legitime*, or non-barrable share of children. INSTITUTES 2.13, 2.18. For a modern suggestion that the concept be developed in this country, see Haskell, *supra* note 5.

23. The creation of trust estates is described in INSTITUTES 2.23. The *post obit* gift, being a transfer to a living person for transfer to others contained the seeds of the fiduciary feoffee to uses. 2 F. POLLOCK & F. MAITLAND, *supra* note 14, at 318. The ancestor was probably the German *Treuhand* or *Salman*. AMES, *Origin of Uses and Trusts*, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 737, 740 (1908). The trust may therefore not have been traceable to Roman antecedents, although the Roman example existed.

24. Maine notes that the "hindoos" had the practice. H. MAINE, *supra* note 15, at 187. An early example of royal exercise of the practice is the "will" of Hattusilis, King of the Hittites:

Lo, I fell sick. I had presented to you the young Labarnas as he who should sit upon the throne; I, the king, called him my son, I embraced him, I exalted him, I cared for him without cease. But he proved himself a young man not worth looking upon: he did not shed tears, he did not sympathize, he is cold and heartless. Then I, the king, called him and made him come to my bedside. So no longer can I go on treating a nephew as a son! To the king's words he paid no heed, but to those of his mother he paid good heed, the serpent! Brothers and sisters spoke evil words to him, and to those he paid heed. But I, the king, learned of it; and then I met strife with strife. Now it is finished! He is no longer a son. Then his mother lowed like an ox: "They have torn my bosom in my living flesh! They have destroyed him, and thou wilt kill him!" But I, the king, did I ever do him any harm? Did I not make him priest? Always I honoured him, thinking of his good. But he did not follow the king's will with love. How could he, following his own will, feel love for Hattusas? . . . Behold, Mursilis is now my son! Him you must acknowledge, set him upon the throne. In his heart god has put rich gifts. . . . In time of war of insurrection, be at his side, O my servants, and you, chiefs of the citizens. . . . Hitherto no one (of my family) has obeyed my will. But do thou obey, O Mursilis, thou who are my son. Follow the words of thy father!

Quoted in S. MOSCATI, *THE FACE OF THE ANCIENT ORIENT* at 159 (1960).

vidual desire are of more recent vintage, but have similarly old roots. Early societies used adoption as a means of testation, thus insuring that an individual did not die without a survivor to take his property.²⁵ The Bible reflects evidence of testation, although the procedure probably was more in the nature of an old-age settlement.²⁶ Rome developed a rudimentary will form in the formal expression of testamentary desire before the governing council,²⁷ and later, a more sophisticated will reflecting all of the characteristics of modern wills — secrecy, revocability, and ambulatoriness.²⁸

While the fall of the Roman Empire brought with it an apparent reversion to more primitive forms and greater reliance upon the customary passage to individuals designated by society, testation did not die.²⁹ Early English history reflects examples of testamentary power over both realty and personalty.³⁰ The ecclesiastical courts customarily enforced the right of the individual to direct, by testament, the passage of some of his personalty to pious uses.³¹ At

25. *E.g.*, S. MOSCATI, *supra* note 24, at 159.

26. *See Deuteronomy* 21:15-17 (Rev. Stand. Ver.):

If a man has two wives, the one loved and the other disliked, and they have borne him children, both the loved and the disliked, and if the first-born son is hers that is disliked, then on the day when he assigns his possessions as an inheritance to his sons, he may not treat the son of the loved as the first-born in preference to the son of the disliked, who is the first-born, but he shall acknowledge the first-born, the son of the disliked, by giving him a double portion of all that he has, for he is the first issue of his strength; the right of the first-born is his.

27. Those lacking immediate family, or *sui*, and collaterals, or *agnates*, could appear before *comitia collata* and express their desires as to succession. There, the *gentiles* — those of similar surname and ultimate heirs — could object and protect their ultimate heirship. Lacking such veto, the “will” would be given effect. H. MAINE, *supra* note 15, at 193-94.

28. Mancipation began as a form of sale with witnesses. By it the head of family status could be transferred to the “buyer,” or *Emptor Familias*, who succeeded to the rights and responsibilities of the grantor. Transfer in this way later became less sale and more form, until it became a purely ambulatory transaction not unlike the modern will. H. MAINE, *supra* note 15, at 202-05.

29. *Id.* at 202; 2 W. BLACKSTONE, *COMMENTARIES* 43-46 (Tucker ed. 1803).

30. The limited testamentary freedom over realty resulted from a distinction between “bookland,” land granted by the king by “book” or grant, and “folkland,” or ungranted land. The book often included the right to have the land for more than one generation, and often included the right to designate the taker upon the death of the first grantee. Usually, however, the exercise of this power was subject to the approval of the granting authority, the king. 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 94-95 (4th ed. 1936); F. MAITLAND, *DOMESDAY BOOK AND BEYOND* 246-47, 297-98 (1897); 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 318-19. Distribution of personalty among spouse, the children, and the church had been set at least as early as the tenth century. Pollack and Maitland trace the custom of antiquity. *Id.* at 312.

31. 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 332.

the same time, grants of realty were often made giving power to the donee to will the property to others.³²

Perhaps no greater evidence of the force of the goal can be found than in the development of the use as an inter vivos substitute for the will.³³ At about the time of the imposition of Norman restrictions upon the devise of realty, courts began to develop the use as an inter vivos substitute. Indeed, the fall of the use in 1535 itself provides a clear indication of the strength and the importance of the power to direct. Within five years of the passage of the Statute of Uses,³⁴ the Statute of Wills³⁵ was forced upon the King by his titled landowners.³⁶ Within the next century, restrictions upon the free passage of personalty fell as well.³⁷

The will and the right of the decedent to direct the passage of his property at death is now taken for granted. Today there is no American state which does not recognize the power of the individual to direct, through both inter vivos transfer and by will, the passage of property which he owns.³⁸ Currently, nearly 60 percent of the estates opened are of the testate category, and there are indications that many more decedents die having accomplished the same objectives by inter vivos transfer of property.³⁹ The withdrawal of this power might well lead to electoral revolt not unlike that facing Henry VIII in 1535 as a result of the passage of the Statute of Uses.⁴⁰

32. See, e.g., materials cited in note 30 *supra*.

33. T. ATKINSON, *WILLS* 14 (2d ed. 1953); 4 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 420 (3d ed. 1945).

34. 27 Hen. VIII, c. 10.

35. 32 Hen. VIII, c.1.

36. For a discussion of the forces leading to the passage of the two statutes, see 4 W. HOLDSWORTH, *supra* note 33, at 464-65.

37. T. ATKINSON, *supra* note 33, at 16.

38. T. PLUCKNETT, *supra* note 10, at 515-87. See generally Rees, *American Wills Statutes* (pts. I & II), 46 VA. L. REV. 613, 856 (1960).

39. Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 248 (1963).

40. Far less has stirred the body politic in this country. As a result of a quirk in New York statutory law, the court in *Tilden v. Green*, 130 N.Y. 29, 28 N.E. 880 (1891) ruled that a bequest by Governor Tilden to establish a public park was invalid because New York had not adopted the English statute of charitable uses. Public outrage promptly resulted in remedial legislation. N.Y. EST., POWERS & TRUSTS LAW (McKinney) § 8-1.1 (1967). See generally G. BOGERT, *THE LAW OF TRUSTS* § 56 (5th ed. 1973); Ames, *The Failure of the Tilden Trust*, 5 HARV. L. REV. 389 (1892).

C. *Providing for the Family*

As noted previously, the earliest examples of desire validation occurred where immediate family was lacking. This favoring of family in succession law has been nearly constant throughout history. The law of inheritance has in fact been described as "an attempt to express the family in terms of property."⁴¹ Providing for the well-being of the family has been an obvious factor in the design of inheritance laws over the millenia.⁴² Such concern may be found in early Roman law, where ownership of property was a matter of status as a family head, rather than mere ownership without responsibilities.⁴³ Family responsibility went with the status of owner of the family property. Upon death, the family and the property passed to a new head of the family, who succeeded as well to the responsibility. Extra-family succession was allowed only in the absence of close family,⁴⁴ as it was in other earlier societies.⁴⁵

The strength of family well-being as a goal is also reflected in both old Germanic law and early English law. Under the former, birthrights could be eliminated only with the child's consent.⁴⁶ Family property was held more in trust by the living elder, than held as "his" property in the modern sense. Similarly, in early English law, the spouse and issue were each the recipients of a forced portion of the decedent's personalty and the decedent was allowed to direct the passage of the residue.⁴⁷ The interests of the family were protected against others by the ecclesiastical courts upon threat of excommunication.⁴⁸

41. T. PLUCKNETT, *supra* note 10, at 711; *accord*, J. STONE, *supra* note 10, at 568.

42. Geffcken found protection of the family to be the goal of inheritance law: "[I]ts foundation and purpose is the material continuity and safety of the family." Cited in 1 R. ELY, *supra* note 10, at 427. Aristotle thought it so important that he would have abolished testamentary power in order to preserve the estate in the family. L. MIRAGLIA, *supra* note 10, at 741.

43. H. MAINE, *supra* note 15, at 172-84.

44. *Id.* at 194.

45. *See* note 24 *supra*.

46. H. MAINE, *supra* note 15, at 190-91.

47. Where spouse and children survived, one-third was subject to testamentary disposition; a half was subject to disposition where either spouse or children did not survive. 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 550 (5th ed. 1942).

48. 1 *id.* at 630; 2 F. POLLOCK & F. MAITLAND, *supra* note 14, at 330. Battles raged between the rights of the Church, the Lord, and the family of the decedent as to distribution of his intestate property. They were eventually resolved in favor of the Church as to the decedent's "share" and in favor of the spouse and the children as to their shares. 3 W. HOLDSWORTH, *supra* note 47, at 550-59.

This protection of the family is more apparent with respect to realty. Both pre- and post-Norman restrictions on the devise⁴⁹ had the necessary effect of protecting the economic viability of the family. Even though typically the property would descend to a single family member as heir, the property remained in the family. Moral duties of the heir, enforced by the strength of an all-powerful church, indirectly protected the family. In addition, the customary right of the wife to a dower interest in realty provided her with special protection in a male-dominated society.⁵⁰

Paradoxically, protection of family was enhanced by two legal transactions apparently counter to the rules of primogeniture. The first was the development of the inter vivos gift. The second was the development of the use, which allowed for testamentary-like inter vivos transfers. Both provided a better means of protecting the family than provided by existing rules of intestacy. Since it retained aspects of testation, the use was particularly helpful in this regard. With it, the individual could provide for at-death descent to chosen recipients, while retaining effective use of the property for his life. In those cases where primogeniture resulted in significant family detriment, the family head had means through which to avoid its effect. Like the Romans before them, the English developed intent validation techniques to avoid family-denying applications of normally protective rules.⁵¹

Provisions for the family as a unit and for individuals within the family have been carried into the contemporary law. This is apparent in the institutions of homestead, exempt property, and family allowances;⁵² in dower and its substitutes;⁵³ and in the design of the rules of intestacy.⁵⁴ Beyond such examples, the goal may have its strongest support in the use that is actually made of the powers

49. It was held that seisen could pass only by livery, an act impossible if the owner is dead and thus impossible in the will context. 2 F. POLLOCK & F. MAITLAND, *supra* note 14, at 324-27; as to pre-Norman restrictions, see Dainow, *Limitations on Testamentary Freedom in England*, 25 CORNELL L.Q. 337 (1940).

50. Though early a matter of contract, dower became, through customary application, a property right. 3 W. HOLDSWORTH, *supra* note 47, at 185-97.

51. H. MAINE, *supra* note 15, at 189. The cure naturally resulted in new problems, since the tools were now at hand to cut off rightful heirs in both the moral and legal sense of the term.

52. For a brief description of such protections see T. ATKINSON, *supra* note 33, at 126-34.

53. *Id.* at 104-26.

54. *Id.* at 60-99.

of alienation and testation, in that gifts and wills typically do increase the provision that is made for the family.⁵⁵

The contemporary importance of this socially recognized obligation to members of the decedent's family is also illustrated by legal requirements imposed collaterally to inheritance laws. Most states require an individual during life to support his spouse⁵⁶ and minor children.⁵⁷ Many also require the support of parents, grandparents, grandchildren, and even siblings provided they are indigent.⁵⁸ These statutes reflect the judgment that an individual has an obligation to provide, where possible, for the well-being of his family. Similarly, there is family preference reflected in the developing body of law, both judicial and statutory, which indicates that the guardian of an incompetent may make gifts of the ward's property where the gift would probably be made by the ward if competent.⁵⁹ In application, these gifts are most often approved where the recipient is a relative, dependent upon the ward for support.⁶⁰ Here again, the law is underscoring the importance of family support for society, and since in both cases property passes from the inter vivos estate to others, it is a type of pre-inheritance distribution.

D. *Providing for Society*

The concept of private property, the effectuation of individual desires, and the protection of the family each provide for the good of society. This seems almost self-evident. Societies do not intentionally create laws which are dysfunctional. Nor do societies continue in existence laws which do not further some societal interest.

Such an argument, however, proves too much. In its purest form, it could, like the old saw about the importance of the "stabil-

55. See note 253 *infra*. See generally Dunham, *supra* note 39; M. SUSSMAN, J. CATES & D. SMITH, *THE FAMILY AND INHERITANCE* (1970). Both studies indicate that the most common deviation in wills from the pattern of intestate succession is the preference for the surviving spouse. Dunham, *supra* at 252. M. SUSSMAN, *supra* at 89. The Sussman study further indicates a preference for "meritorious" relatives, who are particularly in need, or who have provided significant aid to the decedent during his life.

56. 3 C. VERNIER, *AMERICAN FAMILY LAWS* § 161 (1936).

57. 4 *id.* § 234.

58. *Id.* § 235.

59. See generally *Substitution of Judgment Doctrine and Making of Gifts from an Incompetent's Estate*, 7 *REAL PROP. PROB. & TRUST J.* 479 (1972).

60. *Cf. In re Kernochan*, 84 Misc. 565, 570, 146 N.Y.S. 1026, 1029 (Sup. Ct. 1914): "There must exist a real need or necessity upon the part of the applicant to be provided for, the court being mindful that it does nothing wantonly or unnecessarily"

ity of titles," act as a total justification for the status quo no matter how nonsensical. In this article, however, the goal of "providing for society" is used in the more limited sense of expressing those concerns that are normally associated with a personified "society."⁶¹ For example, "society" may worry about minimizing the number and duration of disputes between its members. It may be concerned that the state have sufficient resources to operate and that each of its members have at least minimal support. It may desire the most efficient use of the property within its jurisdiction and by its members. It may concern itself with its own stability from within and without. Such are "societal" interests.

Such uniquely societal interests have been an important influence upon our succession laws. The state has, for example, through taxation of gifts and estates, or through escheat, obtained funds for direct application to societal uses. Similarly, the state has, by allowing or disallowing gifts, devises, and bequests, encouraged the private provisioning of societal goals and discouraged "anti-social" provisions. Finally, the state has, by creating "property" interests in others, often required that a decedent's property be applied to the satisfaction of such societal goals. The historical record is replete with examples of such societal goals being reflected in succession law. Some are notorious; others are more prosaic.

1. PROVIDING FOR THE NEEDY

The concept of civilized society may well require that society attempt to provide its members the bare necessities of life. Stone calls this the "social interest in minimum standards of individual life."⁶² It is reflected in much social legislation of the modern era. In succession law, the concept is clearly illustrated by the institutions of the homestead allowance, the family allowance, and by exempt property provisions.⁶³ Each acts to protect the family against absolute poverty, at the cost of leaving creditors unpaid. It is a shifting of the burden of support from the state to creditors of the deceased, and may arguably, by discouraging extension of

61. Society's interests are, of course, the composite of the interests of the individuals making up society.

62. J. STONE, *supra* note 10, at 595-98. Stone includes more than economic standards in the definition, extending it to include concepts associated with individual freedom and unconscionability.

63. See note 52 *supra*.

credit, discourage consumption to the exclusion of security.

Provision for the needy may be found as well in the history of succession law. The early English practice of allowing the decedent to dispose of part of his property "for the good of his soul" helped the needy.⁶⁴ The direction of property for pious uses ultimately resulted in a portion being used for the care of orphans and other needy in society.⁶⁵ Similar justification may be found in the modern recognition of charitable bequests and devises and in their exclusion from taxation.⁶⁶ Finally, direct societal provisioning may be found in the taxation of estates and in escheat, as the state takes resources which are used in part to satisfy the welfare function.

2. PROVIDING FOR THE MERITORIOUS

A more specialized application of the protection of "minimum standards of individual life" is the protection of those who merit special recognition by the decedent. If one assumes individuals expect quid pro quo recognition of contributions to the decedent's economic or psychological health, such recognition should benefit society by reducing the number of disgruntled members. Furthermore, unless the merit of such persons is recognized, they may fail to make contributions, thus damaging society's interest in the family (if the family's interest is not recognized) and in the market (if credit as interests are not recognized). Such recognition may also reduce the amount of light-fingered non-probate "distribution" of the estate and intra-family quarrels. Recognition of merit should contribute to social stability.⁶⁷ In cognizance of this, the spouse of the decedent has in recent centuries been granted a protected share in the estate. Dower, as an extension of the settlement contract, was an express recognition of the goal. The more recent spousal, or elective share, performs the same function.⁶⁸

64. See text accompanying note 31 *supra*.

65. See G. JONES, *HISTORY OF THE LAW OF CHARITY 1532-1827* (1969).

66. See generally *id.*; E. FISCH, D. FREED & E. SCHACHTER, *CHARITIES AND CHARITABLE FOUNDATIONS* (1974).

67. See J. RAWLS, *A THEORY OF JUSTICE* 310-11 (1971).

68. Dower began as a part of the antenuptial marriage settlement negotiated by the bride's family. Over a period, however, the amount became customary, and later implied. 1 *AMERICAN LAW OF PROPERTY* § 5.2-.4 (A. Casner ed. 1952). The "merit" in this situation results from the marriage contract, similar in kind to that of creditors. Such modern protections may reflect, however, a different concept of merit. Rather than responding to the implied contract concomitant to marriage, the protection of the spouse may be a recognition of the unpaid

Recognition of merit is met in other areas of succession law as well. Modern laws, for example, preserve the claims of creditors and tort claimants, while the protection of the family is limited to the specific exemptions granted by statute. Thus the merit of creditors and tort victims is recognized.⁶⁹ The exemption statutes, on the other hand, reflect the merit of the family by protecting against disinheritance by credit consumption. Obviously, the goals of protecting both the family and creditors may lead to conflicts that cannot be resolved by inflexible and technical rules. Similarly, the goal of recognizing merit may be found in recognition of contracts to devise, where consideration operates to avoid the strictures normally applied to the execution of wills,⁷⁰ and, in a more extreme way, in the recognition of quantum meruit relief to those providing services to the decedent.⁷¹

3. PROVIDING FOR THE DECEDENT

In addition to the claims of the state for general financing in satisfaction of welfare roles and similar activities as noted above, the state may also merit a share of the estate in return for services rendered the decedent during his life.⁷² The state assumes many roles which would otherwise have to be filled by its members in their private capacity. Police and fire protection, the maintenance of sewers and the court systems, and other such functions of the state are a cost of life in society. In recognition of this cost of providing for the health and security of the decedent, the state may and has taken a share in the estate in the form of estate taxes,⁷³ and by escheat.⁷⁴

efforts of the spouse resulting, directly or indirectly, in the accumulation of the estate. This aspect may explain the intensity of disdain with which spousal disinheritance is met. One of the problems that generated this article is that modern statutory successors to dower often fail to carry out the goal of protecting the meritorious spouse. For excellent discussions of this problem, see authorities cited note 5 *supra*.

69. In a sense, both the protection of family and of such creditors and claimants recognizes merit in each respectively. The limits of the value of the exemptions arbitrarily establish the relative value of the conflicting merit claims.

70. See generally T. ATKINSON, *supra* note 33, at 210-22.

71. *Id.* at 218-19.

72. Not referred to here are those situations where the law provides for express repayment of sums expended by the state, for example, the cost of state hospitalization. See THE MENTALLY DISABLED AND THE LAW 129-31 (rev. ed. S. Brakel & R. Rock 1971).

73. In addition to federal estate taxes (I.R.C., ch. 11) most states have either inheritance or estate taxes.

74. All states provide for escheat in some circumstances. T. ATKINSON, *supra* note 33, at

The recognition of "governmental purposes" as proper object for charitable donation may also reflect this goal.⁷⁵ By validating gifts for such purposes and by exempting them from taxation, society encourages voluntary "repayment" of decedent's moral obligations. In any event, the exemption allows substitutions at governmental expense of individual gifts for governmental ends.

4. PROVIDING FOR THE STABILITY OF SOCIETY

Of all interests, maintaining stability may be the greatest societal goal.⁷⁶ It is not surprising that in some situations it is clear that the design of succession law has been the result of a desire to avoid literal revolt. The Statute of Wills of 1540, prevented a revolution.⁷⁷ The recognition of charitable trusts in New York by the Tilden Act may have prevented a somewhat milder electoral revolt.⁷⁸ The electorate did revolt against the McGovern proposal for a 100 percent estate tax, and he discarded it immediately.⁷⁹

These are clear examples. More subtle recognition can be found elsewhere. Primogeniture stabilized social structures, a vital contribution in the uncertainty of the Middle Ages.⁸⁰ Conversely, it has been suggested that the Virginia Statute of Descents, in rejecting the English pattern, was shaped to break up the tidewater estates — an early example of forcing economic equality and reducing economic tensions in increasingly economic times.⁸¹ The Napoleonic Code is said to have had the same goal and result.⁸² Befitting the importance of such a goal, the list of examples is substantial, including even biblical adoption techniques, which may be seen as

97-99. It would not seem significant that the theory of taking is generally held to be that the state is the ultimate heir, not the king, although the latter would be more consistent with "provisioning."

75. Such trusts are described in 4 A. SCOTT, *LAW ON TRUSTS* § 373 (3d ed. 1967).

76. Pound refers to the security of society as the "paramount social interest." Pound, *A Survey of Social Interests*, 57 *HARV. L. REV.* 1, 17 (1943). J. RAWLS, *supra* note 67, at 496-504. For a discussion of how this search for social stability is reflected in the extreme in Duguit's theory of objective law and social solidarity. See, J. STONE, *supra* note 10, at ch. 14.

77. See notes 34-36 *supra* and accompanying text.

78. See note 40 *supra*.

79. See note 18 *supra*.

80. Indeed, the feudal structure based on primogeniture substituted for government as we know it. R. FAWTIER, *THE CAPETIAN KINGS OF FRANCE 169-98* (1960).

81. J. RITCHIE, *supra* note 19, at 44 n.2.

82. Habakkuk, *Family Structure and Economic Change in Nineteenth Century Europe, A MODERN INTRODUCTION TO THE FAMILY* 140 (1968).

having their genesis in the prohibition of disputes over the property of the childless. It is an important goal indeed.

5. PROVIDING FOR THE ECONOMICAL USE OF PROPERTY

It appears self-evident that society is richer if its property is not wasted.⁸³ Certainly the prevention of waste can be seen in succession law design. Prohibiting wasteful devises is the clearest example.⁸⁴ The prohibition of superstitious uses also illustrates the point.⁸⁵ On a different tack, primogeniture provided for centralized property management, and may for a time have increased efficiency, especially military efficiency.⁸⁶ Together with the military strength implicit in the system, it provided at minimum for the security necessary for economic life. In turn, the breakdown of primogeniture has been attributed by some to its economic inefficiency. With the growth of the use, resulting in the validation of wills in 1540, the inefficiencies of spendthrift first-borns and similar family problems were avoided.⁸⁷ Finally, it has been suggested that the Suppression of Monasteries in the 16th century⁸⁸ was the result of an inefficiency shown in the management of church lands, requiring limitations on the Church's burgeoning holdings.⁸⁹ Thus, the efficient use of property has been an important societal goal in the development of succession laws.

6. PROVIDING FOR EASE OF ADMINISTRATION

Even though the succession laws may well have as their purpose the satisfaction of goals relatively basic to social being and stability, the efficacy of such laws may depend upon the ease with which they can be administered. Langbein reflects upon this as one of the justifications for the current requirement for strict compliance with the

83. J. STONE, *supra* note 10, at 601; Pound, *supra* note 76, at 26.

84. 2 A. SCOTT, *supra* note 75, § 124.7.

85. 4 *id.* § 371.5; G. BOGERT, *supra* note 40, § 58.

86. Primogeniture initially was a characteristic only of tenancies by chivalry and certain tenancies by serjeanty where the services could not be divided. See A.W.B. SIMPSON, *supra* note 16, at 48.

87. J. STONE, *supra* note 10, at 568.

88. 23 Hen. 8, c. 10 (1531) (Statute of Superstitious Uses); 27 Hen. 8, c. 28 (1535); 31 Hen. 8, c. 13 (1539); 37 Hen. 8, c.4 (1545); 1 Edw. 6, c. 14 (1547).

89. 1 E. LIPSON, *THE ECONOMIC HISTORY OF ENGLAND* 152-53 (7th ed. 1934).

various Statutes of Wills.⁹⁰ Other examples of simplicity as its own justification can certainly be found in history. The reduction of the formality of the Roman *Mancipatio* to a documentary transaction epitomizes simplification of the law.⁹¹ So does the shift from uses to wills. Now that the administration of wills has become so complex, the striving for simplicity pushes estate planners back once more toward the modern use of the trust to avoid the frustrations of probate.⁹² Gifts *causa mortis* can have the same attraction.⁹³ The Uniform Probate Code has as its major attraction the simplicity which it provides. Simplicity in the administration of estates is an important goal both to society and to its members.

7. PROVIDING FOR CONSTANCY AND STABILITY OF THE LEGAL SYSTEM

It has been suggested that the relative scarcity of changes in the laws of succession throughout history results from a need for constancy and stability of the system. Decedent's wishes should not be thwarted by changes in the law.⁹⁴ Attorneys should not have to learn new systems. So entrenched is the law that vested interests in existing systems are hard to overcome. Outlawing the use nearly caused a revolution. In more recent times, the English bar fought bitterly against major changes in the English law of real property before finally acceding in 1938,⁹⁵ even though the changes drastically simplified the system of estates in English land. Once again one can perceive a conflict between discrete goals of succession law. The battles are but beginning with respect to the Uniform Probate

90. Langbein, *supra* note 1, at 494. This is part of the "channeling" function. See Fuller, *supra* note 10, at 801-03.

91. Maine ascribes the reduction to a documentary transaction to an unknown praetor. H. MAINE, *supra* note 15, at 209-10.

92. See generally N. DACEY, *HOW TO AVOID PROBATE* (1965). Page lists 18 different types of non-will transfers which are used as will substitutes. PAGE ON THE LAW OF WILLS § 6.1 (W. Bowe & D. Parker eds. 1960). Atkinson separately lists 15 categories, but includes all of the Page types. T. ATKINSON, *supra* note 33, §§ 38-49. The shift to trusts from wills reminds one of the development of the covenant to stand seized as a means of avoiding the Statute of Enrollments. See A.W.B. SIMPSON, *supra* note 16, at 177-78.

93. The author remembers one \$250,000 estate from practice which passed by gift *causa mortis* and thus avoided probate. See also Oppenheim, *The Donation Inter Vivos*, 43 TUL. L. REV. 731 (1969).

94. Maintaining "the stability of titles" is commonplace court language against change. Such stability enhances the "channeling" of transactions into neat compartments known by decedents to be valid. Langbein, *supra* note 1, at 493-94.

95. Laufer, *supra* note 8, at 287. For a history of the Act see Dainow, *supra* note 49.

Code.⁹⁶ Indeed, the fact that the existing structure of succession law has remained basically unchanged for 400 years, itself suggests the existence and importance of constancy as a goal.

8. MAINTAINING RESPECT FOR THE SYSTEM

Related to stability of the legal system and perhaps other goals is the societal interest in maintaining respect for the legal system. This is not a goal unique to succession law, any more than are the goals of enhancing the ease of administration, or the stability of society. It is, however, an important aspect of the growth of law in two ways. First, it includes the concept of responsiveness of the legal system to demands of the existing society. Second, it includes the concept of the rule of law as a moderator of societal reactions.

One need not look far to find examples of these roles. One of the primary reasons for the promulgation and adoption of the Uniform Probate Code was an increasingly vociferous lack of respect for the legal system fostered by the existing patterns of administration. Other examples have been referred to earlier, such as adoption of the Tilden Act. On the other hand, law rapidly changing is not law at all, and growth should be slow or other societal goals will be defeated.⁹⁷ Massive overthrow of the existing structure, unless overwhelmingly demanded, ought to be an extremely rare phenomenon. Thus it is not surprising to find, for example, extreme delays in adopting changes in spousal protection for involved is a change in an important part of the structure of the law that should not be (nor was it) lightly taken.

III. THE PROBLEM WITH THE EXISTING STRUCTURE OF SUCCESSION LAW

Given the diverse nature of the goals of succession law, they are not always achieved, and the extent to which goals are satisfied in any particular case may depend more upon happenstance than upon plan. Professor Langbein points out, for example, the wide variation in form required of the various will substitutes and contrasts it with that required of those intent-defining documents

96. Besides the obvious economic value in the probate court's retention of probate, lawyers and judges alike have a tremendous investment in knowledge of the existing system. Wellman, *The New Uniform Probate Code*, 56 A.B.A.J. 636 (1970).

97. The value of the law lies in the fact that it is predictable. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460, 461 (1897).

called "wills." Several more examples of such unevenness in application should illustrate the problem. Five areas will be discussed. The criteria for validity of wills is the first. The second concerns the protections provided the spouse against disinheritance. This is an area which has occasioned significant discussion in the literature during the past few years. The third covers the protections provided children. The fourth is the application of homestead, exempt property, and family allowance provisions. The fifth concerns structure of existing intestacy rules. Taken together, these areas exemplify the goals of decedent intent validation, family protection, and a variety of obvious societal interests, including the reduction of poverty, the recognition of merit, and the maximization of the use of property. They also exemplify how these goals are often frustrated in ways that appear unjustifiable.

A. Will Validation

Notwithstanding the Langbein and Mechem dissatisfaction with the formal requirements of wills, the will-making process as it exists usually works satisfactorily. Most wills are properly executed. Certainly most wills disposing of significant wealth are so executed.⁹⁸ Most are quite rational and comply with existing standards of morality.⁹⁹ The problem derives from exceptional cases. One can, however, draw some general conclusions concerning the efficacy of the will validation mechanism.¹⁰⁰

From the viewpoint of the testator, wills have as their basic purpose the effectuation of the testator's intent. Where there is compliance with the formalities, or will substitutes are effectively used, that intent is validated and the goal satisfied. In such cases, any problem with goal satisfaction must fall into one of two areas. First, those cases where decedent intent as validated is counter to family protection or societal goals. Second, those cases where decedent intent furthering such other goals is denied validity.

One would hope that the test for the validity of the will would distinguish between cases in such a way as to minimize examples

98. Dunham, *supra* note 39, at 250-51.

99. The most substantial authority in the area is M. SUSSMAN, *supra* note 55, which reports on a study of estates in Cuyahoga County, Ohio.

100. See Plager, *The Spouses Non-Barrable Share: A Solution in Search of a Problem*, 30 U. CHI. L. REV. 681 (1966).

of both categories of frustration. Langbein's point is that the present application of the rules by the courts does not minimize the latter group.¹⁰¹ It should be equally clear that existing rules fail to minimize the number of cases within the former category.

Before discussing these two groups of cases in greater detail, it should be noted again that a vast number of cases can be excluded from discussion. They include first, all cases in which there is no decedent intent as to the distribution of his property, or in which decedent intent is not expressed. In these situations goal satisfaction relies totally upon the rules of intestacy.¹⁰² Second, all cases can be excluded in which expressed decedent intent is neutral in its effect upon the satisfaction of other goals, whether such intent is validated or invalidated.¹⁰³ For example, except for possible effect upon respect for the legal system, it is not very significant whether a "will" duplicating intestacy is validated. Third, all cases are excluded in which a decedent's intent is validated and that intent in general furthers the other goals discussed above. Since testators typically use wills to maximize the economic wealth of the family, this includes many of the cases.¹⁰⁴ Finally, all cases are excluded in which decedent intent which is generally counter to the other goals is invalidated. With respect to such cases the law is not operating in a clearly unsatisfactory way, unless one takes the position that decedent intent should reign supreme over family need and societal good.

What remains, then, are the two limited groups of cases: validated but otherwise goal-denying wills, and invalidated but otherwise goal-furthering wills. With respect to each the current rules are clearly inadequate.

In the first group are found a variety of cases not currently dealt with by the law. One is the will of the sane sourpuss, disinheriting

101. Langbein, *supra* note 1, at 498-99.

102. It should be noted that even in intestate estates there may be intentional intestacy, or intentional non-testation. Not uncommon among potential decedents is the statement "the law will make me a will."

103. The Sussman study indicates that most decedents treat children equally (M. SUSSMAN, *supra* note 55, at 97-103), and that most treat collaterals of equal degree equally, *id.* at 103, reflecting intestate schemes.

104. Both the Dunham and the Sussman studies indicate that the most common use of testation is to vary the rules of intestacy to give the entire estate to the surviving spouse. Dunham, *supra* note 39, at 256; M. SUSSMAN, *supra* note 55, at 89. The Sussman study indicates as well a marked preference for dependent children over independent children. *Id.* at 97.

his children willy-nilly.¹⁰⁵ The unnatural nature of such a will is not sufficient in and of itself to invalidate the will under prevailing standards.¹⁰⁶ Yet it clearly denies family protection and a number of societal interests, not the least of which is respect for law and a legal system which allows and validates such behavior.

A similar case is that of the negligent testator. Notwithstanding existing rules concerning revocations implied in law,¹⁰⁷ and pretermitted heir statutes,¹⁰⁸ the testator whose family situation changes after execution of a "valid" will may die with that will still effective although it is totally inconsistent with the demands of the circumstances existing at the time of his death. A child, healthy when the will is executed, may become bedridden and dependent.¹⁰⁹ A sibling of the decedent may become destitute and dependent. The variety of cases is manifold. In such cases, family interest, societal interest, indeed even decedent intent can be violated without any gain except administrative convenience.

Finally, there is the related problem of the non-will "will." The decedent who uses will substitutes such as inter vivos trusts or insurance, may irrevocably establish a plan of distribution that is unwise at or before the time of his death.¹¹⁰ The fact that such substitutes are incompletely analogized to wills ignores the purposes such substitutes often serve. The lack of revocability may result in unwise dispositions at the time of death, which in all likelihood is the time considered by the decedent to be the time of distribution. Again there is no mechanism to counteract the effect. Theory lacks

105. In part, the cases dealing with incompetence may *sub silentio* act as a check on such individuals, notwithstanding judicial authority that the unnatural nature of the will is not itself sufficient proof of incompetence. Green, *Proof of Mutual Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271 (1944).

106. *Abrahams v. Woolley*, 243 Ill. 365, 90 N.E. 667 (1909); *Old Colony Trust Co. v. Di Cola*, 233 Mass. 119, 123 N.E. 454 (1919).

107. See, *The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator*, 5 Wisc. L. REV. 387 (1930). There are some statutory provisions. See Rees, *supra* note 38, at 880-85.

108. See generally Mathews, *supra* note 7.

109. Of course, the survivors may well voluntarily resolve such difficulties. The Sussman study noted examples of such extra-legal "will" recognition. M. SUSSMAN, *supra* note 55, at 121-25. Support laws may encourage such recognition where need is great. See generally 4 C. VERNIER, *supra* note 56, §§ 234, 235.

110. See, e.g., *Pernod v. American Nat'l Bank & Trust Co. of Chicago*, 8 Ill. 2d 16, 132 N.E.2d 540 (1956) (inter vivos trust). Express revocability may make some substitutes "testamentary" and therefore invalid. See, e.g., *Butler v. Sherwood*, 196 App. Div. 603, 188 N.Y.S. 242 (1921) (deed).

the ability to respond to change, and alternative theories have not developed.

Even more distressing are those goal-furthering wills that are invalidated by current law. This type of will may be the basis for Langbein's concern,¹¹¹ although he does not limit his analysis to "meritorious" wills as did Mechem.¹¹² The inartfully expressed or executed "family protective" will, denied effect, carries with it loss to society. The situations that give example to the problem are many. The decedent who expresses considerable but precatory financial concern for a dependent child is one example.¹¹³ The decedent who verbally directs distribution of personalty among relatives and friends is another.¹¹⁴ Finally, decedents who express the desire to reward those who support them in their last years ought not to have those desires frustrated.¹¹⁵ The inadequacies of contract and quantum meruit relief are apparent. The Statute of Frauds, "dead man" statutes, and uncertainty as to terms, all create barriers to enforcement of contracts; the presumption that care is gratuitous limits the availability of quantum meruit theory.¹¹⁶ Yet what is to be gained by invalidating such expressed desires in favor of the uncertainty of the unexpressed "desire" reflected in intestacy? Certainty, perhaps, but at tremendous cost.

B. Spousal Protection

It is a commonly accepted belief that the present protections against disinheritance provided spouses are inadequate.¹¹⁷ Spousal shares, homestead allowances and the like may easily be avoided by

111. "Granting that courts can sometimes give silent play to the equities, the rule of literal compliance inflicts constant and mostly uncontrollable inequity." Langbein, *supra* note 1, at 501.

112. Mechem, *supra* note 2.

113. *E.g.*, M. SUSSMAN, *supra* note 55, at 101. That study also indicates the opposite type of case — disinheritances of children who have taken vows of poverty upon entering religious orders. *Id.* at 99.

114. Such distributions are common and commonly acted upon by families. Langbein, *supra* note 1, at 509 n.85. Holographic versions of such schemes are validated by the UNIFORM PROBATE CODE § 2-513.

115. Such reward systems form one of the most common deviations from equality in testamentary estates. M. SUSSMAN, *supra* note 55, at 97-100.

116. *In re Clark's Estate*, 221 Wis. 569, 267 N.W. 273 (1936).

117. *See generally* W. MACDONALD, *supra* note 5; Cahn, *supra* note 5; Haskell, *supra* note 5; Laufer, *supra* note 8; Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157 (1960). For a view that the problem affects few, see Plager, *supra* note 100.

means of inter vivos transfers denuding the estate. Many proposals for reform have reflected the view that the spouse needs greater protection, and that view has been adopted by the Uniform Probate Code.¹¹⁸ The thrust has been to find a way to include inter vivos transfers in the elective share, increasing the protection of the spouse. Were the problem this simple, it would be shocking that so little change has been effected in the law. However, not all results under the existing system are bad. Not all spouses deserve protection against disinheritance. Some are independently wealthy and need nothing.¹¹⁹ Others have provided adequate cause to be disinherited by any but the most saintly and forgiving decedent. It should, therefore, not be taken as given that present schemes of protection are automatically worse than some of the proposed substitutes.

Analysis of such protection must begin with the presumption that application of the protection will act to deny decedent intent as to the distribution of his property. The protection, after all, must take the form of a power to elect against the will or other type of property transfer. To justify the application of the protection, therefore, it is necessary to find a countervailing need for protection for the family and society as opposed to protecting the testator's intent. In balancing family and societal protection against individual desires, cases may be separated into those where the spouse is economically dependent upon the decedent and those in which she is not. First, protecting the dependent spouse may in terms of "family protection" justify the denial of a decedent's intent. Second, societal interests are validated in the recognition of merit in the spouse, in protecting the welfare of a citizen, in enhancing the security of the marriage relationship, and in reducing conflict between spouses by removing the possibility of spousal neglect. Here, extension of the protections to avoid inter vivos transfers of the decedent could normally lead to yet further goal satisfaction until such extensions conflict with the economic use of property or until they become overly burdensome to administer. Only then should adverse effects upon the interests of society, when added to the goal of validating individual desire, outweigh the benefits.

118. See note 236 *infra* and accompanying text.

119. MacDonalld recognizes this and would limit spousal protection to cases of need. W. MACDONALD, *supra* note 5, at 25-29.

When the spouse is not dependent upon the decedent, however, the results are less obvious. Allowing election against the will or against inter vivos transfers may have neutral or even adverse effects upon the protection of the family. If there are children, the effect may well depend upon the nature of the relationship between the surviving spouse and those children. If it is good, then family protection may ultimately be unaffected. If it is bad, then a significant part of the family, the children, may be denied property without concomitant gain in terms of protection of the other part of the family, the spouse. When it is considered that this negative effect may be paralleled by negative effects on the welfare of those children, by a diminution in the efficient use of the property, and by encouraging disrespect for the legal system, the results must be questionable at best. Indeed, even if the family effects are neutral, the disrespect engendered by application of the protection to one who does not need protection may be seen as sufficient to make questionable any attempt to apply the protections at all.

The nature of the problem facing those concerned with spousal protection may also be illustrated by concentrating upon the societal goal of recognition of merit. It has been suggested that this is the primary justification for spousal protection — that the spouse has helped accumulate the property and merits a share.¹²⁰ Where the effect of the application of the protection is neutral or positive as to family protection, concentration upon this aspect of the goals may well be important. Such a case would be provided by the classic philanderer leaving his property to his mistress to the exclusion of his wife and children. Failure to protect the spousal share would have little redeeming value except in terms of validation of a morally questionable intent. Common understanding recognizes that the spouse “earned her share” and that it ought not be denied her by her morally reprehensible spouse.

Not all decedents are reprehensible, however, and not all spouses “merit” a share in the estate. Spouses who do everything possible to prevent accumulation of an estate are not unknown. Equally common are spouses whose sole existence seems to be directed towards making a failure of marriage. Should a long-suffering decedent be forced to recognize merit in one whose actions are not meritorious? Could not other goals such as fostering respect for the

120. 1 R. ELY, *supra* note 10, at 422-23.

law and seeking to validate decedent intent outweigh the "family protective" and the merit arguments in some such cases? Most importantly, should a system of spousal protection that does not recognize merit or need be expanded to improve the position of the spouse in all cases?

The dilemma here presented is one which will in all likelihood increase in importance in the years to come. As people live longer, second and third marriages are becoming commonplace. In addition, the number of family dissolutions has increased. Yet while divorce is increasingly a simple procedure, there are those for whom it is not an acceptable alternative, yet for whom total and permanent separation is an adequate substitute. Furthermore, it is not unknown to have second spouses of "convenience marriages" of minimal duration electing against wills favoring children of earlier traditional unions.¹²¹ It is also not unknown to have absconding spouses, long engaged in meretricious unions with others, returning to claim from a decedent's estate to the exclusion of blood family.¹²² Cases of these types stand as mute witnesses against automatic expansion of protection.

Finally, it can be argued that even the commonly suggested reforms do not go far enough in protecting the spouse. None of the current systems or suggestions would adequately provide for the limited estate. Among the most generous is the Uniform Probate Code system which provides the spouse with one-third of the "augmented estate" of the decedent.¹²³ However, assuming a normal lower-middle-class estate of \$60,000, this may leave a spouse of 30 years and no saleable skills with \$20,000 in support for the rest of his or her life while the rest may go presumedly to less deserving

121. Many of the problem estates in the Sussman study involved multiple marriages. M. SUSSMAN, *supra* note 55, at 91-95. The problem of second marriages was so commonplace in Florida that the legislature there passed a "stepmother act" restricting the amount which could be passed to the subsequent wife where children from a prior marriage survived. 1939 Fla. Laws ch. 18999. Such an absolute prohibition itself is unresponsive to real life and many meritorious second unions. The statute was repealed in 1945. A similar concern may be seen in Ohio's "half and half" statute limiting intestate succession as to property received from the predeceased spouse. OHIO REV. CODE ANN. § 2105.10 (Page 1968, Rept. Vol.).

122. In *Voorhees v. Spencer*, 89 Nev. 1, 504 P.2d 1321 (1973), such a spouse, separated for years and living with another man in a common-law relationship, was allowed to inherit.

123. Under UNIFORM PROBATE CODE § 2-201 the spouse is entitled to one-third of the "augmented estate." This includes property owned by the decedent at his death, plus: (a) the value of inter vivos gratuitous transfers in which the decedent (1) retained a life interest, or (2) retained power of disposition or revocation; (b) the value of gratuitous inter vivos survivorship interests; (c) gratuitous transfers within 2 years of death in amounts over \$3,000 to any one donee. UNIFORM PROBATE CODE § 2-202.

devises or legatees. Adequate protection might require that all of the estate pass to the surviving spouse in such cases.¹²⁴

In addition, the normal definition of "spouse" may be too narrow. If such a social identity is protected because of the merit assumed from the role, others may well be equally meritorious. If the desire is to reward those in close emotional contact, or to reward reasonable expectations, others may have similar emotional ties and reasonable expectations. Siblings living together are common, as are other family and nonfamily consensual relationships. To expect those in such relationships to protect their expectations by contract may be as unreasonable as would be the expectation in today's society that spouses would contract. Protections for such persons similar to those afforded the spouse may be desirable. None of the suggested modifications of our current law provide any protection for these persons. Those caught by a disinheriting decedent must suffer for their "foolishness" except in the rare cases where they are fortuitous enough to be an intestate taker after the will fails for some extraneous reason.

C. *Protection of Children*

Existing law recognizes the existence and claim of children of the decedent in a variety of ways. Children are normally preferred intestate takers, sharing claims only with the surviving spouse. Children are protected against creditors of the decedent, and, to some extent, against disinheritance by homestead, exempt property, and family allowance legislation. Such protection is normally shared with the spouse or is subject to his or her prior claim.¹²⁵ Finally, children are protected against "unintentional" disinheritance, or pretermission, by pretermitted heir statutes.¹²⁶

Such protections result in some cases in decedent intent fulfillment and in others in decedent intent denial. The following discussion is therefore divided into two parts. The cases where the decedent's intent is fulfilled will be discussed first. They include situations in which there is the normal operation of the intestate succes-

124. It is interesting to note that while such acts are not determinative of the issue, the most common variation on intestacy by testators in both the Dunham and the Sussman studies was the total preference of surviving spouses. See note 104 *supra*.

125. See generally 3 C. VERNIER, *supra* note 56, § 228 (1931); T. ATKINSON, *supra* note 33, § 34.

126. See Mathews, *supra* note 7, at 752-67.

sion statutes, normal application of pretermitted heir statutes, and the application of homestead exempt property and family allowance provisions against creditors. Intent denying situations, which will be discussed subsequently, include a variety of abnormal applications of the rules, such as technical intestacy notwithstanding clearly expressed decedent intent, application of homestead and similar protections against devisees and legatees, and findings of pretermis- sion where disinheritance was clearly intended.

In considering the intent-fulfilling model, it is important to note at the outset that to a large extent intent is assumed. In partic- ular, it is often assumed that the rules of intestacy reflect normal decedent distribution schemes.¹²⁷ It is assumed that most decedents would want their families to be protected against creditors of the decedent. Further, it is assumed that most decedents would not disinherit children except in the clearest manner, and for cause.¹²⁸

Within the context of such assumptions, application of "intent- fulfilling" protections ought also to result in family protection and societal "good." Ignoring for a moment whether the spouse ought be preferred absolutely to the children, intestate provisioning for chil- dren seems so clearly a matter of family protection as to need no comment. So too, it would appear to be in society's interest to see the expectations of the children fulfilled.¹²⁹ The operation of preter- mitted heir statutes also seems to protect the family and societal interests. Assuming that an inheritance is unintended, and also assuming that the intestacy pattern reflects the "normal" intended distribution, the application of the pretermitted heir statutes ought to result in equal treatment of siblings to the benefit of both family and society. Finally, the homestead, exempt property, and family allowance provisions presumably protect both the family and the societal interest in providing basic support for its members.

Unfortunately, these positive effects flowing from application of the protections in the abstract do not always occur. When applied to actual cases, the provisions would seem at times inadequate and

127. Of course the very existence of testation would belie the assumption, at least to the extent wills vary the pattern of the statute of intestacy. So would the judicial "presumption against intestacy." *E.g.*, *In re Estate of Gibson*, 19 Ill. App. 3d 550, 312 N.E.2d 1 (1974).

128. This is clearly an incorrect assumption where the other parent-spouse survives, in which situations most decedents leave all to the other parent. *See Dunham, supra* note 39, at 252 and M. SUSSMAN, *supra* note 55, at 89.

129. Of course, one could say that the expectation results from the state of the law, but the universal recognition of children belies such a skeptical response.

at times overly protective. Homestead and similar protections are often so limited in amount as to be almost meaningless.¹³⁰ Pretermitted heir statutes, since they protect only an intestate share, may totally fail in the attempt to raise the share of the child to equality with that received by siblings. Particularly this will be true under the Uniform Probate Code, where the surviving spouse takes most or all of the smaller estates to the exclusion of children.¹³¹ Conversely, the protections will often be too great. Where the family is financially independent, what benefit results from allowing creditors to suffer while the family takes?¹³² Similarly, may the assumption correctly be made that a decedent would leave a child an intestate share of the estate, where all statistical evidence is to the contrary?¹³³ Finally, where there are other children besides the pretermitted child, may not an intestate share often be greater than that left that child's siblings?¹³⁴ This is particularly likely to be true when a spouse survives and the children are left only "remembrances."

Turning to decedent intent-denying application of the various provisions, one finds, if anything, greater ambivalence in response. Initially, one must question the lack of express protection against disinheritance. Both the solidity of the family and of society might benefit from recognition of a "birthright," similar to the civil law legitime.¹³⁵ In one sense, the concept is now implicitly recognized in homestead and similar protections as they operate against legatees and devisees.¹³⁶ However, these provisions do not recognize that family protection includes status protection as well as economic protection. Homestead and similar provisions respond only to economic need, and are thus not sufficiently flexible to realistically protect any but the relatively poor.¹³⁷

130. Exempt realty of only \$300 is still the law in Pennsylvania. PA. STAT. ANN. tit. 12, § 2164 (Purdon 1967). Indiana provides for only \$700. IND. CODE ANN. § 34-2-28-1 (Burns 1973). See generally Comment, *The Wife's Illusory Homestead Rights*, 22 BAYLOR L. REV. 178 (1970).

131. UNIFORM PROBATE CODE § 2-102. See discussion *infra* at V, A.

132. Cf. *In re Estate of Levy*, 141 Cal. 646, 75 P. 301 (1904) (allowing a multiple dwelling unit of \$17,500 value to be claimed as homestead).

133. See note 128 *supra*.

134. E.g., *Boackle v. Bloom*, 272 Ala. 490, 132 So. 2d 586 (1961); *Twitchell v. Alexander & Liggett, Inc.*, 115 Ohio App. 51, 184 N.E.2d 421 (1961).

135. *Haskell*, *supra* note 5; *Laube*, *supra* note 5. Louisiana recognizes the principle. LA. CIV. CODE ANN. arts. 1493, 1494, 1617-22 (West 1952).

136. See T. ATKINSON, *supra* note 33, § 34.

137. Admittedly some family allowance statutes allow provisioning of substantial eco-

Even assuming that a more generalized protection against disinheritance is not needed, the current protections are at best questionable in their ability to provide defensible results in the decedent's intent-denying situation. In many cases the denial of the decedent's intent will not result in protection of the family or the recognition of merit in any normal sense. Typical would be a pretermitted child whose pre-will siblings were also disinherited, and whose surviving parent receives the entire estate. Protecting the intestate share of the pretermitted child in such a situation would have several negative effects.¹³⁸ Besides denying validity to a normal and understandable intent of the testator, it reduces the capacity of the surviving parent to maximize the use of family property; it may create dissension between siblings; it almost necessarily will create disrespect for the legal system. Yet application of the protection is automatic.¹³⁹ From a goal-satisfaction standpoint the result is indefensible.

A similarly questionable case would arise from the inartful disinheritance of disrespectful children. Pretermitted heir statutes which require "provisioning" for children as bars to pretermittance may result in justifiably disinherited children taking. A decedent may leave all of his estate to one child, intentionally, but inartfully provide for the disinheritance of another. The disinherited child may have, by his acts, merited the disinheritance, and be clearly within the type of situation in which *legitime* would not lie.¹⁴⁰ In such a case, family protection and peace may well be disrupted by the application of the protection, and decedent intent frustrated, without corresponding gain in recognition of merit or goals other than the administrative convenience in applying a mechanical rule.

Finally, two general observations as to undercoverage by the current law should be noted. It is not unusual for a parent or other

nomie needs. For example William Randolph Hearst's widow was allowed \$10,000 a month for 18 months. N.Y. TIMES, Feb. 26, 1952, at p. 29, col. 5. Theoretically, at least, children could receive similar benefits.

138. Some of the statutes and the Uniform Probate Code protect against this result. But the protection is not universal. Mathews, *supra* note 7. See generally T. ATKINSON, *supra* note 33, § 36.

139. Even though the intent of the statutes is to correct unintentional omissions, the application is fairly mechanical. This is particularly true where the statute requires that the omitted child be "provided for" in the will to avoid pretermittance. Cf. *Boman v. Boman*, 49 F. 329 (9th Cir. 1892) ("to each of my heirs at law the sum of one dollar" not sufficient because heirs not specifically named).

140. See generally Mathews, *supra* note 7, at 757, 763.

relative to leave each child a nominal amount as a remembrance. If such gifts are specific, or the will is well drafted with protective "boiler-plate," one negligently left out will not take, notwithstanding the clear implication of attempted equality of treatment — itself evidence of lack of favoritism on the part of the decedent.¹⁴¹ Such a result may protect the sanctity of the written document, but be devastating to the goals of encouraging peace among the family, recognizing merit, and following the most likely intent of the decedent.

Second, one must question the restriction of the protective rules to at-death transfers. If a child can be unintentionally disinherited by will, may he or she not also be unintentionally disinherited by a testamentarily funded inter vivos trust or by a life insurance policy? If the protections of pretermitted heir statutes are directed toward decedent intent validation, should they not have comparable application to other forms of succession direction?¹⁴² The goal of legal consistency would seem to urge greater breadth. One must at least question whether greater application would be so unwieldy as to prohibit the extension.

D. Decedent Insolvency

As noted in the prior section, special protections are provided spouses and children against extreme financial hardship. Homestead, exempt property and family allowance provisions typically provide for the passage of limited amounts of property from the estate to spouse and children free from the claims of creditors or legatees and devisees.

In operation, such devices may protect against both the truly insolvent decedent and the decedent disinheriting family by partially denuding the estate. As protections, however, they operate only with respect to the probate estate, and do not typically limit the capacity of the decedent to avoid their operation by means of inter vivos will substitutes.¹⁴³ On the other hand, notwithstanding their clear purpose of preventing the plunging of the family into

141. By restricting relief to an intestate share, there is no chance to provide equality in fact. The court at best must select between two evils, no protection or over protection.

142. Providing under life insurance policies is common. The description of takers is often identical to that used in wills. The same is true of inter vivos trusts, even those which are revocable. Cf. J. RICHIE, *supra* note 19, at 459.

143. See generally T. ATKINSON, *supra* note 33, § 34.

necessitous circumstances, the application of the statutes is not so limited. Application is indeed rarely dependent upon actual necessity, being rather a claim of right by the spouse and children, and it is thus possible for the protections to be applied for the "protection" of those already moneyed.¹⁴⁴ Furthermore, since the protections apply with respect to probate property only, it is also quite possible for them to be applied in cases where the decedent has more than adequately insured the family support by inter vivos transfers.

Owing to such variables, cases must be divided into those where the protections are in fact needed to provide for the support of the family, and those in which the protection is not needed. With respect to the former, the cases can be further divided between those cases where the statute operates as an anti-disinheritance statute, and those in which it operates as an anti-creditor protection. The cases where the protections are needed create a tension between the importance of providing for the family and that of giving effect to the desires of the decedent. Given the history of succession law, one would be tempted to suggest that in such a conflict the protection of the family must win, and the few cases on point seem to indicate this as a result.¹⁴⁵ This is logical, in the sense that it is supported by the goal of societal interest in protecting against the poverty of its members.

The latter, anti-creditor operation of the statutes, presents no such ambivalence where needed for the support of the family. In such a case it is difficult to accept that application of the protection would be contrary to the desires of the decedent, even though he engaged in the acts that created the creditor-debtor relationship. Second, even if a particular decedent would favor creditors over his or her own necessitous family, the interest of society in protecting the needy would appear to dictate the judgment that protection ought still to be available to the family.

Where the protections of the statutes are not needed for family support, justification for their operation is more difficult to find. In such situations there is an automatic tension between the provisioning for the family and the merit of creditors. Assuming the usual case of the creditor having provided consideration for the debt, denial of the debt in favor of the non-necessitous family seems

144. See note 132 *supra* and accompanying text.

145. T. ATKINSON, *supra* note 33, at 131-32.

harsh. Some support for such a result may be found for homestead and exempt property allowances in the greater use to which the family is likely to put the particular property. To some extent the result may be justified as well as a recognition of merit—the family may indirectly contribute to the acquisition of estate assets, and therefore they may be at least as entitled to the estate as are creditors. On the other hand, does not such a result have the negative effect of inhibiting the establishment of credit, with a corresponding negative effect on trade? The balance is by no means clear.

The analysis of such cases is not particularly helped by reference to the intent of the decedent. Presumably he would want his family to keep their money, but should the law assume that a decedent would want his creditors to go unpaid while the family took property unneeded for their support? If the decedent expressly so provides, then the decision should be faced as to whether such intent is of the type that ought to be weighed in the judgment process. But without express intent, the intent validation as goal seems of little importance.

Such decedent intent may, however, be an important factor in deciding the wisdom of applying homestead and other protections in favor of family as against legatees and devisees. Where the family is otherwise well established, such anti-disinheritance application may lack significant support. In such a situation it would be directly contrary to decedent intent. It would not provide for significant family support, and it is difficult to find any special societal interest in invalidating such an intended transfer. Presumably the decedent makes a judgment as to the value of particular property in the hands of the named recipient, and balances that value against that in the hands of the family. In any event, there is neither family need nor societal benefit in such a denial of the decedent's express intent.

Problems of conflicting goals may also occasionally arise. Normally the spouse has first claim to the protections, with the children named by statute as alternative takers. In the normal family this succession of interests is undoubtedly logical and consistent with family protection and decedent intent. There are, however, an increasingly large number of families which belie the assumption that the surviving spouse will protect the surviving children. As a result of separation, the spouse may not have seen the children for a num-

ber of years.¹⁴⁶ Despite legal duties to support children, the spouse may have exhibited a total lack of concern for fulfilling those duties. Should the children in such a case yield to a primary protection for the spouse? Reason would seem to dictate otherwise, for then society would be left with claimants without gain in increasing family stability or care.¹⁴⁷

Finally, such protections may at times lack sufficient breadth of coverage. If their purpose is the reduction of welfare claims and the strengthening of the family, then the protections need broader definition. Others besides spouses and children may fill "family" roles, and need similar protection. Dependent parents and siblings are not uncommon, and approximate the psychological roles of spouse and children in many living arrangements. Are they less deserving of uninterrupted continuation of their lives? If we are balancing costs to society, ought the question be one of relationship, rather than one of dependence?¹⁴⁸

E. *Descent and Distribution*

Unlike many other areas of succession law, the structure of the rules of intestacy has not occasioned significant critical comment. Suggestions have from time to time been made to adjust the details (such as to vary the form of representation,¹⁴⁹ or to provide for earlier escheat¹⁵⁰) but in general the basic structure of the existing law has been relatively immune from direct criticism.

146. See, e.g., *In re Coon's Estate*, 107 Cal. App. 2d 531, 237 P.2d 291 (3d Dist. 1951) (separation of 32 years).

147. Admittedly the surviving parent would have a legal obligation to support the child if his or her "own," but such legal obligations must be enforced. This may be somewhat difficult, particularly where the parent lives out of state or where money is imbibed as fast as it is acquired. In short, a bird in the hand may indeed be worth more than the bird in the bush.

148. Some courts already respond to this problem with liberal definitions of family where that term is used. Cf. *Strawn v. Strawn*, 53 Ill. 263 (1870) (servant held to be family).

149. See Wormser, *Per Stirpes or Per Capita*, 105 TRUSTS AND ESTATES 91 (1966); Comment, *Descent and Distribution: Computing the Representative Share*, 10 OKLA. L. REV. 73 (1957); White, *Per Stirpes or Per Capita*, 13 U. CIN. L. REV. 298 (1939). The Uniform Probate Code adopted the minority, or Massachusetts form of representation. (§ 2-106 and Comment). This choice has itself been criticized. Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 60 NW. U.L. REV. 626 (1971).

150. Cavers, *Change in the American Family and the "Laughing Heir"*, 20 IOWA L. REV. 203, 208 (1935). Interestingly, the Sussman study indicates that such distant takers regularly feel guilty about their good fortune. M. SUSSMAN, *supra* note 55, at 138-42.

This does not mean, however, that the structure is beyond criticism. Weaknesses in the rules of intestacy may be in part responsible for criticism directed towards other parts of the law. A primary example of this can be found in criticism of the formal requirements of wills. Were the rules of intestacy structured to be intent-responsive, requiring formalism for written wills would present little difficulty. As Professor Langbein admits, the difficulty occurs because the rules of intestacy are not intent-responsive.¹⁵¹ The lack of criticism also may reflect the economic insignificance of intestacy. While only 60 percent of all estates are testate, 90 percent of probate property passes in testate estates.¹⁵² Even greater amounts apparently pass in intent-responsive non-testamentary transfers.¹⁵³ It is also possible that the lack of criticism may result from the existence of protective devices that transform the highly structured system of intestacy into a somewhat more humane one. If, as suggested, most intestate estates are small, then application of homestead, exempt property and family allowance provisions can shift distribution from a spouse-children equality to spousal preference, and can shift the distribution of the estate from sibling equality to preference for minors and dependent children.¹⁵⁴ Finally, it must be recognized that massive informal readjustments of statutorily prescribed distribution schemes regularly occur. Where the survivors do not feel that the prescribed scheme is fair, they often develop their own.¹⁵⁵

Notwithstanding such ameliorating factors, the rules are not above reproach. On the positive side, it must be noted that in preferring family and in treating blood equals equally, the rules of intestacy in general appear to be family supportive and to protect society by minimizing disputes. Being automatic in application, they are administratively convenient as well. However, when one looks at these rules in greater detail, the certainty of fairness is not as clear. As noted above, some argue that distant collaterals ought not to take, reflecting the view that the laws are not sufficiently merit-reflective. Others suggest that representation ought to be on a pure

151. Langbein, *supra* note 1, at 499.

152. Dunham, *supra* note 39, at 250-51.

153. Langbein, *supra* note 1, at 509 n.85.

154. A \$7,000 family allowance can have the same effect in a small estate as would the Uniform Probate Code's \$50,000 intestacy payment to the spouse "off the top." See UNIFORM PROBATE CODE § 2-102.

155. M. SUSSMAN, *supra* note 55, at 125-45.

per stirpes basis, disagreeing with others who opt for a Massachusetts-type per capita-per stirpes mix. The conflict suggests that "equality" of treatment and conflict reduction cannot be taken for granted. Finally, and probably most troubling, is the fact that in certain types of cases, notably those in which there is a surviving spouse, testators regularly deviate from the intestate scheme in fairly predictable ways.¹⁵⁶ The regularity of the deviation suggests that the statutes are not reflecting a common judgment as to the best distribution for family protection. Indeed it suggests the opposite.

In light of such indications of insufficient or misapplied family protection, the present structure of the law must be justified on societal interest grounds, if at all. As noted, administrative convenience in having takers easily determined is an important advantage. Stability of the law is another. One must speculate, however, as to the balance in some types of cases. Apparently, nearly every testate estate in which there is a surviving spouse contains a will leaving the entire estate to the spouse. Evidently decedents generally recognize the need of the surviving spouse for all, not part, of the family property. Decedents generally feel that family stability and care is better accomplished by the surviving spouse having power over the property until death, even where that property is not necessary for strict support. Yet statutes of intestacy typically provide the spouse with no more than one-half of the estate when there are surviving children.¹⁵⁷ Given the problems inherent in the administration of property of minors, not favoring the surviving parent seems questionable. Even if one assumes that most "children" are past the age of majority, the result is barely more defensible. Even there, the present system, by preferring children to parents, works to reduce the strength of the family as a unit, and to minimize the amount of respect paid to the older generation by the younger.

A similar inadequacy is illustrated by the decedent who leaves children or collaterals of unequal capacity. Typically, testate decedents specially provide for the care of infirm and disabled dependents, even to the exclusion of others of equal "rank."¹⁵⁸ In so doing,

156. *Id.* at 144.

157. As indicated in note 154 *supra*, the Uniform Probate Code would provide the spouse with the first \$50,000 in a nuclear family estate. UNIFORM PROBATE CODE § 2-102.

158. M. SUSSMAN, *supra* note 55, at 95-109. The materials also indicate that the testator's family regularly rewards those who had provided care in the testator's declining years.

the societal interest of providing for the welfare of individuals is fostered, and the family obligation to its members is recognized. On the other hand, statutes of intestacy universally treat all siblings equally, relying upon law other than succession law to force the able to support their less fortunate brother or sister. In so doing, the statutes must be questioned as to whether they provide for the efficient use of property and of the resources of the courts, as well as to whether this "in one pocket and out the other" response engenders respect for the legal system.

Yet another potential problem area is the insufficient coverage of the statutes. Only a few recognize relatives by affinity, and then only after relatives of blood are exhausted. None recognize non-blood, non-affinity "family."¹⁵⁹ Thus, the wholly supported foster child is excluded in favor of distant collaterals. The dependent in-law is normally excluded, with the statutes favoring even the state by escheat. There is no way in which the family of orientation (non-blood individuals with whom there are very close relationships) may be recognized. Given the state of recognition of less common family arrangements in society today,¹⁶⁰ the efficacy of the law to provide for family protection must be questioned.¹⁶¹ Indeed, in some of the

159. T. ATKINSON, *supra* note 33, § 18. There are, however, several jurisdictions (Kentucky, Ohio, and California) where children or other relatives of the intestate's spouse will inherit if there are no other takers. *Id.* at 74 & n.31.

160. B. Cogswell & M. Sussman, *Changing Family and Marriage Forms: Complications for Human Service Systems*, 21 *THE FAMILY COORDINATOR* 505 (1972). The authors note the following approximate distribution of the United States population living in various family structures.

<i>Family Type</i>	<i>Percent Distribution</i>
Nuclear Family (normal "family" with children)	44
Nuclear Dyad (normal "family" without children)	15
Single-parent	13
Reconstituted (remarried nuclear)	15
Other traditional: <i>e.g.</i> , middle or aged couple, three-generation, nuclear dyad, and bilateral or extended kin	5
"Experimental" marriages and families	8

Id. at 507.

The authors speculate that by 1980 experimental marriages and families, of which they describe eight types, may comprise as much as 15 percent of the population. *Id.* at 508.

161. It is significant that use of testation to favor the family of orientation is common

cases suggested, even the societal interests of fostering respect for the law, of providing for the welfare of the individual, and of fostering strong social units within society would seem to be violated. One questions whether ease of administration and reduction of conflict provide sufficient justification.

Finally, it is easy to hypothesize as to situations in which the family security is reduced, conflict is heightened, and societal interests are denied in the particular distribution of property. For instance, with a decedent owner of a closely held business, one child may be more qualified to manage the business than others, yet current intestacy rules would put ownership in all children equally. The ease with which such a business may be destroyed by inadequate or uninformed planning needs no explanation.¹⁶² Yet to hypothesize sufficient family harmony to allow the most able member to run the business is to ignore reality in some cases. Distribution to all equally will in some such cases result in family squabbles and in the destruction of the primary economic asset of the estate, to the detriment of the family and society's interest in the efficient use of property and the minimization of disputes. Testators typically provide for more efficient settling of the family resources, yet the intestate rules do not even make an attempt.

IV. THE NATURE OF THE PROBLEM

As the above description illustrates, with respect to several differing examples, the existing system of the law of decedent's estates does not do the job it should. It is suggested here that the result is inevitable since rarely do the tests used by the law correspond to the variables presented by life. Only a system containing greater flexibility provides a chance of greater success. Wills presently are tested against formality; not veracity or reasonableness; forced shares are

although the total numbers of testators bequeathing to non-related persons is small. M. SUSSMAN, *supra* note 55, at 111-13.

162. See, e.g., Sokol v. Glabman, 4 Ill. App. 3d 500, 281 N.E.2d 377 (1972) (bequest of family business to sons, cash to daughters). The necessity for careful consideration of the proper method of handling the family business is the subject of many articles. See, e.g., Note, *Estate Planning for the Close Corporation*, 51 MINN. L. REV. 725 (1967); Schneck, *The Closely-held Business Interest*, 107 TRUSTS & ESTATES 315 (1968). Similar problems exist for estates comprised primarily of real estate. See Eckhardt, *The Farmer, Like Other Business Owners, Needs Expert Estate Planning Advice*, 15 J. TAXATION 294 (1961); Ashley, *Some Estate Problems of the Real Estate Investor*, 18 J. AM. SOC. CLU 68 (1964); Harl, *Estate and Business Planning for Farmers*, 19 HAST. L.J. 271 (1968).

tested by marriage, not need or merit; children, even minors, are barely protected; and intestacy responds to blood, not need or social bonds.

This state of affairs itself may be the result of several problems inherent in the field. First, the manner of development of the rules, almost by historical accident, encourages unresponsive structures. Second, but related, is a lack of any overall review of the legal system comprising the field of succession law in an effort to achieve consistency. Third, the lack of concern with the effect of a particular rule on all goals rather than upon one or two tends to isolate criticism from some of the basic decisions in rule design. Fourth, the system may be attempting to accomplish the impossible in that (a) the problems of providing for rational succession may be beyond solution of any but the most flexible rules, and (b) treating the problems as problems of property law rather than as family settlements may create unmanageable burdens for the legislative draftsman.

A. *The Historical Development of the Law*

As any first year law student will note, property law has historical roots, albeit many of these roots seem only tangentially related to today's society. The same is true, to a large extent, in succession law as a branch of property. Styles and forms have developed over millenia as legislative and judicial responses to problems which existed, and sometimes later disappeared. Brief reference to two of the previously mentioned areas should be ample to indicate the nature of the particular problem. Both the development of formalities required of wills and the growth of spousal protection present classic studies.

1. WILL FORMALITIES

The growth of will formalities begins, most appropriately, with intestacy. In earliest times, inheritance patterns apparently were highly structured, concentrating upon immediate family, and often containing the rudiments of primogeniture.¹⁶³ Since some decedents lacked descendants, continuation of that "family" demanded a

163. See *Deuteronomy* 21:15-17 (Rev. Stand. Ver.) quoted note 26 *supra*. See also *Numbers* 27:8-11 quoted note 13 *supra*.

mechanism for picking a successor to "family" assets.¹⁶⁴ Adoption soon developed as a form of succession-direction covering such situations, as well as did other forms.¹⁶⁵

Other decedents, apparently finding that the predetermined succession patterns did not reflect either merit or talent within their own families, sought similar powers as an avoidance of the predetermined patterns. The Romans developed such a means in the form of *mancipatio*, a form of "sale" of property which gathered to itself the characteristics of the modern will, *i.e.*, revocability and ambulatoriness.¹⁶⁶ The power apparently achieved socially desirable results and it flourished.

With the development of such means of desire validation came the possibility of abuse, both by the decedent and by those intent upon defrauding the family. In early times the possibilities were not serious. The decedent was allowed to disinherit only for cause shown,¹⁶⁷ or was similarly controlled by religious constraints. Similarly, the form of intent statement was such as to inhibit undetected fraud, in that the presence of multiple witnesses was a common requirement.¹⁶⁸

As the will emerged from the Dark Ages it became encrusted with the moral force of the Church, and lost some of the protections in the process, including witnesses.¹⁶⁹ Decedents were morally constrained against disinheritance,¹⁷⁰ but legal constraints did not develop. Testaments were controlled by the clergy and multiple witnesses were not found to be necessary.¹⁷¹ In any event, the protec-

164. *Numbers* 36:6 & 7 (Rev. Stand. Ver.):

This is the thing which the LORD doth command concerning the daughters of Zelophehad, saying, Let them marry to whom they think best; only to the family of the tribe of their fathers shall they marry. So shall not the inheritance of the children of Israel remove from tribe to tribe: for everyone of the children of Israel shall keep himself to the inheritance of the tribe of his fathers

165. See notes 24-25 *supra*, and accompanying text.

166. H. MAINE, *supra* note 15, at 203-14.

167. *Id.* at 215-18.

168. Mancipation required no less than five witnesses. *Id.* at 204.

169. The story clearly is not so simple. Ignored here is the input from the Teutonic tribes and local customs in England. It is clear, however, that mancipation as such did not survive, although a *post obit* gift took its place.

170. The ecclesiastical courts recognized the decedent's power over only a part of his property. See text accompanying note 31 *supra*. Realty was not devisable under Norman law. 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 325-30.

171. Glanville, however, advises two or more witnesses to the testament (which was directed to pious uses). Beames Trans. Bk 7 Ch. VI (Byrne ed. 1900).

tions fell. With the disappearance of the protections against fraud, new ones had to be developed, and the result was the Statute of Frauds of 1677.¹⁷² The mold, requiring written documents signed and witnessed, has persisted to this day.¹⁷³ Similarly, with the waning of moral authority restricting disinheritance, a need developed for a way to control decedent abuse of the power of testation. Regrettably, such means have not developed as simply.¹⁷⁴ We thus are left without an effective limitation upon the use of the decedent's power. Such a limitation should be imposed through a formal system of individual desire fulfillment.

2. SPOUSAL SHARE

The development of spousal share protection presents a similar picture. In early times the wife was provided the succor of the family through custom and religious duty. Later, specific protections were given her at marriage as a matter of agreement.¹⁷⁵ Through time, these settlements took on the form of custom, and the protections were institutionalized as common law dower. As long as the wealth of society was in land, the protection was a healthy one. It could not be avoided by inter vivos alternatives, and it was of significant economic value.

As the economic base of society changed, however, the protection provided by dower faded.¹⁷⁶ Alternatives had to be found which provided protection in a personalty dominated society. The solution was the statutory substitute — a share in all assets owned at death.

172. 29 Car. 2 c. 3, § 5 (1677). It has been suggested that the Statute of Frauds was passed as a result of the disclosure in *Cole v. Mordaunt* (stated in note to *Mathews v. Warner*, 31 Eng. Rep. 96 (1798)) that nine witnesses perjured themselves to establish an oral revocation of a written will. A. REPPY & L. TOMPKINS, *HISTORY OF WILLS* 9 (1928); Fourth Report, Real Property Comm. (Eng. 1833) 26, 27. Similar legislation had previously been before Parliament, however, so that the incident may have provided only the clinching blow. Costigan, *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329 (1913). The Statute of Frauds applied only to realty. Personalty was later included under the Wills Act of 1837. 7 Wm. 4 & 1 Vict., c. 26 § 9.

173. See Rees, *supra* note 38.

174. Dower, of course, protected the spouse. Part of the reason children were not similarly protected may be found in the existence of primogeniture, which, while Roman law, presupposes disinheritance of some children.

175. See note 52 *supra*.

176. See generally Cahn, *supra* note 5; Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 330 (1928); Sullivan, *The Passing of Dower and Curtesy*, 19 GEO. L.J. 306 (1931).

As an alternative it provided protection, and the possibility of dower continued to provide some protection against inter vivos avoidance. Dower, however, restricted commerce in real property, and it soon was modified. It became possible to disinherit the spouse merely by using inter vivos forms of transfer so as to avoid owning property at death.¹⁷⁷ In a desire to protect spouses, courts have been forced to consider inappropriate theories such as "fraud" to invalidate the inter vivos transfers.¹⁷⁸ Such concepts, however, are difficult to apply to the typical disinheritance and have not been popular.¹⁷⁹ As a result, spouses often (although not usually) are left destitute. As with wills, new protections designed to improve the spousal protection have resulted, at times, in reducing that protection.

The two examples illustrate the nature of the problems which slow development of the rules can cause. The reasons the rules were adopted tend to be forgotten, and the rules take on meaning never intended. Changing political, economic and religious constructs may add or remove problems or protections upon which rules were premised. The ability to forget the reasons behind the creation of legal structures may not be uncommon, but in succession law it is abundant. Few would relate testamentary freedom at this date with a desire to increase family protection, yet that was clearly its genesis.¹⁸⁰ Indeed, that is still its primary use.¹⁸¹ Today, the basis of the rule would probably be given as an inherent aspect of private ownership of property without any further justification. (Even though most would agree that some examples of "free" exercise of the power ought to be restricted.) Similarly, spousal protection rules have their basis in the customs of a time when spouses were separately settled with property, testaments were rarely drafted, and legal help was scarce. How different must the assumptions be today, with decedents generally preferring their spouses, and legal advice being freely available.

What is at issue is the importance of the law's reflecting the changing structure of society. If an inheritance rule is premised upon the assumption that the spouse is separately protected and

177. See generally notes 117-18 *supra* and accompanying text.

178. *E.g.*, *Mushaw v. Mushaw*, 183 Md. 511, 39 A.2d 465 (1944). See generally W. MACDONALD, *supra* note 5.

179. *E.g.*, *National Shawmut Bank v. Cumming*, 325 Mass. 457, 91 N.E.2d 337 (1950).

180. H. MAINE, *supra* note 15, at 211-18.

181. See text accompanying note 156 *supra*.

that a parent will normally prefer children by will, ought the rule survive when changing mores and practices result in most decedents preferring spouses to children? Similar questions could be asked with reference to spousal protection. If spousal election was engrafted into succession law based upon customary agreement between spouses, ought it continue when marriage ceases to be surrounded by contract? More importantly, if the protection is based upon the assumption of financially equal backgrounds of the partners, ought the protection continue in the same form when intermarriage of unequals becomes more common?¹⁸² If the protections were established upon the assumption that the wife demanded protection upon death of the husband, ought the protections continue into times of greater female independence and sophistication?

Reference ought to be made as well to the recognition that conduct has controls other than the law itself. At the time of the creation of much current law, the control of behavior by religious restraint was much more significant. Few would brave the Church in disinheriting those who were biblically recognized as just takers. Ecclesiastical courts could expressly control those who dared. Can the same still generally be said? If it cannot, ought rules based upon the presence of that control remain unchanged? The questions would seem particularly relevant to the protection of children against disinheritance, a protection which existed under Roman and ecclesiastical law, but which disappeared with the rise of uncontrolled testamentary power.

B. *The Lack of Comprehensive Review*

Even patchwork growth of the organism may be controlled if from time to time comprehensive review of the system is undertaken to see what has been wrought. Unfortunately, such a review is not the custom in this country. The systems of the fifty states have grown almost independently and usually on an ad hoc basis. A problem seen in one area is "corrected" without comprehensive study of the effects which the patch will have. Nor is this problem unique to American law. The problem identified by Professor Langbein is also an English problem. In an attempt to prohibit perjured testimony as to oral wills, barriers were raised which struck down

182. Rich may still marry rich and poor marry poor, as Plager, *supra* note 100, indicates, but most of us know of exceptions to the rule.

large numbers of inherently valid wills and testaments. Besides this obvious effect, these barriers have the effect of encouraging the development of inter vivos forms of transfer to avoid the perils of the probate court.

Comprehensive reviews are rare at best. Great Britain engaged in one early in this century, and it resulted in massive restructuring of the method of determining succession.¹⁸³ A similar review has never occurred in this country except to the extent reflected in the development of the Model Probate Code in 1946 and the Uniform Probate Code in 1969. Unfortunately, in both the latter instances the review was administration oriented, and as noted later in this article, problem-perpetuating, rather than problem-solving in its effect on succession law. To be sure, the lack of such studies may be defended on several grounds, such as the expense involved and the lack of likelihood of "selling" the results to the legislatures. The English study previously noted resulted in the restructuring of the English system only after substantial opposition of the entrenched English bar,¹⁸⁴ and no less negative reaction should be expected in this country. The response to the relatively mild changes proposed by the Uniform Probate Code indicates the difficulty that reform can experience.¹⁸⁵

C. *Failure to Totally Evaluate the Effect of Changes upon Basic Goals*

Even without comprehensive review of succession law, the problems of the sort previously discussed would probably be rarer if the creation of the patchwork of laws reflected comprehensive analysis of the effects of the rule being adopted on overall goal satisfaction. For example, how can the effect of the Statute of Frauds be judged without reference to the potential likelihood of irregular application of the Statute? It is easy to see the societal

183. The results are contained in the Administration of Estates Act, 1925, 15 Geo. 5, c. 23 § 45 *et seq.*; Supreme Court of Judicature Act, 1925, 15 Geo. 5, c. 49; and the Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6, c. 45. The latter is particularly important in providing for flexible response to family needs.

184. See text accompanying note 95 *supra*.

185. The battles are both public and private as bench and bar search to maintain their role in the administration of estates. Cf. Leslie, *Past and Future Considerations in Alabama of the Uniform Probate Code*, 31 ALA. LAW. 230, 235 (Apr. 1970). For a response to the problem, see Wellman, *Lawyer's Stake in Probate Reforms*, 47 MICH. S.B.J. 10 (Mar. 1968).

interest effectuated by the rule's hindering of fraudulent oral wills. It is not so easy to see the effectuation of any societal interest when the method dictated results in the capacity to prove the fraudulent will upon perjured testimony that cannot be effectively attacked.¹⁸⁶ But more importantly, how can the judgment as to the efficacy of the Statute be made without reference to the function of wills, the use of wills, the interests of various types of family in the will-validation arena, and the effect of wills upon satisfaction of other societal goals, such as property enhancement and dispute reduction? By isolating the discussion to the positive effects of formalities upon will-making and proof, rather than to the general question of the use and function of wills, some of the effects of the Statute are of necessity ignored. Such reviews, to be adequate, should include even expected misuse of the rule under study. For example, people normally do not think of the formalities of wills as a needed protection against disinheritance, yet they clearly are, and undoubtedly are often used as such.¹⁸⁷ Unless such effects are noted and evaluated, the odds are that the rule will misfire significantly.

D. *Attempting to Perform the Impossible*

In the course of consideration of the problems in this area, it must be recognized that some problems are insoluble using the tools normally available. Such impossibility may result from two aspects of the basic problem: first, the problem itself may be so complex as to defy easy solution; second, the tools normally used may be inherently inadequate for the task to which they are applied.

The complexity of the problem should be obvious. There are three major goals to be achieved, which goals may in any given set of facts lead to apparently inconsistent results. This dilemma, coupled with infinite variations in fact patterns, suggests an almost impossible burden on the system in terms of possible resolution. Where factors such as the dependence of a potential claimant, or merit based upon family membership are thought relevant to the design of the laws, variations in the presence of such factors in

186. Since proof of the signatures of testator and witnesses will generally suffice for probate of a will, a forger need only forge the signatures of three, or possibly four people known dead. The proponent could then obtain "knowledgeable" testimony as to the validity of the signatures.

187. Langbein admits as much. Langbein, *supra* note 1, at 500-01; See also T. ATKINSON, *supra* note 33, at 139-40; Laube, *supra* note 5.

individual cases are sure to be great and frequent. The question must therefore be asked whether the system can be responsive to such variations.

The second aspect of the problem lies in the choice of tools used to solve the problem. It is foolish to attempt to raise a submarine with a fishing line, and it may be equally foolish to attempt to pattern succession laws using the types of rules currently common. The natural inadequacy of rule-based succession law is suggested by Professor Langbein in propounding the non-rule "substantial compliance test" for will qualification. As he indicates, formalities of execution are extremely ineffective tools to prevent fraudulent wills, and probably ought not be seriously defended on this basis. They are better defended on the grounds of insuring testamentary intent and in providing firm evidence of testamentary plan. However, even with respect to such grounds the formalities exclude wills which contain within themselves the qualities sought, specifically, clear testamentary intent and testamentary plan. Thus, in so doing, existing rules should receive only qualified approval.

Even worse, when one considers the effect of the formal requirements on other goals, such as protecting the family of the decedent, one finds that the formalities are neutral at best, and may be a negative influence. Used as a protection against unreasonable disinheritance, the formalities suffer because they respond to the wrong facts. Rather than testing the will against what it does, formalities test it against how it was executed, putting a premium on good legal advice, rather than on good testamentary plans.

The inadequacy of normal techniques of problem resolution is illustrated by other types of rules as well. One type is variation in the size of the estate as a means of determining applicable rules. For example, nuncupative wills, where allowed, are often valid for small estates but not for larger estates.¹⁸⁸ However, such a test does not respond to the basic concerns for the verity and appropriateness of the testamentary plan disclosed by the oral will. Of the same type are statutes which validate or invalidate transactions by reference to the type of property being distributed. Dower applied to realty; personalty then could pass by the will while realty could not. Personalty can pass by oral testament and realty requires a written will.¹⁸⁹ The problems with such an approach are clear. Dower be-

188. T. ATKINSON, *supra* note 33, at 366.

189. *Id.* at 364.

came ineffective because of the rise of personalty as an economic force. Landowners needed the ability to market and mortgage their real property holdings and dower restricted that ability. Similarly, personalty may represent far more wealth today than realty, making the "oral will" restriction meaningless. Thus, reference to the type of property does not address the basic problems of any of the basic goals of succession law.¹⁹⁰

A similar mechanical limitation may be found in requirements that only specific portions of an estate pass in certain ways. For example, early testation was allowed only with respect to one portion of the decedent's personalty with the size of the part depending upon the presence or absence of surviving spouse and issue. Modern mortmain statutes allow only a portion of the estate to pass to charities in certain circumstances;¹⁹¹ under forced share statutes one may disinherit the spouse by will only to an extent determined as a set portion of the decedent's estate. Yet such portioning ignores the basic concerns: what portion is actually necessary for the support of the family? It may be a set percentage in some cases, but should it be the same for all estates, large or small, irrespective of the economic needs of those protected?

Another mechanical technique for distinguishing cases has been the separation of survivors by class. Those entitled to take or to be protected against disinheritance have been defined not by role, but by membership in determined classes. For example, early Roman law allowed testation only when no immediate family survived, and allowed veto of the dispositive scheme by those included in the broader generic family.¹⁹² These restrictions were applicable irrespective of the merit or need of the members of the protected classes. Later Roman law allowed testation, but allowed disinheritance of the class "children" only for cause, a pattern retained in the civil law and in force currently in Louisiana.¹⁹³ Modern applicability of the concept is apparent in the general structuring of the intestacy statutes, and in the application of the various provisions protecting against disinheritance and creditors' claims. Under rules of intestacy, takers are ordered by degree of relationship to the decedent,

190. Mechem, in particular, noted the inconsistency. Mechem, *supra* note 2, 501-02.

191. See generally T. ATKINSON, *supra* note 33, § 35.

192. See note 27 *supra*.

193. See note 135 *supra*.

not by need, merit (other than mere relationship) or other factors. Protected takers are defined with reference to affinity or to birth, not by dependence or other goal-related tests.

The difficulty with class definition as a technique is that it limits the concept of merit or need to the arbitrary classification of birth or affinity. It is not responsive to variations in actual fact belying the basic assumptions behind the classification scheme. For example, ought a spouse be protected against disinheritance where he or she is independently wealthy and children surviving the decedent need the entire estate to assure their support? Ought a spouse be protected or preferred over children if separated from the decedent for a substantial period prior to death? Such separations are not uncommon among those with strong religious backgrounds, but should the legal system recognize as meriting of inheritance those who do not contribute to the acquisition of the estate or provide communal support during life? Similar questions can be asked with respect to any class or member of a class. Should all children automatically share equally in the intestate estate, even if one sibling needs institutional care and the others are self-supporting? Should adult children take to the exclusion of dependent grandparents? A class-definition structure just cannot adequately provide for such considerations.

A third technique might be defined as the use of trigger devices. This is the common function of formalities, such as requiring forms of transfer, forms of execution, and forms of dispositive language. Forms of transfer as a device may be seen in the different ways in which the law treats attempted transfer by will and transfer by *inter vivos* conveyance. In early Norman England realty could not be devised but it could be transferred *inter vivos*. Hence there was a development of the use with retained power to appoint the remainder.¹⁹⁴ As a result, the validity of transfers at death was judged by the form used: either will (which could not transfer land) or use (which permitted testamentary exercise of the retained power to appoint the remainder of an interest in land). The second type of trigger, form of execution, is clearly illustrated by the Statute of Wills. Validation of testamentary schemes is made dependent upon

194. T. PLUCKNETT, *supra* note 10. The use developed almost simultaneously to the determination in the 12th century that land was not devisable.

the existence of "proper" ritual. Improper attestation or form of execution will lead to the invalidation of the scheme although it completely meets all tests of certainty needed to reflect decedent intent. The third such trigger form of dispositive language is best illustrated by common pretermitted heir statutes. The validity of provisions disinheriting children are judged by the words used in the disinheritance. If the children are said to be "provided for" they can be disinherited, otherwise, they may not. As a result, the form of disinheriting language becomes critical.

The difficulty with all such approaches is their inability to respond with certainty to any goal except administrative convenience. As Professor Langbein points out, distinguishing between the effectiveness of inter vivos trusts and wills as to form of execution leads to few social or other advantages. Similarly, invalidating testamentary plans solely because the witnesses did not sign together benefits no one, and furthers no goal, at the cost of total unresponsiveness to decedent desire, and often at the cost of decreased family protection. Questions concerning the appropriateness of the plans and the effect of the invalidation of such plans, go unanswered. Formal requirements as to dispositive language produce similar inadequacies. Protecting children from disinheritance by concentrating upon the language used to disinherit must of necessity result in inconsistent results relative to the merit or need of those disinherited. Whether the disinheritance was merited is simply not reflected in the conclusions.

A fourth technique of problem resolution that has been used exhibits somewhat more consistency. This consists of giving effect to statements of ultimate goal which grant discretion to the fact finder as to how that goal should be reached. For example, some family allowance statutes are phrased in terms of "amounts needed for the support of the family," leaving it to the court to determine what, if anything, is in fact needed.¹⁹⁵ In some aspects, this technique is reflected in the early development of the current system. It is apparent that much of the current pattern of intestate distribution was developed as custom by the ecclesiastical courts.¹⁹⁶ The

195. Maine has perhaps the broadest form. See ME. REV. STAT. tit. 18, §§ 801-806 (1964).

196. The Statute of Distribution 22 & 23 Car. 2, c. 10 (1670) codified ecclesiastical rules as a part of the affirmation of ecclesiastical court jurisdiction over administration of estates. T. ATKINSON, *supra* note 33, at 19.

current treatment of advancements has the same roots.¹⁹⁷ Indeed, it is perhaps not surprising that the most significant example of this technique lies in the current English practice under the Inheritance (Family Provisioning) Act of 1938, which grants the court broad discretion to disregard the normal rules of intestacy as well as the will of the decedent where appropriate to protect the family.¹⁹⁸

The difficulty with such a technique is, no doubt, its consumption of judicial time. Not being automatic, it could result in an increase in litigation if applied generally in this country. In addition, its application assumes a judiciary competent to make the necessary determinations. Finally, the technique leads to some uncertainty on the part of the decedent, since testamentary plans may later be upset upon the petition of family. It should be noted, however, there are indications that application of family allowance provisions has not been an undue burden on American probate courts, and that the English experience with their statute has not been adverse.¹⁹⁹

V. THE UNIFORM PROBATE CODE

Any review of existing succession law must of necessity address the effect of the Uniform Probate Code. In its first five years it was adopted by nine states.²⁰⁰ It represents a major attempt to unify and simplify existing law. As such, it naturally also addresses existing inadequacies in those laws.

As a curative statutory system, much can be said for the Code as it affects probate administration. Responding to the unnecessary formalism of existing practice, it does much to simplify administration and to respond to the objections advertised in the popular press by people such as Norman Dacey and Murray Teigh Bloom.²⁰¹ Un-

197. For the history of advancements, see 3 AMERICAN LAW OF PROPERTY § 14.10 (A.J. Casner ed. 1952).

198. For a discussion of operation of that Act see Unger, *The Inheritance Act and the Family*, 6 MOD. L. REV. 215 (1943).

199. *Id.*

200. Alaska, Arizona, Colorado, Florida, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Dakota and Utah. Handbook of the National Conference of Commissioners on Uniform State Laws 951 (Supp. 1976).

201. See generally Fratcher, *Estate Planning and Administration Under the Uniform Probate Code*, 110 TRUSTS & ESTATES 5 (1971); *Informal Proceedings, Under the Uniform Code: Notice and Due Process*, 3 PROSPECTUS 39 (1969); Stroup, *Probate Practice Under the Uniform Probate Code*, 46 N.D.L. REV. 289 (1968); *Symposium on Probate Law: Introduction* 2 CONN. L. REV. 449 (1970).

fortunately, the same cannot be said with respect to the changes worked by the Code in the substantive law of succession. Here, the changes propounded affect not the basic problems, but rather specific inadequacies, and as such tend to continue unaffected the existing law. True, spousal protection has been strengthened by extending it to inter vivos transfers;²⁰² the spouse has received enhanced coverage under the intestate sections;²⁰³ pretermission has been more narrowly defined;²⁰⁴ and the formal requirements of wills have been simplified.²⁰⁵ However, the manner of approach to substantive problems has remained unchanged, and therefore the insufficiencies of the system remain the same. Professor Langbein discusses the insufficiency of its provisions dealing with wills.²⁰⁶ Three other examples of this continuing problem may also be noted: the treatment of the structure of intestacy, the treatment of pretermitted heirs and omitted spouses, and the structure of the elective share provisions.

A. *The Structure of Intestacy*

Under the Code, intestate takers include the spouse and blood relatives through descendants of grandparents.²⁰⁷ As in existing systems, the Code prefers the spouse and descendants, then ascendants and finally collaterals.²⁰⁸ Unlike most existing laws, the spouse is often preferred to the exclusion of children born of the union with the decedent. In such estates, as well as in estates where no children survive but the decedent's parents do, the spouse takes the first \$50,000 of the estate, and shares only the remainder with the children or parents.²⁰⁹ The only other significant changes are adoption

202. See note 123 *supra*.

203. UNIFORM PROBATE CODE § 2-102.

204. *Id.* § 2-302. The spouse not mentioned in a will predating the marriage is also provided an intestate share under § 2-301.

205. See Langbein, *supra* note 1, at 510-12.

206. *Id.*

207. UNIFORM PROBATE CODE art. II, pt. 1.

208. *Id.* §§ 2-102 to 103. See generally Mulder, *Intestate Succession Under the Uniform Probate Code*, 3 PROSPECTUS 301 (1970).

209. UNIFORM PROBATE CODE § 2-102 provides:

[Share of the Spouse.]

The intestate share of the surviving spouse is:

(1) if there is no surviving issue or parent of the decedent, the entire intestate estate;

of the Massachusetts system of representation in lieu of the commonly accepted per stirpal system,²¹⁰ and limitation of collateral takers to descendants of grandparents.²¹¹

As far-ranging as they are, much can and has been said in favor of the changes made by the Code. The increased protection given the spouse is but reflective of normal patterns of testation as indicated by every study of such patterns.²¹² Less overwhelming made.²¹² Less overwhelming evidence supports the adoption of the Massachusetts system of representation,²¹³ but it is supported by reason. Restriction of inheritance among collaterals would appear justified by the significantly less unified nature of families today since such a restriction reduces the possibilities of being a "laughing heir."²¹⁴

As a system, however, the Code's provisions lack flexibility in the same way as do existing statutes. The plan of distribution adopted only approximates an average testator's intent as exercised in usual estate situations. In estates not paralleling those from which the Code's system was taken, deviation from goal satisfaction seems likely. For example, the Code provides no mechanism for unequal distribution of the estate among relatives of equal degree where more is needed for the support of one than for the others. The handicapped child is still treated as normal by the Code. Nor does the Code deal with the problem of the unrelated dependent, as discussed previously.²¹⁵ Merit or expectation notwithstanding, such individuals must look in vain for help from the Code.

Even the changes actually made present potential problems for which adequate provision has not been made. The problem of the deserting spouse provides a ready example. Under section 2-202, the spouse in the usual case takes the small (under \$50,000) estate in

(2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [\$50,000], plus one-half of the balance of the intestate estate;

(3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [\$50,000], plus one-half of the balance of the intestate estate;

(4) if there are surviving issue, one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

210. *Id.* § 2-106.

211. *Id.* § 2-103.

212. See note 124 *supra*.

213. Of 453 testate cases in the Sussman study none included childless decedents. Where grandchildren were left legacies, they were treated equally. M. SUSSMAN, *supra* note 55, at 83, 102-03.

214. See note 150 *supra*.

215. See note 160 *supra* and accompanying text.

its entirety plus a lion's share of any larger estate. This is true even if the surviving spouse is separated from both the decedent and their surviving children and has nothing but antipathy for both (not an uncommon situation, particularly among those whose religious beliefs forbid divorce). Separation, unfortunately, does not bar the spousal relationship for the purposes of section 2-102 unless there is a decree which terminates the status of husband and wife,²¹⁶ and, as the comment to section 2-802 expressly states: "Where there is only a legal separation, rather than a divorce, succession patterns are not affected" In such a situation, it is submitted that most potential decedents would be virulently upset if told that their deserting spouse takes all their estate in preference to the children. Indeed, most would probably be upset and shocked to find that the spouse would take even in circumstances where the spouse was friendly with the children.²¹⁷

Similarly, there are situations in which most people would probably feel that it is fairer to show preference for one relative of a class over others of the same class. For example, where one child is incompetent and dependent and his siblings are self-supporting, most people would probably want to see the incompetent's needs filled before anyone else takes. Likewise, where one member of a class provided significant services to the decedent, most people would think such services should be rewarded.²¹⁸ Where a child or a nephew or a cousin takes care of an elderly relative in his declining years or helps run the farm during a similar period, a common sense of fairness argues that a greater share of the estate should be his. Indeed, wills so providing are not at all uncommon, and the expressed desire that property pass so as to achieve these ends is even more common.²¹⁹ Nonetheless, the Code's only response to this type of situation is to treat it as though no equities were created by

216. UNIFORM PROBATE CODE § 2-802 provides that divorce or annulment negates the surviving spouse status, and further, that: "A decree of separation which does not terminate the status of husband and wife is not a divorce for the purposes of this section."

217. M. SUSSMAN, *supra* note 55, at 136, case 149 reflects this as to a decedent who left his insurance to his mother, even though he was survived by a daughter by his divorced wife. His mother "is planning to use the rest of the money for her granddaughter." The mother says, "If he had made a will, he would have made it out to me — if he left it to his daughter, her mother would get her hands on it."

218. This was a common will effect in the Sussman study. M. SUSSMAN, *supra* note 55, at 97-105.

219. *Id.* at 123.

present condition or past behavior.

In short, the Code reflects the inadequacy of existing laws in dealing with situations that deviate from the norm. For example, where one child is financially successful, and siblings are not, or where some are minors, equal division of the estate penalizes the needy family member. Yet this is the result under the Code. Inheritance may not materially benefit the wealthy child. Less than meritorious and unloving spouses are treated the same as those representing the ideal spouse. Grandparents are excluded in favor of independent and successful children. Justly it can be said that though the rules have changed, the game is still the same.

B. *Pretermitted Heirs and Omitted Spouses*

Under the Uniform Probate Code, both children and spouses omitted from wills executed prior to their respective births or marriages are protected to the extent of an intestate share in the estate.²²⁰ In the applicable sections, the Code defines the situations in which children take more carefully than do most existing statutes, and extends to the spouse a protection not heretofore common. No longer will the spouse receive only an elective share; now he or she may take what may be a much more substantial intestate share.²²¹

Notwithstanding the care used by the drafters of the Code in defining conditions of pretermission and omission by the decedent, the system which results is substantially similar to existing law and equally objectionable. First, the failure to provide for increasing the share by augmenting the estate (such as is done under section 2-501 in application of the spousal elective share) limits the protection to purely testamentary situations, and denies the possibility of omission in living trust, joint tenancy, and other succession law contexts. Second, the absolute share of the spouse may consume the entire estate, to the detriment of even minimal satisfaction of other goals of the decedent, such as token bequests to charities and more distant relatives. Third, the protected share of the child may normally be far more significant in form than in substance, since in smaller estates nothing may pass, notwithstanding any provisioning in the

220. See note 204 *supra*.

221. It may of course be less or nothing at all if the decedent has denuded the estate, since the intestate share is based upon probate property, not the "augmented estate."

will for other children.²²² Fourth, the protected share approach may in fact still be used as a protection against intentional, rather than unintentional disinheritance, which can lead to inconsistency with direct protections provided by the Code, and be conditioned upon an irrelevant factor — form of expression. The threshold conditions used, being basically traditional, still lack sufficient flexibility to provide results which will satisfy the decedent's intent in many cases.

It is important to note that these protections relating to pretermission are applicable only in discrete factual contexts. They come into play only if the testator fails to provide for the protected individual in a will executed before the marriage,²²³ birth, or adoption in question.²²⁴ No protection is available if it appears from the will that the omission was intentional, nor is there protection in the case where there has been extra-testamentary transfer of property intended to serve in lieu of a bequest.²²⁵ Furthermore, there is the additional exception in the case of a decedent who does not provide for other children *in esse* at the time of the execution of the will and who devised "substantially" all his estate to the other parent of the omitted child.²²⁶ Lastly, the Code treats children erroneously thought by their parents to be dead as pretermitted — an area previously covered by mistake rules.²²⁷

The drafters justify these omitted heir provisions on the ground that they reflect decedent intent.²²⁸ Reflection, however, yields four examples (a nonexclusive listing) illustrating the way in which these sections may nonetheless blithely frustrate or ignore the decedent's intent, deny maximum family provisioning, and minimize the best use of property and other social goals. First and most obvious, even if the testator has, by extra-testamentary means, explicitly shown that the omission was intentional, his intent will be disregarded,

222. Since the surviving spouse is entitled to the first \$50,000, there may be nothing left for the child's share.

223. UNIFORM PROBATE CODE § 2-301(a).

224. *Id.* § 2-302(a).

225. *Id.* §§ 2-301(a), -302(a)(1), -302(a)(3).

226. *Id.* § 2-302(a)(2).

227. *Id.* § 2-302(b).

228. *Id.* Official Comment §§ 2-301, 2-302. The protection is obviously designed to replace the common law presumption that subsequent marriage revoked the prior will, (as the concept of the pretermitted child replaced the revoking effect of the birth of a child), so that the reasons for section 2-302 would appear to cover section 2-301 as well.

unless he has expressed that intent in the will or at the time of a transfer of property made in lieu of a bequest.²²⁹

As a second example, a testator's will may provide small bequests to each of two children alive when the will is executed, and give the remainder of the estate to the spouse. The will omits a child born after its execution. It is difficult to say that such an omission was intentional. Under section 2-302(a)(2), however, since the spouse-parent of the omitted child receives substantially all of the estate, the omitted child receives nothing while his siblings receive something. In this situation the Code disregards the decedent's apparent intentions to provide a nominal amount to each of his children. Thus the Code achieves the opposite of its stated goal.

The third example is more complicated. It presupposes a decedent and his first wife having a child, and his execution of a will leaving a nominal amount to the child, and the rest "to my wife." A second child born to this marriage is pretermitted. If the wife then dies and decedent remarries and has another child, it too is pretermitted. If decedent then dies, the surviving spouse will take under the will as the "wife." In this situation, the first child takes the nominal amount specifically given to him. The status of the second and third children is uncertain; however, even though the second child has not been intentionally omitted, he may be disqualified under section 2-302(a)(2). Under that section, the omitted child takes nothing if "when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child . . ." ²³⁰ If the unspecific words "to my wife" refer "to the other parent" of this particular omitted child (child two), then the second child takes nothing. If the devise "to my wife" refers to the decedent's second wife, then the second child takes his intestate share. His half-sibling, the third child, is in the reverse situation. Thus, in any event, one child takes a nominal amount, one takes one-sixth of the estate, and one takes nothing. Equating such a result to any reasonable decedent's intention seems farfetched.

The final example assumes that the decedent's will provides that this spouse is to take one-half of the estate and his two named children are to split the remaining half. After the will has been

229. UNIFORM PROBATE CODE §§ 2-301(a), -302(a)(3).

230. *Id.* § 2-302(a)(2).

executed, he has another child, and he then dies. Under the will the spouse takes one-half, the two children mentioned in the will are entitled to one-fourth each. But, the omitted child qualifies under section 2-302, since the spouse does not receive substantially all of the estate. Thus the Code entitles him to an intestate share.²³¹ The Code's scheme, however, never puts him on a par with his siblings, since under section 2-102, the spouse is entitled to the first \$50,000 of the estate and one-half of the balance over \$50,000. Thus, for an estate of \$50,000, he takes nothing, while his siblings take \$12,500 each. With an estate worth \$100,000, the children named in the will receive almost three times more than the pretermitted child.²³² The purpose underlying section 2-302 was to effectuate decedent's intent or what the drafters presumed that intent to be. In a situation like this one, where all outside circumstances indicate that the decedent, had he remembered, would have treated his third child like the others, the Code's mechanism makes such equal treatment a matter of arithmetical chance. It will almost certainly fail to achieve its goal.

C. *Elective Share*

One of the major changes in existing law made by the Code is the extension of the election of the spouse to many types of probate-avoiding transfers. Under the Code, prior transfers by the decedent which are revocable, joint, in contemplation of death, or with respect to which the decedent has retained a life estate are all subject to the election.²³³ At the same time, the Code includes in the estate, for the purposes of determining the elective share, property previously transferred to the surviving spouse by the decedent,²³⁴ so that the election may not be profitably made by one upon whom property has previously been settled. In making the changes, the drafters have significantly improved the protection of the spouse against avoidance of the elective share by inter vivos transfers and favorably reflect suggestions made in many of the articles criticizing

231. *Id.* § 2-103(1).

232. It is assumed that the spouse would not elect to take against the will, since the half provided under the will is still significantly more than the one-third provided for election under section 2-201, unless there have been substantial inter vivos transfers to inflate the size of the augmented estate, which inflation would not inflate the shares of the children.

233. UNIFORM PROBATE CODE § 2-202.

234. *Id.*

the pre-existing statutory provisions.²³⁵

Notwithstanding these improvements, one must question whether the Code truly solves all of the problems. The Code operates on the principle that the spouse ought to have a right in all cases to take an absolute share of the estate. The spouse has, of course, been protected against disinheritance for centuries. As has previously been indicated, however, the protection violates decedent's intent and may not significantly further other goals. Indeed, the automatic nature of the forced share can occasionally decrease family protection. Where the spouse does not need the assets for support, but children or other family members (for example, parents) do, the protective sections of the Code may effectively deny the assistance where it is needed. Under the Code, as in pre-existing law, presumed need is recognized rather than need in fact.²³⁶

The automatic share may in other cases limit the ability of the family as a whole to utilize the assets of the estate most effectively or to realize their full economic value. Where the spouse is not financially in need of the protection, she still might, for example, block the development of land holdings by electing her share under section 2-201, obtaining partition under section 3-911, and then refusing to develop the land. Similar results may obtain where the major asset of the estate is a family business, left intact to a son or daughter. If there were not sufficient extra assets, satisfaction of the spousal share could destroy the business. Thus, a share which the spouse may not need may destroy the value of the gifts to others.

On the other hand, one must question whether limiting the spousal protection to an automatically applied share of the estate is adequate protection. As implicitly recognized in the intestacy provisions, often a substantial part if not all of the estate is required for spousal support. The Code provides but one-third.²³⁷ With no

235. The use of federal estate tax techniques reflects the suggestion in L. SIMES, PUBLIC POLICY AND THE DEAD HAND (1955). It also follows a similar pattern adopted in New York. N.Y. EST., POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967).

236. UNIFORM PROBATE CODE § 2-202. This may be contrasted to the manner of handling the family allowance under section 2-403, Comment: "If the surviving spouse has a substantial income, this may be taken into account." On the other hand, the comment also states that "If a husband has been the principal source of family support a wife should not be expected to use her capital to support the family." *Id.* This latter conclusion is questionable, unless the drafters refer only to that situation where the spouse's capital is not sufficient for continuing support.

237. UNIFORM PROBATE CODE § 2-201(a).

investigation into the need of the spouse being allowed or deemed relevant under the Code, the protection afforded may be minimal compared to the need.

VI. SUGGESTIONS FOR REFORM

A. *Need for Reform*

In the vast majority of existing cases the legal rules of inheritance undoubtedly lead to results approximately satisfying their underlying goals. Experience has shown that most testate estates are structured to protect the decedent's family and that they do not violate any societal norms. Similarly, in most intestate situations, the disposition of property will likely reflect the desires that the decedent would have expressed had he made a will.

The flaws in the system stem from the fact that it postulates a mythical "normal" family situation and tailors the law to fit this norm. This practice may be tolerable because the "abnormal" cases are few. It is, however, unnecessary and unwise. There are many common fact patterns where the decedent and his family do not fit the normal family model. In these situations the law is at best inadequate and at worst unjust. The end result is that the system only partially does its job. Protections afforded the spouse and divisions of intestate property on the basis of degree of relationship are two of the many examples of judgments based on irrebuttable presumptions about normal decedents' desires and the normal ways in which decedents structure their affective relationships. The system ignores decedents and their families who do not fit neatly into these set inheritance patterns. As a result of the law ignoring the special problems of the broken marriage, nonblood "family" relations, and other situations which do not fit within the norm, it essentially abdicates its responsibility to provide an all-encompassing inheritance law. The present rules are designed for limited situations and leave other cases to chance.

Given the inadequacies of this system the question arises as to how it can be changed in order to lead to more rational results in a higher percentage of cases. Professor Langbein suggests one reform possible in the will-making area. Many other alternatives have been suggested in response to other insufficiencies.²³⁸ The drafters of the

238. See note 117 *supra*.

Uniform Probate Code have adopted some of the suggestions, notably by expanding the protection of the spouse to include property transferred by some inter vivos conveyances and by defining more narrowly the situations in which a pretermitted heir may take.²³⁹

Such piecemeal changes are, however, inherently inadequate to solve the basic problems. While the basic system should lead to correct results in the majority of cases and may properly be applied on a presumptive basis, two changes appear mandatory to make the law more effective. First, some method of providing flexibility is required to allow effective response to the abnormal inheritance situation. Second, the recognition of the tendency of decedents to provide for fair distribution of property necessitates some means of validating as many forms of testamentary expression as possible. The two areas will be discussed in that order.

B. *Flexibility of Response*

Increasing the flexibility of inheritance laws to make them capable of responding to unusual factual situations does not require the development of tools or techniques not presently in use in the law. The problem is rather one of recognizing what is to be accomplished vis-à-vis basic goals and of applying existing techniques to satisfaction of the goals.

For example, the primary goal and the primary use of inheritance law has been the protection of the family. Thus, the basic problem in improving existing law is how to better such provisioning. The most obvious answer is to devise a system through which investigation into each case determines the kind and amount of protection that each family needs. Such an investigation would permit the law to deal with the exigencies of the particular situation; it would avoid the existing practice of arbitrarily setting family members' interests and levels of protection; and it would avoid the risk that the individual family will not fit within the arbitrary prototype adopted by the legislature.

The Uniform Probate Code utilizes investigations of the type suggested. Under the Code, the family allowance is to be based upon the need of the spouse and children. Why could not such an investi-

239. UNIFORM PROBATE CODE § 2-202. The Code follows a suggestion by SIMES, note 235 *supra*. Professor Rheinstein suggested the exclusion of nuncupative wills. Rheinstein, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534, 550 (1948).

gation be held as well upon application for other relief from the claims of creditors? Why not hold such an investigation before relief is granted from the terms of the decedent's will? Since 1821 Maine has used this broader investigation before applying protections against disinheritance.²⁴⁰ A similar provision exists in New Zealand, where the statute gives the probate court the power to make provision from the estate for the necessary support of relatives of the decedent, "as their needs may appear."²⁴¹ Under this statute, family members who would be left largely without protection under American law are protected where appropriate and testamentary desires are not defeated except where necessary.²⁴²

If adopted in the United States, such a system should not present unmanageable problems for the courts. The Sussman study indicates that most estates are left in a manner that is acceptable to the survivors.²⁴³ The same study indicates that presently in many cases where the law provides what is considered by the family to be foolish or inadequate distribution, the beneficiaries redistribute the estate by private agreement.²⁴⁴ An actual need for investigation therefore should arise in only a small minority of cases.

Such investigations should not present the courts with factual determinations which they are unequipped to handle. Similar determinations are presently made regularly by courts (although usually not by probate courts) in every state in determining child support, alimony, and property division in divorce hearings, and in custody and support proceedings.²⁴⁵ Probate courts, based upon their jurisdiction over testamentary support trusts,²⁴⁶ regularly determine what constitutes reasonable support or maintenance. This familiarity with family investigations coupled with the fact that probate

240. See note 195 *supra*.

241. N.Z. Stat. (1900) No. 200; N.Z. Consol. Stat. (1908) No. 60. Similar statutes are contained in the laws of Australia, Canada and Great Britain as well. See generally Laufer, *supra* note 8. Operation of the English statute is discussed in Unger, *supra* note 198.

242. Under the New Zealand statute, the spouse, children, grandchildren, parents, and adopted and illegitimate children all are under the protection of the statute. Such breadth had some support in this country in a few states where family allowance legislation is phrased in terms of the "family" of the decedent. Even servants have on occasion qualified. *Strawn v. Strawn*, 53 Ill. 263 (1870).

243. M. SUSSMAN, *supra* note 55, at 122.

244. *Id.* at 125, 143-45.

245. See generally 2 W. NELSON, NELSON ON DIVORCE AND ANNULMENT §§ 14.29, .84, .135 (2d ed. 1961); 2 H. FOSTER & D. FREED, LAW AND THE FAMILY §§ 21.4, 22.6, .22 (1966).

246. See generally G. BOGERT, *supra* note 40, § 109; 3 A. SCOTT, *supra* note 75, at § 187.1.

courts are made courts of broad jurisdiction by the Uniform Code,²⁴⁷ should allay fears about the competence or ability of the courts to handle such determinations.²⁴⁸

To avoid provisions by a decedent which disregard his responsibilities to his family by way of inter vivos transfer, the proposed discretionary power could be tied to a power to recall assets into the estate. Both New York²⁴⁹ and Uniform Probate Code jurisdictions currently use such recall mechanisms to protect the elective share of the spouse. Their experience and the experience under similar provisions in the Federal Estate Tax Code should calm fears as to the efficacy of such systems.²⁵⁰

In recognition of the possibility that the decedent's close family might include nonblood relatives and friends, two definitional changes would seem appropriate. First, the provisions for passage of intestate property should be broadened to include as possible takers those dependent upon the decedent at the time of his death under circumstances which would lead to the expectation of continued support.²⁵¹ Second, such a provision should also be included within the definition of those entitled to the exercise of the court's discretion under the protective provisions. Again, no new concepts are presented. The Uniform Probate Code applies a similar test in extending the family allowance to those children "whom the decedent was obligated to support . . . [or] who were in fact being supported by him"²⁵² In addition, dependence is already a test in the application of federal income tax exemptions, in the determination of social security benefits, and in other areas, providing authority and expertise in dealing with the concept.

Finally, to insure realistic distribution of the intestate estate, some discretion should be given the court to adjust shares so as to

247. Section 1-309 defines the qualification of judges to be the same qualifications as a judge of a court of general jurisdiction; section 1-302 broadly defines jurisdiction of the courts.

248. It is indicated in Fratcher, *Towards Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1057-58 (1966), that the decision was explicitly made not to provide for a more flexible approach because of the lack of competence of probate judges in general.

249. N.Y. EST., POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967).

250. In the Comment to § 2-202, the drafters recognize the applicability of federal estate tax authority, although with the caveat that "the objectives of a tax law are different from those involved here"

251. Such a system was integrated into the Russian law following the revolution. Hazard, *Whither Communist-Led Society? An Approach Through Property Law*, 39 IND. L.J. 732 (1964).

252. UNIFORM PROBATE CODE § 2-403.

provide for the reasonable expectations or probable desires of the decedent. Assuming that there is no evidence of the actual desire of the decedent, such desire could nonetheless be approximated. The drafters of the Code have already engaged in such approximations in setting up intestate shares, and there is no reason to believe that a court scrutinizing one family would do less well than did the drafters when they guessed at the intentions of all American decedents. Sources such as the Sussman study provide patterns of the more or less common deviations from the norm and further studies ought to provide additional information as to common expectations in different family situations.²⁵³

A somewhat similar determination is now being made in many states. Under the jurisdiction of the local probate courts, gifts are sometimes made from the estates of incompetent wards.²⁵⁴ The question in such cases centers on whom the ward would have favored and in what amount. In decedent's estates the answer should usually parallel the Code's intestacy pattern. But flexibility would allow variation from the regular intestate patterns where other factors, such as care provided decedent during his life, indicate that another dispositive scheme is more appropriate.

C. *Mode of Testamentary Expression*

If the system included the flexibility necessary to deal with real family protection requirements, there would be less need to insist upon the formalities presently required for the execution of wills. Since the formalities do not prevent the very type of fraud that was the reason for their incorporation into the law, little reason for their continued presence in the law exists. It would therefore be appropriate, as Professor Langbein suggests, to reduce the necessity for formal execution of wills.

It is not suggested that all form be done away with. As Langbein implies, the formalities do provide a convenient standard by

253. The Sussman study notes preference in several instances: where a family member has cared for the decedent during his declining years, in the case of estrangement, prior preference of others, and lesser ability of the preferred taker to support himself. See generally M. SUSSMAN, *supra* note 55, at 83-120.

254. See generally Annot., *Power of Court or Guardian to Make Noncharitable Gifts or Allowances Out of Funds of Incompetent Ward*, 24 A.L.R.3d 863 (1969); Report, *Substitution of Judgment Doctrine and Making of Gifts From an Incompetent's Estate*, 7 REAL PROP. PROB. & TR. J. 479 (1972).

which prima facie validity of testamentary expression can be judged. In addition, they give the testator some assurance that his instructions contained in the will will be given effect. That some forms of expression are prima facie valid does not, however, require that all other forms of expression be held invalid. Even though many other forms of testamentary transfer are presently allowed under trust, contract, or other theory, many indications of testamentary intent, not articulated in traditional legal forms, are denied validity solely because of their failure to meet the formal requirements of a will, notwithstanding total absence of question as to their being true expressions of testamentary desire.²⁵⁵ Many of these expressions, it is suggested, could reasonably be validated, so long as the basic elements of a valid testament — testamentary intent, dispositive scheme, and lack of influence — could be proved by clear and convincing evidence.

Again, the suggestion does not require the development of new legal concepts although it would require statutory change. In effect the suggestion would divide purely testamentary expressions into two categories: those contained in what are presently deemed to be valid wills (or recognized will substitutes) would fall into the first category; those failing to comply with the contemporary formalities of wills or inter vivos transfers would fall into the latter. As is presently possible, the first type could be proved invalid by clear and convincing evidence of some basic defect such as lack of testamentary intent.²⁵⁶ The only change would be that those of the second type, which are now held absolutely ineffective in all cases, would be provable as wills using the same "clear and convincing evidence" test. Similar proof is currently allowed to establish constructive trusts upon devises, where an express trust fails for lack of compliance with the Statute of Frauds.²⁵⁷ Application to this new area should not, therefore, create insurmountable difficulties.

255. Many of these may have been expressed less formally than the meritorious wills Mechem would have allowed, in his solution which predicted the Uniform Probate Code. Mechem, *supra* note 2 and accompanying text. Some, such as noncupative wills clearly would not qualify as in "substantial compliance with the Wills Act which is the Langbein solution."

256. See, e.g., *Vickery v. Vickery*, 126 Fla. 294, 170 So. 745 (1936); *Gooch v. Gooch*, 134 Va. 21, 113 S.E. 873 (1922) ("lodge" wills).

257. See generally 5 A. SCOTT, *supra* note 75, §§ 488-94.

D. *Application of the Reform*

The reforms suggested would, of course, present an entirely different picture of inheritance. Much of the present thinking concerning property rights acquired at death would become irrelevant, to be replaced by other concepts.²⁵⁸ It might be helpful, therefore, to outline how the proposed system would work in practice.

Upon the death of an individual, an estate could be opened as either an intestate or testate estate, as is presently possible. If a formal will was in existence, it could be proved in the customary fashion with caveats triable according to current standards. If no formal will existed, but informally expressed testamentary expressions were known, or if such expressions post-dated and conflicted with a formal will, they could be alleged and, if proved as to terms and testamentary intent by clear and convincing evidence, established as the will of the decedent. Contestants would correspondingly have a lighter burden than exists in opposing a formal will.

Upon proof of the will in a testate estate, the estate would be administered and the property distributed in accordance with the terms of the will unless a relative or dependent petitioned for distribution against the will. Upon such a petition, a hearing would be held to determine (1) the dependency, (2) in the case where an alleged dependent is not a relative, the circumstances of the dependency, and (3) the claimants' support requirements. Distribution of reasonable amounts could be ordered based upon such support requirements, taking into account such factors as need, closeness to the decedent, legal obligation of the decedent to support the claimant during life, aid furnished decedent by the claimant during the decedent's life, and treatment in the will of others similarly situated. To the extent such payments were ordered, bequests and devises would abate as they currently do.

If the estate was intestate, any interested party could petition for administration as is presently permitted. After administration, the estate would be distributed in accordance with the statutory scheme as it currently is, unless a relative or dependent petitioned for deviation from the statute. If such a petition were filed, a hearing would be held to determine the eligibility of the claimant if a non-relative and to determine the basis for deviation in all cases. Again,

258. Such as dependency, need, regularity of behavior, and the like.

distribution might be adjusted relative to other takers under the statute based upon such factors as need of the particular claimant, affective relationship to the decedent, support previously furnished by the decedent, support furnished decedent by the claimant, and similar factors. Upon the ordering of any deviation, other shares would abate on a pro-rata basis, unless otherwise ordered by the court. If particular facts appeared indicating that immediate partition would be harmful to the value of the estate, the court could make such orders, including the establishment of trusts, to provide for the most appropriate distribution of the estate under the facts of the case.

In either the testate or intestate situation, any of the interested parties (relatives and dependents) could petition to have inter vivos transfers included for the purposes of satisfaction of their claims. If it is found that a claim is valid and that the inter vivos assets are necessary to satisfy the claim, or in fairness ought to contribute, then they could be included in the estate as is presently provided by article 2, part 2 of the Uniform Probate Code.

Finally, in the event that the estate were insolvent, any of the interested parties (relatives or dependents) could petition for distribution before payment of creditors' claims. If upon hearing it was established that distribution was actually needed by a claimant for his support, and that he was in fact being supported by the decedent during his life, then reasonable provision could be made from the assets of the estate before creditor claims were recognized.

Other alternatives may of course be devised to provide the flexibility necessary to better respond to the variety of different factual situations. It is to be hoped that they would improve upon the suggestions made here. It is even more to be hoped, however, that the current law of decedent's estate is not that which will take us into the twenty-first century.