

# THE FIRST ENGLISH ADOPTION LAW AND ITS AMERICAN PRECURSORS

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In the long history of English law, adoption is quite a recent phenomenon. Despite the ancient roots of adoption in Roman law, the dominance of primogeniture<sup>1</sup> and the role of the heir at law<sup>2</sup> excluded the possibility of adoption in England until 1926. American common law jurisdictions, however, departed from the strictures of English property law by statutorily abolishing primogeniture. Subsequently, American statutes permitting adoption were enacted during the nineteenth century.

The American experience with inheritance and adoption previewed the directions later followed in English law from 1925 to 1949. This article examines the relevant legal considerations at selected points in time. The Roman law of adoption, classical English property law of the high Middle Ages, Tudor-Stuart society, and the American experience are highlighted. The article then focuses on the enactment of the first English adoption law of 1926 in light of the history of English real property law.

## I. THE ROMAN LAW OF ADOPTION

Adoption existed in the earliest period of Roman law for religious reasons. The important memorial services performed for a family's ancestors could not be carried out if the last remaining family member died childless.<sup>3</sup> To prevent extinction, an old, childless man was permitted to adopt a person of any age,

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<sup>1</sup> Primogeniture is defined as follows:

The state of being the first-born among several children of the same parents; seniority by birth in the same family. The superior or exclusive right possessed by the eldest son, and particularly, his right to succeed to the estate of his ancestor, in right of his seniority by birth, to the exclusion of younger sons.

BLACK'S LAW DICTIONARY 1072 (5th ed. 1979).

<sup>2</sup> Heir at law is defined as "he who, after his ancestor dies intestate, has a right to all lands, tenements, and hereditaments which belonged to him or of which he was seised." *Id.* at 650.

<sup>3</sup> See 2 C. SHERMAN, ROMAN LAW IN THE MODERN WORLD 84 (3d ed. 1937).

even an adult.<sup>4</sup> The initial concern in these adoption proceedings was to prevent the adoption of a person whose natural ancestors would be left without anyone to perform memorial services for them.<sup>5</sup> Therefore, the Roman magistrates supervised the adoption process.<sup>6</sup>

Upon adoption, the person, typically a male, became a legal member of his adopted family and ceased to remain a member of his natural family.<sup>7</sup> The adopted son thus inherited property through his new family only.<sup>8</sup> In addition, adoption established a quasi-blood relationship, which constituted a bar to marriage between the adopted son and any members of the adoptive family within the prohibited degrees of kinship.<sup>9</sup>

While less-far-ranging types of adoption also existed in Roman law,<sup>10</sup> the concept underlying all adoption was the strengthening of the adopter's family.<sup>11</sup> Eventually, however, adoption

<sup>4</sup> See *id.* at 86-87. The adoptee was typically a male adult *sui juris*, an independent citizen, called a *paterfamilias*. *Id.* at 86-87 & n.342. The process was called *adrogatio* because the adopter (*adrogans*) was asked whether he desired the *paterfamilias* to become his lawful son. See *id.* at 86-87. This ancient form of adoption was carried out by a special act (*lex curiata*) of the patrician assembly, the *Comitia Curiata*, a male assembly open only to Roman citizens. *Id.* at 87. The religious authorities (*pontifices*) certified that the ancestors of the *paterfamilias* would not be bereft of descendants to carry on the memorial services (*sacra*). See W. BUCKLAND & A. MCNAIR, *ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE* 42 (rev. 2d ed. 1965). In time, *adrogatio* lost its religious aspect, but the Roman State retained supervision over the adoption process. *Id.* Political ambition could sometimes be furthered by adoption as, for example, when a patrician politician had a plebeian adopt him in order to secure his eligibility for the important plebeian office of the tribune. 2 C. SHERMAN, *supra* note 3, at 84.

<sup>5</sup> W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 126-27 (rev. 3d ed. 1963).

<sup>6</sup> See *id.* at 124.

<sup>7</sup> See *id.*

<sup>8</sup> 2 C. SHERMAN, *supra* note 3, at 90.

<sup>9</sup> See W. BUCKLAND & A. MCNAIR, *supra* note 4, at 45.

<sup>10</sup> See 2 C. SHERMAN, *supra* note 3, at 88-89. In the early Roman Republic, another form of adoption developed, simply called *adoptio*. See *id.* at 88. Under this form of adoption, the adoptee (*filiifamilias* or *filiafamilias*) was dependent on his or her father's paternal power (*patria potestas*) and thus was said to be *alieni juris*. See *id.* The Law of the XII Tables (451-449 B.C.) provided the method of adoption. *Id.* at 89. The paternal power of the natural father had to be extinguished by a fictitious sale (*mancipatio*) of the *filiifamilias*. *Id.* Then, an analogous relationship between the adopter and adoptee had to be created. *Id.* Females could be adopted, but not adrogated. See W. BUCKLAND, *supra* note 5, at 125; see also *supra* note 4 (explaining *adrogatio* process). Furthermore, because they did not possess *patria potestas*, women could not adopt or adrogate. See W. BUCKLAND, *supra* note 5, at 123-24. It was not until 291 A.D. that the privilege to adopt was granted to women. 2 C. SHERMAN, *supra* note 3, at 85.

<sup>11</sup> See 2 C. SHERMAN, *supra* note 3, at 84. The modern emphasis placed on the

became a matter of choice rather than a last resort.<sup>12</sup> When no suitable natural child was available to carry out offices, assume honors, or manage estates, an appropriate person could be adopted.<sup>13</sup> Adoption thus quickly developed political and economic functions and soon served as a will substitute.<sup>14</sup> Great political dynasties were built by the shrewd use of adoption. Perhaps the most famous example of such a politically motivated adoption can be found in Julius Caesar's establishment of the Julio-Claudian line. By adopting his nephew Octavius, who became the Emperor Caesar Augustus, Caesar was able to choose his heir.<sup>15</sup>

Beyond the need to protect against the legal extinction of the adoptee's heirs, few conflicts between the interests of the adopter and the adoptee were legally recognized by classical Roman law. Later, under Justinian, the law permitted the adopted son both to retain his succession rights from his natural father and to acquire intestate succession rights from his adoptive father.<sup>16</sup> The Roman idea of the family was thus a civil, legal concept, inasmuch as people who would be deemed "strangers to the blood" at English common law could be considered family members in ancient Rome.

Gradually, adoption became disused as Christianity grew in strength. Although the church was deeply concerned with family law, it did not include adoption in that category because of its pagan religious significance and its economic and political functions.<sup>17</sup> It did include the concept of legitimation, however.<sup>18</sup> Legitimation, which was first introduced in Roman law in the year 335 by the Christian Emperor Constantine,<sup>19</sup> gave Christians a second chance to comply with the laws of the church. When a man and woman had children together and later married

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"best interests" of the child thus played no part in the classical Roman adoption process.

<sup>12</sup> See W. BUCKLAND & A. MCNAIR, *supra* note 4, at 42-43.

<sup>13</sup> See Goody, *Adoption in Cross-Cultural Perspective*, 11 COMP. STUD. SOC. & HIST. 55, 60 (1969).

<sup>14</sup> See *id.* at 60 & n.1.

<sup>15</sup> See R. SYME, *THE ROMAN REVOLUTION* 112-13 (1939).

<sup>16</sup> See 2 C. SHERMAN, *supra* note 3, at 90. Justinian's adoption statute also protected a child whose adoptive father emancipated him at some point after the adoption. See *id.* at 99-100; see also W. BUCKLAND, *supra* note 5, at 123.

<sup>17</sup> See generally H. JOLOWICZ, *ROMAN FOUNDATIONS OF MODERN LAW* 196 (1957) (discussing Roman philosophy of adoption).

<sup>18</sup> See 2 C. SHERMAN, *supra* note 3, at 80.

<sup>19</sup> See *id.* at 81.

each other, those children became legitimated by the marriage.<sup>20</sup> Classical Roman law had not provided for legitimation possibly because the institution of adoption permitted a father to adrogate, or adopt, his own illegitimate child.<sup>21</sup> As the centuries passed, Roman adoption thus became a dead letter for all practical purposes, whereas legitimation was strengthened by the support of canon law.

## II. CLASSICAL ENGLISH PROPERTY LAW

The English common law knew no such phenomenon as adoption because the English concept of the family was based exclusively on marriage and blood ties.<sup>22</sup> During the twelfth and thirteenth centuries, the English law of inheritance gradually took the form that it retained until 1925.<sup>23</sup> Over the centuries, even though England had changed from a landholding to a mercantile and industrial society, the emphasis on land remained. Property law thus crowded out family law, and no provision at all was made for adoption.

The major cornerstones of the English law of inheritance were primogeniture and the heir at law. The doctrine of primogeniture established that the first born son was the heir at law.<sup>24</sup> Only the heir at law could inherit.<sup>25</sup> Younger sons, daughters, and illegitimate sons could not inherit and therefore had to be provided for during their father's lifetime.<sup>26</sup> The common law thus protected only the dynastic line of the family and not the various members of the family itself. The heir at law acquired a right to succeed to the whole of the land his ancestor possessed at death.<sup>27</sup> He took his land by descent rather than by direct grant.<sup>28</sup> Therefore, the heir at law had no property rights unless his ancestor died seised of the land.<sup>29</sup> If the ancestor sold all of

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<sup>20</sup> See *id.* at 80.

<sup>21</sup> See W. BUCKLAND & A. MCNAIR, *supra* note 4, at 43. For a discussion of *adrogatio*, see *supra* note 4.

<sup>22</sup> See generally 2 F. POLLOCK & W. MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* 260-64 (2d ed. 1968) (discussing the law of descent).

<sup>23</sup> See generally *id.*

<sup>24</sup> See *supra* note 1 (defining primogeniture).

<sup>25</sup> See *supra* note 2 (defining heir at law).

<sup>26</sup> See generally A. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF THE LAND LAW* 48-49 (1961).

<sup>27</sup> See *id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *id.*

the land prior to his death, the heir was deprived of his expectation that he would receive the land.<sup>30</sup>

To preserve a family for purposes of inheritance, the common law devised rules for succession when there was no first-born son to step into his father's shoes.<sup>31</sup> Lineal descendants were preferred to collaterals,<sup>32</sup> and collaterals on the father's side were preferred to collaterals on the mother's side.<sup>33</sup> Since Bracton's time in the mid-thirteenth century, males in the same degree as females were always preferred to the females.<sup>34</sup> Devices such as entails and inter vivos gifts that provided for individual members of the family softened the harshness of this scheme, however, and permitted it to remain intact for seven hundred years.<sup>35</sup>

In many ways, the ancient scheme of inheritance became a historical curiosity long before it was abolished in 1925. The preoccupation with blood line and dynasty nevertheless prevented modification of the basic scheme of inheritance. Roman law, including adoption, was thus irrelevant to this scheme. There could be no question of adoption in England so long as the heir at law held sway. The notion of any heir outside a natural, orderly succession was repugnant to English society. Thus, even hypothetically, the idea of adoption of a younger son was not entertained. The possibility that a first-born son might predecease his father without issue and an adopted child inherit made the notion of adoption unpalatable.<sup>36</sup> Even legitimation,

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<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 55-57.

<sup>32</sup> See *id.* at 56. For example, if the Prince of Wales predeceased Queen Elizabeth II, Prince William would "represent" his father and take precedence over his uncle, Prince Andrew.

<sup>33</sup> See *id.* at 55-56.

<sup>34</sup> See *id.* at 55.

<sup>35</sup> See generally *id.* at 48-49.

<sup>36</sup> See Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 Nw. U.L. REV. 1038, 1045 (1979). The author suggests that adoption would have posed many difficulties for English common law. *Id.* For example,

it threatened the security of title to land, which traced ownership through ancestry; it violated practically every rule of inheritance; and it denied the Christian canons of marriage and legitimacy. Since the eighteenth century, the crux of resistance had centered on parental rights. In numerous cases involving custody, both common law and equity courts refused to recognize any rights in de facto adoptive relationships.

*Id.* (footnote omitted). Whether adoption challenged Christian marriage and legitimacy is debatable, however. While the inheritance consequences of Roman adop-

although accepted in England through canon law, was short-lived.

The issue of legitimacy was generally decided by an ecclesiastical court.<sup>37</sup> If the bishops found that the person in question had been born to two people who later married each other, they sent a holding of legitimacy to the secular court.<sup>38</sup> In 1234, however, the bishops were instructed to report to the secular court only on whether the person had been born before or after his parents' marriage.<sup>39</sup> Instead of complying, the bishops sought to have the common law return to the canon law view that a child was legitimated upon the marriage of his parents.<sup>40</sup> The barons of England refused to return to the old law, and the bishops refused to find that a child born before the marriage of his parents was illegitimate.<sup>41</sup> Therefore, in May of 1236, the determination of whether a child was born before marriage or after ceased to be a question for the ecclesiastical courts to decide and became a question for the jury in the civil courts.<sup>42</sup> Consequently, a person born before the marriage of his parents could no longer succeed to his ancestor's estate as he had been able to do earlier in the twelfth century.

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tion were changed in later imperial times, the Christian Emperor Justinian did not outlaw adoption. See *supra* note 16 and accompanying text. Furthermore, the church tried to make legitimation as easy as possible. See *supra* notes 18-21 and accompanying text; see also *Romans* 8:15 (using the term adoption); *Galatians* 4:5-7 (referring to adopted sons of God).

Some scholars have found an implied explanation for the omission of an English adoption law in Shakespeare's *Henry VI*. They have concluded that the answer to the question "may not a king adopt an heir?" essentially "amounts to saying that an outsider may not be brought into a family to the prejudice of the expected heirs." H. WITMER, E. HERZOG, E. WEINSTEIN & M. SULLIVAN, *INDEPENDENT ADOPTIONS: A FOLLOW-UP STUDY* 21-22 (1963) [hereinafter cited as *INDEPENDENT ADOPTIONS*] (footnote omitted).

<sup>37</sup> See 3 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND xvii (S. Thorne trans. 1977).

<sup>38</sup> See *id.*

<sup>39</sup> See *id.* at xv.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Legitimation was abolished by statute in 1235. See Statute of Merton, 1235-1236, 20 Hen. 3, ch. 9. The illegitimate child, who was simply treated as *filius populi*, did not succeed to his parents' property, but did enjoy a right to support. See Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 432-33 (1977). The only possibility for legitimation was by the very rare act of Parliament, such as the act legitimating John of Gaunt's children during the reign of Richard II (1377-1399). See M. MCKISACK, *THE FOURTEENTH CENTURY: 1307-1399*, at 475 (1959).

## III. THE PROBLEMS OF YOUNGER SONS

Despite the many changes in English society, relevant changes in real property law occurred only in the nineteenth and twentieth centuries.<sup>43</sup> Until the upheavals of the First World War, increases and decreases in population had little effect on property law. Economic and social historians show that from the late thirteenth century until the Black Death, there was remarkable continuity of tenure among lesser landholders.<sup>44</sup> At the beginning of the plague in 1348, younger sons and nephews readily assumed vacant tenancies.<sup>45</sup> As outbreaks of the plague recurred roughly every decade, however, families soon became extinct in the male line, households shrank in size, and acreage per family increased.<sup>46</sup> Hereditary continuity began to decline from 1350 to 1410 and then declined even more sharply for the next thirty years.<sup>47</sup> Between 1410 and 1440, tenures turned over with extreme rapidity.<sup>48</sup>

Nothing was done legally to keep individual families in existence as Roman law had done for the last survivor of a Roman family.<sup>49</sup> When surviving farmers without heirs became too old to work, they sold or leased their lands to younger farmers in return for support during the remainder of their lives.<sup>50</sup> While some historians use the word "adoption" to describe this situation,<sup>51</sup> the arrangement was technically a "use."<sup>52</sup> A use did not amount to an adoption, but rather fulfilled the functions of modern trusts, annuities, and social security.<sup>53</sup> Land given to the "use" of a new tenant might pass hereditarily in the new tenant's family if

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<sup>43</sup> See generally A. SIMPSON, *supra* note 26, at 252-61 (discussing nineteenth-century reforms).

<sup>44</sup> See generally Bridbury, *The Black Death*, 26 *ECON. HIST. REV.* (2d ser.) 577, 591 (1973) (Black Death only purged problem of overpopulation; it "was insufficient to change the relationships of land to labour"); Mate, *Agrarian Economy After the Black Death: The Manors of Canterbury Cathedral Priory, 1348-91*, 37 *ECON. HIST. REV.* (2d ser.) 341, 354 (1984) (endorsing Bridbury's theory).

<sup>45</sup> See Bridbury, *supra* note 44, at 590.

<sup>46</sup> See *id.*

<sup>47</sup> See Mate, *supra* note 44, at 354.

<sup>48</sup> See *id.*

<sup>49</sup> See *supra* notes 3-9 and accompanying text (discussing religious purpose of Roman adoption law).

<sup>50</sup> See Howell, *Peasant Inheritance Customs in the Midlands, 1280-1700*, in *FAMILY AND INHERITANCE* 112, 130 (1976).

<sup>51</sup> See *id.*

<sup>52</sup> See generally J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 210-13 (2d ed. 1979) (explaining feudalism and uses).

<sup>53</sup> See Howell, *supra* note 50, at 130.

the beneficial owner had no heirs. The extinction of the donor's family was thus lost in the shuffle. Unlike the situation in ancient Rome, the prospect of the extinction of an ordinary English family did not cause a religious crisis and thus required no legal response by the state. Rather than establishing adoption to avoid familial extinction, English property law recognized the doctrine of *escheat propter defectum sanguinis* (on the death of the tenant intestate and without heirs).<sup>54</sup> If the tenant died without heirs and no mesne lord was available to act as tenant, the land returned to the crown.<sup>55</sup>

The extinction of aristocratic families elicited the same legal response as did the extinction of lower class families. One historian has showed that all the original earldoms in fee were extinct by the end of the fourteenth century.<sup>56</sup> The nobility thus also granted feoffments to "uses."<sup>57</sup> Roughly the same demographic changes influenced landholders in different classes. By the sixteenth century, the plague had spent its main fury and hereditary descent of land regained its former stability.<sup>58</sup>

Although the prospect of familial extinction failed to lead to a legal system of adoption, the proliferation of the family once again created tensions giving rise to severe criticism of primogeniture.<sup>59</sup> As the population grew to its former size, treatises on primogeniture appeared. For example, in Thomas Starkey's *A Dialogue Between Reginald Pole & Thomas Lupset*, written in approximately 1534, Cardinal Pole, a cousin of King Henry VIII, was presented as being vehemently against primogeniture because

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<sup>54</sup> See A. SIMPSON, *supra* note 26, at 19-23.

<sup>55</sup> *Id.* at 23. In 1925, England abolished escheat on the death of a tenant who died intestate and without heirs. See Administration of Estates Act, 1925, 15 Geo. 5, ch. 23, § 45(1)(d).

<sup>56</sup> See K. MCFARLANE, *THE NOBILITY OF LATER MEDIEVAL ENGLAND* 80-81 (1973).

<sup>57</sup> See G. HOLMES, *THE ESTATES OF THE HIGHER NOBILITY IN FOURTEENTH-CENTURY ENGLAND* 52-53 (1957). The nobility, with its great estates, was able to establish a compromise between its dynastic impulses and its desire to provide for younger sons. See *id.* at 53. Family trusts were used to keep the bulk of the estates in the hands of the first son, and provisions to settle younger sons were made during their fathers' lifetimes. See *id.*

<sup>58</sup> See generally L. STONE & J. STONE, *AN OPEN ELITE? ENGLAND: 1540-1880*, at 111-26 (1984) (tracing "transitions" in intrafamilial inheritance after "the high demographic boom" of the 16th and 17th centuries). The author points out, however, that by changing their family name or hyphenating their surname, remote heirs upon succession created an illusion of stability in inheritance through the generations. *Id.* at 126. Of course, the rules of succession, strict settlements, or wills designated the appropriate heir.

<sup>59</sup> See Thirsk, *Younger Sons in the Seventeenth Century*, 54 *HIST.* (n.s.) 358, 361-73 (1969).



younger sons were not being provided with land.<sup>60</sup> Lupset, on the other hand, claimed the dynastic control of estates promoted domestic peace through the increase of estates and the maintenance of an authoritative class.<sup>61</sup> Pole suggested that troubles arose because the gentry, who could not afford primogeniture, nonetheless attempted to increase the status of their families by concentrating land in one hand at the expense of the younger sons.<sup>62</sup>

Nothing was done, however, to change the laws of inheritance. One response was to send younger sons of the gentry to plantations in Ireland and later to Virginia.<sup>63</sup> The church, although previously a haven for second sons, provided little employment after the dissolution of the monasteries and even less during the English Civil War and the Interregnum.<sup>64</sup> The poet George Herbert, fifth son of a well-known gentry family, suffered no illusion about the decline in status his ordination in the 1620's would entail. Herbert stated, "[T]he Iniquity of the late Times have made Clergymen meanly valued, and the sacred name of *Priest* contemptible."<sup>65</sup>

As political dissent grew during the 1630's, historical justifications for a more equitable devolution of land were advanced. Allusions to the ancient custom of gavelkind in Kent and Wales and the Biblical story of Jacob and Esau were made in support of the notion that equal shares should be preferred to primogeni-

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<sup>60</sup> See T. STARKEY, *A DIALOGUE BETWEEN REGINALD POLE & THOMAS LUPSET* 105 (K. Burton ed. 1948). As related by Starkey, Pole stated the adverse consequences of primogeniture on family relationships. *Id.*

<sup>61</sup> See *id.* at 106-07.

<sup>62</sup> See *id.* at 175.

<sup>63</sup> See generally G. HERBERT, *A Priest to the Temple or, The Country Parson*, in *THE WORKS OF GEORGE HERBERT* 278 (F. Hutchinson ed. 1941). Herbert suggests that if a younger son did not enjoy studying, "where can he busie himself better, then [sic] in those new Plantations and discoveries." *Id.* Herbert discusses the problems of idleness and employment for younger brothers and suggests several alternatives for employment, including law, mathematics (comprising such practical pursuits as fortification and navigation), and business and manufacture. *Id.* at 277-78. The civil service also provided opportunities for younger sons of the gentry. See G. AYLMER, *THE STATE'S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC: 1649-1660*, at 58-82 (1973); see also Grassby, *Social Mobility and Business Enterprise in Seventeenth-Century England*, in *PURITANS AND REVOLUTIONARIES: ESSAYS IN SEVENTEENTH-CENTURY HISTORY PRESENTED TO CHRISTOPHER HILL* 355-81 (1978) (discussing the movement into trade by younger sons).

<sup>64</sup> See Thirsk, *supra* note 59, at 365-66.

<sup>65</sup> I. WALTON, *THE LIVES OF JOHN DONNE, SIR HENRY WOTTON, RICHARD HOOKER, GEORGE HERBERT & ROBERT SANDERSON* 277 (1927). Similarly, Barnabas Oley "heard sober men censure" Herbert for losing himself "in an humble way." *THE WORKS OF GEORGE HERBERT*, *supra* note 63, at xxxii (footnote omitted).

ture.<sup>66</sup> One critic observed that primogeniture failed to preserve a family because the eldest son himself often failed to produce a son.<sup>67</sup>

During the Interregnum, from 1649 to 1660, there was no king or established episcopal church to provide alternatives for younger sons.<sup>68</sup> Because the royal dynasty had been abolished, there seemed little reason to have other families mirror a discredited dynastic model. Therefore, political pressure for reform once again increased.<sup>69</sup> Although some members of Parliament sought to change the law of primogeniture, younger sons could not generate enough pressure for law reform, and no legislation emerged.<sup>70</sup>

#### IV. THE AMERICAN EXPERIENCE

Younger sons who settled in Ireland and Virginia found the intestate succession laws very similar to those in England. Although Virginia property law recognized primogeniture and entails,<sup>71</sup> the harsher consequences of the law could sometimes be avoided by seeking relief from the colonial legislature.<sup>72</sup> Nevertheless, American patriot Thomas Jefferson viewed primogeniture and entails as the symbolic basis of an aristocracy of birth and inherited privilege, which prevented the establishment of a true republican government based on "virtue and talent."<sup>73</sup> Accordingly, Jefferson made the elimination of entails and primogeniture the object of his earliest political reforms as a member

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<sup>66</sup> See Thirsk, *supra* note 59, at 364-66. Gavelkind was a method of property distribution, "common in Kent . . . where the lands descend to all the sons, or heirs of the nearest degree, together." BLACK'S LAW DICTIONARY, *supra* note 1, at 613.

<sup>67</sup> See *id.* at 364 (discussing John ap Robert's popular tract, *An Apology for a Younger Brother*).

<sup>68</sup> See generally G. AYLMER, *supra* note 63, at 8-54 (discussing the English Civil War and its aftermath).

<sup>69</sup> See generally G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 191 (1960) (discussing *Examen Legum Angliae*, a tract published in 1656 proposing that heirs take on intestacy "by partible inheritance with a double portion for the eldest son"). Haskins suggests that the author of the tract was aware of Massachusetts law. See *id.*

<sup>70</sup> See generally Thirsk, *supra* note 59, at 369-74 (discussing the plight of younger sons).

<sup>71</sup> See MORRIS, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24, 25 (1927).

<sup>72</sup> See I D. MALONE, JEFFERSON AND HIS TIME: JEFFERSON THE VIRGINIAN 253 (1948).

<sup>73</sup> See THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 38-39 (A. Koch & W. Peden eds. 1944) [hereinafter cited as SELECTED WRITINGS].

of the Virginia House of Delegates in 1776.<sup>74</sup> Within a decade, Virginia had abolished both entails and primogeniture.<sup>75</sup>

Massachusetts Bay had a different experience with property law. Even in the seventeenth century, Massachusetts was less aristocratic and very much more reform-oriented than Virginia.<sup>76</sup> This was partly attributable to Puritanism and the need for cooperative efforts in farming caused by poorer soil.<sup>77</sup> Furthermore, the settlers came from the manors of Eastern England and other areas that clung to the ancient customs of partible inheritance.<sup>78</sup> All of these factors led Massachusetts to enact an intestate succession law of partible inheritance for all children, including females.<sup>79</sup> When the Massachusetts intestacy law was later unsuccessfully challenged in the Privy Council during the eighteenth century, the argument supporting the colony's partible inheritance law was that the economic survival of the colony absolutely depended on it.<sup>80</sup> Despite challenges such as this one, within ten years after the American Revolution, almost all of the states had abolished primogeniture and entails.<sup>81</sup>

In 1851, Massachusetts became the first common law state to enact an adoption statute.<sup>82</sup> A recent commentator suggests that a "favorable climate" for adoption developed because "of the

<sup>74</sup> See 1 D. MALONE, *supra* note 72, at 251. For a discussion of Jefferson's attack on primogeniture and entails, see SELECTED WRITINGS, *supra* note 73, at 38-39, 44-45. See also Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 12-18 (1977) (discussing Jefferson's reform of property law in Virginia).

<sup>75</sup> See 12 Va. Laws 140, 148 (Hening 1823) (abolishing primogeniture); 9 Va. Laws 226, 226 (Hening 1821) (abolishing entails). For a modern textual edition of Jefferson's bills with emendations from Hening, see 1 THE PAPERS OF THOMAS JEFFERSON 560 (J. Boyd ed. 1950); 2 *id.* at 391-93.

<sup>76</sup> See G. HASKINS, *supra* note 69, at 191.

<sup>77</sup> *Id.* at 171.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 170. It must be noted, however, that in the 18th century, Massachusetts regressed, inasmuch as it then accepted entails. See Morris, *supra* note 71, at 27-28.

<sup>80</sup> G. HASKINS, *supra* note 69, at 172; see also Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L.J. 1280, 1295-96 (1942) (discussing the case of *Phillips v. Savage*, which challenged the intestate-succession law of Massachusetts).

<sup>81</sup> See Morris, *supra* note 71, at 25.

<sup>82</sup> See Zainaldin, *supra* note 36, at 1042. The Act provided as follows:

A child . . . adopted . . . shall be deemed, for the purposes of inheritance and succession by such child, custody of the person and right of obedience by such parent or parents by adoption, and all other legal consequences and incidents of the natural relation of parents and children, the same to all intents and purposes as if such child had been born in lawful wedlock of such parents or parent by adoption, saving only that such child shall not be deemed capable of taking property expressly lim-

problems associated with other forms of child placement, the gradual refinement of nurture-based custody law, confusion over inheritance rights, and the everpresent plight of homeless, neglected, and delinquent children."<sup>83</sup> The Massachusetts statute served as a model for many later adoption laws;<sup>84</sup> only Texas and Louisiana, with their civil law heritages, enacted adoption statutes earlier.<sup>85</sup>

Roman law provided the ultimate source for all of the state statutes permitting adoption.<sup>86</sup> Although statutory provisions and judicial interpretations varied widely, perhaps the most important, and indeed the most frequently litigated, legal issue was the adopted child's right of inheritance.<sup>87</sup> One early-twentieth-century commentator concluded that "[t]he general effect and interpretation of [American] adoption statutes [with regard to in-

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ited to the heirs of the body or bodies of such petitioner or petitioners [seeking to adopt].

Act to Provide for the Adoption of Children, ch. 324, § 6, 1851 Mass. Stat. 815, 816.

Recently, historians have tried to reconstruct the legislative intent behind the Massachusetts statute. One writer speculates that the Act may have been part of a trend toward providing a general statute in place of numerous special acts, or that protection of adoptive parents may have moved the legislature, or that a policy of providing the adopted child with a right of inheritance in its family may have contributed to the passage of the Act. See Zainaldin, *supra* note 36, at 1042-43.

<sup>83</sup> M. GROSSBERG, GOVERNING THE HEARTH LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 271 (1985).

<sup>84</sup> See, e.g., Keegan v. Geraghty, 101 Ill. 26, 33 (1881) (Wisconsin followed Massachusetts); Kales, *Rights of Adopted Children*, 9 ILL. L. REV. 149, 149 (1914) (Illinois followed Massachusetts); see also Kuhlmann, *Intestate Succession by and from the Adopted Child*, 28 WASH. U.L.Q. 221, 225 (1943) (discussing influence of Massachusetts law).

<sup>85</sup> Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 747 (1956); see also Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 335-36 (1922) (discussing Texas and Louisiana adoption law). Although Spain early introduced adoption to Louisiana, the state legislature abolished it entirely in 1825. See M. GROSSBERG, *supra* note 83, at 270. In Texas, adoption laws could be traced back to the time when Texas was subject to the jurisdiction of Mexico. See Eckford v. Knox, 67 Tex. 200, 204, 2 S.W. 372, 374 (1886). Furthermore, some states enacted special legislation that permitted specific persons to adopt particular individuals during the 1830's and later. See Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 461 & n.90 (1971).

<sup>86</sup> See Keegan v. Geraghty, 101 Ill. 26, 33 (1881).

<sup>87</sup> See generally Kales, *supra* note 84 (discussing the problems occurring with the adopted child's right to inherit from the adopting parents). Early cases deciding the issue of the inheritance rights of adopted children include the following: Russell v. Russell, 84 Ala. 48, 3 So. 900 (1887); *In re Wardell*, 57 Cal. 484 (1881); Pace v. Klink, 51 Ga. 220 (1874); Barnes v. Allen, 25 Ind. 222 (1865); Wagner v. Varner, 50 Iowa 532 (1879); Power v. Hafley, 85 Ky. 671, 4 S.W. 683 (1887); Sewall v. Roberts, 115 Mass 262 (1874); Morrison v. Sessions, 70 Mich. 297, 38 N.W. 249 (1888).

testate succession] is to approximate as closely as possible by artificial means, the relationship of parent and child between adoptive parent and adopted child."<sup>88</sup>

In effect, this policy required singling out the inheritance feature of Roman adoption law. Furthermore, the selection of the Latin word "adoption" for the name of the new procedure lent rhetorical strength to its acceptance. American adoption thus appeared on the surface to be a very ancient institution, and its newness of purpose was subsumed in its ancient name. Although early American law review articles<sup>89</sup> and even earlier cases<sup>90</sup> emphasize the statutory authority establishing adoption, they fail to acknowledge that American adoption was a new institution, sharing only a name and an inheritance consequence with its remote Roman analogue. The invocation of a Roman source and the use of a Roman name vaguely suggested a factual and conceptual continuity that did not exist. The inheritance feature of Roman adoption law commended itself to nineteenth-century Americans who ignored its religious motivation and the concomitant need to prevent the extinction of families without blood descendants. Judges invoked Roman law notions by referring to the result in the early Louisiana case of *Vidal v. Commagère*<sup>91</sup>—because the word adoption was derived from Roman law, the adoptee could therefore inherit from the adoptive parent.<sup>92</sup>

Another commentator, writing in 1873, also identified Ro-

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<sup>88</sup> Note, *Procedure of Adoption and the Rights of the Adopted Child*, 7 NOTRE DAME LAW. 223, 227 (1932) (footnote omitted).

<sup>89</sup> See, e.g., Brosnan, *supra* note 85, at 333-35; Obermeyer, *The Effect of the Law of Adoption upon Rights of Inheritance*, 1 S.L. REV. (n.s.) 70, 76 (1875).

<sup>90</sup> See, e.g., *Vidal v. Commagère*, 13 La. Ann. 516, 517 (1858); *Morrison v. Sessions*, 70 Mich. 297, 306-07, 38 N.W. 249, 253 (1888). Referring to Roman law, the court in *Morrison* stated, "Our statute has the same object, and no one can fail to see the similarity of the proceedings required by it and the regulations of Justinian." *Morrison*, 70 Mich. at 307, 38 N.W. at 253.

<sup>91</sup> 13 La. Ann. 516 (1858).

<sup>92</sup> See *id.* at 517. The court in *Vidal* stated:

Considered as a word of art, [adoption] is unknown to the common law, but one very familiar to the civilian.

Under the Roman law, the person adopted entered into the family, and came under the power of the person adopting him. And the effect was such, that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person. . . .

This law became the law of Louisiana, and remained unrepealed until the adoption of the Code of 1808. Now, when in an enabling or permissive statute, the Legislature has used a word so familiar in its ordinary acceptation, and so well known in the sources of our law, does it become the judiciary to say that it has not such meaning, because the

man law as the source for American adoption statutes.<sup>93</sup> He compared the purposes behind the inheritance provisions in various American jurisdictions and concluded that they were derived from either classical or imperial Roman law:

The tendency of legislation in many of the American states is in accordance with the later Roman law, in that the statutes regulating adoptions in such states, indicate only an intention to have the adopted child gain a right of inheritance from the adoptive parent, and from him alone, and not to give or take away the right of inheritance naturally belonging to other persons, whether related to the adopting parent or adopted child. Yet in some of the states, the early Roman law is to some extent followed, and the adopted child is there placed in the family of the adoptive parent, as if born to him in natural wedlock; while in other states, the rights and duties, gained or lost, partake of the characteristics of both systems.<sup>94</sup>

With some jurisdictional variations, American adoption was designed to establish a new family by cutting off the adopted child's ties with its original family.<sup>95</sup> Thus, in the event of intestacy, the adopted child inherited through its new family.

## V. THE HARBINGERS OF REFORM

Notwithstanding these American reforms, the law of intestate succession remained the same in England. During the eighteenth century, the yeomen, next below the gentry, began to use primogeniture to concentrate land in the hands of one family

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lawgiver has not himself expressly defined the sense in which he intended the word should be taken?

*Id.* (citations omitted).

Such cases as *Power v. Hafley*, 85 Ky. 671, 675, 4 S.W. 683, 684 (1887) and *Markover v. Krauss*, 132 Ind. 294, 300-01, 31 N.E. 1047, 1049 (1892) cited *Vidal* and treated Roman law as a precedent. One commentator looked favorably upon this invocation of Roman law: "The early cases usually contain rather extensive references to Roman civil law and tacitly incorporate the substantive effects of such law into their own new law of adoption. In this roundabout way a very ancient practice finally acquired an honorable estate in the new world." Huard, *supra* note 85, at 748 (footnote omitted).

<sup>93</sup> See Obermeyer, *supra* note 89, at 76-79. Although this article remained unpublished until 1875, it was written "in the summer of 1873." *Id.* at 79 n.\*.

<sup>94</sup> *Id.* at 79 (footnote omitted). The emphasis on Roman law in the cases and comments may be attributable to a corresponding emphasis on Roman law in early- and mid-nineteenth-century legal education. See generally Hoeflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey*, 1984 U. ILL. L. REV. 719, 723-28 (explaining the Roman influence on American law).

<sup>95</sup> See *Legislation and Decisions on Inheritance Rights of Adopted Children*, 22 IOWA L. REV. 145, 145-46 (1936).

member.<sup>96</sup> In the nineteenth century, however, the Industrial Revolution made the landed heir at law less useful. Industrial growth ultimately devalued landed society with its predictable agricultural wealth. The "dark Satanic Mills," which the poet William Blake recognized as evil and threatening to the quality of human life,<sup>97</sup> provided vast new fortunes. Eventually, the entire fabric of British society was affected.

Another event that changed the position of the heir at law was the passage of the Inheritance Act<sup>98</sup> in 1833. Prior to that time, the heir was not liable for the ancestor's debts except by special charter. The Act, however, treated the land of an ancestor as an asset for the payment of debts.<sup>99</sup> In this way, the position of the heir became disfavored with respect to creditors, whose legal importance grew as landholders became outmoded. Bentham thus called for the abolition of the heir at law.<sup>100</sup> In 1879, however, Maitland was still echoing Bentham's suggestion that the heir at law be "'abandoned to the Society of Antiquaries.'" <sup>101</sup> Nevertheless, the old laws lingered on for another half century.

Social pressure from the new, urban society of the nineteenth century mounted. The modern climate for adoption

<sup>96</sup> Thirsk, *The European Debate on Customs of Inheritance, 1500-1700*, in FAMILY AND INHERITANCE, *supra* note 50, at 177, 191; *see also* Beckett, *The Pattern of Landownership in England and Wales, 1660-1880*, 37 ECON. HIST. REV. (2d ser.) 1, 9-10, 18-20 (1984).

<sup>97</sup> *See* SELECTED POETRY AND PROSE OF WILLIAM BLAKE 244 (N. Frye ed. 1953) (Blake's poem *Milton*). The entire stanza reads as follows:

And did the Countenance Divine  
Shine forth upon our clouded hills?  
And was Jerusalem builded here  
Among these dark Satanic Mills?

*Id.*

<sup>98</sup> 1833, 3 & 4 Will. 4, ch. 106.

<sup>99</sup> *See generally id.* § 3 (heir "considered to have acquired the land as a devisee, and not by descent").

<sup>100</sup> J. BENTHAM, *A Commentary on Mr. Humphreys' Real Property Code*, in 5 THE WORKS OF JEREMY BENTHAM 387, 405 (J. Bowring ed. 1843). Bentham stated that "[h]eirs should . . . be . . . eliminated out of the code, and abandoned to the society of antiquaries." *Id.*

<sup>101</sup> F. MAITLAND, *The Law of Real Property*, in 1 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 162, 200 (H. Fisher ed. 1981) (footnote omitted). Between 1850 and 1880, Parliament again considered the question of primogeniture, but no change in the law occurred. *See* Thirsk, *supra* note 59, at 376. Nevertheless, a survey inquiry into the distribution of landed property was compiled, "the first comprehensive analysis of the subject since 1086." Beckett, *supra* note 96, at 1. The results were embodied in the *Return of Owners of Land*, dubbed the "New Domesday" book because it was believed to be inaccurate. *See id.*

might be said to have started with the founding of the National Children's Home and Orphanage in 1869.<sup>102</sup> As readers of Dickens and fans of Gilbert and Sullivan know, orphans were not a new social problem.<sup>103</sup> Illegitimate children faced an even sadder plight. In Victorian England, unwed mothers were practically forced to give up their babies, who were then sent to baby-farming houses where they were fed "a mixture of laudanum, lime, cornflour, water, milk and washing powder [with the result] 'that with rare exceptions they all of them die in a very short time.'"<sup>104</sup>

Huge sums of money were spent on children's institutions in England because private families could not form permanent relationships with these children. Couples who took in foster children often faced either blackmail from a natural parent or loss of the child.<sup>105</sup> The usual blackmail pattern operated as follows. The foster parents reared a child, paid to send the child to school, and treated the child as their own in every way. Once the attachment was strong, a natural parent, who often had little real interest in the child, demanded money from the guardians, threatening to take the child away.<sup>106</sup>

This exploitation of guardians by unscrupulous parents was possible because, according to the law of England, the rights of natural parents were inalienable. Things began to change in 1891, however. The Custody of Children Act<sup>107</sup> protected those providing for other people's children.<sup>108</sup> If a parent had once de-

<sup>102</sup> See M. KORNITZER, *CHILD ADOPTION IN THE MODERN WORLD* 8 (1952).

<sup>103</sup> Indeed, in *The Pirates of Penzance*, Major General Stanley bought an old estate in the West Country and thereby, as Gilbert put it, acquired ancestors by purchase. He felt he dishonored the ancestors by telling the pirates, who were of course all orphans, that he too was an orphan.

<sup>104</sup> S. CRETNEY, *PRINCIPLES OF FAMILY LAW* 419 (4th ed. 1984) (quoting Report of the Select Committee on the Protection of Infant Life, B.P.P. (1871)). The exposure of several grisly baby farmers (including one who murdered 16 infants in a matter of weeks) led to the 1871 report. See 2 I. PINCHBECK & M. HEWITT, *CHILDREN IN ENGLISH SOCIETY* 611-17 (1973). During the 18th century, Thomas Coram, revolted by seeing dead babies in the streets of London, raised money to open the Foundling Hospital. *Id.* at 596. The composer Handel later assigned the rights to his *Messiah* to the Foundling Hospital. C. HOGWOOD, *HANDEL* 220 (1984).

<sup>105</sup> See REPORT OF THE COMMITTEE ON CHILD ADOPTION, CMD. NO. 1254, at 5, para. 13 (1921) [hereinafter cited as 1921 REPORT].

<sup>106</sup> See *id.* The custom was reflected in George Bernard Shaw's *Pygmalion* when Eliza's father, who had not been supporting her, went to Professor Higgins's house and demanded money because Eliza was living there.

<sup>107</sup> 1891, 54 & 55 Vict., ch. 3.

<sup>108</sup> See *id.* Prior to enactment of the statute, several parents had successfully brought spurious habeas corpus proceedings against Dr. Barnardo's Homes, a



serted his child and later tried to reclaim him, the Act gave the court the discretion to decline custody to the parent.<sup>109</sup> In 1899, the Poor Law Act<sup>110</sup> allowed guardians to have some parental rights over children in their care.<sup>111</sup> The Poor Laws are acknowledged to be "the historic base from which Parliament advanced to meet the needs of the orphans, the deserted, and the abandoned child."<sup>112</sup>

Abandonment and destitution did not feature in every child's case, however. In 1923, even parents who separated could not voluntarily agree to give custody of the child to the natural mother. In *Brooks v. Blount*,<sup>113</sup> the English Court of Appeal held that the father's custody was inalienable except through a court order for abuse.<sup>114</sup> If such separation agreements were unenforceable, *Brooks*, by analogy, indicated that contracts permitting foster parents or guardians to bring up a child were similarly unenforceable.

The social upheavals of World War I exacerbated the problems of orphans. England lost over 800,000 men.<sup>115</sup> The changes begun during the Industrial Revolution accelerated during the war, and rural, landed society virtually disappeared as a vital force. The problems created by the war gave rise to staggering changes in England and throughout Europe. The war left many children orphans and also spawned many illegitimate births. Vast numbers of children were homeless.<sup>116</sup> Older parents, bereaved by the war, responded by asking to adopt children.<sup>117</sup>

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charitable home for abandoned children, to secure their right to possession of their children. See *The Queen v. Barnardo*, 23 Q.B.D. 305 (C.A. 1889); *Barnardo v. McHugh*, 1891 A.C. 388. For a discussion of Dr. Barnardo's efforts on behalf of homeless children, see 2 I. PINCHBECK & M. HEWITT, *supra* note 104, at 526-27.

<sup>109</sup> See Custody of Children Act, 1891, 54 & 55 Vict., ch. 3, §§ 1, 3.

<sup>110</sup> 1899, 62 & 63 Vict., ch. 37.

<sup>111</sup> See *id.* § 1.

<sup>112</sup> *Leeds City Council v. West Yorkshire Metropolitan Police*, [1983] 1 A.C. 29, 41.

<sup>113</sup> [1923] 1 K.B. 257 (C.A.).

<sup>114</sup> See *id.* at 266.

<sup>115</sup> M. KORNITZER, *supra* note 102, at 62.

<sup>116</sup> See *id.* at 348. France experienced similar problems after the war. In 1923, a new adoption statute was designed to provide for the war orphans. See Krause, *Creation of Relationships of Kinship*, in 4 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 74 (1976). It was not until 1939, however, that "adoptive legitimation" was introduced, which "made the adopted child into the near equivalent of a legitimate child." *Id.* (footnote omitted). In 1966, France instituted "adoptive filiation." *Id.*

<sup>117</sup> See M. KORNITZER, *supra* note 102, at 62.

In 1919, the Associated Societies for the Care and Maintenance of Infants held the first adoption conference.<sup>118</sup> The Societies' report, published in 1920, acknowledged that "adoptions" were already unofficially taking place.<sup>119</sup> Legally, however, these arrangements were merely foster placements.<sup>120</sup> The campaigners for an adoption law thus had to make the legislature aware of the needs of both the adults who wished to adopt and the children subject to the abuses of child trafficking. Because of the fear of unscrupulous parents who exhibited their first interest in the child when it approached wage-earning age, adults ready to accept homeless children could not be secure that the child would remain in their care. Moreover, because so many children disappeared into unregulated institutions, even those without parents ready to claim their wages could not be identified and sent to willing foster parents.<sup>121</sup> The increasing tendency to value child life, together with political pressures from social reformers and philanthropic bodies, led the government to look to adoption to solve its child-welfare problems.

In 1920, Parliament appointed a committee to consider the question of legalized adoption.<sup>122</sup> The committee, headed by Sir Alfred Hopkinson,<sup>123</sup> advocated following the law of New York State.<sup>124</sup> It reported that the New York adoption law appeared to function quite effectively under conditions very similar to those existing in England.<sup>125</sup> The New York statute in effect at that time provided that the adopted child inherit from the adoptive

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<sup>118</sup> *Id.* at 348.

<sup>119</sup> *See id.* at 348-49.

<sup>120</sup> *See id.* at 348.

<sup>121</sup> *See* 1921 REPORT, *supra* note 105, at 10, para. 61. The report stated: Children may be handed from one person to another with or without payment, advertised for disposal, and even sent out of the country without any record being kept; intermediaries may accept children for "adoption" and dispose of them as and when they choose; "homes" and institutions for the reception of children exist which are not subject to any inspection or control.

*Id.*

<sup>122</sup> *See id.* at 1.

<sup>123</sup> *Id.*

<sup>124</sup> *See id.* at 4, para. 6.

<sup>125</sup> *Id.* New York had a history similar to England's prior to its providing for statutory adoption. In 1853, the Reverend Charles Loring Brace founded the Children's Aid Society in New York City. *See* Presser, *supra* note 85, at 480. By 1865, the lack of an adoption law in New York was viewed as an embarrassment because would-be adoptive parents remained unprotected. *See* INDEPENDENT ADOPTIONS, *supra* note 36, at 24 n.1. An 1865 report urging legalized adoption in New York stated, "There are very many childless parents who would gladly adopt children, but for their well-founded fears that they could never hold them securely." *Id.*

parent in the event the adoptive parent died intestate.<sup>126</sup>

Even though the committee recommended that "an Act . . . be passed to give legal recognition to the adoption of children,"<sup>127</sup> the government was not yet ready to act. The recommendation provided for an adoption law that would fully integrate the child into the new family.<sup>128</sup> Nevertheless, despite the efforts of such committee members as Neville Chamberlain, consideration of adoption in 1921 was taken no further than the publication of the Hopkinson Committee's report by the stationery office.

## VI. THE ADOPTION OF CHILDREN ACT OF 1926

In 1925, more than a century after Bentham's plea,<sup>129</sup> the Administration of Estates Act finally abolished legal entails and the heir at law.<sup>130</sup> With that legislation, the most ancient institution in English private law ceased to exist, and the way was finally opened for adoption. Parliament appointed another committee in 1924, this time with Mr. Justice Tomlin as chairman.<sup>131</sup> Instead of looking to New York law, the committee proposed an adoption law that was no more than legally recognized foster care.<sup>132</sup> The proposed law prevented the natural parent from blackmailing or taking the child away from the adoptive parent, but stopped short of fully incorporating the child into the new family.<sup>133</sup> According to the proposed bill, an adopted child was to inherit from his natural parents, but not from his adoptive parents.<sup>134</sup> Although the Tomlin Committee bill failed to become law, the report is treated as the official report on adoption.<sup>135</sup> Finally, a similar bill was enacted in 1926 to become effective on

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<sup>126</sup> New York's first adoption statute, enacted in 1873, failed to provide for the adopted child's inheritance if his adoptive parent died intestate. *See Gilliam v. Guaranty Trust Co.*, 186 N.Y. 127, 133, 78 N.E. 697, 699 (1906). Only in 1897 did the adopted child receive inheritance rights from his adoptive parents. *See id.* at 134, 78 N.E. at 699.

<sup>127</sup> 1921 REPORT, *supra* note 105, at 12, para. 70.

<sup>128</sup> *See id.*

<sup>129</sup> *See supra* note 100 and accompanying text.

<sup>130</sup> *See* Administration of Estates Act, 1925, 15 Geo. 5, ch. 23, § 33(1).

<sup>131</sup> *See* CHILD ADOPTION COMMITTEE, FIRST REPORT, CMD. NO. 2401, at 2 (1925) [hereinafter cited as 1925 REPORT].

<sup>132</sup> *See* CHILD ADOPTION COMMITTEE, SECOND REPORT, CMD. NO. 2401 app. cl. 5(1), (2) (1925).

<sup>133</sup> *See id.*

<sup>134</sup> *See id.* cl. 5(2).

<sup>135</sup> *See* M. KORNITZER, *supra* note 102, at 351.

January 1, 1927.<sup>136</sup>

The Adoption of Children Act of 1926<sup>137</sup> essentially provided only for undisturbed custody of the adopted child.<sup>138</sup> To this end, the consent of both natural parents or some other guardian was required unless they had "abandoned or deserted the infant or [could not] be found or [were] incapable of giving such consent or . . . [had] persistently neglected or refused to . . . support" the child.<sup>139</sup> The adopted child, rather than acquiring inheritance rights through his new family, retained his inheritance ties to his blood relations.<sup>140</sup> The desire to maintain the status quo was articulated in the committee's conclusion "that in introducing into English law a new system it would be well to proceed with a measure of caution and at any rate in the first instance not to interfere with the law of succession."<sup>141</sup>

A further indication that the adopted child was not meant to step into the shoes of a natural child was that the statute did not bar marriage between an adoptive parent and the adopted child. The report of Lord Tomlin's Child Adoption Committee stated that

with regard to marriage, we are against the introduction of artificial prohibitions. The blood tie cannot be severed; the existing prohibitions arising thereout must remain and it is repugnant to common sense to make artificial offences [sic] the result of a purely artificial relationship. The relationship of guardian and ward does not to-day preclude inter-marriage and the adopting parent will only hold the position of a special

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<sup>136</sup> See Adoption of Children Act, 1926, 16 & 17 Geo. 5, ch. 29, § 12.

<sup>137</sup> 16 & 17 Geo. 5, ch. 29.

<sup>138</sup> See *id.* § 5(1), (2).

<sup>139</sup> *Id.* § 2(3).

<sup>140</sup> See *id.* § 5(2). By enacting this 1926 adoption statute, the English avoided what a 19th-century American commentator viewed as a drafting problem. In commenting on the Massachusetts Legislature's enactment of an 1876 adoption statute, William Whitmore notes that the legislature drew back from "the sweeping changes in the rules of inheritance" made in the 1851 Massachusetts statute. W. WHITMORE, *THE LAW OF ADOPTION IN THE UNITED STATES, AND ESPECIALLY IN MASSACHUSETTS* iii (1876); see also *supra* notes 82-84 and accompanying text (discussing the 1851 statute). Perhaps these drafting conflicts arose as much from the inability to agree on the proper provision for adopted children as from the failure to consider the problem at all. See Presser, *supra* note 85, at 516. Furthermore, another commentator notes that in 1851, the Massachusetts legislators made "no provision with respect to the child's right to inherit from the adoptor's lineal or collateral relatives or from natural parents and kin, and no mention was made of the rights of the adoptive or natural parents or relatives to inherit from the adopted child." Kuhlman, *supra* note 84, at 225.

<sup>141</sup> 1925 REPORT, *supra* note 131, at 7, para. 19.

guardian. We therefore recommend that legalised [sic] adoption should have no effect in this regard at all.<sup>142</sup>

The English adoption law of 1926 was thus not at all like the scheme of the Roman law examined briefly at the outset of this article.<sup>143</sup> The Roman law of adoption and the English law established two completely different institutions. Far from being religiously inspired, or springing from motives of strengthening the adopter's family in other ways, the English law determined that the adopted child should not interfere with the adoptive family, if at all possible. Whereas America was anxious to create and foster new families through adoption, England with its age-old families was less willing to create new ties while it could still hope to preserve the old. The popularity of adoption among childless couples was looked upon merely as the solution to the country's large orphan problem.

The fact that there was no barrier to marriage between adoptive parent and adopted child strongly indicates that the main idea of the law was not to establish true parental and familial ties, but only to serve social policy by providing homeless children with the experience of life in a private home rather than an orphanage. The failure to provide for full integration of the adopted child into the adoptive family through succession on intestacy, or to bar marriage within the prohibited degrees by virtue of adoption, indicates that the law was not yet looking to create a new family unit by the legal process of adoption. In essence, then, adoption under the 1926 law was limited to nurturing a ward of society in a private home until that child reached maturity.

## VII. CONCLUSION

It took the upheavals of the Second World War before English society accepted both intestate inheritance by the adopted child from its adoptive family and barriers to marriage with the adopted child within the prohibited degrees. The Adoption of

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<sup>142</sup> *Id.* para. 20. One commentator notes that [w]hilst it is doubtless undesirable to encourage such marriages, there are circumstances in which marriage might well be the best solution of a difficult problem. Where, for instance, a childless couple of the working classes, living in two rooms, adopt a girl and the wife dies years afterwards, an adopting father might well desire to make the position of his adopted daughter one beyond question or suspicion.

W.C. HALL & J.C. HALL, *THE LAW OF ADOPTION AND GUARDIANSHIP OF INFANTS* 37 (1928).

<sup>143</sup> See *supra* notes 3-21 and accompanying text (discussing the Roman law of adoption).

Children Act of 1949<sup>144</sup> finally recognized that the process of adoption created a new nuclear family. Thus, even the residual effects of the old inheritance law were removed by the 1949 legislation. The long primacy of property law over the interests of individual family members finally came to an end.

Today, the voluminous English legislation concerning children is very similar in tone to American law and indeed to all modern legislation.<sup>145</sup> The welfare of the child and the use of adoption as a tool of social service agencies are now the key characteristics of English adoption.<sup>146</sup> These aims have recast English intestate succession rights. Adopted English children can inherit, as did their counterparts under classical Roman law. The comparison ends there, however. Whereas Roman law was concerned with the interests of the head of a family, English adoption law now protects the welfare of the child.

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<sup>144</sup> 12, 13 & 14 Geo. 6, ch. 98.

<sup>145</sup> Since 1969, an illegitimate child in England inherits on the intestacy of his parents (but not other relatives) as if legitimate and takes under a bequest to "children" unless a contrary intention appears. See Family Law Reform Act, 1969, ch. 46, §§ 14, 15. For a discussion of modern British law, see H. BEVAN & M. PARRY, CHILDREN ACT 1975 (1979). For an American and international perspective, see M. GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE (1977); M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION (1983).

<sup>146</sup> See S. CRETNEY, *supra* note 104, at 422-23. The total number of adoptions in England and Wales was 2943 in 1927. *Id.* In 1939, 6832 adoptions took place. James, *The Illegitimate and Deprived Child: Legitimation and Adoption*, in A CENTURY OF FAMILY LAW: 1857-1957, at 39, 41 n.8 (1957). Because of the displacement caused by World War II, the number of adoptions skyrocketed to 21,280 in 1946. *See id.* at 41 & n.8. During the 1950's, the number of adoptions stabilized at approximately 13,000 annually and later peaked at 26,986 in 1968. S. CRETNEY, *supra* note 104, at 421. Since then, because abortions have reduced the numbers of infants placed for adoption, local authorities have sought to channel unsatisfied interests in adopting toward providing a secure home for older, institutionalized, or handicapped children. *See id.* at 422-23.