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Problem of the Insolvent Heir

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THE PROBLEM OF THE INSOLVENT HEIR

Adam J. Hirsch†

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"The forms of action we have buried, but they still rule us from their graves."

Frederic William Maitland[1]

"Actually there are, of course, no such distinctly segregated compartments in the law. Everywhere the fields of liability and doctrine interlock; everywhere there are borderlands and penumbras. . . ."

William Lloyd Prosser[2]

I
INTRODUCTION

In their essence, gratuitous transfers are voluntary transfers. A benefactor is ordinarily free to make such gifts and bequests as he pleases. By the same token, "[t]he law certainly is not so absurd as to force a man to take an estate against his will."[3] The beneficiary of a gratuity may accept or reject it at his discretion. Personal autonomy and effectuation of intent have served as the traditional touchstones of this area of the law.

Debtor-creditor law operates according to a different set of premises and purposes. The fundamental axiom of debtor-creditor law is that debtors incur an enforceable obligation to repay what they borrow. Absent such an obligation, the supply side of the market for credit would rapidly crumble.[4] The creditor's right of recovery thus lies at the core of debtor-creditor law, irrespective of the debtor's personal wishes. If an insolvent debtor takes evasive action, for instance by transferring his remaining assets to his relatives, creditors can pursue those assets under the law of fraudulent conveyances.[5]

What, then, of a case implicating both the rules of inheritance and of creditors' rights? Assume that an insolvent debtor is bequeathed a corpus of assets. If he accepts the bequest, it will be subject to levy by his creditors. If he declines, the bequest will go

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1 F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (A. Chaytor & W. Whittaker eds. 1969) (1st ed. 1909).

2 W. PROSSER, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS 380 (1953).

3 Townson v. Tickell, 106 Eng. Rep. 575, 576-77, 1814-23 All E.R. 164, 165 (K.B. 1819) (Abbot, C.J.).

4 The threat to one's future opportunities for credit provides some incentive to repay existing debts, as may other extra-legal contrivances, *see* Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORGANIZATION 5 (1985), but the market for credit could not exist in its present form without the threat of coercive recovery via state action. Furthermore, state action to support the market is socially beneficial, for it promotes more efficient distribution of private resources.

5 *See generally* G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES (rev. ed. 1940).

elsewhere, ordinarily to a close relative.[6] Should the debtor under these circumstances be bound to accept the gratuity? Should this be an offer he cannot refuse? Considered from the vantage point of gratuitous transfers law, the answer would seem to be no: The beneficiary's intent is decisive, and a beneficiary cannot be "force[d] . . . to take an estate against his will."[7] Considered from the vantage point of debtor-creditor law, however, the answer would seem to be yes: The creditor's right of recovery takes precedence over the debtor's right to act as he pleases. Whether the debtor should be obligated to accept the transfer thus appears to depend, at least under conventional analysis, upon the observer's doctrinal frame of reference.

I call this compound scenario the problem of the insolvent heir.[8] It is, in fact, only one of a cluster of problems that arise at the intersection of gratuitous transfers law and debtor-creditor law.[9] Viewed more broadly, the problem is representative of the structural tensions that develop whenever separate categories of legal doctrine come into contact. Ever since the English courts first devised the forms of action, judges have sliced the seamless web of the law into discrete bits, each tending to generate its own autonomous system of analysis and relief. The result, all too often, is inconsistency at the various points of conjunction—a phenomenon that one scholar has termed "interconceptual" conflicts of law.[10] The judicial challenge posed in these areas is to reconcile and harmonize rules within legal categories that have exhibited such a stubborn tendency to branch off, even as they remain inextricably intertwined.

This need not be an exercise in futility. No principle of law is absolute, every right can be qualified.[11] The rights at issue here are

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6 Disclaimed assets flow into the residue (or, in the absence of a residuary clause, are distributed according to the intestacy statute), unless either (1) the will specifies an alternative beneficiary in the event of disclaimer, or (2) the antilapse statute operates to shift the inheritance to the disclaimant's descendants. *See* 6 W. PAGE, ON THE LAW OF WILLS § 49.12, at 55-57 (S. Bowe & D. Parker rev. ed. 1962).

7 *See supra* note 3.

8 The term was chosen for its terseness, at the cost of precision. Strictly speaking, the issue can arise whenever an insolvent debtor is the beneficiary of a gratuitous transfer, whether or not his benefactor is alive or dead, testate or intestate. Nonetheless, "the problem of the insolvent beneficiary of a gratuity," though technically accurate, lacks a certain *je ne sais quoi.*

9 In addition to the problem of the insolvent heir, the intersection of these two areas of the law also gives rise to the problem of the insolvent decedent, and to the problem of inheritance by a debtor in a federal bankruptcy proceeding. The author intends to explore the latter issues in subsequent articles.

10 A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 309 (1962).

11 "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their

certainly no exception: When expedient, both gratuitous transfers law and debtor-creditor law have accommodated competing legal interests. For example, the principle of intent effectuation, though fundamental to inheritance, bows to the imperative of protecting dependents at the point where gratuitous transfers law and family law meet: hence the creation of homestead rights and the family allowance.[12] Similarly, the creditor's right of recovery takes a back seat to the debtor's right to physical security whenever creditors' remedies skate across the line into criminality.[13] The problem, of course, is to determine as a matter of policy which principle should defer to the other at such legal junctures.

In his study of the intersection of tort and contract, Dean Prosser observed that interconceptual conflicts between those two fields of law led, in borderline cases, to enormous uncertainty. But, he added,

> the very uncertainty of the rules has permitted a degree of flexibility which has advantages of its own. Where the cause of action is neither fish nor fowl, but both or either, the courts have been free to look to the purpose of the rule of law in question . . . . When the ghosts of case and assumpsit walk hand in hand at midnight, it is sometimes a convenient and comforting thing to have a borderland in which they may lose themselves.[14]

Such borderlands, Prosser thought, were conducive to bewilderment but also to liberation from formalized modes of doctrinal analysis.

Alas, those ghosts of actions have proven difficult to elude, even in pitch-darkness. Though the problem of the insolvent heir has produced plenty of uncertainty, it has occasioned little of the policy analysis that Prosser envisioned.[15] On the contrary, courts in this area have tended to oscillate between alternative modes of traditional analysis, with scarcely a nod to their social and economic

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own when a certain point is reached." Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1907) (Holmes, J.). *See, e.g.*, Schenck v. U.S., 249 U.S. 47 (1918) (limits on rights under the First Amendment).

12 *See infra* note 216. *See generally* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 34-35 (rev. ed. 1953).

13 In fact, creditors' remedies are limited to a range well short of this line, in order to protect debtors from consequential harm, and, in turn, to preserve the demand side of the market for credit. *See* The Fair Debt Collection Practices Act, 15 U.S.C.A. §§ 1692-92o (1977), and analogous state statutes; Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521 (1973).

14 W. PROSSER, *supra* note 2, at 452.

15 There have been notable exceptions. One early judge, presented with the problem of the insolvent heir, fairly licked his chops as he reported that the case had "all this rich meat in it." Daniel v. Frost, 62 Ga. Rep. 697, 708 (1879) (Bleckley, J.).

foundations. We must probe those foundations, if the formalisms of old are ever truly to be laid to rest.

II
THE STATE OF THE LAW

A. English Origins

The American law of rejection (or "disclaimer")[16] of inheritances traces to England, specifically to the English system of feudalism that has so pervasively (and persistently) colored the common law of property. In their treatment of disclaimers, English courts traditionally drew a sharp distinction between testate and intestate succession. An heir, inheriting property in the absence of a will, could not renounce his inheritance, irrespective of his state of solvency. This rule derived from the feudal theory that tenancy over land was not a matter of individual choice. Land could neither be alienated nor devised; upon the tenant's death, the land over which he held seisin was "cast" upon his heir, vesting in him *eo instanti* "by the single operation of law,"[17] in order to ensure the continued performance of feudal services. Land became alienable in England by the thirteenth century, and after 1540 it was devisable as well.[18] But the notion of "descent cast" lingered on in cases of intestacy. Indeed, courts enlarged the notion, without a trace of feudal logic, to cover intestate inheritance of personal property as well.[19]

Meanwhile, a second line of cases established that a devisee, inheriting property by will, had no obligation to accept it.[20] Unlike inheritance by operation of law, the testator's devise was conceived to be "nothing more than an offer, which the devisee may accept or refuse, and if he refuses, he is in the same situation as if the offer had never been made."[21] This result followed from the fact that a

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16 As a term of art, "disclaimer" traditionally applied only to testate inheritance: a devisee sought to disclaim, whereas an heir sought to "renounce." Today, these terms are used interchangeably, and disclaimer can refer to the rejection of any sort of gratuitous transfer.

17 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *201 (1st ed. London 1765-69). On the feudal background of the doctrine of descent cast, see Lauritzen, *Only God Can Make an Heir*, 48 NW. U. L. REV. 568 (1953); *see generally* A. SIMPSON, A HISTORY OF THE LAND LAW (rev. ed. 1986).

18 The original Statute of Wills, making land for the first time legally devisable, was enacted in 1540, 32 Hen. VIII, c.1 (1540). In practice, however, land had been functionally devisable for as much as a century earlier by recourse to the use. *See* A. SIMPSON, *supra* note 17, at 51-54, 173-92.

19 6 W. PAGE, *supra* note 6, § 49.1, at 36-37.

20 C. SHERRIN & R. BARLOW, WILLIAMS' LAW RELATING TO WILLS 256 n. b. (4th ed. 1974); Lauritzen, *supra* note 17, at 571 n. 21.

21 Townson v. Tickell, 106 Eng. Rep. 575, 576-77, 1814-23 All E.R. Rep. 164, 166 (1819) (Bayley, J.). Likewise, see the more graphic language of Ventris, J.: "[A] man

devise might be "clothed with trusts" and thus could entail burdensome duties.[22] Yet, under the law of real property, title once again vested in the devisee from the moment of the decedent's death, rather than upon acceptance.[23] The decedent himself could not retain title, and the theory of property then (as now) required that title vest in someone; title could not be suspended, so to say, in mid-air. What, then, was the status of the devisee's interest pending his decision? How could the transactional notion of offer and acceptance be reconciled with the conveyancing notion of instantaneous transfer of title to the grantee? Courts resolved this conceptual conflict by resorting to a legal fiction. The devisee was simply presumed to have accepted, and this presumption became conclusive upon actual acceptance. If, however, the devisee disclaimed his inheritance, his action demonstrated that "he never did assent to the devise, and consequently, that the estate never was in him."[24] In other words, the disclaimer "related back" to the testator's death, and the devisee's "inchoate" title vanished retroactively. Thus did English law distinguish the rights of heirs and devisees—and thus did it continue to do so, until the passage of reform legislation in this century.[25]

B. American Elaborations

England's common law of disclaimer was received early into American law.[26] Because at common law an heir could not renounce his inheritance, American courts have always concluded that, absent statutory revision,[27] insolvent heirs cannot avoid their creditor's claims. Any attempt by the insolvent heir to abandon his inheritance, it having vested at the moment of the intestate's death,

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cannot have an estate put into him in spight of his teeth." Thompson v. Leach, 86 Eng. Rep. 391, 396 (K.B. 1689).

22 Townson v. Tickell, 106 Eng. Rep. at 576-77, 1814-23 All E.R. Rep. at 165 (Bayley, J.).

23 E. COKE, THE FIRST PART OF THE INSTITUTE OF THE LAWS OF ENGLAND 111a (London 1628).

24 Townson v. Tickell, 106 Eng. Rep. at 576-77, 1814-23 All E.R. Rep. at 166 (Holroyd, J.); Thompson v. Leach, 86 Eng. Rep. at 394-96. This analysis pertained only to realty. Title to personalty vested in the personal representative pending acceptance by the legatee. The reasons why this alternative solution to the conceptual conflict was not also applied to real property are buried in history. *See* 3 AMERICAN LAW OF PROPERTY § 14.6 (A. Casner ed. 1952).

25 The issue of the heir's right to disclaim has yet to be resolved unequivocally in England, but the Administration of Estates Act of 1925 shifts title upon death initially to the probate judge; thus, descent cast appears to be abolished. *See* C. SHERRIN & R. BONEHILL, THE LAW AND PRACTICE OF INTESTATE SUCCESSION 339-44 (1987).

26 4 J. KENT, COMMENTARIES ON AMERICAN LAW *34 n.(f), *534 (1873); Watson v. Watson, 13 Conn. 83 (1839).

27 *See infra* text accompanying note 49.

constitutes a subsequent transfer of owned property. Accordingly, creditors can set aside the transfer as a fraudulent conveyance.[28] Similarly, disclaimer by an insolvent devisee who has already taken possession of the corpus,[29] or who has delayed his disclaimer beyond a "reasonable" time,[30] has been deemed ineffective, the conclusive presumption of acceptance having already been raised.[31] But these rules failed to resolve whether an insolvent devisee,[32] refusing delivery and acting promptly, could disclaim an inheritance at a time when a transfer of his "own" property would be deemed fraudulent. This issue had not arisen in the English cases.[33] With no precedent to guide them, American courts began to offer a variety of answers.

One line of American cases, beginning in 1893, holds insolvent disclaimer to be valid and effective against creditors.[34] However,

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28 *See* cases cited in Lauritzen, *supra* note 17, at 576 nn. 49-50; New York Trust Co. v. Halkin, 68 N.Y.S.2d 404, 406-07 (1936). In one early case, dower rights were held analogous to inheritance by operation of law, hence not disclaimable. *Watson*, 13 Conn. at 83. Furthermore, under the common law Doctrine of Worthier Title, devises to the testator's heirs were void to whatever extent the devisees would have taken the same property via intestacy—"descent" being deemed "worthier" than "purchase." Thus, to whatever extent a decedent's heirs received their inheritance by devise, the doctrine of "descent cast" still applied to them, and prevented renunciation against creditors. McQuiddy Printing Co. v. Hirsig, 23 Tenn. App. 434, 134 S.W.2d 197 (1939); Morris, *The Wills Branch of the Worthier Title Doctrine*, 54 MICH. L. REV. 451, 474-77 (1956); 6 W. PAGE, *supra* note 6, § 49.3, at 40-41. With the advent of disclaimer statutes encompassing intestate succession, the issue has been substantially mooted, *see infra* text accompanying note 49, but in those rare recent instances where the issue has been raised, the Doctrine of Worthier Title has been disavowed. City Nat'l Bank of Birmingham v. Andrews, 355 So.2d 341 (Ala. 1978).

29 *See generally* Annotation, 93 A.L.R.2d 8 (1964); Voit v. Schultz, 232 Iowa 55, 4 N.W.2d 410 (1942).

30 Not surprisingly, courts have differed over what constitutes a "reasonable" time in which to disclaim one's inheritance. *See* Annotation, 39 A.L.R.4th 633, 641-43 (1985); Annotation, *supra* note 29, 22-23, 29-30.

31 Crumpler v. Barfied & Wilson Co., 114 Ga. 570, 40 S.E. 808 (1902); Strom v. Wood, 100 Kan. 556, 164 P. 1100 (1917); *In re* Wilson's Estate, 298 N.Y. 398, 83 N.E.2d 852 (1948).

32 One case has held that the beneficiary of non-probate assets (life insurance, revocable trusts, etc.) should be permitted to disclaim according to the same rules covering devisees. *In re* Krakoff's Estate, 18 Ohio App. 2d 116, 179 N.E.2d 566 (1961). The same result is achieved by statute in some jurisdictions. *See* Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act §§ 3-4 and comments, 8A U.L.A. 116-18 (1978). This issue may become increasingly important as will substitutes grow more common. *See generally* Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984). *Cf. infra* note 101 and accompanying text (on rejection of inter vivos gifts).

33 In the earliest case to raise this question in America, counsel for the creditor cited to civil law. *See* Stebbins v. Lathrop, 21 Mass. 33, 40 (1826) (issue raised but not resolved).

34 Tarr v. Robinson, 158 Pa. 60, 27 A. 859 (1893); *In re* Krakoff's Estate, 18 Ohio App. 2d at 117, 179 N.E.2d at 566; New York Trust Co. v. Halkin, 68 N.Y.S.2d 404 (Sup. Ct. 1936). This is also the modern tax treatment; disclaimers are effective to avoid es-

most of the cases upholding insolvent disclaimer carve out exceptions to the general rule where the disclaimant has colluded with the alternative beneficiary,[35] or where a creditor has reasonably relied on the disclaiming debtor's acceptance of his inheritance.[36] As these caveats appear almost exclusively in dicta, the precise definitions of collusion and reasonable reliance remain largely unexplored.[37] In addition, at least one case has held that the "reasonable time" granted to the devisee to disclaim his inheritance will be shortened when the rights of his creditors are at stake.[38] But once past these hurdles, opinions in this line uphold the effectiveness of a disclaimer whether or not the objecting creditor has reduced his claim to judgment[39] or has even levied execution against

tate and gift taxes. Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. CHI. L. REV. 316, 316-17 & n.5 (1979).

35 The burden of proof is on the creditor to prove collusion. Bradford v. Calhoun, 120 Tenn. 53, 56, 109 S.W. 502, 504 (1907).

36 *E.g.*, Schoonover v. Osborne, 193 Iowa 474, 479, 187 N.W. 20, 23 (1922); *Bradford*, 120 Tenn. at 53, 109 S.W. at 502; First Nat'l Bank of Houston v. Toombs, 431 S.W.2d 404, 406 (Tex. Ct. App. 1968) (dicta).

37 The collusion exception appears to contemplate cases in which the disclaimant retains some benefit, for example, free use of the disclaimed property or a "parking" arrangement whereby the disclaimant can redeem the disclaimed property at a later date. *See* Funk v. Grulke, 204 Iowa 314, 213 N.W. 608 (1927); *Bradford*, 120 Tenn. at 55, 109 S.W. at 504; *see also In re* Estate of Aylsworth, 74 Ill. App. 375, 219 N.E.2d 779 (1966) (collusive disclaimer of spendthrift trust). Presumably, a secret agreement to pass the property on to *another* party would also constitute "collusion." Since a disclaimer ordinarily operates to divert bequests to other members of the disclaimant's immediate family, the opportunities for collusion are manifest, yet the evidence is elusive. Surreptitious collusion is thus probably common in these cases. *See* Estate of Jensen, 26 Cal. App. 3d 474, 481, 102 Cal. Rptr. 617, 621, (1972); Stein v. Brown, 18 Ohio St.3d 305, 307, 480 N.E.2d 1121, 1122 (1985); Note, *Renunciation of Testamentary Gift to Defeat Claims of Devisee's Creditors*, 43 YALE L.J. 1030-32 (1934) [hereinafter Note, *Renunciation of Testamentary Gift*]; Note, *Renunciation of a Devise In Fraud of Creditors as a Fraudulent Conveyance*, 27 VA. L. REV. 936, 941 & n.47 (1941) [hereinafter Note, *Renunciation of a Devise*]. Creditors have never pressed a claim of collusive disclaimer successfully in a reported case. The reliance exception has been successfully pressed to prevent a debtor who enjoyed the use of property inter vivos, while credit was extended, from disclaiming it as an inheritance upon the actual owner's death. Daniel v. Frost, 62 Ga. 697, 708-09 (1879) (discussed *infra* text accompanying notes 173-75). The exception has been unsuccessfully pressed to prevent disclaimer after a creditor expended legal fees to recover the inheritance, absent misleading conduct or declaration by the disclaimant concerning his intention to accept. *Schoonover*, 193 Iowa at 474, 187 N.W. at 20; Lehr v. Switzer, 213 Iowa 658, 239 N.W. 564 (1931); McGarry v. Mathis, 226 Iowa 37, 282 N.W. 786 (1939). *Quaere* whether such a rule could apply to *ante-mortem* reliance on debtor's status as a devisee, absent ostensible ownership. *See* City Nat'l Bank of Birmingham v. Andrews, 355 So. 2d 341, 344 (Ala. 1978) (noting the absence of such reliance without stating the significance of that finding).

38 *In re* Wilson's Estate, 298 N.Y. 398, 402-06, 83 N.E.2d 852, 854-55 (1948). Some commentators suggest that this has been the implicit practice in other cases. Newman & Kalter, *Disclaimers of Future Interests: Continuing Problems and Suggested Solutions*, 49 NOTRE DAME LAW. 827, 829-30 (1974).

39 U.S. v. McCrackin, 189 F. Supp. 632 (S.D. Ohio 1960); Estate of Hanson, 109 Ill.

the disclaimed estate.[40]

The *ratio decidendum* of these cases conforms with traditional disclaimer analysis. Opinions refer to disclaimer as a "personal right" that the devisee's creditors cannot control.[41] Once the devisee exercises his right to disclaim, the disclaimer "relates hack to the date of the gift, and, as he has never accepted the gift, he has nothing that could be made the subject of a voluntary conveyance."[42] Because, in retrospect, the inheritance never vested in the debtor, no fraudulent transfer of the debtor's property can have occurred. This approach—permitting insolvent disclaimer with or without the exceptions noted—represents the most recent judicial pronouncement in the majority of states where the issue has been tried.

Another line of opinions, apparently emanating from a dictum of Justice Story in 1842,[43] holds insolvent disclaimer to be fraudulent *per se*.[44] These cases rely on the principle that the law must

App. 2d 283, 248 N.E.2d 709 (1969); Tompkins State Bank v. Niles, 160 Ill. App. 3d 226, 231-32, 513 N.E.2d 548, 551-52 (1987).

40 *Schoonover*, 193 Iowa at 477, 187 N.W. at 23 (disclaimer followed levy of execution); *Lehr*, 213 Iowa at 658, 239 N.W. at 564 (disclaimer followed execution sale); *Tarr*, 27 A. at 859 (disclaimer followed sheriff's sale); *see* Kearley v. Crawford, 112 Fla. 43, 151 So. 293 (1933) (court refused to enjoin execution sale because it would not affect devisee's rights). Whether creditors of beneficiaries will be permitted to levy directly against the decedent's estate depends upon state law. *See infra* note 274.

41 *E.g.*, *Kearley*, 112 Fla. at 44, 151 So. at 294; Preece v. Queen, 549 S.W.2d 507, 508 (Ky. 1976); New York Trust Co. v. Halkin, 68 N.Y.S.2d 404, 406 (Sup. Ct. 1936). In *Kearley* the court nonetheless denied a petition to enjoin an execution sale following disclaimer of the devise levied on by the devisee's creditors. For this reason, the case is sometimes read to stand for the proposition that creditors *can* defeat an attempted disclaimer, *e.g.*, Note, *Renunciation of Testamentary Gift*, *supra* note 37, at 1030-31. But *Kearley* sounded in equity, and the court simply refused to issue an injunction pending resolution at common law of the rights of takers in lieu of the disclaimant. The court grounded its refusal on the principle that an execution sale would be no more of a "cloud on the property" than the creditor's judgment alone, *i.e.*, the alternative takers' rights to take against the purchasers would be preserved. 151 So. at 294.

42 *E.g.*, Bradford v. Calhoun, 120 Tenn. 53, 56, 109 S.W. 502, 504 (1907); *New York Trust Co.*, 68 N.Y.S.2d at 406; *Schoonover*, 193 Iowa at 477, 187 N.W. at 22. The relation back fiction is generally needed only for devises of realty. Most American jurisdictions vest title to personalty in the personal representative pending acceptance by the legatee. 6 W. PAGE, *supra* note 6, § 59.2, at 378-80, 383-85.

43 *Ex Parte* Fuller, 9 Fed. Cas. 976, 977 (C.C. Mass. 1842). This was also the civil law rule, which may well have influenced Story, given his interest in civil law, although Story's opinion made no reference to it. *See* Comment, *The Oblique Action*, 54 TUL. L. REV. 699 (1980); G. WHITE, THE AMERICAN JUDICIAL TRADITION 45 (rev. ed. 1988).

44 Estate of Jensen, 26 Cal. App.3d 474, 481-82, 102 Cal. Rptr. 617, 621 (1972); *In re* Kalt's Estate, 16 Cal. 2d 807, 108 P.2d 401 (1940); Cantrella Estate, 20 Pa. D & C 2d 486 (Phila. County Ct. 1960); Neeld's Estate, 38 Pa. D & C 381 (Phila. County Ct. 1940); Buckius' Estate, 17 Pa. C. 270 (Phila. County Ct. 1895); *In re* Estate of Reed, 566 P.2d 587 (Wyo. 1977); Stein v. Brown, 18 Ohio St. 3d 305, 308-09, 480 N.E.2d 1121, 1124 (1985). *Kalt* has been overruled by statute, and the continued viability of the Pennsylvania cases is unclear. *See infra* notes 59, 62. In *Kalt*, *Stein*, and *Reed*, disclaimer was disallowed on an "actual intent to defraud" theory, which does not require proof of insolvency. Uniform Fraudulent Conveyances Act § 7, 7A U.L.A. 509 (1918) [hereinaf-

support creditors' efforts to recover from debtors, and that in judging whether or not a transfer entails a fraud against creditors, courts should look to the substance rather than to the form of the transfer. Because the insolvent debtor holds in essence "a limited right of ownership" over the property disclaimed, irrespective of the fiction of "relation back," the disclaimer should be set aside as a fraudulent conveyance.[45] Although this remains the minority rule today, one modern court perceives a trend in its direction.[46] Still, to date, the issue has arisen in only a third of the states.[47]

C. Statutory Solutions

Given the conflicting lines of cases, one might expect that the movement toward codification of probate law in the last half century would have served to clarify the rules governing insolvent disclaimer.[48] Instead, as sometimes happens, the statutory law has merely added a second layer of uncertainty. One significant development has been the passage, in forty-eight states, of disclaimer legislation ending disparate treatment of testate and intestate beneficiaries. No longer are heirs barred from renouncing *per se*, under the anachronistic principle of descent cast.[49] But the treatment of creditors' claims under these statutes, now pertinent to heirs and devisees alike, varies, and the statutes fairly bristle with

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ter U.F.C.A.]; *see infra* note 178. Likewise, a disclaimer in anticipation of forthcoming insolvency could be deemed fraudulent under U.F.C.A. § 6, 7A U.L.A. 507 (1918). *See* Stein v. Brown, 18 Ohio St. 3d at 307 n.1, 480 N.E.2d at 1123 n.1.

45 *Ex parte* Fuller, 9 F. Cas. at 977; *In re* Kalt's Estate, 16 Cal. 2d at 813, 108 P.2d at 403; Neeld's Estate, 38 Pa. D & C at 386-90; *see In re* Duffy's Estate, 228 Iowa 426, 445-46, 292 N.W. 165, 174 (1940) (will contest); Gottstein v. Hedges, 210 Iowa 272, 279-84, 228 N.W. 93, 96-98 (1929) (dissent); *In re* Wilson's Estate, 298 N.Y. 398, 402-06, 83 N.E.2d 852, 854-55 (1948) (dicta). On the general principle that fraudulent conveyance analysis should look "to the substance of a transaction, rather than its form," see Birmingham Trust & Sav. Co. v. Shelton, 231 Ala. 62, 67, 163 So. 593, 597 (1935); Kincaid v. Brown's Estate, 262 S.W.2d 468, 473 (Ky. Ct. App. 1953); Nat'l Bank of Royal Oak v. Frydlewicz, 67 Mich. App. 417, 425, 241 N.W.2d 471, 475 (1976); Tacoma Ass'n of Credit Men v. Lester, 72 Wash.2d 453, 455, 433 P.2d 901, 903 (1967) (quote); 1 G. GLENN, *supra* note 5, § 195, at 348.

46 *Stein*, 18 Ohio St. 3d at 307, 480 N.E.2d at 1123.

47 States with cases on point are Alabama, Califoruia, Colorado, Connecticut, Florida, Georgia, Illinois, lowa, Kansas, Kentucky, Massachusetts, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Virginia, and Wyoming. Many of the American cases are collected in Annotation, *supra* note 30. There are no English cases on point. For the civil law rule, see *supra* note 43.

48 On the codification movement, see generally Atkinson, *Wanted: A Model Probate Code*, 23 J. AM. JUR. SOC'Y 183 (1940); MODEL PROBATE CODE 9-10 (1946) (Introduction).

49 *See* UNIF. PROBATE CODE § 2-801(a) (1982). The two remaining states that lack harmonized disclaimer legislation are New Hampshire and Mississippi. In New Hampshire, the common law distinction is confirmed by case law. Bradley v. State, 100 N.H. 232, 235, 123 A.2d 148, 150 (1956).

ambiguity.[50]

In five jurisdictions,[51] statutes explicitly bar disclaimer by insolvent[52] beneficiaries.[53] Statutes in other jurisdictions bar disclaimer against creditors under certain circumstances.[54] Yet many of these statutes add that they do "not abridge the right of any person, apart from this chapter, under any existing or future statute or rule of law, to disclaim any interest."[55] Read literally, these statutes supplement

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50 The exercise of wrestling with these statutes brings to mind Arthur Leff's dictum that "it is easy to say nothing with words." Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485, 559 (1967). While the disclaimer statutes do not say nothing, they plainly say not nearly enough.

51 Florida, Louisiana, Massachusetts, Minnesota, and Washington. *See infra* note 53. Three other states have repealed such legislation: Arkansas, Indiana, and Missouri. *See* ARK. STAT. ANN. § 28-2-102-9 (1987); IND. CODE ANN. §§ 29-1-6-4, 30-4-2-3, 30-4-2-4, *repealed by* P.L. 293-1983, § 2, 32-3-2-1, 32-3-2-15 (Burns Supp. 1988); MO. STAT. § 474.490, *amended by* L. 1980, p. 484, § 1 (Vernon's Supp. 1988).

52 With one exception, insolvency is defined in neither the disclaimer statutes themselves, nor in the definitional sections of the relevant state probate codes. Massachusetts applies the definition contained in the state fraudulent conveyance statute. MASS. GEN. LAWS ANN. ch. 191A, § 8(2) (West Supp. 1988). Massachusetts has enacted the Uniform Fraudulent Conveyance Act, which establishes a definition and mode of proof of insolvency different from the Uniform Fraudulent Transfer Act, operative in Florida, Minnesota, and Washington. *Cf.* U.F.C.A. § 2, 7A U.L.A. 442-3 (1918); Uniform Fraudulent Transfer Act § 2, *id.* 648 (1984) [hereinafter U.F.T.A.]. While the Louisiana statute does not expressly require insolvency, the requirement is implicit, and it is defined according to civil law, see Comment, *The Revocatory Action*, 9 TUL. L. REV. 422, 424 (1935). It is unclear whether the alternative of asserting fraudulent intent or anticipation of insolvency, found in the case law, would be construed as additional grounds for barring disclaimer under these statutes. *See supra* note 44. The Massachusetts statute does preclude these alternatives. *See* MASS. GEN. LAWS ANN. ch. 191A, § 8(2) (West Supp. 1988) (omitting application of U.F.C.A. §§ 6-7 to the disclaimer act).

53 FLA. STAT. § 732.801(6)(a) (1987); LA. CIV. CODE ANN. art. 1021 (West 1982); MASS. GEN. LAWS ANN. ch. 191A, § 8(2) (West Supp. 1988); MINN. STAT. ANN. § 525.532(6) (West Supp. 1988); WASH. REV. CODE ANN. § 11.86.060 (West 1987). Louisiana's statutory bar is the oldest by far, dating to 1804, and it derives from the civil law. *See supra* note 43. The disclaimer statutes fail to specify what sorts of creditors have standing to challenge a disclaimer. On this issue, *see infra* note 299.

54 The Wisconsin statute bars disclaimers by absconded or nonresident beneficiaries, where the creditor has intervened in the probate proceeding to compel repayment. WIS. STAT. ANN. § 858.40(7)(b) (West Supp. 1987). Disclaimer statutes in 40 states bar disclaimer upon judicial sale of the inherited property. This rnle follows the UNIF. PROBATE CODE § 2-801(d)(1)(iv) & Comment (1982). Among these statutes, 21 also bar disclaimer upon "other disposition" of the inherited property "pursuant to judicial process," a phrase that has been interpreted to preclude disclaimer following a levy by the beneficiary's creditor. Citizens State Bank of Grainfield v. Kaiser, 12 Kan. App. 2d 530, 750 P.2d 422 (1988) (the language of the New Jersey statute sets out this rule less ambiguously, N.J. STAT. ANN. § 3B:9-9(a) (West 1983)). Thus, in many states debtors participate in the "race of diligence" that is ordinarily restricted to creditors: debtors will rnsh to disclaim before creditors levy against their inheritance. *Cf.* the (majority) common law rule, deeming levy and judicial sale ineffective to prevent a disclaimer, *supra* note 40.

55 WASH. REV. CODE ANN. § 11.86.080 (West 1987). Disclaimer statutes in fifteen other states (Connecticut, Delaware, Florida, Illinois, Indiana, Massachusetts, Minnesota, Missouri, North Carolina, New York, Oklahoma, Ohio, Rhode Island, Vermont,

rather than supplant common law rights of disclaimer, and the bar on disclaimer by insolvents only applies to those beneficiaries asserting a statutory right to disclaim.[56] If, in fact, the legislative intent was to create "safe harbors" rather than exclusive remedies, then insolvent *heirs* in these jurisdictions will surely be estopped from renouncing, both under the statute and at common law, whereas insolvent *devisees* will retain the right to disclaim at common law if state case law acknowledges this right.[57] In this limited respect, the statutes may function to perpetuate the much criticized distinction between treatment of heirs and devisees that they otherwise serve to eliminate.[58] It seems unlikely that legislators anticipated this outcome; the statutes appear simply to be the product of artless drafting.

In contrast to these provisions, only two state disclaimer statutes expressly allow insolvent beneficiaries to disclaim an inheritance.[59] The remaining disclaimer statutes are silent on the issue and thereby leave open the question of how provisions that grant beneficiaries the right to disclaim should be construed *in pari materia* with statutes that bar fraudulent conveyances. While no fraudulent conveyance statute expressly includes disclaimers within the definition of "conveyance," the term is nonetheless broadly defined in every state.[60] Thus, instead of resolving the issue, the vast majority

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and Wisconsin) use the same or similar language, although two of these statutes expressly except the statutory *bars* on disclaimer from the non-exclusivity provision. MASS. GEN. LAWS ANN. ch. 191A § 10 (West Supp. 1988); R.I. GEN. LAWS § 34-5-11 (Michie 1984). *Cf.* UNIF. PROBATE CODE § 2-801(e) & Comment (1982), preserving the right to disclaim under other *statutes*, but pre-empting common law rights of disclaimer. This approach is followed in 25 states.

56 *Cf.* Eiseman & Mathis, *Estate Planning With Disclaimers in Arkansas*, 27 ARK. L. REV. 411, 421-22 (1973); Note, *Taxation: Disclaimers Under Federal and Minnesota Law*, 51 MINN. L. REV. 907, 924-25 (1967); Newman & Kalter, *The Need for Disclaimer Legislation: An Analysis of the Background and Current Law*, 28 TAX LAW. 592 (1975).

57 There is case law in Florida indicating that an insolvent devisee can disclaim his devise. Kearley v. Crawford, 112 Fla. 43, 151 So. 293 (1933). There is no case law on point in Washington or Minnesota, and courts have not construed the statutes in any of these states. *Quaere* whether a court would read the legislative rule back into the common law under these circumstances.

58 *E.g.*, UNIF. PROBATE CODE § 2-801(a) comment (a), general comment to § 2-801 (1982); MODEL PROBATE CODE § 58 comment (1946); T. ATKINSON, *supra* note 12, at 776; 3 AMERICAN LAW OF PROPERTY, *supra* note 24, at § 14.15. *But see* Comment, *Descent and Distribution: Heir Cannot Renounce Share In Intestate's Estate*, 28 IOWA L. REV. 700 (1943) (defending the common law distinction).

59 Maryland and California (expressly overruling *In re* Kalt's Estate, 16 Cal. 2d 807, 108 P.2d 401 (1940). MD. EST. & TRUSTS CODE ANN. § 9-204(f) (Supp. 1987); CAL. PROB. CODE § 283 & Comment (West Supp. 1988).

60 As defined in the Uniform Fraudulent Conveyance Act, in effect in some 17 states, the term "conveyance" "includes every payment of money, assigument, release, transfer, lease, mortgage or pledge of tangible or intangible property . . . ." U.F.C.A. § 1, 7A U.L.A. 430 (1918). As defined in the Uniform Fraudulent Transfer Act, in force in some 17 other states, the term "transfer" "means every mode, direct or indirect,

of states have simply codified the pre-existing tension.[61] Nor does legislative history offer much guidance on the question.[62]

Under the circumstances, it comes as no surprise that courts have interpreted these statutes in different ways. In several states, courts have held the omission of an express bar on disclaimers by insolvents to imply a legislative intent to permit them.[63] Whether

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absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, [and] lease. . . ." U.F.T.A. § 1 (12), 7A U.L.A. 645 (1984). A comprehensive survey of state fraudulent conveyance statutes shows that none expressly includes or excludes disclaimers in the definition of "conveyance." However, cases construing the term "transfer" under the federal Bankruptcy Code, whose definition is analogous to that of the Uniform Fraudulent Transfer Act, have held the term to include disclaimers. *See* 11 U.S.C.A. § 101(5) (West 1988); *In re* Peery, 40 Bankr. 811, 814 (M.D. Tenn. 1984); *In re* Watson, 65 Bankr. 9, 11 (C.D. Ill. 1986); *cf.* Hoecker v. United Bank of Boulder, 476 F.2d 838 (10th Cir. 1973) (defining "transfer" under the Bankruptcy Act of 1898 potentially to include disclaimers, but giving priority to the state's "relation back" doctrine). Since one of the purposes of the Uniform Fraudulent Transfer Act is to bring state fraudulent conveyance law into closer conformity with bankruptcy law, *see* U.F.T.A., Prefatory Note, 7A U.L.A. 639 (1984), it seems plausible that the U.F.T.A. will be construed to make insolvent disclaimer a fraudulent conveyance. As yet, however, no court has reached this issue, *but see* Nielsen v. Cass County Social Service Bd., 395 N.W.2d 157, 159-60 (N.D. 1986) (dictum that an insolvent debtor can disclaim under the Uniform Probate Code; no discussion of the application of U.F.T.A.; unclear whether the cause of action arose before or after the passage of U.F.T.A.).

61 In two states the tension is incorporated directly into the disclaimer statute. New Jersey and Oklahoma each include in their disclaimer statutes a provision barring disclaimer whenever such disclaimer violates the state's fraudulent conveyance statute—without deigning to explain when that is! N.J. STAT. ANN. § 3 B:9-9(d) (West 1983); OKLA. STAT. ANN. tit. 84 § 27 (West Supp. 1988). These statutes appear to manifest both legislative cognizance of the tension and a stubboru unwillingness to resolve it.

62 Because many disclaimer statutes are modeled after the provision contained within the Uniform Probate Code, its legislative history should be illuminating. Unfortunately, it is ambignous. An earlier draft of the U.P.C.'s disclaimer section included an express proclamation of creditors' powerlessness to prevent a disclaimer. W. ROLLISON, COMMENTARY ON THE UNIFORM PROBATE CODE 66 (1970). This provision was *omitted* from the final draft, which nonetheless included as a *comment* a statement that "the relation back is 'for all purposes' which would include, among others for the purpose of rights of creditors. . . . [N]umerous cases have held that a devisee or legatee can disclaim a devise or legacy despite the claims of creditors." A string-cite follows. UNIF. PROBATE CODE § 2-801(c) Comment (1982). Whether this comment is intended to indicate that state case law will continue to govern the issue, or whether it is intended to codify the rule found in the cases cited is unclear. Several of the cases cited include exceptions in the event of collusion or reliance that are not mentioned in the comment. Notice also that several states have repealed bars on insolvent disclaimer. *See supra* note 51. In these states there is a stronger inference that the prior rule is pre-empted. That inference is less clear, however, in states such as Pennsylvania that pass silent disclaimer statutes with a prior case law tradition of barring insolvent disclaimers. *See supra* note 44; 20 PA. CONS. STAT. ANN. §§ 6205, 6206 (Purdon Supp. 1987) (passed in 1976). The effect of the statute has yet to be unequivocally resolved. *See* Estate of Clark, 488 Pa. 1, 6 & n.5, 13-14, 410 A.2d 796, 799 & n.5, 801-02 (1980).

63 *In re* Estate of Colacci, 37 Colo. App. 369, 549 P.2d 1096 (1976); Estate of Schiffman, 105 Misc. 2d 1025, 430 N.Y.S. 229 (Surr. Ct. 1980); Estate of Oot, 95 Misc. 2d 702, 408 N.Y.S.2d 303 (Surr. Ct. 1978); *In re* Estate of Dankner, 86 Misc. 2d 1081, 384 N.Y.S.

this same implication would be read into the statute in the presence of overt collusion between the disclaimant and the alternative beneficiary, an exception found in the case law of many states,[64] remains unclear.[65] But in other jurisdictions, courts have noted the statutory conflict and, in the absence of an affirmative expression of legislative intent, have continued to look to prior case law to resolve the issue.[66] One court has even felt free to overrule prior case law permitting insolvent disclaimer, even after the passage of legislation granting a right of disclaimer without express limitation.[67]

In most states disclaimer statutes have abandoned the "reasonable time" limitation for effective disclaimer, substituting a set deadline (ranging from six to ten months).[68] Thus, the possibility that insolvents will be accorded less time to disclaim than solvent beneficiaries[69] does not arise under statutory law. Nonetheless, provisions in some states that ostensibly continue to permit disclaimer at common law[70] once again raise the possibility that the "reasonable time" limitation is not pre-empted by the statutory limitation, and that devisees (but not heirs) could continue to assert the right to disclaim beyond the statutory period.[71] If so, insolvent devisees

2d 683 (Surr. Ct. 1976); *see* Gillespie v. Boisseau, 23 Ky. L. R. 1046, 1047, 64 S.W. 730, 731 (Ct. App. 1901).

64 *See supra* notes 35, 37.

65 At least one case interpreting the statute to permit disclaimer adds the caveat against collusion. *See* Estate of Oot, 95 Misc.2d at 705-06, 408 N.Y.S.2d at 305. *See also Disclaimer of Testamentary and Nontestamentary Dispositions—Suggestions for Model Acts*, 4 REAL PROP. PROB. & TR. J. 658, 667-68 (1969) (committee report on draft of the Uniform Probate Code's disclaimer provision, suggesting that the exceptions will apply). Notice that many (but not all) disclaimer statutes bar disclaimer upon acceptance or the receipt of *benefits* from a bequest, following the Uniform Probate Code. UNIF. PROBATE CODE § 2-801(d)(1)(iii) (1982). This provision could be interpreted to cover instances of collusion.

66 *See, e.g.*, Estate of Hansen, 109 Ill. App. 2d 283, 248 N.E.2d 709 (1969).

67 Stein v. Brown, 18 Ohio St. 3d 305, 480 N.E.2d 1121 (1985).

68 The majority of jurisdictions set a nine month time limit, following the Uniform Probate Code. UNIF. PROBATE CODE § 2-801(f) (1982). In two jurisdictions the common law "reasonable time" standard is codified, although nine months is conclusively presumed to be reasonable. CALIF. PROB. CODE § 279(a) & (b) (West Supp. 1988); NEV. REV. STAT. ANN. § 120.030 & (1) (Michie 1986). In South Carolina, the statute establishes no time limit; in Pennsylvania the statute expressly permits disclaimer at any time prior to acceptance. 20 PA. CONS. STAT. ANN. § 6206(a) (Purdon Supp. 1988).

69 *See supra* note 38 and accompanying text.

70 *See supra* notes 55-56 and accompanying text. Along with the exclusivity provisions, which vary among states, one must also check time limit provisions which in some states provide for exclusivity where the general exclusivity provision itself does not, *e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(b)(2) & (h) (McKinney 1981). However, the issue of the residual applicability of the "reasonable time" rule could arise, *e.g.*, in Connecticut, *see* CONN. GEN. STAT. ANN. §§ 45-300, 45-304 (West Supp. 1988), Missouri, *see* MO. ANN. STAT. § 474.490(4) & (6) (Vernon Supp. 1988), Rhode Island, *see* R.I. GEN. LAWS §§ 34-5-5, 34-5-11 (Michie 1984 & Supp. 1988), and Indiana, *see* IND. CODE ANN. §§ 32-3-2-3(c), 32-3-2-13 (Burns Supp. 1987).

71 Newman & Kalter, *supra* note 56, at 592.

might still have to disclaim with greater haste than solvent ones.

In sum, the current state of the law governing insolvent disclaimer is unsettled. While commentators sometimes speak of a "common law" in this area,[72] the cases themselves evince more conflict than commonality. In most states, the issue has never been resolved by judicial decision. And even in states with cases on point, the passage of muddled legislation has called into question the continued vitality of earlier precedents.[73] Ironically, the very statutes that were intended to clarify and simplify the law of disclaimer[74] have, if anything, taken a bad situation and made it worse.

No less striking has been the failure of courts to subject the problem of insolvent disclaimer to fundamental policy analysis. Opinions have alternatively applied the literal logic of the "relation back" doctrine to deny the occurrence of a "transfer,"[75] or they have pierced this fictional veil to recognize that the offer of an inheritance does bestow a "right of ownership" that may be the object of a fraudulent conveyance.[76] The first approach follows from the general dictates of gratuitous transfers law that one may accept or reject an offer of a gratuity at one's pleasure. The second approach follows from the general dictates of debtor-creditor law that one should repay one's debts if at all able. What courts thus far have failed to do is inquire into the underlying functions and objectives of these two bodies of law in order to resolve the doctrinal conflict in a principled manner.

D. A Case-Study in Confusion

The analytical poverty of the case law on insolvent disclaimer is illustrated by a recent New York decision on point. In *Matter of Scrivani*,[77] a guardian *ad litem* sought leave to disclaim an inheritance on behalf of her hospitalized ward. Though not technically insolvent, the ward depended upon Medicaid benefits for her support. The court began by noting that the law of New York ordinarily per-

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72 Commentators have not, however, reached a consensus on what exactly the common law rule is, *compare* Note, *Renunciation of a Legacy or Devise as a Fraudulent Transfer Under the Bankruptcy Act*, 49 IND. L. REV. 290, 298 (1973) ("the common law rule [is] that the beneficiary of a will may renounce . . . even where the purpose . . . is to avoid creditors."), *with* MODEL PROBATE CODE § 58 comment (1946) ("the common law is not clear as to whether the devisee is able to defeat the rights of creditors."), *and with* Lewis, *Uncertainty in Disclaimer Laws Creates Problems For Estate Planners*, 34 OKLA. L. REV. 419, 458 (1981) ("under the common law a person could not disclaim if the disclaimer would prejudice the rights of his creditors.").

73 Pennsylvania and Wyoming are two such states. *See supra* notes 44, 62.

74 *Disclaimer of Testamentary and Nontestamentary Dispositions*, *supra* note 65, at 658.

75 *See supra* notes 34-42 and accompanying text.

76 *See supra* notes 43-46 and accompanying text.

77 116 Misc. 2d 204, 455 N.Y.S.2d 505 (Sup. Ct. 1982).

mitted disclaimers even when they operated to frustrate creditors' claims. "At first glance, this rule appears to conflict with long-standing and well established values, by seeming to encourage the evasion of one's just debts," the court observed. "Closer analysis indicates otherwise. Any post mortem distribution . . . is a donative transfer like any other. The law forces no one to accept a gift."[78] Having set out the traditional theory of inheritance, the court proceeded to examine the particular facts of the case. Here, disclaimer by the devisee would have resulted in her continued dependence upon Medicaid payments, whereas "the purpose of [Medicaid is] to aid only economically disadvantaged persons; the economic viability of the Medicaid program itself can be maintained only if eligibility requirements are diligently observed."[79] State Medicaid legislation accordingly denied benefits to persons "who transferred assets which would otherwise have been available to pay medical costs,"[80] just as ordinary creditors could thwart a fraudulent conveyance.

Did a disclaimer constitute a "transfer" for purposes of determining eligibility for continued Medicaid assistance? The court held that it did:

> While a renunciation, as a formal rejection of a gift, compels the conclusion that the inheritance never became the property of the beneficiary, it cannot alter the inheritance's status. It is an inchoate property interest, which clearly has value and is available to the beneficiary; common sense dictates that it cannot be other than an "available resource" for Medicaid purposes. Thus, while a renunciation is technically not a transfer of specific property in which the beneficiary holds title, it is the transfer of a resource.[81]

On this basis, the court denied the guardian's motion to disclaim, concluding that it would damage the ward's financial interests by denying her the right to receive future Medicaid assistance.[82]

The court in *Scrivani* staunchly maintained that its decision left standing a competent devisee's right to disclaim: While Medicaid could deny future eligibility to the disclaimant, it could not compel acceptance and reimbursement for past support.[83] This seems, at best, a nice distinction: Though the competent disclaimant remains "free" to act, her eligibility for future benefits will be determined *as*

78 *Id.* at 208, 455 N.Y.S.2d at 509.

79 *Id.* at 209, 455 N.Y.S.2d at 509-10.

80 *Id.*

81 *Id.*

82 *Id.* at 211, 455 N.Y.S.2d at 510-11. *Contra* this result, see Nielsen v. Cass County Social Servs. Bd., 395 N.W.2d 157 (N.D. 1986).

83 *In re* Scrivani, 116 Misc. 2d at 209, 455 N.Y.S.2d at 509. Under New York law, the state can sue for reimbursement if the recipient of welfare acquires property within ten years of receiving benefits. N.Y. Soc. Serv. Law, § 104 (McKinney 1988).

if the disclaimer had not occurred. Thus, the disclaimant winds up in essentially the same position as under a rule denying her the right to disclaim in the first place.[84] Furthermore, the justification offered by the court for this "exception" proves too much. By labelling the inheritance an "inchoate" interest in property, and recognizing that the disclaimer of this interest is, in effect, the "transfer of a resource,"[85] the New York court prevented this disclaimer from becoming effective on precisely the same theory that courts in other jurisdictions have invoked to bar insolvent disclaimer generally[86]—and it did so without so much as a pause for breath after reciting the formalistic "disclaimer is not a transfer" analysis![87] Evidently, the court in *Scrivani* perceived that insolvent disclaimer should be permitted under some circumstances but not others. Yet, by combining the traditional *general* argnments for and against a right of insolvent disclaimer in order to distingnish *specific* creditors from one another, the court lapsed into self-contradiction—without ever acknowledging, much less addressing, the problematic nature of its reasoning.

Plainly, the tools of analysis in this area of the law need sharpening.

III
THEORETICAL PERSPECTIVES

Scholarly commentary on insolvent disclaimer is as sparse and discordant as the case law. Most treatise writers, notably Professors Simes, Atkinson, and Casner, have sided with the creditors, though without addressing the merits of the issue at any length.[88] When Professors Simes and Atkinson drafted their Model Probate Code in 1945, they included a provision barring disclaimer by insolvents.[89]

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84 This assumes, however, that the disclaimant is in continuing need of medical care.

85 *See supra* text accompanying note 81.

86 *See supra* notes 43-46 and accompanying text.

87 *See supra* text accompanying notes 78, 81. The court was not compelled to reach this contrary conclusion for reasons of federal pre-emption. The federal Social Security Act does not require states to deny Medicaid benefits to disclaimants. *See In re* Scrivani, 116 Misc.2d at 209-10 n.2, 455 N.Y.S.2d at 510 n.2.

88 *See infra* note 89; 3 AMERICAN LAW OF PROPERTY, *supra* note 24, at § 14.15. For additional pro-creditor commentary see Note, *supra* note 72, at 290; Recent Decisions, 37 MICH. L. REV. 1168 (1939); Note, *Renunciation of Testamentary Gift, supra* note 37, at 1030; Comment, *Gifts: Renunciation by Donee: Rights of Donee's Creditors*, 18 CALIF. L. REV. 298 (1930); Recent Decision, 29 CAL. L. REV. 531 (1941); Recent Case, 12 MO. L. REV. 67 (1947); Recent Case, 25 MINN. L. REV. 951 (1941); Howe, *Renunciation by the Heir, Devisee or Legatee*, 42 KY. L.J. 612, 615 (1954); Note, *Renunciation of a Devise, supra* 37, at 936; Lauritzen, *supra* note 17, at 587; Recent Decision, 30 ALA. L. REV. 595 (1979); Recent Decision, 24 N.Y.U.L.Q. REV. 634 (1949); Recent Decision, 18 N.Y.U.L.Q. REV. 142 (1941) (by implication); Recent Case, 92 U. PA. L. REV. 105 (1945).

89 MODEL PROBATE CODE § 58 and comment (1946). The code was also drafted by Professor Paul Basye, then a research associate at the University of Michigan. On the

The chief critics of this approach have been Professors Fratcher and Wellman, principal draftsmen of the subsequent Uniform Probate Code.[90] They provided no protection for creditors in their uniform disclaimer section, although the intended application of the section in relation to prior case law remains unclear.[91]

In examining the problem of insolvent disclaimer from the perspective of public policy, one should emphasize at the outset that any attempt at substantive analysis must ignore the "confusing and unnecessary fictions" that have encrusted title theory.[92] These fictions, charting the trajectory of title upon the benefactor's death, arose to deal with such timely problems as evasion of feudal incidents and the injustice of saddling beneficiaries with burdensome estates. Creditors' rights were not considered when the fictions were established.[93] More fundamentally, however, judicial resort to title theory entails conceptual hazards that might best be avoided by abolishing it altogether. Asking whether a beneficiary holds "title" before he disclaims is rather like asking whether a present "interest" has passed to the *cestui* of a revocable trust.[94] Both are reified abstractions, serving merely to summarize legal rights and relations, which should come into play (if at all) only after the legal system has first decided what rights and relations it wishes to create.[95] The

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drafting history, see *id.* at 5-12. *Cf.* T. ATKINSON, *supra* note 12, at 775-76 (remarking the contrary majority rule without comment). The Model Probate Code was widely praised in its day. *See, e.g.*, Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321 (1947).

90 Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1041 n.12, 1076-77 (1966). Their reasoning is discussed *infra* notes 212, 234. For additional pro-debtor commentary, see Recent Case, 6 MINN. L. REV. 608 (1922) (by implication); Note, *Disclaimers As A Postmortem Estate Planning Devise*, 37 U. CIN. L. REV. 567, 575-76 (1968) [hereinafter Note, *Disclaimers*]; Note, *Renunciation of Testamentary Benefits As Fraudulent Transfer*, 37 CASE W. RES. L. REV. 148 (1986) [hereinafter Note, *Renunciation*]; Recent Case, 28 IOWA L. REV. 700 (1943); Recent Case, 36 HARV. L. REV. 347 (1922) (by implication).

91 UNIF. PROBATE CODE § 2-801 (1982). *See supra* note 62. For background on the drafting of the disclaimer section, see Wellman & Gordon, *Uniformity In State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments*, 1976 B.Y.U. L. REV. 357, 357 n.1. The distinction between the model codes in this respect has sometimes escaped notice. *See* Note, *Disclaimer Statutes: New Federal and State Tools for Postmortem Estate Planning*, 20 WASHBURN L.J. 42, 54 (1980).

92 4 H. TIFFANY, LAW OF REAL PROPERTY § 1058, at 463 (3d ed. 1975). Professor Tiffany describes the presumption of acceptance of an inheritance by the beneficiary as a "double fiction," which would make the "relation-back" doctrine nothing less than a triple fiction! *Id.* § 1057, at 461.

93 Townson v. Tickell, 106 Eng. Rep. 575, 576, 1814-23 All E.R. Rep. 164, 165 (1819) (Bayley, J.); Martin, *supra* note 34, at 318-20.

94 The latter question was the ostensible basis for the decision in Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955) and other revocable trust cases, criticized in Langbein, *supra* note 32, at 1126-29.

95 The point is recognized in Simes, *The Devolution of Title to Appointed Property*, 22 ILL. L. REV. 480, 486-87 (1928).

danger inherent in utilizing such abstractions is that, once established, they may continue to govern with their brute logic cases where the original policy determinants no longer apply. Thus, an abstraction that begins as a semantic tool may well end as an analytical crutch.[96] Whether courts have fallen into this trap in the area of disclaimer law remains to be seen.[97] What *is* clear is that policy analysts need not tarry long amid the intricacies of title theory. Whoever should win, there should the title be.

The analysis that follows approaches the problem of insolvent disclaimer from three different angles. The first, which I call "dominion theory," assesses the property characteristics of an inheritance that the beneficiary wishes to turn down, in order to place it along a spectrum of property interests, some of which creditors have traditionally been empowered to reach and others not. The second, termed "fraud theory," examines more closely how disclaimers should be treated in light of the policy goals of debtor-creditor law generally and fraudulent conveyance law in particular. Finally, by way of "inheritance theory," the policy goals of gratuitous transfers law are entered into the equation.

A. Dominion Theory and the Problem of Analogy

Grant Gilmore once observed, with his usual acuity, that "Lawyers have a professionally inbred passion for speculating on the 'true nature' of things. The legal mind is never satisfied until the novel or unfamiliar has been classified as being 'like' some recognized category of the known and familiar . . . ."[98] In this tradition, some courts have searched for "analogous precedents in our law"[99] to determine whether an insolvent disclaimer should be effective against creditors. Analogical reasoning in fact appears on both sides of the insolvent disclaimer controversy. On the one hand, at least one opinion upholding the insolvent's right to disclaim has

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96 Judge Cardozo once made the same observation with respect to the legal abstraction's close relative, the legal metaphor: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926). Similar alarms have been rung in other disciplines. *See, e.g.*, Lightman, *Magic on the Mind: Physicists' Use of Metaphor*, 58 AM. SCHOLAR 97, 101 (1989).

97 Some commentators have criticized cases permitting insolvent disclaimer by virtue of the "relation back" fiction on the ground that the reasoning is "largely conceptual," "stretch[ing] logic to a fragile tenuity." Note, *Renunciation of Testamentary Gift*, *supra* note 37, at 1032; Note, *Renunciation of a Devise*, *supra* note 37, at 943; *see also* Recent Decision, 18 N.Y.U. L.Q. REV. 142, 144 (1941); Recent Case, 12 MO. L. REV. 69 (1947); Recent Decision, 37 MICH. L. REV. 1168, 1170 (1939). Still, the justifications for this approach lie also in the general dictates of inheritance law, not merely in the tenuous logic of title theory.

98 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 987-88 (1965).

99 Recent Decision, 24 N.Y.U. L.Q. REV. 636 (1949).

equated disclaimer of an inheritance with refusal to accept an inter vivos gift.[100] Cases have uniformly affirmed the donee's right to decline a gift under all circumstances.[101] On the other hand, opinions challenging the debtor's right to disclaim have compared disclaimer to the assignment of an inheritance.[102] It is equally well settled that assignment of an inheritance by an insolvent constitutes a fraudulent conveyance.[103] Moving to a cognate field of doctrine, still another case has analogized a disclaimer to the exercise of a general power of appointment.[104] Again, it is settled law that creditors can reach property subject to a general power that the debtor has exercised, whether or not he is himself the appointee.[105]

Each of the "analogous" doctrines cited in these cases has traditionally been justified on a property interest theory. The intended

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100 "The power of a legatee to refuse is, then, precisely the same as that of a donee of a gift inter vivos, and, of course, it is perfectly evident that if such a donee refuses to accept the gift his creditors are completely powerless to compel his acceptance." *In re* Wilson's Estate, 298 N.Y. 398, 406, 83 N.E.2d 852, 856 (1949) (Fuld, J., dissenting). For a commentator's like argument, see Note, *Disclaimers*, *supra* note 90, at 575-76.

101 Stoehr v. Miller, 296 F. 414, 425 (2d Cir. 1923); Lockard v. Stephenson, 120 Ala. 641, 645-46, 24 So. 996, 997 (1899) (dicta); Gottstein v. Hedges, 210 Iowa 272, 276, 228 N.W. 93, 94 (1929) (dissent); Succession of Henican, 248 So. 2d 385, 387 (La. 1971); *In re* Shepard's Estate, 170 Pa. 323, 328, 32 A. 1040, 1041 (1895) (dicta); Lynch v. Lynch, 201 S.C. 130, 145, 21 S.E.2d 567, 575 (1942).

102 *See, e.g.*, Buckius' Estate, 17 Pa. C. 270, 272 (Phila. County Ct. 1895) ("It is also very clear that the legatee, as against the rights of his attaching creditors, cannot waive the bequest any more than he could assigu the legacy subsequent to the service of the attachment."); *In re* Kalt's Estate, 16 Cal. 2d 807, 811, 108 P.2d 401, 403 (1940) ("By renouncing the legacy he conveys away the property as effectively as if he had assigued his interest to the ultimate recipient."). *See also* Neeld's Estate, 38 Pa. D & C 381, 389 (Phila. County Ct. 1940) (analogy to a "release"); Stein v. Brown, 18 Ohio St. 3d 305, 308, 480 N.E.2d 1121, 1123 (1985) (analogy to a "transfer"). *Cf. infra* note 111 (cases *distinguishing* disclaimer and assignment). For commentary asserting the same equation, see Recent Case, 25 MINN. L. REV. 951, 952-53 (1941). One case has turned the equation around, asserting that precedent permitting insolvent disclaimer serves to support a right of insolvent assignment. *See In re* Murphy's Estate, 217 Iowa 1291, 252 N.W. 523 (1934).

103 McQuiddy Printing Co. v. Hirsig, 23 Tenn. App. 434, 134 S.W.2d 197 (1939); *In re* Wilson's Estate, 298 N.Y. 398, 404, 83 N.E.2d 852, 855 (1949) (dicta); *see also* cases cited in Annotation, *supra* note 29, at 46-48; *infra* note 110 (family settlements). Virtually every modern disclaimer statute bars the right to disclaim upon assignment. *See* UNIF. PROBATE CODE § 2-801(d)(1) (1982). *But see Murphy's Estate*, 217 Iowa at 1291, 252 N.W. at 523 (dicta), overruled by IOWA CODE ANN. § 733.704(4) (West Supp. 1989).

104 "The principle that the exercise of a general power of appointment by a debtor may be a fraudulent conveyance as to his creditors clearly supports the rule we adopt in the present case. . . ." *Kalt's Estate*, 16 Cal. 2d at 812, 108 P.2d at 403. At least one commentator anticipated the *Kalt* opinion in positing this analogy. Comment, *supra* note 88, at 300-01 ("a somewhat analogous situation"). The *Kalt* analogy is approved in Recent Decision, 23 N.Y.U. L.Q. REV. 634, 636 (1949); Note, *Renunciation of a Devise, supra* note 37, at 944.

105 2 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 945, at 399-400 (1956); 5 W. PAGE, *supra* note 6, § 45.24, at 569-70; Annotation, 59 A.L.R. 1510 (1929); Annotation, 97 A.L.R. 1071 (1935); Annotation, 121 A.L.R. 803 (1939).

donee of a gift owns nothing until such time as he accepts; his creditors therefore have no interest in an "inoperative" gift.[106] By contrast, the devisee who assigns his inheritance, by his very act of assignment, makes "an unequivocal assertion of title, which by necessary implication affirms his acceptance."[107] How does a disclaimer compare to the refusal of a gift and to the assignment of an inheritance from the standpoint of property ownership? In order to answer this question substantively, we must take a closer look at the extent of the disclaimant's dominion over the disclaimed property, for that provides the true measure of his interest. Shorn of the formalities of title, the essence of property is power.[108]

One element of dominion that the disclaimant does possess is the power to capture the corpus and convert it to his own use. Unlike the holder of a special power of appointment, for example, the disclaimant could, by perfunctory action, accept his inheritance and apply it to his debts. In this respect, the disclaimant's dominion is equivalent to that of both a declining donee and an assignor, suggesting an identity of interest that the law thus far has seen fit to ignore.[109] However, there may be additional elements of dominion that serve to distingnish the disclaimant from other sorts of beneficiaries.

The crucial element to explore in this regard is the extent of dominion exercised by the act of disclaimer itself. Consider, at one extreme, the refusal to accept an inter vivos gift. By his act of refusal, the declining donee restores the *status quo ante*. The donor can now do with the property what he will, and the donee has disabused himself of all power to control its subsequent disposal. At the other extreme, consider the assignment of an inheritance. By his act of assignment, the assignor does not restore the *status quo*. Rather, he

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106 *E.g.*, Gottstein v. Hedges, 210 Iowa 272, 275, 228 N.W. 93, 94 (1929).

107 *See, e.g.*, McQuiddy Printing Co. v. Hirsig, 23 Tenn. App. 434, 446, 134 S.W.2d 197, 205 (1939). *See also Disclaimer of Testamentary and Nontestamentary Dispositions, supra* note 65, at 659-60 (exercise of "[a] power to re-direct seems to . . . imply acceptance of the legacy.").

108 *See, e.g.*, J. BENTHAM, *Principles of the Civil Code*, in 1 THE WORKS OF JEREMY BENTHAM 308 (J. Bowring ed. 1962) ("The idea of property consists in . . . the persuasion of power to derive certain advantages from the object, according to the nature of the case.").

109 As we have noted, creditors are denied the right to reach an inter vivos gift that the debtor could have accepted but declined, whereas creditors can reach a gift or bequest that the debtor could have accepted but instead assigned. *See supra* notes 101, 103. Notice also the asymmetrical treatment of general powers of appointment from this standpoint. *See infra* note 113 and accompanying text. Nor has the absence of a power to capture been invariably dispositive; while creditors cannot reach property over which the debtor holds a special power of appointment, *see* 5 AMERICAN LAW OF PROPERTY, *supra* note 24, at § 23.15, certain creditors may be permitted to levy against the corpus of a spendthrift trust that the debtor cannot reach himself. *See infra* note 162.

chooses to control the ultimate disposition of the property, and, by unanimous decision, courts deem this power the equivalent of a capture of the property for the assignor's own purposes.[110]

Now consider the devisee who disclaims his inheritance. It is readily apparent that this act lies between the two extremes. The disclaimant has no power to channel the inheritance to chosen takers in lieu of himself. But because the testator is dead, the devisee's disclaimer cannot restore the *status quo*. By examining the will (in conjunction with the disclaimer and antilapse statutes), the devisee is always able to determine who will receive the property in the event that he disclaims. Thus, while the disclaimant does not control the disposition of the property as he does when he assigns it, he can anticipate its disposition as he cannot when he declines an inter vivos gift. I call this sort of transfer a "quasi-conveyance." Given its intermediate character, analogies to the refusal of a gift and to the assignment of an inheritance appear equally inapposite, at least with respect to the action involved.[111]

By the same token, the equation of a disclaimer with the exercise of a general power of appointment is also inapt. The holder of the power, like the assignor of a devise, is channelling the corpus to his preferred recipients. In fact, courts have failed to identify the disclaimer's closest analogue from the standpoint of dominion theory: namely, a general power of appointment that the holder of the power *declines* to exercise.[112] Like a devise, the corpus of such a

110 *See supra* note 103. Similarly, family settlement agreements, whereby beneficiaries arrange an alternative disposition of the estate, have been ineffective to avoid creditors' claims; here again, the devisees control the ultimate disposition of the estate assets. Seeley v. Seeley, 242 Iowa 220, 45 N.W.2d 881 (1951); Shedenhelm v. Cafferty, 174 Iowa 195, 156 N.W. 340 (1916); Cantrella Estate, 20 D & C 2d 486 (Phila. County Ct. 1960); Petrides v. Park Hill Restaurant, 293 A.D. 509, 39 N.Y.S.2d 645 (App. Div. 1943); Niklason v. Ramsey, 233 Va. 161, 353 S.E.2d 783 (1987). *Contra In re* Murphy's Estate, 217 Iowa 1291, 252 N.W. 523 (1934) (dicta).

111 For cases recognizing the conceptual distinctions between a disclaimer and an assignment, see Estate of Schiffman, 105 Misc. 2d 1025, 1027-28, 430 N.Y.S.2d 229, 231 (Surr. Ct. 1981); *McQuiddy*, 23 Tenn. App. at 441, 134 S.W.2d at 204-05; Schoonover v. Osborne, 193 Iowa 474, 477, 187 N.W. 20, 22 (1922); Nielsen v. Cass County Social Services Bd., 395 N.W.2d 157, 160 (N.D. 1986). Still, confusion over these concepts persists. One court, for example, has stated in the context of disclaimer that "when a testator dies, the legatee obtains a power . . . to determine the ultimate disposition of the property regardless of acceptance on his part." *In re* Kalt's Estate, 16 Cal. 2d 807, 811, 108 P.2d 401, 403 (1940). This confusion is also reflected in other rules, such as the doctrine found in some states that a devisee cannot disclaim an (unassignable) spendthrift trust. This doctrine is criticized in A. SCOTT, THE LAW OF TRUSTS § 337.7, at 2682-83 (1967), and has been abolished under many, but not all, state statutes. *See* UNIF. PROBATE CODE § 2-801(d)(2) (1982); Annotation, 14 A.L.R.3d 1437 (1967).

112 *Cf.* Comment, *supra* note 88, at 300-01 & nn.16-17; Note, *Renunciation of a Devise*, *supra* note 37, at 944-45; Note, *Renunciation*, *supra* note 90, at 156-57. Professor Howe argues that the analogy to an exercised power is more appropriate than the analogy to an unexercised power because both a disclaimer and the exercise of a power involve

power may be captured by its holder; and like a disclaimed devise, the corpus of an unexercised power will flow to takers in default of appointment chosen by the donor of the power, but known to the holder of the power. This too is a quasi-conveyance.

At common law, creditors may levy against the corpus of an exercised power but not against property subject to an unexercised power. However, eleven states have reversed the latter rule by statute.[113] Dominion theory suggests that the treatment of unexercised powers should coincide with the treatment of disclaimers, although in practice no such symmetry has developed.[114] These two areas of the law have evidently evolved independently of one another.[115] At the same time, dominion theory suggests another symmetry that does exist pervasively between the rules governing collusive disclaimers and assignments. Under the "collusion exception" found in much of the case law, creditors can set aside insolvent disclaimers that are accompanied by collusion between the disclaimant and the alternative beneficiary.[116] In such an instance, the disclaimant controls the ultimate disposition of the inheritance, just as he would if he had assigned it.[117] Because creditors can also levy against an assigned inheritance,[118] the two rules are harmonious from the standpoint of dominion theory.

But, at the end of the day, how useful *is* dominion theory? While it provides a means of comparative analysis, so cherished by lawyers, dominion theory offers no basis for selecting the incidents of control that are to be adjudged definitive of ownership. While we might light upon the presence of "channelling" to establish ownership, in which respect assignment differs from non-collusive disclaimer, we might just as easily make the "power to capture" dispositive, in which event *all* the interests considered here would

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acts, whereas an unexercised power involves a *failure* to act. Howe, *supra* note 88, at 612. This distinction, however, is merely formal and insignificant, for a failure to act (an omission) is itself a form of commission and is indistinguishable from the standpoint of dominion or any other policy concern. *See, e.g.*, Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 1906 (1985) (see "act").

113 RESTATEMENT (SECOND) OF PROPERTY § 13.2 (1977).

114 For example, in New York creditors can reach the corpus of an unexercised general power of appointment but they cannot prevent a disclaimer. In Ohio, the reverse is true. *Cf. supra* notes 63, 67, 113.

115 The common law of powers emerged out of *agency* law. *See* 2 L. SIMES & A. SMITH, *supra* note 105, §§ 944-45; 5 W. PAGE, *supra* note 6, § 45.24, at 568-71.

116 *See supra* notes 35, 37.

117 Similarly, if through collusion the disclaimant can capture the benefit of an inheritance surreptitiously for himself, then he has, in effect, accepted it (or exercised a general power of appointment in favor of himself). For other theoretical perspectives on the collusion exception, see *infra* text accompanying notes 176-83.

118 *See supra* note 103.

constitute "owned" property.[119] In order to develop a reasoned approach to the problem of disclaimer, we must look beyond the material attributes of dominion to the functional attributes of debtor-creditor law and gratuitous transfers law. Such an inquiry may reveal a rational line of cleavage between "owned" and "unowned" property—or it may even indicate that a consistent line of cleavage under dominion theory is inconsistent with the goals of public policy.

B. Fraud Theory and the Problem of Reliance

Within the broad parameters of debtor-creditor law, the subcategory of fraudulent conveyance law governs the conduct of debtors. Virtually every state has passed a fraudulent conveyance statute permitting creditors to avoid transfers that "delay, hinder, or defraud" them.[120] Whether insolvent disclaimers should be so classified depends upon the purposes that the doctrine is intended to serve. As will be shown, our answer may hinge on the nature of the debtor-creditor relationship at issue in any given case.

1. *Voluntary Creditors*

Assuming that a creditor has voluntarily extended credit to a debtor, we begin with the premise that the transaction which has occurred is, in its essence, commercial. Some commentators refer to the debtor's "moral" obligations to his creditors, the principal one being to repay his debts if it is humanly possible to do so.[121] From this perspective one might conclude that any conduct by the debtor which needlessly reduces his creditors' opportunity for recovery (including disclaimer) violates the moral underpinnings of

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119 Some commentators have taken the latter position, arguing that "the power to acquire ownership" constitutes "the practical equivalent of ownership." 4 RESTATEMENT OF PROPERTY ch. 25, at 1813-14 (introductory note) (1936) (discussing powers of appointment); *see also* 5 AMERICAN LAW OF PROPERTY, *supra* note 24, at §§ 23.4, 23.17 (same); Note, *Renunciation of a Devise*, *supra* note 37, at 942-43 (discussing disclaimers); Martin, *supra* note 34, at 358-39 (discussing tax treatment).

120 The quoted language appeared in the original fraudulent conveyance statute, 13 Eliz., ch. 5 (1571), and was carried forward (with minor rewording) into the U.F.C.A. § 7, 7A U.L.A. 509 (1918) and U.F.T.A. § 4, *id.* at 652 (1984).

121 *E.g.*, John Chipman Gray: "If there is one sentiment therefore, which it would seem to be the part of all in authority, and particularly of all judges, to fortify, it is the duty of keeping one's promises and paying one's debts." J. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY at iii (2d ed. 1895). This principle, Professor Gray felt, was "fit to produce a manly race, based on sound morality and wise philosophy." *Id.* at v. *See also* Clark, *The Duties of the Corporate Debtor to its Creditors*, 90 HARV. L. REV. 505, 510-13 & n.17 (1977) (defining fraudulent conveyance law in terms of moral obligation); Recent Decision, 27 NOTRE DAME LAW. 659, 662 (1952) (applying moral theory to creditor's standing to contest a will).

their transaction.[122] It is submitted that this viewpoint, promulgated in at least one opinion,[123] fundamentally misconstrues the nature of the consensual debtor-creditor relationship. To be sure, some persons extend credit for reasons of friendship or family connection rather than profit, and these transactions may take on a moral tone. More often than not, however, loans within the family are not formalized in law. Creditors' rights in this context are shaped by extra-legal norms (and enforced by extra-legal sanctions) that fully reflect the transaction's moral character.

In the main, formalized extension of credit is a business. Commercial lenders loan money at interest for the purpose of profit,[124] *fully cognizant that some debtors will default.* Commercial lenders demand interest rates that reflect their risk, and they protect themselves against random losses either by obtaining bad-debt insurance or by risk-spreading. The basis for most formal credit transactions is thus contractual, not moral; such transactions are the product of arms' length bargaining between parties holding adverse economic interests, and the creditor's rights of recovery flow from agreement rather than natural justice. When a creditor, for example, agrees to a limited recourse loan (thereby increasing his risk, presumably in exchange for some compensating benefit), he cannot reasonably press a claim for full recourse upon the moral principle that debtors should repay what they borrow. The creditor assumed the risk as a matter of business judgment; if that judgment proves to be sound, he will profit in the aggregate, notwithstanding incidental default.[125]

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122 Thus, one commentator condemns insolvent disclaimer as "morally wrong," its legality leading to "inequitable results." Note, *Renunciation of a Devise, supra* note 37, at 938-39. On the same basis, other scholars have condemned the effectiveness of spendthrift trusts, *see* J. GRAY, *supra* note 121, at iii-x, creditors' inability to levy against an unexercised power of appointment, *see* Berger, *The General Power of Appointment as an Interest in Property,* 40 NEB. L. REV. 105, 119 (1960), and rules which (in some states) deny creditors the right to contest a will disinheriting their debtor, *see* Recent Decision, *supra* note 121, at 659, 662. Rules governing will contests are discussed *infra* text accompanying note 272-304.

123 "As an honest debtor, he must desire, that his creditors should derive as much benefit from all his 'rights of property' as is possible." *Ex Parte* Fuller, 9 Fed. Cas. 974, 976 (C.C. Mass. 1842) (dictum by Story, J., that a disclaimer in bankruptcy would be fraudulent); *cf. In re* Scrivani, 116 Misc. 2d 204, 208, 455 N.Y.S.2d 505, 509 (Sup. Ct. 1982).

124 This is generally true even of purchase-money creditors, selling goods or services on credit. *See* Welshans, *Using Credit for Profit Making,* 45 HARV. BUS. REV. 141 (Jan.-Feb. 1967). But even when purchase-money credit is offered at "bargain" rates (as some automobile manufacturers have done of late), the profit derived from extending credit is hidden in the purchase price. Therefore, no moral or economic distinction need be drawn between purchase-money creditors and commercial lenders.

125 *See generally* P. SMITH, CONSUMER CREDIT COSTS, 1949-59 (1964). In a provocative article, Professor Countryman argues that where credit is extended without proper investigation of the debtor's credit-worthiness (which he believes to be common), the creditor bears moral responsibility when the debtor defaults. Countryman proposes

If one accepts the proposition that commercial lenders take calculated risks, and that no moral indignation need accompany default, then the question of what sorts of conduct "delay, hinder, or defraud" creditors can be simply answered: any conduct contrary to what the parties have themselves agreed upon. Creditors, in consenting to lend money (and debtors, in consenting to borrow it) may generally set whatever terms they desire—the interest rate will fluctuate accordingly.[126] It would be inefficient, however, to require the parties to negotiate over every detail of the contract for credit. That is where fraudulent conveyance law comes in. Fraudulent conveyance law serves to provide a set of "boilerplate" provisions, read into every contract for credit, that creditors and debtors would generally agree upon. For those creditors and debtors who seek greater (or lesser) protection, the avenue of additional negotiation remains; however, by implying those contractual provisions that most creditors and debtors are presumed to want, fraudulent conveyance law serves to reduce transaction costs.[127]

Consider, by way of illustration, the classic case of the insolvent debtor who makes (rather than receives) a gratuitous transfer. Would creditors generally be willing to grant their debtor leave to divest himself of assets past the point of insolvency—that is, to give away all or part of (what is in effect) the corpus of the loan itself? Plainly not: Creditors rely on the opportunity to recover this corpus when they establish the price of credit. Were the debtor empowered spontaneously to reduce to zero his creditors' opportunity for recovery via gift giving, the transaction would become in effect a *no* recourse loan. All lenders would insist on including a provision against such conduct in every loan agreement before extending credit at a finite interest rate. Fraudulent conveyance law eliminates the need for such a provision by permitting creditors to set aside the insolvent debtor's gratuities.[128]

By contrast, an insolvent debtor's refusal to accept a gratuitous transfer does not reduce his creditors' opportunities for recovery. It simply fails to increase them. Of course, creditors may still wish to

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that improvident credit extension be made a complete defense to recovery and even a cause of action for consequential damages. Countryman, *Improvident Credit Extension: A New Legal Concept Aborning?*, 27 ME. L. REV. 1, 6-7, 17 (1975).

[126] There are, of course, several restraints imposed upon the parties' freedom of contract, such as usury laws and rules which deny debtors the right to waive *ex ante* the discharge in bankruptcy, 11 U.S.C.A. § 524(a) (West 1988). These restraints apply when other policy considerations come into play.

[127] This synopsis of the function of fraudulent conveyance law follows Baird & Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 829-36 (1985). *See also* Clark, *supra* note 121, at 544. For a criticism of this model, see Carlson, *Is Fraudulent Conveyance Law Efficient?*, 9 CARDOZO L. REV. 643 (1987).

[128] U.F.C.A. § 4, 7A U.L.A. 474 (1918); U.F.T.A. § 5, *id.* at 657 (1984).

take into consideration such prospects for spontaneous aggrandizement when they extend credit. Creditors may be able thereby to offer their debtors a lower rate of interest. But unless most creditors would wish to do so, conduct thwarting recovery from such sources should not constitute a fraudulent conveyance.

Would creditors, then, generally wish to rely on (that is, have recourse to) a debtor's inheritance prospects when they set the price of credit? A moment's reflection suggests that they would not. Few debtors have the requisite information at their fingertips; efforts to obtain the information would be inefficient, significantly increasing transaction costs.[129] Moreover, even in the unlikely event that such information were cheaply available—say, if the debtor's family had a long-standing financial relationship with the creditor, or if the debtor's inheritance prospects were notorious—there remains the problem of valuing these expectancies.[130] A will is ambulatory, and while the life-span of the testator can be actuarially estimated, thereby indicating the extent to which interests created under the will must be discounted, the probability that the testator will revoke his will before it "matures" depends upon idiosyncrasy, and hence is indeterminate. Indeed, insolvency and the likelihood of revocation are not independent variables. If the option of post-mortem estate planning (via disclaimer) were foreclosed, the likelihood of pre-mortem estate planning (via disinheritance or spendthrift provision) would rise accordingly. Thus, the protection afforded creditors by a debtor's inheritance prospects, even if cheaply determinable, would remain largely illusory.[131]

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[129] Because wills are private documents prior to probate, creditors cannot routinely determine their contents; nor, for that matter, can beneficiaries. On the impracticality of such investigations by creditors, see generally 6 AMERICAN LAW OF PROPERTY, *supra* note 24, § 26.100, at 546; E. GRISWOLD, SPENDTHRIFT TRUSTS 637 (2d ed. 1947). While the monetary information costs would probably be lower for debtors than for creditors, there might well be additional "interpersonal" costs to such investigations by beneficiaries.

[130] This point is noted in Lockard v. Stephenson, 120 Ala. 641, 642, 24 So. 996, 996-97 (1898); *In re* Shepard's Estate, 170 Pa. 323, 327, 32 A. 1040, 1041 (1895); *see In re* Seal, 261 F. 112 (E.D.N.Y. 1919) (noting the possibility of subsequent disinheritance).

[131] *See infra* text accompanying notes 213, 225-26. An analogy may be drawn here between permitting disclaimer on this basis and permitting insolvents a discharge in bankruptcy: labor and insolvency are also dependent variables. The insolvent whose future wages can be garnished will choose to consume leisure (and welfare benefits) instead. Thus creditors cannot realistically rely on an insolvent's future wages. *See* Jackson, *The Fresh-Start Policy in Bankruptcy*, 98 HARV. L. REV. 1393, 1433-34 (1985). The analysis of creditor reliance presented in the text appears equally pertinent to disclaimers of non-probate assets and inter vivos gifts. *See supra* note 32 and text accompanying note 101. On the other hand, the obscurity and illusory character of expectancies serve to distinguish them from general powers of appointment under fraud theory, even as we equated them under dominion theory. *See supra* text accompanying notes 112-14. On the basis of fraud theory, one might well conclude that creditors ought to be able to

Turning from the abstract to the concrete, evidence indicates that creditors ordinarily show little interest in their debtors' expectancies.[132] Consumer credit dossiers normally report the debtor's credit history, income, assets, debts and obligations.[133] Creditors who finance large purchases generally protect themselves by demanding a security interest in collateral and consequently can disregard the debtor's other resources.[134] If creditors stood in a position to prevent disclaimers by insolvents they would receive, literally, more than they bargained for: The expectancy of inheritance will not be reflected in the price of credit.[135]

There is, however, a possible rejoinder to all of this. In a world of perfect, or cost-free, information, creditors would negotiate a personal interest rate for each debtor, reflecting his individual likelihood of default. But because information in the real world comes at a price, creditors find it more efficient to aggregate risk among debtors, offering credit to all at the same "pre-packaged" rate; or, at most, a creditor will establish several classes of debt, offering a preferential rate to those who qualify. In this way, creditors reduce substantially their transaction costs.[136]

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reach an unexercised general power of appointment, since this is an identifiable tangible asset creditors can efficiently rely on.

[132] *E.g.*, City Nat'l Bank of Birmingham v. Andrews, 355 So. 2d 341, 344 (Ala. 1978); *cf.* Daniel v. Frost, 62 Ga. 697, 707 (1879); *Seal*, 261 F. at 112. Of course, this want of concern might stem from the majority rule permitting insolvent disclaimer, though even under such a rule the prospect of a "bailout" by family members could prompt a creditor's attention. Professor Wellman recalls that creditors' lobbies showed little interest in the drafting of the Uniform Probate Code, even with regard to its creditor non-claim provisions, though they were invited to participate. Telephone interview with Richard Wellman, Professor of Law, University of Georgia (April, 1988).

[133] Some dossiers are more rudimentary than others. On investigations of credit-worthiness, see Rule, Caplovitz & Barker, *The Dossier in Consumer Credit*, in ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE esp. 153-54 (S. Wheeler ed. 1969); Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEX. L. REV. 837, 839-42 (1971); Countryman, *supra* note 125, at 2-6; Hersbergen, *The Improvident Extension of Credit as an Unconscionable Contract*, 23 DRAKE L. REV. 225, 267-69 (1974).

[134] This is almost always true of residential real estate financing, for example.

[135] One court has proscribed insolvent disclaimer on the ground that permitting it would result in a "windfall" to the ultimate recipient, and a concomitant "depriv[ation]" of creditors. *In re* Kalt's Estate, 16 Cal. 2d 807, 811, 108 P.2d 401, 403 (1940); for commentary in accord, see Note, *Renunciation of Testamentary Gift*, *supra* note 37, at 1032; Note, *supra* note 72, at 304. This analysis, however, fails to take into consideration creditors' lack of reliance on expectancies when they establish the price of credit. Having set a higher interest rate on this account, creditors would be the ones receiving a "windfall" if they could capture their debtors' expectancies! *Cf.* Fratcher, *supra* note 90, at 1077.

[136] Alternatively, different creditors may specialize in offering credit to a single class of borrowers who qualify for their set rate. On patterns of rate-setting, see REPORT OF THE NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE U.S. 112-13 (1972). *See also* Countryman, *supra* note 125, at 1-7 (suggesting that creditors frequently pay little attention to credit-worthiness, relying on "volume rather than on thorough credit investigation."). *Cf.* Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 105-06 & n.236 (1986).

While creditors could never efficiently determine the value of each debtor's expectancies, they might be able to calculate at little cost the aggregate value of those expectancies and then factor their collective impact on credit risk into the set price of credit. If creditors followed such a strategy, interest rates would in fact respond to laws granting or denying the right of insolvent disclaimer. A rule permitting insolvent disclaimer would, however, raise interest rates for *all* borrowers within a given class, and debtors who stood to inherit less (tending to be poorer overall) would bear part of the burden of a rule benefiting debtors who stood to inherit more (being wealthier on the whole).[137] In short, by creating a right of insolvent disclaimer, lawmakers would effect a wealth transfer from poorer to richer debtors.

This argument, which commentators have offered *mutatis mutandis* to attack the public utility of spendthrift trusts,[138] might be tested empirically. Given the inverse relationship between insolvency and inheritance, it remains unclear whether creditors would place any value at all on their debtor's prospects of inheritance, and therefore whether a rule permitting insolvent disclaimer would have any measurable impact on interest rates.[139] But even if such effects could be demonstrated, proponents of the argument have garbled their economics. The wealth transfer they decry is actually an efficient one. The key to this efficiency lies in the fact that the market for credit is already imperfect due to the cost of debtor differentiation. The moment creditors set a pre-packaged rate of interest for all debtors, the total demand for credit drops from its Pareto-optimal maxima. Poorer debtors, who are likelier to default, tend to borrow more, attracted by an aggregated rate that is lower than the one they could obtain in the event of differentiation. But more affluent debtors borrow still less, because the aggregated rate is higher than they would otherwise have to pay. Wealthier debtors thus subsidize credit to poorer debtors as a necessary consequence of the high

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137 Studies show a positive correlation between income, overall wealth, and inheritance in America; it is generally agreed that inheritance contributes to economic disparities. *See, e.g.*, L. THUROW, GENERATING INEQUALITY 129-31 (1975).

138 *See* Bushman, *The (In)validity of Spendthrift Trusts*, 47 OR. L. REV. 304, 312, 315-17 (1968); *see also* Callahan, *Trusts and Succession*, 22 WAYNE L. REV. 663, 694 (1976). The problem posed by spendthrift trusts is in this respect closely analogous to the problem of disclaimer; both devices offer protection that varies with the wealth of the debtor.

139 The experimental stumbling block here lies in the difficulty of controlling for other variables which may also influence interest rates, although it might still be possible to design a suitable regression analysis. For general discussions of the responsiveness of interest rates to legal change, see Meckling, *Financial Markets, Default and Bankruptcy: The Rule of the State*, 41 LAW & CONTEMP. PROB. 13, 19-24 (1977); Weston, *Some Economic Fundamentals for an Analysis of Bankruptcy*, 41 LAW & CONTEMP. PROB. 47, 48-51 (1977); Shuchman, *Theory and Reality in Bankruptcy: The Spherical Chicken*, 41 LAW & CONTEMP. PROB. 66, 68-83, 89-91 (1977).

price of the information needed to distinguish them.[140]

Now consider again the matter of disclaimer. If insolvent disclaimer is impermissible, the price of credit will (by hypothesis) drop, but the distortion caused by aggregated rates will increase. As a result, poorer debtors will have a marginally greater incentive to borrow, at rates reduced further by richer debtors' inheritance prospects. But those richer debtors will wish to borrow even less, despite the offer of lower rates, because now their expectancies will be at risk, a risk for which the lower rates do not completely compensate.[141]

By comparison, a rule permitting insolvent disclaimer should spur aggregate borrowing, even though it will cause interest rates to rise. This is so because the distortive subsidy from richer to poorer debtors under set interest rates will be reduced. Put simply, whenever one is faced with the market imperfection of undifferentiated consumer prices, one can increase market efficiency by equalizing suppliers' costs. A rule permitting disclaimer is a step in this direction, making debtors of unequal means more equally likely to default.[142] This procrustean solution to the problem of undifferentiated prices is, in fact, a good illustration of what economists call the principle of the "second best": When a market is saddled with imperfections, the introduction of additional imperfections may actually improve market efficiency.[143] While

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140 This phenomenon, known to economists as the problem of "adverse selection," also occurs in connection with other markets, *e.g.*, the insurance market. *See* R. COOTER & T. ULEN, LAW AND ECONOMICS 66-67 (1988); G. CALABRESI, THE COST OF ACCIDENTS 60-64 (1970); Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1540-46 (1987).

141 This analysis assumes that disclaimants can effectively enjoy the benefits of their disclaimed inheritance, as can the beneficiary of a spendthrift trust. Because disclaimers ordinarily operate to divert bequests to other members of the debtor's immediate family, this is a reasonable assumption. *See supra* note 37 and *infra* text accompanying notes 199-200. But in instances where this does not hold true, the option of disclaimer is subject to an externality and debtors will prefer to take the lower, inefficient interest rate (the externality arising from the fact that the alternative beneficiary is not a party to the credit bargain).

142 It would appear that this analysis is equally pertinent to spendthrift trusts, and that their validity can also be justified on this basis. *Cf. supra* note 138.

143 This statement of the principle of the second best is actually a corollary of the theorem as it is usually presented: If one corrects one imperfection in an imperfect market, one does not necessarily move closer to Pareto-optimality. *See generally* Markovitz, *A Basic Structure for Microeconomic Policy Analysis in Our Worse-Than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, 1975 WIS. L. REV. 950. Though the principle of the second best may seem counter-intuitive, it can be proven mathematically, and is applicable to all complex systems (as Arthur Leff—of course—recognized, *see* Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 476 (1974)). For example, in the realm of neuro-pathology, patients who suffer from the organic "imperfection" of epilepsy may be made "more efficient" by adding the surgical "imperfection" of severance of the corpus callosum that

Pareto-optimality cannot thereby be achieved, it can be more closely approached. And because a right of disclaimer performs this function, it is a right that most parties should wish to include in the contract for credit.

A recognition of the distortion caused by aggregated rates also speaks to policies of wealth distribution. The wealth transfer from poorer to richer debtors brought about by the right of disclaimer actually represents a reduction in the subsidy from richer to poorer debtors that already exists due to rate-setting. For present purposes, however, such issues are beside the point, for fraud theory is concerned with transactional efficiency, not distributive equity.[144]

It should be noted that a rule permitting insolvent disclaimer, while desirable to most debtors and creditors, can still be contracted around in individual instances. If, for whatever reason,[145] a debtor and creditor prefer to bar insolvent disclaimer, they can do so simply by inserting a waiver of that right into the loan agreement.[146] This option ensures that debtors and creditors can always achieve the most efficient solution *for them.*

2. *Involuntary Creditors*

When one turns from voluntary to involuntary extensions of credit, the ethics and economics of the problem change dramatically.[147] The morality of the debtor-creditor relationship that we dismissed in connection with commercial lending re-emerges when

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connects their left and right hemispheres. *See* Gazzaniga, *Review of the Split Brain*, in THE HUMAN BRAIN 89 (M. Wittrock ed. 1977). The principle of the second best is also understood deeply, if unsystematically, by amateur golfers.

144 Since parties can contract around an inefficient fraudulent conveyance law, individual contracts for credit will still reflect the more efficient rule, provided that the marginal benefits exceed transaction costs. Distributive equity, on the other hand, can be imposed, inter alia, by resort to the tax system.

145 For example, where the information costs are negligible, or where a disclaimed inheritance could not be captured and thus is of no value to the debtor. *See supra* note 141.

146 *See* Nielsen v. Cass County Social Servs. Bd., 395 N.W.2d 157, 160 (N.D. 1986) (noting creditor's failure to obtain a waiver). Such waivers are enforceable under the vast majority of disclaimer statutes. *See* UNIF. PROBATE CODE § 2-801(d)(3) (1982). Waivers should also be valid under traditional principles of contract law. Of course, given the illusory character of an expectancy, creditors who wish to rely on the wealth of a debtor's family would receive far better protection by obtaining a guarantee from the testator or other relatives. Barring that possibility, a waiver by the debtor is the next best option.

147 I have separated these two modes of analysis, in the Calabresian manner, for distinct treatment. Professor Dworkin, by contrast, advocates an ideal "recipe" of the two, which he calls "deep equality." This conflict of approach is, in more ways than one, academic here, for I shall argue that in the instant case both morality and economics point toward the same legal rule. *Cf.* Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980); Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980); *see also* R. POSNER, ECONOMIC ANALYSIS OF LAW 238-44 (3d ed. 1986). Of

we consider persons who have become creditors against their will.[148] Such creditors have not bargained with the debtor; they are the victims of negligence or circumstance, who take the debtor as they find him. Thus the theory that fraudulent conveyance law serves simply to streamline the bargaining process breaks down in this context.[149]

Analyzed on a moral plane, the proscription of insolvent disclaimer against involuntary creditors can readily be justified. Having incurred a debt without the consent of his creditor, the debtor *arguendo* has an equitable obligation to restore the *status quo ante* with every means at his disposal.[150] There is, if nothing else, poetic justice in a rule that applies the debtor's bonanza to mitigate his creditor's catastrophe. On this basis one could also deduce a moral obligation to accept inter vivos gifts, despite the differences revealed by dominion theory.[151]

Proceeding from ethical concerns to the dismal science, one can also examine insolvent disclaimer against involuntary creditors from the standpoint of economic efficiency. Here again, the analysis must differ from that which applied to commercial lending. Bargaining efficiency has naught to do with extensions of credit that were never agreed to at all. In this context, fraudulent conveyance law should function to allocate efficiently the costs of involuntary credit and to modulate efficiently the debtor's propensity to acquire involuntary debts.

Consider tort claims. The primary economic function of the law of torts is to reduce the total cost of accidental injury by discouraging dangerous activities that may be beneficial to the tortfeasor,

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course, strict utilitarians deny even the existence of a moral justice distinct from utility. *See, e.g.*, *infra* note 228.

148 The most obvious examples of involuntary creditors are tort victims, alimony creditors, and child support creditors. Tax claimants might also be so classified. *See infra* text accompanying note 169. For general discussions of the moral framework of tort liability, see G. CALABRESI, *supra* note 140, at 291-308; Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

149 *But see* Baird & Jackson, *supra* note 127, at 835 n.20 (arguing that fraud theory analysis should remain the same from the standpoint of both voluntary and involuntary credit).

150 This equitable obligation appears strongest in the context of debtor-creditor relationships created by the debtor's intentionally wrongful conduct (*e.g.*, intentional tort claims) and weakest where tbe relationship arose through no fault of the debtor (*e.g.*, no-fault support claims). Given the moral basis of the involuntary debtor-creditor relationship, an involuntary creditor could conceivably seek recourse to an equitable constructive trust over disclaimed assets, even without a statutory mandate. This potentially promising avenue for relief has not been explored in the published cases. On the principles governing imposition of a constructive trust, see A. SCOTT, *supra* note 111, §§ 461-64, at 2311-25.

151 *See supra* text accompanying notes 110-11. This analysis also pertains to disclaimers of non-probate assets. *See supra* note 32.

but harmful to others.[152] Were tortfeasors free from liability, and thereby able to externalize the harm flowing from their actions, the frequency of dangerous activity would rise to an economically inefficient level. Tort liability reduces such activity to an efficient level by forcing tortfeasors to bear the cost of the injuries they cause.[153]

So far, so good. But tortfeasors may still be able to externalize costs, despite the existence of liability rules, under certain conditions. The most common such condition is liability insurance. The more complete, or "perfect," one's insurance coverage, the greater one's incentive to engage in the insured activity. This perverse incentive is known as the "moral hazard" of insurance.[154] Insurers seek to alleviate moral hazard by building limits on coverage into every insurance contract, such as the deductibility feature of automobile insurance.

Now consider the tortfeasor who is insolvent or who is rendered so by his tortious conduct. Like the insured, the insolvent is insulated from liability over and above the level of his assets. He may therefore have an incentive to engage in dangerous activities. There exists, in other words, a moral hazard of insolvency that fraudulent conveyance law should strive to reduce for the sake of social cost efficiency. A rule barring insolvent disclaimer against tort-creditors serves this end. If potential tortfeasors know their expectancies are at risk, they will be that much less prone to engage in tortious conduct.[155]

If one turns to the other principal varieties of involuntary credit, namely alimony and child support, deterrence becomes irrelevant to the analysis: Courts do not award alimony and child support in order to reduce the incidence of divorce. Here, the only relevant economic consideration is efficient distribution of the cost of dissolution of the family.[156] On the assumption that these costs

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152 G. CALABRESI, *supra* note 140, at 26, 68-75; R. POSNER, *supra* note 147, at 186-87; *cf.* Veljanovski, *The Economic Theory of Tort Liability—Toward a Corrective Justice Approach*, in THE ECONOMIC APPROACH TO LAW 126-27 (P. Burrows & C. Veljanovski eds. 1981); *see generally* S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

153 In order for the level of dangerous activity thus achieved to be economically efficient, the duty of care that established liability must itself be set at an efficient level, *i.e.*, where the marginal benefit of the care equals the marginal cost of accident avoidance. R. POSNER, *supra* note 147, at 147-52, 160-65. It is sometimes (if dubiously) assumed that the negligence standard is established at this level. Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972).

154 On the theory of moral hazard, see Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531 (1968).

155 This again assumes that, by disclaiming his inheritance, the debtor will be able to enjoy its benefits. *See supra* note 37 and *infra* text accompanying notes 199-200. Were he unable to do so, the debtor would have no incentive to disclaim, and a rule barring disclaimer would have no effect on his conduct.

156 Efficient cost distribution is also a secondary consideration of tort law, *see* G.

are more easily borne by the deeper pocket,[157] courts award alimony and child support on the basis of need and ability to pay.[158] Having been ruled the better cost bearer, the alimony or child support debtor who receives an inheritance finds his pocket deepened further.[159] *A fortiori*, he is better equipped to bear the cost of marital dissolution after inheritance, which he could shift to the creditor if disclaimer were permitted.[160] Thus, from the standpoint of efficient cost distribution, a rule barring disclaimer against alimony and child support creditors appears appropriate. The same analysis pertains to offers of inter vivos gifts. In each instance, morality and economic efficiency point the law in the same direction.

In singling out involuntary creditors for special treatment under the law, this critique stands in good company. Other commentators have drawn the same conclusion in the course of studying related problems. Professor Scott defended the legitimacy of spendthrift trusts, but only so long as they remained ineffective

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CALABRESI, *supra* note 140, at 26-28, which may conflict with the primary aim of cost avoidance. *Cf.* R. CLARK, CORPORATE LAW 78-79 (1986). Professor Clark argues that in the analogous context of limited liability for corporate shareholders, a rule requiring insurance (which accomplishes efficient cost spreading) could serve as an efficient *substitute* for a rule permitting tort victims to pierce the corporate veil. Surely, Professor Clark will agree that perfect insurance is undesirable because of the moral bazard that it poses. *See* G. CALABRESI, *supra* note 140, at 43-44, 64-67. Therefore, the issue of the desirability of limited liability—and, by analogy, of rules permitting insolvent disclaimer—will always lurk beyond the horizon of the protection that insurance provides.

157 This hypothesis, known to economists as the decreasing marginal utility of wealth, is also reflected in other areas of the law, such as progressive taxation. One should note that there have always been, and there remain today, wealthy persons who disputed this hypothesis. Then, as now, their protests have met with skepticism, as when an anonymous eighteenth-century Englishman marvelled that some of his countrymen acted "as if our Possessions were become dearer in Proportion as they increased." THOUGHTS ON CAPITAL PUNISHMENT 40 (London 1770). For more recent literature on the subject, see G. CALABRESI, *supra* note 140, at 39-41. The goal of efficient cost distribution also encompasses avoidance of social cost. In this regard, alimony and child support creditors could become state charges, and public welfare is less cost efficient than private support.

158 *See, e.g.*, H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 182-87, 442-47, 488-98 (1968). In Orr v. Orr, 440 U.S. 268 (1979), the Supreme Court declared unconstitutional a statute that limited alimony awards to wives. It is sometimes suggested that the "deep pocket" method of cost distribution is also reflected, *sotto voce*, in jury awards in tort cases. *See* G. CALABRESI, *supra* note 140, at 283 n.9. To the extent that this is true, the analysis of alimony and child support debtors is also pertinent to disclaimer rules governing tort debtors.

159 Once again, we assume that the disclaimant is able in practice to enjoy the disclaimed property. Were this not so, one would have to compare the depth of the alimony or child support creditor's pocket with that of the alternative beneficiary, and no uniform answer would result.

160 Though it might appear that an *insolvent* disclaimant is *ipso facto* a shallow pocket, the creditor may also be in dire straits. At any rate, a divorce or support decree is subject to modification upon changed circumstances, so the relative depths of the parties' pockets can be re-measured at the time of the inheritance. *See* H. CLARK, JR., *supra* note 158, at 443-44 & nn.29-30.

against involuntary creditors. Scott thought it would be "shocking indeed" to permit the debtor to continue to enjoy a spendthrift trust while a creditor "who . . . has no opportunity to investigate the [debtor's] credit" remained unpaid.[161] Scott's caveat has become law, in whole or in part, in many states.[162] Similarly, scholars have argued that involuntary creditors of undercapitalized corporate debtors should be permitted to pierce the corporate veil to reach the assets of shareholders. Such creditors likewise never agreed to rely on shareholders' limited liability.[163] This too has been the trend of the law, *de facto* if not *de jure.*[164] The point has also been debated in connection with exemption policy and the discharge in bankruptcy, although the trend of the law in these areas is less clear.[165]

Nonetheless, there remain some difficulties with a bifurcated approach to insolvent disclaimer. Such an approach would carry in its train the additional (if marginal) administrative cost of judicially

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161 A. SCOTT, *supra* note 111, §§ 157, 157.1, 157.5, at 788-800. Professor Griswold made the same point. *See* E. GRISWOLD, *supra* note 129, at 396-400, 442-44. *See also* Note, *Tort Liability of the Beneficiary of a Spendthrift Trust*, 57 DICK. L. REV. 220, 221 (1953); Note, *Spendthrift Trusts: Attachability of a Beneficiary's Interest in Satisfaction of a Tort Claim*, 28 NOTRE DAME LAW. 509, 515 (1953); Note, *Trusts: Tort Claims as an Exception to the Spendthrift Trust Doctrine*, 17 OKLA. L. REV. 235, 237 (1964); Note, *Trusts: Limitations on the Immunities of Spendthrift Trusts: Support and Alimony Claims*, 44 CALIF. L. REV. 615 (1956).

162 The caveat is incorporated into Professor Griswold's model spendthrift trust act, E. GRISWOLD, *supra* note 129, § 2(c), at 648. *See also* RESTATEMENT (SECOND) OF TRUSTS § 157 & comment (1959). On the present state of the law, see 5 W. PAGE, *supra* note 6, § 44.31, at 484-85 nn.32-35; Bushman, *supra* note 138, at 308-09; Annotation, 91 A.L.R.2d 262 (1963); A. SCOTT, *supra* note 111, §§ 157.1, 157.5 & n.1, at 789-800.

163 *See, e.g.*, Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 984-85 (1971). *See also* Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1857-59 (1987).

164 Frey, *Legal Analysis and the "De Facto" Doctrine*, 100 U. PA. L. REV. 1153, 1176 (1952); Hackney & Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837, 867-69 (1982). Courts have not, however, been willing to pierce the corporate veil in tort cases where the *sole* justification for doing so is involuntary insolvency.

165 *Cf.* Vukowich, *The Bankruptcy Commission's Proposal Regarding Bankrupts' Exemption Rights*, 63 CALIF. L. REV. 1439, 1474-77 (1975); T. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 266, 278-79 (1986); Hallinan, *supra* note 136, at 131-32; R. CLARK, *supra* note 156, at 78-81. Under state exemption laws, involuntary creditors can sometimes reach exempt property, see T. JACKSON, *supra*, at 266 n.30, and some involuntary creditor claims pass through bankruptcy as well: tax claims, alimony and child support claims, and willful injury (but not negligence) claims are all excepted from discharge. 11 U.S.C.A. § 523(a)(1), (5), & (6) (West Supp. 1988). Under the Bankruptcy Act of 1898, unliquidated tort claims were also non-dischargeable, and the distinction was justified on both moral and economic grounds; the new Bankruptcy Code eliminates this exception from discharge. Hallinan, *supra* note 136, at 60-65, 87-88 & n.164. Curiously, scholars have never proposed such a bifurcated analysis for unexercised general powers of appointment, an area to which it could be logically applied. *Arguendo*, involuntary creditors have a stronger claim to the corpus of an unexercised general power than do ordinary contract creditors. Such a special claim has never been advocated or enacted in any state, although some states now permit all creditors to reach unexercised general powers. *See supra* note 113.

evaluating the standing of petitioning creditors to set a disclaimer aside.[166] In the process of differentiating voluntary from involuntary creditors, lawmakers would also have to wrestle with some hard cases: There is a grey area in between. Take, for instance, emergency services creditors and essential support creditors. While credit for emergency medical attention and institutional care is, strictly speaking, extended voluntarily, there may nonetheless be an element of duress involved. Should such creditors have the right to prevent a disclaimer? On the one hand, these are commercial creditors who, like any other contract creditor, can make a profit despite incidental default by factoring the risk into the price of their services. On the other hand, like torts, the services provided by these commercial creditors involve social costs. When an emergency services creditor denies treatment to a patient with a high risk of default, it can externalize the social cost of such behavior. Thus, a rule barring disclaimer against such creditors might help to promote socially beneficial conduct.[167] The question, it seems, can be argued both ways.[168]

Tax and other welfare service creditors present similar conceptual difficulties. While these can be conceived at one level as involuntary creditors, at another level they are not. We do, after all, live in a democracy, where taxes and welfare are the products of legislative action. Tax and welfare agencies are really (social) contract creditors, and the opportunity for disclaimer depends upon the terms of the (political) bargain. On the one hand, it would be relatively simple to factor the risk of disclaimer into the "cost" of taxation or welfare. With a universal pool of taxpayers to draw upon, government is the ideal risk spreader. On the other hand, as a matter of social policy, it might well be deemed inequitable to relieve a disclaimant of his share of the tax burden or to permit him to receive welfare benefits.[169] Once again, the argument has two sides.

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166 Under the approach suggested here, involuntary creditors could bar disclaimer up to the amount necessary to satisfy their claims *in toto*, whether the debt was in the form of a set liability award or, as in the case of alimony, a prospective stream of payments whose present value could be actuarially estimated. The result may be that the debtor would still have the right to disclaim part of his inheritance, but partial disclaimer is already permissible in virtually every state. *See* UNIF. PROBATE CODE § 2-801(a) (1982). Those assets that the beneficiary non-disclaimed by court order should also be subject to a statutory lien in favor of the petitioning involuntary creditors, in order to prevent contract creditors from free-riding on involuntary creditors' rights.

167 Extension of these services may be conceptualized as "inverse torts" for purposes of social cost avoidance analysis.

168 By analogy, emergency service and support creditors are empowered to reach spendthrift trusts in some jurisdictions. A. SCOTT, *supra* note 111, § 157.2, at 794-96; RESTATEMENT (SECOND) OF TRUSTS § 157(b) & comment (b) (1957).

169 This appears to have been the substantive basis for the court's decision in *Scrivani*. *See supra* text accompanying notes 79-80; *see also* Nielsen v. Cass County Social

In sum, a rule bifurcating the treatment of insolvent disclaimer would require thoughtful refinement. But in that, of course, the doctrine of disclaimer would hardly differ from the balance of the probate code. Penumbrae such as those identified here surround many, perhaps every, principle of law. Uncertainty in the application of a selective bar on insolvent disclaimer could be minimized by way of precise legislative definition of the creditors who qualified. As of yet, however, no state has undertaken to develop such a rule, with one limited exception: New York's special remedy for Medicaid creditors.[170]

3. *Exceptions*

However one resolves these issues, there remains the matter of exceptions. As previously noted, cases that permit insolvent disclaimer frequently require that it be unaccompanied by collusion or creditor reliance.[171] Should laws governing the insolvent beneficiary's right to disclaim be *per se* rules? Or should those rules be qualified? And, if so, how?

We have already considered generally the problem of reliance. Simply put, if a voluntary creditor wishes to rely on his debtor's prospects of inheritance, efficiency dictates that he be required to affirm that reliance, by soliciting from the debtor a waiver of his right to disclaim.[172] Given the enforceability of such waivers, no further exception for creditors' reliance on their debtors' expectancies is necessary. Occasionally, however, creditors may rely not on their debtors' *prospects* of inheriting property, but rather on their os-

Servs. Bd., 395 N.W.2d 157, 161 (N.D. 1986) (dissent). By analogy, tax creditors and welfare creditors have been able to reach spendthrift trusts in some jurisdictions. W. PAGE, *supra* note 6, § 44.31 at 485 nn.34-35; A. SCOTT, *supra* note 111, § 157.4, at 797-99; RESTATEMENT (SECOND) OF TRUSTS, § 157(d) & comment (d) (1957).

170 *In re* Scrivani, 116 Misc. 2d 204, 455 N.Y.S.2d 505 (Sup. Ct. 1982), discussed *supra* text accompanying notes 77-87. It should be pointed out, however, that as a technical matter the court in *Scrivani* declined to bifurcate the law of insolvent disclaimer, creating instead the special remedy of permitting the creditor to terminate its assistance to the disclaimant. *See supra* notes 83-84 and accompanying text. *See also infra* note 269 (extending this remedy to a related problem). *Contra* the result in *Scrivani*, see Nielsen v. Cass County Social Servs. Bd., 395 N.W.2d at 157.

171 *See supra* notes 34-37 and accompanying text. In defense of these traditional exceptions, see Note, *Renunciation, supra* note 90, at 157-59.

172 The ease with which a creditor can demand a waiver, coupled with the fact that creditors will not ordinarily rely on expectancies, *see supra* text accompanying notes 129-35, dictate this result. *See In re* Seal, 261 F. 112 (E.D.N.Y. 1919), where a debtor allegedly borrowed money upon the representation of his ability to repay out of a forthcoming inheritance and then declared bankruptcy before the testator's death. *Held*, not a fraud on the bankruptcy court because, inter alia, the testator "could at any time have changed her will." *Id.* at 112. Whether such an informal representation could fall under the "reliance" exception is unclear. *See supra* note 37.

tensible *present* rights to such property. In *Daniel v. Frost*,[173] a creditor extended credit to the debtor while he was in possession of land that actually belonged to his father-in-law. The debtor subsequently inherited this property, but sought to disclaim it in order to defeat his creditor. The court held the disclaimer ineffective: The debtor's possession of the property as ostensible owner was an "equitable fact," sufficient in the eyes of the court to bar disclaimer once the debtor actually inherited the property.[174]

The holding in *Frost* seems questionable on policy grounds. The elaborate systems for recording title to real property, found in every state, operate to avoid precisely the sort of ostensible ownership problem that arose in that case. Creditors should be aware that not all persons own the real property they possess. If a creditor neglects to check the title record, he has only himself to blame. When a creditor relies on his debtors' *misrepresentation* of ownership, however, the argument for barring subsequent disclaimer grows stronger. It would seem economically efficient to permit a creditor to rely on his debtors' averments, provided that the rights of third parties are not at issue.[175]

The presence of collusion raises other concerns. Though courts have not spelled out precisely what constitutes collusion,[176] the caveat presumably covers arrangements that permit the disclaimant to retain beneficial enjoyment of the disclaimed property (say, by living in a disclaimed residence rent free), as well as agreements to pass the property on to the disclaimant's favored recipients. From the standpoint of dominion theory, there is a clear distinction between these scenarios and a quasi-conveyance. Via a collusive arrangement, the disclaimant exercises effective control over the disclaimed property, either capturing its benefits or channeling them to chosen others. This produces a substantively different outcome from a non-collusive disclaimer, where the decedent's intent remains operative. Dominion theory thus offers a possible rationale for the caveat against collusion.[177]

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[173] 62 Ga. 697 (1897).

[174] *Id.* at 708-09.

[175] By contrast, a debtor's misrepresentation that his property is not mortgaged will not give a creditor a claim equal to that of the third party mortgagee (so long as the mortgage has been recorded). In *Frost*, third party claims were not involved. In the case of personal property for which no title record exists, the efficiency of a right of reliance upon representations of ownership is even greater.

[176] *See supra* note 37.

[177] *See supra* text accompanying notes 116-18. Were we thus to implement dominion theory, it might well be reasonable to go a step further and rebuttably presume the presence of collusion, given that it is probably common, but remains difficult to prove. *See supra* note 37. Alternatively, the burden of proof could shift in the event of an "unnatural" disclaimer, *e.g.*, one that leaves the bequest in the hands of ascendants or collat-

As a matter of fraud theory, however, there seems to be no justification for this caveat. When an insolvent devisee chooses noncollusively to disclaim his inheritance, an alternative beneficiary receives the property instead of the creditor. Were we to view the transfer as a fraudulent conveyance, we would say that the disclaimant here is being "generous before he is just," otherwise known as "constructive fraud."[178] When a disclaimant retains control over the disclaimed property through willful collusion, however, he is guilty of "actual fraud." Now, when a court bars only collusive disclaimers it is, in effect, proscribing only one form of fraud in connection with inherited assets. Yet, the law of fraudulent conveyances has traditionally recoguized no qualitative distinction between the two.[179]

Historically, courts conceived of constructive fraud as conduct from which fraudulent intent could be inferred, thereby equating it with actual fraud.[180] The Uniform Fraudulent Conveyances Act abandons the inferred intent theory and instead views constructive fraud as conduct from which fraudulent intent should be presumed because the conduct "wrong[s] creditors," even "where an intent to defraud . . . does not in fact exist."[181] Nonetheless, the Uniform Act maintains the equation of the two strains of fraud by also justifying actual fraud on the basis of harm done to creditors.[182] The point is that voluntary creditors sustain no harm if collusion is present, for they have not bargained for the right to reach disclaimed assets in

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erals rather than descendants. On the general principles governing allocation of burden of proof, see C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 785-89, esp. 787 (2d ed. 1972).

178 Neeld's Estate, 38 Pa. D. & C. 381, 386-87, 389 (Phila. County Ct. 1940) (equating insolvent disclaimer with an Article 4 (constructive fraud) violation of the Uniform Fraudulent Conveyance Act); *cf. In re* Kalt's Estate, 16 Cal. 2d 807, 810, 108 P.2d 401, 402-03 (1940) (fraudulent intent admitted by debtor); Stein v. Brown, 18 Ohio St. 3d 305, 308 & n.1, 480 N.E.2d 1121, 1123 & n.1 (1985) (proceeding on a fraudulent intent theory absent evidence of insolvency, but noting that a constructive fraud theory would otherwise apply); Estate of Reed, 566 P.2d 587, 588-90, 592-93 (Wyo. 1977) (proceeding on a fraudulent intent theory with an incomplete trial record; dissent objects to process but notes potential applicability of constructive fraud theory).

179 U.F.C.A. §§ 4,7, 7A U.L.A. 474, 509 (1918). One exception, found in some states, is the denial of reimbursement to third parties who maintain property conveyed to them when they participate in actual, and not merely constructive, fraud. This distinctive treatment is criticized by Professor Glenn. *See* 1 G. GLENN, *supra* note 5, §§ 250-55, at 431-36.

180 This reasoning underlies all of the early cases, beginning with dicta in Twyne's Case, 76 Eng. Rep. 809 (1601), which held conveyances for inadequate consideration fraudulent, despite the requirement of actual fraud under the statute of 13 Eliz. ch. 5 (1570).

181 U.F.C.A. Prefatory Note, 7A U.L.A. 427-29 (1918).

182 *Id.* For a discussion of the theory of constructive fraud, see McCoid, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration*, 62 TEX. L. REV. 639 (1983).

any event.[183] Though dominion theory suggests distinctions between the two situations, they are distinctions without a difference from the standpoint of fraud theory.

We may, indeed, carry this logic one step further: Once we have concluded that the law ought to permit insolvent disclaimer in certain cases, there is no reason in fraud theory to deny debtors the right simply to accept the gratuitous transfer outright in those same cases, exempt from creditor levy. After all, if contract creditors have not set their interest rates in reliance upon inheritance, why should insolvent debtors have to quasi-convey (or collusively convey) the property away? Creditors have no cause for complaint, even if the inheritance remains overtly in the debtor's hands. While it might appear "unseemly" to permit a debtor to benefit from an inheritance while his debts go unpaid, this image dissolves once we discern the commercial nature of the bargain.[184]

At the same time, a rule that exempts inheritances from levy could entail administrative costs. Under the approach suggested here, inherited assets would be exempt from levy only by pre-inheritance (*i.e.*, non-relying) contract creditors. Courts would have to establish the status of each creditor who sought a writ of execution. What is more, an exemption for inherited assets could pose formidable tracing problems. Debtors would have to segregate such assets to ensure that their origin could be identified. But assuming that these practical difficulties could be surmounted,[185] the lessons of fraud theory need not be limited to the law of disclaimer alone.

C. Inheritance Theory and the Problem of Intent

When one examines the problem of the insolvent heir from the perspective of gratuitous transfers law, the focus of the analysis shifts a bit. Here, the spotlight is trained on the nexus between beneficiary and benefactor, instead of the nexus between beneficiary and his creditor. Modern courts conceive of inheritance as the product of a voluntary relation: The gratuitous transfer is not a unilateral action, but a bilateral *transaction*. As under contract law, there

183 *See supra* text accompanying notes 129-35.

184 *See supra* text accompanying notes 124-25. Once again, the analogy to the policy debate over spendthrift trusts is obvious.

185 Even if these administrative difficulties were compelling, insolvent debtors could still be permitted to assign the inheritance to whomever they chose, even though under dominion theory this act would be deemed a "conveyance." Fraud theory suggests no reason to treat assignments differently from disclaimers, and in this context no creditor-identification or tracing problems could arise. Traditionally, however, the law has distingnished insolvent assignments from disclaimers. *See supra* note 103 and accompanying text.

must be a "meeting of the minds."[186] Thus, in judging the nature and execution of a gratuitous transfer, courts place paramount emphasis on the intentions of parties.

1. *Beneficiary*

Given this legal foundation, one commentator has asserted that, whatever the result dictated by fraud theory, courts cannot tamper with the beneficiary's "absolute right" to refuse an offer.[187] Absolute rights, however, are not the stuff of law. Neither history[188] nor current theory supports the notion that citizens must enjoy complete transactional liberty. Take the law of contract. Just as one may be denied the right to contract when one wishes to,[189] one may be effectively obligated, under certain circumstances, to contract when one would prefer not to. Quasi-contract and promissory estoppel are examples of doctrines under which a party, due to his own conduct, is in effect obliged to contract against his will.[190] By analogy, obligating a beneficiary to accept the offer of a gratuity due to his own conduct of having incurred debts beyond his ability to satisfy creditors would not contravene hallowed principles of transactional autonomy.

Transactional liberty, then, is not boundless; but neither is it a nonsense. The mirror image of the argument that debtors have an absolute right to transactional autonomy is the proposition that lawmakers can and should establish rules barring insolvent disclaimer in the debtor's own interest. As one commentator argues, "In the long run, the debtor's economic interests are subserved, though his

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186 Welch v. Sackett, 12 Wis. 243, 255 (1860); 6 W. PAGE, *supra* note 6, § 49.4, at 41-42; Note and Commentary, 25 MICH. L. REV. 171 (1926). *But see* 4 H. TIFFANY, *supra* note 92, §§ 1055-58; Tiffany, *Delivery and Acceptance of Deeds*, 17 MICH. L. REV. 103, 120-26 (1918).

187 Note, *Renunciation*, *supra* note 90, at 159. Defenders of creditors' rights have tended to disavow the transactional conception of gratuitous transfers in favor of Professor Tiffany's view of them as actions by the benefactor, *see supra* note 186, making the beneficiary's intent irrelevant. *See, e.g.*, Note, *Renunciation of a Devise*, *supra* note 37, at 943, 945-47; Recent Case, 12 MO. L. REV. 69 (1947). In light of the statutory abolition of the feudal treatment of heirship, *see supra* note 49 and accompanying text, this theoretical view lacks modern judicial support.

188 *See, e.g.*, M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 160-73 (1977).

189 The power to accept a contract is denied where the contract offer violates public policy. RESTATEMENT (SECOND) OF CONTRACT § 36, comment (c).

190 *See, e.g.*, Williston:

> Quasi contractual obligations are imposed by the law for the purpose of bringing about justice without reference to the intention of the parties. The only apparent restriction upon the power of the law to create such obligations is that they must be of such a sort as would have been appropriately enforced under common-law procedure by a contractual action.

1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 3A, at 13 (3d ed. 1957).

individual pride may not be, by allowing the creditors to satisfy their claims out of this property, thus saving the shortsighted debtor any further harassing by these particular satisfied creditors."[191] This paternalistic rationale has found its way into the reasoning of at least one case.[192] Assuming for the moment that such paternalism were warranted, the logic of its application to bar insolvent disclaim is questionable. The debtor might wish to disclaim property in anticipation of a workout or a bankruptcy proceeding, in which event state and federal law would protect him from further harassment.[193] Thus, disclaimer might well be in the debtor's interest. But the assumption that lawmakers should consider such issues when setting rules of disclaimer is itself contrary to established principles of justice. Though the law denies complete transactional freedom, it has yet to impose transactional slavery. Lawmakers of our era have intruded on the self-determination of transacting parties only when justified by extraordinary circumstances,[194] and here the utility of the intrusion is not even clear.

In order to determine whether an abridgement of the beneficiary's transactional autonomy is justifiable as a matter of (nonpaternal) policy, one must weigh the harm he will suffer by such an abridgement against the harm unabridged autonomy would do to his creditors. In denying insolvents the right to disclaim, the Supreme Court of California baldly declared that a beneficiary can "without hardship . . . avail himself of a bequest."[195] Against the perceived equities in favor of protecting creditors' rights, the court could find no countervailing equities in favor of defending the beneficiary's freedom to refuse an offer. Yet this conclusion is not so manifest that it can be accepted without analysis.

One can hypothesize a variety of reasons why beneficiaries might prefer to decline a gratuitous transfer, apart from a desire to avoid paying their creditors. The right of disclaimer originally de-

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191 Comment, *supra* note 88, at 302 n.20.

192 *See In re* Kalt's Estate, 16 Cal. 2d 807, 813, 108 P.2d 401, 404 (1940).

193 11 U.S.C.A. §§ 362(a)(6), 524(a)(2) (West 1988). Following a workout (which legally terminates the debtor-creditor relationship), harassment would be actionable in tort as a violation of privacy. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 802-18 (1971). Once again, we assume that the debtor can in practice enjoy the disclaimed property. *See supra* note 37 and *infra* text accompanying notes 199-200. Thus, something more than "individual pride" is at stake.

194 For example, social welfare contracts are imposed upon workers because they tend to discount their long-term future interest. *See* Diamond, *A Framework for Social Security Analysis*, 8 J. PUB. ECON. 275 (1977). No similar human failing is apparent to justify paternalism in the instant situation, and none are cited in the sources urging this approach. *See supra* notes 191-92. *See generally* Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

195 *In re* Kalt's Estate, 16 Cal. 2d at 813, 108 P.2d at 404; *cf. In re* Scrivani, 116 Misc. 2d 204, 208, 455 N.Y.S.2d 505, 509 (Sup. Ct. 1982).

veloped to permit beneficiaries to deflect forceable transfers of worthless property, such as property held subject to a trust.[196] Yet, some beneficiaries might find even property of objective value to be subjectively undesirable.[197] As one early American court noted, "Riches are not to be forced on people. . . . Property is a burden as well as a benefit, and whoever is unwilling to bear the burden for the sake of the benefit, is at liberty to decline both."[198] But this rationale for disclaimer is inadequate to counter a creditor's claim. Creditors will gladly unburden the beneficiary of the gratuity directly; he need not suffer the imposition any longer than the time needed to deliver the property to his creditors' doorsteps.

The most common modern inducement for disclaimer is family wealth planning. By declining to accept a bequest, the disclaimant, in effect, exercises his own donative intent. In the process, he may succeed in skipping a generation's worth of inheritance taxes.[199] This motive could exist whether or not the disclaimant was himself financially embarrassed. Under classical principles of fraud theory, however, the desire for effective family wealth planning fails to outweigh creditors' claims. It has long been firmly settled that, once insolvent, a debtor loses his right to pursue his donative inclinations.[200] While not necessarily painless, this loss of right causes no net hardship to the disclaimant, for it leaves him no worse off than if he had never received the bequest in the first place.

Alternatively, a beneficiary may wish to relinquish a gratuitous transfer simply in order to assert his self-reliance.[201] Yet here again,

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196 *See supra* note 22.

197 New England transcendentalists such as Henry David Thoreau eschewed the world of material goods. *See* H. THOREAU, WALDEN, OR LIFE IN THE WOODS 37 (1929) (1st ed. 1854) ("And when the farmer has got his house, he may not be the richer but the poorer for it, and it be the house that has got him."). This view is also taken by a number of current religious and philosophical movements, such as the Amish sect. *See* E. SCHWIEDER & D. SCHWIEDER, A PECULIAR PEOPLE: IOWA'S OLD ORDER AMISH 51-53 (1975); *see also* J. STEINBECK, TORTILLA FLAT 17, 28-29, 260-61 (1935); A. CARNEGIE, THE GOSPEL OF WEALTH 20-21, 25 (E. Kirkland ed. 1962) ("I would as soon leave to my son a curse as the almighty dollar.").

198 Daniel v. Frost, 62 Ga. 697, 706 (1879).

199 Since he knows the identity of the alternative beneficiary, the primary beneficiary can decide whether that person is someone he wishes to benefit ahead of himself. On the family wealth planning implications of disclaimers, *see generally* Note, *Disclaimer, supra* note 90; Martin, *supra* note 34.

200 U.F.C.A. § 4, 7A U.L.A. 474 (1918). Whence the maxim that the debtor must be "just before he is generous," even absent fraudulent intent. The wish to avoid gratuitous transfer taxes is of course subordinate to the disclaimant's desire to benefit others, for the tax never exceeds the gratuity. This aim merely fortifies the disclaimant's donative intent and will never exist in isolation. *Cf. In re* Scrivani, 116 Misc. 2d 204, 208, 455 N.Y.S.2d 504, 509 (Sup. Ct. 1982).

201 This position was advocated by Ralph Waldo Emerson, another transcendentalist. *See* 3 R. EMERSON, *Gifts*, in THE COLLECTED WORKS OF RALPH WALDO EMERSON 93-96 (J. Slater ed. 1983).

this rather esoteric desire seems of little weight against creditors' claims. Arguably, a beneficiary who has fallen into debt has already, in a sense, abandoned his self-reliance. But even assuming that he still has a legitimate claim to this privilege, a beneficiary who is forced to accept a gratuity can maintain his self-reliance simply by undertaking to repay his benefactor (or his estate). The gratuitous transfer thereby becomes a wash from the beneficiary's point of view; his net position remains effectively unchanged.

The most persuasive argument for granting beneficiaries an unqualified right of refusal is that acceptance of a gratuity may entail onerous moral obligations. The fact, if not the law, of the matter is that few transfers are gratuitous in a literal sense. They are, in the main, exchanges for value of various sorts not formally recognized by the legal system,[202] but which nonetheless remain enforceable via extra-legal means of social control. This reality has long been acknowledged in the sociological[203] and economic[204] literature. When viewed in a practical light, the distinction between a contract and a gratuitous transfer is thus blurrier than it appears at first glance.[205]

Now, if we acknowledge that gratuitous transfers may come with strings attached, often of a deeply personal nature, it becomes a serious question whether even involuntary creditors ought to have authority to compel acceptance. By tradition, our legal system has refused to coerce citizens to undertake laborious or intimate activities against their will. The degradation and intrusiveness inherent in such coercion is of sufficient gravity to have occasioned constitu-

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202 The concept of moral obligation is nonetheless not alien to the common law. *See* 1A A. CORBIN, ON CONTRACTS §§ 230-32, at 340-52 (1963); 1 G. GLENN, *supra* note 5, §§ 264-64a, at 451-52.

203 The classic studies of the social psychology and cultural anthropology of gratuitous transfers are C. LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 52-68 (rev. ed. 1969); M. MAUSS, THE GIFT (1954); G. SIMMEL, *Faithfulness and Gratitude,* in THE SOCIOLOGY OF GEORGE SIMMEL 379-95 (K. Wolff ed. 1950); Schwartz, *The Social Psychology of the Gift,* 73 AM. J. SOCIOLOGY 1 (1967).

204 Economic writing (rooted, as always, in utilitarian philosophy) also has emphasized interdependent utility functions to explain gratuity. *See* K. BOULDING, THE ECONOMY OF LOVE AND FEAR 1-34 (1973); Becker, *A Theory of Social Interaction,* 82 J. POL. ECON. 1063 (1974) (reprinted in G. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR ch. 12 (1976)); Bernheim, Schleifer & Summers, *The Strategic Bequest Motive,* 93 J. POL. ECON. 1045 (1985); Cox, *Motives for Private Income Transfers,* 95 J. POL. ECON. 508 (1987); *see also* Posner, *Gratuitous Promises in Economics and Law,* 6 J. LEGAL STUD. 411 (1977) (on *promises* to make gifts. For a good summary, see D. FRIEDMAN, *The Economics of Altruism,* in PRICE THEORY 489-96 (1986).

205 Claude Levi-Strauss and Marcel Mauss both assert that what developed into contractual exchange began in primitive societies as reciprocal gifts. *See supra* note 203. *See also* Miller, *Gift, Sale, Payment, Raid: Case Studies in the Negotiation and Classification of Exchange in Medieval Iceland,* 61 SPECULUM 18 (1986).

tional proscriptions.[206] Presumably, a statute compelling insolvents to accept and perform a *conditional* bequest would be constitutionally suspect, at least insofar as the statute pertained to non-nominal conditions.[207] Yet, a law compelling acceptance of unconditional gratuities which contain *implicit* conditions should raise similar concerns. To give an acute example, offers of gratuities that are accompanied by sexual advances may well be tantamount to conditional offers from the offerees' point of view. While the absence of a *legal* condition probably suffices to remove constitutional impediments to obligatory acceptance in such cases, the possibility of a *moral* quid pro quo ought not to be ignored when we establish disclaimer policy.

Such considerations, in turn, may lead us to draw a distinction between disclaimers of inter vivos and testamentary transfers that failed to emerge out of fraud theory. Inter vivos gifts are far more likely to carry future moral obligations than are bequests, which, under the circumstances, more commonly serve to reward the beneficiary for moral considerations past.[208] Furthermore, the coercive pressures to fulfill moral obligations are likely to be stronger when the obligor is alive and able to monitor the obligee. Such pressures diminish when the obligor is dead (and presumably unable to exert further influence). Given the heightened threat of moral obligations in the inter vivos setting, an unqualified right to refuse offers of gifts may well be warranted, even against involuntary creditors. But absent such a threat in the testamentary setting, an equivalent right to disclaim a bequest[209] is more difficult to justify on the ground of personal autonomy.[210]

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206 U.S. CONST. amend. XIII; 1 G. GLENN, *supra* note 5, § 140, at 259-61; Bailey v. Alabama, 219 U.S. 219 (1911); L. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 15 (1978) (discussing the constitutional right to privacy); Regen, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1569-71, 1583-88, 1618-30 (1979) (discussing constitutional protection from coercive personal impositions).

207 Those statutes that proscribe insolvent disclaimer do not address the issue of conditional bequests. *See supra* note 53. *See also* Estate of Jensen, 26 Cal. App. 3d 474, 102 Cal. Rptr. 617 (1972) (requiring insolvent devisee to fulfill a condition to pay a "nominal" sum into the estate to receive his devise).

208 *Cf.* Schwartz, *supra* note 203, at 9 ("It must be noted that gratitude binds not only the living, but connects the living and the dead as well. . . . Inherited benefits, insofar as they cannot be reciprocated, generate eternal indebtedness and thereby link together present and past."). The wish to avoid "eternal indebtedness," as opposed to obligation, would in effect translate into a desire to assert one's self-reliance. *See supra* text accompanying note 201.

209 In the present context, testamentary substitutes (*i.e.*, non-probate assets) should be classed with bequests, because they play the same social function. Thus, revocable inter vivos trusts and gifts *causa mortis* should for purposes of establishing disclaimability, but not necessarily for other purposes, be deemed testamentary. *See generally* Langbein, *supra* note 32, at 1125-41 (proposing conceptual reform in this area).

210 *Quaere* whether these essentially intuitive determinations should raise conclusive

2. *Benefactor*

Along with the intent of the beneficiary, one has also to consider the intent of the benefactor. Several opinions defend the right of insolvent disclaimer on the ground that to compel acceptance would violate the "probable intent" of the testator, who "sought to benefit the distributee and not a public or private creditor."[211] In order to carry out the benefactor's probable intent, the beneficiary's right of disclaimer must be assured.[212]

This speculation seems intuitively logical. A beneficiary who anticipates bankruptcy or a workout may be able to improve his position by disclaiming (and thereby preserving for his relatives or for surreptitious personal enjoyment) property that would otherwise go to satisfy debts that will be discharged or forgiven anyway. Benefactors should ordinarily prefer to leave their beneficiaries the option of sheltering their inheritances in such circumstances. Conceivably, some patriarchs might see the matter differently. They might specifically intend that their legacies be used to stave off bankruptcy, whether to avoid the resulting family stigma or simply out of "old-time conscientiousness."[213] Granting, however, that most benefactors would take a more pragmatic view and would give insolvent beneficiaries the right to disclaim if they could, we must again weigh the public policies in favor of effectuating that intent against the public policies that support satisfaction of (involuntary) creditors' claims out of inherited assets.

In balancing out these concerns, one should note at the outset that courts traditionally exalt freedom of testation and the fulfillment of testamentary intent as central to gratuitous transfers policy. "As often, and not too often, said, the testamentary right is one of the most important of the inherent incidents of human existence,"[214] one court has stated; therefore, "[i]n the construction of devises, the intention of the testator is admitted to be the pole star

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or rebuttable presumptions. Should the beneficiary of an inheritance have the right to prove that acceptance will entail future moral obligations that he finds objectionable? Should precatory instructions accompanying a bequest suffice to shift the presumption? Needless to say, the evidence in such a case would be highly subjective, though perhaps not hopelessly elusive.

211 Estate of Oot, 95 Misc. 2d 702, 705-06, 408 N.Y.S.2d 303, 306 (Surr. Ct. 1978); *In re* Scrivani, 116 Misc. 2d 204, 209, 455 N.Y.S.2d 505, 509 (Sup. Ct. 1982); *see* Ohio National Bank of Columbus v. Miller, 41 Ohio App. 250, 255, 57 N.E.2d 717, 719-20 (1943) (*express* provision for a right of disclaimer deemed dispositive).

212 This argument, which has appeared in several commentaries, influenced the drafters of the Uniform Probate Code. *See* Fratcher, *supra* note 90, at 1077; Note, *Renunciation*, *supra* note 90, at 160-61, 165.

213 Daniel v. Frost, 62 Ga. 697, 705-06 (1879) (inferring testator's intent that creditors' claims be satisfied).

214 Ball v. Boston, 153 Wis. 27, 31-32, 141 N.W. 8, 10 (1913).

by which the courts must steer."[215] Nonetheless, as with every legal principle, the principle of intent effectuation has its limits. It does not automatically trump all other policy considerations.[216] Were courts to shape the law of insolvent disclaimer by reference to the testator's probable intent, they would in fact be carrying intent effectuation beyond its historical bounds.

The traditional limits of intent effectuation may be illustrated with a simple example: A debtor waives his right to disclaim all gratuitous transfers; he is now contractually bound not to do so. The debtor subsequently inherits under a will which purports expressly to restore his right of disclaimer. Will a court give effect to the testator's intent? Surely it will not.[217] Lawmakers have decided, as a matter of policy, to permit persons to place restrictions on their own conduct by contract. In enforcing the law of contractual obligation, courts do not take into consideration the wishes of third parties. This same principle applies to the law of fraudulent conveyances (as it pertains to disclaimers): Lawmakers impose these restrictions on conduct on the basis of policies governing the relation of debtors and creditors, not on the basis of what third parties expressly (let alone probably) would prefer fraudulent conveyance law to look like. Allowing the wishes of third parties to alter the terms of the debtor-creditor relationship would render the rights of creditors precarious and frustrate other policy goals of debtor-creditor law.[218]

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[215] 4 J. KENT, *supra* note 26, at *537. The phrase has been often repeated. *E.g.*, Biles v. Martin, 288 Ala. 231, 236, 259 So.2d 258, 262 (1972). There is, however, no constitutional right to freedom of testation. *See infra* note 229.

[216] "The privilege of disposing of property is not absolute; it is hedged with various restrictions where there are policy considerations warranting the limitation." Shelley v. Shelley, 223 Or. 328, 335, 354 P.2d 282, 285 (1960). Considered historically, complete freedom of testation is not all that venerable. On the rise of freedom of testation under the common law, see 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 240-363 (2d ed. 1898).

[217] *See supra* note 146.

[218] "To allow the testator to interfere with the established rules of law, would be to permit every man to make a law for himself, and disturb the metes and bounds of property." 4 J. KENT, *supra* note 26, at *535. It should be pointed out that one donative construct defies this principle: the spendthrift trust, to which the disclaimer bears some functional resemblance (especially when coupled with surreptitious enjoyment of the disclaimed property by the disclaimant). The primary argument for granting effectiveness to spendthrift provisions has traditionally been the settlor's right to dispose of his own property according to his wishes, despite the resulting distortion of debtor-creditor law. Critics of spendthrift trusts have long remarked this anomaly and have opposed their validity, inter alia, on the ground that the settlor should not be permitted to tamper with established rules of law. *See* Costigan, *Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined*, 22 CALIF. L. REV. 471, 483-84 (1934); Note, *A Rationale for the Spendthrift Trust*, 64 COLUM. L. REV. 1323, 1324-25 (1964); Bushman, *supra* note 138, at 317; Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1237-40 & n.126 (1985). Even so, spendthrift trust doctrine requires the settlor *expressly* to avow his intent to render the corpus immune to creditor levy, and

At the other end of the scale, a rule that denied testators authority to grant a right of insolvent disclaimer would appear to do no great violence to their freedom of testation. Testators would have it in their power to accomplish the same result, either by establishing solvency as a condition for a bequest's effectiveness,[219] or by executing a new estate plan.[220] Thus, even if an insolvent beneficiary lacked the right of disclaimer, the testator could carry out the "disclaimer" for him. The difficulty, of course, is that, notwithstanding the testator's *theoretical* freedom to keep his wealth out of the hands of other men's creditors, as a *practical* matter his intent to do so might be thwarted by inadvertence or incapacity. If a beneficiary were to become insolvent close in time to the testator's death, for example, he might simply have no realistic opportunity to draft and execute the necessary documents. Indeed, this outcome seems most likely in connection with involuntary insolvency, the one situation where fraud theory suggests that inheritance be made nondisclaimable.[221] For involuntary insolvency tends to occur unpredictably and catastrophically, enhancing the risk to the unwary testator.

These difficulties bring to mind a possible alternative approach to the problem of intent effectuation. Even if lawmakers followed fraud theory and barred insolvent disclaimer under some circumstances, they might simultaneously seek to give effect to testamentary intent when *construing* the testator's will. Ordinarily, wills are read according to their plain meaning, and it is up to the testator to execute any changes of intent.[222] Nonetheless, in certain special sit-

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under most state statutes certain involuntary creditors' claims can nonetheless reach the corpus. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 147, 152, 162, 168-69; *supra* note 157. *But see* WASH. REV. CODE § 6.32.250 (West Supp. 1989) (inferring settlor's intent to make every trust spendthrift). To give effect to the testator's *probable* intent to create a right of insolvent disclaimer against *all* creditors thus carries intent effectuation beyond even the "precedent" of spendthrift trust doctrine. On the policy underlying effectuation (or non-effectuation) of probable intent, see *infra* text at notes 222-36.

219 Conditional bequests are valid unless the condition violates public policy. T. ATKINSON, *supra* note 12, at 410-15. Solvency conditions generally have been upheld by state courts but such conditions are ineffective to avoid a bequest in a federal bankruptcy proceeding. Annotation, 138 A.L.R. 1336 (1942); 11 U.S.C.A. § 541(c)(1)(B)(West 1988).

220 The testator would not have to disinherit his beneficiary: He might be able to impress the bequest with a spendthrift trust. Alteruatively, the testator could create a discretionary power in his beneficiary, by granting him a general power of appointment with a gift over in lieu of appointment after a short period. *See supra* note 113 (general powers exempt from creditors' claims until exercised). This would precisely recreate the beneficiary's power of disclaimer.

221 *See supra* notes 147-70 and accompanying text.

222 *E.g.*, Warner v. Beach, 70 Mass. 162 (1855); Aten v. Tobias, 114 Kan. 646, 657-58, 220 P. 196, 201-02 (1923); Ater v. McClure, 329 Ill. 519, 527, 161 N.E. 129, 132 (1928).

uations courts have inferred unexpressed changes of intent and effectuated them "by operation of law,"[223] on the assumption that the testator's failure to do so could only have resulted from inability or inadvertence.[224] Would this be an appropriate response to the problem of insolvency? Should we infer an intent to revoke bequests to beneficiaries who become insolvent after a will is executed?

One problem with such an approach is that it overgeneralizes testamentary intent. A given testator's preference to revoke *vel non* a bequest to an insolvent might turn on additional economic and idiosyncratic considerations. Very likely, the *degree* of the beneficiary's insolvency, and hence the likelihood of bankruptcy or a workout, would weigh heavily on the testator's decision. If bankruptcy were all but inevitable, a testator would probably prefer to avoid benefitting creditors who would otherwise be left without recourse, unless the testator viewed satisfaction of creditors in itself as a social or moral imperative.[225] Absent the prospect of bankruptcy, however, the mere fact of the beneficiary's insolvency would seem less likely to alter testamentary intent. In making his bequest, the testator's purpose, presumably, was to facilitate spending by the beneficiary. That purpose is accomplished by satisfying creditors whose claims would in the alternative consume the beneficiary's future earnings. Only if the testator happened to view insolvency as a sign of *wasteful* spending might he be inclined to disinherit the beneficiary under these conditions. In short, it is difficult to predict how a particular testator will react to a particular beneficiary's financial embarrassment. While most testators would probably grant insolvent beneficiaries the right to decide for themselves whether or not to accept their inheritance, an inflexible rule of construed revoca-

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223 Alteration of an estate plan by operation of law traditionally occurs when a will is superseded by marriage, divorce, or birth of a child. *See* UNIF. PROBATE CODE §§ 2-301, 2-302, 2-508 (1982). The doctrine is ordinarily governed by statute today, though its roots lie in the common law. *See generally* 2 W. PAGE, *supra* note 6, §§ 21.66-21.111, at 471-558; Graunke & Beuscher, *The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator*, 5 WIS. L. REV. 387 (1930); Durfee, *Revocation of Wills By Subsequent Change in the Condition or Circumstances of the Testator*, 40 MICH. L. REV. 406 (1942).

224 *E.g.*, Warner v. Beach, 70 Mass. 162, 163 (1855); 4 J. KENT, *supra* note 26, at *521.

225 *See supra* text accompanying note 213. Additional considerations might be the size of the inheritance relative to the beneficiary's indebtedness, his post-bankruptcy need relative to that of other potential beneficiaries, and the opportunity for surreptitious provision for the insolvent beneficiary. *See* Nielsen v. Cass County Social Servs. Bd., 395 N.W.2d 157, 162 (N.D. 1986) (dissent) (generally expressing doubt that "our society . . . is at a place where we should assume that decedents would cast their relatives on the welfare roles to reserve their estate for other family members").

tion might frustrate as often as it fulfilled testamentary intent.[226]

Even assuming lawmakers could divine testators' intent with some accuracy, the question remains whether effectuating unexecuted changes of intent would serve public policy. As a principle of construction, testamentary intent effectuation derives from the testator's freedom of testation. But intent effectuation by operation of law extends the principle to cases where the testator himself failed to exercise the freedom he was offered. Is such an extension justified by the policies that underlie "basic" freedom of testation?

The traditional justifications for freedom of testation are several. Perhaps oldest is the notion that testators enjoy a "natural right" to choose the recipients of their property at death, following from the natural privilege of all men to enjoy the fruits of their labor. Locke, Grotius, and (in a metaphysical version) Leibnitz each supported this view, but Blackstone and Jefferson rejected it on the theory that one's natural rights over property cease at the moment of one's death.[227] Utilitarian philosophers such as Bentham and Mill repudiated natural law entirely, insisting that lawmakers ground inheritance (like every other secular institution) upon functional, rather than moral, principles.[228] Although it has informed a number of judicial vindications of freedom of testation over the years, natural rights theory carries little weight today. Certainly, no modern court has elevated freedom of testation to the order of a constitutional right.[229]

Modern defenses of freedom of testation rest upon the institution's social and economic utility. One line of argument (tracing back to Blackstone, if not earlier) asserts that testamentary freedom heightens social control, by creating incentives for obedience and loyalty to one's family.[230] A second line of argument (also at least as

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226 For this reason, courts have traditionally altered estate plans by operation of law restrictively. *See In re* Adler's Estate, 52 Wash. 539, 548-49, 100 P. 1019, 1023 (1909).

227 R. CHESTER, INHERITANCE, WEALTH, AND SOCIETY chs. 2-3 (1982). Leibnitz argued that the lifetime right to dispose of property carried over to the immoral soul—a not-so-dead hand, as it were. L. MIRAGLIA, COMPARATIVE LEGAL PHILOSOPHY 748-50 (1921). *Cf.* 2 W. BLACKSTONE, *supra* note 17, at *10-11 ("We are apt to conceive at first view that [inheritance] has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. . . . For naturally speaking, the instant a man ceases to be, he ceases to have any dominion. . . ."). *See also* the writings of Jefferson and others *quoted in* R. CHESTER, *supra*, at 35-37.

228 R. CHESTER, *supra* note 227, at 17-20, 26-30. In a famous scoff, Bentham referred to natural law as "nonsense upon stilts." J. BENTHAM, *Anarchical Fallacies*, in 2 THE WORKS OF JEREMY BENTHAM 501 (J. Bowring ed. 1962).

229 *See* R. CHESTER, *supra* note 227, chs. 3-4; 1 W. PAGE, *supra* note 6, § 3.1, at 62-67; Laube, *The Right of the Testator to Pauperize His Helpless Dependents*, 13 CORNELL L.Q. 559-64 (1928).

230 J. BENTHAM, *supra* note 108, at 337; 2 W. BLACKSTONE, *supra* note 17, at *11; Brenner, *Why did Inheritance Laws Change?*, 5 INT. REV. L. & ECON. 91 (1985); Nathan, *An*

old as Blackstone) posits that freedom of testation leads to optimal levels of wealth creation and savings.[231] While neither of these justifications has escaped criticism,[232] they remain today's textual orthodoxy.[233]

If one accepts that the fundamental rationale for freedom of testation is motivational in nature—that it is designed to encourage socially useful behavior by the testator and/or his potential beneficiaries—then there would appear to be no functional advantage in effectuating probable, as opposed to express, intent. The social benefits of freedom of testation flow from the *opportunity* to exercise testamentary intent during the testator's lifetime. Following the testator's death, no further behavioral utilities derive from reconstructing the testator's unexpressed intent.[234] In fact, this conclusion accords with the traditional scope of intent effectuation by operation

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Assault on the Citadel: A Rejection of Forced Heirship, 52 TUL. L. REV. 15-16 (1977); Shammas, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145, 149-50 (1987). Though Blackstone wrote in the late eighteenth century, the point had not been lost on William Shakespeare three centuries earlier. *See* W. SHAKESPEARE, KING LEAR (J. Bratton ed. 1987).

231 J. BENTHAM, *supra* note 108, at 338; 2 W. BLACKSTONE, *supra* note 17, at *11; Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 145 (1936); Gold, *Freedom of Testation*, 1 MOD. L. REV. 296, 296-97 (1938); Tullock, *Inheritance Justified*, 14 J.L. & ECON. 465 (1971).

232 *E.g.*, J. WEDGWOOD, THE ECONOMICS OF INHERITANCE 213-16 (rev. ed. 1939) (questioning the impact of freedom of testation on personal industry); Jenks, *English Civil Law*, 30 HARV. L. REV. 109, 119-20 (1916) (same; also questioning the social utility of the power to secure obedience via exercise of testamentary freedom).

233 T. ATKINSON, *supra* note 12, at 34-35; 1 W. PAGE, *supra* note 6, § 1.7, at 26-30. *Cf.* Professor Simes's black-box approach: "The desire to dispose of property by will is very general and very strong. A compelling argument in favor of it is that it accords with human wishes." L. SIMES, PUBLIC POLICY AND THE DEAD HAND 21 (1955). Modern case law has not explored the policy underpinnings of freedom of testation. For an early judicial discussion, see Van Alst v. Hunter, 5 Johns. Cas. 148, 159-60 (N.Y. Ch. 1821) (endorsing the social control theory).

234 *Cf.* Fratcher, *supra* note 90, at 1077. Professor Fratcher argues that it would be *capricious* not to comply with the testator's probable intent. He offers the example of a son who incurs tort liability for negligent driving while his father lies on his deathbed.

> If the collision had occurred a month before, the father could and probably would have devised his property to his grandchildren. . . . If the collision had occurred a month later, the son would have had an opportunity to protect his wife and children by creating a trust of the property inherited. . . . Why should the creditor be in a position to ruin the entire family merely because of the happenstance that his claim arose while the father was dying?

Id. Fratcher is certainly correct to conclude that the vulnerability of the inheritance begins only shortly before the testator's death, but he is wrong to suggest that it ends shortly thereafter. If the son transfers the inheritance to his wife and children he may reduce his own vulnerability, but only by creating new vulnerabilities in them. (Of course, it he attempts to transfer his inheritance after his collision he commits a fraudulent conveyance.) In fact, the caprice argument has two sides: Just as the beneficiary can complain of the "happenstance" that the testator died too soon, tort creditors can complain of happenstance if the tort occurs too soon before his death!

of law. Historically, courts have relaxed the requirement of strict execution of all changes of intent only where such changes conform with some independent public policy.[235] No such public policy favors the disinheritance of insolvents. On the contrary, as we have seen, fraud theory suggests public policies in favor of providing for insolvents in certain situations.[236]

3. *Forced Share*

Having concluded that effectuation of the testator's probable intent forms a weak policy foundation for disclaimer rules (as well as rules of construction), one may go a step further and inquire whether the law should *enjoin* testators to provide for their (involuntarily) insolvent heirs. While the common law does grant a "forced share" to the surviving spouse of the testator, whatever her financial state,[237] lawmakers have never considered creating additional forced shares contingent on insolvency.[238] Does the law pay the principle of testamentary freedom too much deference? Should lawmakers ignore the testator's express intent as well as his probable intent?

An in depth examination of the virtues and vices of freedom of testation is beyond the scope of this article. Nonetheless, it is worth remarking that, for all its sanctification,[239] this fundamental principle of inheritance law has long been the subject of academic debate. Against the Lockian "natural right" of testation, some commentators have posited a moral responsibility to provide for one's depen-

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235 Alteration of an estate plan by operation of law as traditionally applied serves the independent purpose of protection of the nuclear family from disinheritance, *see* Durfee, *supra* note 223, at 416; Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499, 507-08 (1964). Similarly, intestacy statutes—prescribing an entire estate plan by operation of law in default of testation—are structured to accord with this same purpose and only secondarily with testamentary intent. *See* Friedman,, *The Law of the Living, the Law of the Dead: Property, Succession and Society*, 1966 WIS. L. REV. 340, 355, 358; *cf.* Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RESEARCH J. 321, 323-24. A state statute of the sort hypothesized here would in fact be ineffective in a federal bankruptcy proceeding. 11 U.S.C.A. § 541(c)(1)(B)(West 1988).

236 *See supra* text accompanying notes 147-60. Does disinheritance of insolvents serve the goal of protection of dependents from their creditors? To the extent this goal exists, it is fulfilled by recourse to exemption law, homestead law, and the family allowance, rather than alteration of an estate plan by operation of law. *Cf. infra* note 258.

237 The implications of this forced share from the standpoint of creditors' rights against the insolvent surviving spouse are addressed *infra* text accompanying notes 249-71.

238 *E.g.*, Gunn v. Wagner, 242 Iowa 1001, 1009, 48 N.W.2d 292, 296 (1951) ("Of course testatrix was under no obligation to leave her property so it might be reached by her husband's creditors"); Robertson v. Schard, 142 Iowa 500, 504, 119 N.W. 529, 531 (1909) ("The wife is under no obligation to give or devise to an insolvent husband her own estate when she knows that it will be immediately absorbed by his creditors.").

239 *See supra* note 214 and accompanying text.

dents following one's death.[240] And opposite the economic rationale of spurring testators to productivity, there stands the realization that a testator may lack incentives at death to distribute efficiently the assets he has amassed during life. As one astute observer has commented, "Making a will is an exercise in power without responsibility."[241] When persons act during their lifetimes, they must live with the consequences. But persons acting at the moment of death, quite literally, do not: They are free to act "irresponsibly" without paying any of the economic or interpersonal costs that living persons must bear for such behavior.[242] There is, in other words, something close to a moral hazard of testation.[243] Given this fact, the possibility of placing further limitations on testamentary freedom may be an appropriate subject for legislative contemplation.[244]

At any rate, the economic benefits of a forced share for (involuntarily) insolvent heirs are problematic, however one would ultimately calculate the costs. Such a forced share would place at still greater risk the inheritance of an insolvent tortfeasor, who could otherwise have been disinherited and provided for surreptitiously. This enhanced risk would further alleviate the moral hazard of insolvency.[245] However, a forced share contingent on insolvency could aggravate moral hazard in the case of an heir whom the testators sought to disinherit for other reasons. Such an heir could have per-

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240 *E.g.*, Cahn, *supra* note 231, at 147; Haskell, *supra* note 235, at 506-08, 519-20; Laube, *supra* note 229; Lehmann, *In Defense of Forced Heirship*, 52 TUL. L. REV. 20, 24-25 (1977); L. SIMES, *supra* note 233, at 23-25; Nathan, *supra* note 230, at 15-16.

241 Meston, *The Power of the Will*, 1982 JURID. REV. 172, 173. *See* G. HEGEL, PHILOSOPHY OF RIGHT § 179, at 119 (T. Knox trans. 1952).

242 This fact, in turn, speaks to the issue of whether freedom of testation is socially beneficial. *See supra* text accompanying note 230. A number of commentators point out that arbitrary exercise of freedom of testation could function to destroy the social cohesion of the family. *See, e.g.*, T. ATKINSON, *supra* note 12, at 34; G. HEGEL, *supra* note 241, § 180, at 120; M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE 4 (1970). *See also supra* note 232.

243 For a related analysis, see R. POSNER, *supra* note 147, at 481-86. Apart from limiting freedom of testation, one could internalize the social externalities associated with death by dialing forward the process of probate. Antemortem probate has, in fact, long been proposed, and it is now optional in several states. Though traditionally advocated in order to cure the evidentiary problems associated with postmortem probate, antemortem probate could also be justified on a mandatory basis to reduce the moral hazard of testation. *See generally* Cavers, *Antemortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440 (1934); Fink, *Antemortem Probate Revisited: Can an Idea Have Life After Death?*, 37 OHIO ST. L.J. 264 (1976); Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63 (1978); Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066 (1980).

244 To some extent, such contemplation may go on covertly in the jury box when a will is contested. *See* Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271 (1944).

245 *See supra* text accompanying note 155.

verse incentives to engage in tortious activity.[246] Similar ambiguities arise in connection with other forms of involuntary insolvency.[247] Thus, no powerful case can be made on economic grounds to restrict freedom of testation in this context. Nor is there a powerful case to be made on moral grounds. Whatever the testator's moral responsibility toward his heirs, he surely owes no moral obligation to his heirs' creditors, with whom he has had no direct relation.[248] In short, even from the standpoint of fraud theory alone, a forced share for insolvent heirs would not accord unequivocally with public policy.

IV
COGNATE PROBLEMS

Along with insolvent disclaimer, a number of related problems merit consideration. These problems raise not only specific questions of public policy, but also broader issues of structural consistency.

A. Right of Election

Suppose that the insolvent beneficiary under a will happens to be the testator's surviving spouse. Coguizant of the spouse's insolvency, the testator impresses her inheritance in a spendthrift trust or disinherits her entirely. Ordinarily, the beneficiary's creditors would have no remedy here: Having taken the opportunity to shield his wealth from a beneficiary's creditors, the testator has mooted the issue of insolvent disclaimer. A surviving spouse, however, enjoys rights that ordinary beneficiaries do not. In common law jurisdictions she may exercise her right of election, entitling her to receive a fraction of the net estate irrespective of the provisions of the will.[249] In the usual case, the surviving spouse would exercise this right where the testator refused to grant her the statutory minimum. But

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246 *Cf. supra* note 155.

247 In the context of alimony and child support debtors, economic efficiency is attained by imposing the cost on the deeper pocket. *See supra* notes 156-58 and accompanying text. If the debtor would remain the covert beneficiary upon disinheritance, then a forced share will be efficient, for the debtor has been judicially determined to be the deeper pocket. If, however, the debtor is disinherited for other reasons, and would not thereby benefit covertly, then we do not know who is in greater need—the creditor or the alternative beneficiary. Thus, the efficiency of a forced share would be problematic.

248 As far as the testator's ostensible moral responsibility toward his heirs is concerned, even if we acknowledged that such a responsibility existed (which we need not, *cf. supra* note 240) it would not point toward a forced share for insolvents: Such heirs would generally prefer to be disinherited and provided for covertly.

249 Elective share statutes vary in the amount that they guarantee to the surviving spouse and in other details. *See generally* Kulzer, *Property and the Family: Spousal Protection*, 4 RUT.-CAM. L.J. 195 (1973).

in the instant case, the disinherited spouse might well prefer to receive less, in order to thwart her creditors. The question then arises whether the spouse's failure to exercise a right of election while insolvent constitutes a fraudulent conveyance.

Despite the diversity of rules governing insolvent disclaimer, states unanimously deny creditors the right to control spousal elections.[250] The cases have articulated no exception for reliance or even for collusion between the legatees and the surviving spouse.[251] In reaching this result, courts have once again focused on the abstractions of title theory, coupled with the theme of transactional freedom that underlies inheritance law. Unlike a devise, title to the elective share "vests" only upon election, and the decision to elect *vel non* is a "personal right" of the surviving spouse.[252] Curiously, the countervailing arguments associated with fraudulent conveyance law are nowhere to be found in these cases.[253]

Considered from the standpoint of dominion theory, the nonexercise of a right of election at one level appears equivalent to a disclaimer: Both entail the rejection of testamentary assets that the spouse can obtain by the stroke of a pen; both are quasi-conveyances, in that the spouse knows, but cannot control, who will receive the estate in lieu of election.[254] At another level, however, the elec-

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250 *See* the cases compiled in Annotation, 27 A.L.R. 472 (1923); Annotation, *supra* notes 47, at 651-60; 5 W. PAGE, *supra* note 6, § 47.16, at 625 nn.6-7. (The issue does not appear to have arisen in community property states, where debts of the surviving spouse are ordinarily debts of the community as well, see W. FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY §§ 209-13, 218 (2d ed. 1971)). Spousal election is to be distinguished from "equitable election," where the testator bequeaths property to the beneficiary, but also "bequeaths" some portion of the beneficiary's own property. Ordinarily, in such a case, the beneficiary may "elect" to take under the will in exchange for transferring his own property as directed under the will, or to take and transfer nothing. If the beneficiary is insolvent, however, he cannot equitably elect to give away more than he receives without making a fraudulent conveyance. *See* Tripp v. Nobles, 136 N.C. 99, 48 S.E. 675 (1904).

251 *But see* Dalisa v. Dumoff, 206 Misc. 259, 260-61, 132 N.Y.S.2d 550, 551 (Sup. Ct. 1954) (noting the absence of any allegation or proof of collusion, without stating what significance such allegation or proof would have had).

252 *E.g.*, Traudt v. Hagerman, 27 Ind. App. 150, 154, 60 N.E. 1011, 1012-13 (1901) ("It is a matter solely between the husband and wife"); Robertson v. Schard, 142 Iowa 500, 503-04, 119 N.W. 529, 530-31 (1909); Bottom v. Fultz, 124 Ky. 302, 303, 98 S.W. 1037, 1038 (Ct. App. 1907); *In re* Fleming's Estate, 217 Pa. 610, 615, 66 A. 874, 876 (1907); Deutsch v. Rohlfing, 22 Colo. App. 543, 553, 126 P. 1123, 1126 (1912). Many state statutes granting the elective share expressly specify that the right is personal to the surviving spouse (as does the UNIF. PROBATE CODE § 2-203 (1982)); the remaining states are silent on the matter. *Cf.* Watson v. Watson, 13 Conn. 83 (1839) (denying surviving spouse the right to refuse dower or curtesy on the ground that these rights vest *eo instanti* by operation of law); Lahr v. Ulmer, 27 Ind. App. 107, 60 N.E. 1009 (1901) (election was assumed under statute that required affirmative non-election within 90 days.).

253 *See supra* text accompanying note 45.

254 *See supra* text accompanying notes 109-11.

tive share appears more solidly under the dominion of the spouse than an ordinary bequest. Like the spouse's right to community property, to which it is alternative, the spouse's right of election proceeds from the assumption that she has contributed to the testator's wealth.[255] As a consequence, the law, at least in theory, estoppes the testator from denying his spouse a portion of his estate. The elective share thus comprises more than a mere expectancy. Although it does not mature until the testator's death, and is contingent upon survival, the elective share resembles a valuable chose-in-action; it is not a gratuitous transfer at all.[256] From the perspective of dominion theory, then, creditors have, if anything, a *stronger* claim to the elective share than they do to an ordinary bequest.

Studied by way of inheritance theory, the right to decline the elective share is premised on the personal autonomy of the surviving spouse. But autonomy merits deference only where its curtailment would entail onerous burdens or moral obligations.[257] The testator is powerless to impose such obligations when the spouse exercises her right of election, because receipt of the elective share is not a transaction in the usual sense. It is a transfer occasioned by the surviving spouse alone, *in defiance* of the testator's expressed intent. Given this fact, the preservation of personal autonomy fails to justify a right to decline the elective share. Lawmakers could mandate insolvent election with confidence that it would impose no

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255 This rationale is remarkably venerable. The preamble to North Carolina's Dower statute of 1784 states that "it is highly just and reasonable that those who by their Prudence, Economy and Industry, have contributed to raise up an estate to their Husbands, should be entitled to share in it." *Quoted in* L. SIMES, *supra* note 233, at 13-14. For modern discussions, see H. MARSH, JR., MARITAL PROPERTY IN CONFLICT OF LAWS 136 (1952); Kulzer, *supra* note 249, at 214-17; Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513 & n.2 (1970);.Langbein & Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 306-10 (1987); Phipps, *Martial Property Interests*, 27 ROCKY MTN. L. REV. 180-81, 186-87, 190 (1955). To some extent, such contributions may underlie all "gratuitous" transfer. *See supra* text accompanying notes 202-05. In the case of a spouse, however, the contribution is sufficiently manifest to be deemed meritorious of mandatory testamentary compensation.

256 *See* Walker v. Walker, 66 N.H. 390, 393, 31 A. 14, 16 (1891) ("Marriage is equivalent to a pecuniary consideration; that is to say, it is a valuable consideration. The plaintiff's right to her distributory share of her husband's large estate, and which is quite likely to have been one of the inducements to her marriage with him, is therefore in the nature of an actual purchase of that right."). The surviving spouse's claim is sometimes likened to that of a creditor or "quasi-creditor." *See* W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 259-63 (1960). For other scholarly characterizations, see Kulzer, *supra* note 249, at 206; R. POSNER, *supra* note 147, at 486-87. *See also* Haskell, *supra* note 235, at 508-10 (asserting an inconsistency between the legal treatment of spousal claims and creditors' claims). *Cf. In re* Harris, 351 Pa. 368, 379, 41 A.2d 715, 720 (1945) ("It is a mere personal privilege and is not property") (citation omitted); *In re* Fleming's Estate, 217 Pa. 610, 615-16, 66 A. 874, 877 (1907).

257 *See supra* text accompanying notes 202-10.

hardship on the surviving spouse.[258]

A number of courts have defended the spouse's right to repudiate the elective share on the ground that such a decision comports with the testator's own estate plan—it being "the manifest policy of the law" to effectuate testamentary intent whenever possible.[259] This argument is analogous to the proposition, encountered earlier, that granting beneficiaries an unfettered right of disclaimer comports with the testator's "probable intent."[260] But, if the policy of intent effectuation has any merit in the context of disclaimers,[261] it has none in connection with the elective share. The very essence of the right of election is the notion that testamentary intent loses its relevance where the spouse's share is concerned.[262] Were we to consult the intent of the testator, the right of election would disappear entirely.

Viewed finally in the light of fraud theory, the problem of insolvent non-election appears virtually identical to the problem of insolvent disclaimer. Given the opportunity, most contract creditors would no sooner rely on the debtor's right of election than on her expectancies: Here again, the difficulties of acquiring information and of arriving at a meaningful valuation would loom large. Though the elective share is unavoidable in law, it is avoidable in fact—with or without the spouse's blessing—by transforming the estate into non-probate assets, for example.[263] Given this practical

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258 The personal right of non-election might be justified as a means of protecting the surviving spouse from impoverishment at the hands of her creditors, if one assumed that the rejected elective share could be captured surreptitiously, *see supra* note 37. However, the elective share traditionally has not been rationalized as part of the core "safety net" for dependents. Thus, unlike homestead rights and the family allowance, elective assets do not constitute exempt property. *See* H. MARSH, JR., *supra* note 255, at 136. *Cf.*, Robertson v. Schard, 142 Iowa 500, 503-04, 119 N.W. 529, 531 (1909).

259 *In re* Fleming's Estate, 217 Pa. 610, 615, 66 A. 874, 876 (1907); Traudt v. Hagerman, 27 Ind. App. 150, 60 N.E. 1011 (1901); Note, *Renunciation of a Devise, supra* note 37, at 947.

260 *See supra* notes 211-12 and accompanying text.

261 *See supra* text accompanying notes 211-36.

262 Thus, by analogy, the testator's intent is irrelevant to the issue of whether a guardian will elect on behalf of an incompetent surviving spouse.

> It may be well to note that the widow's rights are as ancient as the husband's right to dispose of his property, and have always received particular protection by both the Legislature and the courts. It is not true historically to suggest that the husband's testamentary plans have ever been superior to or deserving of greater honor than the widow's rights to take against the will.

Estate of Strauch, 11 Ohio App. 2d 173, 178, 229 N.E.2d 95, 99 (1967); *cf.* Carey v. Brown, 194 Minn. 127, 260 N.W. 320 (1935) (holding the testator's intent to be siguificant to the extent that an inference can be drawn that the incompetent spouse would have *preferred* to comply with the decedent's wishes); *In re* Hansen's Guardianship, 67 Utah 256, 247 P. 481 (1926) (same); *In re* Connor's Estate, 254 Mo. 65, 162 S.W. 252 (1914) (same).

263 Evasion of the elective share is addressed at length in W. MACDONALD, *supra* note

power, the chose-in-action embodied by the right of election assumes a character almost as evanescent as an ordinary bequest.[264]' Those creditors who nonetheless prefer to assure themselves of recourse to the elective share can contract for the privilege by including a promise of election in the credit agreement.[265] It seems unlikely, however, that creditors as a class would insist on such assurances when they establish the price of credit.[266]

At the same time, the analysis earlier presented in favor of barring insolvent disclaimer against involuntary creditors pertains equally to insolvent non-election.[267] As in the case of insolvent disclaimer, however, courts thus far have made no allowance for the attributes of the spouse's indebtedness,[268] save (once again) in the special context of Medicaid eligibility.[269]

In sum, public policy appears to suggest that no distinction be made between insolvent non-election and insolvent disclaimer. Nonetheless, states that permit the former have not hesitated to bar the latter.[270] Why they have done so remains a mystery, though the

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256. We need not here detail "the fifty ways to leave your lover—broke," but the ease with which it can be accomplished is well known to practitioners. *See, e.g.*, Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 280 (1955).

264 The want of reasonable reliance is noted (if somewhat elliptically) in Bains v. Globe Bank & Trust Co., 136 Ky. 332, 334, 124 S.W. 343, 344 (Ct. App. 1910); *see also* Traudt v. Hagerman, 27 Ind. App. 150, 154, 60 N.E. 1011, 1012 (1901).

265 Such a promise is supported by consideration and would presumably be enforceable. *See* UNIF. PROBATE CODE § 2-204 (1982) (giving effect to contractual waivers of the elective share). A guarantee by the testator himself would, of course, be even more useful to the creditor.

266 *See supra* notes 129-35 and accompanying text.

267 *See supra* text accompanying notes 147-60. One case distinguishes the problem of non-election from disclaimer on the ground that it would be improper to "equate nonaction and action." Bradley v. Hill, 457 S.W.2d 212, 216 (Mo. Ct. App. 1970). But there is nothing improper about the equation when nonaction and action are functionally equivalent. *See supra* note 112. Notice also that under many state statutes, a spouse may waive her right of election *ex ante*. *See* UNIF. PROBATE CODE § 2-204 (1982). In order to be effective, a rule barring insolvent non-election would also have to bar insolvent waiver of the right of election.

268 In one case, for example, the creditor obtained a judgment in a wrongful death action against the debtor (who was also convicted of manslaughter for killing the creditor's husband). The debtor subsequently refused to exercise his right of election against his deceased wife's estate. The court held that the creditor could not compel election. "The judgment creditor . . . relies upon what she terms equitable principles . . . . Because of the particularly unique facts, this argument presents a strong appeal. However, this court may not, because of these facts, fail to be controlled by applicable legal principles." *In re* Savage, 650 S.W.2d 346, 350 (Mo. Ct. App. 1983).

269 Flynn v. Gates, 67 A.D.2d 975, 413 N.Y.S.2d 446 (App. Div. 1979) (holding that failure to exercise one's right of election was a valid cause for denial of Medicaid assistance) (this case is the elective-share analogue to *Scrivani*, discussed *supra* text accompanying notes 77-87). *Contra* Bradley v. Hill, 457 S.W.2d 212 (Mo. Ct. App. 1970).

270 MINN. STAT. ANN. § 524.2-203 (West 1986); 20 PA. CONS. STAT. § 2206 (Purdon's Supp. 1987); *In re* Fleming's Estate, 217 Pa. 610, 66 A. 874 (1907); *In re* Harris, 351 Pa.

widespread failure of courts to *relate* non-election and disclaimer provides a powerful clue.[271] Surely, the phenomenon of legal compartmentalization must be our prime suspect.

B. Will Contests

Suppose a beneficiary submits for probate a will that disinherits the testator's insolvent heir (or devisee under a prior valid will), or that impresses his inheritance in a spendthrift trust. The proffered will may be vulnerable to challenge on any number of grounds,[272] but the insolvent heir, preferring the will that disinherits him, may decline to contest it. Can the insolvent heir's creditors subrogate themselves to his right of contest and bring suit themselves to ensure the heir's inheritance? Put otherwise, does the insolvent heir's refusal to bring suit himself constitute a fraud upon his creditors?

The right to contest a will is statutory. Most of the relevant statutes limit standing to "interested parties," meaning parties who hold a pecuniary interest in the outcome. Yet the statutes fail to spell out how direct the pecuniary interest must be.[273] In the majority of states, creditors of the heir who acquire a pre- or post-judg-

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368, 41 A.2d 715 (1945). In jurisdictions that bar insolvent disclaimer, an insolvent surviving spouse might find it to her advantage to elect against a will that *neglects* to disinherit her. Election in this situation would not be as efficient as disclaimer, but it could serve to reduce the inheritance where disclaimer was forbidden. While no case testing this option has arisen, there is dicta supporting its validity. *See Fleming's Estate*, 217 Pa. at 614, 66 A. at 876; *Savage*, 650 S.W.2d at 351. This scenario highlights the absurdity of a distinction in the treatment of disclaimer and election.

271 Two cases that do look to treatment of disclaimers for purpose of analogy are Bottom v. Fultz, 124 Ky. 302, 307, 98 S.W. 1037, 1038 (Ct. App. 1907); Dalisa v. Dumoff, 206 Misc. 259, 261, 132 N.Y.S.2d 550, 552 (Sup. Ct. 1954). Both of these cases were decided in states that permit insolvent disclaimer. Thus the analogy supported the traditional right of non-election. By contrast, in Pennsylvania, where precedent proscribed insolvent disclaimer, the right of insolvent non-election was justified in *Fleming's Estate*, 217 Pa. at 614, 66 A. at 877, by equating non-election with non-exercise of a power of appointment. *See supra* note 113 and accompanying text.

272 The litany includes mis-execution under the statute of wills, testamentary incapacity, undue influence, forgery, duress, and fraud.

273 "An interest resting on sentiment or sympathy, or on any basis other than gain or loss of money or its equivalent it not sufficient." *In re* Duffy's Estate, 228 Iowa 426, 434, 292 N.W. 165, 169 (1940). On statutory language, see 3 W. PAGE, *supra* note 6, § 26.52, at 117-18. Cases on point are collected in Annotation, 128 A.L.R. 963 (1940); Annotation, 46 A.L.R. 1490 (1926). For commentary, 1 G. GLENN, *supra* note 5, § 141, at 261-62; Kerson, *Creditors and the Will Contest*, 14 HASTINGS L.J. 18 (1962); Recent Decision, 40 CALIF. L. REV. 449 (1952); Note, *Wills, Probate: Who May Contest?*, 12 CORNELL L.Q. 247 (1927); Note, *Right of Persons Claiming Through an Heir to Contest a Will*, 27 IOWA L. REV. 443 (1942); Note, *The Right of a Creditor of an Heir to Contest the Will*, 50 NOTRE DAME LAW. 309 (1974) [hereinafter Note, *The Right of a Creditor*]; Recent Decision, 27 NOTRE DAME LAW. 659 (1952); Comment, *Lien Creditor Permitted to Contest Will Disinheriting Debtor*, 4 STAN. L. REV. 607 (1952); Recent Case, 5 VAND. L. REV. 857 (1952); Recent Case, 2 WASH. & LEE L. REV. 166 (1940); Note, *Wills—Probate—Judgment Creditor of Disinherited Heir Not Privileged to Caveat Will*, 36 YALE L.J. 150 (1926) [hereinafter Note, *Wills*].

ment judicial lien against the estate (but not general creditors) have been held "interested" on the theory that the lien in and of itself constitutes a property right whose value will be enhanced if the contest succeeds.[274] By contrast, courts in other states have denied standing to any creditor, on the theory that a judicial lien is "rather in the nature of a remedy than an estate," and hence fails to qualify as an immediate "right of ownership" upon the success of the contest.[275] For purposes of accomplishing public policy, a more barren vista for analysis could scarcely be imagined.[276]

Applying the tools of dominion theory, the characteristics of the insolvent heir's refusal to contest a will appear to depend on the nature of its vulnerability. If the creditor's contest were predicated on some irregularity outside the heir's control—such as testamentary incapacity or a technical violation of the statute of wills—then his failure to initiate the contest himself is simply another quasi-conveyance: In this situation, the heir knows, but cannot decide, who will receive the property absent a contest.[277] If, however, the creditor seeks to challenge the will on grounds of misconduct—claiming, say, forgery, or undue influence *by the heir* in order to *disinherit himself*[278]—then the heir allegedly has assumed control over the property's disposition, as if he had assigued it. So far, courts have drawn

274 *E.g.*, the pithy discussion in *In re* Langevin's Will, 45 Minn. 429, 47 N.W. 1133 (1891) (judgment lien), or the more extended discourse in *In re* Duffy's Estate, 228 Iowa 426, 292 N.W. 165 (1940) (judgment lien). Though the issue has arisen most frequently in connection with judgment liens, dicta in judgment lien cases often draw a broader lien creditor/general creditor distinction, *e.g.*, Watson v. Alderson, 146 Mo. 333, 346-47, 48 S.W. 478, 481-82 (1898), and there are also cases directly on point, *e.g.*, Seward v. Johnson, 27 R.I. 396, 62 A. 569 (1905) (attachment lien); Marcus v. Pearce Woolen Mills, 353 Mass. 483, 233 N.E.2d 29 (1968) (attachment lien); Bloor v. Platt, 78 Ohio St. 46, 84 N.E. 604 (1908) (execution lien). Whether a lien against the estate is effective prior to distribution depends upon state law. 6 W. PAGE, *supra* note 6, § 59.20, at 438-40; Kerson, *supra* note 273, at 25-27. Thus, creditors unable to obtain a levy even after judgment would be barred from initiating a will contest. *See In re* Estate of Peterson, 716 P.2d 801 (Utah 1986). Old cases in only one state have granted standing to general creditors of the beneficiary to contest a will, see Mullins v. Fidelity & Deposit Co. of Baltimore, 30 Ky. L. Rptr. 1077, 100 S.W. 256 (Ct. App. 1907); Brooks v. Paine's Ex'rs., 123 Ky. 271, 90 S.W. 600 (Ct. App. 1906); Davies v. Leete, 111 Ky. 659, 662, 64 S.W. 441, 442 (Ct. App. 1901) (dicta).

275 *E.g.*, Lee v. Keech, 151 Md. 34, 37-38, 133 A. 835, 836 (Ct. App. 1926); *In re* Estate of Peterson, 716 P.2d at 801. The issue is debated in majority and dissenting opinions in *In re* Harootenian's Estate, 38 Cal. 2d 242, 238 P.2d 992 (1951).

276 *See* Note, *Wills, Probate: Who May Contest?*, *supra* 273, at 250-51; *In re* Duffy's Estate, 228 Iowa 426, 434, 292 N.W. 165, 174 (1940).

277 *See supra* text accompanying note 111. As a practical matter, what appears to be a quasi-conveyance may still be equivalent to a full-fledged conveyance due to collusion between the heir and the devisee under the will. *See supra* note 37.

278 Of course, such a complaint stands on its head the usual allegation that forgery, undue influence and other forms of misconduct have been used to augment the wrongdoer's share. Nonetheless, courts that grant creditors standing have acknowledged the legitimacy of a complaint of wrongdoing to reduce one's share, on the assumption that

no distinction between different sorts of contests on this basis, though such an approach would seem a natural analogue to the "collusion exception" to insolvent disclaimer rules.[279]

Examined under inheritance theory, a grant of standing to creditors appears to interfere with the transactional freedom of neither heir nor testator. Heirs, surely, have no cause to object to a creditor's will contest as an infringement of their autonomy. Only disclaimer laws determine whether heirs must assume the burden of unwanted gifts. As for the testator, a will contest neither violates nor vindicates his intent. Some courts have suggested *en passant* that creditors' will contests (unlike limitations on disclaimer) affirmatively serve to fulfill testamentary intent. If the rightful heir is insolvent, only creditors may have an incentive to challenge an invalid (intent non-effectuating) will. Indeed, the heir himself may be guilty of substituting his own intent for that of the testator.[280] But the flaw in this reasoning is its failure to consider in turn the beneficiaries' intent. So long as no rightful heir objects to the distribution under an invalid or even forged will, the beneficiaries are, in effect, exercising their right vis-a-vis the testator to re-distribute inherited assets among themselves.[281] Their amicable probate of an invalid will is thus substantively equivalent to an amicable division following intestacy. But even while a will contest initiated by creditors does no service on the testator's behalf, it certainly does no violence to his freedom of testation.[282]

Studied finally by way of fraud theory, the issue of creditor standing generates our familiar analytical dichotomy. Voluntary

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the debtor who thereby thwarts his creditors can benefit surreptitiously. *See, e.g.*, Brooks v. Paine's Ex'rs., 123 Ky. 271, 274, 90 S.W.2d 600, 601 (Ct. App. 1906).

279 For cases denying standing despite allegations of misconduct, see *In re* Shepard's Estate, 170 Pa. St. 323, 32 A. 1040 (1895) (creditor's allegation of forgery); Bank of Tennessee v. Nelson, 40 Tenn. (3 Head) 634 (1859); Lockard v. Stephenson, 120 Ala. 641, 24 So. 996 (1899); Lee v. Keech, 151 Md. 34, 133 A. 835 (Ct. App. 1926). *But see* Brooks v. Paine's Ex'rs, 123 Ky. at 275, 90 S.W. at 601 (citing misconduct as a ground from granting standing to creditors *per se*). Nor have cases articulated an exception for collusion between the heir and the beneficiary under the contestable will, *cf. supra* note 37.

280 *See, e.g, In re* Duffy's Estate, 228 Iowa 426, 434, 292 N.W. 165, 172 (1940); Brooks v. Paine's Ex'rs., 123 Ky. at 274, 90 S.W. at 601; Bloor v. Platt, 78 Ohio St. 46, 84 N.E. 604, 605 (1908); Recent Case, 2 WASH. & LEE L. REV. 169 (1940); Note, *Wills, supra* note 273, at 151.

281 This would not be true if the testator sought to place a bequest in trust. In that case, however, the testator's intent will be vindicated in a contest brought by the purported trustee. Intervention by creditors is not necessary.

282 *But see* Note, *Renunciation, supra* note 90, at 161, arguing, incomprehensibly, that a rule permitting creditors to contest a will is "but a short leap" from a rule granting insolvent heirs a forced share, and hence *confounds* testamentary intent. The author appears to assume that a vulnerable will reflects the testator's true intent, contrary to the usual assumption is that it does not.

creditors who do not rely on the debtor's opportunities to inherit have no legitimate interest in the matter, even where the debtor has engaged in wrongdoing to avoid the testator's estate plan.[283] However, for the sake of economic utility as well as morality, involuntary creditors ought to have standing to exercise every right available to the debtor, including his right to contest a will.[284] As of yet, however, no court has advanced such a dual analysis.[285]

In denying standing to creditors, some courts have raised an additional concern: administrative efficiency. Probate is ordinarily a summary proceeding. Were creditors empowered to intervene in probate, they might open the proverbial floodgates of litigation. Small claimants could end up disrupting the settlement of large estates.[286] This fear appears to be unfounded. Historically, creditors have rarely initiated actions of any sort to reach their debtors' inheritances, if only because few creditors possessed the requisite information.[287] In addition, the cost of bringing suit operates to deter small claims. If experience is any guide, a broadened grant of standing would not deluge the courts with expensive and time-consuming will contests—especially if standing were restricted to involuntary creditors.

Other courts have cited related concerns as grounds for limiting creditor standing. One court has rationalized the restriction of standing to lien creditors as a means of averting strike suits. The lien requirement obliges the heir's creditor first to demonstrate the bona fides of his claim, whether at trial or, in the case of pre-judgment liens, at a preliminary hearing, before becoming eligible to contest the will. Thus, the creditor's opportunities for harassment

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283 *See supra* text accompanying notes 129-35, 183. The absence of reasonable reliance is cited as a ground for denying creditor standing in *In re* Shepard's Estate, 170 Pa. St. 323, 325, 32 A. 1040, 1041 (1895); Lockard v. Stephenson, 120 Ala. 641, 642, 24 So. 996, 996-97 (1898); *but cf.*, Recent Decision, 27 NOTRE DAME LAW. 662 (1952) (defending creditor standing on the basis of his moral right to satisfaction, discussed *supra* text accompanying notes 121-25). Individual creditors who wish to avoid a rule denying standing can presumably contract around it by adding to the credit agreement a promise to pursue all inheritance claims or by including a transfer of this right to the creditor. Such a contract should be valid. *See In re* Harootenian's Estate, 38 Cal. 2d 242, 247, 238 P.2d 992, 998 (1951); 2 W. PAGE, *supra* note 6, § 25.2, at 613-18.

284 *See supra* text accompanying notes 147-60.

285 *See, e.g.*, San Diego Trust & Sav. Bank v. Heustis, 121 Cal. App. 67, 10 P.2d 158 (1932); *In re* Harootenian's Estate, 38 Cal. 2d 242, 238 P.2d 992 (1951) (will contests brought by support creditors; cases analyzed under traditional "interested party" standard). No case has yet resolved the effect of a refusal to contest a will on Medicaid eligibility. *Cf. supra* note 269.

286 *See Shepard's Estate*, 170 Pa. St. at 327, 32 A. at 1041; Burk v. Morain, 223 Iowa 399, 404, 272 N.W. 441, 444 (1937); *Harootenian's Estate*, 38 Cal. 2d at 253, 238 P.2d at 998 (Edmonds, J., dissenting).

287 Those states that do permit contests by creditors have not experienced a high volume of such litigation. Note, *The Right of a Creditor, supra* note 273, at 318.

are narrowed considerably.[288] Another court has questioned the wisdom of granting standing to pre-judgment creditors, with or without a lien. Absent a judgment requirement, creditors still have to predicate standing on their status as valid claimants against the heir. Standing by creditors holding unliquidated claims can thus be disputed on substantive grounds. Yet probate courts may be institutionally unfit to try such claims, and the need to do so would unduly prolong the probate proceeding.[289]

While not entirely unpersuasive, these arguments call for limitations on standing that are otherwise anomalous under modern statutes. Since the creditor who initiates a will contest seeks to avoid what is functionally a fraudulent conveyance, the extent of creditors' standing to challenge other sorts of fraudulent transfers would seem pertinent.[290] Though creditors under the original statute of 13 Elizabeth had to reduce their claims to judgment or obtain a pre-judgment lien as a prerequisite to standing,[291] neither requirement appears in the Uniform Fraudulent Conveyance Act or the Uniform Fraudulent Transfer Act.[292] Though these statutes may give false claimants greater opportunities to venture strike suits, they also protect the holders of meritorious claims against dilatory tactics by debtors.[293] Focusing on the latter side of the coin, most commentators have praised the broadened grant of standing under the uniform acts as a helpful "reform," despite its potential for abuse.[294]

The fact that the fraudulent conveyance at issue here involves a

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288 Marcus v. Pearce Woolen Mills, 353 Mass. 483, 485, 233 N.E.2d 29, 30 (1968). The court viewed the lien requirement as striking a "balance" between protection of the estate from false claims and protection of the rights of genuine creditors. *Id.* at 486, 233 N.E.2d at 30.

289 *Harootenian's Estate*, 38 Cal. 2d at 252, 238 P.2d at 998 (Carter, J., concurring). However, the requirement of a judgment *lien*, as opposed to a mere judgment, has been criticized as capricious, see *id.* at 252, 253-54, 238 P.2d at 998, 999-1000.

290 This analogy was made to establish the breadth of creditor standing in *In re* Kalt's Estate, 16 Cal. 2d 807, 813, 108 P.2d 401, 404 (1940) (dicta).

291 1 G. GLENN, *supra* note 5, §§ 80, 85, at 133-36, 144-45. The British statute of 13 Eliz. ch. 5 (1571) was received into American law in some states by statutory enactment and in others as part of the common law, see *id.* § 58, at 79-81. It survives to this day in a number of jurisdictions, *e.g.*, ALA. CODE § 8-9-6 (1984).

292 U.F.C.A. §§ 9-10, 7A U.L.A. 577-78, 630 (1918) U.F.T.A. § 7, *id.* 660 (1984); 1 G. GLENN, *supra* note 5, § 76, at 128-29. However, a general creditor under U.F.C.A. is required to have at least brought suit on the claim before acquiring standing to avoid the debtor's fraudulent conveyance. McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 438 n.170 (1933). By analogy, the same requirement should apply to general creditors seeking standing to contest a will.

293 American Surety Co. v. Conner, 251 N.Y. 1, 9-10, 166 N.E. 783, 785 (1929) (policy analysis by Cardozo, J.).

294 *E.g.*, 1 G. GLENN, *supra* note 5, § 83, at 142-43; Kennedy, *The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195, 197-98 (1986). *But see Current Legislation*, 20 COLUM. L. REV. 341 (1920).

probate estate would not seem to change the policy equation significantly. While the opportunity for a strike suit may be marginally greater,[295] so is the risk of dilatory tactics by the debtor: For probate is an *in rem* proceeding, and under many state statutes the decree of distribution is conclusive on all parties.[296] Accordingly, if the debtor were able to fend off his creditor's suit on the claim until the estate was closed, the creditor seeking to contest the will could be left without a remedy.[297] Lawmakers have not permitted the structural limitations of probate courts or the public policy in favor of closing estates expeditiously to stand in the way of creditor relief in similar cases. In no jurisdiction must a creditor of the decedent (as opposed to the heir) obtain a lien or judgment before asserting his claim against the estate, even though the very same difficulties are involved. In some states, the probate court is itself competent to resolve unliquidated claims; in others, distribution is delayed pending resolution of the claim at common law, or immediate distribution may be conditioned upon the posting of bond to meet the contingency that the claim will subsequently be vindicated in full.[298] If such procedures are followed in the relatively common case of disputed claims against the estate, there seems no reason to follow a different procedure in the rare situation where a general creditor of the heir seeks to challenge the will.[299]

However one evaluates these various issues, it is plainly advisa-

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295 By initiating a will contest, the creditor delays distribution of the estate, though it will continue to generate interest; whereas, when a creditor seeks to avoid an ordinary fraudulent conveyance, the property is already in the hands of the transferee.

296 3 W. PAGE, *supra* note 6, §§ 26.140-41, at 321-27; T. ATKINSON, *supra* note 12, at 798-99.

297 Even a pre-judgment writ of attachment obtained against the estate might offer no protection to the heir's creditor: Under state law, the lien may terminate if judgment is not obtained before the estate is closed. Kerson, *supra* note 273, at 26. Whether such a writ would even be effective against the estate also depends upon state law, *see supra* note 274.

298 T. ATKINSON, *supra* note 12, at 692-705; *see* UNIF. PROBATE CODE §§ 3-803, 3-804, 3-806(b) & (c), 3-810(b)(2) (1982).

299 Of course, if the creditor of the heir is permitted to assert his claim in probate, the heir should be made a party to the proceeding. *See In re* Harootenian's Estate, 38 Cal. 2d 242, 252, 238 P.2d 992, 998 (1951) (absence of heir as a party cited as a reason to limit standing); UNIF. PROBATE CODE § 3-806(b) (1982) (notice requirement for probate proceeding on allowance of claim against the estate). All of this analysis seems equally pertinent to the question of creditor standing to challenge a disclaimer. The issue arose in Stein v. Brown, 18 Ohio St. 3d 305, 308, 480 N.E.2d 1121, 1122-24 (1985), where the court granted standing to an unliquidated tort claimant to intervene in the executor's action for a declaratory judgment to determine the effectiveness of the debtor's disclaimer. The court cited to the Uniform Fraudulent Conveyance Act, which grants standing to non-judgment creditors. In *Stein*, the tort claimant had already commenced an action in tort in the common law court. *Quaere* whether the court would have granted standing in probate absent a concurrent suit to establish the merits of the tort claims. *See supra* note 292. *Cf. supra* note 39 and accompanying text.

ble to coordinate rules governing will contests with rules governing disclaimers. Because the possibility of disclaimer follows a successful will contest, the connection between the two is direct as well as analogical. Yet courts have rarely appeared to recognize, let alone show concern for, this fact.[300] As with the problem of disclaimer, courts are split on the question of standing to contest a will. In this instance, however, the majority and minority rules are reversed: Most states permit lien creditors to institute the contest.[301] In Iowa, for example, a creditor has standing to challenge a will disinheriting his debtor, but the debtor (seemingly) remains free to disclaim his inheritance once the contest succeeds.[302] *Vice versa* in Pennsylvania, a creditor may prevent his debtor from disclaiming, but if the debtor has instead submitted a fraudulent will that accomplishes the same purpose, his creditor lacks standing to do anything about it.[303] Even in states that both permit disclaimers and bar contests, the exception for collusion applies only to disclaimers; the grossest forms of fraudulent probate would remain irremediable.[304] Again, it would appear, the spectre of categorization haunts this field.

V.
CONCLUSION

This article has argued for a dual response to the problem of the insolvent heir. Given the inefficiency of reliance upon inheritance, fraud theory dictates that voluntary creditors should have no right to enjoin an insolvent disclaimer, absent prior representation of ownership over the corpus of the bequest. Indeed, on the same basis, the corpus could be made exempt from prior contract credi-

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300 An exception is *In re* Kalt's Estate, 16 Cal. 2d 807, 813, 108 P.2d 401, 404 (1940) (proscribing insolvent disclaimer in light of creditor's right of contest). *Cf.*, *In re* Shepard's Estate, 107 Pa. 323, 325, 32A. 1040, 1041 (1895) (erroneously equating contest issue with creditor's powerlessness to enjoin acceptance of an inter vivos gift); Lockard v. Stephenson, 120 Ala. 641, 645-46, 24 So. 996, 997 (1899) (same); *In re* Duffy's Estate, 228 Iowa 426, 434, 292 N.W. 165, 172 (1940) (distinguishing contest issue from gift issue on the ground that lack of standing may thwart testamentary intent, discussed *supra* text accompanying notes 280-82.).

301 *See* Note, *The Right of a Creditor, supra* note 273, at 315 n.50.

302 *Duffy's Estate*, 228 Iowa at 426, 292 N.W. at 165; *In re* Estate of Pearson, 319 N.W.2d 248, 249 (Iowa 1982) (dicta). This is all the more remarkable, given that Iowa has produced several of the "leading cases" for the principle that creditors cannot prevent an insolvent disclaimer. *E.g.*, Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20 (1920). Whether *Schoonover* would apply to an inheritance received as a result of a will contest has not been addressed directly. *See Kalt's Estate*, 16 Cal. 2d at 813, 108 P.2d at 404.

303 *Shepard's Estate*, 170 Pa. St. at 323, 32 A. at 1040. For disclaimer cases in Pennsylvania, see *supra* note 44. The continued viability of these cases is unsettled. *See supra* note 62.

304 *See supra* note 279. Whether the exception should apply in either situation depends, however, on whether we give precedence to dominion theory or fraud theory.

tors' claims, thereby permitting the debtor to accept his inheritance. By contrast, involuntary creditors, having had no opportunity to bargain with the debtor, should be permitted to veto the debtor's disclaimer, both on grounds of morality and economic efficiency. The same bifurcated analysis applies to the problem of a creditor's power to mandate the exercise of a right of election and to contest a will disinheriting his debtor.

The tension between this approach and dominion theory, which requires that some uniform line of cleavage be drawn between "owned" and "unowned" property, can only be resolved by abandoning dominion theory. Since dominion theory has no independent foundation in policy,[305] there is no reason to accord it deference; mere aesthetic symmetry is no substitute for utility.

The more substantive tension between (involuntary) creditors' rights of recovery and the autonomy of gratuitous transactors should be resolved by affirming the testator's right expressly to disinherit the debtor, but by rejecting attempts (either by rule of law or construction) to implement his "probable" intent. The beneficiary, in turn, should retain the right to reject inter vivos gifts against even involuntary creditors' objections,[306] but not to refuse inherited assets. The invasion of the beneficiary's autonomy appears smaller in the testamentary setting, where onerous moral responsibilities are less likely to accompany acceptance.

Needless to say, none of these conclusions are inescapable. Policy analysis inherently involves normative judgments, over which reasonable minds may differ. The abandonment of moral analysis of commercial credit,[307] the subordination of the principle of testamentary intent effectuation,[308] and the narrowing of the autonomy of the beneficiary,[309] are all open to debate. As always in the law, the issues are tangled and the questions linger; for, to return to the wisdom of Grant Gilmore, "[T]he path of the law leads not to the revelation of truth but to the progressive discovery of infinite complexity."[310]

Still, we should not hesitate to undertake the search. One of the troubling consequences of the proliferation of legal categories has been their tendency to suppress inquiry, by fostering rigid and formalistic modes of reasoning—a tendency that is all too apparent

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305 *See supra* text accompanying text note 119.

306 Because creditors virtually never learn of inter vivos gift offers (which, unlike probate proceedings, are not matters of public record), this would be the practical outcome, even in the face of a legal rule to the contrary.

307 *See supra* text accompanying notes 121-25.

308 *See supra* text accompanying notes 211-36.

309 *See supra* text accompanying notes 187-210.

310 Gilmore, *For Arthur Leff*, 91 YALE L.J. 217, 218 (1981).

in the case law of disclaimers and fraudulent conveyances. These divers (and diverse) formalisms flourish in isolation, but when they confront each other along categorical borders—such as the border between gratuitous transfers law and debtor-creditor law—they cry out for deeper analysis to bridge discontinuities. Prosser was right:[311] The no-law's land between categories provides fertile soil for substantive analysis, because it is there that interconceptual tensions lie embarrassingly exposed. Substantive analysis may have to begin at the fringe before it can spread inward. But Prosser overestimated the power even of tension to stimulate judicial thought. Formalism, alas, has powerful attractions: Judges are busy persons, and a backward glance at precedent affords far more adjudicative economy than does cogitation over policy.[312] One of the lessons of the insolvent heir is that, even at the border between contrary formalisms, judges may be tempted to finesse problems of reconciliation simply by insisting that the case falls into one formal category or the other—a phenomenon that Justice Frankfurter noticed and criticized in a related context as "the cross-sterilization of disciplines."[313]

Of course, the very fact that judges must *choose* between categories in borderline cases may lead them to make implicit policy judgments—however carefully considered—that they would not otherwise have made at all. In this regard, one cannot but feel ambivalent about a case like *Scrivani*,[314] where the court invoked two contradictory formalisms in the *same* opinion to distinguish the rights of Medicaid creditors from the rest of the field. The holding conformed with the bifurcated approach to disclaimers advocated here, and it seems likely that the court's analytical contortions followed from its underlying policy concerns.[315] But the court's complaisant dependence on formalistic reasoning to dispose of those concerns forestalled the development of a substantive theory of insolvent disclaimer that subsequent judges, faced with other sorts of creditors' claims, could refer to and build upon. To this extent, the opinion in *Scrivani* left much to be desired.

A second unfortunate consequence of categorization high-

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311 *See supra* note 14 and accompanying text.

312 *Cf.* arguments associated with Critical Legal Studies that judges developed legal formalism in order to camouflage the economic and political choices implicit within common law rules. *See, e.g.*, M. HORWITZ, *supra* note 188, at 253-66. It seems to me that pressure toward legal formalism can be explained easily enough without postulating such dominative conspiracies.

313 *Quoted in* Spiegel, *Peer Review*, 27 THE SCI. 16, 19 (Sept.-Oct. 1987).

314 *In re* Scrivani, 116 Misc. 2d 204, 455 N.Y.S.2d 505 (Sup. Ct. 1982), discussed *supra* text accompanying notes 77-87.

315 *See supra* text accompanying notes 79-80.

lighted by the insolvent heir is the tendency of independent categories to develop groundless inconsistencies.[316] To be sure, some inconsistencies, such as the inconsistent treatment of autonomy under inheritance law and fraudulent conveyance law, reflect conflicting policy objectives that fully justify the asymmetry and require compromise only at points of intersection. But other "parallel" inconsistencies, such as the disparate treatment of disclaimer, non-election, and non-contest of a will, have no basis in policy. They are the offspring of judges and legislators who wear blinders. Surely, another lesson of the insolvent heir is that lawmakers toiling within legal categories ought to peek over the barriers from time to time to ensure that their efforts correspond with those conducted in other segments of the legal landscape.

All of this is not to suggest that we should dismantle the barriers that separate legal categories.[317] Much like the process of speciation in biology, the process of categorization in law can generate analytical (as opposed to adaptive) efficiencies whose benefits far outweigh their costs.[318] It is difficult to imagine a workable legal system without them. But some sorts of barriers hurt more than others. The early forms of action were painful precisely because they *were* forms: arbitrary, inflexible rules and remedies that required literally centuries of imaginative advocacy to circumvent.[319] We need not mourn their passing. Though the modern system of common law categories that has risen to replace them has proven far more plastic, it nonetheless continues to exhibit many of the drawbacks of its predecessor—as the insolvent heir can amply testify.[320] If only we could somehow render the modern ghosts of the forms of action more truly ethereal, there would be little cause to fear them.

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316 This phenomenon has been noticed before. *See, e.g.*, Palmer, *The Effect of Indefiniteness on the Validity of Trusts and Powers of Appointment*, 10 UCLA L. REV. 241, 290-91 (1963).

317 Proposals to collapse certain related legal categories have been made on occasion. *See, e.g.*, G. GILMORE, THE DEATH OF CONTRACT 89-90 (1974) (contract and tort).

318 For a related analysis of the costs and benefits of categorization, see Leff, *Contract as Thing*, 19 AM. U.L. REV. 131, 131-37 (1970). For an early discussion, see Pound, *Classification of Law*, 37 HARV. L. REV. 933, esp. 944 (1924). For a study of the birth of a legal category, see Alexander, *The Transformation of Trusts as a Legal Category, 1800-1914*, 5 L. & HIST. REV. 303 (1987). *Cf.* Amadon, *Specialization and Evolution*, 77 AM. NATURALIST 133 (1943) (discussing the efficiency of specialization in nature); E. MAYR, EVOLUTION AND THE DIVERSITY OF LIFE 20-22 (1976) (same).

319 The story is brilliantly told in S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (1969).

320 *But cf.* Thesiger, J.: "Now I do not take the view that the ghosts of the old forms of action always stand in one's path clanking their chains. I think that if one is not unduly timorous one may find that they are waving one along the path of justice." McAlpine & Sons Ltd. v. Minimax Ltd., 1 Lloyd's Rep. 397, 422 (Q.B. 1970).