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The Odd Couple: The Estate Tax and Family Law

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INTRODUCTION

Besides Benjamin Franklin's truism that death and taxes are both certain, another exists: their combination does not eliminate inheritance.[1]

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* Associate Professor of Law, Indiana University Robert H. McKinney School of Law. Thanks to fellow visiting academics at the University of Oxford for conversations on this topic.

1. Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 44 (2010) ("Currently no jurisdiction in the world imposes a wealth transfer tax on the order of 80% to the largest inheritances and none applies a comprehensive inheritance tax."). However, freedom of testation and inheritance also have their limits. *See* Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2185 (2011). On the contrary, many countries have completely abolished taxes on property transfers upon death. *See* David G. Duff, *The Abolition of Wealth Transfer Taxes: Lessons from Canada, Australia, and New Zealand*, 3 PITT. TAX. REV. 71 (2005) (reviewing the abolition of wealth transfer taxes in Canada and briefly describing the abolition of those taxes in Australia and New Zealand); Daphna Hacker, *Intergenerational Wealth Transfer and the Need to Revive and Metamorphose the Israeli Estate Tax*, 8 L. ETHICS HUM. RTS. 59 (2014) (summarizing the history of the Israeli estate tax from its inception in 1949 to its abolition in 1981); Barbara R. Hauser, *Death Taxes Around the World in 2013: Your "A to Zed" Guide on How Other Countries Treat Inheritances*, TR. & EST., Nov. 2013, at 62 (listing several countries that have abolished the inheritance tax

Tax rates around the world are not high enough to infringe on a person's ability to pass property from one generation to the next, even as dynamic as the estate tax system can be.[2] While some continue to call for significantly higher estate taxes, with the aim to redistribute property or generate revenue for the government,[3] this aim has proven an elusive goal.

Many arguments justify the continued existence of significant intergenerational wealth transfers. These include that people will not work or create wealth, or save it, if the government will be the beneficiary upon death.[4] This Article, however, posits another significant reason that the inheritance tax is politically unpopular—the family. As long as people have children, a relatively high estate tax will not be politically viable. Furthermore, family law illustrates the value placed on the private safety net provided by families;[5] indeed, family law and the estate tax are linked in this way.

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and explaining why they have elected to abandon the tax); Michael Littlewood, *The History of Death Duties and Gift Duty in New Zealand*, 18 N.Z. J. TAX'N L. & POL'Y 66 (2012) (describing the rise and fall of estate taxes in New Zealand); William H. Pedrick, *Oh, to Die Down Under! Abolition of Death and Gift Duties in Australia*, 14 U.W. AUSTL. L. REV. 438 (1982) (detailing the Australia death duty abolition movement and providing the underlying reasons for the country's decision to bar the tax); Vrishti Beniwal, *Inheritance Tax Unlikely to be Re-Imposed*, BUS. STANDARD (July 5, 2014), http://www.business-standard.com/article/economy-policy/inheritance-tax-unlikely-to-be-re-imposed-114070500092_1.html [http://perma.cc/FK9W-FRT8] (discussing the unlikelihood that an inheritance tax would be reintroduced in India due to high costs of administering the tax).

2. *See* Jeffrey A. Cooper, *Ghosts of 1932: The Lost History of Estate and Gift Taxation*, 9 FLA. TAX REV. 875 (2010); Elizabeth R. Carter, *New Life for the Death Tax Debat*e, 90 DENV. U. L. REV. 175 (2012); *see also infra* notes 23–25 and accompanying text.

3. *See* Reginald Mombrun, *Let's Protect Our Economy and Democracy from Paris Hilton: The Case for Keeping the Estate Tax*, 33 OHIO N.U. L. REV. 61, 63 (2007) ("[T]he estate tax should not be repealed because it is the only tax that attempts to prevent uncontrolled wealth accumulation, and the potential damage of permanent repeal to our economy and our democratic system are not worth the gamble."); Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 563–64 (2010) ("The notion of equality of opportunity plays a large role in many tax policy debates, providing one of the most common justifications for the estate tax and other forms of redistribution." (footnote omitted)); Matthew B. Gaudin, Note, *The Federal Estate Tax and the National Debt: Why the Debt Forces A Defense of the Tax*, 45 IND. L. REV. 159, 190 (2011) ("[T]he estate tax should be retained, at least for the foreseeable future, and be used *solely* to reduce the national debt or offset increased spending." (emphasis in original)); Batchelder, *supra* note 1 (advocating for a comprehensive inheritance tax).

4. *See infra* Part II.A.

5. *See infra* Part II.

These lessons are important given that taxes upon property transfers at death—the estate and inheritance taxes—are highly dynamic and constantly changing.[6] A few years ago, Congress briefly repealed the estate tax in the United States but then reenacted it in a more favorable form to taxpayers.[7] The tax may now encounter reforms in the United Kingdom, where the estate tax is currently the second highest in the world, following Ireland,[8] and in China, where its introduction has been resisted in recent years.[9]

To begin, Part I of this Article examines the estate tax in various societies, both in classic redistributionist societies and in the modern United States. This Part then compares the estate tax to the income tax, analyzing why societies have better tolerated the latter. Part II establishes the link between family law and estate tax law, proposing that any significant changes to the estate tax would require a reimagining of family law.

I. TAXES ON PROPERTY TRANSFERS AT DEATH

Governments can collect two types of taxes at death upon property transfers: an estate tax and an inheritance tax. While a decedent's estate pays the estate tax, most often based on the amount of the estate,[10] those

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6. *See generally* Cooper, *Ghosts of 1932*, *supra* note 2 (discussing how policy considerations of the Revenue Act of 1932 are relevant to the current changing landscape of estate and inheritance taxes); *see also* Carter, *supra* note 2, at 189.

7. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38, *available at* http://www.gpo.gov/fdsys/pkg/PLAW-107publ16/pdf/PLAW-107publ16.pdf [http://perma.cc/4947-QPZT]; Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296, *available at* http://www.gpo.gov/fdsys/pkg/PLAW-111publ312/pdf/PLAW-111publ312.pdf [http://perma.cc/R7LE-RPHL].

8. Mark Giddens & Ladislov Hornan, *UK and Ireland Have Highest Death Duties of All Major Economies*, UHY HACKER YOUNG (Mar. 31, 2014), http://www.uhy-uk.com/news-events/news/uk-ireland-highest-death-duties-major-economies/ [http://perma.cc/V8PV-474Z] ("The UK government would typically take 25.8% from the estate of an individual passing on assets worth US $3m to their heirs, well above the global average of 7.67%." (footnote omitted)). For a background on the inheritance tax in the United Kingdom, see William T. Thistle, Note, *A Comparative Guide of Where to Die: Should the United Kingdom Repeal its Inheritance Tax?*, 36 GA. J. INT'L & COMP. L. 705 (2008).

9. Justin T. Brown, Note, *Dodging the Draft (Tax): How China's Draft Inheritance Tax Law Turns a Blind Eye to the Rich, a Good Eye to the Masses, and How a Reorientation Can Be Realized*, 12 WASH. U. GLOBAL STUD. L. REV. 161, 163 (2013) (noting that reform introducing an effective inheritance tax has not been enacted yet).

10. *See Estate Tax*, IRS, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-Tax [http://perma.cc/Z724-ZFX4] (last updated Jan. 9, 2015).

inheriting property from a decedent pay the inheritance tax, often based on the nature of their relationship to the decedent or the amount inherited.[11] The United States government collects only an estate tax, while American states may collect an additional inheritance tax and an estate tax.[12]

Linked closely to the taxes on property transfers at death is the gift tax, which guarantees that people will not simply give away their property during their lifetimes to avoid the taxes at death. Instead, the transferor is taxed on lifetime gifts as well as property transfers at death. In the United States, the Unified Credit allows people to exempt a certain amount of property from the federal estate tax and the federal gift tax.[13] If transferors exceed the credit in either gifts or death transfers, then they pay taxes on the excess.[14] Thus, whether the Internal Revenue Service ("IRS") imposes a gift or death tax depends on whether the excess is distributed as a lifetime gift or as an inheritance.

Taxes on property transfers upon death exist all around the world, but no country bars inheritance through taxes.[15] This Part considers the modern federal estate tax and state inheritance taxes, as well as the taxes upon death in other countries and their distinctions from the income tax.

A. Taxes Upon Death in the United States

Both the state and federal governments may tax property transfers at death. The federal government imposes an estate tax, but not an inheritance tax.[16] The state government may impose an additional estate or inheritance

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11. *See* Scott Drenkard & Richard Borean, *Does Your State Have an Estate or Inheritance Tax?*, TAX FOUND. (May 24, 2015), http://taxfoundation.org/blog/does-your-state-have-estate-or-inheritance-tax [http://perma.cc/YM9X-WKGJ].

12. *See id.*

13. *Estate Tax*, IRS, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-Tax [http://perma.cc/Z724-ZFX4] (last updated Jan. 9, 2015).

14. 26 U.S.C. §§ 2010, 2505 (2012).

15. *See supra* note 1.

16. Some have argued for a federal inheritance tax instead of a federal estate tax. *See* Ann Mumford, *From Dahomey to London to DC: "Marketing" Wealth with the Proposal for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 221, 222 (2009) (commending the introduction of a comprehensive inheritance tax to replace the estate tax in federal United States tax system). Professor Batchelder argues as follows:

> The advantages of a comprehensive inheritance tax are threefold. First, such a tax would enhance social welfare by more accurately measuring ability to pay. The United States and most jurisdictions currently exclude financial inheritances from the income tax base of heirs. But substantial financial inheritances directly affect the well-being of the recipient. In addition, they provide valuable indirect information about the heir's welfare because they are correlated with nonfinancial inherited assets and traits that powerfully affect earning ability—such as educational level,

tax, or both.[17] None of these taxes, however, has risen to the level of barring inheritance completely, and both of these taxes differ from the income tax.[18]

1. The Federal Estate Tax

The federal estate tax, first implemented in 1916,[19] has a relatively short history in the United States.[20] Prior to introduction of the estate tax, death was taxed in different ways. For example, in 1797, Congress relied on stamp duties for revenue, and federal stamps were required on wills offered for probate, letters of administration, discharges from legacies, and intestate distributions of property.[21] Various other taxes on property transfers upon death existed before the modern estate tax, but all were short-lived.[22]

Federal estate taxation has been in flux throughout its history, illustrating the highly political nature of the tax. One estate tax characteristic that has significantly fluctuated has been the exemption amount, which the

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> race, social networks, intelligence, and personality. A comprehensive inheritance tax captures this information, thereby ensuring that fiscal burdens and benefits are allocated more fairly.

Batchelder, *supra* note 1, at 2.

17. *See* Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 877–79 (2006) (listing states with inheritance taxes, estate taxes, or both).

18. *See infra* Part I.A.2–3.

19. Phyllis C. Smith, *Change We Can't Believe in . . . or Afford: Why the Timing is Wrong to Reduce the Estate Tax for the Wealthiest Americans*, 42 U. MEM. L. REV. 493, 496 (2012).

20. *See* Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, 27 STAT. INCOME BULL., no. 1, 2007, at 118, *available at* http://www.irs.gov/pub/irs-soi/07sumbul.pdf [http://perma.cc/KCK9-8L7V]. For an even earlier history of the estate tax, see Cooper, *Ghosts of 1932*, *supra* note 2 (highlighting the early history of estate taxes from 1797 to 1932); David Frederick, *Historical Lessons from the Life and Death of the Federal Estate Tax*, 49 AM. J. LEGAL HIST. 197 (2007) (recounting the history of the estate tax in the United States from its predecessors in the nineteenth century, to its inception in 1916, to its current state and framework); Marc L. Stolarsky, *History of the Federal and Ohio Estate Tax*, 20 PROB. L.J. OHIO 237 (2010) (reviewing the history of the estate tax, including its ancient and modern world history, inception in the United States, and metamorphosis from a temporary tax to allay war costs to a general permanent tax). For policy implications, see Debra Rahmin Silberstein, A *History of the Death Tax: A Source of Revenue, or a Vehicle for Wealth Redistribution?*, 17 PROB. & PROP. 58 (2003) (reviewing the history of death taxes in the United States up through the changes in the Economic Growth and Tax Relief Reconciliation Act of 2001 and the evolving and recurring policy implications).

21. Silberstein, *supra* note 20, at 59.

22. *Id.* at 59–61.

value of the estate must exceed to be taxed.[23] Currently, the exemption amount rests at $5.43 million per person.[24] Another fluctuating characteristic is the rate of taxation—the higher the rate, the more the estate is taxed.[25]

The trend has been to decrease the impact of the federal estate tax.[26] In his budget plan announced in 2015, however, President Obama proposed changes to the tax system that would increase the revenue base for the estate tax.[27] Although he has not proposed to raise the tax rate or lower the exemption amount, the President's proposal would tax the increase in the value of inherited assets from when those assets were originally purchased.[28] The increased value of these assets is not taxed under current law because their basis is stepped up at the death of the decedent.[29] For example, if a person inherits property worth $300,000 that the decedent bought for $50,000, the President's proposal would tax the $250,000 in appreciation to the extent that it exceeds exemption amounts. Under the proposal, this appreciation would be taxed at the capital gains rates that apply to investments instead of ordinary income rates.[30] Traditionally, these capital gains rates have been lower than the ordinary income taxation rates,[31] but President Obama also proposed to increase these rates from 20% to 28%.[32] The exemption from this capital gains tax on inherited assets would be the first $200,000 of inherited assets for a married couple and $100,000 for singles.[33] Small businesses would be able to defer the tax until the business

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23. Cooper, *Ghosts of 1932*, *supra* note 2.
24. *In 2015, Various Tax Benefits Increase Due to Inflation Adjustments*, IRS (Oct. 30, 2014), http://www.irs.gov/uac/Newsroom/In-2015,-Various-Tax-Benefits-Increase-Due-to-Inflation-Adjustments [http://perma.cc/R655-RN45].
25. Cooper, *Ghosts of 1932*, *supra* note 2.
26. Professor Bird-Pollan explains as follows:

> Over the last twelve years the estate tax has been eviscerated. Evolving from a tax at 55% on all estates over $675,000 to a tax at only 35% on estates over $5.12 million per person ($10.24 million for a married couple); the estate tax now taxes only about 5,300 estates per year, as opposed to over 58,000 estates in 1999.

Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 ME. L. REV. 1, 2 (2013).
27. Office of Mgmt. & Budget, *The President's Budget for Fiscal Year 2016*, WHITE HOUSE, http://www.whitehouse.gov/omb/budget/ [http://perma.cc/8SFB-4L9R] (last visited Aug. 29, 2015).
28. *Id.*
29. *Id.*
30. *Id.*
31. *See* Calvin H. Johnson, *Taxing the Consumption of Capital Gains*, 28 VA. TAX REV. 477, 478 (2009).
32. An additional 3.8% increase in capital gains tax came into effect in 2013 to help fund President Obama's healthcare law. 26 U.S.C. § 1411 (2012). For background on capital gains taxation, see *id.*
33. Office of the Press Sec., *FACT SHEET: A Simpler, Fairer Tax Code That Responsibly Invests in Middle Class Families*, WHITE HOUSE (Jan. 17, 2015),

is sold, and owners of closely held businesses would be able to spread the taxes over 15 years.[34] Although Congress has not agreed with these proposals,[35] it is not surprising that the dynamic estate tax has continued to receive such significant attention from lawmakers.

Under modern American estate tax law, taxpayers have a few ways to plan around estate taxes. Most notably, an estate tax exemption amount is currently set at $5.43 million, meaning that unless the decedent's estate is worth more, the estate will not have to pay the estate tax.[36] If the decedent was married, however, the spouse has an additional $5.43 million exemption as well.[37] This exemption is given in addition to the $14,000 annual gift exemption.[38] Under federal law, each person can give away up to $14,000 per year per recipient.[39] In addition to this federal tax structure, however, people must also take into account the parallel state system of taxation of property transfers upon death.

2. State Taxes Upon Death

Besides the federal estate tax, Americans are also subject to state taxes on the transfer of their property upon death. Many states have these taxes—some have estate taxes[40] and some have inheritance taxes.[41] The decedent's estate pays an estate tax, while the beneficiaries of the inheritance pay the inheritance tax on the property transfer.[42]

In many state inheritance tax schemes, including Indiana's former regime, the state taxes only certain categories of inheritances.[43] Under Indiana's prior regime, for example, transfers between spouses were exempt from inheritance taxation,[44] as they are under the federal estate

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https://www.whitehouse.gov/the-press-office/2015/01/17/fact-sheet-simpler-fairer-tax-code-responsibly-invests-middle-class-fami [https://perma.cc/RHP8-UXV9].

34. *Id.*

35. *Id.*

36. *In 2015, Various Tax Benefits Increase Due to Inflation Adjustments*, *supra* note 24.

37. Trisha Farrow, Comment, *The Not-So-Simple Estate Plan of* Breaking Bad*'s Walter White*, 46 ARIZ. ST. L.J. 955, 966 (2014).

38. *What's New—Estate and Gift Tax*, IRS, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Whats-New-Estate-and-Gift-Tax [http://perma.cc/Z7EA-UAEB] (last updated Aug. 24, 2015).

39. *In 2015, Various Tax Benefits Increase Due to Inflation Adjustments*, *supra* note 24.

40. *See* Drenkard & Borean, *supra* note 11.

41. *Id.*

42. *Id.*

43. IND. CODE § 6-4.1-3-1 (1978).

44. *Id.*

taxation regime.[45] Indiana taxed all other relationships, but to varying extents that depended on the degree of the relationship between the decedent and the beneficiary.[46] Accordingly, family relationships were privileged more so than friendships, such that brothers and sisters of the decedent inherited under smaller tax rates than would friends or neighbors of the decedent.[47]

States may have an inheritance tax or an estate tax, but most states have neither.[48] The trend, furthermore, has been to minimize such taxation. Indiana serves as an example of this trend to abolish state taxes upon death—the state has changed its taxation laws twice since 2012, both times to either minimize or eliminate its inheritance tax. The first change was in 2012 and the goal of the law was to phase out the Indiana inheritance tax by 2022.[49] Therefore, Indiana applied a credit of increasing size each year to the inheritance tax due, until the tax phased out.[50] This elimination of the state's inheritance tax was not quick enough, however, so Indiana lawmakers enacted a new law in 2013 that completely eliminated the state inheritance tax.[51]

Competition among the states has pressured state governments to minimize taxes on property transfers at death.[52] New Jersey is one of the few states that has both estate and inheritances taxes.[53] Although New Jersey's exemption amount for its inheritance tax is only $500, the

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45. The marital deduction rests on the notion that "a husband and wife should be treated as one economic unit for purposes of estate and gift taxes, as they generally are for income tax purposes. Accordingly, no tax should be imposed on transfers between a husband and wife." S. Rep. No. 97-144, at 127 (1981), *reprinted in* 1981 U.S.C.C.A.N. 105, 229.

46. IND. CODE § 6-4.1-3-1.

47. *See In 2015, Various Tax Benefits Increase Due to Inflation Adjustments*, *supra* note 24.

48. *See* Drenkard & Borean, *supra* note 11. Maryland and New Jersey have both. *Id.*

49. IND. CODE § 6-4.1-5-1.1 (repealed 2013).

50. *Id.* The Indiana inheritance law entirely exempted surviving spouses from an inheritance tax. *Id.* All other beneficiaries of an estate were divided into three groups depending on closeness of relation to the decedent, with differing exemption amounts and tax rates. *Id.*

51. IND. CODE § 6-4.1-5-0.5 (2013) ("This chapter [on the inheritance tax] does not apply to a property interest transferred by a decedent whose death occurs after December 31, 2012.").

52. Cooper, *Interstate Competition and State Death Taxes*, *supra* note 17, at 838–39.

53. *New Jersey: An Outlier in Death*, FACTS FOR DISCUSSION (N.J. Policy Research Org. Found., Trenton, N.J.), Fall 2014, at 3–4, *available at* njprofoundation.org/wp-content/uploads/2014/11/ffd10.pdf [http://perma.cc/P7Z9-YJRA].

exemption amount for its estate tax is $675,000, with a top rate of 16 %.[54] Many of the current arguments to lower New Jersey's inheritance and estate taxes focus on the need to remain competitive with the more favorable tax regimes found in neighboring states, where wealthy New Jersey residents are moving to as a result.[55] Thus, in this way, people can plan to minimize state taxes by moving to a different state, which is not possible under the federal taxation system.

3. Distinctions Between Taxes Upon Death and the Income Tax

The estate tax has been subject to just as much, if not more, fluctuation and debate than the income tax and often meets more resistance as to its constitutionality.[56] Yet fundamental distinctions between the two types of taxes are worth noting, and the two types of taxes present different issues for families.[57] At the definitional level, the income tax is a tax on income, measured each year in the annual accounting system.[58] This definition stands in contrast to the taxes imposed on property transfers made at the time of death, such as estate and inheritance taxes.

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54. Div. of Taxation, Dep't of the Treasury, *Inheritance and Estate Taxes Overview*, STATE OF N.J., http://www.state.nj.us/treasury/taxation/inheritance_over.shtml [http://perma.cc/2D9D-MZVL] (last updated Aug. 20, 2014).

55. The New Jersey Policy Research Organization Foundation has noted as follows:

> For New Jersey to remain competitive not only in the region but with the rest of the country, policymakers need to examine and reform the state's outdated tax policies. . . . Since tax returns of small businesses and the wealthy have a profound impact on our overall tax revenues, it is in the state's best interest to keep as many of its upper tax bracket filers in state.

New Jersey: An Outlier in Death, FACTS FOR DISCUSSION (N.J. Policy Research Org. Found., Trenton, N.J.), Fall 2014, at 3–4, *available at* njprofoundation.org/wp-content/uploads/2014/11/ffd10.pdf [http://perma.cc/M97C-JMSM]; *see also* Paul Sullivan, *Some States Are Moving to Loosen Their Estate Taxes*, N.Y. TIMES (Jan. 24, 2014), http://www.nytimes.com/2014/01/25/your-money/cold-facts-about-estate-taxes.html [http://perma.cc/2TD2-F2GX].

56. The constitutionality of the income tax, however, is well established. U.S. CONST. amend. XVI.

57. For additional differences between the estate tax and the income tax, see Bird-Pollan, *supra* note 26, at 5, 11 (noting that the incentives are different and that the estate tax serves a more significant redistributive function than the income tax).

58. *See* 26 U.S.C. § 61 (2012); Arthur Cockfield, *Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform*, 46 S.D. L. REV. 8, 8 (2001) ("The federal income tax system generally taxes an individual's increase in wealth over the course of a year. For most people, this amounts to a tax on their annual wages or salaries as well as any income derived from investments or savings." (footnote omitted)).

Unlike the estate tax, taxpayers have very few ways to plan around the income tax. Minimizing the income tax consists of increasing tax deductions and credits and decreasing gross income. Wages and tips, however, are always going to be included in gross income, and the main forms of deductions that taxpayers can seek are those relating to retirement planning and charitable deductions. Meanwhile, the estate tax has spurred an entire industry for planning around it.[59]

Finally, predicting the estate tax is more difficult than predicting the income tax. Although people can typically predict their income each year, predicting the status of one's estate at end of life is a much harder task, due to rising health care costs and life expectancies.[60] These factors mean that an estate might dwindle towards the end of a person's life because of the care that the person needs. Perhaps for these reasons, the United States utilizes the income tax to primarily generate revenue, while the estate tax is used as merely a supplement.[61]

B. Taxes Upon Death Outside the United States

There are few societies that have abolished inheritance entirely.[62] An example of a nation that eliminated inheritance occurred in 1918, when the

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59. *See* Dawn Allison, Note, *The Importance of Estate Planning Within the Gay and Lesbian Community*, 23 T. MARSHALL L. REV. 445, 468–81 (1998).

60. *See* Peter A. Ubel, *Can Patients in the United States Become Savvy Health Care Consumers?*, 92 N.C. L. REV. 1749, 1756 (2014) ("Eventually, the cost of healthcare began to burden Americans."); Kerrie S. Howze, Note, *Medical Tourism: Symptom or Cure?*, 41 GA. L. REV. 1013, 1018 (2007) ("[T]he United States spends more on health insurance than any other industrialized nation . . . .").

61. *Policy Basics: Where Do Federal Tax Revenues Come From?*, CTR. BUDGET & POL'Y PRIORITIES, http://www.cbpp.org/research/policy-basics-where-do-federal-tax-revenues-come-from [http://perma.cc/D625-YXVJ] (last updated Mar. 11, 2015).

62. *See generally* ERNST & YOUNG, INTERNATIONAL ESTATE AND INHERITANCE TAX GUIDE 2013 (2013), *available at* http://www.ey.com/Publication/vwLUAssets/2013-international-estate-and-inheritance-tax-guide/$FILE/2013-international-estate-and-inheritance-tax-guide.pdf [http://perma.cc/HA4Y-RPBA] (providing a comprehensive overview of the estate tax planning systems and wealth transfer planning considerations in 36 jurisdictions around the world, including whether a country has barred or abolished the tax); Hauser, *supra* note 1, at 56 (providing an overview of the inheritance taxes of countries around the world, along with each country's highest tax rate); *UK and Ireland Impose Highest Taxes on Inheritance of All Major Economies*, UHY, http://www.uhy.com/uk-imposes-highest-taxes-on-inheritance-of-all-major-economies/ [http://perma.cc/G5WT-7CFH] (last visited Aug. 27, 2015) (summarizing the study of UHY International and noting that the UK and Ireland have the highest inheritance taxes in the world and that "old world" economies charge higher estate taxes than the "new world").

Soviet Bolsheviks applied the teachings of Marx and Engels.[63] One translation of the relevant law reads: "Inheritance, testate and intestate, is abolished. Upon the death of the owner his property (movable and immovable) becomes the property of the [Russian Soviet Federated Socialist Republic]."[64] This abolishment of inheritance, however, lasted only a few years.[65] Currently, Russia does not have an inheritance tax.[66]

Imposition of relatively high taxation rates has been far more common in the history of the estate tax than a complete ban on inheritance. However, countries have nearly always fallen short of imposing rates that would eliminate inheritance. Currently, no country imposes a wealth transfer tax of 80% on the largest inheritances, and none applies a comprehensive inheritance tax.[67]

Two countries that are currently debating or reforming tax laws on property transfers at death are China[68] and the United Kingdom.[69] Because the estate tax presents an opportunity to redistribute wealth, one might logically assume that the societies with the highest redistribution ideals would aim to achieve redistribution through this tax. But this assumption is wrong. China, governed by the Communist Party, does not have an inheritance tax, and the Chinese government has not enforced previous iterations of this tax.[70]

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63. *See generally* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993) (noting the approach of Marx and Engels as abolishing property and inheritance rights); *see also* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 19 (9th ed. 2013).

64. DUKEMINIER & SITKOFF, *supra* note 63, at 19 (quoting [1918] 1 Sob. Uzak., RSFSR, No. 34, item 456, Apr. 26, 1918).

65. *Id.*

66. *UK and Ireland Impose Highest Taxes on Inheritance of All Major Economies*, *supra* note 62.

67. Batchelder, *supra* note 1, at 45; *see also* Hauser, *supra* note 1 (providing an overview of the inheritance taxes of countries around the world, along with each country's highest tax rate).

68. *See A Lack of Will Power*, ECONOMIST (Nov. 22, 2014), http://www.economist.com/news/china/21633875-inheritance-law-needs-catch-up-economic-and-social-change-lack-will-power [http://perma.cc/C3KX-3Z3G].

69. *See Inheritance Tax to be Scrapped on Homes Worth Up to £1m*, BBC (July 4, 2015), http://www.bbc.com/news/uk-33393480 [http://perma.cc/B3TF-NLWA].

70. *See* Brown, *supra* note 9, at 163.

Currently, the debate over whether China should impose an inheritance tax continues,[71] and critics have launched many arguments against the tax.[72]

A similar debate has been ongoing in the United Kingdom, which has the second highest inheritance tax in the world.[73] The debate centered largely on the rise of real estate prices in parts of the United Kingdom,[74] such as London, which results in a higher inheritance for descendants of these homeowners. This factor, along with a threshold that has been static since the early 2000s, has resulted in a significant burden on families that are not particularly wealthy.[75]

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71. *See Should China Levy an Inheritance Tax?*, BEIJINGREVIEW.COM.CN, http://www.bjreview.com.cn/forum/txt/2013-03/25/content_530112.htm (last updated Mar. 28, 2013) (offering opinions of supporters and opponents of a proposed inheritance tax in the Chinese press and media); Sophie Song, *China's Proposed Inheritance Tax Meets With Widespread Disapproval*, INT'L BUS. TIMES (Oct. 1, 2013, 11:14 AM), http://www.ibtimes.com/chinas-proposed-inheritance-tax-meets-widespread-disapproval-1413240 [http://perma.cc/4DC2-9XDQ] (describing the detrimental effects that a proposed inheritance tax would impose on the Chinese middle class); Liyan Qi, *Talk of Inheritance Sparks Debate in China*, WALL ST. J. CHINA REAL TIME REP. BLOG (Oct. 3, 2013, 8:30 AM), http://blogs.wsj.com/chinarealtime/2013/10/03/talk-of-inheritance-tax-sparks-debate-in-china/ (highlighting the recent debate in China over a proposed inheritance tax and suggesting possible incentives along with potential challenges); Yin Pumin, *Inherently Taxing: Consensus on Inheritance Tax Still to be Reached*, BEIJINGREVIEW.COM.CN, http://www.bjreview.com.cn/nation/txt/2013-11/11/content_577150.htm [http://perma.cc/WWL7-CTSQ] (last updated Nov. 14, 2013) (offering a perspective of both sides of the current debate in China).

72. Kyle Pomerleau, *China Flirts with an Estate Tax*, TAX FOUND. (Oct. 3, 2013), http://taxfoundation.org/blog/china-flirts-estate-tax [http://perma.cc/EEW4-XZLE] (suggesting that a proposed Chinese inheritance tax would likely result in more harm than good); *see also* Chris Luo, *Inheritance Tax Law Triggers Heated Debate in China*, CHINA INSIDER (Oct. 1, 2013), http://www.scmp.com/news/china-insider/article/1322177/inheritance-tax-law-talk-triggers-heated-online-debate [http://perma.cc/7JUZ-45YL] (explaining some of the common concerns and fears that Chinese citizens have expressed in reference to a potential inheritance tax).

73. *UK and Ireland Impose Highest Taxes on Inheritance of All Major Economies*, *supra* note 62. For a comprehensive overview of how the United Kingdom's inheritance tax and related tax laws work, see Mark W. Smith, *An Introduction to Estate Planning in the United Kingdom*, EST. PLAN., Apr. 2010, at 10.

74. *See* Nicole Blackmore, *Budget 2015: How Inheritance Tax Changes Affect You*, TELEGRAPH (Jul. 8, 2015, 5:23 PM), http://www.telegraph.co.uk/finance/personalfinance/how-budget-affect-me/11722864/Budget-2015-How-inheritance-tax-changes-might-affect-you.html.

75. *Cameron Would Like to "Go Further" on Inheritance Tax*, BBC NEWS (Mar. 24, 2014), http://www.bbc.com/news/uk-politics-26717875 [http://perma.cc/4S5J-JTV2] (describing Prime Minister David Cameron's intentions to reform the inheritance tax and to lessen the tax's burden on the middle class); *see also* Thistle, *supra* note 8 (providing a historical overview of the inheritance tax in the United Kingdom and describing the political climate that has led up to the current debate); Natalie Lee, *Inheritance Tax—An Equitable Tax No Longer: Time for*

Thus, a complete inheritance bar has not been common, nor has an imposition of high taxes on property transfers at death. Although scholars have offered many economic arguments as the reasons,[76] no one has yet made an argument based on family law principles.

II. THE LINK BETWEEN FAMILY LAW & ESTATE TAXATION

The right to inheritance in the United States and many other countries is well-established. In the United States, this right is rooted in American law and is treated as a stick in the bundle of property rights.[77] Scholars have also offered many economic arguments to support inheritance rights, often hinged on the positive incentives created by inheritance.[78] Another important reason for the failure to bar inheritance, however, is the family.

In fact, the family and the estate tax are notably interconnected. A bar to inheritance would not be consistent with the current system of family law in the United States. First, inheritance incentivizes family behavior—an important function in many families that taxation levels impact. Second, family law shows the value placed on a private safety net.

A. Incentivizing Family Behavior

Many fields of law influence and incentivize the family and its activities. Among these influences is tax law, which incentivizes families to hold and transfer property in certain ways.[79] Family members also

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Abolition, 27 LEGAL STUD. 678 (2007) (noting many arguments in the current debate).

76. *See infra* Part II.A.

77. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003) ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please."); *Id.* cmt. c ("[C]ourts [do not have] any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property. . . . American law curtails freedom of disposition only to the extent the donor attempts to make a disposition . . . that is prohibited or restricted by an overriding rule of law."); *see also* Hirsch, *supra* note 1, at 2189 ("We can discern an analogous trend from status-based rights of inheritance toward unfettered testation.").

78. *See infra* Part II.A.

79. For background on the taxation system as incentive, see Margaret Ryznar & Karen E. Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 MARQ. L. REV. 1667 (2015); *see also* Henry Ohlsson, *The Legacy of the Swedish Gift and Inheritance Tax, 1884–2004*, 15 EUR. REV. ECON. HIST. 539, 539 (2011) ("Taxes create burdens on economic agents as purchasing power is transferred from households and firms to the public sector. Taxes may also change the behaviour of households and firms. Agents might

incentivize each other's behavior through inheritance, which taxation levels impact.

Arguably, tax laws incentivize individuals to act in a particular way.[80] Tax laws undoubtedly incentivize corporate actors given the sophistication of corporations, which benefit from extensive legal advice to minimize taxes.[81] This characteristic of tax laws as creating incentives has led to the debate over whether the current taxation system stifles productivity by decreasing the monetary reward of work and whether different forms of tax are more efficient. For example, scholars have suggested that a consumption tax would spur saving, which is a socially desirable goal.[82]

Mechanically, the current taxation system can incentivize behavior in a few ways, such as by providing a tax deduction that reduces taxable income,[83] or by offering a tax credit that reduces tax liability dollar for

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move from high tax activities to low tax activities, from taxed activities to untaxed activities.").

80. For the argument that economic incentives drive people's behavior, see Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1033, 1040–41 (1993) (arguing that Congress should lower married women's tax rates to encourage marriage and married women's participation in the labor force); *see also* EDWARD J. MCCAFFERY, TAXING WOMEN 19–23 (1997) (noting that because married couples often view the wife's income as supplemental, which is taxed at higher marginal rates, the tax code provides a disincentive for married women to work); Jennifer L. Venghaus, Comment, *Tax Incentives: A Means of Encouraging Research and Development for Homeland Security?*, 37 U. RICH. L. REV. 1213, 1220 (2003) (suggesting that the tax code can change society's behavior). However, other scholars have suggested that the tax code does not influence people's behavior, but that people's behavior influences the tax code. *See* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1392 (1975) (arguing that the tax code codifies social mores); Erik M. Jensen, Book Review, *Jonathan Barry Forman, Making America Work*, 5 PITT. TAX REV. 165, 170 n.16 (2008) (suggesting that the tax code is indifferent to whether the husband or wife is the primary wage-earner, but that social expectations may be more sexist).

81. Mark J. Cowan, *A GAAP Critic's Guide to Corporate Income Taxes*, 66 TAX LAW. 209, 232 (2012) ("Policymakers also understand the motivation of corporate managers to minimize taxes and rely on corporate managers to respond to incentives to engage in certain activities—such as investing in new equipment or research and development—put in the tax law.").

82. *See, e.g.*, Mitchell L. Engler, *Progressive Consumption Taxes*, 57 HASTINGS L.J. 55, 58–61 (2005).

83. Professor Robinson uses the following illustration:

> An example [on tax deductions] may be helpful here. Assume . . . [Taxpayer] A . . . [has] paid $1000 under [a] local property tax. Taxpayer A is an itemizer whose income places him in a 15% marginal rate bracket. . . . Because A is able to take the [$1000] deduction, A will not have to pay $150 in income tax. A's property tax expense has been subsidized by the federal treasury to that extent.

dollar.[84] The most significant incentive is whether a particular tax liability exists. At least one study has found that people are slightly incentivized to delay or accelerate death—to the extent that they can control death—based on economic factors.[85] These economic factors include the existence of any estate taxes.[86]

Chinese inheritance law also explicitly incentivizes certain behaviors in families. For example, people can reward those who fulfill the main duty of support towards the decedent and disinherit children and other heirs who have misbehaved towards them.[87] The Chinese default law bars a wider range of people from inheriting, including those who abandon, mistreat, and fail to support the decedent.[88] The Chinese courts have significantly expanded the scope of these provisions to encompass a wide range of behavior that would result in disinheritance.[89] Financial incentives only work when there is money behind them, and therefore, taking away inheritance rights will eliminate the financial incentives. Thus, China is the classic example of embedding behavioral incentives in its inheritance law.

While similar types of incentives are utilized by American testators, the incentives are publicly seen in the default rules on wills and trusts.[90] Under most intestacy schemes applied in the United States, when a person dies without a will, heirs cannot take an inheritance if they are slayers—heirs that killed the decedent—and, in some states, if they are adulterers.[91]

Mildred Wigfall Robinson, *It Takes a Federalist Village: A Revitalized Property Tax as the Linchpin for Stable, Effective K-12 Public Education Funding*, 17 RICH. J.L. & PUB. INT. 549, 582 (2014).

84. *Id.* at 583 ("Unlike an income tax deduction, a credit is taken after tentative federal income tax liability has been determined. It is a dollar-for-dollar reduction of federal tax liability that would otherwise be borne.").

85. Wojcich Kopczak & Joel Slemrod, *Dying to Save Taxes: Evidence From Estate-Tax Returns on the Death Elasticity*, 85 REV. ECON. & STAT. 256, 256 (2003), *available at* http://www.columbia.edu/~wk2110/bin/dying-final.pdf [http://perma.cc/ANG8-R55G].

86. *Id.*

87. Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 103–04 (1998).

88. *Id.* at 86.

89. *Id.* at 87.

90. Testators are free to change the default rules, and their documents become public upon probate, but trust instruments are private and therefore difficult to analyze as a group. DUKEMINIER & SITKOFF, *supra* note 63, at 466. This analysis omits significant data: the trust is one of the most utilized tools of succession because of its ease, flexibility, and informality. In the United States, FDIC Banking Data—which excludes all trusts for which a trustee is not an institution in the Federal Reserve System—shows that there are 780,000 private and charitable trust accounts, totaling $860 billion. *Id.* at 392–93.

91. *See, e.g.*, Heinzman v. Mason, 694 N.E.2d 1164, 1167 (Ind. Ct. App. 1998) ("Well-established principles of equity require that neither one who takes

A few states, including California, Pennsylvania, and Illinois, have statutes denying inheritance to heirs who abused children or elderly relatives.[92] In Washington, for example, the state has expanded the slayer statute to apply not only to slayers, but also to abusers of the decedent.[93]

These examples, however, are extreme behaviors that result in disinheritance.[94] Only Louisiana, due to its civil law background,[95] has broader disinheritance protections for children, but also has a longer list of behaviors that preclude inheritance.[96] Specifically, disinheritance of a child in Louisiana is allowed when the parent has "just cause," which includes the following acts or omissions of the child:

> (1) The child has raised his hand to strike a parent, or has actually struck a parent; but a mere threat is not sufficient. (2) The child has been guilty, towards a parent, of cruel treatment, crime, or grievous injury. . . . (6) The child, being a minor, has married without the

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property as a result of feloniously killing his spouse nor his heirs benefit from such wrongdoing." (citing Nat'l City Bank of Evansville v. Bledsoe, 144 N.E.2d 710 (Ind. 1957); *In re* Cox Estate, 380 P.2d 584 (Mont. 1963))); IND. CODE 29-1-2-14 (2012) ("If either a husband or wife shall have left the other and shall be living at the time of his or her death in adultery, he or she as the case may be shall take no part of the estate or trust of the deceased husband or wife."); IND. CODE 29-1-2-15 ("If a person shall abandon his or her spouse without just cause, he or she shall take no part of his or her estate or trust.").

92. DUKEMINIER & SITKOFF, *supra* note 63, at 139.

93. *Id.*

94. *But see* Anne-Marie Rhodes, *Blood and Behavior*, 36 ACTEC L.J. 143, 143 (2010) ("The prevailing view of the law of succession is that it is based on blood relationship, and subjective considerations are irrelevant. This perception of a one-dimensional approach is not historically accurate. From the beginning, behavior influenced the distribution of property, albeit at a secondary level.").

95. A quintessential example of the civil law system is France, where forced heirship rights only exist for descendants; until 2006, ascendants were included in forced heirship provisions when the decedent had no children. Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 84 (2008). Under the forced heirship provision in France, all estates are divided into two portions. *Id.* The reserved portion is the portion that cannot be disposed of by an inter vivos gift or will other than to descendants, ascendants, or the surviving spouse. *Id.* The disposable portion is that which the testator is free to dispose of to whomever he chooses and depends upon the number of his children. Ryan McLearen, Comment, *International Forced Heirship: Concerns and Issues with European Forced Heirship Claims*, 3 EST. PLAN. & CMTY. PROP. L.J. 323, 325 (2011).

96. John A. Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 LA. L. REV. 923, 983–84 (2012) ("Louisiana began the lengthy process of re-conceptualizing the institution of forced heirship in the 1980s and early 1990s (a process that was finally completed in 1995 as the result of a state-wide referendum amending the Louisiana Constitution) . . . .").

> consent of the parent. . . . (8) The child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years . . . .[97]

The American inheritance system facilitates inheritance incentives in families by permitting inheritance and disinheritance. Specifically, a child or other descendant has no statutory protection in most American states against intentional disinheritance by a parent.[98] Thus, financial incentives are a policy tool not only for governments,[99] but also for family units.

However, legal protections exist for disinherited spouses. In a community property state, a disinherited spouse still retains ownership over half of the community property.[100] In common law states, the surviving spouse may elect to receive a statutory share of the decedents' estate.[101] Thus, disinheritance is not effective in incentivizing spousal behavior because the surviving spouse keeps a portion of the estate regardless of the decedent's wishes. This is because the law assumes a partnership in marriage and the contribution of each spouse to building marital wealth. Therefore, the trusts and estates law favors a spouse.

Tax law also privileges the surviving spouse with an unlimited tax-free transfer of property during life and at death.[102] Justifying a tax on any property transfer to a surviving spouse is, therefore, conceptually difficult. Two methods of ending a marriage, however, exist: death and divorce. Both rely on the private safety net by which spouses must financially provide for each other, and any significant change to the estate tax would require reimaging family law.

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97. LA. CIV. CODE art. 1621(a) (2014).

98. For background on this policy choice, see Jacqueline Asadorian, Note, *Disinheritance of Minor Children: A Proposal to Amend the Uniform Probate Code*, 31 B.C. THIRD WORLD L.J. 101 (2011).

99. For example, Congress has used tax credits to encourage companies to hire certain groups of people to boost their employment rates. Specifically, the Work Opportunity Tax Credit provides a tax credit for hiring people from certain target groups that have consistently faced significant barriers to employment, such as Temporary Assistance for Needy Families ("TANF") recipients and food stamp recipients. 26 U.S.C. § 51 (2012).

100. *See* Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 WM. & MARY BILL RTS. J. 925, 941 n.97 (2010).

101. DUKEMINIER & SITKOFF, *supra* note 63, at 513.

102. 26 U.S.C. § 1041. Since *United States v. Windsor*, 133 S. Ct. 2675 (2013), this law has also applied to legally married same-sex couples.

B. The Private Safety Net

The traditional view of families is as economic support for its members.[103] In fact, society depends on the family as a private safety net, and family law is a leading example of this societal dependency. Family law has most often put the responsibility for supporting a person in the hands of the family, and a high estate tax undercuts this goal by decreasing the support families are able to provide each other.

In intact marriages, state courts will not intervene because of the family law nonintervention doctrine. This doctrine prevents courts from adjudicating issues arising in ongoing marriages.[104] The exception to this general rule, the doctrine of necessaries, permits the court to intervene to ensure that the earning spouse is responsible for the payment of expenses incurred by the nonearning spouse for those things that are necessary for the family.[105] The court determines necessity by examining factors such as the spouses' means, social position, and circumstances.[106]

Another example of the private support system in family law is the premarital and postmarital agreements, which permit prospective spouses around the world to circumvent their jurisdiction's judicial and statutory

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103. *See* Shelley A.M. Gavigan, *Something Old, Something New? Re-Theorizing Patriarchal Relations and Privatization from the Outskirts of Family Law*, 13 THEORETICAL INQUIRIES L. 271, 289 (2012) ("It is important to remember here that the primary responsibility for economic support of family members has always rested with the family, in particular, with the male breadwinner."); Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J.L. & FAM. STUD. 1, 34 (2012) ("With different background principles in place, many men constitute themselves distinctly as breadwinners, taking pride in providing the primary economic support to the family as a way of caring for and connecting with their partner and their children . . . ."); *see also* Dan Huitink, Note, *Forced Financial Aid: Two Arguments as to Why Iowa's Law Authorizing Courts to Order Divorced Parents to Pay Postsecondary-Education Subsidies Is Unconstitutional*, 93 IOWA L. REV. 1423, 1426 (2008) ("Fortunately, many students receive financial aid in the form of loans, grants, and scholarships from the government and academic institutions themselves. Nevertheless, this aid remains limited because the federal government, colleges, and universities still 'consider it primarily the family's responsibility to pay for school.' Therefore, they limit students' financial-aid packages to the amount their families—not the students themselves—are unable to pay. Importantly, this limit applies regardless of whether the students' families actually contribute to their college expenses." (quoting *What Can You Do If Your Parents Can't Help Pay for School?*, FINAID, http://www.finaid.org/otheraid/parentsrefuse.phtml [http://perma.cc/LEE8-XHG3] (last visited Sept. 2, 2015)) (footnotes omitted)).

104. Elaine M. Chiu, *That Guy's a Batterer!: A Scarlet Letter Approach to Domestic Violence in the Information Age*, 44 FAM. L.Q. 255, 286 (2010).

105. Susan Kalinka, *Taxation of Community Income: It Is Time for Congress to Override* Poe v. Seaborn, 58 LA. L. REV. 73, 94 (1997).

106. *Id.*

defaults in organizing the terms of their marriage and potential divorce.[107] To be effective in the United States, the premarital agreement has particularly undergone significant development over the course of the past few decades, and couples enjoy significant freedom of contract.[108] Although courts may refuse to enforce premarital agreements concerning several topics related to children, the enforceability of these agreements is much firmer when it comes to property division. Barring duress, involuntariness, or unconscionability, the court will enforce a couple's decisions about its property arrangements.[109] Any property arrangement that leaves one spouse on public assistance, however, is not subject to this type of agreement.[110] The courts often will not enforce any property agreement that leaves a spouse impoverished,[111] which highlights the preference for the use of family resources, rather than taxpayer resources, to support the family.

The public safety net enforces the private safety net, as seen in the case of child support collection.[112] Child support in the United States "[has] progressed from private, to state, then to federal remedies."[113] The primary reason for this progression has been the changing demographics that have seen increasing numbers of children unsupported by their noncustodial parents.[114] In such cases, if the custodial parent's support was insufficient,

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107. Margaret Ryznar & Anna Stepień-Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 42 (2009).

108. *Id.*

109. *Id.*

110. *See, e.g.*, IND. CODE 31-11-3-8 (2008).

111. *See id.* § 31-11-3-8(b) ("If: (1) a provision of a premarital agreement modifies or eliminates spousal maintenance; and (2) the modification or elimination causes one (1) party to the agreement extreme hardship under circumstances not reasonably foreseeable at the time of the execution of the agreement; a court, notwithstanding the terms of the agreement, may require the other party to provide spousal maintenance to the extent necessary to avoid extreme hardship.").

112. The public safety net's enforcement of the private safety net is also seen in the context of Social Security. *See infra* note 135 and accompanying text.

113. WALTER WADLINGTON & RAYMOND C. O'BRIEN, FAMILY LAW IN PERSPECTIVE 129 (3d ed. 2012).

114. Divorce breaks the private safety net provided by the family. *See, e.g.*, Margaret F. Brinig, *Contracting Around No-Fault Divorce*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 275, 277 (F.H. Buckley ed., 1999) ("A great deal of research suggests that children of parents who divorce will be worse off in the vast majority of cases. Children may lose out for a number of reasons. They will be poorer than those of intact families . . . ."). Women and children are often disproportionately impacted by this financial burden. For example, in 1993, the mean income for divorced American mothers was $17,859, while for divorced fathers it was $31,034. Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 5–6 (1995).

public assistance served as a substitute for child support.[115] The federal government, however, began to legislate in family law—an area of law traditionally in the state domain—to ensure that the safety net returns to its private nature through reimbursement from the obligor parent.[116]

For example, in 1950, Congress amended the Aid to Families with Dependent Children ("AFDC") program to require state welfare agencies to notify enforcement officials if a child continued to receive benefits under the program after the child's parents abandoned him or her.[117] The Act then empowered state officials to search for the child's parents and compel the parents to fulfill their child support obligations.[118] Currently, custodial parents receiving public assistance frequently must assign their child support right to the state in exchange for the assistance, allowing the state to seek reimbursement from a non-paying parent.[119]

Further, the state prosecutors who enforce child support orders illustrate public enforcement of the private safety net that families provide. Prosecutors

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115. Laura W. Morgan, *The Federalization of Child Support a Shift in the Ruling Paradigm: Child Support as Outside the Contours of "Family Law,"* 16 J. AM. ACAD. MATRIMONIAL L. 195, 203, 216 (1999).

116. Family law subsequently experienced increasing federalization, particularly in the United States Supreme Court's jurisprudence on the constitutional right to privacy. Justice Antonin Scalia has expressed concern about this increasing federalization of family law:

> I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.

Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting). *But see* Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1762–63 (2005) (noting that family law is currently in the domain of the states, but that, historically, the federal government was not limited in this way); Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197 (1999) (arguing that there is no foundation for the view that family law belongs in the state domain).

117. Social Security Act Amendments of 1950, Pub. L. No. 81-734, 64 Stat. 477.

118. HOUSE COMM. ON WAYS & MEANS, 108TH CONG., BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS § 8-5 (Comm. Print 2004).

119. Margaret Ryznar, *Two Direct Rights of Action in Child Support Enforcement*, 62 CATH. U. L. REV. 1007, 1031 (2013); *see also* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 6 (2004) (noting a man's duty to financially provide for non-marital children traces back to the British Poor Laws in 1576, but this obligation arose only if the mother of the child was on public support to avoid using public funds for these purposes).

have become more aggressive in their enforcement methods.[120] Enforcement techniques range from lighter penalties, such as the suspension of recreational licenses or the loss of a work permit, to severe sanctions, such as criminal prosecution and incarceration.[121] In *Turner v. Rogers*, the United States Supreme Court considered whether indigent parents are entitled to state-appointed counsel when they face incarceration for failing to pay child support.[122] The Court determined that, although due process does not require a state to provide counsel to a debtor parent, the state is obligated to ensure a fundamentally fair proceeding.[123]

Much of family law therefore concerns itself with regulating property division and child support, both of which attempt to deal with the distribution of property among family members, particularly to protect children. This concern has provided family members certain rights and privileges, such as financial support. Family law's basic mechanisms ensure that the family's resources are used to support the family members.

Indeed, recognizable limits to family law's protection of children exist, usually upon the child's attainment of an age of majority.[124] Yet the importance of the private safety net has blurred even this limit, as the minority of states that enforce postsecondary obligations illustrates. These states have post-majority educational support laws that aim to provide college tuition support for adult children of divorced or unmarried parents.[125] In these states, a court may order post-majority support in a proceeding for the dissolution of marriage, similar to how a court can order regular child support for a minor child.[126] The laws differ by state: some take into account the parent's financial capacity and the child's ability,

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120. *See* Jennifer Goulah, Comment, *The Cart Before the Horse: Michigan Jumps the Gun in Jailing Deadbeat Dads*, 83 U. DET. MERCY L. REV. 479, 486 (2006) ("Several jurisdictions . . . have implemented the practice of 'booting' vehicles of deadbeat parents."); Marcia Johnson, *Juvenile Justice*, 17 WHITTIER L. REV. 713, 828 (1996).

121. Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1000–01 (2006); *see also* Margaret Campbell Haynes & Peter S. Feliceangeli, *Child Support in the Year 2000*, 3 DEL. L. REV. 65, 89 (2000) (explaining Delaware's ability to suspend recreation, driving, and professional licenses); Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 410 n.27 (2004) (noting that parents behind on child support payments may lose their drivers' licenses or work permits).

122. 131 S. Ct. 2507, 2512 (2011).

123. *Id.* at 2512.

124. *See* Mayra Alicia Cataldo, Note, *Safe Haven: Granting Support to Victims of Child Abuse Who Have Been Judicially Emancipated*, 52 FAM. CT. REV. 592 (2014).

125. *See* IND. CODE § 31-16-6-2 (2008).

126. Anna Stepień-Sporek & Margaret Ryznar, *Child Support for Adult Children*, 30 QUINNIPIAC L. REV. 359, 360 (2012).

which a college admissions letter may be sufficient to prove; some ignore a parent's role—or lack thereof—in choosing the college; and some provide parents access to the child's college transcripts.[127] Some states have statutes permitting this support, while others have court precedent allowing the support.[128] All of these postsecondary education support laws, however, require parents to financially support their adult children, extending the private safety net that family law creates even further.

One reason for these postsecondary education awards is the perception that the private safety net erodes for children of divorced parents. According to the court in *Childers v. Childers*, a postsecondary educational statute remedies the economic disadvantages facing children whose divorced parents likely would have provided greater financial support had they remained married.[129] No states have analogous postsecondary education laws for children of intact families partially because of the assumption that the private safety net is secure in these families.

Upon divorce, courts may consider the family's standard of living before and after the marriage.[130] Courts have required the noncustodial

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127. *See id.* at 365–67.

128. In Missouri, for example, child support is terminated when the child dies, marries, enters active duty in the military, becomes self-supporting, or turns 18. MO. REV. STAT. §§ 452.340, 452.416 (2013). The Missouri legislation, however, includes a lengthy description of child support potentially owed to college students, but the support is capped once the child reaches the age of 21 or finishes the program, whichever occurs first. *Id.* § 452.340; *see also* COLO. REV. STAT. § 14-10-115 (2014); IOWA CODE ANN. § 598.21(f) (West Supp. 2015). For an analysis of parental support of children's college costs in the states of Alabama, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, and Washington, see Madeline Marzano-Lesnevich & Scott Adam Laterra, *Child Support and College: What Is the Correct Result?*, 22 J. AM. ACAD. MATRIMONIAL L. 335, 339–72 (2009).

129. 575 P.2d 201, 207 (Wash. 1978) (en banc).

130. During marriage, the courts do not intervene, but in the limited exceptions when they do, such as under the doctrine of necessaries, the courts may look to the standard of living as well. *See supra* Part II.B. Despite this protection, many households headed by divorced women are at a major financial disadvantage. LaFrance, *supra* note 114; *but see* Kelly Bedard & Olivier Deschênes, *Sex Preferences, Marital Dissolution, and the Economic Status of Women*, 40 J. HUM. RESOURCES 411, 413 (2005) (arguing that divorced women live in households with more income per person than never-divorced women); *see also* Brinig, *supra* note 114, at 277. Further, at least one study has supported the view that divorced parents contribute less to their children's education. Huitink, *supra* note 103, at 1426–27 & n.18 (highlighting a study that showed that 29% of children with divorced parents received parental support for college expenses versus 88% of children from intact families). The Child Support Guidelines now determine how child support is calculated. 24A Am. Jur. 2d, Divorce and Separation § 939 (2015).

parent to provide for the reasonable needs of the children only until the age of majority, unless there is a postsecondary educational support order in a divorce or paternity case.[131] Children, however, have less claim to a parent's property or income than a spouse, who presumably helped to build the marital estate. Therefore, divorce law privileges the spouse, often aiming to maintain that spouse's standard of living after the divorce.[132]

Upon a person's death, courts have not been preoccupied with the standard of living of the widow or widower, and definitely not of the children—their task is only to oversee the distribution of the estate according to state intestacy laws or a decedent's will.[133] Courts do not question whether the estate given to a surviving spouse will suffice to maintain that spouse's standard of living.[134] Although the elderly have a supplementary public safety net that includes Social Security, scholars have largely criticized this supplement as insufficient.[135] Increased estate taxation, however, would cast doubt on whether the family can maintain a standard of living after the death of a family member.[136] Thus, society views the family as a private safety net in both divorce and death, and the states have structured their family laws accordingly. An increase in the estate tax would result in less financial support in this safety net. Such a result would be inconsistent with the discussed family law structure.

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131. *See, e.g.*, White v. Marciano, 235 Cal. Rptr. 779, 782 (Ct. App. 1987) ("Generally, children are entitled to be supported in a style and condition consonant with the position in society of their parents. A parent's duty of support does not end with the furnishing of mere necessities if the parent is able to afford more. Support must be reasonable under the circumstances. How much 'more,' i.e., what amount is 'reasonable' is defined in relation to a child's 'needs' and varies with the circumstances of the parties." (citations omitted)).

132. Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J. L. & GENDER 1, 56 (2008).

133. *See* Julia E. Swenton, Note, *The Missing Piece: The Forgotten Role of Testator Intent in the Application of the Doctrine of Dependent Relative Revocation in Oklahoma*, 59 OKLA. L. REV. 205, 213 (2006) ("The role of a probate court is to carry out the wishes of the testator.").

134. *Id.*

135. *See* Martha N. Ozawa & Hong-Sik Yoon, *Safety Net for Elderly Poor People: A Challenge to Social Security Reform*, 15 NAELA Q. 15 (2002) (noting the issues for the Social Security system created by drastic demographic shifts as baby boomers begin to retire); Jonathan Barry Forman, *Reforming Social Security to Encourage the Elderly to Work*, 9 STAN. L. & POL'Y REV. 289, 289 (1998) ("While there is a growing number of Social Security beneficiaries, there are relatively fewer workers to support them.").

136. However, due to the marital deduction, surviving spouses would be exempt from increased taxes. *See* DALE S. ADAMS & ROBERT B. SMITH, FEDERAL ESTATE & GIFT TAXATION § 2056 (West, Westlaw through 2015).

CONCLUSION

In his budget plan for 2016, President Obama has proposed changes to the federal estate tax system that would increase estate tax revenue.[137] Others have also called for far higher estate taxes, with the aim of redistributing property or generating revenue for the government.[138] This goal, however, has proven elusive.

The right to inheritance in the United States and many other countries is well established. In the United States, this right is comfortably viewed as a stick in the bundle of property rights. There also have been many economic arguments offered to support inheritance rights, often hinged on the positive incentives created by inheritance. However, there is another important reason for the failure to bar inheritance—the family.

A bar to inheritance is inconsistent with the current system of family law in the United States, including the fact that estate taxes incentivize family behavior and that family law places a value on a private safety net. Thus, a high inheritance or estate tax is not politically feasible, and a reason lies in the tax's relation to the family and family law—any significant change to the estate tax would require reimagining family law.

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137. *See supra* Part I.A.1; Office of Mgmt. & Budget, *The President's Budget for Fiscal Year 2016*, WHITE HOUSE, http://www.whitehouse.gov/omb/budget/ [http://perma.cc/8SFB-4L9R] (last visited Aug. 29, 2015).

138. *See supra* note 3.