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PROPERTY AND BELONGINGNESS: RETHINKING GENDER-BIASED DISINHERITANCE

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For centuries, women have been disinherited from family wealth because of cultural traditions and religious rules that suggest their social role does not require an inheritance. Religious or traditionalist testators still adhere to this belief, exercising their testamentary freedom. Moreover, American law respects the testator’s wishes whether they are petty, vindictive or discriminatory. We make the novel argument that the law should not protect gender-biased bequests, as they are contrary to public policy. Our argument centers on a reconfiguration of inheritance in a way that includes its symbolic effect on disinherited relatives, redefining the social, relational and familial role of the institution of inheritance. We claim that in our society today inheritance functions as the communication of statements about a child’s belongingness to the parent and, more generally, to the family. It is closely connected to the child’s need for roots and continuity. Inheritance is located at the intersection of an individual’s vision of continuity and social ideals. The parties’ interests in continuity are broader than a particular relationship between a daughter and her father; they are embedded in a project that has a social and cultural meaning. Therefore, within the doctrine of public policy, we balance conflicting interests. We stress the values of dignity, self-respect, autonomy, and participation in the family property and continuity of the family name. These values are balanced against the freedom of religion and culture.

INTRODUCTION
I. DISINHERITANCE OF DAUGHTERS: THE PHENOMENON
II. INHERITANCE LAW: STRUCTURE AND VALUES
III. THE MEANING OF INHERITANCE
IV. THE LIMITS OF TESTAMENTARY FREEDOM
V. GENDER BIASED DISINHERITANCE AND PUBLIC POLICY
   a. EQUALITY, RESPECT AND PUBLIC POLICY
   b. RELIGION, CULTURE AND PUBLIC POLICY

CONCLUDING REMARK: PROPERTY, FAMILY AND EQUALITY

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INTRODUCTION

Mrs. Singh, a widow, had five children. She loved and cherished all of them equally. Her children were all reasonably settled in life, and maintained good relationships with their mother. Yet only two of these children were men, and consequently entitled to an inheritance according to Mrs. Singh’s Indo-Fijian tradition. Her three loving, supportive daughters received only token amounts according to the will, while the bulk of the estate was left to her two sons. The disappointed daughters turned to court in British Columbia, Canada, which altered the provisions of the will. The court explained that the will simply did not meet the moral norms in Canadian society. Had Mrs. Singh lived in the United States, her daughters would have received no legal relief. They would have just had to live with the painful message that their mother communicated in her final testament: you do not deserve to participate in the family property, because you are women.

Indeed, American law respects the donor’s testamentary freedom. His motives are not scrutinized. Generally, he can be petty, capricious and vindictive, and his estate plan is still perfectly valid. With this starting point in mind, we set out to explore the limits of testamentary freedom with regard to equality in belongingness to the family. We ask whether the law should protect the donor’s discriminatory plan as a matter of public policy, considering the values of dignity, self-respect, autonomy, and participation in the family property and continuity of the family name.

This is mostly uncharted territory. Scholars often focus on discriminatory restraints in bequests or trusts. Such restraints may include requiring the beneficiary to marry within her faith, as was the case in the recently famous In re Estate of Feinberg decision, or, to take a very different example, forming charitable trusts for the enjoyment of a particular group or race. These restraints have been analyzed in the recent literature. For example, Jason Summerfield, Disinheritance in New York State: Legacies We Do and Do Not Want to Leave (2010); Jeremy Macklin, The Puzzling Case of Max Feinberg: An Analysis of Conditions in Partial Restraint of Marriage (2009).
important works focus on testamentary provisions that seek to change the state of affairs in the world. They either encourage a beneficiary to act discriminately, or found an institution with discriminatory goals or purposes. By contrast, we focus on the motives that inspire the distribution of the estate. There is little discussion in current scholarship on the issue of discriminatory motives that result in disinheritance, mostly because lawyers assume that the reasons that lead a testator to disinherit children or other relatives are out of the law’s reach. We suggest that some discriminatory bequest motives violate public policy as they infringe the dignity, self-respect and familial belongingness of potential recipients.

We enter this unmarked territory with a specific focus on gender bias motivations. This focus includes analyzing the construction of familial relations and daughters’ participation in the family property. Nonetheless, we find the comparison to other forms of discrimination quite useful. For example, we compare gender-biased disinheritance to race-biased disinheritance, where a grandparent decides to disinherit one of his grandchildren, because of his or her race.

Our argument centers on a reconfiguration of inheritance in a way that includes its symbolic effect on disinherited relatives. Following this premise, we argue that discriminatory gender bias motives should invalidate an estate plan. This conclusion includes redefining the social, relational and familial role of the institution of inheritance. We claim that in our society today inheritance functions as a communication of statements about the child’s belongingness to the parent and, more generally, to the family. Disinheritance on the other hand reflects, in many cases, a negative statement about the belongingness of the child. We then argue, following Hellman, that disinheritting a daughter because she is a woman deems her and is, therefore, a violation of a public policy principle. We thus employ the concept of discrimination as humiliation stemming from the unique attributes of donative transfers.

Of course, gender-biased disinheritance of the estate has significant economic consequences. The systematic exclusion of daughters from family property would result in economic disparities between men and women. A society committed to gender equality and equal opportunity should beware of such bequest patterns. Both dimensions – the values of roots, belongingness and dignity and the economic inequality – work together as strong arguments against gender-biased disinheritance. In this article we focus on the former dimension, thus contributing to a new understanding of the institution of inheritance.

The main thrust of this article, then, is not to reinvent the familiar tension between liberal values and cultural or religious norms. Instead, our purpose is to

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8 We bracket the gender-biased disinheritance of wives from this discussion, and focus on daughters. Unlike daughters, wives are protected from disinheritance in the American legal system. For the elective share, see John H. Langbein & Lawrence W. Waggoner, Redesigning the Spouse’s Forced Share, 22 REAL PROP. PROB. & TR. J. 303 (1987). Also see Lawrence Waggoner, The Uniform Probate Code’s Elective Share: Time for a Reassessment 37 U. MICH L. REVIEW 1 (2004).
9 DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG (2008).
explore the intersection of property, family and equality. We put the spotlight on inheritance, and its unique characteristics are the foundation for our argument.

The argument is developed as follows: the first three parts of this article define the problem, while the following two parts discuss the possible legal solution. We begin, in Part II, with the phenomenon of disinheritance of daughters because of their gender. Part III is concerned with the structure and values of inheritance. Part IV goes on to explain the effect of disinheritance on family members, children in particular, with a particular focus on the legal, relational and sociological attributes of inheritance. It introduces the concept of inheritance as expressing belongingness and familial continuity, and as being closely connected to notions of dignity, respect and roots. Part V examines the limits of testamentary freedom, commenting on the interrelation between testamentary freedom and equality. Part VI looks into the doctrine of public policy, arguing that gender-biased disinheritance violates its principles. This Part balances values, including equality and dignity on the one hand, and freedom of religion and freedom of culture on the other hand. Finally, we conclude with some thoughts on property, family and equality.

I. DISINHERITANCE OF DAUGHTERS: THE PHENOMENON

Several religions and customary laws stipulate an unequal distribution of assets at death, and distinguish between men and women as heirs.\(^\text{10}\) The social impact of such inheritance patterns varies among different societies, according to the position these religious or customary rules occupy in a particular legal and social framework. To evaluate this phenomenon and give a basic sense of its roots, we offer some brief examples.

A first example of a religious predicament is Jewish law, which orders, regarding the land at least, that the decedent’s sons receive the estate. Only if the owner has no sons (or other male descendants) does a daughter inherit.\(^\text{11}\) In addition, wills that circumvent these succession rules are generally frowned upon in Jewish law, as the rules of inheritance are set forth in the Torah.\(^\text{12}\) This means that religiously observant owners feel compelled to leave their assets to their sons and disinherit their daughters. Even when intestate rules are egalitarian, Orthodox owners can be expected to write wills that follow the Torah’s succession laws. However, in the context of Israeli society, there is an interesting interplay between religion and the norm of equality. In Israel, a rabbinical court may

\(^{10}\) Inheritance law is filled with technical terms, specific verbs and nouns to identify a complex variety of transfers. Most often, there are different words for personal property and real property transfers. For example, “a man dying testate devises real property to devisees and bequeaths personal property to legatees”. Also, some treat wills as disposing real property and testament as disposing personal property. There is a further distinction regarding intestacy. “Real property descends to heirs; personal property is distributed to next of kin”. See JESSE DUKEMINIER ET AL., WILL, TRUSTS AND ESTATES 33 (7th ed., 2005). Following Dukeminier et al., we use these words interchangeably. JESSE DUKEMINIER ET AL., WILL, TRUSTS AND ESTATES 33 (7th ed., 2005).

\(^{11}\) The Torah, Num. 27:8-11. In the order of succession, sons (the eldest son taking a double portion) and their descendants take first, then daughters and their descendants, then the brother of the giver and his descendants, and so on. See JOSEPH RIVLIN, INHERITANCE AND WILLS IN JEWISH LAW 18-19 (1999) (Hebrew).

assume authority over estate disputes, provided all the relevant parties agree to accept its ruling. Surprisingly, perhaps, rabbinical courts in Israel make an effort to accept egalitarian values in the context of inheritance. They recognize wills that include a bequest to daughters, and occasionally employ fictions to overcome the prescribed succession rules in order to acknowledge a daughter’s share.

According to the Quran, to take another example, women do inherit a portion of the estate, but less than male relatives. Moreover, the Quran does not recognize wills that change its distributive scheme. Nonetheless, in some Muslim societies, women are subject to significant pressure to renounce their share of the estate in favor of their brothers. Social custom and Muslim law occasionally compensate them by making sure that women are taken care of by their male relatives, such as husbands, fathers or brothers.

Customary law exhibits similar tendencies. Empirical work shows that daughters are still discriminated against in non-Western societies. Some countries have discriminatory succession rules, while others are dominated by gender-biased customs, despite the fact that the law of the country is otherwise inclined. Inheritances patterns in such societies indeed follow these customs, resulting in an unequal distribution of resources. Notably, the law of the land might carry some symbolic meaning, yet customary law determines actual distributions.

These brief examples give us a sense of the gender-biased disinheritance phenomenon. There are roughly two legal backgrounds to such patterns. In one case, the custom or religious predicament is part of the state law. The governing law itself is discriminatory. This leads to a fundamental constitutional question. In Western countries, such a statute would likely be subject to scrutiny and not be upheld. A second, more complex, possibility is that within the egalitarian state law, individuals exercise their freedom of disposition and choose to follow a custom or religious law. This possibility is our main concern in this article. How should the law in a liberal society respond to discriminatory estate plans?

14 Daphna Hacker, The Gendered Dimension of Inheritance: Empirical Food for Legal Thought 7(2) JOURNAL OF EMPIRICAL LEGAL STUDIES (forthcoming)
17 In certain cultures or religious groups, there are mechanisms that protect women’s financial welfare in different ways such as obligating their brothers to provide for them. See, e.g., JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 39-70 (1982).
18 Hacker, supra note 14.
21 See Supreme Court’s decision in Trimble v. Gordon, 430 U.S. 762 (1977) (holding that that the Illinois intestate succession statute was unconstitutional because it discriminatingly distinguished between legitimate and illegitimate children).
II. INHERITANCE LAW STRUCTURE AND VALUES

What's required in order to define the limits of a testator's ability to disinherit relatives from the estate and scrutinize the reasons for disinheritance is an understanding of inheritance law's structure and an in-depth evaluation of its values.

Inheritance law is a distinct private law field. It deals with the transfer of property after death, and is understood as a donative transfer. The owner of property is free to execute a will that communicates her preferences regarding the allocation of her assets. Accordingly, the entire body of law is structured as a one-sided construction. Indeed, upon review of the case law, testamentary freedom is frequently assumed and is considered a pivotal value of inheritance law. There are, however, two limitations to this freedom. First, in certain jurisdictions, the testator cannot disinherit his spouse. In these cases, the testator's intent is irrelevant and these states secure a portion of the estate in favor of the surviving spouse. Second, there are several public policies that limit the testator's power. For example, the rule against perpetuities requires the testator to vest the interests of the beneficiaries at some point. These limitations protect the public from the dead hand control.

When a person does not write a will, or when the will is invalid for some reason, the law distributes the property according to a set of default rules. Intestacy rules are, therefore, a state-prescribed allocation of property. In keeping with the value of testamentary freedom, intestacy rules are commonly understood as patterning the way most people would like to bequeath their property. Still, Freedom is frequently assumed a one-sided construction. Indeed, upon review of the case law, testamentary freedom is frequently assumed and is considered a pivotal value of inheritance law. There are, however, two limitations to this freedom. First, in certain jurisdictions, the testator cannot disinherit his spouse. In these cases, the testator's intent is irrelevant and these states secure a portion of the estate in favor of the surviving spouse. Second, there are several public policies that limit the testator's power. For example, the rule against perpetuities requires the testator to vest the interests of the beneficiaries at some point. These limitations protect the public from the dead hand control.


25 See sources at supra note 8.

26 See generally, Adam J. Hirsch, Default Rules in Inheritance Law – A Problem in Search of its Context Fordham L. Rev. 73 (2004) 1031. This approach is very common. Most scholars who deal with intestate succession support some version of it. See LAWRENCE W. WAGGONER ET AL., FAMILY
other scholars remind us of the expressive function of the rules. People's preferences are not exogenous to the law. Accordingly, intestacy law not only reflects society's norms, but also "helps to shape and maintain them."30

This basic division between the will and intestacy is quite important to the law. Intestate rules are part of the state law, and therefore have to conform to constitutional values, such as equality.31 The will, on the other hand, is considered a private act, reflecting individual choice. It is a private law arena that contains fewer limitations, with probably no review of the testator's motives. A will can reflect the vindictive, unfair and petty desires of the testator.32 This dichotomy may seem natural to trust and estate scholars, but it is actually quite surprising. The two methods of distribution are more alike than many would care to admit. Both methods ultimately result in the distribution of the estate to recipients; the only difference may be their identity. Actually, in practice, most wills do not diverge grossly from the state-prescribed rules.33 In fact, intestate rules are supposed to serve, according to the conventional view, the wishes of most testators.34 Applying a very different set of standards respectively to each of these methods of distribution obscures the significant outcomes both inflict. Property is a significant resource and inheritance distributes opportunities, power35 and symbolic affiliations.
At any rate, these methods derive from the values of inheritance law, which mostly refer to facilitating the intent of the testator. However, these values themselves are often disputed. A core debate centers on the freedom of the owner versus a recognition of other interests, mainly those of family members, other strong relations or caretakers. While American law is focused on testamentary freedom, a comparative survey reveals that additional interests are protected. Many scholars disagree on the subject. Proponents of testamentary freedom evoke the right to private property, claiming that the power to bequeath is part of the bundle of sticks in the right to private property. Other proponents suggest that testamentary freedom is useful for achieving other purposes. For example, one argument suggests that testamentary freedom creates an incentive to work and save or that it promotes efficient estate planning. A different argument is that the owner’s freedom creates an incentive for receivers to please her and accommodate her needs.

On the other hand, several scholars have argued that family members are entitled to a share of the estate, either as a protection of minor or dependent children, or as part of a concept of family property. Another argument is that inheritance is a final reward for an ongoing close relationship that is based on trust. Finally, Foster claims that the best focus for inheritance law is care and support rather than the wishes of the owner. These arguments all reflect on the interrelation of inheritance and family ties. They either claim that certain relatives deserve a bequest because of a close relationship or that inheritance includes not only privileges but also specific obligations of the owner.

This debate obviously influences the limits of the will and the legitimate reasons for disinherition. Supporters of strong and full testamentary freedom will see nothing legally wrong with a gender-biased distribution. An owner is entitled to

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40 Edward C. Halbach, An Introduction to Chapters 1-4, in DEATH, TAXES AND FAMILY PROPERTY 3, 6 (Edward C. Halbach ed., 1979). Also see, e.g., Burke (“’the power of perpetuating our property in families is one of the most valuable and interesting circumstances belonging to it, and that which tends the most to the perpetuation of society itself”) at EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 49 (1790).


make his choices, based on his set of beliefs and worldviews, whether we approve or not. On the other hand, systems that protect the interests of family members would invalidate a gender-biased scheme since it offends the daughters’ rightful claim. Indeed, in British Columbia, Canada, where adult children have a claim against the estate, the court modified Mrs. Singh’s will. However, one does not have to support family protection to claim that discriminatory wills are invalid. Instead, we argue, one can adopt a more moderate perspective that recognizes the impact of disinheritance in the social and legal realm. This perspective, combined with a theory of equality, offers a new framework for defining the legal limits of such acts. The next part, then, assesses the social impact of disinheritance and, more generally, the significance of receiving a bequest for potential recipients.

III. THE MEANING OF INHERITANCE

We have seen that the owner’s wishes are key elements in inheritance law. He can decide, accordingly, to disinherit his daughter if he pleases. We dispute this conventional view, arguing that discriminatory motives offend the daughters’ sense of continuity, roots and belongingness. The argument offers a shift in current conceptions of inheritance by highlighting its legal, social and cultural impact.

Inheritance, we argue, promotes continuity through property. It is a particular form of continuity, based on the significance of property as an important social and personal symbol. Property is a symbol of identity, and it shapes meaningful connections and ties. It also symbolizes a connection to a heritage or cultural group, and especially to familial continuity. For generations, property transfers in the family have structured familial roles, and reflected the relative power, positions and ties of family members. These structures

44 Supra note 1.  
47 See infra notes 56 -62. Property also poses a risk of objectifying our identity and relations  
48 See, e.g., cultural property in Sherry Hutt & C. Timothy McKeon, The Control of Cultural Property as Human Rights Law 31 ARIZ. ST. L.J. 363, 364 (1999) (“Cultural property can be defined as an evolving, irreplaceable resource that defines the existence of a group of people in a unique manner. It provides the underpinning of group identity in a spatial and temporal context. Cultural property may be the tangible expression of humans interacting with their environment, or the intellectual property of groups such as ceremonial songs or ethnobiological knowledge. The preservation of cultural property rights is essential to give meaning to human existence and as a bond against enslaving a people by diminishing the definition of their existence”).  
49 See, e.g., Toby Ditz, Ownership and Obligation: Inheritance and Patriarchal Households in Connecticut, 1750-1820, 47 WM & MARY Q. 235 (1990) (describing familial duties of brothers to their sisters, when daughters did not receive a portion of the estate.) For property transfers to the eldest son at the expense of other children, see C.Ray Keim, Primogeniture and Entail in Colonial Virginia, WM & MARY Q. 54 (1968).  
50 Marsha Garrison, Towards a Contractarian Account of Family Governance, 1998 UTAH L. REV. 241 (explaining governance in the family). Also see Patricia Hill Collins, Gender, Black Feminism, and Black Political Economy 568 ANNALS 41, 48-49 (2000): “Each social hierarchy relies on the work/family nexus that in turn frames particular understandings of property. Specifically, gender hierarchies depend on family rhetoric and practices to shape differential male and female access to property. Historically, whether property was inherited from their fathers, given to them by their
usually have resulted in a dependency of women on their male relatives.\textsuperscript{51} Family property generally, and inheritance in particular, symbolized access not only to wealth, but also to participation in the continuity of the family.\textsuperscript{52} These transfers structure the position of family members as belonging to the “community” of the family in a unique way. It allows them to engage in a meaningful resource for the family’s continuity and identity, and as a result allows them to view themselves as belonging to the family.

We claim that inheritance today communicates a message regarding the belongingness of the child to the testator and generally to the family. A bequest reaffirms the position of the child with regard to the parent; it represents the child’s interest in continuity. Disinheritance, on the other hand, is a message of exclusion and uprootedness. Although this claim is supported by empirical studies, it is not a factual argument. Rather, we claim that inheritance is located at the intersection of individuals’ vision of continuity and social ideals. The parties’ interests in continuity are broader than a particular relationship between a daughter and her father; they are embedded in a project that has a social and cultural meaning. Social ideals of continuity guide the parties’ understandings and the way they shape the project of continuity. At the same time, the owner does not simply conform to social norms; he evaluates these norms, and applies them to his personal circumstances by making individual assessments of relationships.

We unfold the argument one step at a time, in several layers. We begin with an account of the importance of continuity and roots. We continue with the symbol of property, and a theory of gift-giving, to stress the context of property transfers after death. We then move on to discuss certain sociological works, and review some legal examples that reinforce our conclusion. Finally, we address the cultural backgrounds of such disinheritance decisions.

The need for roots, as part of the general interest in continuity, is a fact of human life. Weil explains: “A human being has roots by virtue of his real, active, and natural participation in the life of a community, which preserves in living shape certain particular treasures of the past and certain particular expectations for the future.”\textsuperscript{53} Others have stressed the need for tradition and guidance, the importance of roots for the creation of an identity and participation in the world of culture.\textsuperscript{54} There is a strong connection between a

husbands, or acquired via the working-class male "property" of the family wage, women typically gained access to property via their relationships with men. Families that are organized around married heterosexual couples form a site for intergenerational control over and transfer of racialized wealth. These same social locations also constitute an important site for intergenerational male control of property. Because they lack access to current male income as well as past and present male property, families maintained by Black single mothers are especially penalized within this system.”

\textsuperscript{51} Collins, \textit{supra} note 50

\textsuperscript{52} See, e.g., Ralph E. Giese, \textit{Rules of Inheritance and Strategies of Mobility in Prer evolutionary France} 82 AM. HIST. REV. 271 (1977) (describing inheritance patterns in northern France prior to the French revolution and the communal effort of consecutive generations in securing continuity of the family wealth).

\textsuperscript{53} SIMONE WEIL, \textbf{THE NEED FOR ROOTS – PRELUDE TO A DECLARATION OF DUTIES TOWARDS MANKIND} 43 (Arthur Wills trans., 1952).

person’s sense of identity, connectedness and roots and her relations with significant others, such as family members. As Taylor elucidates, we define our identity always in dialogue with what “significant others” see in us. Even after these people leave our lives and die, we continue to converse with them and define ourselves through this conversation. Inheritance is part of this dialogue. It communicates a message from the owner of property, now deceased, to his potential heirs.

The meaning of this message derives from the particular attributes of inheritance in most countries. It is a gratuitous transfer that takes place after death. To explain its characteristics, let us consider the ample scholarship on gift-giving theory. The study of gifts is quite expansive, in both the social studies and legal scholarship. These studies often suggest that gifts create and cement social bonds. The gift remains part of the giver when it is transmitted to the recipient and thus they become connected through the possession of it. When an owner gives a gift, she considers the receiver’s needs and character, and she communicates her views of her. Moreover, people “tend to confirm their own identity by presenting it to others in objectified form.”

The identity is reflected not only in the object but also in whom the owner chooses to give a gift to.

In addition, a gift makes valuable statements about the relationship of the owner and her recipients. A gift can either begin a relationship or reaffirm the strength of an existing one. A decision to give a gift communicates a message regarding the giver’s preferences and taste, and regarding her opinion of the recipient. Since a gift creates feelings of trust, it acts as a bridge between the

56 The starting point for most of these studies is the work of the French anthropologist Marcel Mauss. See MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES (Ian Cunnison trans., 1974). Mauss used studies of different societies, both archaic and simple, and concluded that the gift is an extremely central social institution. In such societies, groups exchange not only goods but also “courteisies, entertainments, ritual, military assistance, women, children, dances, and feasts.” Gift exchanges constitute “total social phenomena, [in which] all kinds of institutions find simultaneous expression: religious, legal, moral, and economic.”
59 Id.
61 Id.
62 For example, giving money to charity says something about the giver. See Barry Schwartz, supra note 60 at 2.
64 ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 151 (1995).
65 Barry Schwartz, ibid at 1.
recipient and the giver. When a person receives a gift, it shows what the giver has thought of her, of her ability to use the property and succeed, and of what she likes and what she needs. When the recipient accepts the gift, she actually concurs with the position the giver conferred upon her.

The message that the giver communicates to the recipient is particularly powerful when it is a bequest and not simply a gift. In the paradigmatic case, the giver gives the gift only when she is no longer living. Moreover, she has to dispose of her property since she can no longer keep it. This means that people, especially family members, expect the property to be distributed. Moreover, they expect it to be distributed in a certain way, so as to reflect the values, opinions and judgments of the decedent.

We think of inheritance as communicating a message of belongingness or exclusion. This message is intricate, and works both inwards and outwards. It affects the individual relationship of the parties involved (a specific testator and a legatee or disinherited relative). At the same time, it is evaluated by social expectations. Certain people expect a bequest, based not only on their relationship with the property owner, but also because it is the norm. Disinheriting a child, in our Western society, carries a stronger message than disinheriting a nephew. In the typical case, a child would be much more offended because children in our society are understood to belong to their parents and to continue their legacy.

There are several relevant empirical findings that support this claim. First, most people refrain from disinheriting of children. Hacker explains that equal distribution among children is the norm, and only rarely do parents deviate from it. Tate, on the other hand, discusses economic studies and claims that wills compensate devoted children for providing care. While these studies point in seemingly opposite directions, both confirm that people understand will-making as reflecting a judgment on potential heirs. This judgment is about their relationship with the testator, but even more than that, it is about their role in the family; their role as children. Testators can either wish to signal that they love all their children equally, or show a child that they value her exceptional behavior, which surpassed that of the other children.

Sussman et al. conclude that “will makers conform, by and large, to cultural prescriptions of familial responsibility over generational time.” Note that it is a familial responsibility they have to assume as testators. They make statements not only about their own vision or taste, but also about their family, supported

66 Id.
67 Ibid at 3.
69 Hacker, supra note 14.
70 Tate, supra note 39.
72 SUSSMAN ET AL., supra note 33.
by their familial roles. Therefore, for most disinheritance cases there is a culturally acceptable reason.\[73\] Furthermore, not all inheritance patterns are socially approved. Rosenfeld claims that vindictive disinheritance is deviant from social norms.\[74\] In a more recent work he contends that all disinheritance acts (and will contests) constitute an act of deviation. Benefactors who disinherit their son or daughter have deviated from the norm of intergenerational continuity.\[75\]

Wills, then, involve normative assessments of potential heirs. Children (or other potential recipients) can thus feel offended by an estate distribution,\[76\] as it defies their expectations. A New Zealand court decision eloquently makes this point: “A child’s path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and of having been an important part of the overall life of the deceased” (emphasis added).\[77\]

Testators are aware of these expectations and often feel as though they are under certain obligations. Although they have the final say in the distribution of their estate, they, family members and society at large understand that some distributions communicate a harsh message, and they will try to avoid it, unless they have a normatively acceptable reason for disinheriting the child.

These conclusions are not just a finding of sociological researches, and the law seems to incorporate some of these insights. Courts, especially juries,\[78\] seem to engage in normative judgments of wills.\[79\] Thus, Leslie claims that courts evaluate whether a will conforms to a norm of reciprocity in long-term relationships.\[80\]

The theoretical analysis together with empirical findings shows that inheritance is a unique cultural institution, combining a personal message and social expectations. Accordingly, disinheritance communicates a message of rejection. One could argue that this conclusion is only convincing in certain cultural backgrounds, and that in cultures that have a general norm of disinheriting daughters, these women will not experience an individual message of exclusion. We disagree with this statement. The social and the individual are inseparably

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\[73\] For example, disinheritance of a child in favor of a spouse that is also the parent of the child is considered reasonable. Cf RESTATEMENT OF LAW, (THIRD) OF PROP: WILLS AND OTHER DONATIVE TRANSFERS §2.2, reporter’s note 2 (2003) (discussing the conduit theory).

\[74\] Rosenfeld, Disinheritance and Will Contests, supra note 33 (defining such disinheritance acts as “when people act vindictively toward offspring or kin and behave in such a way that they intentionally violate the norms of reciprocity that ordinarily structure relationships among them”). Cf M.J. Farrelly, State Creation of Old Age Distress in England: An Aspect of Old Age Pensions 4 INT’L J. ETHICS 188 (1894) (noting that “The vindictive, the vainglorious, the superstitious testator was enabled to defy justice by a posthumous robbery of those who naturally depended on his succession”).


\[76\] See Bernheim et al., supra note 71.

\[77\] Williams v Aucutt [2000] NZLR 479, para 52.


\[80\] Leslie, Enforcing Family Promises, ibid.
linked. The cultural message of rejection affects the individual. When the community characterizes women’s position in the family or in society as not being deserving of a bequest, it actually means that they do not participate in the family property. Women are excluded from a significant form of continuity that includes not only wealth, but also a message of belongingness. When their father joins this statement, it means that he is reinforcing this message of exclusion. The social becomes affirmed in the individual context.

Consider, for example, a testator that decides to disinherit one of his grandchildren. The grandchild’s mother is black and the baby has dark skin. The grandparent does not want his black grandchild to inherit his wealth, and for this reason alone he disinherits him. To the grandchild, this is definitely offensive and demeaning. He is left with a painful message that his grandparent rejected him because of his race. Would we come to any other conclusion simply because the grandparent belongs to a culture or group that has racist values?81

The difference, one may say, is that in the latter case the daughter subscribes to the father’s culture. She will not be offended because she shares his worldviews. Yet, even if the daughter accepts this tradition, the message it conveys is offensive to her need for roots, continuity and belongingness to the family. The message is not only a social message, excluding women in general; it is also a personal message, which means that her father did not consider her worthy of continuing his legacy because she is a woman. Continuity through property has a dialectical nature: it moves from individual relations to social norms and back again.

We might have come to a different conclusion had inheritance not been a symbol of continuity at all in such cultures, but simply a technical mechanism of economic utility. But this is not the case. These societies do value the continuity of the family through property, only not for women.

We are not arguing here, however, in favor of adopting legal obligations to provide a certain share for family members. Rather, we emphasize the effect of disinheritance, so as to claim that certain wills can be demeaning if they exclude women from this form of connectedness to the family. Naturally, some estate disputes brought to court by disappointed relatives derive from economic, rather than symbolic or relational, incentives. After all, property is a significant resource in the modern economy. The distribution of financial goods in the family setting is one of the reasons why women are injured by gender-biased inheritance patterns. Nonetheless, our core argument lies elsewhere and suggests, based on a number of sociological findings and theoretical works, that inheritance involves relational messages and communicates normative judgments of belonging to the family.

IV. THE LIMITS OF TESTAMENTARY FREEDOM

A testator is free to make an estate distribution according to her worldview, wishes or caprices. However, this freedom is not without limits. Certain public interests restrain the testator’s power. The law strikes a balance between

respect for the testator’s freedom and public policies, including dead hand control, equality and the rule of law. The legal mechanisms for restricting testamentary power can be divided into two groups: provisions that involve state action and the common law doctrine of public policy.

The doctrine of state action is reserved for cases where a state agency or official is involved.\textsuperscript{82} It is generally established that government enforcement of discriminatory provisions might violate the Equal Protection clause. A number of cases apply the doctrine of state action to donative transfers, mostly in the context of racially discriminatory charitable trusts.\textsuperscript{83} For example, the Supreme Court decided that the enforcement of a trust for the creation and maintenance of a school for “poor white male orphans” was forbidden by the Fourteenth Amendment.\textsuperscript{84} In addition, Roisman suggests that the civil act of 1866 is also applicable in these types of cases. According to her analysis, “section 1982 may protect a potential beneficiary from being rejected as a grantee of property, whether by inheritance or other form of transfer because of her race.”\textsuperscript{85}

Discriminatory bequest motives cannot usually be scrutinized under the state action doctrine. When a father decides to disinherit his daughter because of her gender, no state action is involved. The operation of trusts occasionally involves a trustee who is a governmental official, or a cause of interest to the public, such as parks or schools.\textsuperscript{86} Within the family, however, a state action claim usually has failed.\textsuperscript{87} In addition, our argument is not simply based on equality. It takes into account the effect of discrimination on the daughter’s sense of worth, connection, and position within the family. It builds on inheritance as a symbol of continuity.

A second mechanism is the invalidation of provisions in donative transfers that are contrary to public policy. When the disposition in an instrument is directed to achieve a purpose that is prohibited by the rule of law, the law will interfere with the owner’s discretion.\textsuperscript{88} The rule of law “is used in a broad sense to include rules and principles derived from the United States’ Constitution, a state constitution, or public policy.”\textsuperscript{89}

The public policy doctrine entails a balance of conflicting values.\textsuperscript{90} It balances the freedom of the owner to dispose his property against “other social values and the effects of deadhand control on the subsequent conduct or personal freedoms of others, and also against the burdens a former owner’s unrestrained dispositions might place on courts to interpret and enforce individualized interests and conditions.”\textsuperscript{91} It allows courts to consider a wide variety of values, including the

\begin{thebibliography}{99}
\bibitem{83} See, generally, Roisman, \textit{supra} note 7
\bibitem{85} Roisman, \textit{supra} note 7 at 467.
\bibitem{87} \textit{Shapira v. Union National Bank} 315 N.E.2d 825 (Ohio Com. Pl, 1974).
\bibitem{88} Some states curtail this freedom also with regard to the spouse’s share of the estate. For a general history and early justifications for the elective share, see Langbein & Waggoner, \textit{supra} note 8. Also see Waggoner, \textit{supra} note 8.
\bibitem{89} \textit{RESTATEMENT OF LAW, (THIRD) PROP: (WILLS AND OTHER DONATIVE TRANSFERS)} § 10.1 (2003).
\bibitem{90} \textit{RESTATEMENT OF LAW, (THIRD) PROP: (WILLS AND OTHER DONATIVE TRANSFERS)} § 10.1 (2003).
\bibitem{91} \textit{RESTATEMENT (THIRD) OF TRUSTS} § 29 (2003).
\end{thebibliography}
right to marry or enjoy familial relation, out of respect for an individual’s personal life choices, and freedom of religion. For example, the law is hostile towards conditions that are meant to disrupt family relationship of any kind, including separation and divorce. In addition, creating financial pressure in order to affect the future religious choices of a recipient will normally be declared invalid.

The Restatement, case law and scholars often mention the perils of allowing the donor to control the lives of his beneficiaries. Their concern is the influence of the dead hand, through economic incentives, on meaningful life choices, such as choosing a career, a spouse or a religion. This argument actually has two components: the control of the dead over the living, and the wellbeing and autonomy of the beneficiaries. We suggest that the wellbeing of the beneficiaries includes not only the ability to make life choices, but also values such as dignity, self-respect, and the need for roots. Defining the limits of a private act, according to the interests that society thinks are worthy of protection, lies at the foundation of public policy. These interests should not be limited to religious practices and the right to marry. Rather, they should also include respect for the identity and autonomy of the beneficiary, by scrutinizing the possible effects of the will.

In the next section we analyze gender-biased disinheritance through the prism of public policy. We balance testamentary freedom and freedom of religion against dignity, identity and self respect. This argument requires, however, a shift away from how the doctrine is currently applied and analyzed. First, provisions in wills are less likely to be declared void than similar provisions in a trust. However, we believe that since both are donative transfers, they can be grouped together. Second, the public policy doctrine has been understood to invalidate

92 Restatement (Second) of Prop: Donative Transfers § 6.2 (1983).
93 Id. at § 7.2; Estate of Romero, 115 N.M. 85, 847 P.2d 319 (1993).
94 Id. §7.1.
96 Restatement (Third) of Trusts § 29 (2003).
97 Id.
98 See, e.g., in re Estate of Gerbing, 61 Ill. 2d 503, 508, 337 N.E.2d 29, 33 (1975) (“Plainly the condition in article 4.4 is capable of exerting such a disruptive influence upon an otherwise normally harmonious marriage”); Winterland v. Winterland, 389 Ill. 384, 386 (1945); Graves v. First Nat'l Bank, 138 N.W.2d 584, 588-89 (N.D. 1965). In re Will of Collura, 415 N.Y.S.2d 380, 381 (Sur. Ct. 1979) (“It is the likely effect of the provisions of a will on the person to be influenced rather than the personal purpose of the testator which will determine whether a provision is void”).
99 See, generally Jeffrey G. Sherman, Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices, 1999 U. ILL. L. REV. 1273, 1304 (“it should be considered offensive and unsuitable for society to bring its power to bear when the objective is control by the dead over the personal conduct of the living”); Richard A. Posner, Economic Analysis of Law 18.6, at 512 (4th ed. 1992) (comparing a restraint on a gift and on a bequest, and claiming: “As the deadline approached, the son might come to his father and persuade him that a diligent search had revealed no marriageable Jewish girl who would accept him. The father might be persuaded to grant an extension or otherwise relax the condition. But if he is dead, this kind of ‘recontracting’ is impossible”).
100 For autonomy and life choices, see Joseph Raz The Morality of Freedom 370 (1986).
101 Sherman, supra note 99
102 Restatement (Second) of Trusts § 29 (1959).
103 See generally Sherman, supra note 99.
restraints or conditions on bequests, but not actual distributive plans. Thus, for example, if the testator conditions a bequest on his daughter’s divorce, such a provision will be unenforceable and void.\(^{104}\) However, a will that disinherits a daughter from the estate simply because she is married to a person the testator dislikes is perfectly valid.\(^{105}\) In addition, case law often considers the motive of the donor in drafting the condition.\(^{106}\) This sharp distinction between conditions and motives may seem odd. Would a beneficiary prefer to get nothing than receive a conditioned bequest? Lewinsohn-Zamir argues that more is not always better than less. She explains that “Conditions attached to the transfer of property might insult or humiliate the transferee, thereby harming her dignity and self-respect.”\(^{107}\) Such conditions, even when they are successfully met, may injure the transferee’s autonomy and self-development. Lewinsohn-Zamir assumes that when the property is not transferred at all, there is no insulting message.\(^{108}\)

However, as explained in the previous section, an act of disinheritance communicates a message to disappointed relatives. This does not necessarily mean that they have a right to a portion of the estate. It does mean that certain testamentary motives are demeaning and offensive to a daughter’s sense of worth, dignity and self-respect. In a way, such estate plans are more offensive than conditioning a bequest on a decision to divorce, rather than to marry or to choose a particular religion. When a child is denied a bequest because of her gender, because of race, or because of her sexual orientation, she is denied a bequest because of who she is.\(^{109}\) She cannot change her gender, race or sexual orientation. Unlike restraints on bequests, such estate plans do not depend on the child’s choices, but on her identity.

Because public policy defines the limits of testamentary freedom, it is about balancing interests. Invalidating conditions that restrain personal choices is one way to strike a balance, but in itself does not negate the balancing of interests in other types of conflicts. Courts should consider which values are worthy of legal protection. Once we are convinced that a specific decision is demeaning and offends the daughter’s sense of dignity, roots and identity, the law can and should draw a line.

Of course, proving motives is a tough task,\(^{110}\) which can easily be manipulated. It is similar to the challenging task of proving discrimination in the workplace and elsewhere.\(^{111}\) In addition, current public policy cases often distinguish between restraints based on the donor’s motive. For example, courts examine whether the motive was to encourage divorce or to supply financial assistance in the case of


\(^{105}\) This is an approach that prefers no property to less property; see discussion at Daphna Lewinsohn Zamir, More is Not Always Better than Less – An Exploration in Property Law, 92 MINN. L. REV. 634, 713 (2008)

\(^{106}\) RESTATEMENT (THIRD) OF TRUSTS § 29 (2003). (Comment on section C, j (family relationships).

\(^{107}\) Lewinsohn-Zamir, supra note 105 at 667.

\(^{108}\) Id.

\(^{109}\) See generally HELLMAN, supra note 9.


\(^{111}\) For the difficulties in proving discrimination see, e.g., Charles A. Sullivan, The Phoenix from the Ash: Proving Discrimination by Comparators 60 ALA. L. REV. 191 (2009).
divorce. Only the former motive is considered to be against public policy. Indeed, keeping this difficulty in mind, we would like to suggest an argument based upon the public policy doctrine. We claim that gender-biased disinheritance violates public policy and should not be enforced.

To make this argument, we now turn to the balancing of values that we claim the public policy doctrine is all about. Following Hellman, we claim that disinheriting a daughter because she is a woman demeans her, and is therefore a violation of public policy. This argument is based on the meaning of an act of disinheritance, as reaffirming a child's position in the family.

**PART V. GENDER-BIASED DISINHERITANCE AND PUBLIC POLICY**

Gender-biased disinheritance is an intricate issue. It involves the freedom and autonomy of the testator on the one hand, and the values of equality, autonomy, identity and continuity of certain family members on the other hand. The public policy doctrine, with its innate balance between conflicting values, is particularly appropriate for this analysis. In this section, we consider the values of equality, respect and roots, and freedom of religion and freedom of culture. We argue that gender-biased disinheritance is contrary to public policy because it profoundly demeans the disinherited and offends her need for roots, belongingness and continuity, and her dignity and self respect.

**a. Equality, Respect and Public Policy**

When a father or mother decides to bequeath their property to their sons and to disinherit their daughters, they make a distinction between them on the basis of gender. We claim that such a distinction on the basis of gender is morally wrong. Theories of discrimination attempt to explain when a distinction between persons is morally permissible and when it is wrong. We therefore appeal to theories of discrimination in general, and Hellman's theory of discrimination in particular, only in order to illuminate the wrongs of gender-biased disinheritance. That is, we appeal to theories of discrimination not in order to argue that the disinheritance of daughters amounts to discrimination. We draw on Hellman's theory of discrimination only because it allows us to explain that gender-biased disinheritance profoundly demeans the disinherited and is therefore contrary to public policy. Hellman thus allows us to forge the necessary link between equality and respect.

Discrimination or unequal treatment is generally understood as depriving someone of some of the benefit available to others in circumstances that make it unjust to do so. The aim of theories of discrimination is to identify these circumstances and to explain the nature of the wrong or wrongs done to individuals when they unjustly end up with less than others. Some accounts of discrimination deem stereotypes and prejudice as unjust criteria for the distribution of goods between individuals. By ‘prejudice’ and ‘stereotype’ we mean imposing a trait or a characteristic on an individual only because he or she belongs to a group – not because he or she actually possesses them. When a
trait or characteristic is imposed on a person by other people only because of her group affiliation, regardless of her individual capacities and needs, her autonomy to present herself according to her specific and unique individual capacities and abilities is violated.\textsuperscript{115} A paradigmatic claim against stereotypes was brought in the \textit{Brown} case.\textsuperscript{116} The decision that was challenged in \textit{Brown} (not to allow blacks to study in the same school with whites) was based on an irrelevant consideration, namely race as distinguished by skin color. Skin color, in this case, was used as a stereotype because all black people were thought to have something in common, which justified separating them from white people. In fact, however, the government failed to show any necessary connection between skin color and education.

In cases such as \textit{Brown}, the government should have disregarded the irrelevant consideration of skin color. Skin color may be a person’s characteristic, but it has nothing to do with his or her other characteristics such as educational capacity, social capacity and the like. The case of disinheritance of daughters is in a sense similar, but at the same time more complex. The criterion of gender that serves as a basis for the distribution of goods between family members seems irrelevant for the purpose of inheritance. Their gender characteristic does not say anything about their capacity to care for their parents and act as loyal and supportive children. From the daughters’ perspective, their exclusion is arbitrary in the sense that it does not accord with their actual role as family members. However, the continuity function of inheritance is intricate and based on social ideals. This attribute is harder to pin down. We cannot safely say that it is irrelevant for the parent.

However, most discrimination laws do not enshrine a general guarantee of nondiscrimination as non-arbitrariness.\textsuperscript{117} They do not deem every distinction that is based on an irrelevant stereotype to be wrongful discrimination. Discrimination laws usually restrict recognition of unfair treatment to instances in which the relevant or irrelevant stereotype pertains to one of the prohibited grounds of discrimination. These grounds usually include gender, race, ethnic origin, and sexual orientation.\textsuperscript{118} Not only are distinctions drawn on the basis of such traits usually forbidden by discrimination laws, but they also feel morally wrong. Deborah Hellman suggests a convincing account to explicate this moral intuition. According to Hellman, traits such as race and gender are attributes that define a group that has been mistreated in the past or is currently of lower status in society.\textsuperscript{119} Classifications on the basis of these traits are more likely to demean individuals that bear them. Demeaning an individual amounts to putting him or her down, to subordinate, diminish and denigrate, to treat him or her as lesser, as not fully human or not of equal moral worth.\textsuperscript{120}

\textsuperscript{115} Moreau, supra note 113 at 298-303; Denise G. Réaume, \textit{Discrimination and Dignity}, 63 LOUISIANA L. REV. 645, 673 (2003).
\textsuperscript{117} Choudhry, supra note 114 at 154.
\textsuperscript{119} HELLMAN, supra note 9.
\textsuperscript{120} Ibid at 29, 35. Hellman’s theory of discrimination resonates with earlier accounts that understand discrimination in terms of demeaning and subordinating individuals who belong to vulnerable groups.
Why is classification on the basis of traits such as race and gender more likely to be demeaning than classifications based on other traits? Hellman’s answer is that this is because demeaning is a socially constructed concept. History, conventions, culture and social understandings determine which actions convey a demeaning message.\textsuperscript{121} Whether the characteristic one uses as a basis for distinction between individuals has the potential to demean is determined by how that characteristic has been used in the past to distinguish between individuals and the relative social status of the group defined by that characteristic today.\textsuperscript{122} A demeaning message is likely to be conveyed by distinctions on the basis of race and gender because they replicate familiar forms of discrimination against members of a vulnerable group that have put them in a disadvantageous position in the past. For instance, ordering blacks to sit in the back of the bus is demeaning because it perpetuates the history of racial segregation in public transportation.\textsuperscript{123} Employers who require only female employees to wear makeup demean women because, in our culture, the makeup requirement is associated with a certain understanding of women’s bodies as objects for adornment and enjoyment by others in a way that distinguishes it from other requirements that are not demeaning such as hair-length requirements.\textsuperscript{124}

Hellman stresses that it is not enough for a classification to be based on traits such as race and gender, which replicate past discrimination, in order for it to be demeaning. In order to demean it is necessary that someone have a degree of power or status over another. That is, it is only when the person who performs a distinction is in a position to subordinate another that a demeaning act may take place.\textsuperscript{125}

Hellman’s theory of discrimination is suited to our purpose of arguing that gender-biased disinheritance profoundly demeans the disinherited and is therefore contrary to public policy. This is mainly because of the special role that Hellman attributes to the history, culture and social meaning of specific practices. That is, applying Hellman’s theory to disinheritance practices allows us to consider disinheritance not as a practice that involves only two persons – the testator and his or her daughter – and takes place in a social vacuum, but rather with all its attendant social and cultural implications.

Hellman’s theory takes into account the history and social status of the identified group that bears the characteristic which serves as a basis for distinction. Daughters who are disinherited should be regarded not only as family members, but most importantly as women – as members of a group that has suffered a long history of discrimination and subordination. Throughout history, discrimination

\textsuperscript{121} Hellman, \textit{ibid} at 35. See also Dov Fox, \textit{Racial Classification in Assisted Reproduction}, 118 YALE L.J. 1844, 1868-1870 (2009).
\textsuperscript{122} \textit{Ibid} at 28.
\textsuperscript{123} \textit{Ibid} at 27.
\textsuperscript{124} \textit{Ibid} at 42-43.
\textsuperscript{125} \textit{Ibid} at 35-37.
on the basis of gender is perceived to have been almost as pervasive as discrimination on the basis of race.\textsuperscript{126} Like race, gender has been and still is perceived as a trait that makes women intellectual inferiors, confined to certain societal roles, excluded from many fields of employment, and denied citizenship rights.\textsuperscript{127}

Following this analysis, we have to determine whether disinherit ing a woman because she is a woman, in keeping with a religious belief, indeed demeans her. Here, one might suggest that a daughter belongs to her parents' culture. She will therefore not be offended or demeaned because she understands their cultural motives for disinheriting her. After all, she is most likely to share their cultural worldviews. We disagree with this claim. Even if we assume that the daughter accepts this tradition, the message it conveys is demeaning to her need for roots, continuity and belongingness to the family. The message is not only demeaning because it excludes all women as a \textit{group}, but is also a harsh \textit{personal} message regarding her specific \textit{individual} worth as a family member who wishes to continue the family legacy. It communicates the message that her father adheres to the general cultural norm that she is ill-fitted to continue his project regarding the family property. This is because, as we have already stressed, continuity through property has a dialectical nature: it moves from individual relations to social norms and back again.

To illustrate, consider the disinheritance of a black grandchild because of his race. Assume it is because the grandparent truly believes that family property should be continued along white male lines. Let us further assume that the grandchild accepts his grandparent's tradition and respects it. Other than that, they enjoy a good relationship. Would we still argue that since they share the same worldview, the message is not demeaning? The answer is no, we expect. Most of us would consider such a message demeaning because we do not think skin color is relevant for the continuity of family property. Well, neither is gender. Indeed, gender and race receive different levels of treatment under U.S. equal protection law.\textsuperscript{128} However, this comparison is helpful because it highlights the attributes of inheritance as relating to one's sense of identity, continuity and roots.

Therefore, in order to determine whether disinherit ing women on the basis of religious and cultural beliefs demeans them, we need to change our focus in inheritance and begin to evaluate its social impact. The studies analyzed in Part II and our everyday experience teaches us that disinheritance communicates a message of rejection to a child. It says something about the relationship between the child and the parent; it means something about a child's path in life; it means something about the child's position in the family. Disinheritance – in many cases, though not all – implies a rejection of affection, ties and commitment.\textsuperscript{129}

\textsuperscript{128} See, e.g., Stopler, \textit{supra} note 126.
\textsuperscript{129} CF SÜSSMAN ET AL., \textit{supra} note 33 at 7 (explaining that “will makers conform, by and large, to cultural prescriptions of familial responsibility over generational time”).
The meaning attached to disinheritance depends on the reasons for it. In our social realm, there are a number of understandable reasons for disinheritance. For example, such a reason might be that a child has already received her share during the owner's lifetime, or that one of the children is in greater need of the money than the others. Another reason might be a goal the owner strongly believed in. There are many other reasons why a parent might deny the child’s status and relations through disinheritance. When a parent chooses disinheritance because the two had a rift in the relationship, because the parent is not satisfied with a child’s choice in life, because he or she dislikes her husband, then the law allows him to make his own decision. The child may feel rejected, but she is not demeaned. A gender bias is very different. Women have regularly been excluded from inheritance to form a dynastic male line. A gender bias motive is demeaning because it excludes a daughter from a socially important manner of belonging to the family. She is left outside the family property because she is a woman. From this larger perspective, then, one can conclude that gender-biased disinheritance is demeaning to women. A comparison to a more familiar arena, the workplace, may help clarify the argument. An employer can decide not to hire an applicant because he dislikes her. The applicant may certainly feel rejected and disappointed, but the employer is free to make this decision. However, the employer cannot decide not to hire her because she is a woman. In such a case, she would feel demeaned. So, while the testator can freely dispose of her property for a number of reasons, she should not be able to do so due to a gender bias motive. One could argue that an employer acts in a business environment, which affects public life, whereas the father acts within the family, which represents the private sphere. However, like other feminists, we think that the distinction between the private and the public is usually not sound, as the private invades the public and vice versa. In the specific case of disinheritance of women within the family, clearly any such practice does not remain confined within the family boundaries. When it is prevalent, people that are not part of the family become aware of it as well. In addition, the message conveyed by the father is detrimental to a daughter’s sense of worth, respect and identity, possibly more so than the message conveyed by an employer.

130 See sources and explanations at supra note 7.
This, of course, is not the end of the road. Since a gender-bias motive is often tangled up with religious predicaments or customary laws, we now turn to evaluating it against religious freedom and cultural rights.

b. Religion, Culture and Public Policy

Gender-bias motives for disinheriting daughters may be perceived as not violating public policy and even as justified by the testator’s right to religious freedom. The right to religious freedom is commonly perceived in terms of the right to freedom of conscience. Some scholars perceive it also as a religious manifestation of the right to culture. I now wish to examine the relation between freedom of religion and freedom of conscience. Freedom of conscience is perceived as the freedom to choose one lifestyle over another and to adhere to a religious or non-religious identity. Conscience is taken to be a core component of our identity, which is comprised of our moral values and beliefs. We become complete persons when our core beliefs are embodied in our actions. Acting on our core beliefs “is central to what makes us persons”. On this understanding, freedom of conscience is an “expressive liberty” that stands for an integration of belief and action that is central to human personhood. Under the right of freedom of conscience, every person is entitled to act in accordance with his or her deepest values and beliefs.

Since different persons tend to adhere to different moral values, their identities are comprised of different sets of values. With respect to freedom of conscience, then, the assumption is that not only religious or universal moral values and beliefs should be legally protected. In keeping with this understanding, freedom

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133 The latter perception is put forward most sharply in Gideon Gidon Sapir, Religion and State--A Fresh Theoretical Start, 75 NOTRE DAME L. REV. 579, 625-641(1999). In this article we concentrate on justifications of the right to religious freedom that stress the importance of religion to individuals rather than to society as a whole (for arguments about the importance of religion to society as a whole, which stress the importance of religion qua religion, see Martin E. Marty, The 1988 Overton A. Currie Lecture in Law and Religion: On a Medial Moraine: Religious Dimensions of American Constitutionalism, 39 EMORY L.J. 9, 17 (1990); Harold J. Berman, Religious Freedom and the Challenge of the Modern State, 39 EMORY L.J. 149, 152 (1990); WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES AND DIVERSITY IN THE LIBERAL STATE 264-265 (1991); Timothy L. Hall, Omnibus Protections of Religious Liberty And The Establishment Clause, 21 CARDozo L. REV. 539, 548 (1999)). Like other scholars, we do not find the value of religion to society as a whole persuasive. Even if religion can contribute moral values to society, it can, and surely has, contributed controversial moral values to society with regard to women, homosexuals and other minorities (Gidon Sapir & Daniel Statman, Why Freedom of Religion Does not include Freedom from Religion, 24 LAW AND PHILOSOPHY 467, 471 (2005)).


136 Ibid.

137 William Galston defines expressive liberties as liberties that ensure the ability of individuals and groups to lead their lives as they see fit, in accordance with their own understandings of what gives life meaning and value. This freedom allows individuals and groups to pursue their distinctive visions of what gives meaning and worth to human existence (William A. Galston, Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience, 48 AM. J. JURIS. 149, 150, 173 (2003)).


of conscience applies to and protects consciences of all kinds, religious and non-religious. In the case of religious believers, we protect their right to act in accordance with what they believe their religion is telling them to do, whereas in the case of non-religious persons we protect their right to act in accordance with their most sincere convictions.\(^\text{140}\)

In the case of inheritance, a testator may argue that it is his religious conviction that dictates the disinheritance of his daughter, and that acting differently would compromise one of the core values that constitute his personality. This claim is particularly convincing when the testator disinherit his daughter not because of a customary practice in his religious community, but because he is abiding by specific religious rules that explicitly exclude women from inheriting property.

Freedom of conscience may also justify the disinheritance of daughters not because of religious convictions, but because of a non-religious belief in the inferiority of women. Take a chauvinist testator who genuinely believes that women are less valuable than men and are less capable of dealing with money and protecting the family property. Such a testator may argue that he is merely following his conscience and that doing otherwise would severely compromise the core values that constitute his chauvinist personality.

Although the right to freedom of religion in the understanding of it as the right to freedom of conscience may provide a strong argument for allowing disinheritance on the basis of gender, it is not an absolute right. The freedom of the owner is demeaning to his family members and injurious to the self respect of his daughters. While the daughters do not have a rightful claim to a portion of the estate, the law should recognize the injury they stand to suffer. Freedom of conscience and autonomy have been and should always be balanced against other values such as equality, dignity and familial roots. Moreover, our argument does more than simply balance competing values. It redefines the effect of estate division in a familial context. It explains that inheritance communicates a message to receivers, and that this property institution has the potential to hurt the self-respect, sense of belongingness and self-development of daughters.

Disinheriting women may also be justified as a customary practice that is allegedly necessary for the survival of a religious minority culture. In that case, minority members may argue that their right to religious freedom protects cultural practices, such as disinheriting women, which are unique to their minority culture and help to keep it alive. Here the right to religious freedom is perceived in terms of the right to culture. The idea is that in some cases the right to religious freedom cannot be understood in individualistic terms of conscience alone, and should therefore be understood as a collective right\(^\text{141}\) that protects a participatory good – religion – which is jointly produced and enjoyed by a group.


Religion is regarded in anthropological literature as the example par excellence of an encompassing culture. It is not just an individualistic belief system, but more fundamentally a way of life, a system of public symbols that is produced and enjoyed by many.

The right to religious freedom in the understanding of it as the right to culture does not protect religion as such. It protects the values individuals attach to their religion as part of their identity. Due to religious conflicts in history, Western perceptions of the right to religious freedom have emphasized the separation of church and state, but in fact, in its essence, the right to religious freedom is about religious group identity, which is not unique in comparison to other group identities. In this sense, the right to freedom of religion is a manifestation of the right to culture. Like other cultural minority rights, it protects minority members from integrating into the majority culture and allows them to keep the practices that they perceive as necessary for the survival of their cultural identity. Religious minorities need the legal protection of the right to culture because majority members tend to feel that the cultural components of the minority's religious habits, rituals and values are alien to them. Because of this alienation, minority members are prone to relinquish their cultural practices in order to blend into the majority culture and strengthen their belonging to a society that is largely dominated by that culture. The right to religious freedom provides minority members with the legal power to resist such changes and keep their equal membership in society without compromising their cultural practices.

A testator may argue that disinheriting daughters is a religious custom that dates back several generations in his religious group, and that changing it would compromise an important aspect of his minority culture. That is, a testator may argue that the right to religious culture protects discriminatory practices as long as they are perceived as necessary for preserving a minority culture. However, any such argument is very problematic and does not coincide with the liberal understanding of the right to culture. If, as mentioned above, the right to culture is perceived as a right that protects a participatory good that is produced and enjoyed by all minority members, this means that they should all have equal opportunity to shape the cultural norms, values and practices that they share. In other words, if inheritance practices are perceived as part of a minority religious culture, they constitute a good that is protected by the right to culture only if all minority members produce and enjoy it.

As explained in Part III, inheritance is understood in our society as a practice that has a social impact on the role of individuals in their families and in society in general. Disinheritance therefore conveys a message of exclusion, according to

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142 For a definition of a participatory good that is the object of a collective right, see Denise G. Réaume, *Individuals, Groups and Rights to Public Goods*, 38 U. OF T. L. J. 1, 10 (1988).
144 For a detailed account, see Clifford Geertz, *Religion as a Cultural System*, in *The Interpretation of Cultures* 87-125 (1973).
145 Sapir, “Religion and State”, supra note 133 at 627.
which an individual is denied playing an equal role in her family and society. When the disinheritance of women is a customary practice that persists for decades, it conveys a message of excluding women from belonging to their family in the context of property, and from participating in the property-related endeavors of their culture. When women do not play an equal role in producing, forming and changing the cultural norms and practices of the family (which symbolize the culture) they belong to, these practices and norms cannot be perceived as participatory goods that are protected by the right to culture. To say that the right to culture protects a good (a minority religious practice) that is produced and enjoyed by only some of the members (men) but not by others (women), but is nevertheless required for the sake of preserving a minority culture, is to understand that culture as amounting to more than the shared aims of its members. Such an account of a culture is not compatible with methodological individualism, namely the theory that culture cannot be understood as more than the shared aims of its members.\textsuperscript{148}

At this point we would like to consider possible claims against applying the values of equality, self-respect and belonging via the public policy doctrine in issues of disinheritance within religious minorities. One could argue that we are basically suggesting a paternalistic view that enforces the Western-liberal principle of gender equality, and that this enforcement in itself entails the oppression and patronization of minority cultures. According to this line of reasoning, the imposition of liberal values such as gender equality on minority members by outsiders amounts to "Western patriarchal feminism"\textsuperscript{149} that stereotypes and dehumanizes minority cultures.\textsuperscript{150} Simply put, one may accuse us of arrogance, ignorance, and insensitivity to cultural and religious norms that are different from the mainstream liberal culture to which feminists usually belong.\textsuperscript{151} Such a claim, which has been leveled against the liberal scholar Susan Moller Okin,\textsuperscript{152} belongs to a more general discourse that is often called "feminism versus multiculturalism".\textsuperscript{153}

Yet, consider the consequences of such inheritance practices. They work to leave women holding less property than men. These traditions often compensate women by requiring their male relatives, such as husbands, father or brothers, to

\textsuperscript{148} For an overview of the debate in the philosophy of social sciences about methodological individualism versus collectivism, see Joseph Heath, \textit{Methodological Individualism}, in Edward N. Zalta ed., \textit{The Stanford Encyclopedia of Philosophy} (Spring 2005 Edition), \url{http://plato.stanford.edu/archives/spr2005/entries/methodological-individualism/}. Joseph Agassi argues that assigning interests to a group that are not reducible to the interests of its individual members is unjustified both ontologically and normatively, from a liberal point of view (Joseph Agassi, \textit{Methodological Individualism}, 11 \textit{The British Journal of Sociology} 244 (1960)). For a discussion of this problem in the specific context of group rights, see Green, \textit{ibid} at 319-320.


\textsuperscript{150} Homi K. Bhabha, \textit{Liberalism’s Sacred Cow}, in Susan M. Okin with Respondents, \textit{Is Multiculturalism Bad for Women}? 79, 81-82 (Joshua Cohen et al. eds., 1999).

\textsuperscript{151} Seyla Benhabib, \textit{The Claims of Culture: Equality and Diversity in the Global Era} 101 (2002).

\textsuperscript{152} In response to her essay about gender equality and multiculturalism (Susan M. Okin, \textit{Is Multiculturalism Bad for Women}, in Susan M. Okin with Respondents, \textit{Is Multiculturalism Bad for Women}? 9-24 (Joshua Cohen et al. eds., 1999).

care for them financially.\textsuperscript{154} They thus protect women from poverty, but only by offering them a path of constant dependence. Moreover, as we have highlighted, the impact of disinheriting women extends beyond the social problem of their economic inferiority. The practice of disinheriting women because of religious or cultural motives conveys a demeaning message towards every individual woman that is denied her need to belong and continue her family legacy.

Suppose that we all agree that disinheriting women because of their gender should be limited or prohibited by law because it conveys a demeaning message towards women and therefore violates public policy. Still, one could argue that such a doctrine is impossible to implement. That is because, so the claim goes, it is very hard and sometimes even impossible to prove that the testator had a real intention to disinherit his daughter because of her gender. A testator can always argue that the decision to disinherit a female member of the family stemmed from a different reason, such as disloyalty to her family, or failing in her obligations to her parents or siblings.

Employment discrimination law faces similar difficulties. Discrimination is difficult to prove.\textsuperscript{155} Nonetheless, since we are dealing with the familial setting, the testator’s close family is likely to be aware of his belief system, worldviews and motives. His close friends and neighbors may also contribute information about his motives. Certainly, it would be difficult to prove, but the existence of such a rule would serve its purpose even as a statement that the law refuses to countenance discriminatory motives, even in the familial setting.

VII. CONCLUDING REMARKS: PROPERTY, FAMILY AND EQUALITY

Belonging to a family is an elusive concept, trapped between social practices and intimate relations. The paths of belonging to a family range from education and common values to tradition and symbols, to meaningful ties. Moreover, the family also distributes power and status,\textsuperscript{156} both of which are closely linked through family property. We have argued that family property is a form of distributing goods, status and symbols of belongingness to the family. Inheritance, a gift transferred after death, communicates a particularly powerful message about the belongingness of relatives. This last statement is supported by various sociological findings.

The disininheritance of daughters because of their gender is therefore especially troubling. For one thing, girls are denied a significant resource, which is readily available to their male siblings, leaving them in a worse starting point because of their gender. More importantly for our purposes, this bequest motive communicates a demeaning message to women, excluding them from the family

\textsuperscript{154} In certain cultures or religious groups, there are mechanisms that protect women’s financial welfare in different ways such as obligating their brothers to provide for them. See, e.g., JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 39-70 (1982).


\textsuperscript{156} See, generally, the articles in UNEQUAL CHANCES – FAMILY BACKGROUND AND ECONOMIC SUCCESS (Samuel Bowles et al. ed., 2005); also see cf Nigel Tomes, The Family, Inheritance, and the Intergenerational Transmission of Inequality 89 J. POL. ECON. 928 (1981); also see Samuel Bowles and Herbert Gintis, The Inheritance of Economic Status: Education, Class and Genetics, WORKING PAPERS 01-01-005, SANTA FE INSTITUTE (2001).
property. A society that is committed to equality, and which extends this value to the private arena of contract, employment and property, should also express its commitment in trust and estate law, where the effect of the discrimination can be particularly harsh and offensive.