Legitim in English Legal History

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I. INTRODUCTION

The history of a child's right to a share of his or her parent's estate and (its opposite) the parent's right to dispose of the estate free from any filial claim except a moral one, occupies a place in almost every account of English legal history.¹ The importance of the child's right, known from Roman law terminology as the legitim, has required some notice by conscientious historians. But they have taken it up gingerly. The English evidence shows that the legitim probably was enforced at an early date in medieval history, and that it had largely disappeared by the seventeenth century. In the interval, however, the evidence is slight. The common law courts dealt with the right in a fashion which can only be called confused, contradictory, and half-hearted.

More importantly, historians have had to leave blank half of the story of the legitim. That is the ecclesiastical half. Because primary probate jurisdiction rested with the courts of the church from the Middle Ages until the nineteenth century, and because the same tribunals largely controlled the devolution of moveable property at death, it follows that much of what we can know about the subject of the legitim must come from ecclesiastical sources. The great legal historian F.W. Maitland, writing almost ninety years ago, and after laying out the admittedly unsatisfactory secular evidence, concluded that the full story could not be told without investigation of "whatever records there may be of the ecclesiastical courts . . . ."² There the study has remained since. Later writers have added little.

This article seeks to fill this gap in our knowledge.³ Considerable
numbers of records of the ecclesiastical courts do in fact survive, although most of them have remained in manuscript repositories in England’s local archives. The article surveys the evidence on the subject found in them, after outlining the formal law of the *legitim*. Regrettably, these records will not answer every question the legal historian would like to put to them, including the most important questions of exactly how and why the right disappeared. In some sense, the story they tell is as difficult of interpretation as the story the common law sources have produced. But the evidence is worth having, and it is also illuminating for what it reveals about the more general question of the role of the canon law in English legal history.

II. THE ROMAN-CANON LAW

To understand the role of the *legitim* in English law, the historian must begin with formal law, and the exact starting place must be Roman law. Despite a natural assumption that because the church courts enforced the law of the church, the canon law, rather than the civil law inherited from the Roman Empire and found in the *Corpus Iuris Civilis*, it is to the law of Rome that one must look. The medieval church borrowed both procedure and substance from Roman law where these were not contrary to principles of Christianity, and one good example of such borrowing is this rule of succession. The canon law had no separate law on this subject. The church in effect canonized the civilian principle that a child had a *de iure* share in the estate of his or her parent.4

The Roman law texts inherited by the Middle Ages explicitly stated the principle of entitlement, although they left some room for argument about details and some variation in actual application. The rule was, of course, only one of several restrictions on freedom of testation found in the civil law. Probably the most notable restriction was the *lex Falcidia*, under which the testator’s designated heir had to be given at least a quarter of the estate.5 The purposes of these two restrictions were quite different in origin,6 but they often coincided in effect because the decedent’s heir was normally also his


6. In the civil law, the heir performed the functions of a modern executor, and in order for a testament to be fully valid the heir named in the testament had to be willing to serve. It naturally happened that heirs who received nothing from the testator refused to serve as executors; hence, the *lex Falcidia*. Its purpose was to avoid intestacies.
child. Thus, medieval jurists sometimes treated the two restrictions together; occasionally they even referred to the children’s share as the *quarta Falcidia.*

The classical rule held that the children were entitled to a fourth of the estate. If unjustly disinherited, a child could invalidate the will by means of an action called *querela inofficiosi testamenti.*

By virtue of a later imperial constitution, if the testator had left less than the fourth part to his children, they also had a separate action *ad supplendam legitimam* against the heir. This action allowed them to recover their share without invalidating the testament, although they also retained the older *querela.* The Emperor Justinian made a number of changes in this regime, the most significant of which increased the children’s portion to one-third of the estate if there were four children or fewer, and to one-half if there were five or more. This more generous treatment was the rule taken over by the medieval canon law.

Two decretals, that is, papal decisions defining principles of canon law, explicitly recognizing and enforcing the *legitim,* were included in the official collection of Decretals issued in 1234 by Pope Gregory IX. This collection, along with the earlier Decretum Gratiani (c. 1140) provided the bulk of the canon law applicable throughout Latin Christendom, and the two decisions it contained involved the church in defining and upholding the child’s right. The medieval canonists, the contemporary commentators whose discussion of the texts provides the best guide to understanding the law, also spoke emphatically on the point. For example, Antonius de Butrio (d. 1408), glossing one of the decretals in question, told his readers: “You should recognize that a child has the remedy of a *querela inofficiosi testamenti* against the will of his father when he is disinherited unjustly.”

Or as Hostiensis (d. 1271) had earlier put it, much of testamentary law could be left to local custom or to individual choice, but “in the *legitim* [the child] could in no way be injured.”

The canonists advanced several justifications for canonical

7. See, e.g., ANTONIUS DE BUTRIO, COMMENTARIA IN LIBROS DECRETALIUM X 3.26.18, nos. 7-18 (Venice 1578) [hereinafter cited as DE BUTRIO].
9. CODE JUST. 3.28.36.
10. NOV. 18.1.
12. Although the relevant literature on the subject of the medieval canon law is immense, there is no comprehensive work in English. For two brief introductions, with special reference to the canon law in England, see E. KEMP, AN INTRODUCTION TO CANON LAW IN THE CHURCH OF ENGLAND (1957); R. MORTIMER, WESTERN CANON LAW (1953). For a more recent useful introduction see Bassett, Canon Law and the Common Law, 29 HASTINGS L.J. 1383 (1978).
enforcement of this rule. One was that the rule stemmed from the "office of piety."Another held that it was required by principles of "canonical equity." A third, the most substantial and frequently repeated, was that the legitim formed part of natural law. Fathers were bound ex iure naturae to provide for their children. When they disregarded that duty, the law should step in to make good their omission or their wrong. Although the canonists did not claim exclusive jurisdiction for the courts of the church in enforcing the right, they nevertheless held that where the matter did come before a canonical tribunal, the tribunal ought to uphold the right of the children.

The principle behind the rule appears relatively straightforward. Its implementation, however, was not. The legal rules relating to the legitim that emerged from the commentators’ treatment of the subject would eventually fill a treatise of 730 folio pages, divided into two hundred separate quaestiones. Some of these quaestiones were the sort of academic exercises the Middle Ages prized, questions raised because of the demonstration of learning they facilitated rather than because they raised genuinely difficult, disputed, or important points of law. But most were not. A sixteenth century writer prefaced his discussion by terming the material “useful, extremely frequent in practice, and delightful.” He meant “delightful” in the sense of the pleasure one derives from solving difficult problems to which one needs to know the answer.

Some of those difficult problems with the rule that a parent must provide for his children arose out of exceptions to the rule’s full enforcement. The share was computed after payment of the testator’s legitimate debts, and the computation also required taking account of any advancements made to the children during the lifetime of the testator. Moreover, there could be valid reasons for the

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15. See, e.g., DECRETUM GRATIANI, Glossa ordinaria, Dist. 9 c. 7 (Distinctio 9, canon 7) (Venice 1572) (s.v. officiosa). The text reads: “sicut inofficiosum testamentum quod est contra officium pietatis.”
16. See, e.g., DECRETALES GREGORII IX, Glossa ordinaria, supra note 4, at X 3.26.16, s.v. legitimam. The text reads: “Et ita tenendum est secundum canonicam equitatem.”
17. Id., s.v. Trebelliumum which stated: “Nota ergo quod quartarum alia est debita iure naturali.” See also DE BUTRIO, supra note 7, at X 3.26.16, no. 23.
18. JOANNES ANTONIUS MANGILIUS, De imputationibus et detractioinibus in legitima Trebelliana . . . Tractatus (Venice 1618) [hereinafter cited as MANGILIUS]. See also CLAUDE DE BATTANDIER, Tractatus liberorum parentum ac fratrum legitimarum materiam continens (Lyons 1560).
19. M. CASSUS, Tractatus de successione 415 (Venice 1584) in which the author said: “Haec materia legitima iucunda, utilis, et in foro frequentissima est.”
20. For discussion and medieval references, see id., Quaest. 1, no. 3; MANGILIUS, supra note 18, Quaest. 49, no. 8.
21. The canon law required a sworn renunciation. See MANGILIUS, supra note 18, Quaest. 91, nos. 9-10. Mangilius said, “[R]enunciatio etiam generalis cum iuramento sufficit ad excludendum filium a legitima.” See also Cooper, supra note 1, at 266.
parent's having disinherited the child; for instance, the "vice of ingratitude." If a son physically attacked his father or if a daughter married contrary to her father's expressed wishes, these children not only incurred social stigma, they also forfeited, at least according to some views, their rights to the *legitim*. The canonists and civilians expected that hard questions of fact would arise in practice about whether or not the *legitim* would be due.

The commentators also discussed difficult and disputed legal questions that might arise in practice. For example, suppose a man had five sons, and one of them had been disinherited for good cause. Should the share due to the others be calculated on the basis of the man's having five or four children? If the former, they were entitled to half the estate; if the latter, they were limited to a third. On the one hand, the one-third share seemed correct since the reason behind the distinction was that larger families required a larger overall share in order to provide more than a pittance for each child. On the other hand, the texts themselves were explicit that if a parent had more than four children, the *legitim* was one-half. However you looked at it, the man in question still had five children. This "plain meaning" approach was not without its adherents, and it was further buttressed by the argument that where a child predeceased the parent, the child's estate did not necessarily forfeit his right to *legitim*. This question was, in other words, one of the inevitable matters of detail that were the source of work for medieval lawyers, just as they are for lawyers today. The child's right to set aside the will of the parent raised many such questions.

In all the discussion of detail, however, the canonists and civilians never lost sight of larger principles. The fundamental reasons behind the obligation recurred throughout their discussions. Nowhere is this more evident than in their treatment of the question of whether a statute or custom could abridge or abrogate the right. The question was much disputed. A sixteenth century commentator remarked: "It is the great question, and one of the more difficult that exists in the law, ... on the truth of [which] doctores have contended for two hundred years.

22. See Decretales Gregorii IX, Glossa ordinaria ad X 3.26.16, s.v. *legitimam*.  
23. See G. Durantis, Speculum Iudiciale (Basel 1574) IV:4 tit. *De natis ex libero ventre*, no. 13, containing a libel alleging that these acts gave rise to a cause of action against the son for ingratitude.  
25. See Bartolus, Commentaria (Venice 1570-71) at Authenicum, Collatio iii, tit. *de triente et semisse* (*lam quidem*), no. 9.  
26. An interesting example, on which canonists and civilians apparently disagreed, occurred where the father entered a monastery, the equivalent in some sense of "civil death." Canonists generally held that the children were entitled to the *legitima pars* at once, whereas civilians held that the children must wait until the natural death of the father. See M. Crassus, supra note 19, Quaest. 12, no. 6.
and more." It could be said, for instance, that because a statute (the imperial constitutions) granted the right, a statute could equally revoke it. To this, it could be objected that the statute was declaratory of natural law, and that since the obligation rested on natural law, neither custom nor statute could abrogate it. This objection could, in turn, be met by the argument that texts declaring that the obligation arose from natural law meant only that it proceeded *ex instinctu naturae* or *ex cursu naturae*. In other words, the commentators could say that the *legitim* had simply grown up from men’s natural inclinations to favor their children, and did not have its source in immutable right.

A second approach looked to the basic reason for the right. This too led to subtlety and equivocation. Parents had an unquestioned duty to support their children in the basic necessities of life (*alimenta*), and in some sense the *legitim* resembled the right to *alimenta*. However, what if the child were rich? Then he needed no support, and the canon law held he had no enforceable right to *alimenta* if this would merely require his parents to add to his riches. In some ways, the *legitim* seemed an easier case than *alimenta* for allowing the rich child to be deprived lawfully of part of his parent’s assets, which might otherwise go to pious or at least more useful social purposes. The *legitim* partook of the characteristics of mere bounty, so that where no actual need existed, it might be said that the parent’s obligation ceased. There was an answer to this analysis. However, the analysis did demonstrate that the obligation was not always absolute. Hence, it could be used in argument to support the proposition that statute or custom that abridged the right was not necessarily invalid.

After all the argument, the medieval consensus reached something of a compromise. A statute or custom might validly diminish, but it could not entirely abrogate, the child’s right. Certainly, no statute or custom could eliminate the *legitim* unless the child were rich. There was a fourteenth century decision of the Roman Rota, the regular papal court of appeal, approving this limited power of statute or custom. Antonius de Butrio, professor of the canon law successively at Florence and Bologna, noted the decision, and remarked with casual

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27. *Id.*, Quaest. 42, pr. The original text read: “Maxima quaestio est, una de difficilioribus quae sit in iure . . . ita quod asserverat Socinus circa veritatem huius questionis Doctores pugnasse a ducentis annis cita.”

28. See, e.g., Bartolus, supra note 25, at no. 1. Bartolus says, “Nam legitima debetur filio iure civili . . . ergo potest tolli per alium ius civile scilicet per statutum.”

29. See, e.g., Panormitanus, Commentaria at X 3.26.16. Panormitanus says, “quod potest diminui non autem in totum tolli quia esset contra equitatem naturalem.”


31. See Panormitanus, supra note 29, at X 3.26.16; M. Crassus, supra note 19, Quaest. 42.

32. The answer was that for many purposes *legitim* and *alimenta* were not identical; for example *alimenta* required a “needs test,” while *legitim* was figured by percentage of the estate. This difficult balance has to some extent been repeated by the provisions of the English Inheritance (Family Provision) Act of 1938. See generally P.M. Bromley, Family Law 622-36 (5th ed. 1976).
authority, "The opinion has always been to my liking." This became the *communis opinio*.

III. The English Evidence

Historians should certainly expect the *legitim* to have played a part in English history. Bede mentions the divisions of a man's estate into thirds as the customary rule, and the treatises ascribed to Glanvill and to Bracton in the twelfth and thirteenth centuries, respectively, also speak of the third part reserved to the children. Because the royal courts virtually withdrew from the field of succession to movables under Edward I (1272-1307), these early statements might count for little during the latter Middle Ages, but since the church courts occupied the area, one should expect continued enforcement of the substance of the right to *legitim* in those courts. The canonized Roman law outlined above should have come regularly into play in the testamentary causes heard in the church courts.

When one looks at the records for answers to questions about actual enforcement, it is immediately apparent that the records leave much to be desired. They are much more complete for the fifteenth and sixteenth centuries than for the thirteenth and fourteenth, so that conclusions are surer for the later period than for the earlier. They are also unlike modern case reports in that they almost never reveal any substantive reasons for the judge's decisions. The historian's conclusions must always remain tentative or rest on reasonable inferences drawn from the accumulation of evidence.

Nevertheless, even with these caveats, two conclusions about the *legitim* during the later Middle Ages emerge from an examination of the record evidence. First, there was a time when the right was known and enforced, probably throughout England. However, the right was principally thought of as a matter of custom, not a right guaranteed by the statute law of the church. Second, from at least the end of the fourteenth century, testators in most parts of England acted as if they had freedom of testation. With the possible exception of children with a real need for subsistence, few English children enjoyed a right to the *legitim* after 1400.

The first of these conclusions rests on slightly more satisfactory documentary evidence. Wherever records mention *legitim* or the *legi-
tima pars bonorum, they refer to the right as a customary one. A single possible exception is a reference to the lex Falcidia, found in a 1306 record from Canterbury. But this record may refer to the rights of the heir or the executor, not to those of the children. And in any case this particular ecclesiastical cause stopped short of actual enforcement. The lex Falcidia was noted only as a possible objection that someone might have raised against a testament. It is a thin piece of evidence when contrasted with the many documents which treat the right as customary.

The records produce several cases from the fourteenth century specifically enforcing the right on the basis of long established custom. A clear statement from the same Canterbury act book of 1306 noted that the third part was due “according to the custom of England.” A 1365 reference from York described the portion as due “by the English custom.” Existing precedent books, drawn up for use in the ecclesiastical courts, also described the right as customary, although they occasionally added that the right was owed de iure as well. One from the diocese of Salisbury, for example, contains a form setting out the right as a custom “laudable and ancient, observed throughout the realm from 10, 20, 30, 40, 50 and 60 years and more, from time whereof the memory of man runneth not to the contrary.” That was the normal way of pleading a valid customary right in English canonical practice, and it suggests the contemporary understanding of the source of the legitim as one resting ultimately on custom.

The conclusion is enforced by examination of the Provinciale of William Lyndwood, the fifteenth century English canonist and judge of the Court of Arches. He clearly knew that such a thing as the child’s portion existed in the law books. But he had little to say about its obligatory character in England. What he said instead is this: “For this portio, recourse should be had to the custom of the place.” He noted that there was no single custom throughout the realm, but rather various customs. “[T]here may be,” he wrote, “a general custom of any province, and likewise of any city, territory, or place. The custom of

36. Waley’s c. Waley’s, Lambeth Palace (London) MS. 244, fol. 49r. The executors were ordered to pay to the plaintiffs the sum demanded, presumably a legacy, “nisi locus appareat legi falsidie (sic).”

37. Bonn c. Felingham, Lambeth Palace (London) MS. 244, fol. 17v. The manuscript says “terciam partem bonorum dicit defuncti ipsam dominam Johannam iuxta consuetudinem anglicanae existentibus liberis.” For two similar references from 1313, see 1 Registrum Palatinum Dunelmense 369, 385 (Rolls Series 62:1, T. Hardy ed. 1873).

38. Borthwick Institute (York), D/C H 1/2, fol. 112/1 [The Institute is the record repository for the diocese of York.]. The manuscript says “de iure vel consuetudine anglicana.” See also Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200-1301, at 138-39 (N. Adams & C. Donahue eds. 1981) [95 Selden Soc.].

39. See Wiltshire Record Office (Trowbridge) Salisbury Precedent Book 1, fol. 1655v-1656r; British Library (London), Harl. MS. 6718, fol. 35.

40. W. Lyndwood, Provinciale (Seu Constitutiones Angliae) 178, s.v. defunctum (1679).
the location or region is to be attended to diligently."\(^41\)

A number of ecclesiastical court records do contain references to the *portio legitima* due to children, without stating explicitly the source of the obligation. However, some of these cases probably involved the intestacy of the parent,\(^42\) and if we follow the understanding of Lyndwood and the sense of the entries more fully spelling out the source of the obligation, these cases probably also have depended on the existence of custom. Although the English ecclesiastical lawyers must have been familiar with the canonical texts enforcing the right, when that right was fully articulated in contemporary practice, it was treated as one dependent on customary observance.

The second conclusion suggested by the court records is that by the end of the fourteenth century, the *legitim* had been reduced to the level of a local rather than a national custom, and had largely ceased to be in force outside the Northern Province of York. The Canterbury cases cited above, which invoked the "custom of England," come from the first decade of the fourteenth century. The last surviving Canterbury case in which the right was clearly enforced in the case of testate succession comes from 1375. A fifteenth-century case from the City of London, where the *legitim* was long retained, attributed the right "to the custom of the City of London" rather than to any wider English custom.\(^43\) It looks as though the right had fallen out of general observance by 1400.

Much of the other available evidence fits this picture of relegation to the status of a local custom, enforced only in the North and in a few places in the South of England. The fifteenth-century records of ecclesiastical courts are relatively abundant, but they contain a striking lack of litigation on the subject. The matter seemingly did not arise in practice. Although this is merely an argument from silence, it is enough to suggest that the custom had died out in most places. The law on the subject was complicated. It should have produced legal disputes. However, such disputes do not figure in the surviving records.\(^44\)

In the Northern Province of York, where the custom remained in force until 1679, the situation is quite different. The right to *legitim* has left considerable evidence in the surviving court records. For example,

\(^41\) Id. at 172, s.v. *consuetudinem patriae*.

\(^42\) Wynstall c. Wynstall, Canterbury Cathedral Library, Diocesan Act book Y.1.1, fols. 102r, 104v, 107v (1375); Ex officio c. Jakys & Edwards, Cambridge University Library, Ely Diocesan Records, Probate Liber B, fol. 33v (1468); Chaydok c. Tyldesley, Cheshire Record Office, Chester Archdeaconry Records, EDC 1/1, fol. 7b (1502); Shepard c. Mason & Gretton, Joint Record Office (Lichfield) Act book B/C/2/3, fol. 51v (1529); Aldred c. Aldred, Lichfield Act book B/C/2/3, fol. 68v (1529).

\(^43\) Hall c. Walpole, London Guildhall Library Act book MS. 9064/2, fol. 147v (1486). The manuscript says "terciam partem bonorum iuxta consuetudinem civitatis London."  

the records contain references to the invalidation of testaments as *contra officium pietatis*, or *inofficiosa*. Both phrases were those used where it was necessary to set aside a will as inconsistent with the child's right to *legitim*. The records also contain cases in which questions of law relating to the right were raised in the course of litigation. In *Colynson c. Godesburgh*, for example, a suit heard in the consistory court at York in 1427, one litigant raised the question of what effect the remarriage of a father had on his children's right to the third part of his goods. Did the children's share include property acquired and held in common during the second marriage? Or was it limited to property held by the parent during the marriage of which the child was an issue? In *Hodgeson c. Richardson*, heard at Durham in 1532, the principal issue litigated was the propriety of expenditures by the plaintiff's guardian during his minority. What effect did these have on the *legitim* remaining to the child when he reached majority? Should they be deducted from the share? Unfortunately, the incompleteness of the case records prevents discovery of the answers to the questions. But at least we know that they were litigated. From the Southern Province of Canterbury there is no comparable evidence. Such absence is striking. The most satisfactory explanation for it is that the custom had disappeared there by the end of the fourteenth century.

Moreover, there is more positive evidence. Many of the act book entries make little sense without the assumption that by 1400, a parent had the power to disinherit his children in most parts of England. For instance, in a Rochester case from 1467, a disinherited daughter sued to upset her father's will on the ground that he had been *non compos mentis*. If the daughter had a right to *legitim* at the time, she very likely would have had no need to undertake the burden of showing testamentary incapacity to secure her third part of his estate. In a sixteenth-century case from Winchester, two daughters accused the executor of their father's estate of fraudulently inserting a clause in the testament by which they were deprived of the use of £20 willed to them. Had the daughters enjoyed the right to elect against the will, surely they

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47. Borthwick Institute, CP.F.163 (1427). This cause was still being litigated in early 1430. It was complicated both by the widow's claims and by an allegation of prior satisfaction. Unfortunately no sentence has survived. Other suits at York involving, at least *inter alia*, the recovery of the child's portion, are Wilson v. Belwoode, CP.G.365 (1547); Polyngton c. Polyngton, CP.G.18 (1503-04); Clerk c. Executors of Rede, CP.F.128 (1420); Holme c. Holme, CP.F.18 (1402).
49. Act books were the official day-by-day records of procedure taken in all cases heard by the ecclesiastical courts.
would have done so rather than raising the difficult allegation of tampering with their father’s testament.

Reliance on the exact terms of bequests in the parent’s last will is normally unnecessary if the child has a right to legitim, and such reliance appears over and over again in the records of the Southern Province in England. Children in the Southern Province brought many actions to enforce specific legacies contained in their fathers’ testaments. It makes most sense to suppose that they did so because by the fifteenth century the children no longer had a right to anything else. A right to legitim no longer formed part of the customary law in most of Southern England.

Surviving post-1400 testaments also suggest freedom to disinherit children. In some of these testaments, fathers mentioned their children but bequeathed less than a third share of the estate to them. The freedom of testation assumed in these wills is particularly impressive in contrast to the few testaments from special places where the legitim survived. For instance, in 1416, a testator from Grimsby in northern Lincolnshire left his daughter Alice £40 as well as a remainder interest in land; but he added that if she were not content with the £40, and chose instead to take her portio against the will, she should forfeit the remainder interest in the land. The testator assumed, that is, that his daughter had the right to set aside part of his will, and he made the best provision he could for the eventuality. The absence of such provisions from most English wills is therefore doubly probative. In them the drafters assumed that the legitim did not exist.

None of this should imply that parents regularly disinherited their children in southern England. Such treatment would be contrary to what we know about the ties of kinship in the Middle Ages and afterwards. It would also be contrary to much evidence in actual wills; indeed, some fathers expressly left the “third part of their goods” or the portio to their children. Even in the South, division of an estate into thirds as a proper form of bequest remained a living idea well into early modern times. But the cumulation of evidence suggests that by 1400 this division represented the testator’s choice rather than a legal obligation.

To this general regime of testamentary freedom one slight qualification exists: when the child was in need of the basic necessities of life,
the church courts provided some protection. They regularly enforced a father’s duty to support his minor children, even illegitimate children. The courts enforced trusts established for children, interpreting and even modifying them then “for the comfort and utility” of the child. In addition, a few entries in the records suggest that provision for children with special needs was also sometimes made as part of probate proceedings. For example, John Hull at Canterbury left a residuary legacy to his children. In making the distribution, the court gave one child a share ten times that allotted to the other children “because he was sickly.” Need counted. Although the discretionary nature of the ecclesiastical remedies has removed most of the evidence from the historian’s scrutiny, the records suggest that the church courts did not adopt a wholly heartless regime even while they did increasingly permit testamentary freedom. The reader may recall that in discussing whether or not custom might validly abrogate the right to legitim, the medieval canonists were most insistent that the right be preserved for the child who could not otherwise support himself. Although the records do not show that the courts enforced this rule uniformly, they do suggest that its spirit was not a dead letter.

IV. POSSIBLE EXPLANATIONS FOR THE DEMISE OF THE LEGITIM

Except for special situations and except for particular parts of England, therefore, the story of the legitim during the later Middle Ages is one of decline and disappearance. From a general rule corresponding to the provisions of the Roman-canon law, it had become a custom enforced only in the North of England and a few places in the South by the end of the fourteenth century. The records themselves show this happening.

Exactly how and why the legitim dropped out of general use are, unfortunately, not questions to which the ecclesiastical court records provide exact answers. However, several possible explanations may be advanced. The first explanation is essentially procedural. It takes an internalist approach to legal change. The practical difficulties of enforcement of the right to legitim in the church courts must sometimes have been very great. The possibility of inter vivos conveyances made calculations difficult. The lack of control of questions involving inheritance of land made full enforcement of the legitim impossible. The English church courts were never in a position where they could enforce the full civil law system into which the legitim fit, if only because they held a limited jurisdiction. Enough examples of the inherent diffic-

56. The evidence on this point is laid out in Helmholz, Support Orders, supra note 3.
58. Canterbury Cathedral Library, Act book Y.3.2, fol. 361 (1600). The court allocated £5 to Cales Hull, as opposed to 10s. given to each of the other three children “quia est morbosus.”
iculties have survived in the records to suggest that the church courts never overcame these problems, and this difficulty in enforcement may have contributed to disappearance of the right.

The historian who finds policy explanations more plausible may suggest a second possibility: that a growing sentiment in favor of testamentary freedom influenced practice in the church courts. The sentiment is readily observable in the law relating to real property; the popularity of the use and the ability to bar entails during the later Middle Ages in England reflected testators' natural desires to pass title to land free from the shackles of strict inheritance rules. The success of these devices shows which way the tide ran. The policy against restraints on alienation had its birth in the common law courts of the Middle Ages, and it is not beyond thinking that the judges of the church courts were subject to something like the same influences.

The historian more doctrinally inclined may point to a third possibility. The controversy among medieval commentators as to whether the legitim could be abrogated by statute or custom suggests that the complex English situation simply mirrored the attitudes of the canonists. It is certain that the enforcement of the legitim did not rank as a high priority in the medieval canon law. Although included in its texts, the canon law never ascribed such weight to the legitim that the canonists felt required to treat it as beyond debate. This uncertain status may well have affected actual practice. The judges may not have been sure enough about it to enforce it as a matter of strict right. The legitim was not a rule beyond doubt.

Each of these explanations makes sense. The principal drawback to each is that none is supported by demonstrable evidence of causation. They cannot be proved, because no actor ascribed the disappearance of the legitim to any of these three factors. Indeed, no actor in the story has left any indication whatsoever of motivation. Although there are entries in the surviving church court records which are consistent with each of these explanations, none of the entries rises to the level of proving a connection. Consistency, not proof, is what they offer. Moreover, each possible explanation fits poorly with the counterexamples of the Province of York and the City of London, the one the

59. See, e.g., In re Testament of Wynbush, Rochester Diocesan Act book, DRb Pa 2, fols. 79r, 81v, 84v, 86r (1447). One of the children, who the court cited for impeding his father's testament by withholding goods, answered, "quod bona que habuit erant ei data per patrem suum dum vixit et manualiter liberata et hoc offert se probaturum." Id. at fol. 79r ["that the goods which he had were given to him by his father during his lifetime, and manually delivered. And he offered to prove this"]'). Commentators admitted that the legitim excluded perfected inter vivos gifts. See, e.g., MANGILIUS, supra note 18, Quaest. 10. This exclusion inevitably led to some of the same techniques for "avoiding probate" known to modern lawyers; for example, the life estate followed by remainder, as in a case involving the Estate of William Pyndfold, Canterbury Cathedral Library, Act book Y.1.3, fol. 180r (1422).


61. See supra notes 27-33 and accompanying text.

62. See also, 3 W.S. HOLDSWORTH, supra note 1, at 554-56.
most traditional, the other the most economically "advanced" area of England. In both places the custom of *legitim* survived the Middle Ages. It is hard to see why this survival should have occurred in both places on the basis of any of the arguments advanced above.

Although none of the possible explanations is analytically unassailable, they do nevertheless show the compatibility of this custom with change and communal choice. This is a point worth making. The *legitim* was part of a complex system of inheritance derived ultimately from Roman law. The Roman law system was in widespread use on the Continent, but little of it obtained in England. English law divided testamentary succession between two court systems: secular courts for devolution of real property, and ecclesiastical courts for succession to chattels. Even in the ecclesiastical tribunals the civil law system of universal heirship was only partly enforced. Such a partial civilian regime naturally left greater leeway for change and for variation. The *legitim* was isolated from the regime which gave it birth, and knowledgeable men must therefore have seen it as a simple customary right rather than as an integral part of a functioning system of succession. This left it more vulnerable to challenge in England than on the Continent, where the *legitim* largely survived. If we cannot quite trace the motives of the English actors who retained the custom in some places but not in others, we can nevertheless show that an isolated customary right like the *legitim* was subject to change, perhaps even to rational debate.

V. STUBBS-MAITLAND CONTROVERSY

One additional point ought to be made. It relates to the authority of the canon law in medieval England. The question has long been dominated by the old controversy between F. W. Maitland and Bishop Stubbs. Stubbs initially held to the view that, even before the Reformation, the English church courts were free to pursue a path independent of foreign, and particularly papal, direction. The canon law of Rome, Stubbs wrote, "although always regarded as of great authority in England, was not held to be binding on the courts." Maitland found this argument contradicted by the available evidence. In a series

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of lively and critical essays he attacked Stubbs' position, maintaining that the "papal law books" were in fact regarded as binding statute law in England. Although the strong hand of the English kings kept some parts of the canon law from being enforced in England, Maitland said, for Stubbs' view to carry the day, "[w]e must see an ecclesiastical judge whose hands are free and who has no 'prohibition' to fear, rejecting a decretal . . . ." 67 That he could not find. 68

If Maitland had looked to the law of legitim, he would have found exactly that example. The rule was "not held to be binding on the courts" even though ecclesiastical judges were entirely free to enforce it. No part of the English common law, no writ of prohibition, would have stopped them. And the decretal law supported by the great majority of the canonists called for them to do so. However, except for special local custom, the English church courts did not enforce the right. If put to choose between Maitland and Stubbs on the basis of this evidence, therefore, we should have to embrace the view of Stubbs.

However, so stark a choice need not be made. The Stubbs-Maitland controversy took too "modern" a view of the history of the canon law, and it is important to approach the question from the appropriate perspective. The history of the legitim provides an excellent corrective. First, the controversy treated the canon law too simply. Not all parts of the law were of the same character. Rules about heresy or simony, for example, had greater importance for the medieval church than did rules about inheritance. Not all papal decretals were meant to have the force of "binding statute law" in a modern sense. Some were. Some were not. Legitim, and most inheritance questions, fell into the latter group. The Stubbs-Maitland controversy must therefore be broadened to allow for the variety of rules found in the "papal law books." Not all were meant to be treated alike.

Second, the controversy was anachronistic in reading into the Middle Ages the tenets of legal positivism. Local custom, of which the legitim in England is only a small example, played a much greater role in the legal practice of the ecclesiastical courts than modern statute law would allow. 69 It is of course true that some local customs were illegitimate under the medieval canon law and not to be allowed in practice. But many more were tolerable, though they might qualify or even contradict a papal ruling. What was missing from the Stubbs-Maitland controversy was a recognition of the wide scope that the medieval

67. F. MAITLAND, Church, State, and Decretals, in Roman Canon Law in the Church of England 51, 84 (1898).
68. Id.
canon law left for local variation. The medieval canonists often approached the rulings found in the official texts with a freedom that modern lawyers may find daring. This freedom allowed them to modify and even sometimes to disregard the clear import of the text. This same freedom is found in the local variation permitted within the canon law. Of the inappropriateness of dealing with the medieval canon law as if it were "binding statute law," the history of the legitim in England provides a perfect illustration.

VI. Conclusion

This article has sought to fill a long-standing gap in the history of English law by describing the evolution of a child's right to legitim in the church courts between the thirteenth and seventeenth centuries. The courts enforced that right as a matter of general English custom at the start of the period. By about 1400 they had ceased to do so. Legitim had become a local and noteworthy custom.

Whether this change came about because the English church courts had only a partial probate jurisdiction and lacked power to use the civilian system upon which true enforcement of the legitim depended, or because progressive sentiment in favor of freedom of testation came to dominate the minds of ecclesiastical lawyers in most parts of England, are questions that have proved impossible to answer with any assurance. The evidence is too scanty. But in any case, freedom of testation had largely carried the day by the fifteenth century. The church courts had showed themselves open to this legal change. Although free to follow the law found in papal decretals and endorsed by medieval commentators, the courts nevertheless responded to stronger forces and abandoned the legitim. If the exact reasons for the change have proved elusive, the fact and timing of change have both emerged clearly from a survey of the surviving records.