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The Family Paradigm of Inheritance Law

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THE FAMILY PARADIGM OF INHERITANCE LAW

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In this Article, Professor Foster argues that inheritance law has failed to adapt to modern American society because it is locked in a family paradigm. She begins with a review of the case law and legislation governing intestate succession, wills, contracts to devise, and will substitutes. In the course of that review she demonstrates the paradigm's pervasiveness and the human costs it imposes. She then turns to scholarly reform proposals to show that despite their vitality and innovativeness, they too have remained within the family paradigm. Professor Foster argues that the family categories employed in both law and scholarship are so inflexible, outdated, and culturally biased that they harm all participants in the inheritance process. To show the possibility of reform outside the family paradigm, Professor Foster provides three illustrations: (1) support-based inheritance; (2) inheritance based on decedent's intent; and (3) inheritance based on the actual relationship between the decedent and the claimant. She concludes with a call for the development and discussion of these and other proposals for reform outside the family paradigm.

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INTRODUCTION

At the dawn of the twenty-first century, the inheritance system stands as one of the last bastions of the traditional American family.[1] Many of its rules and doctrines appear frozen in time, remnants of a bygone era of nuclear families bound together by lifelong affection and support.[2] In a world where the individual has emerged from the tyranny of the abstract,[3] inheritance law continues to define people by

1. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 289 (1989) ("The law of inheritance remains a bastion of the legitimate family.").

2. This historical vision may be more mythical than real. Indeed, the "favorite stereotype of the nuclear family" is taken from a television show, *Leave It to Beaver.* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 4 n.14 (2000) [hereinafter Gary, *Adapting Intestacy Laws*] ("*Leave It to Beaver*, a television show depicting the Cleaver family as a 'typical' American family consisting of a mother, father and two kids, is a favorite stereotype of the nuclear family."); *see* Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 223 (1991) [hereinafter Waggoner, *The Multiple-Marriage Society*] ("The traditional 'Leave It To Beaver' family no longer prevails in American society.").

3. Numerous legal scholars have called attention to the human impact of abstract legal rules. *See, e.g.*, D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS, at xxxvi (1998) ("The law affects individuals' lives in profound ways that legal abstractions cannot capture."); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2105 (1989) ("Academics, judges, and lawyers often juggle concepts and spar with abstractions, without consulting the human concerns actually at issue in their

family categories. Decedents and their survivors remain first and foremost spouses, parents, children, and siblings rather than individuals with particular human needs and circumstances that increasingly defy conventional family norms.[4]

The failure of inheritance law to adapt to the changing American family has become a central theme in recent trusts and estates literature.[5] Established scholars and new voices in the field have presented a compelling picture of a system out of step with modern American society. They have shown that inheritance rules fail to recognize the full range of today's families;[6] the growing pattern of family abuse, neglect, and nonsupport;[7] and the evolving status of

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deliberations."); Walter O. Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CAL. L. REV. 699, 707 (1978) ("Both rules of evidence and conceptions of relevance act to exclude certain information, often of a human nature, that cannot be subsumed under a given rule, and therefore have elements of legal masks.").

4. Professor Baron has noted a similar phenomenon in will interpretation cases. She argues that under existing approaches, "[t]he focus remains on the words, not on the complex motives by which they were produced. The discussions are bloodless. One would hardly know that any actual people were involved—only 'testators,' 'beneficiaries,' 'scriviners,' and 'residuary devisees.' " Jane B. Baron, *Essay: Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 663–64 (1992). As Professor Baron states, "[t]here is something deeply dissatisfying about a system that protects individuals only by depriving them of their humanity." *Id.* at 655.

5. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 79, 80 (2d ed. 1997) (titling a chapter "The Changing American Family" and stating that "[t]he challenge facing courts and legislatures is to provide a family property law that reflects the changing and diverse American household"); Gary, *Adapting Intestacy Laws*, *supra* note 2, at 1; E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1094 (1999) [hereinafter Spitko, *The Expressive Function of Succession Law*] (arguing that "[s]uccession law . . . must adapt to recognize the changing nature of the American family").

6. *See, e.g.*, Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94 [hereinafter Brashier, *Children and Inheritance*] ("One of the increasingly notable shortcomings of modern probate law is its failure to provide adequate guidelines governing the inheritance rights of children outside the traditional nuclear family."); Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 982–1019 (1996) [hereinafter Chester, *Freezing the Heir Apparent*] (discussing the limitations of inheritance rules in addressing posthumously conceived children and proposing reforms); Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 15–17, 65–72 (1998) [hereinafter Fellows et al., *Committed Partners*] (demonstrating that intestacy laws fail to recognize committed relationships and family units headed by committed partners).

7. *See, e.g.*, Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 259–61, 265–73 (1994) (criticizing statutes that allow "deadbeat dads" to inherit from their children); Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. 401, 439 (1995) (proposing a family violence statute "to deny abusers any [inheritance] benefits from those they abused"); Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are,*

women in society.[8] They have revealed that current law retains such an outdated definition of family that it denies donative freedom,[9] frustrating even testamentary directives regarding funeral and burial arrangements.[10]

Scholars have offered an array of reform proposals to modernize specific aspects of the inheritance system. These proposals include expanded intestacy rules to cover "nontraditional" family members,[11] updated elective share provisions to implement a partnership theory of marriage,[12] statutory and judicial remedies for disinherited

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Where We Need to Go, 27 IND. L. REV. 517, 524–41 (1994) (discussing reform of intestate succession laws to prevent inheritance by parents who abandoned or failed to support their children).

8. *See, e.g.*, Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers"*, 10 LAW & INEQ. 137, 137–46, 150–52, 155–62 (1991) (criticizing the patriarchal nature of wills and trusts law and its continuing negative impact on women); Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 572 (1995) [hereinafter Gary, *Marital Partnership Theory*] (arguing that elective share statutes are outdated and calling for adoption of a "marital partnership theory [, which] accords with society's changing view of the role of women and the institution of marriage").

9. *See, e.g.*, Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236–37, 258–60 (1996) [hereinafter Leslie, *The Myth of Testamentary Freedom*] (arguing that courts manipulate mental capacity doctrines and will execution formalities to invalidate wills that leave property to those outside the traditional family); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576–77, 629 (1997) (contending that courts use the undue influence doctrine to deny donative freedom to testators who fail to provide for biological family members).

10. *See, e.g.*, Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 973 (1999) ("[F]uneral homes generally maintain a familial approach to death which focuses upon the needs of the biological family and spouse rather than upon the articulated preferences of a testator."); Jennifer E. Horan, Note, *"When Sleep at Last Has Come": Controlling the Disposition of Dead Bodies for Same-Sex Couples*, 2 J. GENDER RACE & JUST. 423, 424–25, 429–34 (1999) (arguing that the presumption in favor of the decedent's spouse and biological family members can "confound the plans of the partners in homosexual couples who have definite wishes as to what should be done with their bodies at death," even where such wishes are expressed in a valid will).

11. For example, there have been numerous proposals to extend intestate succession rights to unmarried partners. *See, e.g.*, Fellows et al., *Committed Partners*, *supra* note 6, at 89–91 (calling for reform of intestacy laws to permit inheritance by committed partners); T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1522–24 (1999) (proposing reform of intestacy and other default rules to "replicate the likely intent of the GLB [Gay, Lesbian, and Bisexual] community," including recognition of same-sex partners as heirs); Spitko, *The Expressive Function of Succession Law*, *supra* note 5, at 1066–67 ("urg[ing] reform of the 1990 [Uniform Probate] Code to include same-sex partners within its intestacy provisions"); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 78–86 (1994) [hereinafter Waggoner, *Marital Property Rights in Transition*] (proposing an intestacy statute in working draft to include unmarried decedent's de facto partner).

12. *See, e.g.*, Gary, *Marital Partnership Theory*, *supra* note 8, at 569, 596–604 (proposing a revised elective share to "appl[y] the marital partnership theory"); John H.

children,[13] and alternative dispute resolution techniques to ensure a fair hearing for "nonconforming" wills that leave property outside the family.[14] Thus far, however, these efforts have yielded only limited success[15] because they are grounded in a paradigm that constrains reform.

Several authors have recognized that American inheritance law is rooted in a family paradigm.[16] Yet, that paradigm remains

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Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 308–10, 314–17 (1987) (proposing an accrual-type forced share to implement "contribution theory . . . sometimes expressed as 'partnership' or 'sharing' theory"); Rena C. Seplowitz, *Transfers Prior to Marriage and the Uniform Probate Code's Redesigned Elective Share—Why the Partnership Is Not Yet Complete*, 25 IND. L. REV. 1, 67–70 (1991) (proposing guidelines to "promot[e] . . . marriage as a total partnership" by "amend[ing] the elective share statutes to take antenuptial transfers into account").

13. *See, e.g.*, Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1253–63 (1990) (proposing a modified version of the forced share approach); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 173–80 (1994) [hereinafter Brashier, *Disinheritance and the Modern Family*] (proposing a posthumous duty to support minor children); Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 32–35 [hereinafter Chester, *Disinheritance and the American Child*] (proposing a discretionary scheme to allow courts to address individual needs and circumstances of disinherited children).

14. E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 294–97 (1999) [hereinafter Spitko, *Gone But Not Conforming*] (proposing testator-compelled arbitration of will challenges to protect a nonconforming testator's testamentary freedom); *see also* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 417–21, 425–28 (1997) [hereinafter Gary, *Mediation and the Elderly*] (discussing the advantages of mediation for resolving inheritance disputes arising from "dispositions of property to persons outside the societal definition of the 'natural objects of the decedent's bounty' ").

15. Drafters of the Uniform Probate Code have expressly drawn on scholarly critiques and proposals as impetus for reform. For instance, comments to revised Article II's intestacy and marital rights provisions refer specifically to scholars' empirical studies, critiques, and proposals (including work by the drafters) regarding "the multiple-marriage society and the partnership/marital-sharing theory." UNIF. PROBATE CODE art. II prefatory note, 8 U.L.A. 75 (1998). *See id.* § 2-102 & cmt. (citing empirical studies); *id.* art. II, pt. 2 general cmt. (discussing and citing work on the partnership theory of marriage). Only a few state legislatures, however, have enacted the revised Uniform Probate Code provisions in full. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 512 (6th ed. 2000) ("The 1990 UPC elective share provisions have been adopted in less than a dozen states, mainly in the Great Plains.").

16. Brashier, *Children and Inheritance*, *supra* note 6, at 95 ("Our inheritance laws . . . remain entrenched in the nuclear family paradigm."); Madoff, *supra* note 9, at 611 (discussing the "paradigm of undue influence as family protection"). For a definition of "paradigm," see THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10 (2d ed. 1970) (referring to "paradigm" as "defin[ing] the legitimate problems and methods of a research field for succeeding generations of practitioners").

surprisingly unchallenged. As this Article will show, proposed reforms have stayed uniformly within the family paradigm and been limited by it.[17] As a result, those reforms have not reached the core of the problem—the human costs of an inheritance system based principally on family status with insufficient regard for support, decedent's intent, or actual relationships. This Article calls for a different approach. It argues that reformers should confront and reconsider the family paradigm itself.[18]

The stakes are enormous. As Professor Lawrence Friedman has observed, inheritance laws act as the "template" and "genetic code of a society," which ensure that each generation generally replicates the structure of the previous generation.[19] In the United States, the inheritance system responds to precisely this reproductive imperative. Its principal function is to maintain and perpetuate the social unit that Americans have traditionally deemed essential for a stable and productive society—the family.[20]

Preservation of the family comes at a price, however. Part I of this Article presents an example of one victim of the family paradigm—support.[21] It shows that the family paradigm constrains efforts to use decedents' estates to provide support to needy survivors and to reward caring survivors for lifetime support of the decedent. Part I demonstrates that these constraints pervade the entire inheritance system in the rules and doctrines governing intestate

17. *See infra* Part II.

18. *See infra* Part III.

19. Lawrence M. Friedman, *The Law of Succession in Social Perspective*, *in* DEATH, TAXES AND FAMILY PROPERTY 9, 14 (Edward C. Halbach, Jr. ed., 1977) (referring to inheritance laws as the "template" and "genetic code of a society," which "guarantee that the next generation will, more or less, have the same structure as the one that preceded it"). For an extended discussion of the relationship between genetics and inheritance, see generally John H. Beckstrom, *Sociobiology and Intestate Wealth Transfers*, 76 NW. U. L. REV. 216 (1981).

20. The authors of one of the leading trusts and estates casebooks have titled their text "Family Property Law" to emphasize the "symbiotic relationship between the transmission of wealth and family." WAGGONER ET AL., *supra* note 5, at 1 (describing "inheritance law as playing a crucial role in the creation and maintenance of families and family law playing a similar role in wealth transmission"). The inheritance system has put particular emphasis on preserving the nuclear family. *See* Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 324 [hereinafter Fellows et al., *Public Attitudes*] (arguing that intestate succession laws "promote and encourage the nuclear family"); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 41 (1992) ("American society has always been, and continues to be, characterized by nuclear families.").

21. *See infra* notes 32–104 and accompanying text.

succession,[22] testamentary disposition,[23] contracts to devise,[24] and will substitutes.[25]

Part II turns to existing scholarly reform proposals. It analyzes these proposals as pursuing three broad strategies: (1) enhancing protections for surviving family members;[26] (2) redefining the family to reflect changes in contemporary American society;[27] and (3) introducing procedural mechanisms to mitigate the effects of the family paradigm on wills that deviate from traditional family norms.[28] Part II argues that although these strategies offer significant improvements over the existing system, they ultimately provide only partial solutions because they fail to break out of the family paradigm.

Part III calls upon reformers to reconsider the paradigm in which they have been working. It argues that the family paradigm today has become the impediment to reform and should be abandoned. Part III first identifies the human costs of the family paradigm. Part III.A shows that the paradigm's inflexibility, obsolescence, and cultural bias harm heirs and beneficiaries, potential beneficiaries, decedents, judges, jurors, and others whose lives do not conform to the family "ideal" the paradigm celebrates.[29] Based on this new understanding of the family paradigm, Part III then contends that reformers should develop approaches to inheritance that lie outside that paradigm. Part III.B attempts to begin that process by offering some preliminary ideas about possible future directions for an inheritance law not grounded in family status.[30] Part IV concludes that the human costs of the family paradigm now outweigh its benefits and that the most promising directions for reform lie outside that paradigm.[31]

I. FAILURE OF SUPPORT UNDER THE FAMILY PARADIGM

In theory, American inheritance law performs an important social welfare function. It supposedly encourages those with means to provide for their dependents.[32] Yet, as this Part will show, in

22. *See infra* notes 34–50 and accompanying text.
23. *See infra* notes 51–73 and accompanying text.
24. *See infra* notes 74–85 and accompanying text.
25. *See infra* notes 86–92 and accompanying text.
26. *See infra* notes 106–38 and accompanying text.
27. *See infra* notes 139–83 and accompanying text.
28. *See infra* notes 184–213 and accompanying text.
29. *See infra* notes 215–57 and accompanying text.
30. *See infra* notes 258–350 and accompanying text.
31. *See infra* notes 351–66 and accompanying text.
32. Edward C. Halbach, Jr., *An Introduction to Chapters 1–4*, *in* DEATH, TAXES AND

practice, the U.S. inheritance system actually disserves support. Its principal function is not support, but rather preservation of the family.[33] When support conflicts with family preservation, support yields.

A. *Intestate Succession*

The rules of intestate succession—the default rules[34] that apply in the absence of a will—provide rigidly[35] for inheritance by status. The decedent's closest relatives by blood, adoption, or marriage automatically inherit, irrespective of their actual relationship with the decedent.[36] A spouse takes one share, a child another.[37] When no

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FAMILY PROPERTY, *supra* note 19, at 3, 5 (stating that inheritance law "encourag[es] those who can to make provision . . . for those who are or may be dependents"). Note that this argument is usually framed in terms of support of a decedent's family members. *See, e.g.*, MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 312 (1970) (arguing that one of the purposes of inheritance is "meeting the maintenance needs of family members"); Fellows et al., *Public Attitudes*, *supra* note 20, at 324 (stating that intestate succession rules help "protect the financially dependent family").

33. State and federal death taxation schemes further promote this goal. "[I]nheritance tax rate schedules afford preferential treatment to close relatives," reflecting "a social view that direct descendants have a birthright claim to the wealth while legacies to collateral relatives and 'strangers' are in the nature of windfalls." BORIS I. BITTKER ET AL., FEDERAL ESTATE AND GIFT TAXATION 11 (7th ed. 1996). Even the estate tax, which "ordinarily tak[es] no account of the beneficiary's identity . . . makes a similar concession in the case of property passing to the decedent's surviving spouse." *Id.*; *see* I.R.C. §§ 2056, 2523 (1994 & Supp. 1999) (setting out "marital deduction" for federal estate and gift tax purposes).

34. The conventional description of intestate succession as a default system, *see* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.1 cmt. c (1999) (stating that "[i]ntestate succession is a default regime"); DUKEMINIER & JOHANSON, *supra* note 15, at 71 (titling chapter "Intestacy: An Estate Plan by Default"), does not convey its full possible impact on inheritance. *See* Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's Love Got to Do With It?*, 57 U. PITT. L. REV. 841, 858 n.106 (1996) (arguing that in undue influence cases "[t]he default function of intestacy distributions is thus converted into normative standards of what is a proper testamentary distribution"). Thus, as Professor Gallanis has recently underscored, it is essential for reformers to address discriminatory default rules as well as mandatory rules. Gallanis, *supra* note 11, at 1514–16 (arguing that advocates of same-sex equality must attack not only mandatory rules but also default rules that discriminate against sexual minorities and citing intestacy rules as one such target for reform).

35. Friedman, *supra* note 19, at 13 (describing U.S. inheritance rules as a "rigid scheme").

36. For an extended discussion of common patterns of U.S. intestacy statutes, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 2 (1999); DUKEMINIER & JOHANSON, *supra* note 15, at 71–97; WAGGONER ET AL., *supra* note 5, at 29–72.

37. Under some statutes, the child may not be entitled to inherit. For example, the 1990 Uniform Probate Code provides that the decedent's surviving spouse inherits the entire intestate estate if "all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who

"close" family members survive, the law ignores those in intimate, dependent relationships with the decedent to confer windfalls on distant relatives who may not even have known the decedent. Under this scheme, behavior and need are irrelevant. In most states, the decedent's closest relative inherits even if she abandoned, maltreated, or physically abused the decedent.[38] Short of murdering the decedent,[39] she retains intestate succession rights because her family status makes her by definition a "natural object of the decedent's bounty."[40] In contrast, a blended family member,[41] extended family

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survives the decedent." UNIF. PROBATE CODE § 2-102(1)(ii) (amended 1993), 8 U.L.A. 81 (1998). For examples of statutes that have adopted this approach, see ALASKA STAT. § 13.12.102 (Lexis 2000); MONT. CODE ANN. § 72-2-112 (1999).

38. For examples of recent critiques and reform proposals to address this situation, see *supra* note 7. Many jurisdictions disqualify spouses who abandoned the decedent, however. *See, e.g.*, MO. ANN. STAT. § 474.140 (West 1992 & Supp. 2001) (excluding a spouse who "voluntarily leaves his or her spouse and goes away and continues with an adulterer or abandons his or her spouse without reasonable cause and continues to live separate and apart from his or her spouse for one whole year next preceding his or her death, or dwells with another in a state of adultery continuously"). A few states also bar parents who abandoned or refused to support their children. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1998) (disqualifying a parent who failed or refused to provide for a minor child); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5(5) (1999) (barring a "parent who has refused to acknowledge or has abandoned his or her child, or a person whose parental rights have been terminated"). One state has recently expanded its definition of "unworthy heir" to disqualify heirs for "abuse . . . of an elder or dependent adult." CAL. PROB. CODE § 259 (West Supp. 2001). This statute defines abuse broadly to include "physical abuse, neglect, or fiduciary abuse of the decedent, who was an elder or dependent adult." *Id.* § 259(a)(1). For a critical evaluation of the California statute, see Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse But Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 568–77 (2001).

39. For comprehensive analyses of the relevant statutes and case law disqualifying "slayers" of the decedent, see generally Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489 (1986); William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65 (1969); Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803 (1993).

40. *See* Mundy v. Simmons, 424 A.2d 135, 139 (Me. 1980) (describing intestacy and wrongful death statutes as "designed to favor the surviving spouse and those who stand in closest relationship within the bloodline as the natural objects of the decedent's bounty").

41. Relatives by affinity (other than the surviving spouse) generally have no intestate succession rights. A few intestacy laws will permit inheritance, however, to prevent escheat of the estate. *See, e.g.*, FLA. STAT. ANN. § 732.103(5) (West 1995 & Supp. 2001) (providing that where decedent is not survived by a spouse or kindred, the kindred of the decedent's last deceased spouse inherit). Under most statutes, steprelatives are ineligible to inherit. *See, e.g.*, MINN. STAT. ANN. § 524.1-201(5) (West Supp. 2001) (barring stepchildren from taking by intestate succession from stepparent). *But see* CAL. PROB. CODE § 6454 (West Supp. 2001) (giving intestacy rights to a stepchild who had a "parent and child relationship" with a stepparent if that relationship began when the stepchild was a minor and continued throughout their joint lifetimes and clear and convincing evidence

member,[42] or nonrelative[43] who was the decedent's primary caregiver or long-term dependent generally receives no recognition under intestate succession statutes.[44] She is considered an "unnatural" recipient of the decedent's estate.[45]

Even among those who do inherit, the needy and the caring fall victim to narrow statutory definitions of "natural" wealth distributions within the family. Intestacy laws assign shares mechanically,[46] based on family status alone. They do not factor in individual heirs' differing support needs or circumstances. As a result, "[i]t does not matter . . . whether one [heir] is rich and another poor; one a minor, one not; one blind and destitute, [and] another not—they share equally in the estate."[47] Similarly, intestate

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exists that the stepparent would have adopted the person but for a legal barrier). A few jurisdictions even limit the inheritance rights of "half-blood" relatives. *See, e.g.*, VA. CODE ANN. § 64.1-2 (Michie 1995) (awarding a half-blood collateral relative half the share of a whole-blood collateral relative).

42. "When the intestate is survived by a descendant, the decedent's ancestors and collaterals do not take." DUKEMINIER & JOHANSON, *supra* note 15, at 90. Thus, the decedent's wealthy, able-bodied child excludes the decedent's elderly dependent parent from inheritance.

43. Because intestacy laws provide rigidly for inheritance by status, nonrelatives are ineligible to inherit. One response has been to create equitable remedies, such as equitable adoption, to recognize those who do not qualify under intestate succession rules. Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 925 (1989) ("A well-established judicial avenue around the blood relationship requirement of the intestacy laws is the doctrine of equitable adoption or adoption by estoppel."). *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmt. k (1999) (discussing "equitable" or "virtual adoption"); DUKEMINIER & JOHANSON, *supra* note 15, at 113–16 (discussing equitable adoption and equitable legitimation).

44. *See* John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 534 (1977):

> None [of the statutes of intestacy] recognize non-blood, non-affinity "family." Thus, the wholly supported foster child is excluded in favor of distant collaterals. The dependent in-law is normally excluded, with the statutes favoring even the state by escheat. There is no way in which the family of orientation (non-blood individuals with whom there are very close relationships) may be recognized.

45. *See In re* Estate of Gersbach, 1998-NMCA-13, ¶ 24, 960 P.2d 811, 817 ("We must conclude the gift to [the legatee] is 'unnatural' because he would not inherit under the laws of intestacy . . . .").

46. WAGGONER ET AL., *supra* note 5, at 71 ("Under American law, as under the English canons of descent and the Statute of Distribution, intestate shares are determined mechanically."). As Professor Mann has remarked, "The rules of intestate succession are 'untailored' default rules that supply a single, off-the-rack standard to all intestate estates." Bruce H. Mann, *Essay: Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1050 (1994) [hereinafter Mann, *Formalities and Formalism*].

47. Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 354 (referring to situations where a

succession laws permit no exceptions[48] to reward "acts of care"[49] toward the decedent. The exemplary heir who remained at the decedent's bedside for decades has no greater claim to the estate than others of the same blood relationship.[50]

B. *Wills*

Donative freedom is a principal value in the American system of inheritance.[51] But, as Professor Melanie Leslie has remarked, even it can become a "myth" when a testator attempts to leave property to those closest by affective rather than by blood or marital ties.[52]

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decedent dies intestate survived by siblings as his closest blood relatives).

48. *Id.* (stating that intestacy laws "recognize no exceptions to their formulas based on particular family circumstances"). Illinois law presents one possible exception. The law authorizes courts to award "conditional gifts from the estate of a disabled person to any spouse, parent, brother or sister of the disabled person who dedicates himself or herself to the care of the disabled person by living with and personally caring for the disabled person for at least 3 years." 755 ILL. COMP. STAT. ANN. § 5/11a-18.1 (West 1993). The statute also provides for a "statutory custodial claim" against the estate of a disabled person by "[a]ny spouse, parent, brother, sister, or child of a disabled person who dedicates himself or herself to the care of the disabled person by living with and personally caring for the disabled person for at least 3 years." *Id.* § 5/18-1.1. Note, however, that this statute too only confers benefits on the caregiver if he or she is a close family member of the decedent.

49. I borrow this term from Trent J. Thornley, Note, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L.J. 513, 514 (1996) (stating that the "current law of undue influence . . . does not adequately account for acts of care").

50. For a superb critique of this flaw of intestate succession law with specific reference to 1969 Uniform Probate Code provisions, see Gaubatz, *supra* note 44, at 548–51. As Professor Gaubatz aptly remarks:

> [T]here are situations in which most people would probably feel that it is fairer to show preference for one relative of a class over others of the same class. . . . [W]here one member of a class provided significant services to the decedent, most people would think such services should be rewarded. Where a child or a nephew or a cousin takes care of an elderly relative in his declining years or helps run the farm during a similar period, a common sense of fairness argues that a greater share of the estate should be his.

Id. at 550. This rigid insistence on equal distribution within classes of relatives may also be linked to efforts to reproduce a preferred family structure. *See* Beckstrom, *supra* note 19, at 248–54 (discussing sociobiological rationales for treating children equally under intestacy laws).

51. WAGGONER ET AL., *supra* note 5, at 6 (discussing the "cultural tradition" of donative freedom); Brashier, *Disinheritance and the Modern Family*, *supra* note 13, at 133 (stating that "the concept of testamentary freedom remains more important in the United States than in other countries"). For an extended discussion of the rationales for freedom of testation, see Hirsch & Wang, *supra* note 20, at 6–14.

52. Leslie, *The Myth of Testamentary Freedom*, *supra* note 9, at 235; *see id.* at 243 (discussing "the duty to family and implicit presumption of invalidity where a will benefits non-relatives"); Spitko, *Gone But Not Conforming*, *supra* note 14, at 276 ("[T]he doctrines of mental capacity, undue influence and testamentary fraud incorporate a rational bias in favor of the testator's legal spouse and close blood relations. This bias . . . imperils any

Courts claim that the testator's intent is their "lodestar."[53] Yet, in practice, judges and juries manipulate[54] mental capacity doctrines such as "undue influence" and "insane delusion" to reach results more in accord with the family paradigm.[55] Bequests to individuals other than "natural objects of the decedent's bounty"[56]—essentially

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estate plan that disfavors the testator's legal spouse or close blood relations in favor of non-family beneficiaries.").

53. *See, e.g.*, Lounden v. Bollam, 258 S.W. 440, 444 (Mo. 1924) (stating that "the testator's intention is the lodestar by which the courts are to be guided in determining the meaning of a will"); *In re* Estate of Janney, 446 A.2d 1265, 1266 (Pa. 1982) ("It is settled in this Commonwealth, as in New Jersey, that the intention of the testator is of primary importance, the lodestar, cornerstone, cardinal rule.").

54. Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 586–87 (1999) [hereinafter Leslie, *Enforcing Family Promises*] (arguing that courts "manipulate doctrine" to enforce an implied family "reciprocity norm" in will contests involving disinherited family members and nonrelated beneficiaries). In earlier work, Professor Leslie found that courts have manipulated will execution formalities as well as mental capacity doctrines to overturn "unnatural" wills. *See* Leslie, *The Myth of Testamentary Freedom*, *supra* note 9, at 258–64. It is difficult to calculate the full impact of this "manipulation." Because "knowledgeable attorneys" are well aware of this phenomenon, many of these cases are settled out of court. Rhonda R. Rivera, *Lawyers, Clients, and AIDS: Some Notes from the Trenches*, 49 OHIO ST. L.J. 883, 892 (1989) (asserting that "knowledgeable attorneys" are aware of courts' use of undue influence to set aside wills of gay men and lesbians and stating that "[u]sually the attack on the will by the biological family ends with a settlement under which the testator's chosen beneficiary is substantially dispossessed"). Moreover, this manipulation of capacity requirements to prefer family members "inevitably infects" testators' initial "deliberation[s]" as well and is "likely to deter them from executing an unusual plan." Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 622 (1988) [hereinafter Fellows, *In Search of Donative Intent*].

55. Spitko, *Gone But Not Conforming*, *supra* note 14, at 283 (arguing that mental capacity and undue influence "standards are sufficiently nebulous that they enable the fact-finder to rewrite the testator's estate plan in accordance with societal norms"). For an extended discussion and critique of mental capacity cases, see, for example, Leslie, *The Myth of Testamentary Freedom*, *supra* note 9, at 236–37 (arguing that "many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent"); Madoff, *supra* note 9, at 576 (arguing that the "undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms—in particular, the norm that people should provide for their families"); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 267 (1981) (concluding from study of undue influence cases that "there is at least some evidence to suggest that a homosexual testator who bequeaths the bulk of his estate to his lover stands in greater risk of having his testamentary plans overturned"). Mental capacity doctrines may also be used to invalidate contracts to devise and will substitutes benefitting those who are not viewed as natural objects of the decedent's bounty. *See infra* notes 77–79, 89 and accompanying text.

56. In fact, one of the requirements for mental capacity is that the testator "know[s] . . . the persons who are the natural objects of the testator's bounty." DUKEMINIER & JOHANSON, *supra* note 15, at 163. Thus, if the will omits or even misnames "natural objects," it may be denied probate on mental capacity grounds. Powell v. Conner, No. CA85-04-020, 1986 Ohio App. LEXIS 5241, at *7 (Ohio Ct. App. Jan. 13, 1986) (stating in a testamentary capacity decision that the "decedent misnamed both her

family members—raise judicial red flags, even when the beneficiary was the decedent's dependent[57] or primary caregiver.[58] The same is

daughter and granddaughter in the will, both of whom were the natural objects of the decedent's bounty"). Similarly, in mental capacity cases, courts give special weight to insane delusions regarding natural objects of the testator's bounty. See, for example, *In re* Estate of Killen, 937 P.2d 1368, 1374 (Ariz. Ct. App. 1996), where the court stated:

> Most significantly for purposes of the will contest, her delusions focused on natural objects of her bounty. If, for example, when she executed her will she had been living at the care center and her delusions had involved only staff at the care center, her delusionary condition would have not impacted her testamentary capacity, and the will might have been valid. However, because her insane delusions focused on natural objects of her bounty and thus materially affected her disposition of her property, the court correctly found the will to be invalid.

937 P.2d at 1374.

57. *See* Fellows, *In Search of Donative Intent*, *supra* note 54, at 622 (stating that courts "require a substantial showing why the presumption in favor of a traditional distribution to the family is inapposite"). Professor Fellows argues that "[a] preference for a sickly, financially dependent child over the property owner's other children is likely to satisfy a court that a deviation from the norm of treating all children equally was rational." *Id.* She contends, however, that "a preference for a financially dependent long-time lover over the property owner's children is unlikely to satisfy a court that a deviation from the norm of providing for immediate family members was not the product of mental incapacity or undue influence." *Id.* Courts do occasionally consider the respective financial positions of will proponents and heirs in determining whether an apparently unnatural disposition is unfair or unjust. *See* Abel v. Dickinson, 467 S.W.2d 154, 156 (Ark. 1971) ("A will cannot be said to be unnatural . . . when the natural objects of the testator's bounty are in no need of funds, aid or assistance."); Daily v. Wheat, 681 S.W.2d 747, 756 (Tex. App. 1984) ("[T]he wealth of the proponent or contestant may occasionally have some bearing on whether there was an unnatural disposition of the testatrix's property.").

58. *See, e.g.*, Smith v. Estate of Harrison, 498 So. 2d 1231, 1232–33 (Miss. 1986) (invalidating on undue influence grounds a will that devised an elderly, physically disabled testator's estate to neighbors who had "waited upon and looked after" the testator for two years, "attended to his physical needs," taken care of his financial affairs, and "do[ne] whatever else [he] required"). As a result, the estate passed by intestate succession to the testator's adopted daughter who had lived in another state for forty years and seldom visited her father. *Id.* at 1232–33. *See generally* WAGGONER ET AL., *supra* note 5, at 229 (discussing undue influence cases involving caregivers); Thornley, *supra* note 49, *passim* (arguing that acts of care become evidence of undue influence). In cases of family misconduct, however, courts often rule in favor of caregivers. *See, e.g.*, Mason v. Estate of Reitz, No. CA 92-637, 1993 WL 57687 *4 (Ark. Ct. App. Mar. 3, 1993) (rejecting daughter's undue influence challenge to will leaving bulk of estate to a friend, Janette Stillman, who cared for testator). The court stated:

> This Court firmly believes that natural family should inherit and when there is nothing such as neglect and abandonment involved, then undue influence is easier to find. But people have the right to love, respond to, and appreciate whomever they please. Karen Mason neglected her own mother so badly that the wedge was driven between them by circumstances, not Janette Stillman. Such a shame!!

Id. at *2. Moreover, if the testator is not survived by nuclear family members, courts are more likely to reject claims that will provisions in favor of caregivers, close friends, or partners are "unnatural." Rogers v. Crisp, 406 S.W.2d 329, 332 (Ark. 1966) ("Nor can it be said to be abnormal or unnatural for a testator, without wife or children, to leave property to a good friend, rather than to a collateral relative."); *see also* Estate of Sarabia,

true of bequests in amounts that deviate from intestate succession patterns.[59]

Long-term support and care of the decedent do not merely go unrewarded. They actually count against the caregiver in cases involving "unnatural" will provisions or contracts to devise. Long-term support and care suggest a "confidential relationship" between decedent and claimant and put the burden on the caregiver to satisfy the court that she did not exploit her position to profit from an enfeebled testator.[60]

In its treatment of incomplete or ambiguous wills, the inheritance system only reinforces this preferred scheme for reallocation of wealth. Courts supposedly abhor[61] intestacy and make every effort

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270 Cal. Rptr. 560, 565 (Cal. Ct. App. 1990) (rejecting testator's brother's claim that will in favor of testator's partner was an "unnatural will"); Mitchell v. Hillsman, 244 S.E.2d 871, 872 (Ga. 1978) (rejecting nieces' claim that will in favor of testator's close friend who "had lived with the testatrix for more than seven years, up to her death, and had taken care of the household and financial affairs of the testatrix without compensation" was an " 'unnatural' disposition of the testatrix' estate to a nonrelative, rather than her living relatives").

59. *See* Fletcher v. DeLoach, 360 So. 2d 316, 319 (Ala. 1978) (characterizing a will leaving entire estate to daughter and making no provision for son or granddaughter as an "unnatural disposition"). The court additionally stated that:

> An *unequal* disposition of property per se raises no presumption... of testamentary incapacity, nor is it per se unnatural; but the unequal treatment of those who ostensibly have equal claims upon the testator's bounty, or the preference of one to the exclusion of another, may under the circumstances of a particular case, be deemed *unnatural.* In such a case, an *unnatural* disposition is a fact to be ascertained and considered by the jury [on the issue of testamentary capacity].

Id.; *see also* Frolik, *supra* note 34, at 877, 880 ("When the testamentary pattern of a will violates [the]... norm [of equal division among children], eyebrows are lifted and questions are asked.... Disproportionate gifts to relatives can also trigger undue influence claims."). Where one child is the testator's primary caregiver, however, courts are more likely to be sympathetic to an unequal disposition of property. *See In re* Estate of Tipp, 933 P.2d 182, 186 (Mont. 1997) (rejecting an undue influence challenge to will leaving bulk of estate to one of seven children and concluding that disposition was not unnatural because beneficiary was testator's primary caregiver).

60. *See* Thornley, *supra* note 49, at 516 ("[C]ourts frequently translate acts of care into evidence that the one-caring unduly influenced the cared-for, or, worse yet, courts use caring acts to support a presumption of undue influence."). For example, the Oklahoma Supreme Court relied on the sole will beneficiary's testimony that for the eight years she had lived with the elderly decedent, who was " 'alone, in frail health, and... unable to care for himself,' " she "cooked for [him], cleaned the house, bathed him, gave him medicine, transported him to the doctor, and grocery shopped with her own money." *In re* Estate of Beal, 769 P.2d 150, 152 (Okla. 1989). The court held this was "irresistable" evidence that she enjoyed a confidential relationship with the decedent that allowed her to exercise undue influence over him. *Id.* at 155–56.

61. Coddington v. Stone, 217 N.C. 714, 720, 9 S.E.2d 420, 424 (1940) (" 'An intestacy is a dernier ressort in the construction of wills, and it has been said that the abhorrence of

possible to read the will to avoid even partial intestacy of the testator's estate. In reality, however, courts often use intestate succession statutes as their charter to determine the likely, most "natural" intent of the testator.[62] They are inclined to uphold wills that leave property to natural objects of the testator's bounty and to void those wills that do not. As a result, the sacred canon of will construction, the "presumption against intestacy," is effectively nullified by the "equally potent" presumption that an intestate heir can be disinherited only by plain words or necessary implication.[63]

Lapse rules further promote distribution to the testator's closest family members. Unless the will states otherwise, a devise to a legatee who predeceases the testator lapses (fails) rather than passes to that legatee's heirs or will beneficiaries.[64] There is a notable exception, however. Most jurisdictions have enacted antilapse provisions that will "save" the devise[65] and substitute another taker

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courts to intestacy under a will may be likened to the abhorrence of nature to a vacuum.' ") (citation omitted).

62. *In re* Estate of Walters, 519 N.E.2d 1270, 1274 (Ind. Ct. App. 1988) (stating that "where the intent of the testator remains in doubt, a construction should be used which considers the natural impulses of people and disposes of property in the same manner the law would, had the decedent died intestate"). *See* JOSEPH M. DODGE, WILLS, TRUSTS, AND ESTATE PLANNING LAW AND TAXATION: CASES AND MATERIALS 309 (1988) (stating that "a court may well consider the *objective* circumstances of the testator, his property, and the natural objects of his bounty at the time the will was executed in order to determine whether a patent or latent ambiguity exists").

63. *In re* Rouse's Estate, 87 A.2d 281, 283 (Pa. 1952) (stating that the presumption against intestacy "is met by an equally potent presumption that an heir is not to be disinherited except by plain words or necessary implication"); *see also* WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS 442 (1988) ("There is a constructional preference against disinheriting the testator's heirs, which arguably cancels out any presumption against intestacy."). Similarly, where wills refer broadly to "relatives" or "family," legislatures and courts have used intestacy statutes as their guide. *See, e.g.*, IND. CODE ANN. § 29-1-6-1(c) (Michie Supp. 2000) (stating that a devise to " 'heirs,' or 'next of kin,' or 'relatives,' or 'family,' or to 'the persons thereunto entitled under the intestate laws' or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws . . ."); Clark v. Campbell, 133 A. 166, 170 (N.H. 1926) (citing cases in which courts construed " 'relatives' or 'relations' . . . to mean those who would take under statutes of distribution or descent"); *In re* Will of Casey, 564 N.Y.S.2d 669, 673 (N.Y. Surr. Ct. 1990) (defining "relatives" as those who would take under intestacy law).

64. DUKEMINIER & JOHANSON, *supra* note 15, at 438–39 ("If a devisee does not survive the devise lapses (i.e., fails). All gifts made by will are subject to a requirement that the devisee survive the testator, unless the testator specifies otherwise.").

65. States that have adopted the most recent version of the Uniform Probate Code explicitly extend antilapse rules to will substitutes and future interests as well. *See* UNIF. PROBATE CODE § 2-706 & cmt. (amended 1993), 8 U.L.A. 192 (1998) ("provid[ing] an antilapse statute for 'beneficiary designations' " in will substitutes); *id.* § 2-707 & cmt. (amended 1993), 8 U.L.A. 197 (1998) ("project[ing] the antilapse idea into the area of

under certain circumstances.[66] Generally, they limit this relief, however, to cases where the deceased legatee was a close blood relative of the decedent, survived by issue.[67]

Inheritance law even goes to the extreme of defining wills as outdated to ensure disposition to "natural objects of the decedent's bounty." If the testator fails to update a will to reflect changes in marital status or the birth or adoption of a child, legislatures and courts usually presume oversight rather than design, and they once again impose the preferred estate distribution scheme—to the testator's closest family members.[68] Under "omitted spouse" and "pretermitted child" statutes, courts generally award intestate shares to post-will[69] spouses and children.[70] Likewise, in the case of a post-

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future interests"). The Uniform Probate Code's (U.P.C.) antilapse provision covers devises to deceased stepchildren as well as close blood or adoptive relatives. *See id.* § 2-603(b) (amended 1993), 8 U.L.A. 165 (1998) (applying to a deceased devisee who was the testator's grandparent, descendant of a grandparent, or stepchild). For an extended discussion of antilapse statutes, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 (1999).

66. DUKEMINIER & JOHANSON, *supra* note 15, at 439 ("In nearly all states, however, antilapse statutes have been enacted which, under certain specified circumstances, substitute another beneficiary for the predeceased devisee.").

67. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (McKinney 1998) (limiting antilapse provisions to a deceased beneficiary who was the testator's issue, brother or sister survived by issue); WYO. STAT. ANN. § 2-6-106 (Lexis 2001) (limiting antilapse provisions to a deceased devisee who was the testator's grandparent or lineal descendent of a grandparent survived by issue). Some antilapse statutes do apply more broadly to nonrelatives as well. *See, e.g.*, MD. CODE ANN., EST. & TRUSTS § 4-403 (2001) (allowing heirs or devisees of any devisee who predeceases the testator after will execution to take the devise). For a chart of various patterns of antilapse statutes, see WAGGONER ET AL., *supra* note 5, at 359 (updating chart in Susan F. French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 375 (1985)).

68. These protections generally are not available, however, if the testator intentionally omitted a spouse or children or provided for them outside the will. *See, e.g.*, ALA. CODE § 43-8-90 (Supp. 2001) (providing an intestate share to an omitted spouse "unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision be reasonably proven"); TENN. CODE ANN. § 32-3-103 (1984 & Supp. 2000) (awarding an intestate share to a pretermitted child "not provided for nor disinherited, but only pretermitted, in such will, and not provided for by settlement made by the testator in his lifetime"). In both the omitted spouse and pretermitted child contexts, however, legislatures and courts have adopted a variety of approaches to determine what constitutes intentional disinheritance. For a summary of these approaches, see ELIAS CLARK ET AL., GRATUITOUS TRANSFERS: CASES AND MATERIALS ON WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS, AND ESTATE AND GIFT TAXATION 169–72 (4th ed. 1999).

69. Some pretermitted child statutes apply to omitted children born or adopted prior to the will as well. *See, e.g.*, ARK. CODE ANN. § 28-39-407(b) (Michie 1987 & Supp. 2001) (awarding an intestate share to a child or issue of a deceased child alive at the time of will execution "whom the testator shall omit to mention or to provide for, either specifically or

will divorce, inheritance law presumes that the testator intended to sever all ties with the former spouse. Because the divorced spouse is by society's definition no longer a "natural object of the decedent's bounty,"[71] will revocation statutes and doctrines "rescue" the testator by declaring all will provisions in favor of the divorced spouse (and, increasingly, relatives of the divorced spouse as well[72]) null and void.[73]

C. *Contracts to Devise*

The family paradigm also impedes contractual efforts to induce and acknowledge support. U.S. inheritance law disfavors contracts to devise between decedents and caregivers.[74] Legislatures and courts

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as a member of a class").

70. Some pretermitted child statutes apply also to the issue of a deceased child. *See, e.g.*, MASS. ANN. LAWS ch. 191, § 20 (Law. Co-op. 1994) (awarding an intestate share to a child or issue of a deceased child "unless they have been provided for by the testator in his lifetime or unless it appears that the omission was intentional and not occasioned by accident or mistake"); R.I. GEN. LAWS § 33-6-23 (1995 & Supp. 2000) (awarding an intestate share to a child or issue of a deceased child "unless it appears that the omission was intentional and not occasioned by accident or mistake").

71. Peevy v. Mutual Servs. Cas. Ins. Co., 346 N.W.2d 120, 123 (Minn. 1984) (stating that an "ex-spouse loses status as one entitled to support" because "the legislature may have recognized that most ex-spouses would not be a 'natural object of decedent's bounty' ").

72. The Uniform Probate Code revokes "any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse." UNIF. PROBATE CODE § 2-804(b) (amended 1993), 8 U.L.A. 217 (1998). It defines "relative of the divorced individual's former spouse" as "an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity, and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity." *Id.* § 2-804(a)(5) (amended 1997), 8 U.L.A. 41 (Supp. 2001). For examples of statutes that have adopted these provisions, see COLO. REV. STAT. § 15-11-804 (2000); N.M. STAT. ANN. § 45-2-804 (Michie 1995).

73. *See* Russell v. Johnston, 327 N.W.2d 226, 229 (Iowa 1982) ("The legislature obviously recognized that due to the change in the family structure new moral duties and obligations may have evolved subsequent to the execution of the will, and that due to the turmoil of a dissolution an automatic revocation is in the best interest of the testator."). Most courts even apply revocation-upon-divorce provisions to wills executed prior to marriage. *In re* Estate of Forrest, 706 N.E.2d 1043, 1046 (Ill. App. Ct. 1999) ("adopt[ing] the view taken by the majority of courts from other jurisdictions and hold[ing] that the revocation by divorce provision of the Act applies to a disposition to a former spouse, whether the testator executed his will before or after marriage to the beneficiary"). *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1(b) & cmt. o (1999) (discussing revocation by dissolution of marriage under non-U.P.C. approaches).

74. Craddock v. Berryman, 645 P.2d 399, 402 (Mont. 1982) (stating that "[c]ontracts to make wills are looked upon with disfavor"); Bentzen v. Demmons, 842 P.2d 1015, 1020 (Wash. Ct. App. 1993) (stating that "[w]hile equity will recognize oral contracts to devise, such contracts are not favored").

regard these arrangements with such "misgivings and suspicion"[75] that they impose high evidentiary standards for enforcement.[76] Contractual caregivers also face fraud, duress, and undue influence challenges.[77] Like "unnatural" will beneficiaries,[78] their very acts of care raise the specter of exploitation.[79]

Even family members can fall victim to the family paradigm when they claim a support contract entitlement to more than their intestate share. Under a model of "natural" family behavior,

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75. Fahringer v. Estate of Strine, 216 A.2d 82, 85 (Pa. 1966) ("[T]raditionally the courts have been reluctant to give recognition to such contracts and have viewed claims based on such contracts with misgivings and suspicion."); *see also* Eggers v. Rittscher, 529 N.W.2d 741, 744 (Neb. 1995) ("We regard with grave suspicion any claim of an oral contract to convey property at death.").

76. Many statutes require that proof of a contract to devise must appear in writing. *See, e.g.*, TENN. CODE ANN. § 32-3-107 (1984 & Supp. 2000) (stating that a contract to devise "can be established only by: (1) Provisions of a will stating material provisions of the contract; (2) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) A writing signed by the decedent evidencing the contract"). Jurisdictions that allow oral contracts to devise impose strict evidentiary standards. *See, e.g.*, Kahn v. First Nat'l Bank of Chicago, 576 N.E.2d 321, 324 (Ill. App. Ct. 1991) ("[E]vidence of the existence of the contract and its terms must be clear and explicit and 'so convincing that it will leave no doubt in the mind of the court.' ") (citation omitted); Thompson v. Henderson, 591 P.2d 784, 786 (Wash. Ct. App. 1979) (stating that oral contracts to devise "are regarded with suspicion" and that "[t]he standard of proof in such cases is not 'a preponderance of the evidence' but rather, one of 'high probability' ") (citation omitted). Dead man's statutes have posed particular problems for contracts to devise. *See, e.g.*, Farah v. Stout, 684 A.2d 471, 474–77 (Md. Ct. Spec. App. 1996) (construing strictly Maryland's dead man's statute to exclude the only evidence of a contract to devise between decedent and caregiver). Failure to satisfy statutory or judicial evidentiary requirements for enforcement of contracts to devise does not necessarily leave the claimant without remedy, however. The claimant may still be entitled to recover in quantum meruit the reasonable value of services rendered. *See* Williams v. Mason, 556 So. 2d 1045, 1051 (Miss. 1990) (rejecting a claim for specific performance of an oral contract to devise but supporting a quantum meruit claim for the reasonable value of services rendered on grounds that "neither the statute of frauds nor the statute of wills per se preclude quantum meruit recovery in such circumstances"); *see also* UNIF. PROBATE CODE § 2-514 cmt. (amended 1993), 8 U.L.A. 160 (1998) (stating that section 2-514, which requires written evidence of contract to devise, "does not preclude recovery in quantum meruit for the value of services rendered the testator"). For an extended discussion of possible remedies, see Daniel S. Field, Note, *Will Contracts for Personal Services and Real Property During the Lifetime of the Aging Devisor: Resolving the Continuing Dilemma*, 11 PROB. L.J. 57, 68–81 (1992).

77. For a detailed survey and analysis of undue influence, fraud, and duress cases involving caregivers, see Clifton B. Kruse, Jr., *Contracts to Devise or Gift Property in Exchange for Lifetime Home Care—Latent and Insidious Abuse of Older Persons*, 12 PROB. L.J. 1, 15–31 (1994).

78. *See supra* notes 56–70 and accompanying text.

79. In specific cases, these suspicions of exploitation may in fact be well founded. For grim examples of mistreatment by caregivers of dependent elderly patients or relatives, see Kruse, *supra* note 77, at 15–31.

inheritance law presumes that their support services were gratuitous rather than contractual,[80] rendered out of "love and affection without expectation of payment."[81] Traditional notions of family structure and values[82] may also defeat the contractual rights of caregivers who shared a nonmarital sexual as well as support relationship with the decedent. Courts may invalidate such contracts on public policy grounds for "illegal" consideration.[83]

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80. *See, e.g., In re* Clark's Estate, 267 N.W. 273, 275 (Wis. 1936). In what it acknowledged to be "concededly a hard case," the Wisconsin Supreme Court rejected the contractual claim of a niece who had lived with the decedent since she was an infant, "was regarded by the deceased as his daughter," and had furnished room, board, and continual care to the decedent during the final six years of his life. *Id.* As the court put it, "[h]ad she been a daughter she could have done no more for him." *Id.* Nonetheless, the court rejected her claim because of the "settled" presumption that services rendered by " 'near relatives by blood or marriage [who] reside together as one common family . . . [are] intended as mutual acts of kindness done or furnished gratuitously.' " *Id.* (quoting *In re* Estate of Goltz, 238 N.W. 374, 376 (Wis. 1931)). As a result, the decedent's estate passed by intestate succession to "blood relatives of the deceased [who] were apparently indifferent to his welfare." *Id.*; *see also* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 17, 19–20 (Cal. Ct. App. 1993) (rejecting the contractual claim of a spouse who, in exchange for her husband's oral promise to devise property to her, provided round-the-clock nursing care for her husband who wanted to live at home rather than in a nursing home after his stroke). In a stinging dissent, Justice Poché characterized the "anomalous rule" followed by the majority as "coerced altruism," based on an outdated view of marriage and the economic role of women in contemporary society. *Id.* at 25 (Poché, J., dissenting). Justice Poché wrote, "Apparently, in the majority's view she had a pre-existing or pre-contract nondelegable duty to clean the bedpans herself. . . . To contend in 1993 that such a contract is without consideration means that if Mrs. Clinton becomes ill, President Clinton must drop everything and personally care for her." *Id.* at 20, 24 (Poché, J., dissenting). For an extended discussion of the family services presumption and its applicability to nonrelated cohabitants as well as relatives, see *In re* Estate of Steffes, 290 N.W.2d 697, 702–04 (Wis. 1980).

81. *In re* Estate of Barr, 658 N.Y.S.2d 933, 936 (N.Y. Surr. Ct. 1997) (rejecting a contract claim for services to the decedent married to the claimants' uncle).

82. *See Steffes*, 290 N.W.2d at 712 (Coffey, J., dissenting) (arguing that enforcement of a contract to devise between parties who lived in an adulterous relationship "can only serve to accelerate the growth of the self-destructive cancer of the 70's 'immorality' and the decline of the family. If there is to be a direct, frontal assault on the traditional values, principles, ideals and pattern of family life, the very lifeline and backbone of our American society, it should be accomplished within the confines of the legislative halls—not in the courts.").

83. "[U]nlawful sexual intercourse is not considered consideration, and a contract based upon such a relationship will not be enforced." JOHN T. GAUBATZ ET AL., ESTATES AND TRUSTS: CASES, PROBLEMS AND MATERIALS 207 (1989). Courts have allowed recovery under contracts to devise between lovers in situations where the "illicit relations were no part of the contract, and were no more than an incidental part of the plaintiff's performance." Green v. Richmond, 337 N.E.2d 691, 696–97 (Mass. 1975). For other examples of cases permitting recovery by unmarried cohabitants, see WAGGONER ET AL., *supra* note 5, at 95–96.

Even when courts are willing to recognize support-based contracts, the claimant may be squeezed out of the estate distribution by the decedent's closest family members. That is because, in many jurisdictions, the statutory rights of surviving spouses[84] and children[85] automatically supersede the contract rights of even the most deserving claimant. Thus, in the contractual context too, the family paradigm may well trump support.

D. Will Substitutes

Nonprobate transfers, such as inter vivos gifts, revocable trusts, insurance, joint tenancies, and payable-on-death contracts, are supposed to avoid the costs and strictures of the inheritance system.[86] Yet, even these will substitutes are vulnerable to the family paradigm.

As in the case of wills[87] and contracts to devise,[88] courts may use mental capacity doctrines to invalidate nonprobate efforts to recognize support needs or contributions outside the family.[89] In

84. Many courts have explicitly cited the public policy in favor of marriage to give the surviving spouse's elective share or omitted spouse rights priority over the rights of contract beneficiaries. *See, e.g.*, Via v. Putnam, 656 So. 2d 460, 466 (Fla. 1995) (citing the "public policy of protecting the surviving spouse of the marriage contract" to give statutory rights of an omitted spouse priority over contractual rights of third-party beneficiaries); Shimp v. Huff, 556 A.2d 252, 263 (Md. 1989) ("[T]he public policy surrounding the marriage relationship also suggests that the surviving spouse's claim to an elective share should be afforded priority over the claims of beneficiaries of a contract to make a will."). Other courts, however, reject this view and give priority to the claims of contract beneficiaries. CLARK ET AL., *supra* note 68, at 344. For a review of various approaches, see *Via*, 656 So. 2d at 464–65; MCGOVERN ET AL., *supra* note 63, at 392–93; WAGGONER ET AL., *supra* note 5, at 603; Carolyn L. Dessin, *The Troubled Relationship of Will Contracts and Spousal Protection: Time for an Amicable Separation*, 45 CATH. U. L. REV. 435, 455–68 (1996).

85. "After-born children of the promisor may also be protected if full enforcement of a contract would deprive them of any share of their father's estate." MCGOVERN ET AL., *supra* note 63, at 393. *See, e.g., In re* Estate of Sherry, 698 P.2d 94, 95 (Wash. Ct. App. 1985) (rejecting specific performance of the decedent's contract to make a will in favor of children of his first marriage, which would exclude minor children of the decedent's second marriage from a share of his estate).

86. WAGGONER ET AL., *supra* note 5, at 403–04 (stating that will substitutes are "referred to as probate-avoidance devices"). For an extended discussion of will substitutes, see John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 *passim* (1984).

87. *See supra* notes 51–60 and accompanying text.

88. *See supra* notes 77–79 and accompanying text.

89. *See* MCGOVERN ET AL., *supra* note 63, at 294–95 (discussing and citing mental capacity challenges to will substitutes); Sherman, *supra* note 55, at 262–66 (arguing that a "homosexual settlor must be as concerned about charges of undue influence as is the homosexual testator"); Spitko, *Gone But Not Conforming*, *supra* note 14, at 286 (stating that "will substitutes are subject to the same grounds of attack as are testamentary transfers"). Some commentators claim will substitutes are " 'more resistant' to capacity

addition, legislatures and courts increasingly subordinate will substitutes to the surviving spouse's marital property rights.[90] Recent reforms, especially those patterned on the Uniform Probate Code,[91] have only reinforced this family emphasis. For example, several states now extend antilapse and automatic revocation-upon-divorce provisions to nonprobate transfers as well as wills.[92]

E. Statutory Support Provisions

This is not to say that the American inheritance system fails to recognize support altogether. It does promote support but limits its protections once again principally to the "natural objects of the decedent's bounty," the decedent's closest surviving family members. Through omitted spouse, elective share, community property, probate exemption, and family allowance provisions, inheritance law provides safeguards for the surviving spouse.[93] In practice, however, these provisions may prove inadequate to address the support needs of the surviving spouse as well as the nonspouse because they too implement preexisting notions of appropriate wealth distribution at the expense of individual need. Omitted spouse[94] and marital property schemes award property mechanically on the basis of fixed rules, with virtually no consideration for the actual circumstances or

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and undue influence challenges." Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 GONZ. L. REV. 1, 66 (1984–1985) [hereinafter Rein-Francovich, *An Ounce of Prevention*] (discussing "[t]he theory . . . that lifetime transfers are 'more resistant' to capacity and undue influence challenges") (citing John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 67 (1978)); *see also* DUKEMINIER & JOHANSON, *supra* note 15, at 393 ("[A] revocable trust, like a will, can be contested for lack of mental capacity and undue influence[;] [i]n practice, however, it is more difficult to set aside a funded revocable trust than a will on these grounds.").

90. For an extended discussion of statutes and cases, see DUKEMINIER & JOHANSON, *supra* note 15, at 500–17; MCGOVERN ET AL., *supra* note 63, at 118–22, 140–43.

91. This extension of wills doctrines and rules to will substitutes is part of a larger trend in the Uniform Probate Code to integrate laws governing both probate and nonprobate transfers. For a detailed discussion of this point, see Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123 *passim* (1993).

92. *See, e.g.*, ALASKA STAT. § 13.12.804 (Lexis 2000); COLO. REV. STAT. § 15-11-804 (2000); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. p (1999) (stating that revocation by dissolution of marriage principles "also apply to a donative transfer in the form of a will substitute").

93. For a summary of these provisions, see DUKEMINIER & JOHANSON, *supra* note 15, at 471–536.

94. Omitted spouse statutes generally provide the qualifying post-will spouse with an intestate share of the decedent's estate. *See supra* note 68.

needs of the surviving spouse.[95] Similarly, probate exemption and family allowance provisions may offer only short-term, minimal levels of support inadequate for the needs of the particular spouse.[96]

The existing protections for the decedent's children are even more flawed from a support standpoint. Under American inheritance law, parents can disinherit their children—even minor, disabled, and unborn children—without cause or remedy.[97] Pretermitted child statutes may cover unintentionally disinherited children.[98] Like omitted spouse provisions, however, these statutes make no adjustment for individual support needs.[99] They simply award

95. *See* WAGGONER ET AL., *supra* note 5, at 532 (arguing that "[c]onventional elective-share law['s] ... fixed fraction, whether it is the typical one-third or some other fraction, disregards the survivor's actual needs"). This statement applies as well to community property schemes. For example, the elderly disinherited survivor of a short-term, late-in-life marriage receives only one-half of assets accumulated during marriage even if that spouse was entirely dependent on the decedent's support during the decedent's lifetime. The most recent Uniform Probate Code version of the elective share provides only minimal concession to support by granting a needy surviving spouse a "supplemental elective-share amount" of up to $50,000. *See* UNIF. PROBATE CODE § 2-202(b) (amended 1993), 8 U.L.A. 102 (1998). Even proponents of this scheme have acknowledged its drawbacks. Langbein & Waggoner, *supra* note 12, at 320–21 (drafters of U.P.C. elective share provisions recognizing that proposed scheme, like all forced-share systems, is "mechanical" and "intrinsically arbitrary" and thus "would not achieve perfect justice").

96. *See, e.g.*, D.C. CODE ANN. § 19-101(a) (2001) (awarding a surviving spouse an "allowance out of the personal estate of the decedent of the sum of $10,000 for the personal use of himself and of minor children"); IND. CODE ANN. § 29-1-4-1 (Michie Supp. 2000) (granting a surviving spouse an allowance of $15,000 claimable against "the personal property of the estate or a residence of the surviving spouse, or a combination of both"); *see also* J. Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 223, 247 (1987–88) [hereinafter Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*] (arguing that family allowance "systems seem quite inadequate to satisfy this function ... because under current systems support for the survivor normally ceases one year after the death of the decedent").

97. Louisiana is the only state that protects children from intentional disinheritance. DUKEMINIER & JOHANSON, *supra* note 15, at 536 ("In all states except Louisiana, a child or other descendant has no statutory protection against disinheritance by a parent."). Louisiana provides a forced share for children who "are twenty-three years of age or younger or [who] ... because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates." LA. CIV. CODE ANN. art. 1493(A) (West 2000). In a landmark recent decision the Supreme Judicial Court of Massachusetts took the first step toward protecting children from disinheritance. L.W.K. v. E.R.C., 735 N.E.2d 359, 364 (Mass. 2000). It held that "[a] parent charged with an obligation to support his child cannot nullify that legal obligation by disinheriting his child ...." *Id.*

98. *See supra* notes 69–70 and accompanying text.

99. One notable exception to the fixed share approach is Wisconsin's pretermitted child statute. WIS. STAT. ANN. § 853.25(d)(5) (West Supp. 2000) (giving state courts discretionary power to depart from statutory pretermitted child share if "the court determines that the share is in a different amount or form from what the testator would

predetermined shares of the estate to qualifying children.[100] Probate exemption and family allowance provisions may extend some relief to the decedent's surviving children as well as spouse.[101] These limited safeguards often are available solely to the decedent's minor children, however.[102] Many statutes disregard altogether the equally compelling needs of physically or mentally disabled adult children.[103] Thus, under the inheritance system, support may ultimately prove illusory even for the decedent's closest family members.[104]

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have wanted to provide for the omitted child or issue of a deceased child"). Even this discretionary provision, however, does not explicitly address support needs of the pretermitted child. Instead, its principal focus is "intent of the testator." *Id.* ("[T]he court may in its final judgment make such provision for the omitted child or issue out of the estate as it deems would best accord with the intent of the . . . testator.").

100. Pretermitted children generally receive intestate shares. This amount may vary, however, if, for example, the testator provided for other children in the will or is survived by a spouse. For a summary of common patterns, see ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES 200 (2d ed. 1999).

101. For a review of the basic patterns of such statutes and their impact on the decedent's children, see MCGOVERN ET AL., *supra* note 63, at 102–06.

102. *See, e.g.*, TEX. PROB. CODE ANN. § 286 (Vernon 2001) (awarding family allowance to the surviving spouse and minor children for one year after the decedent's death); WYO. STAT. ANN. § 2-7-501 (Lexis 2001) (awarding homestead, wearing apparel, household furniture, and support provision to the spouse or minor children). Some statutes permit only unmarried minor children to take. *See, e.g.*, TENN. CODE ANN. § 30-2-102 (Supp. 2000) (providing support allowance to the surviving spouse and unmarried minor children). Others allow minor children to take only if there is no surviving spouse. *See, e.g.*, D.C. CODE ANN. § 19-101 (2001) (awarding family allowance to minor children "when there is no surviving spouse").

103. Some statutes extend rights to both minor children and "dependent" children. *See, e.g.*, N.M. STAT. ANN § 45-2-402 (Michie 1995) (providing family allowance to "each minor child and each dependent child of the decedent" if no surviving spouse). Others follow the U.P.C. model and cover both "minor children whom the decedent was obligated to support, and children who were in fact being supported by the decedent." MINN. STAT. ANN. § 524.2-404 (West Supp. 2001) (providing a family allowance provision). Except for Louisiana, California provides the most extensive coverage of children. Under its family allowance provision, the surviving spouse, minor children, and "[a]dult children of the decedent who are physically or mentally incapacitated from earning a living and were actually dependent in whole or in part upon the decedent for support" are entitled to an allowance. CAL. PROB. CODE § 6540(a) (West 1991 & Supp. 2001). "Other adult children of the decedent who were actually dependent in whole or in part upon the decedent for support" may receive a family allowance at the court's discretion. *Id.* § 6540(b)(1).

104. The situation for other family and nonrelated dependents is even worse. Even elderly, disabled parents receive no guaranteed protection from intentional or unintentional disinheritance. California does give the court discretion to award a family allowance to "[a] parent of the decedent who was actually dependent in whole or in part upon the decedent for support." CAL. PROB. CODE § 6540(b)(2) (West 1991 & Supp. 2001). Florida extends family allowance rights to "lineal heirs" (including both "lineal ascendants and lineal descendants of the decedent") "whom the decedent was obligated to support or who were in fact being supported by him." FLA. STAT. ANN. § 732.403 (West Supp. 2001). Even these provisions offer only limited safeguards. California awards a

II. THE LIMITS OF SCHOLARLY REFORM STRATEGIES

The failure of American inheritance law to realize its social welfare goals has not escaped the notice of the academic community. Legal scholars have offered a wide variety of proposals to address defects in existing rules and doctrines.[105] Close analysis reveals that these proposals take the form of three broad strategies. They seek to (1) enhance protections for surviving family members; (2) redefine the family to reflect changes in modern American society; or (3) introduce procedural mechanisms to mitigate the effects of the family paradigm on wills that deviate from "natural" intestacy patterns. Even if adopted, these strategies would offer only partial solutions. As this Part will show, scholarly reform strategies share the fundamental flaw of the inheritance system itself. They too remain rooted in the family paradigm.

A. Enhancing Protections for Surviving Family Members

The first strategy has targeted gaps in existing protections for the decedent's surviving family members. Reformers have focused particular attention on the plight of disinherited minor children[106] and

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family allowance during estate administration only (and for no more than a year). CAL. PROB. CODE §§ 6540(b), 6543 (West 1991 & Supp. 2001). Florida provides that its "allowance shall not exceed a total of $6000." FLA. STAT. ANN. § 732.403 (West Supp. 2001); *see* 2001 Fla. Laws ch. 226, § 40 (amending family allowance maximum from $6000 to $18,000).

105. This is not to suggest that all of these proposals are designed exclusively or even principally to address support flaws. For example, proponents of schemes to protect nonconforming wills from mental capacity challenges cite donative freedom and fairness as their major goals. At the same time, however, these schemes also respond to a significant impediment to support by promoting testamentary efforts to recognize support needs and contributions by claimants outside societal definitions of natural objects of the decedent's bounty. In the marital property rights area, some reformers even explicitly reject a support rationale for proposals that could effectively improve the financial position of a needy surviving spouse. *See* Fellows, *supra* note 8, at 137, 151 (arguing that support rationale for marital property rights is "patriarchal" and "wholly consistent with the maintenance (or vessel) ideology of the fourteenth century").

106. Reformers have emphasized that the approach taken in the United States stands in marked contrast to that of the rest of the world. Brashier, *Disinheritance and the Modern Family*, *supra* note 13, at 117 n.111 ("Most of the civilized countries in the world provide direct protection from disinheritance to children of a testator."); Paul G. Haskell, *Restraints Upon the Disinheritance of Family Members*, *in* DEATH, TAXES AND FAMILY PROPERTY, *supra* note 19, at 105, 114–15 (discussing the "mysterious absence of protection" in the United States for disinherited minor children). For an extended discussion and explanation of "why U.S. policy toward the inheritance rights of children remains so different from that of almost all other developed nations," see J. Thomas Oldham, *What Does the U.S. System Regarding Inheritance Rights of Children Reveal About American Families?*, 33 FAM. L.Q. 265, 265 (1999).

have offered innovative proposals inspired principally by foreign models.[107] These include modified forced heirship provisions that would automatically entitle a minor child to a share of her parent's estate,[108] discretionary schemes that would allow the court to tailor relief to address the specific needs and circumstances of the disinherited child,[109] and creation of a posthumous parental obligation to support minor children.[110] While most proposals address the plight of disinherited minor children only,[111] others extend protection to adult children as well.[112]

The precarious position of the surviving spouse has also generated considerable scholarly concern. Reformers have responded with calls for increased intestate shares for surviving spouses,[113] more generous probate exemption and allowance

107. *See* Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1207–17 [hereinafter Foster, *Linking Support and Inheritance*] (discussing the influence of foreign models on reform proposals to address support flaws in U.S. inheritance system).

108. *See, e.g.*, Batts, *supra* note 13, at 1253–63 (proposing a protective inheritance system, a modified version of forced heirship approach); Paul G. Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499, 518–26 (1964) (recommending a revised forced heirship scheme). In addition, scholars have responded critically to recent reforms in Louisiana that have reduced forced heirship (legitime) protections for disinherited children. *See, e.g.*, Cynthia Samuel, *Letter from Louisiana: An Obituary for Forced Heirship and a Birth Announcement for Covenant Marriage*, 12 TUL. EUR. & CIV. L.F. 183, 183–89 (1997) (criticizing 1995–96 legislative changes to forced heirship in Louisiana); Katherine Shaw Spaht, *Forced Heirship Changes: The Regrettable "Revolution" Completed*, 57 LA. L. REV. 55 *passim* (1996) (providing extensive critical analysis of Louisiana's legislative reforms of forced heirship).

109. *See, e.g.*, Chester, *Disinheritance and the American Child*, *supra* note 13, at 32–35 (proposing a discretionary scheme based on the British Columbia approach); Edwin M. Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform*, 35 TEMPLE L.Q. 231, 256–58 (1962) (calling for the adoption of discretionary family maintenance legislation based on the British Commonwealth model); Jan Ellen Rein, *A More Rational System for the Protection of Family Members Against Disinheritance: A Critique of Washington's Pretermitted Child Statute and Other Matters*, 15 GONZ. L. REV. 11, 44–55 (1979) [hereinafter Rein, *Protection of Family Members*] (proposing a discretionary approach based on the New Zealand model).

110. *See, e.g.*, HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 38–44 (1981) (proposing a posthumous duty to support minor children); Brashier, *Disinheritance and the Modern Family*, *supra* note 13, at 173–80 (advocating a posthumous obligation to support minor children).

111. *See, e.g.*, Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1110–11 (1980) [hereinafter Fellows, *The Case Against Living Probate*] (proposing a forced share for minor children and expressly "exclud[ing] adult children").

112. *See, e.g.*, Chester, *Disinheritance and the American Child*, *supra* note 13, at 21–24 (discussing arguments for protecting adult as well as minor children).

113. For a sampling of the literature, see UNIF. PROBATE CODE § 2-102 & cmt., 8 U.L.A. 81 (1998) (increasing the surviving spouse's intestate share and citing numerous empirical studies and articles supporting this result).

provisions,[114] and expanded omitted spouse protections.[115] They have placed particular emphasis on flaws in existing marital property rights schemes. Reformers have made a concerted effort to close the loopholes that effectively allow disinheritance of spouses through inter vivos transfers of assets out of the estate.[116] They have also attacked the "underlying architecture"[117] of marital property rights schemes, especially elective share statutes.[118] Recognizing that arbitrary, fixed fractions may prove inadequate to meet the surviving spouse's needs, they have offered radically different responses. Proposals include a larger elective share of the estate,[119] a guaranteed "minimum share for the impoverished survivor,"[120] a flexible, equitable distribution scheme,[121] and an abandonment of the forced

114. *See, e.g.*, Carolyn S. Bratt, *Family Protection Under Kentucky's Inheritance Laws: Is the Family Really Protected?*, 76 KY. L.J. 387, 444–55 (1987–88) (proposing reforms of Kentucky's "inadequate" homestead and personalty exemptions); Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, *supra* note 96, at 251–53 (proposing a modified life estate probate homestead scheme).

115. *See, e.g.*, Mary Ellen Kazimer, Comment, *The Problem of the "Un-omitted" Spouse Under Section 2-301 of the Uniform Probate Code*, 52 U. CHI. L. REV. 481, 498–507 (1985) (proposing a "testator's intent standard" to determine whether omitted spouse provisions extend to a surviving spouse who is a beneficiary of an antenuptial will).

116. *See* Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 *passim* (1977) (discussing efforts to protect surviving spouses from disinheritance through lifetime transfers); Helene S. Shapo, *The Widow's Mite Gets Smaller: Deficiencies in Illinois Elective Share Law*, 24 S. ILL. U. L.J. 95, 119–20 (1999) (proposing reforms to Illinois elective share law to include inter vivos transfers).

117. Langbein & Waggoner, *supra* note 12, at 303.

118. Although elective share schemes have borne the brunt of the attack, community property schemes also have significant support flaws. *See supra* note 95.

119. *See, e.g.*, Langbein & Waggoner, *supra* note 12, at 316 (proposing an increase in the elective share from one-third to one-half).

120. *Id.* at 319. Professors Langbein and Waggoner proposed, *id.*, and the revised version of the Uniform Probate Code adopted a supplemental elective share amount of $50,000 to address a surviving spouse's actual support needs. *See* UNIF. PROBATE CODE § 2-202(b) (amended 1993), 8 U.L.A. 102 (1998). Professor Waggoner has argued, however, that this figure is "too low" and that "[a] somewhat higher figure might be quite appropriate." Waggoner, *supra* note 11, at 56.

121. *See, e.g.*, W.D. MACDONALD, FRAUD ON THE WIDOW'S SHARE 301–27 (1960) (proposing equitable distribution legislation based on the English model); Rein, *Protection of Family Members*, *supra* note 109, at 44–55 (proposing an equitable distribution scheme based on the New Zealand model); Peter H. Strott, Note, *Preventing Spousal Disinheritance in Georgia*, 19 GA. L. REV. 427, 446–47 (1985) (calling for extension to Georgia probate law of divorce law's equitable division of marital property); *see also* Helene S. Shapo, *"A Tale of Two Systems": Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 781 (1993) [hereinafter Shapo, *A Tale of Two Systems*] (concluding from study of the English equitable distribution scheme that the United States should introduce "some degree of flexibility" and judicial discretion to address the needs of the surviving spouse).

share approach altogether[122] or its replacement with the marital sharing/partnership approach of community property.[123]

Most proponents of enhanced protections for family members, however, have confined their efforts to protecting only the decedent's immediate family.[124] As a result, they have failed to address the situation of many potential victims of the vanishing extended family[125]—the destitute parent, elderly grandparent, disabled sibling, or infant grandchild—who "are often, in effect, homeless."[126] Only a few scholars have responded to support needs that transcend nuclear family boundaries. Professor Paul Haskell, for example, has proposed a modified forced share scheme that would protect the decedent's needy parents as well as children and spouse from

122. Some scholars, including those "who assume the purpose of the elective share is spousal support, have questioned the need for an elective share" at all. DUKEMINIER & JOHNANSON, *supra* note 15, at 480 n.1 (citing as examples Elias Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513 (1970) and Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966)); *see also* Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 U. MIAMI INST. ON EST. PLAN. 900 *passim* (1998) (discussing schemes for defeating the elective share).

123. *See, e.g.*, Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred Community-Property Alternative*, 49 EMORY L.J. 487, 488, 523–59 (2000) (proposing a deferred-community property approach to incorporate the partnership theory of marriage into elective share law); Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, *supra* note 96, at 233 (criticizing current forced share systems and stating that the "community property concept of marital property rights" would best serve the marital partnership concept). Professor Whitebread has criticized the Uniform Probate Code elective share provisions, stating:

> If America is really looking for a uniform system of marital property rights that completely incorporates the partnership theory of marriage, eventually all states will have to abandon elective or forced share law and adopt some sort of community property system.

Charles H. Whitebread, *The Uniform Probate Code's Nod to the Partnership Theory of Marriage: The 1990 Elective Share Revisions*, 11 PROB. L.J. 125, 142 (1992); *see also* Waggoner, *supra* note 2, at 245–47 (discussing community property proposals and noting two approaches exist—"the strict deferred-community approach" and "the elective-share deferred-community approach"); Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 810, 874–79 (concluding that Connecticut should adopt some version of the community property model to implement the concept of partnership in marriage).

124. Fellows, *The Case Against Living Probate*, *supra* note 111, at 1111 (stating that her "proposal rests on the conclusion that, after protecting the nuclear family, society has little or no interest in imposing the requirement of mental competency").

125. Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 96 (1990) ("As the extended family vanishes, it leaves behind many victims.").

126. *Id.*

disinheritance.[127] Other commentators, such as Professors Ronald Chester[128] and Jan Ellen Rein,[129] have recommended adoption of foreign family maintenance models that would give courts discretion to provide relief to a wider circle of family dependents—the decedent's spouse, children (including natural, adopted, illegitimate, and stepchildren), grandchildren, and parents.[130] In his radical scheme to curtail inheritance,[131] Professor Mark Ascher too expressly recognized broader family support needs. He offered special tax exemptions for the decedent's surviving spouse, ascendants, dependent lineal descendants, and disabled lineal descendants.[132]

In keeping with the family paradigm, the claims of nonrelated dependents have been virtually ignored under this first reform strategy.[133] The vast majority of commentators have favored a "conclusive presumption of dependency based on certain familial relationships"[134] rather than actual need of survivors.[135] Even

127. Haskell, *supra* note 108, at 520–21.

128. Chester, *Disinheritance and the American Child*, *supra* note 13, *passim* (proposing the adoption of the British Columbia model).

129. Rein, *Protection of Family Members*, *supra* note 109, at 47–55 (proposing the adoption of the New Zealand model).

130. These are the conventional patterns of the Australian, New Zealand and most Canadian models. For extended discussion of these models, see generally Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955). There are variants, however. For example, some maintenance statutes also cover a divorced spouse, grandparent, or descendant dependent on the decedent for at least three years prior to the decedent's death. *See* Carole O. Davis, Comment, *A Recommendation for Family Maintenance in the United States: A Comparative Study of Canadian and American Provisions for Support of Dependents*, 2 CAN. AMER. L.J. 151, 166–69 (1984) (discussing Canadian approaches). A few statutes even extend protection to nonrelated dependents. *See id.* (describing Canadian approaches); Richard R. Schaul-Yoder, Note, *British Inheritance Legislation: Discretionary Distribution at Death*, 8 B.C. INT'L & COMP. L. REV. 205, 217–20 (1985) (discussing the British approach).

131. Ascher, *supra* note 125, at 121–49.

132. *See id.* at 121–32.

133. For a notable exception, see Gaubatz, *supra* note 44. Professor Gaubatz argued that because the "decedent's close family might include nonblood relatives and friends, . . . those dependent upon the decedent at the time of his death under circumstances which would lead to the expectation of continued support" should have both intestate rights and protections from disinheritance. *Id.* at 559.

134. *See, e.g.*, Fellows, *The Case Against Living Probate*, *supra* note 111, at 1111 n.174 ("I do not propose a statute that permits persons who show financial dependency upon the testator to claim a share of the estate; that would encourage litigation and further encumber probate administration. Rather, I propose a conclusive presumption of dependency based on certain familial relationships.").

135. The "weight of opinion in this country opposes" adoption of a more flexible scheme that would give courts discretion to tailor relief to actual need of survivors. DUKEMINIER & JOHANSON, *supra* note 15, at 478. For the most devastating critique of this approach, see Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary*

proponents of the more flexible foreign family maintenance approach have suggested a similar preference for family categories. They have generally bypassed the liberal English model that covers all dependents[136] in favor of status-based variants that extend remedies to only the decedent's closest family members.[137]

Although many reformers have recognized the limits of their approach to support, they have chosen to turn to a second reform strategy rather than discard family categories.[138] These reformers have opted to remain within the family paradigm but adjust the definition of the family to accommodate needs of contemporary American society. As the next section will show, this strategy too

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Family Law and Succession Law, 60 TUL. L. REV. 1165 (1986). *See also* Langbein & Waggoner, *supra* note 12, at 314 (opposing judicial discretion as a "terrible price" to pay for family protection). For a summary of the literature and arguments against family maintenance models, see Foster, *Linking Support and Inheritance*, *supra* note 107, at 1204–05, 1214–16.

136. England's 1975 amended legislation covers the decedent's surviving spouse, former spouse who has not remarried, children, persons treated by the decedent as children during any of the decedent's marriages, and any person maintained in whole or in part by the decedent immediately prior to the decedent's death. Inheritance (Provision for Family and Dependants) Act, 1975, c. 63, § 1(1)(a)–(e) (Eng.).

137. For example, Professor Rein proposed the New Zealand scheme that protects the decedent's spouse, children (including natural, adopted, illegitimate, and stepchildren), grandchildren, and parents. Rein, *Protection of Family Members*, *supra* note 109, at 47–55. She did highlight, however, possible advantages of the broader approach. *See id.* at 52. "Finally, if the legislature were willing to define dependents broadly enough, the enactment of family maintenance legislation could provide a needed arena for the resolution of meritorious claims by dependents who are not related to the decedent by blood or marriage." *Id.* Even proponents of the English model have suggested familial limitations on the "other dependents" category. *See, e.g.*, Note, *Family Maintenance: An Inheritance Scheme for the Living*, 8 RUTGERS-CAM. L.J. 673, 689 (1977) (stating that the " 'other dependents' category might have to be tailored by specification of the eligible dependents, such as parents, other relatives supported primarily by the deceased and 'housemates' who were living with and were supported by the deceased"). The author recognized that although "[t]here should be little resistance to the inclusion of parents and other relatives, . . . [t]he inclusion of 'housemates' . . . may encounter resistance." *Id.*; *see also* Christy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L.J. 941 *passim* (1995) (proposing a more discretionary intestacy statute limited to financially dependent and "deserving" family members). The author cites the English model but restricts her proposal to family members. *Id.* at 947 n.37 and accompanying text.

138. Professor Fellows, for example, rejected broader family maintenance schemes that would protect all of the decedent's dependents from disinheritance in favor of a proposal that would benefit nuclear family members only. *See* Fellows, *The Case Against Living Probate*, *supra* note 111, at 1110–11. At the same time, she has been a major proponent of the second strategy—expanding narrow definitions of the family to "recogni[ze] . . . the changing U.S. household." Fellows et al., *Committed Partners*, *supra* note 6, at 3 (discussing an empirical study supporting the inclusion of same-sex and opposite-sex partners as heirs).

ultimately offers only a partial response to the support flaws of the inheritance system.

B. *Redefining the Family*

The second strategy has attempted to modernize traditional definitions of the family to reflect the diverse composition and circumstances of today's family. Here, reformers have targeted a long-standing impediment to support—the narrow intestate definition of "natural objects of the decedent's bounty" entitled to preferential treatment under inheritance law. They have attacked the statutory definition of the family as both underinclusive and overinclusive. As one commentator has explained, "The definition may be underinclusive because it excludes many currently existing family groups.... The definition may be overinclusive because legal ties do not necessarily create familial ties."[139]

Reformers have addressed the underinclusiveness of intestacy statutes by challenging the conventional definition of family as "a legally married husband and wife, and the children of that marriage."[140] They have attempted to update that definition to fit the changing American family. Reformers, particularly Professor Ralph Brashier, have paid special attention to the outdated definition of "children."[141] They have proposed substantial expansion of that category to encompass not only marital, biological children but also legally and equitably adopted children,[142] nonmarital children,[143]

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139. Gary, *Adapting Intestacy Laws*, *supra* note 2, at 41.

140. *Id.* at 28. *See* Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 389 n.8 (discussing the privileged position of the "natural family" defined as "the traditional nuclear family—husband/father, wife/mother, and their children").

141. For a comprehensive discussion of the failure of existing rules to encompass children in nontraditional families and the flaws in current definitions of the parent-child realtionship, see Brashier, *Children and Inheritance*, *supra* note 6.

142. *See, e.g.*, Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711 *passim* (1984); Note, *Equitable Adoption: They Took Him into Their Home and Called Him Fred*, 58 VA. L. REV. 727 *passim* (1972). *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmts. d–k (1999) (discussing legal and equitable adoption).

143. *See, e.g.*, Karen A. Hauser, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add up to the Need for Change*, 65 U. CIN. L. REV. 891 *passim* (1997); Patricia G. Roberts, *Adopted and Nonmarital Children—Exploring the 1990 Uniform Probate Code's Intestacy and Class Gift Provisions*, 32 REAL PROP. PROB. & TR. J. 539 *passim* (1998); James R. Robinson, Comment, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943 *passim* (1999). Reformers have focused principally on expanding the definition of "child" to allow nonmarital children to inherit from their parents. *See, e.g.*, Brashier, *Children and Inheritance*, *supra* note 6, at 95–147;

stepchildren,[144] children of unmarried cohabitants,[145] children produced by reproductive technology,[146] and nonrelated individuals in a child-parent relationship with the decedent.[147]

Commentators have also focused on the narrow definition of "spouse." They have offered a variety of schemes to extend inheritance rights to survivors of nonmarital as well as marital committed relationships. A notable such scheme is Professor Lawrence Waggoner's Working Draft of a proposed intestacy statute that would provide inheritance rights to surviving "committed partners."[148] A few reformers have called for an even more expansive definition of the traditional family. Professor Mary Louise Fellows, for example, has emphasized "family units headed by committed partners."[149] Professor Gary Spitko has called for explicit recognition of gay and lesbian families in inheritance statutes.[150] Other reformers have gone still further. Professor John Gaubatz, for example, has

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Hauser, *supra*, *passim*. In an innovative recent article, Professor Katheleen Guzman considers the "reverse" situation—"the rights of those parents to inherit from [nonmarital] children." Katheleen Guzman, *Essay: What Price Paternity?*, 53 OKLA. L. REV. 77, 77–78 (2000).

144. *See, e.g.*, Thomas M. Hanson, *Intestate Succession for Stepchildren: California Leads the Way, but Has It Gone Far Enough?*, 47 HASTINGS L.J. 257 *passim* (1995); Mahoney, *supra* note 43, *passim*.

145. *See, e.g.*, Fellows et al., *Committed Partners*, *supra* note 6, at 65–89; Laura M. Padilla, *Flesh of My Flesh but Not My Heir: Unintended Disinheritance*, 36 BRANDEIS J. FAM. L. 219 *passim* (1997–98).

146. For discussions of inheritance reforms to cover such children, see, for example, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmt. l (1999); Brashier, *Children and Inheritance*, *supra* note 6, at 177–222; Chester, *Freezing the Heir Apparent*, *supra* note 6; Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193 (1997).

147. *See, e.g.*, Gary, *Adapting Intestacy Laws*, *supra* note 2, at 71–80.

148. Waggoner, *Marital Property Rights in Transition*, *supra* note 11, at 79 (setting out a "Working Draft" allowing inheritance by a decedent's surviving de facto partner and defining such partner as an individual who was "not . . . prohibited from marrying the decedent . . . by reason of a blood relationship to the decedent" and who was at the decedent's death "unmarried and regularly living in the same household with the decedent in a marriage-like relationship"). In an updated version of the Working Draft, Professor Waggoner uses the term "committed partner" rather than "de facto partner." *See* Fellows et al., *Committed Partners*, *supra* note 6, at 92–94 (reproducing an updated version of Waggoner's Working Draft). Professor Waggoner offered his proposal as a "starting point for discussion" that could lead to reform of elective share provisions as well. Waggoner, *Marital Property Rights in Transition*, *supra* note 11, at 78.

149. Fellows et al., *Committed Partners*, *supra* note 6, at 65.

150. Spitko, *The Expressive Function of Succession Law*, *supra* note 5, at 1096 (calling for "recognition in [Uniform Probate Code] Article II's intestacy scheme of the reality that gay and lesbian families exist . . .").

argued that inheritance law should recognize that the "decedent's close family might include nonblood relatives and friends."[151]

Reports of escalating violence, abuse, and neglect within the American family have led some reformers to conclude that the statutory definition of family is overinclusive as well as underinclusive.[152] They contend that a strict status-based scheme effectively allows wrongdoers to inherit from their victims.[153] In response, these critics too have attempted to redefine the family to exclude even the closest family members for misconduct toward the decedent.

As I have discussed elsewhere,[154] most reformers have found their solution in the traditional notion of "unworthy heirs"—heirs whose conduct is deemed so "reprehensible" that they are disqualified from inheritance.[155] Proponents have recommended expanding the "unworthy heirs" category to penalize not only "slayers"[156] of the decedent but also family members who abandoned, deserted, or refused to support the decedent.[157] Other reformers have responded more broadly with what Professor Paula Monopoli has termed a "behavior-based model of inheritance," a model that would permit courts in cases of misconduct toward the decedent to deviate from the status-based definition of the family and deny inheritance

151. Gaubatz, *supra* note 44, at 559.

152. Guzman, *supra* note 143, at 91 (arguing that Oklahoma intestacy statutes are "both over- and under-inclusive [and] [c]apping the inheritance rights of all nonmarital fathers sweeps in many deserving fathers yet bypasses many undeserving mothers"). For sources offering proposals to respond to family violence, abuse, and neglect, see *supra* note 7.

153. *See* Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 80 (1998) [hereinafter Foster, *Behavior-Based Model*] (discussing the "claim that, under present conditions, an inflexible, status-based model effectively permits wrongdoers to inherit from their victims").

154. *Id.* at 80.

155. WAGGONER ET AL., *supra* note 5, at 462 (referring to homicide as one of the "reprehensible acts that result in forfeiture").

156. For sources discussing statutes and case law disqualifying "slayers," see *supra* note 39.

157. *See* Foster, *Behavior-Based Model*, *supra* note 153, at 80 (stating that the unworthy heirs category "[o]riginally limited almost exclusively to 'slayers' of the decedent . . . now increasingly extends to heirs who abandoned, deserted, or refused to support the decedent"). For a review of legislative and judicial reforms to prevent inheritance by spouses and children for abandonment, neglect or failure to support the decedent, see WAGGONER ET AL., *supra* note 5, at 81–82 n.8; Monopoli, *supra* note 7, at 260 n.11, 265–76; Alison M. Stemler, Note, *Parents Who Abandon or Fail to Support Their Children and Apportionment of Wrongful Death Damages*, 27 J. FAM. L. 871, 871–79 (1988–89).

rights to even the decedent's closest relative.[158] A few legal scholars have recognized the full implications of a behavior-based model and have called for a redefinition of the family that would factor in "good" behavior as well as "bad" behavior.[159]

Thus far, in their efforts to modernize the conventional definition of family, reformers have taken three basic approaches.[160] The "formal" approach accepts the statutory definition of family as "based on blood or formal legal registration processes"[161] but expands the opportunities for families to establish legal as well as personal ties.[162] Proposals to extend inheritance rights to legally adopted children or to legally registered domestic partners provide two examples.[163]

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158. Monopoli, *supra* note 7, at 297 (proposing "a behavior-based model of inheritance by fathers from their deceased children[]" that allows courts to "deviat[e] from a status-based model"). The behavior-based model would exclude even the family paradigm's most preferred claimants if they engaged in misconduct toward the decedent. For example, it would bar a "deadbeat dad" from inheriting from the child he abandoned, *see id.*, and would prevent an abusive child from inheriting from the parent she mistreated, *see* Korpus, *supra* note 38, at 572–77. The most recent proponent of the behavior-based model has noted that in the elder abuse context ninety percent of the abusers are family members. Korpus, *supra* note 38, at 540. Two-thirds of the abusers are the victims' adult children or spouses of those children. *Id.* at 540–41. She calls for behavior-based statutes that would "extinguish inheritance rights," *id.* at 573, of abusers in the full range of elder abuse situations: cases of "physical abuse, sexual abuse, emotional or psychological abuse, financial or material exploitation, abandonment, or neglect," *id.* at 540 n.13.

159. *See, e.g.*, Foster, *Behavior-Based Model*, *supra* note 153, at 81 ("[A] narrow vision of a behavior-based model punishes 'bad' behavior but disregards 'good' behavior. As a result, it fails to explore the full potential of a behavior-based model to use inheritance for 'encouraging and rewarding' exemplary conduct within the family and society."); Gaubatz, *supra* note 44, at 511–12, 562–63 (discussing the need to "provid[e] for the meritorious") (capitalization omitted); Rhodes, *supra* note 7, *passim* (discussing approaches for rewarding a "caring parent" of the decedent as well as penalizing an "abandoning parent" of the decedent); Thornley, *supra* note 49, at 540–49 (proposing a "care-sensitive" standard to promote inheritance by the claimant who was in a "caring relationship" with the decedent).

160. The following discussion of the first two approaches—the formal approach and the functional approach—draws heavily on Professor Gary's recent analysis. *See* Gary, *Adapting Intestacy Laws*, *supra* note 2, at 31–67.

161. *Id.* at 31–32.

162. *Id.*

163. *See id.* at 32–40 (setting out examples). Two states, Hawaii and Vermont, have already adopted this approach toward same-sex domestic partners. *See* HAW. REV. STAT. §§ 560:2-102, 560:2-207, 572C-4, 572C-5 (Supp. 2000) (extending inheritance rights to unmarried adults who are legally prohibited from marrying each other and formally register their relationship as a "reciprocal beneficiary relationship"); VT. STAT. ANN. tit. 15, §§ 1202-05 (Supp. 2000) (extending inheritance rights to nonrelated persons of the same sex who formally enter into a "civil union").

The "functional" approach focuses instead on the quality of the relationship between the claimant and decedent.[164] Its principal concern is whether those individuals "act[ed] like family members."[165] Proposals to exclude "unworthy heirs" are illustrative of this approach. For example, Professor Anne-Marie Rhodes has called for a new definition of "parent" for inheritance purposes that would require "the act of becoming a parent (birth or adoption) coupled with the acts of being a parent (care and nurturing of the child)."[166] Other commentators have used a functional approach to expand the definition of family to include new members of today's American family. Thus, in his Working Draft, Professor Waggoner has proposed to recognize inheritance rights of committed partners in a "marriage-like relationship."[167] Similarly, Professor Gary has recently offered a scheme to extend intestacy rights to nonrelated individuals in a "parent-child relationship."[168]

The "decedent-controlled"[169] approach, in contrast, bases inheritance rights on the decedent's own definition of her "family of choice."[170] The most recent proponent of this approach, Professor Tanya Hernández, has argued in the wills context that courts should recognize the expanding definition of family by allowing the "articulated preferences of a testator"[171] to prevail over status-based definitions of family. Professor Hernández has suggested that the decedent-controlled approach also potentially could apply in the intestate context.[172] She has apparently ruled out, however, cases

164. Hernández, *supra* note 10, at 1006 (stating that the functional approach "legitimizes non-nuclear relationships that share the essential qualities of traditional relationships for a given context by inquiring whether a relationship shares the main characteristics of caring, commitment, economic cooperation and participation in domestic responsibilities").

165. Gary, *supra* note 2, at 42 (describing the functional approach as "determin[ing] whether identified persons are acting like family members").

166. Rhodes, *supra* note 7, at 526.

167. *See supra* note 148.

168. Gary, *Adapting Intestacy Laws*, *supra* note 2, at 81–82 app. (setting out proposed legislation).

169. Hernández, *supra* note 10, at 1017 (referring to "decedent-controlled definitions of family").

170. *Id.* at 1028 (concluding that mortal remains legislation provides a model for the law of wills by "respecting the individual's autonomy to define for himself or herself who constitutes family beyond biological constraints. In this way both the needs of the individual and the family of choice are validated.").

171. *Id.* at 973.

172. *Id.* at 1016–17. Professor Hernández stops short of endorsing this approach, however, due to concerns regarding "predictability and judicial economy." *Id.* at 1016. She is troubled by the fact that such concerns are "being valued at the expense of undermining the stability of a testator's family of choice in contravention of the role of

where "no record of a [decedent's] individual preferences" exists.[173] At least one scholar has taken a step toward using a decedent-controlled approach in that situation as well. Professor Gaubatz has argued that courts should have some flexibility to adjust intestate shares to reflect "the reasonable expectations or probable desires of the decedent."[174] He has concluded that even "[a]ssuming that there is no evidence of the actual desire of the decedent, such desire could nonetheless be approximated."[175]

The formal, functional, and decedent-controlled approaches all respond to the support flaws in American inheritance law. By redefining the category of preferred family claimants, these reform proposals promise to extend inheritance rights and protections to dependents and caregivers who receive little recognition under existing rules—adoptive, nonmarital, blended, and extended family members, unmarried opposite-sex and same-sex partners, and other nonrelated individuals in "families by choice or need."[176] Yet, ultimately all three approaches are inadequate because they share a common limitation. They continue to use "family" as their point of reference.

The formal approach essentially attempts to "bring 'new' families into the fold"[177] by squeezing them into the existing definition of the natural family.[178] This "retrofitting of inheritance laws"[179] thus covers only individuals in relationships that can be accommodated within traditional family categories.[180] The functional approach too is

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inheritance to make 'succession more meaningful, valuable and responsive to the needs and circumstances of a particular family.' " *Id.* at 1016–17 (quoting Halbach, *supra* note 32, at 4). She ultimately concludes that "[t]he role of the family of choice in the intestate context merits greater study." *Id.* at 1017.

173. *Id.*

174. Gaubatz, *supra* note 44, at 559–60.

175. *Id.* at 560.

176. Padilla, *supra* note 145, at 221 n.8 (adopting the phrase from Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 J. FAM. L. 691 *passim* (1996–97)).

177. Gary, *Adapting Intestacy Laws*, *supra* note 2, at 31.

178. *Id.* at 160 (arguing that the formal approach used in California's statute on stepchildren "does not attempt to incorporate new family structures, but rather seeks to squeeze the new family structures into existing rules").

179. Fellows et al., *Committed Partners*, *supra* note 6, at 15.

180. The formal approach may also encourage such individuals to "conform[] to traditional family norms." *Id.* Considerable debate exists, especially among feminist and gay and lesbian scholars, over the desirability of that result. *See id.* at 9–10, 27 (explaining that an intestacy statute that bases inheritance on "marriage-like" relationships "[f]or some opposite-sex couples, . . . risk[s] assimilation into a marriage model that the partners might have chosen to reject because of its patriarchal roots" and "may be politically unappealing to LGBT [Lesbian, Gay, Bisexual, and Transsexual] communities [who] . . . might reason that it increases the potential of reinforcing heterosexual norms"). For an

undermined by its family perspective. Indeed, even its proponents have acknowledged that this approach may prove harmful to the nontraditional families it is supposed to promote. As Professor Gary has recognized, "If the functional definition of family is based on the way a nuclear family functions, then many non-traditional families may still be left out of the definition."[181]

The decedent-controlled approach also provides uncertain protection because of its family focus. By restricting its scope to "any person that a [decedent] may have preferred and viewed as *family*,"[182] this approach invites an initial definitional question: Did the decedent regard the claimant in the capacity of family member?[183] Once again, the nuclear family may serve as the benchmark at the expense of a decedent's nonconforming "family of choice."

As for individuals outside the decedent's "family," all three approaches disregard their claims. The formal, functional, and decedent-controlled approaches follow the conventional practice of defining "natural objects of the decedent's bounty" in familial terms. As a result, even their expanded definitions of the family exclude dependents and caregivers whom a particular decedent may have considered her "natural objects" but not family members. In the end, then, reformers' efforts to redefine the family also fail to offer a comprehensive response to the support flaws of American inheritance

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extended discussion of the debate within the lesbian and gay community over the desirability of legalized same-sex marriage, see David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 449–52, 486–91 (1996); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY 63 *passim* (1991). Another flaw of the formal approach is that it fails to address the "unworthy heir" problem and continues to adopt a status-based approach to determining inheritance rights. *See* Gary, *Adapting Intestacy Laws*, *supra* note 2, at 41.

181. Gary, *Adapting Intestacy Laws*, *supra* note 2, at 142; *see also* Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1653 (1991) (criticizing functionalism for requiring "that all alternative families resemble traditionally recognized relationships in function, if not precise form").

182. Hernández, *supra* note 10, at 1018 n.259 (emphasis added).

183. In a world where "[t]here is even confusion about how to define 'mother' under the law," Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare 'Reform,' Family, and Criminal Law*, 83 CORNELL L. REV. 688, 689 (1998), a scheme that requires an initial definition of "family" status or behavior is problematic. As Professor Fineman has noted,

> [I]t is no longer clear what constitutes appropriate family role behavior—who is or has acted as a "good" wife and mother, or husband and father, fulfilling the well-defined roles in the nuclear family. In fact, it is no longer clear these are even appropriate questions for the legal system to ask.

Fineman, *supra* note 140, at 396.

law because this strategy too remains anchored in a family framework.

C. *Procedural Mechanisms to Mitigate the Effects of the Family Paradigm on Nonconforming Wills*

The third strategy also has addressed the preference for family members in the law of inheritance but from a different direction. It has offered procedural mechanisms to protect so-called "nonconforming wills,"[184] wills that deviate from traditional family norms. Proponents of this strategy have attacked the rules and presumptions that courts use to undermine such wills, focusing particularly on the dangers of existing mental capacity doctrines. Reformers argue that these doctrines are so nebulous that they effectively allow judges and juries to overturn wills that leave property to persons who are not "natural objects of the decedent's bounty"—that is, not close family members.[185]

Several of these critics have challenged the conventional presumptions used in mental capacity cases.[186] In particular, they have called for changes in presumptions with respect to caring relationships to recognize the reality of American society today. Professor Ray Madoff, for example, has identified two such presumptions: "(1) family relationships are co-extensive with caring relationships" and hence "naturally" recognized by gratuitous bequest[187] and "(2) confidential relationships are market relationships governed by an ethic of selfish individualism"[188] and hence "naturally" recognized by contract rather than gratuitous bequest.[189]

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184. Spitko, *Gone But Not Conforming*, *supra* note 14, at 281 (referring to a "nonconforming will").

185. E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065, 1075 (1999) [hereinafter Spitko, *Judge Not*] (arguing that the "doctrines of testamentary capacity, undue influence, and testamentary fraud are sufficiently nebulous that they give wide berth to a trier of fact" to impose "majoritarian cultural norms on the decedent who has left an estate plan that deviates from the cultural norm favoring dispositions to the legal spouse and close blood relations over dispositions to 'non-family' "). For a sampling of other sources expressing similar views, see *supra* note 55.

186. For an extended discussion and analysis of burdens of proof and presumptions in mental capacity and undue influence cases, see Rein-Francovich, *An Ounce of Prevention*, *supra* note 89, at 29–46.

187. Madoff, *supra* note 9, at 608.

188. *Id.*

189. *Id.* at 609–10. Professor Madoff draws her "market/family dichotomy" from Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498, 1520–21 (1983). Madoff, *supra* note 9, at 606–07.

Reformers have proposed either abandoning[190] or reversing such presumptions to reward rather than penalize acts of care.[191]

Other scholars have concluded that even more drastic procedural reforms are required to ensure a fair hearing for nonconforming wills. For some commentators, ante-mortem probate offers a potential solution.[192] Under this approach, a court could determine the validity of a will during the testator's lifetime based on "the best evidence of the testator's capacity to execute a will, namely, the testator herself."[193] The testator could personally explain to the fact-finder the reasons for her "unnatural" will and rebut mental capacity challenges.[194] Professor Lloyd Bonfield has proposed a different ante-mortem mechanism to protect wills from undue influence challenges—adoption of the continental European notarial system for authentication of wills.[195]

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190. *See* Kurt Wanless, Comment, *Rethinking Oregon's Law of Undue Influence in Will Contests*, 76 OR. L. REV. 1027, 1028 (1997) ("advocating that Oregon temper its law of undue influence by removing the presumption and imposing [a] fact-intensive inquiry in its place"); *see also* Madoff, *supra* note 9, at 629 (arguing that these presumptions "must be abandoned" if undue influence doctrine is to promote freedom of testation rather than family protection). Professor Madoff stops short of advocating this position, however. She defines her work as "beg[inning the] inquiry" into "whether family protection can be justified." *Id.*

191. Thornley, *supra* note 49, at 542 (calling for a change in presumption to "encourage acts of care—not punish them").

192. Proponents of "ante-mortem probate" or "living probate" reforms have offered differing models. *See, e.g.*, Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89, 111–21 (1979) (describing the "administrative model"); Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 274–87, 289–90 (1976) (describing the "contest model"); John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 75–85 (1978) [hereinafter Langbein, *Living Probate*] (describing the "conservatorship model"). For a summary, comparison, and critique of these approaches, see Fellows, *The Case Against Living Probate*, *supra* note 111, at 1067–1109; Spitko, *Gone But Not Conforming*, *supra* note 14, at 290–94.

193. Spitko, *Gone But Not Conforming*, *supra* note 14, at 290.

194. According to Professor Spitko:

> [A]nte-mortem probate affords the testator the opportunity to explain in person to the fact-finder why she devised her estate as she did and to refute personally any claims that her "unnatural" disposition of her property was the product of fraud, undue influence or a deficient mental capacity at the time she executed her will.

Id.

195. Lloyd Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past*, 70 TUL. L. REV. 1893, 1918–20 (1996) (proposing adoption of the notarial system to "immunize[]" wills from undue influence challenges by "disgruntled heirs"). The civil law notarial system permits a testator to execute a so-called "authenticated will" before a notary, "a legally qualified and experienced officer of the state who is obliged to satisfy himself of the testator's capacity as a precondition for

Reformers have emphasized the particular threat that juries pose to nonconforming wills.[196] They argue that in mental capacity cases, juries "are 'more disposed to work equity for the disinherited' than to follow the law"[197] or the testator's wishes. One commentator has responded to this problem[198] of jury bias with a proposal to change evidentiary rules in will contests to deny juries the opportunity to view the dispositive provisions of the will at issue.[199] Other reformers have gone even further and suggested abolishing jury trials altogether in will contests involving mental capacity or undue influence.[200]

Most recently, commentators have attacked the traditional adjudication[201] process itself. These reformers argue that in will

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receiving or transcribing the testament." Langbein, *Living Probate*, *supra* note 192, at 65. The authenticated will, although expensive, provides "evidence of exceptional quality" regarding the testator's capacity and is "extremely difficult for contestants to set aside." *Id.* at 65–66.

196. Critics of jury involvement in will contests draw heavily on empirical studies. *See* Edward S. Bade, *Jury Trial in Will Cases in Minnesota*, 22 MINN. L. REV. 513 *passim* (1938) (comparing the outcomes of Minnesota bench and jury trials involving issues of testamentary capacity and undue influence in will execution); Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607 (1987) (analyzing will contest outcomes tried by judges and juries in Nashville, Tennessee); Note, *Will Contests on Trial*, 6 STAN. L. REV. 91 (1953) (criticizing jury involvement in will contest trials in California).

197. MCGOVERN ET AL., *supra* note 63, at 583 (quoting Langbein, *Living Probate*, *supra* note 192, at 65).

198. Not all legal scholars view jury preference for will contestants as a problem. For example, Professor Chester has recently highlighted the "marked propensity [of probate judges] to find for will proponents" and has argued that jury trials " 'level the playing field' between proponent and contestant." Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 204 (1999) [hereinafter Chester, *Less Law, but More Justice?*]. He contends that juries may do a better job than judges on the "case-by-case factual analysis" required under "vague" mental capacity doctrines "because juries appear to focus on what seems most important: who among competing legatees gets what and whether this distribution is just." *Id.* Although he concludes that mediation is the "best system of resolving will contests," Professor Chester argues that "[t]he second-best method would be to have a jury impart the *community's* sense of what a typical family might feel is fair." *Id.* at 205.

199. *See* Michael Falker, Comment, *A Case Against Admitting into Evidence the Dispositive Elements of a Will in a Contest Based on Testamentary Incapacity*, 2 CONN. L. REV. 616, 629–30 (1970).

200. *See, e.g.*, Josef Athanas, Comment, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529, 530–31 (arguing that "states should have a bright-line rule forbidding jury trials in will contests").

201. Spitko, *Gone But Not Conforming*, *supra* note 14, at 314 (arguing that "[t]raditional adjudication may disadvantage cultural minorities even when they seek to vindicate legal rights arising under neutral law"); *see* Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601, 603 (2000) ("Frequently [probate, trust, and guardianship] disputes lead to litigation that results in substantial tangible costs to the estate, trust, or guardianship assets, as well as intangible costs to the

contests involving nonconforming wills, alternative dispute resolution (ADR) techniques better serve the interests of testator and survivors. Professor Spitko, for example, has concluded that fact-finders, judges and juries alike,[202] are so often biased against wills that depart from majoritarian family norms that the abhorrent testator should have the right to opt out of the legal forum.[203] He has proposed a scheme of "testator-compelled arbitration," under which a testator could direct in her will that any future will contest be adjudicated by an arbitrator selected by her.[204]

Other ADR advocates have focused instead on the needs of the testator's survivors. They regard mediation as the best approach for addressing the full range of issues—both emotional and legal—presented by nonconforming wills.[205] These reformers argue that, unlike litigation, mediation responds to the root cause of many mental capacity challenges: "competing notions of fairness"[206] among the decedent's survivors. They contend that fairness concerns arise particularly often in cases where a testator departed from "natural" will distribution patterns to recognize special services provided by one family member or relationships outside traditional family boundaries.[207] Commentators point to numerous other advantages of

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families involved."). Parties will often settle rather than litigate will contests. *See* Gary, *Mediation and the Elderly*, *supra* note 14, at 424 n.155 (citing statistics on settlement of probate disputes). For a critique of "party-driven settlement," see Chester, *Less Law, but More Justice?*, *supra* note 198, at 181–82.

202. Spitko, *Gone But Not Conforming*, *supra* note 14, at 287 (rejecting jury reform proposals as inadequate because judges also are "likely not to appreciate or respect the values and beliefs of the 'abhorrent' testator [and because j]udges elected by the greater community as well as judges appointed and confirmed by officials who are themselves elected by that community are likely to share the values and biases of the community").

203. *Id.* at 314 (arguing that the trier of fact may use mental capacity doctrines "to redistribute the 'abhorrent' testator's probate estate to a legal spouse or close blood relations in line with the trier of fact's majoritarian values and choices" and proposing "[a]rbitration . . . [as] a means for cultural minorities to opt out of a legal forum that is often biased against them").

204. *Id.* at 276–77 ("recommend[ing] that the nonconforming testator direct in her will that any contest concerning the will shall be adjudicated by an arbitrator appointed by the testator").

205. *See, e.g.*, Dominic J. Campisi, *Using ADR in Property and Probate Disputes*, PROB. & PROP., May/June 1995, at 48, 52 (discussing advantages of mediation for dealing with emotional issues); Gary, *Mediation and the Elderly*, *supra* note 14, at 425–28 (discussing the "emotional costs of litigation" and stating that "[m]ediation recognizes that many disputes involve emotional as well as legal issues").

206. Gary, *Mediation and the Elderly*, *supra* note 14, at 418; *see* Radford, *supra* note 201, at 641 ("The flexibility of mediation also allows the parties to construct a resolution they perceive as fair, which may prove more satisfying than a formal, legal resolution.").

207. *See* Gary, *Mediation and the Elderly*, *supra* note 14, at 417–19 & nn.122–30; *see also* Susan N. Gary, *Mediating Probate Disputes*, PROB. & PROP., July/Aug. 1999, at 11,

mediation over litigation for resolving disputes involving nonconforming wills. Specifically, they emphasize that mediation reduces financial and administrative costs,[208] enhances privacy and confidentiality,[209] offers techniques to repair and preserve relationships among contending parties,[210] and "empowers" parties who view themselves as "marginalized in the judicial process"[211] to fashion their own unique solution to their dispute based on nonlegal as well as legal factors.[212]

Proponents of this third reform strategy have contributed important insights into the dangers of the family paradigm. They have presented a devastating picture of a legal process in which decisionmakers impose their own abstract vision of appropriate family wealth distribution at the expense of individual intent, needs, and circumstances. Critics have shown that this approach is particularly prejudicial to caring relationships, which increasingly fall outside conventional definitions of the family. Some reformers have even begun the search for new "custom-made" approaches based on the actual needs of testators and survivors rather than "a hostile or dysfunctional rule of general application."[213]

14–15 (discussing a scenario in which a testator's will leaves the entire estate to the daughter who cared for the testator for many years rather than dividing the estate equally between the testator's two daughters).

208. *See, e.g.*, Chester, *Less Law, but More Justice?*, *supra* note 198, at 198; Gary, *Mediation and the Elderly*, *supra* note 14, at 431; Radford, *supra* note 201, at 642–43.

209. Gary, *Mediation and the Elderly*, *supra* note 14, at 424 (stating that mediation promotes "privacy and confidentiality"); *see also* Chester, *Less Law, but More Justice?*, *supra* note 198, at 198 ("Mediation takes into consideration the fact that most families do not want to 'air their dirty laundry' in open court."). Privacy may be particularly desirable "[i]f the dispute involves relationships outside of society's accepted norms." Gary, *Mediating Probate Disputes*, *supra* note 207, at 14.

210. *See* Gary, *Mediation and the Elderly*, *supra* note 14, at 428 ("Mediation can repair, maintain, or improve ongoing relationships."). Professor Gary stresses that mediation "increases communication between [the] parties" and also teaches parties techniques for resolving future conflicts. *Id.*

211. Chester, *Less Law, but More Justice?*, *supra* note 198, at 198 (summarizing findings of a Massachusetts Supreme Judicial Court Report on Dispute Resolution).

212. Gary, *Mediation and the Elderly*, *supra* note 14, at 429. "Mediation allows parties to craft their own solution to a dispute. The solution may involve money damages or the distribution of property according to legal standards, but it may also take into consideration the nonlegal interests of the parties." *Id.* Professor Gary recognizes that despite the advantages of mediation, "some characteristics of probate disputes may make mediation difficult or even inappropriate." Gary, *Mediating Probate Disputes*, *supra* note 207, at 13. She emphasizes four such characteristics: "grief," "power imbalance," "long-term dispute," and "need for precedent." *Id.*; *see also* Radford, *supra* note 201, at 638–40 (discussing "control and power imbalances" in mediation).

213. Spitko, *Judge Not*, *supra* note 185, at 1083.

Ultimately, however, this third reform strategy also fails to offer a comprehensive response to the support flaws of the American inheritance system. Rather than confronting the family paradigm itself, proponents address only one context in which that paradigm disserves support—its adverse impact on nonconforming wills. They offer procedural reforms that either mitigate the paradigm's effects or give parties a right of exit. In the end, however, these reformers too leave the family paradigm in place.

III. RECONSIDERING THE FAMILY PARADIGM

Preservation of the family paradigm comes at a price. As Part III.A will show, it imposes significant human costs. In the changing American society of the twenty-first century, these human costs have escalated to the point that the family paradigm has lost its mandate. The paradigm has become at best outdated and at worst oppressive. Part III.B looks beyond the family paradigm to consider possible new directions for inheritance law. As Professor Bruce Mann has argued, "[w]hen the categories of the past can no longer accommodate the present, they must eventually change or be abandoned."[214]

A. The Human Costs of the Family Paradigm

1. Beneficiaries: Hardships and Windfalls

The family paradigm prizes status above need, desert, or affection. It presumes that family members—particularly "close" family members—are most entitled to inherit regardless of their actual relationship with the decedent. Under this mechanical approach, the wrong people can and do inherit. The family paradigm allows a daughter to inherit even though she ignored her father's existence for twenty-five years and refused to care for him during his final bout with cancer; it rejects as undue influence the caring acts of neighbors who fed, sheltered, nursed, bathed, and comforted the frightened and helpless old man.[215] The family paradigm permits a father who physically, emotionally, and sexually abused his daughter to inherit as the "natural" recipient of his daughter's estate.[216] The family paradigm prefers so-called "laughing heirs," relatives so

214. Mann, *Formalities and Formalism*, *supra* note 46, at 1062.

215. *See* Mitchell v. Smith, 779 S.W.2d 384, 386 (Tenn. Ct. App. 1989). In fairness, the daughter was willing to support her father but only "if he would buy her a double-wide house trailer to live in." *Id.*

216. Crosby v. Corley, 528 So. 2d 1141, 1142–43 (Ala. 1988).

distant that they "laugh all the way to the bank rather than grieve"[217] for the decedent, over the most beloved or needy friend or companion.[218]

This is not to say that the family paradigm never matches reality. Even in this day of eroding families, there remain spouses, children, parents, and siblings whose "affection-support"[219] relationship with

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217. GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS 31 (1999). The battle over Howard Hughes' estate may be the most famous example of inheritance by laughing heirs. It even inspired a critically-acclaimed film. MELVIN AND HOWARD (Universal 1980). Hughes, an eccentric recluse, died in 1976, with no immediate family, an unsigned will, and an estate of over $500 million. Nearly 500 people claimed the estate "often equipped with fake wills and outrageous claims." ROGER W. ANDERSEN ET AL., FUNDAMENTALS OF TRUSTS AND ESTATES 36 (1996). In 1981, a Houston jury awarded the estate to 21 cousins and an aunt, "far-flung relations, many of whom were complete strangers to him." *Id.* For another notable laughing heirs case, see *In re* Garrett's Estate, 94 A.2d 357 (Pa. 1953) (per curiam). After 22 years, 2000 hearings, 1100 witnesses, and a record of 390 volumes (totalling 115,000 pages), a Philadelphia Orphan's Court finally resolved the claims of 26,000 potential heirs to Henrietta Garrett's $17,000,000 estate. *Id.* at 358–59. Even after this lengthy period,

> 26,000 disappointed claimants ... still sincerely believe[d] that they [were] entitled to her estate as next of kin and [could] not understand how any Court [could] fail to recognize their close relationship to their dear and treasured Henrietta whom they never saw or knew but of whom they [had] recently become so fond.

Id. at 359. The Pennsylvania Supreme Court dismissed their claims stating that "unlike Tennyson's brook, the Garrett estate cannot go on forever." *Id.* at 359, 362–63. In response to such laughing heirs cases, several jurisdictions have enacted intestacy laws barring inheritance by remote collaterals. *See, e.g.*, N.J. STAT. ANN. § 3B:5-4 (West 1983 & Supp. 2001) (limiting inheritance to collateral relatives who are the decedent's parent(s), issue of parent(s), grandparent(s), or issue of grandparent(s)).

218. *See, e.g., In re* Estate of Biewald, 468 N.E.2d 1321, 1324 (Ill. App. Ct. 1984) (awarding the intestate estate to the decedent's first cousins and first cousins once removed rather than her cohabitant of more than fifty years); Vasquez v. Hawthorne, 994 P.2d 240, 243 (Wash. Ct. App. 2000) (rejecting the claim of the decedent's dependent same-sex life-partner of nearly thirty years to a share of the decedent's intestate estate). Rules that permit inheritance by laughing heirs may come at the expense of nuclear family members as well. For example, in a recent case, a California widow ended up sharing her husband's modest intestate estate with an heir finder. Estate of Griswold v. See, 94 Cal. Rptr. 2d 638 (Cal. Ct. App. 2000). After the decedent's death, the heir finder (or, as he preferred, "forensic genealogist," *id.* at 639) located in Ohio two half-siblings of the decedent and obtained from them an assignment of partial interest in the decedent's estate. *Id.* The half-siblings (children of the decedent's natural father) had never met the decedent, communicated with him, or even been aware of his existence. *Id.* at 639–40. Nonetheless, the court ruled that they qualified as intestate heirs, *id.* at 642, thus cutting the widow's share in half. *See* CAL. PROB. CODE § 6401(c)(1), 6401(c)(2)(B) (West 1991 & Supp. 2001) (awarding a surviving spouse the entire intestate estate if no surviving issue, parent, sibling, or issue of a deceased sibling but only one-half of the intestate estate if the decedent is survived by a parent or a parent's issue).

219. Lomenzo, *supra* note 137, at 960 (defining relatives "within the decedent's 'affection-support' circle [as] ... persons whom the decedent knew and had an interest in or who depended on or had the affection of the decedent").

the decedent is as close as their family status. Yet, as American society changes, the family paradigm increasingly excludes the very people who should inherit—those whose lives were most intimately intertwined with the decedent's. This loss of inheritance can take a heavy financial and psychological toll[220] on the decedent's survivors.

Human lives have structure. People assess their financial resources and arrange many details of their lives accordingly. Not only do they adjust to what they can afford to eat and where they can afford to live, they develop self-images based on those resources. They cannot always predict the future, but they do what they can—saving money for their retirement or the education of their loved ones, or spending it to deal with a crisis of their own or of someone close to them.

Death upsets these delicate and often precarious patterns of support. It may cut off all or part of the income of those who were dependent on the decedent for support. It may extinguish the consent required for them to continue living where they live, working where they work, and using the property they use—whether it be a television set or an automobile. It may deprive them of companionship and support crucial to their well-being.[221]

Inheritance can in part offset these losses and promote greater continuity in the decedent's survivors' lives. Inheritance can provide the financial resources essential for maintaining livelihood and peace of mind. When inheritance relieves hardships such as these, the same

220. Madoff, *supra* note 9, at 623 ("Loss of inheritance is upsetting for financial reasons, but even more so for its psychological toll."). Although Professor Madoff refers here to the "plight" of disinherited children, her statement applies more broadly as well to other survivors of the decedent who are excluded from inheritance.

221. The highly publicized *Vasquez* case, 994 P.2d at 240, provides a prime illustration. Frank Vasquez, age sixty-seven, shared a three-room home and a burlap-bag recycling business with Robert Schwerzler until Schwerzler died at the age of seventy-eight in 1995. Marsha King, *Should Companion Get Deceased's Estate?*, SEATTLE TIMES, Jan. 23, 2001, at A1. Due to a childhood head injury, Vasquez can neither read nor write, *id.*, and has never learned how to drive. Daniel B. Kennedy, *Til Death Do Us Part: Same-Sex Survivor Seeks Assets of Partner Under Equitable Doctrine Governing Heterosexuals*, 87 A.B.A.J. 22, 22 (2001). According to his lawyer, Vasquez's "name isn't on anything because he trusted Bob to handle everything.... When Schwerzler died, Frank was utterly adrift." *Id.* (citing Terry Barnett). The Washington Supreme Court is currently reviewing the case. Vasquez v. Hawthorne, 11 P.3d 825 (Wash. 2000) (granting petition for review). In the interim, Vasquez is permitted to reside in the house he once shared with Schwerzler. King, *supra*. For a critical analysis of *Vasquez v. Hawthorne*, see Amanda J. Beane, Note, *One Step Forward, Two Steps Back:* Vasquez v. Hawthorne *Wrongly Denied Washington's Meretricious Relationship Doctrine to Same-Sex Couples*, 76 WASH. L. REV. 475 (2001).

amount of money confers greater value than when received as windfalls by laughing heirs.

Inheritance can also fulfill expectations of those who constituted the decedent's principal source of physical, financial, or emotional support.[222] But inheritance can do still more. It can ensure a continued connection with a deceased loved one. The property that survives a death is often a repository of memories, a tangible reminder of a life shared. When this property goes instead to a family member who had little or no actual relationship with the decedent, the loss can be wrenching.[223]

2. Decedents: Loss of Control Over Property

During life, a person has virtually complete control over her property. She can give it to whomever she pleases. She can assist the needy, reward the meritorious, or simply indulge a whim. So long as the property owner remains competent, that control continues until death.

At death, the family paradigm takes over. If the decedent left no will, the paradigm governs distribution, even if it is clear that distribution is not what the decedent wanted or intended.[224] If the

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222. *See* Madoff, *supra* note 9, at 623–24 (criticizing the argument that "a will leaving everything to her 'helpful' neighbor on whom [the testator] has become dependent" should be "invalidat[ed] . . . based solely on the legitimate expectations of the children" on grounds that "arguably the neighbor as well as the children expect to inherit"). This expectations issue would arise in particular in the case of a contract to devise where the caregiver provided services in expectation of receiving compensation in the decedent's will. *See supra* Part I.C.

223. For a recent cinematic portrayal of this phenomenon, see IF THESE WALLS COULD TALK-#2 (HBO Films 2000). *See also* Brian C. Hewitt, *Probate Mediation: A Means to an End*, RES GESTAE, Aug. 1996, at 41, 43 ("Significant attachment to isolated items of personal property often represents the genesis of probate disputes."); Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 56–59 (1999) (discussing the importance of heirlooms and other sorts of "personal" property in the estate planning process).

224. *See, e.g.*, Gonzalez v. Satrustegui, 870 P.2d 1188, 1195, 1198 (Ariz. Ct. App. 1993), *corrected by* 166 Ariz. Adv. Rep. 14 (Ariz. Ct. App. 1993). In 1986, Frank Satrustegui and Nona Satrustegui, unmarried cohabitants who for fourteen years had lived together, operated a bar, pooled their income, jointly owned bank accounts, a condominium, and a safety deposit box, and even filed joint tax returns as husband and wife, filled out mail-order form wills leaving their property to each other. *Id.* at 1191. They took the forms to a bank, signed the forms in the presence of each other and a bank employee, and had their signatures notarized. *Id.* Despite this clear evidence of intent, Frank's estate ultimately passed by intestacy to his sister. *Id.* at 1198. The Court ruled against Nona on every count. *Id.* It declared the 1986 document an invalid will and inadequate written evidence of a contract to devise. *Id.* at 1193–96. The court also rejected Nona's claims to the estate either under intestacy as a common law spouse or under a partnership agreement between unmarried cohabitants. *Id.* at 1196–98.

decedent left a will, the family paradigm still provides numerous bases to attack it.[225]

The power of that paradigm is so great that it presents a challenge even to the clearly competent testator advised by the best lawyers. That challenge is often accompanied by inordinate expense as the will is revised over and over—not to provide for different beneficiaries, but merely to acknowledge changes in family status or assets that, if not mentioned, could provide the basis for an attack.[226] For the vulnerable testator, whose competency is open to attack by reason of age or infirmity, or who does not have the best legal advice, the family paradigm can be virtually a confiscator of property.[227]

This barrier at the end of life also prevents many decedents from managing their affairs during life in the most convenient and efficient manner—retaining their property to the end of their lives and then passing it to their intended beneficiaries by will. Fearing loss to the paradigm in the end game, they are forced to give their property to their intended beneficiaries prematurely, while they are still around to defend their choice.[228] That has its own obvious risks.[229]

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225. Here, too, the family paradigm may benefit the very people the testator expressly excluded from his estate. *See* Leslie, *The Myth of Testamentary Freedom*, *supra* note 9, at 283–89 (discussing cases in which courts "[m]anipulat[ed] the [p]rocess of [d]etermining [i]ntent" to allow expressly disinherited family members to inherit).

226. For an extended discussion of such estate planning costs and techniques, see Emily Berendt & Laura Lynn Michaels, *Your HIV Positive Client: Easing the Burden on the Family Through Estate Planning*, 24 J. MARSHALL L. REV. 509 *passim* (1991); Matthew R. Dubois, Note, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263, 313–32 (1999).

227. Indeed, some commentators have concluded that only the wealthy may have the luxury to provide for a beneficiary society regards as "unnatural." Hernández, *supra* note 10, at 988 ("[O]ne commentator asserts that only the wealthy have expansive testamentary freedom because their resources are extensive enough to fulfill societal expectations of support to biological family members and simultaneously include bequests to others.") (referring to SUSSMAN ET AL., *supra* note 32, at 6). Another commentator has stated that:

> Freedom of testation, then, is most truly a working reality for the upper classes, but even for them it is hedged about with restrictions. The lower down the economic scale one goes, the higher the likelihood that assets will largely be bound assets outside the system of testation or subject to levy by the nuclear family.

Friedman, *supra* note 47, at 377.

228. Even this technique may not be sufficient to avoid the family paradigm. For example, lifetime transfers to third parties may be subject to a surviving spouse's elective share. For a summary of judicial and legislative approaches to this issue, see DUKEMINIER & JOHANSON, *supra* note 15, at 500–17. *See also supra* Part I.D (discussing the application of the family paradigm to will substitutes).

229. For example, the relationship between donor and donee might change over time. Years after the gift, the donor might no longer regard the donee as her beloved companion and intended beneficiary. Or the donor's financial situation might deteriorate after the gift. Unlike wills, valid, outright inter vivos gifts generally are irrevocable. CAL.

3. Outsiders: Cultural Bias and Exclusion

The family paradigm "transmits a culture through property"[230] that is alien to many Americans. It declares "unnatural" the very relationships that many people, but most frequently ethnic and cultural minorities often experience as "natural"[231]—caring relationships with extended family members, nonmarital partners, close friends, and nonrelated caregivers.

"Extended care systems,"[232] support networks beyond the immediate family circle, have long been a fundamental feature of African-American, Asian-American, Latino, and Native-American culture.[233] They remain so today. In the past decade alone, ethnic

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CIV. CODE § 1148 (West 1982 & Supp. 2001) ("A gift, other than a gift in view of *impending* death, cannot be revoked by the giver."); BEYER, *supra* note 217, at 262 ("Outright inter vivos gifts are irrevocable."). Thus, the impoverished donor must "rely on the good will of the donee, relatives, friends, and charitable organizations or may even need to resort to federal, state, or local welfare programs for assistance." BEYER, *supra* note 217, at 262. For an extended discussion of narrow exceptions to irrevocability of gifts, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 6.2 cmt. zz (Tentative Draft No. 3, 2001); MCGOVERN ET AL., *supra* note 63, at 223–24. Other possible risks of inter vivos gifts include loss of control over the use of the property and the donee's behavior; family disharmony caused by unequal gifts to family members or gifts to nonrelatives; and reduced leverage to inspire would-be donees to treat the property owner with "deference and respect." BEYER, *supra* note 217, at 262 (discussing the disadvantages of outright inter vivos gifts, including "[l]ack of [c]ontrol," "[j]ealousy," and "[l]everage [r]eduction"). Other lifetime efforts to avoid the family paradigm at death present risks as well. *See* Dubois, *supra* note 226, at 317–19, 323 (discussing the risks for gay, lesbian, and non-traditional elders of joint property ownership with right of survivorship, including tax issues, privacy concerns, and challenges by biological family members).

230. *See* WAGGONER ET AL., *supra* note 5, at 11 (criticizing the Supreme Court's application of Anglo-American tradition to American Indian law and stating that "inheritance [can be] viewed not only as a transmission of property, but also of culture through property").

231. These relationships may not only be "natural" but also essential to a healthy life. Hernández, *supra* note 10, at 1006 n.188 ("[M]edical studies demonstrate that individuals with diverse social networks beyond biological family ties have an increased resistance to disease.").

232. Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J.L. & FEMINISM 29, 52–53 (1998) (referring to and discussing "extended care systems").

233. *See, e.g.*, *id.* at 51–56 (discussing extended care systems in African-American, Asian-American, Latino, and Native-American cultures and communities); Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 U. LOUISVILLE J. FAM. L. 691, 696–97 (1996–97) (discussing "cultural values of care and support" in Latino and Native-American culture); Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1658–67 (1995) (discussing the African-American extended family social system, which includes "caring for the elderly as well as the physical, emotional, educational, financial, and child-rearing support of children, through the cooperative efforts of the adults in the community

minority communities have witnessed an extraordinary increase[234] in so-called "kinship caregiving"[235] to the point that hundreds of thousands of American children are now raised by extended family members and nonrelatives rather than their "legal" parents.[236] Similarly, for many African-American, Mexican-American, and Native-American communities, nonmarital cohabitation is both a cultural tradition and common practice.[237] The family paradigm disregards these ethnic differences.[238] It places family status above any "cultural values of care and support."[239]

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and the family"); *see also* Davis v. Means, 21 Indian L. Rep. 6125 (Navajo 1994), *in* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 408, 411 (4th ed. 1998) (emphasizing the importance of extended family and stating that "Navajo common law on the family extends beyond the nuclear family to the child's grandparents, uncles, aunts, cousins and the clan relationships. This is inherent in the Navajo doctrine of *ak'ei* (kinship).").

234. Randi S. Mandelbaum & Susan L. Waysdorf, *The D.C. Medical Consent Law: Moving Towards Legal Recognition of Kinship Caring*, 2 D.C. L. REV. 279, 284 (1994) ("While kinship caregiving has a rich and varied history in the United States, it has experienced a phenomenal growth in the last decade.").

235. Despite its name, "kinship caregiving" refers to care provided by nonrelatives ("fictive kin," *see* Holmes, *supra* note 233, at 1659 n.37) as well as extended family members. *See* Susan L. Waysdorf, *Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers*, 3 TEX. J. WOMEN & LAW 145, 151 n.10 (1994) (defining "kinship care" as that "provided by a relative or by any adult person with close personal or familial ties to the biological parent(s)"). For a discussion of definitions, see Randi Mandelbaum, *Trying to Fit Square Pegs Into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers*, 22 FORDHAM URB. L.J. 907, 910–11 n.4 (1995).

236. *See* Mandelbaum & Waysdorf, *supra* note 234, at 285 (stating that "kinship caregiving has been the hidden safety net providing for the continued stability, sustenance, and survival of hundreds of thousands of children nationwide"). Kinship caregiving is particularly common in "African-American, Native[-]American, and Hispanic communities." *Id.* at 285 n.27.

237. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 725–31, 767 (1996) (discussing "informal marriage" in the African-American, Mexican-American, and Native-American cultural traditions and current practice); Walter O. Weyrauch, *Informal Marriage and Common Law Marriage*, *in* SEXUAL BEHAVIOR AND THE LAW 297, 323–24 (Ralph Slovenko ed., 1965) (stating that informal cohabitation arises frequently among ethnic minority groups, especially African-Americans, Indians, and Eskimos).

238. This is by no means unique to the inheritance system. For example, Professor Weyrauch has emphasized the "ethnocentric approach toward marriage." Weyrauch, *supra* note 237, at 325. He points to the "belief that there is only one kind of marriage, the one which is 'right' and 'proper.' " *Id.* at 326. He explains that the "increasing pressure to abolish common law marriage" reflects the view that "[i]t is a foreign substance within an ethnocentric legal order, which primarily protects middle-class values." *Id.* For a discussion stating that the "nonrecognition of common law marriage has a substantially disparate impact upon persons of different races and cultures," see Bowman, *supra* note 237, at 767.

239. Arriola, *supra* note 233, at 696 (referring to Latino culture). Note that even in its

The family paradigm is not only ethnically biased, however. It also excludes cultural minorities—that is, individuals whose lifestyles, values, or beliefs diverge from those of the majority.[240] In particular, the family paradigm excludes individuals who are unable or unwilling to enter into formal "legal" family relationships. It denies inheritance rights to same-sex partners based on their sexual orientation alone. The family paradigm, even in its most expansive version, also fails to accommodate those who reject "family" classification on ideological or personal grounds.[241] It requires such individuals to accept a family label they find repugnant in order to devise or inherit.

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definition of family, the family paradigm is culturally biased. A definition of family that favors the "small, nuclear unit" ignores the fact that "the concept of the family is culturally determined and subject to ethnic and cultural variations." Walter O. Weyrauch, *Remarks*, *in* GROUP DYNAMIC LAW: EXPOSITION AND PRACTICE 154, 154 (David A. Funk ed., 1988); *see also* Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 607–56 (2000) (discussing the contrasting cultural definitions of family in American Indian tribal jurisprudence and Anglo-American jurisprudence). For example, Professor Atwood emphasizes the impact of "family" definition on child custody disputes between parents and grandparents. She states:

> In many such cases, the tribal court portrays the grandparent as a cultural insider—the special elder who can . . . imbue the child with a sense of cultural heritage. In contrast, in Anglo-American jurisprudence, . . . the grandparent is an outsider whose intrusion into the nuclear family is subject to strict constitutional oversight.

Id. at 656.

240. *See* Spitko, *Gone But Not Conforming*, *supra* note 14, at 275 n.1 (defining a " 'cultural minority' member as an individual whose core religious, political or social values and beliefs differ meaningfully and substantially from majoritarian norms").

241. *See supra* note 180 (discussing the debate over "marriage model"). In recent work, many lesbian feminist theorists have expressly rejected assimilation into traditional marital family categories. For summaries of this literature, see Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 34, 70–73 (1994); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1318–20 (1997). For a sampling of such views, see, for example, Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, *in* SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY 153, 153–54 (1998) (calling for lesbians to resist rather than attempt to redefine family because the "legal notion of family domesticates lesbians through its strategies of demarcation, assimilation, coercion, indoctrination, and arrogation"); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, NAT'L LESBIAN & GAY Q. 9, 14 (Fall 1989) ("Marriage, as it exists today, is antithetical to my liberation as a lesbian and as a woman because it mainstreams my life and voice. I do not want to be known as 'Mrs. Attached-To-Somebody-Else.' Nor do I want to give the state the power to regulate my primary relationship."); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993) ("I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.").

For those excluded from the family paradigm, the effects can be emotionally as well as financially devastating. Decedents are unable to die secure in the knowledge that they have provided for dependent loved ones. Survivors find themselves "treat[ed] . . . as if they were strangers"[242] to the individuals with whom they shared years of affection, intimacy, and companionship. But the family paradigm cuts even more deeply.[243] Its discriminatory rules do not just affect inheritance. They also send a message to society that only some human relationships and losses matter.[244]

4. Judges and Jurors: Corruption of the Process

The family paradigm encourages judges and jurors to "bend" the law to ensure "appropriate" distribution of decedents' estates. Treatment of nonconforming wills presents the most obvious example. To effectuate the testator's "natural" intent as opposed to actual, expressed intent, the family paradigm encourages judges and jurors to use elastic mental capacity doctrines to overturn validly executed wills and redirect assets to the testator's closest family members. Even in its injustices, the family paradigm promotes such "bending." The so-called "fixed rules"[245] of status-based intestacy turn out to be more flexible than acknowledged. When these rules cause injustice in a particular case, judges can turn to equitable doctrines and remedies. They create often elaborate fictions[246]—

242. Fellows et al., *Committed Partners*, *supra* note 6, at 89 (arguing that "the law treats committed partners as if they were strangers to each other").

243. Spitko, *The Expressive Function of Succession Law*, *supra* note 5, at 1064–65 (discussing the "typical intestacy statute's" two "cut[s] against gay people"). According to Professor Spitko, the "first cut" is to "den[y] gay men and lesbians equal donative freedom." *Id.* at 1064. The "second cut" is the "discriminatory message"; "such disparate treatment devalues gay men and lesbians and their relationships." *Id.* at 1064–65.

244. Arriola, *supra* note 233, at 694 (criticizing the view that "love and feelings in some relationships just do not matter because the resident status, or sexual status, or human rights status of these relationships is not traditional or legal" and asking "but are the feelings connected to human loss really any different in a 'non-traditional' family than in a 'traditional' one").

245. *See* Glendon, *supra* note 135, *passim*.

246. *See* LON L. FULLER, LEGAL FICTIONS (1967). In a recent article, Professor Adam Hirsch has presented a comprehensive analysis of this judicial use of what he calls "legal contraptions," with extensive reference to trusts and estates examples. Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 538 (2000) [hereinafter Hirsch, *Inheritance Law*]. Professor Hirsch argues that legal contraptions arise "when a lawmaking body operates from below and seeks to find a way *around* superior rules," *id.* at 538, or when "legal actors operating from below" seek to apply a rule "for secondary purposes not originally contemplated by its creators, to which the rule proves seredipitiously suited." *Id.* at 538 n.40. He identifies several typical characteristics of legal contraptions—they often "incorporate and depend

mythical contracts,[247] constructive trusts,[248] virtual legitimation[249]—to redefine the decedent's family to include the "deserving" and exclude the "unworthy."

The effect of such bending of the law is to corrupt the judges and jurors who engage in it and the process they administer. When they respond to the family paradigm under the cloak of testator's intent or fixed rules, they exercise the most dangerous form of discretion—discretion with no transparent rules, standards, or procedures by which to maintain accountability. Yet, this practice is so prevalent that it is common knowledge among lawyers and even taught in law schools.[250] The judicial subterfuge encouraged by the family paradigm harms all touched by the inheritance system. For decedents and survivors, it creates unpredictability, uncertainty, and added legal expenses. For the public at large, it undermines confidence in the fairness and neutrality of the inheritance system. For the legal

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upon fictitious factual assumptions"; "function through growth of another branch of the law that comes within the subordinate lawmaker's power"; "subsist despite internal, logical contradictions"; "are atomistic, offering multiple solutions for the same doctrinal problem"; and "display imperfections." *Id.* at 539.

247. This occurs, for example, in the case of equitable adoption. *See supra* note 43. As Professor Hirsch has observed of this approach, "some courts conjecture an implicit contract to adopt and proceed to enforce it (post-mortem!) by equitable decree of specific performance. Other courts assume detrimental reliance on the part of the unsuspecting, but in truth uncomprehending, child, and provide redress through equitable estoppel." Hirsch, *Inheritance Law*, *supra* note 246, at 548. For an extended discussion and examples, see *id.* at 548–51.

248. Courts have used constructive trusts, for example, to prevent inheritance by an heir who murdered the decedent. Under the constructive trust approach, the "legal title passes to the slayer but equity holds him to be a constructive trustee for the heirs or next of kin of the decedent." *In re* Estate of Mahoney, 220 A.2d 475, 477 (Vt. 1966). The constructive trust has no real substance. It is simply a "subterfuge," Fellows, *The Slayer Rule*, *supra* note 39, at 550, that allows courts "*to circumvent*" an inheritance rule "while continuing formally to observe it." Hirsch, *Inheritance Law*, *supra* note 246, at 537.

249. *See* WAGGONER ET AL., *supra* note 5, at 132 (discussing judicial doctrines of "virtual or equitable legitimation to allow a nonmarital son to inherit from his biological father").

250. *See, e.g.*, DUKEMINIER & JOHANSON, *supra* note 15, at 537:

> "[L]ack of testamentary capacity," "undue influence," and "fraud" are subtle and elastic concepts that can be used by judges and juries to rewrite the testator's distributive plan in order to "do justice." In contests by disinherited children, judges and juries are frequently influenced by their sympathies for the children. This is well known to practicing lawyers, who will often advise the devisees to agree to an out-of-court settlement with a disinherited child.

See also Rivera, *supra* note 54, at 892 (stating that "knowledgeable attorneys drawing wills for gay folks knew special problems existed" and that in undue influence attacks raised by biological family members "such wills have been set aside by the courts based solely on the effect that the homosexuality of the testator supposedly had on the will").

profession, it encourages cynicism and even "disdain"[251] for the inheritance process and those who administer it.

5. Individuals: Subjugation to the Abstract

Professor Jane Baron has written eloquently of the harms caused by will interpretation approaches that ignore the actual people involved and instead define people by category alone.[252] She has observed that "[t]here is something deeply dissatisfying about a system that protects individuals only by depriving them of their humanity."[253] Yet, that is precisely what occurs under the family paradigm. The family paradigm disregards individual human needs, desires, foibles, and circumstances. It reduces individuals to their "family" relationships. Did they have the requisite status as family members? Did they act as family members? Did the decedent define them as family members? Under the family paradigm, the "natural" triumphs over the actual,[254] the "average" over the particular,[255] and the abstract over the individual.[256]

In the end, this devaluation of the individual may be the greatest human cost of the family paradigm and most compelling reason for reform.[257] The next section of this Article will explore possible new

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251. WAGGONER ET AL., *supra* note 5, at 34 (arguing that an objective of inheritance law should be "to produce a pattern of distribution [that] . . . doesn't produce . . . disdain for the legal system").

252. Baron, *supra* note 4, at 633–34.

253. *Id.* at 655.

254. *See supra* Part I (discussing the inheritance system's preference for "natural objects of the decedent's bounty"—close family members—over the decedent's actual desired recipients of her estate).

255. For example, in intestate succession law, the "average" decedent's preferences prevail over those of a particular decedent. DUKEMINIER & JOHANSON, *supra* note 15, at 74 (stating that the "primary policy" of intestacy statutes "is to carry out the probable intent of the average intestate decedent").

256. For example, under a status-based approach, abstract notions of how family members should behave are more important for inheritance purposes than how individuals actually behaved toward the decedent. *See supra* Parts I.A, III.A.1; *see also* Baron, *supra* note 4, at 654 (criticizing will interpretation approaches for "abstracting individuals").

257. For a different view, see Fellows, *In Search of Donative Intent*, *supra* note 54, at 657. Professor Fellows recognizes that "the law furthers donative freedom for the majority of property owners by forsaking individuality." *Id.* at 613. She cites the adverse impact of this approach, in particular the "preference for family," on "nontraditional distribution schemes that exclude some family members in favor of other family or nonfamily members." *Id.* Nonetheless, based on "analysis [that] abandons the romanticism of individuality," she ultimately concludes that "concern about the law's inadequacy to preserve individuality should not divert efforts to facilitate donative freedom for the majority of property owners." *Id.* at 657.

directions for American inheritance law that might reclaim the individual forgotten by the family paradigm.

B. *Beyond the Family Paradigm*

The preceding section described the reasons why the inheritance system should break out of the family paradigm. What sort of regime should replace that paradigm depends upon a variety of factors. They include social and cultural values, considerations of cost and efficiency, the need for coordination of the inheritance system with other socio-legal systems, and political limitations.

Another consideration is the readiness of the probate courts to administer the new regime. No alternative system is likely to be as rigid and mechanical as the current one. The best options are likely to vest greater responsibility in the courts. Leading scholars have opined that probate courts are not yet ready to assume that responsibility.[258] Many probate judges are not lawyers,[259] and probate courts have sometimes been shown to be corrupt.[260] But the fact that the infrastructure necessary to support a reform is not entirely in place is not an argument against the reform, but merely a cost to be weighed.[261]

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258. Currently, "the weight of opinion in this country opposes" adoption of a more flexible approach to estate distribution based on the English model "because of the vast discretion such a system gives to the probate judge." DUKEMINIER & JOHANSON, *supra* note 15, at 478. For examples of such views, see Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1305–07 (1969); Glendon, *supra* note 135, at 1186–89; Langbein & Waggoner, *supra* note 12, at 314.

259. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS AND ESTATES 482 (5th ed. 1995) (stating that "probate judges in some states do not have to be trained as lawyers; anyone can run for the office").

260. For discussions of such problems among New York Surrogate Courts, see DUKEMINIER & JOHANSON, *supra* note 15, at 212–13; John H. Langbein, *Will Contests*, 103 YALE L.J. 2039 (1994) (book review). *See also* NORMAN F. DACEY, HOW TO AVOID PROBATE! 15 (1965) (claiming that the probate system as a whole is "almost universally corrupt" and providing strategies and forms to "avoid probate"). For the most recent edition of Dacey's book, see NORMAN F. DACEY, HOW TO AVOID PROBATE! (5th ed. 1993).

261. American bankruptcy administration has recently undergone the kind of transformation that would be necessary. Interview with Lynn M. LoPucki, Security Pacific Bank Professor of Law, UCLA School of Law, in Los Angeles, Cal. (Aug. 1, 2000). Prior to the Bankruptcy Reform Act of 1978, bankruptcy cases were administered by "referees." *Id.* The referees were appointed locally by the U.S. District Judges and had status roughly equal to U.S. Magistrates. *Id.* Prominent firms complained of a corrupt "bankruptcy ring" composed of bankruptcy lawyers and referees that controlled the outcomes of cases. *Id.* The 1978 legislation created a bankruptcy court whose judges had broad jurisdiction, contempt powers, and higher salaries. *Id.* Some referees became bankruptcy judges, but many did not. *Id.* Turnover was high in the early years. *Id.* But in less than two decades, the transition had advanced to the point that expressions of concern regarding honesty

Choice of the particular direction that reform should take is beyond the scope of this Article. Rather, I intend to show that reasonable alternatives to family-based inheritance exist and, in so doing, to demonstrate that family-based inheritance is only a paradigm and not a reality. The five approaches discussed here are not exhaustive or mutually exclusive.

1. Abolishing Inheritance

One response to the family paradigm is to abolish inheritance altogether. As this Article has shown, the family paradigm has long privileged one part of American society over others. It has promoted transmission of wealth within only those cultural groups whose "natural objects" match conventional family definitions. In perpetuating this narrow vision of family, inheritance law has created wide disparities in wealth, economic power, and opportunity.[262] Thus, some reformers may conclude that the optimal way to root out such inequalities is to abolish not only the family paradigm but also inheritance itself.[263] Under such a scheme, property owned at death would escheat to the government.

A proposal to abolish inheritance is unlikely to generate significant support, however. As Professor Ascher observed in 1990, "Inheritance . . . seem[s] to occupy a special place in the hearts of many Americans, even those who cannot realistically expect to inherit anything of significance."[264] After a decade of economic prosperity, public support for inheritance has only intensified, to the point that sixty percent of Americans of all ethnic groups favor repeal of the federal estate tax.[265] On May 26, 2001, Congress enacted legislation that will phase out the unpopular "death tax" by 2010.[266]

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and competency are no more prevalent with respect to bankruptcy judges than other federal judges. *Id.*

262. DUKEMINIER & JOHANSON, *supra* note 15, at 15 ("The most powerful argument against permitting transmission of wealth is that the transfer of great fortunes perpetuates wide disparities in the distribution of wealth, concentrates inherited economic power in the hands of a few, and denies equality of opportunity to the poorer.").

263. For an extended discussion and analysis of existing proposals to "curtail" or abolish inheritance, see Ascher, *supra* note 125, at 70–76, 87–99.

264. *Id.* at 75. This public support for inheritance is by no means an exclusively American phenomenon. *See* DUKEMINIER & JOHANSON, *supra* note 15, at 18 (discussing failed efforts to abolish inheritance in Soviet Russia due to public resistance); Frances Foster-Simons, *The Development of Inheritance Law in the Soviet Union and the People's Republic of China*, 33 AM. J. COMP. L. 33, 36–37, 57–61 (1985) (discussing initial efforts to abolish inheritance in Soviet Russia and reasons for retaining inheritance).

265. *See* Jacob M. Schlesinger & Nicholas Kulish, *Will Power: As Paper Millionaires Multiply, Estate Tax Takes a Public Beating*, WALL ST. J., July 13, 2000, at A1 (citing June

Important societal justifications for inheritance exist. Inheritance can, as Professor Halbach remarked, "serve as an incentive to bring forth creativity, hard work, initiative, and ultimately productivity that benefits others, as well as encouraging individual responsibility—encouraging those who can to make provision that society would otherwise have to make for those who are or may be dependents."[267] But perhaps the most persuasive argument for retaining inheritance is its impact at a deeply personal level. Inheritance can give an individual the "great comfort and satisfaction to know during life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them."[268]

The following subsections will outline possible approaches to reform rather than abolish inheritance. As even one of the leading Congressional opponents of estate tax repeal has acknowledged, "These days, I think everybody, regardless of color, can aspire to having some kind of estate.... You don't come in at a time when people are raising their expectations and tell them you're thinking of taking it away."[269] The better approach is to search for reforms that will extend the benefits of inheritance to all Americans, including those whose lives do not conform to the family paradigm.

2. Purging "Family" from the Paradigm

The most obvious means of removing the family paradigm from inheritance law is simply to eliminate the rules that implement it. For example, one might eliminate the presumptions in favor of family members as the "natural objects of the decedent's bounty." While the repeal of particular rules that privilege family members might

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2000 Gallup poll).

266. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107–16, § 501(a), 115 Stat. 38, 69 (2001) (repealing the estate tax on estates of decedents dying after December 31, 2009). Unless Congress passes future legislation, however, the repeal is only temporary. The Act contains a sunset provision that will automatically reinstate the estate tax in 2011. *Id.* § 901(a)(2), (b), 115 Stat. at 150 (stating that with respect to estates of decedents dying after December 31, 2010, the Internal Revenue Code of 1986 will apply as if the provisions and amendments made by the Act had never been enacted). For discussions of the sunset provision and the uncertainty it has created for taxpayers and estate planners, see, for example, CCH, TAX LEGISLATION 2001: LAW, EXPLANATION AND ANALYSIS 3, 99–101, 637 (2001); Martin M. Shenkman, *Estate Tax Repeal; What Are Your Colleagues Doing?*, N.J. LAW., July 2, 2001, at 7; David Cay Johnston, *Coping With a Tax That Has Nine Lives*, N.Y. TIMES, June 24, 2001, § 3, at 1.

267. Halbach, *supra* note 32, at 5.

268. *Id.*

269. Schlesinger & Kulish, *supra* note 265 (quoting Rep. Charles Rangel).

improve the inheritance system, mere repeal offers no escape from the family paradigm. That paradigm is so pervasive that elimination of the rules implementing it would in many—if not most—cases leave us with no answer to the question "who gets the decedent's property?" In intestate succession, for example, family-privileging rules currently are the only alternative to escheat to the state.[270]

3. Appending Non-family Categories to the Family Paradigm

Another possible approach is to keep the family paradigm in place but add new categories that would not require family membership for inheritance. For example, inheritance rights could be extended as well to "dependents" of the decedent regardless of family status. Several foreign countries have already adopted variants of this approach.[271] A few U.S. scholars have recommended similar reforms for the American inheritance system. Professor Gaubatz, for example, has offered a scheme to protect not only the decedent's relatives but also "those dependent upon the decedent at the time of his death under circumstances which would lead to the expectation of continued support."[272] In brief, his proposal would give a decedent's dependent[273] the right in both testate and intestate situations to petition the court for a distribution of the decedent's estate that deviates from that specified in the will or intestacy statute.[274] The court would hold a hearing to determine the claimant's eligibility, circumstances of the dependency, and specific support requirements.[275] Based on these findings, the court could then order distribution of "reasonable amounts" from the decedent's estate to reflect such factors as the claimant's "need," "affective relationship to

270. *See supra* Part I.A.

271. For example, England recognizes claims by any person maintained by the decedent immediately prior to the decedent's death. Inheritance (Provision for Family and Dependants) Act, 1975, c. 1, § (1)(e) (Eng.). Many former socialist countries give nonrelated individuals who were dependent on the decedent for at least one year prior to the decedent's death intestate succession rights. *See, e.g.*, Czech Republic Civil Code §§ 474(1), 475 (amended 1998), *reprinted in* Jiří Kocourek, Občanský Zákoník [Civil Law] 139 (1998) (providing intestate succession rights to "people who lived with the decedent for at least one year prior to the decedent's death in a common household and . . . were dependent on the decedent for their maintenance"); Uzbekistan Civil Code art. 1141 (1996), *translated in* CIVIL CODE OF THE REPUBLIC UZBEKISTAN 464 (W.E. Butler ed. and trans., 1997) (providing intestate succession rights to "persons lacking labour capacity who for not less than one year before the death of the decedent were dependent on him and resided jointly with him").

272. Gaubatz, *supra* note 44, at 559.

273. Professor Gaubatz's proposal also applies to a relative of the decedent. *Id.* at 562.

274. *Id.* at 562–63.

275. *Id.*

the decedent," "legal obligation of the decedent to support the claimant during life, aid furnished decedent by the claimant during the decedent's life, and treatment in the will [or under intestacy] of others similarly situated."[276]

Or the inheritance system could go still further and expand its concept of "natural" recipients of the decedent's estate to include those in actual "support relationships" with the decedent, again with no requirement of family membership. This scheme would encompass both possible support relationships between decedent and claimant: (1) where the decedent supported the claimant; and (2) where the claimant supported the decedent. As I have discussed elsewhere,[277] this broad recognition of support needs and contributions is an integral part of the distinctive Chinese inheritance model. Under such an approach, intestate succession law would continue to base inheritance rights on family status; that is, the decedent's closest relatives by blood, adoption, or marriage would remain eligible intestate heirs. In addition, however, it would recognize nonheirs in a "support relationship" with the decedent—extended family members, steprelatives, in-laws, and nonrelatives alike. A variety of remedies could be used to include such claimants. China, for example, employs three distinct remedies. It accords some dependents and caregivers equal status with legal family members, elevates others to the highest "first order" heir status, and awards to still others "appropriate" distributions from the estate to reflect their individual support needs or contributions.[278]

This recognition of support relationships could have a direct impact on other areas of the inheritance system as well. It could result in expanded protections for family and nonrelated dependents from disinheritance by will.[279] Moreover, it could soften the resistance to wills and contracts to devise that leave property to caregivers.[280] Caregivers could be regarded as "natural" recipients of

276. *Id.*

277. Foster, *Linking Support and Inheritance*, *supra* note 107.

278. *See id.* at 1237–39, 1241–45 (summarizing the Chinese approach). By rewarding support contributions to the decedent's welfare, Chinese intestacy law, unlike its U.S. counterpart, recognizes the desert of claimants. *See supra* notes 44–50, 159 and accompanying text (discussing the failure of U.S. intestacy rules to factor in exemplary behavior toward the decedent).

279. This is precisely what has occurred in China. *See* Foster, *Linking Support and Inheritance*, *supra* note 107, at 1219–30 (setting out Chinese protections for disinherited dependents both within and outside the decedent's nuclear family). Interestingly, China has not given caregivers similar protections from disinheritance. *Id.* at 1249–50.

280. *See id.* at 1245–54 (contrasting the Chinese and U.S. approaches to wills and contracts to devise with caregivers as beneficiaries).

a testator's estate. Thus, a testator's efforts to reward acts of care would no longer be presumed suspicious. Under this new model, a testator would have genuine donative freedom to leave property to caregivers, even at the expense of her "closest" (but not dependent) family members.[281]

There are, of course, numerous other categories that might be used to extend inheritance rights to those excluded by the family paradigm. The strategy, however, would be the same. The new category would simply be appended to the family paradigm. While this approach would be an improvement over the existing system, it has significant limitations. In effect, this approach defines the decedent's "natural objects" as family and "others." Rather than confronting the mindset that distorts the inheritance process—namely, the preference for family members—it merely suggests that additional deserving recipients of the decedent's property might exist. In practice, this approach continues to allow and even encourage lawmakers and courts to regard family ties as primary. The nonconforming individual thus remains at risk that her estate plan will be rewritten after her death to ensure dispositions to the "most" natural recipients, her closest family members. Without a fundamental change in legal culture as well as rules,[282] this approach will likely make a difference only at the margins.

In addition, a definition of "natural objects" as family and "others" fails to address adequately the larger discriminatory message of the American inheritance system. It continues to relegate those outside the family to second-class status. In so doing, it fails to "remove the badge of inferiority"[283] on those excluded from the family paradigm, the badge that shapes both how society views such

281. *See id.* at 1246, 1251–52 (discussing the Chinese approach).

282. *See* Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1535 & n.178 (1996) (arguing that "[f]iddling with the written law typically has little effect on legal outcomes" and that "change requires community action at the level of the shared mental model, as opposed to mere legislative or judicial pronouncements"). For definitions of "legal culture," see, for example, LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 15 (1975) ("those parts of the general culture—customs, opinions, ways of doing and thinking—that bend social forces towards or away from the law and in particular ways"); MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES 8 (1985) ("the network of values and attitudes relating to law and practic[e]"). For an examination of one country's conscious efforts to create a new legal culture, see Frances H. Foster, *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative*, 54 WASH. & LEE L. REV. 923 *passim* (1997) (discussing the post-Soviet Russian experience).

283. Spitko, *The Expressive Function of Succession Law*, *supra* note 5, at 1107.

individuals and how they view themselves.[284] Thus, the twenty-first century may well require, as Professor Gaubatz put it, "an entirely different picture of inheritance."[285]

The remainder of this Article will consider what that new picture of inheritance might look like. The next subsections will describe two approaches that would transcend the family paradigm. Exposition and defense of new paradigms are beyond the scope of this Article. The purpose of the following subsections is merely to demonstrate that alternative approaches that do not operate within the family paradigm are possible. They should be considered as examples of directions that future research may take and not as concrete proposals.

4. Decedent Intent Approach

As Professor Fellows has observed, "Donative transfer law ... does not accomplish the property owner's will, but accomplishes only the property owner's will *as the state identifies it.*"[286] Under the family paradigm, the state uses this power to impose a preference for family members. Thus, another possible response to the family paradigm is to adopt a new approach to inheritance that emphasizes the decedent's actual intent rather than the state's interpretation of that intent.

The decedent intent approach would essentially take Professor Hernández's proposal for a "decedent-controlled definition of family"[287] a step further. It too would abandon the status-based preference for "legal" family members and instead determine inheritance rights by "thoroughly assessing who are the natural objects of a particular ... testator's bounty."[288] Unlike Professor Hernández's proposal, however, this approach would transcend the family paradigm by containing no "family" limitation whatsoever. It would encompass all individuals the decedent defined as her "natural objects," including those the decedent neither recognized nor treated as "family" members.

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284. *Id.* at 1100–01 (stating that "succession law reform has great potential to change the way our society views gay men and lesbians and, indeed, how gay men and lesbians view themselves"); *see also* Fellows et al., *Committed Partners*, *supra* note 6, at 8, 91 (arguing that intestacy statutes "reflect" and "shape [social] norms and values by recognizing and legitimating relationships" and also "shape the relations of the partners to each other and to their children").

285. Gaubatz, *supra* note 44, at 562.

286. Fellows, *In Search of Donative Intent*, *supra* note 54, at 612.

287. *See supra* notes 168–70, 194 and accompanying text.

288. Hernández, *supra* note 10, at 1018.

As a starting point, the decedent intent approach would make freedom of testation in fact "[t]he first principle of the law of wills."[289] The inheritance system would give utmost respect to any validly executed will that clearly[290] recorded the decedent's donative preferences even if that will excluded the decedent's closest family members. In effect, the "unnatural disposition" would become the "natural disposition." This would have significant implications for mental capacity doctrines and rules. Mental capacity requirements would now focus exclusively on protection of testators and not family survivors. As a result, the decedent intent approach would raise the bar in mental capacity challenges. Courts would overturn a will only in exceptional circumstances where strong evidence exists that the will fails to reflect the actual intent of the particular testator due to senility, fraud, duress, and the like. Under the decedent intent approach, no presumption would be made that a mentally sound testator would prefer family members.[291] Will proponents would no longer have to defend a testator's unequal distribution of the estate among family members, failure to name a family member correctly, or exclusion of family altogether. The conventional test of mental capacity—whether the testator understood who constituted her closest family members[292]—would disappear. Under the decedent intent approach, the testator herself, rather than a one-size-fits-all intestacy statute, would control the definition of her own natural objects.

The decedent intent approach would also result in significant changes in construction and interpretation of wills. Current approaches give insufficient weight to the actual intent of the testator. For example, under what Professors Langbein and Waggoner have

289. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) ("The first principle of the law of wills is freedom of testation.").

290. *See* Baron, *supra* note 4, at 659 (describing "clear" will commands as "in the sense of being complete, comprehensible, and in accord with the reader's expectations").

291. Hernández, *supra* note 10, at 1018 n.260 (describing natural objects as individuals whom a " 'mentally sound testator would be expected to favor, such as spouse or children or other close relatives' ") (quoting MARK REUTLINGER, WILLS, TRUSTS, AND ESTATES 53 (2d ed. 1998)). *See In re* Sechrest, 140 N.C. App. 464, 469, 537 S.E.2d 511, 515 (2000), *rev. denied*, 353 N.C. 375, 547 S.E.2d 16 (2001) (defining as two of the factors indicating undue influence that the will "is made in favor of one with whom there are no ties of blood" and "[t]hat it disinherits the natural objects of [the testator's] bounty").

292. *See* Hernández, *supra* note 10, at 1018 & n.260 (stating that "[a] mental incapacity challenge to a will is based in part on whether a testator understood who were the persons who were natural objects of his bounty" and arguing that "[s]ome probate court judges have overly circumscribed" that understanding by limiting natural objects to intestate heirs).

called the " 'no-reformation' rule,"[293] courts have traditionally refused to remedy mistakes in wills to "giv[e] effect to the testator's actual but defectively expressed intention."[294] Similarly, in interpretation of will language, courts have adopted an approach that, as Professor Baron has put it, is "just plain strange."[295] They exclude extrinsic evidence of how the testator actually intended to devise the estate and instead determine that intent from the words alone.[296]

Likewise, where the testator leaves "gaps" in the will, the actual intent of the testator is largely ignored. As Professor Mann has noted, existing approaches to such gaps "apply on the basis of a presumed intent that bears no necessary relationship to the individual case at hand."[297] One illustration is the treatment of lapse—where a beneficiary predeceases the testator and the will fails to specify how to handle that beneficiary's bequest.[298] In these situations, courts do not attempt to determine what the particular testator would have wanted under the circumstances.[299] Instead, they mechanically apply the jurisdiction's antilapse statute, which resolves the issue based on the presumed intent of testators.[300] Under the family paradigm, that presumed intent usually translates into a preference for close family members.

The decedent intent approach, in contrast, would recognize that "[r]eal people, not abstractions, write wills."[301] It would make actual intent rather than presumed intent the standard for construction and

293. John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 521 (1982) [hereinafter Langbein & Waggoner, *Reformation of Wills*].

294. *Id.* at 522.

295. Baron, *supra* note 4, at 663.

296. This is the so-called "plain meaning rule," which Professors Langbein and Waggoner have called the "no-extrinsic-evidence rule." Langbein & Waggoner, *Reformation of Wills*, *supra* note 293, at 521. As Professor Baron has explained, under the plain meaning rule, "the task of interpretation is focused not on discovering the testator's wishes, but rather on decoding his words." Baron, *supra* note 4, at 637; *see also* Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1115–25 (1996) (discussing the plain meaning rule and placing the rule in the context of linguistic theory).

297. Mann, *Formalities and Formalism*, *supra* note 46, at 1053.

298. *See supra* notes 64–67 and accompanying text.

299. *See* Mann, *Formalities and Formalism*, *supra* note 46, at 1055 ("With the single exception of New Jersey, however, courts do not inquire into what testators would have wanted.... Although one could construct an antilapse statute that elicited an approximation of testators' likely intent by a finely contextualized analysis of family relations and the overall estate plan, no state has.").

300. *Id.* at 1054–56 (arguing that antilapse statutes apply "mechanically" based on the "presumed intent of decedents... with little or no regard for what individual testators might have intended").

301. Baron, *supra* note 4, at 664.

interpretation of wills. Recent judicial experience and scholarly literature suggest some possible avenues. For example, the decedent intent approach might follow the lead of New Jersey courts and introduce a "doctrine of probable intent," under which courts would look beyond "words and phrases in the will" and "see[k] to find what [the testator] would *subjectively* have desired had he in fact actually addressed the contingency which has arisen."[302] Or the decedent intent approach might go still further, as Professors Langbein and Waggoner have recommended, and abandon the "no-reformation rule" for a scheme that would allow courts to remedy mistakes where the testator's actual intent can be proved.[303] Ultimately, the decedent intent approach might choose, as Professor Baron has suggested, "to actualize the system's goal of testamentary freedom" by considering individual testators' entire "stories, in all their richness and detail."[304]

The decedent intent approach would likely result in major changes in will execution formalities as well. As leading scholars in the field have emphasized, existing rules that effectuate intent in theory defeat intent in the real world.[305] Documents that decedents clearly intend to be their wills may be declared void for even the most minor deviations from statutory formalities.[306] At worst, under the

302. Engle v. Siegel, 377 A.2d 892, 894 (N.J. 1977). This approach presents its own problems. It requires courts to consider "counterfactuals"—"proposition[s] . . . that depic[t] what would have been the case had things been otherwise." Vanessa Laird, Note, *Phantom Selves: The Search for a General Charitable Intent in the Application of the* Cy Pres *Doctrine*, 40 STAN. L. REV. 973, 978 (1988). For a discussion of general difficulties encountered in using counterfactuals, see *id.* at 977–84 and sources cited in *id.* at 978–79 nn.36–40. For other critiques of the "doctrine of probable intent," see Langbein & Waggoner, *Reformation of Wills*, *supra* note 293, at 558–62 (describing this doctrine as "inarticulate, unsupported, untested, [and] unpredictable").

303. Langbein & Waggoner, *Reformation of Wills*, *supra* note 293, at 577–90 (setting out proposal). This approach has been adopted in RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 (Tentative Draft No. 1, 1995).

304. Baron, *supra* note 4, at 666.

305. As Professor Langbein has stated, "In dealing with . . . botched wills, Anglo-American courts have produced one of the cruelest chapters that survives in the common law. Purely technical violations that could in no way cast doubt on the authenticity or finality of wills are held to invalidate the offending instrument." John H. Langbein, *The Crumbling of the Wills Act: Australians Point the Way*, 65 A.B.A. J. 1192, 1193 (1979). For a review of the literature, see Mann, *Formalities and Formalism*, *supra* note 46; C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167 (pt. 1), 599 (pt. 2) (1991) (discussing the forces influencing the development of the Code's "Harmless Error" rule).

306. Mann, *Formalities and Formalism*, *supra* note 46, at 1036 ("Courts have routinely invalidated wills for minor defects in form even in uncontested cases and sometimes even while conceding—always ruefully, of course—that the document clearly represents the wishes and intent of the testator."); *see also* Bruce H. Mann, *Self-Proving Affidavits and*

family paradigm, judges manipulate execution formalities to deny probate to wills that fail to leave property to family members.[307]

The scholarly literature suggests a variety of reforms that the decedent intent approach might adopt to promote testamentary intent.[308] Under Professor Langbein's proposed harmless-error rule,[309] it could address "harmless errors" in will execution by allowing courts to "dispense" with testamentary formalities in cases where clear and convincing evidence exists that the decedent adopted the formally defective document as his will.[310] Another possible

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Formalism in Wills Adjudication, 63 WASH. U. L.Q. 39, 49 (1985) (discussing cases in which courts declared wills invalid due to execution defects even though "there was little or no question that the testator had intended the instrument to be a will").

307. Leslie, *The Myth of Testamentary Freedom*, *supra* note 9, at 258–68 (finding that courts have manipulated will execution formalities as well as mental capacity doctrines to overturn wills that fail to provide for immediate family members). Professor Spitko views this trend as particularly disturbing "because there does not appear to be any 'innocent' explanation for such a finding." Spitko, *Gone But Not Conforming*, *supra* note 14, at 285. He states "[i]t is simply not tenable to argue that testators who prefer non-relatives to family members are less likely to comply with the testamentary formalities required for the execution of a will—principally, that the testator put her will in writing, sign the will and have the will attested to by witnesses." *Id.*

308. An extended discussion of this literature is well beyond the scope of this Article. Numerous reform proposals exist beyond those mentioned in this Article that should be considered by architects of the decedent intent approach. *See, e.g.*, Langbein, *Substantial Compliance with the Wills Act*, *supra* note 289 (setting out substantial compliance reform proposal).

309. John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 *passim* (1987) (setting out the harmless-error proposal). The original formulation of the harmless-error rule was codified in the Uniform Probate Code. UNIF. PROBATE CODE § 2-503 (amended 1997), 8 U.L.A. 28 (Supp. 2001):

> Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

310. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999) (stating the current formulation of the harmless-error rule as "[a] harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will"). For examples of cases in which courts have used a harmless-error approach to excuse defects in will execution, see *id.* § 3.3 reporter's note 2. These cases include Estate of Black, 641 P.2d 754, 755 (Cal. 1982) (upholding a holographic will written on a pre-printed will form even though the statute required a holographic will to be "entirely written, dated, and signed by the testator himself"); *In re* Will of Ranney, 589 A.2d 1339, 1345–46 (N.J. 1991) (holding that a will could be admitted to probate even though witnesses signed only the self-proving affidavit and not the will itself). *But see In re* Estate of Sky Dancer, 13 P.3d

response would be to minimize formalities[311] and remove those requirements that most often frustrate intent. For example, the decedent intent approach might conclude, as Professor Lindgren has, that the witnessing requirement for wills is "mainly a trap for the unwary"[312] and should be abolished.[313] Or it could even, as Professor Baron has suggested, abandon . will execution requirements altogether.[314]

1231, 1233–34 (Colo. Ct. App. 2000) (concluding after review of foreign "harmless-error" legislation and case law that Colorado's harmless-error statute could not validate a will that was "not executed at all").

311. For an extended review of such proposals, see Miller, *supra* note 305, at 289–91.

312. James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 572 (1990).

313. *Id.* at 569. Although Professor Lindgren advocates elimination of the witnessing requirement for will validity, he also favors encouragement of routine witnessing of wills. *See id.* at 547, 569–72 (setting out a "two-tiered approach . . . [to] ensure routine attestation by witnesses without making it mandatory"). He explores several possible statutory, *id.* at 570–71 (discussing statutes that would require attestation but not invalidate a will for violating the attestation requirement and statutes that would penalize the drafter rather than invalidate the will for attestation defects), evidentiary, *id.* at 571 (discussing heightened evidentiary standards to prove genuineness of unwitnessed wills), and equitable approaches. James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1024–27 (1992) (discussing equitable solutions for "[f]orgiving attestation mistakes," with particular focus on the Uniform Probate Code's "dispensing power"). Professor Lindgren concludes that the optimal approach is an adapted version of the current "self-proving affidavit." Lindgren, *supra* note 312, at 547, 569–70 (arguing that "self-proving affidavits could be adapted to ensure routine attestation without requiring it for formal validity"). Self-proving affidavits, an "invention of the Uniform Probate Code that has proven very popular," DUKEMINIER & JOHANSON, *supra* note 15, at 245, are sworn, signed, and notarized statements by the testator and witnesses that the will was duly executed, *id.* (discussing self-proving affidavits). Self-proving affidavits are optional and are not formally required for will validity; however, they allow a will to be probated without the appearance of witnesses. Lindgren, *supra* note 312, at 570 (explaining the effect of self-proving affidavits). *See generally* Mann, *supra* note 306 (providing an extended discussion of self-proving affidavits). Professor Lindgren argues that the self-proving affidavit thus encourages testators to use witnesses without penalizing them for failing to do so. Lindgren, *supra* note 312, at 570, 571–72 (explaining the advantages of the self-proving affidavit and proposing to encourage attestation by "us[ing] a carrot, easier proof in court for attested wills" rather than a "stick[, . . .] punishing those who fail [to comply]").

314. Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 202–03 (1989) (arguing that "the law adopts intent-defeating requirements for donative transfers" and thus "there is a case to be made for abandoning the formal rules that presently govern donative transfers"). Or the decedent intent approach could go in the opposite direction and consider reform proposals to "maximize" formalities to effectuate intent. *See* Miller, *supra* note 305, at 292–302 (discussing proposals for notarial wills, self-proving wills, ante-mortem probate, and videotaped wills); *see also* Bonfield, *supra* note 195, at 1917–18 (stating that the author "shall swim against the tide, and support even greater formalism in the law of wills than presently obtains" and proposing the notarial system for will authentication).

The decedent intent approach could transform intestacy as well. Here, more than anywhere else in American inheritance law, presumed intent controls. A statutory intestacy scheme that purportedly reflects the "normal desires"[315] of decedents trumps even the most irrefutable evidence of an individual decedent's actual intent. Yet, empirical studies have shown that decedents would seldom deliberately choose the particular estate plan imposed on them by intestacy law.[316] Decedents die intestate for a variety of reasons. They fail to write wills due to laziness, cost, distaste for lawyers, inability to confront their own mortality, or for other reasons.[317] A recent survey of committed partners has underscored another important factor, error.[318] Many decedents die intestate because they have a mistaken understanding of who will inherit their estate under intestacy rules.[319]

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315. UNIF. PROBATE CODE art. II, pt.1, gen. cmt. (1969) (amended 1990).

316. *See* Monica K. Johnson & Jennifer K. Robbennolt, *Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners*, 22 LAW & HUM. BEHAV. 479, 489 (1998) [hereinafter Johnson & Robbennolt, *Using Social Science*] (summarizing studies). In one study, "[n]o participants . . . indicated that their satisfaction with the intestacy scheme was their reason for not writing a will." *Id.* (referring to Rita J. Simon et al., *Public Opinion About Property Distribution at Death*, 5 MARRIAGE & FAM. REV. 25 (1982)). *But see* Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1313 (1969) (arguing that "a willingness by almost half of any group of decedents to allow their property to pass by intestacy does not suggest serious disaffection with the intestacy laws").

317. *See* Johnson & Robbennolt, *Using Social Science*, *supra* note 316, at 489 (summarizing findings of empirical studies); *see also* DUKEMINIER & JOHANSON, *supra* note 15, at 71 (discussing reasons why people do not write wills). As Professor Guzman has recently underscored, the situation of minor children is particularly "poignant." Guzman, *supra* note 143, at 80. With only limited exceptions, jurisdictions will not recognize wills written by testators under the age of eighteen. *See id.* at 80 n.12 (setting out exceptions). As a result:

> [u]nlike other intestacy scenarios where statutes of descent and distribution apply only in default of exercised testamentary freedom, heirs of a child are "forced" in every literal sense. The child may not elect to favor or even disinherit one parent over the other, meaning that people with little or no financial, social, or emotional connection to the child could profit from that child's death.

Id. at 80.

318. This refers to the survey of committed opposite-sex and same-sex partners conducted by Professor Fellows and her colleagues at the University of Minnesota. *See* Fellows et al., *Committed Partners*, *supra* note 6. Analysis of the statistics regarding respondents' erroneous understanding of intestacy provisions appears in Johnson & Robbennolt, *Using Social Science*, *supra* note 316, at 489–90 and Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 442–44 (1999) [hereinafter Robbennolt & Johnson, *Legal Planning for Unmarried Committed Partners*].

319. The survey revealed that many respondents without wills who claimed to "know" who would inherit their estate under intestacy were in fact wrong. Johnson &

At a minimum, the decedent intent approach could respond in the intestacy context by recognizing the potential gaps between presumed intent and actual intent. It could promote educational measures to inform the public of intestacy schemes and ways to opt out of such schemes.[320] Another possibility might be to extend to intestacy a remedy for mistake similar to that proposed in the wills context by Professors Langbein and Waggoner. For example, the decedent intent approach might allow the survivor of a nonmarital relationship to inherit if the survivor could prove that the intestate decedent erroneously believed her partner was her legal heir. Or the decedent intent approach could go still further and admit extrinsic evidence of the decedent's actual dispositive preferences.[321]

The architects of the decedent intent approach will need to address a number of potential problems and objections, however. For example, this approach could have significant implications for current family protection and elective share provisions, which, as Professor Mann has remarked, "wea[r] their frustration of the testator's intent proudly."[322] Fortunately, there is a vast reform literature upon which

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Robbennolt, *Using Social Science*, *supra* note 316, at 489. Most notably, many mistakenly assumed that their nonmarital partners would inherit as intestate heirs (33.3% of respondents with opposite-sex partners; 46.8% of female respondents with same-sex partners; 43.2% of male respondents with same-sex partners). *Id.* An earlier empirical study of married persons found that only 44.6% of those who claimed to know who would inherit their estate under intestacy "were correct or nearly so." *Id.* (referring to Fellows et al., *Public Attitudes*, *supra* note 20).

320. In a recent article, Jennifer Robbennolt and Monica Kirkpatrick Johnson have suggested that lawyers might perform this function both "in general community education activities" and in individual counseling of clients. *See* Robbennolt & Johnson, *Legal Planning for Unmarried Committed Partners*, *supra* note 318, at 456–57 (focusing specifically on education and planning issues for nonmarital committed partnerships).

321. Such an approach would attempt to address the "imbalance" between treatment of actual intent in testacy and intestacy. Mann, *Formalities and Formalism*, *supra* note 46, at 1050. As Professor Mann has stated, "The new availability of the dispensing power to remove formalistic obstacles to the testator's intent underscores the absence of any similar dispensation in intestacy, where the default rules remain as invariable as the formal requirements themselves were." *Id.* Intestacy rules apply "even if evidence of the decedent's preference for a different . . . [scheme] exists that is as persuasive as evidence of the testator's intent now permitted under § 2-503," which is the dispensing power provision of the Uniform Probate Code. *Id.* It should be noted, however, that Professor Mann concludes that there are "compelling administrative reasons why this should be so," including the difficulty of proving intent when there exists "no written document to narrow the inquiry" and the "bureaucratic nightmare" of "an individual inquiry into the dispositional wishes of everyone who dies." *Id.*

322. *Id.* at 1058 (referring to elective share statutes). Indeed, Professor Hernández explicitly cited this factor as a rationale for exploring a decedent-controlled definition of family in the "manageable context" of challenges over burial instructions. *See* Hernández, *supra* note 10, at 1018 (stating that "[t]he context of challenges over burial instructions should be a manageable context in which to respect a testator's own definition of family

to draw.[323] For example, architects might want to explore proposals for continuing lifetime support duties after death as part of a scheme that otherwise enforced decedent intent.[324]

Another likely objection will be that the decedent intent approach promotes dead hand control.[325] By exalting actual intent, this approach effectively limits courts and legislatures from addressing what Professor Sherman has called "posthumous meddling"[326]—decedents' efforts to restrain their survivors' behavior, religious practices, even choice of marital partner.[327] This result, however, may not in fact be inconsistent with current trends in inheritance law. For example, state legislatures increasingly are

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because it can be divorced from probate court concerns over a testator recognizing his or her financial support obligations to minor children and spouses").

323. *See supra* Part II.A, B (discussing this literature).

324. *See supra* note 110 and accompanying text (citing proposals by Professors Brashier and Krause). Another objection to the decedent intent approach is that it gives insufficient recognition to meritorious claimants. Unlike the family paradigm, this approach does extend protection to nonfamily survivors who provided acts of care to the decedent. However, it recognizes only those claimants whom the decedent intended to inherit. Thus, the decedent intent approach allows a decedent to disinherit even the most worthy individual. This is in fact the approach China has adopted. In an otherwise behavior-based scheme of inheritance, China allows disinheritance of caring (but not dependent) survivors. *See* Foster, *Linking Support and Inheritance*, *supra* note 107, at 1249–50.

325. For an extended discussion of the concept of "dead hand control," see, for example, LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND (1955); Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985); Hirsch & Wang, *supra* note 20.

326. Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1273 [hereinafter Sherman, *Posthumous Meddling*].

327. *See, e.g.*, Taylor v. Rapp, 124 S.E.2d 271, 271 (Ga. 1960) (upholding a will provision disinheriting a daughter if she married " 'Jody Taylor, a boy I do not like and care for in any respects' "); *In re* Estate of Romero, 847 P.2d 319, 320 (N.M. Ct. App. 1993) (concerning a will provision leaving use of testator's residence to his fiancée " 'so long as she remains unmarried and does not cohabit with an unrelated adult male' " and to his minor sons " 'provided their mother does not reside there also' "); *In re* Estate of Keffalas, 233 A.2d 248, 250 (Pa. 1967) (involving will provisions conditioning bequests to testator's single children on their marrying spouses of " 'true Greek blood and descent and of Orthodox religion' " and conditioning bequest to testator's married daughter (whose husband was not Greek) "on her remarrying a man of true Greek blood and descent and of Orthodox religion after her first marriage was terminated by death or divorce"). Professor Fellows' defense of "imputed intent" suggests another potential objection to limits on judicial and legislative action. She argues that under the existing imputed intent approach, courts and legislatures are able to correct individuals' defective estate plans and ensure distribution of the estate to the decedents' most likely preferred recipients, close family members. *See* Fellows, *In Search of Donative Intent*, *supra* note 54, at 613, 622–30.

restricting and even repealing the classic defense against dead hand control, the Rule Against Perpetuities.[328]

For many, the decedent intent approach will also raise the specter of judicial discretion and with it greater costs, unpredictability, and administrative inconvenience.[329] As Professor Hernández has argued, this objection is less persuasive in the wills context where today "an individualized judicial assessment is automatically triggered."[330] Indeed, the decedent intent approach actually limits judicial interference with properly executed wills by defining "natural objects" first and foremost as those individuals the decedent named in her will. As Professors Langbein and Waggoner have contended, carefully-crafted remedies for mistake too may ultimately have "advantages over the patchwork of inconsistency and injustice that characterize[s] the present law."[331] In particular, the decedent intent approach may reduce the need for judicial "dissembling"[332] and bending of the law to ensure "natural dispositions" to family members or to address individual inequities.

Removing the preference for family from intestacy will present a greater challenge for architects of the decedent intent approach. Professor Hernández has concluded, for example, that for intestate succession purposes "[t]he uncertainty inherent in an open inquiry into decedent preference may not merit the administrative inconvenience of an individualized assessment and therefore may

328. At least twelve states have already abolished the Rule Against Perpetuities in some form. EUGENE F. SCOLES ET AL., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 1139–40 (6th ed. 2000) (summarizing legislation in Alaska, Arizona, Delaware, Idaho, Illinois, Maine, Maryland, New Jersey, Ohio, Rhode Island, South Dakota, and Wisconsin). For an extended discussion of this movement to repeal the Rule Against Perpetuities, see Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601 (2000); Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023 (1987). As Professor Dukeminier has emphasized, one effect of abolition of the Rule Against Perpetuities is that tax-exempt dynasty trusts "can last forever." DUKEMINIER & JOHANSON, *supra* note 15, at 850; *see* Jesse Dukeminier, *Dynasty Trusts: Sheltering Descendants From Transfer Taxes*, 23 EST. PLAN. 417, 422–23 (1996) (discussing the impact of the repeal of the Rule Against Perpetuities on creation of dynasty trusts).

329. For the most influential statement of this view, see Glendon, *supra* note 135, at 1186–91 (arguing that "under American conditions" fixed rules of inheritance rather than discretionary schemes are essential to limit litigation, depletion of estates, uncertainty, and judicial intrusions on testamentary intent). For a summary of the literature and arguments against adopting foreign models that permit greater judicial discretion in distribution of estates, see Foster, *Linking Support and Inheritance*, *supra* note 107, at 1204–05, 1214–16.

330. Hernández, *supra* note 10, at 1018.

331. Langbein & Waggoner, *Reformation of Wills*, *supra* note 293, at 590.

332. Mann, *Formalities and Formalism*, *supra* note 46, at 1041.

justify the use of statutory default distribution schemes instead."[333] Even in intestacy, however, architects of the decedent intent approach could explore schemes that would admit extrinsic evidence of decedent intent under certain circumstances and impose a high burden of proof.[334] For instance, one such circumstance might be where the decedent clearly records her preferences in a signed writing but does not intend the document to be her will.[335]

These reforms of intestacy raise another key issue and potential objection to the decedent intent approach. What scheme determines distribution of the estate where there is insufficient evidence of the decedent's actual intent? If the decedent intent approach uses current intestacy law[336] as its default rules, it also retains the family paradigm.[337] As Professor Gallanis has warned, "Default rules may not be as visible as their mandatory counterparts, but their effects are no less pernicious."[338] At a minimum, the architects of a decedent intent approach will need to modernize existing intestacy rules to reflect the likely donative intent of those most often excluded by current status-based definitions of family. Professor Gallanis, for example, has focused on one such group—sexual minorities—and has recommended a two-part reform strategy consisting of "thorough empirical research to determine the wishes of most members of the

333. Hernández, *supra* note 10, at 1017.

334. Professor Gaubatz has proposed such a scheme: "If no formal will existed, but informally expressed testamentary expressions were known, . . . they could be alleged and, if proved as to terms and testamentary intent by clear and convincing evidence, established as the will of the decedent." Gaubatz, *supra* note 44, at 562.

335. Even under the liberal "harmless-error rule," this document would not constitute a valid will due to lack of testamentary intent. *See supra* note 309 (setting out harmless-error provisions of Uniform Probate Code); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b, illus. 1 (1999). A signed writing, however, would address one of Professor Mann's objections to reform of intestacy by providing a "written document to narrow the inquiry." Mann, *Formalities and Formalism*, *supra* note 46, at 1050.

336. The decedent intent approach could follow Professor Ascher's lead and "curtail" inheritance, *see* Ascher, *supra* note 125, at 96, in this situation, perhaps even to the point of making escheat to the state the default rules. This result would likely deviate from the actual intent of the decedent even more than the family paradigm. There are rare cases, however, of "public-spirited" testators who will all or part of their estates to the government. For example, Oliver Wendell Holmes left the residue of his estate to the "United States of America." *See* LUCY A. MARSH, WILLS, TRUSTS & ESTATES 127–28 (1998) (citing and discussing implementation of Holmes' residuary provision).

337. *See* Mann, *Formalities and Formalism*, *supra* note 46, at 1048 ("The statutory rules of intestate succession are default rules that approximate what most testators do in their wills anyway—provide for their immediate families."). Professor Langbein refers to this as the "backstopping" role of intestacy rules. *See* Langbein, *Substantial Compliance with the Wills Act*, *supra* note 289, at 499–501.

338. Gallanis, *supra* note 11, at 1531.

GLB [gay, lesbian, and bisexual] community" followed by "translat[ion of] those wishes into workable legislation."[339] Professor Fellows and her colleagues' survey of committed same-sex and opposite-sex partners[340] provides an important recent illustration of how empirical study of donative preferences might inform future efforts to make intestacy statutes more intent-effectuating.[341]

Even updated intestacy laws, however, would remain problematic as default rules for the decedent intent approach. These laws too would define the individual decedent by her intestate category—be it a traditional status-based family category or some new category. Just as under the current system, updated intestacy laws would distribute the decedent's estate based on the preferences of the "average" member of her category rather than the decedent's own actual or likely intent. Thus, reformers may ultimately conclude that more radical changes are required to ensure fuller recognition of decedent intent. One such change might be to allow individuals to specify on their driver's licenses their preferred default takers.[342] Another possibility might be to adopt a comprehensive decedent intent scheme that compels the court to determine the particular decedent's most likely intent—even if that determination had to be based on the scantiest of evidence.

5. Actual Relationship Approach

It is also possible, although somewhat more difficult, to imagine an inheritance scheme based upon the actual relationships of the decedent with others in the decedent's life.[343] One of those

339. *Id.* at 1524.

340. Fellows et al., *Committed Partners*, *supra* note 6, at 1.

341. *See* Gallanis, *supra* note 11, at 1524 ("It is therefore inaccurate and discriminatory to proclaim the current legal regime as intent-effectuating when the likely intent of persons within the GLB community has been ignored.").

342. This would extend current approaches that allow individuals to designate on their licenses whether or not they wish to be organ donors. I am grateful to Bernard Harcourt for this suggestion.

343. In fact, some reformers have already begun to move in this direction. Professor Gaubatz has called for a more flexible approach to inheritance that would "better respond to the variety of different factual situations" and would explicitly consider "such factors as need of the particular claimant, affective relationship to the decedent, support previously furnished by the decedent, support furnished decedent by the claimant, and similar factors." Gaubatz, *supra* note 44, at 563. The actual scheme Professor Gaubatz "outline[s]" remains restrictive, however; it defines only "relatives and dependents" of the decedent as "interested parties." *See id.* at 562–63. Other reformers have begun to explore an actual relationship approach in one context, intestacy law. As discussed above, *see supra* Part II.B., several scholars have proposed expanding intestacy laws to encompass survivors of "family-like relationships" with the decedent—that is, "caring, nurturing and

relationships would be support, whether the decedent was the recipient or the provider.[344] Another would be a financial sharing arrangement in which the decedent and others contributed to a common fund that was applied on a basis other than the amounts of the contributions.[345] Such financial sharing often occurs in marriage where the parties maintain only a single, common bank account and do not concern themselves with the issue of who owns what interest in property. But such financial sharing also occurs among unmarried persons who cohabit, among members of communes, and among members of tribes.[346]

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loving relationships that do not [meet] ... formal requirements that the family members be related by blood, legal marriage or adoption to be considered family." Gary, *Adapting Intestacy Laws*, *supra* note 2, at 80. These reformers have identified a variety of economic, legal, and social factors that indicate a "marriage-like" committed relationship or a parent-child relationship between a particular decedent and survivor. *See, e.g.*, Fellows et al., *Committed Partners*, *supra* note 6, at 62–63 (setting out factors indicating a committed relationship); Gary, *Adapting Intestacy Law*, *supra* note 2, at 81 (listing factors indicating parent-child relationship); Waggoner Working Draft, *reprinted in* Fellows et al., *Committed Partners*, *supra* note 6, at 92–93 (listing factors "to be considered" in determining whether a "marriage-like" committed relationship existed between two individuals). *See generally* Spitko, *The Expressive Function of Succession Law*, *supra* note 5, at 1086–91 (discussing multi-factor approaches to defining committed partnerships). Architects of the actual relationship approach could draw on this literature. The key difference, however, would be that, unlike existing proposals, the actual relationship approach would transcend the family paradigm by removing family as its point of reference. It would not require that the survivor's relationship with the decedent was "family-like."

344. Several scholars have identified a "support relationship" as a key factor to be considered in inheritance. *See, e.g.*, Gary, *Adapting Intestacy Laws*, *supra* note 2, at 81 (describing a model statute defining a positive indication of parent-child relationship where "[t]he parent provided economic and emotional support for the child; the child provided economic and emotional support for the parent"); Gaubatz, *supra* note 44, at 562–63 (recognizing both types of support relationships—where decedent supported claimant and where claimant supported decedent).

345. Examples of some of the indicators of such financial interdependence include:

> [T]he degree to which the parties intermingled their finances, such as by maintaining joint checking, credit card, or other types of accounts, sharing loan obligations, sharing a mortgage or lease on the household in which they lived or on other property or titling the household in which they lived or other property in joint tenancy.

Waggoner Working Draft § (d)(2), *reprinted in* Fellows et al., *Committed Partners*, *supra* note 6, at 93.

346. *See generally* RICHARD H. CHUSED, CASES, MATERIALS, AND PROBLEMS IN PROPERTY 251–83 (2d ed. 1999) (discussing property ownership in communes, with specific focus on cases involving the Harmony Society); WAGGONER ET AL, *supra* note 5, at 11, 85–103 (referring to "anti-individualistic views found in many tribes and ... the tribes' notion of commonly held property" and discussing financial interdependence among unmarried cohabitants and possible contractual claims); Patricia A. Cain, *A Review Essay: Tax and Financial Planning for Same-Sex Couples: Recommended Reading*, 8 LAW & SEXUALITY 613, 619–21 (1998) (discussing issues related to sharing of assets by same-

A third possible relationship between decedent and survivor would exist where one or both parties "assum[ed]... legal responsibility and/or decision-making authority"[347] for the other party. Such relationship might arise, for example, where one or both parties designated the other as primary beneficiary of a life insurance policy or employee benefit plan or as health care decisionmaker.[348]

A fourth relevant type of relationship would be one in which the decedent had indicated an attitude of generosity toward a person or organization that would likely have continued had death not intervened. For example, the decedent may have made gifts to particular family members, to a lover, to a college student of the decedent's own ethnicity or background, or to the decedent's church or university.

An inheritance scheme based on actual relationship might be largely congruent with one based on decedent's intent. The types of relationships described here[349] certainly would be evidence of a possible intent that the persons or organizations involved inherit. But there remains a subtle and perhaps important difference. The actual relationship approach would view the relationship from the perspective of the survivor rather than the decedent. The difference would be most apparent in the case where the decedent had been generous in life but harbored a secret intent to disinherit the survivor.[350] In such a system, a testator could maintain full

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sex couples); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 80–91 (1993) (reviewing empirical studies of financial sharing arrangements among unmarried as well as married individuals). For an extended discussion of Navajo property concepts, see GETCHES ET AL., *supra* note 233, at 413–17. "[P]rivate ownership of lands, such as the fee simple in the Anglo legal system, is unknown in the Navajo Nation.... A much different concept of property is recognized by Navajo customs and traditions." *Id.* at 415. " 'When we speak of the Navajo Nation as a whole, its lands and assets belong to those who use it and who depend upon it for survival—the Navajo People.' " *Id.* (citing Tome v. Navajo Nation, 4 Navajo Rptr. 159, 161 (Window Rock D. Ct. 1983)).

347. Spitko, *The Expressive Function of Succession Law*, *supra* note 5, at 1090.

348. I borrow these examples from Professor Waggoner's Working Draft. *See* Waggoner Working Draft § (d)(3), *reprinted in Fellows* et al., *Committed Partners*, *supra* note 6, at 93 (considering "the degree to which the parties formalized legal obligations, intentions and responsibilities to one another, such as by one or both naming the other as primary beneficiary of life insurance or employee benefit plans or as agent to make health care decisions").

349. The four types of relationships described above are by no means intended as an exhaustive list of relationships that would create inheritance rights under an actual relationship approach. They are merely illustrations of possible such relationships.

350. Another such case would be where the decedent disinherited an individual who provided her extensive support and care during her lifetime. The actual relationship approach would recognize the survivor's acts of care; the decedent intent approach would

testamentary control only through honesty in her relationships. Surprise disinheritance over the survivor's objection would be impossible.

This description of a possible actual relationship approach is admittedly sketchy. But hopefully this outline is sufficient to demonstrate that the decedent intent approach is not the only possible alternative to the family paradigm in the law of inheritance—and perhaps even sufficient to inspire the search for others.

IV. CONCLUSION

Professor Mary Ann Glendon has aptly observed that, in the context discussed here, "inheritance law, which at first seems to be a fortress of the legitimate family, appears on closer inspection to be more like a museum."[351] Inheritance law presents and celebrates a family ideal that fewer and fewer Americans experience as reality. Its rules and doctrines are less tools to address contemporary needs than historical artifacts fashioned for an era now past.

The family paradigm of inheritance law is more than just a relic of the past. As this Article has shown, it is a source of considerable hardship for the present. As Americans are increasingly finding support and affection outside the traditional family, inheritance law remains entrenched in a paradigm that condemns those relationships as "unnatural."

The costs of the family paradigm are prohibitive. They fall particularly heavily on the needy and the caring.[352] The privilege conferred on traditional family relationships comes partly at the expense of support. Nor are the needy and the caring the only victims of inheritance law's family paradigm. The paradigm is so inflexible, outdated, and culturally biased that it harms all touched directly or indirectly by the inheritance system.[353] It creates financial, administrative, and psychological costs for all categories of participants in the process—heirs, beneficiaries, potential beneficiaries, decedents, judges, jurors, and lawyers.[354] In addition, by imposing a single vision of "natural" wealth distribution, the family

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not.

351. GLENDON, *supra* note 1, at 290 (referring to the situation where "informal family relationships are disrupted by death").

352. *See supra* Part I.

353. *See supra* Part III.A.

354. *See supra* Part III.A.1, 2, 4.

paradigm sends a broader message to society that devalues ethnic, cultural, and individual differences.[355]

The human costs of American inheritance law have already sparked significant reform efforts. Legal scholars and lawmakers have recognized many of the shortcomings of a family-based inheritance system and responded with an array of innovative legal and equitable exceptions. These exceptions protect decedents' family survivors,[356] redefine the family to reflect changes in modern American society,[357] and alter procedures to give effect to wills that deviate from traditional family norms.[358] Today, the family paradigm is so riddled with exceptions that it has outlived its usefulness. Indeed, if experience in the hard sciences is any guide, inheritance law appears poised for an imminent paradigm shift.[359] Yet, reformers continue to confine their search for answers to a paradigm that can provide only stock responses from the past.

This Article has offered some preliminary ideas about possible future alternatives to the family paradigm. The most radical response would be to abolish inheritance altogether.[360] Another possibility would be to draw on foreign precedent and base inheritance rights on a support relationship prior to death, either one in which the decedent supported the claimant or vice versa.[361] Or inheritance law might make the individual decedent's intent the determinant of inheritance rights.[362] For those who prefer to focus on the understandings of survivors rather than the intent of decedents, inheritance based on actual relationship between decedent and claimant might offer a more promising approach.[363] There are undoubtedly other directions that inheritance law might take as well. The ultimate choice of direction will require extended study and debate of such factors as the respective costs and benefits of each approach, the social and cultural values at stake, and any political constraints. But the search for new answers can begin only when

355. *See supra* Part III.A.3, 5.
356. *See supra* Part II.A.
357. *See supra* Part II.B.
358. *See supra* Parts II.C, III.A.4.
359. *See* KUHN, *supra* note 16, at 66–76 (discussing and providing examples of paradigm shifts).
360. *See supra* Part III.B.1.
361. *See supra* Part III.B.3.
362. *See supra* Part III.B.4.
363. *See supra* Part III.B.5.

reformers take the first step and see the family paradigm for what it is—the problem, not the solution, for American inheritance law.[364]

Rejection of the family paradigm will not destroy the family. For many of us, the family will remain, as Professor Glendon described it, "the only theater in which we can realize our full capacity for good or evil, joy or suffering."[365] But at the same time, we should hope that future American inheritance law will also recognize that the "ties of human affection"[366] do not run solely along family lines.

364. For examples of similar approaches to problems in other legal fields, see Frances H. Foster, *The Illusory Promise: Freedom of the Press in Hong Kong, China*, 73 IND. L.J. 765, 796 (1998) (arguing that "the search for [new U.S. policies toward Chinese Hong Kong] ... can only begin once American policymakers have removed the blinders that prevent them from seeing the truth—that China's 'promise' of 'freedom of the press' for Hong Kong is merely the product of bad translation and wishful thinking"); Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 762 (1999) (arguing in the international bankruptcy context that "[t]he time has come to recognize that universalism is the problem, not the solution, and to put universalism behind us").

365. GLENDON, *supra* note 1, at 313.

366. *Id.*